

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO. 35601

BNSF RAILWAY COMPANY
-- TRACKAGE RIGHTS EXEMPTION --
UNION PACIFIC RAILROAD COMPANY

VERIFIED NOTICE OF EXEMPTION
Pursuant to 49 C.F.R. § 1180.2(d)(7)



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SURFACE
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Dated: February 21, 2012

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BNSF Railway Company ("BNSF"), submits this Notice of Exemption pursuant to the class exemption at 49 C.F.R. § 1180.2(d)(7), for trackage rights over a rail line owned by Union Pacific Railroad Company ("UP").

Under 49 C.F.R. § 1180.2(d)(7), the acquisition, renewal or modification of trackage rights by a rail carrier over the lines owned or operated by any other rail carrier or carriers is exempt if the rights are (i) based on a written agreement, and (ii) not filed or sought in a responsive application in rail consolidation proceedings. The trackage rights covered by this notice are based on a written agreement between BNSF and UP, attached as Exhibit B, and are not being sought in a responsive application in a rail consolidation proceeding. Under these circumstances, the Section 1180.2(d)(7) class exemption is applicable.

BACKGROUND

In 1998, BNSF and UP entered into a Term Sheet Agreement which, among other things, granted BNSF 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....” The 50/50 Line is the former Southern Pacific Transportation Company (“SP”) Lafayette Subdivision between Dawes, TX and Avondale, LA.

In Finance Docket No. 33630, BNSF and UP jointly filed a petition seeking joint ownership of UP’s rail line located between Dawes, TX and Iowa Junction, LA and of BNSF’s rail line located between Avondale, LA and Iowa Junction, LA. In that Petition, BNSF and UP pointed out that BNSF was gaining “access to all present and future shipper facilities on the 50/50 Line, including on former SP branches or spurs connecting to the 50/50 Line....” Joint Petition at 3. BNSF and UP also pointed out to the Surface Transportation Board (“Board”) that BNSF’s access to the former SP branches does not require Board action. Joint Petition at 4, note 3.

On September 29, 2011, in STB Docket No. AB 33 (Sub-No. 277X), UP filed to abandon the portion of the Lockport Branch located between Milepost 1.7, near Raceland, and Milepost 14.2, near Jay, in Lafourche Parish, La (“Line”). The Lockport Branch is a former SP branch line located on the 50/50 Line.¹

Upon learning of the abandonment filing, BNSF informed the Board that it had authority to serve all present and future shipper facilities on the Lockport Branch and that it was working diligently with a rail-served shipper to have one of its facilities located adjacent to the Line. On February 13, 2012, in STB Docket No. AB 33 (Sub-No. 277X), Rail Solutions LLC, notified the Board that it was working with BNSF to locate a facility on the Line.

¹ In STB Docket No. AB 318 (Sub-No. 7X), Louisiana & Delta Railroad, Inc. (“L&D”) sought to discontinue its operations over the Line. L&D consummated its discontinuance on December 31, 2011.

In its latest filing in STB Docket No. AB 33 (Sub-No. 277X), UP, for the first time, takes that position that BNSF does not have direct access to the Lockport Branch because the Board never expressly authorized such operations. While BNSF disagrees with UP's argument, out of an abundance of caution and in order to protect BNSF's interests in the Lockport Branch, BNSF is seeking trackage rights over the Lockport Branch pursuant to the attached First Supplemental Agreement between UP and BNSF.²

Pursuant to the Board's regulations at 49 C.F.R. § 1180.4(g), BNSF submits the following information:

Section 1180.6 Supporting Information

(a)(1)(i) Description of Proposed Transaction

The First Supplemental Agreement ("Agreement") between BNSF and UP, dated August 1, 2000, grants BNSF trackage rights over all former SP branch lines on the SP Lafayette Subdivision between Dawes, TX and Avondale, LA. While the Agreement covers all former SP branches, BNSF, in this proceeding, is seeking trackage rights only over the Lockport Branch located between Milepost 0.1, at Raceland Junction, and Milepost 14.2, at Jay, Louisiana. Depending on the Board's decision in STB Docket No. AB 33 (Sub-No. 277X), BNSF may or may not seek trackage rights over the other former SP branch lines.

Name and address of tenant railroad:

BNSF Railway Company
2650 Lou Menk Drive
Fort Worth, Texas 76131

² The First Supplemental Agreement is a supplement to the Trackage Rights Agreement dated September 10, 1998, between UP and BNSF and authorized by the Board in STB Finance Docket No. 33663, *The Burlington Northern and Santa Fe Railway Company – Trackage Rights Exemption – Union Pacific Railroad Company* (not printed), served October 19, 1998.

