

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

300908

ENTERED
Office of Proceedings
July 22, 2020
Part of
Public Record

Docket No. FD 36420

**COMMUTER RAIL DIVISION OF THE REGIONAL TRANSPORTATION
AUTHORITY, d/b/a METRA**

**UNION PACIFIC RAILROAD COMPANY'S MOTION
TO HOLD PROCEEDING IN ABEYANCE**

RHONDA S. FERGUSON
CRAIG V. RICHARDSON
JAMES B. BOLES
Union Pacific Railroad Company
1400 Douglas Street
Omaha, Nebraska 68179
(402) 544-7004

MICHAEL L. ROSENTHAL
Covington & Burling LLP
One CityCenter
850 Tenth Street, NW
Washington, D.C. 20001
(202) 662-6000

Attorneys for Union Pacific Railroad Company

July 22, 2020

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. FD 36420

**COMMUTER RAIL DIVISION OF THE REGIONAL TRANSPORTATION
AUTHORITY, d/b/a METRA**

**UNION PACIFIC RAILROAD COMPANY'S MOTION
TO HOLD PROCEEDINGS IN ABEYANCE**

Union Pacific asks the Board to hold all proceedings in this docket in abeyance. The Board should hold the proceedings in abeyance at least until Judge Jorge L. Alonso of the U.S. District Court for the Northern District of Illinois rules on a pending motion that *Metra* filed to dismiss a case in which Union Pacific raised *precisely the same issue* Metra seeks to litigate here. Union Pacific's federal court case, filed more than seven months ago, addresses whether Union Pacific has a common carrier obligation that would require it to operate commuter rail service in the Chicago area after the expiration of its purchase of service agreement ("PSA") with Metra.

Metra has acknowledged the District Court's jurisdiction to resolve the common carrier question but asked the Court in March to dismiss or stay the case in favor of a proceeding before the Board, although there was no such proceeding pending then or until yesterday. Briefing on Metra's motion in the District Court is scheduled to be completed tomorrow, July 23, 2020. Briefing would have been completed already, had Metra not sought additional time to file its reply—time it apparently used to open this competing proceeding. Metra does not give the Board any valid reason to act before the District Court rules on Metra's own motion, and the Board has a compelling reason not to act: unless the District Court grants Metra's motion, the Court will

resolve the common carrier issue, eliminating any need for Board action. In addition, the District Court has jurisdiction to grant Metra preliminary injunctive relief, if such relief actually were warranted. By contrast, the Board has no jurisdiction over the PSA. *See* 49 U.S.C. § 10709. In these circumstances, “abeyance would promote efficiency” and would not “be fundamentally unfair to any party.” *N. Am. Freight Car Ass’n v. Union Pac. R.R.*, NOR 42144, slip op. at 3 (STB served Mar. 31, 2017).

BACKGROUND

Union Pacific is a freight railroad. It does not hold itself out as offering passenger service, and it is not a passenger railroad. Metra offers commuter service on 11 lines in the Chicago area, including three lines operated over tracks owned by Union Pacific. Metra directly operates the commuter service on most of its lines. On Metra’s three lines operating over Union Pacific’s tracks, Union Pacific operates the commuter service on Metra’s behalf under the parties’ contract, which is known as the PSA. Union Pacific has been operating the commuter service under repeat short-term extensions of the PSA since January 1, 2020.

Since 2019, Union Pacific and Metra have been engaged in negotiations to ensure the continued operation of commuter service on Union Pacific’s railroad after the PSA’s expiration, which is currently set for August 31, 2020. Union Pacific has advised Metra that it intends to exit the business of operating commuter service on Metra’s behalf and has asked to work with Metra to ensure the seamless transition of the commuter service on its tracks to Metra. Union Pacific has consistently maintained throughout this process that it is committed to uninterrupted service for Chicago-area commuters. Union Pacific does not operate commuter service anywhere else on its 23-state, 32,000-mile freight railroad. Union Pacific has offered to make its tracks, other property, and specific essential services (such as train dispatching and track maintenance)

available to Metra under a new contract, so Metra can continue to provide the commuter service directly as it does on most of its lines, with no difference to riders.

Negotiations have been unsuccessful to date. The PSA initially was set to expire on December 31, 2019. During negotiations, Metra contended that, if the PSA were to expire without the parties reaching a new agreement, Union Pacific would be subject to a common carrier obligation to continue operating commuter service on the tracks currently used by Metra—*i.e.*, Union Pacific would have no choice but to renew the PSA under Metra’s terms because Union Pacific, according to Metra, cannot exit the business of operating the commuter service as a matter of law. When it became clear this fundamental disagreement over Union Pacific’s legal obligations could not be resolved between the parties and was impeding their negotiations, Union Pacific filed a complaint on December 5, 2019, seeking declaratory relief in the U.S. District Court for the Northern District of Illinois. *See Exhibit A.*¹

On March 3, 2020, Metra filed a motion to dismiss or stay Union Pacific’s complaint. In the motion, Metra acknowledged the District Court’s jurisdiction over the dispute, but it urged the court to stay or dismiss the case under the doctrine of primary jurisdiction. *See Exhibit B.*

On June 11, 2020, Union Pacific filed its opposition to Metra’s motion. Union Pacific argued that the Court should deny Metra’s motion because the parties’ dispute involves strictly legal matters, not policy or technical considerations within the Board’s expertise. *See Exhibit C.*

Metra’s reply would have been due on June 25, 2020. Metra sought and obtained an extension of time to July 23, 2020, representing that its counsel were busy with other federal cases and that preparation of Metra’s reply brief would require “substantial effort.” *See Exhibits D & E.*

¹ Union Pacific’s exhibits are attached to this filing.

ARGUMENT

“The Board has broad discretion to determine whether to hold a proceeding in abeyance.” *Norfolk S. Ry.—Pet. to Set Trackage Rights Compensation—Norfolk & Portsmouth Belt Line R.R.*, FD 36223, slip op. at 3 (STB served Dec. 19, 2019) (quotations omitted); *see also* *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 543 (1978) (“Absent constitutional constraints or extremely compelling circumstances, the administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.”) (quotation omitted). In this case, the Board should exercise its discretion to hold this proceeding in abeyance because the District Court case may eliminate any need for litigation at the Board.

If Judge Alonso denies Metra’s motion to dismiss or stay, the District Court will decide the *precise* issue Metra seeks to raise here—*i.e.*, whether Union Pacific has a common carrier obligation that would require it to operate commuter rail service in the Chicago area after the expiration of its PSA. The existence of a pending federal court case that could moot the need for any Board action is the paradigm of a situation in which the Board should hold proceedings in abeyance to avoid wasting Board and party resources. *See, e.g., Ballard Terminal R.R.—Pet. for Declaratory Order*, FD 36261, slip op. at 4–5 (STB served June 27, 2019); *Pet. of the Nat’l R.R. Passenger Corp. for Relief Pursuant to 49 U.S.C. § 24905*, FD 36048, slip op. at 4 (STB served Oct. 3, 2016). The Board often holds matters in abeyance where pending court cases might merely simplify future Board proceedings or otherwise promote efficiency. *See, e.g., Norfolk S.*, slip op. at 4; *Dyno Nobel, Inc. v. Nustar Pipeline Operating P’ship, L.P.*, NOR 42147, slip op. at 4–5 (STB served Mar. 24, 2017).

Metra cannot argue that holding this docket in abeyance would be fundamentally unfair. Metra did not invoke the Board’s jurisdiction before Union Pacific filed its complaint in federal court in December 2019. Instead, Metra participated in the District Court litigation for more than seven months before filing this proceeding at the Board. Metra now seeks to short-circuit *its own motion to dismiss* by instituting this proceeding before filing its reply brief in District Court. Metra’s dilatory and forum shopping tactics are fundamentally unfair to Union Pacific and an affront to the District Court’s jurisdiction to decide a pending motion filed by Metra.

Metra has asked the Board to issue a preliminary injunction to preserve the benefits of the PSA while litigation proceeds at the Board. However, Metra has a ready alternative to Board action: seeking injunctive relief from the District Court. In fact, Metra could obtain the injunctive relief it seeks only from the District Court: the Board has no jurisdiction to require Union Pacific to provide services under the terms of the PSA—a contract under which Metra purchases rail services from Union Pacific—beyond the PSA’s expiration. *See* 49 U.S.C. § 10709.

For all the reasons discussed above, Union Pacific requests that the Board hold these proceedings in abeyance.

Respectfully submitted,

RHONDA S. FERGUSON
CRAIG V. RICHARDSON
JAMES B. BOLES
Union Pacific Railroad Company
1400 Douglas Street
Omaha, Nebraska 68179
(402) 544-7004

/s/ Michael L. Rosenthal
MICHAEL L. ROSENTHAL
Covington & Burling LLP
One CityCenter
850 Tenth Street, NW
Washington, D.C. 20001
(202) 662-6000

Attorneys for Union Pacific Railroad Company

July 22, 2020

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of July, 2020, I caused a copy of the foregoing document to be served by first-class mail, postage prepaid, or a more expeditious manner of deliver on all parties of record in Finance Docket No. 36420.

/s/ Michael L. Rosenthal

cc

FILED

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

DEC 05 2019 *YJ*

**THOMAS G. BRUTON
CLERK, U.S. DISTRICT COURT**

UNION PACIFIC RAILROAD COMPANY,)

Plaintiff,)

v.

COMMUTER RAIL DIVISION OF THE
REGIONAL TRANSPORTATION
AUTHORITY, d/b/a METRA,)

Defendant.)

1:19-cv-07957

Judge Jorge L. Alonso

Magistrate Judge Gabriel A. Fuentes

[SEALED] COMPLAINT FOR DECLARATORY RELIEF

Union Pacific Railroad Company brings this complaint for declaratory relief against the Commuter Rail Division of the Regional Transportation Authority d/b/a Metra ("Metra") and alleges as follows:

NATURE OF THE ACTION

1. More than 100,000 passengers travel across the Chicago metropolitan area each weekday on Metra commuter rail trains operated by Union Pacific under a service agreement with the commuter rail agency. This transportation service, which accounts for 27 million passenger trips each year, is important to the economic well-being and quality of life in the communities located along these lines.

2. Union Pacific is an interstate freight railroad with a history dating back more than 150 years. Union Pacific's participation in Metra's regional commuter rail service arose under a predecessor railroad, which became part of Union Pacific in the 1990s, and has its roots in the reorganization of Chicago-area transit services during the 1970s. Union Pacific currently

provides commuter rail service to Metra under a Purchase of Service Agreement (“PSA,” as amended, attached as Exhibit A (omitting exhibits to the PSA)). The PSA went into effect on January 28, 2010, and has been amended several times over the years. It is set to expire on February 29, 2020.

3. In general, the PSA requires Union Pacific to operate commuter trains owned by Metra on three lines—known as the North Line, the Northwest Line and the West Line—all of which serve downtown Chicago. Union Pacific employees operate and maintain the commuter trains for Metra and perform administrative functions, such as selling tickets and collecting fares. Union Pacific owns and maintains the track, bridges and signal systems, which are also used in freight operations. Union Pacific also owns much of the adjacent property (*e.g.*, stations, administrative buildings and parking lots) along the lines. Union Pacific receives compensation from Metra for its services under the PSA. Importantly, the PSA contains liability protections in the form of indemnity provisions that are a necessary precondition for Union Pacific’s participation in Metra commuter rail service. Metra retains overall authority over commuter service, including fares, and holds itself out to the public as the commuter rail service provider.

4. The PSA previously was set to expire on December 31, 2019. Union Pacific and Metra have been engaged in ongoing negotiations during 2019 to ensure the continued provision of commuter rail service on Union Pacific’s three lines after the PSA expires. Union Pacific has advised Metra that it is willing to enter into an agreement to make its track and property available to Metra for future commuter rail service on its lines. Union Pacific would continue to provide limited essential services under contract to Metra, such as dispatch and line maintenance, to ensure that Metra’s commuter rail service continues with no difference to riders. Union Pacific, however, has advised Metra that it intends to exit the business of operating commuter

rail trains with its employees for the transit agency. The Metra service is the only example across Union Pacific's 23-state, 32,000-mile freight railroad where Union Pacific operates commuter rail trains.

5. Union Pacific and Metra recently agreed to a short-term Interim Agreement, which extended expiration of the PSA to February 29, 2020, to provide additional time for Union Pacific and Metra to negotiate the terms of a mutually acceptable new agreement. (Interim Agreement Extending Purchase-of-Services Agreement to Allow More Time to Finalize a New Agreement, "Interim Agreement," attached as Exhibit B). The Interim Agreement memorializes Union Pacific and Metra's shared interest to try to finalize a new agreement to take the place of the PSA and specifically acknowledges that either party may institute legal proceedings during the pendency of the Interim Agreement to assist with resolution of issues preventing the parties from reaching a new agreement. (Ex. B, § 2).

6. During the course of negotiations, Metra has contended that, if the PSA were to expire without the parties reaching a new agreement for the continued provision of commuter rail service on Union Pacific's lines, Union Pacific would be subject to a "common carrier" legal duty that would require Union Pacific to continue operating Metra's commuter trains after the expiration. Union Pacific disagrees any such duty would exist and contends that: (1) Congress eliminated any obligation to provide inter-city passenger service in the Rail Passenger Service Act of 1970, P.L. 91-518, 84 Stat. 1327, and (2) in passing the ICC Termination Act ("ICCTA"), 49 U.S.C. § 10101 *et seq.*, Congress eliminated any vestiges of freight railroads' common carrier duty to provide passenger service. Union Pacific has not held itself out as offering passenger service in the Chicago region, and it cannot reasonably be tasked with instituting such service.

7. Union Pacific has no desire to play any role in disrupting the lives of the people

and communities who have come to rely on Metra's commuter rail service on its lines. Union Pacific is committed to working with Metra to accomplish an efficient, seamless and timely transition of the operation of Metra's commuter rail service on Union Pacific's lines from the way that service previously has been provided under the PSA, with Union Pacific and its employees operating Metra trains, to how it will be provided in the future. Metra's position that Union Pacific cannot exit the business of operating Metra's commuter trains is preventing the parties from reaching a new agreement—which will require coordination between Union Pacific and Metra to ensure a seamless transition—and ultimately raises a threat to the uninterrupted future provision of commuter service on Union Pacific's lines.

8. Metra's contention that Union Pacific's alleged common carrier obligation would require Union Pacific to continue operate Metra's commuter trains after expiration of the PSA raises a substantial controversy of sufficient immediacy and interest to warrant the issuance of declaratory relief. Union Pacific would suffer millions of dollars in losses and incur millions of dollars in additional risk if it were required to continue to operate Metra's commuter rail service after the PSA's expiration, despite Union Pacific's stated determination to exit the business of operating Metra's commuter trains. A declaratory judgment as to Union Pacific's alleged common carrier duty will clarify and settle the Union Pacific's legal obligations, as well as the legal relations between Union Pacific and Metra, and afford Union Pacific relief from liability that could arise after expiration of the PSA.

PARTIES

9. Plaintiff Union Pacific is a Delaware corporation with its principal place of business in Omaha, Nebraska.

10. Defendant Commuter Rail Division is a division of the Regional Transportation

Authority (“RTA”), an Illinois municipal corporation with its principal place of business in Chicago, Illinois.

JURISDICTION & VENUE

11. The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1332 because the amount in controversy exceeds \$75,000, exclusive of interest and costs, and is between citizens of different states.

12. The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 because the action arises under the laws and regulations of the United States, including ICCTA.

13. Declaratory relief is authorized by 28 U.S.C. §§ 2201 and 2202.

14. Venue in this District is proper pursuant to 28 U.S.C. § 1391(b)(1) and (b)(2) because Defendant resides in this district and the claims arise in this district.

FACTUAL BACKGROUND

I. Metra’s Creation

15. In the early 1970s, public transportation in the Chicago metropolitan area faced a funding crisis. Because of declining revenues, bus companies and commuter rail operators either cut services substantially or ceased operating altogether.

16. To avoid further deterioration of regional transit, voters in six counties in Northeastern Illinois (Cook, DuPage, Kane, Lake, McHenry, and Will counties) on March 19, 1974, approved via referendum the creation of the RTA to furnish public transportation services. The Illinois General Assembly then enacted the Regional Transportation Authority Act (“RTAA”) to organize and support public transportation in the six counties. The RTAA tasked the RTA with planning, funding, and providing “adequate, efficient, geographically equitable and coordinated public transportation” in the region. 70 ILCS 3615/2.01(a)(i).

17. The General Assembly created within the RTA three “Service Boards”: the Suburban Bus Division (now known as Pace Suburban Bus), responsible for suburban bus services; the Chicago Transit Authority, responsible for bus and subway services in the City of Chicago; and the Commuter Rail Division (now known as Metra), responsible for regional commuter rail operations.

18. The RTAA permits the Service Boards to provide public transportation services themselves or to purchase public transportation services from transportation agencies upon terms and conditions set forth in purchase of service contracts with those agencies.

19. Metra’s 11 lines today represent a mix of approaches. Four of its 11 lines—Rock Island, Metra Electric, Milwaukee District North, and Milwaukee District West—are owned and operated by Metra. Two lines are operated by Metra on tracks owned by freight railroads. Another line is operated on sections of track owned by Metra and sections owned by a freight railroad. The remaining four lines are operated directly by freight railroads on behalf of Metra through purchase of service agreements—three of those by Union Pacific.

20. The three Metra commuter rail lines operated by Union Pacific operate between the Ogilvie Transportation Center in Chicago and, respectively, Kenosha, Wisconsin (the North Line); Harvard and McHenry, Illinois (the Northwest Line); and Elburn, Illinois (the West Line).

21. According to Metra, the three Union Pacific-operated commuter lines together serve 65 stations in Northeastern Illinois and account for more than a third of all Metra trips, or almost 580 million passenger miles.

II. The Metra-Union Pacific Purchase of Service Agreement

22. Effective January 28, 2010, Union Pacific and Metra entered into the PSA, which governs the operation of Metra’s commuter rail service on Union Pacific’s lines. (Ex. A). By

amendment, dated December 21, 2015, the PSA was modified to, among other things, extend the term of the agreement until December 31, 2019. Union Pacific and Metra further extended the term until February 29, 2020 with their recent Interim Agreement. (Ex. B).

23. Under the PSA, Union Pacific is responsible for the following services in connection with operating the Metra trains:

- a. Hiring, training and certifying trainmen, engineers and yard personnel necessary to operate commuter trains on the lines;
- b. Maintaining and servicing rolling stock;
- c. Maintaining rights of way, track, bridges, signal systems, stations, platforms, offices, parking lots and other structures necessary to operate commuter service;
- d. Selling tickets and collecting fares; and
- e. Providing administrative, professional and supervisory services.

24. As a necessary condition to entering into the PSA, Metra and Union Pacific also agreed that liability protections for Union Pacific would be included in the PSA. These indemnification provisions allocate ultimate financial responsibility for any claims made against Union Pacific or Metra in connection with the performance of the PSA. (Ex. A, § 10.02–10.05). Without these protections, Union Pacific would not have entered into the PSA, and Union Pacific could not continue to allow for the provision of commuter rail service on its lines unless these liability protections remained in force and effect.

III. The Dispute Over Union Pacific's Alleged Common Carrier Obligation

25. Over the course of 2019, Metra and Union Pacific have engaged in good faith negotiations for a new agreement after expiration of the PSA. To date, the parties have been

unable to agree on a new contract. Recognizing the importance of maintaining service on the three lines, Union Pacific and Metra recently agreed to a short-term extension of the PSA to allow the parties to continue negotiating a comprehensive new agreement. (Ex. B).

26. During these negotiations, Metra has contended that, in the event the PSA were to expire without a new agreement in place, Union Pacific could not cease operating commuter trains on behalf of Metra on its lines because, according to Metra, Union Pacific would have a common carrier legal duty to maintain commuter rail service after expiration. Union Pacific has advised Metra that it has no obligation to maintain commuter rail service after expiration of the PSA and encouraged Metra to negotiate toward a resolution that transitions the operation of Metra's commuter trains on Union Pacific's lines to Metra or another third-party operator in an efficient, seamless and timely manner.

COUNT ONE
Declaratory Judgment (No Common Carrier Obligations)

27. Union Pacific incorporates by reference all of the allegations in the Complaint as if fully set forth in this paragraph.

28. An actual case or controversy exists with respect to whether Union Pacific has a common carrier obligation to operate commuter trains on behalf of Metra after expiration of the existing PSA between Union Pacific and Metra.

29. ICCTA grants the Surface Transportation Board ("Board") jurisdiction over transportation by rail carrier between "a State and a place in the same or another State as part of the interstate rail network." 49 U.S.C. § 10501(a)(2)(A). "Transportation" includes movement of passengers, *id.* § 10102(9). The transportation at issue in this case would be provided over lines that are part of Union Pacific's interstate rail network.

30. ICCTA also makes the Board's jurisdiction "exclusive" and broadly preempts

state and local regulation of rail transportation. *Id.* § 10501(b); *see also, e.g., Union Pac. R.R. v. Chi. Transit Auth.*, 647 F.3d 675, 678 (7th Cir. 2011) (“Congress’s intent in the Act to preempt state and local regulation of railroad transportation has been recognized as broad and sweeping.”).

31. Congress’s enactment of the ICCTA eliminated any remnants of freight railroads’ common carrier obligation to provide passenger service. Congress’s Conference Report recognizes that, under the ICCTA, “regulation of passenger transportation is generally eliminated.” H.R. Report No. 104-422, at 167 (1995).

32. The elimination of prior statutory provisions regulating passenger train discontinuances provides further evidence of Congress’s intent. Thus, even if a freight railroad were currently offering passenger service, it could discontinue such service without obtaining Board authority. *See DesertXpress Enters., LLC – Petition for Declaratory Order*, FD 34914 (STB serviced May 7, 2010) at 13 (noting repeal of passenger train discontinuances statute as part of Congress’s “curtailment” of the Board’s regulation of passenger transportation in the ICCTA).

33. Union Pacific has not held itself out as offering passenger rail service in the Chicago region, and it therefore cannot have any obligation to provide such service. *See Commuter Rail Division of the Regional Transportation Authority of Northeast Illinois d/b/a Metra – Tariff Filing Requirements*, NOR 41506 (ICC served Feb. 24, 1995) (“[O]nly Metra holds itself out to provide the commuter service at issue.”); *id.* (“[W]e find that it is METRA, and not the contracting carriers, that is properly subject to our tariff filing obligation for the commuter services being provided.”).

34. Union Pacific also has no common carrier obligation to provide commuter rail

service under state statutory or common law. ICCTA establishes exclusive Board jurisdiction to regulate intrastate rail transportation as part of the interstate rail network, so any state law purporting to impose common carrier-type requirements on Union Pacific to establish passenger service on its interstate lines would be preempted.

PRAYER FOR RELIEF

WHEREFORE, Union Pacific asks the Court to issue a judicial declaration that Union Pacific has no common carrier obligation to operate commuter trains on its lines after expiration of the PSA between Metra and Union Pacific.

Dated: December 5, 2019

Respectfully submitted,

/s/ Patricia Brown Holmes

Patricia Brown Holmes, Bar # 6194645
Sarah E. Finch, Bar # 6312797
RILEY SAFER HOLMES & CANCELIA LLP
70 W. Madison St., Ste. 2900
Chicago, IL 60602
Telephone: (312) 471-8745
pholmes@rshc-law.com
sfinch@rshc-law.com

David E. Schoenfeld, Bar #6197020
Benjamin E. Sedrish, Bar #6308141
SHOOK, HARDY & BACON L.L.P.
111 S. Wacker Dr., 47th Floor
Chicago, IL 60657
Telephone: (312) 704-7700
dschoenfeld@shb.com
bsedrish@shb.com

Joe Rebein (*pro hac vice forthcoming*)
SHOOK, HARDY & BACON L.L.P.
2555 Grand Blvd.
Kansas City, MO 64108
Telephone: (816) 474-6550
jrebein@shb.com
pkenney@shb.com

*Attorneys for Plaintiff Union Pacific Railroad
Company*

EXHIBIT A

AMENDED AND RESTATED
PURCHASE OF SERVICE AGREEMENT
BETWEEN
THE COMMUTER RAIL DIVISION OF THE REGIONAL TRANSPORTATION
AUTHORITY
AND
THE UNION PACIFIC RAILROAD COMPANY
January 1, 2010 – December 31, 2016

THIS AMENDED AND RESTATED AGREEMENT entered into this 28th day of January 2010, by and between the COMMUTER RAIL DIVISION (“CRD”) created by Article III, Section 3B.01 of the Regional Transportation Authority Act, as amended, and the UNION PACIFIC RAILROAD COMPANY, a Delaware corporation (“**Railroad**”) shall amend and restate the Original Agreement, as defined in Article I. This Amended and Restated Agreement shall be effective January 1, 2010.

Preliminary Statement

Railroad is a Transportation Agency which provides Public Transportation Services by rail in the Metropolitan Region in the northeastern area of the State of Illinois. The Regional Transportation Authority (“**Authority**”) was established pursuant to the Regional Transportation Authority Act (“**Act**”), as amended, for the purposes of (a) providing for, aiding and assisting public transportation in the Metropolitan Region, without impairing the overall quality of existing public transportation, and (b) providing and facilitating public transportation which is attractive and economical to users, comprehensive and coordinated among its various elements, and economical, safe, efficient and coordinated with area and State plans. The Authority and Railroad entered into previous Purchase of Service Agreements, the most recent of which was for the period ending on December 31, 1998. On November 9, 1983, the Act was amended to provide for the establishment of the Commuter Rail Division of the Authority. The CRD is the operating division of the Authority responsible for providing public transportation by commuter rail and for the negotiation and administration of Purchase of Service Agreements.

ARTICLE I

Definitions

In this Agreement, the following terms shall have the following meanings:

Act -- the Regional Transportation Authority Act, Public Act 78-5, 3rd Sp. Sess. (70 ILCS 3615/1.01 et seq.) as in effect on the date hereof and as hereafter amended.

Accounting Change Notice (ACN) – the meaning thereof in Article 6.02.

Accounting Change Request (ACR) -- the meaning thereof in Article 6.02.

Agreement -- this Amended and Restated Purchase of Service Agreement and all exhibits hereto as amended from time to time.

CRD & UPRR PSA AGREEMENT

Additional Compensation -- the meaning thereof in Article 6.06.

Agreement Term -- the term of this Agreement as provided in Article 11.01.

Allocation Statistics Report -- the meaning thereof in Article 7.01.

Approved Budget -- the budget for a Budget Period approved in accordance with Article 6.03.

Authority -- the Regional Transportation Authority.

Billing Number -- a unique number assigned to record and allocate expenses for maintenance of way and engineering for track segments, buildings and other purposes.

Board of Directors -- Directors of the CRD.

Budget Limits -- the meaning thereof in Article 6.02.

Budget Objection -- the meaning thereof in Article 6.03.

Budget Period -- the meaning thereof in Article 6.03.

Calendar Year -- the 12-month period beginning January 1 and ending December 31.

Capital Expenditure -- the cost of acquisition, construction, modification, replacement, installation or permanent improvement of the kinds of tangible property listed in Property Account Nos. 1-20, 22, 26-52, 54, 57, 58, 59 and 90 of the Uniform System of Accounts, 49CFR, 1200-1219, revised as of October 1, 1997.

Capital Needs -- a list of any items proposed for acquisition, construction, modification, replacement, installation or permanent improvements of tangible property that is eligible for federal, state, or local funding.

Chargeable Cost Centers -- the Cost Centers defined in Exhibit 6-A.

Claim -- the meaning thereof set forth in Article 10.01.

Commencement Date -- the date on which Contract Services are first performed in accordance with a Service Change.

Common Expense -- the expense of an activity attributable to both Contract Services and Railroad's other operations.

Compensation -- the meaning thereof in Article 6.04.

Consist -- the number and type of cars and locomotive units making up a particular train.

Contract Security Services -- the meaning thereof set forth in Article 6.13.

Contract Services -- (a) with respect to the Agreement Term, the Public Transportation Services by rail to be provided by Railroad, acting as an independent contractor for the benefit of the CRD, pursuant to this Agreement, and the performance by Railroad of its

~~CRD & UPRR PSA AGREEMENT~~

other obligations under this Agreement, and (b) with respect to the term of the Prior Agreement, Contract Services (as that term is defined in the Prior Agreement) rendered under the Prior Agreement.

Contract Services Property -- the meaning thereof in Article 3.01.

Contract Services Revenue -- the meaning thereof in Article 6.01.

Cost Center -- the unique identifying number to which expenses are charged as set forth in the Subsidiary Accounting System.

Cost Code -- a description of an expense as set forth in the Subsidiary Accounting System.

CRD -- the Commuter Rail Division of the Regional Transportation Authority.

Emergency Services Manager -- the meaning thereof in Article 2.07.

Estimated Compensation -- the meaning thereof in Article 6.04.

Estimated Surplus -- the meaning thereof in Article 6.04.

Fair Market Rental -- a periodic rental payment based on the Fair Market Value determined in accordance with Exhibit 2-AB and the appraisal criteria as provided in Exhibit 2-AC.

Fair Market Value -- the meaning as determined by the procedure set out in Exhibit 2-AB.

Fare Change; Fare Change Notice -- the meaning thereof in Article 5.02.

Function Cost Report -- the meaning thereof in Article 7.01.

Government Requirements -- federal, state, and local statutes, codes, regulations, ordinances, rules, orders and other requirements.

Labor -- the meaning thereof in Article 2.03.

Metropolitan Region -- all territory which is included within the territory of the Authority and CRD pursuant to the Act.

Monthly Expense Reports -- the meaning thereof in Article 7.01, including actual expenses for the Primary Cost Centers, Secondary-Engineering Centers, and the Secondary-Other Centers.

Monthly Payment -- the meaning thereof in Article 6.04.

Parties -- CRD and Railroad.

Peak Periods -- the meaning thereof in Article 2.04.

~~CRD & UPRR PSA AGREEMENT~~

Primary Cost Centers -- the meaning thereof set forth in Exhibit 6-A.

Prior Agreement -- the Purchase of Service Agreement as amended between the Authority and Railroad for the period beginning January 1, 2004 and ending December 31, 2008 with a one year extension to December 31, 2009 and an additional extension to January 31, 2010.

Property -- the meaning thereof in Article 2.02.

Proposed Budget -- the meaning thereof in Article 6.03.

Proposed Budget Amendment -- the meaning thereof in Article 2.04.

Public Transportation Services -- the transportation or conveyance of persons within the Metropolitan Region by means available to the general public, including groups of the general public with special needs, except for transportation by automobile not used for conveyance of the general public as passengers and except any portion of any service provided by, or pursuant to an agreement with, National Railroad Passenger Corporation.

Railroad -- Union Pacific Railroad Company, a Delaware corporation.

Reimbursable Expenses -- the meaning thereof in Article 6.02.

Secondary-Engineering Centers -- the meaning thereof set forth in Exhibit 6-A.

Secondary-Other Centers -- the meaning thereof set forth in Exhibit 6-A.

Service Change: Service Change Notice -- the meanings thereof set forth in Article 2.04.

Service Emergencies -- the meaning thereof set forth in Article 2.07.

Service Plan -- the plan describing the Contract Services Railroad is to provide during a Calendar Year as provided in Article 6.03.

Standards -- the standards specified in Exhibit 2-C.

Stations -- specific locations identified in Article 2.02 and listed in Exhibit 2-AA.

Subsidiary Accounting System -- the specific system of accounting detailing cost codes, billing numbers, cost centers and allocation techniques by which costs are recorded, reported and allocated to CRD as set forth in Exhibits 6A, 6B, 6C, 6D, 6G and 6H.

Summary Variance Report -- the meaning thereof in Article 7.01.

Transportation Agency -- the meaning thereof set forth in the Act.

Uniform System of Accounts -- the Uniform System of Accounts for Railroad Companies, as set forth in Title 49 of the Code of Federal Regulations, Part 1201, revised as of October 1, 1997.

~~CRD & UPRR PSA AGREEMENT~~

Weather Emergency Plan -- the meaning thereof set forth in Article 2.08.

Work Order -- a five digit number that is management's authority for the capital expenditure (old AFE) of funds for project work to be done or the retirement (old AFR) of existing property.

ARTICLE II

Services to be Provided
by Railroad

2.01 Basic Scope of Services. Railroad hereby agrees that throughout the Agreement Term, Railroad, acting as an independent contractor for the benefit of the CRD, will provide Public Transportation Services by rail. Except as otherwise expressly permitted under this Agreement, Railroad shall (a) operate in accordance with the schedules listed and described in Exhibit 2-A and the Consists listed and described in Exhibit 2-B; (b) comply with the Standards specified in Exhibit 2-C; and (c) provide the maintenance services specified in Exhibit 2-D, and all accommodations and other services as are reasonably necessary for commuter comfort, convenience, and safety.

2.02 Property To Be Used. Railroad shall, except as otherwise provided in this Agreement, provide such of the real and personal property, rights and privileges of Railroad ("Property") as are necessary for the provision by Railroad of the Contract Services including, but not limited to: stations, platforms, offices, parking lots and other real estate and facilities, the cars and locomotives listed in Exhibit 2-E, trackage, ways and structures; rights of Railroad under contracts, leases, joint operating agreements and patents; other intangible property; and materials (except locomotive fuel and other inventory provided by the CRD upon mutual agreement of the Parties) supplies and parts. The purchase of fuel by the CRD, and its delivery and withdrawal from storage will comply with the terms contained in Exhibit 2-G. Locomotive fuel oil supplied by either party hereto shall comply with Locomotive Fuel Specifications contained in Exhibit 2-H.

