

LEASE AND OPERATING AGREEMENT

between

TEXAS DEPARTMENT OF TRANSPORTATION

as Lessor

and

FANNIN COUNTY RURAL RAIL TRANSPORTATION DISTRICT

as Lessee

**REGARDING THE RAIL LINE BETWEEN BONHAM AND PARIS,
TEXAS**

February 1, 2006

LEASE AND OPERATING AGREEMENT

THIS LEASE AND OPERATING AGREEMENT (“Agreement”) is entered into this 1st day of February, 2006, by and between the Texas Department of Transportation (“TxDOT”), and Fannin County Rural Rail District. (“Lessee”).

RECITALS

WHEREAS, TxDOT has acquired by purchase from Lessee all of the rights, title and interest in certain personal and real property (“the Rail Line”) located in Lamar and Fannin Counties, State of Texas, extending from Mile Post 94.0 to Mile Post 127.5 on the Bonham Subdivision for a total of approximately 33.5 miles; and

WHEREAS, on August 19, 2003, the Surface Transportation Board, in STB Docket No. AB-33(Sub-No. 163X), authorized Lessee to operate the Rail Line; and

WHEREAS, from and after the Effective Date, Lessee desires to lease the Rail Line, as hereinafter defined, from TxDOT, and to occupy, rehabilitate, use, maintain, and manage the Rail Line and improvements thereon, for the purpose of operating a rail freight transportation service; and

WHEREAS, TxDOT desires to lease the Rail Line to Lessee, provided the Lessee operates a rail freight transportation service on the Rail Line or subleases operations to provide a freight rail transportation service on the Rail Line pursuant to its common carrier obligation and in accordance with the terms and conditions of this Agreement; and

WHEREAS, the Texas Transportation Commission, by Minute Order No. 110350, dated December 15, 2005, authorized the Executive Director of the Texas Department of Transportation to negotiate and enter into agreements necessary for the continued operation of the Rail Line.

NOW, THEREFORE, in consideration of the premises, the mutual covenants contained herein, and other good, fair, and valuable consideration, the receipt, adequacy, and reasonable equivalency of which are hereby acknowledged, the parties hereto agree as follows:

1. LEASED PROPERTIES AND LEASE TERM

1.1. From and after the Effective Date, TxDOT agrees to lease, demise, and let to the Lessee and by these presents, does hereby lease, demise and let to the Lessee, and Lessee hereby leases and accepts from TxDOT (i)

That certain right of way of various widths more commonly known as the Bonham Subdivision in Lamar County, Texas from railroad Mile Post 94.0 to the west line of Lamar County and

continuing through Fannin County, Texas to railroad Mile Post 127.5; and that is more particularly described on Exhibit A attached hereto and made a part hereof for all purposes, save and except those lands covered by the leases and agreements listed on Schedule I hereto, together with any and all installed rails, ties, switches, ballast, track structures, sidings, bridges, buildings, stations, communication facilities, fixtures, improvements or appurtenances located thereon (the entire length of the foregoing rail line and all lands, improvements, and interests being collectively referred to herein as the "Rail Line"); (ii) all equipment, hardware, books, records, uninstalled rails and ties and other tangible personal property used in connection with railroad operations on the Rail Line acquired by TxDOT from UP and TNER pursuant to the Purchase Agreement; and (iii) any and all patents, trademarks, trade names, service marks, copyright registrations, any and all registrations and applications therefor, and any licenses under any proprietary rights used or held for use in connection with the Rail Line and acquired by TxDOT from UP and TNER pursuant to the Purchase Agreement.

1.2. Primary Term. Unless this Agreement is terminated earlier in accordance with Section 7 hereof, this Agreement shall continue in full force and effect for a primary term commencing on the Effective Date and expiring on the date which is forty (40) years thereafter.

1.3. Renewal Options. Lessee shall have five (5) options to renew and extend the term of this Agreement, such option to follow consecutively upon the expiration of the last month of the primary term and each succeeding term. Each renewal option shall be for a term of ten (10) years. Such option shall be exercised by Lessee's giving written notice of its intention to renew and extend the term of this Agreement to TxDOT at least one hundred and eighty (180) days before the expiration of the then effective term. The renewal and extension of this Agreement shall be on and under the same terms, provisions, and conditions as the primary term. Any termination of this Agreement pursuant to the terms hereof and after the occurrence of an event of default and the expiration of the applicable grace or curative period shall terminate all rights of renewal or extension set forth herein.

