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MAY 28 2004

**SURFACE  
TRANSPORTATION BOARD**



May 27, 2004

211129



**VIA UPS OVERNIGHT DELIVERY**

The Honorable Vernon A. Williams  
Secretary  
Surface Transportation Board  
1925 K Street, N.W.  
Washington, D.C. 20423-0001

**FILED**

MAY 28 2004

**SURFACE  
TRANSPORTATION BOARD**

**Re: Finance Docket No. 34504; Union Pacific Railroad Company – Lease and  
Operation Exemption – Line of the Burlington Northern and Santa Fe  
Railway Company**

Dear Mr. Williams:

I am enclosing the following material for filing in the above proceeding:

1. An original and ten (10) copies of a Petition for Exemption covering the transaction proposed in the above proceeding
2. A payment form in the amount of \$4,900.00 for the filing fee required by 49 C.F.R. § 1002.2(f), Part IV (41)(vi).
3. Twenty (20) unbound copies of the Exhibit 1 map.

Please indicate receipt of the enclosed materials by returning a stamped copy of this letter in the self-addressed, stamped envelope enclosed for this purpose.

Very truly yours,

Robert T. Opal  
General Commerce Counsel  
Direct dial: 402/271-3072  
Fax: 402/271-5610

**Office ENTERED  
of Proceedings**

MAY 28 2004

**Part of  
Public Record**

RTO/mls  
Enclosures

Law Department

**UNION PACIFIC RAILROAD**  
1416 Dodge Street, Rm. 830, Omaha, NE 68179-0001  
fx. (402) 271-5610

**ORIGINAL**

CONTAINS COLOR IMAGES

BEFORE THE  
SURFACE TRANSPORTATION BOARD

211129

\_\_\_\_\_  
FINANCE DOCKET NO. 34504  
\_\_\_\_\_

MAY 28 2004  
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UNION PACIFIC RAILROAD COMPANY  
-- LEASE AND OPERATION EXEMPTION --  
LINE OF THE BURLINGTON NORTHERN  
AND SANTA FE RAILWAY COMPANY

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TRANSPORTATION BOARD

UNION PACIFIC RAILROAD COMPANY

Robert T. Opal  
General Commerce Counsel  
1416 Dodge Street  
Room 830  
Omaha, Nebraska 68179-0001  
(402) 271-3072  
(402) 271-5610 (FAX)

Dated: May 27, 2004

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

\_\_\_\_\_  
**FINANCE DOCKET NO. 34504**  
\_\_\_\_\_



**UNION PACIFIC RAILROAD COMPANY  
-- LEASE AND OPERATION EXEMPTION --  
LINE OF THE BURLINGTON NORTHERN  
AND SANTA FE RAILWAY COMPANY**

\_\_\_\_\_  
**PETITION FOR EXEMPTION**

This Petition is filed on behalf of Union Pacific Railroad Company ("UP"). It requests an exemption covering UP's lease and operation of a line of The Burlington Northern and Santa Fe Railway Company ("BNSF") extending from BNSF milepost 474.4 near Marion, AR to BNSF milepost 479.01 near West Memphis, AR, a distance of approximately 5.39 miles, as shown on the map attached on Exhibit 1 (the "Line"). The lease agreement covering this transaction is attached as Exhibit 2. BNSF will retain trackage rights over the entire Line and certain other rights as provided in the lease agreement.

I.

**DESCRIPTION AND PURPOSE OF THE TRANSACTION**

The purpose of this transaction is to restructure existing joint facility arrangements applicable to the Line. UP currently has and is utilizing overhead trackage rights on the segment of the Line between BNSF 476.2 near Presley Junction and BNSF milepost 479.4 near West Memphis. These rights were acquired as part of the UP/BNSF settlement agreement in the UP/SP merger, see UP/SP Decision No. 44, 1 S.T.B.2d 233 at 546 (exempting all of the "Sub-No. 1" trackage rights) at 563 (listing the Sub-No. 1 "Trackage Rights grants to UP/SP").<sup>1</sup>

UP also currently has and is utilizing temporary overhead trackage rights over the remaining segment of the Line between BNSF milepost 474.1 near Marion, AR and BNSF milepost 476.2 near Presley Jct., AR subject to the same terms and conditions as applicable to the West Memphis - Presley Jct. line segment.<sup>2</sup> These rights are scheduled to expire on July 31, 2004.

The purpose of this transaction is to convert these two trackage rights arrangements into a long term lease of the Line by UP, subject to BNSF's retained trackage rights. In effect, the lease will permit UP to control and operate the Line more like a track owner than as a trackage rights tenant.

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<sup>1</sup> While negotiating the lease, it was discovered that an error had been made in the 1996 trackage rights agreement in the mileposts for the West Memphis-Presley trackage rights segment. The 1996 agreement showed the ending milepost at West Memphis as "474.0", which is actually north of Presley Jct. near Marion. The correct milepost for West Memphis is "479.01," as shown in the lease.

<sup>2</sup> Finance Docket No. 34440, Union Pacific R. Co. - Temporary Trackage Rights Exemption - The Burlington Northern and Santa Fe R. Co., served January 29, 2004.

The principal reason for this restructuring is that UP requires a higher level of track maintenance for its operations on the Line than does BNSF. In a typical trackage rights arrangement, the track owner maintains the track to whatever level it requires for its own operations. The tenant normally uses the line as it finds it, paying for its use on a pro-rata basis. If the track owner desires to make capital improvements in the line, the owner will capitalize and depreciate the resulting expenditures, essentially spreading the cost over the useful life of the improvements. In this case, the tenant will also often pay its pro-rata share of the capital improvements over time, where the capital expenditures get built into the interest portion of the trackage rights compensation.

However, the Marion-West Memphis Line is different. Unlike the typical trackage rights arrangement, UP (the tenant) requires a higher level of track maintenance than BNSF (the owner). This is because UP uses the Line primarily for through movements while BNSF uses the Line primarily for local wayfreights serving on line industries (which requires that the line be maintained only as FRA "excepted track"). In addition, UP is the predominant user of the Presley Jct.-West Memphis segment of the Line, currently using it for 4-6 trains per day. The parties anticipate that UP will continue to be the predominant user of the Presley-West Memphis segment of the Line, as the segment forms part of a route from UP's Marion, AR intermodal facility.

UP and BNSF believe that, given the circumstances described above, it is more appropriate to structure their relationship as a lease of the Line to UP (subject to retained BNSF trackage rights) rather than as a trackage rights arrangement with UP as the tenant. The primary advantage of the lease structure is giving the control of the

Presley Jct.-West Memphis segment of the Line to the railroad which is making the most use of it (UP). In addition, by restructuring the relationship as a long term lease, UP will have better control of the Line, including the expenditures relating to track upgrades, allowing UP to capitalize these improvements in the same manner as the track owner.

Finally, by giving UP long term rights over the Marion-Presley Jct. segment, the lease eliminates the necessity for BNSF to grant UP temporary trackage rights to UP over this segment whenever UP is performing maintenance work on its Jonesboro Line that necessitates use of this line segment.<sup>3</sup> While this could also be accomplished by a long term grant of trackage rights or by individual grants of temporary trackage rights each time the rights are needed, the lease is preferable for the reasons discussed above. Also, given the short length of this segment (just over 2 miles), it makes sense to treat the entire Marion-West Memphis Line as a single facility, rather than as two separate facilities structured and operated in different ways.