With regard to station buildings, platforms, parking lots and the real estate they are located upon, as well as any other real estate, the terms and conditions that Railroad provides these facilities are as follows:

1. Stations (a) The current buildings and/or canopies, the platforms and ingress/egress to the parking lots and public ways will be provided by the Railroad. The current stations are listed in Exhibit 2-AA and will be provided under this Agreement on the same terms and conditions as the Railroad provided them under the Prior Agreement.

(b) Railroad has leased some station buildings, but not the platforms and usually not the canopies, to the municipality where the station is located, with CRD approval, as shown on Exhibit 2-AA. Any revenues generated by the station are paid to the municipality to offset the building maintenance, janitorial cost and any utility costs the municipality assumes under the

~~CRD & UPRR PSA AGREEMENT~~

lease. All maintenance, janitorial and utility costs of the unleased stations are Reimbursable Expenses, and all maintenance, janitorial and utility costs of a leased station, not assumed by the municipality, are Reimbursable Expenses. Neither CRD nor the municipalities shall pay Railroad rent or any other compensation not included in Article VI of this Agreement for the use of the station buildings, canopies or platforms.

(c) In the event that CRD or any municipality wants to (i) increase the size of a current station or platform and it will occupy additional Railroad real estate, (ii) relocate the station building, canopies or platform to another location on Railroad's real estate and the relocation of either the station building or canopies or platforms occupy additional Railroad real estate, which is more than what the current station building, canopy or platform being vacated now occupies, or (iii) construct a station where a stop does not now exist on Railroad's schedule in Exhibit 2-A, then CRD (or the municipality) will either purchase or lease the additional or newly occupied real estate from the Railroad at Fair Market Value. The Fair Market Value will be determined by the procedure set out in Exhibit 2-AB. The appraisal criteria will be determined as provided in Exhibit 2-AC.

2. Parking Lots (a) Current parking lots are adjacent to the Stations listed in Exhibit 2-AA.

(b) Improved (paved) parking lots are leased to the municipalities, who perform the maintenance, snow removal, collect the parking revenue, prosecute the non-payers, and assume other costs specified in the individual lease agreements. Currently, most municipalities charge between \$1.00 and \$1.50 per day or issue monthly or quarterly permits at a comparable cost. Unless capital costs are being refunded under the lease, the municipality pays Railroad one-third of the revenue generated from the parking lots for the use of Railroad's real estate. This revenue, which is below Fair Market Value, is not Contract Services Revenue. The current parking lots under lease, and the amount of space occupied, are listed in Exhibit 2-AD. When leases expire on the current sized parking lot, it will be renewed by Railroad on substantially the same terms and conditions of the prior lease, (including the amortization of required Capital Expenditures approved by Railroad), with lease rental below Fair Market Value.

(c) Unimproved parking lots, as well as stations where no parking exists on Railroad real estate, are listed on Exhibit 2-AE. The Railroad maintains the unimproved parking lots on its real estate. Since commuters are not charged for using these parking lots, no revenue is generated. Railroad shall provide these lots under this Agreement under the same terms and conditions as the Prior Agreement.

(d) In the event that CRD or any municipality wants to (i) increase the size of a current parking lot and it will occupy additional railroad real estate, or (ii) relocate the parking lot to another location on Railroad's real estate and the relocation of the parking lot occupies additional Railroad real estate, which is more than what the current parking lot being vacated now occupies, or (iii) a parking lot is needed at a station which does not now exist on Railroad's schedules in Exhibit 2-A, then CRD (or the municipality) will either purchase or lease the additional or newly occupied real estate required from the Railroad at Fair Market Value. The Fair Market Value will be determined by the procedure set out in Exhibit 2-AB. The appraisal criteria will be determined as provided in Exhibit 2-AC. With regard to the additional or newly

~~CRD & UPRR PSA AGREEMENT~~

occupied real estate, Railroad will not waive Fair Market Rental or the purchase of the real estate at Fair Market Value to amortize any capital expenditures that need to be made to the Parking Lot. However, if CRD or a municipality elects to lease Railroad's real estate at Fair Market Value, the value of the Capital Expenditures, not paid for by the Railroad, will not be included in the Fair Market Rental.

3. Other Real Estate. Revenue generated at station buildings and on or near the platforms at the Stations listed in Exhibit 2-AA, and as set forth in Article 6.01 or listed on Exhibit 2-AF is Contract Services Revenue. All other revenue not listed on Exhibit 2-AF and generated by Railroad's real estate is not Contract Services Revenue; provided, however, that re-branding or adding sponsor names to the commuter lines shall be seen as Contract Service Revenue, if CRD is able to generate such underwriting contributions.

2.03 Labor To Be Provided. Except as otherwise provided in this Agreement, Railroad shall provide and furnish all labor, administrative, professional and supervisory services ("**Labor**") necessary for the provision by Railroad of the Contract Services.

2.04 Service Changes. (a) The CRD may, at any time or from time to time, during the Agreement Term, direct changes in Contract Services, Property, Labor or Standards (including, without limitation, changing the claims administration function so that it is performed in whole or in part directly by the CRD or by any person designated by the CRD ("**Service Change**").

(b) The CRD shall initiate a Service Change by delivery to Railroad of a written notice ("**Service Change Notice**") stating the proposed Service Change and its Commencement Date. Within 30 days (or such other period as may be agreed to by the Parties in a particular case) after delivery of the Service Change Notice, Railroad shall either (1) state in writing to the CRD that it will not implement the Service Change for one or more of the reasons set forth in subsection 2.04 (d) and specify such reasons, or (2) prepare and submit to the CRD a proposed budget amendment with respect to the Service Change ("**Proposed Budget Amendment**"). The Proposed Budget Amendment shall set forth the changes in the Budget Limits and the estimated changes in Contract Services Revenue and Reimbursable Expenses (including necessary Capital Expenditures) for the Budget Period resulting from such Service Change, and shall set forth the estimated adjustment resulting from such Service Change to the monthly payments to be made by the CRD or Railroad in accordance with Article 6.04.

(c) If the CRD does not object in writing to the Proposed Budget Amendment within 30 days after delivery of the Proposed Budget Amendment, the Service Change shall become effective on the Commencement Date. If the CRD objects to the Proposed Budget Amendment, the Parties shall negotiate in good faith with respect to the Budget Amendment. Subject to Subsection (d) of this Article, if on the Commencement Date of the Service Change the Parties have not agreed, Railroad shall commence the Service Change and the Approved Budget shall be amended and the monthly payments to be made by the CRD or Railroad under Article 6.04 shall be adjusted in accordance with the Proposed Budget Amendment as modified by the CRD's objections to it.

~~CRD & UPRR PSA AGREEMENT~~

(d) Railroad shall implement a Service Change on the Commencement Date unless such Service Change:

- (1) is unsafe, illegal or impossible to implement with prudent, economical and efficient use by Railroad of amounts which are Reimbursable Expenses,
- (2) would require Railroad to use real property which was not used by Railroad in providing Public Transportation Services by rail during the Agreement Term or during the term of the Prior Agreement,
- (3) will require or authorize the operation of any facility or service on terms or in a manner which unreasonably interferes with the ability of Railroad to provide efficient freight or inter-city passenger service, or
- (4) would result in increased Reimbursable Expenses, provided, however, that this exception shall be effective only during any period in which the CRD is in arrears in its payments, excluding disputed amounts, to Railroad Under this Agreement for a period in excess of 30 days.

(e) For purposes of subsection (d) of this Article, the Parties agree that a Service Change shall not be deemed to require or authorize the operation of any facility or service on terms or in a manner which unreasonably interferes with the ability of Railroad to provide efficient freight or inter-city passenger service to the extent that:

- (1) such Service Change changes schedules, Consists, or frequency of trains operated on one or more of Monday, Tuesday, Wednesday, Thursday or Friday, which depart from their originating stations between the following times ("Peak Periods"):
 - (a) On the West Line, between 6:10 AM and 9:00 AM, or between 4:00 PM and 7:20 PM;
 - (b) On the Northwest Line, between 6:30 AM and 9:30 AM, or between 4:00 PM and 7:30 PM;
 - (c) On the North Line between the Chicago Passenger Terminal and the Lake Bluff Interlocking plant (but not including the Lake Bluff Interlocking plant), between 5:30 AM and 9:30 AM, or between 3:30 PM and 7:30 PM;
 - (d) On the North Line between the Lake Bluff Interlocking Plant (including the Lake Bluff Interlocking plant) and the Illinois State Line, between 6:30 AM and 9:00 AM, or between 4:00 PM and 7:00 PM.
- (2) such Service Change does not require origination of trains used in providing Contract Services at intervals of less than one hour in each direction on each of the three Suburban Lines (West, Northwest and North) during periods other than Peak Periods, except to the extent that

CRD & UPRR PSA AGREEMENT

Exhibit 2-A shows service at other than Peak Periods at intervals of less than one hour;

(f) At any time prior to commencement of a Service Change, the CRD may rescind the Service Change Notice, in which event Railroad shall not commence such Service Change. Any expense reasonably incurred by Railroad in preparation for commencement of the Service Change so rescinded (other than costs incurred in objecting to the Service Change) is a Reimbursable Expense, subject to subsequent audit by the CRD.

(g) Subject to the provisions of subsection 2.04 (d), if Railroad does not commence a Service Change in accordance with the Service Change Notice, the CRD may seek to compel compliance with the Service Change Notice and this Agreement through the institution of appropriate proceedings in the Circuit Court of Cook County.

(h) The CRD may, without limitation of the generality of any other provision of this Article 2.04, make the following Service Changes: (1) change the paint scheme and insignia of cars and locomotives owned by the Authority or CRD, and of other cars and locomotives with the prior consent in writing of the owners or lessors thereof, (2) change the names, paint scheme and insignia of equipment owned by Railroad and primarily used in providing Contract Services other than cars and locomotives, (3) subject to any required governmental approvals, change the names, paint scheme and insignia of stations, provided that the cost to Railroad's freight operations of changing the names of stations which are listed in Exhibit 5-C shall be Reimbursable Expenses, (4) change the color, style and insignia of uniforms of personnel, (5) change the design of tickets, transfers and public timetables, and (6) add the name or insignia of the Authority or CRD or any advertisement or sponsor's name to any of the foregoing (with the prior consent in writing of the owners or lessors in the case of cars and locomotives not owned by the CRD, Authority or Railroad).

(i) Subject to the provisions of subsection 2.04 (d), the CRD may require immediate commencement of a Service Change, and may require temporary Service Changes.

2.05 Permitted Performance Variations. With the prior approval of the CRD, and after having given reasonable advance notice to users of the Contract Services of any disruptions which will result therefrom, Railroad may make reasonable temporary adjustments in schedules or Consists to minimize interference with the performance of track and roadbed maintenance or construction work or with construction of public utilities, State or other public highways or public works crossing the routes of Railroad, or for any other purpose.

2.06 Force Majeure Occurrences. (a) The failure of Railroad or CRD to perform, in whole or in part, any of the Contract Services, by reason of the occurrence of fire, flood, explosion, disaster, strike or labor work stoppage, or any other cause beyond the reasonable control of Railroad or CRD, to the extent such failure is beyond the reasonable control of Railroad or CRD ("**Force Majeure Occurrence**"), is excused for all purposes.

(b) In the event of a Force Majeure Occurrence, Railroad or CRD shall provide such modified or adjusted Contract Services as are practicable. Such adjustment or modifications

~~CRD & UPRR PSA AGREEMENT~~

shall be made only with the prior approval of the CRD. Railroad's costs which are required for adjustments or modifications in accordance with this subsection and which exceed Budget limits in the Approved Budget are Reimbursable Expenses.

2.07 Service Emergencies. (a) The Executive Director or his designee may declare a Service Emergency when he determines that the Contract Services are substantially impaired as a result of any cause other than a strike or other labor-related work stoppage. If the declaration is oral, it shall immediately be confirmed in writing. A Service Emergency shall terminate at the time specified in the notice, but not more than 120 hours after such a declaration, unless the Board of Directors extends its period.

(b) After declaration of a Service Emergency, the Executive Director or his designee may appoint an Emergency Services Manager with whom the Contract Services Manager shall consult during the Service Emergency. Subject to subsection 2.08(c), the Contract Services Manager shall implement the Weather Emergency Plan if requested to do so by the Emergency Services Manager, and shall implement any other recommendations of the Emergency Services Manager pertaining to the operation of trains in Exhibit 2-A which are scheduled to depart from their originating stations or arrive at their terminating stations during Peak Periods.

2.08 Weather Emergency Plan. (a) On or before October 1 of each year during the Agreement Term, Railroad shall prepare and submit to the CRD a proposed weather emergency plan ("Weather Emergency Plan") which is designed to re-establish Contract Services during and after a weather event causing a Service Emergency. The Weather Emergency Plan shall include programs for (1) resumption of normal service, (2) prompt dissemination of correct information to riders regarding schedules and the condition of service, (3) emergency deployment of manpower and equipment, and (4) changes in Contract Services necessary to provide for a substantial number of additional temporary riders. The Weather Emergency Plan shall include an emergency budget, specifying maximum labor positions and estimated expenses, which shall take effect with the Weather Emergency Plan. For the period during which the Weather Emergency Plan is in effect, actual costs of quantities in the emergency budget are Reimbursable Expenses. Within 60 days after the submission of a proposed Weather Emergency Plan, the CRD shall approve it, or return it to Railroad for modification. The CRD and Railroad shall cooperate with respect to preparation of the Weather Emergency Plan. Subject to Article 2.08(c), final decisions with respect to such Plan shall be made by the CRD.

(b) The Weather Emergency Plan prepared by Railroad shall contain no provision the implementation of which (1) would be unsafe, illegal or impossible, or (2) would unreasonably interfere with the ability of Railroad to provide freight or intercity passenger service. Railroad may object to inclusion of any Weather Emergency Plan provision not prepared by Railroad on these grounds within 15 days after Railroad first receives a request for modification of the Weather Emergency Plan from the CRD containing such provision.

(c) The Weather Emergency Plan shall be implemented at the direction of the CRD for such period as the CRD may from time to time direct. Railroad shall not object to implementation of any Weather Emergency Plan provision which Railroad prepared or of any

~~CRD & UPRR PSA AGREEMENT~~

provision which could have been objected to in accordance with Subsection 2.08(b). Railroad shall not be required to implement any other provision of Weather Emergency Plan, or any modification thereof, to the extent that such implementation (1) would be unsafe, illegal or impossible, or (2) would unreasonably interfere with the ability of Railroad to provide freight or intercity passenger service.

ARTICLE III

Property

3.01 Property Dispositions. (a) Railroad agrees that (1) it will not sell, lease, abandon, scrap, or otherwise dispose of any of the properties described in Subsection 3.01(b) below ("**Contract Services Property**"), if such disposition will impair the performance by Railroad of the Contract Services which are required to be provided at the time of such disposition or at any time during the term of this Agreement; and (2) in any case not within clause (1) above, it will not sell, lease, mortgage, abandon, scrap, or otherwise dispose of or encumber any Contract Services Property unless, not less than 45 days prior to the earlier of the date of such sale, lease, mortgage, abandonment, scrapping or other disposition or the entering into by Railroad of any agreement therefore, written notice thereof is given by Railroad to the CRD, which notice shall set forth a description of the property to be disposed of, and the price and other terms and conditions of such proposed disposition. The requirements of clause (2) above shall not apply to a disposition of property to a party having eminent domain power or for public or quasi-public utility purposes or to property leased if the lease is cancelable upon not more than 90-day notice. With respect to Contract Services Property which is used primarily for Contract Services, Railroad shall offer in such notice, with the exception of notices of mortgages, to transfer such property to the CRD at a price and on other terms and conditions not less favorable than those of the proposed disposition. If the CRD does not accept such offer within such 45 days, the offer shall be deemed to be rejected.

(b) The provisions of this Article apply to all of Railroad's rights, privileges, power and title in, to or over all property which is hereinafter described and which was used and useful at any time during the term of the Prior Agreement or the Agreement Term in the provision of Contract Services:

(1) Real property (including easements, leaseholds, and all buildings, improvements, appurtenances and fixtures thereon), platforms and parking lots but excluding air rights at and above a horizontal plane at such elevation as to provide 23 feet vertical clearance above top of rail, plus land for reasonable supports and foundations at such locations, which may affect the Contract Services;

(2) Trackage (including, but not limited to, rails, ties, ballast, switches, turnouts, wyes, signals, interlocking, crossovers, and yards) and structures or improvements (including, but not limited to, bridges, culverts, fills, cuts, tunnels, and grade crossings), which are essential to the convenient use of trackage;

(3) Passenger train cars and locomotives listed and described in Exhibit 2-E and all equipment permanently installed in or on such cars and locomotives;

CRD & UPRR PSA AGREEMENT

(4) Equipment and machinery used for maintenance of such passenger train cars and locomotives, except equipment or machinery which

- (A) has a normal replacement cycle of less than three years; or
- (B) has a reproduction cost of less than \$10,000.00; or
- (C) is not kind of property which is depreciated for federal income tax purposes in the regular and normal course of business of Railroad;

(5) Items of personal property with a reproduction cost new of greater than \$10,000.00; and

(6) Items of property which have been specially constructed or modified for or by Railroad for use in whole or in part in the provision of Contract Services by rail (including, for example, specialized test equipment, signal equipment, data processing equipment, fare-collection equipment, switch parts, and repair parts for communication systems or for equipment in service).

(c) Contract Services Property does not include system machinery or tools not primarily used in connection with Contract Services, small tools, supplies, property regularly consumed and replaced not less frequently than annually, office equipment and furniture, highway vehicles, any items of property hereafter from time to time specifically designated in writing by the CRD as excluded from the definition of Contract Services Property and any other item of personal property with a reproduction cost new of less than \$10,000.00.

3.02 Use of Certain Property. Railroad shall not, without the written consent of the CRD, use equipment, cyber property, software and electronics owned by the CRD or Authority for any purpose other than provision of Contract Services.

3.03 Ogilvie Transportation Center. CRD owns the Ogilvie Transportation Center (“OTC”) and CRD has entered into various agreements with MetraMarket of Chicago LLC, and related affiliates, for the leasing, maintenance, and parking operation of various aspects of OTC, which are primarily located below track level. From time-to-time, however, CRD may desire Railroad to operate and maintain the suburban concourse, sidewalks, any utility, parking facilities, or any door or HVAC unit at OTC because of its relation to Contract Services. Consequently, Railroad shall, during the term of this Agreement or any extension thereof, to the extent requested by CRD in writing and agreed to by Railroad in writing, operate and maintain such aforementioned OTC facilities to provide Contract Services or Public Transportation Services in the same manner and subject to the same terms of this Agreement as Railroad operates and maintains its property described in Article 2.02 hereof, or in accordance with such other standards as the parties may agree to in writing. CRD has an agreement with the owners of CitiCorp Center (Atrium) for commuter access, a ticket office, and office space and the Railroad shall, during the term of this Agreement, continue to operate and maintain this space to provide Contract Services or Public Transportation Services in the manner set forth in the CRD agreements covering the Atrium. Office space in CitiCorp will be expiring on or about 2012. Railroad will reasonably cooperate with CRD or its designated real estate broker in negotiating

~~CRD & UPRR PSA AGREEMENT~~

and determining office space needs at CitiCorp Center or any other building located within the immediate area.

3.04 Elburn Extension. In 2006, Contract Services and Contract Service Property were extended from Geneva to Elburn, Illinois and CRD acquired additional property to accommodate improvements desired by Railroad for this extension. Railroad is authorized to use such real property owned by CRD between Geneva and Elburn as shown on the attached Exhibit 3-A, including the property needed for the Elburn Commuter Storage Yard Facility, for the provision of Contract Services and freight train operation, with the understanding that the Elburn Commuter Storage Yard Facility shall not be used by Railroad for the provision of freight service.

As part of the extension, CRD has constructed two new station facilities, at LaFox and Elburn, upon a portion of Railroad property. Railroad agrees to operate and maintain the LaFox station and platform facilities in accordance with the Agreement and CRD shall operate and maintain the Elburn station with the exception of the platform, stairwells and ramps which shall be operated and maintained by Railroad in accordance with this Agreement.

ARTICLE IV

Railroad's Responsibility to Manage

4.01 Managerial Control. Railroad is an independent contractor for, and not an agent of, the CRD. Railroad shall have managerial control with respect to the Contract Services. Except as provided in Article 2.07, all operating and other personnel of Railroad involved in any aspect of providing Contract Services shall be subject to the direction, supervision and control of Railroad and not the CRD. With the written approval of the CRD, and subject to such terms and conditions as the CRD prescribes in writing, Railroad may subcontract for the performance of work or the provision of equipment or facilities required to be provided by Railroad under this Agreement.

4.02 Contract Services Manager. Railroad agrees that throughout the Agreement Term one of its employees will be designated Contract Services Manager who shall (a) devote such portion of his time to the performance of his responsibilities as may reasonably be required for the effective performance thereof, (b) have as one of his responsibilities the performance by Railroad of Contract Services, (c) be available at reasonable times to consult with representatives of the CRD with respect to matters relating to the Contract Services, and (d) perform the duties required of him by Subsection 2.07(b) of this Agreement during Service Emergencies.

4.03 Employees and Agents. Railroad acknowledges that, and agrees to advise its officers, such of its management personnel within the Metropolitan Region as have responsibilities directly relating to the provision of Contract Services, and such of its employees and agents as are primarily engaged in providing Contract Services, that none of Railroad's officers, employees or agents is, or is authorized to hold himself out or claim to be, an officer, employee or agent of the CRD. No officer, employee or agent of Railroad shall be permitted by Railroad, by reason of this Agreement, to make any claim, demand or application to or for any right or privilege to which any officer, employee or agent of the CRD may, by reason of such position, be entitled, including, but not limited to, rights and privileges concerning workmen's

~~CRD & UPRR PSA AGREEMENT~~

compensation and occupational disease coverage, claims under the Federal Employers Liability Act (45 U.S.C. §51 et seq.) unemployment compensation benefits, social security coverage or retirement system membership or credit.

ARTICLE V

Fares and Tickets

5.01 Customer Fares and Charges. (a) Except as changed under Article 5.02, the fares and charges made to the public by Railroad for the Contract Services shall be those specified in Exhibit 5-A. Railroad may continue the pass policies described in Exhibit 5-B, but shall not otherwise cause or allow the use of Contract Services except in accordance with this Article.

(b) Refunds of fares and charges shall not be made by Railroad except in accordance with Railroad's written policy as approved by the CRD.

5.02 Fare Changes. (a) Railroad will change any or all of its fares or charges ("**Fare Change**"), and will honor or sell transfers for interconnections with other Transportation Agencies, all as directed from time to time by the CRD. The CRD shall provide Railroad and the public, and Railroad shall provide its employees and agents, with reasonable notice of a Fare Change before the effective date of the Fare Change.

(b) The CRD shall initiate a Fare Change by delivery to Railroad of a written notice ("**Fare Change Notice**") which shall specify (1) the proposed Fare Change, (2) an estimate of the changes in Contract Services Revenue, Reimbursable Expenses and monthly payments to be made by the CRD or Railroad in accordance with Article 6.04 as a result of the Fare Change, and (3) the effective date of the Fare Change. Within 45 days after delivery of the Fare Change Notice, Railroad shall notify the CRD in writing if it objects to item (2) of the Fare Change Notice, in which event the CRD and Railroad shall negotiate in good faith. If the Parties are unable to agree prior to the effective date of the Fare Change, the Approved Budget shall be amended and the monthly payments by the CRD or Railroad in accordance with Article 6.04 shall be adjusted in accordance with the Fare Change Notice.

(c) At any time prior to implementation of a Fare Change, the CRD may rescind the Fare Change Notice, in which event Railroad shall not implement the Fare Change. Any expense reasonably incurred by Railroad in preparation for implementation of the Fare Change so rescinded (other than costs incurred in objecting to the Fare Change or any part of the Fare Change Notice) is a Reimbursable Expense, subject to subsequent audit by the CRD.

5.03 Transfers and Interconnections. The CRD may, at any time, or from time to time, during the Agreement Term, direct implementation of, or alterations or modifications in such terms as the CRD may provide for (a) transfers or interconnections of passengers between Transportation Agencies, and (b) fares and charges for such transfers or interconnections. If an action directed by the CRD under this Article provides for sale of tickets for Railroad's Public Transportation Services by any seller other than Railroad, such action shall provide procedures under which Railroad will receive all revenues due it for such Public Transportation Services within 30 days after the last day of the month of receipt of such revenues by the seller of the

~~CRD & UPRR PSA AGREEMENT~~

ticket. If Railroad sells tickets for Public Transportation Services provided by any other Transportation Agency, Railroad will remit to such Transportation Agency all revenues due it within 30 days after the last day of the month of receipt of such revenues by Railroad unless otherwise agreed to by the Parties hereto. Actions authorized by this Article shall be proposed, objected to and implemented in accordance with Article 2.04 of this Agreement.

5.04 Ticket Sales. (a) Railroad shall sell tickets for the Contract Services at the locations and times specified in Exhibit 5-C. Railroad shall continue collection of cash fares by on-train personnel and the sale of tickets by mail in accordance with past practices of Railroad. At the request of the CRD, Railroad shall change its practices or procedures for selling tickets for the Contract Services, shall sell tickets for transportation provided by the CRD or by other Transportation Agencies and shall use the forms for tickets, ticket accounting and reporting provided by the CRD. In the event CRD decides to implement a partial or complete automatic fare collection system, Railroad agrees to cooperate with CRD in the implementation of the system. Changes in the forms for tickets, ticket accounting and reporting shall be proposed, objected to and implemented in accordance with Article 2.04 of this Agreement. Revenue handling procedures covering the sale of Monthly Tickets and 10-Ride Tickets by Internet, and the acceptance of credit cards for all tickets is specified in Exhibits 5-D and 5-E

(b) In the event of loss of Contract Services Revenue due to theft or fraud by Railroad employees, Railroad shall immediately notify CRD upon the discovery of a theft or at the time any special agents of Railroad or other law enforcement personnel are assigned to investigate possible theft or fraud by Railroad employees related to Contract Services Revenue.

(c) Revenue handling procedures covering the sale of monthly tickets and ten-ride tickets by internet, and acceptance of credit cards for all tickets shall be as specified in Exhibit 5D and 5E as revised from time-to-time by the Parties.

5.05 Validity of Tickets. At the expiration of the Agreement Term, with respect to any ticket for Contract Services sold during the Agreement Term and for which Railroad has been paid during the Agreement Term, Railroad shall, at the CRD's discretion, either (a) honor such ticket until the expiration of such ticket according to the terms in effect at the time of sale, (b) provide a full refund for the unused portion of such ticket, or (c) provide a full refund for the unused portion of such ticket against the price of any new ticket sold for Public Transportation Services by rail provided by Railroad after the Agreement Term. The CRD shall reimburse Railroad for such refunds made pursuant to the procedures described in clauses (b) and (c) of this Article, and Railroad shall be entitled to retain any revenues received by it pursuant to the procedures described in clause (a) of this Article. Railroad shall honor tickets sold during the term of the Prior Agreement.

ARTICLE VI

Revenues and Compensation

6.01 Revenue Collection. (a) Railroad shall collect the fares specified in Article V for each and every passenger carried during the Agreement Term, and shall collect all other revenues of whatever kind or nature (including, but not limited to, revenues from station leases, Link-Up Bus and Plus Bus tickets as referenced in Exhibit 6-1, concessions, vending-style

~~CRD & UPRR PSA AGREEMENT~~

machines and advertising) generated by, related to or attributable to the Contract Services during the Agreement Term, regardless of when actually collected ("**Contract Services Revenue**"). Contract Services Revenues include, without limitation, revenue recordable in Accounts 102, 103 and 110 of the Uniform System of Accounts.

(b) Railroad has entered into an Advertising License Agreement with Clear Channel Outdoor, Inc., dated March 17, 2008, (Clear Channel Agreement) for the exclusive license for advertising signs along and adjacent to passenger loading platforms at the stations identified in the Clear Channel Agreement, and advertising signs attached to commuter cars. The revenue from the Clear Channel Agreement is considered Contract Service Revenue. At the end of the term of the Clear Channel Agreement (or if it is terminated earlier), Railroad shall, in good faith, attempt to enter into new agreements with the same parties that CRD has entered into for similar advertising on CRD property. The revenue from any new agreement will be Contract Service Revenue.

(c) Contract Service Revenue includes the opportunity of re-naming or re-branding any or all of the three Railroad commuter service lines with sponsors' names (other than the name of any other railroad), and Railroad shall not unreasonably reject the re-painting of any bridge which crosses a highway in the Contract Service Property with the service line name, as long as such re-naming is consistent with applicable laws, does not interfere with Railroad's advertising revenue, and is at CRD's sole cost and expense.

6.02 Reimbursable Expenses. (a) Except as excluded below, Reimbursable Expenses are the actual expenses to Railroad which satisfy each of the following requirements: (1) they are both incurred during, and attributable to, the Agreement Term or the term of the Prior Agreement as recorded in Railroad's accounts in accordance with Generally Accepted Accounting Principles ("**GAAP**"), consistently applied; and they are charged to the correct Cost Center/Cost Code combinations to reflect that the expense has an identifiable relationship to Contract Services (commuter operations); (2) either (A) they are Claims, or (B) they are properly chargeable to the Cost Centers and Cost Codes presented in Exhibit 6-A when the direct expenses have a 100% relationship to Contract Services (commuter operations) and allocated expenses have an identifiable relationship to Contract Services (commuter operations) (which will be reviewed by mutual agreement of Railroad and CRD on a quarterly basis) or the Cost Codes or other categories of expense presented in Exhibit 6-C, as amended from time to time in accordance with Article 6.04; and (3) either (A) for Primary Cost Centers only, they are attributable to not more than the maximum number of labor positions set forth as budget limits in the Approved Budget ("**Budget Limits**"), or (B) they are actual expenses reasonably incurred by Railroad for quantities of materials, labor, fuel or equipment rentals authorized by the Emergency Services Manager under Article 2.07 or authorized under the Weather Emergency Plan. Direct expenses for maintenance of way, bridge and building maintenance and signal maintenance shall be charged to Billing Numbers as described in Exhibit 6-G. The allocation of expenses to the CRD shall be as prescribed in the Exhibits to this Article, as amended from time to time in accordance with Article 6.04. Where allocation of expenses is based on a fraction of total expenses, the fraction shall be rounded to the sixth decimal place. For purposes of overhead expense allocation, any expense attributable to intercity passenger service will be treated as though directly related to freight service. Notwithstanding the allocation principles of Exhibits 6-

CRD & UPRR PSA AGREEMENT

A, 6-B, 6-C, and Generally Accepted Accounting Principles, solely for the purposes of this Agreement the following costs shall be treated in the following manner:

(1) Lease payments for rolling stock which are solely-related to the Contract Services shall be treated as Reimbursable Expenses, without regard to whether or not such leases are capitalized for other purposes;

(2) For the period beginning January 1, 2010, and throughout the Agreement Term, depreciation, at the annual flat rate of \$2,241,000.00 and without adjustment during the term of this Agreement, which, on a monthly basis, equals \$186,750.00, shall, except as limited by Article 6.02(b)(16), be treated as Reimbursable Expenses.

(3) The actual expenses incurred by Railroad in the performance of actions directed by the Emergency Services Manager during a Service Emergency shall be treated as Reimbursable Expenses;

(4) Expenses and Capital Expenditures reasonably incurred by Railroad in complying, in accordance with Articles 8.01 and 8.08, with valid and applicable Government Requirements except such local Government Requirements as may be preempted by the CRD, shall be treated as Reimbursable Expenses to the extent not treated as Reimbursable Expenses under another provision of this Agreement; and

(5) Railroad follows GAAP in pricing second-hand reusable material. The price is set at the lower of market value or depreciated ledger value. In most cases, depreciated ledger value is the lower price. This includes ties, rail and other track material. If second-hand material is purchased from a vendor, then it is priced at invoice cost. This methodology shall be used as the basis for charging second-hand reusable material expenses allocable to Contract Services.

(b) Reimbursable Expenses do not include:

(1) Expenses charged to Primary Cost Centers attributable to labor positions or other defined quantities in excess of the Budget Limits;

(2) Expenses that are improperly charged to the Cost Centers or Cost Codes presented in Exhibit 6-A or 6-C, respectively;

(3) The portion of any Common Expense which is properly allocable to Railroad in accordance with the principles of Exhibits 6-A, 6-B and 6-C;

(4) Capital Expenditures, unless specifically authorized by a Service Change, permitted by Subsection 6.02(a)(4), permitted by Subsection 6.02(b)(19) hereof, or otherwise authorized in writing by the CRD's Executive Director or his designee.

~~CRD & UPRR PSA AGREEMENT~~

(5) Costs of, and liability for, property damage or personal injury caused by Railroad's willful or wanton act, by Railroad's criminal act, or by breach of this Agreement by Railroad, provided, however, that where a Claim results in a loss of less than \$5,000, it shall be conclusively presumed that such loss was not caused by Railroad's willful or wanton act or criminal act;

(6) Expenses resulting from any third party agreement affecting only Contract Services, which are based on purchase prices that are unreasonably above the lowest available market prices of products or services which meet the pertinent technical specifications at the time of purchase provided, however, that the lowest reasonable available price of such product or service shall be reimbursable;

(7) Costs, expenses, or penalties, of whatever kind or nature, incurred in breach of this Agreement or resulting from Railroad's failure to comply with applicable Government Requirements, including, without limitation, any claim against Railroad with respect to which Railroad has not complied with Article X.

