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Office of Proceedings  
October 7, 2021  
Part of  
Public Record

**Steptoe**

October 7, 2021

**VIA E-FILING**

Cynthia T. Brown  
Chief, Section of Administration  
Surface Transportation Board  
Office of Proceedings  
395 E Street, SW  
Washington, DC 20423

**Re: STB Docket No. FD 36547, BNSF Railway Company—  
Trackage Rights Exemption—Union Pacific Railway Company**

Dear Ms. Brown:

Enclosed for e-filing in the above-referenced proceeding is a highly confidential version of BNSF Railway Company's Notice of Exemption under 49 C.F.R. § 1180.2(d)(7), to be filed under seal. We are concurrently filing a Motion for Protective Order, along with a public version of the Notice of Exemption with appropriate redactions that the Board can place in its docket.

The filing fee of \$1,400 was paid using pay.gov. Please contact me with any questions.

Respectfully submitted,

/s/ Peter W. Denton

Peter W. Denton  
*Attorney for BNSF Railway Company*

FEE RECEIVED  
October 7, 2021  
SURFACE  
TRANSPORTATION BOARD

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**REDACTED - TO BE PLACED ON PUBLIC FILE**

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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FINANCE DOCKET NO. 36547

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BNSF RAILWAY COMPANY  
—TRACKAGE RIGHTS EXEMPTION—  
UNION PACIFIC RAILROAD COMPANY

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VERIFIED NOTICE OF EXEMPTION  
Pursuant to 49 C.F.R. § 1180.2(d)(7)

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**Tyler R. White**  
Senior General Attorney  
BNSF Railway Company  
2500 Lou Menk Drive, AOB-3  
Fort Worth, TX 76131-2828

**Peter W. Denton**  
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1330 Connecticut Ave, NW  
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(202) 429-3000

*Attorneys for BNSF Railway  
Company*

Dated: October 7, 2021

**REDACTED - TO BE PLACED ON PUBLIC FILE**

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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FINANCE DOCKET NO. 36547

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BNSF RAILWAY COMPANY  
—TRACKAGE RIGHTS EXEMPTION—  
UNION PACIFIC RAILROAD COMPANY

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VERIFIED NOTICE OF EXEMPTION  
Pursuant to 49 C.F.R. § 1180.2(d)(7)

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BNSF Railway Company (“BNSF”) submits this Notice of Exemption pursuant to the class exemption at 49 C.F.R. § 1180.2(d)(7), for overhead trackage rights over a rail line owned by Union Pacific Railroad Company (“UP”).

Under 49 C.F.R. § 1180.2(d)(7), the acquisition, renewal or modification of trackage rights by a rail carrier over the lines owned or operated by any other rail carrier or carriers is exempt if the rights are (i) based on a written agreement, and (ii) not filed or sought in a responsive application in rail consolidation proceedings. The trackage rights covered by this Notice are based on a draft written trackage rights agreement (“Agreement”) between BNSF and UP, attached as Exhibit B, and are not being sought in a responsive application in a rail consolidation proceeding. Under these circumstances, the Section 1180.2(d)(7) class exemption is applicable. *See e.g., Norfolk S. Ry. Co.—Trackage Rights Exemption—S. Elec. R.R. Co., FD 36020 (STB served Apr. 27, 2016)*

(Notice issued based upon a redacted version of the draft trackage rights agreement and indicated that a final version of the agreement was to be submitted within ten days of execution); *Iowa, Chi. & E. R.R. Co.—Trackage Rights Exemption—Commuter Rail Div. of Reg'l Transp. Auth. of Ne. Ill. & Soo Line R.R.*, FD 34177 (Sub-No. 1) (STB served Apr. 11, 2003) (Notice issued based upon draft trackage rights agreement filed under seal, with the petition indicating that a final version of the agreement would be submitted within ten days of execution).

Pursuant to the Board's regulations at 49 C.F.R. § 1180.4(g), BNSF submits the following information:

### **Section 1180.6 Supporting Information**

#### **(a)(1)(i) Description of Proposed Transaction**

The Agreement between BNSF and UP grants BNSF overhead trackage rights over UP's Jefferson City Subdivision between MP 34.66 near Pacific, MO and MP 46.22 near Labadie, MO pursuant to Section 7(e) of the Restated and Amended BNSF Settlement Agreement (RASA) for the expressed purpose of serving Ameren Corporation's facility at Labadie as well as the right to serve all "2-to-1" Shipper Facilities, New Shipper Facilities, and Existing Transload Facilities at Labadie as those terms are defined in the RASA.<sup>1</sup>

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<sup>1</sup> Pursuant to the RASA, UP grants BNSF trackage rights over UP's Jefferson City Subdivision between MP 34.8 near Pacific, MO and MP 43.8 near Labadie, MO. However, due to structural changes to the track infrastructure used to access the Labadie facility since the RASA was instituted, BNSF proposes to operate between MP 34.66 and MP 46.22. For instance, when the parties agreed to the RASA, there was not a connection at Pacific. These changes reflect the slight variance in mileposts between the RASA and present-day operations at Labadie and allow BNSF to

Name and address of tenant railroad:

BNSF Railway Company  
2650 Lou Menk Drive  
Fort Worth, Texas 76131

Questions regarding this transaction are to be addressed to BNSF's counsel:

Peter W. Denton  
Steptoe & Johnson LLP  
1330 Connecticut Ave, NW  
Washington, DC 20036  
(202) 429-3000

**(a)(1)(ii) Consummation Date**

The trackage rights will be consummated after the effective date of this Notice of Exemption.

**(a)(1)(iii) Purpose Sought to be Accomplished**

The trackage rights are intended to permit BNSF to serve Ameren Corporation's facility at Labadie as well as the right to serve all "2-to-1" Shipper Facilities, New Shipper Facilities, and Existing Transload Facilities at Labadie.

**(a)(5) List of States in which the Party's Property is Situated**

The involved trackage rights are located in the State of Missouri.

**(a)(6) Map**

A map illustrating the trackage rights is attached as **Exhibit A**.

**(a)(7)(ii) Agreement**

A redacted copy of the draft Agreement is attached as **Exhibit B**, with highly confidential material redacted. An unredacted version of the draft Agreement is

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connect, as UP does today, to both legs of the wye connecting to the lead track and support trackage extending into the Ameren facilities.

being submitted under seal pursuant to a concurrently-filed motion for a protective order. An executed copy of the Agreement will be filed with the Board within 10 days of its execution in accordance with the requirements of section 1180.6(a)(7)(ii).

### **Labor Protection**

BNSF is agreeable to the labor protection conditions generally imposed in trackage rights proceedings as found in *Norfolk and Western Ry. Co.—Trackage Rights—BN*, 354 I.C.C. 605 (1978), as modified by *Mendocino Coast Ry., Inc.—Lease and Operate*, 360 I.C.C. 653 (1980).

### **Environmental and Historical Matters**

Environmental and historical impacts associated with trackage rights transactions generally are considered to be insignificant. Therefore, an environmental and historical report and documentation normally need not be submitted for this type of transaction, pursuant to 49 C.F.R §§ 1105.6(c)(3) and 1105.8(b)(3).

Respectfully submitted,

/s/ Peter W. Denton

Tyler R. White  
General Attorney  
BNSF Railway Company  
2500 Lou Menk Drive, AOB-3  
Fort Worth, TX 76131-2828

Peter W. Denton  
Onika K. Williams  
Steptoe & Johnson LLP  
1330 Connecticut Ave, NW  
Washington, DC 20036  
(202) 429-3000

*Attorneys for BNSF Railway  
Company*

Dated: October 7, 2021

## VERIFICATION

I, Susan Odom, depose and state under penalty of perjury that I am Manager of Contracts and Joint Facilities of BNSF Railway Company, that I am authorized to make this verification, and that I have read the foregoing Notice of Exemption and know the facts asserted therein are true and accurate as stated to the best of my knowledge, information, and belief.

Dated: October 7, 2021

/s/ Susan Odom

Susan Odom

SURFACE TRANSPORTATION BOARD

NOTICE OF EXEMPTION

FINANCE DOCKET NO. 36547

BNSF RAILWAY COMPANY  
—TRACKAGE RIGHTS EXEMPTION—  
UNION PACIFIC RAILROAD COMPANY

Union Pacific Railroad Company (“UP”) has agreed pursuant to Section 7(e) of the Restated and Amended BNSF Settlement Agreement (RASA) to grant overhead trackage rights to BNSF Railway Company (“BNSF”) over UP’s Jefferson City Subdivision between MP 34.66 near Pacific, MO and MP 46.22 near Labadie, MO for the expressed purpose of serving Ameren Corporation’s facility at Labadie as well as the right to serve all “2-to-1” Shipper Facilities, New Shipper Facilities, and Existing Transload Facilities at Labadie.

The trackage rights will be consummated on or after November \_\_, 2021.