## II.

### **THE STANDARDS FOR AN EXEMPTION HAVE BEEN MET**

Under 49 U.S.C. §11323(a)(2), prior Board approval is required for a rail

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<sup>3</sup> UP's current rights to use the Marion-Presley Jct. segment of the Line will end when the temporary trackage rights agreement in Finance Docket No. 34440 described above expire. While the lease will give UP long term operating rights over this line segment, UP does not anticipate making regular use of the rights. Rather, the rights will normally be used only when it is necessary to route some traffic off UP's Jonesboro Line when that line is under repair. This segment has been included in the lease because UP will require a higher level of track maintenance to accommodate these moves, when they occur, then the "excepted track" BNSF requires for its own operations.

carrier to lease and operate the line of another rail carrier. However, under 49 U.S.C. §10502, the Board must exempt a transaction from regulation if the Board finds that (1) regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. §10101 and (2) either (a) the transaction is of limited scope, or (b) regulation is not necessary to protect shippers from an abuse of market power. As shown below, the proposed lease transaction easily meets the requirements for exemption.

**A. Rail Transportation Policy**

In determining whether regulation of a transaction proposed for exemption is necessary to carry out the rail transportation policy, the Board considers the policies of the statute from which exemption is sought, *Indiana R. Co. - Acq. & Oper. - Illinois Central R. Co.*, 6 I.C.C.2d 1004, 1006 (1990); *aff'd sub nom., Village of Palestine v. ICC*, 936 F.2d 1335 (D.C. Cir. 1991); Finance Docket No. 31493, *Blackstone Capital Partners - Control Exemption - CNW*, served July 5, 1989, p. 2.

The proposed transaction does not involve the merger or control of two or more Class I railroads. Thus, absent an exemption, this transaction would be subject to the standards of 49 U.S.C. §11324(d). This section requires the Board to approve a transaction, unless it finds both that:

- (1) as a result of the transaction, there is likely to be a substantial lessening of competition, creation of a monopoly, or restraint of trade in any region of the United States; and
- (2) the anticompetitive effects of the transaction outweigh the public interest in meeting significant public needs.

This transaction has no anticompetitive effects. As discussed above, the transaction is simply the restructuring of an existing joint facility relationship between UP and BNSF from trackage rights to a lease. Neither BNSF nor UP is giving up any

operating rights that will effect their ability to compete against each other, or against other carriers. BNSF, in fact, is not giving up any operating rights at all -- it will continue to use the Line under its retained trackage rights, and the Line will be maintained to higher standards than it has historically been maintained. UP similarly is not giving up any operating rights. It is actually gaining long term rights it does not now have to use the Marion-Presley Jct. segment of the Line, which will enhance UP's ability to provide competitive service when its Jonesboro route is under repair. Further, by allowing UP and BNSF to restructure this joint facility in a manner that makes more business sense than the current arrangements, an exemption will minimize the administrative expenses and review associated with a formal application under §11321, minimize the need for Federal regulatory control over the rail transportation system, and foster sound economic conditions in transportation, 49 U.S.C. §10101(a)(2), (5) and (9).

**B. Limited Scope**

The proposed lease is clearly a transaction of "limited scope." The Marion-West Memphis Line is only 5.39 miles in length. UP already has long term trackage rights over most of the Line. The additional long term operating rights UP will obtain over the Marion-Presley Jct. segment of the Line involve a line segment only about 2 miles in length. It would be difficult to find many transactions which are more "limited" in scope than this one.

**C. Abuse of Market Power**

There is no conceivable way the proposed lease would result in any abuse of market power by either UP or BNSF. As previously discussed, neither BNSF nor UP is giving up any rights to compete against each other, and UP is gaining rights that will

enhance its ability to provide competitive rail service when its primary Jonesboro route is under repair.

III.

**LABOR PROTECTION**

The applicable labor protective conditions for this transaction are those imposed in New York Dock Ry. - Control - Brooklyn Eastern Dist., 360 I.C.C. 60 (1979).

IV.

**ENVIRONMENTAL AND HISTORICAL DOCUMENTATION**

This transaction is exempt under 49 C.F.R. §1105.6(c)(2)(i) and §1105.7(e) from environmental reporting requirements because the proposed transaction will not result in operational changes that exceed any of the Board's environmental threshold. The transaction should not result in any changes in rail traffic on the Presley Jct.-West Memphis segment. Whatever UP and BNSF traffic will move under the terms of the lease would, in the absence of the lease, move under UP's existing trackage rights or under BNSF's existing rights as the line owner. With respect to the new operating rights UP is obtaining over the Marion-Presley Jct. segment, these rights will only be used for an alternate route for some of UP's Jonesboro route traffic when the Jonesboro route is under repair (similar to the existing temporary trackage rights arrangement). The rights will not be regularly used, and the traffic will not exceed the Board's applicable thresholds on an annual basis.

The proposed transaction is exempt from historic preservation requirements under 49 C.F.R. §1105.8(b)(1) because further Board approval will be

required to abandon any service, and there are no plans to alter or dispose of any properties subject to Board jurisdiction that are 50 years old or older.<sup>4</sup>

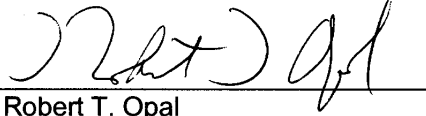
V.

**CONCLUSION**

For the reasons stated above, UP respectfully requests the Board to exempt the proposed lease transaction from regulation under 49 U.S.C. §10502.

Respectfully submitted,

UNION PACIFIC RAILROAD COMPANY

By: 

Robert T. Opal  
General Commerce Counsel  
1416 Dodge Street, Room 830  
Omaha, Nebraska 68179-0001  
(402) 271-3072 (direct)  
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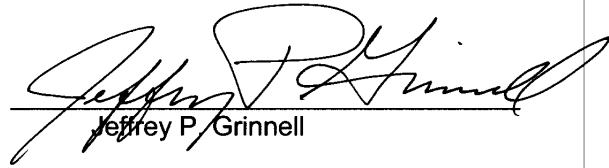
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<sup>4</sup> Board and FRA rules require "Safety Integration Plans" for certain transactions between a Class I and a Class I or II carrier. No safety integration plan is required for this transaction as it does not involve a proposal by a Class I railroad to consolidate with, merge with or acquire control of another Class I railroad or a Class II railroad, 49 C.F.R. §§244.1, 1106.2 (definition of "transaction") and 1106.3.

**VERIFICATION**

Jeffrey P. Grinnell, Director-Joint Facilities of Union Pacific Railroad Company, under penalty of perjury, declares and verifies that he has read the foregoing Petition for Exemption in Finance Docket No. 34504, knows the facts stated therein, and that said facts are true as stated.

Dated: May 27, 2004.