1.4. TxDOT agrees that it shall be responsible for all leases, subleases, easements, crossing agreements, and all other agreements with third parties assigned to TxDOT under the Purchase Agreement. TxDOT agrees that it shall enforce such Third Party Agreements so as to facilitate Lessee's operation of the Rail Line. TxDOT agrees that Lessee shall have access to any lands or railroad tracks covered by such Third Party Agreements as may be necessary in connection with Lessee's operation of the Rail Line and TxDOT hereby grants the Lessee a license to enter upon all the land and railroad tracks covered by such Third Party Agreements in the course of the Lessee's operation of the Rail Line. TxDOT hereby grants, transfers, and assigns to Lessee all of its rights and interests in any interchange agreements assigned to TxDOT under the Purchase Agreement for the term of the Agreement. Lessee shall not negotiate or enter into any other leases, subleases, easements, crossing agreements and other agreements after the Effective Date affecting the use, occupancy or possession of all or any portion of the Rail Line without the express written consent of TxDOT. All such leases, subleases, easements, crossing agreements, or other agreements affecting the use, occupancy, or possession of all or any portion of the Rail Line shall be negotiated and entered into by the Lessee with the full knowledge and direct

oversight of TxDOT; and all contracts for leases, subleases, operation, maintenance, rehabilitation, improvements, easements, crossing agreements, or other agreements shall be advertised, let, negotiated, or executed according to TxDOT procedures and with the full knowledge, participation, and approval of TxDOT. The Lessee may not assign any or all of its rights or obligations under such leases, subleases, easements, crossing agreements and other agreements, other than to any affiliate of the Lessee, without the prior written consent of TxDOT, which consent shall not be unreasonably withheld.

TxDOT hereby covenants that: (a) TxDOT will own at Closing and will lease, demise and let to the Lessee the same right, title and interest in the Rail Line and other property that TxDOT received from UP AND TNER pursuant to the Purchase Agreement free and clear of all liens, charges, pledges, security interests and other encumbrances, other than permitted encumbrances in any lease, sublease, easement, license or crossing agreement, and any other agreement with a third party affecting the use and occupancy of the Rail Line that were assigned to TxDOT under the Purchase Agreement; (b) TxDOT has full authority to execute and deliver this Agreement and to perform its obligations hereunder, and this Agreement constitutes a legal, valid and binding obligation of TxDOT enforceable against TxDOT in accordance with its terms; (c) to the best knowledge of TxDOT no other party has any rights to the Rail Line or other property subject to this Agreement; (d) to the best knowledge of TxDOT no claims exist (or with the passage of time will exist) related to any event, condition or transaction regarding the Rail Line; (e) to the best knowledge of TxDOT each lease, sublease, easement, license and crossing agreement related to the Rail Line is a customary and usual agreement entered into in the ordinary course of operating a rail freight transportation service on the Rail Line, is in full force and effect, has been fully performed by the parties thereto through the Closing, is not the subject of any claim or demand, and will not result in any obligation or other liability for the Lessee.

1.5. TxDOT will provide the Lessee with access (with an opportunity to make copies at Lessee's expense) to all records relating to the Rail Line that are retained by TxDOT other than records constituting privileged and confidential attorney-client communications or work product.

1.7. TxDOT and the Lessee intend that the lease and the related rights and obligations of the parties contemplated by this Agreement shall become effective as of the Effective Date. Notwithstanding any provision herein to the contrary, the Lessee shall have the right to terminate this Agreement at any time on or prior to the Effective Date.

1.8 Buy-Out Option. TxDOT shall have the right to buy-out the remaining term of the primary lease or any renewal or extension of the lease executed subsequent to the expiration of the primary lease. This Agreement shall terminate upon the expiration of one hundred-eighty (180) days following written notice to Lessee of TxDOT's exercise of this buy-out option. TxDOT shall compensate the lessee for the buy-out and termination of the lease according to the following schedule:

- a.) \$40,000 if within the first ten (10) years of the Agreement
- b.) \$30,000 if within the second ten (10) years of the Agreement

- c.) \$20,000 if within the third ten (10) years of the Agreement
- d.) \$10,000 if within the fourth ten (10) years of the agreement
- e.) \$5,000 if within any of the ten (10) year extensions of the primary Agreement,

plus the value of any improvements added by the Lessee to the extent that such improvements have not yet been fully capitalized.

2. LEASE PAYMENTS

2.1. Lessee agrees to pay an annual rent in the amount of Five Hundred (\$500.00) Dollars to TxDOT to cover administrative and legal costs incurred by TxDOT through ownership of the Rail Line, including costs incurred by TxDOT in carrying out the inspection and oversight responsibilities set out in Section 4. In addition, a surcharge of Ten (\$10.00) Dollars will be added to the annual rent for the total number of loaded railcars interchanged with connecting railroads that exceeds One-Thousand Four Hundred (1,400) carloads. The annual carload surcharge will be reviewed and adjusted every five (5) years based on the average annual increase during the prior five (5) year period in line-haul railroads producer price indices available from the United States Department of Labor Bureau of Labor Statistics. All payments due to TxDOT hereunder shall be paid by the Lessee to TxDOT at the address of TxDOT set forth hereinafter, or to such other person and/or at such other address as TxDOT may direct by notice to Lessee.