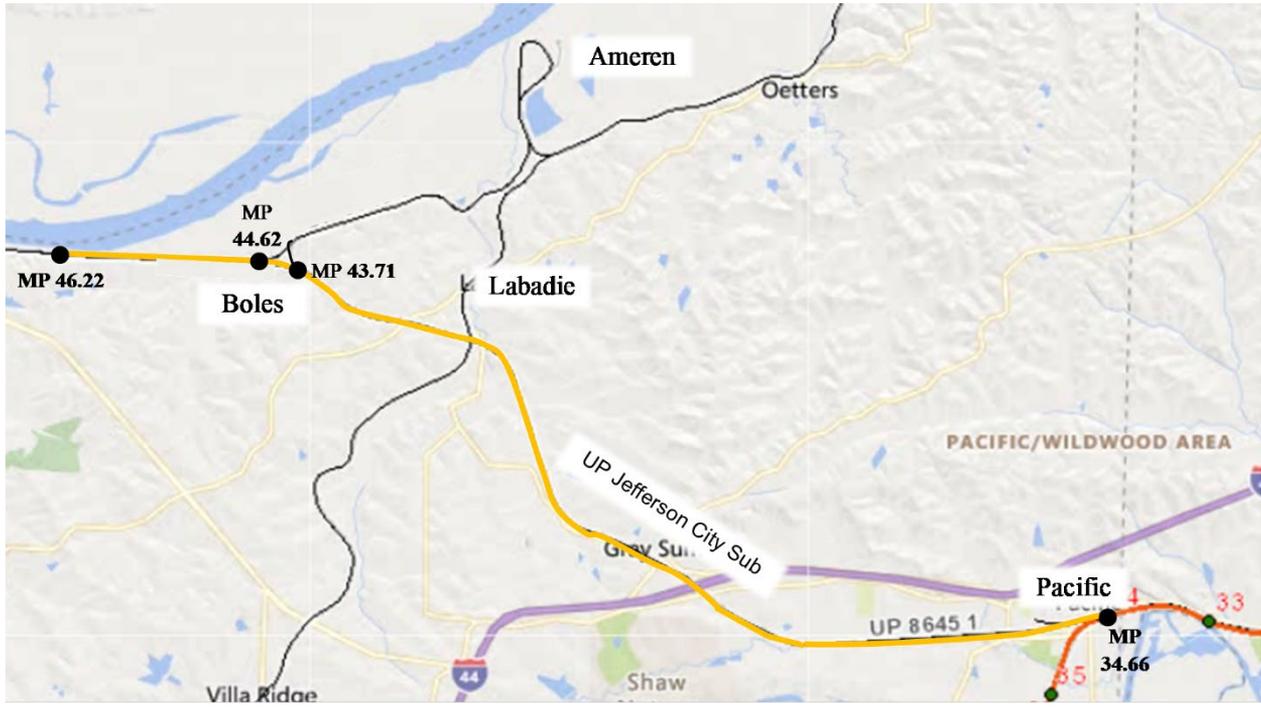
This Notice is filed under 49 C.F.R. § 1180.2(d)(7). Petitions to revoke the exemption under 49 U.S.C. § 10502(d) may be filed at any time. The filing of a petition to revoke will not stay the transaction.

Dated:

By the Board

# EXHIBIT A

## MAP



**EXHIBIT B**

**Draft Redacted Trackage Rights Agreement**

**TRACKAGE RIGHTS AGREEMENT  
BETWEEN  
BNSF RAILWAY COMPANY AND UNION PACIFIC RAILROAD  
PACIFIC TO LABADIE, MO**

THIS AGREEMENT made as of this \_\_\_\_ day of \_\_\_\_\_, 2021, between UNION PACIFIC RAILROAD COMPANY, a Delaware corporation (“UP” or “Owner”), and BNSF RAILWAY COMPANY, a Delaware corporation (“BNSF” or “User”).

WITNESSETH:

WHEREAS, Owner owns a line of railroad extending between Pacific and Labadie, Missouri, as shown by bold line on the attached print dated \_\_\_\_\_ (identified as Exhibit A) and described in Section 1.15 of Exhibit B, which shall be referred to collectively herein as the “**Joint Trackage**”;

WHEREAS, UP and BNSF are parties to an agreement dated September 25, 1995, as restated and amended from time to time (the “**Settlement Agreement**”), pursuant to which UP granted certain rights to BNSF, including overhead trackage rights over UP’s Jefferson City Subdivision between Pacific and Labadie, Missouri for the expressed purpose of accessing Ameren Corporation’s facility at Labadie as well as the right to serve all “2-to-1” Shipper Facilities, New Shipper Facilities and then Existing Transload Facilities at Labadie;

WHEREAS, BNSF’s rights as described were affirmed in Surface Transportation Board Finance Docket 32760, Decision No. 44; and

WHEREAS, pursuant to the Settlement Agreement, Owner and User wish to more specifically define the terms and conditions under which said trackage rights shall be exercised.

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

**Section 1. General Conditions**

The General Conditions set forth in Exhibit B attached hereto are hereby made a part of this Agreement. Subject to Section 7 below, all capitalized terms used and not otherwise defined in this Agreement shall have the meaning ascribed to them in the General Conditions or Settlement Agreement, as the case may be. If any conflict between the General Conditions and this Agreement shall arise, the provisions of this Agreement shall prevail.

**Section 2. Rights of User**

- (a) Subject to the terms and conditions contained herein, Owner grants to User the nonexclusive right to use the Joint Trackage for the limited operation of Equipment in User's account over the Joint Trackage in common with Owner and such other railroad company or companies as Owner has heretofore admitted or may hereafter at any time in the future admit to the joint use of all

or part of the Joint Trackage (provided that such future admittance shall not materially hinder or obstruct the fair and reasonable exercise of the rights granted in this Agreement), such other railroad company or companies to hereinafter be considered Owner for the purposes of this Agreement, it being understood and agreed that User shall not have the right to:

- (i) Switch industries on the Joint Trackage, except as otherwise provided in the Settlement Agreement and herein;
  - (ii) Set out, pick up or store Equipment on the Joint Trackage, or any part thereof, except as otherwise provided in the Settlement Agreement and herein and in Sections 2.11, 2.12 and 2.13 of Exhibit B;
  - (iii) Serve any industry, team or house track, intermodal or auto facility now existing or hereafter located on the Joint Trackage, except as otherwise provided in the Settlement Agreement and herein;
  - (iv) Permit or admit any third party to the use of all or any portion of the Joint Trackage, nor, under the guise of doing its own business, contract or make any agreement to handle as its own Equipment over or upon the Joint Trackage, or any portion thereof, the Equipment of any such third party which in the normal course of business would not be considered the Equipment of User; provided, however, that the foregoing shall not prevent User, pursuant to a run-through agreement with any railroad, from using the locomotives and cabooses of another railroad as its own under this Agreement; or
  - (v) Connect with or interchange with any other railroad, except as otherwise provided in the Settlement Agreement and herein.
- (b) The rights granted in Section 2 (a) shall be for rail traffic of all kinds and commodities, both carload and intermodal.

User shall have the right to access via the Joint Trackage (i) “2-to-1” Shipper Facilities and Existing Transload Facilities at Labadie, (ii) any New Shipper Facility (including a new Transload Facility) located at Labadie subsequent to UP’s acquisition of control of SP, and (iii) any New Shipper Facility (including a new Transload Facility) located at Labadie subsequent to UP’s acquisition of control of SP. Each party shall provide the other party with written notice of any such New Shipper Facility within a reasonable time of when such party first learns of such a facility. User shall also have the right to establish and exclusively serve intermodal, transload and auto facilities at Labadie. User shall also have the right to access on or via the Joint Trackage, pursuant to the Settlement Agreement, “2-to-1” short lines (Section 8(j)), new short lines (Section 8(k)), and build-in/build-out lines (Section 8(l)), including trackage rights granted to User to reach a build-in/build-out point.

User shall participate in fifty percent (50%) of Owner's cost and expense of any Capital Improvements constituting connecting and access tracks, sidings, switches and other support facilities required by both Owner and User to provide rail service to a New Shipper Facility upon User's election to directly serve such New Shipper Facility which then shall become part of the Joint Trackage. Should User decline to participate in the cost and expense of Capital Improvements required to serve any New Shipper Facility, User shall be denied access to such New Shipper Facility via the Capital Improvements and the Capital Improvements then shall not be part of the Joint Trackage; provided, however, should User elect at a later date to serve such New Shipper Facility via the Capital Improvements, such right shall be granted to User by Owner upon payment of fifty percent (50%) of Owner's initial cost and expense of the Capital Improvements plus interest as calculated pursuant to Section 2 (j) below.

- (c) Access to Shipper Facilities at Labadie open to User shall be direct or through reciprocal switch, or, with Owner's prior agreement, through a third-party contractor. Access to New Shipper Facilities open to User on the Joint Trackage shall be (i) direct; (ii) with Owner's prior agreement, through haulage for the shortest period of time necessary to allow User to establish its own direct operating access after initiating service to a New Shipper Facility, but not to exceed the later to occur of 90 days or the date upon which Owner completes the construction of and accepts for service any connections, sidings or other support facilities to be paid for by User that Owner is then obligated to construct pursuant to the Settlement Agreement or this Agreement; (iii) with Owner's prior agreement, reciprocal switching where, at the time User service is to commence, Owner already provides reciprocal switching on the portion of the Joint Trackage upon which the turnout to the facility is to be located; or (iv) with Owner's prior agreement, the use of a third-party contractor; provided, however, that it shall be Owner's sole decision whether User's service will be provided by either haulage or reciprocal switching; and provided, further, that in no case shall Owner be required to initiate any new local service or increase its level of service to accommodate the level of service proposed by User. New Shipper Facilities open to User under the Settlement Agreement shall be open to both Owner and User, subject to the terms of Section 2(b) above. The geographic limits within which (x) New Shipper Facilities shall be open to BNSF service at Labadie and (y) BNSF shall have the right to establish and exclusively serve intermodal, transload and auto facilities at Labadie shall generally correspond to the territory within which, prior to the merger of UP and SP, a new shipper or receiver could have constructed a facility that would have been open to service by both UP and SP either directly or through reciprocal switch. Where switching districts have been established, such districts (as described in Section 9 (g) of the Settlement Agreement) shall be presumed to establish these geographic limitations.
- (d) At least 45 days before initiating service to (i) a Shipper Facility open to User at Labadie, or (ii) any New Shipper Facility on the Joint Trackage, User shall

notify Owner of its election, as provided above, of the manner by which it proposes such service be provided and the specifics of its operating plan over Owner trackage. Within 30 days of its receipt of User's proposed plan (provided, however, that the terms of the "2-to-1" Point Identification Protocol (Exhibit E to the Settlement Agreement) shall govern with respect to access and service by User to "2-to-1" Shipper Facilities at Labadie), Owner shall notify User of its approval or disapproval of User's plan (including any plans for construction). Owner's approval of such plan shall not be unreasonably withheld.

