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218226

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December 7, 2006

VIA HAND DELIVERY

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

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TRANSPORTATION BOARD

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TRANSPORTATION BOARD

Re: Finance Docket No. 34974
Keokuk Junction Railway Co. d/b/a/ Peoria & Western Railway – Lease And
Operation Exemption – BNSF Railway Company

Dear Secretary Williams:

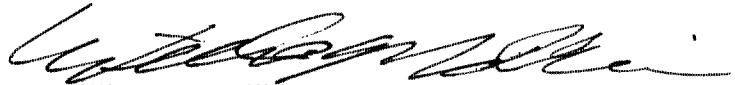
Enclosed on behalf of Keokuk Junction Railway Co. d/b/a/ Peoria & Western Railway (“KJRY”) are an original and eleven copies each of (1) a Petition for Exemption (“Petition”) seeking authority for KJRY to lease and operate a line of railroad between Vermont, IL, and Farmington, IL, which is currently owned and operated by BNSF Railway Company (“BNSF”); and (2) a Motion for Protective Order (“Motion”) seeking to maintain the confidentiality of certain documents entered into between KJRY and BNSF in connection with the above-captioned proceeding, information drawn therefrom as used in the Verified Statement of William J. Brennan, PhD (“V.S. Brennan” – which is an exhibit to the Petition), and a document produced during settlement discussions with Ameren Energy Fuels and Services Company (“Ameren”). The Petition and Motion are accompanied by a check in the amount of \$5,600 covering the filing fee for the Petition as set forth at 49 CFR 1002.2(f)(14)(iii).

The Motion relates to maintaining the confidentiality of the proposed lease agreement between KJRY and BNSF, certain information drawn therefrom and used in the V.S. Brennan, and the settlement proposal letter tendered to Ameren. Accordingly, accompanying the public versions of the Petition and the Motion in a sealed envelope are Highly Confidential copies of the Petition which contain unredacted copies of the proposed lease agreement, the Brennan V.S., and the letter proposal to Ameren. Redacted copies of the proposed lease agreement and Brennan V.S. are included as exhibits to the public version of the Petition.

The Honorable Vernon A. Williams
December 7, 2006
Page 2

Please acknowledge filing of the Petition and Motion by date stamping the extra copy of each thereof and returning those copies to the courier for return to my offices. If there are any questions concerning this filing, please contact me by telephone at (202) 663-7823 or by e-mail at wmullins@bakerandmiller.com.

Sincerely,

A handwritten signature in black ink, appearing to read 'William A. Mullins', with a long horizontal flourish extending to the right.

William A. Mullins

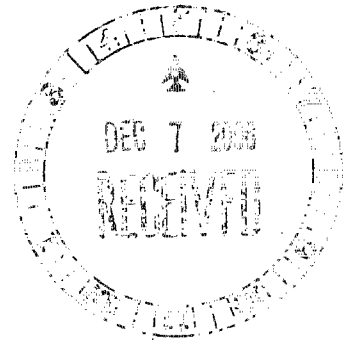
Enclosure

cc: Sandra L. Brown

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 34974

**KEOKUK JUNCTION RAILWAY CO. D/B/A PEORIA AND WESTERN RAILWAY
— LEASE AND OPERATION EXEMPTION —
BNSF RAILWAY COMPANY**



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EXPEDITED CONSIDERATION REQUESTED

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**Attorneys for Keokuk Junction Railway
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DATED: December 7, 2006

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 34974

**KEOKUK JUNCTION RAILWAY CO. D/B/A PEORIA AND WESTERN RAILWAY
— LEASE AND OPERATION EXEMPTION —
BNSF RAILWAY COMPANY**

EXPEDITED CONSIDERATION REQUESTED

Pursuant to 49 U.S.C. 10502 and 49 CFR Part 1121, Keokuk Junction Railway Co. d/b/a Peoria & Western Railway ("KJRY"),¹ a Class III rail carrier, hereby petitions the Board for an exemption from the formal requirements of 49 U.S.C. 10902 to lease from BNSF Railway Company ("BNSF") and operate a line of railroad extending between Vermont (Milepost 94.3) and Farmington (Milepost 52.2), in Fulton County, IL (the "Line"). As will be shown, the proposed transaction satisfies the criteria for an individual exemption, is being undertaken for entirely legitimate business purposes, and will produce public benefits. Further, as discussed below, KJRY respectfully requests expedited consideration of this petition.

BACKGROUND

On August 4, 2006, KJRY filed a verified notice of exemption (the "Notice") pursuant to the provisions at 49 CFR 1150.41, et seq., to lease and operate the above-referenced Line, which

¹ In related proceedings, KJRY has referred to itself for purposes of the proposed lease transaction using the acronym "PWRY." The scope of the discussion in this Petition for Exemption, however, involves KJRY in both in its PWRY capacity and strictly as KJRY. In order to avoid confusion, KJRY will herein refer to itself generally as KJRY and dispense with the PWRY acronym.

is approximately 42.1 miles long.² In response to a request from Ameren Energy Fuels and Services Company (“Ameren”), on August 10, 2006, the Board issued a “housekeeping stay” to seek further information and is so doing prevented KJRY from consummating the proposed transaction until further Board order. On November 17, 2006, Ameren filed a petition to reject KJRY’s notice or to revoke the exemption (“Petition To Revoke”).

Prompting Ameren’s participation in the Notice proceeding is the fact that Ameren has a corporate affiliate – Ameren Energy Generating Company – which owns and operates the Duck Creek electricity generating plant (“Duck Creek”) near Dunfermline and Canton IL. Duck Creek owns several thousand feet of industrial spur track that provides direct access to the Duck Creek plant. The Duck Creek spur tracks connect with a line owned and operated by KJRY and the BNSF Line that is the subject of this petition.

As mentioned above, KJRY proposes to lease from BNSF and to operate approximately 42.1 miles of the Yates City Subdivision extending between Milepost 94.3 at Vermont and Milepost 52.2 at Farmington, in Fulton County, IL. The Line intersects at or near Canton, IL, with an east-west running line already owned and operated by KJRY.³ In recent years, the only traffic handled over the Line was coal destined to Duck Creek. Such traffic was transported via BNSF over the southern portion of the Line, from Vermont to Duck Creek. See maps at Exhibit

² Attached hereto as Exhibit A is a copy of that Notice filed under Finance Docket No. 34918. KJRY hereby incorporates by reference into this petition for exemption proceeding the statements and materials presented in the attached Notice, except for the anticipated consummation date contained in the notice of exemption, because that date (August 15, 2006) has long since come and gone. KJRY also clarifies that an exemption applies to the Line as described above, and not to KJRY’s possible operation of any industrial spurs extending from and connecting with the Line (which are not within the Board’s authority to regulate).

³ Maps depicting the intersection between KJRY’s “east-west” line and the (north-south running) Line that KJRY proposes to lease from BNSF are attached hereto as Exhibit B. Duck Creek is very near the intersection of these two lines, in the general vicinity of Canton.

B. Although never abandoned, the portion of the Line north of Duck Creek has been out of service for several years, and considerable expense will be needed to restore that portion of the Line to operating condition should demand for service arise.

Prior to the proposed transaction and to avoid being solely served by BNSF, Ameren undertook, without Board authority, a spur track construction project to gain access to KJRY's east-west line between Peoria on the east and Keokuk on the west. Until completion of this project, Duck Creek was solely served by BNSF. The project allowed the Duck Creek plant to receive coal via either the BNSF route or via KJRY and its connection with UP and others. Upon completion of the project, Ameren put its Duck Creek coal transportation contract out to bid. The winning bid was for service via the UP-KJRY route.⁴ As a result, Ameren ceased using BNSF to transport coal to Duck Creek. Instead, Ameren now receives coal via originating mines served by the UP. This coal is carried to Hollis, IL (near Peoria) by UP where it is ultimately interchanged with KJRY which, in turn, transports the coal over its east-west line to the connections with the Duck Creek spur tracks. With no other traffic on the southern portion of the Line (Vermont-Canton) over which it had been serving Ameren, BNSF suspended track maintenance and expressed an interest in either selling or leasing the line to Ameren, KJRY, or others.⁵

⁴ KJRY has no knowledge of the rate UP quoted to Ameren nor any knowledge of the overall through rate being charged to Ameren.

⁵ Given that the line is no longer active and that maintenance has been suspended, this trackage will require rehabilitation to restore it to safe operating condition. While KJRY and BNSF await approval of the lease transaction, the Line continues further to deteriorate. Because KJRY has aggressively pursued carload traffic opportunities on the Line from shippers other than Ameren that would warrant the restoration of rail service, delays in the consummation of the transaction serve only to allow further deterioration, which, in turn, will add to KJRY's costs to return portions of the Line to safe operating condition.

After first offering the Line for sale to Ameren, an offer which Ameren refused because it appears that Ameren felt it could acquire the Line cheaper under the OFA procedures (Petition To Revoke at 13), BNSF and KJRY began discussions. Seeing an opportunity to preserve the BNSF routing into the Duck Creek plant and to obtain additional business on both the northern and southern segments of the Line, KJRY agreed to the lease arrangement and filed the Notice. As noted, Ameren has objected to the Notice and appears to believe, incorrectly, that the transaction will reduce its transportation options.

KJRY is responding to Ameren's Petition To Revoke in that proceeding. But as it explains in KJRY's reply to the Petition To Revoke, KJRY has offered to withdraw its Notice and is filing the subject individual exemption petition under a new Finance Docket number. After reviewing KJRY's Petition for Exemption and its Reply to the Petition To Revoke, KJRY leaves it to the Board's discretion either to continue with the previously-initiated Notice proceeding (and lift its housekeeping stay in order to allow the transaction to be consummated) or to accept KJRY's offer to withdraw the Notice and instead proceed under the Petition for Exemption process. If the Board moves forward with the Petition for Exemption, KJRY respectfully requests that the Board act as soon as possible to grant its Petition.

ARGUMENT

49 U.S.C. 10902, which governs transactions such as the one KJRY proposes here, provides that the Board shall authorize a Class II or Class III carrier's acquisition (by lease) and operation of a rail line unless that transaction is deemed inconsistent with the public convenience and necessity. See 49 U.S.C. 10902(c). Moreover, the Board is directed to grant exemptions from the formal application processes of section 10902, to the maximum extent consistent with the Board's oversight of railroads, where a formal application process is not necessary to carry

out the rail transportation policy ("RTP") at 49 U.S.C. 10101 and the proposed transaction is either of limited scope or will not result in an abuse of market power. 49 U.S.C. 10502(a).

While KJRY believes the transaction qualifies for handling under the notice of exemption procedures, the transaction undoubtedly qualifies for an individual exemption from the formal prior approval requirements of section 10902 as well. The transaction is not inconsistent with the public convenience and necessity and KJRY is pursuing the lease for entirely legitimate purposes. As a result, and because further delay to execution of the lease would be costly for all concerned, the Board should grant the exemption as soon as possible.

I. THE LEGAL STANDARDS UNDER 49 U.S.C. 10502 FOR AN EXEMPTION FROM THE REQUIREMENTS OF 49 U.S.C. 10902 FOR THE ACQUISITION AND OPERATION OF THE RAIL LINE HAVE BEEN MET

As noted, the Board must exempt a transaction from regulation pursuant to 49 U.S.C. 10502(a) when it 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 the abuse of market power. The proposed transaction is fully consistent with the RTP and is limited in scope. While the statute merely requires those two elements be proven to grant an exemption, KJRY also establishes herein that the transaction will not result in a reduction in competition to Duck Creek and will not allow KJRY to exercise market power over Ameren.⁶

The legislative history of section 10502 demonstrates a clear Congressional intent that the Board should liberally exercise its exemption authority to free certain transactions from the administrative and financial costs associated with continued regulation. In enacting the Staggers

⁶ Indeed, if anything, it is Ameren that is exercising its market power and leverage in order to undo a freely negotiated transaction so as to obtain ownership of the Line under the OFA procedures rather than through negotiations in the marketplace.

Rail Act of 1980,⁷ Congress made clear its intent that the Interstate Commerce Commission would use its expanded exemption authority under former section 10505 to free certain transactions and service from administrative and financial costs associated with continued regulation:

The policy underlying this provision is that while Congress has been able to identify broad areas of commerce where reduced regulation is clearly warranted, the Commission is more capable through the administrative provisions and practices not yet addressed by Congress to determine where they can be deregulated consistent with the policies of Congress. The conferees expect that, consistent with the policies of this Act, the Commission will pursue partial and complete exemption from remaining regulation.

H.R. Conf. Rep. No. 1430, 96th Cong. 2d Sess. 105 (1980).⁸ See also Exemption From Regulation – Boxcar Traffic, 367 I.C.C. 424, 428 (1983), vacated and remanded on other grounds, Brae Corp. v. United States, 740 F.2d 1023 (D.C. Cir. 1984), and H.R. Rep. No. 422, 104th Cong., 1st Sess. 168-69 (1995) (conference report accompanying the ICC Termination Act of 1995). Congress reaffirmed this policy in the conference report accompanying the ICC Termination Act of 1995, which reenacted the existing exemption provisions as Section 10502. H.R. Conf. Rep. No. 422, 104th Cong. 1st Sess. 168-169 (1995).

⁷ Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1897 (1980).

⁸ The exemption provision was considered an important cornerstone of the legislation. American Trucking Association v. ICC., 656 F.2d 1115, 1119 (5th Cir. 1981) (“American Trucking”). As President Carter stated upon signing the Staggers Act into law, the Act “strips away needless and costly regulations in favor of market forces, competitive market forces, whenever possible.” 16 Weekly Comp. President Doc. 2225-26 (Oct. 14, 1980). The Court in American Trucking at 1119 cited the affirmative use of section 10502 to exempt transactions, quoting from legislative history that “the Commission is charged with the responsibility of actively pursuing exemptions for transportation and service that comply with the section’s standards.” The Board is further charged with removing “as many as possible of the Commission’s restrictions” H.R. Rep. No. 1430, 96th Cong., 2d Sess. at 105 (1980).

The acquisition and operation of this rail line is the type of transaction for which the exemption provision of the Staggers Act was designed. As explained in detail below, the transaction proposed herein complies with section 10502 and, accordingly, should be exempted from the burdensome filing requirements of obtaining formal Board approval under the application procedures of section 10902.

A. Application of the Formal Requirements of Section 10902 Is Not Necessary to Carry Out the Rail Transportation Policy

Granting an exemption, instead of requiring burdensome regulation, will promote the rail transportation policy as expressed in 49 U.S.C. 10101. Specifically, the transportation policies which will be promoted by the issuance of an exemption are as follows:

- To allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail [10101(1)];
- To minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required [10101(2)];
- To promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues [10101(3)];
- To ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers to meet the needs of the public [10101(4)];
- To foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes [10101(5)];
- To reduce regulatory barriers to entry into the industry [10101(7)];
- To encourage honest and efficient management of rail roads [10101(9)]; and
- To provide for the expeditious handling and resolution of all proceedings required or permitted to be brought under this part [10101(15)].

As noted, the Line currently consists of two parts. The northern part (Canton to Farmington) has not been used in years and is in need of significant rehabilitation. The southern

part (Vermont to Canton) was previously used by BNSF to deliver coal to Duck Creek. As a result of Ameren opting for KJRY/UP service to Duck Creek, the southern part has not been used by BNSF in almost two years and is deteriorating. Other than Ameren's prior use of the southern part of the Line, there are no existing shippers on either segment.

While BNSF may not have actively pursued marketing opportunities for the Line, KJRY has a different business plan. Like many short line transactions, lease of the line to KJRY will lower costs, allow more focused marketing, and provide opportunities to interested potential shippers that may have been difficult for BNSF to offer or supply. In fact, KJRY intends to attract new shippers to use the Line. Especially of note is the fact that the lease agreement contains no "paper barriers," except for restrictions on bridge traffic that would move between BNSF's interchange at Vermont and another line-haul carrier. This is important, because of the Line's intersection at Canton with KJRY's east-west line that enjoys connections to several Class I carriers. Under the lease, KJRY may originate or terminate traffic on the Line in coordination with all line haul carriers other than BNSF without penalty. This is especially important as KJRY has connections not only with UP, but with Norfolk Southern, CSX, Toledo Peoria & Western, Iowa Interstate, and others.

In anticipation of its acquisition of leasehold rights in the Line, KJRY has already been exploring opportunities to develop new traffic. Of particular note, Central Illinois Energy ("CIE") is constructing an ethanol plant near Canton which most conveniently would be accessed from the Line. This plant is currently under construction, with an anticipated completion date of June 2007. See CIE Letter, attached hereto as Exhibit C. Once completed, CIE's plant could generate as much as 2,000 carloads of new business per year. Lease of the Line would afford CIE access to service via KJRY's east-west line in addition to the subject

Line, and it would permit BNSF to market traffic directly to the plant under the terms of the lease with KJRY. It is likely that some of the traffic to and from this new plant would originate or terminate on BNSF, and would therefore be transported over the Line.⁹

KJRY has also discovered that there are active industries along the Line that do not currently ship by rail but are very interested in resuming rail service if KJRY obtains authority to operate the Line. Interested shippers include Hitchcock Scrap Yard, Inc. ("Hitchcock"), and United Paving & Construction Co. ("United"), both of which are located in the vicinity of Canton. Copies of letters from these two potential shippers are attached hereto as Exhibits D and E, respectively. It is not certain at this time how many carloads each of these two shippers could generate, but, preliminary KJRY estimates indicate that these two shippers could generate 1,100 carloads annually.

Given the new service that could be provided to CIE, Hitchcock, United, and potentially others, the transaction is clearly consistent with the RTP. It would promote the objectives of 49 U.S.C. 10101(1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail. Similarly, the transaction would foster the objectives of 49 U.S.C. 10101(4) "to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense," and those of 49 U.S.C. 10101(9) to "encourage honest and efficient management of railroads."

⁹ CIE's plant would be most efficiently served from an industrial spur extending from the Line at a point near Canton to Duck Creek. It appears, however, that this spur is owned in whole or in part by Ameren. As the CIE letter indicates, Ameren agreed to allow CIE to use that spur so that CIE could obtain service from BNSF. Once the lease transaction was announced, Ameren reneged on its agreement and is now telling CIE that it cannot use the spur for rail service by KJRY if the lease goes forward. Ironically, Ameren speaks of competition and the need for shippers to have access to dual carriers while it prevents service to other potential shippers.

Granting the petition would also minimize the need for Federal regulatory control over the rail transportation system and would facilitate fair and expeditious decisions when regulation is required, and would also, quite obviously, serve to reduce regulatory barriers to entry. See 49 U.S.C. 10101(2), (7) and (15).

By transferring the Line to a lower cost short line operator with extensive operating experience (KJRY) working toward renewing relationships with past and new shippers interested in using the Line, the proposed transaction would “promote a safe and efficient rail transportation system,” and would “foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes.” See 49 U.S.C. 10101(3) and (5).

The only area of potential inconsistency with the RTP is Ameren’s argument that the transaction would eliminate its ability to use either BNSF or UP to obtain coal deliveries to Duck Creek due to the insertion of KJRY into either route. This is the lynchpin of Ameren’s objection to the transaction as Ameren has presented its position in the Finance Docket No. 34918 notice of exemption proceeding. While that issue is further addressed and disposed of below and in the attached Verified Statement of Dr. William J. Brennan (“V.S. Brennan”) (attached hereto as Exhibit F), where KJRY demonstrates that no competitive harm will befall Ameren or anyone else as a consequence of the transaction, suffice to say that Ameren’s concerns are unwarranted.

Although the transaction, if approved, would place KJRY into both of Ameren’s routing options to the Duck Creek plant, KJRY will not be able to exercise any market power to raise rates to Ameren or otherwise change the existing competitive situation. Under the existing competitive structure, Ameren has two routing options: the BNSF route and the UP/KJRY route. BNSF retains sole control to quote rates for the pricing to Ameren via the BNSF route and UP

and KJRY jointly control the pricing on the other route. While the transaction will place KJRY into the BNSF routing, KJRY will have no pricing authority over that route. Therefore, the competitive landscape has not changed as a result of the transaction.

Under the terms of the subject lease,¹⁰ BNSF retains the right to market service to and from points on the Line, including Duck Creek, and reserves the right to offer rates on all through movements to and from points on the Line. Accordingly, KJRY would not establish or charge its own rates for movements in conjunction with BNSF moving to or from shippers on the Line, including, of course, Duck Creek. Under this arrangement, BNSF would retain its market presence at Duck Creek, BNSF's line-haul rates would be the only rates applicable to such traffic, KJRY merely would provide origination and/or termination services on BNSF's behalf, and KJRY would be compensated by BNSF on a prescribed per-car allowance basis. In a post-transaction environment, KJRY would have no ability to quote rates, would not know the rates BNSF would quote, would not be able to obtain additional compensation by increasing rates, and would not otherwise control BNSF's pricing decisions.

Likewise, there will be no change in KJRY's pricing authority for the UP/KJRY route. UP and KJRY each have separate pricing authority for that route today and will continue to do so after the transaction. Indeed, because that traffic moves under contract, and will continue to do so for the next year or two, neither UP nor KJRY can raise their rates. Furthermore, even if they attempted to do so after the contract expires, they risk losing the traffic to BNSF, because neither KJRY nor UP has any control over BNSF's pricing. As such, because BNSF retains pricing

¹⁰ A copy of the lease and the related exhibits to that lease (all of which are designated as highly confidential) is attached as Attachment 1 to the highly confidential version of the Verified Statement of Dr. William J. Brennan ("V.S. Brennan" itself attached hereto as Exhibit F). There is a redacted copy of the lease, but not the exhibits to the lease, in the public version of Dr. Brennan's verified statement.

authority over the one route and UP and KJRY retain it over the other route (as they do today), there is absolutely no change in the competitive environment by putting KJRY into both routes. As is explained further below, KJRY's lack of market power means that the transaction remains consistent with the RTP, and in particular, Section 10101(1).

B. The Proposed Transaction Is Of Limited Scope

Because the transaction is consistent with the RTP, to meet the second element of the statutory test, KJRY needs to establish that the proposed transaction is either of limited scope or will not result in the abuse of market power. The proposed transaction involves the lease of 42.1 miles of currently inactive rail line located entirely in one county in the State of Illinois. The proposed transaction is therefore undoubtedly of limited scope and is consistent with previous transactions exempted by this Board. See, e.g., Norfolk and Western Railway Company – Acquisition Exemption – Consolidated Rail Corporation, Finance Docket No. 32957, 1996 STB LEXIS 223 at *9 (STB served Aug. 15, 1994) (acquisition of 49.8 miles of rail line presumed to be of limited scope); Norfolk and Western Railway Company – Purchase and Operation Exemption – Consolidated Rail Corporation Between Fort Wayne and Warsaw, IN, Finance Docket No. 32736, 1995 ICC LEXIS 216 at *5 (ICC served Aug. 25, 1995) (line sale involving the transfer of about 50 miles of track in Indiana “appears to be of limited scope).

C. The Proposed Transaction Will Not Result in an Abuse of Market Power

Because the first two parts of the statutory test have been met, KJRY need not also prove that the transaction will not result in the abuse of market power. Nonetheless, the proposed transaction would not give KJRY the ability to eliminate competition or otherwise exercise market power. In the course of the Finance Docket No. 34918 proceeding, Ameren has expressed concerns about KJRY's lease of the Line, which, although they are ultimately

nonsensical and appear designed for the limited purpose of extorting concessions from KJRY and/or BNSF, KJRY has nevertheless attempted to assuage through private negotiations and clarification of the terms of the proposed relationship between BNSF and KJRY.¹¹ As will be shown, KJRY's petition for exemption should be granted over Ameren's entirely meritless objections, because the proposed lease of the Line – (1) would not result in KJRY accumulating market power, and (2) would not enable KJRY to abuse market power (it would have none to exert in the first place).

