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BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36627

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April 24, 2023
Part of
Public Record

TGS CEDAR PORT RAILROAD LLC
—OPERATION EXEMPTION—
IN CHAMBERS COUNTY, TEX.

**BNSF RAILWAY COMPANY'S REPLY TO
UNION PACIFIC'S PETITION TO REVOKE EXEMPTION**

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Dated: April 24, 2023

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EXHIBITS

Exhibit A: February 12, 1998 Term Sheet Agreement

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BNSF Railway Company (“BNSF”) hereby replies to the Petition to Revoke filed by Union Pacific Railroad Company (“UP”) in the above-captioned proceeding on April 4, 2023 (the “Petition”).¹ BNSF requests that the Surface Transportation Board (“Board” or “STB”) confirm that the UP/SP merger conditions do not allow UP to block BNSF from providing competitive line-haul service to customers simply because a common carrier railroad replaces a private railroad as the provider of first-mile/last-mile service to those customers.

The Petition represents an attempt to erode the essential competition-preserving bargain struck by UP and Southern Pacific Rail Corporation (“SP”) to obtain Board authority for their merger in 1996. For the last quarter-century,

¹ To the extent the Board deems it necessary, BNSF respectfully requests that it be permitted to intervene in this proceeding. Consistent with 49 C.F.R. § 1112.4, BNSF’s comments do not unduly broaden the issues raised in this proceeding and will not unduly disrupt a procedural schedule if one is subsequently instituted. BNSF has interests that might not be represented in the record absent its participation. If a grant to intervene is necessary and permitted, it would be consistent with other Board decisions. *See, e.g., Norfolk S. Ry.—Pet. to Set Trackage Rts. Comp.—Norfolk & Portsmouth Belt Line R.R.*, FD 36223, slip op. at 6-7 (STB served Mar. 29, 2019) (Board permitted CSXT to intervene because CSXT had met the § 1112.4(a) standard and “CSXT ha[d] interests that might not be represented in the record absent its participation.”); *Eastside Community Rail—Acquis. & Operation Exemption—GNP RLY Inc.*, FD 35692 et al., slip op. at 4, 6 (STB served Dec. 13, 2018) (Board permitted the City of Woodinville to intervene because the transaction at issue would affect the City’s property rights in the rail corridor).

BNSF has served as a replacement for the competition that would have otherwise been lost with the UP/SP merger. During this time, BNSF has repeatedly and successfully sought to enforce the rights of BNSF and its customers under the UP/SP merger conditions – all in the face of UP seeking to limit competition by restricting BNSF access.²

Under the latest argument made by UP, any shipper with its pre-UP/SP competitive options preserved by BNSF access could suddenly see its line-haul carrier choices reduced from two (BNSF and UP) to one (UP) as a result of first-mile/last-mile services being provided by a common carrier railroad instead of a private carrier. Such a result makes no sense on its face and would run counter to the basic competition-preserving premise of the UP/SP merger conditions. The Board should confirm that UP’s argument is invalid.

I. Background

A. BNSF accesses Cedar Port shippers to fulfill its competition-preserving role under the UP/SP merger conditions.

The shippers sited at TGS Cedar Port Industrial Park (the “Park” or “Cedar Port”) are located at a point (Baytown, Tex.) where the competitive options for shippers after the UP/SP merger would have been reduced from two line-haul carriers (UP and SP) to one (UP). In order to preserve the pre-merger competitive landscape, the Board conditioned its approval of the UP/SP merger on BNSF having

² See, e.g., *Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp.* (*Decision No. 75*), FD 32760, (STB served Oct. 24, 1997) (Board permitted BNSF to serve the R.R. Donnelley & Sons Company’s transload facility pursuant to the transload condition imposed in the UP/SP approval decision (*Decision No. 44*) over UP’s objection); *Decision No. 81*, FD 32760 (STB served Oct. 5, 1998) (Board permitted BNSF to serve South Texas Liquid Terminal, Inc., a transload facility located within the San Antonio, Tex. switching limits pursuant to the UP/SP-BNSF settlement agreement, over UP’s objection); *Decision No. 86*, FD 32760 (STB served July 12, 1999) (Board permitted BNSF to serve Four Star Sugar Co. facility in El Paso, Tex. pursuant to the new facilities conditions imposed in *Decision No. 44*); *Decision No. 95*, FD 32760 (STB served Mar. 4, 2002) (Board provided guidance concerning “build-in/build-out” options for shippers to obtain access to an additional rail carrier and instructed BNSF and UP to negotiate implementation of the build-in/build-out UP/SP merger condition); *Decision No. 109*, FD 32760 (STB served Jan. 31, 2008) (Board ordered UP to permit BNSF to provide rail service to Mission Rail Park).

access at “2-to-1” points such as Baytown to all shipper facilities that were open to UP and SP at the time of the merger, and all new shipper facilities arising after the merger.³ These include the Park and all shippers at the Park, as UP has long acknowledged. (See UP Pet. 3.). BNSF currently provides line-haul service to approximately 20 Cedar Port customers under these rights.

B. BNSF accesses Cedar Port shippers pursuant to operating rights obtained through the 50/50 Line agreements and via switching service provided by TGSi.

BNSF accesses the Cedar Port shippers by running BNSF trains either from the 50/50 Line (described below) or BNSF’s Dayton Yard located off the Baytown Branch, down the Baytown Branch, and then to the end of the Cedar Bayou Industrial Lead at the Park’s entrance. There, Trans-Global Solutions, Inc. (“TGSi”), a private switching railroad, drops off and picks up cars to and from BNSF and provides first-mile/last-mile service to the Cedar Port shippers.

In 1998, UP and BNSF became equal one-half owners of the former SP Lafayette Subdivision that runs generally west-to-east between Dawes, TX and Avondale, LA (the “50/50 Line”). *Burlington N. & Santa Fe Ry. Co. & Union Pac. R.R. Co.—Acquisition Exemption—Lines Between Dawes, Tex., & Avondale, La. (50/50 Line Decision)*, FD 33630 (STB served Sept. 29, 1998). As the Board noted in its approval, the transaction resulted in BNSF “gain[ing] access to all present and future shipper facilities . . . on former SP branches or spurs that connect to the [50/50 Line], as well as on new branches and spurs added to the line.” *Id.* at 2. One of the reasons BNSF operates on the 50/50 Line and related branches and spurs is

³ These rights are memorialized in the BNSF Settlement Agreement, the final form of which, the Restated and Amended Settlement Agreement (“RASA”), was submitted to the Board in 2002 and is attached as Exhibit A to UP’s Petition. The RASA is generally organized by geography, with provisions relevant to Baytown, Tex. located at Section 5. Baytown is listed as a “2-to-1” point at Exhibit A to the RASA. (See UP Pet., Ex. A, RASA at 52).

to fulfill its UP/SP merger obligations to serve 2-to-1 shippers in the Eastern Texas – Louisiana area. *See id.* at 1-2.

BNSF operations on the 50/50 Line and former SP branches and spurs connected to the 50/50 Line are governed by the February 12, 1998 Term Sheet Agreement, attached as Exhibit A, and the September 1, 2000 Operating Agreement, attached as Exhibit B. Because the Baytown Branch and the Cedar Bayou Industrial Lead are former SP branches or spurs that connect to the 50/50 Line, all of the BNSF operations described above leading to Cedar Port are performed pursuant to the 50/50 Line agreements. *See* Ex. A, Term Sheet Agreement, Section II.2; Ex. B, Operating Agreement, Section 1.1 (defining “Joint Trackage” subject to BNSF operating rights to include “Customer Access Trackage,” defined as including former SP branches and spurs connected to the 50/50 Line and used to serve shippers located on that trackage).

Importantly, the 50/50 Line agreements contain no restriction on BNSF interchanging traffic with any other common carrier connected to the 50/50 Line or any former SP branches or spurs connected to the 50/50 Line. Any such restriction would have been inconsistent with BNSF’s rights as an equal co-owner with UP of the 50/50 Line.

C. TGSC obtained the requisite Board authority to provide common carrier railroad services at Cedar Port.

On July 7, 2022, TGS Cedar Port Railroad LLC (“TGSC”) filed with the Board a notice invoking an exemption, available to a class of transactions that include the establishment of common carrier operations by a new carrier, from the otherwise applicable certification requirements of 49 U.S.C. § 10901. (*See* TGSC Notice pdf page 2.) The notice explained that TGSC, a new company owned by TGSI, would provide on a common carrier basis the same first-mile/last-mile services over approximately 1.28 miles of track in the Park that TGSI then provided on a private

basis. (*Id.* at 4-5.) TGSC obtained the required Board authority for such common carrier operations by invoking the class exemption through the notice. *See TGS Cedar Port R.R.—Operation Exemption—in Chambers County, Tex.* (STB served July 22, 2022).

Although not required to do so by the Board’s rules, the notice explained that customers at the Park receive competitive railroad service from both UP and BNSF under the UP/SP merger conditions, and that this “service arrangement. . .will continue, albeit under different service circumstances within the Park going forward.” (TGSC Notice pdf page 4.) The Board accepted the notice and the exemption took effect on August 6, 2022. *See TGS Cedar Port R.R.*, FD 36627, slip op. at 2. In so doing, the Board noted TGS’s representation that “the proposed transaction will not contractually limit [TCSC’s] ability to interchange traffic with any third-party connecting carrier.” *Id.* at 2.

D. UP filed a Petition to Revoke the TGSC exemption, alleging that TGSC’s characterization of BNSF’s access rights was false and misleading.

On April 4, 2023, UP filed a petition to revoke the TGSC exemption as void *ab initio*. The Petition alleges that the TGSC notice “contains the materially false statement that if TGSC institutes common carrier operations over the Line, shippers in the [Park], will continue to have the same access they currently have to both [UP] and [BNSF] because TGSC could interchange traffic with both carriers.” (UP Pet. 2.) Instead, UP claims that, under the UP/SP merger conditions and the RASA, “BNSF cannot interchange with any new short line railroad that, like TGSC, would connect to a merger-related trackage rights line via existing track.” (*Id.* at 3.) UP advanced a legal argument to support this assertion, based on interpretation of multiple RASA provisions, as discussed in detail below.

II. Argument

BNSF requests that the Board confirm that the Park and Cedar Port shippers will continue to benefit from competitive BNSF access via interchange with TGSC. In crafting the UP/SP merger conditions, the Board could never have intended that the creation of a new short-line railroad to provide first-mile/last-mile service to shippers who benefit from BNSF's competition-preserving access under the UP/SP merger conditions would suddenly reduce those shippers' line-haul options from two railroads (UP and BNSF) to one (UP). Moreover, BNSF's operating rights under the 50/50 Line agreements contain no limitation on interchanging with short-line railroads such as TGSC. Finally, UP could resolve its invented issue by simply agreeing to allow BNSF to continue to interchange with TGSC.

A. The UP/SP merger conditions require UP to allow BNSF access to the Cedar Port shippers.

At the core of the UP/SP merger conditions is the requirement that UP enable BNSF to fulfill BNSF's right and responsibility to serve customers such as those located at Cedar Port who previously had competitive service from both UP and SP. This ensures that those shippers would not suffer a loss of competition and would continue to have at least two line-haul carrier options after the UP/SP merger.⁴

There is **no argument** here that the Park and Cedar Port shippers have long enjoyed BNSF access under the UP/SP merger conditions. The only issue is whether the change of first-mile/last-mile service to a covered shipper from a private railroad to a common carrier railroad could allow UP to evade its UP/SP merger commitments and reduce the competitive options available to those shippers.

⁴ See, e.g., *Decision No. 44*, 1 S.T.B. 233, 252 ("Applicants claim that their basic purpose in entering into the BNSF agreement was to preserve competitive rail service for all 2-to-1 customers of UP and SP."); *Id.* at 251-52 ("Applicants claim that the merger, as conditioned by the BNSF agreement, will greatly intensify rail competition in the West; the BNSF agreement, applicants contend, will substitute a stronger competitor (BNSF) for a weaker one (SP)")

The Board cannot allow that absurd and harmful result to occur.⁵ Instead, the Board should issue an order finding that, regardless of UP's interpretation of the RASA, the broader UP/SP merger conditions require UP to enable BNSF to continue to provide competitive line-haul service to shippers covered by the merger conditions, even if the first-mile/last-mile service to such shippers shifts from a private carrier to a common carrier.⁶

B. The RASA does not restrict BNSF from interchanging with TGSC.

BNSF respectfully suggests that the Board's confirmation of the analysis set forth above would be sufficient to confirm that the Park and Cedar Port shippers will continue to benefit from competitive BNSF access via interchange with TGSC. But if the Board were to decide that it was necessary to evaluate UP's interpretation of the RASA, it will find that the RASA does not limit BNSF access to Cedar Port shippers via interchange with TGSC, as UP alleges.

The RASA very clearly states that:

“[i]t is the intent of the parties that this Agreement result in the **preservation of competition by two rail carriers** for (a) all “2-to-1” Shipper Facilities . . . and (b) all other shippers who had direct competition or competition by means of siting, transload or build-in/build-out from only UP and SP pre-merger.”

(See UP Pet., Ex. A RASA 8(i) (emphasis added).) Regarding the geographic region that includes Cedar Port/Baytown, the RASA provides that “BNSF shall receive

⁵ UP's effort here to limit two carrier competition based on a strained interpretation of the RASA is reminiscent of UP's prior efforts to defeat BNSF's right to preserve effective two-carrier competition. The Board rejected one such effort by holding that UP's RASA interpretation “would severely undermine the purpose of the merger conditions and the integrity of the Board's processes.” *BNSF Ry.—Terminal Trackage Rights—Kan. City S. Ry. & Union Pac. R.R.*, FD 32760 (Sub-No. 46), slip op. at 12 (STB served July 5, 2016)). UP's interpretation here would do likewise.

⁶ In this regard, had the UP/SP merger not occurred, the Park and other Baytown shippers would have continued to be served by both UP and SP after the common carrier was formed.

access” to certain shipper facilities, which UP agrees includes the Park and the Cedar Port shippers. *Id.* at RASA 5(b).

