

BEFORE THE  
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35065

NORFOLK SOUTHERN RAILWAY COMPANY —  
TRACKAGE RIGHTS EXEMPTION —  
MICHIGAN CENTRAL RAILWAY, LLC

VERIFIED NOTICE OF EXEMPTION  
PURSUANT TO 49 C.F.R. §1180.2(d)(7)

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John V. Edwards  
Norfolk Southern Corporation  
Three Commercial Place  
Norfolk, VA 23510  
(757) 629-2838

G. Paul Moates  
Jeffrey S. Berlin  
Donald H. Smith  
Sidley Austin LLP  
1501 K Street, N.W.  
Washington, D.C. 20005  
(202) 736-8000

Attorneys for  
Norfolk Southern Railway Company

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**NORFOLK SOUTHERN RAILWAY COMPANY —  
TRACKAGE RIGHTS EXEMPTION —  
MICHIGAN CENTRAL RAILWAY, LLC**

**VERIFIED NOTICE OF EXEMPTION  
PURSUANT TO 49 C.F.R. §1180.2(d)(7)**

Norfolk Southern Railway Company (“NSR”) respectfully submits this notice of exemption, pursuant to 49 C.F.R. §1180.2(d)(7), in connection with NSR’s acquisition of trackage rights over portions of certain rail lines to be acquired by Michigan Central Railway, LLC (“Michigan Central”) in Michigan and Indiana.

In a separate proceeding, Michigan Central is seeking an individual exemption for its proposed acquisition of these rail lines in STB Finance Docket No. 35063, *Michigan Central Railway, LLC – Acquisition and Operation Exemption – Norfolk Southern Railway Company* (filed July 13, 2007). Watco Companies, Inc. (“Watco Companies”) and Watco Transportation Services, Inc. (“Watco Transportation,” and collectively with Watco Companies, “Watco”), are filing a verified notice of exemption in STB Finance Docket No. 35064, *Watco Companies, Inc. and Watco Transportation Services, Inc. — Continuance in Control Exemption — Michigan Central Railway, LLC* (filed July 13, 2007) in connection with their continuance in control of Michigan Central after it becomes a rail carrier. The parties intend to consummate each of these transactions after the Board has issued a final decision granting the requested individual exemption in Finance Docket No. 35063.

In this proceeding, the trackage rights to be acquired by NSR are based upon a written agreement and are not filed or sought in a responsive application to a rail consolidation proceeding. Accordingly, these trackage rights are exempt from the prior approval requirements of 49 U.S.C. § 11323 pursuant to 49 C.F.R. § 1180.2(d)(7).

In support of this Verified Notice of Exemption and in compliance with 49 C.F.R. §§ 1180.4(g) and 1180.6, NSR states as follows:

**49 C.F.R. §1180.6(a)(1)(i)–Description of Transaction and Parties Thereto:**

a. Description of Parties and Transaction.

NSR, a Virginia corporation, is a Class I rail carrier, and a wholly-owned subsidiary of Norfolk Southern Corporation, a noncarrier holding company. *See Norfolk Southern Corp.-Control-Norfolk & Western Ry. Co.*, 366 I.C.C. 173 (1982). NSR (with its subsidiaries) operates a rail system extending approximately 21,300 miles throughout 22 states in the eastern United States, the District of Columbia, and Ontario, Canada.

Michigan Central Railway, LLC, is a Delaware limited liability company formed for the purpose of acquiring and operating approximately 299 miles of NSR rail lines, and 85 miles of trackage rights, in Michigan and Indiana. Michigan Central is controlled by Watco Companies and Watco Transportation. Michigan Central is currently a noncarrier, but will become a rail carrier subject to the Board's jurisdiction upon acquiring these rail lines from NSR.

The trackage rights that are the subject of this Notice will be granted by Michigan Central to NSR. Under the Joint Use Agreement (attached hereto as Exhibit 2), NSR will retain the right to serve, under certain specified conditions, (i) the General Motors facilities at Grand Rapids and Lansing, MI, as well as any subsequent occupant(s) of these facilities (the "GM

Properties”); and (ii) the RSDC of Michigan LLC automotive steel processing facility at Holt, MI, as well as any subsequent occupant(s) of such facility (the “Holt Property”).<sup>1</sup>

The trackage rights, if exercised, will permit NSR to operate its own trains, locomotives, cars and equipment with its own crews, between points of connection between NSR and Michigan Central, on the one hand, and the GM Properties or the Holt Property, on the other hand, generally as depicted on the map attached as Exhibit 1, and more specifically stated as follows:

- Between Milepost KH 1.4 at Elkhart, IN and Milepost KH 27.4 at Three Rivers, MI;
- Between Milepost FB 27.3 at Three Rivers and Milepost FB 101.5 at Grand Rapids, MI;
- Between Milepost KY 0.0 at Gibson, MI and Milepost KY 0.3 at CP BO in Kalamazoo, MI;
- Between Milepost MH 143.03 at CP BO in Kalamazoo, MI and Milepost MH28 at CP Ypsi; and
- Between Milepost LZ 0.0 at Jackson, MI and Milepost LZ 35.0 at Holt, MI.

While the parties intend for these trackage rights to be immediately effective, these trackage rights shall be exercisable only upon the occurrence of Service Standard Failures, as described in detail in the Joint Use Agreement.

b. Names, Addresses, and Phone Numbers of Involved Parties.

Norfolk Southern Railway Company  
Three Commercial Place  
Norfolk, VA 23510-9227  
(757) 629-2600

Michigan Central Railway, LLC  
315 W. 3rd Street  
Pittsburg, Kansas 66762  
(202) 638-3307

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<sup>1</sup> RSDC is the largest automotive steel distribution facility in North America, able to handle more than one million tons of steel per year. RSDC relies on fast, efficient rail service, making just-in-time shipments to automotive stamping plants that must arrive within four to eight hours.

c. Names of Counsel to Whom Questions Can Be Addressed.

Correspondence with respect to this Verified Notice of Exemption should be addressed to:

John V. Edwards  
Norfolk Southern Corporation  
Three Commercial Place  
Norfolk, VA 23510  
(757) 629-2657

G. Paul Moates  
Sidley Austin LLP  
1501 K Street, N.W.  
Washington, D.C. 20005  
(202) 736-8000

**49 C.F.R. §1180.6(a)(1)(ii) --Consummation Schedule.**

The proposed transactions will be consummated after a final decision granting the requested individual exemption in Finance Docket No. 35063 has been issued.

**49 C.F.R. §1180.6(a)(1)(iii) -- Purpose of the Transaction.**

Michigan Central's grant of trackage rights to NSR will serve several purposes. In particular, the structure of the transaction will permit Michigan Central to serve the GM Properties and the Holt Property directly, and will also permit NSR to exercise its right to serve these facilities via trackage rights, with its own locomotives, cars and crews, only if Michigan Central fails to meet the specified service standards under the conditions and over the timeframes set forth in the Joint Use Agreement. This structure will provide appropriate incentives to Michigan Central to meet or exceed the service standards, while protecting the interests of the involved shippers, and ensuring that NSR will be able to respond if Michigan Central fails over a period of time to provide acceptable service for this high-volume, time-sensitive automotive traffic.

**49 C.F.R. §1180.6(a)(5) -- List of States in Which the Parties' Property is Located.**

NSR operates in the States of Alabama, Delaware, Florida, Georgia, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Michigan, Mississippi, Missouri, New Jersey, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, Virginia, and West Virginia, and in the District of Columbia and the Province of Ontario, Canada.

The trackage rights to be acquired by NSR are located in Michigan and Indiana.

**49 C.F.R. §1180.6(a)(6) -- Map Exhibit.**

A map showing the location of the trackage rights at issue, their relationship to other rail lines in the area, and the principal geographic points in the area traversed is attached as Exhibit 1.

**49 C.F.R. §1180.6(a)(7)(ii) -- Agreement Exhibit.**

Attached as Exhibit 2 is a copy of the Joint Use Agreement to be entered into by NSR and Michigan Central.

Certain confidential business terms have been redacted from the copies of the agreement submitted with the public version of this Notice. The parties are also filing a Motion for Protective Order requesting that the Board adopt certain well-established procedures and processes governing the submission and exchange of confidential documents and information in this proceeding. The parties are also submitting, under seal, and subject to the Protective Order, an unredacted highly confidential version of the Joint Use Agreement.

**49 C.F.R. §1180.4 (g)(1)(i) -- Level of Labor Protection.**

49 U.S.C. §11326 requires the imposition of employee protective conditions for transactions approved or exempted pursuant to 49 U.S.C. § 11323. The acquisition of trackage rights exemption would be subject to the employee protective conditions specified in *Norfolk and*

*Western Ry. Co.—Trackage Rights—Burlington Northern, Inc.*, 354 I.C.C. 605 (1978), as modified by *Mendocino Coast Ry., Inc.—Lease and Operate—California Western Railroad*, 360 I.C.C. 653 (1980).

**49 C.F.R. §1180.4 (g)(2)(i) -- Caption Summary**

A caption summary suitable for publication in the Federal Register is attached hereto as Exhibit 3.

**49 C.F.R. §1105.6 through 1105.8--Environmental Report.**

Pursuant to 49 C.F.R. § 1105.6(c)(4), no environmental documentation is required in connection with the trackage rights transaction that is the subject of this Notice. Similarly, in accordance with 49 C.F.R. § 1105.8(b)(3), no historic report is required in connection with the trackage rights at issue in this proceeding.