- (e) In the event a request is approved by Owner, Owner shall construct and maintain the trackage to access the Shipper Facility at User's sole cost and expense, provided, that Owner, subject to the provisions of the third paragraph of Section 2(b) regarding payment of fifty percent (50%) of the cost thereof plus interest, if applicable, may elect to participate in the cost of the trackage at that time or in the future.
- (f) In the event Owner disapproves of User's proposed operating plan, Owner shall provide an explanation in writing to User of its reasons for disapproval, and Owner shall propose an alternative operating plan that would be acceptable to Owner and also be no more onerous than the operating plan that the Owner would establish for service provided by Owner. If Owner approves User's operating plan but establishes conditions on the approval, those conditions shall be set forth in writing and shall be no more onerous than Owner would establish for service provided by Owner. User shall have the right, upon 180 days' prior written notice to Owner, to change its election; provided, however, that User shall not change any such election more than once every five years. User shall reimburse Owner for any costs incurred by Owner in connection with any change in its election.
- (g) It is the intent of the parties that User shall, where sufficient volume exists, be able to utilize its own terminal facilities for traffic handled by User under the terms of this Agreement. Facilities or portions thereof presently utilized by Owner shall, pursuant to a separate written agreement entered into between the parties, be provided by Owner to User by lease or purchase at normal and customary charges. Upon request of User and subject to availability and capacity, Owner shall, pursuant to a separate written agreement entered into between the parties, provide User with terminal support services, including fueling, running repairs and switching. Owner shall be reimbursed by User for such services at Owner's normal and customary charges. Where terminal support services are not required, User shall not be assessed additional charges for train movement through a terminal.
- (h) User may, subject to Owner's written consent which shall not be unreasonably withheld, use agents for limited feeder service on the Joint Trackage.

- (i) User shall have the right to connect, for movements in all directions, with its present lines (including existing trackage rights) at points where its present lines (including existing trackage rights) intersect with Trackage Rights Lines or lines it shall purchase or the Joint Trackage.
- (j) User agrees that when entering, exiting, setting out or picking up from its existing lines of railroad or trackage rights lines (“**User's Operations**”), it shall do so without unreasonable interference or impairment of the Joint Trackage. However, except as expressly agreed otherwise by the parties in writing, User agrees that, if sufficient trackage is not available at such location(s) to facilitate User's Operations, Owner may require User to construct additional trackage (“**Additional Trackage**”) in the vicinity of such location(s) as may be required in the reasonable judgment of Owner, the cost and expense of which shall be borne by User. In the event such Additional Trackage is constructed at the cost and expense of User, and Owner shall choose to use such Additional Trackage, Owner shall pay User fifty percent (50%) of the cost of constructing such Additional Trackage plus per annum interest thereon at a rate equal to the average paid on 90-day Treasury Bills of the United States Government as of the date of completion until the date of use by Owner commences. Per annum interest shall be adjusted annually on the first day of the twelfth (12th) month following the date of completion and every year thereafter on such date, based on the percentage increase or decrease, in the average yield of 30-year U.S. Treasury Notes for the prior year compared to their average yield in first year of completion of the Additional Trackage. Each annual adjustment shall be subject, however, to a cap (up or down) of two percentage points of the prior year's interest rate (i.e., the adjustment may not exceed an amount equal to two percentage points of the immediately preceding year's interest rate).
- (k) Owner agrees not to take unilateral action that would materially impair the ability of User to provide competitive service over the Joint Trackage.
- (l) In the event Owner institutes directional operations over a Joint Trackage line,
  - (i) Owner shall provide User with reasonable notice of the planned institution of such operations and shall adjust, as appropriate, the trackage rights granted to User pursuant to this Agreement so as to avoid impairing User's ability to provide competitive service on such line, and
  - (ii) User shall operate in accordance with the flow of traffic established by such directional operation; provided, however, that any rights granted to User as a result of Owner's institution of directional operations shall be Overhead Trackage Rights only, and provided further that User shall have the right, on any line over which directional operations have been instituted (including lines on which User received Overhead Trackage Rights to serve a point listed or described in Section 8(i) of the Settlement Agreement or a build-in/build-out line), to operate against the flow of traffic if it is reasonably necessary to do so for User to provide competitive service to shippers on the line which are accessible to User (including service to New Shipper Facilities and build-in/build-out lines) over such line including but not limited to circumstances where Owner operates

against the flow of traffic with trains of the same or similar type for the same shipper(s) or for shipper(s) in the same general area. In the event User operates against the flow of traffic as set forth above and Owner's operations impact BNSF's ability to provide competitive service to shippers, Owner shall be obligated to provide an alternative route or routes, or means of access commercially equivalent, to minimize operating inconvenience to User, consistent with ensuring that BNSF can provide competitive service.

- (m) In the event Owner determines to sell or remove from service a Joint Trackage line and/or any associated facilities, Owner shall provide User with reasonable written notice of such determination. Any such sale to a third party shall be expressly made subject to the terms and conditions of the Settlement Agreement and this Agreement, and Owner shall remain responsible as to the obligations imposed on it herein in the event the third-party purchaser does not fulfill those obligations.
- (n) In the event Owner determines to terminate or not renew a lease to an Existing Transload Facility to which User gained access as a result of the Settlement Agreement or the conditions imposed on the UP/SP merger and User has previously entered into a contract to provide transportation services to the Existing Transload Facility, Owner shall extend the lease for the remaining period of such transportation contract or for a period not to exceed 24 months, whichever period is shorter.
- (o) In the event, for any reason, any of the trackage rights granted under this Agreement cannot be implemented because of the lack of sufficient legal authority to carry out such grant, then Owner shall be obligated to provide an alternative route or routes, or means of access of commercially equivalent utility at the same level of cost to User as would have been provided by the originally contemplated rights.

**Section 3. GTM Rates**

- (a) In addition to other payments to be made under this Agreement, User shall [REDACTED] remit to Owner for the use of the Joint Trackage in the operation of its Equipment therealong and thereover, the total amount of [REDACTED]

- (i) [REDACTED]

(ii) [REDACTED]

(b) For the purpose of computing the GTM Rates [REDACTED]  
[REDACTED]

In the event that for whatever reason there is a change in the Joint Trackage that results in a change in the mileage provided herein, [REDACTED]  
[REDACTED]

(c) The GTM Rates set forth in Section 3(a) of this Agreement shall be subject to adjustment annually, [REDACTED]:

The GTM Rates shall be adjusted upward or downward effective [REDACTED] of each year during the term of this Agreement by the difference in the [REDACTED]  
[REDACTED] "URCS costs" shall mean costs developed using the Uniform Rail Costing System.

Upon every fifth anniversary of the Effective Date of this Agreement ("Anniversary Date"), either party may request, on 90 days' written notice prior to the Anniversary Date, that the parties jointly review the operations of the adjustment mechanism and renegotiate its application. If the parties do not agree on the need for or extent of adjustment to be made upon such renegotiation, either party may request binding arbitration under Section 6 of the General Conditions. It is the intention of the parties that rates and charges for trackage rights and services granted under this Agreement reflect the same basic relationship to operating costs as upon execution of this Agreement.

(d) [REDACTED]

[REDACTED]

**Section 4. Reciprocal Switching Charges**

In addition to the other payments to be made under this Agreement, User shall remit to Owner the following amounts for reciprocal switching User elects to be performed by Owner under this Agreement.

- (a) Except as provided in Subsection 4(b) below, Owner shall receive [REDACTED] per rail car for all reciprocal switching pursuant to the terms of this Agreement.
- (b) Owner shall receive [REDACTED] per rail car for all reciprocal switching pursuant to the terms of this Agreement of rail cars constituting part of a Unit Train that contain commodities within the following Standard Transportation Commodity Codes (“STCC”): [REDACTED]
- (c) All such reciprocal switching services shall be provided on an impartial basis.
- (d) Unless mutually agreed otherwise, in the event User’s access to a Shipper Facility pursuant to this Agreement is effected by means of a [REDACTED]

[REDACTED]

The foregoing provisions shall not apply with respect to third parties performing switching/unloading for and on behalf of the Ameren Corporation’s (or its successor entity) facility at Labadie.

- (e) Charges set forth in this Section 4 shall be adjusted [REDACTED] of each year during the term of this Agreement to reflect [REDACTED] in the Rail Cost Adjustment Factor (“**Index**”), not adjusted for changes in productivity (“**RCAF-U**”), published by the STB or successor agency or other organization. In the event the RCAF-U is no longer maintained, the parties shall select a substantially similar index and failing to agree on such an index, the matter shall be referred to binding arbitration under Section 6 of the General Conditions. [REDACTED]

[REDACTED] but under no circumstances shall the adjusted rate be less than the initial reciprocal switching charges provided in this Agreement.