In its Petition, UP claims that three provisions in the RASA should be read to negate this expressly stated intent of the RASA and to restrict BNSF’s ability to interchange with TGSC in order to access the Cedar Port shippers. (UP Pet. 4-5) (citing RASA 5(b), 8(j), 8(k).) These provisions all grant BNSF rights to interchange with short-line railroads that are specifically-named or described as a class. (*See id.*) None of these provisions limit BNSF’s basic rights to access covered shippers. In other words, the **affirmative** grant of BNSF interchange rights to certain short-line railroads in the RASA does not **restrict** BNSF from interchanging with a new short-line railroad in order to fulfill BNSF’s responsibility to access 2-to-1 shippers such as those located at Cedar Port. Indeed, the provisions were added to the RASA in order to preserve UP’s or SP’s pre-merger exclusive service in certain situations.

Moreover, even if the Board somehow agreed with UP that the RASA provisions cited above restricted BNSF from interchanging with TGSC, Section 8(i) of the RASA makes it clear that BNSF would still have alternative competitive access to the Cedar Port shippers:

The parties recognize that some [covered shipper facilities] will not be able to avail themselves of BNSF service by virtue of the trackage rights and line sales contemplated by this Agreement. . . . Accordingly, UP/SP and BNSF agree to enter into arrangements under which, through trackage rights, haulage, ratemaking authority or other mutually acceptable means, BNSF will be able to provide competitive service to [covered shipper facilities]

(UP Pet., Ex. A, RASA 8(i).) If it were necessary to invoke this provision, then the most obvious arrangement through which BNSF could provide competitive service to the Park and Cedar Port shippers is through interchange with the common carrier TGSC, much as BNSF interchanges with the private carrier TGSi today.

C. BNSF’s operating rights under the 50/50 Line agreements do not limit interchange with short-line railroads.

In its Petition, UP states that its “separate agreements implementing the trackage rights granted to BNSF in the RASA typically contain provisions precluding BNSF from using the Trackage Rights Lines to interchange with any other railroad” (UP Pet. 6 n12.) But what UP fails to mention is that BNSF accesses the Park via the 50/50 Line – a jointly-owned UP/BNSF line subject to separate operating rights. So even if the Board decides that UP could restrict BNSF’s access to Cedar Port shippers by invoking the RASA, BNSF has an independent right to operate on the 50/50 Line and related spurs that lead to the Park, and to interchange there with TGSC. *See supra* Section I.B.

Section 2.1(a) of the 50/50 Line Operating Agreement provides that “UPRR and BNSF shall each have the right to serve all present and future industries or facilities originating or terminating traffic on the Joint Trackage.” This right extends to the Park and the Cedar Port shippers, because the definition of Joint Trackage includes the 50/50 Line itself and all former SP branches and spurs used to access customers, including the lines used by BNSF to serve the Park such as the Baytown Branch and the Cedar Bayou Industrial Lead. The Operating Agreement contains no limitation on BNSF interchanging with a short-line railroad such as TGSC.

Moreover, Section 3.4 of the Operating Agreement requires that “in the management, operation (including dispatching) and maintenance of the Joint Trackage, [UP] and [BNSF] shall be treated equally.” Allowing UP to interchange with TGSC while prohibiting BNSF from doing so would be a clear violation of this provision.

D. UP could resolve its invented issue by simply agreeing to allow BNSF to interchange with TGSC.

In its Petition, UP laments that “[s]hould TGSC institute common carrier operations, shippers in the Park will experience a significant reduction in their competitive options.” (UP Pet. 3.) The Board should reject UP’s feigned dilemma out of hand. The only way that Cedar Port shippers will have their competitive options reduced is if UP decides, contrary to its obligations under both the UP/SP merger conditions and the 50/50 Line agreements, to block BNSF from interchanging with TGSC. In other words, UP has the ability to resolve the problem it invented.

III. Conclusion

The Board should confirm that UP cannot block BNSF’s ability to provide line-haul service to customers who were guaranteed competitive line-haul service by the Board in 1996 simply because a common carrier railroad replaces a private railroad as the provider of first-mile/last-mile service to those customers.

Respectfully submitted,

/s/ Peter W. Denton

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IN CHAMBERS COUNTY, TEX.

Exhibit A
February 12, 1998 Term Sheet Agreement

**TERM SHEET AGREEMENT
COVERING OWNERSHIP AND OPERATION
OF LINES IN AND AROUND HOUSTON, TX**

I. GENERAL CONCEPT

1. UP and BNSF agree that they will jointly own and operate the former SP Lafayette Subdivision between Dawes (MP 352.8) and Avondale (MP 14.9) (the "50/50 Line"), on a basis similar to that found in the Powder River Basin Agreement except for dispatching. Trackage between MP 14.9 and 10.5 owned by UP and by BNSF shall be jointly dispatched and used by both parties without charge but otherwise shall be subject to typical joint facility provisions.
2. BNSF will grant UP overhead trackage rights between Beaumont and Navasota.

II. SPECIFIC TERMS COVERING JOINT OWNERSHIP AND DISPATCHING OF FORMER LAFAYETTE SUB

1. UP and BNSF will exchange 50 percent interests in their respective main lines, including operating sidings used for meeting and passing trains, which constitute the former SP Lafayette Subdivision, with each party having a 50 percent interest in the resulting operating corridor. A listing of such operating sidings is provided at Exhibit A.
2. It is the intention of the parties that UP and BNSF shall have the right to serve all present and future industries or facilities originating or terminating traffic on the 50/50 Line and on former SP branches and spurs connecting to the 50/50 Line or any new branches or spurs connecting to these lines. These industries and facilities shall be open to BNSF on the same basis that BNSF serves "2-to-1" customers per Section 5 of the Settlement Agreement, as amended and supplemented, or on a haulage basis for the fee called for in Section 8j of the Settlement Agreement, and calculated as shown on the Example attached as Exhibit B.
3. Except for existing rights, neither BNSF nor UP can admit a third party or provide haulage without the other's approval on the 50/50 Line; provided, however, that either party may use the Louisiana & Delta Railroad as its agent to provide service over the 50/50 Line without obtaining the approval of the other party. As of the date hereof, UP shall not impose or enforce any requirement (a) contained in any agreement entered into after execution of

the Settlement Agreement and (b) covering traffic which BNSF had access to under the terms of the Settlement Agreement, that the L&DRR pay any additional rental or other fee if traffic is routed via BNSF.

4. On the 50/50 Line, capital additions and betterments will be split on a user (i.e., 50/50) basis, and maintenance capital (track replacement), ordinary maintenance, and operations will be split on an annualized usage basis (gross ton miles). Except as to capital additions and betterments agreed to by the parties prior to the date of this Term Sheet Agreement as payable out of the Capital Improvements Fund established by the Settlement Agreement, capital additions and betterments will be subject to the mutual agreement of the parties in the same manner as they are agreed to under procedures established in the Powder River Basin Agreement.
5. Capital costs of projects which benefit only one party shall be paid for solely by such party. If, for any reason, the other party desires to use such facility it will pay 50% of the actual cost plus interest.
6. Exchange is subject to TexMex' existing trackage rights. TexMex trackage rights charges shall be paid to UP for UP's sole benefit. TexMex usage of the line shall be considered UP usage for purposes of allocating liability, calculating UP and BNSF's respective usage shares, etc. The parties' contracts with Amtrak shall not be affected by this Term Sheet Agreement. Amtrak usage of the 50/50 Line shall be considered the usage of the respective owner of the segment in question prior to the exchange of ownership for all purposes including, but not limited to, compensation, liability, and all other provisions of the parties' respective contracts with Amtrak.
7. BNSF and UP agree on a consolidated regional dispatching center encompassing BNSF, UP, HB&T and PTRR (between Bridge 5A and Deer Park) lines, and including KCS and TexMex participation as appropriate, as described in Exhibit C.
8. Field management, facility maintenance, and improvements to the 50/50 Line will continue to be performed by UP or BNSF on segments each owned prior to the exchange of ownership.
9. BNSF and UP agree to establish reasonable joint service standards, including a joint service standards committee for operations pursuant to this Term Sheet Agreement.

10. UP shall not be required to pay for any expenditures made by BNSF to meet the line condition standard in Section 10c of the Settlement Agreement and Section 6(b) of the Purchase and Sale Agreement up to the amount in the escrow account (principal of \$10.5 million plus interest). After the expenditures equal the amount in the escrow account, further expenditures shall be allocated pursuant to this Term Sheet Agreement. The cash and interest in the escrow account will be divided between the parties pursuant to their agreement settling the dispute over the condition of the Iowa Jct. to Avondale segment of the 50/50 Line.

III. SPECIFIC TERMS COVERING BEAUMONT-NAVASOTA TRackage RIGHTS

1. BNSF will grant UP overhead trackage rights between Beaumont and Navasota at the same mill rate and the same general terms as provided for such trackage rights in the Settlement Agreement.
2. UP shall have the right to enter/exit at Cleveland and Conroe.
3. UP will make capital contributions to capacity related improvements to the trackage rights line on a usage basis (gross ton miles).

IV. STRANG/PASADENA INTERCHANGE

1. UP shall continue interchange of traffic originating between Sinto and Bayport through the PTRa at Pasadena for movement by BNSF. BNSF will be responsible for PTRa charges resulting from this service. The parties agree to reconsider this issue in 6 to 8 weeks after UP's directional operations and terminal changes are in place and operational. The adequacy of interchange service provided subsequent to the reinstatement of the prior interchange after such reconsideration shall be subject to review by the Service Standards Committee. The Pasadena interchange shall be reinstated in the event the Service Standards Committee finds that interchange service standards have not been met for a reasonable period of time.

V. OTHER

1. The parties agree to cooperate with each other and make and prosecute diligently whatever filing or applications, if any, are necessary to implement the provisions of this Term Sheet Agreement.

2. The parties agree to use their best efforts to promptly complete definitive agreements reflecting the intent and provisions of this Term Sheet Agreement.
3. Unresolved disputes and controversies concerning any of the terms and provisions of this Term Sheet Agreement shall be submitted for binding arbitration under Commercial Arbitration Rules of the American Arbitration Association which shall be the exclusive remedy of the parties.
4. The provisions of Section II.2, Industry Access, Section II.7, Joint Dispatching Center, and Section III, Beaumont-Navasota Trackage Rights, shall be effective and implementation shall begin as soon as practical but no later than 30 days from execution, and remain in effect thereafter, and the remaining provisions of this Term Sheet Agreement shall be implemented as soon as possible upon receipt of required governmental approval or exemption, if any.
5. The parties intend that the undertakings in this Term Sheet Agreement constitute legally enforceable obligations.

AGREED TO:

UNION PACIFIC RAILROAD COMPANY

By: Jance V. Dolan
Title: Vice President - Law
Date: Feb 12 1998

THE BURLINGTON NORTHERN AND SANTA FE
RAILWAY COMPANY

By: R. J. Allen
Title: Vice President, UP/SP Lines
Date: February 12, 1998

EXHIBIT A
OPERATING SIDINGS

I. BNSF Segment

- (a) Salix
- (b) Raceland Jct.
- (c) Schriever
- (d) Berwick
- (e) Bayou Sale
- (f) Baldwin
- (g) New Iberia
- (h) Cade
- (i) Lafayette (only track 902, not Lafayette yard)
- (j) Crowley Siding
- (k) Midland
- (l) Roanoke

II. UP Segment

- (a) Fauna
- (b) Crosby
- (c) Dayton
- (d) Ames
- (e) Devers
- (f) China
- (g) Connell
- (h) Francis
- (i) N. Echo
- (j) S. Echo
- (k) Brimstone
- (l) Lockmore
- (m) Iowa Siding (to be constructed)

Charges

• **Provided for illustrative purposes only. Charges subject to annual adjustment in accordance with the Settlement Agreement.**