The essence of Ameren's objection to KJRY's lease of the Line (as contained in Ameren's Petition) is that, while Duck Creek today enjoys access to two rail carriers – KJRY and BNSF – only KJRY would serve the plant after the lease transaction. Ameren therefore portrays KJRY's proposed lease as creating something "similar to a '2-to-1' situation" in which Ameren would become "captive" to KJRY. Petition at 6.

As briefly addressed above, Ameren's allegation of competitive harm is baseless, and its claim that the proposed lease transaction would create a "2-to-1 situation" is simply a smokescreen. The proposed transaction will result in no diminution in competition, will not reduce Ameren's line-haul service options, and will not enable KJRY to abuse market power (since it would acquire none anyway). When considered in the light of the facts, Ameren's participation in the notice of exemption proceeding, its objection to the proposed transaction, and

¹¹ Attached hereto as Exhibit G is a draft confidential letter dated November 17, 2006 in which KJRY set forth for Ameren in considerable detail the terms of the lease with BNSF. That letter clarified the circumstances under which BNSF would retain marketing authority for traffic originating or terminating on the line (including, in particular, Duck Creek). In short, that letter sets forth certain protections in favor of Ameren, and it represents one of the many steps that KJRY has taken to show Ameren that it will not be harmed by the proposed line lease. This letter constituted a proposal to Ameren, and it would have been executed had Ameren accepted the proposal and agreed to withdraw its opposition to the transaction.

its allegations of “nefarious” dealings between BNSF and KJRY are nothing more than diversionary tactics designed to delay the transaction and thereby wrest wholly inappropriate concessions from KJRY and/or BNSF.

1. Ameren’s Assertions Are Contrary To Economic Theory And The Facts Of The Proposed Lease Transaction

As set forth in Dr. Brennan’s verified statement, KJRY will not obtain any additional market power as a result of the transaction and Ameren will continue to benefit from competition between the UP/KJRY route and the BNSF route just as it does today. To suggest that KJRY could, as a consequence of the proposed lease with BNSF, exert market power to the potential injury of shippers, Ameren would need to prove that: (1) KJRY has independent pricing authority on both routes as a result of the transaction so as to be able to create a bottleneck and to use that bottleneck to manipulate the rates to Ameren; (2) KJRY knows enough about the through rates that both BNSF and UP charge, or would charge, for coal service to Duck Creek to be able to manipulate the rates in its favor; (3) KJRY could exert leverage against UP in adjusting upwards KJRY’s portion of a UP-KJRY move to Duck Creek; and (4) assuming KJRY could upwardly adjust its rate on a joint UP-KJRY move, UP would keep its portion (division) of the through rate steady (so as to result in an overall transportation cost increase to Ameren) and would thereby risk losing the traffic to BNSF, rather than simply reducing its division. Ameren has not proven any of these factors nor can it.

Of primary importance is the fact that KJRY does not have independent pricing authority over the BNSF route. BNSF would secure under the lease an exclusive right to offer rates to Duck Creek, thereby enabling BNSF to continue marketing service directly to the plant. KJRY would have no authority to interfere with BNSF’s pricing and marketing to Ameren, and, thus,

BNSF would – (1) retain a wholly effective market presence at Duck Creek, and (2) continue as a competitive alternative to the UP-KJRY route.¹²

For all intents and purposes, as far as BNSF's competitive market presence at Duck Creek is concerned, the transaction has changed nothing. Although Ameren knows this, it has attempted to elevate form over substance in its filings to the Board. Ameren ignores the fact that, post-transaction, BNSF would continue to be the beneficial service provider for traffic originating on BNSF and destined to shippers on the Line, including Duck Creek. Because BNSF would control the terms and conditions for service to and from Duck Creek, there would be absolutely no reduction in Ameren's competitive alternatives. There would be no allegedly "2-to-1" situation.

For the same reasons, Ameren's allegations of captivity to KJRY are equally hollow. For KJRY to be able to even theoretically exercise market power so as to make Ameren a truly "captive" shipper unable to benefit from the upstream competition between UP and BNSF, KJRY would have to possess the ability to control pricing on both routes, but KJRY has no such pricing ability. Ameren's line-haul options for Powder River Basin coal are BNSF and UP, each of which is a competitive counterbalance to the other in the provision of service to Duck Creek. Under the circumstances, both BNSF and UP have a vested interest in ensuring that their respective abilities to compete are not encumbered by a terminating carrier that could exercise potentially arbitrary monopoly pricing on the terminating portion of a move. For that reason, it would be entirely illogical for BNSF to agree to the transaction and for UP to acquiesce in it

¹² As Ameren's counsel is already aware, there are provisions in the Lease Agreement that further enable BNSF to ensure that KJRY makes not attempt to manipulate rates in KJRY's favor. See V.S. Brennan at 5-6.

(which they appear to have done by not opposing it) if the transaction would enable KJRY to acquire and exercise market dominance over rail movements to Duck Creek.¹³

If KJRY could effect “captivity” over Ameren’s Duck Creek plant through the lease, then, by extension, KJRY should, in theory, have the ability absorb all of the available profits for coal movements originating on either BNSF or UP. Of course, this cannot happen nor would BNSF or UP allow it to happen. See V.S. Brennan at 3-6. KJRY has no pricing authority over the BNSF route and the transaction has done nothing to alter in anyway the existing pricing authority that KJRY has now with respect to the UP-KJRY movement. Whatever pricing authority KJRY may have with respect to the UP routing option, it retains after the transaction and the transaction has not changed that authority. Whatever pricing authority BNSF had prior to the transaction, it continues to have and the transaction does nothing to change that fact. Yet, Ameren would have the Board reject this transaction or condition it even though nothing has changed.¹⁴

Second, KJRY lacks any ability to obtain knowledge of BNSF’s possible through rates to Duck Creek so as to somehow manipulate its divisions on the other route. Likewise, KJRY has no knowledge of UP’s existing through rate to Duck Creek which would give KJRY an

¹³ The fact that BNSF has retained pricing authority under the proposed lease shows that BNSF is not acting illogical and understands that it continues to have the ability to price in competition to the UP-KJRY routing post-transaction. See also V.S. Brennan at 5-7.

¹⁴ The Board has no such authority. See Kansas City Southern – Control – The Kansas City Southern Railway Company, et al., Finance Docket No. 34342 (Decision No. 12) (STB served Nov. 29, 2004), slip op. at 16 (citing CSX Corp. et al. – Control – Conrail Inc., et al., 3 S.T.B. 196, 246 (1998)(Board will not impose conditions to remedy pre-existing harms); See also Canadian National Railway Company, et al. – Control – Duluth, Missabe and Iron Range Railway Company, et al., Finance Docket No. 34424 (Decision No. 7) slip op. at 14 (STB served Apr. 9, 2004)(Board does not exercise its broad conditioning authority to address “pre-existing circumstances” that would not be the product of the proposed transaction).

advantage in its own pricing. KJRY knows only its own rate requirements and does not know what UP's division is or even what the overall through rate to Duck Creek is. As far as KJRY is concerned, it knows its own revenue needs and thus would act as a neutral carrier for both routes; allowing Ameren to benefit from the upstream competition between UP and BNSF.

Third, the assumption that UP would stand idly by if KJRY were somehow to attempt to use whatever market power it has (which it has none) to raise the overall through rate for the UP routing is preposterous. UP would not allow its overall through rate to be raised beyond what its competitor, BNSF, charges so as to lose the traffic. If KJRY were to seek more revenue from UP, UP would either reduce its division so as to maintain the traffic or would raise the overall through rate to Ameren and thus potentially lose the traffic to BNSF.¹⁵ This is the definition of competition. The transaction does not change this dynamic as it gives KJRY no more nor less market power than it already has with respect to the UP-KJRY route.

KJRY lacks market strength to dictate rates on a UP-KJRY routing to the detriment of UP, and that it would likely suffer collateral damage elsewhere if it tried to do so. As it does today, UP also has significant market power to use against KJRY if KJRY were to attempt to raise its revenue requirements. KJRY is affiliated with several other short line railroad companies under the control of Pioneer Railcorp. ("Pioneer"), and many of those short lines interchange and work with UP. The nature of Class I-short line relationships is such that KJRY actions harmful to UP would likely result in reciprocal harm to KJRY elsewhere or to other railroads in the Pioneer family. Accordingly, even if it hypothetically were possible for KJRY to

¹⁵ As a profit maximizing firm, one has to presume, given that UP-KJRY were able to switch the traffic from a BNSF routing, that UP's overall through rate is priced just below what BNSF was quoting to Ameren.

obtain market dominance over Duck Creek movements (and, as shown, that is simply not the case), it would be very short-sighted of KJRY to use it.

Finally, BNSF's retention of an ownership interest in the Line and pricing authority over service to shippers accessed by the Line are themselves safeguards against KJRY's ability to obtain and exercise market power. Such safeguards, combined with the lease termination provisions discussed in Dr. Brennan's verified statement, further ensure that KJRY cannot force BNSF to interchange traffic with KJRY at another location and that KJRY could not otherwise exercise any possible market advantages over BNSF or Ameren.

2. Ameren's Assertions Are Contrary To Precedent

Recall that, if Ameren's assertions were correct, it would mean that a Class III carrier (KJRY) that solely serves a shipper (Duck Creek) and that connects with two Class I carriers (UP and BNSF) has so much market power that it is able to extract monopoly rents so as to prevent the shipper from benefiting from the competition between the two Class I carriers. Dr. Brennan explains why this is not the case as a matter of economic principle and why this theory is inconsistent with the facts of this proceeding. Put simply, a Class III carrier does not have the same market power as a Class I, and thus no ability to take advantage of a "bottleneck" from which it might otherwise be able to extract monopoly rents. As a result, the Class III usually acts as a neutral carrier allowing the solely served shipper to take advantage of the competition between the two connecting carriers. This is particularly true where the Class III carrier has no independent pricing authority and merely serves as handling carrier for the Class I, receiving a per-car charge with no relation to the overall through rate. See V.S. Brennan at 5.

Indeed, even the Class Is, the Board, and the ICC before it, have recognized that short line railroads do not have sufficient market power in such situations so as prevent a shipper

solely served by a Class III from benefiting from the competition of the two Class Is connecting to that short line. The clearest applications of this prevailing policy is seen in the major rail consolidation proceedings of the 1990s – such as, among others, the consolidation the Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company¹⁶ and the consolidation of UP and the Southern Pacific Transportation Company¹⁷ – in which the applicants pledged (and the Board imposed as conditions) that shippers who were solely served by short line railroads that connected to both of the merging Class I carriers (and thus the shipper – and its connecting short line railroad – would otherwise become “2-to-1 shippers” as a result of an unconditioned merger by losing the two independent Class I connections) would not lose the competitive line haul option previously provided by the two connecting Class I carriers.

The merging carriers committed to such competition-preserving conditions even though they might otherwise have argued (as Ameren does here) that: (1) because the shippers were solely served by the short lines, the shippers were “captive” to those short lines and thus did not benefit from the competition of the two upstream line-haul connecting carriers; and (2) since the short line already possessed market dominance by taking the “one-lump” available to bottleneck carriers that protective conditions or concessions were unwarranted. The merging railroads did not so argue against extending protections to “2-to-1” short line-served customers. Instead, because of a recognition that short lines do not possess market dominance and that shippers connecting to such short lines did in fact benefit from the competition between the two connecting Class I carriers notwithstanding the fact that a short line was solely-serving a

¹⁶ Burlington Northern et al. – Merger – Santa Fe Pacific, et al., 10 I.C.C.2d 661 (1995).

¹⁷ Union Pacific/Southern Pacific Merger, 1 S.T.B. 233 (1996), aff’d sub nom. Western Coal Traffic League v. STB, 169 F.3d 775 (D.C. Cir. 1999).

particular customer, applicants proposed and the Board imposed protections to ensure that such short line carriers (and the shippers that they solely served) continued to have two connecting Class I carriers.

This prevailing view is equally apt and controlling here, although Ameren argues precisely the opposite. However, you can bet the farm that if KJRY were the only carrier serving Duck Creek and UP and BNSF proposed to merge, Ameren would be the first to argue that it needed a condition to preserve its ability to benefit from the competition provided by UP and BNSF in cooperation with KJRY. Ameren knows full well that it benefits from the competition between UP and BNSF today and that it will continue to reap such benefits in the future under the proposed transaction. The placement of KJRY into the BNSF routing, with no pricing authority, no knowledge of UP's and BNSF's through rates, and no ability to exert market power against UP, does not erode Ameren's ability to take advantage of this upstream competition.

II. KJRY HAS VALID BUSINESS REASONS FOR LEASING THE LINE AND IT IS NOT BEING DONE SO THAT KJRY CAN EXERCISE MARKET POWER OVER COAL SHIPMENTS TO DUCK CREEK

In its Petition To Revoke, Ameren questions why KJRY would be interested in leasing the Line from BNSF, when: (1) virtually all of the Line is out of service, (2) KJRY already serves the one active customer on the Line via another route, and (3) there is no immediate need for service on the Line by Ameren or any other shipper. In raising such questions, Ameren's implies that the only business justification for KJRY agreeing to the lease would be that it would benefit KJRY by allowing it to squeeze Ameren on Duck Creek rates. As shown above, there is no truth or substance to such allegations of "nefarious" schemes; there are valid reasons why KJRY would agree to the lease that have nothing to do with Ameren, and there is no reason for BNSF to cooperate in such schemes.

Unquestionably, the lease would permit KJRY to earn revenue from movements to and from Duck Creek regardless of whether such movements originate on UP, BNSF, or any other carrier with which KJRY connects. But those revenues are needed to maintain and rehabilitate KJRY's east-west line, to rehab and maintain the Vermont to Canton segment, and to restore service on the Canton to Farmington segment. The transaction also offers far more immediate business potential for KJRY. To begin with, KJRY is exploring a car storage contract with BNSF, under which KJRY would store cars for BNSF on otherwise unused parts of the Line. Such an arrangement would provide revenue opportunities for KJRY. Also, as noted above, there is CIE's ethanol plant near Canton (currently under construction), which most conveniently would be accessed from the Line, and which would benefit from access to BNSF via KJRY. CIE anticipates that the plant will commence operations on or shortly after June 2007. In addition, potential shippers such as Hitchcock and United offer added traffic opportunities that may be secured only through the advantages of a lower-cost short line service provider connecting to multiple line-haul carriers. For BNSF's part, they get to rid themselves of expensive maintenance obligations and reduce their costs for serving the Duck Creek plant.¹⁸ In short, there are entirely independent business reasons for why BNSF and KJRY have undertaken the proposed transaction, and those reasons have nothing to do with attempting to squeeze monopoly rents from Ameren.

¹⁸ The proposed lease transfers the rehabilitation and maintenance costs of the Line to KJRY while maintaining BNSF's access to Duck Creek and other potential shippers. This is of significant benefit to BNSF. It is not unreasonable, therefore, for BNSF to compensate KJRY for this expense by providing KJRY with a per-car revenue charge to cover both variable as well as capital costs.

III. THE TRANSACTION IS NOT INCONSISTENT WITH THE PUBLIC INTEREST

KJRY has already shown that the proposed transaction clearly satisfies the exemption criteria of 49 U.S.C. 10502(a). Even under the balancing standards of section 10902, which requires the Board to approve the transaction unless it is shown that the transaction is inconsistent with the public interest, the transaction should be approved.¹⁹ Because the proposed transaction is not inconsistent with the public interest and would actually benefit Ameren, it should be approved. As discussed in Dr. Brennan's verified statement, BNSF has selected a short line operator with potentially lower operating costs than itself to provide the originating and terminating service over a light-density line that happens to serve Duck Creek. Under the lease, BNSF would reduce overall service costs to Duck Creek and thus, in the future, is likely to be even more competitive than it has been previously. In this sense, the proposed transaction actually enhances competition by lowering BNSF's costs and making it better able to compete against UP.

Moreover, by transferring operations of the Line to KJRY without restrictive "paper barriers," the transaction will again enhance competition and actually expand the available routing options for any other potential shippers on the Line. By conveying operating rights to an existing short line (KJRY) that already operates connecting trackage and could generate new traffic opportunities that BNSF may not have been in a position to pursue as aggressively, the transaction is pro-competitive. In fact, because KJRY already operates in the area, it would

¹⁹ The Board need only find that the proposed transaction would not be inconsistent with the public convenience and necessity, not that the public benefits flowing from the transaction would outweigh any harms resulting therefrom. Even if it were true that Ameren suffered some small possibility of harm as a result of the transaction, such harm would be outweighed by the benefits of transferring the Line to a short line carrier that could operate this light-density Line as an integral part of its existing lines. See V.S. Brennan at 11.

enjoy economies of scale that a stand-alone short line would not enjoy if a different short line were to acquire or lease the Line. See V.S. Brennan at 7-9.

As indicated, the lease lacks a paper barrier restricting traffic originating or terminating on the line, and thus enables KJRY to fully and efficiently to integrate the Line with those that it already operates. Potential shippers on the Line would benefit from the economies of scale of an existing short line operator (KJRY) and would enjoy routing options via line haul carriers other than BNSF, which might not have been the case if the lease had been framed differently. These benefits of the transaction militate in favor of granting KJRY's petition.

IV. EXPEDITED HANDLING OF KJRY'S PETITION IS WARRANTED

Given that the transaction raises no competitive or public interest issues, it more than qualifies under the notice of exemption procedures. However, the transaction remains stayed and has been stayed since August. Yet, time is of the essence in moving forward with KJRY's lease of the Line. Indeed, expeditious handling is chief among the reasons why KJRY is willing to withdraw its original notice of exemption encompassing this transaction and seek approval under the petition for exemption process.²⁰ To begin with, the Line is wholly inactive at the moment and will continue to suffer deterioration due to suspended track maintenance until KJRY executes the lease, is able to focus its attention to the Line, restore it to service, and, in the process, secure new traffic.

Among the new sources of traffic is CIE, who, as mentioned, is constructing an ethanol plant that would be most efficiently served – and, in fact, may only be able to obtain direct rail

²⁰ If the Board, after reviewing this Petition for Exemption, agrees with KJRY that the transaction is pro-competitive and in the public interest, the Board has the discretion to reject KJRY's request to withdraw the Notice and instead to issue a decision lifting the housekeeping stay and allowing the transaction to be consummated.

service – via the Line. As CIE’s plant is under construction, plant components could be moved directly to the work site, but that is not currently feasible for a variety of reasons, among them the fact that the Line is out of service (and thus BNSF service is not available) and that Ameren has thus far refused to accommodate traffic over the spur track that best accesses the work site. Until KJRY is installed as the Line’s operator, and secures the ability to pursue a working relationship with CIE to effect a direct connection to the plant, CIE will have to undertake very expensive transload operations or receive no rail service at all.²¹

KJRY has endeavored here to provide a complete and thorough depiction of the proposed transaction, and has supplied detailed expert testimony and legal analysis to show why an exemption is appropriate and why, even under the standard balancing test of section 10902, the lease should be permitted to proceed. There is little doubt that the proposed transaction is in the public interest. Furthermore, there is absolutely no merit to Ameren’s claim that KJRY’s lease of the Line would harm it or would result in any anticompetitive impacts. Finally, even if there were any possible adverse impact from the transaction (which there is no such possibility); the benefits of the transaction clearly outweigh any conceivable harms. For all of these reasons, KJRY respectfully urges expedited consideration of its petition.

V. ENVIRONMENTAL ANALYSIS

A petition for exemption must comply with the Board’s environmental reporting requirements, if applicable. 49. CFR 1121.3(a). Under 49 CFR 1105.6(c)(2)(i), this transaction

²¹ KJRY currently is moving construction materials and plant components over its existing east-west line to a point near Canton, where the traffic completes its move to the plant via truck. KJRY understands that certain plant components that will need to be transported by rail to the work site are too large for final transfer by truck. Accordingly, delay in the handling of this petition equally delays a resolution among KJRY, Ameren, and CIE of the transportation issues confronting CIE.

is exempt from environmental reporting requirements. The proposed acquisition will not result in significant changes in carrier operations, *i.e.*, changes that exceed the thresholds of 49 CFR1105.7(e)(4) or (5).

Under 49 CFR1105.8(b)(1), the proposed lease of the Vermont to Farmington line by KJRY is also exempt from the historic reporting requirements. KJRY's lease and operation of the line is for the purpose of continued rail operations. In addition, further Board approval would be required as a prerequisite to abandonment or discontinuance of service, and there are no plans in connection with this transaction to dispose of or alter properties subject to the Board's jurisdiction that are 50 years old or older.

VI. LABOR PROTECTION

Under 49 U.S.C. 10502(g), the Board may not exempt a rail carrier from otherwise applicable employee protection obligations. Section 10902(d) provides that a Class II rail carrier which acquires rail lines pursuant to Section 10902 shall "provide a fair and equitable arrangement for the protection of the interests of [affected] employees." That same section provides that "[t]he Board shall not require such an arrangement from a Class III rail carrier. . . ." KJRY is a Class III carrier. As such, not employee protection arrangements are required as part of the proposed lease transaction.

CONCLUSION

KJRY's proposed lease of the Line from BNSF is not inconsistent with the public interest. As shown above, application of the formal requirements of 49 U.S.C. 10902 is not necessary to carry out the RTP. Further, the transaction is unquestionably of limited scope, and that should end the exemption analysis. Nevertheless, KJRY also has shown that the proposed transaction would not enable KJRY to accumulate or abuse market power. Ameren will not be

harm by the transaction, and, in fact, it and other potential shippers on the line will benefit from KJRY's planned operations. Finally, delay in moving forward with this transaction has already cost KJRY needed revenues that could have been used in restoring the Line. Further delay disadvantages interested shippers and contributes to the deterioration of the Line. For these reasons, KJRY's petition for exemption should be granted as expeditiously as possible, or alternatively, the housekeeping stay lifted and the transaction be allowed to be consummated.

Respectfully submitted,

Daniel A. LaKemper
Keokuk Junction Railway Co.
1318 S. Johanson Road
Peoria, IL 61607
Tel.: (309) 697-1400
Fax: (309) 697-8486


William A. Mullins
Robert A. Wimbish
BAKER & MILLER PLLC
2401 Pennsylvania Ave, NW
Suite 300
Washington, DC 20037
Tel: (202) 663-7820
Fax: (202) 663-7849

Attorneys for Keokuk Junction Railway Co. d/b/a
Peoria & Western Railway

December 7, 2006

VERIFICATION

I, J. Michael Carr, declare under the penalty of perjury that to the best of my knowledge the facts stated within the foregoing petition for exemption are true and correct. Further, I certify that I am qualified to make such verification on behalf of Keokuk Junction Railway Co. d/b/a Peoria & Western Railway.

Executed this 7th day of December, 2006.



J. Michael Carr
President, CEO and Chief Financial
Officer, Pioneer Railcorp

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 34974

**KEOKUK JUNCTION RAILWAY CO. D/B/A PEORIA AND WESTERN
RAILWAY
— LEASE AND OPERATION EXEMPTION —
BNSF RAILWAY COMPANY**

EXHIBIT A

FD 34918 - VERIFIED NOTICE OF EXEMPTION

217229

BEFORE THE SURFACE TRANSPORTATION BOARD

ENTERED
Office of Proceedings

AUG 04 2006

Fa.
Public Recd

FINANCE DOCKET NO. 34918

KEOKUK JUNCTION RAILWAY CO.
d/b/a PEORIA & WESTERN RAILWAY
- LEASE AND OPERATION EXEMPTION -
BNSF RAILWAY COMPANY
BETWEEN VERMONT and FARMINGTON, ILLINOIS



FILED

AUG 04 2006

SUR.
TRANSPORTATION BOARD

VERIFIED NOTICE OF EXEMPTION
PURSUANT TO 49 CFR 1150.41

FEE RECEIVED

AUG 04 2006

SURFACE
TRANSPORTATION BOARD

NOTICE OF OPERATION OF RAIL LINES
INFORMATION REQUIRED BY 49 CFR 1150.43

Daniel A. LaKemper, Esq.
General Counsel
Keokuk Junction Railway Co.,
d/b/a Peoria & Western Railway
1318 S. Johanson Road
Peoria, Illinois 61607
Tel.: (309) 697-1400
Fax: (309) 697-8486

Dated: July 27, 2006.