## **Section 5. Additions**

- (a) Except as may be expressly agreed by the parties otherwise in writing, expenditures for any future Changes in and/or Additions to the Joint Trackage, such as, but not limited to, sidings (other than Capital Improvements), Centralized Traffic Control, grade separations, interchange trackage, and future connections (other than connections), shall be handled as follows:
- (i) Owner shall bear the cost of all Changes in and/or Additions to the Joint Trackage that are necessary to achieve the benefits of the consolidation of UP and SP as outlined in the application filed with the STB in Finance Docket No. 32760 for UP to control SP. The operating plan filed by UP and SP in support of that application shall be given presumptive weight in determining what Changes in and/or Additions to the Joint Trackage are necessary to achieve these benefits.
  - (ii) Any Changes in and/or Additions to the Joint Trackage other than those covered by subparagraph (i) of this Section 5 shall be shared by Owner and User on the basis that the parties' respective GTMs operated over the Joint Trackage bear to total GTMs operated over the Joint Trackage for the 12-month period immediately prior to the month work on the project is commenced. The use of Joint Trackage by any third party shall be attributed to Owner for purposes of computing respective GTMs for purposes of this Section.
- (b) User shall have the right to construct, or have constructed for it, for its sole use exclusively owned or leased facilities, including, without limitation, automobile, transload and intermodal facilities, storage in transit facilities, team tracks, sidings, and yards along the Joint Trackage pursuant to the following terms and conditions:
- (i) User shall submit its plans to Owner for its review and approval, which approval shall not be unreasonably withheld or delayed;
  - (ii) In the case of the construction of team tracks and ancillary facilities, including loading facilities and necessary track connections, the parties shall work cooperatively with each other to enable such construction;
  - (iii) Such exclusively owned or leased and used facilities shall not (i) impair Owner's use of the Joint Trackage, (ii) prevent or unduly hinder Owner's access to existing or future customers or facilities served from the Joint Trackage, or (iii) impair access to other exclusively owned facilities then in existence; and
  - (iv) If jointly owned or leased and used property is to be used for the construction of such exclusively owned or leased and used facilities, User shall reimburse Owner for its ownership of the jointly owned property so utilized at 50% of its then current fair market value. If User

proposes to use property of Owner for the construction of exclusively owned or leased and used facilities, User shall reimburse Owner at 100% of the then current fair market sale or lease value of the property.

**Section 6. Notices**

All notices, demands, requests, submissions and other communications which are required or permitted to be given pursuant to this Agreement shall be given by either party to the other in writing and shall be deemed properly served if delivered by hand, or mailed by overnight courier or by registered or certified mail, return receipt requested, with postage prepaid, to such other party at the address listed below:

If intended for Owner:

Executive Vice President-General Manager  
Room 1206  
1416 Dodge Street  
Omaha, Nebraska 68179

With a copy to:

Joint Operations Facilities  
Room 1200  
1416 Dodge Street  
Omaha, Nebraska 68179

If intended for User:

AVP Contracts and Joint Facilities  
2600 Lou Menk Drive  
P.O. Box 961034  
Fort Worth, Texas 76161-0034

Notice of address change may be given any time pursuant to the provisions of this Section 6.

**Section 7. Settlement Agreement**

The provisions, rights and obligations set forth in the Settlement Agreement, as amended and supplemented from time to time and as interpreted and applied by the Surface Transportation Board, shall survive, and nothing herein shall be deemed to repeal or supersede the Settlement Agreement or any of those provisions, rights and obligations. If any conflict between the Settlement Agreement and this Agreement (including the General Conditions) shall arise, the provisions of the Settlement Agreement, as amended and supplemented, shall govern. Capitalized terms not otherwise defined in this Agreement shall have the same meanings in this Agreement as they are given in the Settlement Agreement as it may be modified from time to time.

**Section 8. Term**

This Agreement shall be effective as of \_\_\_\_\_, 2021 and shall remain in effect for an initial term of 99 years (“**Initial Term**”), subject to renewal for successive 99-year periods (each, an “**Extension**”) upon mutual written agreement of the parties to that effect within 90 days prior to the conclusion of the Initial Term or an Extension, as applicable, and except to the extent expressly provided otherwise herein.

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

**UNION PACIFIC RAILROAD COMPANY**

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

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

**BNSF RAILWAY COMPANY**

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

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

**EXHIBIT A**



## **EXHIBIT B GENERAL CONDITIONS**

### **Section 1. DEFINITIONS**

To the extent used in this Exhibit B and/or the Agreement, the following terms shall have the meanings indicated below:

1.1 “**AAR**” shall mean the Association of American Railroads.

1.2 “**Agreement**” shall mean that certain Trackage Rights Agreement between Owner and User dated \_\_\_\_\_, 2021, to which this Exhibit B is attached.

1.3 “**Annual**” shall mean a calendar year.

1.4 “**Capacity Improvements**” shall mean projects or improvements that expressly increase the capacity or through-put over the Joint Trackage or a portion thereof and provide utility beyond ordinary and/or programmed maintenance, the cost of which is chargeable in whole or in part to Property Accounts under STB accounting standards in effect as of the effective date of the Agreement.

1.5 “**Car**” shall mean one (1) rail car except in the case of an articulated rail car where the number of cars shall be determined by the AAR Car Type Code as defined in the Universal Machine Language Equipment Register Specification Manual or such successor manual, if any. The second character in the Car Type Code field covering codes “Q” and “S” will be factors used to determine the car count for an articulated unit. For example, AAR Car Type Code S566 would be equal to five (5) cars as an articulated rail car with a Car Type Code of S566 has five wells capable of handling 40’ to 48’ containers in each well. Notwithstanding the foregoing, car count data for articulated units are subject to change upon further development of technology for separate units using car numbers. Each locomotive shall be counted as two (2) cars.

1.6 “**Cars Handled Proportion**” shall mean the Cars handled over the Joint Trackage by or for a party divided by the total number of Cars handled by or for all parties using the Joint Trackage, during the same period. For the purpose of computing such Cars Handled Proportion, Equipment engaged in work service pertaining to construction, maintenance or operation of the Joint Trackage, Capacity Improvements or Changes in and/or Additions to the Joint Trackage shall not be counted and Cars of third parties shall be attributed to the Owner.

1.7 “**Car Mile**” shall mean the distance a Car travels over one (1) mile of track included in the Joint Trackage.

1.8 “**Car Mile Handled Proportion**” shall mean the Car Miles handled over the Joint Trackage by or for a party divided by the total number of Car Miles handled by or for all parties using the Joint Trackage, during the same period. For the purpose of computing the Car Miles Handled Proportion, Equipment engaged in work service pertaining to construction, maintenance

or operation of the Joint Trackage, Capacity Improvements or Changes in and/or Additions to the Joint Trackage shall not be counted and Car Miles of third parties shall be attributed to the Owner.

1.9 “**Changes in and/or Additions to**” shall mean line changes to or realignment of the Joint Trackage or a portion thereof and/or new infrastructure on the Joint Trackage that is not otherwise a replacement for existing infrastructure, the cost of which is chargeable in whole or in part to Property Accounts (defined below) under STB (defined below) accounting standards in effect as of the effective date of the Agreement.

1.10 “**Dimensional Traffic**” shall mean Equipment that exceeds 17 feet, 0 inches above the top of rail and/or 11 feet, 0 inches wide and/or any freight on a Car exceeding 17 feet, 0 inches above the top of rail and/or 11 feet, 0 inches wide and/or freight that over hangs the end sills of the Car.

1.11 “**Equipment**” shall mean (i) trains, locomotives, Cars (loaded or empty), intermodal units, and cabooses, (ii) vehicles and machinery which are capable of being operated on railroad tracks or right-of-way that, at the time of any occurrence, are being operated on, over or along the Joint Trackage, and/or (iii) vehicles and machinery that, at the time of any occurrence, are located on, over or along the Joint Trackage for the purpose of maintenance or repair thereof or the clearing of wrecks thereon.

1.12 “**GTM**” shall mean gross ton mile which is the weight in tons for Equipment and lading transported over one (1) mile of track included in the Joint Trackage.

1.13 “**GTM Handled Proportion**” shall mean the GTMs handled over the Joint Trackage by or for a party divided by the total number of GTMs handled by or for all parties using the Joint Trackage, during the same period. For the purpose of computing such GTM's Handled Proportion, Equipment engaged in work service pertaining to construction, maintenance or operation of the Joint Trackage, Capacity Improvements or Changes in and/or Additions to the Joint Trackage shall not be counted and GTMs of third parties shall be attributed to the Owner.

1.14 “**Hazardous Materials**” shall mean and include all toxic or hazardous substances, pollutants, waste or contaminants to which liability or standards of conduct may be imposed under any Environmental and Safety Requirements including, without limitation, (a) petroleum or petroleum based products or any derivatives or hazardous constituents thereof or any additives thereto, (b) fuels (including motor fuels, diesel, methane and other natural gas), (c) waste oils, lubricating oils and cleaning solvents, (d) ammonia, glycol and freon, (e) any “Hazardous Substances,” “Hazardous Materials,” “Regulated Substances” or “Toxic Substances,” or similarly defined terms, as set forth in any Legal Requirements, and/or (f) any other substances at levels greater than those allowed by applicable Legal Requirements.

1.15 “**Joint Trackage**” shall mean the track structure of Owner as described in the Agreement including necessary right-of-way and all appurtenances, signals, communications, and facilities of Owner and all Changes in and/or Additions, including any Capacity Improvements, to said track structure now or in the future.

1.16 “**Ordinary Maintenance**” shall mean usual and routine work or maintenance performed in the daily upkeep of the Joint Trackage, consistent with industry custom and practice, the cost of which is not chargeable in whole or in part to Property Accounts under STB accounting standards in effect as of the effective date of this Agreement.

1.17 “**Owner**” shall have the meaning given to such term in the Agreement.

1.18 “**Programmed Maintenance**” shall mean work or maintenance that is normally pre-planned, non-periodic and generally involves substantial replacements or renewals of existing assets, the cost of which is chargeable to Property Accounts under STB accounting standards in effect as of the effective date of this Agreement. Further, the replacement or renewal should have the same utility as the asset replaced/renewed, without necessarily reproducing exactly any particular characteristic of the original asset or property.

1.19 “**Property Accounts**” shall mean accounts so designated under the Uniform System of Accounts for Railroad Companies prescribed by the STB, or any replacement of such system prescribed by the applicable federal regulatory agency, if any, and used by the parties hereto.

1.20 “**STB**” shall mean the Surface Transportation Board of the United States Department of Transportation or any successor agency.

1.21 “**User**” shall have the meaning given to such term in the Agreement.

