

224767

K&L|GATES

K&L Gates LLP  
1601 K Street NW  
Washington, DC 20006-1600  
t 202.778 9000 www.klgates.com

March 27, 2009

Kevin M Sheys  
202 778 9290  
Fax 202 778 9100  
kevin.sheys@klgates.com



BY HAND DELIVERY

The Honorable Anne K. Quinlan  
Acting Secretary  
Surface Transportation Board  
395 E Street SW  
Washington, DC 20423-00001

Re. STB Finance Docket No. 35225, San Benito Railroad LLC – Acquisition and Operation Exemption – Certain Assets of Union Pacific Railroad Company

Dear Acting Secretary Quinlan:

Enclosed for filing are (i) the original and ten copies of a Verified Notice of Exemption under 49 C F R § 1150.31 and a check covering the \$1,800 filing fee, and (ii) the original and ten copies of a Motion to Dismiss the Notice of Exemption. Also enclosed is a disc containing the enclosed filings. Original versions of Exhibits B and D to the Notice will be filed on Monday.

Please time and date stamp the extra copy of the filings and return it with our messenger.

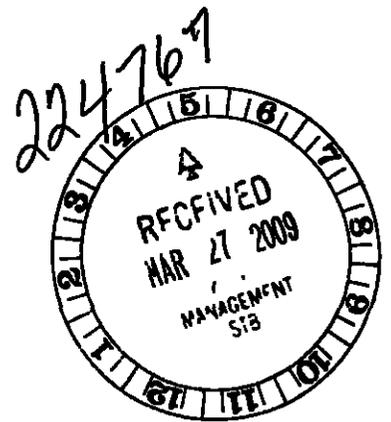
If you have any questions, please contact me.

Respectfully submitted,

Kevin M. Sheys

Enclosures

BEFORE THE  
SURFACE TRANSPORTATION BOARD



---

FINANCE DOCKET NO. 35225

SAN BENITO RAILROAD LLC  
- ACQUISITION EXEMPTION -  
CERTAIN ASSETS OF UNION PACIFIC RAILROAD COMPANY

ENTERED  
Office of Proceedings

MAR 27 2009

Part of  
Public Record

---

**SAN BENITO RAILROAD LLC  
MOTION TO DISMISS NOTICE OF EXEMPTION**

---

**I. INTRODUCTION**

San Benito Railroad LLC ("San Benito") has filed in this docket a Verified Notice of Exemption pursuant to 49 C.F.R. § 1150.31, et. seq., with respect to certain rail line and right-of-way (described below, the "Subject Line") that is the subject of an Option Agreement with Union Pacific Railroad Company ("UP"). Under the terms of the Option Agreement, upon consummation UP would retain an exclusive and perpetual freight rail operating easement over the Subject Line.

San Benito hereby moves the Board to dismiss the Notice. San Benito submits that because of the nature and terms of the acquisition of the Subject Line from UP as described in the Notice and this Motion to Dismiss (and its Exhibits), the acquisition would not be subject to Surface Transportation Board ("Board" or "STB") jurisdiction and consummation would not make San Benito a rail carrier.

**II. STATEMENT OF FACTS**

San Benito is a limited liability company organized in the State of California and is a non-carrier. UP is a corporation organized under the laws of the State of Delaware

and a Class I rail carrier. The purpose of the transaction would be to convey ownership of the underlying physical assets that constitute the Subject Line to San Benito while UP continues its freight rail operations on the line.

Under the Option Agreement entered into by and between San Benito and UP, San Benito would exercise an option to acquire UP's right, title and interest in the right-of-way, trackage and other physical assets associated with the line of railroad, referred to herein as the "Subject Line," extending between approximately milepost 0.07 and approximately milepost 12.50 in the County of San Benito, California. UP would retain from the transfer to San Benito an exclusive freight rail operations easement (the "Railroad Easement").<sup>1</sup> San Benito would not conduct, or have the right or obligation to conduct, freight rail service over the Subject Line and would not hold itself out as willing or able to do so.

UP would continue to conduct freight rail service over the Subject Line pursuant to its rights under the Railroad Easement. In addition, San Benito and UP would enter into a Usage Agreement (the "Usage Agreement") governing capital improvements, maintenance, and day-to-day operations on the Subject Line.<sup>2</sup>

San Benito would use the Subject Line for the purpose of providing (through a designated third-party operator) intrastate passenger rail service primarily for a planned community that would be designed and constructed by an affiliate of San Benito.<sup>3</sup>

---

<sup>1</sup> The Railroad Easement is reserved in the Quitclaim Deed, the form of which is attached hereto as Exhibit A.

<sup>2</sup> The Usage Agreement will be substantially in the form of Exhibit B.

<sup>3</sup> San Benito would obtain passenger operating rights on UP's line from the northern endpoint of the Subject Line to Gilroy, California. The Board does not have jurisdiction over these rights because the passenger service is wholly intrastate passenger service.

### III. ARGUMENT

Under 49 U.S.C. § 10901, the Board has exclusive jurisdiction over the acquisition of a railroad line by a non-carrier, where common carrier rights and obligations also are being transferred. Common Carrier Status of States, State Agencies, 363 I.C.C. 132, 133 (1980), aff'd sub nom. Simmons v. ICC, 697 F.2d 326 (D.C. Cir. 1982). Whether a particular transaction is an acquisition of a railroad line subject to Board jurisdiction depends on whether the acquiring entity is holding itself out to provide common carrier rail service and has the ability to provide common carrier rail service. Status of Bush Universal, Inc., 342 I.C.C. 550, 564 (1973). This is an objective test; the Board (like the former Interstate Commerce Commission ("ICC")) looks at what the acquiring entity will do as opposed to how it labels itself. Los Angeles County Transportation Commission – Petition for Exemption – Acquisition from Union Pacific Railroad Company, STB Fin. Docket No. 32374 (STB served Jul. 23, 1996); see United States v. California, 297 U.S. 175, 181 (1936).

Subtitle IV of Title 49 defines "railroad" to include "the road used by a rail carrier and owned by it or operated under an agreement...." 49 U.S.C. § 10102(6)(B). It defines "rail carrier" as a "person providing common carrier railroad transportation for compensation...." 49 U.S.C. § 10102(5). A typical Section 10901 rail line acquisition includes the conveyance of a property interest sufficient to permit the buyer to provide (or at least control) interstate railroad transportation for compensation, and that interest forms the basis of the Board's jurisdiction over the transportation and the buyer.

---

See *Magner O'Hara Scenic Railway v. Interstate Commerce Commission*, 692 F.2d 441 (6<sup>th</sup> Cir. 1982).

However, the Board (like the former ICC) has consistently recognized that under certain circumstances the acquisition of the physical assets of a rail line is not subject to its jurisdiction and does not make the buyer a rail carrier. Such precedent is applicable to and should govern the transaction that is the subject of the Option Agreement.

In State of Maine, Dept. of Transportation – Acquisition and Operation Exemption – Maine Central Railroad Company, 8 I.C.C.2d 835 (1991) (“State of Maine”), the State of Maine, acting by and through its Department of Transportation (“MDOT”), sought an exemption to acquire certain railroad right-of-way and trackage from Maine Central Railroad Company (“MEC”), subject to MEC’s retained easement for common carrier railroad operations. MDOT acquired the line for possible establishment of a public transit system using the acquired assets. MEC’s retained easement included access rights for maintenance and renewal of the line and was permanent. As a result, MDOT’s acquisition of the line’s underlying physical assets did not impair freight railroad operations. The ICC found that no common carrier rights or obligations were transferred to MDOT, because nothing in the transaction disabled MEC’s affiliate and lessee, Springfield Terminal Railroad (“STR”), from meeting its common carrier obligations, and STR could not cease to offer service on the line without ICC approval. For these reasons, the ICC saw “no reason to impose upon the purchaser of the underlying rail assets an additional common carrier obligation.” State of Maine, 8 I.C.C.2d at 837.

In State of Georgia, Dept. of Transportation – Acquisition Exemption – Georgia Southwestern Railroad, Inc., STB Fin. Docket No. 33876 (STB served Jul. 7, 2000), the State of Georgia, acting by and through its Department of Transportation (“GDOT”), filed

a motion to dismiss its notice of exemption for the acquisition of certain railroad assets, including rail line owned by Georgia Southwestern Railroad, Inc. ("GSRW"). Pursuant to an agreement with GSRW, GDOT acquired the rail line, but not the right or obligation to conduct common carrier freight operations on the line. Instead, pursuant to a separate easement agreement, Heart of Georgia Railroad, Inc. ("HOG") acquired an exclusive rail freight service easement over the line from GSRW.