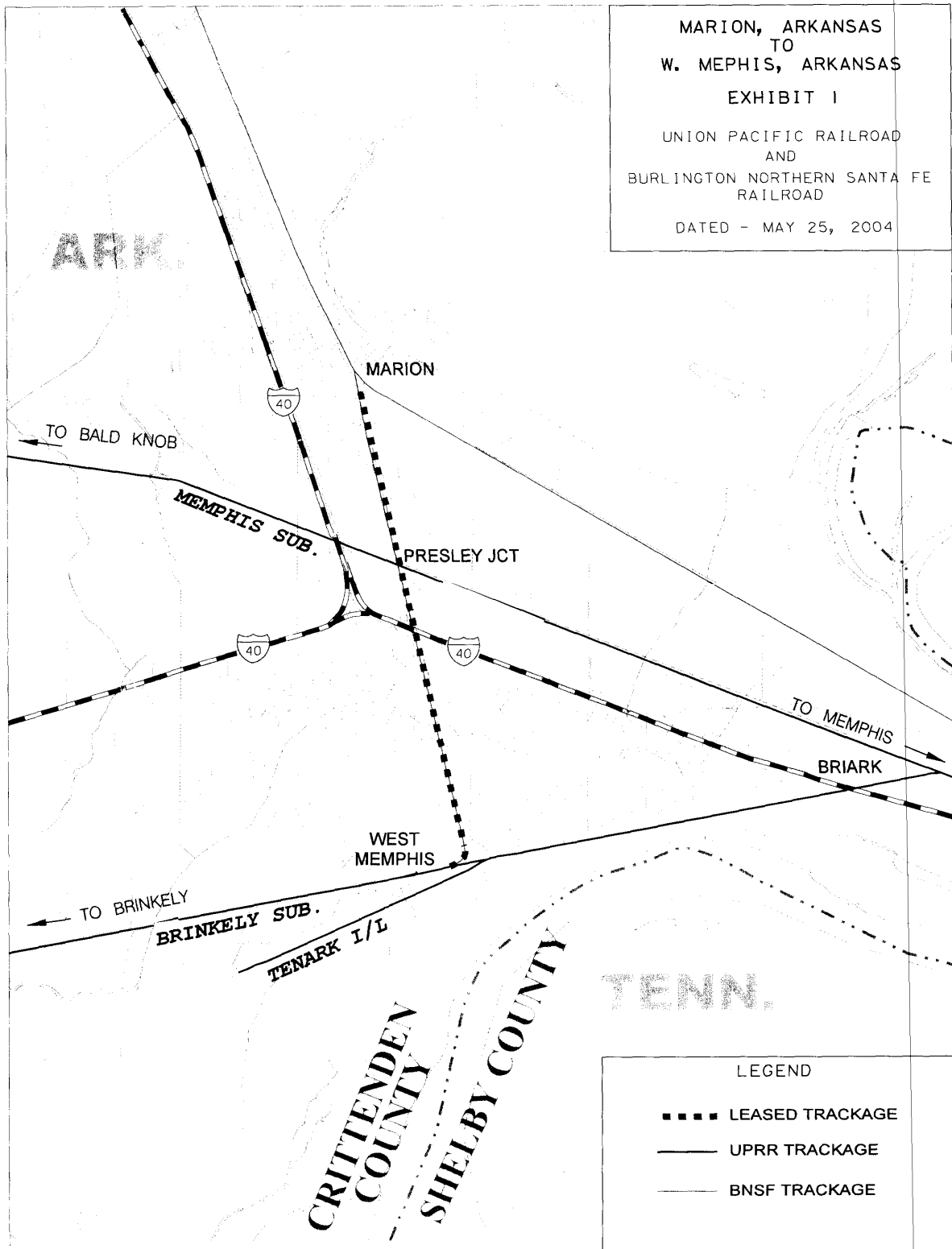
Jeffrey P. Grinnell

MARION, ARKANSAS  
TO  
W. MEMPHIS, ARKANSAS

EXHIBIT I

UNION PACIFIC RAILROAD  
AND  
BURLINGTON NORTHERN SANTA FE  
RAILROAD

DATED - MAY 25, 2004



**LEASE AGREEMENT FOR  
WEST MEMPHIS, ARKANSAS TO MARION, ARKANSAS  
OF  
THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY  
TO  
UNION PACIFIC RAILROAD COMPANY**

## AGREEMENT DIRECTORY

|                                             | Page |
|---------------------------------------------|------|
| 1. DESCRIPTION OF LEASED PROPERTY .....     | 2    |
| 2. TERM AND TERMINATION .....               | 4    |
| 3. LESSEE'S OBLIGATIONS .....               | 6    |
| 4. IMPROVEMENTS .....                       | 9    |
| 5. [RESERVED] .....                         | 9    |
| 6. GOVERNMENT APPROVAL .....                | 9    |
| 7. LESSEE'S INSPECTION PRIOR TO LEASE ..... | 10   |
| 8. LIABILITY AND INDEMNITY .....            | 11   |
| 9. PERSONAL PROPERTY WAIVER .....           | 13   |
| 10. [RESERVED] .....                        | 13   |
| 11. COMPLIANCE WITH LAWS .....              | 13   |
| 12. ENVIRONMENTAL .....                     | 14   |
| 13. ALTERATIONS .....                       | 15   |
| 14. DEFINITION OF COST AND EXPENSE .....    | 15   |
| 15. INVOICES .....                          | 15   |
| 16. DEFAULT .....                           | 15   |
| 17. LIENS .....                             | 16   |
| 18. CLEARANCES .....                        | 16   |
| 19. ASSIGNMENT AND SUBLEASE .....           | 17   |
| 20. PROPERTY TAXES .....                    | 17   |
| 21. APPLICABLE LAW .....                    | 18   |
| 22. DISPUTE RESOLUTION .....                | 18   |
| 23. NOTICES .....                           | 20   |
| 24. SURVIVAL .....                          | 21   |

|     |                                    |    |
|-----|------------------------------------|----|
| 25. | [RESERVED].....                    | 21 |
| 26. | WAIVER AND AMENDMENTS.....         | 21 |
| 27. | SEVERABILITY .....                 | 21 |
| 28. | INTEGRATION .....                  | 21 |
| 29. | AGREEMENTS WITH THIRD PARTIES..... | 21 |

**LEASE AGREEMENT FOR  
WEST MEMPHIS, ARKANSAS TO MARION, ARKANSAS  
OF  
THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY  
TO  
UNION PACIFIC RAILROAD COMPANY**

This Lease Agreement ("Lease") is entered into by and between THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY, a Delaware corporation (hereinafter referenced as "Lessor" or "BNSF"), and UNION PACIFIC RAILROAD COMPANY, a Delaware corporation (hereinafter referenced as "Lessee" or "UP") as of this 29 day of October, 2003 ("Effective Date").

WHEREAS, Lessor and Lessee are parties to that certain West Memphis, Arkansas to Presley Junction, Arkansas Trackage Rights Agreement, dated June 1, 1996 (as amended from time to time) governing UP trackage rights over approximately 3.3 miles of BNSF main track ("Trackage Rights Agreement"); and

WHEREAS Lessor desires to obtain access to an additional 2.09 miles of BNSF track from Presley Junction to approximately Marion, Arkansas (Supplemental Trackage); and

WHEREAS, Lessor desires to grant to Lessee, on the terms and conditions set forth in this Lease, a lease for railroad purposes of trackage and real property owned by Lessor between Milepost 474.01 near Marion, Arkansas and Milepost 479.4 near West Memphis, Arkansas, and to set forth the parties' agreements concerning certain other rights and obligations as specified in this Lease; and

WHEREAS, for the purpose of connecting trackage owned by Lessee, facilitating UP train traffic, and performing upgrading of certain trackage owned by BNSF that would connect said UP trackage, the performance of which such upgrading is for the benefit of UP and is work that BNSF had no plans of undertaking, UP desires to lease, pursuant to the terms and conditions set forth in this Lease, a non-exclusive lease for railroad purposes of

trackage and real property herein described owned or possessed by Lessor, in addition to acceptance of certain other rights and obligations as specified in this Lease;

**NOW THEREFORE, Lessee and Lessor agree as follows:**

**1. DESCRIPTION OF LEASED PROPERTY**

A. **Grant by Lessor.** Lessor shall grant to Lessee, as of the Effective Date, subject to the terms and conditions set forth in this Lease, a non-exclusive lease for freight railroad purposes in the following property of Lessor:

Trackage and associated operating real estate between Lessor's Milepost 474.01, located near Marion, Arkansas, and Milepost 479.4 West Memphis, Arkansas, including all of Lessor's trackage, operating real estate, and other improvements located upon said track corridor, all more particularly shown on the print attached hereto and marked as **Exhibit 1**, and collectively referenced hereinafter as "Leased Premises." No buildings, equipment not expressly identified herein, or lands located immediately under those buildings, shall be included as part of this Lease.

B. **Lessor's Retention of Operating Rights and Lessee's Retention of Trackage Rights.**

1) Lessor shall retain rights of non-exclusive possession of and operation over the Leased Premises which will allow Lessor, and any other third parties allowed or which may be allowed in the future by Lessor (provided that such future admittance shall not materially hinder or obstruct the fair and reasonable exercise of the rights granted in this Agreement), the right (but not the obligation under this Lease) to serve any and all rail freight customers located on, along, connected to, or which may become connected to the Leased Premises and/or for bridging through freight.

