

# FLETCHER & SIPPEL LLC

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July 10, 2014

236304

236305

**VIA OVERNIGHT DELIVERY**

Ms. Cynthia T. Brown  
Chief, Section of Administration  
Office of Proceedings  
Surface Transportation Board  
395 E Street, S.W.  
Washington, DC 20423-0001

ENTERED  
Office of Proceedings  
July 11, 2014  
Part of  
Public Record

**Re: *Brownsville & Rio Grande International Railway, LLC – Change in Operator Exemption Including Interchange Commitment – Brownsville & Rio Grande International Railroad, STB Docket No. FD 35836***  
**[INCLUDES CONFIDENTIAL MATERIALS SUPPLIED UNDER SEAL]**

And

***Patrick D. Broe, OmniTRAX, Inc., and OmniTRAX Holdings, LLC. – Continuation in Control Exemption – Brownsville & Rio Grande International Railway, LLC, STB Docket No. FD 35837***

Dear Ms. Brown:

Enclosed are an original and eleven copies each of – (1) a verified notice of exemption for a change of operator under 49 C.F.R. § 1150.31(a)(3), pursuant to which Brownsville & Rio Grande International Railway, LLC (“BRGIR”) will assume operation of railroad lines currently operated by Brownsville & Rio Grande International Railroad (“Change of Operator Notice”); and (2) a verified notice of exemption filed by Patrick D. Broe, OmniTRAX, Inc. and OmniTrax Holdings, LLC, pursuant to 49 C.F.R. § 1180.2(d)(2) to continue in control of BRGIR at such time as BRGIR becomes a common carrier by railroad (“Continuation in Control Notice”).

Enclosed as part of the Change of Operator Notice is a caption summary required by 49 C.F.R. § 1150.34, along with electronic versions of both exemption notice filings. Also accompanying the Change of Operator Notice are documents offered in connection with the requirements of 49 C.F.R. § 1150.33(h). Certain designated documents responsive to the Board’s disclosure requirements at section 1150.33(h) are to be kept confidential, have been segregated from the balance of the Change of Operator Notice filing, and are submitted under seal in keeping with the aforementioned regulation and 49 C.F.R. § 1104.14(a).

The Continuation in Control Notice includes color copies of maps (as part of Exhibit A to that filing), which are included at the end of the document.

**FILED**  
**July 11, 2014**  
**SURFACE**  
**TRANSPORTATION BOARD**

**FEE RECEIVED**  
**July 11, 2014**  
**SURFACE**  
**TRANSPORTATION BOARD**

# FLETCHER & SIPPEL LLC



Pursuant to 49 C.F.R. §§ 1002.2(f)(14)(ii) and 1002.2(f)(39)(iv), enclosed is a check in the amount of \$3,300 covering the combined filing fee amount due for the Change of Operator Notice (\$1,900.00) and the Continuance in Control Notice (\$1,400).

Please acknowledge receipt and filing of both exemption notice filings by time stamping the eleventh copy of each and returning both to me in the envelope provided. If there are any questions about this matter, please contact me directly, either by telephone: (312) 252-1504 or by email: [rwimbish@fletcher-sippel.com](mailto:rwimbish@fletcher-sippel.com).

Respectfully submitted,

Robert A. Wimbish  
Attorney for Brownsville & Rio Grande  
International Railway, LLC; Patrick D. Broe;  
OmniTRAX, Inc. and OmniTRAX Holdings, LLC

Enclosures

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**STB Docket No. FD 35836**

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**BROWNSVILLE & RIO GRANDE INTERNATIONAL RAILWAY, LLC  
– CHANGE IN OPERATOR EXEMPTION  
INCLUDING INTERCHANGE COMMITMENT–  
BROWNSVILLE & RIO GRANDE INTERNATIONAL RAILROAD**

---

**VERIFIED NOTICE OF EXEMPTION PURSUANT TO 49 C.F.R. 1150.31, ET SEQ.**

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**INCLUDES CONFIDENTIAL MATERIALS SUPPLIED UNDER SEAL**

**Robert A. Wimbish  
FLETCHER & SIPPEL LLC  
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**Attorney for Brownsville & Rio Grande  
International Railway, LLC**

**July 10, 2014**

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**STB Docket No. FD 35836**

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**BROWNSVILLE & RIO GRANDE INTERNATIONAL RAILWAY, LLC  
– CHANGE IN OPERATOR EXEMPTION  
INCLUDING INTERCHANGE COMMITMENT –  
BROWNSVILLE & RIO GRANDE INTERNATIONAL RAILROAD**

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**VERIFIED NOTICE OF EXEMPTION PURSUANT TO 49 C.F.R. 1150.31, ET SEQ.**

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Pursuant to 49 U.S.C. § 10502 and 49 C.F.R. § 1150.31, et seq., Brownsville & Rio Grande International Railway, LLC (“BRGIR”), currently a non-carrier, hereby invokes the applicable class exemption from the formal requirements of 49 U.S.C. § 10901 for a transaction encompassing a change in rail operator from Brownsville & Rio Grande International Railroad (“BRG”) to BRGIR on rail lines operated by BRG within and proximate to the seaport facilities of the Brownsville Navigation District of Cameron County, Texas (the “District”) at the Port of Brownsville, Texas. The subject change of operators from BRG to BRGIR encompasses the following:

1. BRGIR will assume responsibility for providing rail common carrier service over approximately 10.5 miles of STB-regulated rail line and 39.5 miles of ancillary (yard, siding and industry) track (collectively, the “District Trackage”) owned by the District<sup>1</sup> in and around the Port of Brownsville, Texas, including the District-owned Palo Alto Yard west of the Port. Upon BRGIR’s commencement of rail common

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<sup>1</sup> The District is a political subdivision of the State of Texas that manages operations within the Port of Brownsville, and owns the railroad trackage and other facilities within the port terminal area as well as Palo Alto Yard. The District’s trackage has been operated for decades by rail common carriers pursuant to agreements with the District, but the District is not itself a rail common carrier. In 1984, the District established BRG under provisions of the Texas Water Code to lease and operate the District Trackage. BRG obtained authority from the Interstate Commerce Commission (the “ICC”) to operate the District Trackage in 1984. See Brownsville & Rio Grande International Railroad Company – Operation – Port of Brownsville, Brownsville, TX, Finance Docket No. 30255 (STB served Sept. 8, 1984).

carrier operations over the District Trackage, BRG's operating rights over the same will terminate, and BRG's common carrier status on this trackage will end.

2. BRG will assign to BRGIR its leasehold interests in a line of railroad owned by the Union Pacific Railroad Company ("UP") and known as the "Port Lead," extending between milepost 2.20 near Arthur Street in Brownsville, Texas, and milepost 7.92 at a point of connection with the District Trackage at the western end of the Port of Brownsville. As relevant to this proceeding, the lease terms governing BRG's – and, by virtue of the planned assignment, BRGIR's – operation of the Port Lead contain an interchange commitment in favor of UP. As a consequence, BRGIR is complying with the requirements of 49 C.F.R. § 115.33(h). As a result of the assignment, BRG's common carrier status on the Port Lead also will terminate.
3. Incidental to the above-enumerated transaction elements, BRGIR will assume by assignment BRG's overhead trackage rights over UP's "New Port Lead" between mileposts 7.49 and 9.47, enabling BRGIR to access Palo Alto Yard.<sup>2</sup>

The assorted railroad properties over which BRGIR will operate under an agreement with District and pursuant to an assignment of BRG's existing leasehold and operating rights interests in UP-owned lines will be referred to collectively as the "Port Railroad Facilities."

As is set forth in the attached verified statement of Norma Torres (BRG's president and chief operating officer), BRG is aware of the subject change of operator notice and the transaction elements encompassed herein, and BRG has agreed that it will cease operations over the Port Railroad Facilities upon BRGIR's commencement of common carrier operations pursuant to this notice.<sup>3</sup> Accordingly, the subject notice of exemption contemplates a change of operator, under which, as a consequence of the transaction elements described above, BRGIR will replace BRG as railroad common carrier over the Port Railroad Facilities.

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<sup>2</sup> The subject overhead trackage rights do not prohibit BRG (and, once assigned, would not prohibit BRGIR) from serving industries from Palo Alto Yard.

<sup>3</sup> The verified statement of Norma Torres evidencing BRG's concurrence in the proposed change of operator transaction is attached hereto as Exhibit A.

**List of Exhibits**

Appended to this notice of exemption are the following exhibits, which are introduced serially in this filing:

- Exhibit A Verified Statement of Norma Torres
- Exhibit B Relevant Portions of the Master Franchise Agreement
- Exhibit C Maps of Port Railroad Facilities
- Exhibit D Certification and Verification
- Exhibit E Port Lead Shippers
- Exhibit F Evidence of Compliance with 49 C.F.R. § 1150.31(e)
- Exhibit G Caption Summary
- Exhibit H Certificate of Compliance with 49 C.F.R. § 1150.32(b)
- Confidential Exhibit A Port Lead Lease Containing Interchange Commitment
- Confidential Exhibit B Annual Aggregate Carload Data (Port Lead)
- Confidential Exhibit C Estimate of Port Lead Lease Differential

In support of this notice of exemption, BRGIR submits the following information as required by 49 C.F.R. § 1150.33:

**(a) Full name and address of applicant:**

Brownsville & Rio Grande International Railway, LLC  
252 Clayton St, 4<sup>th</sup> Floor  
Denver, CO 80206  
Attn: General Counsel

**(b) Applicant's Representative:**

Robert A. Wimbish  
Fletcher & Sippel LLC  
29 North Wacker Drive  
Suite 920  
Chicago, IL 60606-2832  
Phone: (312) 252-1504  
Facsimile: (312) 252-2400  
E-mail: [rwimbish@fletcher-sippel.com](mailto:rwimbish@fletcher-sippel.com)

**(c) Statement that an agreement has been reached or details about when an agreement will be reached:**

BRGIR has reached agreements with the District, BRG, and UP pursuant to which –

(1) BRGIR will operate the District Trackage pursuant to the terms of a new Master Franchise Agreement (“MFA”) between the District<sup>4</sup> and BRGIR’s corporate affiliate, OmniTRAX, Inc. (“OmniTRAX”);<sup>5</sup> and (2) BRG will assign to BRGIR its common carrier operating rights over and/or leasehold interests in the UP-owned portions of the Port Railroad Facilities.

**(d) Operator of the property:**

BRGIR will operate the property (the Port Railroad Facilities), and, in so doing, will replace BRG as a common carrier.

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<sup>4</sup> With the District’s consent, third-party railroads have provided continuous rail common carrier service over the District Trackage for more than 60 years. Records available to BRGIR indicate that a predecessor to UP obtained authority from the ICC in 1952 to operate over District-owned track as a common carrier. BRG replaced the UP predecessor in 1984. The long history of uninterrupted railroad operations since 1952 demonstrates the District’s commitment to rail service. Despite the District’s long history of commitment to rail common carrier service, a recent line of cases beginning with Anthony Macrie – Continuance in Control Exemption – N.J. Seashore Lines, Inc., FD 35296, slip op. at 3-4 (STB served Aug. 31, 2010) (“Macrie”), stands for the proposition that the Board should examine the particulars of the agreement(s) between a non-common carrier track owner and the would-be common carrier track operator to ensure that the track owner may not exert undue control, or unduly interfere with, the tenant’s provision of common carrier service. In light of Macrie, BRGIR offers herewith as Exhibit B an unredacted copy of the MFA that will govern BRGIR’s proposed operation of District-owned trackage.

<sup>5</sup> The aforementioned MFA, which is an expansive agreement dealing with OmniTRAX’s management and development of the port facilities beyond the more limited scope of the District Trackage, speaks in terms of OmniTRAX’s operation of the District Trackage. In fact, OmniTRAX will not be the provider of rail common carrier service on the District Trackage. Rather, at such time as BRGIR is prepared to commence railroad operations in place of BRG, OmniTRAX, which is not itself situated to be or act as a rail common carrier, will immediately convey the railroad operating rights set forth in the MFA to OmniTRAX’s designated railroad carrier affiliate – BRGIR – pursuant to an Assignment, Assumption and Guarantee Agreement among OmniTRAX, the District, and BRGIR. The aforementioned Assignment, Assumption and Guarantee Agreement permits OmniTRAX to designate BRGIR to fulfill OmniTRAX’s rail service commitments under the MFA, but it does not bear on the terms and conditions of rail operations themselves, which remain contained entirely in the MFA. For this reason, BRGIR has supplied as part of the record here a copy of the MFA, but has not supplied a copy of the Assignment, Assumption and Guarantee Agreement.

**(e) Summary of the proposed transaction**

**(1) The name and address of the railroad(s) transferring – and agreeing to the transfer of – operating interests in the subject property:**

Brownsville & Rio Grande International Railroad  
1650 State Hwy 48  
Brownsville, TX 78521

Union Pacific Railroad Company  
1400 Douglas Street  
Omaha, NE 68179

**(2) The proposed time schedule for consummation of the transaction:**

The proposed change of operator transaction as described above is expected to be consummated on or after August 11, 2014.

**(3) The mileposts of the subject property, including any branch lines:**

The District will operate approximately 50 miles of District Trackage (of which about 10.5 miles is designated as STB-regulated line of railroad, while the balance is ancillary – industry and yard – track), all of which lacks railroad milepost designations. BRGIR will also operate the roughly 5.72-mile Port Lead from milepost 2.20 to milepost 7.92. In addition, BRGIR will exercise overhead trackage rights on the UP-owned New Port Lead between milepost 7.49 and milepost 9.47, linking the Port of Brownsville and Palo Alto Yard (which rights BRGIR will acquire by way of assignment from BRG).

**(4) The total route miles being acquired:**

BRGIR will assume operation of the District Trackage, a total of about 10.5 route miles (exclusive of extensive yard, siding, and industry track). In addition, BRGIR will assume BRG's leasehold interest in the UP-owned Port Lead, another 5.72 route miles, approximately. Also, BRGIR will acquire by way of assignment from BRG incidental, overhead trackage rights over

approximately 1.98 miles of UP's New Port Lead to permit BRGIR to access the District-owned Palo Alto Yard.

**(f) Map:**

Maps depicting the Port Railroad Facilities are attached hereto as Exhibit C.

**(g) Certificate of Compliance with the provisions of 49 CFR 1150.33(g):**

Attached as Exhibit D is a certificate affirming that BRGIR's projected revenues as a consequence of the transaction will not result in the creation of a Class II or Class I rail carrier so as to require processing under 49 C.F.R. § 1150.35.

**(h) Interchange commitments:**

The terms of the arrangement pursuant to which BRGIR will assume operation of the District Trackage do not include an interchange commitment. The lease arrangement that BRG will assign to BRGIR governing operation of the UP-owned Port Lead, however, contains, as of 2004,<sup>6</sup> an interchange commitment in favor of UP that is applicable (and limited) to traffic originating and terminating on the Port Lead. As indicated, the subject interchange commitment for the Port Lead operation has no bearing on BRG's, or, in the future, BRGIR's handling of traffic originating or terminating on District-owned trackage.