The Board specifically noted that "under the easement agreement, HOG has the ability to provide unrestricted freight service as a railroad common carrier over the line." The Board also noted that "HOG's easement agreement enables it to carry out its common carrier obligation and gives it more than sufficient power over the operation and maintenance of the line to avoid any undue interference by GDOT." The Board acknowledged that based upon the representations made by the parties, GDOT would not conduct any freight rail operations over the line or hold itself out to do so. Accordingly, the Board held that the proposed transaction did not require Board approval and granted GDOT's motion to dismiss the notice of exemption.<sup>4</sup>

In State of Wisconsin Dept. of Transportation – Petition for Declaratory Order, STB Fin. Docket No. 34181 (STB served Aug. 1, 2002), the State of Wisconsin Department of Transportation ("WisDOT") requested a declaratory order to determine whether the Board had jurisdiction over its acquisition of certain specified railroad right-of-way and improvements from the Wisconsin and Southern Railroad company ("WSOR"). Pursuant to the acquisition transaction, WisDOT would exercise an option to acquire the real estate and improvements on a line of railroad operated by WSOR, but

---

<sup>4</sup> See also State of Georgia, Dept. of Transportation – Acquisition Exemption – South Carolina Central Railroad, Inc., STB Fin. Docket No. 34057 (STB served Apr. 30, 2002).

would not assume the common carrier obligation to operate the rail line. Instead, WSOR would retain a perpetual easement to operate freight rail service on the rail line.<sup>5</sup>

The STB noted that pursuant to the acquisition transaction, no common carrier obligations were being transferred and that WisDOT would not hold itself out as a common carrier performing rail freight service. The STB acknowledged that WSOR would retain all common carrier rights and obligations by virtue of its perpetual easement for freight rail operations. Therefore, the STB concluded that as a result of the acquisition transaction, there would be no alteration of any common carrier rights or obligations, and therefore STB approval was not required.

Taken together, State of Maine and subsequent cases establish that an entity may acquire the physical assets of a rail line without becoming a carrier, provided that another entity retains sufficient interest to operate as a rail carrier on the line and has autonomy to conduct common carrier freight rail operations. Stated somewhat differently, if an acquisition of a rail line is subject to the existing operating interests of a common carrier and the acquiring entity does not have the ability to materially interfere with the carrier's operations, the acquiring company is not a common carrier subject to Board jurisdiction.

The transaction described herein would be similar in all material respects to the transactions in the State of Maine case and the other cases discussed above. San Benito would acquire certain real property and related improvements, but would not acquire the rights necessary to conduct or control common carrier freight rail operations

---

<sup>5</sup> The option was included in an operating agreement between WSOR and Wisconsin River Rail Transit Commission ("WRRTC") that gave WRRTC the right to contract for commuter rail service on the line.

on the Subject Line. UP would retain the exclusive right to provide or permit rail freight service on the Subject Line. See Exhibit A, at B-2.

UP and San Benito would enter into a Usage Agreement pursuant to which UP would have the exclusive right and obligation to provide rail carrier service on the Subject Line. See Sections 2.1(a) and 2.2 of the Usage Agreement, Exhibit B. Neither San Benito nor any other person or entity (other than UP or its successors or assigns) would be permitted to provide any type of freight rail service on the Subject Line. See Sections 2.1(a) and 2.2 of the Usage Agreement, Exhibit B. UP would have the right to construct capital improvements on the Subject Line. See Section 2.4 of the Usage Agreement, Exhibit B. The Usage Agreement provides that UP would be responsible for operating its freight trains on the Subject Line. See Section 3.2(a) of the Usage Agreement, Exhibit B. UP currently maintains the Subject Line to a standard reasonably determined by UP to be consistent with its use of the line. If San Benito elected to assume maintenance of the Subject Line, it would be obligated to do so to not less than the standard previously met by UP. See Section 4.1 of the Usage Agreement, Exhibit B. If, at anytime, the maintaining party fails in its maintenance obligation, the other party may step in to perform maintenance and would be entitled to full reimbursement of costs. See Section 4.2 of the Usage Agreement, Exhibit B. UP currently operates and dispatches all trains on the Subject Line. San Benito would have the right to take over dispatching of the Subject Line, in which case San Benito would provide UP with reports and other information relating to train and equipment movements as may be reasonably necessary for UP to conduct its freight rail service on the Subject Line. See Section 3.1(c) of the Usage Agreement, Exhibit B. UP and San

Benito would meet and confer in good faith to discuss and resolve any issues that arise under the Usage Agreement. See Section 3.1(g).

San Benito's acquisition of the underlying physical assets of the Subject Line would not constitute an acquisition of a line of railroad subject to the Board's jurisdiction. San Benito's ownership interest in those assets would not make it a common carrier subject to STB jurisdiction. San Benito would not conduct freight rail operations on the Subject Line and would not hold itself out as willing or able to do so.

#### IV. CONCLUSION

For the reasons set forth above, San Benito respectfully requests that the Board dismiss its Verified Notice of Exemption for lack of jurisdiction.

Respectfully submitted,

By: 

Kevin M. Sheys  
Janie Sheng  
K&L Gates LLP  
1601 K Street, NW  
Washington, D.C. 20006  
(202) 778-9000

**ATTORNEYS FOR SAN  
BENITO RAILROAD LLC**

March 27, 2009

Exhibit A  
Motion

RECORDING REQUESTED BY:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

AND WHEN RECORDED MAIL TO:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

MAIL TAX STATEMENTS TO:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

SPACE ABOVE THIS LINE FOR RECORDER'S USE

**QUITCLAIM DEED**

For good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, **Union Pacific Railroad Company**, a Delaware corporation (formerly known as Southern Pacific Transportation Company, a Delaware corporation) ("**Grantor**"), remises, releases and quitclaims to San Benito Railroad LLC, ("**Grantee**") (a) all of Grantor's right, title and interest in the land located in the County of San Benito, State of California, more particularly described on Exhibit A attached hereto and made a part hereof ("**Land**"); (b) all of Grantor's interest in the improvements on the Land, except for the retained personalty set forth on Exhibit B attached hereto and made a part hereof ("**Improvements**"); (c) all fixtures that Grantor owns and uses in the operation and maintenance of the Land and the Improvements; and (d) all appurtenances to the foregoing property (the Land, the Improvements, such fixtures and such appurtenances being referred to herein collectively as the "**Property**") subject to the reservations set forth below.

Grantor excepts from the Property hereby quitclaimed and reserves unto itself and its successors and assigns the following:

(i) a perpetual, nonexclusive easement (the "**Fiber Optics Easement**") ten (10) feet in width, at the location identified in writing to Seller by Purchaser of any fiber optic or other cable installed by Purchaser on the Property, or if Purchaser has not given Seller written notice of any such installations at the time Seller elects to utilize the Fiber Optics Easements then such easements shall be at a location which is the ten(10) foot wide area which is the easternmost section of the Property and along the entire length of the Property, together with necessary rights of access to the Fiber Optics Easement over and across the Property, for the purpose of constructing, reconstructing,



maintaining, repairing, operating, using, relocating and/or removing future fiber optic communications systems, lines, facilities and necessary appurtenances (above ground as necessary), and all rights related thereto (collectively, the "Fiber Optics Easement Use"), provided, however, that: (a) Grantor shall pay all costs whatsoever in connection with the Fiber Optics Easement Use by Grantor and (b) the Fiber Optics Easement Use shall not interfere in any way with the constant, continuous and uninterrupted use of the tracks, property and facilities of Grantee or otherwise unreasonably interfere with or create safety risks in connection with Grantee's rail operations or other permitted uses of the Property by Grantee, and (c) the Fiber Optics Easement Use shall be expressly limited to Grantor's use in satisfying existing obligations under those certain third party agreements described in Exhibit D attached hereto; and

(ii) a perpetual, exclusive easement (the "Railroad Easement") in, on, under, over and through the Property, in which areas Grantor and its lessees, sublessees, licensees, successors and assigns shall have the right, in accordance with the terms of the Usage Agreement and Trackage Rights Agreement to be entered into between the parties (the "Trackage Agreements") to construct, reconstruct, maintain, repair, operate, use, relocate and/or remove existing and/or future railroad, rail and railroad-related equipment, facilities, and transportation systems necessary for and limited exclusively to Grantor's freight rail operations, provided, however, that: (a) if Grantor ever abandons or discontinues its freight rail operations (the "Operations"), the Railroad Easement shall be automatically extinguished as of the effective date of the abandonment or discontinuance of the Operations and Grantor shall thereafter have no right to any maintenance fees from Grantee for the Operations, (b) if Grantor intends to file an application or petition to abandon or discontinue the Operations, Grantor shall serve Grantee with a copy of the application or petition to abandon or discontinue the Operations at least thirty (30) days in advance of the filing or such application or petition, (c) if Grantor receives an offer to purchase or otherwise acquire the Railroad Easement which Grantor desires to accept, Grantor shall first provide Grantee with a copy of such offer and Grantee shall have the right, within thirty (30) days following receipt of such offer, to elect to acquire the Railroad Easement from Grantor on the same terms and conditions as are contained in such offer, except that if such offer is made as an Offer of Financial Assistance ("OFA") in Grantor's abandonment case and Grantee has also made an OFA, Grantor and Grantee shall negotiate the terms and conditions of the sale of the Railroad Easement, and if Grantee has not made an OFA, Grantee shall not oppose a sale of Grantor's exclusive perpetual freight easement to the offeror who has made an OFA, (d) Grantor shall first obtain Grantee's prior written consent, which shall not be unreasonably withheld, before selling or conveying the Railroad Easement, and (e) Grantor shall never sell or convey less than all of its exclusive rights to the Railroad Easement or offer non-exclusive rights to the Railroad Easement to any third party.