## **Section 2. MAINTENANCE, ADDITIONS, OPERATION, AND CONTROL**

2.1 Owner shall have sole charge of the maintenance and repair of the Joint Trackage with its own supervisors, labor, materials and equipment. Owner, from time to time, may make such Changes in and/or Additions to the Joint Trackage as shall be required by Legal Requirements, or as Owner, in its sole discretion, shall deem necessary, subject to Section 2.2. Such Changes in and/or Additions to the Joint Trackage shall become a part of the Joint Trackage or in the case of retirements shall be excluded from the Joint Trackage.

2.2 Unless otherwise mutually agreed to by the parties in writing, Owner shall, (i) keep and maintain the Joint Trackage on a consistent basis at no less than the track standard designated in the timetable in effect on September 25, 1995, including special instructions for the Joint Trackage as of the date of the Agreement, (ii) maintain at least the physical capacity of the Joint Trackage as of the effective date of the Agreement (i.e., number of main tracks, support tracks, signal systems, rail weight, line clearances, etc.), and (iii) be responsible for construction of any Capacity Improvements and Changes in and/or Additions to the Joint Trackage, the cost of which shall be subject to the cost sharing provisions of Section 5 of the Agreement as shall be necessary to accommodate the traffic of Owner and User while maintaining existing service standards (including transit times) in effect on the effective date of the Agreement. In the event that User desires that the Joint Trackage be improved to a condition in excess of the standard set forth in this Section 2.2, or desires that other Changes in and/or Additions to be made to the Joint

Trackage, Owner may, in Owner's sole discretion, make such Changes in and/or Additions to the Joint Trackage if funded in advance solely by User. Thereafter, such Changes in and/or Additions to the Joint Trackage shall become part of the Joint Trackage and shall be maintained by Owner in compliance with the Agreement.

2.3 Owner shall have the exclusive right to perform all construction, operation, maintenance, repair and renewal of the Joint Trackage. Owner shall make reasonable efforts to ensure that User is given the same advance notice of maintenance plans and schedules as is provided to Owner's personnel. Notwithstanding anything to the contrary contained in the Agreement, User shall not, by reason of Owner's performing or failing or neglecting to perform any construction, operation, maintenance, repair, renewal, or management of the Joint Trackage, have or make and **USER HEREBY WAIVES AND RELEASES ANY CLAIMS OR DEMANDS AGAINST OWNER FOR ANY LOSS, DAMAGE, DESTRUCTION, INJURY, OR DEATH WHATSOEVER RESULTING FROM OWNER'S PERFORMANCE OR FAILURE TO PERFORM CONSTRUCTION, OPERATION, MAINTENANCE, REPAIR, RENEWAL OR MANAGEMENT OF THE JOINT TRACKAGE OR FROM ANY CONDITION OR DEFECT OF THE JOINT TRACKAGE REGARDLESS OF ANY NEGLIGENCE, FAULT OR MISCONDUCT, IN WHOLE OR IN PART, OF OWNER.**

2.4 The trackage rights granted hereunder shall give User access to and joint use of the Joint Trackage equal to Owner's use of the Joint Trackage. The management, operation (including dispatching) and maintenance of the Joint Trackage shall, at all times, be under the exclusive direction and control of Owner. Additionally, the movement of Equipment over and along the Joint Trackage shall at all times be subject to the exclusive direction and control of Owner's authorized representatives and in accordance with such reasonable operating rules as Owner shall from time to time institute (including, without limitation, Owner's General Code of Operating Rules). User shall, at User's sole cost and expense, obtain, install and maintain necessary communication equipment to allow User's Equipment to communicate with Owner's dispatching and signaling facilities. Owner shall provide User with prior notice of the adoption or implementation of new communication or signaling systems on the Joint Trackage which have not generally adopted in the railroad industry as of the date of such adoption or implementation.

2.5 If the use of the Joint Trackage shall at any time be interrupted or traffic thereon or thereover be delayed for any cause, neither party shall have or make any claim against the other for loss, damage or expense caused by or resulting solely from such interruption or delay.

2.6 Owner may from time to time substitute any track or tracks included in the Joint Trackage and delineated on Exhibit A to the Agreement as long as User is provided with a continuous route of equal utility for the operations of its Equipment between the termini of the Joint Trackage. When substitute tracks are used as provided herein, the terms and conditions of the Agreement shall apply to User's access and use of such substitute tracks as if all movement had been made over the Joint Trackage.

2.7 Unless provided otherwise in the Agreement, each party shall be responsible for furnishing, at its sole cost and expense, all labor, fuel, train supplies and other supplies necessary for the operation of its own Equipment over the Joint Trackage. In the event a party furnishes

labor, fuel or train and other supplies to another party, then the receiving party shall promptly, upon receipt of billing therefor, reimburse the furnishing party for its reasonable costs thereof, including customary additives.

2.8 Unless provided otherwise in the Agreement, User shall be responsible for the reporting and payment of any mileage, per diem, use or rental charges accruing on Equipment in User's account on the Joint Trackage. Except as may be specifically provided for in the Agreement, nothing contained herein is intended to change practices with respect to interchange of traffic between the parties or with other carriers on or along the Joint Trackage.

2.9 (a) Except as otherwise may be provided in the Agreement, User shall operate its Equipment over the Joint Trackage with its own employees. Before any employees of User are assigned or permitted to operate Equipment on, over or along the Joint Trackage, and from time to time thereafter as and when reasonably requested by Owner, such employees shall be required to pass the applicable rules examinations required for employees of Owner. User may conduct such examinations upon obtaining Owner's prior written consent. If Owner conducts examinations of User's employees, then User shall pay Owner a reasonable fee for each employee being examined. User shall certify and qualify its locomotive engineers and other employees (including, without limitation, pilots) in compliance with Legal Requirements and the Agreement. User's written program covering certification and qualification of User's employees shall be subject to Owner's review and approval prior to User commencing operations as contemplated herein.

(b) Notwithstanding any examination set forth herein, User shall be responsible for ensuring that its employees are certified and qualified in compliance with Legal Requirements and shall ensure that all its employees engaged in or connected with the operations of User on, over or along the Joint Trackage shall, at all times, be in compliance with Legal Requirements. Unless provided otherwise in the Agreement, pending qualification of train and engine crews of User or as requested by User thereafter, Owner shall furnish a pilot or pilots, at the sole expense of User, as deemed necessary by Owner to assist in operating trains of User on, over or along the Joint Trackage.

Upon request of User and at User's sole cost and expense, Owner shall qualify one or more of User's supervisory officers as pilots and such supervisory officer or officers so qualified shall further qualify employees of User engaged in or connected with User's operations on, over or along the Joint Trackage.

2.10 If any employee of User shall neglect, refuse or fail to abide by Owner's rules, instructions and restrictions governing the operation on, over or along the Joint Trackage or Legal Requirements, such employee shall, upon written request of Owner, be prohibited by User from working on, over or along the Joint Trackage. If either party shall deem it necessary to hold a formal investigation to establish such neglect, refusal or failure on the part of any employee of User, then upon such notice presented in writing, Owner and User shall promptly hold a joint investigation in which the parties concerned shall participate and bear the expense for their

respective officers, counsel, witnesses and employees participating in such investigation. Notice of investigations to User's employees pursuant to this Section shall be given by User's officers, and such investigations shall be conducted in accordance with the terms and conditions of schedule or labor agreements between User and its employees. If, in the judgment of Owner, the result of any investigation warrants that an employee of User be withdrawn from service on, over or along the Joint Trackage, then User shall withdraw such employee from such service upon Owner's written request for withdrawal. User releases, indemnifies, defends and holds Owner harmless from and against any and all claims and expenses arising from or related to any withdrawal pursuant to this Section.

If the disciplinary action is appealed by an employee of User to the National Railroad Adjustment Board or other tribunal lawfully created to adjudicate such cases, and if the decision of such board or tribunal sustains the employee's position, such employee shall not thereafter be barred from service on, over or along the Joint Trackage.

2.11 If any Equipment of User is bad ordered enroute on the Joint Trackage and (i) it is necessary that it be set out, and (ii) only light repairs to the Equipment are required, then such bad ordered Equipment shall be promptly repaired and removed from the Joint Trackage by User. Owner may, upon request of User and at User's sole cost and expense, furnish the required labor and material and perform light repairs to make such bad ordered Equipment safe for movement. The employees and Equipment of Owner shall be considered Sole Employees (as hereinafter defined) of User and Sole Property (as hereinafter defined) of User while performing repairs, moving Equipment or traveling to or from Owner's terminal pursuant to the preceding sentence. However, should Owner's employees after repairing such bad ordered Equipment for User move directly to perform service for Owner's benefit rather than returning to Owner's terminal, then User's exclusive time and liability will end when Owner's employees depart for work to be performed for Owner's benefit. In the case of repairs by Owner to freight cars in User's account, billing therefor shall be in accordance with the field and office manuals of the interchange rules, adopted by the AAR (hereinafter collectively called "**Interchange Rules**"), in effect on the date of performance of the repairs. Owner shall then prepare and submit billing directly to and collect from the car owner for car owner responsibility items as determined under said Interchange Rules, and Owner shall prepare and submit billing directly to and collect from User for handling line responsibility items as determined under said Interchange Rules. If any car owner refuses or otherwise fails to make payments for car owner responsibility items, then User shall be responsible for paying Owner for such repairs. Repairs to locomotives shall be billed as provided for in Section 3 of these General Conditions.