Exhibit C

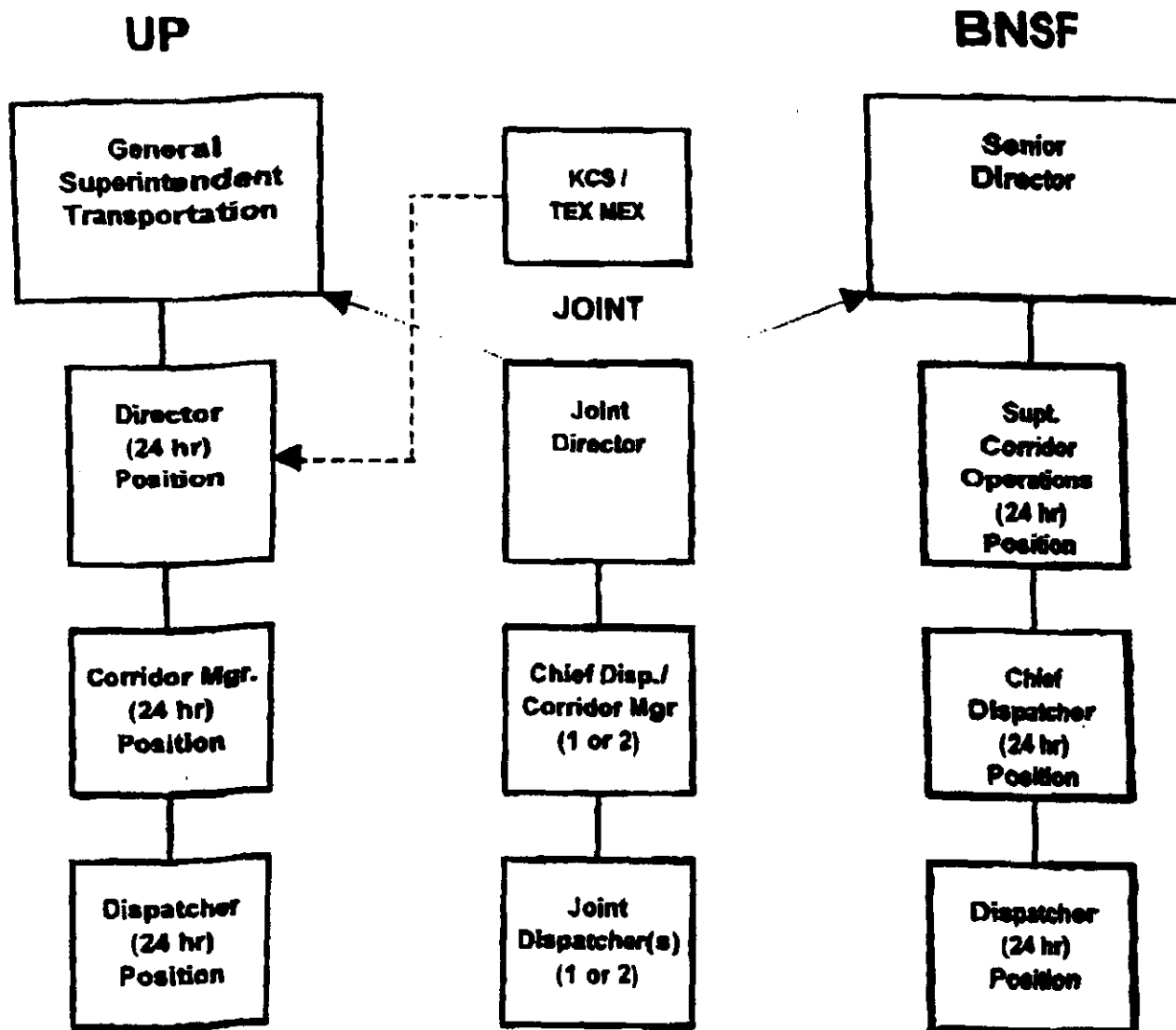
Consolidated Dispatching Center

- a) The lines to be dispatched by the Consolidated Dispatching Center are shown on the map attached hereto. Each railroad will control, manage and dispatch its own lines and the 50/50 Line will be dispatched jointly. BNSF shall be provided necessary office space and facilities in the Consolidated Dispatch Center.
- b) See attached organizational chart for management structure.
- c) A Joint Director, reporting to Service Standards Committee, will be retained by UP and BNSF's respective Vice Presidents-Transportation. Each railroad shall submit the names of two potential candidates and then mutually agree on the person to fill the position. BNSF and UP will mutually agree upon a process to change the Joint Director which permits either to remove the incumbent. The parties shall agree upon a written description of the Joint Director's job duties, two of which will include responsibility for ensuring compliance with (1) dispatching protocol standards and (2) standards for the gathering and distribution of cars to/from industries on the 50/50 Line, former SP branches and spurs, to either railroad. The Joint Director's job description and performance shall be reviewed/evaluated periodically by both railroads. Either railroad shall have the right to remove the Joint Director at its sole discretion.
- d) Until UP implements CAD III, UP will support its dispatching using Digacon. UP's server is located in Omaha and during emergency outages UP will take control of its lines and the 50/50 Line from Omaha. During emergency outages BNSF will control its lines from Ft. Worth.
- e) BNSF and UP agree that KCS/Tex Mex should be offered the opportunity to dispatch their lines in the Gulf Coast area from the Consolidated Dispatching Center.
- f) Cost allocation shall be subject to customary joint facility arrangements.
- g) Consolidated Dispatching Center will be located in the first floor of UP's Spring, Texas, regional offices. UP will develop and furnish proposed office layout.

CONSOLIDATED DISPATCHING CENTER

HOUSTON, Texas

Organization Chart

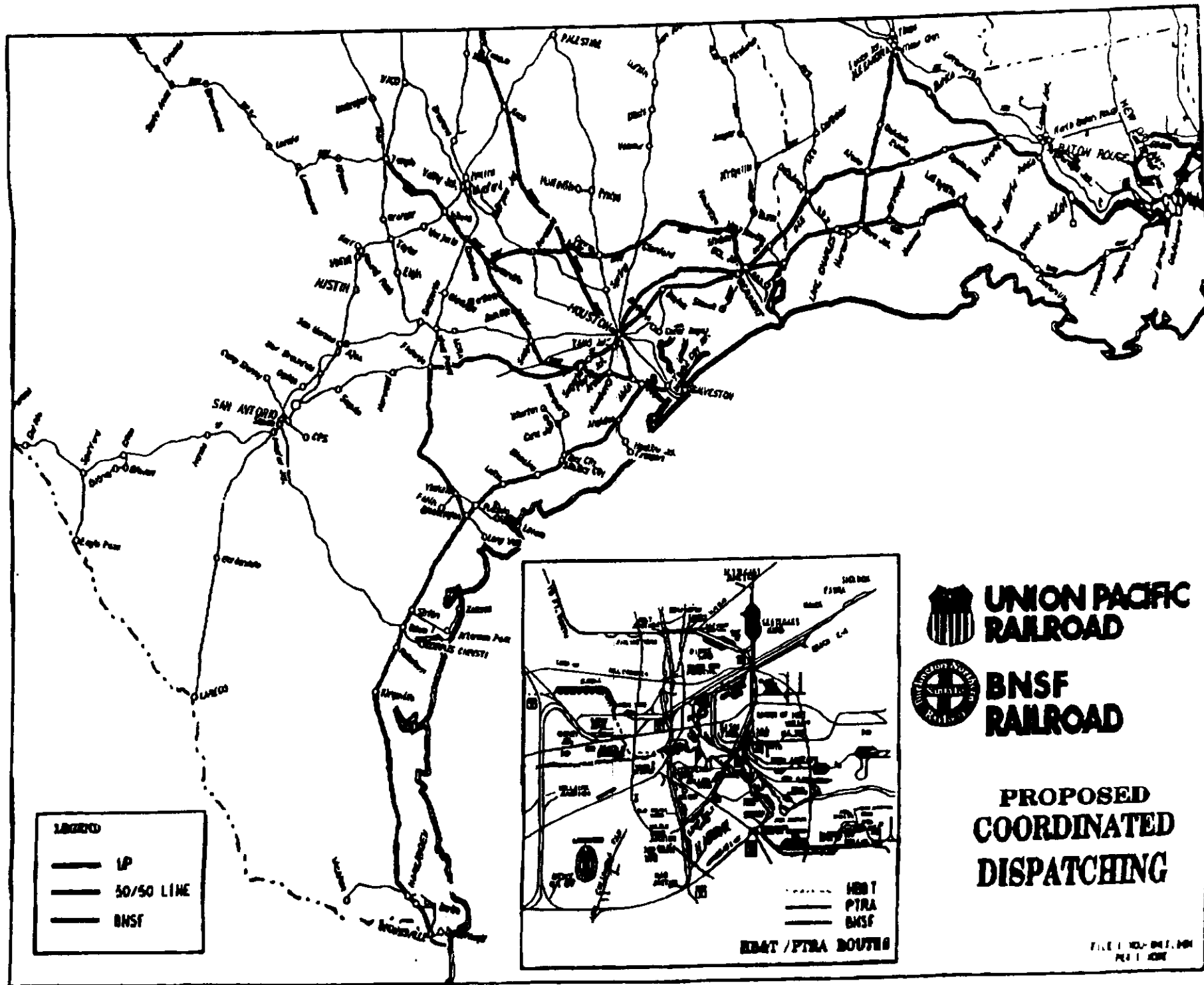


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BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36627

TGS CEDAR PORT RAILROAD LLC
—OPERATION EXEMPTION—
IN CHAMBERS COUNTY, TEX.

Exhibit B
September 1, 2000 Operating Agreement

AGREEMENT

AGREEMENT made this 1st day of September, 2000, between THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY, a Delaware corporation, hereinafter called "BNSF," and UNION PACIFIC RAILROAD COMPANY, a Delaware corporation, hereinafter called "UPRR."

WITNESSETH:

WHEREAS, BNSF owns a line of railroad between Iowa Junction, Louisiana and Avondale, Louisiana and UPRR owns a line of railroad between Dawes, Texas and Iowa Junction, Louisiana; and

WHEREAS, by conveyance simultaneous with the entry into this Agreement, but separate and apart from this Agreement, BNSF is acquiring an undivided one-half interest in certain of the UPRR Trackage (as hereinafter defined) and UPRR is acquiring an undivided one-half interest in certain of the BNSF Trackage (as hereinafter defined); and

WHEREAS, the parties desire to set forth in this Agreement the manner in which the Joint Trackage (as hereinafter defined) will be managed, maintained and operated subsequent to acquisition by (1) UPRR of a one-half interest in that portion of the BNSF Trackage to be conveyed to it, and (2) BNSF of a one-half interest in that portion of the UPRR Trackage to be conveyed to it.

NOW, THEREFORE, it is mutually agreed:

Section 1. DEFINITIONS

1.1 For the purposes of this Agreement, the following definitions and terms shall apply:

Additions and Betterments shall mean work projects, the cost of which is chargeable in whole or in part to Property Accounts under principles of railroad retirement and betterment ("RRB") accounting.

BNSF Trackage shall mean ~~(a)~~ the portion of the mainline track of the former Southern Pacific Transportation Company ("SP") Lafayette Subdivision between Iowa Junction, Louisiana, in the vicinity of BNSF Milepost 205.3, and Avondale, Louisiana, in the vicinity of BNSF Milepost 14.94, as shown on the print dated February 12, 1998, attached as Exhibit "A" and by reference made a part of this Agreement (the "Print"), including the right of way and operating sidings used for passing and meeting trains shown on "Exhibit 'A'," and trackage appurtenances, together with signals and communications facilities required for the control of operations over such track (for purposes of management and use of such signals and communications facilities only, and not ownership), and all Additions and Betterments or Improvements, in which UPRR has participated pursuant to this Agreement, to any of the foregoing, and (b) such of the Customer Access Trackage (as defined below) as is now owned or controlled by BNSF or as is added to the ownership or control of BNSF.

Consolidated Dispatching Center or CDC shall mean a consolidated regional dispatching center, established and operated pursuant to the provisions of an agreement entered into between the parties, located in UPRR's Spring, Texas facility, encompassing BNSF, UPRR, Houston Belt & Terminal Railway Company ("HBT") and Port Terminal Railroad Association ("PTRA") (between Bridge 5A and Deer Park Junction) lines generally as shown on Exhibit "A" attached thereto, and lines of The Kansas City Southern Railway Company ("KCS") and Texas Mexican Railway Company ("TexMex") in the same general area if KCS and TexMex elect to participate in consolidated dispatching.

Customer Access Trackage shall mean trackage which is not included in subsection (a) of the above definition of BNSF Trackage or in subsection (a) of the below definition of UPRR Trackage, and which from time to time would be utilized to provide access to present and future industries or facilities originating or terminating traffic on the former SP Lafayette Subdivision between Dawes (MP 353.0) and Avondale (MP 14.94) and on former SP branches and spurs connecting to the said section of the Lafayette Subdivision or any new branches and spurs connecting to these lines, together with the right of way for such trackage, and trackage appurtenances, signals and communications facilities for the control of operations thereover (for purposes of management and use of such signals and communications facilities only, and not ownership); it being agreed that such trackage is included in the definition of "Customer Access Trackage" (and as such is subject to the terms of this Agreement) only during the time period that such trackage is to be utilized for access.

Equipment shall mean trains, locomotives, rail cars (loaded or empty), trailers and containers (loaded or empty), cabooses, vehicles and machinery which are

capable of being operated on railroad tracks or on adjacent right-of-way for purpose of the maintenance or repair of such railroad tracks or right-of-way.

Exclusive BNSF Trackage shall mean that portion of the track of the former SP Lafayette Subdivision between Iowa Junction, Louisiana, in the vicinity of BNSF Milepost 205.3, and Avondale, Louisiana, in the vicinity of BNSF Milepost 14.94, and all Additions and Betterments thereto, not included at any given time within the definition of BNSF Trackage.

Exclusive UPRR Trackage shall mean that portion of the track of the former SP Lafayette Subdivision between Dawes, Texas in the vicinity of UPRR Milepost 353.0, and Iowa Junction, Louisiana, in the vicinity of UPRR Milepost 205.3, and all Additions and Betterments thereto, not included at any given time within the definition of UPRR Trackage.

GTM shall mean gross ton mile, which is the weight in tons for Equipment and lading transported over one (1) mile of track included in the Joint Trackage.

GTM Handled Proportion shall mean the GTMs operated by one of the parties over the Joint Trackage divided by the total GTMs operated by both parties over the Joint Trackage during the same time period. All movements over the Joint Trackage shall be counted for the purposes of computing such GTM Handled Proportion; provided, however, that (1) Equipment engaged in work service pertaining to inspection, construction, maintenance or operation of the Joint Trackage or changes in and/or Additions and Betterments or Improvements to the Joint Trackage shall not be so counted, and (2) GTMs of third parties (other than Louisiana & Delta Railroad, Inc., or its successors, ("L&D") whose use shall be attributed as provided at Section 4.1 below) shall be attributed to the party that admitted such third party or for whose benefit such third party was so admitted.

Joint Service Standards Committee shall mean a committee comprised of the chief transportation officers (or their designees) of UPRR and BNSF which shall be responsible for establishing appropriate rules or standards to ensure equitable and non-discriminatory treatment, appropriate maintenance and efficient joint use of the Joint Trackage.

Joint Trackage shall mean the BNSF Trackage and the UPRR Trackage, collectively.

Light Engines shall mean one or more locomotive units not coupled to cars.

Management Services shall mean (1) the field management of, facility maintenance of, and making of Additions and Betterments or Improvements to, the Joint

Trackage, (2) provision and performance of all work and services necessary to facilitate, or incidental to, the operation and use of the Joint Trackage pursuant to and in accordance with the terms of this Agreement, and (3) provision and furnishing of all Equipment and employees in the management, control and maintenance of the Joint Trackage. The Management Services do not include any of the services to be provided under the Property Management Agreement.

Manager shall mean UPRR with reference to the performance of Management Services on the UPRR Trackage, and BNSF with reference to the performance of Management Services on the BNSF Trackage.

Project shall mean the establishment of the CDC and the relocation of certain existing dispatching functions of the parties to the CDC.

Property Accounts shall mean the accounts so designated in the applicable STB accounting classification for railroad companies in effect from time to time.

Property Exchange Agreement shall mean the Property Exchange Agreement of September 1, 2000, between BNSF and UPRR.

Property Management Agreement shall mean the Property Management Agreement of September 1, 2000, between BNSF and UPRR.

Purchase and Sale Agreement shall mean the Purchase and Sale Agreement of December 11, 1996, between BNSF and Southern Pacific Transportation Company.