Respectfully submitted,

John V. Edwards  
Norfolk Southern Corporation  
Three Commercial Place  
Norfolk, VA 23510  
(757) 629-2657

  
\_\_\_\_\_  
G. Paul Moates  
Jeffrey S. Berlin  
Donald H. Smith  
Sidley Austin LLP  
1501 K Street, N.W.  
Washington, D.C. 20005  
(202) 736-8000

Attorneys for  
Norfolk Southern Railway Company

Dated: July 13, 2007

VERIFICATION

STATE OF VIRGINIA

)

) ss.

CITY OF NORFOLK

)

I, Daniel M. Mazur, being duly sworn, depose and state that I am

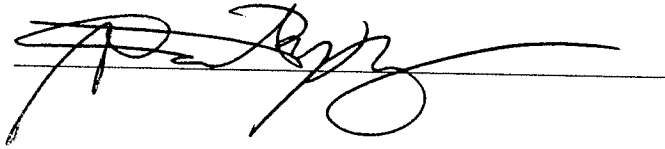
Vice President

of Norfolk Southern Railway

Company, that I am authorized to make this declaration, and that I have read the foregoing

"Verified Notice of Exemption Pursuant to 49 C.F.R. §1180.2(d)(7)" and know that the facts

therein are true as stated to the best of my knowledge, information and belief.



Subscribed and sworn to before me, a Notary Public, this 10<sup>th</sup> day of July, 2007.

Shelia R. Voorheis

Notary Public

My Commission Expires:

My Commission Expires October 31, 2010

In the City of Norfolk, Virginia  
my registration number is  
7038212.

## **CERTIFICATE OF SERVICE**

I hereby certify this 13<sup>th</sup> day of July, 2007, that I have caused the foregoing Verified Notice Of Exemption Pursuant To 49 C.F.R. §1180.2(d)(7) to be served by first class mail, postage pre-paid, on the Governor and the Department of Transportation of the States of Indiana and Michigan, on the national offices of the labor unions with employees on the affected lines, and on the following parties:

National Railroad Passenger Corp., 60 Massachusetts Ave., NE, Washington, DC 20002

Marquette Rail LLC, 5500 First Street, Ludlington, MI 49431

Michigan Southern Railroad Co., 1318 South Johnson Road, Peoria, IL 61607

Grand Rapids Eastern Railroad Inc., 101 Enterprise Drive, Vassar, MI 48768

Mid-Michigan Railroad, 432 E. Grove Street, Greenville, MI 48838 USA

In addition, notice of this filing and instructions on how to obtain copies thereof have been or will be served by fax, email, or first class mail, postage prepaid, on all shippers located on the rail lines involved, within one week of the date hereof.

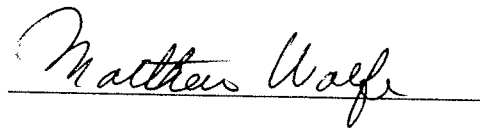
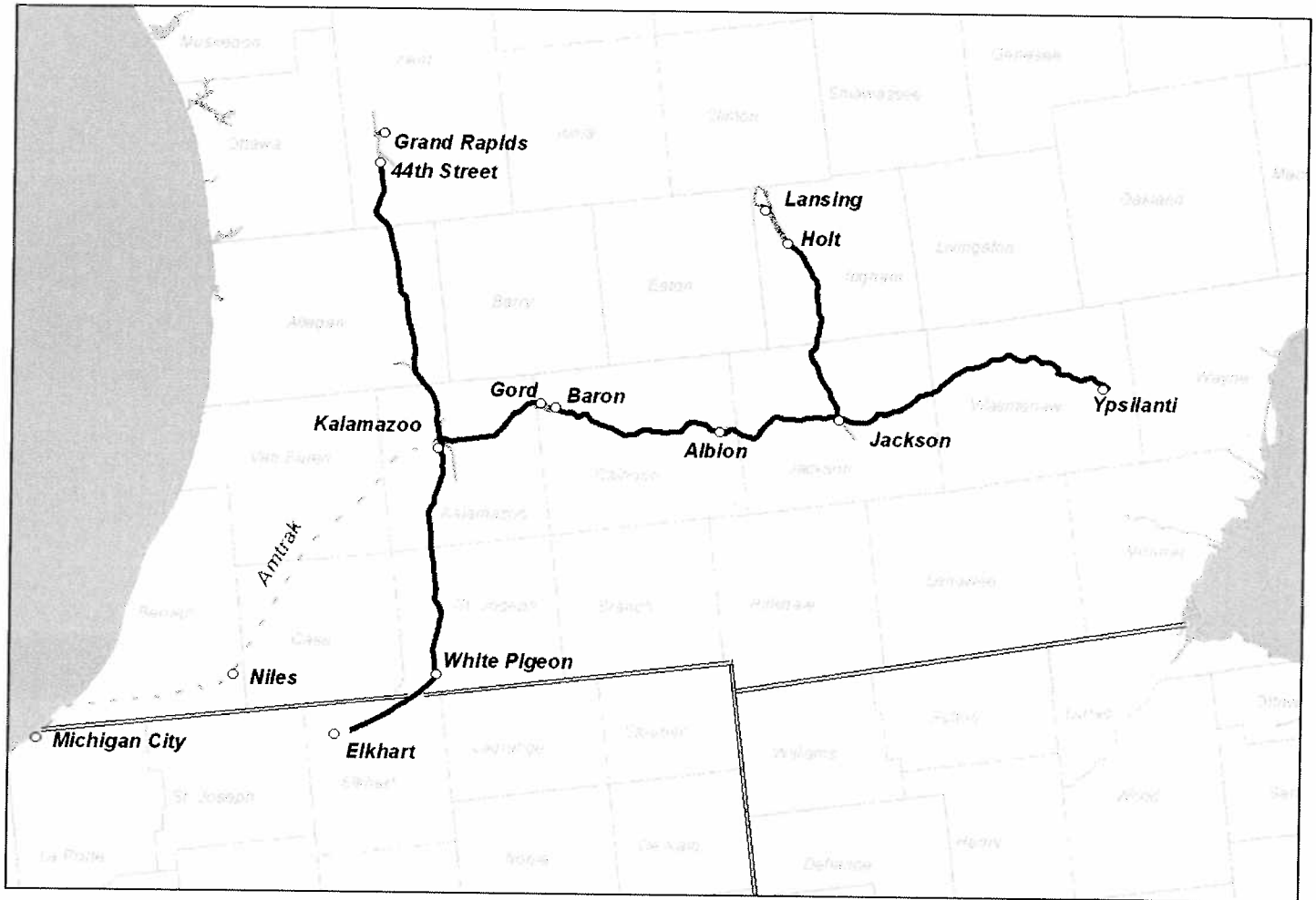
  
\_\_\_\_\_

Exhibit 1



**CONFIDENTIAL**

**JOINT USE AGREEMENT**

**THIS AGREEMENT** (the "Agreement") is entered into as of this \_\_\_\_ day of \_\_\_\_\_, 2007, by and between Michigan Central Railway, LLC ("Landlord"), a Delaware limited liability company, and Norfolk Southern Railway Company, a Virginia corporation ("NSR"). Landlord and NSR are referred to individually herein as a "Party" and collectively as the "Parties".

**RECITALS:**

**WHEREAS**, on [ ], 2007, NSR, Watco Transportation Services, Inc. ("Watco"), and Landlord have entered into a transaction agreement (the "Transaction Agreement") that, among other things, provides generally for the transfer, subject to the retention of certain rights, from NSR to Landlord of the Subject Trackage, as defined in the Transaction Agreement; and

**WHEREAS**, NSR currently uses the Subject Trackage to interchange directly with three short line companies with which it has a handling line relationship, specifically the Michigan Southern Railroad Company ("MSO"), the Grand Rapids Eastern Railroad ("GRE"), and the Mid-Michigan Railroad ("MMR", and, together with MSO and GRE, the "Three Handling Lines"); and

**WHEREAS**, NSR currently uses the Subject Trackage to reach an intermediate switch location for a CSX Transportation, Inc. ("CSXT") intermediate switch of traffic between NSR and Marquette Rail LLC ("Marquette"); and

**WHEREAS**, NSR currently performs haulage services for the movement between White Pigeon, MI and Fort Wayne, IN of traffic ("MSO Haulage Traffic") in the revenue account of MSO between MSO and CSX Transportation, Inc. ("CSXT") pursuant to an agreement between NSR and MSO, dated as of June 1, 1999, and having a term of ninety-nine (99) years for the transport of traffic in MSO's revenue waybill account to be interchanged with CSX Transportation, Inc. (the "MSO Haulage Agreement"); and

**WHEREAS**, Landlord desires to provide, and NSR desires to receive, haulage services ("Haulage Services") for the movement of MSO Haulage Traffic and other traffic in NSR's revenue waybill account bridged between NSR and one of the Three Handling Lines, or between NSR and Marquette; and

**WHEREAS**, pursuant to the Transaction Agreement, NSR retains the right to serve, pursuant to trackage rights, General Motors at Grand Rapids and Lansing, MI, (as well as any subsequent occupant(s) of the General Motors property at Grand Rapids and Lansing, MI, the "GM Property") and Holt RSDC at Holt, MI (as well as any subsequent occupant(s) of such property, the "Holt Property"), but although the Parties intend for the trackage rights to be immediately effective, the Parties desire the trackage rights to be exercisable with respect to the

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GM Property or the Holt Property only upon the occurrence of a Service Standard Failure, as hereinafter described; and

**WHEREAS**, the Parties desire to set forth the terms and conditions upon which Landlord shall provide such Haulage Services, and upon which Landlord shall grant such Trackage Rights, to NSR; and

**NOW, THEREFORE**, the Parties hereto, intending to be legally bound, agree as follows:

### SECTION 1. DEFINITIONS AND INTERPRETATION

(a) Interpretation Generally.