Grantor shall be entitled to all revenues derived from: all current and future agreements to which Grantor is a party affecting freight rail operations. Grantor may assign this Railroad Easement, in whole or in part, without the consent of Grantee, to any successor or affiliate of Grantor, to any other Class I Railroad. Grantor may assign this Railroad Easement, with the consent of Grantee (not to be unreasonably withheld

or delayed) to any other operator who is financially responsible and has a management team with a demonstrated record of reliable and safe railroad maintenance and operating experience.

IN WITNESS WHEREOF, Grantor has set its hand and seal as of this \_\_\_ day of \_\_\_\_\_, 2\_\_\_\_.

**GRANTOR:**

**UNION PACIFIC RAILROAD COMPANY,  
a Delaware Corporation**

By: \_\_\_\_\_

Its: \_\_\_\_\_

**USAGE AGREEMENT -- HOLLISTER BRANCH**

THIS USAGE AGREEMENT ("Agreement") dated as of \_\_\_\_\_, 200\_, is entered into by and between Union Pacific Railroad Company, a Delaware corporation ("Seller"), and San Benito Railroad LLC, a California limited liability company ("Purchaser").

**RECITALS:**

A. Seller and Purchaser have entered into an Option Agreement dated September 4, 2001 (the "Option Agreement"), pursuant to which Seller has granted Purchaser an option to acquire the railroad line and right-of-way commonly known as the Hollister Branch, between the UP Coast Main Line in the vicinity of M.P. 0.07 and the current stub end of the track, near Park Street, in the vicinity of M.P. 12.50 in Hollister, California, located in the County of San Benito, State of California, as described in Exhibit A, hereto, together with certain improvements, fixtures, trackage and structures located thereon, and certain contract and other rights relating thereto, all of which are included in the definition of "Property" as further defined in the Option Agreement. If Purchaser exercises its option and acquires the Property upon the terms and conditions set forth in the Option Agreement, Seller and Purchaser shall execute this Agreement, which shall be effective upon the Closing of Purchaser's acquisition of the Property (the "Effective Date").

B. Purchaser has acquired the Property for the purpose of providing passenger rail service (through a designated third-party operator) and for any purpose

other than those purposes reserved exclusively to Seller in the Option Agreement (the "Retained Rights")

C. Seller has retained a perpetual and exclusive easement (the "Freight Easement") to provide common carrier freight rail service on the Joint Trackage (as defined in Section 1 below). Purchaser has agreed to permit Seller to continue such freight rail service on the terms set forth herein.

D. Purchaser and Seller desire to set forth their respective rights and obligations with respect to the Joint Trackage, including the terms and conditions governing Seller's provision of common carrier freight rail service on the Joint Trackage.

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

#### **SECTION 1. DEFINITIONS.**

"Agreement" shall mean this Usage Agreement by and between Union Pacific Railroad Company and San Benito Railroad LLC.

"Changeover Date" shall mean the date, if any, on which Purchaser elects to assume responsibility for maintenance and dispatching on the Joint Trackage or any portion thereof, as set forth in a written notice provided by Purchaser to Seller thirty (30) days prior to the assumption of such responsibility.

"Changes and/or Additions" shall mean any improvements to the Joint Trackage constructed after the Effective Date, including but not limited to additions, betterments,

and any construction, reconstruction, alteration and modification thereto, and any retirements to the Joint Trackage, but excluding ordinary maintenance, repair and renewal of the Joint Trackage.

"Effective Date" shall mean the date of execution of this Agreement, which shall coincide with the Closing of Purchaser's acquisition of the Property under the Option Agreement (as the term "Closing" is defined therein).

"Environmental Laws" shall mean any and all applicable laws, statutes, regulations, enforceable requirements, order, decrees, judgments, injunctions, permits, approvals, authorizations, licenses, permissions or binding agreements issued, promulgated or entered by any governmental agency having jurisdiction over the Joint Trackage, relating to the environment or relating to the management, release or threatened release of contaminants or noxious orders, including, without limitation, the Hazardous Materials Transportation Act, the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), the Resource Conservation and Recovery Act, the Toxic Substances Control Act, the Solid Waste Disposal Act, the Clean Air Act, the Clean Water Act, and any similar or implementing federal, state or local law, and all amendments or regulations promulgated thereunder.

"Equipment" shall mean trains, locomotives, passenger cars, freight cars (loaded or empty), intermodal units (loaded or empty) or cabooses in the account, possession, custody or control of a party. Equipment shall also mean vehicles and other machinery capable of being operated on railroad tracks or on right-of-way for purposes of maintenance, repair or renewal of such railroad tracks

**"Excluded Conduct" shall have the meaning set forth in Section 6.**

**"Freight Easement" shall mean the perpetual and exclusive common carrier freight railroad easement that Seller reserved from its conveyance of the Property to Purchaser, as more particularly described in the Deed attached to the Option Agreement.**

**"Freight Operator" shall have the meaning set forth in Section 2 3**

**"Hazardous Materials" shall mean any pollutant, toxic substance, hazardous waste, hazardous material, hazardous substance, oil or petroleum product as defined in or pursuant to the Resource Conservation and Recovery Act, as amended; the Comprehensive Environmental Response, Compensation, and Liability Act, as amended; the Toxic Substances Control Act, or any federal, state or local environmental law or regulation existing as of the date hereof.**

**"Joint Trackage" shall mean the railroad trackage located between the Coast Main Line in the vicinity of M.P. 0.07 and the current stub end of the track, near Park Street, in the vicinity of M.P. 12.50, in Hollister, California in the right-of-way described in Exhibit A, hereto, and all improvements, fixtures, and structures located thereon or appurtenant thereto as of the Effective Date, including but not limited to rails, ties, switches, bridges, culverts, tunnels, grade crossings, buildings, communication systems and signal systems.**

**"Loss" or "Losses" shall mean all losses, damages, claims, demands, costs, liabilities, judgments, fines, fees (including, without limitation, reasonable attorneys'**

fees) and expenses (including, without limitation, costs of investigation, expenses at arbitration, trial or appeal and without institution of arbitration or suit, and, with respect to damage or destruction of property, cleanup, repair and replacement expenses) of any nature arising from or in connection with the death of or injury to persons, including, without limitation, employees of the parties, or damage to or destruction of property, including, without limitation, property owned by either of the parties hereto, in connection with freight rail service or passenger rail service on, over and upon the Joint Trackage.

**"Maintenance Fee" shall have the meaning set forth in Section 4 1**

**"Operator" shall have the meaning set forth in Section 2 3.**

**"Option Agreement" shall mean the Option Agreement dated September 4, 2001 by and between Union Pacific Railroad Company and San Benito Railroad LLC.**

**"Passenger Service Commencement Date" shall mean the date, if any, on which Purchaser (through its Operator) commences regularly scheduled, revenue passenger rail service on the Joint Trackage. The Passenger Service Commencement Date cannot occur prior to the Changeover Date.**

**"Property" shall have the meaning set forth in the Option Agreement.**

**"Purchaser" shall mean the San Benito Railroad LLC.**

**"Retained Rights" shall have the meaning set forth in the Option Agreement.**

**"Seller" shall mean the Union Pacific Railroad Company**

"STB" shall mean the Surface Transportation Board of the United States Department of Transportation or any successor federal agency.

"Trains" shall consist of one or more locomotive units with freight or passenger cars attached thereto or one or more self-propelled passenger cars.

## **SECTION 2. RIGHTS OF PURCHASER AND SELLER.**

### **2.1 Purchaser's and Seller's Rights Generally**

(a) Pursuant to the Freight Easement, and subject to the terms and conditions of this Agreement, Seller has reserved and shall have the perpetual and exclusive right to provide common carrier freight rail service to current and future freight rail customers located on or adjacent to the Joint Trackage. Neither Purchaser nor any person or entity other than Seller (or its successors or assigns) shall be permitted to provide local, overhead or any other type of freight rail service on the Joint Trackage

(b) Except for the Retained Rights and any other rights provided to Seller under this Agreement, Purchaser shall have all of the rights incident to ownership of the Property and the Joint Trackage, including but not limited to the right to use the Joint Trackage for any purpose other than providing freight rail service and the right to rehabilitate, relocate or otherwise construct improvements on or adjacent to the Joint Trackage under the terms and conditions set forth herein.