2) Lessee shall retain trackage rights pursuant to the Trackage Rights Agreement to operate freight trains over a portion of the Leased Premises pursuant to the terms of the Trackage Rights Agreement, and Lessee's rights to use the Leased Premises in the service of any rail freight customers shall be limited by the provisions set forth in the Trackage Rights Agreement; provided, that during the term of this Lease, for so long as Lessee shall continue to pay rents due and payable under this Lease and Lessee is not otherwise in default under this Lease, trackage rights fees under the Trackage Rights

Agreement shall be deemed waived.

3) Except as may be expressly provided otherwise in this Lease, while the Lease and the Trackage Rights Agreement are in both full force and effect, the provisions of the Trackage Rights Agreement, including its General Conditions (Exhibit B) shall continue to apply to the parties with respect to the Joint Trackage as therein defined and for the term of this Lease only shall also apply with respect to the Supplemental Trackage, except to the extent of any conflict with the terms of this Lease; provided, however, except to the extent of any conflict with the terms of this Lease, Lessee shall assume and bear the rights and obligations of Owner and Lessor shall assume and bear the rights and obligations of User thereunder for the following provisions as provided for in the General Conditions (Exhibit B) to the Trackage Rights Agreement in Sections 2.1, 2.2, 2.3, 2.4, 2.5, 2.12, 2.13, 4.2 (Derailment clean up provisions only, starting with the 3d paragraph), 4.3, 5.2(f), and 5.3(f), except that BNSF shall continue to dispatch the Leased Premises between Presley Junction and Marion.

4) All rights granted to the Lessee hereunder are subject and subordinate to the prior and continuing right of BNSF, without liability to the Lessee or any other party for compensation or damages thereto: (i) to use the Leased Premises; (ii) to construct, maintain, renew, use, operate, change, modify or relocate the track and fixtures on the Leased Premises; and (iii) to allow to be constructed upon its right-of-way such other facilities and to use its right-of-way in any manner, each as BNSF in its sole discretion deems appropriate, provided BNSF uses commercially reasonable efforts to avoid material interference with the use of the Leased Premises for the purposes described herein.

C. **Rights of Lessee.** On and after the Effective Date, Lessee shall be entitled to use and occupy the Leased Premises for the sole and exclusive purpose of performing rail freight transportation services (but only to the extent allowed pursuant to the Trackage Rights Agreement), together with upgrading and maintaining the Leased Premises, including the tracks, land required for railroad operations, and improvements located upon the Leased Premises as set forth herein. UP shall use the track on the Leased Premises subject to the terms of the Trackage Rights Agreement and the terms provided in this Lease. This Lease is granted expressly subject to all rights, interest, and estates of third parties in and to the Leased Premises, whether of record or not. UP shall not

use or store hazardous substances, as defined by the Comprehensive Environmental Response, Compensation, and Liability Act, as amended ("CERCLA") or petroleum or oil as defined by applicable Environmental Laws on any part of the Leased Premises.

**2. TERM AND TERMINATION**

A. **Effective Date and Term.** This Lease shall become effective as of the Effective Date, and, unless earlier terminated pursuant to the provisions of this Lease, shall continue in effect for a period of 25 years from and after the Effective Date and shall automatically continue thereafter until terminated on six months' written notice by either party (the "Term"). Upon termination or expiration of the Term of this Lease, all rights, obligations, liabilities, and indemnities which arise or accrue under this Lease prior to the termination or expiration hereof and the provisions of subsections B(2) and B(3) of Section 2 of this Lease, together with all provisions necessary to enforce or construe such provisions or rights and liabilities shall survive and be enforceable for the applicable statute of limitations period.

B. **Governmental Approvals Upon Termination.**

1) To the extent allowed by law, upon the expiration of the Term of this Lease, or upon termination prior to expiration of the Term hereof, Lessee shall vacate the Leased Premises, subject to retention of any rights it may have to operate the Joint Trackage pursuant to the Trackage Rights Agreement if such agreement remains in force and effect at that time. In addition to all other remedies available at law or in equity, BNSF may, without incurring any liability to Lessee under this Lease, terminate this Lease at any time and at its discretion BNSF may discontinue the maintenance and operation of the track and/or remove the BNSF track, in the event of any of the following contingencies:

a) If BNSF is authorized by competent public authority to abandon its line to which trackage subject to this Lease may be connected, BNSF may, upon written notice to Lessee, terminate this Lease effective immediately.

b) If BNSF is dispossessed of the right to operate over the track or its connecting track or any part thereof, BNSF may terminate this Lease effective immediately by written notice to Lessee.

c) In the event the Trackage Rights Agreement expires or terminates prior to expiration or termination of this Lease, either party may terminate this Lease, at any time, by serving written notice of termination upon the other party. Upon expiration of the time specified in such notice, this Lease and all rights of Lessee shall absolutely cease.

d) Lessee hereby agrees to waive and release all claims, rights, and causes of action that Lessee has, may have, or may assert against BNSF because of the discontinuance of operation and removal of the BNSF track as provided in this Section of this Lease.

2) Following expiration or termination hereof, Lessee shall at the written request of Lessor, promptly and expeditiously initiate and with commercially reasonable efforts prosecute to conclusion any regulatory or other governmental application, petition, or proceeding to obtain any necessary governmental approvals to effect a discontinuance and/or termination of the terms of this Lease. In addition, Lessee shall not oppose, and shall support any effort by Lessor to obtain such governmental approval or authority as may be necessary (if any) for Lessor to discontinue, abandon and/or transfer rail operations of or from Lessee or Lessor upon the Leased Premises.

3) Lessee, at its option, will handle or request Lessor to handle labor claims associated with Leased Premises that result from or arise out of this Lease. Lessor and Lessee agree that their respective handling of Labor Claims will be done in a diligent and timely fashion. Lessee will assume and indemnify, defend, and hold harmless Lessor against, any and all labor protection liabilities and expenses as to any employee claims resulting from the implementation of any of the terms or provisions or termination or expiration of the Term of this Lease. If, in the sole opinion of Lessee, the parties hereto working cooperatively are unable to successfully resolve any such Labor Claims in a satisfactory manner, then Lessee may, during the first six (6) months of this Agreement, terminate this Agreement upon notice to the other party. Lessee's obligation to assume and indemnify, defend, and hold harmless Lessor against any and all labor protection liabilities and expenses as to any employee claims as outlined above, shall survive such termination. Lessee also agrees that should the Lease be terminated pursuant to the terms of this

Section 3B(3), Lessee shall return the Leased Premises to the Lessor in a usable condition and in no worse condition than on the Effective Date.

4) Upon termination of this Lease, howsoever, Lessee shall vacate and surrender the quiet and peaceable possession of the Leased Premises. Lessee, at its expense, shall (a) remove from the Leased Premises all (i) obstructions, (ii) contamination caused by or arising from the use of the Leased Premises for Lessee's purposes, other property not belonging to Lessor or a third party, located thereon and (b) restore the Leased Premises to the conditions provided in Section 3(A)(3) of this Lease. If Lessee fails to perform such removal and restoration, or if the work performed by Lessee is unsatisfactory to Lessor, Lessor may, without prejudice to any other rights or remedies, perform the work at Lessee's expense.

5) The provisions of subsections 2, 3, and 4 above shall survive termination or expiration of the Term of this Lease. The parties acknowledge money damages alone are insufficient to remedy a breach of the terms of subsection 2 hereinabove by Lessee, and Lessor shall have in addition to any other remedies available at law or in equity, a right of specific performance and/or injunctive relief. Lessee agrees to waive posting of any required bonds in connection with seeking any such remedy.