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34918

KEOKUK JUNCTION RAILWAY CO.,
d/b/a PEORIA & WESTERN RAILWAY
--LEASE AND OPERATION EXEMPTION--
BNSF RAILWAY COMPANY
BETWEEN VERMONT AND FARMINGTON, ILLINOIS

VERIFIED NOTICE OF EXEMPTION

Pursuant to 49 C.F.R. §1150.41, et. seq., Keokuk Junction Railway Co., d/b/a Peoria & Western Railway ("PWRY"), a Class III rail carrier, hereby files this Verified Notice of Exemption to lease and operate the portion of BNSF Railway Company's Yates City Subdivision between Vermont (Milepost 94.3) and Farmington (Milepost 52.20), as shown on Exhibit A, attached hereto, in Fulton County, Illinois (the "Line"). Based on projected revenues for the Line, PWRY expects to remain a Class III rail carrier after consummation of the transaction proposed herein.

In accordance with the requirements of 49 C.F.R. §1150.43, PWRY submits the following information:

Name and Address of Applicant: 49 C.F.R. §1150.43(a)

The full name and address of the Class III rail carrier applicant herein is as follows:

Keokuk Junction Railway Co., d/b/a Peoria & Western Railway
1318 S. Johanson Road
Peoria, Illinois 61607

Applicant's Representative: 49 C.F.R. §1150.43(b)

The name, address and telephone number of the representative of the applicant who should receive correspondence is as follows:

Daniel A. LaKemper
General Counsel
Keokuk Junction Railway Co.,
d/b/a Peoria & Western Railway
1318 S. Johanson Road
Peoria, Illinois 61607

Statement Concerning Agreement: 49 C.F.R. §11500.43(c)

PWRY has reached agreement with BNSF Railway Company ("BNSF") providing for PWRY's lease and operation of that portion of the BNSF's Yates City Subdivision between Vermont, Illinois (Milepost 94.3) and Farmington, Illinois (Milepost 52.20), commencing August 15, 2006.

Operation of the Property: 49 C.F.R. §1149.43(d)

PWRY will operate, maintain and provide all rail common carrier services on the Line, pursuant to the Lease Agreement between PWRY and BNSF referenced hereinabove.

Brief Summary of the Transaction: 49 C.F.R. §1150.43(e):

Pursuant to the Lease Agreement between PWRY and BNSF, PWRY proposes to lease, operate, maintain, and perform all common carrier service on the Line. PWRY is controlled by Pioneer Railcorp, See Finance Docket No. FD-34010, Served February 27, 2001 (Pioneer Railcorp – Continuance in Control Exemption – Gettysburg & Northern Railroad Co.).

- (1) The name and address of the railroad transferring the subject property to the Class III rail carrier applicant:

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

(2) The proposed time schedule for consummation of the transaction:

Under the Agreement, consummation of this transaction will occur on August 15, 2006, and operations under this exemption will begin thereafter.

(3) The mileposts of the subject property:

That portion of the BNSF's Yates City Subdivision between Vermont, Illinois (Milepost 94.3) and Farmington, Illinois (Milepost 52.20), in Fulton County, Illinois, including the Dunfermline industrial spur.

(4) The total route miles being acquired:

The length of the mainline trackage is approximately 42.1 miles.

Map: 49 C.F.R. §1150.43(f):

A map showing the Line and the surrounding trackage is attached as Exhibit A of this Notice.

Certificate of Compliance: 49 C.F.R. §1150.43(g):

A Certificate of Compliance with the provisions of 49 C.F.R. §1150.33(g) is attached as Exhibit B to this Notice.

Environmental and Historic Preservation Data: 49 C.F.R. §1105:

Under 49 C.F.R. §1105(c)(2), PWRY's proposed lease and operation of the Line is exempt from environmental reporting requirements. The proposed transaction will not result in significant changes in carrier operations, i.e., changes that exceed the thresholds established in 49 C.F.R.

§1105.7(e)(4) or (5).

Under 49 C.F.R. §1105.8(b)(1), PWRY's lease and operation of the Line is also exempt from historic preservation reporting requirements. The proposed lease is for the purpose of continued rail operations. Further Surface Transportation Board approval is required to discontinue or abandon service, and there are no plans to dispose of or alter properties subject to Board jurisdiction that are fifty years old or older.

Caption Summary: 49 C.F.R. §1150.44:

A caption summary in appropriate form is attached as Exhibit C to this Notice.

Pursuant to 49 USC §10902(d), no labor protection is required by the action described in this Notice.

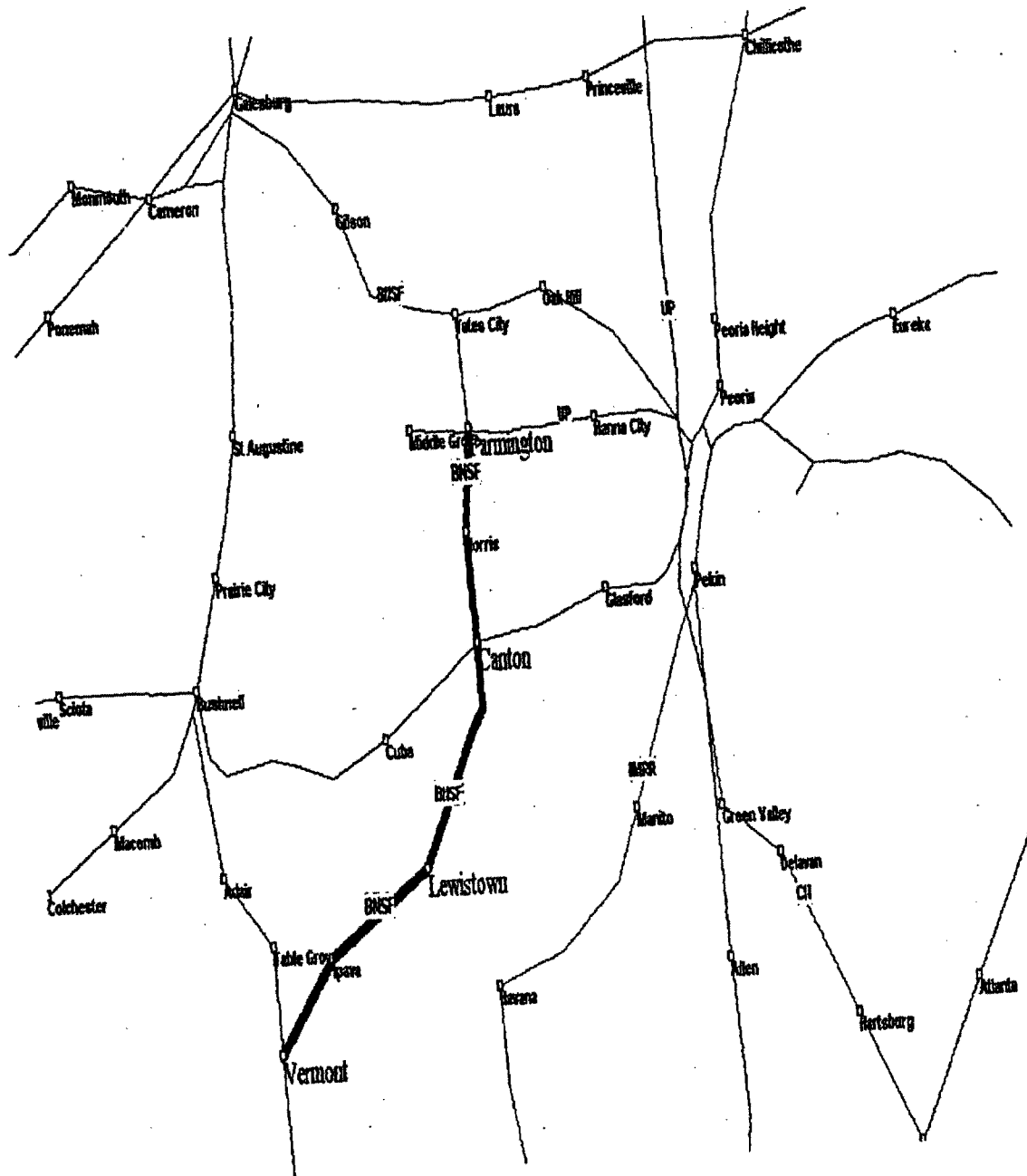
All shippers known to have shipped or received freight within the last two years will be served a copy of this Notice.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Daniel A. LaKemper".

Daniel A. LaKemper, Esq.
Keokuk Junction Railway Co.,
d/b/a Peoria & Western Railway
1318 S. Johanson Road
Peoria, Illinois 61607
Tel.: (309) 697-1400

EXHIBIT A
MAP



STATE OF ILLINOIS)
) ss
COUNTY OF PEORIA)

VERIFICATION AND CERTIFICATE OF COMPLIANCE

J. Michael Carr, being first duly sworn, deposes and states that:

He is the President and Chief Financial Officer of applicant Keokuk Junction Railway Co., d/b/a Peoria & Western Railway:

He has read the foregoing Notice of Exemption; that he is familiar with the facts stated therein and that the contents thereof are true and correct to the best of his knowledge and belief

That the Line being leased pursuant to this Notice of Exemption has no traffic currently, and that I hereby certify that applicant's projected revenues as a result of the transaction will not result in the creation of a Class II or Class I rail carrier so as to require processing under §1150.45.

J. Michael Carr

Subscribed and sworn to
Before me this 3rd day of August, 2006

Notary Public



EXHIBIT C
CAPTION SUMMARY

SURFACE TRANSPORTATION BOARD

Notice of Exemption

Finance Docket No. 34918

KEOKUK JUNCTION RAILWAY CO.
d/b/a PEORIA & WESTERN RAILWAY
-LEASE AND OPERATION EXEMPTION-
BNSF RAILWAY COMPANY

Keokuk Junction Railway Co., d/b/a Peoria & Western Railway, has filed a notice of exemption to lease and operate BSNF Railway's line between Vermont and Farmington, Illinois.

Comments must be filed with the Board and served upon Petitioner's representative, Daniel A. LaKemper, 1318 S. Johanson Road, Peoria, Illinois 61607.

The notice is filed under 49 CFR 1150.41. If the notice contains false or misleading information, the exemption is void *ab initio*. The filing of a petition to revoke will not automatically stay the transaction.

Dated:

By the Board,
Vernon A. Williams,
Secretary.

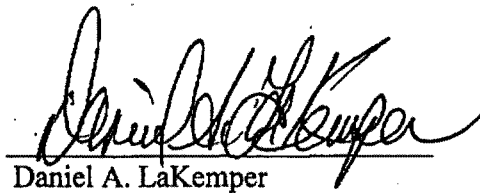
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Verified Notice of Exemption was served on the following via UPS Overnight Mail on August 3, 2006:

BNSF Railway Company
2650 Lou Menk.
Fort Worth, Texas, 76131
Attn: AVP Joint Facilities
AVP Short Line Development

and

Ameren Energy Fuels and Services Co.
VP Coal Supply & Transportation
1901 Chouteau Avenue, MC 611
St. Louis, MO 63103



Daniel A. LaKemper

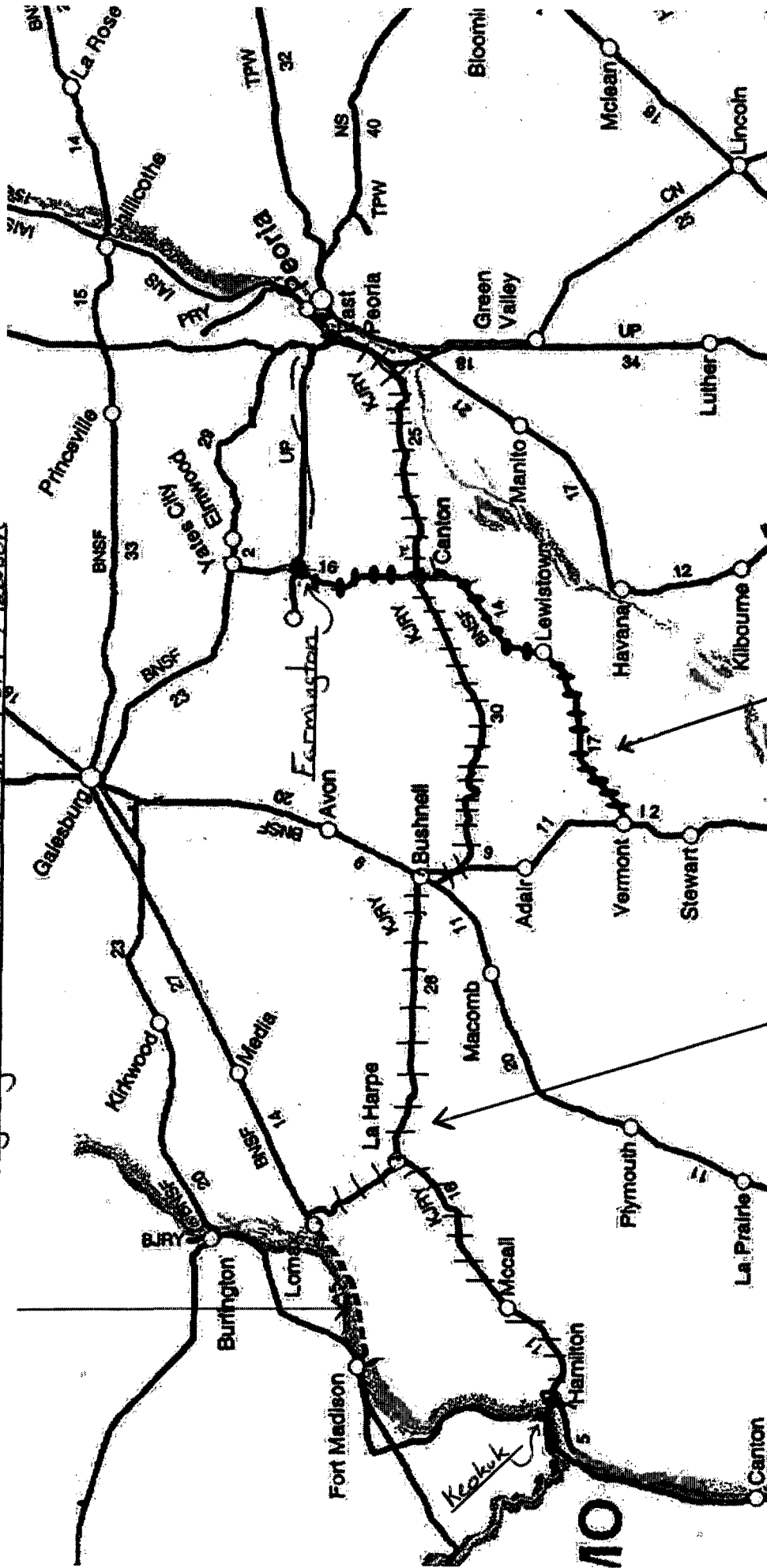
**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 34974

**KEOKUK JUNCTION RAILWAY CO. D/B/A PEORIA AND WESTERN
RAILWAY
— LEASE AND OPERATION EXEMPTION —
BNSF RAILWAY COMPANY**

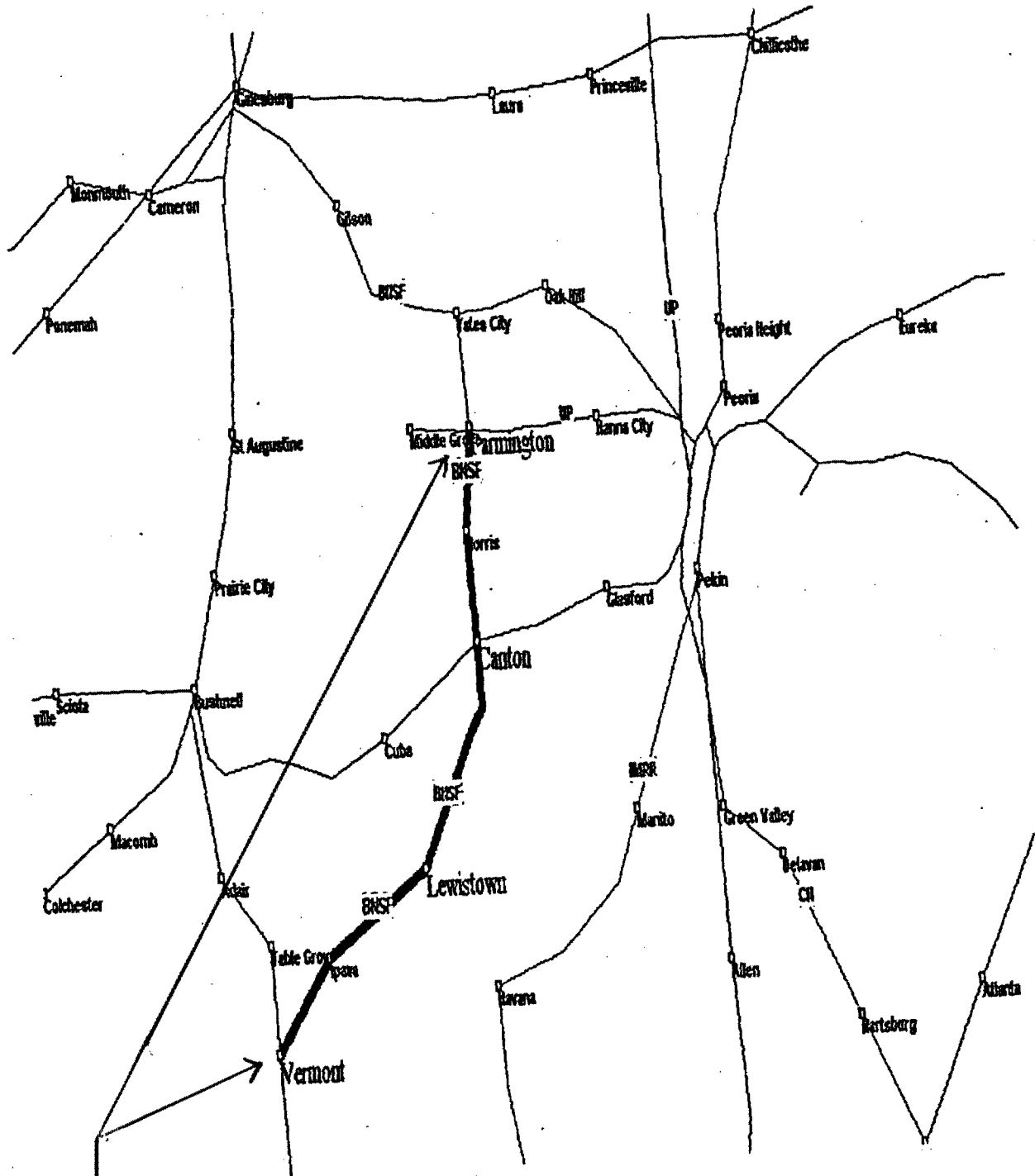
**EXHIBIT B
RAIL LINE MAPS**

KJRY trackage rights over BNSF: Lomax - Fort Madison

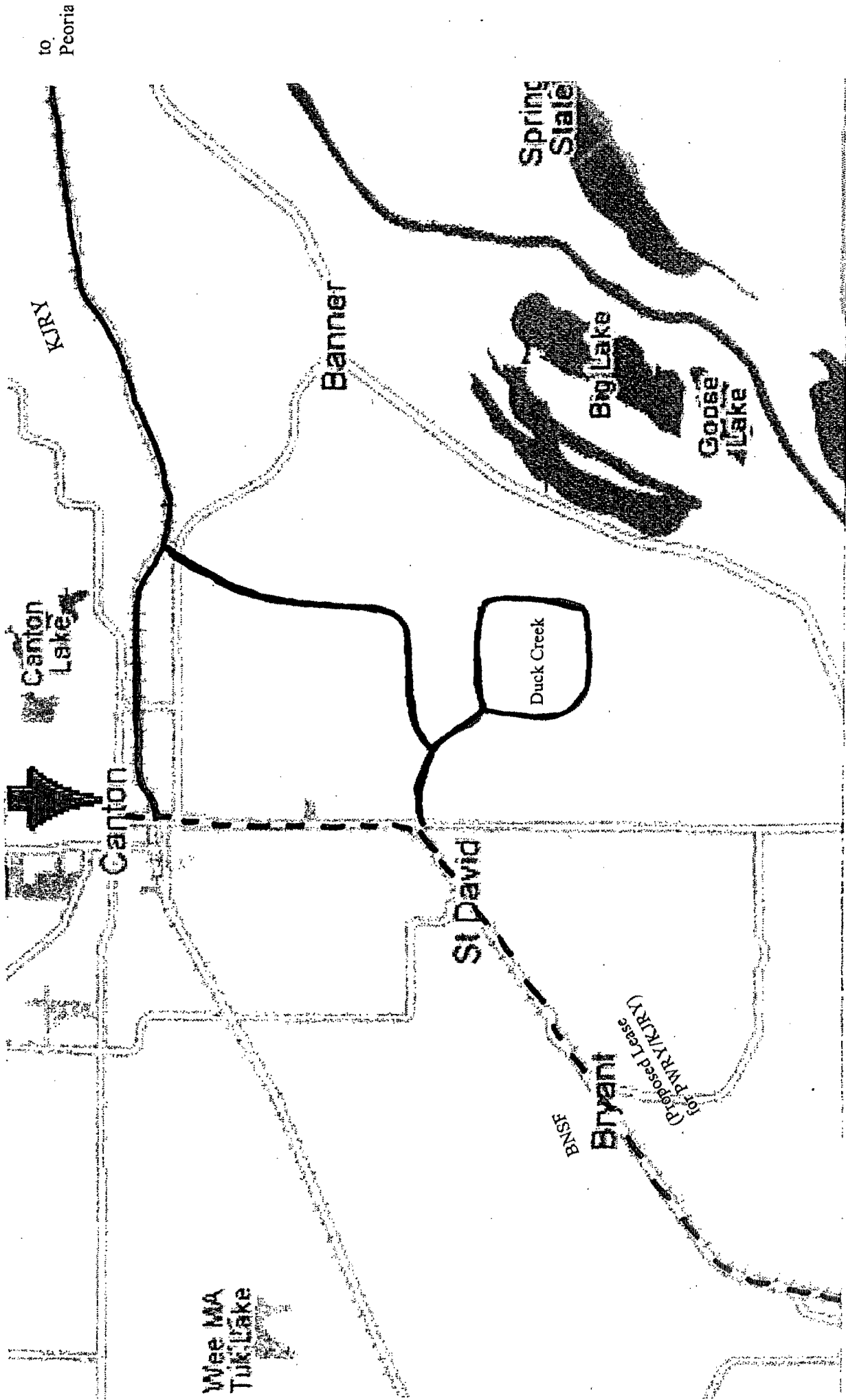


Line to be leased:
Farmington - Vermont

Existing KJRY lines: Keokuk/Lomax - Hollis (Peoria)



Proposed Lease (BNSF): Farmington - Vermont



to
Vermont

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 34974

**KEOKUK JUNCTION RAILWAY CO. D/B/A PEORIA AND WESTERN
RAILWAY
— LEASE AND OPERATION EXEMPTION —
BNSF RAILWAY COMPANY**

EXHIBIT C

CENTRAL ILLINOIS ENERGY LETTER DATED DECEMBER 4, 2006

December 4, 2006

Central Illinois Energy
2006-2007
2006-2007

Vernon A. Williams, Secretary
Surface Transportation Board
1925 "K" Street, N.W.
Washington, DC 20423

RE: Docket Numbers FD-34918 & FD-34917

Mr. Williams:

Central Illinois Energy (CIE) is a 37 million gallon per year ethanol plant being constructed in Fulton County, Illinois. The plant, which is to begin production in June, 2007, is an investment of more than 90 million dollars. 380 local farmers and businesses pooled investment money together to build and operate this ethanol plant. This also includes grants from the Department of Commerce and Economic Opportunity of \$6.35 million, including \$1.1 million from IDOT for rail infrastructure. The plant will create jobs and commerce for this small rural community. The exact location of the facility was largely driven by the desire to have reliable rail transportation. If all CIE's ethanol and distiller grains were to be shipped by rail, CIE would ship more than 2000 rail cars per year.