Settlement Agreement shall mean that Agreement dated September 25, 1995, as amended and supplemented by the parties hereto and as conditioned by the STB, between Union Pacific Corporation, UPRR, Missouri Pacific Railroad Company (collectively referred to as "UP"), and Southern Pacific Rail Corporation ("SPRC"), Southern Pacific Transportation Company, The Denver and Rio Grande Western Railroad Company, St. Louis Southwestern Railway Company and SPCSL Corp. (collectively referred to as "SP"), on the one hand, and The Burlington Northern Railroad Company ("BN") and The Atchison, Topeka & Santa Fe Railway Company ("Santa Fe"), on the other hand, concerning the proposed acquisition of SPRC by UP Acquisition Corporation, and the resulting common control of UP and SP pursuant to an application to the Interstate Commerce Commission in Finance Docket No. 32760, Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company -- Control and Merger -- Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company.

STB shall mean the Surface Transportation Board or successor agency.

Term Sheet shall mean that Term Sheet Agreement between UPRR and BNSF covering Ownership and Operation of Lines In and Around Houston, Texas dated February 12, 1998.

UPRR Trackage shall mean (a) the portion of the mainline track of the former SP Lafayette Subdivision between Dawes, Texas in the vicinity of UPRR Milepost 353.0, and Iowa Junction, Louisiana, in the vicinity of UPRR Milepost 205.3, as shown on the Print, including the right of way and operating sidings used for passing and meeting trains shown on "Exhibit 'A'," and trackage appurtenances, together with signals and communications facilities required for the control of operations over such track (for purposes of management and use of such signals and communications facilities only, and not ownership), and all Additions and Betterments or Improvements, in which BNSF has participated pursuant to this Agreement, to any of the foregoing, and (b) such of the Customer Access Trackage (as defined above) as is now owned or controlled by UPRR or as is added to the ownership or control of UPRR.

User shall mean (1) BNSF with reference to BNSF's operation over the UPRR Trackage and (2) UPRR with reference to UPRR's operation over the BNSF Trackage.

Section 2. ACCESS

2.1 (a) UPRR and BNSF shall each have the right to serve all present and future industries or facilities originating or terminating traffic on the Joint Trackage.

(b) In the event that UPRR shall locate a New Customer Facility (as such term is defined at Section 2.2 (a) below) on or adjacent to the Exclusive UPRR Trackage, BNSF shall have the right to serve such New Customer Facility; provided, however, that BNSF shall not have the right to locate a New Customer Facility on or adjacent to the Exclusive UPRR Trackage.

(c) In the event that BNSF shall locate a New Customer Facility on or adjacent to the Exclusive BNSF Trackage, UPRR shall have the right to serve such New Customer Facility; provided, however, that UPRR shall not have the right to locate a New Customer Facility on or adjacent to the Exclusive BNSF Trackage.

(d) Whenever a New Customer Facility is to be located on the Joint Trackage, the Manager of that portion of the Joint Trackage shall notify the other party that such New Customer Facility is to be so located. Such notice shall be given as soon as

practicable after agreement between the Manager and the customer has been reached for the location of the New Customer Facility.

(e) At least forty-five (45) days prior to initiating service to an industry or facility, the non-Manager must elect, in writing, whether its service shall be (1) direct, (2) through reciprocal switch, (3) on a haulage basis for the fee calculated as shown on the example attached as Exhibit B, or (4) with the Manager's prior written agreement, using a third party contractor to perform switching for the non-Manager alone or both parties. If the party electing to provide service is not also the Manager of that section of Joint Trackage on which the customer to be served is located, such electing party shall provide its proposed rail service plan for the customer to the Manager in its notice of election on the manner in which service is to be provided, and the Manager shall within twenty-two (22) days of its receipt of such notice either (i) notify the electing party of its approval or disapproval of such rail service plan, which approval shall not be unreasonably withheld, or (ii) if the Manager disapproves of such rail service plan, submit to the electing party a revised rail service plan as to such customer. In the event such revised rail service plan is unacceptable to the electing party, the Manager shall provide service, comparable to its own, on behalf of the electing party on an interim basis at a fee determined by the election choices of this Agreement until the parties mutually agree upon a rail service plan or one is established by arbitration pursuant to Section 10 below. The non-Manager, having elected to initiate service pursuant to this Agreement or when already providing service to a customer under a previous election pursuant to the Settlement Agreement, shall have the right, upon one hundred eighty (180) days' notice to the Manager, to change its election; provided, however, that the Non-Manager (x) shall not change its election more often than once every five (5) years and (y) shall reimburse the Manager for any costs incurred by the Manager in connection with such changed election.

2.2 (a) A party to this Agreement ("Party X"), unless it elects in writing not to participate, shall pay fifty percent (50%) of the other party's ("Party Y") cost and expense of (1) constructing any connecting and access tracks and switches (each, a "New Customer Improvement") for new industries or facilities originating or terminating traffic on the Joint Trackage other than exclusively owned or leased facilities as set forth at Section 5.3 below (each, a "New Customer Facility") upon Party X's election to serve a New Customer Facility, and/or (2) upgrades ("Existing Customer Improvements") to connecting and access tracks and switches required to serve an existing industry or facility originating or terminating traffic on the Joint Trackage other than exclusively owned or leased facilities as set forth at Section 5.3 below (each, an "Existing Customer Facility") (New Customer Facilities and Existing Customer Facilities are hereinafter collectively referred to as "Customer Facilities", while Existing Customer Improvements and New Customer Improvements are hereinafter collectively referred to as "Improvements").

(b) Improvements that Party X elects to participate in the cost and expense of constructing shall progressively during construction become a part of the Joint Trackage either: (i) if the Improvement itself connects directly to any portion of the Joint Trackage defined in subsection (a) of the definition of BNSF Trackage or subsection (a) of the definition of UPRR Trackage, become a jointly owned part of the Joint Trackage; or (ii) if the Improvement itself does not connect directly as described in (i) above, become Customer Access Trackage. Party Y shall promptly execute the necessary conveyances to transfer one-half ownership of any Improvements that become jointly owned under the foregoing sentence. Should Party X decline to participate in the cost and expense of constructing Improvements, Party X shall be denied access to the Customer Facility served by such and the Improvements then shall not become a jointly owned part of the Joint Trackage (except that if any part of the same was already a part of the jointly owned Joint Trackage, it will remain so), but will become Customer Access Trackage.

(c) Should Party X elect at a later date to serve a Customer Facility served by Improvements the cost and expense of constructing it previously declined to participate in (and thus was denied access to), such right shall be granted to Party X by Party Y upon payment of fifty percent (50%) of Party Y's cost and expense of the Improvements plus per annum interest equal to the rate paid on 90-day Treasury bills of the United States government as of the date of completion. On the date of use by Party X, such Improvements shall become part of the Joint Trackage as described in Section 2.2 (b) above. Per annum interest shall be adjusted annually on the first day of the twelfth (12th) month following the date of completion and every year thereafter on such date, based on the percentage increase or decrease, in the average yield of 30-year U.S. Treasury Notes for the prior year compared to their average yield in first year of completion of the access to such industry or industries. Each annual adjustment shall be subject, however, to a "cap" (up or down) of two percentage points of the prior year's interest (i.e., adjustment may not exceed an amount equal to two percentage points of the immediately preceding year's interest rate).

Section 3. MAINTENANCE, OPERATION, AND CONTROL

3.1 UPRR shall manage the UPRR Trackage and BNSF shall manage the BNSF Trackage. Manager shall have sole charge of the maintenance and repair of its respective portions of the Joint Trackage, including, without limitation, ordinary and routine replacement of ties, rails and other track and signal equipment, with its own supervisors, labor, materials and Equipment. Any work projects performed pursuant to this Section 3.1 shall become a part of the Joint Trackage or, in the case of retirements, shall be excluded from the Joint Trackage. By September 1 of each year during the term of this Agreement (1) UPRR will advise BNSF of its anticipated programmed maintenance on the UPRR Trackage for the succeeding calendar year, and (2) BNSF will advise UPRR of its

anticipated programmed maintenance on the BNSF Trackage for the succeeding calendar year.

3.2 Unless otherwise mutually agreed to by the parties in writing, Manager shall, (1) keep and maintain the Joint Trackage on a consistent basis at no less than the track standard designated in the timetable in effect on the date of the Term Sheet, including any special instructions for the Joint Trackage as of the date of the Term Sheet, (2) maintain at least the physical capacity of the Joint Trackage as of the date of the Term Sheet (i.e., number of main tracks, support tracks, signal systems, rail weight, line clearances, etc.), and (3) be responsible, as provided for in Section 5.1, for any Additions and Betterments to the Joint Trackage as shall be necessary to accommodate the traffic of the parties while maintaining existing service standards (including transit times) in effect on the date of the Term Sheet. Manager shall also make such Additions and Betterments to its respective portion of the Joint Trackage as shall be required by any law, rule, regulation or ordinance promulgated by any government body having jurisdiction. Additions and Betterments to the Joint Trackage that are for the exclusive benefit of User shall be performed by Manager at User's sole cost and expense. In the event that either party desires to perform Additions and Betterments to the Joint Trackage to improve it to a condition in excess of the standard set forth in this Section 3.2, such Additions and Betterments shall be referred to the Joint Service Standards Committee for approval. Any question or controversy arising with respect to the undertaking of Additions and Betterments pursuant to this Section 3.2 that cannot be resolved by the Joint Service Standards Committee within sixty (60) days following its submission shall be submitted for arbitration pursuant to Section 10 below.

3.3 Manager shall employ all persons necessary to construct, operate, maintain, repair and renew its respective portion of the Joint Trackage. Manager shall be bound to use reasonable and customary care, skill and diligence in the construction, operation, maintenance, repair and renewal of the Joint Trackage and in management of the same. Manager shall make its best effort to ensure that User is given the same advance notice of maintenance plans and schedules as is provided to Manager's personnel.

3.4 Field management of the Joint Trackage shall at all times be under the exclusive direction and control of Manager. Operation (including dispatching) of the Joint Trackage and the movement of Equipment over and along the Joint Trackage shall at all times be subject to the exclusive direction and control of the CDC in accordance with the Consolidated Dispatching Center Agreement dated March 15, 1998, and such reasonable operating rules as Manager shall from time to time institute; provided, however, that in the management, operation (including dispatching) and maintenance of the Joint Trackage, Manager and User shall be treated equally. User shall, at User's sole cost and expense, obtain, install and maintain necessary communication equipment to allow User's Equipment to communicate with the CDC's dispatching and signaling facilities. The parties

shall consult with each other prior to the adoption of new communication or signaling systems to be employed on the Joint Trackage which have not theretofore been generally adopted in the railroad industry.

3.5 The Joint Service Standards Committee shall meet on a regular basis, including an annual meeting to be held on or about September 15 of each year during the term of this Agreement; provided, however, that during the first year of operation under this Agreement the Joint Services Standards Committee shall meet not less often than every three (3) months. Thereafter, the Joint Service Standards Committee shall meet when any party serves upon the other party thirty (30) days' written notice of its desire to meet to review the overall performance of Equipment on the Joint Trackage, conflicts, if any, experienced between trains of Manager and trains of User, grievances over the handling of particular trains or operational events, maintenance of the Joint Trackage, ways in which future conflicts may be minimized, ways of improving operations and maintenance of the Joint Trackage and such other relevant matters as the Joint Service Standards Committee may decide to consider. The Joint Service Standards Committee may issue standards or rules to prevent unnecessary interference or impairment of use of the Joint Trackage by either party or otherwise ensure fair and equal treatment as between Manager and User. Either party may request a special meeting of the Joint Service Standards Committee on reasonable notice to the other. Informal telephonic conferences shall be held by the Joint Service Standards Committee where appropriate to address immediate concerns of either party. It is expected that the work of the Joint Service Standards Committee shall be undertaken in a spirit of mutual cooperation consistent with the principle of non-discrimination in service expressed in this Agreement.

3.6 The annual Additions and Betterments program for the next year shall be prepared and submitted by the Manager to the Joint Service Standards Committee prior to September 1 of each year during the term of this Agreement.

3.7 If the use of the Joint Trackage shall at any time be interrupted or traffic thereon or thereover be delayed for any cause, neither party shall have or make any claim against the other party for loss, damage or expense caused by or resulting from such interruption or delay.

3.8 Manager may from time to time provide any track or tracks other than those delineated in Exhibit A to this Agreement for use by User hereunder provided there shall at all times be afforded User a continuous route of equal utility for the operation of its Equipment between the termini of the Joint Trackage. When such tracks which are not part of the Joint Trackage are used as provided herein, this Agreement shall govern for purposes of direction and control and liability as if all movement had been made over the Joint Trackage.

3.9 Each party shall be responsible for furnishing, at its sole cost and expense, all labor, fuel and train and other supplies necessary for the operation of its own Equipment over the Joint Trackage. In the event a party furnishes such labor, fuel or train and other supplies to the other party, the party receiving the same shall promptly, upon receipt of billing therefor, reimburse the party furnishing the same for its reasonable costs thereof, including customary additives.

3.10 User shall be responsible for the reporting and payment of any mileage, per diem, use or rental charges accruing on Equipment in User's account on the Joint Trackage. Except as may be specifically provided for in this Agreement, nothing herein contained is intended to change practices with respect to interchange of traffic between the parties or with other carriers on or along the Joint Trackage.

3.11 Except as otherwise may be provided in this Agreement, User shall operate its Equipment over the Joint Trackage with its own employees, but before said employees are assigned or permitted to operate Equipment over the Joint Trackage as herein provided, and from time to time thereafter as and when reasonably requested by Manager, they shall be required to pass the applicable rules examinations required by Manager of its own employees. Manager shall delegate to specified User officers the conduct of such examinations in the event User chooses to conduct such examinations. If an officer of Manager conducts such examinations of employees of User, User shall pay Manager a reasonable fee for each employee so examined, such fee to be mutually agreed upon by the parties from time to time in a separate agreement. Notwithstanding any such examination, User shall be responsible for ensuring that its employees are qualified and have taken all such rules examinations.

3.12 If any employee of a party shall neglect, refuse or fail to abide by rules, instructions and restrictions governing the operation on or along the Joint Trackage, such employee shall, upon written request of the other party, be prohibited by the party employing such employee from working on the Joint Trackage. If either party shall deem it necessary to hold a formal investigation to establish such neglect, refusal or failure on the part of any employee, then upon such notice presented in writing, the parties shall promptly hold a joint investigation in which the parties concerned shall participate and bear the expense for their respective officers, counsel, witnesses and employees. Notice of such investigations to a party's employees shall be given by the officers of such party, and such investigation shall be conducted in accordance with the terms and conditions of labor agreements between such party and its employees. If, in the judgment of the party not employing such employee, the result of such investigation warrants, such employee shall, upon written request by such party, be withdrawn by the employing party from service on the Joint Trackage, and the employing party shall release and indemnify the other party from and against any and all claims and expenses arising from such withdrawal.