The aforementioned interchange commitment is relevant, because BNSF Railway Company ("BNSF") – a third party railroad – possesses the right to access the Port of Brownsville and, in turn, to interchange with BRGIR. See Union Pacific/Southern Pacific Merger, 1 S.T.B. 233, 562 (Appendix C) (1996), aff'd Western Coal Traffic League v. STB, 169 F.3d 775 (D.C. Cir. 1999) ("UP-SP"); see also Union Pacific Railroad Company – Acquisition and Operation Exemption – Brownsville and Matamoros Bridge Company, et al., FD 35791, et al. (UP Petition for Exemption at 6-7, filed Dec. 16, 2013) (notwithstanding a

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<sup>6</sup> The original Port Lead lease was supplemented by agreement as of June 28, 2004, at which time the subject interchange commitment was inserted into the lease arrangement.

proposed rail line relocation project, “the northern and eastern portions of Brownsville . . . , including the port of Brownsville, will continue to receive rail service from UP, BNSF and [BRG]”). To the best of BRGIR’s knowledge, however, BNSF does not operate to and from Brownsville, opting instead, as is its right under the terms of a Board-approved agreement arising from the UP-SP proceeding, to serve Brownsville and the Brownsville-Matamoros (Mexico) international gateway via exercise of haulage rights on UP.

It warrants emphasizing that BRGIR contemplates assuming an existing interchange commitment by virtue of assignment of BRG’s leasehold interest in the Port Lead under the terms of a pre-existing lease. The parties to the assignment are not establishing a new leasehold arrangement for the Port Lead, and they are not modifying, “renewing,” or extending the terms of the existing lease, which, incidentally, predates the Board’s interchange commitment disclosure requirements. As such, it reasonably can be argued that the Board’s interchange commitment disclosure requirements are not applicable under the circumstances. Nevertheless, in observance of the requirements of 49 C.F.R. § 1150.33(h)(1), BRGIR supplies the following information out of an abundance of caution:

- (ii) **A confidential, complete version of the document(s) containing or addressing the provision or agreement that may limit future interchange with a third-party connecting carrier**

BRG is party to an existing lease agreement with UP governing BRG’s operation over the Port Lead. BRG will assign its rights and obligations as prescribed under the terms of that lease to BRGIR. The lease terms currently applicable to the interchange of traffic originating or terminating on the Port Lead are supplied herewith under seal as Confidential Exhibit A.

**(iii) A list of shippers that currently use or have used the line in question within the last two years**

A list of shippers located along the Port Lead that have made use of rail service over the past two years is attached hereto as Exhibit E.

**(iv) The aggregate number of carloads the above-listed shippers originated or terminated (confidential)**

Annual aggregate carload figures for calendar years 2012, 2013, and through June of 2014, are supplied herewith as Confidential Exhibit B.

**(v) Certification that BRGIR has provided notice of the proposed transaction and interchange commitment to the above-listed shippers**

BRGIR hereby certifies that it has served a copy of the subject notice of exemption upon all shippers identified in Exhibit E. Also, see certification attached hereto as Exhibit H.

**(vi) A list of third party railroads that could physically interchange with the line sought to be acquired or leased**

No third party railroad physically connects with the Port Lead. As the maps attached to this notice indicate, all traffic originating or terminating on the Port Lead that makes use of connecting line-haul service beyond Brownsville is interchanged between BRG and UP at UP's Olmito Yard, a location several railroad miles removed from the Port Lead. However, absent the interchange commitment provisions in the Port Lead lease, BRG (and, in the future, BRGIR) could conceivably interchange traffic originating or terminating on the Port Lead with BNSF at Olmito Yard. The reason for this is that BNSF currently exercises haulage rights via UP between Houston and Brownsville (convertible at BNSF's discretion to trackage rights), and such

haulage service provides for BNSF interchange with BRG (and, in the future, with BRGIR) at Olmito Yard.

**(vii) An estimate of the difference between the sale or lease price with and without the interchange commitment (confidential)**

An estimate of the difference between the Port Lead rental with and without the applicable interchange commitment is supplied herewith as Confidential Exhibit C.

**Other information and supporting material:**

BRGIR's projected annual revenues would not exceed the revenues that would qualify BRGIR as a Class III rail carrier, but BRGIR's projected annual revenues are expected to exceed \$5 million. Accordingly, BRGIR arranged for the posting of its notice of intent to undertake the proposed transaction at the workplace of BRG's employees on June 12, 2014. BRGIR understands that none of BRG's employees is represented by any labor union. BRGIR previously certified that it had complied with its advance notice and posting requirements at 49 C.F.R. § 1150.31(e) on the date of posting – June 12, 2014. A copy of that notice, along with the related certification of posting, is attached hereto as Exhibit F.<sup>7</sup>

A caption summary in the prescribed form is attached as Exhibit G.

Pursuant to 49 C.F.R. § 1150.32(b), BRGIR hereby certifies that it will, contemporaneously with this exemption filing, furnish all known shippers on the Line with notice of the proposed change of operator transaction. See Exhibit H, attached hereto.

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<sup>7</sup> The original June 12 certification filing inadvertently, and incorrectly, refers to Docket No. FD 35837, which corresponds to the related continuance in control notice filed on behalf of Patrick D. Broe, OmniTRAX, Inc. and OmniTRAX Holdings, LLC in connection with their control of BRGIR. The actual notice posted that day, however, correctly refers to Docket No. FD 35836.

Pursuant to 49 C.F.R. § 1105.6(c)(2)(ii), the proposed transaction is exempt from environmental review because the action proposed herein will not exceed any of the thresholds established in 49 C.F.R. § 1105.7(e)(4) or (5).

Also, this transaction is exempt from historic review under 49 C.F.R. § 1105.8(b)(1), because the proposed change of operator is for the purpose of continued rail operations. Board approval would be required for the parties to abandon service, and there are no plans to dispose or alter properties subject to STB jurisdiction that are 50 years or older.

This action will not significantly affect the quality of the human environment or energy conservation.

Respectfully Submitted,



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FLETCHER & SIPPEL LLC  
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Chicago, IL 60606-2832  
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Facsimile: (312) 252-2400  
Email: [rwimbish@fletcher-sippel.com](mailto:rwimbish@fletcher-sippel.com)

Attorney for Brownsville & Rio Grande  
International Railway, LLC

DATED: July 10, 2014

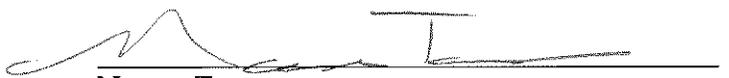
# **EXHIBIT A**

## **Verified Statement of Norma Torres**

**VERIFIED STATEMENT OF NORMA TORRES ON BEHALF OF  
BROWNSVILLE & RIO GRANDE INTERNATIONAL RAILROAD**

I, Norma Torres, President and Chief Operating Officer of the Brownsville & Rio Grande International Railroad ("BRG"), state that I am authorized to make this verification, and hereby verify that BRG concurs with the proposed change in rail operator as set forth in the notice of exemption submitted in this docket by Brownsville & Rio Grande International Railway, LLC ("BRGIR"). In connection with the subject change of operator notice, I also verify that BRG intends, as elements of the proposed transaction, to:(1) relinquish its leasehold interest in the trackage of the Brownsville Navigation District of Cameron County (the "District"), under which leasehold interest BRG is entitled to operate and conduct railroad common carrier operations within the Port of Brownsville, at such time as BRGIR commences operations over the same District-owned tracks in place of BRG; (2) assign its leasehold interest in a line of railroad known as the Port Lead, owned by the Union Pacific Railroad Company ("UP"), to BRGIR; and (3) assign its trackage rights to operate over a UP-owned line of railroad linking the District-owned tracks in the Port of Brownsville to the Palo Alto Yard to BRGIR. (Each of these transaction elements are set forth in greater detail in the change of operator notice of exemption to which this verification is appended.) At such time as all three of the above-listed steps occur, BRG has agreed that it will relinquish its common carrier status over the rail lines in question, enabling BRGIR to assume a rail common carrier status in place of BRG.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States that the foregoing statement is true and correct to the best of my knowledge and belief.

  
\_\_\_\_\_  
Norma Torres  
President and Chief Operating Officer  
Brownsville & Rio Grande International Railroad

Executed on: July 3rd, 2014

# **EXHIBIT B**

## **Relevant Portions of Master Franchise Agreement**

**(Unredacted)**

**PORT OF**   
**BROWNSVILLE**  
• WORLD CLASS •

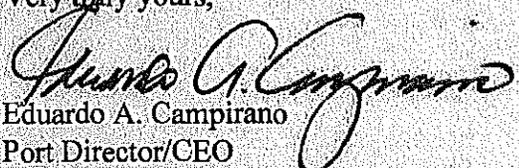
Andy C. Engeman  
General Counsel  
OmniTRAX Inc.  
252 Clayton Street, 4<sup>th</sup> Floor  
Denver, CO 80206  
VIA FEDERAL EXPRESS

Dear Mr. Engeman:

As you no doubt are aware, the Brownsville Navigation District Board of Commissioners formally approved the Master Franchise Agreement for Development of Port Properties and Operation of Railroad.” Article 30 of the Agreement requires all Notices to go to the OmniTRAX General Counsel. Therefore, enclosed please find three originals of the “Master Franchise Agreement” signed by Sergio Tito Lopez, our chairman. Under Chapter 63 of the Texas Water Code OmniTRAX has 30 days to accept the agreement from the date it was finally approved by the Board. That date was May 8, 2014, so we calculate the acceptance deadline to be Saturday June 7, 2014. Please have the Mr. Shuba sign all three originals on behalf of OmniTRAX, and then return two fully executed original to me. Once we have a fully-executed document, we will assign it a BND contract number, and return a copy to you with that information.

We look forward to a long and mutually beneficial relationship between the Port of Brownsville and the Broe entities.

Very truly yours,

  
Eduardo A. Campirano  
Port Director/CEO

cc: Alan Simon (via email)  
Rich Montgomery (via email)  
Daniel Rentfro Jr.

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**MASTER FRANCHISE AGREEMENT  
for  
Development of Port Properties and  
Operation of Railroad**

**Between**

**BROWNSVILLE NAVIGATION DISTRICT OF CAMERON  
COUNTY, TEXAS**

**and**

**OMNITRAX, INC.**

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## TABLE OF CONTENTS

1. Grant of Franchise	2
1.1 Relationship of the Parties	2
1.2 Consideration for Franchise	2
<b>Part I – BRG Railroad</b>	
2. Franchise Agreement	3
3. Rail Operations	6
4. Financial Terms and Payments	11
4.1 Fees	11
4.2 Payment	12
4.3 Guarantee	12
4.4 Bonds	12
5. Rail Maintenance and Improvement	12
6. Right of First Refusal to Purchase BRG Railroad	13
7. Commencement of Operations and Rail Regulatory Authority	14
7.1 Conditions Precedent	14
7.2 Satisfaction, Waiver or Deferment of Conditions Precedent	15
7.3 Commencement Date	15
7.4 Approvals	15
7.5 Protective Conditions	15
7.6 Standstill	16
7.7 Hiring	16
8. Compliance with Laws	16
9. Liability	16
10. Insurance	22
11. Taxes	22
12. Term and Termination	22
13. Eminent Domain	24
14. Railroad Bonds	25
<b>Part II – Master Development</b>	
15. Industrial Park	25
16. Master Developer	25
17. Reimbursement and Expenditures	27
18. Development Income Sharing	27
19. Fill Dirt	28

<b>20. Right of First Refusal</b>	<b>28</b>
<b>Part III – Incubator Site</b>	
<b>21. Incubator Site</b>	<b>29</b>
<b>Part IV – General Terms</b>	
<b>22. Representation and Warranties of District</b>	<b>29</b>
<b>23. Representation and Warranties of Franchisee</b>	<b>30</b>
<b>24. Confidentiality</b>	<b>31</b>
<b>25. Force Majeure</b>	<b>31</b>
<b>26. Assignment, Succession, Changes</b>	<b>32</b>
<b>27. Sole Benefit</b>	<b>32</b>
<b>28. Waiver</b>	<b>32</b>
<b>29. Amendment</b>	<b>33</b>
<b>30. Notices</b>	<b>33</b>
<b>31. Governing Law</b>	<b>34</b>

**MASTER FRANCHISE  
Development of Port Properties and  
Operation of Railroad**

THIS MASTER FRANCHISE AGREEMENT ("Agreement") is made this 8th day of May, 2014 ("Effective Date"), by and between the Brownsville Navigation District of Cameron County, Texas, (also referred to herein as the "Port of Brownsville" "Port" or the "District") and OmniTRAX, Inc. (referred to herein as "Franchisee" or "OmniTRAX").

WHEREAS, District is the owner of a port related switching and terminal short line railroad and railroad facilities, known as the Brownsville & Rio Grande International Railroad ("B&RG"). The B&RG currently operates the rail line ("BRG Trackage") and related railroad facilities within the District and other lines and facilities extending from the District (collectively, the "BRG Railroad") as specifically described on the attached Exhibit A. The District is also the owner of developable land capable of being serviced by the B&RG; and

WHEREAS, Franchisee and its affiliated companies have a long history of real estate development and successfully managing short line railroad operations. Through activities in North America, Franchisee and its affiliated companies have successfully promoted growth of rail and maritime traffic, supported direct and indirect creation of thousands of new jobs, attracted investment of capital, and generated new income for municipalities and partners; and

WHEREAS, District desires to grant OmniTRAX a franchise to develop certain real estate assets described herein as the Master Developer in accordance with the terms and conditions stated in this Agreement; and

WHEREAS District also desires to grant OmniTRAX a franchise to operate the BRG Railroad (*i.e.*, its port related switching and terminal short line railroad, railroad facilities, BRG Trackage and railroad operations) and exclusive use of the underlying realty in order to promote growth of rail and maritime traffic through the Port, support the creation of new jobs, attract investment of capital, and generate increased income to the District; and

WHEREAS OmniTRAX intends to operate the railroad through one of its railroad affiliates as described in Section 26.1 below, while remaining fully liable to District for the obligations of Franchisee hereunder.

NOW, THEREFORE, in consideration of the promises, the mutual covenants, and the other good and valuable consideration set forth herein, District and Franchisee agree to the following:

1. Grant of Franchise

1.1. Relationship of the Parties.

Effective as of the Commencement Date specified in Section 7.3 below, and subject to the provisions of Article 12 below, the District grants Franchisee a franchise to operate the BRG Railroad and act as the Master Developer of certain District real estate, as described herein. Prior to the Commencement Date, the District shall ensure that B&RG releases, transfers, conveys and assigns all rights that the BRG Railroad has to use, occupy or operate over the BRG Trackage as specified in Article 2 and all equipment, materials and rights related thereto to the District. Thereupon, the District will transfer the same to Franchisee under the terms of this Agreement. From the Commencement Date, in accordance with the terms and conditions set forth below, Franchisee shall be the exclusive operator of the BRG Railroad and the exclusive Master Developer of certain of the District's real estate assets as described herein. Franchisee and the District are independent contractors, and nothing in this Agreement shall be construed to create a joint venture; partnership, agency, employer-employee, fiduciary, master and servant, or any other special relationship.

