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*Analysis of Metropolitan Council's Obligations
under the Agreements with BNSF*

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Agreements to be Signed by the Council

- “CSA” – Commuter Service Agreement
 - Defines the rights and obligations of the Council for commuter rail service on the Northstar Corridor
 - In effect when BNSF operates the commuter trains
 - Term is 10 years, then renews for five year periods
 - Terminable by either side with notice
- “JUA” – Joint Use Agreement
 - Terms are substantially identical to the CSA
 - JUA is in effect only when BNSF is not the operator (until then, it is “on the shelf”)

Agreements to be Signed by the Council



- Other Agreements
- Master Cooperation Agreement
- Platform/Underpass/Overpass/Track
 - Lease Agreements
 - Terms still being negotiated
 - Construction Agreements
 - D.O.T.

Overview



- BNSF will grant the State easements enabling the Council to provide commuter service
- BNSF will manage, operate and maintain the Northstar Corridor

The Council's Payment Obligations

- Necessary improvements
- Obtaining permits
- Any costs for construction delays
- Additional improvements to expand the Corridor

The Council's Payment Obligations

When BNSF is the operator, the Council pays for:

- BNSF's insurance
- BNSF's costs to clear wrecks

The Council's Payment Obligations

When BNSF is NOT the operator, the Council pays for:

- Maintaining railroad, signals and switches
- Dispatching commuter trains
- Improvements by BNSF that benefit the Council

The Council's Payment Obligations

- Rolling stock (trains, etc.)
- Expense of BNSF Superintendent of Commuter Operations
- Ticketing and customer issues
- Law enforcement on train
- Obtaining regulatory approval
- Setup costs (construction, parking, computer syncing)

Dispute Resolution

- The parties agree to cooperate to avoid and resolve any disputes
- High level personal meetings are required to resolve disputes
- Unresolvable disputes are subject to binding arbitration by the American Arbitration Association in Minneapolis
- The Arbitrator shall be a retired judge or equivalent; generally, one person; if operation of commuter service is suspended, three-person panel
- Courts: only for emergency relief

Insurance and Liability Allocation Overview



Liability Management

1. Council purchases specialty insurance
 - Non-standard and unique requirements
2. Federal/State statutes (tort caps and immunities) may limit exposure
 - Third-Party claims
3. Allocates between Council and BNSF various liabilities and defense costs
 - Not fault-based

Insurance



Council to obtain required insurance

- Market availability
- Cost (premium)
- Council staff and specialty lines brokers

Insurance Challenges

- Can't obtain, coverage exclusions, or no longer commercially available
 - Must negotiate “equivalent protection” for BNSF
 - If no agreement, train stops
 - BNSF can purchase insurance and charge the Council
 - If there is no coverage then Indemnity and Allocation provisions control

Insurance



WHO IS THE INSURED?

- Both the Council and BNSF
- BNSF means its officers, employees, agents and contractors performing duties related to the Northstar Corridor

WHEN DOES INSURANCE BEGIN?

- Movement of rolling stock to mobilize for Commuter Service

WHEN DOES INSURANCE END?

- Five years after specified events occur

What Insurance is Required

- Annual \$200 million (plus) Railroad liability policy
 - May include up to \$5 million “SIR”
 - Council liable for SIR for BNSF liability
- \$200 million for *each* event
 - Annual aggregate not to exceed \$400 million
 - Reinstatement option

Insurance Requirements

“Loss or Damage”:

- Personal and real property (includes BNSF property)
- Injury/death to person/animals (includes employees, agents, contractors, Parties and Third Parties)
- Includes:
 - Fines, penalties, fees
 - All costs to investigate and defend claims
 - Punitive damages
 - Workers compensation (includes FEOLA)

Insurance Requirements

“Environmental Tort Liability”:

- Personal injury/property damage:
 - Hazardous Materials from a railroad accident
- Not “Environmental Loss or Damage”
 - Personal injury/property damage
 - No railroad accident – Hazardous Material clean-up

Insurance Requirements

Must include:

- Gross negligence, recklessness, willful and wanton misconduct
- Property damage to Rolling Stock and personal property listed on a bill of lading
 - May require separate first party policy
- “Blanket Contractual Coverage”
 - Covers all liability for the Agreement’s insurance and indemnity provisions

Insurance Changes

- Meet and confer every 5 years
 - BNSF can seek changes to requirements
- Developments in federal law can trigger a change
 - Increase or decrease in \$200 million
 - If federal law held inapplicable to Council and BNSF

Allocation and Indemnification

- Look to insurance first
- If coverage, no allocation
- If no coverage, allocation provisions apply
 - Loss or damage exceed insurance limits
 - If only part of the loss is covered (or there is no coverage)

Allocation of Loss or Damage

- Allocation is not “fault” based
- Does not allocate “Environmental Tort Liability”
- Council bears Loss or Damage to “the Northstar party”
 - Council employees, agents contractors
 - Commuter passengers or others at or near stations
- BNSF bears Loss or Damage to “BNSF Party”
 - BNSF, employees, agents, contractors using Corridor for BNSF duties
 - Other parties using Corridor by agreement with BNSF