If the disciplinary action is appealed by an employee of User to the National Railroad Adjustment Board or other tribunal lawfully created to adjudicate such cases, and if the decision of such board or tribunal sustains the employee's position, such employee shall not thereafter be barred from service on the Joint Trackage by reason of such disciplinary action.

3.13 If any Equipment of User is bad ordered en route on the Joint Trackage and (1) it is necessary that it be set out, and (2) only light repairs to the Equipment are required, such bad ordered Equipment shall be promptly repaired and picked up by User. Manager may, upon request of User and at User's sole cost and expense, furnish the required labor and material and perform light repairs to make such bad ordered Equipment safe for movement. The employees and Equipment of Manager while in any manner so engaged or while en route to or returning to Manager's terminal from such an assignment shall be considered Sole Employees (as hereinafter defined) of User and Sole Property (as hereinafter defined) of User. However, should Manager's employees after repairing such bad ordered Equipment for User move directly to perform service for Manager's benefit rather than return to Manager's terminal, then User's exclusive time and liability will end when Manager's employees depart for work to be performed for Manager's benefit.

In the case of such repairs by Manager to freight cars in User's account, billing therefor shall be in accordance with the Field and Office Manuals of the Interchange Rules, adopted by the Association of American Railroads ("AAR") (the "Interchange Rules"), in effect on the date of performance of the repairs. Manager shall then prepare and submit billing directly to and collect from the car owner for car owner responsibility items as determined under the Interchange Rules, and Manager shall prepare and submit billing directly to and collect from User for handling line responsibility items as determined under said Interchange Rules. Manager also shall submit billing to and collect from User any charges for repair to freight cars that are User's car owner responsibility items as determined under the Interchange Rules, should said car owner refuse or otherwise fail to make payment therefor. Repairs to locomotives shall be billed as provided for in Section 7 of this Agreement.

3.14 If Equipment of User shall become derailed, wrecked, or otherwise disabled while upon the Joint Trackage, it shall be rerailed or cleared by Manager, except that employees of User may rerail User's derailed Equipment on the Joint Trackage whenever use of motorized on or off track equipment is not required; however, in any such case employees of User shall consult with and be governed by the directions of Manager. Manager reserves the right to rerail Equipment of User when, in the judgment of Manager, Manager deems it advisable to do so to minimize delays and interruptions to train movement. The reasonable costs and expenses of rerailing or clearing derailed, wrecked or disabled Equipment shall be borne by the parties in accordance with Section 9 of this Agreement. Services provided under this section shall be billed in accordance with Section 7 of this Agreement.

3.15 In the event Equipment of either party shall be forced to stop on the Joint Trackage, and such stoppage is due to insufficient hours of service remaining among such party's employees, or due to mechanical failure of such Equipment (other than bad ordered Equipment subject to light repairs pursuant to Section 3.13), or to any other cause not resulting from an accident or derailment (including the failure of such party to promptly repair and clear bad ordered Equipment pursuant to Section 3.13), and such Equipment is unable to proceed, or if a train of either party fails to maintain the speed required by Manager on the Joint Trackage, or if, in emergencies, disabled Equipment is set out of a party's trains on the Joint Trackage, the other party shall have the option to furnish motive power or such other assistance (including but not limited to the right to recrew the train) as may be necessary to haul, help or push such Equipment, or to properly move the disabled Equipment off the Joint Trackage. Any Equipment or Employee of a party so furnished shall for purposes of liability be considered the Sole Property and Sole Employee of the other party. The reasonable costs and expenses of rendering such assistance shall be borne by the party receiving assistance from the other party. Services provided under this section shall be billed in accordance with Section 7 of this Agreement.

3.16 User, at Manager's request, shall be responsible for reporting to Manager the statistical data called for in this Agreement, which may include, but is not limited to, the number and type of Equipment and GTMs operated on the Joint Trackage.

3.17 User shall have the right to establish crew points at various locations along the Joint Trackage as may be mutually agreed to in writing between the parties from time to time. However, User agrees that if sufficient trackage is not available at such location(s) to facilitate crew changes of User, Manager may require User to construct additional trackage in the vicinity of such location as may be required in the reasonable judgment of Manager, the cost and expense of which shall be borne by User. In the event such trackage is constructed at the cost and expense of User, and Manager shall choose to use such trackage, Manager shall pay User fifty percent (50%) of the cost of constructing such trackage, plus interest as calculated pursuant to Section 2.2 above. In addition, Manager shall lease to User by separate written agreement, existing facilities, for office, locker, change and lunchroom purposes by User's personnel upon request of User to Manager, and as reasonably available, or property as reasonably available for User to establish its own facilities.

3.18 The terms and conditions applicable to the management of the real property underlying the Joint Trackage which is subject to the Property Exchange Agreement shall be contained in a separate agreement to be entered into between the parties.

Section 4. ADMISSION OF THIRD PARTIES; PROVISION OF HAULAGE SERVICES.

4.1 Except for rights in existence on February 12, 1998, neither party shall admit a third party to the use of the Joint Trackage or provide haulage services thereover without the prior written consent of the other party; provided, however, that either party may use L&D as its agent to provide service over the Joint Trackage without obtaining the prior written consent of the other party with the following understandings:

- (a) Any agreement entered into between either party and L&D subsequent to the effective date hereof shall fully comply with all terms and conditions of this Agreement;
- (b) BNSF shall assume and guarantee all liabilities arising from L&D's operations as BNSF's agent;
- (c) UPRR shall assume and guarantee all liabilities arising from L&D's operations as UPRR's agent;
- (d) L&D usage of the Joint Trackage for the benefit of one party shall be considered the usage of such party for purposes of allocating liability and calculating the parties' respective usage shares;
- (e) L&D usage of the Joint Trackage for the benefit of both parties shall be considered the usage of each party to the extent each benefits from such usage (e.g., on a GTM proportion basis) for purposes of allocating and calculating the parties' respective usage shares; and
- (f) Either party may interchange with L&D at Lafayette, Louisiana and other locations as agreed by the parties in writing from time to time.

As of the date hereof, UPRR shall not impose or enforce any requirement (a) contained in any agreement entered into after execution of the Settlement Agreement and (b) covering traffic which BNSF had access to under the terms of the Settlement Agreement, that the L&D pay any additional rental or other fee if traffic is routed via BNSF.

Section 5. ADDITIONS AND BETTERMENTS

5.1 Manager shall construct such Additions and Betterments to the Joint Trackage with an estimated cost of One Hundred Thousand Dollars (\$100,000) or less per project as Manager or User shall deem desirable for the safe, efficient and economical use of the Joint Trackage by both parties. Before commencing construction of Additions and Betterments with an estimated cost greater than One Hundred Thousand Dollars (\$100,000) per project for use by both parties, Manager shall secure the written approval of User. Neither party shall unreasonably withhold its written approval of any project

proposed by the other party for the safe, efficient and economical use of the Joint Trackage by both parties. All Additions and Betterments to the Joint Trackage shall progressively during construction become part of the Joint Trackage. Manager shall have the right to include as a part of the cost of Additions and Betterments any engineering costs related to Additions and Betterments to the Joint Trackage.

5.2 Either party shall have the right to construct, or have constructed for it, Additions and Betterments, Improvements (in accordance with Section 2 above), industrial trackage or, subject to the conditions set forth in Section 5.3 below, other trackage and facilities connecting to the Joint Trackage, provided that such construction is performed in such a manner as not to impair the other party's use of the Joint Trackage. Except as provided in Section 5.3 below, the party not constructing, or having the construction performed for it, shall have the right to jointly use such industrial trackage or other trackage and facilities or any portion thereof (1) as soon as it is placed in service and upon payment of one-half of the cost of construction, or (2) at any time subsequent to such construction by payment of an amount equal to (a) one-half of such cost of construction, plus Additions and Betterments, less retirements, and (b) per annum interest equal to the rate paid on 90-day Treasury bills of the United States government as of the date of completion. On the date such party's use commences, said Additions and Betterments, Improvements (in accordance with Section 2 above), industrial trackage or, subject to the conditions set forth in Section 5.3 below, other trackage or facilities shall become part of the Joint Trackage. Per annum interest shall be adjusted annually on the first day of the twelfth (12th) month following the date of completion and every year thereafter on such date, based on the percentage increase or decrease, in the average yield of 30-year U.S. Treasury Notes for the prior year compared to their average yield in first year of completion of the access to such industry or industries. Each annual adjustment shall be subject, however, to a "cap" (up or down) of two percentage points of the prior year's interest (i.e., adjustment may not exceed an amount equal to two percentage points of the immediately preceding year's interest rate.) Upon the exercise of such election to take use and the payment as prescribed, such industrial trackage or other trackage and facilities or portion thereof shall be deemed equally jointly owned, and become a part of the Joint Trackage.

5.3 Either party shall have the right to construct, or have constructed for it, for its sole use exclusively owned or leased facilities, including, without limitation, automobile and intermodal facilities, along the Joint Trackage pursuant to the following terms and conditions:

- (a) The party wishing to construct such exclusively owned facilities for its sole use shall submit its plans to the other party for its review and approval, which approval shall not be unreasonably withheld or delayed;

- (b) Such exclusively owned or leased ~~and used facilities~~ shall not (i) impair the other party's use of the Joint Trackage, (ii) prevent or unduly hinder the other party's access to existing or future customers or facilities served from the Joint Trackage, or (iii) impair access to other exclusively owned facilities then in existence; and
- (c) If jointly owned or leased and used property is to be used for the construction of such exclusively owned or leased and used facilities, the party so constructing such exclusively owned or leased and used facilities shall reimburse the other party for its ownership of the jointly owned property so utilized at 50% of its then current fair market value, except for properties identified in Exhibit "C" .

Each party has identified in Exhibit "C" any area or areas where it currently anticipates it will need such exclusively owned or leased and used facilities. Each party hereby agrees to reserve for the construction of such exclusively owned or leased and used facilities property currently owned by it at the area(s) identified with its name in Exhibit "C".

Section 6. SETTLEMENT AGREEMENT ESCROW ACCOUNT

Notwithstanding any other provision of this Agreement to the contrary, UPRR shall not be required to pay for any expenditures made by BNSF to meet the line condition standard in Section 10c of the Settlement Agreement up to the amount in the escrow account established pursuant to Section 10c of the Settlement Agreement (approximately principal of \$10.5 million plus interest) (the "Escrow Account"). After the expenditures equal the amount in the Escrow Account, further expenditures shall be allocated as set forth above in this Agreement.

Section 7. COMPENSATION AND BILLING

7.1 Accounting as prescribed by the STB from time to time will be followed for purposes of this Agreement, except as provided in Sections 1.1 and 7.5.

7.2 Each of the parties shall bear one-half of the costs properly chargeable to capital account and its cost (or other accounting treatment) for retirement of its one-half of any depreciable property in connection with the Joint Trackage. Either party incurring costs properly chargeable to capital account in constructing Additions and Betterments or Improvements to the Joint Trackage shall progressively bill the other party hereto one-half of the cost incurred subject to adjustment when the Roadway Completion Report is received. The progressive billing shall be made not more frequently than monthly within thirty (30) days of the close of the month in which the billing party charges its fifty percent

(50%) of the cost to its appropriate capital account and the amount of such progressive billing shall not exceed the fifty percent (50%) so charged by the billing party.

7.3. Except as otherwise provided in Section 7.5, Manager will, on the first day of each month, render to User a bill for User's estimated share of the estimated cost incurred by Manager in controlling operations over, maintaining, repairing and renewing the Joint Trackage for that month. User shall pay that bill by the twentieth day of the same month. Each party shall furnish to the other within fifteen (15) days subsequent to the close of each calendar month during the term of this Agreement a statement of its usage (in GTMs) of the Joint Trackage during such month. Since User's actual GTM Handled Proportion for the month will not be known until the end of the month and since the actual costs will similarly not be known until some later date, the bill rendered to User shall be an estimate derived from the latest preceding month for which actual cost and User's actual GTM Handled Proportion of such cost is known. Promptly after identifying the actual costs and User's actual GTM Handled Proportion for the month covered by the estimated bill, Manager shall render to User a statement showing User's actual GTM Handled Proportion of such actual cost for the month. In the event User's actual GTM Handled Proportion of such cost for any month shall exceed its estimated payment for that month, Manager shall include a bill for such difference with a statement of actual cost and User shall pay said bill within thirty (30) days of its receipt thereof. In the event User's actual GTM Handled Proportion of such cost for any month shall be less than its estimated payment for that month, Manager shall include a refund payment for such difference with a statement of actual cost. In the event User shall fail to provide Manager with User's GTMs for any particular month by the 15th day as provided for in this Section, Manager may compute User's actual GTM Handled Proportion by using the latest monthly GTM Handled Proportion available and make the appropriate adjustment in subsequent monthly billing.

7.4 Each of the parties hereto shall pay one-half of any taxes or assessments levied by any governmental body, municipal or otherwise, on the Joint Trackage.

7.5 The parties hereto agree that the current cost of replacement in kind of track materials replaced under AFE or similar programmed work authority will be shared between them on an annual Gross Ton Mile Proportion for the calendar year in which the expense is incurred for the replacement in kind.

7.6 In the event either party hereto shall fail to receive any monies due from the other party hereto within the time period specified in this Agreement, or if not specified, within thirty (30) days of receipt of billing, the party so failing shall add an amount to the payment of such delinquent monies equal to 1/365th of the sum of the (1) effective annual rate of return on 180-day U. S. Treasury Bills plus (2) two percent (2%), for each day the payment is delinquent commencing with the date the payment was due and continuing until and including the date the payment is received. The rate of return on the first issue of

such Treasury Bills in January of any year shall be used for the period January through June 30 of such year, and in July of any year shall be used for the period July 1 through December 31 of such year. The delinquent payment additive provided for herein shall be (1) compounded monthly, and (2) the lesser of (a) the amount calculated as set forth above, or (b) the maximum amount permitted by law.