2.2. Payment of the annual rent shall be considered delinquent if not paid within thirty (30) days of the date the payment is due to TxDOT. If the Lessee fails to pay any rent installment and such payment shall become delinquent, simple interest at the rate of ten percent (10%) per year shall be added to any such overdue payment from the due date to the date of payment. Payment of the annual rent shall be remitted to:

Texas Department of Transportation
Multimodal Section
P.O. Box 149217
Austin, Texas 78714-9217

3. RIGHTS AND OBLIGATIONS OF LESSEE

3.1. Subject to compliance with the terms and conditions of this Agreement, TxDOT hereby grants and Lessee hereby acquires and assumes as of the Effective Date the exclusive right to provide rail transportation service on the Rail Line during the term of this Agreement, and to lease or sublease the rail line in accordance with the provisions of Section 1.4 of this agreement to provide the common carrier for the rail freight service provided on the Rail Line. It is Lessee's intention to conduct freight operations on the Rail Line. Lessee, to the extent required by statute or regulation, at its sole expense, shall prepare and file such documents as may be

required to secure exemption from approval by the Surface Transportation Board (“STB”) or other governmental authority of Lessee’s acquisition of the leasehold interest and operations on the Rail Line. Lessee, at its discretion and at its expense, shall have the right to record this Agreement in the land record office of each of the counties through which the Rail Line runs. The parties acknowledge and agree that TxDOT has and shall continue to have during the term of this Agreement the complete and exclusive ownership of the Rail Line, including the exclusive right to commence abandonment proceedings for the Rail Line or any portion thereof, following the termination of this Agreement pursuant to Section 7. Lessee shall have the right to obtain approval to discontinue rail service. For all purposes relating to the ownership of the Rail Line, including all filings with or appearances before the STB or any other federal or state authority, TxDOT shall be shown as the owner of the Rail Line.

3.2. Upon the commencement of rail freight service, TxDOT hereby grants and the Lessee hereby acquires, subject to TxDOT’s inspection and oversight responsibilities set out in Section 1.4, the right to manage the Rail Line, and agrees to do so in compliance with all applicable federal and state laws and regulations, and with all generally accepted industry standards, including those standards promulgated by the Association of American Railroads (“AAR”). All revenues and expenses therefrom shall accrue to the Lessee. All contracts for freight transportation over the Rail Line shall be in the name of the Lessee or that of any connecting railroad with which it participates in through transportation over the Rail Line and Lessee shall be responsible for the operating policies, billing rates, and scheduling of transportation over the Rail Line and the relationship with all shippers and connecting rail carriers. Lessee shall not discriminate unreasonably with respect to rates, transportation, and services against any shipper and shall provide transportation or service on reasonable request. Lessee shall be responsible for negotiating directly with all connecting railroads with respect to switch charges, divisions of revenue, car hire agreements, interchange agreements, and clerical/data exchange agreements. Lessee shall be responsible for promptly remitting to TxDOT as received all revenues collected by or credited to Lessee subsequent to the Closing that are attributable to operations prior to the Closing.

3.3. With regard to the rail freight service and its management and operation of the Rail Line, the Lessee agrees to furnish all equipment, machinery, manpower and support services, make such improvements to the Rail Line, establish such rates, tariffs, and other commercial arrangements, provide rail freight service to shippers within the State of Texas, and maintain the Rail Line in the condition necessary to comply with all applicable federal and state laws and regulations, and with all generally accepted industry standards, including those standards promulgated by the AAR. The parties understand and agree that there is no intent by this Agreement to create any unique regulations. Lessee shall have management and control of the operation and maintenance of the Rail Line in accordance with Section 1.4 of this agreement; such operation and maintenance shall be carried out at the Lessee’s sole cost and expense. All funds for the rehabilitation or construction of the rail line shall be administered by TxDOT without regard to the source of the funds. All contracts for the rehabilitation or construction of the rail line shall be administered in accordance with Section 1.4 of this agreement, except that funds provided by the Lessee or his designee used for routine maintenance of the rail line after

freight rail service is resumed may be administered by the Lessee; provided that the Lessee's routine maintenance plan or program has been approved by TxDOT.