2.12 If Equipment of User shall become derailed, wrecked, or otherwise disabled while upon the Joint Trackage, it shall be re-railed or cleared by Owner, except that employees of User may, with Owner's permission, re-rail User's derailed Equipment on the Joint Trackage whenever use of motorized on- or off-track equipment is not required and prior permission was granted by Owner. Any rerailing of Equipment by User shall be subject to, and User agrees to follow, directions of Owner. Owner reserves the right to determine whether to re-rail or clear Equipment of User when, in the sole judgment of Owner, Owner deems it advisable to do so to minimize delays and interruptions to train movement. The reasonable costs and expenses of rerailing or clearing derailed, wrecked, or disabled Equipment and any Loss or Damage incidental thereto

shall be borne by the parties in accordance with Section 5 of these General Conditions. Work and services performed under this Section shall be billed in accordance with Section 3 of these General Conditions.

2.13 In the event Equipment of User shall be forced to stop on the Joint Trackage, and such stoppage is due to insufficient hours of service remaining among User's employees, or due to mechanical failure of User's Equipment (other than bad ordered Equipment subject to light repairs pursuant to Section 2.11), or to any other cause not resulting from an accident or derailment (including the failure of User to promptly repair and clear bad ordered Equipment pursuant to Section 2.11), and such Equipment is unable to proceed, or if a train of User fails to maintain the speed required by Owner on the Joint Trackage, or if, in emergencies, disabled Equipment is set out of User's trains on the Joint Trackage, Owner shall have the option, without prejudice to any other rights or remedies which may be applicable, to furnish motive power or such other assistance (including but not limited to the right to re-crew User's train) as may be necessary to haul, help or push such Equipment, or to properly move the disabled Equipment off the Joint Trackage. The reasonable costs and expenses of rendering such assistance shall be borne by User. Work and services provided under this Section shall be billed in accordance with Section 3 of these General Conditions.

2.14 User shall pay to Owner reasonable expenses incurred by Owner in the issuance of timetables made necessary solely by changes in the running time of trains of User over the Joint Trackage. If changes in running time of trains of Owner or third parties, as well as those of User, require the issuance of timetables, then User shall pay to Owner that proportion of the expenses incurred that one bears to the total number of parties changing the running time of their trains. If changes in running time of trains of Owner or third parties, but not those of User, require the issuance of timetables, then User shall not be required to pay a proportion of the expenses incurred in connection therewith.

2.15 User, at Owner's request, shall be responsible for reporting to Owner the statistical data called for in the Agreement, which may include, but is not limited to, the number and type of Equipment and GTMs operated on the Joint Trackage.

### **Section 3. BILLING**

3.1 User will furnish to Owner on or before the fifteenth (15<sup>th</sup>) day of each month a statement giving the number of GTM's operated by User over the Joint Trackage for the preceding month in a format mutually agreed to by the parties. Such data shall include sufficient detail for the Owner to verify the GTM's supplied.

3.2 Invoices and billings under the Agreement shall be in a mutually agreed upon format. Each invoice shall contain sufficient detail to permit computation of payments due thereunder. Invoices shall be prepared according to the rules, additives, and equipment rental rates as published by the Owner. User shall pay Owner, at such location designated by Owner from time to time, all compensation and charges that User is required to pay pursuant to the terms and conditions of the Agreement. User shall pay invoices in United States money within thirty (30)

days after the invoice date. Invoices shall include a statement of the amount due and services rendered during the applicable billing time period. In the event that either party hereto shall fail to pay any monies due to the other party hereto within thirty (30) days after the invoice date, then such first party shall pay interest on such unpaid sum from thirty (30) days after its invoice date to the date of payment by such first party at an annual rate equal to (i) the greater of (a) for the period January 1 through June 30, the prime rate last published in the *Wall Street Journal* in the preceding June plus two and one-half percent (2 ½%), or (b) twelve percent (12%), or (ii) the maximum rate permitted by law, whichever is less.

3.3 Errors or disputed items in any invoice shall not be deemed a valid excuse for delaying payment of undisputed portions of such invoice. User shall notify Owner in writing of any errors or disputed items within fifteen (15) days after such receipt of Owner invoices. User and Owner shall work together in good faith to resolve any billing errors or disputes within thirty (30) days of Owner receiving User's written notice setting forth such errors and/or disputes. If the parties are unable to resolve the billing errors or disputes in accordance with this provision, the parties may proceed to arbitration. Notwithstanding the foregoing, no dispute or exception to any invoice shall be honored, recognized, or considered after the expiration of three (3) years from the last day of the calendar month during which the invoice is rendered and no invoice shall be rendered later than three (3) years (i) after the last day of the calendar month in which the expense covered thereby is incurred, or (ii) if in connection with a project for which a roadway completion report is required, after the last day of the calendar month in which the roadway completion report is made covering such project, retroactive up to three (3) years from date of billing, or (iii) in the case of claims disputed as to amount or liability, after the amount is settled and/or the liability(ies) established. This provision shall not limit the retroactive adjustment of billing made pursuant to exception taken to original accounting by or under authority of the STB or retroactive adjustment of wage rates and settlement of wage claims.

Books, accounts, and records of each party that are reasonably related to the subject matter of this Agreement shall at all reasonable times be open to inspection by the authorized representatives and agents of the parties.

3.4 If any amount becomes payable by Owner to User under the Agreement, the provisions of Section 3 of this Exhibit "B" shall apply to Owner as the paying party.

3.5 If User fails to make any undisputed payment when due and such failure continues for a period of ten (10) days after notice in writing of such failure is given by Owner to User, or if User fails to cure a User default within the time period set forth below or in the Agreement, then Owner may, as its election, exclude User from using or operating on, over or along the Joint Trackage until such failure is cured by User. The parties also agree that any failure to make any payment which is the subject of arbitration or litigation between the parties shall not be deemed a default hereunder, pending the final decision in such arbitration or litigation. In the event User is excluded from use of the Joint Trackage, User shall surrender to Owner all said Joint Trackage and shall have no claim or demand against Owner for such exclusion.

Owner may waive any default of User hereunder, but no action of Owner in waiving any default shall affect or impair any other rights of Owner resulting therefrom.

#### **Section 4. COMPLIANCE**

4.1 With respect to operation of Equipment on, over or along the Joint Trackage, User shall comply with all Legal Requirements. If any failure by User to comply with Legal Requirements shall result in a fine, penalty, cost or charge being imposed or assessed on or against BNSF, BNSF shall give prompt notice of such fine, penalty, cost or charge to User and User shall promptly reimburse, indemnify, defend and hold BNSF harmless from and against any such fine, penalty, cost or charge and all expenses and reasonable attorneys' fees incurred in connection therewith.

4.2 User also agrees to comply fully with all Environmental and Safety Requirements. User shall not treat or dispose of Hazardous Materials on the Joint Trackage. User further agrees to furnish Owner (if requested) with proof, satisfactory to Owner that User is in compliance with this Section 4.

User shall be responsible for filing any reports required under Legal Requirements for any derailment, accident, incident, vandalism, bad ordered Equipment, wreck (hereinafter collectively called, for purposes of Section 4 and Section 5, "**Derailment**") involving Hazardous Materials on or along any segment of the Joint trackage in connection with User's Equipment and/or Equipment operated by or on behalf of User. User shall advise Owner and the owner/shipper of the Hazardous Materials involved in the Derailment immediately.

In the event of a Derailment, Owner shall assume responsibility for cleaning up any release of Hazardous Materials from User's Equipment in accordance with all Legal Requirements. User may have representatives at the scene of the Derailment to observe and provide information and recommendations concerning the characteristics of the released Hazardous Materials, if any, and the cleanup effort. Any costs related to the cleanup and removal of Hazardous Materials shall be governed by Section 5 of these General Conditions.

If a Hazardous Materials release is caused by a Derailment involving Equipment of User, or by Equipment operated by User, and such release results in the contamination of real property or water on, along or adjacent to the Joint Trackage (whether such real property or water is owned by Owner or a third party), then Owner shall assume initial responsibility for emergency cleanup of such Hazardous Materials so as to mitigate further damage. After Owner's initial cleanup efforts, User shall be responsible for performing the appropriate remedial measures in compliance with Legal Requirements. Any costs associated with cleaning up real property or water on, along or adjacent to the Joint Trackage contaminated by Hazardous Materials shall be governed by Section 5 of these General Conditions.

If Hazardous Materials must be transferred to undamaged Equipment or trucks as a result of a release caused by a Derailment involving Equipment of User, or by Equipment operated by or on behalf of User, User shall perform the transfer; PROVIDED, HOWEVER, that if the Hazardous Materials are in damaged Equipment that is blocking the Joint Trackage, Owner, at its option, may transfer the Hazardous Materials and any costs associated with such transfer shall be governed by Section 5 of these General Conditions. Transfers of Hazardous Materials by User shall only be conducted after being authorized by Owner.

4.3 The total cost of clearing a Derailment, cleaning up any Hazardous Materials released during such Derailment, and/or repairing the Joint Trackage or any other property damaged thereby shall be borne by the party or parties liable therefor in accordance with Section 5 of these General Conditions.

4.4 In the event of release of Hazardous Materials caused by faulty Equipment or third parties, cleanup will be conducted as stated in Section 4 of these General Conditions.

## **Section 5. LIABILITY**

5.1 General. The provisions of this Section 5 shall apply only as between the parties hereto and are solely for their benefit. Nothing herein is intended to be for the benefit of any person or entity other than the parties hereto. It is the explicit intention of the parties hereto that no person or entity other than the parties hereto is or shall be entitled to bring any action to enforce any provision hereof against any of the parties hereto, and the assumptions, indemnities, covenants, undertakings and agreements set forth herein shall be solely for the benefit of, and shall be enforceable only by, the parties hereto. Notwithstanding anything contained in this Section 5, no provisions hereof shall be deemed to deprive Owner or User of the right to enforce or shall otherwise restrict any remedies to which they would otherwise be entitled under other provisions of the Agreement as a result of the other party's failure to perform or observe any other obligation or duty created by this Agreement. The provisions of this Section 5 shall apply as between the parties hereto irrespective of the terms of any other agreements between the parties hereto and other railroads using the Joint Trackage, and the allocation of liabilities provided for herein shall control as between the parties hereto.