1.2. Consideration for Franchise.

Franchisee agrees to contribute and attract franchise consideration of not less than \$8.5 million ("Franchise Consideration") of direct capital investment in the common elements in the Development Area (defined hereafter in Article 15). Franchisee will provide Franchise Consideration during the period of five years following acceptance of the Master Plan ("Franchise Consideration Period"). For purposes of this section 1.2, Franchisee shall receive credit against the Franchise Consideration for: direct investment in the common elements as shown on the Master Plan; tenant/user investment in the common elements as shown on the Master Plan; amounts paid for engineering and related professional consulting services for the common elements as shown on the Master Plan; costs for development of infrastructure for the Incubator Site (defined in Section 21) not specifically dedicated to an individual tenant or user (e.g., trackage, scale, and other common elements); grant funding for common elements; and up to \$1,000,000 in out-of-pocket marketing expenses for the Development Area. If Franchisee fails to satisfactorily perform with respect to Franchise Consideration during the Franchise Consideration Period, the District may terminate Franchisee's exclusive rights to the percentage of undeveloped and unimproved acreage in the Development Area ("Undeveloped Area") existing at that time, based upon the following formula: the shortfall in Franchise Consideration below \$8.5 Million paid during the Franchise Consideration Period divided by \$8.5 million

("Percentage of Undeveloped Acreage"), unless Franchisee posts a bond or provides security to the District for the Undeveloped Area. For example if by the end of the Franchise Consideration Period Franchisee has paid total Franchise Consideration of \$6.8 million, Franchisee shall either post a bond acceptable to District in the amount of \$1.7 million, or District may terminate Franchisee's exclusive rights to 20% of the Undeveloped Area. (8,500,000-6,800,000/8,500,000). The bond or security shall cover the value of Undeveloped Area, less added value attributed to infrastructure improvements made by Franchisee to the Development Area from the Commencement Date through the time of appraisal, as determined through an independent appraisal, mutually acceptable to the parties. The bond or security shall be relinquished/released to Franchisee when at least 50.1% of Undeveloped Area has been developed by Franchisee; or when Franchisee satisfies the Franchise Consideration requirement; or upon expiration or termination of this Agreement, whichever occurs earlier.

## **PART I – BRG RAILROAD**

### **2. Franchise Agreement.**

2.1. This Agreement authorizes and obligates Franchisee, subject to the terms and conditions set forth herein, to operate the BRG Railroad and any extensions of the BRG Trackage, including the Port Lead, which consists of five (5) miles of rail line that extend beyond the District boundaries into the city limits of Brownsville and future and existing rights of way ("ROWS") that extend from a minimum of eight feet (8') to twenty-five feet (25') from the centerline on each side of all tracks. Franchisee will be entitled to any and all revenue from the BRG Trackage and BRG Railroad, effective on the Commencement Date. It is understood that the BRG Railroad includes all yards, sidetracks, industry tracks, and operating rights used or useful in railroad operations. Except as otherwise provided herein, Franchisee shall have the exclusive right and obligation to operate the BRG Railroad (*i.e.*, its port related switching and terminal short line railroad, railroad facilities, BRG Trackage and railroad operations during the Term).

2.2. In addition to Franchisee operating the BRG Railroad, Franchisee shall purchase the equipment identified in Section 2.6 and specifically listed on Exhibit B-1 ("Purchased Equipment").

2.3. Franchisee shall have the right to use all other assets and items, including but not limited to the rails, ties, ballast, other track materials, switches, crossings, bridges, culverts, signals, crossing warning devices and any and all improvements or fixtures that are affixed thereto, as generally described on Exhibit B-2 ("Infrastructure") subject to the terms and conditions provided herein.

2.4. Franchisee shall lease from District the real estate and improvements listed on Exhibit B-3, at District standard rental rates and in District's standard lease form. The lease term shall be thirty years, subject to earlier termination as provided in the lease. As of the Commencement Date of this Agreement, the rent for real estate will be \$3,693.50 per month commencing on the first day of the month following the Commencement Date during the Term, and on the first day of each month thereafter. Rent for the buildings and locomotive pit ("RE Assets") will be \$10,714.29 per month, paid from the first day of the month following the Commencement Date and on the first day of each month thereafter for 7 years. Rent for any partial month shall be prorated. Upon payment of 7 years of rent for the RE Assets (\$900,000.36), Franchisee shall own, free and clear, all rights and title to the RE Assets listed on Exhibit B-3 (not including the land itself). Said lease shall carry with it the right to use certain items of Office Equipment listed in Exhibit B-3. Franchisee shall have the right to dispose of or replace any Purchased Equipment or Office Equipment in accordance with the terms and conditions set forth in Section 2.6. District shall have no obligation to repair or replace any item of personal property listed on Exhibit B-3.

2.5. At the Commencement Date, and pursuant to the Assignment and Assumption Agreement attached hereto as Exhibit C, District shall assign to Franchisee and Franchisee shall assume from District those certain agreements attached to Exhibit C. Upon expiration of this Franchise, or other termination, the assignments and assumptions shall terminate and the assignments and agreements listed therein shall revert to District.

2.6. Franchisee shall buy the Purchased Equipment from District, as specifically listed on Exhibit B-1, for \$2.5 million, \$500,000 paid within 30 days of the Commencement Date, and \$2 million paid in seven equal annual installments of \$285,714.29 each, plus interest at the then WSJ prime rate, beginning on the first anniversary of the Commencement Date. Franchisee's obligation hereunder shall be represented by a Promissory Note in the form promulgated by the State Bar of Texas, secured by a security interest and financing statement covering the Purchased Equipment. District agrees to allow Franchisee to use at Franchisee's sole risk and expense, as of the Commencement Date, all equipment, supplies and other personal property currently in use by the B&RG or the District in operating the BRG Railroad (collectively, "Equipment") not otherwise identified in a schedule to this Franchise Agreement, including all items of personal property set forth on the attached Exhibit B-2.

**2.7. Franchisee assumes all liabilities arising from the use of all equipment and agrees to INDEMNIFY, DEFEND and HOLD**

**HARMLESS District and B&RG Railroad, as well as any parent entities, subsidiaries, affiliates and members, including the officers, directors, employees, agents and representatives of each of them (collectively, the "Port Parties") from and against all claims, lawsuits, actions, proceedings, losses, costs, damages, injuries, assessments, fines, penalties, liens, reasonable and necessary attorneys' fees, consulting experts' fees and expenses and court costs, or awards of any kind or nature whatsoever, and the loss of or damage to any property, or injury to or death of any person, asserted by any person, firm, governmental agency or corporation whomsoever (including, without limitation, Franchisee, its employees, invitees, contractors and subcontractors or their employees and B&RG's employees, invitees and tenants, contractors, subcontractors and their employees, including survivors claiming under the wrongful death statute), that relate to, arise out of, or are otherwise connected with the use of equipment, supplies and other personal property used by**

**Franchisee.** During the Term of this Franchise if, at the sole determination and discretion of Franchisee, any Equipment reaches the end of its useful life or becomes uneconomical to repair ("Non-Functional Equipment"), Franchisee may salvage or dispose of Non-Functional Equipment and retain any proceeds from its salvage or disposal. Franchisee, at its sole cost and expense, shall purchase and own the new Equipment ("Franchisee Equipment"), which is obtained to replace the Non-Functional Equipment. Franchisee shall also have the right to use without separate compensation or payment, the trade names "Brownsville & Rio Grande International Railroad" and "B&RG", car marks, trademarks, copyrights, and other intellectual property associated with the BRG Railroad.

2.8. Franchisee shall have the right to use all market information, market analyses, marketing plans, customer information, operating or management policies, procedures, and forms within the custody, control, or possession of the B&RG Railroad used or developed for use in the operation of the BRG Railroad.

2.9. Subject to applicable contractual or license restrictions, Franchisee will have the right to use all computer software used by the Brownsville & Rio Grande International Railroad in the operation of the railroad business. However, Franchisee acknowledges that much of said software is subject to a license agreement and that Franchisee may not be able to use said computer software without prior approval from a third party vendor or license grantor. This Agreement does not transfer to Franchisee any right to use any software in violation of an applicable license agreement.

2.10. District shall provide to Franchisee one paper or electronic copy of all documents (whether in written or other form) of any kind within the custody, control, or possession of District or B&RG relating to any of the assets transferred to Franchisee pursuant to this Agreement or the past, present, or future operation of the Railroad, including but not limited to: customer lists, supplier lists, distributor lists, purchase and sales records, blueprints, specifications, personnel and labor relations records, environmental control records, accounting and financial records, maintenance records, operating and management manuals, computer systems and software documentation, blank forms, and plans and designs of products and equipment. To the extent such documents exist in the computer system transferred under this Agreement, District shall have complied with this Section 2.10. Prior to the Commencement Date, District shall be authorized to remove any data from any computer transferred under this Franchise that is not described in this Section 2.10.

2.11. This Franchise does not carry with it any cash, bank accounts, reserve accounts, securities, investments, accounts receivable, or other intangible asset unless specifically mentioned in this Agreement or attached and incorporated Exhibits.

### 3. Rail Operations.

3.1. Franchisee shall operate the BRG Railroad as a common carrier and shall preserve all existing interchange agreements subject to future amendments with connecting line haul carriers, including, but not limited to, Union Pacific, BNSF, and KCSM/KCS. Franchisee shall be permitted to service any site located along the BRG Trackage and any area where the BRG Railroad currently has rights to operate. Franchisee shall not abandon service over a portion of the BRG Trackage or to an individual customer without the prior approval of the District. As long as Franchisee operates the BRG Railroad, Franchisee may in the normal course of business, take action including, but not limited to, entering into industry track agreements, licenses for underground or overhead crossing of the of the B&RG Trackage, right of ways, and rights of ingress and egress.

3.2. Franchisee shall provide all personnel necessary to safely carry out the operations of the B&RG Railroad and will ensure that all personnel and operations of Franchisee shall comply with all applicable Railroad circulars, AAR Circulars and Manuals, and ordinances, regulations, statutes, rules, decisions and orders (including, but not limited to, those relating to safety, rail operations, air and water quality, noise, hazardous substances and hazardous wastes) issued by any court or federal, state or local governmental entity with proper jurisdiction, including, without limitation, the federal Department of Transportation, the Federal Railroad Administration and the federal Environmental Protection Agency ("Laws"). Franchisee shall be solely responsible for securing and maintaining, at its expense, any necessary permits, licenses, and approvals required by any Laws for its operations of the B&RG Railroad or the operations of any railcars stored or placed on the B&RG Railroad premises by or for Franchisee. If at any time Franchisee is not in full compliance with any Laws as required herein District, after notifying Franchisee of its noncompliance and Franchisee's failure to correct such noncompliance within a timeframe that is satisfactory to regulatory and/or other legal authorities, may take reasonable action necessary to bring Franchisee into compliance with such Laws or District may initiate compliance action immediately. Franchisee shall reimburse District for all reasonable costs (including without limitation consulting, engineering, clean-up, disposal, legal costs and attorneys' fees, fines and penalties) incurred by District in complying with, abating a violation of, or defending any claim of violation of such Laws related to Franchisee's operations of the B&RG Railroad.

3.3. Franchisee will use its best efforts to maintain the same level of service and excellence that the B&RG has traditionally maintained over the years and agrees to operate the B&RG Railroad as a prudent, fair, equitable and businesslike rail operator in a manner that is as good as or better than past B&RG operations, taking into account the interests of Franchisee, the District, the tenants and users of the Port of Brownsville, and the general public

3.4. Franchisee shall not take any of the following actions without the expressed written consent of the District Board of Commissioners:

- a. Sell the BRG Trackage.
- b. Assign its operating rights, except to identified affiliated entities of Franchisee approved by District.
- c. Abandon the BRG Trackage.
- d. Expand the BRG Trackage beyond District property.

3.5. The District and Franchisee shall also agree to develop joint Key Performance Indicators ("KPIs") concerning issues such as incidents and carloads and targets for those KPIs

("Targets") within ninety (90) days after the Commencement Date. The KPIs shall include, but are not limited to, the items listed below:

- a. Customer delivery and customer complaints.
- b. Class I interchange agreements with equal or better terms than those in place on the Commencement Date.
- c. Derailments.
- d. Injuries and accidents.
- e. Carloads and tonnages.

The ninety (90) day period described in this Section 3.5 will be considered the transition period for Franchisee to familiarize itself with the switching and service needs of the BRG Railroad to optimally manage workflows. Formalized KPI's and Targets will be attached as an addendum to this Franchise once agreed upon by the parties. If Franchisee fails to achieve the Targets and also fails to cure non-achievement of Targets within six months after receiving written notice of such failure, the District may terminate this Franchise. However, during this time neither District nor B&RG is obligated to operate the B&RG Railroad or provide rail services to or for Franchisee.

**Except as otherwise set forth in this Agreement, Franchisee hereby agrees during the ninety (90) period described in section 3.5 to INDEMNIFY, DEFEND and HOLD HARMLESS the Port Parties, as well as any parent entities, subsidiaries, affiliates and members, including the officers, directors, employees, agents and representatives of each of them from and against all claims, lawsuits, actions, proceedings, losses, costs, damages, injuries, assessments, fines, penalties, liens, reasonable and necessary attorneys' fees, consulting experts' fees and expenses and court costs, or awards of any kind or nature whatsoever, and the loss of or damage to any property, or injury to or death of any person, asserted by any person, firm, governmental agency or corporation whomsoever (including, without limitation, Franchisee, its employees, invitees, contractors and subcontractors or their employees and Railroad's employees,**

**invitees and tenants, contractors, subcontractors and their employees, including survivors claiming under the wrongful death statute), that relate to, arise out of, or are otherwise connected with (1) Franchisee's failure to comply with any obligation of Franchisee under this Agreement; (2) any activity or operations of or on behalf of Franchisee conducted on the BRG Railroad; (3) any defective rail cars or equipment associated therewith placed on the BRG Railroad pursuant to this Agreement and not owned or leased by Franchisee; and (4) the escape, release, migration, explosion, burning, inhalation of, or exposure to any hazardous substance or hazardous waste released from a rail car placed or stored on the B&RG Railroad by or for Franchisee pursuant to this Agreement, (collectively, "Franchisee Liabilities" and/or "Franchisee Liability"). The term "Franchisee Liability" or "Franchisee Liabilities" shall include Liabilities arising from Franchisees' own past, present or future negligence or strict liability, including Industry Liabilities under CERCLA, RCRA, Clean Water Act, Oil Pollution Act, the Texas Water Code or Health and Safety Code, Federal Employers Liability Act (FELA) or any other state or federal strict liability law or regulation.**

3.6. After the Commencement Date and once KPIs are established and agreed to by the parties, Franchisee will provide written reports, to the District regarding the KPI's and Targets and general operations updates. The reports shall be provided no later than 30 days after the end of each quarter. Franchisee shall also submit to District, on an annual basis, a detailed maintenance and capital program for the coming year.

3.7. District shall have the right to enter the premises, in a manner that does not interfere with operations, to inspect the BRG Trackage at such times as it reasonably deems necessary to monitor compliance with this Franchise Agreement; however District agrees to comply with any instructions of Franchisee reasonably designed to protect the safety of persons

or property. At Franchisee's option, a representative of Franchisee may accompany District during the inspection. District will provide Franchisee three (3) days advance notice before conducting an inspection. However, in the event of an emergency, District may seek clearance from the Franchisee to enter the premises without three (3) days advance notice.