(i) Unless otherwise defined herein, all words, terms and phrases used in this Agreement shall be construed in accordance with the generally applicable definition or meaning of such words, terms and phrases in the railroad industry.

(ii) Each definition in this Agreement includes the singular and the plural, and references in this Agreement to the neuter gender include the masculine and feminine where appropriate. References herein to any agreement or contract mean such agreement or contract as amended. As used in this Agreement, the word "including" means "without limitation", and the words "herein", "hereof" and "hereunder" refer to this Agreement as a whole. All dollar amounts stated herein are in United States currency.

(iii) The Party from which traffic will be received shall be referred to as the "delivering carrier" and the Party to which traffic is delivered shall be referred to as the "receiving carrier." A "train" consists of at least one locomotive connected to at least one Interchange Car.

(b) Capitalized Terms.

In addition to terms and words defined in this Agreement, the following capitalized terms shall have the defined meaning set forth below:

**"AAR"** shall mean the Association of American Railroads, or any successor organization.

**"Cars"** means each loaded or empty railroad freight car (including platform and well rail cars) or similar equipment, each of which will be referred to as a **"Car."**

**"Equipment"** shall mean and be confined to hi-rail vehicles, track inspection equipment and other non-revenue vehicles and machinery (other than locomotives) capable of being operated on railroad tracks that, at the time of an occurrence, are (i) being operated on the trackage upon which such occurrence takes place, or (ii) are on the trackage upon which such

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occurrence takes place, or on the adjoining right-of-way, for the purpose of maintenance or repair thereof or the clearing of wrecks thereon.

**“Foreign Railroad”** shall mean a railroad that is not a party to this Agreement.

**“Governmental Entity”** shall mean any federal, state, local or foreign court, administrative agency or commission or other governmental or regulatory authority or commission or any arbitration tribunal.

**“Landlord’s Cars,”** except when used in Section 8 hereof, shall mean Cars and Equipment in the revenue and/or car hire account of Landlord or a Foreign Railroad.

**“Landlord’s Equipment,”** except when used in Section 8 hereof, mean Equipment operated by or in the account of Landlord or a Foreign Railroad.

**“NSR Cars”** shall mean Cars and Equipment in the revenue and/or car hire account, inclusive of NSR.

**“NSR Haulage Cars”** shall mean NSR Cars being transported pursuant to NSR Haulage Rights.

**“NSR Transportation Agreement”** shall mean a Transportation Agreement involving NSR.

**“Rule 11 Rate”** shall mean any rate whereby NSR separately bills and collects from the customer for its portion of the transportation.

**“STB”** shall mean the Surface Transportation Board or any successor entity thereto.

**“Third Party Traffic”** shall mean freight rail service provided for a Foreign Railroad.

**“Track Geometry Vehicle”** shall mean Equipment or non-revenue Car that inspects track gage, surface, alignment or other physical attributes of track or clearances, generally in order to locate problematic conditions that are difficult to detect using conventional methods such as visual inspection.

**“Transportation Rate”** shall mean a transportation rate in whatever form, including without limitation a joint line rate, a proportionate rate, a Rule 11 Rate or a haulage rate, inclusive of any rebates or refunds to any person or party.

**“Transportation Agreement”** shall mean an agreement, whether a signatory agreement, rate quote or other form of agreement, providing for a Transportation Rate for the movement of loaded or empty rail cars between locations.

(c) Successor Laws.

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A reference to any particular statute or regulation shall include a reference to any successor statute or regulation.

(d) Railroad Industry.

All words, terms and phrases used in this Agreement, and not otherwise defined, shall be construed in accordance with the generally applicable definition or meaning of such words, terms and phrases in the railroad industry.

## **SECTION 2. TRACKAGE RIGHTS**

(a) Grant of Trackage Rights.

On the terms and subject to the conditions herein provided, Landlord hereby grants to NSR the right to operate its trains, locomotives, cars and Equipment with its own crews (such rights being referred to hereinafter as the "Trackage Rights") over the following Landlord's railroad lines (the "Subject Trackage"), generally as depicted on Appendix A - Map to this Agreement, and more specifically stated as follows:

- Between Milepost KH 1.4 at Elkhart, IN and Milepost KH 27.4 at Three Rivers, MI;
- Between Milepost FB 27.3 at Three Rivers and Milepost FB 101.5 at Grand Rapids, MI;
- Between Milepost KY 0.0 at Gibson, MI and Milepost KY 0.3 at CP BO in Kalamazoo, MI;
- Between Milepost MH 143.03 at CP BO in Kalamazoo, MI and Milepost MH28 at CP Ypsi; and
- Between Milepost LZ 0.0 at Jackson, MI and Milepost LZ 35.0 at Holt, MI.

(b) Use of the Subject Trackage.

(i) NSR shall have the right, but not the obligation, to exercise trackage rights in the event of a Major Service Standard Failure, as determined in a manner as set forth in Section 5(d).

(ii) NSR's use of Subject Trackage shall be in common with Landlord, and, other than explicitly set forth herein, Landlord's right to use the Subject Trackage shall not be diminished by this Agreement.

(iii) NSR may operate trains in either direction over the Subject Trackage.

(iv) NSR may use the trackage rights granted herein solely for the purposes of moving empty and loaded cars between a point of connection between NSR and Landlord (in each case, the respective Party's rail lines or rights) near Willow Run, MI and Elkhart Yard, IN, on the one hand, and the GM Property or the Holt Property, on the other hand.

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(v) NSR locomotives and crews operating over the Subject Trackage shall be equipped to communicate with Landlord on radio frequencies normally used by Landlord in directing train movements on the Subject Trackage.

(vi) NSR's operations over the Subject Trackage shall at all times be subject to the direction and control of Landlord's operating officer in charge of the Subject Trackage and to applicable provisions of Landlord's safety and operating rules.

(c) Restrictions on Use.

(i) Except as may otherwise be permitted by this Agreement, NSR shall not use any part of the Subject Trackage for the purpose of switching, storage or servicing cars or Equipment, or the making or breaking up of trains, except as necessary for the handling of locomotives or cars bad ordered en route, provided, that NSR shall use such auxiliary Subject Trackage as may be designated by Landlord for such purposes.

(ii) NSR may not, pursuant to this Agreement, grant haulage rights or trackage or other operating rights of any nature on the Subject Trackage to other parties.

(d) Training of NSR Crews.

NSR shall make such arrangements with Landlord as may be required to have all of its employees who shall operate its trains, locomotives, cars and Equipment over the Subject Trackage qualified for operation thereover. Landlord shall provide reasonable cooperation and assistance in the qualification of NSR operating (train and engine) crews for service over the Subject Trackage upon receipt of the Trackage Rights Notice. NSR shall pay to Landlord, upon receipt of bills therefor, any cost incurred by Landlord in connection with the qualification of such employees of NSR, as well as the cost of pilots furnished by Landlord, until such time as such NSR employees are deemed by the appropriate examining officer of Landlord to be properly qualified for operation as herein contemplated. NSR supervisory personnel who have been qualified to operate over the Subject Trackage by an appropriate examining officer of Landlord may qualify other NSR employees for operation of trains over the Subject Trackage.

(e) Compensation.

NSR shall compensate Landlord for the use of the Subject Trackage pursuant to this Section 2 in accordance with Appendix B – Trackage Rights Compensation.

(f) Mileage and Car Hire.

All mileage and car hire charges accruing on cars in NSR's trackage rights trains on the Subject Trackage shall be assumed by NSR and reported and paid by it directly.

### SECTION 3. HAULAGE SERVICES

(a) Haulage Services Generally.

(i) Landlord shall provide, upon request by NSR, the "Haulage Services," which shall consist of, as applicable, (i) the transportation of rail cars; (ii) movement of bad order NSR Haulage cars and MSO Haulage Cars to or from repair tracks, provided, that NSR will be billed separately for repairs to such Equipment performed by Landlord pursuant to Section 3(b)(vi) of this Agreement; (iii) such mechanical or other inspection of NSR Haulage Cars as may be prescribed by regulation or Landlord's operating practices; (iv) provision of supervision as required; and (v) the physical interchange of traffic with NSR, all for the purposes of the movement of loaded and empty cars between an interchange between NSR and Landlord in Elkhart Yard, on the one hand, and: (1) an interchange between Landlord and one of the Three Handling Lines, and (2) an interchange between Landlord and CSXT as intermediate switcher between Landlord and Marquette, on the other hand.

(ii) Landlord shall provide NSR Haulage Cars and MSO Haulage Cars substantially the same type and levels of service for the protection of freight (such as inspections, other than 1000-mile inspections, load shifting and security) as Landlord does for Landlord's traffic.

(iii) NSR Haulage Cars shall at all times remain in the revenue waybill and car hire accounts of NSR while moving in Haulage Service on Landlord's lines. MSO Haulage Cars shall at all times remain in the revenue waybill and car hire accounts of MSO while moving in Haulage Service on Landlord's lines. Landlord shall not be entitled to any line haul revenue for the handling of NSR Haulage Cars or MSO Haulage Cars, nor shall Landlord participate in the routing of, nor appear in tariffs, waybills or other shipping documents as a participating carrier in connection with, the movement of NSR Haulage Cars or MSO Haulage Cars. As between Landlord and NSR, NSR shall be responsible for all mileage and car hire charges accruing on NSR Haulage Cars and MSO Haulage Cars (although the Parties recognize that, as between NSR and MSO and pursuant to the MSO Haulage Agreement all mileage and car hire charges accruing on MSO Haulage Cars shall be the responsibility of MSO), and NSR shall report and pay, or arrange to have reported and paid, all appropriate allowances and charges directly to the owner(s) of such cars.