Questions regarding this transaction are to be addressed to BNSF's counsel:

Karl Morell
Of Counsel
Ball Janik LLP
Suite 225
655 Fifteenth Street, N.W.
Washington, DC 20005
(202) 638-3307

(a)(1)(ii) Consummation Date

The trackage rights will be consummated on or shortly after the effective date of this Notice of Exemption.

(a)(1)(iii) Purpose Sought to be Accomplished

If the Board deems these trackage rights necessary, the trackage rights will enable BSNF to serve all present and future industries or facilities on the Lockport Branch.

(a)(5) List of States in which the Party's Property is Situated

The involved trackage rights are located in the State of Louisiana.

(a)(6) Map

A map illustrating the trackage rights is attached as Exhibit A.

(a)(7)(ii) Agreement

A copy of the First Supplemental Agreement is attached as Exhibit B.

Labor Protection

BNSF is agreeable to the labor protection conditions generally imposed in trackage rights proceedings as found in *Norfolk and Western Ry. Co. – Trackage Rights – BN*, 354 I.C.C. 605 (1978), as modified by *Mendocino Coast Ry., Inc. – Lease and Operate*, 360 I.C.C. 653 (1980).

Environmental and Historic Matters

Environmental and historical impacts associated with trackage rights transactions generally are considered to be insignificant. Therefore, an environmental and historical report and documentation normally need not be submitted for this type of transaction, pursuant to 49 C.F.R §§ 1105.6(c)(4) and 1105.8(b)(3).

Respectfully submitted,



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Attorneys for:
BNSF Railway Company

Dated: February 21, 2012

SURFACE TRANSPORTATION BOARD

NOTICE OF EXEMPTION

STB FINANCE DOCKET NO. 35601

**BNSF RAILWAY COMPANY
-- TRACKAGE RIGHTS EXEMPTION --
UNION PACIFIC RAILROAD COMPANY**

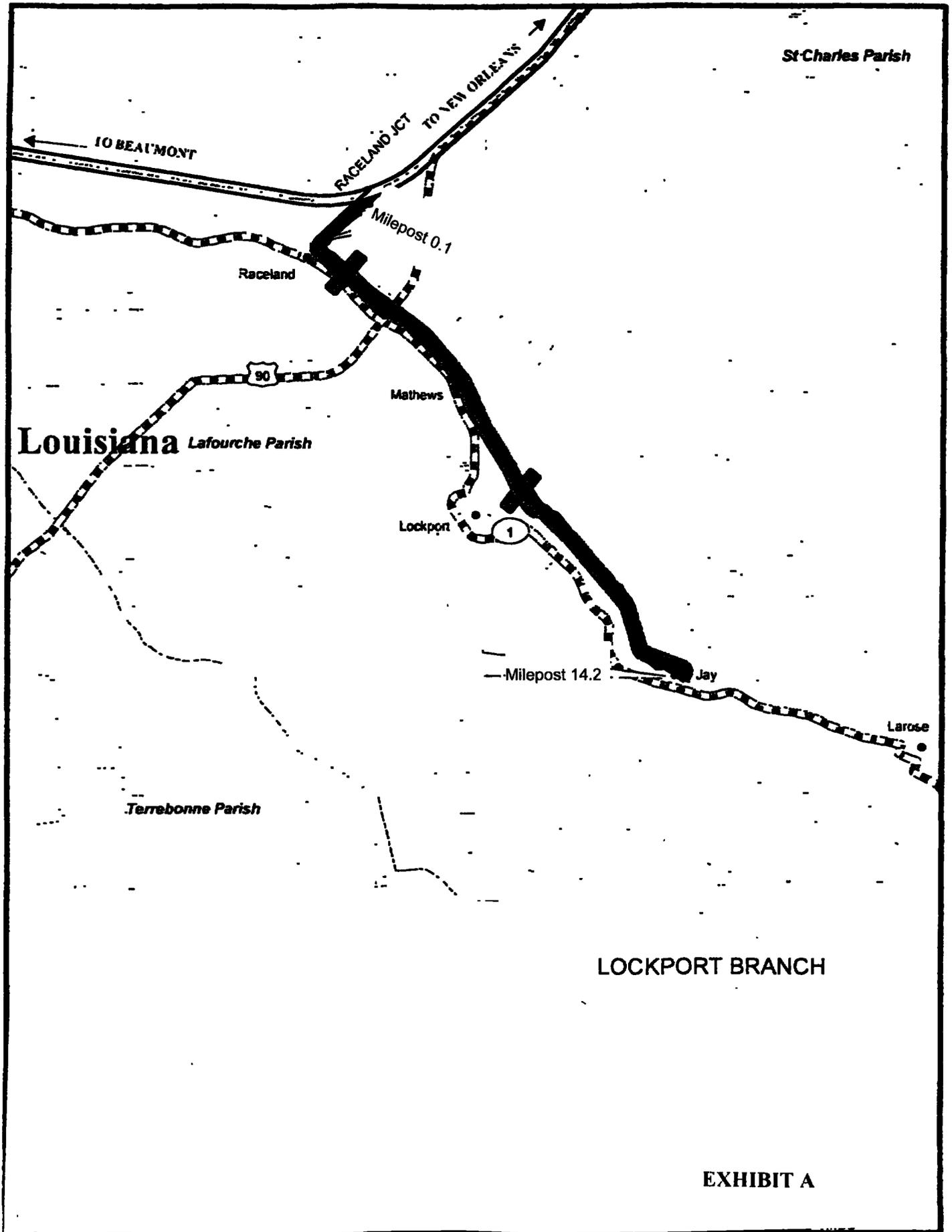
Union Pacific Railroad Company (“UP”) has agreed to grant trackage rights to BNSF Railway Company, over UP’s Lockport Branch located between UP Milepost 0.1 at Raceland Junction, LA, and UP Milepost 14.2, at Jay, LA.