3.8. Upon written request by the District, the parties will jointly inspect the BRG Trackage to determine whether it has been maintained in accordance with all applicable Railroad circulars, AAR Circulars and Manuals, and ordinances, regulations, statutes, rules, decisions and orders (including, but not limited to, those relating to safety, rail operations, air and water quality, noise, hazardous substances and hazardous wastes) issued by any court or federal, state or local governmental entity with proper jurisdiction, including, without limitation, the federal Department of Transportation, the Federal Railroad Administration and the federal Environmental Protection Agency ("Laws"). If Franchisee and District disagree concerning the condition of the BRG Trackage or any determination by Franchisee of the required level of maintenance, the District may require an inspection by a third party consultant agreed to by the parties to inspect those segments or portions of track in dispute and the findings in this regard shall be binding up on the parties. The party against whom the Consultant rules will be responsible for paying the full cost of the Consultants invoice. In the event that Consultant determines that both parties are correct the parties will divide the cost evenly.

3.9. Subject to Franchisee acquiring rights to extend BRG Trackage not contemplated in this Agreement, District shall allow Franchisee to extend the BRG Trackage and build track necessary for day-to-day operations in order to facilitate new users, lessees, and customers.

3.10. During the Term, the District agrees to cooperate with Franchisee and use its best efforts to enter into other agreements (on terms reasonably acceptable to the District in its sole discretion) to the extent necessary to facilitate Franchisee's efforts to grow rail traffic to and from the BRG Trackage and to market, develop and locate new tenants within the Development Area.

3.11. Franchisee is solely responsible for promulgating and ensuring that all public rates and tariffs, and Franchisee issued rules, and timetables, regulations and orders governing operations on and along the BRG Trackage be fair, reasonable, uniform and in compliance with all applicable AAR Circulars and Manuals, and ordinances, regulations, statutes, rules, decisions and orders (including, but not limited to, those relating to safety, rail operations, air and water quality, noise, hazardous substances and hazardous wastes) issued by any court or federal, state or local governmental entity with proper jurisdiction, including, without limitation, the federal Department of Transportation, the Federal Railroad Administration and the federal

Environmental Protection Agency ("Laws"). Franchisee shall provide a copy of all such rules and timetables which are issued by Franchisee to District on an annual basis unless a specific rule or timetable has been revised in which case Franchisee shall provide a copy to District thirty (30) days after such revision. Franchisee must provide District sixty (60) days' written notice to District of any public tariff rate increase issued by Franchisee, during which time District shall schedule an agenda item at a Board of Commissioners' meeting, at which time Franchisee shall appear to explain the need for the increase. Interested parties and the general public shall be given the opportunity to comment on the proposed increase. In addition, during the Franchise Consideration Period, Franchisee shall not increase the rates in public tariffs issued by Franchisee which are charged to existing B&RG customers, or their successors or assigns to an existing facility at the Port, by the greater of the Rail Cost Adjustment Factor (Adjusted) as published by the Surface Transportation Board or 5% per annum, without the consent of the Board of Commissioners. Nothing in this section 3.11 shall restrict the ability of Franchisee to charge a special rate for additional services provided to a BRG customer, or to enter into future Transportation Service Agreements with existing or new customers.

3.12. To avoid the appearance of conflicts of interest, and to address concerns by the District regarding potential competition to the District, Franchisee will provide written notice to District and obtain approval from the District prior to the acquisition or operation of any short line railroad by Franchisee within a 200-mile radius from the Port's turning basin, excluding Mexico. District agrees not to unreasonably withhold approval of such an acquisition unless there is evidence to the contrary that the acquisition would substantially and materially harm the District. Information shared regarding Franchisee's acquisition plans shall be treated as exempt from disclosure under the Texas Public Information Act, and shall not be released in response to a request for public information without first referring the request to the Texas Attorney General for a ruling.

#### 4. Financial Terms and Payments.

##### 4.1. Fees. Franchisee shall pay District

- a. A fee for each loaded railcar (including an empty railcar delivered to a District lessee for the purpose of dismantling) originated or terminated on the BRG Trackage as follows:
  - i. \$20 for each loaded railcar for the first 35,000 cars per year; plus
  - ii. \$25 for each loaded railcar above 35,000 cars per year; and
- b. Beginning with the sixth anniversary of the Commencement Date, Franchisee shall pay 5% of gross revenues from railroad operations above \$10,500,000 per year

("BRG Revenue Share"). "Gross revenues" shall include, but not be limited to freight allowances, customer switching charges, demurrage (net of car-hire expenses), car storage income, and charges for late payment by customers. Gross revenues shall be determined by Franchisee's year-end audited financial statements.

4.2. Payment. Carload Fees and BRG Revenue Share shall be paid monthly no later than the fifteenth day of the applicable following month, and then reconciled annually in arrears within sixty (60) days after each anniversary of the Commencement Date.

4.3. Guarantee. In no event shall the annual loaded railcar revenue paid by Franchisee to District under Subsection 4.1.a be less than \$550,000.

4.4. Bonds. The following outstanding bonds associated with the operation of the BRG Railroad exist as of the Effective Date of this Agreement: Junior Lien Railroad Revenue Bonds Series 2003. Franchisee assumes all payments on those bonds as they become due as of the Effective Date of this Agreement not to exceed \$2,228,610.00, excluding late fees. If it becomes necessary to redeem a bond prior to its maturity date, District will agree to redeem the bond and Franchisee will make the remaining bond payments to District pursuant to the original bond payment schedule. Franchisee shall at all times maintain an interest and sinking fund equal to the next years' payment on the bonds.

5. Rail Maintenance and Improvement.

5.1. Franchisee shall, at its sole risk, cost and expense inspect, maintain, repair and replace the BRG Trackage, including but not limited to rails, ties, ballast, switches, and other track material and drainage needed to permit the safe operation of the BRG Trackage, in accordance with all applicable Railroad circulars, AAR Circulars and Manuals, and ordinances, regulations, statutes, rules, decisions and orders (including, but not limited to, those relating to safety, rail operations, air and water quality, noise, hazardous substances and hazardous wastes) issued by any court or federal, state or local governmental entity with proper jurisdiction, including, without limitation, the federal Department of Transportation, the Federal Railroad Administration and the federal Environmental Protection Agency. Franchisee shall use its best efforts to avoid service disruptions and in the case that Franchisee determines at Franchisee's sole discretion that any section of the rail is at the end of its life cycle and needs to be replaced in accordance with applicable AAR Circulars and Manuals, ordinances, regulations, or statutes, Franchisee agrees that the size and weight of the replacement rail shall at a minimum meet or exceed 115 lb. rail.

5.2. Subject to capital expenditure procedures and conditions set forth herein, Franchisee may make fixture improvements upon or connected to the BRG Trackage without the prior written consent of District, provided that all such improvements are in compliance with all applicable Railroad circulars, AAR Circulars and Manuals, and ordinances, regulations, statutes, rules, decisions and orders (including, but not limited to, those relating to safety, rail operations, air and water quality, noise, hazardous substances and hazardous wastes) issued by any court or federal, state or local governmental entity with proper jurisdiction, including, without limitation, the federal Department of Transportation, the Federal Railroad Administration and the federal Environmental Protection Agency. Fixture improvements discussed herein shall become the property of District.

6. Right of First Refusal to Purchase BRG Railroad.

District grants Franchisee a Right of First Refusal ("ROFR") to purchase the BRG Railroad and/or BRG Trackage or any part of the BRG Trackage ("B&RG property") from District, as provided herein. If District receives an offer from a third party to buy the B&RG property or any part of the B&RG property and it intends to accept the offer, or if District decides to sell the B&RG Property to a third party, District will provide written notice to Franchisee ("Notice of Intent") of the terms and conditions upon which District is willing to sell the B&RG property. Franchisee shall have ninety (90) days after receipt of such Notice of Intent within which to accept in writing those same terms and conditions to purchase the BRG Property or part thereof. If Franchisee fails to accept all of the terms and conditions (partial acceptance of the terms and conditions or a counter-offer will not constitute acceptance for purposes of the ROFR) contained in the Notice of Intent, District may sell the B&RG Property to the offering third party or to any other entity substantially in accordance with the material terms offered by the District. In such event, the Franchisee shall promptly execute and deliver to District such instruments as District may reasonably request to evidence a termination of the Franchisee's Right of First Refusal. District shall not enter into any sale transaction on terms and conditions less favorable to it than those contained in the Notice of Intent without providing Franchisee a new Notice of Intent based on such terms ("Revised Notice of Intent"), and Franchisee shall have ninety (90) days to accept the terms and conditions in such Revised Notice of Intent. To the extent allowable by law, the District agrees not to convey any right, title or interest in the BRG Railroad and/or BRG Trackage to a third party on terms that were not first offered to Franchisee. If no sale of the BRG Railroad and/or BRG Trackage or part thereof to a third party is consummated within one-hundred-eighty (180) days of the latest Notice of Intent or Revised Notice of Intent to Franchisee, then Franchisee's waiver shall expire, and Franchisee shall

continue to have a right of first refusal as provided herein. Provided, however, that so long as there is continuously a contract in effect between District and the third-party, District may extend the 180 period for one additional term of 60 days to facilitate closing. This Agreement shall remain in full force and effect if any BRG Property is sold.

7. Commencement of Operations and Rail Regulatory Authority.

7.1. Conditions Precedent.

- a. Within 24 hours from the Commencement Date, as specified in Section 7.3 below, the District shall terminate BND Contract Number 3420, 3533, and 3575, being the real property leases and existing operating agreement between B&RG and the District ("Operating Agreement").
- b. Prior to, and after the Commencement Date, the parties hereby agree to fully cooperate regarding termination of other agreements, if any, necessary to facilitate Franchisee's exclusive operation of the BRG Railroad.
- c. Franchisee shall not be responsible for any liabilities and obligations that may have accrued prior to termination of the Operating Agreement.
- d. To the extent allowed by law, the District shall indemnify Franchisee from all liabilities, cost and expense, including, without limitation, attorneys' fees which may arise as a result of the termination of the Operating Agreement.
- e. On all agreements between B&RG and a Class I rail carriers, including, without limitation, Union Pacific Railroad Company ("UP") which require the concurrence of a Class I rail carrier to assign agreements, the District and Franchisee shall use their best efforts to obtain written approval from the Class I rail carrier to allow assignment from B&RG to Franchisee.
- f. The STB prior to the Commencement Date shall have authorized or exempted from authorization the operation of the BRG Railroad by Franchisee or its authorized affiliate under Section 26.1 under the terms of this Franchise and without any conditions unacceptable to either party.
- g. The B&RG Board of Trustees shall have consented to this Agreement.
- h. The representations and warranties of the parties as set forth in this Franchise are true and correct as of the Commencement Date and thereafter.
- i. Due diligence shall have been completed to the satisfaction of the parties.
- j. The BRG Railroad shall have been operated in the ordinary course of business and without any materially adverse effects prior to the Commencement Date.

k. There shall have been no material change in the financial position of either party between the Effective Date and the Commencement Date.

7.2. Satisfaction, Waiver or Deferment of Conditions Precedent. Ten (10) days following the effective date of any order or notice of exemption issued by the STB authorizing the consummation of this Franchise, the parties shall exchange letters either acknowledging that the conditions precedent to this Franchise have been satisfied or waived, or have been deferred. If either party is not satisfied that the conditions precedent have been satisfied, waived or have been deferred, or that the Class I agreements described in Paragraph e have not been finally assigned there shall be an automatic sixty-day extension to satisfy the conditions precedent, and if the parties are still unable to agree, then this Franchise Agreement shall become null and void and of no effect.

7.3. Commencement Date. If the parties agree that the conditions precedent have been satisfied, waived or have been deferred, then Franchisee's operation of the BRG Railroad shall become effective immediately and shall be evidenced in writing and signed by the parties. On the "Commencement Date", District will transfer to Franchisee the assets of the B&RG including the possession of the BRG Railroad, Purchased Equipment, Personnel, Infrastructure, and Equipment for Franchisee's use and operation; possession of the leased real estate described in Section 2.4; and Franchisee will deliver the first installment of the Purchased Equipment Purchase Price.

7.4. Approvals. Franchisee is solely responsible for filing with the Surface Transportation Board ("STB") and any other governmental authority with jurisdiction over operation of the BRG Railroad, any and all applications, petitions, or notices, and/or secure any and all approvals or exemptions from the STB and other such governmental authorities, that may be required for operation of the BRG Railroad and Franchisee's rail operations on the BRG Trackage. Franchisee shall be responsible for any and all filing fees with respect to the aforesaid filings.

7.5. Protective Conditions. Each party shall be solely responsible for any protective conditions or benefits imposed by any judicial, regulatory or governmental body, for the benefit of its own employees or the employees of any of its parent, subsidiary or affiliated entity, or are otherwise required to be paid to such employees under its collective bargaining or other Franchise, howsoever arising, including as a consequence of the approval of the Franchise, the exercise or performance by the parties of any rights or obligations hereunder, the termination of the Franchise or Franchisee's discontinuance of operations on the BRG Trackage.

7.6. Standstill. Unless otherwise mutually agreed by the parties, the District shall use its best efforts to ensure that B&RG shall not hire any new employees or undertake any material obligations during the period between the Effective Date and the Commencement Date.

7.7. Hiring. The parties agree to provide a fair and equitable arrangement for the protection of the interests of employees who may be affected by this Agreement. On the Commencement Date, all B&RG employees will be transferred to Franchisee and become employees of the Franchisee subject to results from drug testing, criminal background checks, and post-employment physical abilities test ("POET"). To the extent applicable any employee affected by the acquisition will be protected, as required by § 10902(d) and subject to the standards and procedures established in *Wisconsin Central Ltd.—Acquisition Exemption—Lines of Union Pacific Railroad Co.*, 2 S.T.B. 218 (1997), *aff'd* in relevant part sub nom. *Association of American Railroads v. STB*, 162 F.3d 101 (D.C. Cir. 1998). Subject to the foregoing, Franchisee shall not have any obligation to employ any individuals who fail drug testing, criminal background checks, or POET, or cannot be qualified according to FRA rules and regulations. Upon becoming an employee of the Franchisee, the Franchisee employees shall be bound by and shall be entitled to the protections of Franchisee procedures, policies, benefits, and rules. Former B&RG employees who become Franchisee employees will maintain their same level of seniority, level of service, and similar compensation and benefits accrued as of the Commencement Date. Nothing herein shall affect railroad retirement benefits accrued by an employee prior to the Commencement Date.

#### 8. Compliance with Laws.

Both parties shall comply with all applicable Federal, State and local laws, ordinances and regulations in their use and operation of the BRG Railroad. To the extent provided by law, each party hereby agrees to indemnify the other party and hold the other party harmless from and against any and all liability, claims, costs, damages and expenses arising in any manner out of its failure to comply with such laws, ordinances and regulations.

#### 9. Liability.

9.1. Franchisee and District agree that they will cooperate with each other as necessary in defense of any claim, demand, investigation, litigation or loss arising out of the use, occupation, possession or operation of the BRG railroad during the term.