3.4. Subject to this Section 3, Lessee or its approved sub-lessee or designee agrees to provide the following services as reasonably necessary for the efficient operation of the Rail Line and the transportation of freight thereover: routine marketing consistent with the business goals of Lessee; routine inspection and maintenance of the Rail Line (including railroad bridges and trestles, culverts, structures, signs, road crossing signals, crossings, and lighting); equipment maintenance, repair, and supply, car repair and maintenance, and sufficient motive power, including fuel and supplies, and establishing a routine system in order to facilitate compliance with industry rules, regulations and practices. All operating personnel of Lessee, prior to operating any locomotive or other track mounted equipment, shall be qualified in accordance with applicable Federal Railroad Administration ("FRA") rules and regulations.

3.5. Lessee shall have the right at its expense to erect, construct or install any structures, guards, devices, rails, ties, ballast, tracks, sidings, bridges, buildings, stations, communication facilities or other improvements upon the Rail Line for any lawful purpose. During the term of this Agreement, the improvements shall remain the property of the Lessee, and Lessee shall have the sole right to all tax benefits that may be derived from or by virtue of the improvements. Lessee agrees to cause all new improvements to be constructed in accordance with the requirements of Section 1.4 and in compliance with all applicable laws, ordinances, rules, and regulations of any political subdivision, agency, or instrumentality having jurisdiction over the Rail Line. Upon termination of this Agreement, such improvements shall become the property of TxDOT.

3.6. The inspection and maintenance of the tracks and other improvements of the Rail Line, the repair and servicing of locomotives, cars and other equipment and buildings or other structures within the Rail Line's right-of-way, at the discretion of the Lessee in accordance with Section 1.4, may be performed by contractors engaged by it for such purposes. The rehabilitation of the rail line or construction of new rail lines, sidings, tracks, or spurs, and the erection or repair of any bridges shall be managed and administered by TxDOT as stipulated in Section 1.4.

3.7. Lessee may, with the written consent of TxDOT in accordance with Section 1.4, allow the use of the Rail Line by other railroads for rail freight operations, and may enter into agreements with other railroads for such use.

3.8. If during the term of this Agreement, any rails, ties, switches, ballast, track structures, sidings, bridges, buildings, stations, communication facilities, fixtures, improvements or appurtenances, now or thereafter situated on the Rail Line, or fixtures or personal property therein or thereon, be wholly or partially destroyed or damaged by any cause whatsoever, TxDOT shall have no liability or responsibility to repair or restore the same (unless the damage was a result of negligent or willful misconduct of TxDOT). The cost of repairing and restoring the same shall be the responsibility of the Lessee.

3.9. (a) Lessee and TxDOT agree that if all or substantially all of the Rail Line is taken (which term as used in this Section 3.9 shall include any conveyance in avoidance or settlement of condemnation or eminent domain proceedings) by any governmental authority under the right of eminent domain or other similar proceedings, then this Agreement shall terminate as of the date of the taking of possession by such governmental authority, and any award made by any governmental authority shall belong to and be the property of TxDOT, subject to the Lessee's rights of reimbursement hereunder.

(b) Lessee and TxDOT agree that if less than all or substantially all of the Rail Line is taken by any governmental authority under the right of eminent domain or other similar proceeding, then this Agreement shall nevertheless continue in effect as to the remainder of the Rail Line unless, in Lessee's judgement, evidenced by notice by Lessee to TxDOT, so much of the Rail Line has been taken or condemned as to make it economically unsound to attempt to use the remainder thereof for the uses and purposes contemplated herein, in which latter event this Agreement shall terminate in the same manner as if the whole of the Rail Line had been taken or condemned upon possession of such portion of the Rail Line by the condemning authority, and any award made by any governmental authority shall belong to and be the property of TxDOT, subject to the Lessee's rights of reimbursement hereunder.

4. RIGHTS AND OBLIGATIONS OF TXDOT

4.1. Upon a decision by the Lessee to discontinue providing rail freight service, a failure by the Lessee to exercise a renewal option, or termination of this Agreement pursuant to Section 7, exclusive operating rights on the Rail Line shall, subject to approval by the STB, or any successor thereto, revert to TxDOT as the owner of the Rail Line (the "residual common carrier obligation"). The residual common carrier obligation retained by TxDOT, and TxDOT's complete and exclusive ownership of the Rail Line includes the exclusive right to commence abandonment proceedings for the Rail Line or any portion thereof following the termination of this Agreement pursuant to Section 7.

4.2. TxDOT and its agents or its authorized representatives, after three (3) days written prior notice to the Lessee (except in an emergency, which for purposes of this Section 4 shall mean an immediate risk to human life or of bodily injury or of material damage to the Rail Line), shall have the right to enter at all times the premises, workings or operations of the Lessee in order to inspect and examine the same for the purpose of ascertaining the conditions of the operation, the methods of operation practiced or any other lawful purpose; provided, however, that such inspections shall not unreasonably interfere with the Lessee's operations. Additionally, responsible officers of the Lessee shall be available to consult with TxDOT from time to time as may be necessary or required by TxDOT in order to advise TxDOT of ongoing activities and services performed by Lessee on the Rail Line. It is mutually understood and agreed that TxDOT's agents or authorized representatives, when in or on the Rail Line or any of Lessee's operations for any purpose, shall not be regarded under the law or otherwise as employees of the

Lessee. During any such inspection, Lessee shall have the right to have appropriate personnel available to accompany the inspection party.