It is mutually agreed and understood by Railroad and CRD that the "costs, expenses, or penalties" which result "from Railroad's failure to comply with applicable Government Requirements" referred to in this Article 6.02(b)(7) is limited to fines or similar penalties imposed by Federal, State, or local governmental entities, including but not limited to those levied by the Illinois Commerce Commission and the Federal Railroad Administration, and the costs and expenses related thereto. Such fines, penalties, and related costs are not Reimbursable Expenses under the Agreement.

It is further understood, however, that railroads are a highly regulated industry and that virtually every personal injury or property Claim brought against Railroad will typically present allegations of a violation of Government Requirements. Therefore, it is further agreed by CRD and Railroad that said Article 6.02(b)(7) does not exclude as Reimbursable Expenses payments made in disposition of personal injury or property damage claims or in satisfaction of judgments rendered in regard to such Claims, even though the claimant(s) may allege that a violation of applicable Government Requirement(s) was a cause of his/her injury or loss. The resolution of all such personal injury or property damage Claims shall be considered as Reimbursable Expenses unless otherwise excluded by other terms or conditions of this Agreement, including, without limitation, cases in which Railroad's violation of or non-compliance with the relevant Government Requirements is determined to be willful and wanton, or a criminal act as provided by Article 6.02(b)(5) of this Agreement.

It is also understood and agreed that the foregoing clarification relates only to "Government Requirements." Notwithstanding the foregoing clarification, costs, expenses, or penalties incurred in breach of the Agreement, including, without limitation, any claim arising from a failure of Railroad to comply with Article X of this Agreement, are not Reimbursable Expenses hereunder.

CRD & UPRR PSA AGREEMENT

- (8) Federal or state income taxes, deferred or payable, and franchise taxes;
- (9) Expenses for maintenance resulting from Railroad's failure to perform work in a workmanlike manner or with ordinary care;
- (10) Expenses resulting solely from changes in Railroad's operations (but not changes resulting from normal fluctuations in Railroad's freight business), organizational structure or Railroad's accounting system since January 1, 2010 which, without prior approval from the CRD, burden the CRD with a greater amount of expenses than would otherwise be assigned or allocated to the CRD;
- (11) Expenses, other than expenses under equipment obligations (including leases), specifically allocated to Railroad in any other agreement or in any other provision of this Agreement;
- (12) Expenses attributable to fraudulent acts by any Railroad employee;
- (13) Expenses attributable to service beyond the scope of the Service Plan or Weather Emergency Plan, except expenses incurred in performance of actions directed by the Emergency Service Manager during a Service Emergency;
- (14) Expenses which were reimbursed, or with reasonable efforts of Railroad were reimbursable, by any entity other than the CRD including, but not limited to, expenses for construction or maintenance of stations or grade crossings;
- (15) Expenses (including wages and fringe benefit costs) attributable to the establishment, without the prior written approval of the Executive Director or his designee, of new Labor positions in non-primary responsibility areas which will be substantially chargeable to a Cost Code or Cost Codes which by definition are one hundred percent allocable to Contract Services;
- (16) Depreciation attributable to capitalized equipment leases for which the CRD is reimbursing lease payments as Reimbursable Expenses;
- (17) Expenses incurred during, attributable to, or accrued for any period outside the Agreement Term or the term of the Prior Agreement;
- (18) Expenses for the revision (other than routine revisions made in the ordinary course of business) or redevelopment of the Subsidiary Accounting System other than at the specific request of the CRD;
- (19) Expenses chargeable to a Work Order under the Railroad's accounting system as in effect on January 1, 2010, unless such expenditure has the prior written approval of the CRD, provided, however, Work Order expenses

CRD & UPRR PSA AGREEMENT

are Reimbursable Expenses to the extent that expenses charged to each Work Order do not exceed \$10,000 per Work Order and that the accumulation of such Work Order expenses incurred without CRD approval does not exceed \$50,000 in any Calendar Year and;

(20) The cost of fuel supplied by the CRD to Railroad and used for other than Contract Services, or which is lost, stolen or otherwise not accounted for by Railroad as having been used in its provision of Contract Services;

(21) Expenses incurred by Railroad due to ticket agent or conductor loss or theft, if Railroad has not used its best efforts in response to such loss or theft under collective bargaining agreements with the employee and the organizations representing the ticket agent or conductor. The Parties appreciate that revenue collection is extremely important and a serious issue that must be resolved. Best efforts include taking all disciplinary action necessary and commensurate with the infraction, including steps up to dismissal of such employee, if warranted for reporting less revenue than records indicate should have been collected. It is understood that if the same employee has a second violation for the same infraction, that the Railroad has not met its best efforts standard. It is also understood that labor boards, under collective bargaining agreements, or courts can reverse Railroad's disciplinary action.

(c) If a Chargeable Cost Center is charged with expenses in a Cost Code for which no allocation technique is prescribed in Exhibits 6-A, an Accounting Change Notification ("ACN") should be filed by UP explaining the nature of the change and its applicability to CRD. Those expenses shall be temporarily assigned or allocated to the CRD based on allocation code ALMC (as defined in Exhibit 6-B). Such assignments or allocations will be denoted by an asterisk (*) in the Monthly Expense Reports: Actual for Primary Cost Centers, Actual for Secondary-Engineering Cost Centers and Actual for Secondary Other-Cost Centers and may be disallowed in accordance with this Article, or, in accordance with Subsections 6.02 (d) or 6.02 (f), may be reassigned or reallocated based on a more appropriate allocation technique as agreed to during the quarterly review outlined in 6.02(a)(2)(B). The ACN will not require a separate approval by CRD, however, the ACN is subject to review and audit by CRD.

(d) If an error is discovered in, or an expense is disallowed from, a report for a prior month, Railroad shall make an appropriate accounting adjustment that shall be reflected in the earliest possible month. Railroad shall maintain reasonable documentation for any such adjustment.

(e) If insignificant passenger-related activities are performed in a non-Chargeable Cost Center, for purposes of recording passenger-related expenses and with the prior approval of CRD, those charges directly related or allocable to passenger service as described in Exhibits 6-A and 6-C may be transferred into a Chargeable Cost Center.

(f) Modifications of the Subsidiary Accounting System may be made from time to time upon written agreement with an Accounting Change Request ("ACR" in the form of Exhibit 6-H) between Railroad's Contract Service Manager and the CRD's Chief Financial

CRD & UPRR PSA AGREEMENT

Officer. Instances constituting a change for which an ACR is required under this Article are those relating to subsequent changes in operations or if the existing responsibility accounting system is at variance with the operations on the ground or with the intent of the contract service agreement resulting in incorrect charges to CRD. If a change in the Subsidiary Accounting System made in accordance with this Article results in a change in the Reimbursable Expenses, an adjustment will be made retroactively to January 1 of the Calendar Year in which the change takes place. If the annualized effect of the adjustment exceeds \$10,000, such adjustment also shall be made with respect to the Calendar Year preceding such change. An ACR will be accepted or rejected within sixty (60) days of the date of submission. If the ACR is not approved or rejected ninety (90) days after the date of submission, CRD's Director of Audit and the Railroad's Contract Service Manager will have an additional thirty (30) days to resolve the ACR. If the ACR is not accepted or rejected after that period, CRD's Deputy Executive Director (Corporate Affairs) and Railroad's Vice President-Planning & Analysis in its Finance Department will resolve the ACR within the next thirty (30) days. If agreement cannot be reached after participation by CRD's Deputy Executive Director and Railroad's Vice President, either Party may submit such disputed matters to arbitration as set forth under Article 13.16 herein. Annual updates to allocation techniques in Exhibit 6-B are allowed under the Agreement and do not require an ACR. The update should be transmitted on an ACN and is subject to review and audit by CRD.

(g) Railroad agrees that at both the corporate and Cost Center levels the payment of Reimbursable Expenses by the CRD shall be treated as revenue and shall not be treated as a reduction of expense or as a reinstatement or reimbursement of budgeted amounts.

(h) Notwithstanding the foregoing, the cost, calculated on a FIFO basis, of fuel supplied to Railroad by the CRD shall constitute a Reimbursable Expense upon delivery of such fuel to a Contract Services locomotive.

6.03 Annual Budget. (a) Prior to May 1 of each year during the Agreement Term, the CRD shall prepare and submit to Railroad a Service Plan ("**Service Plan**") for the next Calendar Year ("**Budget Period**"). The Service Plan shall describe the Contract Services Railroad is to provide during the next Calendar Year. The Service Plan may contain one or more material changes from the Contract Services then required to be provided by Railroad. Such changes shall be treated as if such changes were Service Changes and shall be proposed, objected to and implemented in accordance with the procedures set forth in Article 2.04. The CRD shall include a Service Change Notice for such changes as part of the Service Plan.

(b) On or before June 15, of each year during the Agreement Term, Railroad shall submit to CRD an estimate of the budget requirements for the next calendar year, which shall be based on the CRD service plan. The estimated budget shall be prepared in two (2) formats:

1. In the format of the regular monthly statements as defined in this Agreement.

CRD & UPRR PSA AGREEMENT

2. In a format similar to Exhibit 6-E, showing labor, material, and other totals only for M of W, M of E, transportation, and general and administrative expenses.

(c) At or around September 15 of each Calendar Year during the Agreement Term, CRD shall advise Railroad of the total amount approved by the Regional Transportation Authority (RTA) for Railroad's budget for the Budget Period. Prior to October 31 of each Calendar year during the Agreement term, Railroad shall prepare and submit to the CRD a budget ("**Proposed Budget**") in the form of Exhibit 6-F for the Budget Period. The Proposed Budget shall (1) be consistent with the Service Plan, and (2) specify budgeted labor positions for each Primary Cost Center and specify estimated expenses for each Chargeable Primary Cost Center, (3) include Railroad's best estimate of the total of other Reimbursable Expenses that are not flat-rated and Estimated Contract Services Revenue for the Budget Period, (4) include additional needs for the Service Plan, and (5) will identify areas where the Proposed Budget exceeds the RTA Approved Budget, including Railroad's justification.

(d) The Proposed Budget shall reflect actual operations and levels of service during the immediately preceding Calendar Year except as modified by the Service Plan or Service Changes.

(e) Within 30 days after delivery to the CRD of the Proposed Budget, the CRD shall (1) approve the Proposed Budget, or (2) deliver to Railroad a written notice ("**Budget Objection**") containing Primary Cost Center Budget Limits and objections (if any) to one or more specific items in the Proposed Budget.

(f) The CRD and Railroad agree to promptly negotiate (within thirty (30) days) with respect to any items set forth in a Budget Objection, and the Proposed Budget shall be amended to reflect any changes agreed on by the CRD and Railroad. To the extent that the CRD and Railroad do not agree on items in the Proposed Budget before the commencement of the Budget Period, the Approved Budget for the previous Calendar Year for those items shall be the Approved Budget for the Budget Period; provided, however, that said items shall be adjusted to reflect changes in the Index of Railroad Materials Prices, Wage Rates and Supplements, or revisions thereof, published by the Association of American Railroads, or, where appropriate, changes in rates of pay or other costs mandated by collective bargaining or other agreements. The Parties may at any time thereafter amend the Approved Budget in accordance with Articles 2.04, 5.02 and 6.04, or by the mutual agreement in writing.

(g) By February 15, Railroad shall deliver to the CRD a revision of the Approved Budget (in the form of Exhibit 6-F) which provides (1) the detail by Cost Code of expenses allocated by Cost Center for Chargeable Cost Centers, and (2) summary of expenses not allocated by Cost Centers, including flat-rated items. Such revision shall replace Railroad's best estimate of the total of these expenses provided under Subsection 6.03(c), but shall not alter the Approved Budget for expenses allocated by Cost Center for Primary Cost Centers, except to the extent necessary to correct errors that may have occurred in the preparation of the Approved Budget.

~~CRD & UPRR PSA AGREEMENT~~

(h) Modifications of the Approved Budget may be made from time to time upon written agreement (including a description of such modification) between Railroad's Contract Services Manager and the CRD's Executive Director or his designee.

6.04 Compensation for Contract Services. (a) The CRD agrees to pay to Railroad, as provided in this Article, and Railroad agrees to accept in full payment for providing the Contract Services, an amount ("**Compensation**") equal to the amount by which the sum of Reimbursable Expenses for each Budget Period exceeds the sum of the Contract Services Revenues, if any, and the cost of fuel used in Contract Services which was supplied to the Railroad by the CRD for such Budget Period. If, for a Budget Period, the sum of Contract Services Revenue and the CRD's cost of fuel used in Contract Services which was supplied to Railroad by the CRD exceeds Reimbursable Expenses, Railroad agrees to pay to the CRD the amount ("**Surplus**") of such excess, provided that the CRD is not in arrears on any payment owed to Railroad for services under this Agreement, disputed amounts excepted.

In any event, the inventory of fuel supplied by CRD will remain the property of the CRD until returned, used in Contract Services or purchased by Railroad. All fuel gallonage lost or used, other than amounts reflected in Railroad's records as used for Contract Services, is chargeable to Railroad's freight operations subject to the tolerance range set forth in Exhibit 2-G.

(b) On the 15th day of each month, the CRD shall pay to Railroad an amount ("**Monthly Payment**"), if any, equal to (1) the estimate of Compensation in the Approved Budget as amended from time to time ("**Estimated Compensation**"), less the sum of the Monthly Payments previously made during the Budget Period, divided by (2) the number of full calendar months, including the month of payment, remaining in the Budget Period. If, in the Approved Budget for a Budget Period, Contract Services Revenue exceeds the sum of Reimbursable Expenses for that Budget Period, Railroad shall pay to the CRD on the 15th day of each month an amount equal to (1) the amount of such excess in the Approved Budget as amended from time to time ("**Estimated Surplus**") less the sum of such payments previously made by Railroad during the Budget Period divided by (2) the number of full calendar months, including the month of payment, remaining in the Budget Period, provided that the CRD is not in arrears on any payment owed to Railroad for services under this Agreement, disputed amounts excepted. The amount of Estimated Compensation or Estimated Surplus shall be adjusted from time to time in accordance with Articles 2.04, 5.02 and this Article 6.04.

(c) Within 30 days after the end of each calendar month (45 days in the case of April and December), or sooner if possible, Railroad shall submit to the CRD a Summary Expense Report in the form of Exhibit 7-B for Contract Services performed during that month, and a statement of the actual Contract Services Revenue and other credits for that month as shown on Exhibit 6-F. The difference between expenses for that month shown on the Summary Expense Report and the actual Contract Services Revenue for that month, shall be the "Net Amount" for that month. The difference between the amount paid by Railroad or the CRD for a month and the actual Net Amount for that month shall be adjusted on the 15th day of the month following the month in which the Summary Expense Report is received by the CRD either as a credit or payment to the CRD or Railroad, provided, however, that no additional payment shall

CRD & UPRR PSA AGREEMENT

be made to Railroad to the extent Railroad has exceeded the Budget Limits. All monthly payments shall be subject to subsequent audit by the CRD.

(d) (1) Within 45 days after the end of each Calendar Year, the Parties shall determine actual Contract Services Revenue, Reimbursable Expenses and Compensation or Surplus for that Calendar Year. With the next scheduled monthly payment, the CRD or Railroad shall pay or credit the other the net amount shown thereby to be due. Any such determination shall be subject to subsequent audit by the CRD. The scope of any such audit may include evaluation of financial performance relative to the Approved Budget, evaluation of operating performance relative to the Service Plan and an evaluation of Railroad's accounting controls, practices and procedures. Railroad will cooperate with the CRD in performing audits and will provide reasonable office space to the CRD's auditors during performance of any audit. CRD auditors shall advise Railroad, at the earliest possible date, of any expense item they intend to take exception to or they intend to disallow. In the event that the CRD audits revenues and expenses of Railroad with respect to a period within the Agreement Term or the term of the Prior Agreement and all adjustments determined thereby are made, the period so audited shall be considered closed and no subsequent adjustments with respect to such period shall be made. Railroad and CRD further agree to memorialize the "closed" audit period in a letter agreement that summarizes the audit issues for the period under consideration and recapitulates the individual line items on a separate schedule attached as an exhibit. The letter agreement shall be executed by Railroad's Contract Services Manager and CRD's Director of Audit.

(2) It is expressly understood and agreed that the language in this Article 6.04(d) is not intended to preclude recording in subsequent periods of inventory adjustments applicable to an audited period, adjustments of joint facility, personal injury, labor rate/wage adjustments and other accruals contained in the accounts for an audited period, nor the recording of delayed vendor invoices, if any, applicable to an audited period. In addition, as long as audits under this Agreement and the Prior Agreement do not coincide with audits relating to separately funded Capital Needs, it is further agreed the language in this Article 6.04(d) is not intended to preclude recording in subsequent periods amounts mistakenly charged against the Capital Needs project and subsequently disallowed under the audit of that program, which were legitimately chargeable under this Agreement or the Prior Agreement applicable to a "closed" audited period. It is further agreed that such adjustments recorded in subsequent periods, applicable to "closed" audited periods, are subject to audit in the period in which they are recorded.

(e) Railroad shall notify the CRD in writing promptly if a change in Railroad's accounting system results in an addition to, deletion from, or modification of the scope of any of the Chargeable Cost Centers or Cost Codes presented in Exhibit 6-A or 6-C, and shall include in such notification its best estimate of the impact of any such modification on Reimbursable Expenses. The CRD may at any time request in writing an addition to or deletion from the Cost Centers or Cost Codes presented in Exhibits 6-A or 6-C. Either Party may at any time request a modification of any of the expense allocation techniques presented in Exhibits 6-A, 6-B, or 6-C, or a redesignation of Primary Cost Centers or non-Primary Cost Centers. Either Party may at any time request a change in Estimated Compensation or Estimated Surplus. CRD and Railroad agree to promptly negotiate in good faith with respect to any such modification or request, and agree

~~CRD & UPRR PSA AGREEMENT~~

that the Chargeable Cost Centers and Cost Codes, the cost allocation techniques, and the Approved Budget shall be amended to reflect any changes agreed on by the CRD and Railroad.

6.05 Penalty for Failure to Collect Fares. (a) Subject to the provisions of Subsection 6.05(b), in each case in which the CRD demonstrates that Railroad failed to collect a cash fare or punch or collect a ticket, as the case may be, Railroad shall pay to the CRD five times the one-way fare between Railroad's downtown Chicago station and the station in the Metropolitan Region farthest from Chicago served by the train on which said failure occurred. Such payment is not a Reimbursable Expense.

(b) Railroad shall not be liable to the CRD for the payment set forth in Article 6.05(a) in any case in which Railroad demonstrates that its failure to collect a cash fare or punch or collect a ticket, as the case may be, was the result of severe weather conditions, unusually heavy ridership on the train on which the failure occurred, or an emergency requiring the attention of one or more members of the train crew.

(c) In each case in which Railroad has made the payment set forth in Article 6.05(a) to the CRD, the CRD shall provide such assistance as Railroad reasonable shall request in any proceedings to discipline members of Railroad's train crews whose failure to collect a cash fare or punch or collect a ticket resulted in such payment.

6.06 Additional Compensation. (a) In addition to compensation, Railroad shall receive for each month during the Agreement Term additional compensation ("Additional Compensation"). Such payment shall be payable on the 15th day of each month.

For the period beginning January 1, 2010, the Additional Compensation for each month shall be \$166,416.66 for an annual total of \$1,997,000.

For the period beginning January 1, 2011, the Additional Compensation for each month shall be \$171,250.00 for an annual total of \$2,055,000.

For the period beginning January 1, 2012, the Additional Compensation for each month shall be \$176,250.00 for an annual total of \$2,115,000.

For the period beginning January 1, 2013, the Additional Compensation for each month shall be \$181,333.33 for an annual total of \$2,176,000.

For the period beginning January 1, 2014, the Additional Compensation for each month shall be \$186,583.33 for an annual total of \$2,239,000.

For the period beginning January 1, 2015, the Additional Compensation for each month shall be \$192,000.00 for an annual total of \$2,304,000.

For the period beginning January 1, 2016, the Additional Compensation for each month shall be \$197,583.33 for an annual total of \$2,371,000.

(b) The Parties agree to enter into a Benefit Sharing Program ("BSP") which provides for the implementation of new programs and procedures designed to promote cost savings in the provision of commuter rail service. The Parties further agree to share at a rate of 80% for Railroad and 20% for CRD all first-year savings and for the following two years to share equally savings incurred from the implementation of a BSP program originating with the Railroad. Upon 30 days written notice with supporting documentation, CRD shall consider and respond in writing within 15 days. If CRD initiates a BSP, it will realize the full savings and not

~~CRD & UPRR PSA AGREEMENT~~

have to make any payments to the Railroad. No program will be implemented without the express written consent of both Parties.

6.07 Accounting Method. The method of accounting for charges to be reimbursed under this Agreement shall be the accrual method of accounting (except for deferred Claims of \$25,000 or over and contract labor wage increases that are accrued before the labor contracts are signed). Amounts due to Railroad by CRD under labor contracts shall only be reimbursed for the period for which backup documentation exists. Amounts due for Claims will be paid by CRD 10 days and amounts due under labor contracts will be paid by CRD 30 days after Railroad submits an invoice when they are due and payable in accordance with Generally Accepted Accounting Principles, provided, however, that Railroad shall not make any change in its current method of accounting to conform to Generally Accepted Accounting Principles when such change would have the effect of altering the timing of recognition of expenses or revenues. Notwithstanding any other provision of this Agreement, Railroad shall not implement a change in its method of accounting which would have the effect of recognizing expenses during the Agreement Term which were, or should have been, previously charged during any period prior to the Agreement Term or the term of the Prior Agreement.

6.08 Capital Expenditures. Except as otherwise provided by Articles 6.02(a) (4), 6.02 (b) (5), 6.02 (b) (7), neither the CRD nor Railroad shall be obligated under this Agreement to make any Capital Expenditure. A failure of Railroad to perform any part of the Contract Services because such performance has been made impossible solely by the failure of either party to make a Capital Expenditure, to the extent such failure is beyond the reasonable control of Railroad, shall be excused hereunder, provided, however, that:

- (1) Railroad continues to perform the Contract Services to the extent then possible; and
- (2) The necessity of such Capital Expenditure was not caused by Railroad's prior disposition during the Agreement Term of property comparable to the property which would have been the subject of such Capital Expenditure if it had been made.

6.09 Overdue Payments. Except as otherwise specifically provided in this Agreement, unpaid sums of money due and payable on a particular date pursuant to this Agreement by one party hereto to the other party shall accrue interest at the rate equal to the greater of six percent (6%) per annum or the Prime Rate plus two (2) interest percentage points based on the Prime Rate as published in the Money Rates section of the Wall Street Journal on the date the Bill or Invoice was originally issued. Interest shall not accrue with respect to any sums due as compensation adjustments made pursuant to this Agreement or the Prior Agreement until 30 days after the date on which payment of such sums is requested in writing.

6.10 General Office Expense/Corporate Overhead Expenses. (a) (1) Railroad will receive a flat-rate amount to compensate it for the General Office/Corporate Overhead expenses related to and in support of the Chicago commuter operation ("**Contract Services**"). During the Prior Agreement, and up until the conversion from the Chicago and North Western

~~CRD & UPRR PSA AGREEMENT~~

Transportation Company's ("CNW") responsibility accounting system to Railroad's accounting system, these costs and expenses were allocated under CNW'S Responsibility Areas 00501 through 00999 and other General Office/Corporate Overhead areas reflecting allocated expenses to CRD.

Except for specific cost areas agreed to otherwise by the parties, the flat-rate shall be all inclusive and encompass future expenses of the General Office/Corporate Overhead nature including, but not limited to, incentive compensation, bonuses and other compensation that is in addition to the annual salary of Railroad's non-agreement (non-union) employees.

The General Office/Corporate Overhead expenses identified as covered by the flat-rate (CNW's Responsibility Areas 00501 through 00999 and other General Office/Corporate Overhead cost areas allocated expenses to CRD) shall not be charged to Cost Centers or Cost Codes included in Exhibit 6-A.

(2) For the period beginning January 1, 2010, Railroad shall receive an annual flat-rate of \$10,640,000.00 ("**Base Amount**"), which on a monthly basis equals \$886,666.66. The Base Amount shall increase 2.9% annually as follows:

For the period beginning January 1, 2011, Railroad shall receive an annual flat rate of \$10,949,000.00, which on a monthly basis equals \$912,416.66.

For the period beginning January 1, 2012, Railroad shall receive an annual flat rate of \$11,266,000.00, which on a monthly basis equals \$938,833.33.

For the period beginning January 1, 2013, Railroad shall receive an annual flat rate of \$11,593,000.00, which on a monthly basis equals \$966,083.33.

For the period beginning January 1, 2014, Railroad shall receive an annual flat rate of \$11,929,000.00, which on a monthly basis equals \$994,083.33.

For the period beginning January 1, 2015, Railroad shall receive an annual flat rate of \$12,275,000.00, which on a monthly basis equals \$1,022,916.66.

For the period beginning January 1, 2016, Railroad shall receive an annual flat rate of \$12,631,000.00, which on a monthly basis equals \$1,052,583.33.

Except for expenses identified in Exhibit 6-C, and in Article 6.11 hereof, this amount reflects Railroad's entire reimbursement for General Office/Corporate Overhead expenses identified the in Prior Agreement, including additives.

6.11 Train Dispatching Costs. (a) Railroad's train dispatching costs will be charged to CRD based on actual labor charges of those employees working on the CRD train dispatching positions. Exhibit 6-C shows the calculations of estimated dispatching costs. The 50% factor is an estimate of the time spent dispatching CRD versus Railroad's freight trains. The total dispatching amount will change based on the following: 1) changes in labor rates; 2) changes in the number of dispatchers on these positions; or 3) changes in the time spent on dispatching CRD trains. The direct costs of dispatching CRD trains shall be a reimbursable expense.

(b) **Crew Calling and Timekeeping.** Railroad's train crew calling and timekeeping costs will be based on actual labor charges of those employees working on CRD crew calling and

CRD & UPRR PSA AGREEMENT

CRD timekeeping positions. Exhibit 6-C shows the calculation of estimated crew calling and timekeeping costs. The total crew calling and timekeeping amount will change based on the following: 1) changes in labor rates; 2) changes in the number of crew callers or timekeepers on these positions; or 3) changes in the time spent in crew calling or timekeeping for CRD trains. The direct costs of crew calling and timekeeping shall be a reimbursable expense.

Taxi expense to take CRD crews to where their assigned train starts, in the event labor agreements do not provide for them starting there, will be identified with an appropriate commuter notation, and will be charged to CM399, and shall be a reimbursable expense.

6.12 Training Expenses. CRD's share of Railroad's cost to hire, train and certify new trainmen, engineers and yard personnel will be billed to CRD at the following flat rate amounts:

For the period beginning January 1, 2010, Railroad shall receive an annual flat rate of \$500,000.00, which on a monthly basis equals \$41,666.66.
For the period beginning January 1, 2011, Railroad shall receive an annual flat rate of \$750,000.00, which on a monthly basis equals \$62,500.00.
For the period beginning January 1, 2012, Railroad shall receive an annual flat rate of \$750,000.00, which on a monthly basis equals \$62,500.00.
For the period beginning January 1, 2013, Railroad shall receive an annual flat rate of \$1,000,000.00, which on a monthly basis equals \$83,333.33.
For the period beginning January 1, 2014, Railroad shall receive an annual flat rate of \$1,000,000.00, which on a monthly basis equals \$83,333.33.
For the period beginning January 1, 2015, Railroad shall receive an annual flat rate of \$1,029,000.00, which on a monthly basis equals \$85,750.00.
For the period beginning January 1, 2016, Railroad shall receive an annual flat rate of \$1,059,000.00, which on a monthly basis equals \$88,250.00.

6.13 Other Expenses. Security expenses for Contract Services will be split between Railroad police force expense and Contracted Security. Contracted Security Services will continue to be billed to CRD under Exhibit 6-A. Charges to CRD for Railroad police force expense and management will be billed to CRD at the following flat rate amounts and in accordance with Exhibit 6-C:

For the period beginning January 1, 2010, Railroad shall receive an annual flat rate of \$1,515,000.00, which on a monthly basis equals \$126,250.00.
For the period beginning January 1, 2011, Railroad shall receive an annual flat rate of \$1,590,000.00, which on a monthly basis equals \$132,500.00.
For the period beginning January 1, 2012, Railroad shall receive an annual flat rate of \$1,640,000.00, which on a monthly basis equals \$136,666.66.
For the period beginning January 1, 2013, Railroad shall receive an annual flat rate of \$1,690,000.00, which on a monthly basis equals \$140,833.33.
For the period beginning January 1, 2014, Railroad shall receive an annual flat rate of \$1,765,000.00, which on a monthly basis equals \$147,083.33.
For the period beginning January 1, 2015, Railroad shall receive an annual flat rate of \$1,775,000.00, which on a monthly basis equals \$147,916.66.

CRD & UPRR PSA AGREEMENT

For the period beginning January 1, 2016, Railroad shall receive an annual flat rate of \$1,825,000.00, which on a monthly basis equals \$152,083.33.

ARTICLE VII

Reports and Access to Information

7.01 Weekly Reports. (a) Within three (3) working days after the end of each calendar week, included in the Agreement Term, Railroad shall deliver to the CRD a train ridership report in the form of Exhibit 7-D.

Monthly Reports. (b) Within 30 days after the end of each calendar month (45 days in the case of December) included in the Agreement Term, except the report specified in subparagraph 7.01(b) (6) hereof, which will be provided 45 days after end of each calendar month (unless constraints are imposed by Railroad's systems department), Railroad shall deliver to the CRD:

(1) a statement signed by Railroad's Contract Services Manager or his designee (A) setting forth variations during such calendar month from the schedules set forth in Exhibit 2-A, from Standards set forth in Exhibit 2-C and from the maintenance service set forth in Exhibit 2-D and the reasons thereof, and (B) a summary of major maintenance performed during such calendar month with respect to ways and structures and equipment used in providing Contract Services, in a format agreeable to the Parties. Currently the Budget (Exhibit 6-F), the Monthly Expense Reports: Actual Expenses for the Primary Cost Centers, Secondary-Engineering Centers, and the Secondary-Other Centers (Exhibit 7-A) are being provided to CRD to fulfill this Subsection (B).

(2) a Function Cost Report, (in electronic format, using Excel, Access or other CRD acceptable data base), which presents each Cost Code charged (excluding Work Orders) to each Chargeable Cost Center, unallocated. Railroad will provide a paper copy of this report when specifically requested by CRD.

(3) Monthly Expense Reports: actual expenses for the Primary Cost Centers, Secondary-Engineering Centers, and the Secondary-Other Centers (Forms 17127, 17128 and 17129), in the form of Exhibit 7-A, which presents "Labor," "Materials" and "Other" expense components of both primary and Secondary Expenses which were assigned or allocated by Cost Center.

(4) a Summary Variance Report (Form 17325), in the form of Exhibit 7-B, which presents those totals for expenses which were assigned or allocated by Cost Center, for each Chargeable Cost Center.

(5) an Allocation Statistics Report in the form of Exhibit 7-C which presents "applied" and "budgeted" allocation statistics or predetermined percentages for each Chargeable Cost Center by allocation technique code. This report will be provided in April and November only, unless specific pages are requested by CRD for other months.

CRD & UPRR PSA AGREEMENT

(6) a statement setting forth Reimbursable Expenses in the format set forth in Exhibit 7-I.

(7) a report of labor positions for Primary areas, detailing the number of positions authorized in each Cost Code and the number of positions open, with an indication of how long of a time that the position has been open. On a quarterly basis, in addition to the information provided in the monthly report, information will be provided regarding position title, position number, union code, pay rate and any special comments.

(8) a report detailing reports that Railroad has made to the Federal Railroad Administration (FRA) on Form 6180-55a (PT), Form 6180-57 (Crossings) and Form 6180-54 (Rail Equipment/Derailment) relating to Railroad's Chicago commuter operation.

(9) a Claims report in two formats. One will be in a financial format that includes all cases accrued at \$25,000 and over, and the other in the Risk Management format, which includes all CRD cases, regardless of the accrual level.

(10) Budget Variance Report for Commuter Operations Primary Areas and Commuter Operations Engineering Secondary Areas, which will compare actual monthly performance to budget and actual year-to-date performance to budget in the format of Exhibit 7-F.

(11) a summary of operational testing results performed on Contract Services trains, including but not limited to Efficiency Testing in the format of Exhibit 7-L.

7.02 Quarterly Reports. Within 45 days after the end of each calendar quarter included in the Agreement Term, Railroad shall cause to be prepared and delivered to the CRD each of the following:

(a) a statement listing any changes during such calendar quarter in the assignment of any person who was a superintendent or trainmaster and a material part of whose work was the provision of the Contract Services, as well as a statement signed by the Railroad's Contract Services Manager, or his designee, setting forth variations during the calendar quarter from the Consists set forth in Exhibit 2-B.