(b) Management and Operations.

(i) For Haulage Services between NSR and MSO, Landlord shall deliver to NSR, and NSR shall deliver to Landlord, NSR Haulage Cars and MSO Haulage Cars in Elkhart Yard, IN, and Landlord shall deliver to MSO, and receive from MSO, NSR Haulage Cars and MSO Haulage Cars in White Pigeon, MI, in each case on such track(s) as shall be designated from time to time by local operating personnel or other designated representative in charge of such track(s).

(ii) For Haulage Services between NSR and GRE, Landlord shall deliver to NSR, and NSR shall deliver to Landlord, NSR Haulage Cars in Elkhart Yard, IN, and Landlord shall deliver to GRE, and receive from GRE, NSR Haulage Cars in Grand Rapids, MI, in each case on such track(s) as shall be designated from time to time by local operating personnel or other designated representative in charge of such track(s).

(iii) For Haulage Services between NSR and MMR, Landlord shall deliver to NSR, and NSR shall deliver to Landlord, NSR Haulage Cars in Elkhart Yard, IN, and Landlord shall deliver to MMR, and receive from MMR, NSR Haulage Cars in Grand Rapids, MI, in each case on such track(s) as shall be designated from time to time by local operating personnel or other designated representative in charge of such track(s).

(iv) For Haulage Services between NSR and Marquette, Landlord shall deliver to NSR, and NSR shall deliver to Landlord, NSR Haulage Cars in Elkhart Yard, IN, and Landlord shall deliver to CSXT, and receive from CSXT, in each case as intermediate switcher, NSR Haulage Cars in Grand Rapids, MI, in each case on such track(s) as shall be designated from time to time by local operating personnel or other designated representative in charge of such track(s).

(v) NSR and Landlord shall provide to the other, via EDI transmission (or by such other means as may be mutually agreed by the Parties), information necessary for the further handling and movement of NSR Haulage Cars and MSO Haulage Cars that are delivered by one Party to the other Party. Landlord shall provide this information to each of MSO, GRE and MMR for all NSR Haulage Cars and MSO Haulage Cars that are to be interchanged with the same. NSR shall attempt to cause each of the Three Handling Lines to provide this information to Landlord for NSR Haulage Cars and MSO Haulage Cars that each interchange with Landlord. Such information shall include, for each car:

(A) Car initial and number.

(B) Loaded or empty.

(C) All required hazardous materials information.

(D) Such other information as Parties may agree to be necessary or convenient for the safe and efficient exchange and further movement of such cars.

(v) Landlord shall have exclusive management and control over the movement of trains containing NSR Haulage Cars and MSO Haulage Cars while on Landlord's lines.

(vi) Landlord may arrange for such repairs to NSR Haulage Cars, and adjustments to or transfers of lading from bad ordered, defective or overloaded NSR Haulage Cars, as in Landlord's judgment may be necessary to move such NSR Haulage Cars safely. NSR shall reimburse Landlord for the cost of such work at rates prescribed

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in, and submitted pursuant to, the Field and Office Manuals of the Interchange Rules of the Association of American Railroads.

### **(c) Compensation.**

NSR shall compensate Landlord for the provision of Haulage Services pursuant to this Section 3 in accordance with Appendix C – Haulage Compensation

## **SECTION 4. MAINTENANCE AND INFRASTRUCTURE**

(a) Landlord shall be solely responsible for the maintenance, repair and renewal of the Subject Trackage. Landlord shall keep and maintain the Subject Trackage in reasonably good condition for the use herein contemplated, but Landlord does not guarantee the condition of the Subject Trackage or that operations thereover will not be interrupted. Landlord shall take reasonable steps to ensure that any interruptions will be kept to a minimum and shall use commercially reasonable efforts to avoid such interruptions.

(b) Existing connections or facilities, which are jointly used by the Parties hereto under existing agreements, shall continue to be maintained, repaired and renewed by and at the expense of the party or parties responsible for such maintenance, repair and renewal under such agreements.

(c) Landlord, from time to time and at its sole cost and expense, may make changes in, additions and betterments to, or retirements from, the Subject Trackage as shall, in its judgment, be necessary or desirable for the economical or safe operation of the Subject Trackage or as shall be required by any law, rule, regulation, or ordinance promulgated by any Governmental Entity having jurisdiction, provided that no such retirement shall materially affect operations over the Subject Trackage. Such additions and betterments shall become a part of the Subject Trackage and such retirements shall be excluded from the Subject Trackage.

(d) NSR may request facility changes, additions and betterments to the Subject Trackage. NSR and Landlord in good faith shall determine the proportion of benefit to each of them of facility changes, additions and betterments proposed by NSR and if such determination can be agreed to by NSR and Landlord, each of them shall bear their proportionate cost of such facility changes, additions and betterments. If Landlord, in the exercise of its best business judgment, determines that its proportionate benefit from any such facility change, addition or betterment is less than the amount of the cost thereof which NSR believes should be borne by Landlord, Landlord shall nonetheless make such facility change, addition or betterment at NSR's cost and expense if requested in writing by NSR.

## **SECTION 5. MANAGEMENT OF THE SUBJECT LINE**

### **(a) Management and Operations.**

(i) Landlord shall have exclusive control of the management and operation (including dispatching) of the Subject Trackage. Operation and control, including

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dispatching, of the Subject Trackage shall be conducted in a manner as to afford each of the Parties, and any other present or future user of the Subject Trackage (or any portion thereof) the most economical and efficient movement of its traffic over the line.

(ii) For the purposes of dispatching, NSR's trains and Landlord's trains of the same class, shall be treated with equal priority, with the four (4) classes of trains being:

(A) Premium intermodal such as UPS;

(B) Other intermodal and automotive;

(C) General Merchandise (all freight trains and solid trains not scheduled to set off/pick up en route); and

(D) Other (includes trains and Equipment that must operate at restricted speeds, i.e., local, work, or other such Equipment movements);

provided, that in the event of a conflict, the Landlord dispatcher shall be empowered to employ best practices to efficiently move all trains.

(b) The maximum length of NSR trains (including locomotives and other motive power units) operating pursuant to this Agreement, whether pursuant to Section 2 or Section 3, shall be the maximum length of Landlord's trains permitted over the Subject Trackage.

(c) Loss of Use of the Line.

(i) Other than as specifically set forth in this Agreement, NSR shall not have, pursuant to this Agreement, any claim against Landlord for liability on account of loss or damage of any kind in the event the use of the Subject Trackage by NSR is interrupted or delayed at any time from any cause.

(ii) If the Subject Trackage is unavailable for service due to a derailment, line outage or other interruption of service, then Landlord shall cooperate and consult with NSR in order to address any resulting backlog of trains over a period of time following the resolution of such derailment as may be required to reduce such backlog of NSR traffic or trains.

(d) Service Standards.

(i) There is hereby established a committee (the "Service Standards Committee") which shall consist of the President of Landlord and the Division Superintendent of NSR's Dearborn Division.

(ii) The Service Standards Committee shall develop a Report Card for service performance on the Landlord's lines. The term "Report Card" shall mean a report that:

(A) sets forth train schedules (including departure schedules) for trains moving pursuant to this Agreement and, in the case of service to the GM Property and the Holt Property,

trains moving in interline service to the GM Property and the Holt Property; and (B) defines and sets standards for haulage service performed by Landlord for NSR, and for interline service to the GM Property and the Holt Property, including, at a minimum, crew availability, adherence to and deviation from departure schedules, and adherence to and deviation from transit time metrics, all taking into consideration any and all then-existing NSR Transportation Agreements. The Service Standards Committee shall develop a specific process for: (1) the resolution of disputes on an ongoing basis (which shall include, at a minimum, elevation of the dispute to the Chief Operating Officers); (2) the issuance of notices from NSR to Landlord of actual or purported failures under the Report Card; (3) the joint development of a corrective action plan (with a timetable for the development and implementation of the same); and (4) a specified time period for cures available with regard to actual or purported failures under the Report Card (without admission as to fault or responsibility for such failures).

(iii) The Service Standards Committee will meet on a quarterly basis, or more frequently if required, to modify the Report Card to reflect changes in train schedules (including departure schedules and transit times) in response to added or discontinued Transportation Agreements. The Service Standards Committee will also monitor service performance and address other operational and service issues as they arise. The Service Standards Committee shall discuss and, if possible, resolve all operational and service issues involving the Haulage Services, and to measure Landlord's performance in providing the Haulage Services against the standards defined in the Report Card.

(iv) Landlord's performance against the Report Card standards will be used to determine whether there is a Major Service Standard Failure. If Report Card service standards are not being met, the Committee shall determine if the cause is due to failures that either are: (A) the result of actions or omissions of Landlord or could be addressed by commercially reasonable actions of Landlord ("Landlord Failures"); (B) failures on the part of NSR; or (C) failures on the part of shippers, receivers, or other parties (including but not limited to one of the Three Handling Lines) which failures could not be addressed by commercially reasonable actions of Landlord. The Service Standards Committee shall also determine if the failure is a recurring failure or short term in nature. If the failure is recurring and a Landlord Failure, the Service Standard Committee shall declare that a Major Service Standard Failure exists. If the failure is not recurring, or is recurring and is not a Landlord Failure, the Service Standards Committee shall develop methods, and the Parties shall implement, methods of mitigating the failures and the damage arising therefrom.