4.3. The parties shall, at least once annually, jointly inspect the Rail Line to determine whether the Rail Line has been maintained in accordance with Section 3.3 of this Agreement. TxDOT and its agents or its authorized representatives shall have the right to inspect, at other times determined by TxDOT and after three (3) days written prior notice to the Lessee (except in an emergency, which for purposes of this Section 4 shall mean an immediate risk to human life or of bodily injury or of material damage to the Rail Line), the Rail Line to ascertain whether it has been properly maintained by the Lessee, provided, however, that such inspections shall not unreasonably interfere with the Lessee's operations. To assist TxDOT in its inspections, the Lessee shall provide TxDOT with copies of all FRA inspection reports within sixty (60) days of receipt.

4.4. If TxDOT and the Lessee disagree concerning the condition of the Rail Line or any determination by the Lessee of the appropriate level of maintenance, it is agreed by the parties that an inspection by a qualified representative of the FRA shall be arranged and such representative shall inspect those segments or portions of track in dispute. The representative's findings in this regard shall be binding upon the parties.

4.5. TxDOT reserves the exclusive right to grant easements for public road crossings. Lessee shall not be required to share in the cost and expense of providing the physical public road crossing surface or any associated warning devices on any such easement granted by TxDOT unless agreed to, in advance and in writing, by the Lessee and TxDOT. After installation, the Lessee shall maintain such crossings and associated warning devices as required by applicable Federal and State laws and regulations.

4.6. If the Lessee makes application for federal grant funding, federal loan assistance, or any other federal, state or local financial aid, redevelopment or other assistance program for rehabilitation of the Rail Line, TxDOT shall, upon the request of the Lessee, provide reasonable assistance to the Lessee in the Lessee's application.

4.7. TxDOT hereby covenants and agrees with Lessee and its successors and assigns that Lessee, upon observing and fulfilling the covenants on its part herein contained, during the lease term herein granted, shall and may peaceably and quietly have, use, occupy, possess and enjoy the full exclusive and unrestricted use and enjoyment of the Rail Line within the sections of this agreement and receive and enjoy to its own use the earnings and income and all other benefits and advantages thereof, without and free from all manner of disturbance or interference.

4.8. Notwithstanding any other provision of this Agreement, TxDOT reserves the right to grant access for the installation of telecommunications or other utility facilities along, across, over, in, or on, the real property portion of the Rail Line, and to authorize a grantee to enter upon the Rail Line for purposes of installation, adjustment, relocation, and maintenance of those

facilities, provided that such installation, adjustment, relocation, and maintenance does not unreasonably interfere with Lessee's operations.

4.9. TxDOT reserves the right to provide passenger and/or commuter rail services on the rail line. Any passenger or commuter services implemented on the line shall have priority over any freight services existing or implemented on the line. Any passenger or commuter services implemented on the line shall be coordinated with the Lessee to provide for the safe and efficient operation of services on the line. TxDOT shall have the right at its expense to erect, construct or install any structures, guards, devices, rails, ties, ballast, tracks, sidings, bridges, buildings, stations, communication facilities or other improvements upon the Rail Line for passenger or commuter services.

5. INSURANCE AND INDEMNIFICATION

5.1. Lessee shall secure and maintain in effect at all times during the term of this Agreement a commercial railroad liability insurance policy or policies providing liability coverage in the minimum amount of One-Million (\$1,000,000) Dollars in connection with its lease and operation of the Rail Line. Insurance shall be obtained from insurance companies authorized to do business in Texas and contain a waiver of subrogation in favor of TxDOT, and shall name TxDOT as an additional insured. Lessee shall use commercially reasonable efforts to furnish to and maintain with TxDOT certificates of such insurance evidencing current coverage, each containing agreements by the insurers not to cancel or modify the policies without giving TxDOT at least thirty (30) days prior written notice.

5.2. Lessee shall hold harmless and indemnify TxDOT and its officers, agents, and employees against any liability, loss, claim, or expense TxDOT incurs that relates to or arises out of the acts or omissions of the Lessee as the operator of rail services on the Rail Line. Lessee shall hold harmless and indemnify TxDOT and its officers, agents, and employees against any liability, loss, claim or expense for damage to property or for personal injury or death if such property damage, personal injury or death shall arise out of any act or omission of the Lessee in its performance of its rights and responsibilities as the operator of rail services on the Rail Line.