**9.2. FRANCHISEE SHALL BE RESPONSIBLE FOR AND SHALL INDEMNIFY, DEFEND AND HOLD HARMLESS DISTRICT AGAINST ALL LOSSES ARISING FROM:**

- a. **THE NEGLIGENT ACTS AND OMISSIONS OF FRANCHISEE AND ITS OFFICERS, EMPLOYEES, AGENTS, AND CONTRACTORS IN THE USE, OCCUPATION, POSSESSION MAINTENANCE OR OPERATION OF THE BRG RAILROAD DURING THE TERM OF THIS FRANCHISE;**
- b. **ANY BREACH BY FRANCHISEE OF ANY APPLICABLE LAW, RULE OR REGULATION, OR OF ANY OF ITS REPRESENTATIONS OR WARRANTIES SET FORTH IN THIS FRANCHISE, OR**
- c. **ANY FAILURE BY FRANCHISEE TO PERFORM ANY OF ITS OBLIGATIONS CONCERNING THE USE AND OPERATION OF THE BRG RAILROAD UNDER THIS FRANCHISE.**

**THIS INDEMNITY PROVISION SHALL SURVIVE FOLLOWING TERMINATION OF THE FRANCHISE.**

9.3. Franchisee shall require contractors performing work on the BRG Trackage ("Contractors") to have adequate insurance coverage for liability, loss, claim or expense for bodily injury or death to any persons or damage to any property (including property of or under the control of District) arising out of any act or omission of such contractor on or in connection with the BRG Trackage. Franchisee shall, upon request, provide to District a copy of all such policies or certificates of such insurance.

**9.4. TO THE EXTENT ALLOWED BY LAW ONLY, CONSISTENT WITH THE CONSTITUTION AND LAWS OF THE STATE OF TEXAS, AND WITHOUT WAIVING ANY DEFENSE OF SOVEREIGN OR GOVERNMENTAL IMMUNITY, DISTRICT SHALL BE RESPONSIBLE FOR AND SHALL INDEMNIFY, DEFEND AND HOLD HARMLESS FRANCHISEE AGAINST ALL LOSSES ARISING FROM:**

- a. **DISTRICT'S AND/OR B&RG'S ACQUISITION, OWNERSHIP, USE, POSSESSION OR OPERATION OF THE BRG RAILROAD PRIOR OR SUBSEQUENT TO THE TERM OF THIS FRANCHISE;**
- b. **ANY BREACH BY DISTRICT AND/OR B&RG OF ANY APPLICABLE LAW, RULE OR REGULATION, OR OF ANY OF ITS REPRESENTATIONS OR WARRANTIES SET FORTH IN THIS FRANCHISE, OR**
- c. **ANY FAILURE BY DISTRICT AND/OR B&RG TO PERFORM ANY OF ITS OBLIGATIONS CONCERNING THE USE AND OPERATION OF THE BRG RAILROAD UNDER THIS FRANCHISE.**

**THIS INDEMNITY PROVISION SHALL SURVIVE FOLLOWING TERMINATION OF THE FRANCHISE.**

9.5. Franchisee covenants and agrees from the date hereof and as long as the provisions of this Franchise Agreement shall remain in effect, to remove from the ROW, the Leased Lands, and any other land belonging to District (collectively, "the Premises"), if and as required by law, any Hazardous Materials placed in or on the Premises by Franchisee, its agents, its employees or its independent contractors, and to comply in all respects with all federal, state and local governmental laws and regulations governing such removal. Franchisee promises to give notice to District of any claim, action, administrative proceeding (including, without limitation, informal proceedings), or other demand by any governmental agency or other third party involving the existence of Hazardous Materials on the Premises, and copies of any notice of any releases of Hazardous Materials given by Franchisee pursuant to any law, rule or regulation, and any report of and response to any such incident.

**Franchisee agrees to indemnify, pay and protect, defend and save District harmless from and against any and all claims (including, without limitation, third party claims for personal injury or real or personal**

property damage), actions, administrative proceedings (including informal proceedings), judgments, damages, punitive damages, penalties, fines, costs, liabilities (including sums paid in settlement of claims), interest, or losses, including reasonable attorneys' and paralegals' fees and expenses, consultant fees, and expert fees, together with all other costs and expenses of any kind or nature (collectively, the "Costs") that arise directly or indirectly from or in connection with the release or suspected release by Franchisee or its agents, its employees or its independent contractors of any Hazardous Materials in or into the air, soil, ground water, or surface water at, on, about, under, arising from or within the Premises, or any portion thereof, or elsewhere in connection with Franchisee's operations on or in connection with the Premises. The indemnification provided in this Agreement shall specifically apply to and include claims or actions brought by or on behalf of employees of Franchisee. In the event District shall suffer or incur any such costs, Franchisee shall pay to District the total of all such costs suffered or incurred by District upon demand therefore by District. Without limiting the generality of the foregoing, the indemnification provided in this easement shall specifically cover costs, including capital, operating and maintenance costs, incurred in connection with any investigation or monitoring of site conditions, any cleanup, containment, remedial, removal, or restoration work required or performed by any federal, state or local government agency or political subdivision or performed by any nongovernmental entity or person because of the presence, suspected presence, release, or suspected release of any Hazardous Material in or into the air, soil, ground water, or surface water at, on, about, under, or

**within the Premises or any portion thereof, or elsewhere in connection with Franchisee's operations on or in connection with the Premises and any claims of third parties for loss or damage due to such hazardous materials.**

In the event Franchisee is required to conduct or perform any investigation or monitoring of site conditions for any cleanup, containment, restoration, removal or other remedial work (collectively the "Remedial Work") under any applicable federal, state or local law or regulation, by any judicial order or by any governmental entity, or in order to comply with any agreements affecting the Premises because of or in connection with any occurrence or event described in this Agreement, Franchisee shall perform or cause to be performed the Remedial Work in compliance with such law, regulation, order or agreement; provided that Franchisee may withhold such compliance pursuant to a good faith dispute regarding the application, interpretation, or validity of the law, regulation, order or agreement, subject to the requirements of the following paragraph. All remedial work shall be performed by one or more contractors selected by Franchisee and approved in advance in writing by District, and under the supervision of a consulting engineer selected by Franchisee and approved in advance in writing by District. All costs and expenses of such Remedial Work shall be paid by Franchisee, including, without limitation, the charges of such contractors and/or the consulting engineer, District's reasonable attorneys and paralegals' fees and costs incurred in connection with monitoring or review of such Remedial Work. If Franchisee shall fail to timely commence or cause to be commenced, or fail to diligently prosecute to completion, such Remedial Work, District may, but shall not be required to, cause such Remedial Work to be performed, and all costs and expenses thereof or incurred in connection therewith shall be Costs within the meaning of this Agreement. All such Costs shall be due and payable upon demand therefore by District.

Franchisee shall be permitted to contest or cause to be contested, subject to compliance with the requirements of this paragraph, by appropriate action any Remedial Work requirement, and District shall not perform such requirement on its behalf, so long as Franchisee has given District written notice that Franchisee is contesting or shall contest or cause to be contested the application, interpretation, or validity of the governmental law, regulation, order or agreement pertaining to the Remedial Work by appropriate proceedings conducted in good faith with due diligence; provided that such contests shall not subject District or any assignees of District's interest in the Premises to civil liability and does not jeopardize any such parties' interest in the Premises. Franchisee shall give such security or assurances as may be reasonably required by District to insure compliance with the legal requirements pertaining to the Remedial Work (and payment of all Costs in connection

therewith) and to prevent any sale, forfeiture, or loss by reason of such nonpayment or noncompliance.

This article shall be binding upon, inure to the benefit of, and be enforceable by District and Franchisee, and their respective heirs, legal representatives, successors and assigns, including, without limitation, any assignee or purchaser of all or any portion of the District's interest in the Premises. If any term of this article or any application thereof shall be invalid, illegal, or unenforceable, the remainder of this article and any other application of such term shall not be affected thereby. No delay or omission in exercising any right hereunder shall operate as a waiver of such right or any other right. The provisions of this article shall survive the termination or expiration of this lease.

9.6. For purposes of this Agreement,

- a. The term "Loss" shall include any and all costs, expenses, fees or liabilities arising from any bodily injury or death of any person and any damage to property, or natural resources, or any Environmental Contamination or release of Hazardous Materials. Losses shall include, but not be limited to, all costs of claims, including claims arising under the Federal Employer's Liability Act, activities in response to enforcement, damages, judgments, awards, orders, decrees, payments, fines, penalties, assessments, remediation costs, court costs, and attorney, consultant and expert witness fees. Losses shall exclude incidental, consequential, economic, lost opportunity or lost profits of Franchisee or District.
- b. "Environmental Contamination" shall mean any condition arising from the disposal or other release of Hazardous Materials to, on or under the BRG Railroad.
- c. "Hazardous Materials" shall mean and include, without limitation, (a) "hazardous substances" or "toxic substances", or "pollutants or contaminants", as those terms are defined by the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601, et seq.; the Toxic Substances Control Act, 15 U.S.C. § 2601, et seq.; or the Hazardous Materials Transportation Act, 49 U.S.C. § 1802, all as amended; (b) "hazardous wastes", as that term is defined by the Resource Conservation and Recovery Act, 42 U.S.C. § 6901, et seq., as amended; (c) any pollutant or contaminant or hazardous, dangerous or toxic chemicals, materials or substances within the meaning of any other applicable federal, state or local law, regulation, code, ordinance, guideline, order, agreement or requirement imposing liability or standards of conduct concerning any hazardous, toxic or dangerous or residual waste substance or material, or the exposure of persons

thereto all as amended as of the date hereof; (d) any crude oil or any other petroleum product; (e) any radioactive material, including any source, special nuclear or by-product material as defined in 42 U.S.C. § 2100 et seq., as amended; (f) asbestos and asbestos containing materials in any form; or (g) compounds containing polychlorinated biphenyls. For the purposes of this Subsection, "as amended" shall mean and include any amendment, adoption, revision or promulgation now in effect or occurring after the date of this Franchise.

#### 10. Insurance.

10.1. Effective as of the Commencement Date, Franchisee shall maintain Railroad Liability Insurance, including FELA, Foreign Rolling Stock, Bill of Lading, and Pollution Liability coverages, subject to minimum limits of at least \$25,000,000 per occurrence and Business Automobile Insurance subject to minimum limits of at least \$1,000,000 each accident or equivalent, in full force and effect at all times during the Term. Such insurance policies shall specifically name Franchisee and the District as "insureds" thereon and include a "severability of interests" provision.

10.2. Franchisee shall also carry at Franchisee's expense All Risk Property Insurance for the full insurable value of the BRG Trackage, Equipment, supplies, and other personal property used by Franchisee in the performance of its duties under this Agreement, including but not limited to the Purchased Equipment and all replacements for the Purchased Equipment.

10.3. Effective as of the Commencement Date, District shall maintain Commercial General Liability Insurance in such amounts as are customary and appropriate for navigation districts in the State of Texas.

10.4. The District and Franchisee shall be furnished with certified copies of the above-referenced insurance policies.

#### 11. Taxes.

During the Term, the District will not be responsible for payment of any property, ad valorem, value added taxes, or similar taxes attributable to the BRG Railroad, the assets conveyed or leased herein, or any replacements of those assets. The District agrees to cooperate with Franchisee to minimize or eliminate property, ad valorem, value added taxes, and similar taxes potentially or actually assessable to Franchisee. However, any such taxes that are assessed shall be the responsibility of Franchisee.

#### 12. Term and Termination.

12.1. The term of this Franchise shall be thirty (30) years from the Effective Date (the "Term").

12.2. This Agreement may be terminated by the non-breaching party if either Franchisee or District breaches any of the material covenants or obligations (Material Terms) of this Agreement and if such breach continues without cure for a period of sixty (60) calendar days from the date of receipt of written notice of such breach. If a cure of a breach of a material term, other than a breach of a payment obligation, would reasonably take more than thirty (30) days, the cure period may be extended by the non-breaching party for a reasonable period of time as determined by the non-breaching party. For purposes of this Section 12.2, the District shall have the right to terminate this Franchise Agreement for any of the following material breaches:

- a. Failure to timely pay any sum of money due under this Agreement, including but not limited to:
  - i. the guarantee described above in Section 4.3 to the District; or
  - ii. District's share of Operating Income, as defined in Article 18 below;
- b. Failure to maintain any insurance required by this Agreement;
- c. Failure to maintain the Trackage in accordance with applicable laws and to the standard required by this Agreement;
- d. Failure by Franchisee to meet or to cure, its KPIs after receiving notice to cure from District;
- e. Failure to perform any indemnification;
- f. Failure to remediate under Section 9.5 of this Agreement;
- g. Breach of any other obligation created by this Agreement that would substantially impair the benefit of the bargain to the non-breaching party.

12.3. Upon expiration or termination of this Franchise Agreement or Franchisee's ROFR, Franchisee shall surrender and transfer the BRG Trackage to District, in good operating condition, and consistent with the condition necessary to permit railroad freight operations, and shall assign to District all agreements entered into by Franchisee pursuant to Section 3.1 hereof. Upon termination of this Agreement, and at the District's request, Franchisee will sell to District any Purchased Equipment then in use by Franchisee in operating the BRG Railroad at a price to be determined in good faith by the parties. Franchisee shall also promptly seek any necessary authority to discontinue rail service from the Surface Transportation Board or other governmental authority. If there is a dispute as to whether a termination has occurred, OmniTRAX will continue to operate the B&RG Railroad and assume all liabilities set forth in this Agreement until the dispute is resolved. If Franchisee fails to seek the necessary approvals as mentioned herein to discontinue rail service from the Surface Transportation Board and does

not dispute the validity of the termination, Franchisee hereby grants a power of attorney to District for the limited purpose of seeking such authority or exemption in the name of and on behalf of Franchisee, and Franchisee shall reimburse District for all costs (including filing fees and attorneys' fees) incurred by District. Franchisee shall not oppose the efforts of District or any successor rail carrier designated by District to operate the BRG Railroad to obtain authority from the STB or other government authority to provide service over the BRG Trackage.

### 13. Eminent Domain.

13.1. In the event that the B&RG Railroad or any part of the B&RG Trackage is taken, condemned, expropriated or seized by a governmental entity or lawful authority through the exercise of the right of eminent domain, the following provisions shall be applicable:

- a. If such proceedings result in the taking of the whole or a material portion of the BRG Trackage (*i.e.*, that which materially interferes with Franchisee's use of the BRG Trackage for railroad purposes), Franchisee shall have the right, upon written notice to District, to terminate this Agreement as of the date title to the BRG Trackage, or such material portion, vests in the condemning authority.
- b. If such proceedings result in the taking of less than all or a nonmaterial part of the BRG Trackage, then this Agreement shall terminate only as to the part so taken, and this Agreement shall continue in full force and effect as to the BRG Trackage remaining, subject to an equitable abatement of Per Car Payments to the District.

13.2. If during the Term any part of the BRG Trackage is condemned or temporarily used (*i.e.*, less than ninety (90) consecutive days) for any public or quasi-public use, purpose, or benefit, the Franchise Agreement shall be suspended for the portion of the B&RG Trackage that is the subject of such temporary taking but continue for the balance of its Term. In the event that such temporary taking shall exceed such ninety (90) day period, then either District or Franchisee may elect to treat such action as a permanent taking in accordance with the provisions of Section 13.1 hereof.

13.3. District shall be entitled to any and all funds payable for the total or partial taking or temporary use of the B&RG Trackage provided that nothing contained herein shall be construed to preclude Franchisee from prosecuting any claim directly against the condemning authority for loss of its business and the value hereunder.

13.4. During the Term, each party shall provide prompt notice to the other party of any and all proceedings for condemnation, expropriation or seizure, or any and all threats of the exercise of the powers to condemn, expropriate or seize all or any portion of the BRG Trackage, by

furnishing the other party a written copy of any and all documents and written communications with respect thereto that may be received by the receiving party.