## 2.2 Freight Service

(a) Seller currently provides and has the exclusive right and obligation to continue to provide common carrier freight rail service to customers located on or adjacent to the Joint Trackage. Seller shall have the right to use the Joint Trackage and any Changes and/or Additions to the Joint Trackage constructed by Seller in accordance with Section 2.4 to provide such common carrier freight rail service. Seller shall have the right to use any Changes and/or Additions to the Joint Trackage constructed by Purchaser for switching operations for current and future local customers, including all normal and customary railroad operations in connection therewith ("Switching Operations"). Subject to the foregoing right of Seller, Seller shall not have the right to use any Changes and/or Additions to the Joint Trackage constructed by Purchaser for any purposes other than Switching Operations. Seller shall provide Purchaser with advance written notice, as soon as is reasonably practicable, if Seller intends to provide freight rail service to any customer located on or adjacent to the Joint Trackage that is not currently being served by Seller from the Joint Trackage as of the Effective Date of this Agreement. If Seller materially extends or increases its freight rail service obligations with respect to customers located on or adjacent to the Joint Trackage, it shall provide advance written notice thereof to Purchaser as soon as is reasonably practicable. Notwithstanding such notice, and except as otherwise provided herein, Purchaser shall have no right to veto any such extension of freight rail service.

(b) Seller expressly retains and Purchaser expressly declines to assume any obligation to provide freight rail service to customers located on or adjacent

to the Joint Trackage, any common carrier obligation or any other obligation with respect thereto.

**2.3 Third Party Operators.** It is understood and agreed by the parties hereto that Purchaser has the right to designate a third party operator ("Operator") to exercise its operating and related rights under this Agreement. The parties agree that the Operator shall be the same entity that is operating the Caltrain San Francisco-San Jose-Gilroy service at the time of such designation, and thereafter, any successor operator of such service. For purposes of this Agreement, the term "Purchaser" shall be deemed to include or to mean and refer to the "Operator," and the term "Purchaser's employees" (or any similar reference) shall be deemed to include or to mean and refer to the "Operator's employees," unless the context requires otherwise. In addition, any reference herein to a "party" or the "parties" to this Agreement shall be deemed to include the Operator, unless the context requires otherwise. The Seller's operating and related rights under this Agreement can be exercised by a designated third-party operator ("Freight Operator") only in accordance with Section 11 herein. Both parties and their respective operators, if any, shall comply with any and all governmental regulations, and all terms and conditions of this Agreement.

**2.4 Seller's Right to Make Changes and/or Additions.**

(a) Seller shall have the right, at its sole cost and expense, to design and construct Changes and/or Additions to the Joint Trackage consisting solely of railroad-related facilities reasonably necessary for and related to Seller's freight operations on the Joint Trackage; provided, however, that such Changes and/or

Additions shall not unreasonably interfere with Purchaser's use or intended use of the Joint Trackage or the Property; provided, further, that Seller shall not have the right to construct additional trackage on the Property after the Effective Date without permission of Purchaser, which shall not be unreasonably withheld or delayed. Purchaser shall have the right to review and approve such Changes and/or Additions in accordance with subparagraph 2.4(b) below. In addition, Purchaser shall have right to use such Changes and/or Additions in accordance with the terms and conditions of this Agreement.

(b) Seller shall deliver copies of the design plans (including schematic designs and any engineering, structural, mechanical and construction plans and specifications)(collectively "Plans") relating to such Changes and/or Additions that it proposes to design and construct pursuant to subparagraph 2.4(a) at least ninety (90) days prior to commencing construction of such Changes and/or Additions. Purchaser shall have the right to reject such Plans if the proposed design would unreasonably interfere with Purchaser's use or intended use of the Joint Trackage or the Property. The parties shall use their best efforts to agree on appropriate modifications to such Plans in order to eliminate or minimize interference with Purchaser's use or intended use of the Joint Trackage or the Property. If the parties are unable to agree on appropriate modifications to such Plans, the matter shall be submitted to the dispute resolution process set forth in Section 7 herein

(c) Seller shall construct such Changes and/or Additions that have been approved by Purchaser in accordance with subparagraph (b) at such times and in such a manner as to not unreasonably interfere with, delay or endanger passenger rail

operations on the Joint Trackage or the Property, Purchaser's Trains or Equipment, or the Joint Trackage or Property itself. Such construction shall be conducted in accordance with Seller's safety rules and construction standards and shall comply with all applicable laws, rules and regulations. Seller shall provide, at its sole cost and expense, appropriate protection to Purchaser's employees, passengers, Trains and Equipment during such construction.

**2.5 Purchaser's Right to Make Changes and/or Additions.**

(a) Purchaser shall have the right, at its sole cost and expense, to design and construct Changes and/or Additions to the Joint Trackage in its sole discretion. Purchaser shall provide Seller with ninety (90) days advance written notice prior to commencing the construction of such Changes and/or Additions. Purchaser shall construct such Changes and/or Additions at such times and in such a manner as to not unreasonably interfere with, delay or endanger Seller's freight rail operations on the Joint Trackage or Seller's Trains or Equipment located thereon. Purchaser shall provide, at its sole cost and expense, appropriate protection to Seller's employees, lading, Trains and Equipment during such construction.

(b) Purchaser shall be responsible for designing and constructing, at its sole cost and expense, any Changes and/or Additions to the Joint Trackage (including, without limitation, any track crossings or grade separations) that are required by any governmental agency, unless such Changes and/or Additions are required by such agency solely for or solely as a result of Seller's use of the Joint Trackage (in which event Seller shall be responsible for designing and constructing such Changes and/or

Additions, at its sole cost and expense, and in compliance with the provisions of the preceding Section 2.4).

**2.6 Ownership of Changes and/or Additions.** Purchaser shall own all Changes and/or Additions that are not expressly made the property of Seller under this Section 2.6. Seller shall own such Changes and/or Additions that are (i) sidings, industrial tracks, spur tracks or other improvements that are reasonably severable from the main corridor right-of-way and trackage of the Joint Trackage (ii) that are used solely to provide freight rail service on the Joint Trackage and (iii) that are made at Seller's sole cost and expense. Purchaser shall not remove any such Changes and/or Additions to the Joint Trackage without the prior written consent of Seller, which consent shall not be unreasonably withheld, conditioned or delayed. Within ninety (90) days of the abandonment of Seller's common carrier freight obligations on the Joint Trackage, Seller shall have the right (but not the obligation) to remove any Changes and/or Additions that it owns from the Joint Trackage and restore the Joint Trackage to its original condition as of the Effective Date. If Seller does not remove any such Changes and/or Additions within the ninety (90) day period, Purchaser shall have the right to request that Seller, at its sole cost and expense and within ninety (90) days, remove such Changes and/or Additions and restore the Joint Trackage to its original condition as of the Effective Date. Any Changes and/or Additions not removed by Seller in accordance with the foregoing sentence shall become the property of Purchaser.

### **SECTION 3. OPERATIONS.**

**3.1 Dispatching and Control.**

(a) Prior to the Changeover Date, the operation and dispatching of any and all Trains and Equipment of either party over and along the Joint Trackage shall be subject to the direction and control of Seller's train dispatchers and other authorized agents. Seller shall be responsible for such dispatching at its sole cost and expense. In performing its dispatching responsibilities, Seller shall schedule and dispatch Trains and Equipment over and along the Joint Trackage in a safe, reliable and on-time manner, in a manner that minimizes disruption of Purchaser's passenger operations and other activities on the Joint Trackage, if any, and in a manner that complies with all applicable laws, regulations or rules (including reasonable operating rules as Seller shall, from time to time, institute in accordance with the terms and conditions of this Agreement). Seller shall provide Purchaser with reports and other information relating to Train and Equipment movements on the Joint Trackage as may be reasonably necessary for Purchaser to conduct activities on the Joint Trackage.

(b) Prior to the Changeover Date, Purchaser shall have access to the Joint Trackage for the purpose of surveying, inspecting or testing the Joint Trackage or for any other similar purpose, unless such other similar purpose could cause a work stoppage or other labor dispute on any of Seller's rail lines, upon giving reasonable notice to Seller; provided that, Purchaser shall not undertake any rehabilitation, construction or relocation activities thereon prior to the Changeover Date. During any period of access to the Joint Trackage by Purchaser for such purposes, if Purchaser reasonably requests, Seller shall issue notices of interrupted service, including embargo notices (with duration thereof to be specified by Purchaser) to affected customers located on or adjacent to the Joint Trackage. Any access or activity by Purchaser

pursuant to this Section shall be coordinated with Seller to minimize interference with freight service, but Purchaser shall bear the financial cost of any such interruption relating to freight operations, including the costs of flagmen or safety signals. Purchaser shall hold harmless, indemnify and defend Seller from and against any cost, expense, claim or liability (other than labor disputes or claims) resulting from any such access or activities, including, without limitation, claims by freight customers located on or adjacent to the Joint Trackage alleging failure to provide adequate freight service

(c) Except as set forth in Section 3.1(a) and Section 3.1(b), the management and operation of the Joint Trackage shall, at all times, be under the exclusive direction and control of Purchaser and its authorized agents, and the dispatching of all Trains and Equipment of either party over and along the Joint Trackage shall, at all times, be subject to the exclusive direction and control of Purchaser's dispatcher and other authorized agents. Purchaser shall be responsible for such dispatching at its sole cost and expense. In performing its dispatching responsibilities, Purchaser shall schedule and dispatch Trains and Equipment over and along the Joint Trackage in a safe, reliable and on-time manner and in a manner that complies with all applicable laws, regulations or rules (including reasonable operating rules as Purchaser shall, from time to time, institute in accordance with the terms and conditions of this Agreement). Purchaser shall provide Seller with reports and other information relating to Train and Equipment movements on the Joint Trackage as may be reasonably necessary for Seller to conduct freight operations on the Joint Trackage.