Both the BNSF and Ameren are well aware of CIE activities and need for rail. In September, 2004, CIE signed a lease with Ameren to use Ameren lead track to access the BNSF rail spur. In January, 2006, the BNSF signed an eight year track agreement with CIE. Despite this, CIE now finds itself without rail access. The BNSF has taken the rail spur out of service and proposes to lease it to the Keokuk Junction Railway. If this lease is approved, Ameren has informed CIE it cannot use Keokuk Junction Railway to switch CIE cars by virtue of the 9/04 lease with Ameren which requires CIE to use BNSF to switch its railcars (despite the fact that Ameren, itself, is presently using Keokuk Junction to switch cars in its own facility a few miles away). If the lease is not approved, the BNSF has not indicated the track will be placed back in service and the needed repairs will be made. Even if BNSF does place the track in service, CIE would have access to fewer delivery points than the Keokuk Junction short line can provide. We understand that Ameren already has "dual access" and that only the lease to Keokuk Junction would provide that to us.

Although CIE will not be in production until summer of 2007, CIE has equipment needed during construction that is to be delivered by rail. One such delivery due this month has already been impacted and several more significant deliveries are expected in the coming months. If we do not have direct rail service by March, our construction schedule may be

delayed, and the project put at risk. Because of this immediate need, we request that the issue regarding the BNSF/Keokuk Junction lease be resolved as soon as possible. We further request that regardless of the outcome of this lease transaction, CIE be assured that rail service will be made available at commercially competitive rates.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael W. Smith". The signature is fluid and cursive, with the first name "Michael" and last name "Smith" being clearly legible, and "W." in the middle.

Michael W. Smith
General Manager

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 34974

**KEOKUK JUNCTION RAILWAY CO. D/B/A PEORIA AND WESTERN
RAILWAY
— LEASE AND OPERATION EXEMPTION —
BNSF RAILWAY COMPANY**

EXHIBIT D

HITCHCOCK SCRAP YARD, INC. LETTER DATED NOVEMBER 28, 2006



Hitchcock Scrap Yard, Inc.



November 28, 2006

The Honorable Vernon A. Williams, Secretary
Surface Transportation Board
1925 K Street, NW, Suite 715
Washington, DC 20423-0001

Dear Members of the Board:

We are a prospective shipper of the rail line that runs from Vermont, IL through Farmington, IL which KJRY is looking to lease from BNSF. This line runs directly in front of the Hitchcock Scrap Yard (HSY) just outside of Canton, IL. Hitchcock Scrap supports the Keokuk Junction Railway's efforts to lease and operate this from the BNSF as at present, the only mode of transportation available to Hitchcock Scrap Yard is truck.

Though Hitchcock Scrap has shipped rail in the past, this was not through direct rail access. At that time HSY was loading and trucking product to a transload site a few miles away and reloading the product into rail gons. But with the rise in fuel costs over the past few years, this no longer makes this a competitive option. As such, we have lost many markets that were once available by rail.

Annually Hitchcock Scrap Yard, Inc ships approximately 100,000 tones of scrap metal. Without, direct rail service HSY can not continue to expand.

Once again, Hitchcock Scrap Yard highly supports KJRY's efforts to operating and reactivating service on the rail line.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael Hitchcock Sr.", written in a cursive, flowing style.

Michael Hitchcock Sr.
President
Hitchcock Scrap Yard, Inc.

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 34974

**KEOKUK JUNCTION RAILWAY CO. D/B/A PEORIA AND WESTERN
RAILWAY
— LEASE AND OPERATION EXEMPTION —
BNSF RAILWAY COMPANY**

EXHIBIT E

UNITED PAVING & CONSTRUCTION LETTER DATED NOVEMBER 27, 2006



29265 NORTH ILLINOIS 78
CANTON, ILLINOIS 61520

November 27, 2006

The Honorable Vernon A. Williams, Secretary
Surface Transportation Board
1925 K Street, NW, Suite 715
Washington, DC 20423-0001

Dear Members of the Board:

The present rail line in question to be leased by KJRY from the BNSF, running between Vermont, IL and Farmington, IL runs directly past through the United Paving facility, located on Route 78, Canton, IL. United Paving & Construction has received aggregates by rail in the past, but always via rail shipped to a transload site a few miles from our actual facility. The product would then be conveyed into trucks and delivered to our facility.

This past year, when combining the rail rates along with that of our transloading/trucking/fuel costs, receipt of rail become non-competitive. Reactivating the rail line in question with rail service provided by the KJRY would be very beneficial and cost effective to our operation. United Paving supports the Keokuk Junction Railway leasing and operating the BNSF rail line from Vermont, IL to Farmington, IL in order that we may receive direct rail service and again have competitive modes of transportation available.

Sincerely,

Bob Pschirrer,
Owner
United Paving & Construction Co.



**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 34974

**KEOKUK JUNCTION RAILWAY CO. D/B/A PEORIA AND WESTERN
RAILWAY
— LEASE AND OPERATION EXEMPTION —
BNSF RAILWAY COMPANY**

EXHIBIT F

**VERIFIED STATEMENT OF WILLIAM J. BRENNAN, PHD
PUBLIC VERSION**

PUBLIC VERSION
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BEFORE THE
SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO. 34974

KEOKUK JUNCTION RAILWAY CO. D/B/A PEORIA AND WESTERN RAILWAY
— LEASE AND OPERATION EXEMPTION —
BNSF RAILWAY COMPANY

VERIFIED STATEMENT
OF
WILLIAM J. BRENNAN, PHD

I. Introduction

I am William J. Brennan, PhD, Managing Director of Transportation Economics, Inc. ("TEI"), an economic consulting firm. At the request of Keokuk Junction Railway Co., ("KJRY"), I have reviewed a petition filed by Ameren Energy Fuels and Services ("Ameren") to reject or revoke the notice of exemption filed by KJRY d/b/a/ Peoria & Western Railway ("PWRY")¹ in Finance Docket No. 34918. That transaction contemplates PWRY's lease of a line (from Vermont to Farmington, IL) from BNSF Railway Company ("BNSF") in Fulton County, IL. KJRY has also requested that I prepare this statement in connection with a petition for exemption to undertake the same transaction that is covered by the Finance Docket No. 34918 proceeding. The purpose of my statement here is to explain why the proposed rail line lease would not harm Ameren and to identify benefits that will flow from the transaction should it be approved.

¹ Although I understand that, for the purposes of this transaction, KJRY would conduct business under the d/b/a "PWRY," I will hereafter refer to KJRY (including under its d/b/a PWRY) simply as KJRY.

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As I understand it, prior to the proposed lease transaction and to avoid being solely served by BNSF, Ameren undertook, without Board authority, a spur track construction project to gain access to KJRY's east-west line between Peoria on the east and Keokuk on the west. Until completion of that project, Duck Creek was solely served by BNSF. The project allowed the Duck Creek plant to receive coal via either the BNSF route or via KJRY and its connection with UP and others. I also understand that upon completion of the project, Ameren put its Duck Creek coal transportation contract out to bid and that the winner bidder was the UP-KJRY route. As a result, Ameren now receives coal via originating mines served by the UP. This coal is carried to Hollis, IL (near Peoria) by UP where it is ultimately interchanged with KJRY which, in turn, transports the coal over its east-west line to the connections with the Duck Creek spur tracks.

There is no doubt that Ameren spent a considerable sum to build out from its Duck Creek power plant to KJRY. Through its access to KJRY and, by extension, KJRY's interline partner, UP, Ameren enjoys the benefits of access to multiple Class I carriers.² It is understandable that Ameren would be reluctant to endorse any change in the *status quo*, even if only for the sake of appearances. Fortunately, Ameren's concerns about competition are misplaced; the proposed lease does not eliminate Ameren's competitive options. In fact, the lease *strengthens* Ameren's long-term ability to benefit from multiple-railroad competition at Duck Creek. In addition, the proposed lease is likely to generate important economic benefits to other parties besides Ameren.

² Although, as discussed below, Ameren may be particularly interested in access to the two western Class I carriers, BNSF and UP, but through KJRY, Ameren also has effective access to other railroads, including Canadian National Railway and Norfolk Southern Railway.

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Ameren's "2-1" Concerns Are Unwarranted

The thrust of Ameren's argument is that this lease "would effectively force the Duck Creek plant back in a competitive status similar to a '2-to-1' situation, by eliminating competitive rail transportation options that Ameren has spent significant resources to create for its coal movements into Duck Creek."³ For Ameren's assertions to be correct, however, this means that a Class III carrier (KJRY) that solely serves a shipper (Duck Creek) and that connects with two Class I carriers (UP and BNSF) has so much market power that it is able to extract monopoly rents to as to prevent the shipper from benefiting from the upstream competition between the two Class I carriers. Ameren thus appears to be endorsing the "one-lump" theory of monopoly profits.

The "one-lump" theory refers to the proposition that there is only one monopoly rent to be gained. Thus, if a firm monopolizes the final stage of production, it can capture a monopoly profit directly. In these circumstances, efforts to integrate operations with earlier stages of production, such as a merger between a downstream monopolist and one of its upstream participants in the supply chain, will not enhance a monopolists' market power. The "one-lump" theory has been used to evaluate the effects of vertical integration and has been relied upon by the Board in railroad merger cases.

Here, Ameren admits that it would *not* oppose a lease of this line to a third-party, thus making clear that its objection is solely related to its concern that KJRY will be the sole destination carrier, i.e. a "bottleneck carrier," serving the Duck Creek plant and thus will be able to act as a monopolist over the Duck Creek traffic.⁴ However, Ameren's concerns are misguided be-

³ Ameren, *Petition to Revoke or Reject Notice of Exemption*, at 6.

⁴ Ameren, *Petition to Revoke or Reject the Notice of Exemption*, footnote 14 at 11.

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cause it seems not to understand (or has ignored) critical terms of the proposed lease agreement between BNSF and KJRY. The terms of the proposed lease grant no market power to KJRY.

In its approval of the Union Pacific/Missouri Pacific merger, the ICC correctly identified the conditions that generate the monopoly rent:

A carrier with a destination monopoly will likely push the through rate as high as possible and keep the monopoly profits to itself by playing off competing connecting carriers against one another in setting divisions. That is, the through rate will be set at the level maximizing net revenue for the traffic, subject to regulatory limits, and the destination carrier will establish favorable through service with the origin carrier willing to take the lowest division of the through rate for its segment of the movement.⁵

Thus, the key to exercising market power as the end-stage monopolist (and capturing the “one-lump” of monopoly rent) is to “play” the competing connecting carriers one against the other; to drive division requirements on the competitive portion of the movement to their lowest possible levels, but then to retain these savings rather than passing these benefits onto the end user. As a practical matter, there is an overriding fact that undermines any claims that KJRY could exercise a “bottleneck” monopoly over Ameren. KJRY does not possess independent pricing authority over the BNSF route.

Because KJRY does not have pricing authority over both routes, it can not exercise that power against UP and BNSF and capture any monopoly rent for itself. KJRY will have no pricing authority over the BNSF route as a result of the transaction. While KJRY may have some pricing authority with respect to the UP-KJRY route, the transaction does nothing to alter in anyway that existing pricing authority. Whatever pricing authority KJRY may have with respect to the UP routing option, it retains after the transaction and the transaction has not changed that authority. Whatever pricing authority BNSF had prior to the transaction, it continues to have and

⁵ *Union Pacific Corp., Pacific Rail System, Inc., & Union Pacific R.R. Co. Control Missouri Pacific Corp. & Missouri Pacific R.R. Co.*, 366 I.C.C. 462, 538 (1982).

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the transaction does nothing to change that fact. Consequently, KJRY lacks the ability to “play” UP against BNSF.⁶

Indeed, even if KJRY possessed independent pricing power – which it does not – it would be hard pressed to exercise its alleged market power. KJRY is a Class III carrier serving a local market. As a result, KJRY lacks the detailed knowledge of Ameren’s electricity generating markets, the PRB coal mining industry, and the Class I railroad industry that it would need to effectively set a monopoly price. In fact, it doesn’t even know the through rates that both BNSF and UP could charge for coal service to Duck Creek. Therefore, it is hardly capable of playing UP and BNSF against each other and then manipulating the overall through rate to Ameren in its favor.

Moreover, the nature of this transaction and the terms of the lease itself, argue against the notion that KJRY will possess market power. If, as the ICC correctly reasoned, a destination monopolist must be able to “play off” competing carriers against one another in setting divisions, then, for Ameren’s concern to be valid, the lease agreement must give KJRY the power to drive BNSF’s rates down to their “lowest possible division.” How else could KJRY play BNSF off against UP? But this assumption violates the rational-actor perspective: it suggests that BNSF, by entering into this lease, is harming its own interests; that it will confer on KJRY the ability to drive BNSF’s rates down to their lowest possible levels. The logical implication is that by enter-

⁶ Class III carriers, like KJRY, generally do not have the same ability as Class I carriers to take advantage of “bottleneck” situations and extract monopoly rents. As a result, a Class III carrier typically acts as a neutral carrier, allowing the solely served shipper to take advantage of the competition between the two connecting carriers. This is particularly true where the Class III carrier has no independent pricing authority and merely serves as handling carrier for the Class I, receiving a per-car charge with no relation to the overall through rate. I see nothing in the facts of this transaction to change that general principle.

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ing into this lease, BNSF must not be an efficient, profit-maximizing firm. But BNSF is an efficient, profit-maximizing firm!

In fact, as one would suspect, BNSF possesses the necessary foresight to ensure that KJRY can never exercise the sort of market power that would harm both Ameren *and* BNSF. In fact, the terms of the lease – in particular, [] – *explicitly deny* KJRY independent pricing power over joint-haul BNSF/KJRY movements. If the proposed lease is approved, KJRY will not have the ability “play” BNSF off against UP. Thus, the lease preserves the ability of competition and demand for services to establish reasonable rates as contemplated by 49 U.S.C. § 10101(1).

A further safeguard against any possible exercise of pricing power by KJRY is BNSF’s ability []. This option imposes a strict and calculable upper limit on KJRY’s alleged ability to extract rents from Ameren. Should BNSF [], it would be obligated []. Therefore, should KJRY possess market power – which it does not – it could not exercise that power beyond [] before BNSF would find it advantageous to []. So, even if we assume – contrary to logic – that the lease confers market power to KJRY, the ability of KJRY to exercise this power would be severely limited.

In Actuality, The Proposed Transaction Is Beneficial To Both BNSF And Ameren

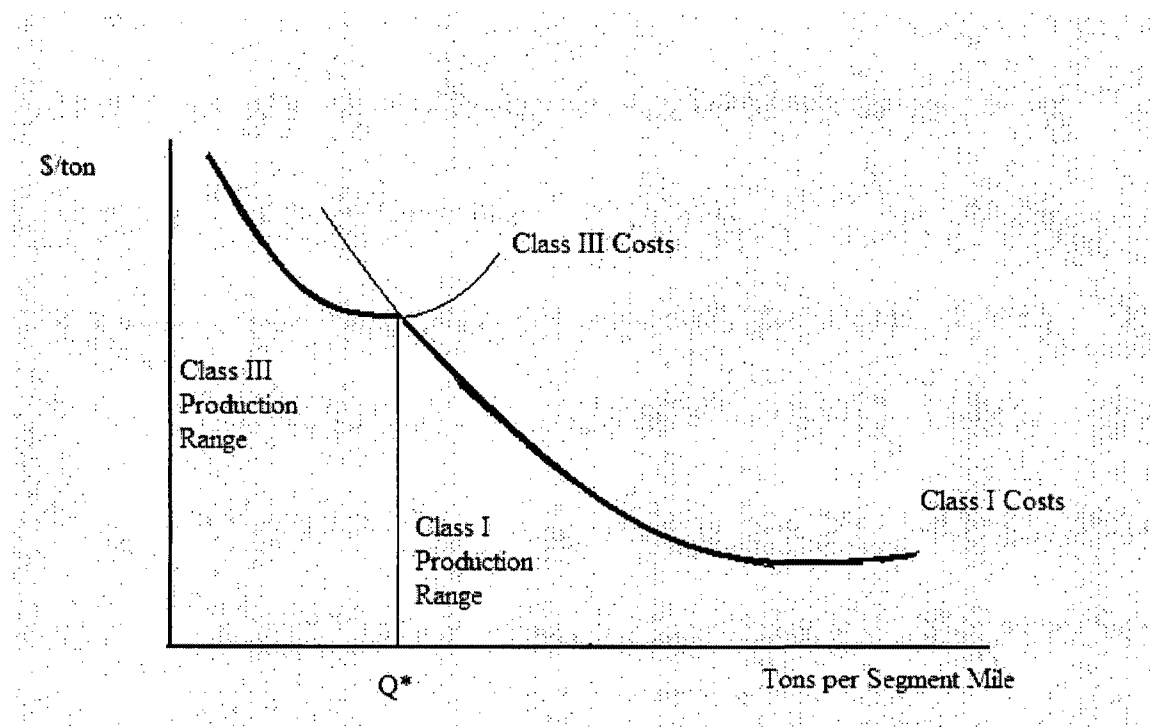
This proposed lease is similar to the scores of leases that the Board has approved under the exemption process. The Vermont-Farmington line is a light density line, especially now that UP and KJRY have successfully competed for the right to haul coal to the Duck Creek. BNSF, rationally and prudently, has curtailed maintenance activities along the line, but there is a limit to

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how far a firm can defer maintenance before it must incur significant rehabilitation. Leasing the line to KJRY ensures that the line's future maintenance needs will be met and would preserve (at lower cost) BNSF's long-term ability to compete for Ameren's traffic.

In fact, not only does the lease agreement preserve Ameren's competitive options, but it is likely to strengthen that competition and enhance the benefits to Ameren. By relying on KJRY to handle movements to Duck Creek, BNSF is likely to lower the cost structure of this movement. Class I carriers and Class III carriers work together for their mutual benefit, as can be explained using the familiar concept of average cost curves.

Figure 1: Average Costs for a Class I and Class III Carrier



Thanks to their superior economies of scale, scope, and density, Class I carriers typically are the low-cost provider of rail services. However, for lighter-density rail lines (where tons per segment mile fall below Q^*), Class III carriers are generally able to provide rail service at lower cost. The line from Vermont to Duck Creek is just such a line, handling [] tons on an

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annual basis. There is every reason to expect that BNSF can lower its total costs by contracting with KJRY to handle the final delivery of Ameren's coal. An arrangement of this nature permits BNSF to employ its own crews more intensively on its high-density corridors, while permitting KJRY to handle the low-density segment from Vermont to Duck Creek. As a result, the proposed lease is likely to *increase* rather than reduce the benefits of two-railroad competition for Ameren. Thus, the proposed lease is consistent with the goals expressed in 49 U.S.C. § 10101(5) and fosters sound economic conditions in transportation and ensures effective competition and coordination between rail carriers.

In addition, because KJRY already operates in the Peoria area, it is almost certain to be the low-cost provider of services along this particular line segment. The railroad industry is characterized by significant economies of scale and there is every reason to suspect that KJRY would be, by far, a lower cost supplier than a new Class III carrier whose operations are limited to the Vermont-Farmington line. For example, after approval of the proposed lease KJRY would not, in all likelihood, need to hire a new general manager, marketing manager, maintenance supervisor, or additional back-office support. Most likely, with only modest adjustments, KJRY's present staff can handle the requirements of the Vermont-Farmington line. BNSF was aware of KJRY's capabilities when it drafted this lease and has, no doubt, structured the relationship in a way that ensures BNSF can capture some of the economies of scale that KJRY would enjoy.

Certainly, there is no reason to expect that a start-up Class III carrier operating on the Vermont-Farmington line could serve Ameren at lower cost than KJRY. Quite the contrary, there is every reason to suspect that a start-up Class III carrier operating over these lines would have a higher cost structure. Thus, Ameren itself is likely to benefit from approval of the proposed lease. Ameren's opposition to the lease stems entirely from an unfounded fear that the

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lease will eliminate the competition it now enjoys at Duck Creek, and Ameren overlooks the benefits that accrue from BNSF leasing the line to a lower-cost operator.

The Transaction Actually Increases The Competitive Pressure On The UP-KJRY Routing

Ameren's Duck Creek plant is currently served by KJRY via its connections with UP. The proposed agreement with BNSF will only strengthen Ameren's ability to generate intense and sustainable competition between the BNSF routing and the UP-KJRY routing.

[

]

In fact, it is not clear that KJRY has any pricing power over Ameren at all. Rather, any "market power" KJRY might possess would not be exercised against Ameren, but would more likely be reflected in changing the divisions between UP and KJRY. Divisions between UP and

⁷ [

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KJRY reflect a host of considerations, but the idea that, after entering into this lease, UP would stand idly by if KJRY were somehow to attempt to use whatever market power it has (which it has none) to raise the overall through rate for the UP routing is preposterous. UP is not going to allow its overall through rate to be raised beyond what its competitor, BNSF, charges so as to lose the traffic. Both KJRY and UP are aware that an attempt to raise rates to Ameren would likely be met with a competitive response by BNSF. If KJRY sought more revenue for its portion of the UP routing, UP will either be forced to reduce its division so as to maintain the traffic or keep its division steady, which would result in the overall through rate to Ameren being raised; thus losing the traffic to BNSF.⁸ KJRY simply lacks market strength to dictate rates on a UP-KJRY routing to the detriment of UP, and that it would likely suffer collateral damage elsewhere if it tried to do so. Indeed, as I noted above, [

] It would be a high-risk game of “chicken” for KJRY to raise its divisions in an attempt to drive UP’s rates lower, but not so low as to risk losing the business to BNSF.

Finally, it should be noted that the ability of KJRY to exercise any market “advantage” is limited by a severe informational asymmetry. As the November 17th [

] Lacking this information, KJRY will be unable to exercise market power over UP or Ameren. Given the limited information it possesses, and the knowledge that [

] it is highly improbable that KJRY would or could manipulate its rates to obtain pricing power over Ameren.

⁸ As a profit maximizing firm, one has to presume that given that UP-KJRY were able to switch the traffic from a BNSF routing, that UP’s overall through rate is priced just below what BNSF was quoting to Ameren.

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The Proposed Lease Agreement Has Other Public Benefits

Ameren claims that the purpose of the proposed lease can only be motivated by a desire to gain market power, but nothing could be further from the truth. The lease is simply an ordinary transaction designed to improve the ability of BNSF to compete for Ameren's traffic, to ensure that the Vermont-Farmington line is maintained adequately, and promote the use of rail transportation along the line.

The lines at issue here are light-density lines that, at present, are lying fallow and are not being actively maintained. Should this trend continue, BNSF will likely face the need to rehabilitate or, eventually, to abandon these lines. By entering into this lease with KJRY, BNSF retains a long-term interest in the line and ensures that present maintenance needs of these lines are met. This is an important public benefit. In addition, KJRY has obtained letters of support from several potential new shippers. These shippers do not currently ship by rail, but might find it profitable to do so if KJRY were able to serve them. KJRY is also eager to serve the new ethanol plant that is being built near Duck Creek and, in that context, it is important to note that the lease contains no "paper-barrier" provisions, thus ensuring that all shippers along the line (including the new ethanol plant) have access not only to BNSF, but also to all of KJRY's connecting carriers.