14. Railroad Bonds.

Nothing in this Franchise Agreement limits the District's and/or B&RG's authority to issue bonds for rail-related or development purposes, except that the District shall ensure that no future bond indenture will unreasonably interfere with Franchisee's right to operate under this Agreement. The parties agree that they will work in good faith to implement such financing when appropriate and desirable.

**PART II – MASTER DEVELOPMENT**

15. Industrial Park.

The District hereby grants Franchisee the right and authority to be the Master Developer of certain District real estate as described below. For purposes of this Agreement, the Industrial Park shall include approximately 1,200 acres, consisting of Parcels 1 through 7, ("Phase I") as identified in Exhibit D to this Agreement. Unless Franchisee is in default of any of its material obligations under this Agreement or Franchisee is no longer operating the BRG Railroad, the parties agree to negotiate in good faith to amend this Agreement to add approximately 2,000 additional acres ("Phase II"), at such time when Phase I reaches 80% build-out. (Phase I and Phase II collectively referred to hereafter as the "Development Area")

16. Master Developer.

- 16.1. Franchisee will serve as the exclusive Master Developer of the Development Area. Franchisee's responsibilities as Master Developer will include the following:
- a. Franchisee will use its reasonable efforts to develop the Development Area in phases, starting with Phase I and then Phase II as specified in Article 15. The parties, by written agreement during the Term, may add additional parcels of District real estate to the Development Area.
  - b. Within one (1) year of the Commencement Date, Franchisee will establish guidelines for the Development Area (the "Master Plan"), create, and begin implementation of a phased Master Plan for the Development Area. It is foreseeable, and agreed by the parties, that the Master Plan may evolve during the Term as opportunities are evaluated and development progresses.
  - c. The Master Plan shall address the following topics:
    - i. Existing Conditions;
    - ii. Land Use and Development;

- iii. Landscaping;
- iv. Architectural Design Guidelines;
- v. Common Elements, including roadways, utilities, and infrastructure;
- vi. Covenants, Conditions, and Restrictions;
- vii. Implementation.

The Master Plan should be consistent with standard industrial development practices

16.2. The Master Plan shall require the approval of District's Board of Commissioners.

As long as the Master Plan conforms with Section 16.1 in a manner consistent with industrial development practices, the District shall have 30 days from submittal to approve the Master Plan. If the District fails to approve the Master Plan within 30 days the District may request an extension of 30 days in which to make a decision. The Master Plan shall also specify which activities shall be approved without subsequent review and action by the Board of Commissioners, and which activities will require subsequent review and approval by the Board.

16.3. Franchisee shall be responsible for the following activities and decisions in the Development Area, in Franchisee's sole discretion, consistent with the Master Plan:

- a. overall planning, design, and engineering and causing to be constructed of common elements;
- b. marketing;
- c. negotiating leases;
- d. coordinating individual site development plans and activities.

16.4. Franchisee shall have the sole right and discretion to select and hire contractors for the Development Area. Franchisee will use its best efforts to hire qualified local contractors.

16.5. Franchisee shall perform or be responsible for performing all maintenance of the common elements in the Development Area. The cost of maintenance shall be paid through a Common Area Maintenance charge to all tenants of the Development Area, and all owners of land in the Development Area (other than District). If the Common Area Maintenance funds are insufficient to perform all necessary and reasonable maintenance of the common elements, the excess cost shall be divided equally between District and Franchisee and recaptured through adjustments to the Common Area Maintenance Charge.

16.6. The District shall be the owner of the infrastructure, and shall be solely responsible for replacement of infrastructure. The District shall benefit from contractor warranties on the infrastructure.

16.7. District agrees not to unreasonably withhold approval of any activity described above in Section 16.3, provided:

- a. A lease either involves the District's standard lease agreement (Exhibit E) or conforms with the CCRs, the District's Leasing Policy and applicable law, and is for an amount equal to or greater than the lowest published lease rate (other than grazing leases or fishing harbor leases) for the District; and
- b. In the case of a lease, the prospective tenant demonstrates sufficient financial strength to sustain the contemplated operation, (*e.g., including producing audited financial statements showing at least one years' projected rent in unencumbered cash and five years' projected rent in net worth*).

16.8. The District and Franchisee agree to cooperate in the marketing and development of the Development Area, including, to the extent consistent with their legal obligations, including regularly disclosing information about contacts and potential customers to locate facilities within the Development Area, the appropriate location for such prospects and appropriate terms and conditions for such use.

16.9. While the District is authorized to sell, lease, or convey real property, it is the general policy of the District not to sell real property. However, the District may consider sales of real property within the Development Area in special circumstances. All such sales must be specifically approved by the District's Board of Commissioners, shall be for no less than the then-current appraised market value, and shall be in conformity with applicable laws. Nothing in this Agreement shall be construed to restrict the District's discretion in approving or rejecting proposed sales.

#### 17. Reimbursement of Expenditures.

Upon the sale or lease of any real estate parcel within the Development Area, Franchisee shall be entitled to reimbursement from the proceeds of the transaction for reasonable transaction-related out-of-pocket expenditures for tenant or user-specific marketing, engineering or other services, and capital improvements, excluding salaries of Franchisee employees.

#### 18. Development Income Sharing.

18.1. Unless otherwise agreed to in writing by the parties, all Operating Income generated during the Term of this Agreement arising from the development of the

Development Area shall be divided equally (50% to the District and 50% to Franchisee) and distributed between the District and Franchisee.

18.2. "Operating Income" shall be defined as gross revenue received, including but not limited to, leasing revenue, sales proceeds, wharfage, (in order for wharfage to be included in Operating Income, there must be a minimum annual tonnage commitment made by the user at the then tariff rates, and the user must not be a Port customer at the time). The following items shall not be considered Operating Income, and shall accrue to the exclusive benefit of District:

- a. Sums paid to District by Franchisee pursuant to an exercise of a Right of First Refusal under Section 20 below;
- b. Payment of royalties, bonus, delay rentals or the like pursuant to any oil, gas or other mineral leases.

18.3. Franchisee shall supply District with a quarterly report of Operating Income within thirty days of the end of each fiscal quarter, and shall distribute 80% of the District's Share of Operating Income for the previous quarter within ten days after the date of the quarterly report. In addition, Franchisee shall supply District with a full accounting of all revenues attributable to the Development Area by April 1 of the following calendar year, and shall remit by June 1 the remaining Operating Income for the previous year in the portions as provided above.

19. Fill Dirt.

District will provide fill dirt to the Development Area from its land for development projects at no charge to Franchisee, users, tenants, and purchasers of developed properties, to the extent the District reasonably can do so. District will determine the locations from which fill dirt will be sourced. District will not be responsible for the cost of excavation or transportation of fill dirt. Franchisee agrees to accept such fill dirt at its own risk and hereby RELEASES and FOREVER DISCHARGES District from any and all Claims and damages of any kind, known or unknown, whether in contract or in tort that may arise from the fill dirt provided by the District.

20. Right of First Refusal.

Franchisee shall have the right of first refusal to purchase land within the Development Area on the following terms. If District intends at any time during the Term to sell all or part of the property within the Development Area to an unrelated private third party, District shall give Franchisee prior written notice of such intent ("Notice of Intent"), which shall specify the terms and conditions upon which District is willing to sell the property. Franchisee shall have ninety (90) days after receipt of such Notice of Intent within which to accept in writing those same

terms and conditions to purchase the property or part thereof. Failure of Franchisee to accept those terms and conditions shall be deemed a waiver of Franchisee's right of first refusal only with respect to the property or part thereof and, subject to this Article 20, District shall be free to sell the property or part thereof on the same terms and conditions specified in the Notice of Intent. In such event, the Franchisee shall promptly execute and deliver to District such instruments as District may reasonably request to evidence a termination of the Franchisee's Right of First Refusal. District shall not enter into any sale transaction on terms and conditions less favorable to it than those contained in the Notice of Intent without providing Franchisee a new Notice of Intent based on such terms ("Revised Notice of Intent"), and Franchisee shall have ninety (90) days to accept the terms and conditions in such Revised Notice of Intent. To the extent allowed by law, District agrees not to convey any right, title or interest in the property or part thereof to a third party on terms that were not first offered to Franchisee. If no sale of the property or part thereof to a third party is consummated within one-hundred-eighty (180) days of the latest Notice of Intent or Revised Notice of Intent to Franchisee, then Franchisee's waiver shall expire, and Franchisee shall continue to have a right of first refusal as provided herein.

### **PART III – Incubator Site**

#### **21. Incubator Site.**

Parcel 4, an unimproved, raw parcel of land consisting of 227 acres, as outlined in Exhibit D, shall be designated as an incubator site magnet to attract new users to the Port ("Incubator Site"). The Incubator Site will be exclusively developed, used and operated by Franchisee during the Term and Franchisee will develop, construct, market, and operate the Incubator Site, at Franchisee's sole expense. Upon receiving rental income from the first user, Franchisee shall pay the District \$500 per acre per year based on each user's actual acreage during the Term. Franchisee shall begin construction of the Incubator Site within 365 days of the Commencement Date of this Agreement. Any portion of the Incubator Site not developed within five years after the Commencement Date shall be added to the Development Site.

### **PART IV – General Terms**

#### **22. Representation and Warranties of District.**

District represents and warrants as follows:

- 22.1. District holds merchantable title to the real estate and improvements thereon comprising the BRG Trackage and the Development Area.
- 22.2. District is duly authorized and holds an ownership interest and other rights under applicable federal and state law to operate the BRG Railroad as a common

carrier in the fashion it is currently operated and as it is operated at the Commencement date.

- 22.3. District has the ownership interest and governmental authority to grant the rights to the BRG Railroad in this Franchise and to develop the real property within the Development Area for commercial use.
- 22.4. As of the Commencement date, District has secured all requisite corporate, governmental and third-party consent and authority to enter into this transaction, and the transactions contemplated herein will not materially violate the terms or requirements of any agreement, judgment, decree or law.
- 22.5. There is no pending litigation or other claim that if successful would materially impair or interfere with operation of the BRG Railroad as currently conducted.
- 22.6. The District has complied with publication requirements related to the Franchise in accordance with applicable laws, statutes, and regulations.
- 22.7. Upon execution of this Agreement by the signatory for the District, this Franchise will become the valid, legal and binding obligation of the District.

23. Representations and Warranties of Franchisee.

Franchisee represents and warrants as follows:

- 23.1. As of the Commencement date, Franchisee has secured all requisite corporate and governmental authority to enter into this transaction, and the transactions contemplated herein will not materially violate the terms or requirements of any agreement, judgment, decree or law.
- 23.2. Upon execution of this Agreement by the signatory for Franchisee, this Franchise will become the valid, legal and binding obligation of Franchisee.
- 23.3. Franchisee agrees to maintain car load records during the Term in accordance with generally accepted accounting principles and maintained in auditable condition for a period of not less than three years after preparation of the records. Franchisee agrees to make all such records available to District within thirty days after Franchisee's receipt of District's request to audit such records. District's right to audit Franchisee such records shall survive termination of this Franchise for a period of one year.
- 23.4. Franchisee shall cause Franchisee's external auditing firm to prepare an annual report to District concerning income and capital development for the operation of the railroad and the Development Area, including but not limited to investment in the

Development Area as provided for in Section 1.2. In addition, said report shall verify that there has been no material adverse change in Franchisee's financial position during the previous fiscal year that would impede Franchisee's ability to operate the BRG Railroad and the Development Area. In addition, Franchisee agrees to provide District's general counsel and external auditor with a copy of Franchisee's complete audit report, or in the alternative to allow District's general counsel and external auditor to examine Franchisee's complete external audit report at Franchisee's main offices or other agree-upon location, to verify the statements made in the report made to District regarding Franchisee's financial position.

**24. Confidentiality.**

24.1. The parties recognize that District is a political subdivision of the State of Texas, subject to the Texas Public Information Act. This Agreement, and any subsidiary agreement executed in fulfillment of this Agreement, are public information. District shall comply with the provisions of the Texas Public Information Act, including those portions that deem certain classes of information confidential, with respect to any requests for public information received by the District.

24.2. Subject to the Texas Public Information Act, prior to the Effective Date of this Agreement neither party shall make any public announcement, press release or similar statement concerning this Agreement or its terms without the prior approval of the other party.

**25. Force Majeure.**

25.1. The prompt and timely performance of all obligations and covenants under this Agreement is and shall be of the essence of this Franchise.

25.2. Whenever a period of time is provided in this Agreement for either party to do or perform any act or thing, said party shall not be liable or responsible for any delays due to strikes, lockouts, casualties, acts of God, war, terrorist acts, court orders, work stoppages, nuclear incidents, riots, public disorder, criminal acts or acts or omissions of other parties or entities, governmental regulations, or other such causes beyond the reasonable control of said party (each a "Force Majeure"). In the event of such Force Majeure, the performance time period shall be extended for the amount of time said party is so delayed; provided, however, that this Article 25 shall not be construed to affect the responsibilities of said party hereunder to perform such act or thing once such Force Majeure conditions have been removed.

26. Assignment, Succession, Changes.

26.1. Subject to the provisions of Section 3.2, this Agreement may be assigned, transferred, or subcontracted by Franchisee to a parent, a subsidiary, or a railroad affiliate of Franchisee, with notice to, but without the prior written consent of District. Subsequent to an assignment under this Section, the term "Franchisee" shall be deemed to refer to the assignee, provided that no assignment shall relieve Franchisee of any obligation under this Agreement.

26.2. Franchisee shall have the right, in the ordinary course of business, to enter into track lease agreements, public/private road/pedestrian/utility crossing agreements, whether overhead, underpass or at grade, private sidetrack agreements and similar agreements regarding or affecting the BRG Trackage.

26.3. If, during the Term, there are any changes, modifications, successions, or assignments related to the District's governance, legal structure, management, operations, control, or authority; such changes, modifications, successions, or assignments shall not limit, change, modify, supersede, revise, or terminate any rights, benefits, authority or status of Franchisee, as described herein.

27. Sole Benefit.

Except as otherwise indicated herein, this Agreement is intended for the sole benefit of the parties hereto. Nothing in this Agreement is intended or may be construed to give any person, firm, corporation, or other entity, other than the parties hereto and their respective officers, agents, employees, parent corporation, subsidiaries, affiliates, successors, and permitted assigns, any right or benefit pursuant to any provision or term of this Agreement, and all provisions and terms of this Agreement are and will be for the sole and exclusive benefit of the parties to this Agreement.

28. Waiver.

Any waiver at any time by one party of a breach hereof by the other party will extend only to the particular breach so waived and will not impair or affect the existence of any provision, condition, obligation, or requirement of this Agreement or the right of either party hereto thereafter to avail itself of any rights under this Agreement with respect to a subsequent breach. No provision of this Agreement shall be waived by any act or knowledge of the parties hereto, but only by a written instrument signed by the party waiving a right hereunder.

29. Amendment.

No provision of this Agreement shall be modified without the written concurrence of the parties hereto. This Agreement represents the entire understanding of the parties hereto, and to that extent supersedes any prior understandings, written or oral regarding the subject matter of this Agreement.