(b) a statement listing any discontinuance of use, or retirement or replacement, of any of the cars and locomotives listed in Exhibit 2-E;

(c) a statement setting forth, with respect to the Contract Services provided by Railroad during such calendar quarter, the number of revenue passengers, revenue passenger miles, gross ton miles, train miles, locomotive unit miles, train hours, yard switching hours, car miles and gallons of diesel fuel carried, operated or consumed by Railroad;

~~CRD & UPRR PSA AGREEMENT~~

(d) copies of Form RE&I (Quarterly Report of Revenues, Expenses and Income, Class 1 Line Haul Railroads) and Form CBS (Quarterly Condensed Balance Sheet for Class 1 Line Haul Railroads) as filed with the Surface Transportation Board.

(e) a report detailing personal injury incidents as reported on the daily incident reports filed by Railroad's Commuter Operations Department.

7.03 Annual Reports. Within 120 days after the end of each Calendar Year any part of which is included in the Agreement Term, Railroad shall deliver to the CRD the following:

(a) an audited Statement of Consolidated Financial Position of Railroad as of the end of such Calendar Year and audited Statement of Consolidated Income, Statement of Changes in Common Stockholders' Equity and Statement of Consolidated Cash Flows of Railroad for such Calendar Year. Such financial statements shall be consolidated if Railroad has any subsidiaries and shall be accompanied by the audit report with respect thereto of Railroad's independent public accountants; and

(b) a copy of the Annual Reports on Forms R-1 and 10-K as filed with the Surface Transportation Board and the Securities and Exchange Commission, respectively.

7.04 Event Reports. After the occurrence of any of the following events, Railroad shall cause the CRD to be notified as specified below:

(a) Upon the occurrence of death or serious bodily injury to any person arising in connection with the Contract Services, or of damage or destruction exceeding \$5,000 to property used in providing the Contract Services, Railroad will provide notice thereof to the CRD on the format set forth in Exhibit 7-J. At the request of CRD, Railroad shall promptly deliver to the CRD a written report of said occurrence containing estimates of costs and substantial detail.

(b) Upon the occurrence of the service upon Railroad by any federal, state or local government or government agency of a petition, complaint or notice which asserts that Railroad, in the provision of Contract Services, is in violation of any law or regulation, Railroad shall supply a copy of such document to the CRD by the earliest of: (1) 10 days after such service; (2) 48 hours before such petition, complaint or notice is scheduled to become effective; or (3) 48 hours before expiration of Railroad's time to respond to such petition, complaint or notice.

(c) Forms 1,2 or 3 that Railroad files with the Illinois Commerce Commission regarding changes to signalization at crossings in the Chicago commuter territory.

(d) a listing of any red signal violations which are made by an engineer of a CRD train and the discipline issued. Railroad's Upgrade Policy (UP General Rules for Administering Discipline Effectively), or its successor will govern Railroad's handling of employee discipline.

7.05 Duplicate Report. Within 10 days after Railroad shall, (a) file with the Securities and Exchange Commission any 10-K, 10-Q or 8-K report or any report in place

CRD & UPRR PSA AGREEMENT

thereof subsequently required by the SEC, (b) file with the Surface Transportation Board, the Illinois Commerce Commission, the United States Department of Transportation, the Illinois Department of Transportation, or any division or agency of these agencies, any document, report, or statement relating to the Contract Services, or requesting the abandonment or discontinuance of any trackage within the Metropolitan Region, or seeking consent or approval for the disposition of any property located in the Metropolitan Region, or (c) send any written report, statement, or communication to any class of its public shareholders, Railroad shall deliver a copy thereof to the CRD.

7.06 Access to Records and Additional Information. (a) Railroad shall provide to the CRD such further information relating to the Contract Services as may reasonably be requested by the CRD. In January 2009, Railroad changed its accounting system to the SAP ERP system. Access to SAP, auditable data and other information to be provided to CRD for the audit of 2009 and subsequent years are listed in Exhibit 7-K. Access to the legacy system to audit financials prior to 2009 will be maintained by Railroad until the open audit years are closed.

(b) Either Party shall have the right to inspect and, except with respect to working papers, obtain copies of the books, records, or any other written or otherwise recorded information of the other Party relating to the Contract Services. Unless agreed otherwise, such inspections shall be during normal business hours and at the place where such information is normally kept. The inspecting party may supervise the making of any copies of documents it requests.

(c) This Article shall not be applied or construed to: (1) limit any right either Party may have under law to have counsel or to conduct audits or inspections, or to obtain information or access to records; (2) authorize either Party to demand, inspect or copy information unrelated to this Agreement; (3) waive or diminish any privilege of non-disclosure under Illinois or Federal law; (4) require disclosure of any communication with, by or prepared at the request of an attorney and relating to a matter in which the attorney is serving or being consulted in this capacity as an attorney; (5) require disclosure of any communication concerning preparation for anticipated negotiations or concerning actual negotiations with the other Party; or (6) except as provided in Article 7.08 below, disclose any internal projections or forecasts of Railroad's budget, cash flow or income.

7.07 Form of Reports. All reports to the CRD with respect to income and expenses derived or incurred by Railroad in connection with Contract Services shall be prepared in accordance with Exhibits 7-A and 7-B.

7.08 Estimated Capital Needs Projections. During each year of the Agreement Term or on any date thereafter as specified by the CRD, Railroad shall prepare and deliver to the CRD a projection in the form set forth in Exhibit 7-E of Capital Needs, ranked by priority, deemed necessary or advisable by Railroad with respect to the provision of Contract Services during the next Calendar Year. The Five Year Capital Improvement Program which Railroad prepares annually, if substantially in the form prepared by Railroad in Calendar Year 2010, shall satisfy the requirements of this Article.

~~CRD & UPRR PSA AGREEMENT~~

7.09 Inspection. (a) The CRD shall provide Railroad with a list of not more than ten persons, or job titles, which persons or the holders of which job titles shall be the CRD's authorized representatives for purposes of this Article. The CRD's authorized representatives shall be familiar with the safety rules of Railroad and the Federal Railroad Administration. The CRD's authorized representatives shall have the right and privilege at any time, from time to time or on a continuing basis, to enter upon any or all lands and properties of Railroad which are related to Contract Services for the purpose of inspecting the same. Such inspections may be conducted without advance notice to, or supervision by, Railroad, provided, however, that the CRD's authorized representatives shall identify themselves to Railroad's supervisory employees, if any, at the time of entering upon lands or property of Railroad for inspection purposes. In the course of any inspection, the CRD shall have the right to obtain information directly from the employees of Railroad, provided, however, that Railroad shall have the right to have the Contract Services Manager or his designated representative present when such information is sought.

(b) In the event of an emergency with regard to Contract Services, CRD police shall have the unencumbered right to enter upon any or all land and/or property of the Railroad for the purpose of assessing the scope of the Contract Services emergency and determining the impact of the emergency upon the operation of Public Transportation Services. CRD's police may also enter upon Railroad's land and/or property to assist a passenger or to assist Railroad's employees in the performance of Public Transportation Services.

(c) The CRD hereby assumes liability for and agrees to hold harmless, defend and indemnify Railroad and Railroad's successors, assigns, officers, directors, employees, agents and servants from and against any and all liabilities, obligations, losses, damages, penalties, judgments, settlements claims, actions, suits, proceedings, costs, expenses and disbursements, including legal fees and expenses, of whatever kind and nature, imposed on, incurred by or asserted against Railroad or any of Railroad's successors, assigns, officers, directors, employees, agents or servants, in any way relating to or arising out of any injury to any person, loss of life or damage to property of any person, arising out of the presence of, act of, or omission to act of any of the CRD's authorized representatives occurring while any such authorized representative is on lands or properties of Railroad which are related to Contract Services, other than such lands or properties which are open to the general public, and irrespective of any negligence or fault of Railroad, its officers, directors, employees, agents or servants.

7.10 Retention of Records. Railroad shall maintain and preserve supporting accounting, operating, engineering, maintenance and mechanical department records necessary to substantiate Reimbursable Expenses. Such documentation includes, but is not limited to, (1) the documentation described in Exhibit 7-K and (2) details of train Consists, locomotives and cars serviced, inspected, cleaned and dispatched, locomotives and cars repaired, work orders, material listings, material charge out documents, timerolls, labor summaries, and timecards separating labor between Contract Services and other Railroad activities, to the extent such separation was made in Railroad's records on the date of execution of this Agreement. All such records shall include the CRD designated locomotive and passenger car number, and shall be maintained and accumulated on a location by location basis. Such records shall be retained for a period of not less than 36 months or the period of time required by STB record retention rules

~~CRD & UPRR PSA AGREEMENT~~

(49 C.F.R. Articles 1220-1239) whichever is greater and shall be available to the CRD or its representatives for review and audit during regular business hours at the location where the record is retained.

7.11 Customer Complaints. Railroad shall have a procedure for the receipt and recording by the Contract Services Manager or his office of customer complaints received in person, in writing or by telephone with respect to the Contract Services. Railroad shall use its best efforts to respond to each complaint within 72 hours of its receipt or sooner if warranted by the circumstances. Within 15 days after the end of each calendar month included in the Agreement Term, Railroad shall deliver to the CRD a statement showing the number of such complaints received, in the form which Railroad provided to the Authority during the term of the Prior Agreement. Railroad shall make available for inspection by the CRD all written complaints received, and the records of Railroad upon which the statement required by this Article was based.

7.12 Additional Reporting Requirements. (a) The CRD may at any time, or from time to time, during the Agreement Term, direct reasonable changes in the content or form of any report required under this Article.

(b) The Illinois Freedom of Information Act (5 ILCS 140/1 et. Seq., the “FOIA Act” is a law in the State of Illinois that allows for requests of public records and as such it is anticipated that at some time during the term of this Agreement certain public records in the possession of CRD may be requested under this FOIA Act. If CRD requests Railroad to produce public records of CRD that Railroad possesses, Railroad agrees to cooperate with its obligations, if any, under the FOIA Act to produce to CRD such records Railroad agrees are public records within the definition of that term under the FOIA Act so long as Railroad has not previously provided said records to CRD or if CRD has its own copy of same. Railroad is under no obligation to produce records Railroad considers non-public records and Railroad will defend CRD, indemnify, and hold CRD harmless during the defense of Railroad’s position that the records are non-public or not subject to the FOIA Act. Railroad is under no other obligation under this Agreement to search, find and produce records that Railroad has already produced to CRD or which CRD produced to Railroad as said documents are equally accessible to CRD, a public entity to whom the FOIA Act applies; provided, however, that Railroad will use reasonable efforts, at Metra’s cost, to provide a second copy of records subject to this Agreement that may have been previously provided to Metra. Railroad, of course, agrees to fulfill its obligations under the law.

7.13 Substitute Reports. Railroad may satisfy any requirement of this Article by delivery to the CRD at the time and in the form required herein of a document containing the required information, even if such document is prepared for another purpose or contains additional information not required herein.

7.14 Accounting. The Railroad shall keep and maintain proper books of account regarding its Public Transportation Service in accordance with this Agreement and otherwise in accordance with Generally Accepted Accounting Principles of the railroad industry, consistently applied.

~~CRD & UPRR PSA AGREEMENT~~

ARTICLE VIII

Additional Covenants, Warranties and Agreements of Railroad

8.01 Compliance With Laws. (a) Unless otherwise agreed by the CRD, Railroad will, in the provision of Contract Services comply with valid and applicable Government Requirements except such local Government Requirements as may be preempted by the CRD.

(b) Railroad will give prompt notice to the CRD of any proceedings which might result in its incurring any Capital Expenditures or expenses not provided for in an Approved Budget, the necessity for which expense or Capital Expenditure is caused by a newly instituted Government Requirement or enforcement of a Government Requirement which theretofore had not been enforced, and shall timely offer to the CRD the opportunity to contest the validity and applicability of such Government Requirement.

8.02 Opinion of Counsel. When this Agreement is executed by Railroad, Railroad will furnish the CRD with an opinion of Railroad's counsel, dated the date on which this Agreement is executed by Railroad and to the effect that (1) Railroad is a corporation duly organized and existing and in good standing under the laws of its jurisdiction of incorporation, and has full corporate power to carry on its business as and where then conducted; (2) Railroad is qualified to engage in the business of providing Public Transportation Services by rail in, and is in good standing under laws of, the State of Illinois; (3) the execution, delivery and performance of this Agreement by Railroad has been duly authorized by all requisite corporate action of Railroad; (4) this Agreement has been duly executed and delivered by Railroad and constitutes the valid and binding obligation of Railroad in accordance with its terms; (5) the compliance by Railroad with the terms and conditions of this Agreement will not result in a breach of, or default under, any judgment, decree, mortgage, indenture or other agreement applicable to Railroad known to such counsel; (6) all approvals as may be required to permit the performance by Railroad of its obligations under this Agreement have been obtained; and (7) except as previously disclosed to the CRD in writing, such counsel has no knowledge of any litigation or proceeding pending or threatened against Railroad which could materially and adversely affect the provision by it of Contract Services under this Agreement.

8.03 Maintenance of Insurance. (a) CRD will use its best reasonable efforts to keep in full force and effect insurance coverage of the same type, character and coverage as that maintained by it as of February 9, 2010, or at subsequent renewals, with respect to Contract Services. Coverage at the time of execution of this Agreement is set out in Exhibit 8-A. CRD shall use its best reasonable efforts to cause the Railroad to be named as an additional named insured, as its interests may appear, under all of such insurance, and shall notify the Railroad promptly of any material change in the insurance required by this Article. CRD represents to the Railroad that such insurance covers Railroad's liability for personal injury, death, and damage to or destruction of property of others, and damage to or destruction of property of Railroad and pollution liability.

In the event of an unexpected loss that substantially erodes the RTA Policy in place, or if it uses its commutation provisions that allow it to terminate coverage for a given year

CRD & UPRR PSA AGREEMENT

or period, CRD will undertake its best reasonable efforts to reimplement limits or to purchase alternative insurance.

(b) At each renewal and in the event of a material change in insurance which reduces the coverage or limits, the CRD shall provide 90 days' written notice to Railroad. Railroad shall have 60 days from the date of said notice to review the contract of insurance proposed by the CRD or its insurer and, by written notice to the CRD, approve or disapprove such insurance. Failure by Railroad to so notify the CRD within 60 days shall constitute approval. Upon disapproval by Railroad, Railroad shall purchase insurance in accordance with its specifications, and the premiums therefore shall be a Reimbursable Expense.

(c) If the CRD decides not to continue in force any insurance which it purchased pursuant to this Article 8.03, the CRD shall give Railroad at least 90 days' written notice of cancellation or termination of any insurance policy then in force, so that Railroad may procure such insurance, and the premiums therefore shall be a Reimbursable Expense. In addition, the CRD shall provide Railroad with copies of all application data supplied by the CRD to its insurers, and shall notify its insurers that the CRD has terminated its efforts to purchase insurance for the Railroad.

(d) It is the intention of the Parties hereto that (except for retentions not to exceed \$5,000,000 million per occurrence) insurance obtained under this section covers Railroad for all liabilities related to Claims which are caused by or arise, in whole or in part, from the provision of Contract Services under Article X of this Agreement. However, CRD's insurance coverage does not limit its obligation to reimburse Railroad for Claims arising under this Agreement. CRD and Railroad agree to reopen this Agreement to discuss the level of insurance to be carried by CRD for liability claims arising out of commuter train service each time Congress may modify, alter or change the cap on liability claims involving commuter train service.

(e) Subrogation. Railroad shall exercise its best judgment and provide reasonable efforts to identify subrogation opportunities and actively pursue recovery against responsible third parties, for costs incurred by Railroad to repair damages to equipment or property, which would otherwise be recovered or reasonably sought to be recovered by Railroad, in the absence of subrogation, under the Agreement. Costs incurred to pursue recovery from responsible parties shall be submitted for reimbursement under the Agreement. Recoveries from responsible parties and expenses incurred will be allocated between CRD and Railroad based upon the share each Party contributed to the original asset that was damaged or destroyed and then further allocated upon each Party's share of the total gross ton miles at that location for track related components and using train counts for signal related components. Railroad recovery efforts shall include notifying the Illinois Secretary of State of those instances where the damage is attributable to uninsured drivers and/or owners.

Railroad will retain sufficient details of cost and materials to identify the amounts involved. Railroad will allow CRD to conduct an audit of expenses submitted under the Agreement each six (6) months so CRD can determine if additional subrogation measures are reasonably warranted. If Railroad disagrees with CRD regarding whether subrogation efforts should proceed or disagrees to the level of subrogation efforts warranted, Railroad will not unreasonably

CRD & UPRR PSA AGREEMENT

withhold permission from CRD for CRD to pursue subrogation itself in the name of Railroad to recover said damages CRD wishes to pursue.

Under circumstances where the Railroad agrees to permit CRD to pursue subrogation efforts directly and independently of Railroad, the Parties will mutually agree on the selection of counsel. No direct and independent subrogation efforts by CRD or counsel will be done without the permission of Railroad.

Railroad shall not forego or suspend subrogation opportunities without written notice to CRD's Risk Management. CRD and Railroad are to mutually agree to the selection of counsel if suit is filed against a responsible party, whether Railroad is pursuing subrogation or CRD is pursuing subrogation directly with Railroad's permission. CRD will receive a status report regarding any subrogation files being pursued by CRD which are assigned to counsel as requested by CRD, or beginning ninety days following counsel's assignment to matters being pursued by Railroad and each ninety day period thereafter.

Railroad will also identify any instances involving vehicles assigned or loaned to Railroad, including road licensed vehicles and trailers, where an accident occurs with potential subrogation. Railroad agrees to notify CRD of the occurrence and when appropriate, pursue recovery from the adverse owner or driver for the repair

8.04 Report of Compliance. On or before the date on which this Agreement becomes binding on Railroad and the CRD, Railroad will deliver to the CRD a Report on Compliance with this Agreement confirming that to the best of Railroad's Officers knowledge in the exercise of due diligence none of the reports, summaries, financial statements or other written information furnished by Railroad to the CRD in connection with or pertaining to this Agreement contains any untrue statement or misrepresentation of a material fact, or omits to state or represent any material fact necessary to make the statements or representations made, in light of the circumstances under which they were made, not misleading in any material respect. This Report on Compliance will be in the format of Exhibit 8-B.

8.05 Compliance With Agreements. Railroad will comply with the provisions of existing leases, contracts and agreements to which it is a party and which are material to the provision by it of the Contract Services. Railroad shall not, without the prior written approval of the CRD, enter into, renew, fail to renew, modify or terminate any such contracts, leases or agreements if such entry, renewal, failure to renew, modification or termination will impair the performance by Railroad of the Contract Services or result in any material increase in Reimbursable Expenses or material reduction in Contract Services Revenues.

8.06 Representations and Warranties. Railroad hereby represents and warrants to the CRD that: (a) none of the reports, summaries, financial statements or other written information heretofore furnished by Railroad to the CRD in connection with or pertaining to this Agreement or the Prior Agreement and none of the reports, summaries, financial statements or other written information hereafter furnished by Railroad to the CRD pursuant to the provisions of this Agreement or the Prior Agreement, contains or will contain any untrue statement or misrepresentation of a material fact or omits or will omit to state or represent any material fact

CRD & UPRR PSA AGREEMENT

necessary to make the statements or representations made, in the light of the circumstances under which they were made, not misleading in any material respect; and (b) Railroad has complied with and will comply with, has fully performed and will fully perform, all of its obligations under the Prior Agreement in all material respects.

8.07 Labor Law Compliance. Railroad agrees that, with respect to the Contract Services, it will comply with all the applicable requirements of federal and Illinois labor laws, including without limitation applicable requirements of federal and Illinois law with regard to the minimum wages to be paid to its employees, limitations upon the employment of minors, minimum fair wage standards for minors, the payment of wages due employees and all regulations established according to law to protect the health and safety of its employees.

8.08 Compliance with Environmental Protection and Safety Laws. Railroad agrees that, with respect to the Contract Services, it will comply with all applicable Government Requirements enacted or adopted according to law relating to the protection of the environment. Railroad agrees that it will comply with the provisions of general or special orders, rules or regulations issued by the Illinois Commerce Commission, which pertain to public transportation and to public transportation facilities.

8.09 Equal Employment Opportunity and Fair Employment Practices. (a) As to all of Railroad's Public Transportation Services, Railroad agrees that it will comply with all Government Requirements (including those of the CRD) relating to equal employment opportunity, fair employment practices and minority business enterprises, including but not limited to, the provisions of Title VII of the United States Civil Rights Act of 1964 (P.L. 88-352, 78 Stat. 253, 42 U.S.C. 2000 (e)), as the same may be amended, the Illinois Human Rights Act (775 ILCS 5/1-10 et seq.) as the same may be amended, Article 2.02(d) of the Act as the same may be amended, and Authority Ordinance No. 80-51, as the same may be amended.

(b) Railroad shall furnish the CRD with proof that it has filed with the Illinois Human Rights Commission or its successor agency an affirmative action program for employment by it with regard to the Public Transportation Services provided by Railroad in the Metropolitan Region. Such program shall insure that applicants are employed and that employees are treated during employment without unlawful discrimination, and such affirmative action program shall include provisions relating to hiring, upgrading, demotion, transfer, recruitment, recruitment advertising, selection for training and rates of pay or other forms of compensation. No unlawful discrimination, as defined and prohibited by any applicable law shall be made in any term or aspect of employment, and discrimination based upon political reasons or factors shall be prohibited. Railroad hereby agrees that throughout the Agreement Term it will fully comply with such program and shall provide the CRD with all information reasonably requested by it pursuant to the requirements of the Illinois Human Rights Act (775 ILCS 5/1-101 et seq.), as the same may be amended.

ARTICLE IX

Labor Protection

9.01 Labor Protection and Labor Protection Costs. (a) Pursuant to Sections 2.15 and 2.16 of the Act the CRD agrees that it will have financial responsibility for, and that

CRD & UPRR PSA AGREEMENT

Railroad will have no financial responsibility for, the fair and equitable protection of employees of Railroad who are adversely affected by action(s) initiated by or taken at the direction of the CRD pursuant to this Agreement in the event such action(s) of the CRD cause claims which are allowed under the terms of existing agreements covering employees of Railroad negotiated pursuant to Section 13(c) of the Urban Mass Transportation Act of 1969, as amended [49 U.S.C. Section 1609(c)] and/or Section 405(b) of the Rail Passenger Service Act of 1970, as amended [45 U.S.C. Section 565(b)] or any existing agreement covering employees of Railroad or agreement required to be entered into pursuant to said existing agreement. The CRD will pay all claims allowed pursuant to said labor protection agreements under the aforementioned circumstances in accordance with the principles of Section 2.04. Nothing in this paragraph shall be construed to limit the CRD's other duties, obligations or financial responsibilities under Sections 2.15 or 2.16 of the Act.

(b) Railroad will, pursuant to Section 2.16(b) of the Act, either on behalf of or jointly with the CRD, negotiate with the accredited representatives of the employees of Railroad authorized to act for them such labor protective arrangements as are required by the Act in the event existing agreement(s) are not or cannot be utilized pursuant to paragraph 9.0 1(a) hereof. Said labor protection agreements shall cover employees of Railroad who may be adversely affected by action of the CRD specified in paragraph 9.0 1(a). The CRD and Railroad shall have the same financial responsibilities as provided in paragraph 9.01(a). Nothing in this paragraph shall be construed to limit CRD's other duties, obligations or financial responsibilities under Sections 2.15 or 2.16 of the Act. The Railroad shall, to the fullest extent feasible, cooperate with the CRD in the administration and implementation of any labor protection agreement arising from the application of this Article. Reasonable additional costs of administration and implementation shall be compensated by the CRD in accordance with the principles of Article 2.04. The Railroad further agrees that, pursuant to Section 2.16(b) of the Act, if agreement cannot be reached on the terms of such protective arrangement, any party may submit any matter in dispute to arbitration. In such arbitration, each party shall have the right to select one nonvoting arbitration board member. An impartial arbitrator will be selected by the American Arbitration Association and appointed from a current listing of the membership of the National Academy of Arbitrators, upon request of any party. Unless otherwise specified by the Parties, the following procedure in interest arbitration shall be followed:

The party requesting arbitration shall name its arbitrator at the time the request for arbitrations is made. Within five working days after receipt of such request, the other party shall name its arbitrator. Within seven working days thereafter, the two arbitrators or their representatives shall meet to select the impartial chairman of the Board of Arbitration. Should the two arbitrators be unable to agree upon the appointment of a third arbitrator within ten working days after the second of the arbitrators was named, then either party to the arbitration may request the American Arbitration Association to furnish a list of five arbitrators who are currently available to serve from which the third member shall be selected to serve as Chairman. The list requested shall be composed of arbitrators who are experienced in interest arbitration in the transportation industry. Within seven days after the receipt of the list, the arbitrator shall be selected from the panel by each party alternately striking a name until only one name remains. The order of striking shall be determined by the toss of a coin.

CRD & UPRR PSA AGREEMENT

The impartial arbitrator's decision shall be final and binding on all Parties. Each party shall pay an equal share of the impartial arbitrator's fees and expenses.

(c) In the event an adversely affected employee of Railroad makes a claim and elects to take protection more favorable or other than any allowed under any existing agreement made or entered into pursuant to paragraphs 9.01(a) and 9.01(b) hereof, and pursuant to an agreement entered into by Railroad without the CRD's participation or approval which agreement or claim does not arise from action(s) initiated by or taken at the direction of CRD, the CRD shall have no financial responsibility for said claim.

(d) In the event an employee of Railroad who is adversely affected by action(s) initiated by or taken at the direction of the CRD makes a claim electing to take protection more favorable or other than any allowed under any existing agreement made or entered into pursuant to paragraphs 9.01(a) and 9.01(b) hereof, and pursuant to an agreement entered into by Railroad without the CRD's participation or approval which agreement did not arise from action(s) initiated by or taken at the direction of the CRD, then the CRD will have financial responsibility for such portion of the fair and equitable protection of employees as CR1) would have paid under existing agreements made and entered into pursuant to paragraphs 9.01(a) and 9.01(b) hereof.

9.02 Non-Interference with Labor Agreements. Nothing in this Agreement shall be applied or construed to authorize or require conduct which violates any of Railroad's labor agreements or, except to the extent Railroad is reimbursed therefore, which requires payment by Railroad of any penalty or payment pursuant to such agreements; provided, however, that Railroad will not directly or indirectly propose any new provision or change in any existing provision, in such agreements which would, as compared with such agreements in effect December 31, 1998, increase any prohibition against conduct that may be undertaken or required by the CRD pursuant to this Agreement. If the CRD proposes a Service Change or a Fare Change, implementation of which would violate any of Railroad's labor agreements, Railroad will use good faith efforts in informal negotiations (but without any obligation to institute procedures under Section VI of the Railway Labor Act) to obtain a modification or waiver of the applicable provisions of such agreements to permit such change to be implemented in accordance with this Article.

ARTICLE X

Notice, Defense of Claims, and Allocation of Claims Expenses

10.01 Notice. Railroad shall, promptly after gaining knowledge thereof, notify the CRD of the assertion against Railroad or the CRD by any person or entity of any claim or liability arising out of the provision of the Contract Services and the expense for which Railroad intends to seek reimbursement pursuant to Article 6.02 hereof ("**Claim**"). The CRD shall, promptly after gaining knowledge thereof, notify the Railroad of the assertion against Railroad by any person or entity of any claim arising out of the Contract Services operations.

10.02 Allocation of Claims - Generally. Except as provided in Article 10.03 and 7.09(b), Claims shall be Reimbursable Expenses when the cause of the Claim is solely-related (as between Railroad and CRD) to Contract Services equipment or employees, but shall not be Reimbursable Expenses when the cause of the claim is solely-related (as between Railroad and

~~CRD & UPRR PSA AGREEMENT~~

CRD) and to non-Contract Services equipment or employees. Except as provided in Article 10.03 below, in all cases: (a) in which it is not determinable that the cause of the Claim is solely-related (as between Railroad and CRD) to either Contract Services equipment or employees or non-Contract Services equipment or employees, or (b) the cause of the Claim is related to both Contract Services equipment or employees and non-Contract Services equipment or employees, the expense of the Claim shall be allocated to Reimbursable Expenses and to Railroad in accordance with the allocation principles set forth in Exhibit 6-A or 6-C governing the work, property or activity which caused or gave rise to the Claim.

Notwithstanding the provisions of this Article 10.02 (a) and (b) and the following Article 10.03, if the Claim involves or is caused by train operations and the only train(s) involved relates to Contract Services, the Claim shall be a Reimbursable Expense, regardless of the negligence of any party to this Agreement. Notwithstanding the foregoing, the CRD shall not be obligated to pay any cost or expense which is not a Reimbursable Expense in accordance with Article 6.02 (b)(5) or (7) of this Agreement, and costs of a Claim shall not include any liability or expense to the extent that Railroad is reimbursed by an insurance carrier or other third party.

Conversely, notwithstanding the provisions of this Article 10.02 (a) and (b) and the following Article 10.03, if the Claim involves or is caused by train operations and the only train(s) involved relates to non-Contract Services, the Claim shall not be a Reimbursable Expense, regardless of the negligence of any party to this Agreement. Notwithstanding the foregoing, the CRD shall not be obligated to pay any cost or expense which is not a Reimbursable Expense in accordance with Article 6.02 (b) (5) or (7) of this Agreement, and costs of a Claim shall not include any liability or expense to the extent that Railroad is reimbursed by an insurance carrier or other third party.

10.03 Allocation of Claims Caused by non-Contract Services and Contract Services Train Collisions. Notwithstanding the provisions of Article 10.02, in the event of damage to property of Railroad or others or personal injury or death resulting from the collision of a non- Contract Services train operated by Railroad and a Contract Services train that was caused by:

- (i) negligence or other fault of the Contract Services train crew, the costs of the claim thereby caused shall be borne by the CRD;
- (ii) negligence or other fault of the non-Contract Services train crew, the costs of the Claim thereby caused shall be borne by Railroad;
- (iii) negligence or other fault of employees of Railroad having duties relating to both Contract Services and non-Contract Services operations, or negligence of one or more employees of Railroad having duties relating solely to the Contract Services and negligence of one or more employees of Railroad having duties relating solely to Railroad's non-Contract Services operations, or the cause cannot be ascertained, the costs of the Claim thereby caused shall be borne equally by Railroad and CRD.

CRD & UPRR PSA AGREEMENT

10.04 Definition of Claims Expense. In addition to the amounts of settlements and judgments, the cost of a Claim includes direct expenses of investigating the facts, and fees of attorneys and experts necessary to the defense of a Claim, provided, however, that Railroad shall obtain the prior written approval, or at CRD's discretion, oral approval for any litigation expense item which may reasonably be expected to exceed \$10,000 with respect to any one claim or incident, provided further, however, that such \$10,000 limitation shall not apply to salaries of Railroad's employee-attorneys and employee-claims personnel. Notwithstanding the foregoing, the CRD shall not be obligated to pay any cost or expense which is not a Reimbursable Expense in accordance with Article 6.02(b)(5), (7) or (12) of this Agreement and the costs of a Claim shall not include any liability or expense to the extent that Railroad is reimbursed therefore by an insurance carrier or other third party.

10.05 Defense of Claims. (a) Railroad shall investigate and dispose of all Claims, provided that the CRD also may investigate any such Claim, at its election, and Railroad shall cooperate with the CRD in each such investigation. Railroad shall not settle or compromise any Claim involving payment by the CRD of any amount in excess of \$25,000, without in each case the prior written consent of the CRD; provided, however, Railroad can settle or compromise Claims involving the payment by CRD of an amount up to and including \$100,000 as long as CRD receives the prior written concurrence of Mr. Thomas W. Cushing while he is employed by Railroad or by such party acceptable to CRD. CRD reserves the right to adjust this level of authority if significant changes occur within the Railroad's Law and/or Claim departments in terms of staffing or personnel. The CRD shall have the right to join as an additional party in any proceeding with respect to a Claim. Railroad shall give prompt notice to the CRD of the assertion of each Claim and thereafter shall provide to the CRD such documents and information as the CRD reasonably may request in the circumstances. At such time as an attorney's lien or a lawsuit is filed with respect to any claim the majority of the expense of which is allocable to the CRD, Railroad shall tender defense thereof to the CRD upon its request.

(b) In the event of serious personal injury or death Claim(s) which will likely result in extraordinary defense costs, Railroad may request that the defense costs associated with the Claim(s) be allocated on a direct expense basis, rather than through the Corporate Overhead itemized on Exhibit 6-B. CRD, in its sole discretion, may approve such allocation, such approval shall not be unreasonably withheld.

ARTICLE XI
Agreement Term

11.01 Duration. The term of this Agreement ("**Agreement Term**") shall be retroactive to January 1, 2010, and shall end on whichever of the following dates is the earlier:

- (a) December 31, 2016, or
- (b) the date, if any, as of which this Agreement is terminated by the CRD or Railroad pursuant to Article XII below.

11.02 Effect of Termination. Upon the termination of the Agreement Term, all rights and privileges of Railroad and the CRD under this Agreement shall cease, and neither Railroad nor the CRD shall have any further obligations to the other under this Agreement, provided that such termination shall not affect, impair or discharge any claims, indemnifications,

CRD & UPRR PSA AGREEMENT

benefits or rights of Railroad or the CRD which shall have accrued, or which are based upon acts, omissions to act or events which shall have occurred, during the Agreement Term.

ARTICLE XII

Termination

12.01 Rights to Terminate. (a) The CRD may, by written notice to Railroad terminate this Agreement in the event the overall level, safety or quality of the Contract Services is materially impaired as a result of the breach or failure of compliance by Railroad of or with any of the provisions of this Agreement and Railroad fails to cure such impairment within 60 days after written notice thereof by the CRD and stating its intention to terminate. Termination pursuant to this Article shall not become effective during the pendency of proceedings involving issues underlying the CRD's asserted right to terminate in a particular case.