(d) At least thirty (30) days prior to the Passenger Service Commencement Date, Purchaser shall determine the schedules for its Trains and shall

provide such schedules to Seller. Prior to the Passenger Service Commencement Date, Seller shall reschedule its Trains, to the extent necessary, so as to minimize interference with Purchaser's scheduled Trains. Each party shall have a continuing obligation to notify the other of any changes to such Train schedules, and Seller shall have a continuing obligation to schedule its Trains so as to minimize interference with Purchaser's scheduled Trains.

(e) All operating and dispatching decisions affecting the movement of Trains and Equipment on the Joint Trackage shall give priority to passenger Trains.

(f) Neither party shall adopt, except by agreement with the other party (which shall not be unreasonably withheld, conditioned or delayed), a new communications system or signal system for use on the Joint Trackage which would adversely affect the other party's provision of its rail service, unless required by any statute, law, ordinance or governmental regulation.

(g) The parties hereby acknowledge that operating and management issues may arise from time to time with respect to the Joint Trackage and agree to meet and confer in good faith to discuss and resolve such issues upon the written request of either party.

### 3.2 Train Operations.

(a) Purchaser and Seller shall each be responsible for providing and operating their own Trains and Equipment on the Joint Trackage and each shall operate such Trains and Equipment in a safe manner. Each party shall be responsible for

furnishing, at its sole cost and expense, all labor, fuel and other supplies necessary for the operations of its own Trains and Equipment over the Joint Trackage.

(b) Purchaser and Seller shall each comply with (i) all applicable laws, regulations or rules, state or federal, governing operations on, and the inspection, testing or safety of, the Joint Trackage, the Trains and Equipment thereon, and any personnel employed in the operation and maintenance thereof (including any laws relating to the transportation of Hazardous Materials applicable to their respective operations), and (ii) all of Purchaser's timetables, general orders and bulletins and other standards relating to such operation, maintenance, condition, inspection, testing or safety, which timetables, general orders, bulletins and other standards shall be provided in writing by Purchaser to Seller.

(c) Neither Purchaser nor Seller shall have any responsibility for inspecting, maintaining, servicing or repairing any Trains or Equipment used by the other party on the Joint Trackage. If, for any reason, Purchaser's or Seller's Trains or Equipment become stalled or disabled on the Joint Trackage and are unable to proceed, then the party whose Trains or Equipment are involved in the incident (the "Responsible Party") shall within a reasonable time furnish such assistance as may be necessary to haul, help, push or move such Trains or Equipment and clear the Joint Trackage. If the Responsible Party does not clear its Trains or Equipment from the Joint Trackage within a reasonable time, the other party may clear such Trains or Equipment from the Joint Trackage and obtain from the Responsible Party reimbursement of all reasonable costs incurred in so doing.

(d) Purchaser shall, as soon as practicable, notify Seller of any investigation or hearing concerning the violation of any operating rule, safety rule, regulation, order or instruction of Purchaser by any employee of Seller. Such investigation or hearing may be attended by an official of Seller.

(e) If in the exercise of any of its rights or performance of any of its obligations under this Agreement, Seller shall reasonably need to enter upon any portion of the Joint Trackage outside the normal course of freight operations, then Seller shall give reasonable notice to Purchaser of such entry, which notice shall be not less than forty-eight (48) hours in advance, except in the case of emergencies. Except in the case of emergencies, in no event shall Seller, or any of its agents, servants, employees, consultants or contractors, enter upon the Joint Trackage outside the normal course of freight operations without having first received permission from Purchaser.

#### **SECTION 4. MAINTENANCE.**

##### **4.1 Maintenance Obligations of Seller.**

(a) Prior to the Changeover Date, Seller shall at its sole cost and expense, and under its sole management and control, maintain the Joint Trackage to a level reasonably determined by Seller to be consistent with the use being made thereof by Seller. Such maintenance shall include, without limitation, the repair of trackage, structures and signals, installation of ties and ballast, surfacing work and replacement *in-kind of existing facilities such as trackage, structures and signals.* In conducting its maintenance obligations, Seller shall use reasonable and customary care, skill and diligence and shall comply with all applicable laws, regulations or rules.

(b) No more than ten (10) days after the Changeover Date, the parties shall conduct a joint inspection of the Joint Trackage. The date on which the joint inspection occurs shall be the Joint Inspection Date.

(c) As of the Changeover Date, Purchaser shall assume sole and exclusive responsibility for maintaining, under its sole management and control, the Joint Trackage at no less than the condition the Joint Trackage was in on the Joint Inspection Date. Such maintenance shall include, without limitation, the repair of trackage, structures and signals, installation of ties and ballast, surfacing work and replacement in-kind of existing facilities such as trackage, structures and signals. At such time as Purchaser elects to commence passenger rail service on the Joint Trackage, the Joint Trackage must be upgraded to minimum FRA Class III standards at Purchaser's sole cost and expense.

(d) Following the Changeover Date, but prior to the Passenger Service Commencement Date, Seller shall pay to Purchaser a fee of \$60.00 per loaded car for each loaded car that moves over the Joint Trackage ("Maintenance Fee"). Seller and Purchaser further agree that the Maintenance Fee shall be increased or decreased on an annual basis (as of each anniversary of the Changeover Date) to reflect fifty percent (50%) of the change in the Rail Cost Adjustment Factor-Unadjusted from the corresponding quarter of the prior year.

(e) As of the Passenger Service Commencement Date, the Maintenance Fee charged to Seller by Purchaser shall be terminated.

4.2 Failure to Maintain. In the event that either Purchaser or Seller (as appropriate, the "Maintaining Party") fails to fulfill any maintenance obligation under Section 4.1 of this Agreement, the other party shall be entitled to give written notice of such failure to the Maintaining Party. If the Maintaining Party has not performed such maintenance obligation within thirty (30) days after receipt of such notice, the other party may perform such maintenance obligation and shall be entitled to full reimbursement for the costs thereof from the Maintaining Party; provided, however, that if the Maintaining Party makes its best efforts to commence to cure such failure within such thirty (30) days, the period for cure shall be extended for so long as the Maintaining Party continues to make its best efforts to cure, but in no case longer than an additional thirty (30) days. The performance of any such maintenance obligation by the other party shall not be deemed or construed as an assumption of any other or ongoing maintenance obligations of the Maintaining Party.

## **SECTION 5. INSURANCE**

(a) Purchaser shall obtain and maintain general liability insurance with limits of liability applicable to bodily injury and property damage in the amount of at least One Hundred Million Dollars (\$100,000,000.00) per occurrence and shall either include its Operator as insured under its policies or furnish evidence of separate insurance of the same amount and type for the Operator. Insurance shall be placed with a company or companies authorized to conduct business in California which has a current Best's Insurance Guide Rating of at least A, or its equivalent. Purchaser may self-insure to an amount not to exceed Five Hundred Thousand Dollars (\$500,000.00) provided that the total coverage limits (self insurance plus excess liability insurance) are at least One

**Hundred Million Dollars (\$100,000,000.00) per occurrence. Purchaser shall provide Seller with certificates of insurance and endorsements evidencing the coverage specified above prior to the Passenger Service Commencement Date. The foregoing policy limit shall be adjusted by the parties every five (5) years to reflect industry standards, liability claim trends and market conditions, but in no event shall the total coverage ever be less than One Hundred Million Dollars (\$100,000,000.00); provided that any adjustment in the policy limit shall be capped at ten (10) percent per adjustment period.**

**(b) Seller shall obtain and maintain at all times this Agreement is in effect, at its sole cost and expense, general liability insurance coverage, or self insurance, consistent with other railroads of similar size and operations. Such insurance coverage or self insurance shall be at least as comprehensive as the coverage provided by ISO form CG 00 01 10 93, with limits of liability applicable to bodily injury and property damage in the amount of at least One Hundred Million Dollars (\$100,000,000.00). If obtained from an insurance company or companies, such insurance shall be placed with a company or companies authorized to conduct business in California which has a current Best's Insurance Guide Rating of at least A, or its equivalent. Purchaser and its Operator shall be named as additional insureds (or treated as additional insured to the extent Seller is self-insured) under Seller's coverage, in a form acceptable to Purchaser. Seller shall provide Purchaser with certificates of insurance and copies of endorsements, or a letter of self insurance, evidencing such insurance coverage or self insurance within thirty (30) days after the Effective Date of this Agreement.**

(c) The general liability insurance or self insurance required by this Section shall provide coverage for personal injury, bodily injury, death and property damage with respect to all operations of the Seller and Purchaser on the Joint Trackage. Such insurance shall include broad form contractual liability coverage and shall be applicable to the indemnity provisions set forth in Section 6. Any policy of general liability insurance obtained or maintained by the Purchaser shall provide a waiver of subrogation and shall name Seller as an additional insured with respect to any liability to be borne by the Purchaser pursuant to the provisions of Section 6. Any policy of general liability insurance obtained or maintained by the Seller shall provide a waiver of subrogation in favor of Purchaser and its Operator, and shall name Purchaser and its Operator as additional insureds with respect to any liability to be borne by the Seller pursuant to the provisions of Section 6; to the extent that Seller maintains self-insurance, Seller hereby waives its rights of subrogation against Purchaser and its Operator with respect to all claims which are covered by such self-insurance (or would have been covered had Seller purchased insurance), and agrees that Purchaser and its Operator shall be treated as additional insureds under Seller's coverage, in a form acceptable to Purchaser.