30. Notices.

All notices required to be given under this Agreement shall be in writing, signed by or on behalf of the party giving the same, and transmitted to the addresses shown below or such successor addresses as that party may specify by notice hereunder. Such notices shall be transmitted by United States registered or certified mail return receipt requested or by facsimile, with confirmed receipt, addressed to the officers and addresses shown below. All notices shall be effective on the day following confirmed receipt of the letter or facsimile.

If to District:

Attn: Port Director / CEO  
Brownsville Navigation District  
1000 Foust Road  
Brownsville, TX 78521

If to Franchisee:

Attn: General Counsel  
OmniTRAX, Inc.  
252 Clayton Street, 4<sup>th</sup> Floor  
Denver, CO 80206

31. Governing law.

This Agreement will be construed in accordance with the domestic laws of the state of Texas, without regard to any choice of law or conflict of law statute or jurisprudence. Exclusive venue of any action concerning this Franchise shall lie in Cameron County, Texas.

(CONTINUED ON NEXT PAGE)

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed in duplicate, each part being an original, as of the day and year first above written.

**BROWNSVILLE NAVIGATION DISTRICT  
NAVIGATION AND CANAL COMMISSIONERS OF BROWNSVILLE NAVIGATION  
DISTRICT OF CAMERON COUNTY, TEXAS**

By:   
Name: Sergio Tito Lopez  
Title: Chairman

**OMNITRAX, INC.**

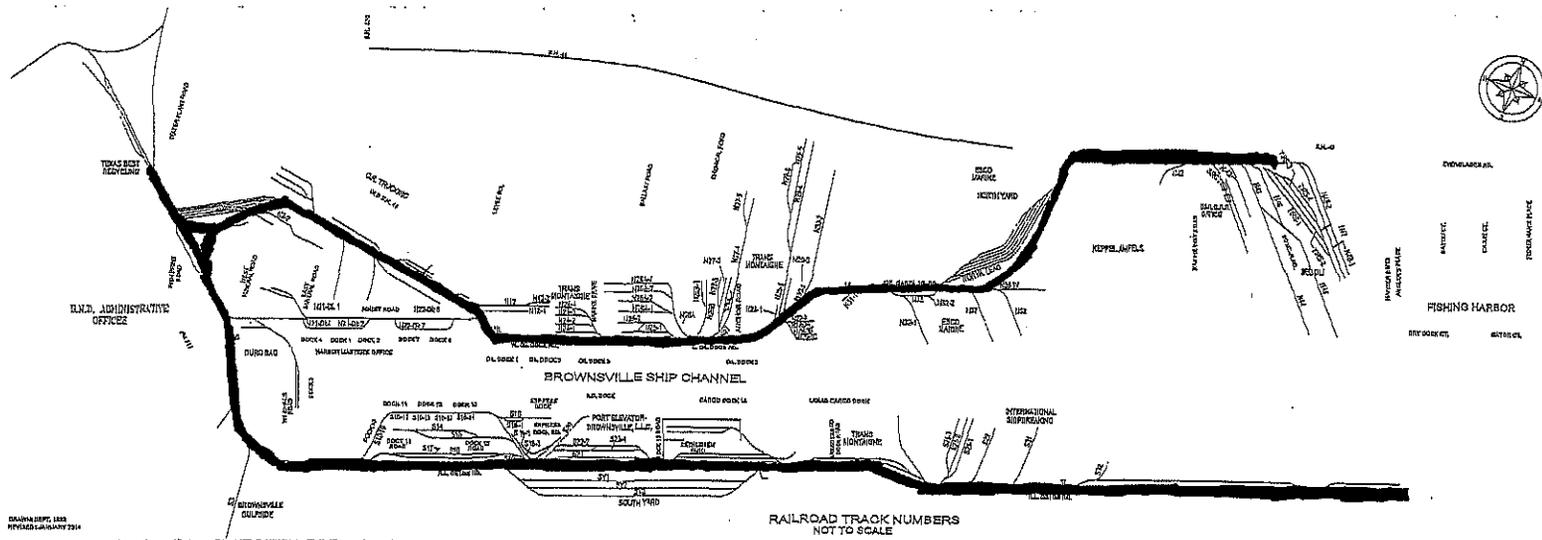
By:   
Name: Kevin J. Shaban  
Title: Chief Executive Officer

# **EXHIBIT C**

## **Maps of Port Railroad Facilities**

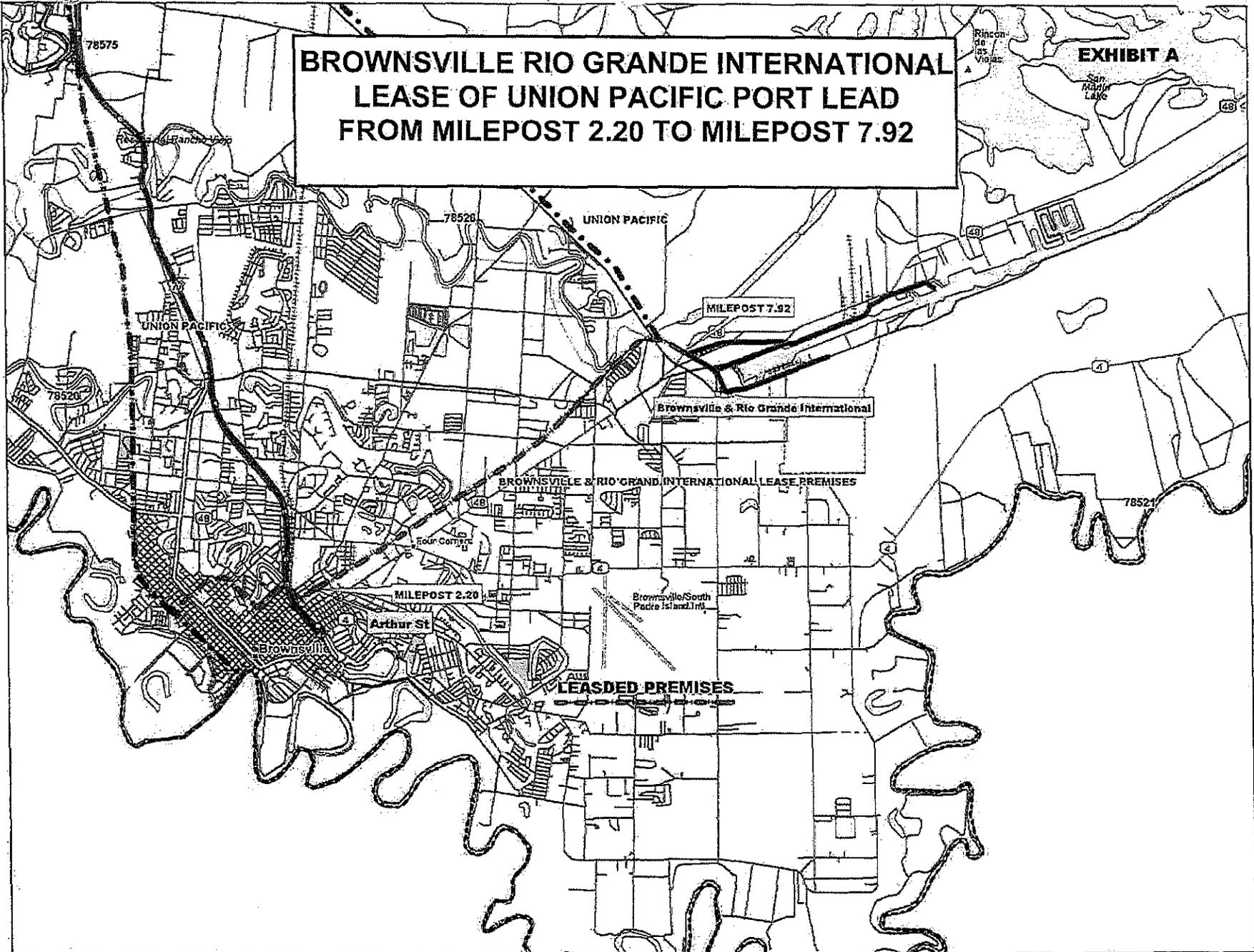
# Port of Brownsville Trackage

## STB-Regulated "Main" Track Shown in Bold

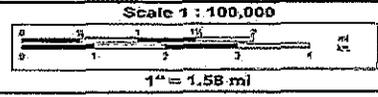
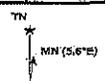


# BROWNSVILLE RIO GRANDE INTERNATIONAL LEASE OF UNION PACIFIC PORT LEAD FROM MILEPOST 2.20 TO MILEPOST 7.92

EXHIBIT A



©2002 DeLorme Street Atlas USA © 2003.  
www.delorme.com





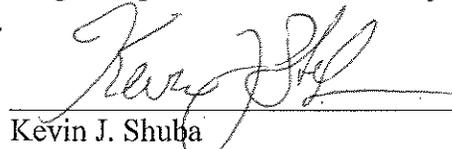
# **EXHIBIT D**

## **Certification and Verification**

## CERTIFICATION AND VERIFICATION

I, Kevin J. Shuba, Chief Executive Officer of Brownsville & Rio Grande International Railway, LLC ("BRGIR") hereby certify that BRGIR's projected annual revenues will not as a consequence of the proposed change of operator transaction result in BRGIR becoming a Class II or Class I rail carrier so as to require processing of the foregoing notice of exemption under 49 C.F.R. § 1150.35.

Also, pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States that the foregoing change of operator notice of exemption is true and correct to the best of my knowledge and belief.



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Kevin J. Shuba  
Chief Executive Officer  
Brownsville & Rio Grande International Railway, LLC

Executed on: July 3, 2014

# **EXHIBIT E**

## **Port Lead Shippers**

**Port Lead Shippers**

AMERICA DISPATCH 3535 E. 14th Street Brownsville, TX 78521
BRO-TEX INTERNATIONAL, LLC Bro-Tex International Metal 4690 Mar Street Brownsville, TX 78521
EL CLAVO LUMBER 3261 E. 14th Street Brownsville, TX 78520
International Forwarding & Storage Corp. 1650 Central Ave. Brownsville, TX 78520
LOERA CUSTOMS BROKERAGE P.O. Box 6370 Brownsville, TX 78523

MCCOY'S LUMBER 5500 East 14th Street Brownsville, TX 78521
Milwhite, Inc. 5487 South Padre Island Hwy. Brownsville, TX 78521
PARKER & COMPANY PO Box 484 Brownsville, TX 78521
RIO GRANDE FORWARDING 6333 Padre Island Highway. Brownsville, TX 78521
Turn Key Warehousing, Inc. 200 Texas Ave., Ste. 155 Brownsville, TX 78521

# **EXHIBIT F**

**Evidence of 60-Day Advance  
Notice Pursuant to  
49 C.F.R. § 1150.31(e)**

# FLETCHER & SIPPEL LLC

ATTORNEYS AT LAW

29 North Wacker Drive  
Suite 920  
Chicago, Illinois 60606-2832

Phone: (312) 252-1500  
Fax: (312) 252-2400  
www.fletcher-sippel.com

ROBERT A. WIMBISH  
(312) 252-1504  
rwimbish@fletcher-sippel.com

236186

June 12, 2014

ENTERED  
Office of Proceedings  
June 12, 2014  
Part of  
Public Record

## VIA E-FILING

Ms. Cynthia T. Brown  
Chief, Section of Administration  
Office of Proceedings  
Surface Transportation Board  
395 E Street, S.W.  
Washington, DC 20423-0001

**Re: *Brownsville & Rio Grande International Railway, LLC – Change of Operator Exemption – Brownsville & Rio Grande International Railroad, STB Docket No. FD 35837***

Dear Ms. Brown:

In accordance with the requirements of 49 C.F.R. § 1150.31(e), Brownsville & Rio Grande International Railway, LLC (“BRGIR”), a non-carrier, hereby certifies that on June 12, 2014, the attached Notice advising the employees of Brownsville & Rio Grande International Railroad (“BRG”) of a proposed change in railroad operators was posted at the workplace of BRG employees in Brownsville, Texas.<sup>1</sup> The proposed transaction that is the subject of the Notice involves the planned transfer of the entirety of BRG’s existing railroad operations to BRGIR on or after August 11, 2014. BRGIR has been advised that none of BRG’s workforce is represented by any labor union.

As is set forth in the attached Notice, BRGIR anticipates that none of BRG’s current workforce will be adversely affected by the proposed change in operators, because BRGIR has committed to offer employment to all such BRG employees subject to satisfactory completion of background and driver’s license checks and pre-employment drug and alcohol testing and physical examinations. Moreover, as is also set forth in the Notice, BRGIR will offer current BRG employees jobs in their current or substantially-equivalent positions at the same wage rates, subject to the aforementioned conditions.

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<sup>1</sup> BRGIR understands that all BRG employees report to work at the same location/facility in Brownsville. Also, as is indicated by its compliance with the requirements of section 1150.31(e), BRGIR contemplates that its annual, post-transaction revenues will exceed \$5 million.

# FLETCHER & SIPPEL LLC

Ms. Cynthia T. Brown  
June 12, 2014  
Page 2

As is reflected in the attached Notice, BRGIR intends to file with the Board in the coming weeks a verified notice of exemption pursuant to 49 C.F.R. part 1150, subpart D, to assume operations over the lines BRG currently operates, and thereby to replace BRG as the railroad common carrier responsible for providing service to existing and future customers located on lines currently served by BRG.<sup>2</sup> In complying at this time with the notice of intent posting requirements of section 1150.31(e), BRGIR expects that it will be able, subject to the timely filing of the requisite “change of operators” and “continuance in control” class exemption notices, to assume operation of the lines currently operated by BRG on or after August 11, 2014, a minimum of 60 days from the June 12<sup>th</sup> posting/certification date.

If you have any questions concerning this certification filing and BRGIR’s compliance with the requirements of section 1150.31(e), you are welcome to contact me.

Respectfully submitted,



Robert A. Wimbish  
Attorney for Brownsville & Rio Grande  
International Railway, LLC

Enclosure (Notice of Intent, as posted)

Cc: A. Engeman  
J. Bertram  
T. Eklund  
N. Torres

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<sup>2</sup> BRGIR is under common control with non-connecting rail carriers. Accordingly, the entity or entities that will continue in control BRGIR and other railroads at such time as BRGIR becomes a rail common carrier itself will file a notice of exemption pursuant to 49 C.F.R. § 1180.4(g) at least 30 days in advance of the consummation of the proposed change of operators transaction to permit them to add BRGIR as a rail carrier subsidiary within the “corporate family.”

Brownsville & Rio Grande International Railway, LLC  
12650 Highway 48  
Brownsville, TX 78523  
(956) 831-7731

## NOTICE

Pursuant to Surface Transportation Board regulations at 49 C.F.R. § 1150.32(e), Brownsville & Rio Grande International Railway, LLC ("BRGIR"), a non-carrier subsidiary of OmniTRAX, Inc. ("OmniTRAX"), hereby provides notice to employees of Brownsville & Rio Grande International Railroad ("BRG") that, subject to the satisfaction of certain conditions of closing, including receipt of any required regulatory approvals, BRGIR intends to assume all of BRG's interest in certain rail operations in and around the Brownsville Navigation District of Cameron County, Texas (the "Port of Brownsville"). Under the proposed transaction, BRGIR will replace BRG as the franchise operator of the railroad facilities owned by the Port of Brownsville, and will assume all of BRG's leasehold and other operating interests in and over certain railroad facilities in the vicinity of Brownsville, Texas, owned by the Union Pacific Railroad Company ("UP"). The subject transaction will include, but is not limited to, the following railroad properties:

1. Those rail lines owned by the Port as more fully detailed on Exhibit A; and
2. A UP-owned rail line known as The Port Lead.