(b) In the event the CRD is in arrears in its payments to Railroad under this Agreement for a period of three (3) months or more, disputed items excepted, Railroad shall have the right to terminate this Agreement by written notice to the CRD.

12.02 Non-Waiver and Pursuit of Other Remedies. Article 12.01 above is not intended to waive or limit any other remedy available to either Party under this Agreement. The failure of either Party to insist at any time upon the strict observance or performance of any of the provisions of this Agreement or to exercise any right or remedy provided for in this Agreement, shall not impair any such right or remedy nor be construed as a waiver or relinquishment thereof.

ARTICLE XIII

Miscellaneous Provisions

13.01 Prior Agreements Between the Parties. Nothing in this Agreement shall be deemed to restrict or impair the exercise by either Party of any of the rights, powers and privileges conferred upon it by any other written agreement between Railroad and the Authority or CRD and pertaining to periods before the effective date of this Agreement.

13.02 Subordination. (a) All obligations of the CRD which may, from time to time, be incurred by it under provisions of the Act which authorized secured, unsecured short term, long term, equipment trust certificate or other borrowing shall be superior to and have priority over any and all obligations of the CRD under this Agreement.

(b) Any locomotives, cars, equipment or other property furnished or used or to be furnished or used by Railroad under this Agreement shall be subject to all existing liens and superior rights, including, but not limited to, real estate or chattel mortgages, equipment liens pursuant to equipment trusts agreements, conditional sale agreements, leases, or otherwise, and all obligations or rights of the Parties shall be subject and subordinate to the provisions of any existing leases, licenses, joint facility agreements, joint terminal agreements, union depot agreements, track agreements, or easements or other encumbrances pertaining to any of the real or personal property used or occupied in connection with the performance of the Agreement.

CRD & UPRR PSA AGREEMENT

13.03 Limitation of Rights. The CRD shall have no obligation or duty to any person to make any of the inspections, audits or examinations which the CRD may have the right to make under this Agreement or otherwise. Such rights are for the sole benefit of the CRD and neither Railroad nor any other person shall rely on the CRD's exercise of, or failure to exercise, any of such rights. Except for labor protection obligations pursuant to Article IX, this Agreement is not intended to and shall not be construed or applied to create any rights in any person or entity not a party hereto.

13.04 Non-Waiver. In no event shall the payment or receipt of any money under this Agreement by the CRD or Railroad constitute or be construed as a waiver by the CRD or Railroad of any breach of covenant or of any default on the part of the other under this Agreement which may then exist, and the making or receipt of any payment under this Agreement while any such breach or default shall exist shall in no way impair or prejudice any right or remedy available in respect of such breach or default. Neither the CRD or the Railroad shall be deemed to have waived any right under this Agreement unless such waiver is in a writing signed by one of its respective authorized officers. No delay or omission in exercising any right under this Agreement shall operate as a waiver of such right or other right. All the rights and remedies of the CRD and Railroad under this Agreement shall be cumulative and not exclusive and may be exercised singly or concurrently. The waiver or exercise of any remedy shall not be construed as a waiver of any other remedy available hereunder or under general principles of law or equity.

13.05 Non-Collusion. Railroad warrants and represents that it has not paid and agrees not to pay any bonus, commission, fee or gratuity to any employee or official of the CRD for the purposes of obtaining this Agreement. No officer or employee of the CRD shall be admitted to any financial share of this Agreement or to any direct or indirect financial benefit arising therefrom.

13.06 Successors and Assigns. All covenants, agreements, representations and warranties in this Agreement made by or on behalf of Railroad or its subsidiaries or by or on behalf of the CRD shall bind and inure to the benefit of the respective successors and assigns of such party hereto.

13.07 Notices. Any written notice required or permitted by this Agreement may be delivered by depositing it in the United States Mail, postage prepaid, addressed to the CRD at Commuter Rail Division of the Regional Transportation Authority, 547 West Jackson Boulevard, Chicago, Illinois 60661, to the General Counsel and Director, Office of Real Estate & Contract Management and to Railroad at 101 North Wacker, Suite 1910, Chicago, Illinois 60606, to the attention of Assistant Vice President, Government Affairs - Central Region, or at such other address or person as either party may designate in writing.

13.08 Governing Law. This Agreement shall be construed in accordance with and be governed by the laws of the State of Illinois.

13.09 Assignment. Railroad agrees that this Agreement shall not be assigned or transferred without the written consent of the CRD, unless the transaction is (1) specifically

CRD & UPRR PSA AGREEMENT

authorized under a federal law, or (2) a merger, consolidation, sale or lease of all or substantially all of Railroad's assets approved in a State or federal administrative or judicial proceeding in which the CRD has had a reasonable opportunity to appear. Railroad agrees that no such transaction shall occur unless any successor to Railroad's rights under this Agreement agrees to accede to all of the terms, conditions and requirements of this Agreement as a condition precedent to such succession. Railroad agrees that any purported assignment of this Agreement, except in accordance with this Article, without the consent of the CRD is null and void.

13.10 Amendment. The Parties agree that no change or modification to this Agreement shall be of any force or effect unless the amendment is dated and is reduced to a writing executed by both Parties.

13.11 Severability. The Parties agree that if any provision of this Agreement shall be held invalid for any reason whatsoever, the remaining provisions shall not be affected thereby if such remaining provisions could then continue to conform with the purposes of this Agreement and the terms and requirements of applicable law. If such a holding of invalidity deprives Railroad of the Compensation provided hereunder, Railroad may by written notice to the CRD elect to terminate this Agreement.

13.12 Titles and Precedent. The Parties agree that the titles of the Articles and Sections of this Agreement are inserted for convenience only and shall not be considered for any other purpose. This Agreement or anything done in connection herewith shall not be considered precedent for any future agreement which may be entered into between the Parties.

13.13 Documents Forming This Agreement. The Parties agree that this Agreement, including Exhibits attached hereto, constitutes the entire agreement between the Parties pertaining to the subject matter hereof, that there are no agreements or understandings, implied or expressed, except as set forth specifically in this Agreement and that all prior and contemporaneous agreements and understandings in this connection are merged into and contained in this Agreement. No covenant or condition not expressed in this Agreement shall effect or be effective to interpret, change or restrict this Agreement.

13.14 Powers of Eminent Domain. Nothing in this Agreement shall in any way preclude the CRD from exercising any of its powers of eminent domain. Railroad hereby agrees that in the event any of the property used in providing the commuter rail service is taken or acquired by eminent domain by the CRD, for the purpose of determining the award due to Railroad with respect to such property, no effect shall be given to any amounts paid or payable to Railroad under this Agreement or any payment or grant made or to be made by the Authority to Railroad.

13.15 Review of Operations. The Parties understand that one of the inducements for CRD to enter into this amended and restated PSA with Railroad is to include a provision where the Parties will review current Contract Services provided by Railroad to determine if any of them can be transferred during the term of this Agreement over to CRD's operating affiliate, the Northeast Illinois Regional Commuter Railroad Corporation. During the term of the Agreement, the Parties will investigate the practicality of transferring some or all aspects of

CRD & UPRR PSA AGREEMENT

various Contract Services to CRD, including, but not limited to: maintenance of equipment, training of personnel, and the employment and management of employees, such as: ticket and accounting clerks, conductors, engineers, trainmen, and coach cleaners. As part of that investigation, the Parties will analyze what further changes to this underlying Agreement would be necessary to address financial equitable adjustments, including credits and/or additional charges to CRD should it decide to accept the transfer of operations and the Parties must reach agreement on mutually acceptable terms and conditions associated with any such transfer of operations. The Parties also understand that such transfer be performed under a realistic time frame and should address related personal and real property.

13.16 Article VI Exhibits: The Parties intend that the Exhibits conform to the body of the amended Agreement and the intention of the Parties. Exhibits 6-A, 6-B (Kedzie only), and 6-G to this Agreement have not been completely reviewed and approved by CRD's Audit Department. During the process of incorporating the changes from Railroad's prior mainframe accounting system into its new SAP system, Railroad has used its best efforts to not change the scope and financial impact of these above-designated Exhibits. Subsequent to signing this Agreement, if during CRD Audit's review it determines that the Exhibits do not comply with the body of the Agreement, the Parties will use best efforts to resolve the matter consistent with the ACR process, which ultimately requires the participation of CRD's Deputy Executive Director (Corporate Affairs) and Railroad's Vice President-Planning & Analysis in its Finance Department. If agreement cannot be reached on the terms of the remaining exhibits after participation by the Deputy Executive Director and Railroad's Vice President, any Party may submit such matters in dispute to arbitration. In such arbitration, each Party shall have the right to select one nonvoting arbitration board member. An impartial arbitrator will be selected by the American Arbitration Association and appointed from a current listing of the membership of the National Academy of Arbitrators, upon request of any Party. Unless otherwise specified by the Parties, the following procedure in interest arbitration shall be followed:

The party requesting arbitration shall name its arbitrator at the time the request for arbitrations is made. Within five working days after receipt of such request, the other party shall name its arbitrator. Within seven working days thereafter, the two arbitrators or their representatives shall meet to select the impartial chairman of the Board of Arbitration. Should the two arbitrators be unable to agree upon the appointment of a third arbitrator within ten working days after the second of the arbitrators was named, then either party to the arbitration may request the American Arbitration Association to furnish a list of five arbitrators who are currently available to serve from which the third member shall be selected to serve as Chairman. The list requested shall be composed of arbitrators who are experienced in interest arbitration in the transportation industry. Within seven days after the receipt of the list, the arbitrator shall be selected from the panel by each party alternately striking a name until only one name remains. The order of striking shall be determined by the toss of a coin.

The impartial arbitrator's decision shall be final and binding on all Parties. Each Party shall pay an equal share of the impartial arbitrator's fees and expenses.

13.17 Effective Date. This Agreement is effective as of January 1, 2010.

Case: 1:19-cv-07957 Document #: 1 Filed: 12/05/19 Page 59 of 86 PageID #:59

CRD & UPRR PSA AGREEMENT

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be made effective and executed as of the date first above mentioned by their respective duly authorized officials.

ATTEST:

COMMUTER RAIL DIVISION OF THE
REGIONAL TRANSPORTATION
AUTHORITY:

By: /s/ Delores Ellison

By: /s/ Philip A. Pagano
Philip A. Pagano, Executive Director

(Signature continued on next page).

Case: 1:19-cv-07957 Document #: 1 Filed: 12/05/19 Page 60 of 86 PageID #:60

CRD & UPRR PSA AGREEMENT

ATTEST:

**THE UNION PACIFIC RAILROAD
COMPANY:**

By: /s/ Thomas Whitaker

By: /s/ James R. Young
James R. Young, Chairman, President
and Chief Executive Officer

CRD & UPRR PSA AGREEMENT

SUMMARY OF EXHIBITS

1.	Exhibit 2-A	Schedules
2.	Exhibit 2-B	Train Consists
3.	Exhibit 2-C	Standards of Performance
4.	Exhibit 2-D	Maintenance of Equipment
5.	Exhibit 2-E	List of Cars and Locomotives
6.	Exhibit 2-F	Reserved
7.	Exhibit 2-G	Fuel
8.	Exhibit 2-H	Fuel Specifications
9.	Exhibit 2-I	Reserved
10.	Exhibit 2-AA	Suburban Station Status
11.	Exhibit 2-AB	Fair Market Value
12.	Exhibit 2-AC	Appraisal Criteria
13.	Exhibit 2-AD	Parking Lots Covered by Leases
14.	Exhibit 2-AE	Parking Lots With No Lease
15.	Exhibit 2-AF	Station/Coach Contract Service Revenue
16.	Exhibit 3-A	Use of CRD Owned Property for Elburn Extension
16.	Exhibit 5-A	Fares
17.	Exhibit 5-B	Pass Policy
18.	Exhibit 5-C	Ticket Offices and Hours
19.	Exhibit 5-D	Procedure for Sales of Tickets by Internet
20.	Exhibit 5-E	Procedures for sales of Tickets by Credit Card
19.	Exhibit 6-A	Expenses Assigned or Allocated by Responsibility Area (This Exhibit is subject to Article 13.16)
20.	Exhibit 6-B	Expense Allocation Techniques for Expenses to be Assigned or Allocated by Responsibility Area or Special Study (Kedzie dispatchers shall be subject to Article 13.16)
21.	Exhibit 6-C	Expenses Not Assigned or Allocated by Responsibility Accounting System
22.	Exhibit 6-D	Functions to be Excluded from Automated Processing in the Subsidiary Accounting System
23.	Exhibit 6-E	June 15 Budget (Format)
24.	Exhibit 6-F	Budget (Format)
25.	Exhibit 6-G	Billing Number Maps (This Exhibit is subject to Article 13.16)
26.	Exhibit 6-H	Accounting Change Request (Format)
27.	Exhibit 6-I	Link-UP Bus Tickets
28.	Exhibit 6-J	Reserved
29.	Exhibit 7-A	Monthly Expense Report (Format)
30.	Exhibit 7-B	Summary Variance Report (Format)
31.	Exhibit 7-C	Allocation Statistics Report (Format)
32.	Exhibit 7-D	Train Ridership Report
33.	Exhibit 7-E	Capital Expenditure Plan (Format)
34.	Exhibit 7-F	Budget Variance Report (Format)
35.	Exhibit 7-G	Work Order Format
36.	Exhibit 7-H	Reserved
37.	Exhibit 7-I	Reimbursable Expenses Alternative Format (Format)
38.	Exhibit 7-J	Personal Injury, Property Damage and Grade Crossing Report (Format)

CRD & UPRR PSA AGREEMENT

- | | | |
|-----|-------------|----------------------------------|
| 39. | Exhibit 7-K | List of Computer Tapes for Audit |
| 40. | Exhibit 7-L | Summary of Efficiency Reporting |
| 41. | Exhibit 8-A | Insurance |
| 42. | Exhibit 8-B | Report on Compliance |



Michael W. Payette
AVP, Government Affairs, Central Region

April 9, 2010

Mr. Mike Noland
Deputy Executive Director
Metra
547 W. Jackson Boulevard
Chicago, IL 60661

RE: Section 10.05 of Purchase of Service Agreement

Dear Mr. Noland:

Please refer to Section 10.05 Defense of Claims of the Purchase of Service Agreement (Agreement) dated January 28, 2010 between the Commuter Rail Division of the Regional Transportation Authority (CRD) and the Union Pacific Railroad Company (Railroad).

Section 10.05 of the Agreement provides, in part: "Railroad can settle or compromise claims involving the payment by CRD of an amount up to and including \$100,000 as long as CRD receives the prior written concurrence of Mr. Thomas W. Cushing while he is employed by Railroad or by such party acceptable to CRD."

Since Mr. Cushing is no longer employed by the Railroad, we request that Mr. Robert N. Belt be substituted in Section 10.05 as a party that is acceptable to CRD to settle or compromise claims up to \$100,000 as described in said Section 10.05 of the Agreement.

If acceptable, please sign both copies of this letter agreement and return one copy to me. The remaining terms, covenants, provisions and conditions of the Agreement shall remain in full force and effect.

Very truly yours,

A handwritten signature in black ink, appearing to read "Michael W. Payette".

Michael W. Payette
Assistant Vice President
Government Affairs

Agreed to and Accepted

A handwritten signature in black ink, appearing to read "Mike Noland".
Mike Noland
Deputy Executive Director-Administration

(MWP1040910-001)

C40383-2

SECOND AMENDMENT
TO
THE PURCHASE OF SERVICE AGREEMENT
BETWEEN
THE COMMUTER RAIL DIVISION OF THE REGIONAL TRANSPORTATION
AUTHORITY
AND
THE UNION PACIFIC RAILROAD COMPANY

THIS SECOND AMENDMENT ("**Second Amendment**") is made and entered into as of this ~~23rd~~ day of August 2013, by and between the COMMUTER RAIL DIVISION of the REGIONAL TRANSPORTATION AUTHORITY, a division of an Illinois municipal corporation ("**CRD**") and the UNION PACIFIC RAILROAD COMPANY, a Delaware corporation ("**Railroad**"). CRD and Railroad are hereinafter sometimes individually referred to as a "**Party**" and jointly referred to as the "**Parties**."

RECITALS

- A. The Parties entered into a Purchase of Service Agreement dated January 28, 2010, for the purpose of providing for, aiding and assisting public transportation in the Chicago Metropolitan Region ("**Agreement**").
- B. The Parties amended Article 10.05 of the Agreement by Letter Agreement dated April 9, 2010 ("**First Amendment**") by changing the party at Railroad responsible for certain settlement authority for claims.
- C. Article 13.16 of the Agreement acknowledged that the Parties had not completely agreed on the final version of the Article VI Exhibits and the Parties intended to pursue a complete analysis so that the Exhibits would conform to the body of the Agreement, the current state of the operations and the intention of the Parties.
- D. In the course of reviewing and revising the above mentioned exhibits, it became necessary to revise Exhibits 6A, 6B, 6C, 6D, 6G, 7K and 8B due to the impact of the revisions. A new Exhibit 6J was also created to clarify and explain certain provisions in the Agreement. The Parties also agree that the revised Exhibits 6A, 6B, 6C, 6D, 6G, 7K and 8B replace the prior ones and the newly created Exhibit 6J become part of the Agreement.
- E. The Parties now desire to amend certain exhibits to the Agreement and certain references to the exhibits within the Agreement.

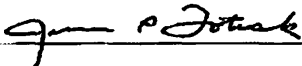
NOW, THEREFORE, for and in consideration of the foregoing Recitals, which are hereby incorporated into and made a part of this Second Amendment and the mutual covenants and agreements set forth herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged and accepted by the Parties, CRD and Railroad agree as follows:

1. That Exhibits 6A, 6B, 6C, 6D, 6G, 7K and 8B attached to the Agreement be deleted and replaced with the Exhibits 6A, 6B, 6C, 6D, 6G, 7K and 8B attached to this Second Amendment (“**Revised Exhibits**”) and that the Revised Exhibits will become effective and retroactive to July 1, 2013.
2. That Exhibit 6J attached to this Amendment is hereby attached to the Agreement as Exhibit 6J, which will become effective and retroactive to July 1, 2013.
3. The Agreement is hereby amended as follows to add the following Exhibit 6J references:
 - a. Add “and 6-J” to end of the list of Exhibits in Article I Definitions, Subsidiary Accounting System.
 - b. Add “and 6-J” to the list of Exhibits in Article 6.02(a) in both the twelfth and twenty-fifth sentences.
 - c. Add “and 6-J” to the list of Exhibits in Article 6.02(b)(2) and in Article 6.02(b)(3).
 - d. Add “and 6-J” to the list of Exhibits in Article 6.04(e) in the third, sixth and seventh sentences.
4. Delete “Reserved” from Item 28 on the Summary of Exhibits page and replace with “Other Explanations Relative to Certain Non-Mechanized and Mechanized Items.”
5. Delete “List of Computer Tapes for Audit” from Item 39 on the Summary of Exhibits page and replace with “Data for Metra Audits and Reviews.”
6. Prior-year Audit Reviews for calendar years 2009 through 2011 shall be completed and closed by January 31, 2014. The 2012 Audit Review shall be completed by February 28, 2014. Prospectively, both Parties will make good faith efforts to ensure that audits are completed within one calendar year from the date of Metra’s receipt of all requested mechanized items data as listed in Exhibit 7K and supporting calculations for non-mechanized items for the audit year. Metra may review the data and request further supporting documentation for transactions in the data which will be provided by Railroad in a timely manner. An audit will be classified as complete when there are no open or outstanding issues. Upon execution of this Second Amendment, UP and Metra agree that the exhibits, subsidiary accounting system, allocation rates, and financial statements represent a fair and equitable sharing of costs for providing commuter train service. Therefore, prospectively, UP and Metra agree not to submit any Accounting Change Requests that have less than \$100,000 impact on current year Reimbursable Expenses. Such limit will not apply to corrections of errors and adjustments in the recording and estimation of costs in the ordinary course of business which have no bearing on the underlying basis of the subsidiary accounting system.

7. To the extent that a provision or provisions of the Agreement are in conflict with a provision or provisions of this Second Amendment, the provision or provisions of this Second Amendment shall take precedence and control. Capitalized terms, not otherwise defined herein, shall have the same meanings ascribed to them in the agreement. Except as modified by this Second Amendment, the remaining terms covenants, provisions, and conditions of the Agreement shall remain in full force and effect.

IN WITNESS WHEREOF, the Parties hereto have executed this Second Amendment on the day and year first above written.

UNION PACIFIC RAILROAD COMPANY:

By: 

COMMUTER RAIL DIVISION OF THE
REGIONAL TRANSPORTATION
AUTHORITY:

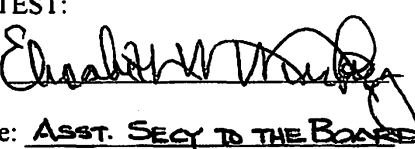
By: 
Donald A. Orseno
Deputy Executive Director of Operations

ATTEST:

By: 

Title: ASSISTANT VICE PRESIDENT - PUBLIC AFFAIRS

ATTEST:

By: 

Title: ASST. SECY TO THE BOARD

THIRD AMENDMENT
TO
THE PURCHASE OF SERVICE AGREEMENT
BETWEEN
THE COMMUTER RAIL DIVISION OF THE REGIONAL TRANSPORTATION
AUTHORITY
AND
THE UNION PACIFIC RAILROAD COMPANY

THIS THIRD AMENDMENT ("Third Amendment") is made and entered into as of this 22 day of November 2013, by and between the COMMUTER RAIL DIVISION of the REGIONAL TRANSPORTATION AUTHORITY, a division of an Illinois municipal corporation ("CRD") and the UNION PACIFIC RAILROAD COMPANY, a Delaware corporation ("Railroad"). CRD and Railroad are hereinafter sometimes individually referred to as a "Party" and jointly referred to as the "Parties."

RECITALS

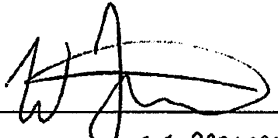
- A. The Parties entered into a Purchase of Service Agreement dated January 28, 2010, for the purpose of providing for, aiding and assisting public transportation in the Chicago Metropolitan Region ("Agreement").
- B. The Parties amended Article 10.05 of the Agreement by Letter Agreement dated April 9, 2010 ("First Amendment") by changing the party at Railroad responsible for certain settlement authority for claims.
- C. The Agreement was amended by an Amendment dated August 23, 2013, ("Second Amendment") to revise certain exhibits to the Agreement to better conform to the body of the Agreement, the current state of operations and the intention of the Parties.
- D. Railroad owns a commuter rail car known as Car 553 ("Car 553") and has an agreement with Commuter Associates governing the use of Car 553 for commuter service ("Use Agreement").
- E. CRD is agreeable to add Car 553 as Property to be used in Contract Services and the Parties agree that the revenues, fees and income received by Railroad under the terms of the Use Agreement shall be applied to Contract Services Revenue.
- F. Car 553 shall be maintained and operated in the same manner as other coaches used by Railroad in Contract Services and any repairs, rehabilitation or other costs required for its operation or maintenance that are not typically provided for Contract Services coaches shall be paid by parties other than CRD.
- G. The Parties now desire to amend the Agreement to accommodate this use.

NOW, THEREFORE, for and in consideration of the foregoing Recitals, which are hereby incorporated into and made a part of this Third Amendment and the mutual covenants and agreements set forth herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged and accepted by the Parties, CRD and Railroad agree as follows:

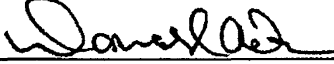
1. Car 553 will be added to Exhibit 2-E to the PSA and Exhibit 2-E attached to the Agreement will be deleted and replaced with the Exhibit 2-E attached to this Third Amendment ("**Revised Exhibit**") and that the Revised Exhibit will become effective with the date of this Amendment.
2. Car 553 shall be maintained and operated in the same manner as other coaches used by Railroad in Contract Services and any repairs, rehabilitation or other costs required for its operation or maintenance that are not typically provided for Contract Services coaches shall be paid by parties other than CRD.
3. Revenues, fees and income received by Railroad shall not be less than Ten Thousand Nine Hundred Sixty-Eight and 75/100 Dollars (\$10,968.75) for months 1 through 6 of the Use Agreement, Thirteen Thousand Three Hundred Sixty-Eight and 75/100 Dollars (\$13,368.75) for months 7 through 12 of the Use Agreement, and Fifteen Thousand Eight Hundred Thirty-Three and 75/100 Dollars (15,833.75) for months 13 through 120 of the Use Agreement and shall be payable to CRD as Contract Services Revenue on a monthly basis. PROVIDED; however, in the event Commuter Associates breaches its Use Agreement with Railroad, or otherwise fails to meet its obligations for the use of Car 553 in Contract Services, Railroad will be relieved of its obligations as set forth in this Paragraph 3. All payments shall be made in accordance with terms in the Agreement and non-payment of this amount will cause the immediate removal of Car 553 from Contract Services.
4. CRD shall provide insurance coverage for Car 553 as if it were any other car in Contract Services.
5. To the extent that a provision or provisions of the Agreement are in conflict with a provision or provisions of this Third Amendment, the provision or provisions of this Third Amendment shall take precedence and control. Capitalized terms, not otherwise defined herein, shall have the same meanings ascribed to them in the Agreement. Except as modified by this Third Amendment, the remaining terms covenants, provisions, and conditions of the Agreement shall remain in full force and effect.

IN WITNESS WHEREOF, the Parties hereto have executed this Third Amendment on the day and year first above written.

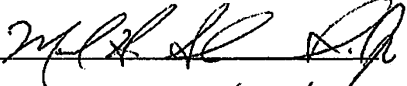
UNION PACIFIC RAILROAD COMPANY:

By: 
Assistant Vice President - Public Affairs

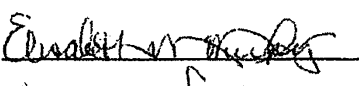
COMMUTER RAIL DIVISION OF THE
REGIONAL TRANSPORTATION
AUTHORITY:

By: 
Donald A. Orseno
Interim Executive Director

ATTEST:

By: 
Title: General Attorney

ATTEST:

By: 
Title: Assistant Secretary to the Board

FOURTH AMENDMENT
TO
THE PURCHASE OF SERVICE AGREEMENT
BETWEEN
THE COMMUTER RAIL DIVISION OF THE REGIONAL TRANSPORTATION
AUTHORITY
AND
THE UNION PACIFIC RAILROAD COMPANY

THIS FOURTH AMENDMENT ("**Fourth Amendment**") is made and entered into as of this 21 day of December 2015, by and between the COMMUTER RAIL DIVISION of the REGIONAL TRANSPORTATION AUTHORITY, a division of an Illinois municipal corporation ("**CRD**") and the UNION PACIFIC RAILROAD COMPANY, a Delaware corporation ("**Railroad**"). CRD and Railroad are hereinafter sometimes individually referred to as a "**Party**" and jointly referred to as the "**Parties**."

RECITALS

- A. The Parties entered into a Purchase of Service Agreement dated January 28, 2010, for the purpose of providing for, aiding and assisting public transportation in the Chicago Metropolitan Region ("**Agreement**").
- B. Article 10.05 of the Agreement was amended by Letter Agreement dated April 9, 2010 ("**First Amendment**") by changing the party at Railroad responsible for certain settlement authority for claims.
- C. The Agreement was amended by an Amendment dated August 23, 2013, ("**Second Amendment**") to revise certain exhibits to the Agreement to better conform to the body of the Agreement, the current state of operations and the intention of the Parties.
- D. The Agreement was amended by an Amendment dated November 22, 2013, ("**Third Amendment**") to include Railroad owned Car 553 as Property to be used in Contract Services and that revenues, fees and income received by Railroad for said use shall be applied to Contract Services Revenue.
- E. The Parties now desire to extend the Agreement and to make certain revisions thereto as defined herein.

NOW, THEREFORE, for and in consideration of the foregoing Recitals, which are hereby incorporated into and made a part of this Fourth Amendment and the mutual covenants and agreements set forth herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged and accepted by the Parties, CRD and Railroad agree as follows:

1. Exhibit 2D(v)(A) and Exhibit 6-C to the Agreement are hereby deleted and replaced with the Exhibit 2D(v)(A) and Exhibit 6-C attached to and made a part of this Amendment.

2. The following language is hereby added as new Article 3.05 to the Agreement:

"3.05 Use of Office Building at CRD's Western Avenue Coach Yard, Chicago. CRD owns Building A located at its Western Avenue Coach Yard Facility ("**Building**") including limited parking and UP uses the Building as office space for UP personnel involved in the facilitation of Contract Service. Metra is agreeable to allow UP use of the Building at no cost to UP with the understanding that UP's use of the Building remains related to the facilitation of Contract Service. UP personnel not involved in Contract Service will not be allowed use of the Building without the negotiation of a lease agreement for this use.

3. Article 6.02(b)(5) is hereby deleted and the following new Article 6.02(b)(5) is hereby added as follows:

"(5) Costs of, and liability for, property damage, personal injury, whistleblower or discrimination claims caused by Railroad's willful or wanton act, or by Railroad's criminal act, or by breach of this Agreement by Railroad, provided, however, where a Claim results in a loss of less than \$15,000, it shall be conclusively presumed that such loss was not caused by Railroad's willful or wanton act or criminal act;"

4. Article 7.02(c) is hereby deleted. A new Article 7.01(b)(12) is hereby added as follows:

"A statement setting forth, with respect to the Contract Services provided by Railroad during such calendar month, the number of revenue passengers, revenue passenger miles, gross ton miles, train miles, locomotive unit miles, train hours, yard switching hours, car miles and gallons of diesel fuel carried, operated or consumed by Railroad."

5. Article 8.03 is hereby deleted and replaced with the following:

"8.03 Maintenance of Insurance. (a) CRD will keep in full force and effect insurance coverage of the same type, character and coverage as that maintained by it as of February 9, 2010, or at subsequent renewals, if commercially available, with respect to Contract Services. Coverage at the time of execution of this Agreement is set out in Exhibit 8-A. CRD shall cause the Railroad to be named as an additional named insured, as its interests may appear, under all of such insurance, and shall notify the Railroad promptly of any material change in the insurance required by this Article. CRD represents to the Railroad that such insurance covers Railroad's liability for personal injury, death, and damage to or destruction of property of others, and damage to or destruction of property of Railroad and pollution liability.

In the event of an unexpected loss that substantially erodes the insurance coverage required herein, or if CRD uses its commutation provisions that allow it to terminate coverage for a given year or period, CRD will undertake its best reasonable efforts to re-implement limits or to purchase alternative insurance.

(b) At each renewal and in the event of a material change in insurance which reduces the coverage or limits, the CRD shall provide 90 days' written notice to Railroad.

(c) It is the intention of the Parties hereto that (except for retentions not to exceed \$15,000,000 per occurrence) insurance obtained under this section covers Railroad for all liabilities related to Claims which are caused by or arise, in whole or in part, from the provision of Contract Services under Article X of this Agreement. However, CRD's insurance coverage does not limit its obligation to reimburse Railroad for Claims arising under this Agreement. CRD and Railroad agree to reopen this Agreement to discuss the level of insurance to be carried by CRD for liability claims arising out of commuter train service each time Congress may modify, alter or change the cap on liability claims involving commuter train service, as currently outlined in 49 U.S.C. § 28103.

(d) Subrogation. 1) Railroad shall exercise its best judgment and provide reasonable efforts to identify subrogation opportunities and actively pursue recovery against responsible third parties, for costs incurred by Railroad to repair damages to equipment or property, which would otherwise be recovered or reasonably sought to be recovered by Railroad, in the absence of subrogation, under the Agreement. Recoveries from responsible parties and expenses incurred will be allocated between CRD and Railroad based upon the allocation of the costs incurred. If the cost allocation to repair or replace the asset is not available, recoveries and expenses incurred will be allocated based upon the most applicable of, each Party's contribution to the original asset that was damaged or destroyed, each Party's share of the total gross ton miles at that location for track related components, or each Party's share of total train miles for signal related components. Railroad recovery efforts shall include notifying the Illinois Secretary of State of those instances where the damage is attributable to uninsured drivers and/or owners.

2) Railroad will retain sufficient details of cost and materials to identify the amounts involved. Railroad will allow CRD to conduct an audit of expenses submitted under the Agreement each six (6) months so CRD can determine if additional subrogation measures are reasonably warranted. If Railroad disagrees with CRD regarding whether subrogation efforts should proceed or disagrees to the level of subrogation efforts warranted, Railroad will not unreasonably withhold permission from CRD for CRD to pursue subrogation itself in the name of Railroad to recover said damages CRD wishes to pursue.

3) Under circumstances where the Railroad agrees to permit CRD to pursue subrogation efforts directly and independently of Railroad, the Parties will mutually agree on the selection of counsel. No direct and independent subrogation efforts by CRD or counsel will be done without the permission of Railroad.

4) Railroad shall not forego or suspend subrogation opportunities without written notice to CRD's Risk Management. CRD and Railroad are to mutually agree to the selection of counsel if suit is filed against a responsible party, whether Railroad is pursuing subrogation or CRD is pursuing subrogation directly with Railroad's permission. CRD will receive a status report regarding any subrogation files being pursued by CRD which are assigned to counsel as requested by CRD, or beginning ninety days following counsel's assignment to matters being pursued by Railroad and each ninety day period thereafter.