5.3. To the extent allowed by law, TxDOT shall hold harmless and indemnify the Lessee and its officers, agents, and employees against any liability, loss, claim, or expense the Lessee incurs that relates to or arises out of the acts or omissions of TxDOT as the owner of the Rail Line. To the extent allowed by law, TxDOT shall hold harmless and indemnify the Lessee and its officers, agents, and employees against any liability, loss, claim or expense for damage to property or for personal injury or death if such property damage, personal injury or death shall arise out of any act or omission of TxDOT in its performance of its rights and responsibilities as the owner of the Rail Line. To the extent allowed by law, TxDOT shall hold harmless and indemnify the Lessee and its officers, agents, and employees against any liability, loss, claim, or expense the Lessee incurs that relates to any event or transaction regarding the Rail Line occurring prior to the Effective Date. TxDOT hereby assigns to the Lessee a joint interest in any indemnities from the UP AND TNER acquired by TxDOT pursuant to the Purchase Agreement or any other

agreement, including the Indemnity Agreement executed by UP AND TNER, pursuant to which UP AND TNER indemnifies TxDOT and its successors and assigns with respect to claims for damages resulting from the operation of the railroad business on the Rail Line and related activities; TxDOT agrees it shall not release or terminate any such indemnities during the term of this Agreement.

5.4. Lessee shall require all persons entering upon or performing work on the Rail Line under any agreement with the Lessee (including any other railroads allowed on the Rail Line under Section 3.7) to agree to hold harmless and indemnify TxDOT and its officers, agents, and employees from and against any liability, loss, claim, or expense for bodily injury or death to any persons or damage to any property arising out of any act or omission of such contractor on or in connection with the Rail Line, irrespective of the fault, failure or negligence (other than sole negligence) of TxDOT. Lessee shall also require any such person or entity to secure and maintain in effect at all times during the performance of such work on the Rail Line a contractual liability insurance policy in the minimum amount of One Million (\$1,000,000) Dollars insuring such person or entity from liability under this section. Lessee shall provide TxDOT a copy of all such policies or certificates of insurance upon request.

5.5. Anything herein to the contrary notwithstanding, it is the intention of the parties that the Lessee shall be an independent contractor with regard to any and all activities and services performed and conducted by it under and pursuant to the terms of this Agreement. All persons engaged by the Lessee for purposes of discharging its duties hereunder shall be deemed to be the employees, agents or subcontractors (as the case may be) of the Lessee and shall not be deemed to be employees, agents or subcontractors of TxDOT. Lessee shall be solely liable for compliance with all laws and regulations of the United States and Texas and any other proper authority relating to employee wages and benefits, FELA and worker's compensation, unemployment compensation, social security, and all other employment laws and regulations, and Lessee shall hold harmless and indemnify TxDOT from any and all liability for and on account of the aforesaid matters.

6. EVENTS OF DEFAULT

6.1. The occurrence of any of the following events, in the absence of a Force Majeure Event (except as to Section 6.1 (a)), shall constitute a default by the Lessee hereunder:

(a) Failure to make payments of the annual fee when due, and such failure continues for sixty (60) days following written demand therefor;

(b) Failure to perform its duties in a manner required by law, rule, regulation, or ordinance or, in the absence of such laws, rules, regulations or ordinances, in a manner consistent with industry accepted practices and procedures and generally accepted railroad safety practices or procedures;

- (c) Failure to provide transportation or service upon reasonable request to shippers located on the Rail Line after service is restored, and in the absence of a lawfully filed and maintained embargo, and such failure continues for a period of sixty (60) days;
- (d) The performance of its duties in such a manner that results in a cessation or closure order from any governmental agency, department, or bureau, including without limitation any order from any agency, department, or bureau regarding the work environment of railroad employees;
- (e) The breach of any other provision of this Agreement for a period of thirty (30) days after receipt of notice of such breach from TxDOT;
- (f) The levy of a writ of execution, foreclosure or attachment or the filing of a mechanics' or materialmen's lien against the personal property of the Lessee located on the Rail Line or used in connection therewith that precludes the Lessee's ability to perform its duties hereunder unless Lessee has posted a surety bond therefor.

6.2 The occurrence of any of the following events shall constitute a default by TxDOT hereunder:

- (a) Failure to perform its duties in a manner required by law, rule, regulation, or ordinance or, in the absence of such laws, rules, regulations or ordinances, in a manner consistent with industry accepted practices and procedures and generally accepted railroad safety practices or procedures;
- (b) The breach of any other provision of this Agreement for a period of thirty (30) days after the receipt of notice of a separate breach from the Lessee; or
- (c) The levy of a writ of execution, foreclosure or attachment or the filing of a mechanics' or materialmen's lien against the personal property of TxDOT located on the Rail Line or used in connection therewith that precludes TxDOT's ability to perform its duties hereunder unless TxDOT has posted a surety bond therefore.