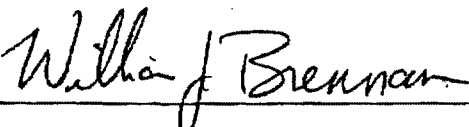
Conclusion

Contrary to Ameren's fears, the proposed lease will strengthen and not weaken the two-railroad competition it enjoys at its Duck Creek facility. The proposed transaction is consistent with the public interest and will not enable KJRY to exercise market power over Ameren. Consequently, the Board should approve the lease arrangement expeditiously so that the important public benefits that the parties anticipate can be brought to fruition.

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VERIFICATION

I, William J. Brennan, PhD, declare under the penalty of perjury that to the best of my knowledge the foregoing is true and correct. Further, I certify that I am qualified to file this Verified Statement. Executed this 7th day of December, 2006.



William J. Brennan

Qualifications of William Brennan, Ph.D.

William Brennan is a co-founder and Managing Director of Transportation Economics, Inc., an economic consulting firm whose principal office is located at 6122 Mountain Springs Lane, Clifton, VA 20124.

Dr. Brennan graduated from the College of William and Mary in 1985 with a Bachelor of Arts in Economics. In 1995 he graduated from Virginia Tech with a Masters Degree in Economics. In 2006, he graduated from George Mason University with a Doctorate of Philosophy in Economics. He is a member of the American Economic Association and the Association for Law, Logistics, and Policy.

Dr. Brennan founded Transportation Economics in 2005. Dr. Brennan advises clients on range of business and regulatory issues. Before founding Transportation Economics, he served as an economist for the U.S. Surface Transportation Board (Board). At the Board, Dr. Brennan worked on primarily on rate reasonableness cases, railroad mergers, and other policy matters. Dr. Brennan worked at the Surface Transportation Board from 1999 to 2005.

Prior to joining the Surface Transportation Board, Dr. Brennan worked for the U.S. Department of Agriculture (USDA) from 1997 to 1999. He served as USDA's lead analyst for freight railroad issues and was responsible for briefing and preparing testimony for Secretary Glickman and other senior leaders at the Department on transportation issues.

Dr. Brennan also worked for the Association of American Railroads (AAR) from 1992 to 1997. At the AAR, Dr. Brennan analyzed regulatory and legislative proposals. Dr. Brennan served in a similar capacity for the Association of Manufacturing Technology (previously, the National Machine Tool Builders Association), from 1987 to 1992. He has worked as

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an economist for 19 years, the last 14 of which have been spent in and around the U.S. freight railroad industry.

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 34974

**KEOKUK JUNCTION RAILWAY CO. D/B/A PEORIA AND WESTERN
RAILWAY
— LEASE AND OPERATION EXEMPTION —
BNSF RAILWAY COMPANY**

**VERIFIED STATEMENT OF WILLIAM J. BRENNAN, PHD
PUBLIC VERSION**

ATTACHMENT 1: REDACTED LEASE AGREEMENT (NO EXHIBITS)

REDACTED - PUBLIC

**LEASE OF RAIL OPERATIONS
AND
REAL AND PERSONAL PROPERTY
BETWEEN
VERMONT, ILLINOIS AND FARMINGTON, ILLINOIS
IN
*FULTON COUNTY***

BY AND BETWEEN

BNSF RAILWAY COMPANY, LESSOR

AND

***KEOKUK JUNCTION RAILWAY CO.,
d/b/a PEORIA & WESTERN RAILWAY, LESSEE***

DATED JULY 1, 2006

AGREEMENT DIRECTORY

SECTION NUMBER / NAME

ARTICLE I. DEFINITIONS; INTERPRETATION

- Section 1.1 Definitions
- Section 1.2 Interpretation.....

ARTICLE II. DESCRIPTION OF LEASED PREMISES

- Section 2.1 Grant by Lessor.....
- Section 2.2 Rights and Obligations Transferred to Lessee.....
- Section 2.3 Telecommunications Equipment
- Section 2.4 Buildings.....

ARTICLE III. TERM AND TERMINATION

- Section 3.1 Effective Date and Term.....
- Section 3.2 Termination for Material Breach
- Section 3.3 -----
- Section 3.4 -----
- Section 3.5 Reserved
- Section 3.6 Termination Without Cause.....
- Section 3.7 Government Approvals Upon Termination

ARTICLE IV. RENTAL

- Section 4.1 -----
- Section 4.2 Standard Adjustment to Rental Payments
- Section 4.3 Payment Instructions
- Section 4.4 Penalty for Late Payments
- Section 4.5 No Right of Offset
- Section 4.6 -----

ARTICLE V. MAINTENANCE

- Section 5.1 Condition of Premises.....
- Section 5.2 Rehabilitation and Maintenance
- Section 5.3 Inspections by Lessor
- Section 5.4 Grade Crossing and Structures Inventory and Governmental Surveys
- Section 5.5 New Grade Crossings
- Section 5.6 Grade Crossing Improvements or Modifications
- Section 5.7 Grade Crossing Agreements
- Section 5.8 Grade Separation Obligations and Track Relocation Projects
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**LEASE OF RAIL OPERATIONS
AND
REAL AND PERSONAL PROPERTY
BETWEEN
VERMONT, ILLINOIS AND FARMINGTON, ILLINOIS
IN
FULTON COUNTY**

BY AND BETWEEN

BNSF RAILWAY COMPANY, LESSOR

AND

**KEOKUK JUNCTION RAILWAY CO.,
d/b/a PEORIA & WESTERN RAILWAY, LESSEE**

This Agreement is entered into as of **July 1, 2006** (the "Effective Date") between BNSF RAILWAY COMPANY, a Delaware corporation with its principal place of business at 2500 Lou Menk Drive, Fort Worth, Texas, 76131 (hereinafter referenced as "Lessor" or "BNSF"), and **KEOKUK JUNCTION RAILWAY CO., d/b/a PEORIA & WESTERN RAILWAY**, an Iowa corporation (hereinafter referenced as "Lessee" or "KJRY").

WHEREAS, Lessor desires to grant to Lessee, on the terms and conditions set forth in this Agreement, a lease for railroad purposes **a portion of BNSF's Yates City Subdivision between the Milepost 52.20 near Farmington, Illinois and Milepost 94.3 near Vermont, Illinois** and to transfer certain other rights and obligations as specified in this Agreement; and

WHEREAS, Lessee desires to acquire, pursuant to the terms and conditions set forth in this Agreement, a lease for railroad purposes **a portion of BNSF's Yates City Subdivision between the Milepost 52.20 near Farmington, Illinois and Milepost 94.3 near Vermont, Illinois** and to accept the transfer of certain other rights and obligations as specified in this Agreement.

NOW THEREFORE, Lessee and Lessor agree as follows:

**ARTICLE I
DEFINITIONS; INTERPRETATION**

Section 1.1 Definitions. The terms as defined and set forth in Exhibit E to this Agreement, when used in this Agreement, shall have the meanings set forth in said Exhibit E.

Section 1.2 Interpretation. Unless a clear contrary intention appears or the context otherwise requires, in this Agreement:

- (a) the singular number includes the plural number and vice versa;

- (b) reference to any gender includes each other gender;
- (c) reference to any applicable law means such applicable law as amended, modified, codified or reenacted, in whole or in part, and in effect from time to time, including rules and regulations promulgated thereunder;
- (d) reference to any Article, Section or Exhibit means such Article, Section or Exhibit hereof;
- (e) “hereunder,” “hereof,” “hereto” and words of similar import shall be deemed references to this Agreement as a whole and not to any particular Article, Section, Exhibit or other provision hereof; and
- (f) “including” (and with correlative meaning “include”) means including without limiting the generality of any description preceding such term.
- (g) It is the intent of the parties that the provisions of this Agreement and all provisions of the other Transaction Documents be given effect where possible. In the event of a conflict between the terms set forth in any Exhibit and the main body of this Agreement, the terms of the main body of this Agreement shall control, unless and except to the extent expressly provided otherwise in either the main body or the Exhibit(s).

ARTICLE II

DESCRIPTION OF LEASED PREMISES

Section 2.1 Grant by Lessor. Except to the extent expressly provided otherwise in this Agreement, Lessor shall grant to Lessee, on the Commencement Date of this Agreement, subject to the terms and conditions set forth in this Agreement, a lease of rail operations and all real and personal property necessary for railroad operations in the following property of Lessor: **a portion of BNSF’s Yates City Subdivision between the Milepost 52.20 near Farmington, Illinois and Milepost 94.3 near Vermont, Illinois**, including all of Lessor’s trackage and other improvements located upon said track corridor, all as more particularly shown on the print attached and marked as Exhibit A, attached hereto, and is referenced hereinafter as “Leased Premises.”

Section 2.2 Rights and Obligations Transferred to Lessee. Lessee agrees to accept all responsibility for rail transportation services performed by Lessor upon the Leased Premises. On and after the Commencement Date of this Agreement, Lessee agrees to perform the rail freight transportation services that Lessor conducts on the Leased Premises, including without limitation assumption of all applicable common carrier obligations, subject to the terms and conditions set forth in this Agreement. Lessee shall use and occupy the Leased Premises for the sole and exclusive purpose of performing rail freight transportation and related services, together with upgrading and maintaining the Leased Premises, including the tracks, land and improvements located upon the Leased Premises as set forth herein.

Section 2.3 Telecommunications Equipment. The Telecommunications Disposition Plan is attached as Exhibit G to this Agreement. The Telecommunications Disposition Plan shall set forth all telecommunications equipment which shall remain on the Leased Premises and be leased to Lessee under the terms of this Agreement and all such equipment which may be removed or relocated by Lessor at any time at Lessor’s sole and absolute discretion. Pending any such removal or relocation, if any, such equipment shall be deemed a part of the Leased Premises subject to the terms of this Agreement.

Section 2.4 Buildings. No Buildings shall be deemed a part of the Leased Premises for purposes of this Agreement.

ARTICLE III **TERM AND TERMINATION**

Section 3.1 Effective Date and Term. This Agreement shall become effective as of the Effective Date, provided that transfer of all operations under this Agreement shall occur on and after the Commencement Date, and the terms hereof shall continue in effect through 11:59 p.m. Central Time on **December 31, 2016** ("Expiration Date"), unless earlier terminated as provided herein. Notwithstanding the foregoing, to the extent provided herein certain terms and conditions of this Agreement and any related provisions necessary for the enforcement and or administration thereof may survive and be enforceable by the term of this Agreement where expressly provided in this Agreement.

Section 3.2 Termination for Material Breach. In addition to and without prejudice to pursuit of any and all other rights and remedies available at law or in equity, Lessor shall have the option to terminate this Agreement prior to the expiration of the full term hereof, upon sixty (60) days' written notice, in the event of a material breach by Lessee and failure to cure or take substantial steps to cure within thirty (30) days of written notice thereof. Material breach may include, but is not limited to, severe service disruptions, failure to maintain adequate insurance pursuant to the terms of this Agreement, failure to maintain the track to the standards required under this Agreement, a declaration of bankruptcy or inability to pay debts when due by Lessee, use of the Leased Premises for a Prohibited Use pursuant to Section 10.2, or creation or maintenance of an environmental hazard or nuisance on the Leased Premises.

Section 3.3 -----

Section 3.4 -----

Section 3.5 **Reserved.**

Section 3.6 Termination Without Cause. Lessor, at Lessor's sole discretion, shall have the right to terminate this Agreement on thirty (30) days' written notice to Lessee at any time for any cause or no cause whatsoever. If this Agreement is terminated without cause and at Lessor's sole discretion prior to the Expiration Date of this Agreement, Lessor shall --- Lessee ----- for each month or portion of a month of the term remaining on this Agreement from the date of Lessee's discontinuance of service. ----

Section 3.7 Government Approvals Upon Termination.

- (a) Upon the expiration or termination of this Agreement, Lessee shall vacate the Leased Premises and allow Lessor to resume the provision of rail services upon the Leased Premises. At least ninety (90) days prior to the expiration or, in the case of an early termination, on the earliest date Lessee is on notice of an impending termination if such notice is less than ninety (90) days, Lessee shall at the written request of Lessor, promptly and expeditiously initiate and with best efforts prosecute to conclusion any regulatory or other governmental application, petition, or proceeding to obtain any necessary Governmental Approvals to effect a discontinuance of service, abandonment and/or termination of service by Lessee. In the event Lessor initiates and attempts to prosecute to conclusion any regulatory or other governmental application, petition, or proceeding to obtain any necessary Governmental Approvals to effect a discontinuance of service, abandonment and/or termination of service by Lessee, in no event shall Lessee oppose such action by Lessor. Lessor's initiation of such action shall not waive any other rights or remedies available at law or in equity to Lessor, nor shall such action by Lessor relieve Lessee of any obligations under this Agreement.
- (b) Upon expiration or termination of this Agreement, Lessee shall not oppose any effort by Lessor to obtain such Governmental Approval or authority as may be necessary, if any, for Lessor to discontinue, abandon and/or resume or transfer rail operations of or from Lessee or Lessor upon the Leased Premises, and Lessee shall cooperate with any reasonable request for information or similar assistance with such effort.
- (c) The parties acknowledge money damages alone are insufficient to remedy a breach of the terms of this Section 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.
- (d) In the event expiration or termination of Lessee's operating rights over the Leased Premises is forestalled due to inability to obtain or delay in obtaining any required Governmental Approvals, the parties agree that all terms of this Agreement which are necessary for the continued administration of the operation of the Leased Premises shall continue to survive and be enforceable for so long as necessary to terminate any operating rights pursuant to any required Governmental Bodies; provided that in addition to any rights or remedies available at law or in equity, the Rental payments due for operating of the Leased Premises beyond termination or expiration of this Agreement shall continue for twelve (12) months at the Standard Monthly Lease Fee, then shall be automatically adjusted to two hundred percent (200%) of Lessee's Standard Monthly Lease Fee and escalate thereafter pursuant to Section 4.2.

ARTICLE IV

RENTAL

Include a notation on the check stub that this is a Short Line Agreement with the Agreement period that the payment covers.

A copy of the Rental payment check and details supporting the Rental payments shall be sent to:

BNSF Railway Company
920 Southeast Quincy, 7th Floor
Topeka, Kansas 66612
Attention: Joint Facilities
Joint Facilities will prepare a money-in-hands bill.

Section 4.4 *Penalty for Late Payments.* Payment of Rental and any other payments due and payable from Lessee under this Agreement shall be subject to a late payment charge of one and one-half percent (1.5%) per month (eighteen percent (18%) per annum) or the maximum interest permitted by applicable law, if lower, on balances past due over thirty (30) days.

Section 4.5 No Right of Offset. In no event shall Lessee be entitled to a right of offset against Rental payments due under this Article IV or against any sums otherwise due and owing Lessee by Lessor for any reason.

Section 4.6

ARTICLE V

MAINTENANCE

Section 5.1 Condition of Premises. Lessee shall accept all Leased Premises “as is, where is” and “with all faults”.

Section 5.2 Rehabilitation and Maintenance. 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 mainline railroad trackage on the Leased Premises to at least **FRA Class I** Track Safety Standards, including all grade crossings, signs, Department of Transportation numbers 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 Legal Requirements and standards promulgated by the Federal Railroad Administration and other Governmental Bodies.

If During the term of this Agreement, Lessor is awarded the Ameren coal contract, Lessee shall within 90 days of being notified by Lessor that Lessor has been awarded the Ameren Coal contract, and at Lessee's sole expense, rehabilitate and thereafter maintain the mainline railroad trackage on the Leased Premises between Milepost 94.3 near Vermont, Illinois and Milepost 66 near Dunfermline, Illinois to at least FRA Class II Track Safety Standards, including all grade crossings, signs, and signals in such safe and satisfactory condition as necessary to conform with Lessor's and industry standards and specifications, and to conform with all applicable Legal Requirements and standards promulgated by the Federal Railroad Administration and other Governmental Bodies.

Notwithstanding the above, if Lessor informs Lessee it will begin a regular movement of unit trains loaded to 286,000 pounds per car, and Lessee is not in default of this Agreement, Lessor shall credit Lessee up to --- per tie, including materials and labor [up to a maximum of 5,000 ties] for each New, Treated, Grade 5, Hardwood Tie, not less than 8 feet 6 inches by 7 inches by 9 inches that Lessee inserts or causes to be inserted into the mainline on the Leased Premises between Milepost 94.3 near Vermont, Illinois and Milepost 66 near Dunfermline, Illinois within 90 days of notification by Lessor that Lessor has been awarded the Ameren coal contract. Lessee shall notify Lessor upon completion of the tie program, and Lessee shall deduct the credited amount from Lessee's monthly rent payment until Lessee has recouped the cost of the number of ties inserted multiplied --- per tie, or Lessee's actual cost whichever is less, up to a maximum of -----.

Lessee shall maintain sidings, run-around tracks, spurs, yards, and other secondary tracks in substantially the same condition they are in on the date of commencement. Lessee shall control, maintain and/or install all grade crossings (including the surface of all grade crossings), right-of-way vegetation, and fencing or other structure requirements pursuant to any applicable Legal Requirements of any Governmental Body. Additionally, Lessee's use of all grade crossings shall comply with any applicable Legal Requirements of any Governmental Bodies. Lessee shall be responsible for the maintenance of all grade crossing signal equipment on the Leased Premises and shall so arrange that if any such equipment is reported defective by the public or by law enforcement or other governmental agencies, that a qualified signal maintenance person is able to receive such reports twenty-four (24) hours a day, seven (7) days a week, including all holidays, and is present and making repairs within three hours of Lessee receiving such report. Lessee shall indemnify, defend, and hold harmless Lessor from and against all actions, claims, fines, Losses or penalties against Lessor as a result of Lessee's failure to comply with any obligations referenced in this Section 5.2. Nothing herein contained shall prohibit Lessee from seeking any governmental or other third party assistance with the maintenance, repair, replacement or upgrading of tracks, grade crossings, signals, bridges or other structures or appurtenances on the Leased Premises.

In addition to the foregoing, if Lessor is awarded the Ameren Coal Contract, the portion of the Leased Premises between Vermont, Illinois (Milepost 94.3) and Dunfermline, Illinois (Milepost 66) must be capable of accommodating 130 car unit trains, with each car weighing 286,000 pound gross weight on rail. Failure to maintain the Leased Premises to meet this requirement shall be deemed a material breach of the Agreement.

Section 5.3 Inspections by Lessor. At all times and on reasonable advance notice to Lessee, Lessor shall have the right to enter upon the Leased Premises and make inspections to determine compliance with the terms of this Agreement. 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 any matters which are not in compliance with this Agreement. In no event shall the conducting of inspections be deemed to result in a waiver of compliance with any terms of this Agreement by Lessee.

Section 5.4 Grade Crossing and Structures Inventory and Governmental Surveys. Lessee shall be responsible for reporting of grade crossing and structures inventory and other information as may be required by the Federal Railroad Administration and any other Governmental Body.

Section 5.5 New Grade Crossings. Any voluntary installation of new grade crossings by Lessee shall require written approval of Lessor.

Section 5.6 Grade Crossing Improvements or Modifications. Lessee shall be solely responsible to maintain, improve, or modify, at Lessee's sole cost and expense, all grade crossings and grade crossing warning devices in accordance with all applicable laws, regulations, and orders of any Governmental Body. Elimination or consolidation of grade crossings may be undertaken by Lessee at any time, provided such elimination or consolidation is consistent with applicable law and that salvage of any grade crossing warning devices or other crossing installations which may be owned in whole or in part by any third party (including any Governmental Bodies) shall be coordinated with such third party. Any remaining net salvage value obtained for elimination or consolidation of grade crossing shall be remitted to Lessor. Nothing herein contained shall prohibit Lessee from seeking any governmental or other third party assistance with the maintenance, repair, replacement, elimination, modification or upgrading of grade crossings, signals, warning devices, or other similar structures or appurtenances on the Leased Premises.

Section 5.7 Grade Crossing Agreements. Lessee shall make no covenants or binding agreements or representations or warranties or create any Encumbrances on the Leased Premises for the installation, elimination, upgrade or modification of any Grade Crossings or any other structures or facilities on the Leased Premises, where such agreements, Encumbrances, or representations or warranties may bind Lessor upon expiration or termination of this Agreement without Lessor's advance written consent. To the extent Lessor has made written commitments with any Governmental Bodies concerning the status of any Grade Crossings prior to the Effective Date of this Agreement, Lessee shall comply with such commitments.

Section 5.8 Grade Separation Obligations and Track Relocation Projects. Lessee shall be responsible for all grade separation and track relocation obligations (including all costs, expenses, and Losses related thereto) imposed by any Governmental Body with authority over the Leased Premises. Responsibility for such obligations shall include, but shall not be limited to funding contribution obligations for any grade separation project or related at grade crossing closure. Lessee shall provide Lessor with advance written notice of the grade separation and track relocation projects. Lessee shall complete all of the required work in a good and workmanlike manner and shall repair all damage to the Leased Premises resulting therefrom. Any track relocation shall require the prior approval of Lessor.

Section 5.9 Rehabilitation Loans. In no event shall Lessee obtain any Rehabilitation Loans or any other loans that shall Encumber the Leased Premises without Lessor's advance written consent.

Section 5.10 Establishment of Quiet Zones. Lessee may coordinate with Governmental Bodies concerning the establishment of Quiet Zones through the construction of State DOT and FRA approved supplemental safety measures in order to reduce or eliminate the need to blow train whistles at each at-grade crossing on the Leased Premises in the Quiet Zone, provided that any such coordination shall not commit Lessor to pay any sums or make any changes to the Leased Premises or Encumber the Leased Premises. In the event Lessee shall be required to make changes to the configuration of the trackage or grade crossing approaches in order to establish a Quiet Zone, advance written consent shall be required by Lessor prior to any material track configuration modifications and Lessee shall be responsible for such reconfiguration and all costs associated therewith. In no event shall Lessee Encumber the Leased

Premises with any commitments concerning establishment of a Quiet Zone, which commitments shall extend beyond expiration or termination of this Agreement, absent the advance written consent of Lessor.

ARTICLE VI

IMPROVEMENTS

Section 6.1 Title to 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 provided in Section 6.2, Lessee shall not be entitled to compensation from Lessor for any track work performed upon the Leased Premises, provided, however, that any materials salvaged from the Leased Premises shall become the sole and exclusive property of Lessee, if such materials are replaced by materials of equal or greater value that become part of the Leased Premises. .

Section 6.2 -----

ARTICLE VII

GOVERNMENTAL APPROVALS

Section 7.1 Acquisition Approvals. Promptly following execution of this Agreement, Lessee, at its sole expense, shall prepare and file such documents as may be required, if any, to secure all Governmental Approvals for this transaction including without limitation any approval, or exemption from approval, of this transaction by the STB, if such approval or exemption from approval is necessary or appropriate. Lessee shall permit Lessor to review prior to filing all documents proposed by Lessee to be filed with the STB, or any other Governmental Body, to secure legal approval or exemption of this transaction.

Section 7.2 Cost of Governmental Approvals. Lessee shall bear and assume any and all expense of acquiring any required Governmental Approvals to acquire, operate, and maintain the Leased Premises and shall indemnify, defend, and hold harmless Lessor from any actions or legal proceedings and all costs related thereto, including without limitation attorneys' fees, arising as a result of Lessee's acquisition of the leasehold interests pursuant to this Agreement and/or pursuit of any required Governmental Approvals for this transaction.