(d) The insurance (including self insurance) obtained or maintained pursuant to this Section shall be primary with respect to the liability obligations under this Agreement of the party obtaining the insurance and with respect to the interests of all parties added as additional insureds. Any other insurance maintained by an additional insured shall be excess of the coverage herein defined as primary and shall not contribute with it.

(e) Unless otherwise specified herein, the insurance required by this Section shall be maintained by each party for the full term of this Agreement and shall not be permitted to expire or be canceled or materially changed except upon sixty (60) days' written notice to the other party. Each insurance policy required by this Section shall provide that coverage shall not be suspended, voided, canceled, or materially reduced in coverage or limits except after sixty (60) days' prior written notice has been given to the insureds, including additional insureds provided for in this Agreement.

(f) Each party shall maintain workers' compensation and employers' liability insurance, with at least minimum required statutory limits, and in compliance with requirements of California and/or federal law.

(g) A failure of either party to obtain or maintain the insurance required by this Section shall not relieve such party of any of its liabilities or obligations under this Agreement.

## **SECTION 6. LIABILITY.**

### **6.1 Assumption of Responsibility.**

(a) Each of the parties hereto shall assume, bear and pay any and all Losses allocated to it as the responsible party under the terms of this Section 6. Except as otherwise expressly provided in Sections 6.2(b)(v) and 6.3, the responsibility for Losses allocated to each party under this Section 6 is without respect to fault, failure, negligence, misconduct, malfeasance or misfeasance of any party or its employees, agents or servants.

(b) All costs and expenses incurred in connection with the investigation, adjustment and defense of any claim or suit pertaining to a Loss shall be included as part of any Loss for which responsibility is assumed under the terms of this Section 6, including salaries or wages and associated benefits of, and out-of-pocket expenses incurred by or with respect to, employees of either party or employees of the Operator engaged directly in such investigation, adjustment and defense work and a reasonable amount of allocated salaries and wages of employees providing support services to such employees so engaged directly in such work.

**6.2 Allocation of Responsibilities.**

(a) Except as otherwise expressly provided in Section 6.3, Losses arising out of personal injury (including bodily injury and death) to, or property damage suffered by, an invitee of either party shall be the responsibility of and borne and paid solely by that party regardless of the cause of such Loss or the fault of either party or whose Equipment was involved. For purposes of this paragraph, consultants and contractors of a party and any person who is on Equipment operated by or for the account of a party (other than an employee of a party engaged in performing duties for that party) shall be deemed to be an invitee of that party.

(b) Except as otherwise expressly provided in Section 6.3, Losses arising out of personal injury (including bodily injury and death) to, or property damage suffered by, persons other than invitees of either Purchaser or Seller and casualty losses to property owned by Purchaser or Seller shall be the responsibility of and borne and paid by the parties as follows

- (i) Loss to Equipment and Loss of other property owned, leased or exclusively used by Purchaser shall be the responsibility of the Purchaser and borne by it.**
- (ii) Loss to Equipment and Loss of other property owned, leased or exclusively used by, and freight transported by, Seller shall be the responsibility of Seller and borne by it.**
- (iii) Loss to property jointly used by both parties shall be the responsibility of and borne and paid by the parties as follows:**

  - (A) totally by the party whose Equipment was involved in the incident giving rise to the Loss if the Equipment of only one party was involved in the incident giving rise to such Loss;**
  - (B) equally by the parties if the Equipment of both parties was involved in the incident giving rise to the Loss;  
and**
  - (C) by the party that owns the real property on which the Loss occurred when no Equipment of either party was involved in the incident giving rise to such Loss.**
- (iv) Losses arising out of personal injury (including bodily injury and death) to, or property damage suffered by, any**

employee of either party which occurs during the course of employment or while traveling to or from employment shall be the responsibility of and borne solely by the party employing such employee.

- (v) Losses arising out of personal injury (including bodily injury and death) to, or property damage suffered by, any person who is not an employee or invitee of either party (including, without limitation, persons using vehicular and pedestrian crossings and trespassers) shall be the responsibility of and borne (A) totally by the party whose Equipment was involved in the incident giving rise to such Loss if the Equipment of only one party was involved in the incident giving rise to such Loss, (B) by Purchaser if no Equipment of either party was involved in the incident giving rise to such Loss and the incident occurred on the Joint Trackage, and (C) by both parties in proportion to their relative degrees of fault if the Equipment of both parties was involved in the incident giving rise to such Loss; provided, however, that Losses consisting of property damages suffered by either party hereto arising out of the explosion, combustion, leakage, spillage or release of Hazardous Materials by or in connection with the operations of or service provided by a party (the "Responsible Party") or its agents, employees, customers or

consignees on the Joint Trackage or other real property shall be borne by the Responsible Party

- (vi) Except as provided in Section 3.1(b), Losses arising out of claims by freight rail customers located on or adjacent to the Joint Trackage for failure to provide adequate freight service or for violation of freight service agreements shall be the responsibility of and borne by Seller.

6.3 Limitations on Indemnification. The provisions of this Section 6.3 shall apply notwithstanding the provisions of Section 6.2 above. "Excluded Conduct" shall mean (i) an entire failure of care or the exercise of so slight a degree of care as to raise a presumption that there was a conscious indifference to the things and welfare of others, (ii) conduct constituting a reckless or wanton disregard of the probable results of such conduct, (iii) willful misconduct, or (iv) conduct which would permit the award of exemplary or punitive damages. Neither party shall be indemnified for any Loss resulting from its own Excluded Conduct, and in any such case such party shall be responsible for and bear Loss in proportion to its relative degree of fault and such party shall be responsible for and bear all exemplary or punitive damages, if any, resulting from its Excluded Conduct. If any of the provisions of Section 6.2 would be prohibited by or unenforceable under the laws of the State of California (including a determination that indemnification under the circumstances involved is against the public policy of the state), the indemnity provided by such provision shall be deemed to be limited to and operative only to the maximum extent permitted by law. Without limitation, if it is determined that any law or public policy of the State of California prohibits the

indemnification of a party for its own sole negligence in any instance covered by the provisions of Section 6.2, those provisions shall be deemed to exclude indemnification for such party's sole negligence but to permit full indemnification, as specified in Section 6.2, if both parties were negligent. In the case of any Loss for which the provisions of this Section 6.3 would prevent the indemnification of a party, such party shall be responsible for and bear such Loss.

**6.4 Scope of Indemnification** In any case where a party is required under the provisions of this Section 6 to bear a Loss, it shall pay, satisfy and discharge such Loss and all judgments or orders that may be rendered by reason thereof and all costs, charges and expenses incident thereto. In addition, such party shall forever indemnify, defend and hold harmless the other party and its directors, officers, agents, employees, shareholders, parent corporation and affiliated companies from, against and with respect to any and all such Losses, irrespective of the fault or negligence of the indemnified party. If a party asserts that the other was guilty of Excluded Conduct and denies liability for indemnification of the other party based thereon, the party asserting such Excluded Conduct shall have the burden of proof in establishing such conduct

**6.5 Procedure.**

(a) If any claim or demand shall be asserted by any person against an indemnified party under this Section 6, the indemnified party shall, within thirty (30) days after notice of such claim or demand, cause written notice thereof to be given to the indemnifying party, provided that failure to notify the indemnifying party shall not relieve the indemnifying party from any liability which it may have to the indemnified party under

this Section 6, except to the extent that the rights of the indemnifying party are in fact prejudiced by such failure. If any such claim or demand shall be brought against the indemnified party and it shall have given notice thereof to the indemnifying party, the indemnifying party shall have the right, at its own expense, to control (including the selection of counsel reasonably satisfactory to the indemnified party) or to participate in the defense of, negotiate or settle, any such claim or demand, and the parties hereto agree to cooperate fully with each other in connection with any such defense, negotiation or settlement. In any event, neither the indemnified party nor the indemnifying party shall make any settlement of any claim or demand which might give rise to liability on the part of the other party under this Section 6 without the prior written consent of such other party, which consent shall not be unreasonably withheld, conditioned or delayed. If any claim or demand relates to a matter for which the parties, under the terms of Section 6.2, are to share liability equally or in proportion to their relative degrees of fault, each party shall be entitled to select its own counsel and defend itself against the claim or demand at its own expense, and neither party shall make any settlement of any such claim or demand without the prior written consent of the other party, which consent shall not be unreasonably withheld, conditioned or delayed.