5.2 Definitions and Covenants. The parties agree that for the purposes of this Section 5:

(a) The term “**Employee(s)**” of a party shall mean all officers, agents, employees and contractors of that party. Such Employees shall be treated either as “Sole Employees” or “Joint Employees”, as hereinafter specified.

(b) “**Sole Employees**” and “**Sole Property**” shall mean one or more Employees, Equipment, tools and other equipment and machinery while engaged in, en route to or from, or otherwise on duty incident to performing service for the exclusive benefit of one party. Pilots furnished by Owner to assist in operating Equipment of User shall be considered the Sole Employees of User while engaged in such operations. Equipment shall be deemed to be the Sole Property of the party receiving the same at such time as deemed interchanged under AAR rules or applicable interchange agreements, or when such party is responsible for the car hire or per diem for the Equipment under agreement between the parties.

(c) “**Joint Employee**” shall mean one or more Employees while engaged in maintaining, repairing, constructing, renewing, removing, inspecting or managing the Joint Trackage or making Changes in and/or Additions to the Joint Trackage for the

benefit of both of the parties hereto, or while preparing to engage in, en route to or from, or otherwise on duty incident to performing such service for the benefit of both parties.

(d) **“Joint Property”** shall mean the Joint Trackage and all appurtenances thereto, and all Equipment, tools and other equipment and machinery while engaged in maintaining, repairing, constructing, renewing, removing, inspecting, managing or making Changes in and/or Additions to the Joint Trackage for the benefit of both of the parties hereto, or while being prepared to engage in, en route to or from, or otherwise incident to performing such service.

(e) **“Loss and/or Damage”** shall mean injury to or death of any person, including Employees of the parties hereto, and loss or damage to any property, including property of the parties hereto and property being transported by the parties, which arises out of an incident occurring on, over or along the Joint Trackage and shall include liability for any and all claims, suits, demands, judgments and damages resulting from or arising out of such injury, death, loss or damage, except liability for punitive and exemplary damages. Loss and/or Damage shall also include all costs and expenses incidental to any claims, suits, demands and judgments (including, without limitation, attorneys' fees, court costs and other costs of investigation and litigation), the expense of clearing wrecked or derailed Equipment and the costs of environmental protection, mitigation or clean up necessitated by such wreck or Derailment and any liabilities for any third-party claims for personal injury or death, property damage, natural resource damage, or any penalties, judgments or fines associated with a release of any contaminants resulting from such wreck or Derailment. Loss and/or Damage shall be reduced by any amount recovered from third parties.

(f) Operating employees of Owner whose service may be jointly used by the parties hereto for the movement of trains over the Joint Trackage, including, but not limited to, train dispatchers, train order operators, operator clerks and watchmen shall at the time of performing their services be deemed to be Sole Employees of the party hereto for whose benefit said services may be separately rendered (during the time they are so separately rendered) and be deemed to be Joint Employees of the parties hereto at such time as their services may be rendered for the parties' joint benefit.

(g) All Employees, Equipment, tools and other equipment and machinery other than as described in (b), (c), (d) or (f) above or in Section 5.4 shall be deemed the Sole Employees of the employing party and the Sole Property of the using party.

(h) Except as otherwise provided in Section 5.2(i) below, any railroad allowed to use of any portion of the Joint Trackage, now or in the future, that is not a party to this Agreement shall, as between the parties hereto, be regarded in the same light as a third party. Without limiting the generality of the foregoing, neither of the parties hereto assumes any responsibility to the other under the provisions of this Agreement for any Loss and/or Damage occasioned by the acts or omissions of any employees of any such other railroad, or for any Loss and/or Damage which such other railroad shall be

obligated to assume in whole or in part pursuant to law or any agreement relating to such other railroad's use of any portion of the Joint Trackage.

(i) For the purpose of this Section 5, Equipment of any foreign railroad company being detoured over the Joint Trackage, and all persons other than Joint Employees engaged in moving such Equipment, shall be considered the Equipment and employees of the party hereto under whose detour agreement or other auspices such movement is being made.

5.3 Reimbursement and Defense. The parties agree that:

(a) Each party hereto shall promptly pay for any Loss and/or Damage arising out of or connected with the liability assumed by such party under the provisions of this Section 5, and shall indemnify, defend and hold the other party harmless from and against such Loss and/or Damage. If any suit or suits shall be brought against either of the parties hereto and any judgment or judgment shall be recovered which said party is compelled to pay, and the other party shall under the provisions of the Agreement be solely liable therefor, then the party which is so liable shall promptly repay on demand the other party for any monies which it may have been required to pay, whether in the way of Loss and/or Damage, costs, fees or other expenses; and if the Loss and/or Damage in such case or cases is joint or allocated between the parties to the Agreement, the party defendant paying the same or any costs, fees or other expenses shall be reimbursed by the other party as allocated pursuant to this Agreement.

(b) Each party covenants and agrees with the other party that it will pay for all Loss and/or Damage, both as to persons and property, and related costs which it has herein assumed, or agreed to pay, the judgment of any court in a suit by a third party or parties to the contrary notwithstanding, and will forever indemnify, defend and hold harmless the other party, its successors and assigns, from and against all liability and claims therefor, or by reason thereof, and will pay, satisfy and discharge all judgments that may be rendered by reason thereof, and all costs, charges and expenses incident thereto.

(c) Each party hereto shall have the sole right to settle, or cause to be settled for it, all claims, and the sole right to defend or cause to be defended all suits, for Loss and/or Damage for which such party is solely liable under the provisions of this Section 5.

(d) User shall provide written notice to Owner of any accidents or events resulting in Loss and/or Damage within seven (7) days of its discovery or receipt of notification of such occurrence.

(e) In the event both parties hereto may be liable for any Loss and/or Damage under the provisions of this Section 5 (“**Co-liable**”), and the same shall be settled by a voluntary payment of money or other valuable consideration by one of the parties who is Co-liable therefor, release from liability shall be taken to and in the name of all the parties so Co-liable; however, no such settlement in excess of the sum of One Hundred Thousand Dollars (\$100,000) shall be made by or for any party who is Co-liable therefor

without the written consent of the other parties so liable, but any settlement made by any party in consideration of One Hundred Thousand Dollars (\$100,000) or a lesser sum shall be binding upon the other parties and allocated in accordance with this Section 5. No party shall unreasonably withhold its consent to a settlement proposed by the other party pursuant to this Section 5; provided, however, that failure by a party to secure consent from the other shall not release such other party to the extent the party who failed to obtain such consent demonstrates that the other party was not prejudiced by such failure.

(f) In the event a claim or suit is commenced against any party hereto for or on account of Loss and/or Damage for which another party hereto is or may be solely liable or Co-liable under the provisions of this Section 5, the party against whom such claim or suit is commenced shall give to such other party prompt notice in writing of the pendency of such claim or suit, and thereupon such other party shall assume or join in the defense of such claim or suit as follows: (i) if the claim or suit involves Loss and/or Damage to the Sole Employees or Sole Property of a party or its invitee or property in its care, custody or control, that party shall assume and control the investigation and defense of such claim or suit; (ii) if the claim or suit involves Loss and/or Damage to third parties, Joint Employees or the Joint Trackage, the party whose Sole Employees or Equipment were involved in the incident shall investigate and defend such claim or suit; and (iii) if such claim or suit involves Loss and/or Damage to third parties, Joint Employees or the Joint Trackage and neither or both party's Equipment and Sole Employees were involved in the incident, Owner shall investigate and defend such claim or suit; provided that the other party also may participate in the defense of any of the foregoing if it may have liability as a result of such incident.

(g) No party hereto shall be conclusively bound by any judgments against the other party, unless the former party shall have had reasonable notice requiring or permitting it to investigate and defend and reasonable opportunity to make such defense. When such notice and opportunity shall have been given, the party so notified and the other party shall be conclusively bound by the judgment as to all matters which could have been litigated in such suit, including without limitation a determination of the relative or comparative fault of each.

5.4 Wrecks and Derailment. The cost and expense of repairing bad ordered Equipment, clearing wrecks or otherwise disabled Equipment or rerailing Equipment (and the costs of repair or renewal of damaged Joint Trackage or adjacent properties) shall be borne in accordance with Section 5.5. All employees or Equipment, while engaged in, en route to or from, or otherwise incident to operating wrecker or work trains clearing wrecks, disabled Equipment or Derailments or engaged in repair or renewal of the Joint Trackage subsequent to any such wreck, disability or Derailment, shall be deemed to be Sole Employees and/or Sole Property of the party whose Equipment was wrecked, disabled or derailed. However, such employees or Equipment, while en route from performing such clearing of wrecks, disabled Equipment or Derailments or repairing or renewing the Joint Trackage to perform another type of service, shall not be deemed to be performing service incident to the instant wreck, disability or Derailment.

5.5 Allocation of Liability for Loss and/or Damage.

(a) Each party shall bear all costs of, and shall indemnify, defend and hold the other party harmless from and against, any Loss and/or Damage to its Sole Employees or its Sole Property, or property in its care, custody or control or its invitees without regard to which party was at fault.

(b) Loss and/or Damage to third parties (i.e., any person or entity other than a party hereto, a Sole Employee of either party, a Joint Employee or an invitee of either party) or their property, to Joint Employees or their property or to Joint Property shall be borne by the parties hereto as follows:

(i) If the Loss and/or Damage is attributable to the acts or omissions of only one party hereto, that party shall bear and pay for, and shall indemnify, defend and hold the other party harmless from and against, any such Loss and/or Damage.

(ii) If such Loss and/or Damage is attributable to the acts or omissions of more than one party hereto, each party shall bear and pay for, and shall indemnify, defend and hold the other party harmless from and against, any such Loss and/or Damage in accordance with a comparative negligence standard, whereby each such party shall bear and pay a portion of the Loss and/or Damage equal to the degree of causative fault or percentage of responsibility for the Loss and/or Damage attributable to that party without regard to laws limiting recovery if one party is more than fifty percent (50%) at fault.