Allocation of Loss or Damage

1. If an accident only involves a Northstar Party train, and there is loss or damage to a Third Party, a BNSF Party or a Northstar Party, then
 - The Council bears the loss

Allocation of Loss or Damage

2. If an accident involves a BNSF Party train and (1) it is not result of operation of Commuter Service and (2) it is not contributed to by the Northstar Party, then
 - BNSF bears the loss or damage to the Third Party or BNSF Party
 - Note: losses for the Northstar Party not allocated to BNSF

Allocation of Loss or Damage

3. If an accident only involves both a Council train and a BNSF train, then:
 - The loss or damage to a Third Party or BNSF Party is allocated between parties on a usage-basis formula
 - Note: losses for the Northstar Party are not allocated to BNSF
 - Note: losses for BNSF/Third Party partially allocated to Council

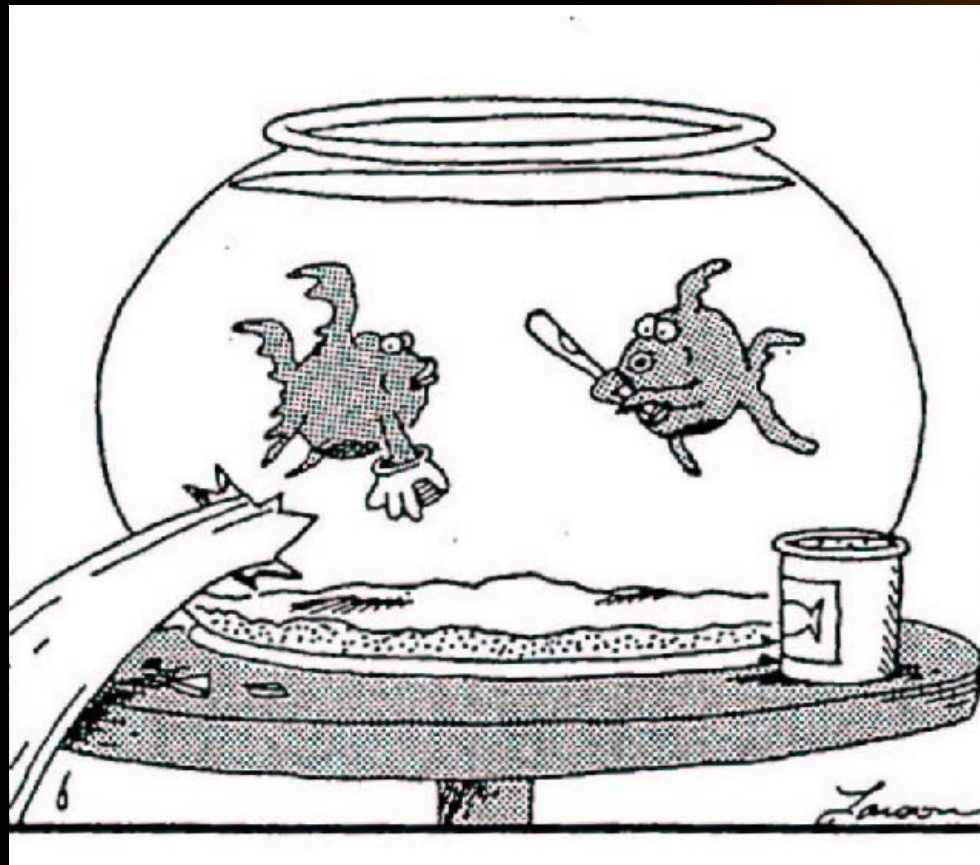
Releases and Indemnification

- Council releases BNSF for losses allocated to the Council
- BNSF releases the Council for losses allocated to BNSF
- Each defends and indemnifies the other for claims made for the losses allocated to it
- The parties retain immunities, tort caps, limitations, etc. to limit exposure to third parties, but waive these claims between each other
- If void, BNSF negotiates “equivalent protection” or train stops

Environmental Liability

- The Agreement does not require the Council to obtain insurance for environmental loss or damage
- If there is no insurance coverage for environmental loss or damage, then:
- The Council and BNSF each agree to bear so much of such Environmental Loss, Damage or Tort Liability as was caused by each.

Environmental Liability



Environmental Liability

- The parties indemnify each other for environmental problems they create, regardless of any negligence, gross negligence, or strict liability of the other
- The allocation of costs for environmental problems is not affected by any allocation involving a non-party

Environmental Liability

- The Council may not report any environmental problems on the Northstar Corridor unless it has a legal obligation to do so
- BNSF will conduct and control the investigation and clean-up of all environmental problems
- If the investigation and clean-up costs are allocated to the Council, then the Council is afforded reasonable notice and opportunity for input



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