- 5) Railroad will also identify any instances involving vehicles assigned or loaned to Railroad, including road licensed vehicles and trailers, where an accident occurs with potential subrogation. Railroad agrees to notify CRD of the occurrence and when appropriate, pursue recovery from the adverse owner or driver for the repair.”
6. The following language is hereby added to the end of Article 6.06:
- “For the period beginning January 1, 2017, the Additional Compensation for each month shall be \$203,313 for an annual total of \$2,439,759.
For the period beginning January 1, 2018, the Additional Compensation for each month shall be \$209,209 for an annual total of \$2,510,512.
For the period beginning January 1, 2019, the Additional Compensation for each month shall be \$215,276 for an annual total of \$2,583,317.”
7. The following language is hereby added to the end of Article 6.10(a)(2):
- “For the period beginning January 1, 2017, Railroad shall receive an annual flat rate of \$12,997,299, which on a monthly basis equals \$1,083,108.
For the period beginning January 1, 2018, Railroad shall receive an annual flat rate of \$13,374,221, which on a monthly basis equals \$1,114,518.
For the period beginning January 1, 2019, Railroad shall receive an annual flat rate of \$13,762,073, which on a monthly basis equals \$1,146,839.”
8. The following language is hereby added to the end of Article 6.12:
- “For the period beginning January 1, 2017, Railroad shall receive an annual flat rate of \$1,089,711, which on a monthly basis equals \$90,809.
For the period beginning January 1, 2018, Railroad shall receive an annual flat rate of \$1,121,313, which on a monthly basis equals \$93,443.
For the period beginning January 1, 2019, Railroad shall receive an annual flat rate of \$1,153,831, which on a monthly basis equals \$96,153.”
9. The last line of Article 6.13 is deleted and the following language is hereby added to the end of Article 6.13:
- “Beginning January 1, 2016, Railroad police force expense and management will be billed to CRD at the following flat rate amounts, plus an increase for hiring additional police officers which could be up to a maximum of five incremental, in accordance with the revised Exhibit 6-C attached to and made a part of this Amendment:
- For the period beginning January 1, 2016, Railroad shall receive an annual flat rate of \$1,825,000, which on a monthly basis equals \$152,083.
For the period beginning January 1, 2017, Railroad shall receive an annual flat rate of \$1,877,925, which on a monthly basis equals \$156,494.
For the period beginning January 1, 2018, Railroad shall receive an annual flat rate of \$1,932,385, which on a monthly basis equals \$161,032.

For the period beginning January 1, 2019, Railroad shall receive an annual flat rate of \$1,988,424, which on a monthly basis equals \$165,702."

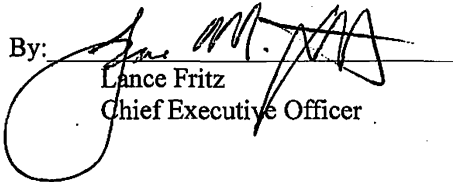
10. Article 11.01(a) is hereby deleted and replaced with the following:

"(a) December 31, 2019, or"

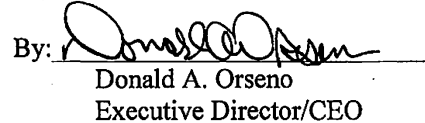
11. To the extent that a provision or provisions of the Agreement are in conflict with a provision or provisions of this Fourth Amendment, the provision or provisions of this Fourth Amendment shall take precedence and control. Capitalized terms, not otherwise defined herein, shall have the same meanings ascribed to them in the Agreement. Except as modified by this Fourth Amendment, the remaining terms covenants, provisions, and conditions of the Agreement shall remain in full force and effect.

IN WITNESS WHEREOF, the Parties hereto have executed this Fourth Amendment on the day and year first above written.

UNION PACIFIC RAILROAD COMPANY:

By: 
Lance Fritz
Chief Executive Officer

COMMUTER RAIL DIVISION OF THE
REGIONAL TRANSPORTATION
AUTHORITY:

By: 
Donald A. Orseno
Executive Director/CEO

**FIFTH AMENDMENT
TO
THE PURCHASE OF SERVICE AGREEMENT
BETWEEN
THE COMMUTER RAIL DIVISION OF THE REGIONAL TRANSPORTATION
AUTHORITY
AND
THE UNION PACIFIC RAILROAD COMPANY**

THIS FIFTH AMENDMENT ("Fifth Amendment") is made and entered into as of this 21 day of November 2017, by and between the COMMUTER RAIL DIVISION of the REGIONAL TRANSPORTATION AUTHORITY, a division of an Illinois municipal corporation ("CRD") and the UNION PACIFIC RAILROAD COMPANY, a Delaware corporation ("Railroad"). CRD and Railroad are hereinafter sometimes individually referred to as a "Party" and jointly referred to as the "Parties."

RECITALS

- A. The Parties entered into a Purchase of Service Agreement dated January 28, 2010, for the purpose of providing for, aiding and assisting public transportation in the Chicago Metropolitan Region ("Agreement").
- B. Article 10.05 of the Agreement was amended by Letter Agreement dated April 9, 2010, ("First Amendment") by changing the party at Railroad responsible for certain settlement authority for claims.
- C. The Agreement was amended by an Amendment dated August 23, 2013, ("Second Amendment") to revise certain exhibits to the Agreement to better conform to the body of the Agreement, the current state of operations and the intention of the Parties.
- D. The Agreement was amended by an Amendment dated November 22, 2013, ("Third Amendment") to include Railroad owned Car 553 as Property to be used in Contract Services and that revenues, fees and income received by Railroad for said use shall be applied to Contract Services Revenue.

E. The Agreement was amended by an Amendment dated December 21, 2015, ("Fourth Amendment") with respect to several provisions and appendices, including but not limited to a revision to Article 6.13 with respect to the provision of police and contract security by the Railroad, and the Agreement was extended until December 31, 2019.

F. The Parties now desire to further amend the Agreement and to make certain revisions.

NOW THEREFORE, In consideration of the foregoing Recitals, which are hereby incorporated into and made a part of this Fifth Amendment and the mutual covenants and agreements set forth herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged and accepted by the Parties, CRD and Railroad agree as follows:

Section 1. Defined Terms.

Section 1.1. Definitions. Unless the context otherwise requires, all capitalized terms used herein without definition will have the respective meanings set forth in Article I of the Agreement.

Section 2. Amendments.

Section 2.1 Revision of Article 6.13.

The text of Article 6.13 is deleted and replaced with the following language:

"Beginning January 1, 2018, Railroad expense for security of Railroad infrastructure will be billed to CRD in accordance with the revised Exhibit 6-C attached to and made a part of this Amendment.

Section 2.2 New Section 2.09.

There is hereby added a new Section 2.09 with the following language:

"2.09 Security (a) On January 1, 2018, ("Transition Date") CRD shall assume the responsibility for providing police services for the Contract Services. On and after the

Transition Date Railroad shall have no duty to provide police services for the Contract Services, whether by Railroad police or Contract Security Services, and such services, including the management thereof provided after the Transition Date shall not be a Reimbursable Expense. Prior to the Transition Date, Railroad may provide police services for the Contract Services by an appropriate combination of Railroad police forces and Contract Security Services, the cost of which shall be Reimbursable Expenses to the extent consistent with the Approved Budget.

“(b) Railroad shall provide to CRD a credit in the amount of \$750,000 for CRD’s capital costs, police overtime expense and other expenses necessary to assume the police services on the Transition Date. Such sum represents the entire amount payable from Railroad to CRD for those additional costs CRD will incur in order to assume the police services on the Transition Date. Such sum shall be payable to CRD in two equal credits on Railroad’s monthly invoice to CRD of Reimbursable Expenses on the invoices which next occur 30 days and 60 days after Railroad’s execution and delivery of this Fifth Amendment.

“(c) As part of the transition of the police services, on the Transition Date, Railroad shall surrender the possession of the police office space at Ogilvie Transportation Center (“OTC”) to CRD and shall make available to CRD two parking spaces associated with that police office space.

“(d) CRD police officers, and Contract Security Services shall be considered CRD’s authorized representatives for the purposes of Article 7.09 and for purposes of 49 USC §28101, but shall not be subject to the ten person limitation set forth in the first sentence of Article 7.09(a), and in addition to inspections their duties will include all matters set out in this Fifth Amendment. To ensure efficient police operations, the Railroad hereby authorizes CRD police officers to file criminal process and/or non-criminal civil process on behalf of the Railroad with respect to incidents occurring on or around the Contract Services Property, vehicles or assets used, owned or controlled by the Railroad, including but not limited to any (i) tunnel, bridge, viaduct, trestle, track, signal, station, depot, warehouse, terminal, or any

other way, structure, property, or appurtenance used in the operation of, or in support of the operation of Contract Services, or (ii) any garage, terminal, structure, track, supply, or facility used in the operation of, or in support of the operation of, a Contract Services train.

“(e) In general, the police services assumed by CRD in connection with Contract Services will be those necessary to respond to incidents which occur on or in connection with any one or more of Contract Services rolling stock, Contract Services station facilities or parking lots, Railroad train crew while providing Contract Services or any third party incident involving a Contract Services train on Railroad property. In those instances, the CRD police officers will respond and participate as the primary investigating or assisting agency, per standard CRD procedures. The Railroad police will work with local jurisdictions with respect to occurrences on or in connection with non Contract Services trains and/or non Contract Services property. Any incidents that are initially of unknown cause or origin will be investigated in a collaborative manner until such cause can be determined.

(i) In events involving a Contract Services train, CRD police shall have authority to release the train, subject to the approval of the Railroad’s Operations Manager.

(ii) For greater specificity, CRD shall provide CRD police or Contract Service Security or any combination thereof as the primary or only police response to the following situations:

- 1) A Contract Services train strike of a pedestrian or motor vehicle.
- 2) On-train incidents on Contract Services trains of fare disputes, assault or warrant execution.
- 3) Trespass or criminal activity, vandalism or destruction to any or all of Contract Services rolling stock, platforms, stations or parking lots. For stations or parking lots not owned by Railroad or leased by Railroad to a third party, CRD may elect to co-ordinate police response with local municipal police or permit local municipal police to be the primary response.

- 4) Derailment of a Contract Services train.
- 5) Trespass or criminal activity, vandalism or destruction at Elburn Yard.

“(f) Railroad shall provide the primary or only police response for the following situations:

- (i) A freight train strike of a pedestrian, including a pedestrian at or about a Contract Services station in connection with Contract Services, or of a motor vehicle.
- (ii) Trespassers on Railroad right-of-way whether called in by a freight train crew or by a Contract Services train crew.
- (iii) Vandalism, destruction or criminal trespass to any of Railroad’s infrastructure, rails, roadbed, signals, signal bridges or switches. In the event CRD police forces became aware of such activity, CRD police forces shall promptly notify Railroad of the same. In the event CRD police forces observe any vandalism, destruction or criminal trespass to any of such of Railroad’s infrastructure which may appear to cause an imminent safety issue, CRD police are authorized to immediately respond and shall promptly provide notice thereof to Railroad as soon as reasonably practical.
- (iv) All yards owned by Railroad, whether or not used in Contract Services.
- (v) All crossing gate failures.

“(g) In the event of a collision between a freight train and a Contract Services train, Railroad and CRD police forces shall both respond and collaborate.

Section 2.3 Amendment to Exhibit 2-G Fuel and 2-H Fuel Specifications.

(a) Exhibit 2-G Fuel is hereby deleted and replaced with the new Exhibit 2-G dated August 2, 2017, which is attached hereto as Attachment A.

(b) The last sentence of the first paragraph in Section 2.02 which provides “Locomotive fuel oil supplied by either party hereto shall comply with Locomotive Fuel Specifications

contained in Exhibit 2-H” is hereby deleted. Exhibit 2-H is hereby deleted and will remain reserved.

(c) Exhibit 6A of the Agreement is hereby deleted and replaced with the new Exhibit 6A dated October 17, 2017, which is attached hereto as Attachment C.

(d) Exhibit 6C of the Agreement is hereby deleted and replaced with the new Exhibit 6C dated October 17, 2017, which is attached hereto as Attachment D.

Section 3. General.

Section 3.1. Separate Counterparts. This Fifth Amendment may be executed by the Parties hereto in separate counterparts, each of which, when so executed and delivered, shall be an original, but all such counterparts shall together constitute but one and the same instrument. All signatures need not be on the same counterpart.

Section 3.2. Effectiveness. The Parties agree that this Fifth Amendment shall be effective immediately upon full execution by the Parties.

Section 3.3. Ratification of Amended and Restated Purchase of Service Agreement. Except as amended herein, all terms and provisions of the Amended and Restated Purchase of Service Agreement as previously amended by the amendments mentioned in the recitals above, are hereby ratified, confirmed and approved in all respects. If and to the extent that any of the terms or provisions of the Amended and Restated Purchase of Service Agreement, including any prior amendments, are in conflict with any of the terms or provisions of this Fifth Amendment, this Fifth Amendment shall govern.

Section 3.4 Incorporation of Attachments. The following documents attached hereto are incorporated herein as if fully set forth:

- (a) Attachment A to Fifth Amendment, Exhibit 2-G, Fuel, dated August 2, 2017.
- (b) Attachment B to Fifth Amendment, Exhibit 2-H, is reserved.
- (b) Attachment C to Fifth Amendment, Exhibit 6A, dated October 17, 2017.
- (c) Attachment D to Fifth Amendment, Exhibit 6C, dated October 17, 2017.

IN WITNESS WHEREOF the Parties hereto have executed this Fifth Amendment as of the day
and year first above writ.

UNION PACIFIC RAILROAD COMPANY

COMMUTER RAIL DIVISION OF THE
REGIONAL TRANSPORTATION
AUTHORITY

By: Cameron A. Scott
Name: Cameron Scott
Title: EVP & Chief Operating Officer

By: Donald A. Orseno
Name: Donald A. Orseno
Title: CEO/Executive Director

EXHIBIT B



BUILDING AMERICA®

Confidential Negotiation Communication Per September 6, 2019 Agreement

December 4, 2019

James M. Derwinski
CEO/Executive Director
Metra
547 W. Jackson Blvd., 13th Floor
Chicago, IL 60661

Re: *Interim Agreement Extending Purchase-of-Service Agreement to Allow More Time to Finalize a New Agreement*

Dear Mr. Derwinski,

As we discussed with the Metra team, Union Pacific Railroad Company ("Union Pacific" or "Railroad") and the Commuter Rail Division of the Regional Transportation Authority ("CRD" or "Metra") desire to negotiate an amendment to the Purchase of Service Agreement dated January 28, 2010, as subsequently amended ("Agreement"). (Union Pacific and CRD collectively shall be referred to here as the "Parties" and individually as "Party".) This interim agreement ("Interim Agreement") sets forth the transitional terms and understandings of the Parties that will allow the Parties more time to finalize a New Agreement (see definition below).

RECITALS

WHEREAS, the Parties entered into the Agreement for the purpose of providing for, aiding and assisting public transportation in the Chicago Metropolitan Region; and,

WHEREAS, Article 10.05 of the Agreement was amended by Letter Agreement dated April 9, 2010 ("First Amendment") to change the person at Railroad responsible for certain settlement authority for claims; and,

WHEREAS, the Agreement was amended by an Amendment dated August 23, 2013, ("Second Amendment") to revise certain exhibits to the Agreement to better conform to the body of the Agreement, the current state of operations and the intentions of the Parties; and,

WHEREAS, the Agreement was amended by an Amendment dated November 22, 2013, ("Third Amendment") to include Railroad-owned Car 553 as Property to be used in Contract Services and to provide that revenues, fees and income received by Railroad for said use shall be applied to Contract Services Revenue; and,

UNION PACIFIC RAILROAD
1400 Douglas Street, MS 1110
Omaha, Nebraska 68179

Cynthia M. Sanborn P 402-544-5505
Vice President Planning & Ops E cmsanbor@up.com
Strategic Planning

WHEREAS, the Agreement was amended by an Amendment dated December 21, 2015, (“Fourth Amendment”) with respect to several provisions and appendices, including but not limited to a revision to Article 6.13 with respect to the provision of police and contract security by Railroad, and an extension of the term of the Agreement until December 31, 2019; and,

WHEREAS, the Agreement was amended by an Amendment on November 21, 2017 (“Fifth Amendment”) with respect to several provisions and appendices, including but not limited to, the transitioning of the provision of police service responsibilities from Railroad to CRD; and,

WHEREAS, the Parties entered into a confidentiality agreement on September 6, 2019 in the interest of promoting the free flow of information and exchange of data between the Parties to facilitate negotiations concerning the terms and conditions of a New Agreement (see definition below); and,

WHEREAS, Union Pacific and Metra wish to execute a new agreement to be effective on January 1, 2020 immediately following the expiration of the current Agreement on December 31, 2019 (“New Agreement”); and,

WHEREAS, in order to allow more time for Union Pacific and Metra to try to finalize a New Agreement, Union Pacific and Metra wish to extend the term of the Agreement pursuant to this Interim Agreement.

NOW, THEREFORE, for and in consideration of the mutual covenants and agreements contained herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereto mutually agree as follows:

1. **Term.** Subject to the conditions of this Interim Agreement, the term of the Agreement shall expire at 11:59 p.m. Central Time on February 29, 2020 (“Amended Expiration Date”).
2. **New Agreement.** If Union Pacific and Metra do not execute a New Agreement prior to December 31, 2019, Union Pacific and Metra shall negotiate a New Agreement after December 31, 2019, during the extended term of the Agreement as stated in section 1 above. Notwithstanding (a) the Amended Expiration Date of the Agreement, (b) the date upon which Union Pacific and Metra actually execute a New Agreement, (c) any agreements between third-party operators, on the one hand, and either Union Pacific or Metra or both, on the other hand, to perform any of the services specified in the Agreement, (d) any proceedings sought by either Union Pacific or Metra to assist with or impose some or all of the provisions of a New Agreement, or to provide other relief as applicable, or any one or more of the preceding provisions (a) through (d), the terms and conditions of the New Agreement shall retroactively apply and be effective as of January 1, 2020.

3. **Representations.** Union Pacific and Metra represent and warrant to each other that the person signing this Interim Agreement on its behalf has the requisite authority and power to execute this Interim Agreement and to thereby bind the Party on whose behalf it is being signed.

4. **Temporary Continuance of Terms.** Except as expressly modified herein or by prior written amendment, all terms, conditions and provisions of the Agreement shall remain in full force and effect until the Amended Expiration Date.

IN WITNESS WHEREOF, Union Pacific and Metra have executed this Interim Agreement as of the day and year first hereinabove written.

Sincerely,



Cynthia M. Sanborn
Vice President
Network Planning & Ops

ACKNOWLEDGED & AGREED
METRA

By: 
James M. Derwinski, CEO/Executive Director

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNION PACIFIC RAILROAD COMPANY,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 1:19-cv-07957
	)	Judge Jorge L. Alonso
COMMUTER RAIL DIVISION OF THE	)	Magistrate Judge Gabriel A. Fuentes
REGIONAL TRANSPORTATION	)	
AUTHORITY, d/b/a METRA,	)	
	)	
Defendant.	)	

**METRA’S MEMORANDUM IN SUPPORT OF ITS
MOTION TO DISMISS OR STAY BASED ON PRIMARY JURISDICTION**

Defendant, Commuter Rail Division of the Regional Transportation Authority, d/b/a Metra (“Metra”), pursuant to Fed. R. Civ. P. 12(b)(6) and 12(b)(1), submits this memorandum in support of its motion to dismiss or stay, stating as follows:

I. INTRODUCTION

During Union Pacific’s negotiations with Metra for a new contract for the operation of commuter service on Union Pacific’s rail lines, Union Pacific brought this action, asking the Court to find that Union Pacific has no legal obligation to provide commuter rail service to, on average, more than 80,000 daily commuters. In doing so, Union Pacific seeks to gain leverage in its negotiations with Metra. If the commencement of this action were motivated by a genuine need for an answer to the common carrier question, Union Pacific would have petitioned the federal agency that it alleges is charged with oversight and exclusive regulatory jurisdiction over the interstate rail system—the Surface Transportation Board (“STB”).

Whether Union Pacific, in the absence of a contract with Metra, must provide commuter rail service or can decline to do so, is best addressed by the STB. Because the Complaint raises novel questions of railroad policy and regulation—over which Congress has given primacy to the STB—the Court should invoke the primary jurisdiction doctrine and dismiss the Complaint without prejudice, or in the alternative, stay the matter pending consideration by the STB.

II. UNION PACIFIC’S ALLEGATIONS

Union Pacific Railroad Company (“Union Pacific”) currently provides commuter rail service to Metra under a Purchase of Service Agreement (“PSA”). Complaint ¶ 2. Under the PSA, Union Pacific, in exchange for compensation paid by Metra, operates and maintains commuter trains on three lines between the Ogilvie Transportation Center in Chicago and, respectively: Kenosha, Wisconsin (“North Line”); Harvard, and McHenry, Illinois (“Northwest Line”); and Elburn, Illinois (“West Line”) (collectively, “UP Lines”). *Id.* at ¶¶ 2, 3, 20. Union Pacific also operates freight trains on these lines. *Id.* at ¶ 3.

The PSA was set to expire on February 29, 2020 (*Id.* at ¶ 22), but has since been extended by the parties to a date beyond a scheduled negotiating session.¹ The parties began their negotiations for a new contract in 2019. *Id.* at ¶ 4. Union Pacific advised Metra it wants to discontinue operating the commuter service that Union Pacific and its predecessors have provided pursuant to state and/or federal law for nearly five decades, and transfer commuter service to Metra. *Id.* at ¶ 7.

¹ Both Union Pacific and Metra have publicly stated that their disagreements will not result in any interruption of service. Union Pacific pledges to “accomplish an efficient, seamless and timely transition of the operation of Metra’s commuter rail service on Union Pacific’s lines....” Complaint ¶ 7.

Union Pacific's Complaint seeks to bypass an STB determination on Union Pacific's common carrier obligation to operate commuter service on the UP Lines. *Id.* at ¶¶ 6, 26. Union Pacific denies that it has an obligation to provide passenger service. *Id.* In doing so, Union Pacific relies upon Amtrak legislation (the Rail Passenger Service Act of 1970 (Pub. L. No. 91-518, 84 Stat. 1327), and the ICC Termination Act ("ICCTA") (49 U.S.C. § 10101 *et seq.*). Union Pacific further asserts that ICCTA preempts any common carrier passenger obligation that exists under the laws of the state of Illinois. *Id.* at ¶ 34.

With regard to the STB's jurisdiction, Union Pacific alleges: (i) "[t]he transportation at issue in this case would be provided over lines that are part of Union Pacific's interstate rail network," and is within the [STB]'s jurisdiction; (ii) ICCTA grants the STB exclusive jurisdiction over "transportation by rail carriers" and "the remedies" provided in Subtitle IV, Part A ("RAIL") of Title 49 United States Code; and (iii) STB jurisdiction broadly preempts any common carrier passenger obligation imposed under state law. *Id.* at ¶¶ 29-30, 34.

III. LEGAL DISCUSSION

A. Primary Jurisdiction, Generally

Under the doctrine of primary jurisdiction, courts may defer certain matters to a public agency, such as the STB, that has specialized knowledge about a complicated area of law. "The doctrine seeks to produce better informed and uniform legal rulings by allowing courts to take advantage of an agency's specialized knowledge, expertise, and central position within a regulatory regime." *Pharmaceutical Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 673 (2003) (internal citations omitted). The doctrine applies when "a claim is originally cognizable in the courts and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an

administrative body.” *Ill. Bell Tel. Co., Inc. v. Global Naps Ill., Inc.*, 551 F.3d 587, 594 (7th Cir. 2008) (quoting *United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 63-64 (1956)).

The benefits of the doctrine are clear: (1) it promotes consistency and uniformity, particularly where the development of the law is dependent upon administrative policy; (2) it allows uniquely qualified administrative agencies to handle certain complex areas not within the conventional expertise of courts; and (3) it serves judicial economy by permitting agencies to fully resolve disputes and thereby obviate the need for court intervention. *Ryan v. Chemlawn Corp.*, 935 F.2d 129, 131 (7th Cir. 1991). “No fixed formula exists for applying the doctrine of primary jurisdiction. In every case, the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation.” *United States v. Western Pac. R.R. Co.*, 352 U.S. 59, 64 (1956).

The Seventh Circuit has held that, when reviewing “the purposes of the statute involved and the relevance of administrative expertise to the issue at hand, the court ought to defer initially to the administrative agency.” *Ryan*, 935 F.2d at 131 (quoting *Bradford Sch. Bus Transit v. Chicago Transit Auth.*, 537 F.2d 943, 949 (7th Cir. 1976)). The Seventh Circuit has also cited with approval the Second Circuit’s observation that referral to the appropriate administrative agency is appropriate when a case raises issues “extending beyond the conventional experience of judges or falling within the realm of administrative discretion to an administrative agency with more specialized experience.” *See Arsberry v. Illinois*, 244 F.3d 558, 563 (7th Cir. 2001) (quoting *National Comm. Ass’n, Inc. v. AT&T Co.*, 46 F.3d 220, 222-23 (2d Cir. 1995)).

B. The STB has Primary Jurisdiction in Matters Involving Common Carrier Obligations Under ICCTA.

Courts regularly recognize the specialized experience required to regulate railroads and invoke primary jurisdiction in dismissing or staying cases involving the Interstate Commerce Act

(“ICA”) and later ICCTA. As demonstrated below (*supra* at § III.B(3)), this is often done regarding the common law, now statutory, doctrine of the “common carrier obligation”—the requirement that specially-chartered, regulated entities provide service to the public upon reasonable request.

Here, deference to the STB’s primary jurisdiction is especially warranted. Union Pacific’s allegations engender: (1) complicated questions of first impression under ICCTA; (2) a need for historical understanding of the common carrier obligation as it has existed under common law, the ICA, and ICCTA for more than 150 years, the changes and additions effectuated by federal and state legislatures, courts, and agencies throughout that period, including the legislative history of various railroad statutes to the extent required due to any textual ambiguities, and STB jurisprudence fundamental to the resolution of the issues; (3) questions, and fact-specific inquiries regarding the scope of federal jurisdiction, remedies, and preemption, as to which the STB has unique, Congressionally sanctioned expertise; and (4) a need for resolutions that will contribute to a uniform national railroad policy.

1. The History of the Federal Legislation Regulating Common Carrier Obligations.

The Interstate Commerce Act (“ICA”), enacted in 1887, created the Interstate Commerce Commission (“ICC”). 104 S. Rpt. 176, at 2 (1995). The ICA “codified the common-law obligations of railroads as common carriers.” *American Trucking Ass’ns. v. Atchison, T. & S. F. R. Co.*, 387 U.S. 397, 406 (1967). The ICC explained the common carrier obligation as follows: “The privately-owned railroad, as a “common carrier” in the broadest sense of that term, bears an initial obligation to provide service to all segments of the public, both freight and passenger, as the public may require and may be willing to pay for on a reasonable basis. This general obligation, by which the railroad may fairly be characterized as a quasi-public utility, can be

nullified only by an Act of Congress.” *New York, N.H. & H. R. Co.—Discontinuance of Trains*, 327 ICC 151, 220 (1966). *See also Decatur County Comm’rs v. Surface Transp. Bd.*, 308 F.3d 710, 715 (7th Cir. 2002) (railroads “may not refuse to provide service merely because to do so would be inconvenient or unprofitable”); *Pejepscot Industrial Part, Inc., d/b/a Grimmel Industries—Petition for Declaratory order*, Docket 33989 (STB served May 8, 2003) (“a carrier must adhere to its statutory obligations even if it suffers hardship in so doing”). Over the years, Congress has refined the statutes that regulate the interstate rail network, but it has always reaffirmed the statutory common carrier obligation. *See Nat’l Grain & Feed Ass’n v. United States*, 5 F.3d 306, 309–10 (8th Cir. 1993); 49 U.S.C. § 11101 (current codification of common carrier obligations).

In 1958, Congress passed the Transportation Act and charged the Interstate Commerce Commission, which had long had the power to enforce the common carrier obligation by requiring a carrier to provide service, with federal regulatory oversight of whether a carrier could discontinue intrastate and interstate common carrier service; these sections were later codified at 49 U.S.C. §§ 10908 and 10909. 49 U.S.C. §§ 10908-10909 (1994); Pub. L. No. 85-625.

In 1970, Congress enacted the Rail Passenger Service Act (“RPSA”), which created the National Railroad Passenger Corporation (“Amtrak”). 91 Pub. L. No. 518, 84 Stat. 1327. Under the RPSA, a railroad could relieve itself of the obligation to provide “intercity” passenger services by entering into a valid contract with Amtrak to preserve passenger service, rendering ineffectual § 10909 ICC discontinuance oversight under the Transportation Act with regard to intercity service. 84 Stat. 1334, § 401(a)(1). However, the relief from passenger common carrier obligations under the RPSA applied only to intercity rail passenger service, which excluded, among other things, commuter and other short-haul service in metropolitan and suburban areas,

usually characterized by reduced fare, multiple-ride and commutation tickets, and by morning and evening peak period operations. *Id.*, at 1328, § 102(5).

In 1995, Congress enacted ICCTA, eliminating the ICC and transferring its duties to the STB.² ICCTA confirms that “transportation” embraces the provision of facilities and services “related to the movement of passengers.” 49 U.S.C. § 10102(9). The term “rail carrier” includes any “person providing common carrier railroad transportation for compensation” except “electric railways not operated as part of the general system of rail transportation.” 49 U.S.C. § 10102(5).

Common carrier obligations for providers of rail transportation, as defined by ICCTA, are codified in several provisions of the United States Code. Under ICCTA, rail carriers shall provide “safe and adequate” transportation or service on reasonable request. 49 U.S.C. § 11101(a). ICCTA requires that rail carriers establish reasonable rates, rules, and practices on matters related to transportation or service. 49 U.S.C. § 10702. ICCTA further requires that rail carriers furnish adequate car service and establish, observe, and enforce reasonable rules and practices on car service. 49 U.S.C. § 11121(a)(1). These common carrier obligations are imposed upon any rail carrier, such as Union Pacific, “providing transportation or service subject to the jurisdiction of the Board under this part...” 49 U.S.C §§ 11101(a), 10702, 11121(a)(1).

“Congress does not further elucidate the requisites of the common carrier obligations, leaving to the Interstate Commerce Commission and the courts the task of clarifying, on a case-by-case basis, a more precise definition of ‘reasonable request,’ ‘adequate car service,’ and ‘reasonable rules and practices.’” *Nat’l Grain & Feed Ass’n v. United States*, 5 F.3d 306, 310

² The STB is the successor to the former Interstate Commerce Commission (1887-1995) and was administratively aligned with—but still independent of—the executive agency of the U.S. Department of Transportation from 1996 to mid-December 2015. “The STB Reauthorization Act of 2015 established the STB as a wholly independent federal agency on December 18, 2015.” <https://prod.stb.gov/about-stb/>

(8th Cir. 1993). “The very complexities of [rail transportation] have necessarily caused Congress to cast its regulatory provisions in general terms. Congress has, in general, left the contents of these terms to be spelled out in particular cases by administrative and judicial action, and in the light of the congressional purpose to foster an efficient and fair national transportation system.” *United States v. Pennsylvania Railroad Co.*, 323 U.S. 612, 615–19 (1945) (upholding the ICC’s authority to compel railroads to interchange their rail cars with water carriers despite the statute’s silence on the subject, because the ICA is sufficiently broad to permit the ICC’s interpretation).

2. Congress Endowed the STB with Jurisdiction in Recognition of the STB’s Administrative Expertise.

The STB has jurisdiction over rail transportation by rail carrier “between a place in—(A) a State and a place in the same or another State as part of the interstate rail network. . . .” 49 U.S.C. § 10501(a)(2)(A). Within the interstate rail network, the STB has exclusive jurisdiction over:

- (1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and
- (2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State.

Where STB jurisdiction is exclusive, ICCTA and STB remedies preempt all conflicting laws. 49 U.S.C. § 10501(b).

Union Pacific’s Complaint implicates numerous provisions of ICCTA. *See, e.g.*, 49 U.S.C. § 11101 (outlining the obligations of a rail carrier); 49 U.S.C. § 11707 (authorizing the STB to investigate and remedy a violation of the common carrier obligation in § 11101); 49 U.S.C. § 11704(c) (authorizing the STB to adjudicate a claim that a railroad breached its

common carrier obligation). As explained below, courts regularly invoke primary jurisdiction in referring to the STB cases involving an alleged breach of the common carrier obligation.

3. Courts Have Regularly Invoked Primary Jurisdiction in Cases Involving the Common Carrier Obligation.

As explained further below (*infra* at § B.4(c)), the common carrier obligation—and thus the primary jurisdiction of the STB—is a necessary adjunct to transportation subject to the Board’s jurisdiction. Union Pacific alleges the STB’s jurisdiction over Union Pacific’s provision of transportation on the lines at issue. See Complaint ¶ 29.

Union Pacific is necessarily subject to the common carrier obligation that ICCTA applies to *all* transportation—passenger and freight alike—within its jurisdiction, though questions abound as to the nature and extent of that obligation.