7.7 Bills containing clerical errors will not be deemed a valid reason for delaying payments. Any bills containing minor errors (errors of less than \$5,000) shall be paid subject to adjustment in subsequent billing. Bills containing major errors (errors of \$5,000 or more) may be reduced by the amount of the major error. Adjustments of clerical errors of less than \$5,000 requested by either party and not made within sixty (60) days after receipt of such request shall thereafter become subject to the same delinquent payment additive provided for in Section 7.6. Disputed items in excess of \$5,000 shall be subject to the same delinquent payment additive as provided in Section 7.6 if payment is due and withheld, or a similar credit if paid and subsequently refunded; provided, however, that no exception to any bill shall be honored, recognized or considered if filed after the expiration of three (3) years from the last day of the calendar month in which the expense covered thereby is incurred, except that there will not be any time limitation in connection with liability and casualty claims or capital expenditures and related operating expenses accounted for under authority for AFEs or in the case of claims disputed as to amount or liability. This provision shall not limit the retroactive adjustment of billing made pursuant to exception taken to original accounting by or under authority of the STB or retroactive adjustment of wage rates and settlement of wage claims. Notwithstanding the delinquent payment additive provisions hereinbefore provided, in the event either of the parties shall fail to make one or more payments within six (6) months of the date the same became due and payable and the matter is not the subject of arbitration, such failure or nonpayment shall constitute a default and thereafter the party hereto not in default shall have the right to exercise any and all of the actions, remedies or privileges hereinafter provided for defaults.

7.8 Except as otherwise specifically provided for in this Agreement, bills rendered pursuant hereto shall be prepared in conformance with the standard practices of the party rendering the bill. Such billings, including surcharges, Equipment rental and other rates, will be based on cost, and such surcharges, Equipment rental and other rates will be subject to revision from time to time to reflect changes in costs. A one percent (1%) surcharge will be applied in lieu of the material surcharge in the billing party's standard billing practice to material placed under AFE or similar programmed work authority when the material is delivered to the job site from suppliers or processors such as rail welders or tie treaters and not from existing stock. Secondhand material prices, including, without limitation, rail, shall be equal to fifty percent (50%) of the cost of new materials at the time the materials are applied to or released from the Joint Trackage. Scrap materials shall be priced at the current market scrap prices received by Manager at the time of removal from

the Joint Trackage. Either of the parties shall have the option to receive fifty percent (50%) of the amount(s) received from the salvage of any retired depreciable property or a portion of the salvage from any retired non-depreciable facilities equal to its GTM Handled Proportion for the calendar year in which the retirement occurred in lieu of receiving a credit for the value of the salvage in the maintenance and operation bills. For the purposes of this Section, salvage from track materials replaced in kind or the value thereof shall be apportioned on an annual GTM Handled Proportion basis for the calendar year in which salvage occurred.

7.9 So much of the books, accounts, and records of each party hereto as are related to the subject matter of this Agreement shall at all reasonable times be open to inspection by the authorized representatives and agents of the other party hereto.

Section 8. COMPLIANCE WITH LAWS

8.1 With respect to operation of Equipment on the Joint Trackage pursuant to this Agreement, each party shall comply with all applicable federal, state and local laws, rules, regulations, orders, decisions and ordinances ("Standards"), and if any failure on the part of any party to so comply shall result in a fine, penalty, cost or charge being imposed or assessed on or against another party, such other party shall give prompt notice to the failing party and the failing party shall promptly reimburse and indemnify the other party for such fine, penalty, cost or charge and all expenses and attorneys' fees incurred in connection therewith, and shall upon request of the other party defend such action free of cost, charge and expense to the other party.

8.2 Each party (i) agrees to comply fully with all applicable Standards concerning "hazardous waste" and "hazardous substances" ("Hazardous Materials") and covenants that it shall not treat or dispose of Hazardous Materials on the Joint Trackage.

In the event any accident, bad ordered Equipment, derailment, vandalism or wreck (for purposes of this Section 8.2 and Section 8.3 hereinafter called collectively "Derailment") involving Equipment of or a train operated by a party to this Agreement (the "Derailing Party") carrying Hazardous Materials shall occur on any segment of the Joint Trackage, any report required by federal, state or local authorities shall be the responsibility of the Derailing Party. The Derailing Party shall also immediately advise the owner/shipper of the Hazardous Materials involved in the Derailment, and Manager, if other than the Derailing Party.

Manager shall assume responsibility for cleaning up any release of Hazardous Materials from Equipment involved in a Derailment on that section of the Joint Trackage for which it provides Management Services in accordance with all federal, state, or local regulatory requirements. The Derailing Party may have representatives at the

scene of the Derailment to observe and provide information and recommendations concerning the characteristics of Hazardous Materials release and the cleanup effort. Such costs shall be borne in accordance with Section 9 of this Agreement.

If a Hazardous Materials release caused by a Derailment results in contamination of real property or water on the Joint Trackage or on real property or water adjacent to the Joint Trackage (whether such real property or water is owned by a party to this Agreement or a third party), Manager shall assume responsibility for emergency cleanup conducted to prevent further damage. The Derailing Party shall be responsible for performing cleanup efforts thereafter. Any costs associated with cleaning up real property or water on or adjacent to the Joint Trackage contaminated by Hazardous Materials shall be borne in accordance with Section 9 of this Agreement.

If Hazardous Materials must be transferred to undamaged Equipment or trucks as a result of a release caused by a Derailment, the Derailing Party shall perform the transfer; provided, however, that if the Hazardous Materials are in damaged Equipment that is blocking the Joint Trackage, Manager, at its option, may transfer the Hazardous Materials with any costs associated with such transfer borne in accordance with Section 9 of this Agreement. Transfers of Hazardous Materials by a Derailing Party shall only be conducted after being authorized by Manager.

8.3 The total cost of clearing a Derailment, cleaning up any Hazardous Materials released during such Derailment, and/or repairing the Joint Trackage or any other property damaged thereby shall be borne by the party or parties liable therefor in accordance with Section 9 of this Agreement.

8.4 In the event of release of Hazardous Materials caused by faulty Equipment or third parties, cleanup will be conducted as stated in Sections 8.2 and 8.3 of this Agreement.

Section 9. LIABILITY

9.1. The provisions of this Section 9 shall apply only as between the parties hereto and are solely for their benefit. Nothing herein is intended to be for the benefit of any person or entity other than the parties hereto. It is the explicit intention of the parties hereto that no person or entity other than the parties hereto is or shall be entitled to bring any action to enforce any provision hereof against any of the parties hereto, and the assumptions, indemnities, covenants, undertakings and agreements set forth herein shall be solely for the benefit of, and shall be enforceable only by, the parties hereto. Notwithstanding anything contained in this Section 9, no provisions hereof shall be deemed to deprive either party of the right to enforce or shall otherwise restrict any remedies to which they would otherwise be entitled under other provisions of this

Agreement as a result of the other party's failure to perform or observe any other obligation or duty created by this Agreement. The provisions of this Section 9 shall apply as between the parties hereto irrespective of the terms of any other agreements between the parties hereto and other railroads using the Joint Trackage, and the allocation of liabilities provided for herein shall control as between the parties hereto.

9.2 The parties agree that for the purposes of this Section 9:

- (a) The term "Employee(s)" of a party shall mean all officers, agents, employees and contractors of that party. Such Employees shall be treated either as "Sole Employees" or "Joint Employees", as hereinafter specified;
- (b) "Sole Employees" and "Sole Property" shall mean one or more Employees, Equipment, tools and other equipment and machinery while engaged in, en route to or from, or otherwise on duty incident to performing service for the exclusive benefit of one party. Pilots furnished by one party to assist in operating Equipment of the other party shall be considered the Sole Employees of such other party while engaged in such operations. Equipment shall be deemed to be the Sole Property of the party receiving the same at such time as deemed interchanged under AAR rules or applicable interchange agreements, or when such party is responsible for the car hire or per diem for the Equipment under agreement between the parties;
- (c) "Joint Employee" shall mean one or more Employees while engaged in maintaining, repairing, constructing, renewing, removing, inspecting or managing the Joint Trackage or making Additions and Betterments or Improvements to the Joint Trackage for the benefit of both of the parties hereto, or while preparing to engage in, en route to or from, or otherwise on duty incident to performing such service for the benefit of both parties;
- (d) "Joint Property" shall mean the Joint Trackage and all appurtenances thereto, and all Equipment, tools and other equipment and machinery while engaged in maintaining, repairing, constructing, renewing, removing, inspecting, managing or making Additions and Betterments or Improvements to the Joint Trackage for the benefit of both of the parties hereto, or while being prepared to engage in, en route to or from, or otherwise incident to performing such service;

- (e) **"Loss and/or Damage"** shall mean injury to or death of any person, including Employees of the parties hereto, and loss or damage to any property, including property of the parties hereto and property being transported by the parties, which arises out of an incident occurring on the Joint Trackage and shall include liability for any and all claims, suits, demands, judgments and damages resulting from or arising out of such injury, death, loss or damage, except (other than as provided in Section 9.5(c)) liability for punitive and exemplary damages. Loss and/or Damage shall include all costs and expenses incidental to any claims, suits, demands and judgments, including attorneys' fees, court costs and other costs of investigation and litigation. Loss and/or Damage shall further include the expense of clearing wrecked or derailed Equipment and the costs of environmental protection, mitigation or clean up necessitated by such wreck or derailment and shall include any liabilities for any Third-Party claims for personal injury or death, property damage, natural resource damage, or any penalties, judgments or fines associated with a release of any contaminants resulting from such wreck or derailment;
- (f) Operating Employees of a party whose service may be jointly used by the parties hereto for the movement of trains over the Joint Trackage, including, but not limited to, train dispatchers, train order operators, operator clerks and watchmen shall at the time of performing their services be deemed to be Sole Employees of the party hereto for whose benefit said services may be separately rendered (during the time they are so separately rendered) and be deemed to be Joint Employees of the parties hereto at such time as their services may be rendered for the parties' joint benefit;
- (g) All Employees, Equipment, tools and other equipment and machinery other than as described in (b), (c), (d) or (f) above or in Section 9.4. shall be deemed the Sole Employees of the employing party and the Sole Property of the using party;
- (h) **"Third Party"** shall mean any person or entity other than (i) a party hereto, (ii) a Sole Employee of either party, (iii) a Joint Employee, or (iv) an invitee of either party;
- (i) Any railroad not a party to this Agreement heretofore or hereafter admitted to the use of any portion of the Joint Trackage, shall, as between the parties hereto, be regarded in the same light as a Third Party. Without limiting the generality of the foregoing, neither of the

parties hereto assumes any responsibility to the other under the provisions of this Agreement for any Loss and/or Damage occasioned by the acts or omissions of any employees of any such other railroad, or for any Loss and/or Damage which such other railroad shall be obligated to assume in whole or in part pursuant to law or any agreement relating to such other railroad's use of any portion of the Joint Trackage;

- (j) For the purpose of this Section 9, Equipment of foreign lines being detoured over the Joint Trackage, and all persons other than Joint Employees engaged in moving such Equipment, shall be considered the Equipment and Employees of the party hereto under whose detour agreement or other auspices such movement is being made.

9.3 The parties agree that:

- (a) Each party hereto shall pay promptly Loss and/or Damage for which such party shall be liable under the provisions of this Section 9, and shall indemnify the other party against such Loss and/or Damage, including reasonable attorneys' fees and costs. If any suit or suits shall be brought against either of the parties hereto and any judgment or judgments shall be recovered which said party is compelled to pay, and the other party shall under the provisions of the Agreement be solely liable therefor, then the party which is so liable shall promptly repay on demand to the other party paying the same any monies which it may have been required to pay, whether in the way of Loss and/or Damage, costs, fees or other expenses; and if the Loss and/or Damage in such case or cases is joint or allocated between the parties to the Agreement, the party defendant paying the same or any costs, fees or other expenses shall be reimbursed by the other party as allocated pursuant to this Agreement;
- (b) Each party covenants and agrees with the other party that it will pay for all Loss and/or Damage, both as to persons and property, and related costs which it has herein assumed, or agreed to pay, the judgment of any court in a suit by Third Party or Parties to the contrary notwithstanding, and will forever indemnify and save harmless the other party, its successors and assigns, from and against all liability and claims therefor, or by reason thereof, and will pay, satisfy and discharge all judgments that may be rendered by reason thereof, and all costs, charges and expenses incident thereto;

- (c) Each party hereto shall have the sole right to settle, or cause to be settled for it, all claims for Loss and/or Damage for which such party shall be solely liable under the provisions of this Section 9, and the sole right to defend or cause to be defended all suits for the recovery of any such Loss and/or Damage for which such party shall be solely liable under the provisions of this Section 9;
- (d) User shall provide written notice to the other party of any accidents or events resulting in Loss and/or Damage within seven (7) days of its discovery or receipt of notification of such occurrence;
- (e) In the event both parties hereto may be liable for any Loss and/or Damage under the provisions of this Section 9 ("Co-Liable"), and the same shall be settled by a voluntary payment of money or other valuable consideration by one of the parties Co-Liable therefor, release from liability shall be taken to and in the name of all the parties so liable; however, no such settlement in excess of the sum of One Hundred Thousand Dollars (\$100,000) shall be made by or for any party Co-Liable therefor without the written consent of the other parties so liable, but any settlement made by any party in consideration of One Hundred Thousand Dollars (\$100,000) or a lesser sum shall be binding upon the other parties and allocated in accordance with Section 9.5; and no party shall unreasonably withhold its consent to a settlement proposed by the other party; provided, however, that failure by a party to secure consent from the other shall not release such other party to the extent the party who failed to obtain such consent demonstrates that the other party was not prejudiced by such failure.
- (f) In case a claim or suit shall be commenced against any party hereto for or on account of Loss and/or Damage for which another party hereto is or may be solely liable or Co-Liable under the provisions of this Section 9, the party against whom such claim or suit is commenced shall give to such other party prompt notice in writing of the pendency of such claim or suit, and thereupon such other party shall assume or join in the defense of such claim or suit as follows:
If the claim or suit involves Loss and/or Damage to the Sole Employees or Sole Property of a party or its invitee or property in its care, custody or control, that party shall assume and control the investigation and defense of such claim or suit; if the claim or suit involves Loss and/or Damage to Third Parties, Joint Employees or the Joint Trackage, the party whose Sole Employees or Equipment were

involved in the incident shall investigate and defend such claim or suit; and if such claim or suit involves Loss and/or Damage to Third Parties, Joint Employees or the Joint Trackage and neither or both party's Equipment and Sole Employees were involved in the incident, Manager shall investigate and defend such claim or suit unless resulting from an incident covered under Section 9.5(c) in which case said Section shall govern; provided that the other party also may participate in the defense of any of the foregoing if it may have liability as a result of such incident;

- (g) No party hereto shall be conclusively bound by any judgments against the other party, unless the former party shall have had reasonable notice requiring or permitting it to investigate and defend and reasonable opportunity to make such defense. When such notice and opportunity shall have been given, the party so notified and the other party shall be conclusively bound by the judgment as to all matters which could have been litigated in such suit, including without limitation a determination of the relative or comparative fault of each.