### **3. LESSEE'S OBLIGATIONS**

In consideration for Lessor's lease of the Leased Premises, and conveyance of the other rights, interests and obligations described herein, Lessee agrees to all of the following:

#### **A. Condition of Premises.**

- 1) Lessee shall accept all Leased Premises "AS IS, WHERE IS" and "with all faults."
- 2) Upon termination or expiration of the Term of this Lease, Lessee shall surrender possession of the properties free and clear of any encumbrances imposed or caused to be accrued by Lessee or resulting from Lessee's possession or operation of the Leased Premises after the Effective Date.
- 2) 3) Upon termination or expiration of the Term of this Lease, Lessee shall relinquish possession of the Leased Premises (subject to any right of operation thereon which may then exist pursuant to the Trackage Rights Agreement) in at least FRA Class I condition, and in no event shall any part of the

Leased Premises be in any worse a condition than it was as of the Effective Date. Lessee shall indemnify Lessor in the event any rehabilitation or cost or expense is required to upgrade the Leased Premises to the condition specified in this subsection 3A(3). Upon termination or expiration of the Term of this Lease, in the event the Trackage Rights Agreement shall remain in effect at that time, BNSF's obligation to maintain the Joint Trackage in improved condition pursuant to the terms of Section 2.2 of the Trackage Rights Agreement shall be limited to an obligation to maintain the Joint Trackage in no worse of a condition than existed as of the date of the Lease termination or expiration.

- B. **Lease Rentals.** Lessee shall pay BNSF annual rental of \$5.25 per track foot per year for each year of this Lease. UP shall pay such rental to BNSF within thirty (30) days after bills are rendered therefor. Said rental charge may be subject to revision by BNSF upon thirty (30) days' written notice to UP prior to each anniversary of the Effective Date. In the event of early termination of this Lease, prepaid rental shall not be pro-rated.

C. **Rehabilitation and Maintenance.**

Notwithstanding any provision to the contrary herein or in the Trackage Rights Agreement (as amended herewith) and in addition to all obligations under same:

1) Lessee shall at all times, and at its sole cost and expense, maintain the Leased Premises and maintain, or cause to be rehabilitated and/or maintained, the railroad trackage to the standards described herein, including all grade crossings and signals, located upon the Leased Premises in such safe and satisfactory condition as necessary to conform with Lessor's and industry standards and specifications, and to conform with all applicable standards promulgated by the Federal Railroad Administration and other governmental agencies regardless of the condition of the Leased Premises prior to the Effective Date.

2) The cost and expense of any and all public works projects, including but not limited to grade crossing projects, involving the Leased Premises shall be apportioned between Lessor and Lessee based on their respective use of the Leased Premises for the twelve (12) month period immediately prior to commencement of construction of said public works project. During the Term hereof, Lessor shall

transfer to Lessee any such public funds received by Lessor, but not expended on the Leased Premises for use by Lessee solely for the specified purpose(s); provided, however, upon expiration or termination of this Lease, all such public funds transferred to Lessee, but not expended, shall be returned to Lessor.

3) Lessee shall at all times, and at its sole risk and expense, maintain, or cause to be maintained the track and all turnouts (from the point of switch to the clearance point, a distance defined by current BNSF Engineering Standards) located on the Leased Premises in a condition satisfactory to BNSF and in compliance with all applicable Legal Requirements as hereinafter defined. Without relieving UP from any of its obligations under this Lease or the Trackage Rights Agreement and notwithstanding any provision to the contrary in the Trackage Rights Agreement, whenever Lessor, in its sole discretion, determines that the track is unsatisfactory for operation, Lessor may but shall not be obligated to take action to remedy such condition(s) and charge Lessee for the actual costs of such remedial action, without prejudice to any other available rights or remedies. Prior to Lessor taking action to remedy the unsatisfactory condition described in the preceding sentence Lessor will provide Lessee written notice of such condition and allow Lessee thirty (30) days following receipt of such notice to correct the condition. In addition to the foregoing remedy and without prejudice to any other rights or remedies available at law or in equity, BNSF may, avail itself of the default remedies set forth in Section 16 of this Lease.

4) BNSF's operation over the Leased Premises with knowledge of an unsatisfactory condition shall not be deemed a waiver of Lessee's obligations contained herein.

5) Maintenance for the purpose of this Lease includes, but is not limited to, responsibility for maintaining proper drainage along the Leased Premises and for keeping the trackage on the Leased Premises free and clear of snow, ice, vegetation, structures, and other obstacles. Maintenance also includes, but is not limited to, responsibility for the maintenance of grade crossing warning devices, stop signs, gates, fences or barriers, roadway construction, track drainage facilities, lighting, track signals and signal maintenance.

6) Lessee shall construct, install, use, maintain, and repair all trackage and fixtures on the Leased Premises at its sole risk and expense, in a manner and of materials satisfactory to BNSF. Lessee,

during the installation, construction, use, operation, renewal, relocation, modification, maintenance and repair of the Leased Premises, shall exercise reasonable and customary care, skill and diligence to prevent damage to the property of BNSF or injury to its agents, employees, invitees and contractors. The presence of any UP personnel, agents, invitees, contractors or representatives, or materials or structures on the Leased Premises must never be a source of danger to or unreasonably interfere with the safe operations or use and enjoyment of the Leased Premises by Lessor or any third parties who have been granted access to the Leased Premises by Lessor. In furtherance of the foregoing obligation of Lessee but not in limitation of the same, Lessee agrees to the following:

a) Lessee shall operate and maintain the Leased Premises so as not to negatively affect the safe and efficient operation of BNSF (or other authorized third parties) over the Leased Premises.

b) Lessee agrees that BNSF shall not be required to furnish to Lessee any water, light, power or any other services in connection with the use of the Leased Premises, unless mutually agreed otherwise.

c) BNSF may require for safety purposes that Lessee, at its sole cost and expense, provide flagmen, lights, traffic control devices, automatic warning devices, or any such safety measure that BNSF deems appropriate in connection with Lessee's use of the Leased Premises for the purposes specified herein. Lessee shall reimburse BNSF within thirty (30) days of receipt of bill rendered therefor for all costs expended by BNSF, including but not limited to the cost of BNSF's Flagman (\$500.00 per eight hour day, \$95.00 per hour thereafter) in the event Lessee fails to provide a flagman upon reasonable request of BNSF.

7) It is understood and agreed that Lessee shall maintain the Leased Premises in a Class I state of repair which is reasonably suited for the combined requirements of Lessor and Lessee, but Lessor shall accept such trackage as it finds it and shall not, by reason of any failure, deficiency or defect therein or failure or neglect in the maintenance or dispatching of the Leased Premises, have or make against Lessee

any claim or demand for any Loss or Damage whatsoever; provided, however, nothing in the foregoing shall be construed to preclude Lessor from availing itself of any remedies expressly under this Lease for breach of the terms hereof, including without limitation, rights of termination for material default and failure to cure.

D. **Inspections by Lessor.** At all times Lessor shall have the right to enter upon the Leased Premises without notice to Lessee for any purpose whatsoever so long as it does not interfere with Lessee's safe and efficient operation of the Leased Premises, including making inspections to determine compliance with the terms of this Lease. In no event shall Lessor be obligated to make any such inspections, and Lessor shall not be liable for any failure to make any such inspections or failure to identify and/or cure observable defects upon making any such inspections.

E. **Operations.** Lessee will be required to provide and maintain locomotive power, fuel and crews required to perform its own operations pursuant to the terms of the Trackage Rights Agreement. In the event the Leased Premises are used for transportation of hazardous materials as defined by any federal, state, or local environmental law or regulation, Lessee agrees to comply with all applicable Legal Requirements and with BNSF's further requirements concerning the same. Pursuant to the terms of Section 2.4 of the General Conditions (Exhibit B) of the Trackage Rights Agreement (as amended herein for the term of this Lease) and the Dispatch Protocols referenced therein, equal dispatch treatment for BNSF and UP shall apply to operations under this Lease.