The trackage rights will be consummated on or after March 22, 2012.

This notice is filed under 49 C.F.R. § 1180.2(d)(7). Petitions to revoke the exemption under 49 U.S.C. § 10502(d) may be filed at any time. The filing of a petition to revoke will not stay the transaction.

Dated:

By the Board, Rachel D. Campbell, Director, Office of Proceedings.



FIRST SUPPLEMENTAL AGREEMENT
FOR BEAUMONT, TEXAS TO PORT ARTHUR, TEXAS
TRACKAGE RIGHTS AGREEMENT

THIS FIRST SUPPLEMENTAL AGREEMENT made as of this 1st day of August, 2000, between the UNION PACIFIC RAILROAD COMPANY, a Delaware corporation, hereinafter called "Owner," and THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY, a Delaware corporation, hereinafter called "User".

WITNESSETH:

WHEREAS, by agreement dated September 10, 1998, entitled Beaumont, Texas to Port Arthur, Texas Trackage Rights Agreement (Original Agreement), Owner granted to User the non-exclusive right to operate over Owner's line of railroad consisting of track structure comprising Owner's Sabine Branch, Port Arthur Lead and Chaison Spur (collectively referred to as "Branch Lines"); and

WHEREAS, Owner and User desire to modify the terms and conditions of the Original Agreement pursuant to the Term Sheet Agreement Covering Ownership and Operation of Lines In and Around Houston, Texas, between Owner and User dated February 12, 1998 (Term Sheet), pursuant to which User obtained access to present and future industries or facilities originating or terminating traffic on the former Southern Pacific Transportation Company (SP) Lafayette Subdivision between Dawes, Texas (MP 353.0) and Avondale, Louisiana (MP 14.94) and on former SP branches and spurs connecting to said section of the Lafayette Subdivision or any new branches and spurs connecting to those lines.

NOW, THEREFORE, it is mutually agreed by and between the parties:

1. That portion of the first WHEREAS of the Original Agreement which reads "...and further described in Section 1.7 of Exhibit "B"..." is amended to read "...and further described in Section 1.8 of Exhibit "B"..."
2. Subsection (c) Section 2. Rights of User, of the Original Agreement is deleted in its entirety and replaced with the following:

"(c) User shall have the right serve all present and future industries or facilities, except intermodal and auto facilities of Owner, originating or terminating traffic on: (i) the Branch Lines; and (ii) the Customer Access Trackage, but only during the period that the Customer Access Track is to be utilized for access.