(b) Subject to the provisions of Section 6.5 (a), on each occasion that the indemnified party shall be entitled to indemnification or reimbursement under this Section 6, the indemnifying party shall, at each such time, promptly pay the amount of such indemnification or reimbursement. If the indemnified party shall be entitled to indemnification under this Section 6 and the indemnifying party shall not elect to control

any legal proceeding in connection therewith, the indemnifying party shall pay to the indemnified party an amount equal to the indemnified party's reasonable legal fees and other costs and expenses arising as a result of such proceeding

(c) Any dispute between the parties as to the right to indemnification or the amount to which it is entitled pursuant to such right with respect to any matter shall be submitted to arbitration pursuant to Section 7; provided, however, that if either party or both parties are named as defendants, third party defendants, cross-claim defendants or are otherwise named as parties to a lawsuit or other legal proceeding initiated by a third party, and such proceeding involves or relates to such indemnification rights, then either party shall have the right to pursue the resolution of such indemnification issues in that proceeding instead of through the arbitration procedures set forth in Section 7.

6.6 Third Party Operators. The Freight Operator shall agree to be bound by the provisions of this Section 6 unless otherwise agreed to in writing by Purchaser and Seller. For purposes of this Section 6, as between Purchaser and Seller, the Equipment and actions of any entity acting on behalf of and for the account of a party hereto shall be deemed to be the Equipment and actions of such party hereto. Nothing contained herein shall be construed to limit or waive the rights of a party hereto to seek indemnification or damages from said entities acting on its behalf for the actions of said entities.

6.7 Not For Benefit Of Third Parties. The provisions of this Section 6 are not intended to confer any right, benefit, or cause of action upon any third party and are

intended solely to deal with the allocation of liability, if any, as between the parties to this Agreement.

**SECTION 7. DISPUTE RESOLUTION AND BINDING ARBITRATION.**

(a) Both of the parties hereto shall make every reasonable effort to settle any disputes arising out of their respective rights and obligations under this Agreement through prompt and diligent negotiations. If at any time a question or controversy shall arise between the parties hereto in connection with the Agreement that the parties cannot resolve, such question or controversy shall be submitted to and settled by arbitration. Unless other procedures are agreed to by the parties, arbitration between the parties pursuant to this Section 7 shall be governed by the rules and procedures set forth in this Section 7.

(b) If the parties to the dispute are able to agree upon a single disinterested arbitrator within twenty (20) days after written notice by one party of its desire for arbitration to the other party, then the question or controversy shall be submitted to and settled by that single arbitrator. Otherwise, any party (the "notifying party") may notify the other party (the "noticed party") in writing of its request for arbitration and its nomination of one disinterested arbitrator. Within twenty (20) days after receipt of said notice, the noticed party shall appoint a disinterested arbitrator and notify the notifying party in writing of such appointment. Should the noticed party fail within twenty (20) days after receipt of such notice to name its arbitrator, said arbitrator may be appointed by the Chief Judge (or acting Chief Judge) of the United States District Court for the Northern District of California upon application by either party after

ten (10) days' written notice to the other party. The two arbitrators so chosen shall select one additional disinterested arbitrator to complete the board. If the arbitrators so chosen fail to agree upon an additional arbitrator, the same shall, upon application of a party, be appointed by said judge in the manner heretofore stated.

(c) Upon selection of the arbitrator(s), said arbitrator(s) shall, with reasonable diligence and subject to the rights of the parties under subparagraph 7(f), determine the questions as disclosed in said notice of arbitration, give both parties reasonable notice of the time and place (of which the arbitrator(s) shall be the judge) of hearing evidence and argument, take such evidence as the arbitrator(s) shall deem reasonable or as either party may submit with witnesses required to be sworn, and hear arguments of counsel or others. If an arbitrator declines or fails to act, the party (or parties in the case of a single arbitrator) by whom the arbitrator was chosen or said judge shall appoint another to act in the arbitrator's place.

(d) After considering all evidence, testimony and arguments, said single arbitrator or the majority of said board of arbitrators shall promptly state such decision or award and the reasoning for such decision or award in writing which shall be final, binding, and conclusive on all parties to the arbitration when delivered to them. The award rendered by the arbitrator(s) may be entered as a judgment in any court having jurisdiction thereof and enforced as between the parties without further evidentiary proceeding, the same as entered by the court at the conclusion of a judicial proceeding in which no appeal was taken. Until the arbitrator(s) shall issue the first decision or award upon any question submitted for arbitration, performance under the Agreement shall continue in the manner and form existing prior to the rise of such

question. After delivery of said first decision or award, each party shall forthwith comply with said first decision or award immediately after receiving it

(e) Each party to the arbitration shall pay all compensation, costs, and expenses of the arbitrator appointed in its behalf and all fees and expenses of its own witnesses and counsel. The compensation, cost, and expenses of the single arbitrator or the additional arbitrator in the board of arbitrators shall be paid in equal shares by all parties to the arbitration.

(f) The parties may obtain discovery and offer evidence in accordance with the Federal Rules of Civil Procedure Rules 26 - 37, and Federal Rules of Evidence, as each may be amended from time to time.

#### **SECTION 8. TERM AND ABANDONMENT.**

Seller may not abandon or discontinue its common carrier freight rail service on the Joint Trackage except in accordance with this Section 8. At any time, Seller may elect to abandon or discontinue such freight rail service. In the event that Seller applies for and receives STB authority to abandon or discontinue common carrier freight service on the Joint Trackage, or in the event such service is otherwise abandoned or discontinued, Seller's Freight Easement shall be extinguished, Seller shall execute, acknowledge and deliver to Purchaser an instrument in recordable form reasonably acceptable to Purchaser under which Seller quitclaims to Purchaser all of Seller's right, title and interest in the Freight Easement and Seller's rights under this Agreement shall terminate.

**SECTION 9. PROPERTY TAXES.**

To the extent any real property taxes are payable with respect to any portion of the Joint Trackage by reason of Seller's use thereof in accordance with this Agreement, Seller will pay, to the extent required to do so, such real property taxes prior to delinquency and shall protect, defend, indemnify and hold Purchaser harmless from and against any and all liability, loss, cost, damage or expense (including, without limitation, reasonable attorneys' fees) Purchaser may sustain or incur on account of any such real property taxes by reason of this provision.

**SECTION 10. COMPENSATION AND BILLING.**

(a) Invoices submitted to the parties under this Agreement ("Invoices") must be itemized with a detailed description of the work performed, the date of such work, the time expended and the associated hourly billing rate or charge for such work, and any reimbursable expenses (including, without limitation, the cost of materials used) incurred in the performance of the work. The party requesting reimbursement shall certify that it has actually incurred the expenses set out in its Invoice. Invoices for reimbursable expenses may not exceed the out-of-pocket expense for such items including customary additives. Invoices shall be paid within thirty (30) days after receipt thereof by the payor. If a party disputes any items on an Invoice, that party may deduct the disputed item from the payment, but shall not delay payment for the undisputed portions. The amounts and reasons for such deductions, if any, shall be documented to the other party within thirty (30) days after receipt of the Invoice. Once documentation is given for the disputed amounts, and accepted by the paying party, the disputed

amounts shall be paid by the paying party with thirty (30) days after receipt of the documentation. No Invoice shall be submitted later than three (3) years after the last day of the calendar month in which the reimbursable expense or cost covered thereby is incurred.

(b) So much of the books accounts, and records (except for privileged or confidential records) of each party hereto as are related to the subject matter of this Agreement shall at all reasonable times be open to inspection by the authorized representatives and agents of the parties. All accounting records and other supporting papers shall be maintained for a minimum of three (3) years from the date thereof. If work relating to this Agreement is funded in whole or in part by a federal grant, the Comptroller General of the United States and authorized representatives of the federal agency furnishing the grant shall have the right to examine and audit such books, accounts, and records in accordance with applicable federal laws and regulations.