#### **4. IMPROVEMENTS**

Lessor shall retain ownership of the Leased Premises and all improvements thereon, including track work and other improvements installed by Lessee during the Term hereof. Except as may be expressly provided otherwise herein, Lessee shall not be entitled to compensation from Lessor for any track work performed upon or improvements placed on the Leased Premises.

#### **5. JOINT USE BY OTHER RAILROADS**

This Lease is also made for the benefit of such other railroads which, either by agreement with BNSF or order of competent public authority, have the right to use the Leased Premises, all of which railroads shall be deemed "BNSF" under this Lease.

**6. GOVERNMENT APPROVAL**

Lessee shall be responsible to file, pursue, and obtain all governmental authority as may be required, if any, as a result of this Lease. Lessee shall be responsible for all filing fees and costs, and other expenses (including attorneys' fees) in connection with such filings. BNSF shall have an opportunity to review and comment on all such filings prior to submission thereof by Lessee.

Lessee shall assume and bear any and all expense resulting from the acquisition of any such governmental authority, including, without limitation, labor protection obligations arising as a result of such authority or by virtue of the existence of this Lease, and Lessee shall indemnify, defend and hold harmless BNSF from any actions, legal proceedings or claims and all costs related thereto (including without limitation attorneys' fees) arising as a result of this Lease or pursuit of any required governmental authority.

**7. LESSEE'S INSPECTION PRIOR TO LEASE**

A. **Acknowledgement of Inspection.** By signing this Lease, Lessee acknowledges that Lessee has inspected the Leased Premises, including all improvements and structures on the Leased Premises. Lessee further acknowledges that:

- 1) No representation or warranty has been made by Lessor to Lessee concerning the state or condition of the Leased Premises, or the age of any improvements on the Leased Premises;
- 2) Lessee has not relied upon any statement or declaration of Lessor with respect to the physical condition of the Leased Premises, Lessor's title to the Leased Premises, Lessor's or any other party's freight traffic volumes to or from the Leased Premises, or any other matter, either oral or in writing, as an inducement to entering into this Lease, other than as stated in this Lease; and
- 3) The sole consideration for execution of this Lease by Lessee is set forth in this Lease.

B. **Lessor's Disclaimers.**

- 1) LESSOR HEREBY DISCLAIMS ANY REPRESENTATION OR WARRANTY, WHETHER EXPRESS OR IMPLIED, WHETHER BY OPERATION OF LAW OR IN EQUITY, NOW

OR IN THE FUTURE AS TO THE DESIGN OR CONDITION OR ANY OTHER MATTER RELATED TO THE LEASED PREMISES, ITS MERCHANTABILITY, HABITABILITY OR FITNESS FOR ANY PARTICULAR PURPOSE, THE QUALITY OF TITLE TO THE LEASED PREMISES, THE QUALITY OF THE MATERIAL OR WORKMANSHIP OF THE LEASED PREMISES, OR THE CONFORMITY OF THE LEASED PREMISES TO ITS INTENDED USES. LESSOR SHALL NOT BE LIABLE TO LESSEE FOR ANY LOSS, DAMAGE, INJURY, OR DEATH, INCLUDING WITHOUT LIMITATION, ANY INCIDENTAL OR CONSEQUENTIAL DAMAGES (INCLUDING STRICT LIABILITY IN TORT) WITH RESPECT TO THE DESIGN, CONDITION, QUALITY, SAFETY, MERCHANTABILITY, OR FITNESS FOR ANY PARTICULAR PURPOSE, OF THE LEASED PREMISES OR THE CONFORMITY OF THE LEASED PREMISES TO ITS INTENDED USES.

2) LESSEE ACCEPTS, THE LEASED PREMISES IN "AS IS, WHERE IS" AND "WITH ALL FAULTS" CONDITION, AND SUBJECT TO ALL LIMITATIONS ON LESSOR'S RIGHTS, INTEREST, AND TITLE TO THE PROPERTY COMPRISING THE LEASED PREMISES.

3) LESSOR DOES NOT UNDERTAKE TO DEFEND LESSEE IN THE PEACEABLE POSSESSION OR USE OF THE LEASED PREMISES. NO COVENANT OF QUIET ENJOYMENT IS MADE.

**8. LIABILITY AND INDEMNITY**

A. To the fullest extent permitted by law, Lessee shall indemnify, defend and hold harmless BNSF and BNSF's affiliated companies, partners, successors, assigns, legal representatives, officers, directors, shareholders, employees and agents (collectively, "Indemnitees") for, from and against any and all claims, liabilities, fines, penalties, costs, damages, losses, liens, causes of action, suits, demands, judgments and expenses (including, without limitation, court costs, attorneys' fees and costs of investigation, removal and remediation and governmental oversight costs) environmental or otherwise (collectively "Liabilities") of any nature, kind or description of any person or entity directly or indirectly arising out of, resulting from or related to (in whole or in part):

1) Breach of the terms of this Lease by Lessee, including without limitation, Lessee's breach

of its environmental provisions,

2) The environmental condition and status of the Leased Premises or BNSF's property to the extent caused by or contributed to, in whole or in part, by Lessee, **or**

3) The environmental condition and status of Lessee's, its agents', employees', contractors', invitees' or customers' personal property.

B. Further, notwithstanding the limitations in the preceding subsection, Lessee now and forever waives any and all claims, regardless whether based on the strict liability, negligence or otherwise, that BNSF is an "owner", "operator", "arranger", or "transporter" of Lessee's or Lessee's customers' property for the purposes of CERCLA or other environmental laws. Lessee will defend, indemnify, and hold the Indemnitees harmless from any and all such claims except to the extent caused by the negligence of the Indemnitees. Lessee further agrees that the use of the Leased Premises as contemplated by this Lease shall not in any way subject BNSF to claims that BNSF is other than a common carrier for purposes of environmental laws and expressly agrees to indemnify, defend, and hold the Indemnitees harmless for any and all such claims. In no event shall BNSF be responsible for the environmental condition of Lessee's or its customers' property under this Lease.

C. Upon written notice from BNSF, Lessee agrees to assume the defense of any lawsuit or other proceeding brought against any Indemnitee by any entity, relating to any matter covered by this Lease for which Lessee has an obligation to assume liability for and/or save and hold harmless any Indemnitee. Lessee shall pay all costs incident to such defense, including, but not limited to, attorneys' fees, investigators' fees, litigation and appeal expenses, settlement payments, and amounts paid in satisfaction of judgments. In the event such proceeding relates to a matter for which Lessee and Lessor shall share responsibility, Lessor shall reimburse Lessee for a reasonable equitable portion of Lessee's defense costs as the same are incurred.

D. Notwithstanding the foregoing, Lessee's only responsibility under this Section shall be in proportion of the extent Lessee (including, without limitation, its officers, agents, invitees, employees, or anyone directly or indirectly employed by any of them or anyone they control or exercise control over) caused or contributed to the environmental conditions involved. Lessee shall not have any responsibility whatsoever for any environmental conditions which were caused or existed before the effective date of this Lease of which Lessee did

not cause, in whole or in part.

**9. PERSONAL PROPERTY WAIVER**

All personal property, including, but not limited to, fixtures, equipment, or related materials placed by Lessee upon the Leased Premises will be at the risk of Lessee only, and no Indemnitee will be liable for any damage thereto or theft thereof, whether or not due in whole or in part to the negligence of any Indemnitee.

**10. [Reserved.]**

**11. COMPLIANCE WITH LAWS**

A. Lessee shall be responsible for obtaining, without expense to BNSF, all necessary real property rights and public authority and permission, including applicable permits, for the maintenance and operation of the Leased Premises provided Lessee obtains prior written consent from BNSF.