(v) If the Service Standards Committee cannot agree on any of the following, that dispute will be resolved through an expedited arbitration process, generally governed by the process defined in Section 15, provided, however, the Parties shall submit to the Arbitrator a joint document reflecting each element upon which there is agreement, and each of the Parties shall submit to the Arbitrator a single proposal containing that Party's proposal as to each element to which there is disagreement, and the Arbitrator shall be obligated to choose between the entire proposal presented by each Party: (1) the Report Card; (2) the fault to which the failure is attributable; or (3) that a Major Service Standard

Failure exists, this dispute shall be resolved through the arbitration process defined in Section 15.

## **SECTION 6. COMPLIANCE WITH APPLICABLE LAWS AND RULES**

(a) Compliance Generally.

Each Party hereto shall comply with all applicable federal, state and local laws, rules, regulations and orders promulgated by any Government Entity that relate to the operations contemplated hereunder. If any fine, penalty, cost or charge is imposed or assessed on or against either Party hereto by reason of the other Party's non-compliance with any such laws, rules, regulations or orders, such non-complying Party shall reimburse and indemnify the other Party for or on account of any such fine, penalty, cost, or charge, and all expenses and attorney's fees incurred in connection therewith, and, to the extent feasible, such non-complying Party shall defend the interests of that other Party in any related legal proceeding free of cost, charge or expense to that other Party.

(b) Federal Locomotive Inspection Act and Federal Safety Appliance Act.

Without affecting the generality of the foregoing Section 6(a), the Parties shall comply with the provisions of the Federal Locomotive Inspection Act and the Federal Safety Appliance Act, as amended, and any other federal and state and local laws, regulations and rules respecting the operation, condition, inspection and safety of its trains, locomotives, cars and Equipment while such trains, locomotives, cars, and Equipment are being operated over the Subject Trackage. Each Party shall indemnify, protect, defend, and save harmless the other Party and their respective Indemnified Persons from and against all fines, penalties and liabilities imposed upon such Party or its respective Indemnified Persons under such laws, rules, and regulations by any public authority or court having jurisdiction, when attributable solely to the failure of indemnifying Party to comply with its obligations in this regard.

(c) Compliance with Landlord's Safety and Operating Rules and Practices.

(i) NSR, in its physical use of the Subject Trackage, shall comply in all respects with the safety rules, operating rules and other regulations of Landlord, and the movement of NSR's trains, locomotives, cars, and Equipment over the Subject Trackage shall at all times be subject to the orders of the transportation officers of Landlord.

(ii) NSR's trains shall not include locomotives, cars or Equipment which exceed the width, height, weight or other restrictions or capacities of the Subject Trackage as published in Railway Line Clearances, and no train shall contain locomotives, cars or Equipment which require speed restrictions or other movement restrictions below the maximum authorized freight speeds as provided by Landlord's operating rules and regulations, without the prior consent of Landlord. Landlord shall make proper accommodation for exceptions, should that be reasonable, necessary and practicable. All NSR trains shall be operated by locomotives with horsepower sufficient to permit operation at posted speeds.

(iii) If any employee of NSR shall neglect, refuse or fail to abide by Landlord's rules, instructions and restrictions governing the operation on or along Landlord's property, such employee shall, upon written request of Landlord, be prohibited by NSR from working on Landlord's property. If any party shall deem it necessary to hold a formal investigation to establish such neglect, refusal or failure on the part of any employee of NSR, then upon such notice presented in writing, NSR shall promptly hold an investigation in which all parties concerned shall participate and bear the expense for its officers, counsel, witnesses and employees. Notice of such investigations to NSR's employees shall be given by NSR's officers, and such investigation shall be conducted in accordance with the terms and conditions of schedule agreements between NSR and its employees. If the result of such investigation warrants, such employee shall, upon written request by Landlord, be withdrawn by NSR from service on Landlord's property, and NSR shall release and indemnify Landlord from and against any and all claims and expenses because of such withdrawal.

## **SECTION 7. INVOICES AND PAYMENT OF BILLS**

(a) Generally.

On or before the 30<sup>th</sup> day of each calendar month during the term of this Agreement, NSR shall prepare and deliver to Landlord a statement setting forth the number of Railcars operated pursuant to Section 2, or NSR Haulage Cars moved by Landlord pursuant to Section 3, during the next to immediately preceding month (the "Monthly Statement"). The Monthly Statement shall be delivered to Landlord's designee in electronic format, and shall contain a detailed list of the cars that moved during the subject month, which list shall include, for each car, the following information: (1) car initial and number, (2) the entry and exit point along the Subject Trackage over which the car moved, and (3) any other information relating to such cars that Landlord may reasonably request in connection with accounting for the use of the services and rights provided hereunder. Landlord shall develop and present to NSR an invoice (the "Use Invoice") calculated upon the Monthly Statement information provided by NSR. NSR shall make reasonable efforts to make payment to Landlord within thirty (30) days, but in any event shall make payment within sixty (60) days, after the date of such Use Invoice.

(b) Disputes.

Any dispute regarding the amount of a Monthly Statement or Use Invoice shall be reconciled between the Parties, and any adjustment resulting from such reconciliation shall be reflected in a subsequent Use Invoice. If NSR disputes any portion of an Use Invoice, it shall nevertheless pay such Use Invoice in full (unless such dispute involves a material amount in relation to the total amount of such Use Invoice), subject to adjustment upon resolution of the dispute; provided, however, that (i) no exception to any charge in a Use Invoice shall be honored, recognized or considered if filed after the expiration of three (3) years from the date of the Use Invoice, and (ii) no invoice shall be rendered more than three (3) years (a) after the last day of the calendar month in which the expense covered thereby is incurred, or (b) in the case of charges disputed as to amount or liability, after the amount owed or liability therefore is

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established. Any claim for the adjustment of a Monthly Statement or Use Invoice shall be deemed to be waived if not made in writing within three (3) years after the date of the relevant Monthly Statement for statement adjustments and the date of the relevant Use Invoice for invoice adjustments.

### (c) Audits.

Landlord and NSR shall each have the right, at its own expense, to audit the records of the other Party pertaining to the use of the Subject Trackage under this Agreement, and any Monthly Statement, Use Invoice or other invoice issued by Landlord or NSR, respectively, pursuant to this Agreement, provided such audit is initiated at any time within three (3) years of the date of the relevant Use Invoice or other invoice (as applicable) relating to this Agreement. All such audits shall be conducted at reasonable intervals, locations and times. All such audits shall be prosecuted with reasonable due diligence. Each Party agrees that all information disclosed to it or its representatives in connection with such an audit will be held in strictest confidence and will not be disclosed to any third party (other than to an arbitrator in connection with an arbitration conducted pursuant this Agreement or as required by applicable law). Any adjustment resulting from an audit conducted pursuant to this Section 7(c) with respect to which the Parties are in concurrence shall be reflected in a subsequent Use Invoice.

### (d) Labor and Material.

Invoices rendered pursuant to the provisions of this Agreement, other than Use Invoices, shall include direct labor and material costs, together with the surcharges, overhead percentages and Equipment rentals as specified by Landlord at the time any work is performed by Landlord for NSR, or shall include actual costs and expenses, upon mutual agreement of the Parties.

## SECTION 8. LIABILITY

As between the Parties hereto, responsibility for any loss or destruction of, or damage to, any property whatsoever, and any injury to or death of any person or persons whomever (including employees of NSR or Landlord), resulting from, arising out of, incidental to or occurring in connection with this Agreement ("Loss or Damage"), shall be allocated as follows, without regard to considerations of fault or negligence (except as otherwise specifically provided for hereinafter):

(a) Whenever Loss or Damage occurs with more than one train being involved, and one or more of the involved trains is a Landlord train containing NSR Haulage Cars and one or more of the involved trains is a train of a Foreign Railroad ("Foreign Railroad Train"), the responsibility of the Parties, as between themselves, for such Loss or Damage shall be determined as follows:

first, Loss or Damage shall be allocated between or among the involved train(s) containing NSR Haulage Cars and the trains not containing NSR Haulage Cars in accordance with the provisions of any applicable agreement between Landlord and the Foreign Railroad; and

then, any Loss or Damage allocated to a Landlord train handling NSR Haulage Cars shall be allocated as between the Parties in accordance with Section 8(b)(i) as if the Landlord train handling NSR Haulage Cars was the only train involved.

(b) Whenever Loss or Damage occurs with one or more trains being involved, and a Foreign Train is not involved, the responsibility of the Parties, as between themselves, for such Loss or Damage shall be determined as follows:

(i) Whenever Loss or Damage occurs with only one train being involved, and that train is handling (A) only NSR Cars or (B) both NSR Cars and Landlord Cars, then NSR shall assume and bear all liability for Loss or Damage to NSR Cars moving in such train, and Landlord shall assume and bear all liability for Landlord Cars moving in such train. In such event, any other Loss or Damage, including without limitation Loss or Damage to employees or locomotives of the Parties (which employees and locomotives are hereby specifically excluded from the allocation provided for in the immediately preceding sentence) and any Loss or Damage to third party rail cars and Equipment, to trackage or to property, and any injury to or death of any other person or persons, so occurring shall be: (A) borne solely by NSR if the involved train is handling only NSR Cars, or (B) borne by each of Landlord and NSR in proportion to the number of Cars in such train that are moving in that Party's revenue waybill or car hire account, if the train is handling both NSR Cars and Landlord Cars.