Section 7.3 Abandonment or Discontinuance Approvals. If this Lease expires without renewal, or is terminated without cause, Lessor shall bear and assume any and all expense of any Governmental Approvals to be required for any abandonment or discontinuance by Lessee which are authorized or required under this Agreement. If this Lease is terminated for cause prior to expiration, Lessee shall bear and assume any and all expense of any Governmental Approvals to be required for any abandonment or discontinuance by Lessee which are authorized or required under this Agreement. In no event shall Lessee have any authority to dispose of any interests in the Leased Premises pursuant to

railbanking procedures of the National Trails Systems Act or any other voluntary procedure for the disposition of railroad rights of way in the course of any abandonment or discontinuance proceeding or under any other circumstances without the advance written consent of Lessor. In the event any Offer of Financial Assistance requires the disposition of the Leased Premises, Lessor may, upon written election, require that Lessee: i) seek a voluntary dismissal of the abandonment or discontinuance proceedings; ii) subject to applicable laws and regulations, continue the proceedings and arrange through the regulatory procedures for the assignment of its leasehold interests only; or iii) continue the proceedings and arrange for the disposition of the entirety of the Leased Premises for the fair market value, with all proceeds therefrom to be paid to Lessor.

ARTICLE VIII

REPRESENTATIONS AND WARRANTIES OF LESSEE

Lessee hereby represents and warrants to Lessor and Lessor's successors and assigns the following facts as of the date of this Agreement and as of the Effective Date of this Agreement, except where specifically noted otherwise in this Agreement:

- (a) Lessee is a corporation duly organized, validly existing and in good standing under the laws of the State of Iowa and is qualified to do business in the State of Illinois.
- (b) Lessee has or shall have acquired on or before the Commencement Date all requisite authority to lease the Leased Premises and assume Lessor's rights and obligations which are conveyed to Lessee by this Agreement, to enter into this Agreement, to conduct rail freight transportation business on the Leased Premises, and to perform all of Lessee's obligations under this Agreement.
- (c) The execution and consummation of this Agreement have been duly authorized and approved by all necessary company actions by Lessee, and immediately upon execution of this Agreement by Lessee's authorized representative, all of Lessee's obligations set forth in or referenced in this Agreement shall constitute legal, valid and binding obligations of Lessee or Lessee's successors or assigns, which obligations are enforceable in accordance with their terms against Lessee or Lessee's successors or assignees.
- (d) There is no provision in the Articles of Organization of Lessee which prohibits the execution of this Agreement or consummation of the transactions covered by this Agreement.
- (e) As of the Commencement Date of this Agreement, Lessee shall have obtained all legal authority which may be necessary, if any, to enable Lessee lawfully to conduct rail freight transportation operations over the Leased Premises.
- (f) The negotiations related to this Agreement have been handled by Lessee on its own behalf, without intervention of any agent or party, and in such manner as not to give rise to any valid claim by any party for any finder's fee, brokerage commission, or other similar payment in connection with any of the transactions included in this Agreement.
- (g) No representation or warranty by Lessee in this Agreement contains any untrue statement of a material fact, nor omits any material fact that is necessary to prevent that representation or warranty from being materially misleading.

ARTICLE IX
LESSEE'S INSPECTION PRIOR TO AGREEMENT

Section 9.1 Acknowledgement of Inspection. By signing this Agreement, Lessee acknowledges that Lessee has inspected the Leased Premises, including all improvements and structures (except buildings) on the Leased Premises. Lessee further acknowledges that:

- (a) No representation has been made by Lessor to Lessee concerning the state or condition of the Leased Premises or the age of any improvements on or quality of title to the Leased Premises;
- (b) 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 freight traffic volumes to, from or via the Leased Premises, or any other matter, either oral or in writing, as an inducement to enter into this Agreement, other than as stated in this Agreement; and
- (c) The sole consideration for execution of this Agreement by Lessee is set forth in this Agreement.

Section 9.2 Lessor's Disclaimers. **LESSOR HEREBY DISCLAIMS ANY REPRESENTATION OR WARRANTY, WHETHER EXPRESS OR IMPLIED, AS TO THE DESIGN OR CONDITION OF THE LEASED PREMISES, ITS MERCHANTABILITY OR FITNESS FOR ANY PARTICULAR PURPOSE, 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 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 TO ITS INTENDED USES. LESSOR OFFERS, AND 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. LESSOR DOES NOT UNDERTAKE TO DEFEND LESSEE IN THE PEACEABLE POSSESSION OR USE OF THE LEASED PREMISES. NO COVENANT OF QUIET ENJOYMENT IS MADE.**

ARTICLE X
USE OF PROPERTY

Section 10.1 Authorized Uses. Lessee shall use the Leased Premises solely for provision of rail freight and related services and for no other purposes whatsoever.

Section 10.2 Prohibited Uses. All uses not consistent with the Authorized Uses set forth in Section 10.1 shall be prohibited. Prohibited Uses shall also include but shall not be limited to the following:

- (a) With the exception of routine rehabilitation and maintenance or emergency response cleanup for derailments or other emergencies as may be required by the terms of this Agreement or Governmental Bodies, all construction activities, property development or other subsurface disturbance shall be prohibited unless approved in writing by Lessor.

- (b) In no event shall Lessee either conduct or suffer to be conducted tie treating, waste treatment, storage, transfer, or disposal or maintain or suffer any underground storage tanks.
- (c) In no event shall Lessee provide passenger rail service.
- (d) With the exception of the rail transportation of hazardous materials consistent with Environmental Laws and Lessee's common carrier obligations or any activity otherwise expressly authorized by this Agreement, Lessee shall perform no Hazardous Activities on or about the Leased Premises.
- (e) In no event shall Lessee allow the Leased Premises to be used for the benefit of another rail carrier. The Leased Premises may not be used to perform haulage for another rail carrier or otherwise use the Leased Premises to haul traffic for another railroad under the guise of conducting Lessee's own freight rail operations. No trackage rights or any other operating rights over the Leased Premises may be granted to any other rail carrier.
- (f) In no event shall Lessee build, or allow to be built, a rail line, extension or spur on and or between the Leased Premises and any other railroad or non-railroad without the expressed written permission of Lessor. Nothing contained herein shall prohibit Lessee from restoring the diamond at Canton, Illinois, or connecting tracks between the Leased Premises and KJRY tracks, or constructing new or additional tracks to serve industries, it being understood that such tracks, to the extent they are on the Leased Premises, shall be removed or become part of the Leased Premises at termination or expiration.

ARTICLE XI

ENVIRONMENTAL COMPLIANCE

Section 11.1 Environmental Assessment. Prior to the Commencement Date, or as soon thereafter as is reasonably practical, at Lessor's request Lessor and Lessee will jointly conduct an environmental assessment of the Leased Premises (hereinafter referred to as "Environmental Assessment"), with the costs thereof to be borne by Lessor. The Environmental Assessment may include a physical examination of said portions of the Rail Line and any structures, facilities or equipment located thereon, soil samples, ground and surface water samples, storage tank testing, review of pertinent records, data or documents. Notwithstanding the foregoing, nothing herein requires Lessor to disclose privileged or confidential information. If the Environmental Assessment identifies a Release of Hazardous Materials which requires remediation or further evaluation under applicable Environmental Law, then the parties will agree upon a plan to remediate or otherwise address the Release ("Action Plan") that is consistent with customary practices in the railroad industry, including use restrictions or institutional controls, and Lessor shall bear the cost of implementation of the Action Plan, except to the extent the parties may mutually agree otherwise. If the cost of implementation of the Action Plan exceeds the greater of ten percent (10%) of the total Rentals due over the life of this Agreement or One Hundred Thousand Dollars (\$100,000.00 US), either party has the option to terminate this Agreement on ten (10) days' written notice to the other party. Upon implementation and completion of the Action Plan, Lessor shall have no further responsibility or liability to Lessee with respect to the Release giving rise to the Action Plan.

Section 11.2 Environmental Compliance by Lessee.

- (a) Lessee shall strictly comply with all Environmental Laws. Lessee shall not maintain any treatment, storage, transfer or disposal facility, or underground storage tank, as defined

by Environmental Laws, on the Leased Premises. Lessee shall not release or suffer the release of Hazardous Materials on or about the Leased Premises.

- (b) No later than six (6) months after the Commencement Date, Lessee shall have developed, implemented and shall thereafter maintain and update, as necessary or appropriate, an Environmental Management Plan which identifies applicable environmental standards and describes best management practices and appropriate procedures for all aspects of the operation, use and occupancy of the Leased Premises.
- (c) In addition to fulfilling reporting requirements to Governmental Bodies, Lessee shall give Lessor immediate notice to Lessor's Resource Operations Center at (800) 832-5452 of any Release of Hazardous Materials during the term of this Agreement on or from the Leased Premises and to Lessor's contact representative identified for notice pursuant to Section 22.1 of this Agreement for any violation of Environmental Laws, or inspection or inquiry by Governmental Bodies charged with enforcing Environmental Laws with respect to Lessee's occupancy or use of the Leased Premises. Lessee shall promptly respond to any Release on or from the Leased Premises and give Lessor immediate notice of all measures undertaken on behalf of Lessee to investigate, remediate, respond to or otherwise cure such Release or violation with copies of all relevant reports and/or data.
- (d) In the event that Lessor 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 Agreement, Lessor may require Lessee, at Lessee's sole risk and expense, to take timely measures to investigate, remediate, respond to or otherwise cure such Release or violation affecting the Leased Premises. If any governmental license or permit or other Governmental Approval is required or desirable for the proper and lawful conduct of Lessee's business or other activity in or on the Leased Premises, or if the failure to secure such a license or permit or Governmental Approval might in any way affect Lessor, then Lessee, at Lessee's expense, shall procure and thereafter maintain such license or permit or Governmental Approval and submit the same to inspection by Lessor. Lessee, at Lessee's expense, shall at all times comply with the requirements of each such license or permit.
- (e) Lessee shall promptly report to Lessor 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 Lessor shall not relieve Lessee of any obligation whatsoever imposed on it by this Agreement. Lessee shall promptly respond to Lessor's request for information regarding said conditions or activities.
- (f) Hazardous Materials are not permitted on the Leased Premises except as otherwise described herein. Lessee expects to use on the Leased Premises the following Hazardous Materials used in the ordinary course of rail operations (i.e., fuel and cleaning solvents), and to store on or about the Leased Premises the following Hazardous Materials used in the ordinary course of rail operations (i.e., fuel and cleaning solvents); provided, however, that Lessee may only use and store the listed Hazardous Materials in such amounts as are under the reportable quantity pursuant to applicable Environmental Laws and in strict accordance with all Environmental Laws and Lessor's Approved Cleaners List, as amended from time to time. Use or storage on or about the Leased Premises of any Hazardous Materials not disclosed in this Section 11.2 is a material breach of this Agreement.

- (g) As soon after the termination or expiration of this Lease, Lessee and Lessor shall conduct an environmental audit of the Leased Premises through an environmental consulting engineer acceptable to Lessee and Lessor, the cost and expense to be borne solely by Lessee (unless such termination is without cause, in which case such cost and expense shall be borne by Lessor), to determine if any noncompliance or environmental damage to the Leased Premises has occurred during Lessee's occupancy thereof. The audit shall be conducted to Lessee and Lessor's satisfaction and a copy of the audit report shall promptly be provided to Lessee and Lessor for their review. In addition to and without prejudice to any other rights or remedies available to Lessor under the circumstances, Lessee shall pay all expenses for any remedial action that may be required as a result of said audit to correct any noncompliance or environmental damage (where such noncompliance or damage occurred after the Commencement Date, and all necessary work shall be promptly performed by Lessee, but no later than twelve months after termination or expiration of this Agreement.. In the event such work is not concluded upon the effective date of termination or expiration, the obligation to continue such work (and all necessary provisions of this Agreement to enforce and administer all provisions related thereto) shall survive and be enforceable until such work is completed consistent with the terms of this Section. The obligations arising hereunder shall be deemed to have arisen or accrued prior to termination or expiration of the term of this Agreement.

Section 11.3 Unknown Conditions.

- (a) If unknown Hazardous Materials are encountered not previously disclosed in the Environmental Assessment, Lessee shall give immediate notice to Lessor. All non-essential activities shall immediately cease in the area of such Hazardous Materials until further procedures are undertaken in accordance with this Section 11.3. Lessor and Lessee shall undertake an Environmental Study to determine the nature and extent of the Hazardous Materials. The cost of such Environmental Study shall be borne equally. If the Environmental Study identifies a Release of Hazardous Materials which requires remediation or further evaluation under applicable Environmental Law, then the parties shall develop and implement a plan to remediate or otherwise address such Release ("Cleanup Plan") that is consistent with customary practices in the railroad industry, including use or restrictions or institutional controls, at Lessor's sole discretion. The Cleanup Plan shall take into account any existing or proposed improvement and relocate such improvement if the remediation would be expedited or more cost effective. Lessor may, at any time and at its sole option, undertake investigation, remediation or other measures as it deems appropriate to cleanup or otherwise address the Hazardous Materials, including restricting access and imposing use restrictions. The costs of implementation of the Cleanup Plan shall be allocated as follows:
- (i) If the Hazardous Materials existed prior to the Commencement Date of this Agreement, Lessor shall bear the cost of the Cleanup Plan less the value of any betterments or improvements to Lessee. Lessee shall bear the cost of compliance with any health and safety plans, use restrictions or other conditions arising from the Cleanup Plan.
 - (ii) If the Hazardous Materials did not exist prior to the Commencement Date, then Lessee shall bear the cost of the Cleanup Plan less the value of any betterments or improvements to Lessor.

- (iii) Regardless of whether the Hazardous Materials existed prior to the Commencement Date, if the Hazardous Materials are attributable to a third party with which Lessee is in privity, through lease or other agreements, Lessee shall exhaust its contractual and other remedies against such third party prior to Lessor's obligation to fund the Cleanup Plan.
- (b) For purposes of this Section 11.3, Lessee shall have the burden of demonstrating with clear and convincing evidence that the Hazardous Materials existed prior to the Commencement Date. There are rebuttable presumptions that (i) Hazardous Materials discovered after the Commencement Date are not pre-existing and that (ii) the discovery of a Release of Hazardous Materials similar to those used in railroad operations are attributable to Lessee's operations. Upon completion of the Cleanup Plan, including payment of any outstanding invoices related which may be the responsibility of Lessor pursuant to the terms of this Section 11.3, Lessor shall have no further responsibility or liability.
- (c) At all times, Lessee shall exercise due care with respect to the environmental condition of the Leased Premises and adjacent properties and shall, at its sole cost, strictly comply with any use restrictions, health and safety plans or recommendations. Nothing herein shall relieve Lessee of its obligations with respect to the health and safety of its employees and contractors.

Section 11.4 Fueling. Lessee shall not perform any routine fueling on the Leased Premises. In the event Lessee performs any emergency fueling of locomotives on the Leased Premises, Lessee shall perform such functions with due care and consistent with industry custom and practice for safe handling of fuel on the Leased Premises. Any third parties entering upon the Leased Premises for the purposes of providing fuel transport and/or delivery services for Lessee shall be required to execute a written agreement as a condition of the right of entry upon the Leased Premises, and such terms shall include the terms and conditions for entry upon the Leased Premises as set forth in Exhibit L to this Agreement. Any such third party executing agreement to such terms shall recognize BNSF as a named third party beneficiary (but not obligor) of any such agreement by such third party fuel transport or delivery service provider.

Section 11.5 Car Cleaning. In the event Lessee performs car cleaning on the Leased Premises, Lessee shall conduct such activities with due care and in accordance with industry custom and practice and all applicable Legal Requirements of any Governmental Body. In the event Lessee contracts with any third party for the performance of any car cleaning functions where such cleaning may involve any Hazardous Activity or handling of any Hazardous Materials on the Leased Premises, Lessee shall ensure such third party is a reputable firm and further shall ensure that such entity shall agree in writing to the performance of such services with due care and in accordance with industry custom and practice and all applicable Legal Requirements of any Governmental Body and to release, indemnify, defend, and hold harmless Lessor from and against any claims, fines, penalties, or any other Losses resulting from such third party's failure to comply with any Legal Requirement of any Governmental Body.

Section 11.6 **Reserved.**

Section 11.7 Environmental Reporting. The parties acknowledge and agree that certain reporting obligations under the laws and regulations of any Governmental Body may arise as a result of the environmental assessments conducted pursuant to the terms of this Agreement. The parties agree that each shall cooperate with the other to comply with any such reporting obligations, to the extent any reporting may be required by applicable law.

ARTICLE XII
LIABILITY, INDEMNITY, AND INSURANCE

Section 12.1 Cooperation in Defense. Lessee and Lessor agree that, following the Commencement Date of this Agreement, they will cooperate as necessary in defense of any claim, demand, investigation or litigation arising out of Lessor's or Lessee's acquisition, transfer, use, occupation, possession or operation of the Leased Premises.

Section 12.2 Definition of Losses. In this Agreement the term "Losses" shall include all costs, expenses, fees or liabilities of, or in any way related to the following:

- (a) any violation of law, order, or regulation;
- (b) any damage to property, the environment or to natural resources;
- (c) any bodily injury or death of any person; or
- (d) the breach of any contract.

Losses shall include, but not be limited to, all costs of claims, activities in response to enforcement, damages, judgments, awards, orders, decrees, payments, fines, penalties, assessments, court costs, and attorney, consultant and expert witness fees except as may be expressly provided otherwise in this Agreement. Losses shall exclude incidental, consequential, economic, lost opportunity or lost profits of Lessee, as well as costs of the Action Plan or Cleanup Plan in Article 11 of this Agreement.

Section 12.3 Lessor's General Liability and Indemnity. Except as provided in Section 13.3 of this Agreement governing Environmental Liability, Lessor shall be responsible for and shall indemnify, defend and hold harmless Lessee fully against all Losses, which:

- (a) arise out of Lessor's ownership or operation of the Leased Premises on or prior to the Commencement Date of this Agreement; or
- (b) result from any failure by Lessor to perform any of its obligations under this Agreement.

Section 12.4 Lessee's General Liability and Indemnity. Except as provided in Section 13.2 of this Agreement governing Environmental Liability, Lessee shall be responsible for and shall indemnify, defend and hold harmless Lessor fully against, regardless of any negligence or alleged negligence of Lessor, all Losses which:

- (a) arise out of Lessee's acquisition, use, occupation, possession or operation of the Leased Premises on and after the Commencement Date of this Agreement; or
- (b) result from any breach by Lessee of any of its representations or warranties set forth in this Agreement, or any failure by Lessee to perform any of its obligations under this Agreement; or
- (c) arise out of Lessee's performance or failure to perform rail freight service on the Leased Premises on and after the Commencement Date; or

- (d) result from claims of third parties caused by Lessee's nonperformance or required performance under any material contract, lease, permit, license, easement or commitment relating to the Leased Premises which may be assigned to Lessee pursuant to this Agreement.

Section 12.5 Insurance. Lessee shall comply with the Insurance terms and conditions set forth in Exhibit F to this Agreement.

ARTICLE XIII

ENVIRONMENTAL LIABILITY AND INDEMNITY

Section 13.1 Inspection. Lessee acknowledges that Lessor has provided Lessee with full access to inspect the Leased Premises. Lessee further acknowledges that Lessor makes no representations and warranties to Lessee concerning the existence of any hazardous or toxic substances on or near the Leased Premises or compliance of the Leased Premises with Environmental Law on or near the Leased Premises.

Section 13.2 Lessor's Liability and Indemnity. As part of the consideration for this Agreement, and except as otherwise provided for in this Agreement, Lessor shall be responsible for and shall indemnify, defend, and hold harmless Lessee fully against Losses due to any claim, demand or litigation concerning violation of any applicable Environmental Law concerning the Release of Hazardous Materials located on or under the Leased Premises to the extent such Losses:

- (a) were proximately caused by one or more acts of Lessor or its corporate predecessors, and/or their agents, employees, officers or directors that occurred on or prior to the Commencement Date; and
- (b) result from any written demand or claim of an environmental agency or other third party ("Claims") that is promptly delivered to Lessor, and
- (c) exceed \$5,000 in aggregate in any year.

Section 13.3 Lessee's Liability and Indemnity. As part of the consideration for this Agreement, and except as otherwise provided for in this Agreement, Lessee shall be responsible for and shall indemnify, defend and hold harmless Lessor fully against, regardless of any negligence, alleged negligence or strict liability of Lessor occurring prior to the Commencement Date, Losses incurred due to any Claim concerning breach of this Agreement, violation of any Environmental Law or Release of Hazardous Materials where such Losses either:

- (a) were not proximately caused by one or more acts of Lessor or Lessor's corporate predecessors and/or their agents, employees, officers or directors, regardless of when the act or omission giving rise to the Claim occurred; or
- (b) were not proximately caused by the acts of a third party prior to the Commencement Date; or
- (c) regardless of cause, do not result from a Claim delivered to Lessor.

Section 13.4 Allocation of Losses. Any dispute between Lessor and Lessee as to allocation between them of Losses or costs of any Action Plan or Cleanup Plan for which Lessor and/or Lessee are responsible under the terms of this Agreement shall be settled by binding arbitration pursuant to the dispute resolution procedures set forth in Section 22.10 of this Agreement.

Section 13.5 Condition of Indemnity. Lessor's indemnity is expressly conditioned on (a) Lessee's strict compliance with all applicable Environmental Laws and the terms of this Agreement subsequent to the Commencement Date; and (b) prompt notice of the Claim.

Section 13.6 Exclusivity of Remedies. Lessor and Lessee agree that the remedies and obligations set forth in this Article XIII shall be exclusive remedies and obligations of each one to the other with respect to any Losses relating to the Release or existence of Hazardous Materials on or near the Leased Premises.

Section 13.7 Claim Waiver. **TO THE FULLEST EXTENT PERMITTED BY LAW, LESSEE SHALL NOW AND FOREVER WAIVE ANY AND ALL CLAIMS, REGARDLESS OF WHETHER SUCH CLAIMS ARE BASED ON STRICT LIABILITY, NEGLIGENCE OR OTHERWISE, THAT LESSOR IS AN "OWNER", "OPERATOR", "GENERATOR", "ARRANGER", OR "TRANSPORTER" WITH RESPECT TO THE LEASED PREMISES FOR THE PURPOSES OF CERCLA OR OTHER ENVIRONMENTAL LAWS. LESSEE FURTHER AGREES THAT THE USE OF THE LEASED PREMISES AS CONTEMPLATED BY THIS AGREEMENT SHALL NOT IN ANY WAY SUBJECT LESSOR TO CLAIMS THAT LESSOR 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 LESSOR BE RESPONSIBLE FOR THE ENVIRONMENTAL CONDITION OF THE LEASED PREMISES EXCEPT IN ACCORDANCE WITH THIS AGREEMENT.**

Section 13.8 Right of Entry. In addition to any other rights retained by Lessor in this Agreement to enter upon the Leased Premises, for any matters related to retained rights or obligations of Lessor under this Agreement or any matters related to the Leased Premises for which Lessee claims liability or indemnity against Lessor or for which Lessor assumes liability or indemnity under this Agreement, Lessor shall, upon reasonable advance notice and coordination with Lessee's management personnel, have a continuing right of entry upon the Leased Premises. Such right of entry shall include, but is not limited to, a right to enter upon the Leased Premises to perform environmental assessments or undertake remediation activities. Entry upon the Leased Premises for surveys or reconnaissance by Lessor in response to alleged Losses incurred and/or claimed or potential claims of liability or indemnity shall not be deemed an admission of liability or assumption of any obligation to indemnify or defend. In no event shall this Section 13.8 obligate Lessor to enter upon the Leased Premises and/or perform any inspections or surveys.

ARTICLE XIV

USE OF LESSOR LOCOMOTIVES

Lessor may from time to time in its sole and absolute discretion allow Lessee to use Lessor's locomotives solely for transport of cars to be handled for and on behalf of BNSF's account. In that event, the use of such locomotives shall be governed by the terms and conditions of that certain Locomotive Use Agreement attached as Exhibit H to this Agreement.