9.4 The cost and expense of repairing bad ordered Equipment, clearing wrecks or otherwise disabled Equipment or rerailing Equipment (and the costs of repair or renewal of damaged Joint Trackage or adjacent properties) shall be borne by the party whose Equipment was wrecked, disabled, or derailed. All Employees or Equipment, while engaged in, en route to or from, or otherwise incident to operating wrecker or work trains clearing wrecks, disabled Equipment or derailments or engaged in repair or renewal of the Joint Trackage subsequent to any such wreck, disability or derailment, shall be deemed to be Sole Employees and/or Sole Property of the party whose Equipment was wrecked, disabled or derailed. However, such Employees or Equipment, while en route from performing such clearing of wrecks, disabled Equipment or derailments or repairing or renewing the Joint Trackage to perform another type of service, shall not be deemed to be performing service incident to the instant wreck, disability or derailment.

9.5 Allocation.

- (a) Each party shall bear all costs of Loss and/or Damage to its Sole Employees or its Sole Property, or property in its care, custody or control or its invitees without regard to which party was at fault (whether or not contributed to by acts or omissions of Joint Employees or defect in Joint Property).
- (b) Loss and/or Damage to Third Parties or their property (other than Third Parties involved in any crossing accident on the Joint

Trackage), to Joint Employees or their property or to Joint Property shall be borne by the parties hereto as follows:

- (i) If the Loss and/or Damage is attributable to the acts or omissions of only one party hereto, or only one party is involved (whether or not contributed to by acts or omissions of Joint Employees or defect in Joint Property), that party shall bear and pay all of such Loss and/or Damage.
- (ii) If such Loss and/or Damage is attributable to the acts or omissions of more than one party hereto, or occurs in such a way that it cannot be determined how such Loss and/or Damage came about, such Loss and/or Damage (whether or not contributed to by acts or omissions of Joint Employees or defect in Joint Property) shall be apportioned between the two (2) parties to this Agreement, and any other party(ies) authorized to use the Joint Trackage as a trackage rights tenant, on a usage basis considering each party's gross ten miles over the Joint Trackage for the preceding twelve (12) months or, if such Loss and/or Damage occurs during the first twelve (12) months following the effective date of this Agreement, the usage of each party between the occurrence of such Loss and/or Damage and the effective date of this Agreement. User shall not bear or incur any liability for claims, suits, demands, judgments, losses or damages resulting from environmental contamination of or hazardous material on or released from the Joint Trackage, except contamination or a release of hazardous materials from User's own Equipment or caused by or arising from the actions or omissions of User or User's Employees, and then only in accordance with the other provisions hereof.
- (c) As to claims by Third Parties against either party hereto for grade crossing accidents, it is understood and agreed that a number of vehicular crossings of the Joint Trackage presently exist, or may be constructed. Each party agrees, as an equal owner of the Joint Trackage, to accept all crossings in whatever condition they may be during the term of this Agreement, and that neither party will assert any claim, demand or cause of action against the other party hereto that a crossing is inadequate, defective, or extra hazardous. In any crossing accident on the Joint Trackage in which only one party's Sole Property is involved, that party will investigate, defend,

indemnify, and hold harmless the other from and against any claim, demand or cause of action by any Third Party for actual damages arising out of the crossing accident on the Joint Trackage. Notwithstanding anything in this Section to the contrary, in any crossing accident in which only one party's Sole Property is involved, and that same party, pursuant to this Agreement, is responsible for maintenance of the portion of the Joint Trackage on which the crossing accident occurred, then that party will additionally investigate, defend, indemnify, and hold harmless the other party from and against any claim by a Third Party for punitive damages arising from the crossing accident.

- (d) The parties agree that the characterization herein of certain Employees as "Sole Employees" or "Joint Employees" is only for the purpose of allocating Loss and/or Damage suffered by those Employees. Except as specified in this Section 9.5. (which provides for the allocation of certain Loss and/or Damage between the parties without regard to fault), no party shall be liable or allocated fault for the acts or omissions (negligent or otherwise) of any other party's Employee.

9.6 THE PARTIES EXPRESSLY INTEND THAT WHERE ONE PARTY IS TO INDEMNIFY THE OTHER PURSUANT TO THE TERMS OF THIS AGREEMENT, SUCH INDEMNITY SHALL INCLUDE (1) INDEMNITY FOR THE NEGLIGENCE OR ALLEGED NEGLIGENCE, WHETHER ACTIVE OR PASSIVE, OF THE INDEMNIFIED PARTY WHERE THAT NEGLIGENCE IS A CAUSE OF THE LOSS OR DAMAGE; AND (2) INDEMNITY FOR STRICT LIABILITY OF THE INDEMNIFIED PARTY RESULTING FROM A VIOLATION OR ALLEGED VIOLATION OF ANY FEDERAL, STATE OR LOCAL LAW OR REGULATION BY THE INDEMNIFIED PARTY, INCLUDING BUT NOT LIMITED TO THE FEDERAL EMPLOYERS LIABILITY ACT ("FELA"), THE SAFETY APPLIANCE ACT, THE BOILER INSPECTION ACT, THE OCCUPATIONAL SAFETY AND HEALTH ACT ("OSHA"), THE RESOURCE CONSERVATION AND RECOVERY ACT ("RCRA"), THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT ("CERCLA"), THE CLEAN WATER ACT ("CWA"), THE OIL POLLUTION ACT ("OPA"), AND ANY SIMILAR STATE STATUTE IMPOSING OR IMPLEMENTING SIMILAR STANDARDS.

Section 10. ARBITRATION, PROCEEDINGS AND AWARD

10.1 If at any time a question or controversy shall arise between the parties hereto touching the construction of any part of this Agreement or concerning the business or manner of transacting business carried on under its provisions, or concerning the

observance or performance of any of the conditions herein contained, or the rights or obligations of any party under or arising from this Agreement upon which question or point in controversy the parties cannot agree, such question or controversy shall be submitted for arbitration to a disinterested person or persons familiar with such business and experienced in railway management as hereinafter provided. Such question or controversy shall be submitted to a single competent disinterested arbitrator if the parties hereto are able to agree upon such single arbitrator within twenty (20) days after the party desiring such arbitration shall notify in writing the other party to such question or controversy. If such single arbitrator cannot be agreed upon before the expiration of such period of twenty (20) days, such arbitration shall be had before a board of three competent and disinterested persons to be named as follows: The party demanding such arbitration shall give the other party notice of demand, stating specifically the question or questions to be submitted for decision or the point or points in controversy, and nominating a person who has the required qualifications to act as one (1) arbitrator. The party hereto to whom such notice is given shall appoint a second arbitrator and give the party hereto demanding arbitration notice in writing of such appointment within twenty (20) days from the time of such notice. If at the expiration of twenty (20) days from the receipt of such notice the party receiving it has not notified the party demanding the arbitration of its nomination of a second arbitrator having like qualifications, the party making the demand may make such selection. The first and second arbitrators chosen shall select a third, and if the arbitrators chosen shall be unable to agree upon a third arbitrator within a period of twenty (20) days from the date of appointment of the second arbitrator, the third arbitrator may be appointed upon ten (10) days' notice upon motion or application of either party hereto by the Chief Judge (or Judge acting as Chief Judge) of the United States District Court for the Southern District of the State of Texas.

10.2 Upon the selection of the single arbitrator if there shall be just one (1), or upon completion of the selection of such board of three (3) arbitrators, the said arbitrator, or board, shall proceed at once with reasonable diligence to inquire into and determine the questions and controversies at issue as disclosed in the notice of arbitration and shall give to both parties reasonable notice of the time and place (of which the arbitrator or arbitrators shall be the judge) where the arbitrator or arbitrators may take such evidence as may be deemed reasonable or as either party may submit, without requiring witnesses to be sworn, and may hear arguments of counsel or others. If any arbitrator shall decline or fail to act, the party (or parties in the case of a single arbitrator) by whom he was chosen or said judge shall appoint another to act in his place. After considering the evidence and hearing the testimony and arguments which may be submitted by each party, said single arbitrator, or the majority of such board of arbitrators (as the case may be), shall state such decision or award in writing within ninety (90) days of the final submissions by the parties, which decision or award, when delivered to both parties, shall be final, binding and conclusive upon both parties, and each party hereby expressly agrees to be bound conclusively thereby as to any of the matters submitted to arbitration. Until the single

arbitrator, or board of arbitrators, as the case may be, shall issue the first decision or make the first award upon any question or controversy so submitted for arbitration, the business, settlements and payments to be transacted and made under the terms of this Agreement shall continue to be transacted and made in the manner and form existing prior to the rise of such questions. Immediately after such first decision or award, each party shall forthwith make such changes in the conduct of its business, or such payments or restitution, as the case may be, as are in and by such decision or award required of it to be made.

10.3 The books and papers of both parties as far as they relate to any matter submitted to arbitration shall be open to the examination of the arbitrator or arbitrators, as the case may be. Each party to the arbitration shall pay all compensation, costs and expenses of the arbitrator appointed in its behalf and all fees and expenses of its own witnesses, exhibits and counsel. The compensation, cost and expenses of the single arbitrator or the additional arbitrator in the board of arbitrators shall be paid in equal shares by all parties to the arbitration.

Section 11. DEFAULT

11.1. In the event of default by either of the parties with respect to the payment of monies due the other pursuant to the terms of this Agreement, the party to whom such money is owed shall have the right to offset against any monies whatsoever, except divisions of revenues, it may then or thereafter owe the party in default. This right to offset shall be in addition to any other rights or remedies available to the party not in default and shall prevail notwithstanding provisions, if any, in any other agreements to the contrary.

11.2. In the event either of the parties shall fail to make one or more payments of monies due the other party pursuant to this Agreement within six (6) months of the date the same became due and payable and the matter is not the subject of arbitration, such failure or non-payment shall constitute a non-payment default. In the event of a non-payment default, and provided the non-defaulting party delivers notice of its intention to rely on this Section 11.2 in connection with such default to the other party in default not less than thirty (30) or no more than sixty (60) days prior to the expiration of the six month default period specifying the bill or bills payment of which is overdue, the non-defaulting party may file an application with the appropriate authorities, if necessary, seeking authority for the party in default to cease operations over the Joint Trackage. The party in default shall cooperate with the non-defaulting party in seeking authority for such cessation of operations, and if such authority is obtained, or if such authority is not required, the party in default shall cease operations over the Joint Trackage as quickly as it can legally do so and continue such cessation until the default has been cured.

Section 12. NOTICES

All notices, demands, requests, submissions and other communications which are required or permitted to be given pursuant to this Agreement shall be given by either party to the other in writing and shall be deemed properly served if delivered by hand, by facsimile transmission, or mailed by overnight courier or by registered or certified mail, return receipt requested, with postage prepaid, to such other party at the address listed below:

If intended for UPRR:

Executive Vice President-Operation
Room 1206
1416 Dodge Street
Omaha, Nebraska 68179

With a copy to:

Director Joint Facilities
Room 1200
1416 Dodge Street
Omaha, Nebraska 68179

If intended for BNSF:

Sr. Vice President-Operations
2600 Lou Menk Drive
P.O. Box 961034
Ft. Worth, Texas 76161-0034

With a copy to:

-AVP Joint Facilities
2600 Lou Menk Drive
P. O. Box 961034
Ft. Worth, Texas 76161-0034

Notice of address change may be given any time pursuant to the provisions of this Section 12.

Section 13. SECTION HEADINGS

All section headings are inserted for convenience only and shall not affect any construction or interpretation of this Agreement.

Section 14. EFFECTIVE DATE AND TERM

This Agreement shall become effective as of the date first hereinabove written and shall remain in full force and effect for a term of ninety-nine (99) years.

Section 15. LAWS GOVERNING

This Agreement shall be interpreted in accordance with the laws of the State of Texas.

Section 16. ASSIGNABILITY

16.1 Except as provided in the sentence immediately following, this Agreement and any rights granted hereunder may not be assigned in whole or in part by either party hereto without the prior written consent of the other. This Agreement may be assigned by either party without the prior written consent of the other only (1) as a result of a merger, corporate reorganization, consolidation, change of control or sale of substantially all of its assets, or (2) to an affiliate of the assigning party where the term "affiliate" means a corporation, partnership or other entity controlled, controlling or under common control with the assigning party. In the event of an authorized assignment, this Agreement and the operating rights hereunder shall be binding upon the successors and assigns of the parties

16.2 This Agreement and each and every provision hereof is for the exclusive benefit of the parties hereto and not for the benefit of any third party. Nothing herein contained shall be taken as creating or increasing any right in any third person to recover by way of damages or otherwise against either of the parties hereto.