(ii) Whenever Loss or Damage occurs with more than one train, and one or more of such trains is handling (A) only NSR Traffic or (B) both NSR Cars and Landlord's Cars, then NSR shall assume and bear all liability for Loss or Damage to NSR Cars moving in such Landlord's train(s), and Landlord shall assume all liability for Landlord's Cars moving in such train(s). In such event, any other Loss or Damage, including without limitation Loss or Damage to employees or locomotives of the Parties (which employees and locomotives are hereby specifically excluded from the allocation provided for in the immediately preceding sentence) and any Loss or Damage to third party Cars and Equipment, to trackage or to property, and any injury to or death of any other person or persons, so occurring shall be allocated between the Parties in the following manner:

first, the total amount of such other Loss or Damage shall be allocated equally among the trains involved; and

then (A) all such Loss or Damage allocated to any train(s) which is (are) handling cars only Landlord's Cars shall be borne solely by Landlord, (B) all such Loss or Damage allocated to any train(s) which is (are) handling only NSR Cars shall be borne solely by NSR, and (C) all such Loss or Damage which is allocated to any train(s) handling both NSR Cars and Landlord Cars shall be shared and

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borne by each of NSR and Landlord in proportion to the number of Cars in such train that are moving in that Party's revenue waybill or car hire account.

(c) Notwithstanding anything to the contrary in Section 8(a) and Section 8(b) above, when any damage to or destruction of the environment, including without limitation land, air, water, wildlife, and vegetation, or to third parties from substances in cars or contained in locomotives occurs with one or more trains handling NSR Cars being involved, then, as between themselves, (i) Landlord shall be solely responsible for any damage or destruction to the environment and to third parties which results solely from a substance transported in Landlord's Cars and/or contained in a Landlord locomotive which was released, (ii) NSR shall be solely responsible for any damage or destruction to the environment and to third parties which results solely from a substance transported in NSR Cars and/or contained in a NSR locomotive which was released, and (iii) responsibility for damage or destruction to the environment and to third parties which results from one or more substances which was (or were) being transported in Cars, Equipment or locomotives in the revenue waybill and car hire accounts of both NSR and Landlord which was (or were) released shall be shared by the Parties in proportion to the total number of such Cars, Equipment or locomotives in the revenue waybill and car hire account of each Party from which there was such a release.

(d) Except as otherwise provided in Section 8(a), for the purposes of assigning responsibility for Loss or Damage under this Section 8 (including but not limited to Section 8(c)) as between the Parties hereto, the trains, Cars and Equipment of a Foreign Railroad shall be considered to be the trains, Cars and Equipment of Landlord.

(e) Notwithstanding anything to the contrary in this Section 8, if: (i) Loss or Damage occurs with one or more trains being involved; (ii) one or more of the involved trains is handling (A) only NSR Cars or (B) both NSR Cars and Landlord Cars; (iii) such Loss or Damage is attributable solely to the Gross Negligence or Willful or Wanton Misconduct of only one of the Parties to this Agreement; and (iv) such Gross Negligence or Willful or Wanton Misconduct is the direct or proximate cause of such Loss or Damage, then the Party to which such Gross Negligence or Willful or Wanton Misconduct is attributable shall assume all liability, cost and expense in connection with such Loss or Damage. The Parties agree that, for purposes of this Section 8(e), "Gross Negligence or Willful or Wanton Misconduct" shall be defined as "the intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another; such a gross want of care and regard for the rights of others as to justify the presumption of willfulness and wantonness" and shall include, by definition, acts or omissions of any its employees while under the influence of drugs or alcohol.

(f) If any suit or action shall be brought against any Party for Loss or Damage which under the provisions of this Agreement are in whole or in part the responsibility of the other Party, said responsible Party shall be notified in writing by the Party sued, and the Party so notified shall have the right and be obligated to take part in the defense of such suit and shall pay its share of the judgment and the costs and expense incurred in such suit in accordance with the terms of this Section 8.

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(g) In every case of death or injury suffered by an employee of NSR or Landlord, when compensation to such employee or employee's dependents is required to be paid under any present or future state or federal worker's compensation, occupational disease, employers' liability or other law, and one or more of the Parties under provisions of this Agreement is/are required to pay same or a portion of same in installments over a period of time, said Party or Parties shall not be released from paying any such future installment(s) by reason of the expiration or other termination of this Agreement prior to any of the respective date(s) upon which any such future installments are to be paid.

(h) Whenever any liability, cost or expense is assumed by or allocated to a Party under this Section 8, that Party shall (i) forever protect, defend, indemnify and save harmless the other Party from and against that liability, cost and expense, regardless of whether such liability, cost and expense was caused in whole or in part by the fault, failure, negligence, misconduct, malfeasance or misfeasance of the Party indemnified, or their directors, officers, agents or employees, and (ii) defend such Party against such claims with counsel selected by the responsible Party and reasonably acceptable to the indemnified Party.

(i) Each Party shall investigate, adjust and defend all cargo related claims filed with it in accordance with 49 U.S.C. Section 11706 or 49 C.F.R. Section 1005, or in accordance with any applicable transportation contract entered into pursuant to 49 U.S.C. Section 10709.

(j) All costs and expenses in connection with the investigation, adjustment and defense of any claim or suit (other than cargo-related claims made against a Party by a customer whose traffic was moving in the revenue and/or car hire account of such Party) under this Agreement shall be included as costs and expenses in applying the liability provisions of this Section 8, provided, however, that salaries or wages of full-time agents, full-time attorneys and other full-time employees of any Party engaged directly or indirectly in such work shall be borne by such Party.

(k) No Party shall settle or compromise any claim, demand, suit or cause of action (other than a cargo-related claim filed with it in accordance with 49 U.S.C. Section 11706 or 49 C.F.R. Section 1005, or in accordance with any applicable transportation contract entered into pursuant to 49 U.S.C. Section 10709) for which the other Party has any liability under this Agreement without the concurrence of such other Party if the consideration for such settlement or compromise exceeds Thirty-Five Thousand Dollars (US) (\$35,000). The foregoing amount of Thirty-Five Thousand Dollars (\$35,000) shall be adjusted annually in accordance with the provisions of Section 2(b) and Section 2(c) of Appendix B.

## **SECTION 9. RERAILING, WRECKING, BAD ORDERS AND REPAIRS**

(a) Whenever one or more cars and/or locomotives in the account of NSR requires rerailling, wrecking service or wrecking train service, Landlord shall arrange for the provision of such service, including the repair and restoration of roadbed, the Subject Trackage and structures. Landlord shall promptly inform NSR of its intent to proceed with wrecking service or wrecking train service, and shall permit a NSR representative to be present on the scene, to work in concert with Landlord employees to manage such wrecking service or wrecking train service.

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The reasonable cost, liability and expense of the foregoing, including without limitation loss of, damage to, or destruction of any property whatsoever and injury to and death of any person or persons whomsoever or any damage to or destruction of the environment whatsoever, including without limitation land, air, water, wildlife, and vegetation, resulting therefrom shall be apportioned in accordance with the provisions of Section 8 hereof. All locomotives, cars, Equipment and salvage from the same so picked up and removed which is owned by or under the management and control of or used by NSR at the time of such wreck, shall be promptly delivered to it.

(b) If any cars or locomotives of NSR are bad ordered en route on the Subject Trackage and it is necessary that they be set out, those cars or locomotives may, after being repaired, be transported by Landlord to be picked up by NSR. Landlord may, upon request of NSR and at the expense of NSR, unless otherwise provided for in the Field and Office Manuals of the Interchange Rules of the AAR, furnish required labor and material to perform light repairs required to make such bad ordered Equipment safe and lawful for movement, and billing for this work shall be at rates prescribed in, and submitted pursuant to, the Field and Office Manuals of the Interchange Rules of the AAR.

### **SECTION 10. FORCE MAJEURE**

The obligations, other than payment obligations, of the Parties to this Agreement shall be subject to force majeure (including flood, earthquake, hurricane, tornado, or other such severe weather or climatic condition, riot, accident, wreck, derailment, washout, explosion, Acts of God, act of terrorism and public enemy, war, blockage, insurrection, vandalism or sabotage, fire, strike, lockout or labor dispute, embargoes or AAR service orders, or governmental laws, orders or regulations, and other causes or circumstances beyond the control of the Party invoking such force majeure as an excuse for nonperformance), but only as long as, and to the extent that, such force majeure shall reasonably prevent performance of such obligations by the affected Party. In the event that an event of force majeure impairs either Party's ability to fulfill its obligations to the other Party under this Agreement, said Party shall take all commercially reasonable measures to restore performance of its obligations in a timely manner.

### **SECTION 11. TRACK GEOMETRY VEHICLE**

Notwithstanding anything herein to the contrary, NSR shall have the right, but not the obligation, to operate a Track Geometry Vehicle over the Subject Lines up to two times each calendar year, at times mutually agreed upon by the parties. Landlord shall provide crews and power for the operation of the Track Geometry Vehicle upon request of NSR, the costs of which NSR shall reimburse to Landlord.

### **SECTION 12. TERM AND TERMINATION**

(a) This Agreement shall become effective following the latest date of: (i) the date first written above; (ii) following receipt of any required regulatory approvals or exemptions; and (iii) following the expiration of any time periods required by the issuance of labor notices by

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NSR and/or Landlord, should such labor notices be required ("Effective Date"). The Parties shall determine the Effective Date through an exchange of written correspondence.

(b) This Agreement shall commence on the Effective Date, and shall continue for an initial term ("Initial Term") of twenty-five (25) years from the Effective Date.

(c) This Agreement shall automatically renew for additional terms of ten (10) years (each a "Renewal Term") unless NSR gives Landlord written notice during a window period beginning twelve (12) months before the end of the then-current term and ending six (6) months before the end of the then-current term.

(d) Termination or expiration of this Agreement shall not relieve or release any Party hereto from any obligations assumed or from any liability which may have arisen or been incurred by such Party under the terms of this Agreement prior to termination or expiration hereof, nor shall it terminate any underlying right, or contingent right, of movement pursuant to the trackage rights grant.