Congress codified its policy direction to the STB at 49 U.S.C. § 10101 and the STB relies on this direction in establishing a uniform regulatory scheme. *Louisville & Jefferson County Riverport Authority and CSX Transp. Inc. — Construction and Operation Exemption — In Jefferson County, Kentucky*, 4 ICC 2d 749, 754 (1988) (“The rail transportation policy is designed to guide the Commission in *all* of its regulation of the railroad industry”) (emphasis in original). In light of the STB’s near-complete authority over, and special expertise regarding, the national rail system, courts have routinely invoked the primary jurisdiction doctrine and referred matters to the STB. See *Elam v. Kansas City S. Ry. Co.*, 635 F.3d 796, 809 (5th Cir. 2011) (“courts have repeatedly applied the judicial doctrine of ‘primary jurisdiction’ in the context of both the ICCTA and its predecessor statute, the Interstate Commerce Act”).

Courts have specifically invoked primary jurisdiction in cases involving the common carrier obligation. For example, in *DeBruce Grain, Inc. v. Union Pac. R.R.*, 983 F. Supp. 1280 (D. Mo. 1997), DeBruce sought to prevent Union Pacific from cutting off the supply of rail cars

to DeBruce's grain elevators for loading despite DeBruce's reasonable request, an alleged violation of Union Pacific's common carrier obligations under 49 U.S.C. §§ 11101(a) and 11121(a)(1). Union Pacific argued that the district court should dismiss the case based on the doctrine of primary jurisdiction, and let the parties proceed before the STB. DeBruce argued that the STB's expertise was not required to interpret the terms of Union Pacific's Tariff (a published, quasi-contractual document that manifests how the common carrier will meet its obligation to supply rail cars). The court found that the STB had exclusive authority to impose remedies associated with rail car supply under sections 11101(a) and 11121(a)(1), and primary jurisdiction over the remaining claims, and dismissed the case without prejudice. *Id.* at 1283. On appeal, the Eighth Circuit determined the district court had "properly concluded that DeBruce's claim should be left to the STB in the first instance due to its greater expertise with rail policy and the need for a uniform response to maintain regulatory uniformity." *DeBruce Grain, Inc. v. Union Pac. R.R.*, 149 F.3d 787 (8th Cir. 1998).

Similarly, in *Pejepscot Indus. Park v. Me. Cent. R.R.*, 215 F.3d 195 (1st Cir. 2000), a shipper brought an action against a carrier alleging that the carrier violated the common carrier obligation under 49 U.S.C. § 11101(a) by failing to provide service upon reasonable request. The court referred the matter to the STB under the doctrine of primary jurisdiction because the STB's expertise "is clearly involved in the question of whether Guilford's actions constitute an unlawful refusal to 'provide. . . service on reasonable request'" and "referral to the STB will promote uniformity in the standards governing refusals to provide service." *Id.* at 205-06; *see also Greenville County Economic Development Corporation — Petition for Declaratory Order*, Docket No. FD 34487, (STB served July 27, 2005), [2005 WL 1767438 at *3] (citing *Pejepscot*

with approval and holding that “the Board has primary jurisdiction to determine whether a railroad’s common carrier obligation has been met”).

The common carrier obligation implicates nearly every railroad activity, even down to the precise method and terms of how a commodity should be transported. For example, in *Chlorine Inst., Inc. v. Soo Line R.R.*, 792 F.3d 903 (8th Cir. 2015), the Eighth Circuit found that the STB had primary jurisdiction to determine whether a railroad’s requirement to transport hazardous materials was reasonable and therefore required by the common carrier obligation under 49 U.S.C. § 11101(a) because the question involved the expertise of the STB. *Id.* at 911.

In addition to cases involving a refusal to provide common carrier service under § 11101(a), other cases involving the common carrier obligation have been found to be within the STB’s primary jurisdiction. *See, e.g., Jones Truck Lines v. Williamhouse-Regency*, 1995 WL 453342, *9 (S.D.N.Y. July 31, 1995) (staying proceedings pursuant to the primary jurisdiction doctrine because, among other things, the ICC had primary jurisdiction to decide whether the plaintiff acted as a common carrier); *Riffin v. Surface Transp. Bd.*, 733 F.3d 340 (D.C. Cir. 2013) (STB’s interpretation of the freight carriage obligations required under § 11101(a) was a permissible interpretation of the statute under *Chevron* deference); *Ill. Cent. R.R. v. S. Tec Dev. Warehouse, Inc.*, 1999 WL 519042, *2-3 (N.D. Ill. July 15, 1999) (question of tariff construction, as well as that of the reasonableness of the tariff, were within the primary jurisdiction of the STB); *Santa Cruz Regional Transportation Commission–Petition for Declaratory Order*, 2011 WL 3667482 (S.T.B.), *3 (STB addressed a request by the City of Santa Cruz that it issue a declaratory judgment that Santa Cruz would not become a common carrier as the result of a proposed transaction).

Each of these cases involved an alleged violation of 49 U.S.C. §11101(a), or the reasonableness of a request or limitation imposed by the carrier, which also necessarily involves the foundational question of whether a common carrier obligation exists. There is no principled primary jurisdiction rationale distinguishing the STB's primary jurisdiction in the foregoing cases from the issues presented here by Union Pacific.

4. The Novel Questions of Regulatory Authority Involved Here Are With the Primary Jurisdiction of the STB.

Although there are cases holding, generally, that a court and an agency are equally well suited to answer questions of pure statutory interpretation, when the matter at issue requires a determination of the nature and scope of regulatory authority in a complex factual context, referral to the agency with primary jurisdiction is advisable in the same circumstances in which a court would afford *Chevron* deference to the agency's interpretation. *American Auto. Mfrs. Ass'n v. Massachusetts Dep't of Env'tl. Protection*, 163 F.3d 74 (1st Cir. 1998). Referral of a question of statutory interpretation is particularly appropriate, for example, in construing undefined terms of art. *See Ill. Terminal R.R. Co. v. ICC*, 671 F.2d 1214, 1216 (8th Cir. 1982) (Courts "have long recognized that interpretation of terms of art is within the special province or primary jurisdiction of the ICC and therefore should, in the first instance, be decided by the ICC"); *In re Starnet, Inc.*, 355 F.3d 634, 639 (7th Cir. 2004) (invoking primary jurisdiction and referring a matter to the Federal Communications Commission to clarify an ambiguity in the term "location" in the Telecommunications Act); *Union Pac. R.R. v. FMC Corp.*, 2000 WL 134010 (E.D. Pa. 2000) (STB referrals appropriate as to questions of tariff construction and the applicability of a tariff where the words in a tariff are used in a technical sense that is within the special expertise of the administrative agency); *Charvat v. Echostar Satellite, LLC*, 630 F.3d 459 (6th Cir. 2010) (the

phrase “on behalf of” was a matter which necessitated FCC interpretation; thus, the court found that primary jurisdiction existed).

Courts have also held that the doctrine of primary jurisdiction may be invoked “if a claim requires resolution of an issue of first impression, or of a particularly complicated issue that Congress has committed to a regulatory agency, and if protection of the integrity of a regulatory scheme dictates preliminary resort to the agency which administers the scheme.” *Clark v. Time Warner Cable*, 523 F.3d 1110, 1114 (9th Cir. 2008).

a. The nature and scope of Union Pacific’s duty to provide passenger service after ICCTA implicates novel regulatory policy questions.

Union Pacific erroneously asserts that Congress, in enacting RPSA and ICCTA, intended to entirely eliminate federal regulation of passenger service. Complaint ¶ 31. Union Pacific cites a Conference Report that stated, in part, “regulation of passenger transportation is generally eliminated.” Complaint ¶31 (citing H.R. Report No. 104-422, at 167 (1995)).

Union Pacific, however, cannot point to statutory language to support its claim. Moreover, the very STB case cited by Union Pacific at paragraph 32 of its Complaint contradicts its assertion: “ICCTA’s legislative history shows that the Conference Committee considered, but then expressly rejected, complete elimination of Board jurisdiction over passenger transportation in favor of a more limited ‘curtailment’ of Board regulation of such transportation.”

DesertXpress Enters., LLC - Petition for Declaratory Order, FD 34914 (STB served May 7, 2010). As the STB also explained, the bill reported out of the Committee and ultimately enacted, “(1) explicitly retained the definition of ‘transportation’ in 49 U.S.C. § 10102(9)(A) (discussed above), which includes facilities and services solely for the movement of passengers; (2) expanded the statutory exception for local transit; (3) repealed the statutory sections regulating

passenger train discontinuance and special passenger rates—a significant reduction in (but not elimination of) the regulation of passenger transportation; and (4) clarified that the few ‘local governmental authorities’ providing ‘mass transportation’ that remain under STB jurisdiction may invoke 49 U.S.C. §§ 11102 and 11103 (governing access to terminal facilities of, and switch connections to, other carriers, respectively).” *Id.*

The STB in *DesertXpress* also observed that the text of ICCTA “supports the view that a passenger-only operation...is within the Board’s jurisdiction.” *Id.* at *9. If passenger operations which are interstate or are part of the interstate rail network are jurisdictional and common carrier obligations attach to all transportation subject to the STB’s jurisdiction (*see, e.g.*, 49 U.S.C. § 11101), then there exists a common carrier obligation to passengers. The inquiry turns to the nature and scope of that obligation and of the STB’s remaining authority to regulate passenger service. These are novel questions not yet raised in the post-ICCTA regulatory scheme and are uniquely within the expertise and province of the STB.

b. Questions of jurisdiction under §10501(a)(2)(A) involve undefined terms, require agency expertise, and should be answered uniformly to serve the national rail policy.

Union Pacific asserts that the STB has jurisdiction over the transportation at issue. If, however, there are any remaining questions regarding the STB’s jurisdiction, resolving them would involve complicated factual and regulatory determinations best suited to the STB. The STB “has primary jurisdiction to determine its own jurisdiction.” *PCI Transportation, Inc. v. Fort Worth & Western Railroad Company*, Docket No. 42094 (STB served April 25, 2008) (citing *Burlington N. Inc. v. Chicago & N.W. Transp. Co.*, 649 F.2d 556, 558 (8th Cir. 1981)).

Union Pacific alleges that all of the UP Lines, including those operated entirely within Illinois, are part of its interstate rail network. Complaint ¶ 29. However, the phrase “part of the

interstate rail network” is undefined and ambiguous. *See DesertXpress Enters., LLC - Petition for Declaratory Order*, FD 34914 (STB served May 7, 2010) at *8 (“The [statute] does not define the term ‘interstate rail network,’ as used in § 10501(a)(2)(A), and so we have discretion to interpret the term in a reasonable manner.”).

The STB has thrice had occasion to address certain jurisdiction and preemption issues arising under § 10501(a)(2)(A) in cases involving passenger service operated wholly within one state. As is evident in each of the three decisions below—with distinct facts yielding distinct outcomes based on various rationales—the STB brings its expertise to bear in identifying analogous circumstances, drawing distinctions, and applying its precedent to create a cogent body of law that impacts its own jurisdiction and the scope of ICCTA preemption.

In All Aboard Florida—Operations LLC and All Aboard Florida—Stations—Construction and Operation Exemption—in Miami, Fla. And Orlando, Fla., Docket No. FD 35680 (STB served Dec. 21, 2012), the STB found that it lacked jurisdiction because the passenger service between Miami and Orlando did not connect with Amtrak or any other interstate passenger rail service, even if some of the passengers would make their trip an interstate journey by multimodal transportation. *All Aboard Florida* involved a new entry (not a historic service), it did not involve a freight carrier operating interstate service along the same tracks, and the matter was uncontested.

In Cal. High-Speed Rail Auth.—Constr. Exemption—Merced, Madera and Fresno Cntys., Cal., Docket No. FD 35724 (STB served June 13, 2013), the STB found that ICCTA preemption applied to a planned operation of an 800-mile high-speed rail corridor from San Francisco to San Diego because there would be “extensive connectivity” to enable passengers to connect with Amtrak trains to travel both within and outside California.

Lastly, in *Texas Central Railroad and Infrastructure, Inc. & Texas Central Railroad, LLC—Petition for Exemption—Passenger Rail Line Between Dallas and Houston, Tex.*, Docket No. FD 36025 (STB served July 18, 2016), the STB found that its approval was not required for the construction and operation of a proposed rail line that would be constructed and operated entirely within the State of Texas because there were no concrete plans for through ticketing or direct connection to Amtrak or any other interstate passenger rail carriers.

In the instant action, the North Line is purely local intrastate service with the exception of a single station located in Kenosha, Wisconsin. The West Line and Northwest Line are both purely intrastate service, but Union Pacific also operates interstate freight service on these lines. The commuter service is currently operated pursuant to a contract with Metra, and, upon expiration of that contract, it may be operated by Union Pacific pursuant to its common carrier obligation. As in the three STB decisions described above, interpretation of the phrase “part of the interstate rail network” in this matter will require a fact-intensive inquiry within the primary jurisdiction and expertise of the STB. In addition, the resolution of these jurisdictional matters will influence the development of a uniform transportation policy. These considerations weigh in favor of referral to the STB. *See generally Hansen v. Norfolk & W. R. Co.*, 689 F.2d 707 (1982) (“The primary jurisdiction doctrine requires initial submission to the [STB] of questions that raise issues of transportation policy which ought to be considered by the [STB] in the interests of a uniform and expert administration of the regulatory scheme laid down by [the ICCTA]”).

c. What effect, if any, the repeal of certain regulatory authorities has on the nature and scope of other duties is a novel question of regulatory policy best suited to resolution by the STB.

Union Pacific cannot point to any provision of ICCTA to support its position that Congress eliminated the federal common carrier obligation to passengers. As the STB has

determined (*supra* at § B.4(a)), by retaining movement of passengers in the definition of “transportation,” Congress ensured that passenger service remained within the STB’s jurisdiction over “transportation by rail carriers” between states or as part of the interstate network. 49 U.S.C. § 10501. Common carrier obligations attach to all rail carriers “providing transportation or service subject to the jurisdiction of the Board...” 49 U.S.C. § 11101. Even the legislative history that Union Pacific cites does not specifically address the common carrier obligation in relation to passenger service.

Relying on inferences drawn from legislative history and the repeal and addition of other sections, Union Pacific has conjured an imaginary limit on the STB’s authority where none exists. In so doing, Union Pacific raises a novel question as to the relationship between certain regulatory duties and authorities (i.e. discontinuance regulations) and others (i.e. common carrier obligations). This is a question of regulatory policy with potentially broad implications that is especially suitable for STB resolution.

Union Pacific’s specific allegations further demonstrate the wisdom of referral. Union Pacific misinterprets *dicta* from *DesertXpress* in arguing that the repeal of sections 10908 (intrastate discontinuance authority) and 10909 (interstate discontinuance authority) evinces Congressional intent to eliminate the common carrier obligation to passengers. *See* Complaint ¶ 32 (citing *DesertXpress Enters., LLC-Petition for Declaratory Order*, FD 34914 (STB served May 7, 2010) at *13). As explained above, this was not the STB’s conclusion in *DesertXpress*. Moreover, Metra disagrees with Union Pacific’s repeal-by-implication theory for additional reasons.

Congress continued to define transportation to include movement of passengers, and the obligations under section 11101 apply to rail carriers engaged in transportation. Union Pacific’s

speculation about what Congress was thinking by repealing sections 10908 and 10909 cannot overcome the express language of section 11101.

In addition and in any event, a common carrier passenger obligation existed, and continued to exist in the absence of STB discontinuance authority. Congress created the statutory common carrier obligation in 1887, but no federal discontinuance authority for either freight or passenger service existed until the Transportation Act amended the ICA 71 years later. *See New Jersey et al. v. New York, Susquehanna, and Western R.R.* 372 U.S. 1, 5 (1962) (“To discontinue these trains before the enactment of §13a [the Transportation Act amendment to ICA], the railroads were required in all cases to seek authority from each of the States served. ... the Commission could not permit partial discontinuance of service over a line of railroad, whether the line crossed state boundaries or not.”). Given that rail carriers’ common carrier obligation for passenger service antedates all federal discontinuance authority, there is no support for Union Pacific’s proposition that the repeal of the passenger service discontinuance provisions in 1995 could, by implication, eviscerate an entirely independent statutory duty.

Rather, sections 10908 and 10909 were repealed seemingly based on a belief that they were no longer necessary. *See* H.R. Conf. Rep. No. 104-22, 164 (“rail passenger transportation today...is now purely local or regional in nature...”). A second possibility is that Congress viewed these sections to be redundant with section 10903, which prescribes the procedures to abandon any part of a railroad lines or discontinue the operation of all rail transportation over any part of a railroad line, whether freight or passenger. *See* 49 U.S.C. § 10903.

Further, Union Pacific’s focus on discontinuance or “exit” procedures is misplaced. The question may be whether Union Pacific would be obligated to “enter” commuter rail service upon expiration of the PSA. In post-ICCTA decisions, the STB has held that it has jurisdiction

under section 10901 over “entrance” into passenger transportation in the form of approval of the construction and operation of passenger systems. *See, e.g., Boston Surface Railroad Co.—Pet. for Partial Exemption From 49 U.S.C. Subtitle IV*, 2016 WL 5904758 (STB); *DesertXpress Enterprises, LLC—Petition for Declaratory Order*, 2010 WL 1822102, *2.

Union Pacific does not allege an explicit repeal of the common carrier obligation to passengers. Nor does it offer a clear statement of Congressional intent to effectuate such a repeal. Instead, Union Pacific asks the Court to extrapolate from the repeal of the §§ 10908 and 10909 discontinuance procedures and vague intimations about a limited “curtailment” of passenger regulation and find that it is not subject to a common carrier obligation to Metra’s passengers. Union Pacific also offers no indication as to whether Metra, or the passengers themselves, would be treated in the same manner as a shipper requesting new service or the restoration of a service once provided.

A resolution of the merits of these questions is for another day. For purpose of the instant motion, what is most important is that, although Union Pacific attempts to frame the issue as narrow and straight forward, its request for declaratory relief in fact raises myriad complicated regulatory and policy questions of first impression, that lie squarely within the primary jurisdiction of the STB.

C. Dismissal Without Prejudice Based on the Doctrine of Primary Jurisdiction Will Promote Judicial Efficiency.

When an agency has primary jurisdiction, a court has discretion either to stay the case pending an STB determination or, if the parties would not be unfairly disadvantaged, dismiss the case without prejudice. *Reiter v. Cooper*, 507 U.S. 258, 269-70 (1993). A stay is in order when a party may be prejudiced by a dismissal, such as where the statute of limitations might expire. *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213, 223 (1966); *Hansen v. Norfolk &*

W. R. Co., 689 F.2d 707 (7th Cir. 1982). However, dismissal is appropriate where there is no likelihood of prejudice and all of the relief sought in court can be obtained in an administrative forum or in an easily initiated suit subsequent to the administrative proceedings. *See DeBruce Grain, Inc. v. Union Pac. R.R.*, 149 F.3d 787 (8th Cir. 1998) (affirming dismissal and referral to STB because it did not disadvantage DeBruce and the STB's decision could be appealed to the district court); *Chlorine Inst., Inc. v. Soo Line R.R.*, 792 F.3d 903, 911 (8th Cir. 2015) (same).

In the instant action, dismissal is especially appropriate. There is no risk of an applicable statute of limitations expiring because one has not yet accrued. Union Pacific seeks a declaration of rights and obligations relating to a period of time after a future, hypothetical cessation of service. The parties have both publicly stated that there will be no interruption of service. Further, if Union Pacific gets the contract structure it wants (*see* Complaint ¶4), the process of transitioning the operations and personnel would unfold over an extended period of time, well over one year. There are no statute of limitations or other delay concerns.

In addition, the STB has broad powers to resolve the issues that Union Pacific or any other party might raise regarding Union Pacific's duty to provide commuter rail service in the absence of a PSA. *See* 5 U.S.C. § 554(e); 49 U.S.C. § 721 (vesting the STB with broad authority to issue a declaratory order to terminate a controversy or remove uncertainty); *Union Pacific Railroad Company—Petition for Declaratory Order*, Docket 35219 (STB served June 11, 2009) (issuing declaratory order that Union Pacific had a common carrier obligation to establish and provide rates and service in response to request for transportation of hazardous materials). *See also* 49 U.S.C. §§ 1321 (granting the STB power to issue inquiries, reports, orders, subpoenas, and depositions), 10709 (granting the STB authority to review contracts), 11101 (vesting the STB with regulatory authority over operations), 11701 (vesting the STB with investigative,

judicial, and enforcement authority). Moreover, Congress has established a special appellate process for review of STB decisions. 28 U.S.C. §§ 2321-23, 2342; *see, e.g., Riffin v. Surface Transp. Bd.* (D.C. Cir. 2013) (reviewing a STB interpretation of common carriage duties under 49 U.S.C. § 11101 with *Chevron* deference). Thus, the STB can fully resolve the issues.

In view of the absence of any risk of prejudice and the probability of the STB resolving the entire controversy, this Court should dismiss the case without prejudice. To the extent of any sensitivity to timing, the Court could require the parties to initiate proceedings before the STB by a date certain. In the alternative to dismissal without prejudice, the Court should enter a stay pending the STB's resolution of the issues.

IV. CONCLUSION

WHEREFORE, Defendant, Commuter Rail Division of the Regional Transportation Authority, d/b/a Metra, respectfully requests that this Court dismiss the case without prejudice, or in the alternative, stay the case pending the completion of proceedings before the Surface Transportation Board, and in either case grant such other relief as the Court deems appropriate.

Respectfully submitted,

**COMMUTER RAIL DIVISION OF THE
REGIONAL TRANSPORTATION
AUTHORITY, d/b/a METRA**

By: /s/Adam L. Saper
One of Its Attorneys

Robert T. Shannon
Adam L. Saper
Hinshaw & Culbertson LLP
151 N. Franklin Street, Suite 2500
Chicago, Illinois 60601
(312) 704-3000

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNION PACIFIC RAILROAD COMPANY,	)	
	)	
Plaintiff,	)	
	)	No. 1:19-cv-07957
v.	)	
	)	Honorable Jorge L. Alonso
THE REGIONAL TRANSPORTATION	)	
AUTHORITY AND ITS COMMUTER RAIL	)	Magistrate Judge Gabriel A. Fuentes
DIVISION, d/b/a METRA,	)	
	)	
Defendant.	)	

**UNION PACIFIC'S MEMORANDUM IN OPPOSITION TO
METRA'S MOTION TO DISMISS OR STAY BASED ON PRIMARY JURISDICTION**

Patricia Brown Holmes, Bar # 6194645
Sarah E. Finch, Bar # 6312797
RILEY SAFER HOLMES & CANCELIA LLP
70 W. Madison St., Ste. 2900
Chicago, IL 60602
Telephone: (312) 471-8745
pholmes@rshc-law.com
sfinch@rshc-law.com

David E. Schoenfeld, Bar #6197020
Benjamin E. Sedrish, Bar #6308141
SHOOK, HARDY & BACON L.L.P.
111 S. Wacker Dr., 47th Floor
Chicago, IL 60657
Telephone: (312) 704-7700
dschoenfeld@shb.com
bsedrish@shb.com

Joe Rebein (*pro hac vice*)
SHOOK, HARDY & BACON L.L.P.
2555 Grand Blvd.
Kansas City, MO 64108
Telephone: (816) 474-6550
jrebein@shb.com

Attorneys for Plaintiff Union Pacific Railroad Company

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
BACKGROUND	2
ARGUMENT	4
I. The Primary Jurisdiction Doctrine Does Not Apply When Courts Are Asked To Resolve Purely Legal Issues.	4
II. The Parties’ Dispute Involves Purely Legal Issues Requiring Application Of This Court’s Conventional Competence, Not Technical Or Policy Matters Within The STB’s Expertise.	6
A. Determining whether ICCTA creates a common carrier obligation to provide commuter service and preempts other law that might purport to create such an obligation is a function for courts.	6
1. Congress’s intent to relieve freight railroads from the burdens of providing common carrier passenger service is clear from ICCTA and legislative history.	7
2. This Court should resolve any disputed issues of statutory interpretation without referring the matter to the STB.	10
3. This case does not involve whether railroad rates or practices are “reasonable”—issues courts properly refer to the STB.	13
B. Determining whether the STB would have jurisdiction over Union Pacific’s post-contractual commuter service is a function for courts.	14
III. If The Court Refers This Matter, It Should Ensure A Prompt Resolution.	16
CONCLUSION.....	17

TABLE OF AUTHORITIES

	<u>Page</u>
Cases	
<i>Am. Orient Express Ry. v. STB</i> , 484 F.3d 554 (D.C. Cir. 2007)	7
<i>Assoc. of Am. R.Rs. v. S. Coast Air Quality Mgmt. Dist.</i> , 2007 WL 2439499 (C.D. Cal. 2007)	12
<i>Baker v. IBP</i> , 357 F.3d 685 (7th Cir. 2004)	16
<i>Balt. & Ohio Chi. Terminal R.R. v. Wis. Cent. Ltd.</i> , 154 F.3d 404 (7th Cir. 1998)	4, 5, 11
<i>Bd. of Educ. of the City Sch. Dist. of the City of N.Y. v. Harris</i> , 622 F.2d 599 (2d Cir. 1979)	5
<i>Chi. Southshore & South Bend R.R. – Petition for Declaratory Order – Common Carrier Obligations</i> , 1989 WL 247064 (ICC 1989)	7
<i>Chlorine Institute, Inc. v. Soo Line Railroad</i> , 792 F.3d 903 (8th Cir. 2015)	13
<i>City of Chi. v. United States</i> , 396 U.S. 162 (1969)	8
<i>City of Chi. v. Purdue Pharma, L.P.</i> , 211 F. Supp. 3d 1058 (N.D. Ill. 2016)	12
<i>Coastal Distribution, LLC v. Town of Babylon</i> , 2009 WL 10706008 (E.D.N.Y. Oct. 9, 2009)	11
<i>Commuter Rail Div. of the Reg'l Transp. Auth. of N.E. Ill., d/b/a Metra – Exemption – Tariff Filing Requirements</i> , 1995 WL 73348 (ICC 1995)	7
<i>CSX Transp., Inc. v. City of Seabee</i> , 2018 WL 2376099 (W.D. Ky. May 24, 2018), <i>aff'd</i> , 924 F.3d 279 (6th Cir. 2019)	12
<i>DeBruce Grain, Inc. v. Union Pacific Railroad</i> , 149 F.3d 787 (8th Cir. 1998)	13
<i>DesertXpress Enters., LLC – Petition for Declaratory Order</i> , 2010 WL 1822102 (STB 2010)	10, 15, 16

Page

<i>Gross Common Carrier, Inc. v. A.B. Dick Co.</i> , 861 F. Supp. 638 (N.D. Ill. 1993)	17
<i>Ill. Cent. R.R. v. S. Tec. Dev. Warehouse</i> , 1999 WL 519042 (N.D. Ill. July 15, 1999).....	14
<i>Jones Truck Lines, Inc. v. Williamhouse-Regency, Inc.</i> , 1995 WL 453342 (S.D.N.Y. Aug. 1, 1995).....	14
<i>Louisville & Nashville R.R. v. F.W. Cook Brewing Co.</i> , 223 U.S. 70 (1912).....	4, 10, 14
<i>Madison County Mass Transit v. Hanfelder</i> , 2001 WL 775977 (S.D. Ill. Feb. 7, 2001).....	11
<i>Nader v. Allegheny Airlines, Inc.</i> , 426 U.S. 290 (1976).....	4, 10
<i>Occidental Chem. Corp. v. La. Pub. Serv. Comm’n</i> , 810 F.3d 299 (5th Cir. 2016)	17
<i>Oregon Coast Scenic Railroad, LLC v. Oregon Department of State Lands</i> , 841 F.3d 1069 (9th Cir. 2016)	15
<i>Pejepscot Industrial Park v. Maine Central Railroad</i> , 215 F.3d 195 (1st Cir. 2000).....	13
<i>Port City Props. v. Union Pac. R.R.</i> , 518 F.3d 1186 (10th Cir. 2008)	16
<i>Riffin v. STB</i> , 733 F.3d 340 (D.C. Cir. 2013)	14
<i>Ryan v. Chemlawn Corp.</i> , 935 F.2d 129 (7th Cir. 1991)	<i>passim</i>
<i>Santa Cruz Reg’l Transp. Comm’n</i> – <i>Petition for Declaratory Order</i> , 2011 WL 3667482 (STB 2011).....	14
<i>Schiller v. Tower Semiconductor Ltd.</i> , 449 F.3d 286 (2d Cir. 2006).....	5, 10
<i>Southern Ry. Co. v. North Carolina</i> , 376 U.S. 93 (1964).....	8
<i>Study of Interstate Commerce Comm’n Regulatory Responsibilities Pursuant to</i> <i>Section 210(A) of the Trucking Industry Regulatory Reform Act of 1994</i> , 1994 WL 639996 (ICC 1994).....	9

Page

<i>Tex. Cent. Bus. Lines Corp. v. City of Midlothian</i> , 669 F.3d 525 (5th Cir. 2012)	15
<i>U.S. ex rel. Sheet Metal Workers Int’l Assoc., Local Union 20 v. Horning Investments, LLC</i> , 828 F.3d 587 (7th Cir. 2016)	16
<i>Union Pac. Corp., Union Pac. R.R. & Mo. Pac. R.R. – Control – Chi. & N.W. Holdings Corp. & Chi. & N.W. Transp. Co.</i> , 1993 WL 48301 (ICC 1993)	7
<i>Union Pac. R.R. v. Chi. Transit Auth.</i> , 2009 WL 448897 (N.D. Ill. Feb. 23, 2009)	12
<i>United States v. Elrod</i> , 627 F.2d 813 (7th Cir. 1980)	5
<i>United States v. W. Pac. R.R.</i> , 352 U.S. 59 (1956)	4
<i>Wagner & Brown v. ANR Pipeline Co.</i> , 837 F.2d 199 (5th Cir. 1988)	17
<i>Wilbert Family Limited Partnership v. Dallas Area Rapid Transit</i> , 2012 WL 246091 (N.D. Tex. Jan. 26, 2012)	11

Statutes

49 U.S.C. § 13(a)	8
49 U.S.C. § 10102(9)	9
49 U.S.C. § 10501	3
49 U.S.C. § 10501(a)(1)	9
49 U.S.C. § 10501(a)(2)(A)	9
49 U.S.C. § 10501(b)	9, 16
49 U.S.C. § 10501(c)(2)(A)	10
49 U.S.C. § 10908	8, 9
49 U.S.C. § 10909	8, 9
ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995)	9
Rail Passenger Service Act of 1970, Pub. L. No. 91-518, 84 Stat. 1327	8

Page

Other Authorities

H.R. Rep. No. 104-311 (1995).....	15
H.R. Rep. No. 104-422, at 167 (1996).....	10

INTRODUCTION

This Court has jurisdiction to resolve the only question presented in this case: whether Union Pacific has a common carrier obligation that would require it to operate commuter rail service in the Chicago area after the expiration of its purchase of service agreement (“PSA”) with Metra. Metra acknowledges this Court’s jurisdiction but attempts to invoke the primary jurisdiction doctrine by asking the Court “to dismiss this case without prejudice, or in the alternative, stay the case pending completion of proceedings before the Surface Transportation Board.” ECF 26 at 3. This Court should decline Metra’s invitation. The primary jurisdiction doctrine does not apply. Jurisdiction lies with this Court and the Court should decide the issue.

The Court should deny Metra’s motion because the parties’ dispute involves strictly legal matters within the conventional experience of federal judges—not policy or technical considerations within the special competence of the Surface Transportation Board (“STB”). Additionally, Metra provides no grounds for the extraordinary relief requested. The primary jurisdiction doctrine allows courts, under appropriate circumstances, to refer matters to administrative agencies or to defer to ongoing administrative proceedings. Those circumstances are not present here.

Moreover, Metra nowhere actually asks this Court to refer the matter to the STB. Nor does Metra identify a related case now pending at the STB—none exists to Union Pacific’s knowledge—or state that it intends to initiate such an action. Consequently, Metra’s motion, if granted, would leave the parties exactly where they stood before Union Pacific sought relief from the Court last year—with no prospect for resolution of the important public interest question presented.

Union Pacific and Metra both have advised this Court that resolution of their common carrier dispute will require only limited fact discovery and no expert testimony. ECF 22 & 42.

Both parties also have recognized the public interest implicated and the need to avoid interruption of Chicago-area commuter service, which has been provided under repeat short-term extensions of the PSA since Jan. 1, 2020. *See* ECF 7 at 2, n.1. That is no way to manage a critical public service. Judicial economy and the public interest would be better served by this Court exercising its acknowledged jurisdiction to resolve the common carrier issue. Accordingly, this Court should deny Metra's motion.

BACKGROUND

Union Pacific is an interstate freight railroad. ECF 1 (Complaint) ¶ 2. It does not hold itself out as offering passenger service, and it is not a passenger railroad. *Id.* ¶ 33. Metra offers commuter service on 11 lines in the Chicago area, including three lines operated over tracks owned by Union Pacific. *Id.* ¶ 19. Metra directly operates the commuter service on most of its lines. *Id.* On Metra's three lines operating over Union Pacific's tracks, Union Pacific operates the commuter service on Metra's behalf under the parties' contract, which is known as the PSA. *Id.*

Since 2019, Union Pacific and Metra have been engaged in negotiations to ensure the continued operation of commuter service on Union Pacific's railroad after the PSA's expiration, which is currently set for June 30, 2020. *Id.* ¶ 4.¹ Union Pacific has advised Metra that it intends to exit the business of operating commuter service on Metra's behalf and has asked to work with Metra to ensure the seamless transition of the commuter service on its tracks to Metra. *Id.* Union Pacific does not operate commuter service anywhere else on its 23-state, 32,000-mile freight railroad. *Id.* Union Pacific has offered to make its tracks, other property and specific essential services (such as train dispatching and track maintenance) available to Metra under a new

¹ The parties are currently in the process of negotiating a further PSA extension to August 31, 2020.

contract, so that Metra can continue to provide the commuter service directly, as it does on most of its lines, with no difference to riders. *Id.*

Negotiations so far have been unsuccessful. The PSA initially was set to expire on December 31, 2019. *Id.* That deadline precipitated this lawsuit. Since last year, to allow for the continued provision of Chicago-area commuter service on Union Pacific tracks, Union Pacific and Metra have entered into a series of short-term extensions of the PSA to provide additional time to reach a new agreement that meets both sides' needs. *See, e.g., id.* ¶ 5.