ARTICLE XV

INTERCHANGE

Section 15.1 *Interchange Agreement.* Lessee and Lessor shall interchange rail freight cars and equipment to and from each other pursuant to the terms of an Interchange Agreement to be executed in substantially the form attached as Exhibit B at **Vermont, Illinois**. Lessor shall have the right to change the location at which such interchange occurs if Lessor determines that such change is necessary for operational purposes. Interchange between Lessee and any party other than Lessor will not be permitted at any location along the Leased Premises. The trackage upon which such interchange takes place shall be referenced hereinafter as "Interchange Track." Lessee will block traffic for interchange with Lessor in accordance with written instructions to be furnished by Lessor.

Section 15.2 *Possession of Cars.* Cars and their contents delivered by one party to the other party on an Interchange Track shall be deemed to be in the possession of the receiving party as of the time they are placed on the Interchange Track and uncoupled from the delivering party's train or engine, except that if any such car is rejected by the receiving party under the Interchange Rules of the Association of American Railroads ("AAR"), as amended from time to time, or any successor rules, the refused car shall be deemed to remain in the possession of the delivering party until that car is accepted by the receiving party.

ARTICLE XVI

FREIGHT CAR EQUIPMENT

Section 16.1 *Equipment Availability.* Lessor shall make reasonable efforts to make freight cars available at Lessee's request on an Interchange Track as needed by Lessee for rail service from or to facilities located on or along the Leased Premises where Lessor is a line haul carrier in the route and receives a division of the freight revenues, on a non-discriminatory basis between Lessor's car needs on similar rail lines and Lessee's car needs; however, Lessor makes no guarantee of equipment supply to Lessee. Lessor shall make reasonable efforts to make freight cars available at Lessee's request on an Interchange Track as needed by Lessee for rail service from or to facilities on or along the Leased Premises where Lessor is not a line haul carrier in the route and does not receive a division of the freight revenues; however, Lessor may give preference to providing empty equipment to customers not located on or along the Leased Premises where Lessor is a line haul carrier in the route and receives a division of the freight revenues. It is the responsibility of Lessee to provide all locomotives, freight equipment for local traffic, and maintenance of way equipment.

Section 16.2 *Car Hire.* The practice of not designating Lessee in the revenue route will have no effect upon car hire and car accounting practices between the parties and will place no obligation on either party to provide additional free time or car hire relief to the other party. The Association of American Railroads' Code of Car Hire Rules, Code of Trailer and Container Reporting Rules, and Tariff RPS 6007-J or any successor rules or tariffs, as amended from time to time, will govern all car hire matters on rolling stock and equipment interchanged and settled pursuant to this Agreement. The party in possession of any car shall be responsible for all car hire costs, per diem expenses and mileage allowances payable with respect to such car, for any per diem charges for trailers or containers carried by such car, or for any equipment use charges applicable to any RoadRailer equipment or similar carless intermodal technology.

Section 16.3 Equipment Contract Participation and Tariff Adoption. Lessee warrants and

- (a) Be a signatory to the American Rail Box Company Form BX contract and the Railgon Form G car contract;
- (b) Be a permanent nonmember payor of the TTX Company Form A Car contract; and
- (c) Adopt and be a participating carrier in Freight Tariff RPS 6007 (private car mileage) and Freight Tariff RPS 6740 (heavy duty flatcars), as each may be amended from time to time.

Section 16.4 *Empty Cars Sent to Lessee Without A Valid Car Order.* Empty cars received by

Section 16.5 *Pre-Positioned Empty Cars.* Lessor retains the right to pre-position empty cars

Section 16.6 Early Interchange Per Diem. Cars sent to Lessee with valid car orders, but

Section 16.7

ARTICLE XVII
THROUGH RATES AND ROUTES

Excluding industries and trackage on, or connecting to, or become connected to the KJRY as it exists as of this date, Lessor and Lessee agree that, with respect to all current and future traffic originating or terminating on or along or from properties which are or may become connected to the Leased Premises, branchline, team track or side track , and interchanged between Lessor and Lessee at **Vermont, Illinois** during the term of the Agreement, Lessor shall have authority to establish through routes and offer through freight rates via through routes involving both Lessor and Lessee with interchange between Lessor and Lessee at **Vermont, Illinois**. Lessee shall not impose a surcharge upon this traffic or charge any additional fees to Lessor or customers along the Leased Premises or consignees of customers or any other third party. For the term of this Agreement, Lessor may, at its sole and absolute discretion, specify junctions and routes for all traffic as of the Commencement Date of this Agreement. For the term of this Agreement, Lessee automatically concurs in all such through rates established by Lessor, whether for present or future freight traffic, so long as Lessee shall receive for transporting the traffic the division of revenues set forth in Article XVIII of this Agreement. If required by Lessor or by applicable law, Lessee shall provide its power of attorney to make joint rates and routes consistent with the terms of this Agreement. Any such power of attorney shall be automatically revoked upon cessation of service by Lessee under this Agreement. Except to the extent required by applicable laws or regulations, Lessee shall not quote or move traffic from or to Lessor under Rule 11 rates. Nothing herein shall prohibit Lessee from charging demurrage, car storage, car cleaning, special handling, overweight, and similar fees customary in the industry, so long as those fees are not greater than similar fees published by Lessee for its other customers not located on the Leased Premises.

Absent advance written consent, Lessee may not impose any surcharges on any through movements with Lessor. Lessee may not offer Rule 11 rates for interchange with Lessor.

ARTICLE XVIII
DIVISION OF REVENUE

Section 18.1 Standard Divisions. Lessor and Lessee agree that for the term of this Agreement, the through revenue accruing on all existing and future loaded cars with a loaded weight less than 286,000 pounds gross weight on rail and interchanged between Lessor and Lessee at **Vermont, Illinois**, to or from existing and future rail destinations or origins on or along the Leased Premises, shall be divided between Lessor and Lessee on the following basis for each carload of traffic:

Fuel and Locomotives are Provided By	Coal Unit Trains	Other Unit Trains	All Other Traffic
KJRY	----	----	-----

BNSF	----	----	----
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Section 18.2 Intermodal Traffic. Lessor and Lessee agree that for the term of this Agreement, the through revenue accruing on all existing and future intermodal units (trailers, containers, RoadRailers or other carless technology) with a loaded weight less than 300,001 pounds and interchanged between Lessor and Lessee at **Vermont, Illinois**, to or from existing and future rail destinations or origins on or along the Leased Premises, shall be divided between Lessor and Lessee on the following basis each intermodal box:

Fuel and Locomotives are Provided By	Each Intermodal Unit – Loaded or Empty
KJRY	---
BNSF	---

Section 18.3 Heavy Loads. Except for Dimensional Loads referenced in Section 18.4 below, Lessor and Lessee shall reach mutual written agreement on proposed shipments of carloads and intermodal carloads exceeding 300,001 pounds on a case by case basis.

Section 18.4 Dimensional Loads. Lessor and Lessee agree that for the term of this Agreement, the rate on Dimensional Loads shall be 1.5 times the Standard Divisions set forth in Section 18.1 hereinabove.

Section 18.5 Empty Car Returns and Pallet Returns. Lessor and Lessee agree that for the term of this Agreement, the applicable division of revenue for Lessee shall be equal to the Shortline Mileage Rate set forth in BNSF 90020, Item 100, as same may be amended from time to time.

Section 18.6 Routine Adjustment To Divisions. For all current and future traffic originating or terminating on or along or which are connected to or may become connected to the Leased Premises, and interchanged between Lessor and Lessee at **Vermont, Illinois (and traffic identified in Section 27.1)**, the divisions set forth in Section 18.1 shall be adjusted annually, commencing as of **January 1, 2008**, based on --- of the increase or decrease between the **first quarter of 2008** compared to the **first quarter of 2007**, in the Rail Cost Adjustment Factor, unadjusted for productivity, as published by the Surface Transportation Board, or, if it ceases to be published, some similar rail cost index as may be mutually agreed upon between the parties as a reasonable substitute, and thereafter as of each January 1 based on -- - of the increase or decrease in the Rail Cost Adjustment Factor Unadjusted for Productivity in the **first quarter** of the immediately preceding year compared to the first quarter of the year before that.

Section 18.7 Imbalance in Empties and Loads. In the event Lessor has Lessee move empty cars over the Leased Premises that are not for (a) loading purposes on the Leased Premises, or at another KJRY station, or (b) returning from unloading on the Leased Premises or another KJRY station, such empty cars shall be billed to Lessor at a rate not exceeding the mileage portion of the Shortline Mileage Rate set forth in BNSF 90020, Item 100, as same may be amended from time to time. Such empty cars shall be returned to Lessor at the closest interchange point, unless directed otherwise by Lessor. Cars sent by Lessor to KJRY for loading by KJRY served customers, which are rejected, or simply returned empty to Lessor, shall be moved at no charge.

Section 18.8 **Reserved.**

Section 18.9 Collection of Revenue Divisions.

- (a) Unless otherwise agreed by the parties in writing, on the first (1st) and fifteenth (15th) of each month, Lessee will transmit electronically (or via another mutually agreed upon method of transmission) to Lessor an invoice of revenue divisions due Lessee from Lessor. Except as expressly provided otherwise, Applicable Divisions shall be calculated based upon the waybill date. The invoice for payment of divisions sent to Lessor shall include the following information:
1. Car initial and number.
 2. Interchange date.
 3. Interchange location.
 4. 7-digit STCC number.
 5. Whether the car is loaded or empty.
 6. Amount due for each carload calculated based on the division in effect as of the interchange date; provided, however, divisions shall be subject to adjustment and paid by Lessor based upon the lesser of the division applicable as of the waybill date or the division applicable as of the interchange date.
- (b) The invoice is to be sent to Lessor via electronic mail to liabilityrating2@bnsf.com or, if electronic mail is unavailable, mailed to the following address (or any other updated address as may be provided to Lessee on advance written notice by Lessor). The invoice shall provide the name and telephone number of Lessee's contact representative in the event Lessor may have questions:

Revenue Contract Accruals and Disbursements - Shortlines
BNSF RAILWAY COMPANY
2500 Lou Menk Drive
Fort Worth, Texas 76131

- (c) Lessor agrees to make payments to Lessee twice monthly on the fifteenth (15th) and last business day of each month by automated clearing house (ACH) credit or through another agreed method. The parties understand and agree that the payment made on the fifteenth (15th) of any given month is payment for carloads interchanged during the preceding month from the first (1st) and through the fifteenth (15th) of that month. The parties further understand and agree that the payment made on the last business day of each month is for carloads interchanged during the preceding month from the sixteenth (16th) and through the last day of that month. Notwithstanding any provision to the contrary herein, in no event shall Lessor be obligated to pay any bill for revenue divisions tendered by Lessee later than six (6) months after the interchange date.

ARTICLE XIX
LIENS AND ENCUMBRANCES

Lessee shall promptly pay and discharge any and all Encumbrances, including liens, which arise out of any actions or omissions of Lessee, (including without limitation, liens which arise out of any construction, alterations or repairs done, suffered or permitted to be done by Lessee on the Leased Premises) and shall indemnify Lessor against any Loss, liability or expense incurred by Lessor on account of such liens. Lessor is hereby authorized 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 interests in and to the Leased Premises by any Governmental Body or third party claiming rights to the Leased Premises; provided, however, that actions or failure of Lessor to take any such actions shall not relieve Lessee of any obligation or liability under this Section or any other Section of this Agreement. If, because of any act or omission of Lessee, any mechanic's lien or other lien, Encumbrance, 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 thereof from Lessor to Lessee, and Lessee shall indemnify and save harmless Lessor against and from all costs, liabilities, penalties, and claims, including legal expenses, relating therefrom. Lessee shall exercise due vigilance against encroachments on the right-of-way of the Leased Premises and shall act to remove such encroachments, in no case allowing any claim of adverse possession to arise against the Leased Premises.

ARTICLE XX

ASSIGNMENT AND SUBLEASE

Lessee shall not assign this Agreement, in whole or in part, or any interest herein, or grant a security interest in any buildings or 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. Any permitted assignee, including any successor in interest, of Lessee's or Lessor's rights under or property acquired by this Agreement, shall assume in writing all of Lessee's continuing and existing or thereafter arising obligations under the Agreement, and under any then effective contract assigned by Lessor to Lessee, in whole or in part, in accordance with the terms of this Agreement, which obligations are related to the property or rights involved in the assignment.

ARTICLE XXI

TRANSITION OF RAIL OPERATIONS

Section 21.1 *Transition of Operations.* Unless otherwise agreed in writing, the transition of rail freight operations on the Leased Premises on the Commencement Date and the apportionment of transportation revenues and expenses shall be governed by the terms of this Section.

Section 21.2 *Billing and Freight Revenue.* Lessor will be responsible for processing and accounting for all unreported waybills (including freight billing of prepaid shipments originating and waybilled prior to Commencement Date and collect shipments terminating prior to Commencement Date) and submission of interline settlements, for all shipments that reach public team tracks or private sidings on the Leased Premises prior to Commencement Date.

Section 21.3 *Inventory of Cars.* Lessor will make an inventory of all cars on the Leased Premises as of the Commencement Date, for the purpose of identifying and allocating revenue, Car Hire and Mileage Allowances between Lessor and Lessee and determining responsibility for Car Hire and Mileage Allowances. The inventory will show separately (a) loaded cars at the interchange yard or origin point, which have not moved in linehaul service on the Leased Premises as of the Commencement Date;

(b) loaded cars at the interchange yard or at destination for which linehaul service on the Leased Premises has been completed as of the Commencement Date; (c) loaded Lessor cars en route (in a train consist or at an intermediate siding or yard) on the Leased Premises as of the Commencement Date; and (d) empty cars on the Leased Premises.

Section 21.4 Allocation of Revenue. Transportation revenue for cars located on the Leased Premises, as shown in the inventory made pursuant to Section 21.3 shall be allocated between Lessor and Lessee as provided in this Section.

- (a) Where inbound loaded cars are located at an interchange yard or outbound loaded cars are located at the destination point on the Leased Premises on the Commencement Date, and no linehaul service over the Leased Premises has yet been performed, Lessee shall be entitled to one hundred percent (100%) of the revenue provided by this Agreement for movement of the cars over the Leased Premises.
- (b) Where outbound loaded cars are located at an interchange yard or inbound loaded cars are located at the destination point on the Leased Premises on the Commencement Date, and linehaul service over the Leased Premises has been completed, Lessor shall be entitled to one hundred percent (100%) of the revenue for movement of the cars over the Leased Premises, and Lessee shall not receive any division of revenues for such cars.
- (c) Where inbound or outbound loaded cars are en route on the Leased Premises on the Commencement Date, Lessee shall be entitled to fifty percent (50%) of its revenue division provided by this Agreement for movement of the cars over the Leased Premises.
- (d) Neither Lessor nor Lessee shall be entitled to any allocation of revenue for the movement of empty cars.

Section 21.5 Demurrage Revenue. Lessor shall be entitled to all demurrage charges attributable to cars subject which are actually or constructively placed on the Leased Premises prior to Commencement Date, regardless of whether such cars remain placed on the Leased Premises on or after the Commencement Date. Lessee shall be entitled to all demurrage charges attributable to cars subject which are actually or constructively placed on the Leased Premises on or after the Commencement Date.

Section 21.6 Miscellaneous Revenue Other Than Demurrage. Revenue for services other than line haul service and demurrage shall be billed and retained by the carrier providing the service.

Section 21.7 Switching Charges Assessed By Another Railroad. Charges for switching service performed by another railroad prior to the Commencement Date, which are to be absorbed or paid by the owner or operator of the Leased Premises pursuant to agreement or tariff, will be paid by Lessor. Lessee shall be responsible for such charges for switching performed after the Commencement Date in accordance with the terms of this Agreement.

Section 21.8 Freight Overcharge Claims. Liability for any overcharge claim on a shipment for which revenue is allocated hereunder shall be assumed by Lessor and Lessee in the same proportion as the linehaul revenues are allocated pursuant to Section 21.4.

Section 21.9 Allocation of Car Hire and Mileage Allowances. For purposes of determining responsibility for Car Hire and Mileage Allowances, a paper interchange of all equipment, as shown in the inventory prepared pursuant to Section 21.3 (except outbound cars which have reached the interchange point), shall be deemed made from Lessor to Lessee, as of the Commencement Date. Lessor will be responsible for Car Hire and Mileage Allowances accrued prior to the Commencement Date.

Lessee will be responsible for Car Hire and Mileage Allowances accrued after the Commencement Date, except for such charges, including trackage rights fees for cars for which Lessee receives no revenue, pursuant to the terms and conditions of this Agreement. Mileage allowances and the mileage portion of Car Hire shall be calculated based on the actual location of the car as of the Commencement Date.

Section 21.10 Freight Loss and Damage. As between the parties hereto, and notwithstanding any provision to the contrary in this Agreement, Lessor shall be responsible for and shall indemnify, defend, and hold harmless Lessee from freight loss and damage claims arising from events which can be ascertained to have occurred on the Leased Premises prior to the Commencement Date. Lessee shall be responsible for and shall indemnify, defend, and hold harmless Lessor from freight loss and damage claims arising from events which can be ascertained to have occurred on the Leased Premises after the Commencement Date. If the date or location of an event giving rise to a claim cannot be determined, freight loss and damage liability attributable to movements over the Leased Premises shall be assumed by Lessor and Lessee in accordance with AAR Freight Claims Rules, except to the extent expressly provided otherwise herein. This Section provides only for the allocation between Lessor and Lessee of responsibility for valid claims for freight loss and damage with respect to shipments on the Leased Premises at Commencement Date, and is not intended, and shall not be interpreted, as an admission or acknowledgement of liability by Lessor or Lessee to any third party with respect to any claim for freight loss and damage. For purposes of this Section and notwithstanding any provision to the contrary in the AAR Freight Claim Rules, when freight is in the possession custody or control of Lessee, Lessee shall assume owner carrier responsibility for all freight loss and damage related thereto, regardless of whether Lessee is acting as a handling carrier for Lessor or whether said cars shall be in the account of BNSF at the time such freight loss or damage occurs.

Section 21.11 Settlements.

- (a) Any payments required by this Section 21.11 to be paid from one party to the other shall be settled and made in accordance with AAR Accounting Rules.
- (b) Customers are to be advised to pay freight bills to the railroad submitting the bill. Any payment erroneously received by Lessee or Lessor which should have been made to the other party, shall be adjusted as provided in Section 21.4.
- (c) The parties will process loss and damage claims in accordance with AAR Rules, Principles and Practices.

Section 21.12 Utilities. Lessee shall be responsible for the payment of all utilities on and after the Commencement Date and shall defend, indemnify and hold harmless Lessor from and against any such charges. Lessee's liability for utilities begins with first billing cycle after the Commencement Date. There shall be no proration between Lessor and Lessee of utility bills applicable to the Leased Premises. Lessee shall be required to notify all providers of utilities for the Leased Premises and arrange to switch over all utilities to Lessee's own account.

ARTICLE XXII

MISCELLANEOUS

Section 22.1 Notices, etc. All communications provided for in this Agreement shall be in writing and shall become effective when delivered by hand or by a nationally recognized overnight courier service or received by telex, telecopy, or other wire transmission (with request for assurance of receipt in a manner customary for communications of such respective type), to the respective party at such address as such party may from time to time designate by notice duly given in accordance with the

provisions of this Section 22.1 to the other party. Until further notice, the following addresses and telephone numbers shall be used for all such notices:

To Lessor:

BNSF RAILWAY COMPANY
2650 Lou Menk Drive
Fort Worth, Texas 76131
Attn: AVP Joint Facilities
AVP Short Line Development
Telecopy No.: (817) 352-7154
Confirm No.: (817) 352-6434

To Lessee:

Keokuk Junction Railway Co.
1318 S. Johanson Road
Peoria, Illinois 61607
ATTN: PRESIDENT
V.P. – Law
Telecopy No.: (309) 697-1677
Confirm No.: (309) 697-1400

Either party hereto may change its address or addressee to which notices are to be given by providing written notice of the change to the other party.

Section 22.2 Choice of Law. This Agreement shall be governed by the laws of the State of **Illinois** without regard to any conflicts of law provisions of any jurisdiction.

Section 22.3 Severability. In the event that any of the provisions of this Agreement or any of the Contemplated Transactions, or portions or applications hereof or thereof, are held to be unenforceable or invalid by a court of competent jurisdiction, BNSF and **KJRY** shall negotiate an equitable adjustment to the provisions of this Agreement with a view toward effecting to the extent possible the original purpose of this Agreement, and the validity and enforceability of the remaining provisions, or portions or applications thereof, shall not be affected thereby. Notwithstanding any provision to the contrary herein, in the event any material provisions of this Agreement (including without limitation, provisions which govern or affect, directly or indirectly, rights or obligations pertaining to interchange) are deemed to be unenforceable, are nullified, or are otherwise altered, reformed, or supplemented by condition action, order, or decision of any court, arbitration panel, or governmental authority, BNSF may, at its election which may be exercised in its sole and absolute discretion at any time, terminate this Agreement on 10 days' written notice to **KJRY**.

Section 22.4 Amendment. This Agreement may not be modified or amended except by an instrument in writing signed by both Lessor and Lessee.

Section 22.5 Execution. This Agreement (or any amendments hereto) may be executed in any number of counterparts and by Lessor and Lessee in separate counterparts, each of which shall be deemed an original. The exchange of copies of this Agreement and of signature pages by facsimile transmission shall constitute effective execution and delivery of this Agreement as to the parties and may be used in lieu of the original Agreement for all purposes. Signatures of the parties transmitted by facsimile shall be deemed to be their original signatures for all purposes.

Section 22.6 *Binding Effect*. Subject to the provisions of Article XX, this Agreement shall be binding upon each of the parties and their respective successors, legal representatives and permitted assigns, and shall inure to the benefit of each of the parties, and their respective successors, legal representatives and permitted assigns.

Section 22.7 *No Waiver*. Except as may be expressly provided otherwise in this Agreement, no failure on the part of either party or any of its agents to exercise, and no course of dealing with respect to, and no delay in exercising, any right, power or remedy hereunder or thereunder shall operate as a waiver thereof; nor shall any single or partial exercise by either party or any of its agents of any right, power or remedy hereunder or thereunder preclude any other or further exercise thereof or the exercise of any other right, power or remedy.

Section 22.8 *No Third Party Beneficiaries*. This Agreement is made and intended for the benefit of the parties hereto and their respective successors and permitted assigns and for no other parties.

Section 22.9 *Integration*. The Exhibits referenced in this Agreement and attached hereto are specifically made a part of this Agreement by reference. This Agreement together with its Exhibits embodies the entire agreement and understanding between the parties hereto with respect to the subject matter hereof and supersedes all prior understandings and agreements (whether oral or written) concerning the subject matter hereof. Any other prior or contemporaneous agreements, understandings, representations or statements, whether oral or written, relating to this transaction are merged herein. The headings and titles to provisions in this Agreement are for convenience only and shall not be deemed to modify or affect the rights or duties of the parties. All rights and obligations of the parties set forth in this Agreement are integral parts of this Agreement. The consideration inducing the parties to enter into this Agreement includes all of the commitments by Lessor to Lessee, and by Lessee to Lessor, as set forth in this Agreement. The terms of this Agreement have been arrived at 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.

Section 22.10 *Dispute Resolution*.