### **SECTION 13. SUCCESSORS AND ASSIGNS**

(a) This Agreement shall inure to the benefit of and be binding upon each of the Parties and their respective successors and permitted assigns.

(b) Except as otherwise specifically provided hereinafter, neither Party may assign this Agreement, or any of its rights, interests or obligations hereunder, including by operation of law, without the prior consent in writing of the other Party, which consent may be withheld at the discretion of such other Party.

(c) In the event of a sale of substantially all of the assets or business of NSR, or the merger or consolidation of NSR, NSR may, without the prior consent of Landlord, assign this Agreement to such firm or corporation acquiring substantially all of the assets or business of NSR, or merging or consolidating with NSR; provided, however, that such assignment shall not transfer or extinguish any liability or obligation to or of Landlord under this Agreement that existed prior to such assignment. Furthermore, NSR may assign this Agreement to any NSR Affiliate without the prior consent of Landlord, provided that such assignment shall not transfer or extinguish any liability or obligation to or of Landlord under this Agreement that existed prior to such assignment. The term "NSR Affiliate" shall mean any entity that directly or indirectly controls, is controlled by, or is under common control with NSR.

(d) In the event of a sale of substantially all of the assets or business of Landlord, or the merger or consolidation of Landlord, Landlord may, without the prior consent of NSR, assign this Agreement to such firm or corporation acquiring substantially all of the assets or business of Landlord, or merging or consolidating with Landlord; provided, however, that such assignment shall not transfer or extinguish any liability or obligation to or of NSR under this Agreement that existed prior to such assignment. Furthermore, Landlord may assign this Agreement to any Landlord Affiliate that controls all of the Subject Trackage without the prior consent of NSR, provided that such assignment shall not transfer or extinguish any liability or obligation to

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or of Landlord under this Agreement that existed prior to such assignment. The term "Landlord Affiliate" shall mean any entity that directly or indirectly controls, is controlled by, or is under common control with Landlord. The term "control" as used in the immediately preceding sentence shall mean exercising day-to-day control over the rail operations of the Subject Trackage.

### **SECTION 14. NOTICE**

Any notice required or permitted to be given by one Party to the other Party under this Agreement shall be deemed given on the date sent by certified mail, or by such other means as the Parties may mutually agree, and shall be addressed as follows:

(i) If to Landlord:

President  
Michigan Central Railway, LLC  
315 W. 3rd Street  
Pittsburg, Kansas 66762

with a copy to:

Ed McKechnie  
Chief Commercial Officer  
Watco Transportation Services, Inc.  
315 W. 3rd Street  
Pittsburg, Kansas 66762

with a copy to:

Craig Richey  
General Counsel  
Watco Transportation Services, Inc.  
315 W. 3rd Street  
Pittsburg, Kansas 66762

(ii) If to NSR:

Executive Vice President Operations  
Norfolk Southern Corporation  
Three Commercial Place  
Norfolk, Virginia 23510-2191

with a copy to:

Senior Director – Joint Facilities  
Norfolk Southern Corporation

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1200 Peachtree Street, N.E., Box 158  
Atlanta, Georgia 30309

with a copy to:

Vice President Law  
Norfolk Southern Corporation  
Three Commercial Place  
Norfolk, VA 23510

Either Party may provide notice of changes in the above addressees to the other Party by personal service or certified mail.

### **SECTION 15.            ARBITRATION**

(a) Any dispute, controversy or claim arising out of or otherwise with respect to this Agreement (a "Dispute") shall be referred to their respective senior operating officers for resolution. In the event such officers are unable to resolve the Dispute, either party may submit the Dispute for binding arbitration by a sole, disinterested arbitrator in accordance with the Delaware Uniform Arbitration Act (the "Act") and the Commercial Arbitration Rules of the American Arbitration Association (the "Rules"). In the event of any inconsistency between this Article, the Act and/or the Rules, this Article shall take precedence over the Act and the Rules, and the Act shall take precedence over the Rules. The arbitrator shall be jointly selected by the parties and shall have not less than ten (10) years of experience in railroad operations. The arbitrator shall have the power to require, and shall require, the performance of acts found to be required by this Agreement and the cessation or nonperformance of acts found to be prohibited by this Agreement. The arbitrator shall not have the power to award damages that are inconsistent with this Agreement or special, consequential or punitive damages or to determine violations of criminal or antitrust laws. The arbitrator shall render a written decision on the Dispute that shall include findings of fact and conclusions of law and shall be final and conclusive upon the parties. Judgment upon the award rendered may be entered in any court of competent jurisdiction, which court may order appropriate relief at law or equity. Notwithstanding the foregoing, each party shall have the right to seek vacation or modification of any award that is based, in whole or in part, on an incorrect or erroneous ruling of law by appeal to a court of competent jurisdiction, with any such application for vacation or modification to be filed with such court within thirty (30) days from the date the award is rendered.

(b) Each party to the arbitration shall pay the compensation, costs, fees and expenses of its own witnesses, experts and counsel. The compensation, costs and expenses of the arbitrator, if any, shall be borne by NSR and Landlord, with each paying fifty percent (50%) of such compensation, costs and expenses. Pending the written decision of the arbitrator, there shall be no interruption in the transaction of business under this Agreement, and all obligations in respect thereto shall be fulfilled in the same manner as prior to the arising of the Dispute until the matter in dispute shall have been fully determined by arbitration, and thereupon such remedy shall be made as required by the written decision of the arbitrator. In the event either party fails

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in its obligations under the preceding sentence, the other party is entitled to apply to the arbitrator seeking interim or provisional relief until the arbitration award is rendered or the Dispute is otherwise resolved, and the arbitrator shall have the authority to issue orders granting interim or provisional relief.

(c) No provision of, nor the exercise of any rights under, this Agreement regarding arbitration shall limit the right of either party to seek provisional or ancillary judicial remedies with respect to any Dispute, such as preliminary injunctive relief, sequestration, attachment, garnishment, or the appointment of a receiver from a court having jurisdiction before, during or after the pendency of any arbitration. The institution and maintenance of an action for such judicial remedies shall not constitute a waiver of the right of any party, including the claimant in such action, to submit to arbitration nor render inapplicable the compulsory arbitration provisions hereof.

(d) No provision of, nor the exercise of any rights under, this Agreement regarding arbitration shall limit the right of either party to join the other party in litigation in the event of any litigation or proceeding commenced by any third party against a party to this Agreement in which the other party is an indispensable party or potential third party defendant (e.g., where such other party may be obligated to indemnify the defendant in such third party action).

## **SECTION 16. CONFIDENTIALITY**

Except as provided by law or by rule, order, or regulation of any court or regulatory agency with jurisdiction over the subject matter of this Agreement, or as may be necessary or appropriate for a Party hereto to enforce its rights under this Agreement, during the term of this Agreement (including any extensions thereof), and for a period of three (3) years after termination or expiration of this Agreement, the terms and provisions of this Agreement and all information to which access is provided or which is obtained hereunder will be kept confidential and will not be disclosed by either Party to any person other than members, officers, employees, and attorneys, without the prior written approval of the other Party. Notwithstanding anything to the contrary, either party may disclose this Agreement in connection with an audit by its external auditors, the Internal Revenue Service or other tax authority.

## **SECTION 17. INDEMNITY COVERAGE**

(a) As a part of the consideration hereof, each Party hereby agrees that each and all of its indemnity commitments in this Agreement in favor of the other Party hereto shall extend to and indemnify the parent corporation, subsidiaries and affiliates of such other Party, and all of their respective directors, officers, agents and employees.

(b) Each of Landlord and NSR shall indemnify and hold harmless the other Party against any and all costs and payments, including benefits, allowances, and arbitration, administrative and litigation expenses, arising out of lawsuits, claims or grievances brought by or on behalf of its own employees or their collective bargaining representatives, either pursuant to employee protective conditions imposed by a governmental agency upon the agency's approval or exemption of this Agreement and operations hereunder or pursuant to a collective bargaining agreement. It is the Parties' intention that Landlord and NSR each shall bear the full costs of

protection of its own employees under employee protective conditions that may be imposed, and of grievances filed by its own employees arising under its collective bargaining agreements with its employees.

## **SECTION 18. CLAIMS**

The Parties shall agree between themselves on the most fair, practical and efficient arrangements for handling and administering freight loss and damage claims with the intent that (i) each Party shall be responsible for losses occurring to lading in its possession for the account of such Party and (ii) the Parties shall follow applicable AAR rules and formulas in providing for the allocation of losses which are either of undetermined origin or in cars handled in interline service by or for the account of the Parties.

## **SECTION 19. ABANDONMENT**

(a) Landlord shall have the right, subject to securing any necessary regulatory approval or exemption, to abandon the Subject Trackage or any portion thereof (the "Abandonment Segment") during the term of this Agreement.

(b) Landlord shall provide NSR no less than ninety (90) days prior notice of its intention to seek to abandon any Abandonment Segment.

(c) If Landlord elects to abandon the Subject Trackage (or any portion thereof), this Agreement shall continue to apply in all respects to any remaining portion of the Subject Trackage not abandoned by Landlord. Upon request, NSR shall promptly prepare and, on or after the date that Landlord has filed its own application or petition with respect to said abandonment, file any required application or petition to obtain regulatory authorization or exemption for the discontinuance of NSR's trackage rights over the relevant Abandonment Segment.