During negotiations, Metra has contended that, if the PSA were to expire without the parties reaching a new agreement, Union Pacific would be subject to a common carrier obligation to continue operating commuter service on the tracks currently used by Metra—*i.e.*, Union Pacific has no choice but to renew the PSA under Metra's terms because Union Pacific, according to Metra, cannot exit the business of operating the commuter service as a matter of law. *Id.* ¶ 6. Metra's insistence on this point has raised a substantial controversy, which is now before this Court.

Union Pacific did not file this lawsuit lightly. Union Pacific only sought relief from this Court when it became clear that the parties' fundamental disagreement over Union Pacific's legal obligations would not be resolved between the parties. Given the critical public interest involved in the commuter service, Union Pacific also believed the question should not be indefinitely deferred or left to chance. There is no question that Congress granted the STB broad and exclusive jurisdiction over many aspects of rail transportation in the United States. 49 U.S.C. § 10501. But Congress did not displace the basic role of courts in interpreting statutes in disputes involving purely legal issues. Metra agrees that the Court has jurisdiction to determine whether

Union Pacific has a common carrier obligation to operate commuter service after expiration of the PSA. Union Pacific is asking the Court to exercise that jurisdiction now.

ARGUMENT

I. The Primary Jurisdiction Doctrine Does Not Apply When Courts Are Asked To Resolve Purely Legal Issues.

“The doctrine of primary jurisdiction is concerned with promoting proper relationships between the courts and agencies charged with particular regulatory duties.” *Ryan v. Chemlawn Corp.*, 935 F.2d 129, 131 (7th Cir. 1991). It applies when a court must resolve “issues which, under a regulatory scheme, have been placed within the special competence of an administrative body.” *Id.* (quoting *United States v. W. Pac. R.R.*, 352 U.S. 59, 64 (1956)). Courts apply the doctrine “when an action otherwise within the jurisdiction of the court raises a question of the validity of a rate or practice filed with an agency.” *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 305 (1976). Courts also apply the doctrine “with regard to issues of tariff interpretation involving highly technical matters central to the agency’s mission and expertise.” *Balt. & Ohio Chi. Terminal R.R. v. Wis. Cent. Ltd.*, 154 F.3d 404, 411 (7th Cir. 1998). In such cases, referral of issues to an agency can promote “uniformity in regulation” and application of “technical expertise” by giving the court the benefit of the agency’s “specialized knowledge.” *Nader*, 426 U.S. at 305 (quoting *Western Pac.*, 352 U.S. at 64).

The doctrine of primary jurisdiction does not extend to cases raising pure issues of law, notwithstanding their connection to a regulatory scheme. *See Louisville & Nashville R.R. v. F.W. Cook Brewing Co.*, 223 U.S. 70, 84 (1912); *Nader*, 426 U.S. at 305–06; *Balt. & Ohio*, 154 F.3d at 411. In such cases, the applicable standards “are within the conventional competence of the courts, and the judgment of a technically expert body is not likely to be helpful.” *Nader*, 426 U.S. at 305–06. The Seventh Circuit has emphasized the doctrine’s limited scope. In *Balt. &*

Ohio, for example, the court explained that a dispute whether charges in a railroad interchange agreement were lawful even though the agreement had not been filed with the STB was “an issue of law rather than a matter within the special expertise of the STB, and therefore it did not have to be referred to the agency.” 154 F.3d at 411; *see also id.* (“The particular issue in controversy here, however, is neither one of tariff interpretation nor one of the reasonableness of the tariff.”); *United States v. Elrod*, 627 F.2d 813, 818 (7th Cir. 1980) (referral not appropriate ““where the issue, regardless of its complexity, is not the reasonableness of a rate or rule, but a violation of such rate or rule”” (quoting *Civil Aeronautics Bd. v. Modern Air Transp.*, 179 F.2d 622, 624 (2d Cir. 1950))). Other courts follow the Seventh Circuit in emphasizing that referral is inappropriate where an issue “requires [courts] to engage in an activity—statutory interpretation—that is the daily fare of federal judges.” *Schiller v. Tower Semiconductor Ltd.*, 449 F.3d 286, 295 (2d Cir. 2006) (citing *Baltimore & Ohio*); *see also, e.g., Bd. of Educ. of the City Sch. Dist. of the City of N.Y. v. Harris*, 622 F.2d 599, 607 (2d Cir. 1979) (“[C]ourts need not defer to an agency where the issue involved is a strictly legal one, involving neither the agency’s particular expertise nor its fact finding prowess.”).

The Seventh Circuit also has emphasized that referral is inappropriate where it would not serve “judicial economy.” *Ryan*, 935 F.2d at 131. As the court explained, where Congress has placed an issue within an administrative agency’s special competence, “primary jurisdiction serves judicial economy because the dispute may be decided within the agency, thus obviating the need for courts to intervene.” *Id.* Where a dispute presents purely legal issues, however, “judicial economy will be better served” by allowing the case to proceed in court. *Id.* at 132; *see also id.* (district court “could have asked the [agency] to file an amicus brief”).

II. The Parties' Dispute Involves Purely Legal Issues Requiring Application Of This Court's Conventional Competence, Not Technical Or Policy Matters Within The STB's Expertise.

The controversy between Union Pacific and Metra involves purely legal issues of statutory interpretation. Union Pacific contends Congress's enactment of the ICC Termination Act ("ICCTA") eliminated any federal common carrier obligation to provide passenger service and preempts any common carrier obligations based on state or local law. Metra disagrees and contends the common carrier obligation would require Union Pacific to operate commuter service on its tracks after expiration of the PSA. Deciding whether Union Pacific would have *any* legal obligation to operate the commuter service is a purely legal matter within the conventional competence of this Court, not a technical or policy matter "'placed within the special competence'" of the STB. *Ryan*, 935 F.2d at 131 (quoting *Western Pacific*, 352 U.S. at 64).

Metra argues that this case may raise an additional issue: whether Union Pacific's post-PSA compulsory commuter service would fall within the STB's jurisdiction. ECF 27 at 14–16. But determining the STB's jurisdiction also is a matter of statutory interpretation squarely within the conventional competence of judges. Moreover, if the STB were to conclude that it lacked jurisdiction, the STB simply would return the dispute to this Court without resolving the controversy, leaving all concerned back exactly where they started. Such a detour would not "serve judicial economy" (*Ryan*, 935 F.2d. at 131) or the public interest.

A. Determining whether ICCTA creates a common carrier obligation to provide commuter service and preempts other law that might purport to create such an obligation is a function for courts.

No special administrative expertise is needed to conclude that Congress's enactment of ICCTA eliminated any obligation of federally regulated railroads to provide common carrier passenger service and preempted state and local authorities from imposing such requirements.

This Court is fully within its authority to determine Congress's intent by interpreting ICCTA, legislative history and relevant precedent.

1. Congress's intent to relieve freight railroads from the burdens of providing common carrier passenger service is clear from ICCTA and legislative history.

Federally regulated freight railroads are not required to provide passenger service. The STB and its predecessor agency, the Interstate Commerce Commission ("ICC"), have historically "treat[ed] freight and passenger operations as severable." *Chi. Southshore & South Bend R.R. – Petition for Declaratory Order – Common Carrier Obligations*, 1989 WL 247064, at *3 (ICC 1989). Even before Congress passed ICCTA, the ICC would grant railroads authority to provide freight service, but would "not impose a requirement to provide passenger service," when carriers would "specifically seek to limit their common carrier obligation to freight transportation only." *Id.* As courts have explained, a railroad assumes the obligations of a common carrier of passengers only if it "holds itself out to the general public as engaged in the business of transporting persons." *Am. Orient Express Ry. v. STB*, 484 F.3d 554, 557 (D.C. Cir. 2007) (internal quotation omitted).

The ICC previously found Chicago & North Western Railway Company ("CNW"), which operated the commuter service at issue for Metra before merging with Union Pacific,² did not hold itself out to provide commuter service. In 1994, Metra asked the ICC to exempt the commuter services it provided directly and those provided by CNW under contract to Metra from the ICC's tariff filing requirements. *See Commuter Rail Div. of the Reg'l Transp. Auth. of N.E. Ill., d/b/a Metra – Exemption – Tariff Filing Requirements*, 1995 WL 73348 (ICC 1995). The

² See *Union Pac. Corp., Union Pac. R.R. & Mo. Pac. R.R. – Control – Chi. & N.W. Holdings Corp. & Chi. & N.W. Transp. Co.*, 1993 WL 48301, at *2 (ICC 1993).

ICC exempted Metra from the requirements, but it concluded CNW did not need an exemption, because CNW did not hold itself out to provide the commuter service:

METRA appears to be the only entity here that could benefit from the requested exemption because only METRA holds itself out to provide the commuter service at issue. While the METRA route literature . . . reveals the names of various interstate carriers providing service under contract to METRA, it does not appear that any of them actually hold out to provide the service in their own name or in any capacity other than as a contractor to METRA. Even CNW's operation of the Kenosha commuter line is on METRA's behalf as it is METRA that holds itself out to provide the service. Thus, we find it is METRA, and not the contracting carriers, that is properly subject to our tariff filing obligation for the commuter services being provided.

Id. at *2.

Before 1958, the ICC could authorize a railroad to discontinue all its service on a line but “lacked power to discontinue particular trains or services while leaving the remaining services in operation.” *Southern Ry. Co. v. North Carolina*, 376 U.S. 93, 101 (1964). Instead, railroads needed state regulators’ approval to discontinue passenger service—approval the regulators were often unwilling to grant. *See City of Chi. v. United States*, 396 U.S. 162, 164–65 (1969). In 1958, “concerned with the problems posed by passenger services . . . which were consistently deficit-producing, thus forcing the carriers to subsidize their operations out of freight profits,” Congress granted the ICC authority to discontinue interstate *and* intrastate trains. *Southern Ry.*, 376 U.S. at 101. This discontinuance authority was initially codified at 49 U.S.C. § 13(a), and later re-codified at 49 U.S.C. § 10908 (interstate service) and § 10909 (intrastate service).

Congress took a second major step to reduce railroads’ obligations to provide passenger service by enacting the Rail Passenger Service Act of 1970 (“RSPA”), Pub. L. No. 91-518, 84 Stat. 1327. Under RSPA, by contracting with the National Railroad Passenger Corporation (Amtrak), a railroad could eliminate its obligations to provide “intercity rail passenger service,”

§ 401(a)(1), 84 Stat. 1334—that is, passenger transportation “except commuter and other short-haul service in metropolitan and suburban areas,” § 102(5), 84 Stat. 1328.

In 1995, Congress eliminated whatever remained of railroads’ historical obligation to provide passenger service in ICCTA. ICCTA was a major piece of deregulatory legislation that abolished the ICC and transferred a reduced set of regulatory functions to the STB. *See* Pub. L. No. 104-88, 109 Stat. 803 (1995). In passing ICCTA, Congress fully eliminated the former passenger common carrier obligation by repealing 49 U.S.C. § 10908 and § 10909. With the repeal, railroads immediately could exit any passenger service without seeking agency authorization. The repeal was not an accident or oversight. Congress followed the ICC’s recommendation to “[e]liminate regulation of route discontinuances by non-Amtrak carriers.” *Study of Interstate Commerce Comm’n Regulatory Responsibilities Pursuant to Section 210(A) of the Trucking Industry Regulatory Reform Act of 1994*, 1994 WL 639996, at *41 (ICC 1994). By eliminating the legal barriers to exit, Congress removed any obligation railroads once had to provide common carrier passenger service.

At the same time, by granting the STB broad and exclusive jurisdiction over rail transportation, Congress acted to ensure that states and local governments could not step in and reregulate railroad passenger service. It granted the STB jurisdiction over “transportation by rail carrier,” 49 U.S.C. § 10501(a)(1), between “a State and a place in the same or another State as part of the interstate network,” *id.* § 10501(a)(2)(A). It defined “transportation” to include property and services related to “movement of passengers.” *Id.* § 10102(9). Congress also made the STB’s jurisdiction “exclusive.” *Id.* § 10501(b). In short, Congress ensured that only the STB could regulate passenger transportation within its jurisdiction, while at the same time, “regulation

of passenger transportation [was] generally eliminated.” H.R. Rep. No. 104-422, at 167 (1996).³ It is against this clear statutory backdrop—the unambiguous combination of congressional decisions both to eliminate the common carrier obligation for passenger service and to provide for exclusive federal jurisdiction—that Metra’s motion should be evaluated.

2. This Court should resolve any disputed issues of statutory interpretation without referring the matter to the STB.

Importantly, this Court need not resolve the merits of either party’s position on the common carrier question in order to deny Metra’s motion. It only needs to recognize that the parties’ dispute involves pure legal issues of statutory interpretation—“the daily fare of federal judges.” *Schiller*, 449 F.3d at 295. Deciding whether Union Pacific would be obligated to continue to operate the commuter service in the event the PSA expired does not require the Court to determine any issue Congress placed “‘within the special competence of an administrative body.’” *Ryan*, 935 F.2d at 131 (quoting *Western Pac.*, 352 U.S. at 64). The answer “does not turn on a determination of reasonableness . . . that could be facilitated by an informed evaluation of the economics or technology of the regulated industry.” *Nader*, 426 U.S. at 306. The dispute here involves purely legal questions within “the conventional competence of the courts.” *Id.*

When asked to invoke primary jurisdiction, courts take care to distinguish between cases presenting legal questions within their experience and cases presenting administrative questions properly referred to the STB (or its predecessor, the ICC). For example, in *Louisville & Nashville Railroad*, where a railroad refused to carry beer moving across state lines to comply with certain

³ Congress generally excluded from the STB’s jurisdiction “public transportation provided by a local government authority,” but established limited exceptions. 49 U.S.C. § 10501(c)(2)(A). Rail carriers other than local government authorities still must obtain authorization from the STB to provide passenger service “as part of the interstate network.” *See, e.g., DesertXpress Enters., LLC – Petition for Declaratory Order*, 2010 WL 1822102, at *7 (STB 2010).

local laws, the Supreme Court rejected arguments that the shipper should have challenged the refusal at the ICC. It explained the matter “must turn not upon any administrative question or questions of fact within the scope of power of the Commission, but rather the validity of the legislation,” which presented “a question of general law, for a judicial tribunal.” 223 U.S. at 84. Similarly, the Seventh Circuit emphasized in *Baltimore & Ohio* that disputes touching on issues under the STB’s jurisdiction may nonetheless present “an issue of law rather than a matter within the special expertise of the STB.” 154 F.3d at 411. The point is well illustrated by *Madison County Mass Transit v. Hanfelder*, 2001 WL 775977 (S.D. Ill. Feb. 7, 2001), where the court declined to refer questions about whether a line was “railbanked” and thus within the STB’s exclusive jurisdiction, or abandoned, and thus outside the STB’s jurisdiction. The court acknowledged the STB’s exclusive power to regulate abandonments, *see id.* at *1, but found referral was inappropriate because the dispute involved only whether actions complied with certain statutory and regulatory obligations, not their “reasonableness,” *id.* at *4; *see also Coastal Distribution, LLC v. Town of Babylon*, 2009 WL 10706008, at *3 (E.D.N.Y. Oct. 9, 2009) (declining referral to STB because dispute whether Clean Railroads Act precluded application of zoning regulations to rail transload facility “is a matter of statutory interpretation, a function routinely performed by the courts”).

Courts apply the same principles in rejecting referral of legal issues involving application of the common carrier obligation. For example, in *Wilbert Family Limited Partnership v. Dallas Area Rapid Transit*, 2012 WL 246091 (N.D. Tex. Jan. 26, 2012), the court said it would decide whether STB regulations exempted certain products from the common carrier requirement. The court explained such “[l]egal issues need not be referred to agencies,” because they ““involv[e] neither the agency’s particular expertise nor its fact finding prowess; the standards to be applied

in resolving the issue are within the conventional competence of the courts and the judgment of a technically expert body is not likely to be helpful in the application of these standards to the facts of the case.” *Id.* at *5 (quoting *Columbia Gas Transmission Corp. v. Allied Chem. Corp.*, 652 F.2d 503, 319 n.15 (5th Cir. 1981)).

This Court recognized the importance of focusing on the legal issue actually presented by a case, rather than the broader regulatory background, in *City of Chicago v. Purdue Pharma, L.P.*, 211 F. Supp. 3d 1058 (N.D. Ill. 2016). The Court declined to invoke primary jurisdiction because it was not being asked to decide whether a particular medical treatment was appropriate—an issue within the technical expertise of the Food and Drug Administration—but whether particular marketing practices were unlawful. *See id.* at 1065. As this Court explained, “Courts are equipped to adjudicate such claims.” *Id.* (internal quotation omitted).

Finally, to the extent Metra were to contend that ICCTA would not preempt state or local laws purportedly creating a common carrier obligation for Union Pacific to provide commuter service, federal courts routinely resolve disputes regarding ICCTA’s preemptive effect without referring the issue to the STB. *See, e.g., CSX Transp., Inc. v. City of Seabee*, 2018 WL 2376099 (W.D. Ky. May 24, 2018) (ICCTA preempts local ordinance requiring approval for certain rail maintenance or construction projects), *aff’d*, 924 F.3d 279 (6th Cir. 2019); *Union Pac. R.R. v. Chi. Transit Auth.*, 2009 WL 448897 (N.D. Ill. Feb. 23, 2009) (ICCTA preempts state law condemnation of actively used railroad property), *aff’d*, 647 F.3d 675 (7th Cir. 2011); *Assoc. of Am. R.Rs. v. S. Coast Air Quality Mgmt. Dist.*, 2007 WL 2439499 (C.D. Cal. 2007) (ICCTA preempts rules enacted by air quality management district), *aff’d*, 622 F.3d 1094 (9th Cir. 2010).

3. This case does not involve whether railroad rates or practices are “reasonable.”

The cases Metra cites reinforce the distinction between a court’s conventional role in deciding purely legal issues and the STB’s policy-making role in deciding whether railroad rates and practices are “reasonable.” ECF 27 at 9–11. In *DeBruce Grain, Inc. v. Union Pacific Railroad*, 149 F.3d 787 (8th Cir. 1998), the court stated: “The basic question presented by the complaint in this case is whether UPR’s response to DeBruce’s request for cars was *reasonable*.” *Id.* at 789 (emphasis provided). The court further explained: “DeBruce’s claims require not only legal analysis, but also an informed evaluation of the economics or technology of the regulated industry.” *Id.* Those kinds of questions are not present here.

Similarly, in *Pejepscot Industrial Park v. Maine Central Railroad*, 215 F.3d 195 (1st Cir. 2000), the court held referral to the STB was appropriate because “the STB’s expertise [was] clearly involved in the question of whether [the railroad’s] actions constitute unlawful refusal to ‘provide service on *reasonable request*.’” *Id.* at 205 (quoting 49 U.S.C. § 11101(a), emphasis provided). As the court explained, “referral to the STB will promote uniformity in the standards governing refusals to provide service.” *Id.* at 206 (citing *DeBruce*). Again, the controversy presented in this case raises no such matters.

Likewise, in *Chlorine Institute, Inc. v. Soo Line Railroad*, 792 F.3d 903 (8th Cir. 2015), the court held referral was appropriate because the case involved “the reasonableness” of a rail tariff requiring that certain hazardous materials be shipped in normalized steel rail cars – a safety requirement that went beyond Department of Transportation regulations – and the STB was “best equipped to determine if such additional requirements are ‘*reasonable*.’” *Id.* at 912 (emphasis provided). The court explained: “[T]he STB, with its expertise in the industry, is better equipped than federal courts to address fact-intensive questions of whether a particular safety requirement

beyond the regulations is consistent with the regulations and national policy.” *Id.* Significantly, the court recognized referral would have been unnecessary if the issue were purely legal. It considered referral only after concluding the challenged requirements were “not barred as a matter of law.” *Id.* at 911. It also distinguished *Louisville & Nashville* as a case not requiring referral because the Court “was merely analyzing the legal question of whether a railroad could outright refuse (not reasonably limit) its transportation obligations.” *Id.*⁴

B. Determining whether the STB would have jurisdiction over Union Pacific’s post-contractual commuter service is a function for courts.

Metra claims it is uncertain whether the compulsory post-PSA commuter service obligation to be imposed on Union Pacific would fall within the STB’s jurisdiction over transportation between “a State and a place in the same or another State as part of the interstate rail network.” ECF 27 at 14–16 (citing 49 U.S.C. § 10501(a)(2)(A)). There is no uncertainty on this point. The STB has jurisdiction over any interstate and intrastate passenger transportation provided by federally regulated interstate freight railroads. The ICC had such jurisdiction before Congress enacted ICCTA. Congress expressly authorized the ICC to exercise that jurisdiction when it empowered the agency to discontinue freight railroads’ interstate and intrastate passenger service. In ICCTA, Congress modified the statutory provisions governing the agency’s jurisdiction, but it made the changes to “clarif[y] and expand[] the scope of the agency’s

⁴ The additional cases Metra cites on page 11 of its Memorandum also fail to show a court should refer legal matters to the STB. See *Jones Truck Lines, Inc. v. Williamhouse-Regency, Inc.*, 1995 WL 453342 (S.D.N.Y. Aug. 1, 1995) (referring claims about reasonableness of rates and practices and classification of transportation as contract or common carriage); *Riffin v. STB*, 733 F.3d 340 (D.C. Cir. 2013) (affirming STB regarding the scope of the common carrier requirement in case filed at STB); *Ill. Cent. R.R. v. S. Tec. Dev. Warehouse*, 1999 WL 519042 (N.D. Ill. July 15, 1999) (referring claims about reasonableness of demurrage tariff, but not legal question whether boxcars were exempted from demurrage charges); *Santa Cruz Reg’l Transp. Comm’n – Petition for Declaratory Order*, 2011 WL 3667482 (STB 2011) (addressing whether STB would have authority over a proposed line acquisition).

jurisdiction over *intrastate* rail transportation.” *DesertXpress Enters., LLC – Petition for Declaratory Order*, 2010 WL 1822102, at *7 (STB 2010) (emphasis in original); *see also* H.R. Rep. No. 104-311 at 95 (1995) (“[C]hanges are made to reflect the direct and complete preemption of State economic regulation of railroads.”). Under ICCTA, the agency’s jurisdiction over passenger service provided by federally regulated interstate freight railroads is no longer shared with states. It is *exclusive*.

Metra claims STB cases show a need for agency expertise to determine whether intrastate passenger transportation is provided “as part of the interstate rail network.” ECF 27 at 16–19. However, the cases Metra cites all involve service provided by *passenger-only railroads* on *passenger-only rail lines*. *See* ECF 27 at 15–16. Here, the dispute involves compulsory commuter service to be operated by Union Pacific—an interstate *freight* railroad—on tracks used to transport interstate *freight*. *See* ECF 1 ¶¶ 2, 3. This service would have been within the ICC’s pre-ICCTA jurisdiction over discontinuances. It is plainly within the STB’s expanded post-ICCTA jurisdiction.

In any event, courts routinely resolve questions about the STB’s jurisdiction without resort to the primary jurisdiction doctrine. In *Oregon Coast Scenic Railroad, LLC v. Oregon Department of State Lands*, 841 F.3d 1069 (9th Cir. 2016), the Ninth Circuit interpreted the same statutory language Metra discusses to hold a passenger railroad’s repairs in one state of track owned by a freight railroad that was once connected to the interstate network and could potentially be reconnected were done “as part of the interstate rail network” and subject to STB jurisdiction. *Id.* at 1075. Courts regularly interpret other provisions of ICCTA to resolve purely legal questions about the STB’s jurisdiction. *See, e.g., Tex. Cent. Bus. Lines Corp. v. City of Midlothian*, 669 F.3d 525, 530–32 (5th Cir. 2012) (affirming district court’s conclusion that a

transloading operation was “transportation by rail carrier” under § 10501(b)); *Port City Props. v. Union Pac. R.R.*, 518 F.3d 1186, 1188–89 (10th Cir. 2008) (affirming district court’s conclusion that certain track is subject to STB jurisdiction under § 10501(b)).

Finally, the STB in *DesertXpress* already provided its views on the jurisdictional issue Metra raises. Where an agency has expressed its views on a disputed matter, no justification exists for invoking primary jurisdiction. *See, e.g., Western Pac.*, 352 U.S. at 69 (“Certainly there would be no need to refer the matter of construction to the Commission if that body, in prior releases or opinions, has already construed the particular tariff at issue or has clarified the factors underlying it.”). In these circumstances, referral merely would delay the court’s resolution of a matter; it would not “serve[] judicial economy.” *Ryan*, 935 F.2d at 131.

III. If The Court Refers This Matter, It Should Ensure A Prompt Resolution.

The Court should decline Metra’s invitation to invoke the primary jurisdiction doctrine. However, in the event the Court were to grant Metra’s motion, it should stay this action, not dismiss it. Where a court refers a matter to an agency under a primary jurisdiction theory, a stay, not dismissal, is the proper procedural outcome. *See, e.g., U.S. ex rel. Sheet Metal Workers Int’l Assoc., Local Union 20 v. Horning Investments, LLC*, 828 F.3d 587, 592 (7th Cir. 2016) (primary jurisdiction is “a permissive doctrine” under which “a federal court may stay the proceeding to allow the agency to take the first look at the case”); *Baker v. IBP*, 357 F.3d 685, 688 (7th Cir. 2004) (“[T]he doctrine of primary jurisdiction is implemented by abstention—which means by staying rather than dismissing the litigation.”).

Here, the parties are scheduled to complete discovery by August 21, 2020 (ECF 43)—at which point the case should be ready for merits resolution. A stay would allow them to pick up the litigation immediately should the STB fail to decide the common carrier issue or fail to do so within a reasonable time. Dismissing the case, on the other hand, would require starting all over

again, with Union Pacific re-filing its complaint, re-serving it and awaiting Metra's responsive pleading.

Should the Court refer the matter to the STB, Union Pacific requests that it impose a deadline by which the STB should rule, with the understanding that the Court will decide the issue itself if the STB does not rule within that period. Courts in a number of circuits, including in the Seventh Circuit, have adopted this kind of approach. In *Wagner & Brown v. ANR Pipeline Co.*, 837 F.2d 199 (5th Cir. 1988), for example, the Fifth Circuit issued the following order:

To ensure that [plaintiff's] rights will not be unreasonably delayed or lost, we direct that the district court modify its judgment by vacating its order of dismissal and substituting an order staying proceedings before it for a period of 180 days If no such ruling is forthcoming within that time . . . then the district court should proceed to adjudicate the rights of the parties without further deference to the expertise of FERC.

Id. at 206; *see also Occidental Chem. Corp. v. La. Pub. Serv. Comm'n*, 810 F.3d 299, 313 (5th Cir. 2016) (directing district court to enter an order staying proceedings 180 days to allow FERC to rule); *Gross Common Carrier, Inc. v. A.B. Dick Co.*, 861 F. Supp. 638, 641 (N.D. Ill. 1993) (staying case 90 days to allow defendant to obtain ruling from ICC). The legal question presented here is neither fact-intensive nor an expert subject matter. ECF 22 & 42. Therefore, Union Pacific requests that, if the Court does refer the matter to the STB, it do so for only 90 days, with the Court proceeding to consider the common carrier question itself, if the STB does not rule within that time.

CONCLUSION

Union Pacific requests that the Court deny Metra's motion or, in the alternative, stay this matter 90 days to allow the STB to rule on the common carrier question, with the understanding that the Court will decide this matter without the STB's guidance if the agency fails to issue a ruling within that time.

Dated: June 11, 2020

Respectfully submitted,

/s/ Patricia Brown Holmes

Patricia Brown Holmes, Bar # 6194645

Sarah E. Finch, Bar # 6312797

RILEY SAFER HOLMES & CANCELILA LLP

70 W. Madison St., Ste. 2900

Chicago, IL 60602

Telephone: (312) 471-8745

pholmes@rshc-law.com

sfinch@rshc-law.com

David E. Schoenfeld, Bar #6197020

Benjamin E. Sedrish, Bar #6308141

SHOOK, HARDY & BACON L.L.P.

111 S. Wacker Dr., 47th Floor

Chicago, IL 60657

Telephone: (312) 704-7700

dschoenfeld@shb.com

bsedrish@shb.com

Joe Rebein (*pro hac vice*)

SHOOK, HARDY & BACON L.L.P.

2555 Grand Blvd.

Kansas City, MO 64108

Telephone: (816) 474-6550

jrebein@shb.com

Attorneys for Plaintiff

Union Pacific Railroad Company

CERTIFICATE OF SERVICE

I, Patricia Brown Holmes, certify that on June 11, 2020, I caused a copy of the forging document to be filed electronically using the Court's CM/ECF system, which will generate notice of this filing to all counsel of record.

/s/ Patricia Brown Holmes
Patricia Brown Holmes

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNION PACIFIC RAILROAD COMPANY,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 1:19-cv-07957
	)	Judge Jorge L. Alonso
COMMUTER RAIL DIVISION OF THE	)	Magistrate Judge Gabriel Fuentes
REGIONAL TRANSPORTATION	)	
AUTHORITY, d/b/a METRA,	)	
	)	
Defendant.	)	

DEFENDANT'S UNOPPOSED MOTION FOR ENLARGEMENT OF TIME TO FILE
DEFENDANT'S REPLY IN SUPPORT OF MOTION TO DISMISS OR STAY

Defendant, Commuter Rail Division of the Regional Transportation Authority, d/b/a Metra, through its undersigned attorneys, pursuant to Rule 6(b) of the Federal Rules of Civil Procedure, states as follows:

1. Metra filed its Motion to Dismiss or Stay on March 3, 2020. Due to the COVID-19 pandemic General Orders, Union Pacific's Response in Opposition to Metra's Motion to Dismiss or Stay was not due or filed until June 11, 2020.
2. For the reasons explained below, Metra respectfully requests an enlarge of time, to July 23, 2020, to files its reply in support of its motion to dismiss or stay.
3. Plaintiff Union Pacific does not object to the Court granting the requested enlargement of time.
4. Lead counsel for Metra is also lead counsel for Appellant-Defendant, the Cook County Sheriff, in *Mays, et al. v. Dart*, Case No. 20-cv-2134, pending before Judge Gettleman in this District, and in Case No. 20-1792, a related interlocutory appeal from entry of a

preliminary injunction, pending in the United States Court of Appeals for the Seventh Circuit. The Seventh Circuit issued an order on June 23, 2020 expediting the appeal and requiring Appellant's brief to be filed by July 10, 2020. While the appeal is pending, the Court has also ordered the parties to move forward on an aggressive discovery schedule requiring all fact and expert discovery to be completed by September 30, 2020.

5. In addition to the challenges engendered by the extraordinary matters described above and those posed generally by COVID-19, the matters alleged by Plaintiff and argued in its response brief implicate numerous statutes, regulations, legislative history, administrative agency decisions, Illinois statutes, regulations, and caselaw. Consequently, the preparation of Metra's reply brief will be a substantial effort.
6. This motion is not filed for the purpose of creating unnecessary delay, and the granting of the relief requested will not prejudice any party.

WHEREFORE, Defendant Commuter Rail Division of the Regional Transportation Authority, d/b/a Metra, respectfully requests the Court to grant an enlargement of time to July 23, 2020, for Defendant to file its Reply in Support of its Motion to Dismiss or Stay.

Respectfully submitted,

**The Commuter Rail Division of the Regional
Transportation Authority**

By: /s/Robert T. Shannon
One of Its Attorneys

Robert T. Shannon
Adam L. Saper
HINSHAW & CULBERTSON LLP
151 N. Franklin Street, Suite 2500
Chicago, Illinois 60606
Telephone: (312) 704-3000
Facsimile: (312) 704-3001

Case: 1:19-cv-07957 Document #: 53 Filed: 06/24/20 Page 1 of 1 PageID #:241

**UNITED STATES DISTRICT COURT
FOR THE Northern District of Illinois – CM/ECF LIVE, Ver 6.3.3
Eastern Division**

Union Pacific Railroad Company

Plaintiff,

v.

Case No.:
1:19-cv-07957
Honorable Jorge L.
Alonso

Commuter Rail Division of the Regional
Transportation Authority

Defendant.

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Wednesday, June 24, 2020:

MINUTE entry before the Honorable Jorge L. Alonso: Plaintiff's motion for leave to file a brief in excess pages [46] is granted. Defendant's unopposed motion for enlargement of time to file Defendant's reply in support of motion to dismiss or stay [51] is granted to 7/23/20. Motion hearing dates of 6/30/20 and 7/15/20 are stricken. Notice mailed by judge's staff (lf,)

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by CM/ECF, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

For scheduled events, motion practices, recent opinions and other information, visit our web site at www.ilnd.uscourts.gov.