User shall participate in fifty percent (50%) of Owner's cost and expense of any connecting and access tracks and switches ("Improvements") for such new shipper facilities upon User's election to directly serve such new shipper facility which then shall

EXHIBIT B

become part of the Joint Trackage. Should User decline to participate in the cost and expense of Improvements required to serve any new shipper facility, User shall be denied access to such new shipper facility and the Improvements then shall not be part of the Joint Trackage; provided, however, should User elect at a later date to serve such new shipper facility, such right shall be granted to User by Owner upon payment of fifty percent (50%) of Owner's initial cost and expense of the Improvements plus interest calculated per annum at a rate equal to the rate paid on 90-day Treasury bills of the United States Government as of the date of completion until the date use by Owner commences. 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 such additional trackage. Each annual adjustment shall be subject, however, to a "cap" (up or down) of two percentage points of the prior year's interest rate (i.e., each annual adjustment may not exceed an amount equal to two percentage points of the immediately preceding year's interest rate.

"If User wishes to provide rail service to any new shipper facility at the locations set forth in this Section 2 (c), User shall provide Owner with written notice of its plans including a proposed rail service plan to the new shipper facility and Owner shall, within thirty (30) days of its receipt of such notice and plan, notify User of its approval or disapproval of User's plans for construction, which approval Owner shall not unreasonably withhold. In the event a request is approved by Owner, Owner shall construct and maintain the Improvement at User's sole cost and expense. In the event such Improvement is constructed at the cost and expense of User, and Owner shall choose to use such Improvement, Owner shall pay User fifty percent (50%) of the cost of constructing such Improvements plus per annum interest as calculated pursuant to this Section 2 (c).

"At least forty-five (45) days prior to initiating service to an industry or facility, User 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 "C", or (4) with the Owner's prior written agreement, using a third party contractor to perform switching for User alone or both parties. User shall have the right, upon one hundred eighty (180) days' prior written notice to Owner, to change its election; provided, however, that User shall (x) not change its election more often than once every five (5) years and (y) shall reimburse Owner for any costs incurred by Owner in connection with such changed election.

"If User elects to provide service, User shall provide its proposed rail service plan for the customer to Owner in its notice of election on the manner in which service is to be provided, and Owner shall within twenty-two (22) days of its receipt of such notice either (i) notify User of its approval or disapproval of such rail service plan, which approval shall not be unreasonably withheld, or (ii) if Owner disapproves of such rail service plan, submit to User a revised rail service plan as to such customer. In the event such revised rail service plan is unacceptable to User, Owner shall provide

service, comparable to its own, on behalf of User 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 6 of Exhibit "B".

3. Section 6. Notices. of the Original Agreement is amended for User by deleting the term "General Director Contracts and Joint Facilities" and replace with "AVP Joint Facilities".
4. Section 1.8 of Exhibit "B", General Conditions, of the Original Agreement is deleted in its entirety and replaced with the following:

"1.8 "Joint Trackage" shall mean: (a) the track structure of Owner as described in the Agreement including necessary right-of-way and all appurtenances, signals, communications, and facilities of Owner and all Changes in and/or Additions to said track structure now or in the future located as are required or desirable for the operation of the Equipment of the parties hereto and (b) Customer Access Trackage as defined in subsection 1.14 of this Exhibit "B".

5. The following is added as a new subsection 1.14 to Section 1 Exhibit "B", General Conditions, of the Original Agreement:

"1.14 Customer Access Trackage shall mean Owner's trackage as described in this sentence, and which from time to time would be utilized to provide access for User, pursuant to the Term Sheet, 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, that is not Joint 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 pursuant to the Term Sheet."

6. Section 5 of Exhibit "B", General Conditions, of the Original Agreement is deleted and replaced with the following:

"5.1. The provisions of this Section 5 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 5, 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 5 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.

5.2 The parties agree that for the purposes of this Section 5:

- (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 5.5(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 5.4. 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 5, 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.

5.3 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 5, 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 5, 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 5;

- (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 5 ("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 5.5; 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 5, 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 5.5(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.

5.4 The cost and expense of repairing bad ordered Equipment, clearing wrecks or otherwise disabled Equipment or rerailling 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.

5.5 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 ton 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.

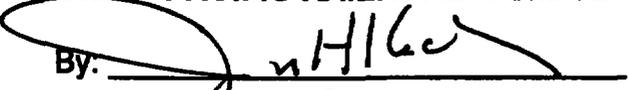
- (d) The parties agree that the characterization herein of certain Employees as "Sole Employees" or "Joint Employees" is only for the purpose of allocating Loss and/or Damage suffered by those Employees. Except as specified in this Section 5.5. (which provides for the allocation of certain Loss and/or 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.

5.6 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."

7. The Original Agreement shall remain in full force and effect except as specifically modified herein.

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

UNION PACIFIC RAILROAD COMPANY

By: 

Title: U.P. Field Ops.

THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY

By: 

Title: UP ops - up/SP Lines