7. TERMINATION

7.1. This Agreement shall terminate upon the occurrence of any of the following:

- (a) Upon the expiration of the primary term or any renewal term without a renewal option having been exercised in accordance with Section 1.3;
- (b) Upon the expiration of ninety (90) days following written notice given by TxDOT of the occurrence or existence of any event of default as provided for in Section 6.1, unless such default has been cured or waived or such notice is withdrawn within such ninety (90) day period provided that if Lessee within such ninety (90) days period shall

have commenced action to cure such default but is unable, by reason of the nature of the performance required, to cure same within such period, and if Lessee continues such action thereafter diligently and without unnecessary delays, Lessee shall not be in default hereunder until the expiration of a period of time as is reasonably necessary to cure such default;

(c) Upon the expiration of ninety (90) days following written notice given by the Lessee of the occurrence or existence of any event of default as provided for in Section 6.2, unless such default has been cured or waived or such notice is withdrawn within such ninety (90) day period; provided that if TxDOT within such ninety (90) days period shall have commenced action to cure such default but is unable, by reason of the nature of the performance required, to cure same within such period, and if TxDOT continues such action thereafter diligently and without unnecessary delays, TxDOT shall not be in default hereunder until the expiration of a period of time as is reasonably necessary to cure such default; or

(e) Upon the expiration of a fifteen (15) consecutive year period during which no freight rail traffic moves over the line; or

(d) At any time by written mutual agreement of the parties hereto.

7.2 In the event of any termination of this Agreement, the Lessee shall vacate the Rail Line in an orderly manner, and shall deliver to TxDOT all occupation agreements, track and signal maps, structural, bridges and other drawings and plans in its possession, files related to maintenance history, a list of customers the Lessee for whom the Lessee has provided service to since the commencement of this Agreement, and any other data related to the continued operation and maintenance of the Rail Line.

7.3. In the event of termination of this Agreement pursuant to Section 7.1 (a), (b) or (d), the Lessee, at its sole cost and expense, will promptly seek any necessary authority to discontinue rail service from the STB or other governmental authority. If the Lessee fails to do so, the Lessee agrees that TxDOT may seek such authority on behalf of the Lessee, and the Lessee shall reimburse TxDOT for all costs (including filing fees and attorney's fees) incurred by TxDOT. Following its having been authorized to discontinue providing service on the Rail Line, Lessee shall not oppose the efforts of any rail carrier designated by TxDOT to operate rail freight services on the Rail Line to obtain authority from the STB or other governmental authority to provide rail service.

7.4. All accrued obligations and indemnity provisions shall survive the termination of this Agreement.

8. AUDITS AND REPORTS

8.1 Lessee shall file an annual report with TxDOT in the form attached hereto as Exhibit B on or prior to May 1 of each calendar year during the term of this Agreement beginning on May 1, 2006, and covering the preceding calendar year. The financial statement will be unaudited and will fairly present the following information: (a) income from operating the Rail Line during the preceding calendar year, specifying freight revenue and all other revenue; (b) expenses incurred by the Lessee in operating the Rail Line during the preceding calendar year, specifying transportation expense, maintenance expense, general and administrative expense, and all other expense; and (c) the depreciated book value of the Rail Line Improvements as of December 31st of the preceding calendar year.

8.2 Lessee shall file a monthly operational report with TxDOT in the form attached hereto as Exhibit C on or prior to the 15th calendar day of each month, beginning on or before the 15th day of the first month after the execution date of the agreement and continuing on each consecutive month thereafter.

8.2. Any and all information acquired by TxDOT under the terms of this Section 8 shall only be divulged as may be required by law or in connection with any administrative or legal proceeding.

9. TAXES

9.1. Railroad properties owned by TxDOT are currently exempt from ad valorem taxation of real property by the Texas Constitution. In the event that the Texas Constitution is amended or lawfully construed to permit ad valorem taxes to be assessed by any taxing jurisdiction authorized to assess and/or collect ad valorem taxes against the Rail Line properties, including right-of-way and other lands and improvements thereto, the Lessee shall be responsible for such taxes; provided, however, TxDOT shall reimburse the aggregate of such taxes to the Lessee upon termination of this Agreement (except for termination based in whole or in part on a failure by the Lessee to make a payment of the annual fee when due).

9.2. Nothing herein shall be construed to relieve the Lessee from any liability to pay taxes assessed against its motive power, rolling stock or other equipment, or any other personal property owned by the Lessee.