B. Lessee further agrees that it will exercise its rights and fulfill its obligations hereunder in full compliance with all laws, statutes, regulations, ordinances, orders, covenants and restrictions (collectively, "Legal Requirements") relating to the use of the Leased Premises.

C. Prior to entering BNSF's Property, Lessee shall and shall cause its employees, agents, contractors, invitees and representatives to comply with all BNSF's applicable safety rules and regulations.

**12. ENVIRONMENTAL**

A. Lessee shall strictly comply with all federal, state and local environmental laws and regulations in its use of the Leased Premises, including, but not limited to, the Resource Conservation and Recovery Act, as amended (RCRA), the Clean Water Act, the Oil Pollution Act, the Hazardous Materials Transportation Act, CERCLA (collectively referred to as the "Environmental Laws"). Lessee shall not maintain a treatment, storage, transfer or disposal facility, or underground storage tank, as defined by Environmental Laws on, under, or within the Minimal Clearances of track. Lessee shall not release or suffer the release of oil or hazardous substances, as defined by Environmental Laws on, under the Leased Premises or within the Minimal Clearances of the track.

B. Lessee shall give BNSF immediate notice to BNSF's Resource Operations Center at (800) 832-5452 of any release of hazardous substances on or from the Leased Premises, violation of Environmental Laws, or inspection or inquiry by governmental authorities charged with enforcing Environmental Laws with respect to

Lessee's use of the Leased Premises. Lessee shall use its best efforts to promptly respond to any release on or from the Leased Premises. Lessee also shall give BNSF immediate notice of all measures undertaken on behalf of Lessee to investigate, remediate, respond to or otherwise cure such release or violation.

C. In the event that BNSF has notice from Lessee or otherwise of a release or violation of Environmental Laws on the Leased Premises which occurred or may occur during the term of this Lease, without prejudice to any other rights or remedies available at law or in equity, BNSF may require Lessee, to take timely measures to investigate, remediate, respond to or otherwise cure such release or violation affecting the Leased Premises or any adjacent properties affected thereby. Alternatively, BNSF may, at its sole discretion and without prejudice to any other rights or remedies available at law or in equity, undertake such measures. Cost and expense of any such actions shall be apportioned between the parties as provided for in Section 8 of this Agreement.

D. Lessee shall promptly report to BNSF in writing any conditions or activities upon the Leased Premises which create a risk of harm to persons, property or the environment and shall take whatever action is necessary to prevent injury to persons or property arising out of such conditions or activities; provided, however, that Lessee's reporting to BNSF shall not relieve Lessee of any obligation whatsoever imposed on it by this Lease. Lessee shall promptly and fully respond to BNSF's request for information regarding said conditions or activities.

### **13. ALTERATIONS**

At Lessee's sole cost, risk, and expense, Lessee shall rehabilitate the existing track and turnouts to FRA Class I condition. Lessee shall comply with engineering standards and practices during the track rehabilitation that have been mutually agreed upon by the Lessor's and Lessee's Engineering Departments in advance. Without prejudice to any other rights or remedies available at law or in equity, BNSF reserves the right, but not the obligation, to suspend UP's performance of rehabilitation if Lessee does not conform to agreed upon engineering standards and practices and undertake such performance itself at Lessee's cost. In the event of such suspension, Lessee may not make any additional alterations of the track or permanently affix anything to the Leased Premises without BNSF's prior written consent.

**14. DEFINITION OF COST AND EXPENSE**

For the purpose of this Lease, "cost" or "costs" "expense" or "expenses" includes, but is not limited to, actual labor and material costs including all assignable additives, and material and supply costs at current value where used.

**15. INVOICES**

All invoices are due thirty (30) days after the date of invoice. In the event that Lessee shall fail to pay any monies due to BNSF within thirty (30) days after the invoice date, then Lessee shall pay interest on such unpaid sum from thirty (30) days after its invoice date to the date of payment by Lessee 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 December plus two and one-half percent (2 1/2%), and for the period July 1 through December 31, the prime rate last published in *The Wall Street Journal* in the preceding June plus two and one-half percent (2 1/2%), or (b) twelve percent (12%), or (ii) the maximum rate permitted by law, whichever is less.

**16. DEFAULT**

A. If Lessee creates or maintains any condition, including without limitation, any environmental condition, on or about the Leased Premises, which in BNSF's reasonable judgment interferes with or endangers the operations of BNSF, and within thirty (30) days after receiving written notice of such condition from BNSF UP shall not have addressed or begun to diligently address the condition, or in the case of any unauthorized assignment of this Lease, BNSF may, at its option, terminate this Lease by serving five (5) days' notice in writing upon Lessee.

B. Except as otherwise set forth in subparagraph A above, if Lessee defaults on any of the covenants or agreements of Lessee contained in this document, for a period of thirty (30) days following written notice of such default by BNSF, BNSF may, at its option, terminate this Lease on five (5) days' notice in writing to Lessee.

C. Any waiver by BNSF of any default or defaults shall not constitute a waiver of the right to terminate this Lease for any subsequent default or defaults, nor shall any such waiver in any way affect BNSF's ability to enforce any Section of this Lease.

The remedies set forth in this Section shall be in addition to, and not in limitation of, any other remedies that BNSF may have at law or in equity.

E. In no event shall any default of any of the covenants or agreements in this document affect the Lessee's right to operate freight trains over the Joint Trackage pursuant to the terms of the Trackage Rights Agreement, except to the extent any such default otherwise qualifies as a default under the Trackage Rights Agreement.

**17. LIENS**

Lessee shall promptly pay and discharge any and all liens arising out of any construction, alterations or repairs done or any other liens or encumbrances suffered or permitted to be done by Lessee on the Leased Premises and shall indemnify, defend, and hold harmless Lessor against any loss, liability or expense incurred by Lessor on account of such liens. Lessor is hereby authorized (but not otherwise obligated) to post any notices or take any other action upon or with respect to the Leased Premises that is or may be permitted by law to prevent the attachment of any such liens to the Leased Premises; provided, however, that failure of Lessor to take any such action shall not relieve Lessee of any obligation or liability under this Section or any other Section of this Lease. If, because of any act or omission of Lessee, any mechanic's lien or other lien, attachment, charge or order for the payment of money shall be filed against Lessor or any portion of the Leased Premises, Lessee shall, at its own expense, cause the same to be discharged of record within thirty (30) days after written notice from Lessor to Lessee of the filing thereof, and shall indemnify defend and save harmless Lessor against and from all costs, liabilities, penalties, and claims, including legal expenses, resulting therefrom.

**18. CLEARANCES**

A. Lessee shall not place, permit to be placed, or allow to remain, any permanent or temporary material, structure, pole, or other obstruction within 8½ feet laterally from the center (nine and one-half (9-1/2) feet on either side of the centerline of curved Track) or from 24 feet vertically from the top of the rail of said track ("Minimal Clearances"), provided that if any Legal Requirement requires greater clearances than those provided for in this Section, then Lessee shall strictly comply with such Legal Requirement. However, vertical or lateral clearances which are less than the Minimal Clearances but are in compliance with Legal Requirements will not be a violation of this Section, so long as Lessee strictly complies with the terms of any such Legal Requirement.

B. Lessee shall not place or allow to be placed any freight car within 250 feet of either side of any at-grade crossings on the Track, and shall release, indemnify, defend and hold harmless Lessor from any loss or damage resulting from violations of any Legal Requirements with respect to the condition or blockage by Lessee of any at grade crossings.