Section 17. ENTIRETY, AMENDMENTS, AND WAIVERS

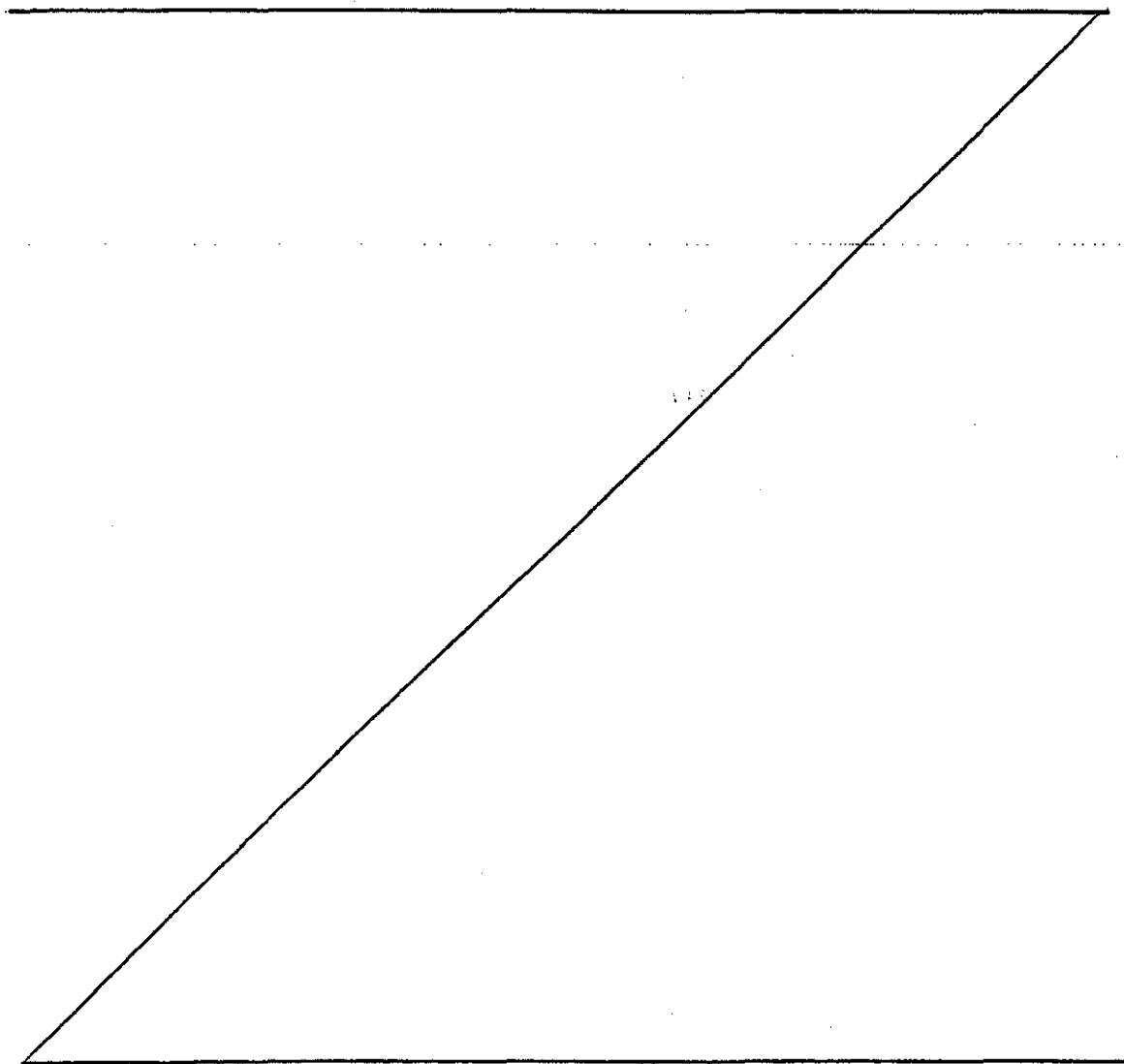
~~17.1 This Agreement is entered into to implement certain provisions of the~~ Term Sheet. The provisions of the Term Sheet shall govern in the event of any conflict with the provisions of this Agreement except as to Sections 3 and 9. Notwithstanding the first sentence of this Section 17.1, nothing in this Agreement shall affect, expand or diminish the rights and obligations of the parties under the Property Exchange Agreement and the Purchase and Sale Agreement. All amendments, supplements, modifications to and waivers of the terms of this Agreement shall be in writing and signed by the parties hereto.

17.2 The parties acknowledge that they have previously entered into a trackage rights agreement dated June 1, 1996 (the "June 1, 1996 Agreement"), providing for BNSF operation over UPRR trackage between Houston, Texas and Iowa Junction, Louisiana as well as BNSF operation over UPRR's Baytown Branch, and (2) a trackage rights agreement dated September 10, 1998 (the "September 10, 1998 Agreement"), providing for BNSF operation over UPRR trackage between Beaumont, Texas and Port Arthur, Texas. The June 1, 1996 Agreement and the September 10, 1998 Agreement will be modified, by actions separate from this Agreement, to reflect changes required by the Term Sheet and shall continue in existence pursuant to their terms as so modified. The agreement between UPRR and BNSF dated as of June 1, 1996, by which BNSF granted UPRR trackage rights over BNSF trackage between Iowa Junction, Louisiana (BNSF MP205.3) and Avondale, Louisiana (BNSF MP 14.94) is hereby terminated.

17.3 Any branches and spurs constructed after the date of this Agreement (i) on the former SP Lafayette Subdivision between Dawes, Texas (MP 353.0) and Avondale,

Louisiana (MP 14.94), or (ii) on its former SP branches and spurs, shall be treated as Improvements and governed by this Agreement. Obtaining any STB approval required for such construction shall be the responsibility of the constructing party.

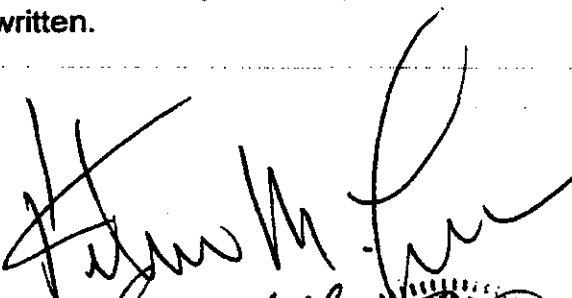
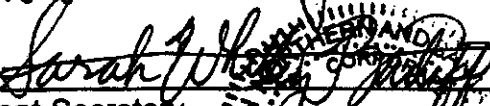
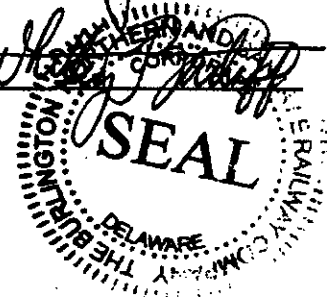
17.4 The failure of either party hereto to insist in any one or more instances upon strict performance of any of the obligations of the other pursuant to this Agreement or to take advantage of any of its rights hereunder shall not be construed as a waiver of the performance of any such obligations or the relinquishment of any such rights for the future, but the same shall continue and remain in full force and effect.



Section 18. GOVERNMENTAL APPROVAL

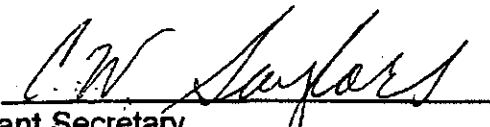
In the event that service to any Customer Facilities hereunder requires the operation by one party over trackage of the other which is subject to the jurisdiction of the STB, the party proposing to so operate shall, at its own cost and expense, initiate by appropriate application or petition and thereafter diligently prosecute proceedings for the procurement of all necessary consent, approval, or authority from any governmental agency for the sanction of the operations to be carried on and any agreement between the parties with respect thereto. The other party, at its expense, shall assist and support said application or petition and will furnish such information and execute, deliver, and file such instrument or instruments in writing as may be necessary or appropriate to obtain such governmental consent, approval, or authority. Each of the parties agrees to cooperate fully to procure all such necessary consent, approval, or authority.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by their duly authorized officers as of the date and year first hereinabove written.

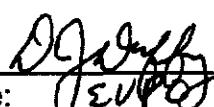

Attest: 
Assistant Secretary


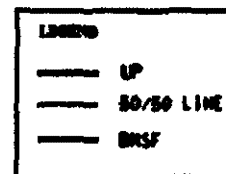
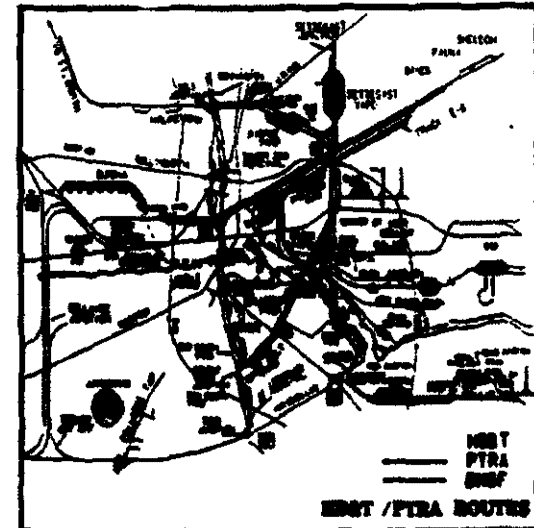
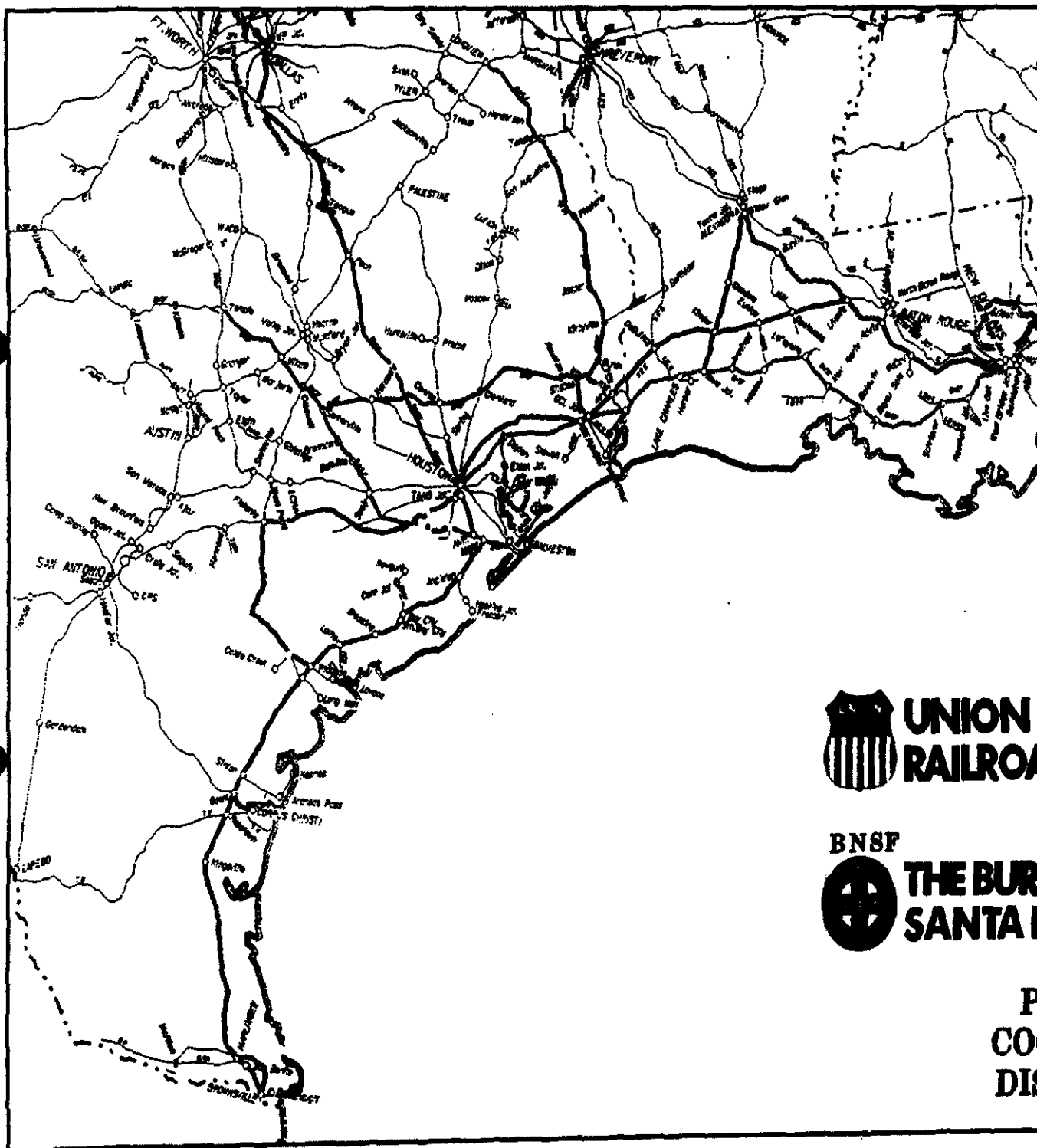
THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY

By 
Title: Senior Vice President Operations

Attest: 
Assistant Secretary

UNION PACIFIC RAILROAD COMPANY

By 
Title: General Counsel



**UNION PACIFIC
RAILROAD**

**BNSF
THE BURLINGTON NORTHERN &
SANTA FE RAILWAY**

**EXHIBIT "A"
PROPOSED
COORDINATED
DISPATCHING**

Dated February 12, 1999 FILE: 0-0901, BGN
PEN: NONE

EXHIBIT B*

<u>Between:</u>	<u>Mileage</u>	<u>Roundtrip</u>	<u>Charges</u> <u>On/Off+Miles+Recip=Total/Car</u>
Origin and Destination	15	30	$\$100 + \$15 + \$130 = \245
Reciprocal Switch (per load) within Switching District	--	--	$NA + NA + \$130 = \130

* Provided for illustrative purposes only. Charges subject to annual adjustment in accordance with Settlement Agreement

EXHIBIT "C"

UP Dayton, TX – south side of mainline between MP 326.92 and MP 330.36
Orange, TX – south side of mainline between MP 258.21 and MP 258.91
Brimstone, LA – north side of mainline between MP 232.13 and 234.63
Lockmoor, LA – north side of mainline between MP 223.54 and 224.34
Lake Charles, LA – north side of mainline between MP 215.42 and MP 217.73

BNSF

Sheldon, TX -- in the vicinity of MP 343, sufficient property east of the San Jacinto Bridge
Orange, TX – north side of main line between MP 255 and MP 259.
Lockmoor, TX – south side of main line between MP 222 and MP 226.

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of April, 2023, I have caused the foregoing *BNSF Railway Company's Reply to Union Pacific's Petition to Revoke Exemption* to be served electronically or by first-class mail, postage pre-paid, on all parties of record in this proceeding.

/s/ Onika K. Williams

Onika K. Williams

Attorney for BNSF Railway Company