(iii) Loss and/or Damage to third parties or Joint Employees occurring in such a way that it cannot be determined how such Loss and/or Damage came about shall be apportioned equally between the parties, provided that, without limitation, User shall not bear or incur any liability for Loss and/or Damage resulting from environmental contamination of or Hazardous Materials on or released from the Joint Trackage, except contamination or a release of Hazardous Materials from User's Equipment or Equipment operated on User's behalf or caused by or arising from the actions or omissions of User or User's Employees, and then only in accordance with the other provisions herein.

(c) The parties agree that the characterization herein of certain Employees as "Sole Employees" or "Joint Employees" is only for the purpose of allocating Loss and/or Damage suffered by those Employees.

**5.6 EXCEPT AS EXPRESSLY PROVIDED OTHERWISE HEREIN, OWNER AND USER EXPRESSLY INTEND THAT WHERE ONE PARTY IS TO INDEMNIFY THE OTHER PURSUANT TO THE TERMS OF THIS AGREEMENT, SUCH INDEMNITY SHALL INCLUDE (1) INDEMNITY FOR THE NEGLIGENCE OR ALLEGED NEGLIGENCE, WHETHER ACTIVE OR PASSIVE, OF THE INDEMNIFIED PARTY WHERE THAT NEGLIGENCE IS A CAUSE OF THE LOSS AND/OR DAMAGE; (2)**

**INDEMNITY FOR STRICT LIABILITY OF THE INDEMNIFIED PARTY RESULTING FROM A VIOLATION OR ALLEGED VIOLATION OF ANY LEGAL REQUIREMENTS BY THE INDEMNIFIED PARTY, INCLUDING BUT NOT LIMITED TO THE FEDERAL EMPLOYERS LIABILITY ACT, THE SAFETY APPLIANCE ACT, THE BOILER INSPECTION ACT, THE OCCUPATIONAL SAFETY AND HEALTH ACT, THE RESOURCE CONSERVATION AND RECOVERY ACT, THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT, THE CLEAN WATER ACT, THE OIL POLLUTION ACT, AND ANY SIMILAR STATE STATUTE IMPOSING OR IMPLEMENTING SIMILAR STANDARDS, ALL AS AMENDED FROM TIME TO TIME; AND (3) INDEMNITY FOR ACTS OR ALLEGED ACTS OF GROSS NEGLIGENCE OF THE INDEMNIFIED PARTY, OR OTHER CONDUCT ON THE PART OF THE INDEMNIFIED PARTY FOR WHICH PUNITIVE DAMAGES MIGHT BE SOUGHT.**

5.7 Notwithstanding any provision to the contrary herein, for so long as that certain Joint Facility Claims Handling Agreement, dated September 14, 2012 (as amended and supplemented from time to time) (“Claims Agreement”), shall remain in effect, its terms shall apply to this Agreement, including Exhibit B. In the event of any conflict between the terms of said Claims Agreement and this Agreement, including Exhibit B, the terms of the Claims Agreement shall govern.

## **Section 6. ARBITRATION**

6.1 If at any time a question or controversy shall arise between the parties hereto in connection with this Agreement upon which the parties cannot agree, either party shall have the right to require a meeting of designated representatives with authority to settle the matter within thirty (30) days of written notice of a desire to meet; if it cannot be resolved within thirty (30) days of the meeting of the parties, then the aggrieved party may demand arbitration. Unless other procedures are agreed to by the parties, arbitration between the Parties shall be governed by the rules and procedures set forth in this Section 6.

6.2 If the parties to the dispute are able to agree upon a single competent and disinterested arbitrator within twenty (20) days after written notice by one party of its desire for arbitration to the other party, then the question or controversy shall be submitted to and settled by that single arbitrator. Otherwise, any party (the notifying party) may notify the other party (the noticed party) in writing of its request for arbitration and nominating one arbitrator. Within twenty (20) days after receipt of said notice, the noticed party shall appoint an arbitrator and notify the notifying party in writing of such appointment. Should the noticed party fail within twenty (20) days after receipt of such notice to name its arbitrator, said arbitrator may be appointed by the Chief Judge (or acting Chief Judge) of the United States District Court for the District of Columbia, upon application by either party after ten (10) days’ written notice to the other party. The two arbitrators so chosen shall select one additional arbitrator to complete the board. If the arbitrators so chosen fail to agree upon an additional arbitrator, the same shall, upon application of a party, be appointed in the same manner hereto before stated.

6.3 Upon selection of the arbitrator(s), said arbitrator(s) shall, with reasonable diligence, determine the questions as disclosed in said notice of arbitration, shall give both parties reasonable notice of the time and place (of which the arbitrator(s) shall be the judge) of hearing evidence and argument, may take such evidence as the arbitrator(s) shall deem reasonable or as either party may submit with witnesses required to be sworn, and hear arguments of counsel or others. In no event shall the arbitrator(s) have authority to award indirect, special, consequential, punitive or exemplary damages. If an arbitrator declines or fails to act, the party (or parties in the case of a single arbitrator) by whom the arbitrator was chosen or the American Arbitration Association, as the case may be, shall appoint another to act in the arbitrator's place.

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

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

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

6.7 Interest computed annually, at a rate equal to the Prime Rate plus two (2) percentage points (or the maximum interest allowed by applicable law, if lower), shall be applied to any and all arbitration awards requiring the payment of money and shall be calculated from thirty (30) days following the date of the applicable arbitration decision. For purposes of this Section 6, the term "**Prime Rate**" shall mean the minimum commercial lending rate charged by banks to their most credit-worthy customers for short-term loans, as published daily in the Wall Street Journal.

## **Section 7. ABANDONMENT**

7.1 In the event Owner shall be involuntarily dispossessed, including by threat of condemnation by competent public authority, of the right to operate upon and/or maintain any portion of its Joint Trackage and Owner fails or declines to replace said Joint Trackage, Owner shall have no obligation hereunder to provide tracks in replacement of such Joint Trackage for

User's use, and User shall have and shall make no claim of any kind, legal or otherwise, against Owner for failure to provide such Joint Trackage for User's use.

7.2 To the extent that Owner may lawfully do so, Owner reserves to itself the exclusive right, exercisable at any time during the life of the Agreement without concurrence of User, to elect to abandon all or any part of the Joint Trackage by giving six (6) months' prior written notice of such abandonment to User .

7.3 Owner and User each shall be responsible for and shall bear labor claims, and employee protection payable to, its own respective employees (and employees of its respective affiliated companies) including any amounts that either Owner or User may be required to pay to its own respective employees pursuant to labor protective conditions imposed by the STB.

## **Section 8. CATASTROPHIC EXPENSE**

Catastrophic expense to the Joint Trackage, such as, but not limited to, that arising from fire, flood, earthquake or other acts of God, or acts of vandalism, riots, insurrection, terrorist attack or events of a similar nature, for any amount in excess of One Hundred Thousand Dollars (\$100,000) for each occurrence shall be billed to User in addition to the GTM Rates and apportioned on the basis of the parties' GTMs operated over the Joint Trackage for the twelve (12) month period ending immediately prior to the first day of the month of such occurrence, or if occurring prior to the first twelve (12) months of permanent User operations for the twelve (12) month period immediately after the month the event occurred.

## **Section 9. ASSIGNMENT**

This Agreement shall inure to the benefit of and be binding upon the successors and permitted assigns of the parties hereto. User shall not assign, transfer, convey or sublease any interest in this Agreement (by contract or by operation of law) or undertake any transaction or series of transactions which would result in a transfer of this Agreement or any interest therein, in whole or in part, without Owner's prior written consent. Notwithstanding anything to the contrary herein, Owner may assign this Agreement without obtaining User's consent. In the event of an authorized assignment, the Agreement and the operating rights hereunder shall be binding upon the successors and assigns of the parties.

## **Section 10. DEFAULT**

10.1 Notwithstanding the provisions of Section 3 of these General Conditions, any party hereto claiming a default of any of the provisions of the Agreement (including these General Conditions) shall furnish the other party with written notice of such default, including specific information regarding the default and the particular Section or Sections of the Agreement which have allegedly been breached, along with a demand or request specifying the desired curative action.

10.2 If the default continues and is not cured for an additional period of thirty (30) days after receipt of such written notice and demand, or reasonable steps have not been nor continue to be taken to remedy a failure or default which cannot reasonably be remedied within said thirty (30) day period, and such default relates to the provisions and terms of the Agreement, either party shall resort to binding arbitration provided that the arbitrator shall not have the authority to amend, modify or terminate the Agreement.

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

## **Section 11. OTHER CONSIDERATIONS**

11.1 The Agreement and each and every provision hereof is for the exclusive benefit of the parties hereto and not for the benefit of any third party. Nothing herein contained shall be taken as creating or increasing any right in any third person to recover by way of damages or otherwise against any of the parties hereto.

11.2 All amendments, supplements, modifications to and waivers of the terms of this Agreement shall be in writing and signed by authorized representatives to the parties hereto.

11.3 All section headings are inserted for convenience only and shall not affect any construction or interpretation of the Agreement.

11.4 Reference to any agency or other organization shall include any successor agency or organization, and reference to any index or methodology (e.g., RCAF-U, URCS, etc.), if such index or methodology ceases to exist or is no longer available, shall include any substantially similar index or methodology selected by the parties or, if the parties fail to agree on such, one determined by binding arbitration under Section 6 of these General Conditions.

11.5 The terms of this Agreement have been arrived after considerable arms length negotiation and mutual review of the parties, and the parties agree that none of the provisions herein shall be deemed or presumed to be construed against either party, regardless of which party drafted all or part of the terms of this Agreement.

**END OF EXHIBIT B**