- (a) Questions or controversies pertaining to the construction, application, rights, obligations, remedies, or performance of this Agreement shall be resolved by neutral binding arbitration under the rules and regulations (but not the administration unless otherwise agreed) of the American Arbitration Association ("AAA").
- (b) Subject to written agreement to the contrary, arbitration shall be held in accordance with the Commercial Rules of the AAA in effect at the time of the arbitration; provided, however, that except to the extent that the AAA Rules are inconsistent with the terms of this Agreement or the terms of this Agreement are more specific than the AAA Rules, the terms of this Agreement will govern.
- (c) Unless otherwise agreed in writing, discovery and motion practice shall be permitted, and the Federal Rules of Civil Procedure and Federal Rules of Evidence shall govern all such motion practice and discovery, the exchange of exhibits, witness lists and work papers, and the presentation of evidence by expert witnesses.
- (d) The question or controversy shall be submitted for arbitration to a single competent, disinterested arbitrator, if the parties are able to agree upon such single arbitrator within thirty (30) days after the party requesting arbitration notifies the other party of such

request. Within 30 days of its demand for arbitration, the party initiating the arbitration shall state in writing the question(s) to be submitted for decision. Within 30 days of receipt of the initiating party's summary of claims, the receiving party shall provide any notice of claims or defenses it wishes to have adjudicated. If the parties shall be unable to agree upon such arbitrator an arbitrator shall be appointed by the AAA on written application of either party or pursuant to other neutral entity or process if mutually agreed upon in writing. Unless mutually agreed otherwise in writing, any arbitrator selected must have a minimum of ten (10) years' experience working in the railroad industry with railroad agreements and contracts.

- (e) Upon selection of the single arbitrator, the arbitrator shall proceed with diligence to inquire into the questions or controversies. A hearing shall be held within one hundred eighty (180) days of appointment of the arbitrator, and the arbitrator shall state its decision and award, in writing, within thirty (30) days of the final submission by the parties, which decision and award, when delivered to both parties, shall be final and binding. Judgment may be entered upon such decision and award in any court of competent jurisdiction.
- (f) Each party shall bear its own expenses incurred in connection with arbitration under this Section. The parties shall share equally the expenses associated with the services of the single, disinterested arbitrator.
- (g) In the event of any controversy, claim or dispute between either party affecting or relating to the performance of the rights and obligations under this Agreement, the arbitrator have the authority to award reasonable expenses, including, without limitation, attorneys' fees, accountants' fees, consultants' fees, court costs, arbitration costs, and interest, as he/she may deem equitable.

Section 22.11 Confidentiality. Except to the extent that the terms of this Agreement are required to be disclosed by applicable Legal Requirements or by any Governmental Bodies, no party to this Agreement shall disclose the contents of this Agreement to any other Person, without the prior written consent of the other parties to this Agreement. Independent consultants, attorneys and auditors may be provided certain terms of this Agreement as may be necessary in the ordinary course of business; provided, however, any such Person who is lawfully permitted access to any of the terms of this Agreement shall be required by the party to this Agreement who is disclosing the information not to disclose those terms to any other party without the prior written consent of both parties to this Agreement. It is understood and agreed that the terms of this Agreement shall not be placed of public record except to the limited extent as may be required by applicable Legal Requirements or Order or any Governmental Body.

Notwithstanding anything herein to the contrary, any party subject to confidentiality obligations hereunder or under any other related document (and any employee, representative or other agent of such party) may disclose to any and all persons, without limitation of any kind, such party's U.S. federal income tax treatment and the U.S. federal income tax structure of the transactions contemplated by this Agreement and any other agreement related thereto and all materials of any kind (including opinions or other tax analyses) that are provided to it relating to such tax treatment and tax structure.

Section 22.12 Force Majeure.

- (a) Lessee shall not be in default of any service obligations; nor shall it have any obligation to operate over any portion of the Leased Premises as to which it is prevented or hindered from operating by Acts of Nature, public authority, strikes, riots, labor disputes, criminal acts of third parties, war, terrorism, or any cause beyond its reasonable control and pursuant to a

lawful embargo; Provided, however, Lessee shall use its best efforts to take whatever action is necessary or appropriate to be able to resume its operations. In the event of damage or destruction caused by natural disaster, or other force majeure event, Lessee shall commence repairs within seventy-two (72) hours of the conclusion of such event, and shall pursue such repairs with reasonable diligence.

- (b) In the event the cost of such repairs exceed Lessee's insurance coverage and Lessee will be unable to recover or recoup such costs above Lessee's insurance coverage within a reasonable period of time following completion of repairs, Lessee may, upon verification of the foregoing, request that Lessor permit it to discontinue all or the affected portion of its operations over the affected segment of the Leased Premises, which request shall not be unreasonably denied. Notwithstanding the foregoing, Lessor may require Lessee to either (1) make repairs up to the maximum insured amount or (2) pay Lessor the full amount up to the maximum insured amount prior to termination of the Lease. In the event the STB approves such discontinuance, and this Lease shall be terminated without prejudice to either party, but Lessee will not be eligible to receive any payments under Section 3.6 Termination Without Cause. In the event of partial termination there shall be no adjustments to the Rental Payments.
- (c) In no event shall this Section 22.12 relieve Lessee of any obligations of liability and indemnity.

ARTICLE XXIII **RAIL OPERATIONS**

Section 23.1 Electronic Data Interchange (EDI). Within ninety (90) days following the Commencement Date, transaction reporting by Lessee shall meet all industry standards for Electronic Data Interchange (EDI), including but not limited to the ability to send and receive electronically waybills and bills of lading, advance consists. To the extent Lessor and Lessee provide through blocking for each other, blocking instructions, as well as Train II reports and passing/placement reports for performance purposes shall also be available in electronic format. Except as otherwise specifically provided, Lessee shall perform such work during its normal business hours, which are 5:30 a.m. to 3:30 p.m. Central Time, Monday through Friday, holidays excluded.

- (a) **Interline Waybills and Bills of Lading (417 and 404).**
 - i.) Timeliness. No later than four hours after car(s) are released by customer(s) for unit coal trains, and during normal business hours for all other trains, Lessee will transmit interline waybills (via an electronic 417 report) to Lessor. In no event shall Lessee interchange cars to Lessor prior to sending Lessor a 417 report.
 - ii.) Accuracy. 417 reports sent by Lessee to Lessor will be complete and accurate as determined by the applicable industry standard.
- (b) **Advance Consist (418)**
 - i.) Timeliness. No later than eight hours prior to actual interchange for unit coal trains, and during normal business hours for all other trains, Lessee will transmit advance consists (via an electronic 418 report) to Lessor.
 - ii.) Accuracy. 418 reports sent by Lessee to Lessor will be complete and accurate as determined by the applicable industry standard.
- (c) **Blocking Instructions (419 and 420)**

- i.) Timeliness. Lessee will take no more than four hours to transmit a 420 (blocking instruction) to Lessor upon receipt of Lessor's 419 (request for blocking instructions) for unit coal trains and during normal business hours for all other trains. Lessee will send a 419 (request for blocking instruction) for each car to be blocked for interchange to Lessor no less than 2 hours before interchanging cars to Lessor. Lessee is not relieved of responsibility to block cars for Lessor by either Lessee's failure to process Lessor's 420, Lessor's lack of response to Lessee's 419 due to errors therewith, or Lessee's failure to send a 419.
- ii.) Accuracy. 419 and 420 transmissions sent by Lessee to Lessor will be complete and accurate as determined by the applicable industry standard.

(d) **Train II Reports.**

- i.) Minimum Train II reporting shall include:
 - 1) Interchange Received;
 - 2) Interchange Forwarded;
 - 3) Constructive Placement;
 - 4) Placed for Loading or Unloading; and
 - 5) Released Loaded or Empty.
- ii.) Timeliness. Lessee will transmit Train II Reports during normal business hours, except that items i(1) and I(2) will be transmitted within four hours of each event for unit coal trains. .

The parties agree that the terms of this Agreement impose a liability on Lessee to maintain whatever current industry standards are in effect for electronic data interchange over the term of this Agreement, provided that the Agreement shall control as to timeliness. If Lessee, for any reason, is unable to comply with the terms set forth above in all material respects, Lessor will pay Lessee ninety percent (90%) of the per car divisions set forth in this Agreement through the earlier date of (i) Lessee's compliance with the terms in Section 23.1, or (ii) the first anniversary of Lessee operating the Leased Premises. If Lessee, for any reason, is unable to comply with the terms of Section 23.1 after the first anniversary of the Lessee operating the Leased Premises, Lessor may terminate this Agreement for cause.

If BNSF, at its sole discretion, may request additional informational systems, Lessee agrees to negotiate in good faith with Lessor to reach a mutually beneficial solution to implement such systems.

Section 23.2 **Interline Service Agreements.** Lessee agrees to enter into an Interline Service Agreement ("ISA") upon the written request of the Lessor, if Lessor deems it necessary or appropriate for either the efficient interchange of traffic between Lessor and Lessee, or in order to provide customers (either the shipping party or the receiving party) on the Leased Premises with competitive and reliable rail service.

Section 23.3 **Transfer of Rail Operations and Liabilities.** Except to the extent expressly provided otherwise in Article XXI governing transition of freight rail operations, the following shall apply to the parties:

- (a) Before the Commencement Date of this Agreement, Lessor shall be responsible for:
 - (i) all rail operations, including car supply, on the Leased Premises;
 - (ii) any freight loss and damage claims attributable to rail operations over the Leased Premises, regardless of Lessee's Handling Carrier status; and

- (iii) all car hire and car mileage allowance payments relating to rail operations over the Leased Premises.
- (b) On and after the Commencement Date, Lessee shall be responsible for:
 - (i) all rail operations, including car supply, on the Leased Premises;
 - (ii) any freight loss and damage claims attributable to rail operations over the Leased Premises; and
 - (iii) all car hire and car mileage allowance payments relating to rail operations over the Leased Premises.

Section 23.4 *Accident and Incident Reporting.* During the term of this Agreement, Lessee shall comply with all accident and incident reporting related to the Leased Premises and required by any Governmental Bodies.

Section 23.5 *Special Service Provisions.* **The Ameren power plant at Dunfermline accounts for the preponderance of traffic originated or terminated on this line as of this date. This power plant provides electricity for tens of thousands of homes and business in Central Illinois. Lessee shall handle Ameren's (and its successors and assigns) coal trains from interchange receipt from BNSF to interchange delivery to BNSF in a prompt and efficient manner. Lessee shall not cause undue delay in the interchange delivery, unloading, or return of Ameren's loaded or empty coal trains. Default of the terms of this Section shall be subject to all remedies available at law or in equity, including without limitation, specific performance and/or money damages for all losses, which shall include all economic losses of Lessor, including incidental or consequential damages. This section is not, however, meant to encompass "normal" or occasional delays caused by grade crossing accidents, mechanical breakdowns, and other events to which rail operations are routinely subject.**

ARTICLE XXIV

PROPERTY TAXES

Section 24.1 *Property and Ad Valorem Taxes.* Lessee shall be responsible for the timely payment of all property, ad valorem, franchise and special taxes or fee(s) imposed by the United States of America or any state(s) or political subdivision thereof upon the Lessor, Lessee or the Leased Premises, if such tax or fee(s) is related to the Agreement, use or operation of the Leased Premises during the term hereof. If directly billed by a taxing or levying authority, all taxes and fee(s) 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 fee(s) shall be provided by Lessee to Lessor no later than thirty (30) days after the due date. In the event any of the tax or fee(s) required to be paid by Lessee pursuant to this Section are paid by Lessor, Lessee shall reimburse Lessor the full amount paid within thirty (30) days of the date a bill for reimbursement is mailed by Lessor. 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. All such taxes shall be prorated to the date of Commencement, and Lessor shall pay that portion attributable to periods before January 1, 2007.

Section 24.2 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(s) for which it is responsible pursuant to this Section, 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(s) for which it is obligated pursuant to this Section.

Section 24.3 Obligations Upon Termination or Expiration.

- (a) Upon termination or expiration of the term of this Agreement and all operations by Lessee hereunder, Lessee's prospective property tax and franchise payment obligations shall terminate and all tax and franchise payments made up to the date thereof shall not be subject to pro-ration or refund of all or part of any taxes paid by Lessee.
- (b) Upon termination or expiration of the term of this Agreement and all operations by Lessee hereunder, all tax and franchise obligations which arose or accrued prior thereto shall survive and be enforceable as against Lessee, including without limitation, obligations to pay such taxes or franchises which may be subject to pending contest at the time of termination or expiration.

ARTICLE XXV
ADMINISTRATION OF AGREEMENTS
GOVERNING LEASED PREMISES

Section 25.1 Lessor's Property-Related Agreements.

- (a) Lessor shall have the sole right and responsibility to administer all records and, except to the extent expressly provided in this Agreement, shall be entitled to all rents or revenues relating to property acquisition agreements, property leases, term leases, indefinite term leases, permits, licenses, easements, sales of property surplus to railroad operations and, with the exception of any agreements identified in Sections 25.2 and 25.3 below, all other property-related agreements including, without limitation, those agreements listed on Exhibit C of this Agreement ("Lessor's Property-Related Agreements") respecting the Leased Premises, whether such agreements are existing as of the Commencement Date or entered into after the Commencement Date. During the term of this Agreement and for so long as Lessee is not in material default, Lessor shall annually remit to Lessee a [25%] share of all rentals or net revenues received by Lessor during the preceding year from Lessor's Property-Related Agreements.
- (b) Within forty-five (45) days following the Commencement Date, Lessor shall conduct a search of its business records in locations where Lessor's Property-Related Agreements may reasonably be found and shall provide Lessee written notice of availability of, and upon request of Lessee, copies of Lessor's Property-Related Agreements which have not otherwise been provided to Lessee or identified on Exhibit C prior to Closing. Lessee acknowledges and agrees that Lessor does not undertake to identify, nor does Lessor represent or warrant that it shall have accurately or completely identified all property-related agreements that may govern the Leased Premises.

- (c) From and after the Commencement Date, Lessee shall direct all inquiries concerning prospective Lessor's Property-Related Agreements to Lessor. Lessee shall not enter into any agreements that are defined as Lessor's Property-Related Agreements pursuant to subparagraph (a) hereinabove.
- (d) Lessor shall provide Lessee with at least ten (10) calendar days' advance written notice of any proposed new Lessor's Property-Related Agreement, along with a sufficient description of the proposed agreement to allow Lessee to assess whether the proposed agreement would result in material interference with Lessee's rail freight operations. Lessee shall provide its consent to Lessor's proposed Property-Related Agreement within said ten (10) day period, and such consent shall not be withheld, conditioned, or delayed where the Lessor's proposed agreement (i) does not result in a material interference with Lessee's rail freight operations on the Leased Premises; and (ii) provides sufficient liability and indemnity protecting Lessee either as an express third party beneficiary of said agreement, or at the option of Lessor, as a signatory and party to said agreement along with Lessor. For purposes of subsection (d)(ii), liability and indemnity provisions protecting Lessee from claims or losses that are essentially the same as the indemnity provisions granted to Lessor in the agreement and protecting Lessee from claims or losses arising or accruing as a result of Lessee's provision of rail freight service over the Leased Premises and/or resulting from acts or omissions of the contracting party, except to the extent any claims or losses are caused by negligence, or intentional acts of Lessee, shall be deemed to be sufficient protection for Lessee. In the event Lessee fails to provide written consent or valid written objection to Lessor's Property-Related Agreement within ten (10) days of Lessee's receipt of written notice thereof, Lessee's consent shall be deemed automatically granted.
- (e) Subject to any provisions of liability or indemnity otherwise protecting Lessee in any of Lessor's Property-Related Agreements, Lessee shall indemnify, defend, and hold harmless Lessor from and against any and all liabilities incurred under Lessor's existing or prospective Property-Related Agreements which may arise or accrue as a result of Lessee's or any third party's use, occupation, possession, and/or operation on the Leased Premises at any time, except to the extent any such liabilities are caused by Lessor. To the extent any of Lessor's Property-Related Agreements impose any obligations to provide rail service or other obligations within the control of Lessee, Lessee shall assume and bear such obligations for the term of this Agreement and shall indemnify, defend, and hold harmless Lessor from and against any claims of breach of such obligations which arise or accrue during the term of possession of the Leased Premises by Lessee. Lessor shall, however, assign and/or sublet to Lessee, for the Term of this Agreement, the indemnifications, waivers, and similar rights as to third parties, concerning the operation, maintenance, repair, rehabilitation and occupation of the Leased Premises; provided that Lessor shall retain such indemnifications as they relate to ownership.

Section 25.2 Lessee's Property-Related Agreements.

- (a) Lessee shall, subject to the terms of this Agreement, administer all records and shall be entitled to all rents or revenues relating to track construction agreements, track leases and industry track agreements including, without limitation, those agreements listed on Exhibit D of this Agreement ("Lessee's **Industry Track Agreements**") respecting the Leased Premises which are in effect as of the Commencement Date. Effective as of the Commencement Date, Lessor shall, to the extent allowed by applicable law, assign and sublet to Lessee, for the term of this Agreement, all rights, duties and obligations, including without limitation, obligations of indemnity, under Lessee's Property-Related

Agreements, to the extent such rights, duties and obligations arise or accrue during the term of this Agreement. Upon termination or expiration of the term of this Agreement, all of Lessee's Property-Related Agreements shall be deemed automatically re-assigned to Lessor, and Lessor shall thereafter assume and bear all rights, liabilities, and obligations arising or accruing thereunder after termination or expiration of the term of this Agreement. Lessee shall indemnify, defend, and hold harmless Lessor for all obligations and liabilities under any sublet Joint Facility Agreements to the extent such obligations and liabilities arise or accrue during possession or operation of the Leased Premises by Lessee.

- (b) Within forty-five (45) days following the Commencement Date, Lessor shall conduct a search of its business records in locations where Lessee's Property-Related Agreements may reasonably be found and shall provide Lessee written notice of availability of, and upon request of Lessee, copies of Lessee's Property-Related Agreements which have not otherwise been provided to Lessee or identified on Exhibit D prior to Closing. Lessee acknowledges and agrees that Lessor does not undertake to identify, nor does Lessor represent or warrant that it shall have accurately or completely identified all property-related agreements which may govern the Leased Premises.
- (c) From and after the Commencement Date, proposals for prospective Lessee's Property-Related Agreements shall be subject to mutual negotiation between Lessor and Lessee. After the Commencement Date, in no event may Lessee or Lessor enter into any new agreements that are defined as Lessee's Property-Related Agreements absent mutual written agreement of Lessor and Lessee to enter and execute same. In the event Lessee enters into any authorized Property-Related Agreement, such agreement shall provide for automatic termination thereof upon termination or expiration of this Agreement unless Lessor shall have provided written election to assume and bear all rights and obligations under such agreement upon the expiration or termination of the term of this Agreement.

Section 25.3 Joint Facility Agreements.

- (a) Effective as of the Commencement Date for the term of this Agreement, Lessor shall assign and sublet to Lessee to the extent allowed by applicable law and in substantially the form identified in Exhibit K to this Agreement, for the term of this Agreement, all rights, duties and obligations, including without limitation, obligations of indemnity, under any joint facility agreements with other railroads which are necessary to or which may otherwise directly affect the operation of the Leased Premises including, without limitation, any Trackage Rights Agreement(s) identified, if any, in Section 27.3 of this Agreement ("Joint Facility Agreements"), to the extent such rights, duties and obligations relate to the Leased Premises and arise or accrue during the term of this Agreement. Upon termination or expiration of the term of this Agreement, all of said Joint Facility Agreements shall be deemed automatically re-assigned to Lessor, and Lessor shall thereafter assume and bear all rights, liabilities, and obligations arising or accruing thereunder after termination or expiration of the term of this Agreement. Lessee shall indemnify, defend, and hold harmless Lessor for all obligations and liabilities under any Joint Facility Agreements to the extent such obligations and liabilities arise or accrue during possession or operation of the Leased Premises by Lessee.
- (b) Within forty-five (45) days following the Commencement Date, Lessor shall conduct a search of its business records in locations where any Joint Facility Agreements may reasonably be found and shall provide Lessee written notice of availability of, and upon request of Lessee, copies of Joint Facility Agreements which have not otherwise been

provided to Lessee prior to Closing. Lessee acknowledges and agrees that Lessor does not undertake to identify, nor does Lessor represent or warrant that it shall have accurately or completely identified all Joint Facility Agreements that may govern or affect the Leased Premises.

- (c) From and after the Commencement Date, proposals for prospective Joint Facility Agreements concerning the Leased Premises shall be subject to mutual negotiation between Lessor and Lessee. After the Commencement Date, in no event may Lessee or Lessor enter into any new Joint Facility Agreements absent mutual written agreement of Lessor and Lessee to enter and execute same. In the event Lessee enters into any authorized Joint Facility Agreement, such agreement shall provide for automatic termination thereof upon termination or expiration of this Agreement unless Lessor shall have provided written election to assume and bear all rights and obligations under such agreement upon the expiration or termination of the term of this Agreement.

Section 25.4 Required Consents and Survival of Indemnities.

- (a) To the extent any consents to assignment may be required by applicable law for assignment and sublease of all or part of any Joint Facility Agreements or Lessee's Property-Related Agreements pursuant to this Agreement, upon written request of Lessee, Lessor shall with reasonable diligence attempt to procure from the other party or parties thereto such consents. In no event shall Lessor be required to assume any obligations or retain liabilities under the agreements to be assigned and sublet as a condition of obtaining consent to assignment.
- (b) Unless expressly provided otherwise, all obligations of indemnity under this Agreement shall survive expiration or termination of this Agreement, as to those liabilities accrued prior to the expiration or termination.

ARTICLE XXVI
LABOR MATTERS

Section 26.1 Lessor's Employees. During the first ninety (90) days of the term of this Agreement, Lessee shall consider for employment those of Lessor's employees who work on the line and who want to work for Lessee on the terms and conditions of employment that are offered by Lessee, at Lessee's sole discretion. Any such individual who Lessee, in its sole discretion, determines to be qualified for a job that Lessee has available, shall be offered such job by Lessee on the terms and conditions that Lessee establishes, in Lessee's sole discretion. Lessee promptly shall notify Lessor of the name of each of Lessor's current employees who Lessee offers to hire and also the name of each of these employees who Lessee actually hires. Lessee shall assume a neutral stance in any Brotherhood of Maintenance of Way Employees (or successor organization) organizing efforts.

Section 26.2 Labor Protection and Claims. Lessee shall assume and bear (and indemnify, defend and hold harmless Lessor against) all costs, liability, Losses or expenses resulting from any claims made by any employees of Lessee at any time for work related to the performance of any rail operations on the Leased Premises or any labor protection arising or resulting from the parties' implementation of or the termination or expiration of the terms of this Agreement (including, without limitation, any labor protection claims of Lessee's employees imposed by any Governmental Body as a result of Lessee's operation on the Leased Premises or cessation of operations over the Leased Premises). Lessor shall assume and bear (and indemnify, defend and hold harmless Lessee against) all costs, liability, Losses or expenses resulting from any claims made by any employees of Lessor for work related to the performance

of any rail operations on the Leased Premises prior to Commencement Date or any labor protection claims of Lessor's employees arising or resulting from the parties' implementation of the terms of this Agreement. Liability and indemnity for labor claims and labor protection under this section is intended to cover liability for claims related to right to work, work rules and/or compensation rights covered under a collective bargaining agreement or any other rights covered under the Railway Labor Act (as it may be amended from time to time) and federal laws, regulations, and orders of any Governmental Body with jurisdiction over such matters. In no event shall liability and indemnity under this section apply to claims for personal injury or death of persons (including without limitation, FELA claims) or property damage, whether or not such claims are work related.

ARTICLE XXVII
TRACKAGE RIGHTS

Section 27.1

IN WITNESS WHEREOF, authorized representatives of the parties have executed this Agreement as of the date first above written.

BNSF RAILWAY COMPANY

By: _____

Print: _____

Title: _____

**KEOKUK JUNCTION RAILWAY
d/b/a PEORIA & WESTERN RAILWAY**

By: _____

Print: _____

Title: _____

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 34974

Public Version - Lease Exhibits have been redacted

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 34974

**KEOKUK JUNCTION RAILWAY CO. D/B/A PEORIA AND WESTERN
RAILWAY
— LEASE AND OPERATION EXEMPTION —
BNSF RAILWAY COMPANY**

PUBLIC VERSION

EXHIBIT G - HAS BEEN REDACTED