BRGIR will also acquire BRG's operating rights over UP-owned trackage to access and conduct railroad operations within Palo Alto Yard, and to interchange traffic with UP at UP's Olmito Yard.

On or after June 12, 2014, BRGIR intends to file with the STB a notice of exemption pursuant to 49 C.F.R. Subpart D, under STB Docket No. FD 35836, to authorize the proposed change of rail operators from BRG to BRGIR. In addition, BRGIR anticipates commencing operations on the above-described railroad properties on or about August 12, 2014.

BRGIR has committed to offer employment to **all current** BRG employees subject to satisfactory completion of background and drivers license checks and pre-employment drug and alcohol testing and physical examinations. BRGIR's Post-Offer Employment Testing program, which tests various job-specific physical skills and abilities will also be required of all new employees, but will not be used to disqualify any current BRG employee.

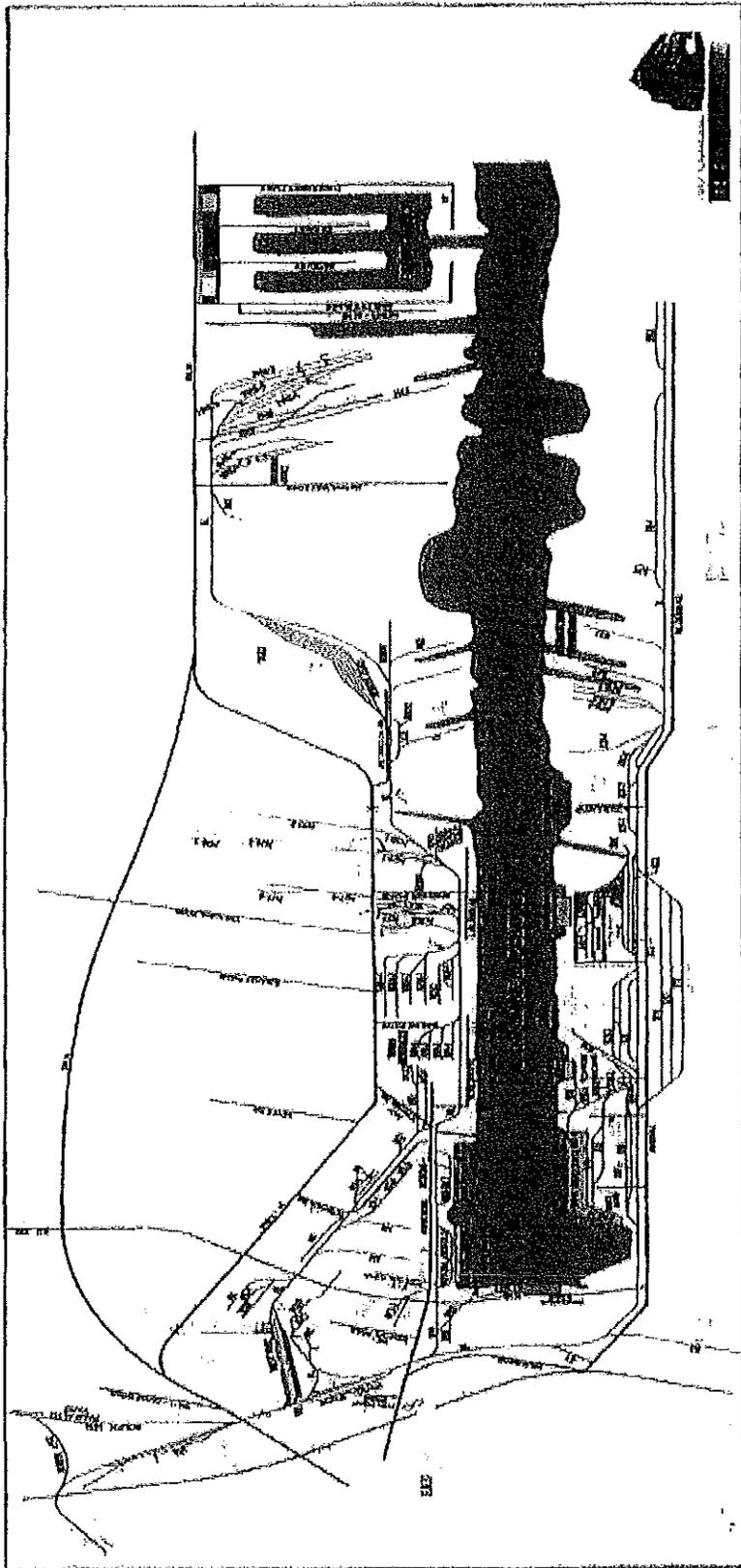
Employees will be offered jobs in their current or substantially-equivalent positions at the same wage rates. Fringe benefits will be the standard benefits provided to employees of OmniTRAX railroad affiliates, including medical and dental insurance, life insurance, 401(k) plan, holidays and paid vacations.

BRGIR will conduct all hiring and other employment decisions without regard to race, creed, color, religion, national origin, sex, age, marital status, disability, veteran, National Guard or military reserve status, and any other protected characteristics.

Any BRG employee interested in applying for employment or in obtaining further information concerning positions that BRGIR is planning to make available should contact Norma Torres, at 956-831-7731.

BRGIR is a non-carrier entity established to assume rail operations in and around the Port of Brownsville in place of BRG. Upon consummation of this transaction, BRGIR will become a Class III rail carrier with expected annual revenues in excess of \$5 million. (The proposed transaction would not, however, cause BRGIR to become a Class II carrier.) In accordance with the provisions of 49 C.F.R. § 1150.32(e), which prescribes advance posting requirements in such situations, BRGIR hereby posts advance notice of this transaction at the workplace of the employees on the affected railroad line(s) at least 60 days before the notice of exemption relating to the proposed transaction becomes effective. Once this notice has been posted at appropriate BRG workplaces BRGIR will certify to the STB its compliance with the requirements of section 1150.32(e).

Exhibit A



# **EXHIBIT G**

## **Caption Summary**

SURFACE TRANSPORTATION BOARD

Notice of Exemption

STB Docket No. FD 35836

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BROWNSVILLE & RIO GRANDE INTERNATIONAL RAILWAY, LLC  
– CHANGE IN OPERATOR EXEMPTION INCLUDING INTERCHANGE COMMITMENT –  
BROWNSVILLE & RIO GRANDE INTERNATIONAL RAILROAD

Brownsville & Rio Grande International Railway, LLC (“BRGIR”), currently a non-carrier, has filed a notice of exemption pursuant to 49 C.F.R. § 1150.31, *et seq.*, for a change of operator from Brownsville & Rio Grande International Railroad (“BRG”) to BRGIR on various rail lines in and around the Port of Brownsville, Texas, as follows:

BRGIR will assume responsibility for providing rail common carrier service over approximately 50 miles of track (approximately 10.5 miles of which will function as STB-regulated lines of railroad, and another 39.5 miles of which will serve as ancillary trackage – collectively, the “District Trackage”)<sup>1</sup> owned by the Brownsville Navigation District of Cameron County, Texas (the “District”) in and around the Port of Brownsville, Texas, and including the District-owned Palo Alto yard located to the west of the port. Upon BRGIR’s commencement of rail common carrier operations over the District Trackage, BRG’s track lease over the same District Trackage will terminate, and BRG’s common carrier status on this trackage will end. In addition, BRG will assign to BRGIR its leasehold interests in, and, in keeping with the assignment, BRGIR will commence operations over, a line of railroad owned by the Union Pacific Railroad Company (“UP”) and known as the “Port Lead,” extending between milepost 2.20 near Arthur Street in Brownsville, Texas, and milepost 7.92 at a point of connection with District-owned track at the western end of the Port of Brownsville. As relevant

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<sup>1</sup> The District Trackage lacks milepost designations.

to this proceeding, the lease terms governing BRG's – and, by virtue of the planned assignment, BRGIR's – operation of the Port Lead contain an interchange commitment in favor of UP. By virtue of the assignment, BRG's common carrier status on the Port Lead also will terminate. Finally, incidental to the above-enumerated transaction elements, BRGIR will assume by assignment BRG's overhead trackage rights over UP's "New Port Lead" from milepost 7.49 to milepost 9.47, enabling BRGIR to access the District-owned Palo Alto Yard, which is located west of the Port of Brownsville.<sup>2</sup>

This change of operator exemption notice, pursuant to which BRGIR will replace BRG as rail common carrier on the above-referenced lines is exempt under 49 C.F.R. § 1150.31(c). As indicated in the caption, the subject transaction involves an interchange commitment. Specifically, BRG will assign its rights to operate the Port Lead under a lease arrangement with UP, and the underlying lease – which will be continued on its existing terms – contains an interchange commitment in favor of UP. The interchange commitment affects only traffic moving to and from the Port Lead, and none of the other lines over which BRGIR will assume common carrier responsibilities in place of BRG.

BRGIR certifies that upon consummation of the transaction, BRGIR's projected annual revenues will not exceed those that would qualify it as a Class III rail carrier. However, because BRGIR's annual operating revenues are expected to exceed \$5 million, BRGIR previously has caused notice of the proposed transaction to be posted at the workplaces of the affected employees of the incumbent operator (BRG), and, accordingly, has certified that it has complied with the Board's advance notice and posting requirements.

The transaction is scheduled to take place on or after August 11, 2014.

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<sup>2</sup> The subject overhead trackage rights do not prohibit BRG (and, once assigned, would not prohibit BRGIR) from serving industries from Palo Alto Yard.

If the verified notice contains false or misleading information the exemption is void ab initio. Petitions to reopen the proceeding 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 automatically stay the effectiveness of the exemption. Stay petitions must be filed by \_\_\_\_\_, 2014 (at least 7 days before the exemption becomes effective).

An original and 10 copies of all pleadings, referring to STB Docket No. FD 35836, must be filed with the Surface Transportation Board, 395 E Street, SW, Washington, DC 20423-0001. In addition, a copy of each pleading must be served on BRGIR's representative, Robert A. Wimbish, Fletcher & Sippel LLC, 29 North Wacker Drive, Suite 920, Chicago, IL 60606-2832.

# **EXHIBIT H**

**Certificate of Compliance  
with  
49 C.F.R § 1150.32(b)  
Service Requirements**

## CERTIFICATION OF SERVICE

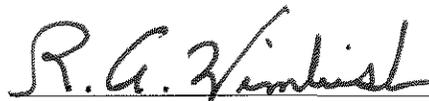
I hereby certify that, in compliance with the notice requirements of 49 C.F.R. § 1150.32(b), I have today arranged to serve a copy of the foregoing change of operator notice of exemption by first class mail, postage prepaid, or via more expeditious means upon all shippers on the railroad lines – (1) which are the subject of the Docket No. FD 35836 proceeding; and (2) over which Brownsville & Rio Grande International Railway, LLC will replace Brownsville & Rio Grande International Railroad. The shippers so served – including the shippers on the Port Lead (which are also required to be served with notice of the transaction pursuant to 49 C.F.R. § 1150.33(h)(1)(v)) – are listed immediately below.

ALL STAR METALS 101 Box Car Rd. Brownsville, TX 78526
AMERICA DISPATCH 3535 E. 14th Street Brownsville, TX 78521
AMFELS, INC. 20000 State Highway 48 Brownsville, TX 78521
BAY BRIDGE TEXAS, LLC 23501 R.L. Ostos Road Brownsville, TX 78521
BROWNSVILLE GULFSIDE WAREHOUSE 3500 R.L. Ostos Road Brownsville, TX 78521
BROWNSVILLE MINERAL WAREHOUSE Brownsville Mineral Warehouse C/O 905 Logistics 1682 Silverwood Drive Fort Mill, SC 29715
BRO-TEX INTERNATIONAL, LLC Bro-Tex International Metal 4690 Mar Street Brownsville, TX 78521
CANTERAS Y AGREGADOS SA RT. 8 Box 611 8570 Old Military Highway Brownsville, TX 78520
DIX SHIPPING 5500 RL Ostos Rd. Brownsville, TX 78521

DURO PAPER BAG Daniel Hartig 7600 Empire Drive Florence, KY 41042
EL CLAVO LUMBER 3261 E. 14th Street Brownsville, TX 78520
ESCO MARINE 16200 Joe Garza Sr. Rd. Brownsville, TX 78521
FIREBIRD BULK CARRIERS, INC. 9100 Old State Highway 48 Brownsville, TX 78521
GULF STREAM MARINE PO Box 4268 Brownsville, TX 78521
GULF FACILITIES PO Box 4499 Brownsville, TX 78520
INTERLUBE CORPORATION 750 W. Anchor Rd. Brownsville, TX 78521
International Forwarding & Storage Corp. 1650 Central Ave. Brownsville, TX 78520
INTERNATIONAL SHIPBREAKING 18501 R.L. Ostos Road Brownsville, TX 78521
LOERA CUSTOMS BROKERAGE P.O. Box 6370 Brownsville, TX 78523

LOGISTICA US TERMINAL LLC/ELITE PACKAGING 8700 OLD HIGHWAY 48 BROWNSVILLE, TX 78521
LUHR BROS., INC. 250 W. SANDBANK ROAD PO BOX 50 COLUMBIA, IL 62236-0050
MARINE METAL 16901 R.L. Ostos Road Brownsville, TX 78526
MCCOY'S LUMBER 5500 East 14th Street Brownsville, TX 78521
MERVIS INDUSTRIES Attn: Mario Cantu 6955 N. FM 511 Brownsville, TX 78523
Milwhite, Inc. 5487 South Padre Island Hwy. Brownsville, TX 78521
MISWACO 13905 R. L. Ostos Road Brownsville, TX 78521
PARKER & COMPANY PO Box 484 Brownsville, TX 78521
Port Elevator Brownsville, LC 9155 R.L. Ostos Rd. Brownsville, TX 78521
Premier Chemicals C/O 905 Logistics 9405 Bethesda Court Matthews, NC 28104

RIO GRANDE FORWARDING 6333 Padre Island Highway. Brownsville, TX 78521
RTW TERMINALS 1005 Anchor Rd. Brownsville, TX 78521
SCHAEFER/ROLL & HOLD 2993 N. INDIANA STE3 BROWNSVILLE, TX 78521
SCHAEFER STEVEDORING PO Box 4499 Brownsville, TX 78520
SCHAEFER STEVEDORING/RH P.O. Box 4499 Brownsville, TX 78523
STF BOX 347115 PITTSBURGH, PA 15251-4115
Transmontaigne Terminaling 10150 State Hwy 48 Brownsville, TX 78520
TRANSMONTAIGNE OPERATING COMPANY LP 200 MANSELL CT. EAST, SUITE 600 ROSWELL, GA 30076-4853
Turn Key Warehousing, Inc. 200 Texas Ave., Ste. 155 Brownsville, TX 78521
Valero Energy Corp./Brownsville Terminal One Valero Way, E2-187F San Antonio, TX 78249



Robert A. Wimbish  
Attorney for the Brownsville & Rio Grande  
International Railway, LLC

Executed on: July 10, 2014