10. FORCE MAJEURE

10.1. Lessee shall have no obligation to operate over any portion of the Rail Line or perform any of its other obligations hereunder (other than its obligations to make lease payments pursuant to Section 2 hereof) during any period when it is prevented or hindered from operating or performing such obligations by acts of God, public authority, strikes, riots, labor disputes, judicial or administrative order or decree, or any other cause beyond its control.

10.2. Events or conditions referred to in Section 10.1 are referred to herein as "Force Majeure Events".

11. OTHER USES OF THE RAIL LINE

11.1. Lessee shall not make any use of the Rail Line, other than as provided herein, except with the prior consent of TxDOT.

12. MISCELLANEOUS PROVISIONS

12.1. Entire Agreement. This Agreement expresses the entire agreement between the parties and supersedes all prior oral or written agreements, commitments or understandings with respect to the matters provided for herein, and no amendment of this Agreement shall be effective unless set forth in writing and duly executed by both parties.

12.2. Notices. Any notice, request or other communication required or permitted hereunder shall be in writing and shall be deemed to have been duly given and received: (a) upon receipt if personally delivered or by overnight courier; (b) on the date sent if made by facsimile transmission to the party to whom such notice or communication is directed to the facsimile number of such person stated on Exhibit D (or as otherwise provided to or obtained by the sending party) and if followed by a telephone call to such person at the same time to the telephone number stated on Exhibit D (or otherwise provided to or obtained by the sending party) advising such person that the facsimile transmission has been sent and a general statement about the contents thereof; or, (c) on the third business day after being sent by registered or certified mail, return receipt requested, postage prepaid, to the parties at their respective addresses set forth in Exhibit D. Any party by written notice to the other may change the address or the persons to whom notices or copies thereof shall be directed.

12.3. Binding Effect. This Agreement shall be binding upon and inure to the benefit of TxDOT and the Lessee, and shall be binding upon the successors and assigns of the Lessee, subject to the limitations hereinafter set forth. Lessee may not assign its rights and obligations under this Agreement or any interest therein, or attempt to have any other person, firm or corporation assume its rights or obligations under this Agreement other than to any affiliate of the Lessee, without the prior written consent of TxDOT, which consent shall not be unreasonably withheld. TxDOT may not assign its rights and obligations under this Agreement or any interest therein, or attempt to have any other person, firm or corporation assume its rights or obligations under this Agreement, other than to another agency of the State Texas, without the prior written consent of the Lessee, which consent shall not be unreasonably withheld.

12.4. Non-Collusion. The officer or duly authorized agent of the Lessee that has executed this Agreement on behalf of the Lessee warrants and affirms that: (a) the execution, delivery, and performance by the Lessee under the terms of this Agreement have been duly and validly authorized by all necessary action under applicable law, its governing documents and otherwise (none of which actions have been modified or rescinded and all of which actions are in full force and effect); and (b) the officer or agent is fully aware of the facts and circumstances surrounding

the making of this Agreement, and neither the Lessee, its partners, or anyone else subject to the Lessee's direction and control has paid, given, donated or agreed to pay, give or donate any money or other thing of value, either directly or indirectly, to any officer or employee of TxDOT in procuring this Agreement.

12.5. Severability. If any provision of this Agreement, or the application thereof to any person or circumstance, is rendered or declared illegal for any reason and shall be invalid or unenforceable, the remainder of the Agreement and the application of such provision to other persons or circumstances shall not be affected thereby but shall be enforced to the greatest extent permitted by law.

12.6. Counterparts. This Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original, and all of which together shall constitute one and the same instrument.

12.7. Waivers. Any waiver by any party of any violation of, breach of, or default under any provision of this Agreement or any other agreements provided for herein, by the other party must be in writing and shall not be construed as, or constitute, a continuing waiver of such provision, or waiver of any other violation of, breach of, or default under any other provision of this Agreement or any other agreements provided for herein.

12.8. Headings. The headings herein are solely for convenience of reference and shall not be given any effect in the construction or interpretation of this Agreement.

12.9. Governing Law. All issues, claims, disputes or controversies arising out of or related hereto shall be governed by and resolved in accordance with the laws of the State of Texas, excluding the choice-of-law rules of the State of Texas.

IN WITNESS WHEREOF, the parties have caused their duly authorized representatives to execute this Agreement as of the date first above written.

**STATE OF TEXAS
DEPARTMENT OF TRANSPORTATION**

Executed by the Executive Director for the purpose and effect of activating and/or carrying out the orders, established policies or work programs heretofore approved and authorized by the Texas Transportation Commission.

By: 
Michael W. Behrens, P.E.
Executive Director

Fannin County Rural Rail District.

By: 
The Honorable Derrell Hall
Fannin County Judge