(c) Upon request, a party disputing the accuracy of any Invoice shall be entitled to receive from the invoicing party copies of such supporting documentation and/or records as are kept in the ordinary course of the invoicing party's business and which are reasonably necessary to verify the accuracy of the Invoice as rendered

**SECTION 11. ASSIGNMENT.**

Purchaser may assign or sell any of its rights and obligations under this Agreement to any (i) entity owned or controlled by, or under common control with, Purchaser or (ii) municipality or other governmental entity of the State of California without the consent of Seller; provided that Purchaser shall give Seller thirty (30) days

advance written notice of any such assignment. Unless otherwise agreed by the parties, and subject to the requirements of Section 4.3 of the Option Agreement, Seller may assign or sell all but not less than all of its rights and obligations under this Agreement to (i) any other Class I Railroad; or (ii) any experienced shortline railroad operator with a demonstrated record of reliable and safe railroad operating experience; provided, however, that Seller, not less than thirty (30) days prior to such assignment or sale, has given Purchaser written evidence reasonably satisfactory to Purchaser that such successor or assign (A) has the legal power and authority to undertake all of the rights and obligations of Seller hereunder, (B) has the financial capacity to fulfill Seller's obligations under this Agreement (including the capacity to pay for damages), and (C) is a Class I railroad or an experienced shortline railroad operator with a demonstrated record of reliable and safe railroad operating experience.

**SECTION 12. DEFAULT.**

(a) Notwithstanding the provisions of Section 10, either party hereto claiming default of any of the provisions of the Agreement shall furnish notice and written demand to the other party for performance or compliance with the covenant or condition of the Agreement claimed to be in default, which notice shall specify wherein and in what respect such default is claimed to exist and shall specify the particular Section or Sections of the Agreement under which such claim of default is made.

(b) If the default shall continue for an additional period of thirty (30) days after receipt of such written notice and demand, and such default has not been remedied within said thirty (30) day period, or reasonable steps have not been nor

continue to be taken to remedy a failure or default which cannot reasonably be remedied within said thirty (30) day period, and such default relates to the provisions and terms of the Agreement, either party may resort to arbitration under the provisions of Section 7, provided, however, that the arbitrator shall not have the authority to amend, modify or terminate this Agreement.

(c) Failure of a party to claim a default shall not constitute a waiver of such default. Either party hereto entitled to claim default may waive any such default, but no action by such party in waiving such default shall extend to or be taken to effect any subsequent defaults or impair the rights of either party hereto resulting therefrom.

### **SECTION 13. MISCELLANEOUS PROVISIONS.**

13.1 Successors and Assigns. This Agreement and each and every provision hereof is for the benefit of the parties hereto and their successors and assigns only, and shall not be deemed to inure to the benefit of any third parties. Nothing herein shall be construed to create or increase any right in any third party to recover by way of damages or otherwise against either of the parties hereto.

13.2 Notices. Except as otherwise expressly provided in this Agreement, all notices and other communications under this Agreement shall be in writing and shall be deemed to have been duly given (a) on the date of delivery, if delivered personally to the party to whom notice is given or if sent by overnight courier, or if made by telecopy directed to the applicable telecopy number listed below and the transmission is confirmed by mail as provided under (b) below which is deposited on the first business day after the transmission, or (b) at the earlier of actual receipt or the third business day

following deposit in the United States mail, postage prepaid. Notices and other communications shall be directed to the parties at the addresses shown below. A party may change its person designated to receive notice, its telecopy number or its address from time to time by giving notice to the other party in accordance with the procedures set forth in this Section.

If to Purchaser: San Benito Railroad LLC  
ATTN: Philip R. Taylor  
535 Cowper Street  
Second Floor  
Palo Alto, CA 94301  
Telephone: (650) 614-9203  
Facsimile (650) 833-6903

With copies to: Gray Cary Ware & Freidenrich LLP  
3340 Hillview Avenue  
Palo Alto, CA 94304  
Attn: Patrick J. McGaraghan  
Telephone: (650) 833-2030  
Facsimile: (650) 833-2301

and

Kirkpatrick & Lockhart LLP  
1800 Massachusetts Avenue N.W  
Washington, D.C. 20036  
Attn: Kevin M. Sheys  
Telephone: (202) 778-9000  
Facsimile: (202) 778-9100

If to Seller: Union Pacific Railroad Company  
ATTN: Richard Gooch  
45 Stevenson Street, 15<sup>th</sup> Floor  
San Francisco, CA 94105  
Telephone: (415) 541-7050  
Facsimile: (415) 541-7060

With a copy to: General Manager Joint Facilities and Passenger Operations  
Union Pacific Railroad Company  
1416 Dodge Street  
Omaha, NE 68179

13.3 Headings. The section and subsection headings in this Agreement are for convenience only and shall not be used in its interpretation or considered part of this Agreement.

13.4 Integration, Amendment, and Waiver.

This Agreement is the entire agreement, and supersedes all prior and contemporaneous agreements, representations, and understandings, of the parties concerning the subject matter hereof. No supplement, modification, or amendment of this Agreement shall be binding unless executed in writing by both of the parties. No waiver of any provision of this Agreement shall be deemed, or shall constitute, a waiver of any other provisions, whether or not similar, nor shall any waiver constitute a continuing waiver. No waiver shall be binding unless executed in writing by the party making the waiver.

13.5 Counterparts. This Agreement may be executed in any number of counterparts, and by different parties in separate counterparts, each of which, when executed and delivered, shall be deemed to be an original and all of which counterparts taken together shall constitute but one and the same instrument.

13.6 Governing Law. This Agreement shall be construed and interpreted in accordance with the laws of the State of California.

13.7 Attorneys Fees. If any legal action or any arbitration or other proceeding is brought for the enforcement or interpretation of this Agreement, or because of an alleged dispute, breach, default or misrepresentation in connection with any of the

provisions of this Agreement, the prevailing party or parties shall be entitled to recover reasonable attorneys' fees and other costs in connection with that action or proceeding, in addition to any other relief to which it or they may be entitled

13.8 Force Majeure. Each party will be excused from the performance of any of its obligations hereunder to the other party where such nonperformance is occasioned by any event beyond its control, which shall include without limitation, any order, rule or regulation of any federal, state, or local governmental body, agency or instrumentality, natural disaster, work stoppage, or civil disorder, provided the party so excused hereunder shall use all reasonable efforts to minimize its nonperformance and to overcome, remedy, cure, or remove such event as soon as reasonably practicable.

13.9 Catastrophic Expense. Catastrophic expense to the Joint Trackage, including but not limited to that arising from flood, earthquake or other acts of God, in excess of One Hundred Thousand Dollars (\$100,000) (as adjusted annually in the same manner as the fee in Section 4.1(d) hereof) for each occurrence shall be billed and apportioned on the basis of the parties' respective number of trains operated over the Joint Trackage during the twelve (12) month period ending immediately prior to the first day of the month of the occurrence; provided, however, that in lieu of paying any such amount billed to Seller, Seller shall have the right to extinguish its Freight Easement and terminate this Agreement in accordance with Section 8 hereof.

IN WITNESS WHEREOF, the parties to this Agreement have duly executed it as of the day and year first above written.

UNION PACIFIC RAILROAD COMPANY

SAN BENITO RAILROAD LLC

---

Title:

---

Title.

<b>SECTION 1</b>	<b>DEFINITIONS</b>	<b>2</b>
<b>SECTION 2</b>	<b>RIGHTS OF PURCHASER AND SELLER</b>	<b>6</b>
2.1	Purchaser's and Seller's Rights Generally	6
2.2	Freight Service	7
2.3	Third Party Operators	8
2.4	Seller's Right to Make Changes and/or Additions	8
2.5	Purchaser's Right to Make Changes and/or Additions	10
2.6	Ownership of Changes and/or Additions	11
<b>SECTION 3</b>	<b>OPERATIONS</b>	<b>11</b>
3.1	Dispatching and Control	11
3.2	Train Operations	14
<b>SECTION 4</b>	<b>MAINTENANCE</b>	<b>16</b>
4.1	Maintenance Obligations of Seller	16
4.2	Failure to Maintain	18
<b>SECTION 5</b>	<b>INSURANCE</b>	<b>18</b>
<b>SECTION 6</b>	<b>LIABILITY</b>	<b>21</b>
6.1	Assumption of Responsibility	21
6.2	Allocation of Responsibilities	22
6.4	Scope of Indemnification	26
6.5	Procedure	26
6.6	Third Party Operators	28
6.7	Not For Benefit Of Third Parties	28
<b>SECTION 7</b>	<b>DISPUTE RESOLUTION AND BINDING ARBITRATION</b>	<b>29</b>
<b>SECTION 8</b>	<b>TERM AND ABANDONMENT</b>	<b>31</b>
<b>SECTION 9</b>	<b>PROPERTY TAXES</b>	<b>32</b>
<b>SECTION 10</b>	<b>COMPENSATION AND BILLING</b>	<b>32</b>
<b>SECTION 11</b>	<b>ASSIGNMENT</b>	<b>33</b>
<b>SECTION 12</b>	<b>DEFAULT</b>	<b>34</b>
<b>SECTION 13</b>	<b>MISCELLANEOUS PROVISIONS</b>	<b>35</b>
13.1	Successors and Assigns	35
13.2	Notices	35
13.3	Headings	37
13.4	Integration, Amendment, and Waiver	37
13.5	Counterparts	37
13.6	Governing Law	37
13.7	Attorneys Fees	37
13.8	Force Majeure	38
13.9	Catastrophic Expense	38