**19. ASSIGNMENT AND SUBLEASE**

Lessee shall not assign this Lease, in whole or in part, or any interest herein, or grant a security interest in any improvements on the Leased Premises, or sublet, and no heir, executor, administrator, receiver, master, sheriff, trustee in bankruptcy, or other assignee by operation of law shall assign or sublet, without the express prior written consent of Lessor. Notwithstanding any provision to the contrary, no consent shall be required for assignment which occurs as a result of a sale or transfer of all or substantially all of Lessee's assets pursuant to merger, sale, consolidation, combination, or order or decree of governmental authority. Any permitted assignee shall assume in writing all of Lessee's continuing and existing or thereafter arising obligations, liabilities, and indemnities under this Lease. Subject to the foregoing provisions, the terms of this Lease shall bind and inure to the benefit of the parties, their successors and permitted assigns.

**20. PROPERTY TAXES**

A. **Property and Ad Valorem Taxes.** Lessee shall be responsible for the timely payment of all property, Ad Valorem, franchise and special taxes or fees imposed by the United State of America or any state political subdivision thereof, municipality, or other governmental authority upon the Lessor, Lessee or the Leased Premises if such tax or fee is related to the lease, use or operation of the Leased Premises by Lessee during the Term hereof. If any tax bill includes taxes related to real property other than the Leased Premises, the payment of such tax bill shall be allocated between the Lessor and Lessee such that Lessee shall pay that portion of such tax bill related to the Leased Premises during the Term hereof and Lessor shall pay the remainder of such bill. If directly billed by a taxing or levying authority, all taxes and fees required to be paid by the Lessee pursuant to this Section shall be timely paid by Lessee directly to the taxing or levying authority. Proof of payment of any taxes and fees shall be provided by Lessee to Lessor no later than thirty (30) days after the due date. In the event any tax

or fee required to be paid by Lessee or Lessor pursuant to this Section is paid by the other, the responsible party shall reimburse the paying party for the full amount paid within thirty (30) days of the date a bill for reimbursement is mailed by the paying party. To the extent permitted by law, Lessee shall timely prepare and file all reports and returns which are required to be made with respect to any obligation of Lessee arising out of this Section. Proof of filing and a copy of all reports and returns shall be provided by Lessee to Lessor no later than thirty (30) days after the due date.

B. **Contest.** If the Leased Premises are assessed by the taxing authority directly to the Lessee and separate from the assessment of any other property of the Lessor, Lessee shall have the right to contest or protest, in Lessee's own name and at its own cost, any tax or fee for which it is responsible, provided only that such contest or protest will not result in any material danger of sale, forfeiture, or loss of the Leased Premises or any other asset of Lessor. If the Leased Premises are assessed by the taxing authority directly to the Lessor or as part of any other property of the Lessor, Lessee shall seek from the Lessor written permission to contest or protest any tax or fee for which it is obligated pursuant to Section, which permission shall not be unreasonably withheld, delayed or conditioned.

**21. APPLICABLE LAW**

This Lease shall be governed by and construed in accordance with the laws of the State of Texas.

**22. DISPUTE RESOLUTION**

A. If at any time a question or controversy shall arise between the parties hereto, other than a question or controversy related to Dispatching Protocol which shall be handled in accordance with the terms and procedures of that agreement, in connection with the Lease upon which the parties cannot agree, such question or controversy shall be submitted to and settled by arbitration. Unless other procedures are agreed to by the parties in writing, arbitration between the parties pursuant to this Section 22 shall be governed by the rules and procedures set forth in this Section 22.

B. 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 said 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 by said judge in the manner heretofore stated.

C. 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 the 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. 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 AAA shall appoint another to act in the arbitrator's place.

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

E. Each party to the arbitration shall pay all compensation, costs, and expenses of the arbitrator appointed in its behalf and all fees and expenses of its own witnesses, exhibits, and counsel. The compensation,

cost, and expenses of the single arbitrator or the additional arbitrator in the board of arbitrators shall be paid equally by UP and BNSF.

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

G. Interest computed annually, at a rate equal to the Prime Rate plus two (2) percentage points, shall be applied to any and all arbitrator's awards requiring the payment of money and shall be calculated from thirty (30) days following the date of the applicable arbitration decision. 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.

**23. NOTICES**

Any notice required or permitted to be given hereunder by one party to the other shall be in writing and the same shall be given and shall be deemed to have been served and given if (i) placed in the United States mail, certified, return receipt requested, or (ii) deposited into the custody of a nationally recognized overnight delivery service, addressed to the party to be notified at the address for such party specified below, or to such other address as the party to be notified may designate by giving the other party no less than thirty (30) days' advance written notice of such change in address.

**For UP:**

Union Pacific Railroad Company  
Gen. Mgr. Joint Facilities - Room 1200  
1416 Dodge Street  
Omaha, Nebraska 68179

**For BNSF:**

Staubach Global Services – RR, Inc.  
5650 N. Riverside Dr., Ste. 101  
Fort Worth, Texas 76137-2464  
Attn: Track Agreements

**24. SURVIVAL**

Neither termination nor expiration will release either party from any liability or obligation under this Lease, whether of indemnity or otherwise, resulting from any acts, omissions or events happening prior to the date of termination or expiration.

**25. RESERVED**

**26. WAIVER AND AMENDMENTS**

No amendment to this Lease shall be effective unless made in writing and signed by both parties hereto. No waiver of rights under this Lease shall be effective unless it is made in writing and signed by the waiving party. The waiver by BNSF of the breach of any provision herein by Lessee shall in no way impair the right of BNSF to enforce that provision for any subsequent breach thereof.

**27. SEVERABILITY**

To the maximum extent possible, each provision of this Lease shall be interpreted in such manner as to be effective and valid under applicable law, but if any provision of this Lease shall be prohibited by, or held to be invalid under, applicable law, such provision shall be ineffective solely to the extent of such prohibition or invalidity, and this shall not invalidate the remainder of such provision or any other provision of this Lease.

**28. INTEGRATION**

This Lease is the full and complete agreement between BNSF and Lessee with respect to all matters relating to the maintenance and operation of the Track and supersedes all other agreements between the parties hereto relating to the maintenance and operation of the Leased Premises, with the exception of the Trackage Rights Agreement which shall remain in effect between the parties. Nothing herein is intended to terminate any surviving obligation of Lessee or Lessee's obligation to defend and hold BNSF harmless in any prior written agreement between the parties.

**29. AGREEMENTS WITH THIRD PARTIES**

A. Lessor shall retain, administer and be responsible for all records and shall be entitled to all rents or revenues relating to property acquisition agreements, industry track agreements, property leases, term leases, indefinite term leases, permits, licenses, easements and all other agreements concerning the Leased Premises ("Third Party Agreements"). Lessor shall within forty-five (45) days after the Effective Date provide Lessee a list of such agreements for Lessee's information. In the exercise of any rights under this Lease, Lessee shall abide by any obligations and conditions affecting the Leased Premises and set forth in said agreements.

B. Lessee is explicitly prohibited from entering into any Third Party Agreements, independently from Lessor, for the use of the Leased Premises. At any time after the Effective Date, Lessor may, at any time,

encumber, assign all or part of its rights in, grant rights in the Leased Premises directly or indirectly without notice to or consent of Lessee so long as any such action shall not materially interfere with Lessee's use of the Leased Premises for the purposes leased herein.

C. All real estate included in property leases, term leases and indefinite term leases to third parties that existed prior to the date of this Lease and all real estate included in property leases, term leases and indefinite term leases to third parties that are executed after the date of this Lease and per the terms of this Lease shall be excluded from the definition of Leased Premises under this Lease.

IN WITNESS WHEREOF, authorized representatives of the parties have executed this Lease as of the date referenced hereinabove.

**THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY**

By: James J. O'Neil

Title: AVP - Property & Facilities Mgr.

**UNION PACIFIC RAILROAD COMPANY**

By: Jim H. Cannon

Title: Vice President Network Planning & Oprns.

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39