(d) Subject to rights of third parties existing as of the date first appearing above, Landlord shall, not less than 90 days prior to any submission to the Surface Transportation Board (or successor agency having jurisdiction over said abandonment) of an application or exemption for authority to abandon an Abandonment Segment(s), offer NSR the first right to purchase such Abandonment Segment(s) for the fair market value of such Abandonment Segment(s) at the time of purchase, and on such other terms and conditions as are customary with respect to line sales by Landlord at the time. NSR shall have sixty (60) days ("Abandonment Notice Period") within which to advise Landlord that it will exercise its right to purchase ("Exercise Notice"). If the Parties are unable to agree upon the fair market value of the Abandonment Segment(s) that NSR wishes to purchase, either Party may refer the issue to arbitration pursuant to Section 15, which arbitration shall determine all other issues relating to terms and conditions for the sale not then (at the time of the initiation of the arbitration) agreed to by the Parties. Such arbitration shall be conducted on an expedited basis, with selection of the arbitrators within forty-five (45) days of the initiation of arbitration, all submissions to be made by the Parties within ninety (90) days of the initiation of arbitration, and a decision to be rendered within thirty (30) days following the final submissions of the Parties.

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(e) The Parties shall consummate the sale contemplated by Section 19(d) within forty-five (45) days of the latest of: (a) the rendering of an arbitration decision, should issues related to the sale proceed to arbitration; (b) the execution of a purchase and sale agreement, should the Parties execute the same; and (c) the grant of authority, or exemption from the need to obtain a grant of authority, from any regulatory body having jurisdiction over the same.

(f) If NSR elects not to purchase the Abandonment Segment, it shall so advise Landlord within the same sixty (60) day Abandonment Notice Period by delivering to Landlord a notice of waiver of right to purchase said segment ("Waiver Notice"). Failure of NSR to provide Landlord with either an Exercise Notice or a Waiver Notice within the aforesaid sixty (60) day period shall constitute a Waiver Notice.

(g) In the event of a Waiver Notice, NSR shall promptly file such application, petition or exemption notice as may then be required to obtain regulatory authority or exemption for the discontinuance of its trackage rights over the Abandonment Segment.

## **SECTION 20. MISCELLANEOUS PROVISIONS**

(a) This Agreement and each and every provision hereof is for the exclusive benefit of the Parties hereto and not for the benefit of any third party. Nothing herein contained shall be taken as creating or increasing any right of any third party to recover by way of damages or otherwise against any of the Parties hereto.

(b) This Agreement contains the entire understanding of the Parties hereto with respect to the subject matter hereof and supersedes any and all oral understandings between the Parties.

(c) No term or provision of this Agreement may be changed, waived, discharged or terminated except by an instrument in writing and signed by all Parties.

(d) The division of this Agreement into articles, sections and subsections and the insertion of headings and references are for convenience of reference only, and shall not affect the construction or interpretation of this Agreement. Unless the context otherwise requires, all references to articles, sections or subsections are to articles, sections or subsections of this Agreement.

(e) As used in this Agreement, whenever reference is made to the trains, locomotives, cars or Equipment of, or in the account of, one of the Parties hereto, such expression means the trains, locomotives, cars and Equipment in the possession of or operated by such Party and includes such trains, locomotives, cars and Equipment which are owned by, leased to, or in the account of such Party.

(f) This Agreement is the result of mutual negotiations between the Parties hereto, neither of whom shall be considered the drafter for purposes of contract construction.

(g) No consent or waiver, expressed or implied, by a Party of any breach or default by the other Party in the performance by such other Party of its obligations hereunder shall be

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deemed or construed to be a consent to or waiver of any other breach or default in the performance hereunder by such other Party. Failure on the part of a Party to complain of any act or failure of the other Party or to declare the other Party in default, irrespective of how long such failure continues, shall not constitute a waiver by such first mentioned Party of its rights hereunder.

(h) If any provision of this Agreement or the application thereof to any Party hereto or to any circumstance shall be determined by a court of competent jurisdiction to be invalid or unenforceable to any extent or for any reason, the remainder of this Agreement or the application of the provisions thereof to such Party or circumstance, other than those determined to be invalid or unenforceable, shall not be affected thereby and shall be enforced to the fullest extent permitted by law, and the Parties shall promptly enter into such other agreement(s) as their respective legal counsel may deem appropriate in order to replace such invalid or unenforceable provisions in a manner that produces a result which is substantially equivalent to the terms of this Agreement in all material respects.

(i) Nothing herein shall be interpreted as creating an association, partnership, joint venture or other joint undertaking between Landlord and NSR.

(j) This Agreement shall be governed and interpreted in accordance with the laws of the State of Delaware, without regard to application of the choice of law principles thereof.

(k) This Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original, but all such separate counterparts shall together constitute but one and the same instrument.

(l) The Parties do not intend that the execution or administration of this Agreement shall be a default or, with the elapse of time, shall become an event of default of any other agreement to which Landlord is a party and which is effective as of the Effective Date ("Other Agreement"). If, subsequent to the execution of this Agreement, the Parties discover that the execution or administration of this Agreement is a default or, with the elapse of time, shall become an event of default of any Other Agreement, then the Parties agree to immediately take such further action and execute such further instruments as may be reasonable and necessary in order to both: (1) effectuate the intent of the Parties to this Agreement; and (2) modify the Agreement in such a manner as to cause the execution or administration of the Agreement no longer to be a default or, with the elapse of time, become an event of default of such Other Agreement.

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IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be duly executed as of the date first above written.

WITNESS:

MICHIGAN LINES LLC

\_\_\_\_\_  
As to LANDLORD

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

WITNESS:

NORFOLK SOUTHERN RAILWAY COMPANY

\_\_\_\_\_  
As to NSR

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

Appendix A – Map to this Agreement

**Appendix B – Trackage Rights Compensation**

**Section 1. Compensation**

(a) The factor to be used in calculating payments to be made by NSR for the Trackage Rights governed by this Agreement shall be [REDACTED] (hereinafter referred to as the “Current Charge”).

(b) NSR will pay Landlord a sum computed by multiplying (i) the Current Charge, as may be revised in Section 2 of this Appendix B by (ii) the number of cars (loaded and empty), locomotive and caboose units moved by NSR with its own crews and power over the Subject Trackage by (iii) the miles of Subject Trackage used. Each locomotive unit and caboose, for the purpose of this Appendix B, shall be counted as one (1) car. With respect to articulated units, the number of cars shall be determined by the AAR Car Type code as defined in the UMLER Specification Manual. The second numeric in the Car Type Code field covering codes “Q” and “S” will be the factor in determining the car count for an articulated unit. For example, AAR Car Type code “S566” would equate to a five (5) car count as these type cars have five (5) wells capable of handling forty-foot (40’) to fifty-foot (50’) containers in each well. Each well shall count as one-half (1/2) of a car. A single unit of RoadRailer® equipment (or comparable bimodal freight hauling equipment in either NSR’s or Landlord’s account) shall count as one-half (1/2) of a car.

**Section 2. Revision of Current Charge**

(a) The Current Charge shall be subject to change to reflect any increases or decreases in labor, material and other costs as hereinafter provided.

(b) The Current Charge shall be revised upward or downward each year, beginning with the bill rendered for the month of July first following the “Effective Date” of this Agreement, to compensate for the increase or decrease in the cost of labor and material, excluding fuel, as reflected in 50% of the change from one year to the next year in the Rail Cost Adjustment Factor (Unadjusted) (“RCAFU”) as approved by the Surface Transportation Board. The Current Charge shall be revised by calculating the percent of increase or decrease in the index for the latest calendar year as related to the index for the previous calendar year and applying that percentage to the Current Charge. In computing the adjusted Current Charge, any fraction of a cent less than one-half shall be dropped, and any fraction equal to or greater than one-half of a cent shall be increased to the next whole cent.

(c) In the event the base for the RCAFU shall be changed from that in effect at the Effective Date of this Agreement, an appropriate revision shall be made. If the STB or any successor organization discontinues publication of the RCAFU, an appropriate substitute for determining the percentage of increase or decrease shall be negotiated by the parties hereto. In the absence of agreement, the parties shall submit the matter to binding arbitration under terms of Section 15 of the Agreement.

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(d) At the option of either Landlord or NSR, the compensation provided for in this Appendix B shall be open for renegotiation every ten (10) years from the Effective Date of the Agreement. In the event the parties fail to reach agreement upon such renegotiation, such failure shall not constitute a breach of this Agreement, and the parties shall continue to be bound by the terms of compensation provided in this Appendix B until the matter is settled or submitted to binding arbitration.

[Appendix C – Haulage Compensation]

## Section 1. Compensation

The Current Charge for each loaded railcar shall be as follows:

NSR will pay Landlord a sum computed by multiplying (i) the Current Charge, as set forth above and as may be revised in Section 2 of Appendix B, including but not limited to, Section 2(d) of Appendix B, by (ii) the number of loaded cars (not counting locomotives or other power units) moved in Haulage Service over the Subject Trackage. With respect to articulated units, the number of cars shall be determined by the AAR Car Type code as defined in the UMLER Specification Manual. The second numeric in the Car Type Code field covering codes "Q" and "S" will be the factor in determining the car count for an articulated unit. For example, AAR Car Type code "S566" would equate to a five (5) car count as these type cars have five (5) wells capable of handling forty-foot (40') to fifty-foot (50') containers in each well. Each well shall count as one-half (1/2) of a car. A single unit of RoadRailer® equipment (or comparable bimodal freight hauling equipment in either NSR's or Landlord's account) shall count as one-half (1/2) of a car.

## Section 2. Revision of the Current Charge

The Current Charge shall be escalated in the same manner as is set forth in Section 2 of Appendix B.

Exhibit 3

SURFACE TRANSPORTATION BOARD

Notice of Exemption

Finance Docket No. 35065

Norfolk Southern Ry. Co. -Trackage Rights Exemption-Michigan Central Railway, LLC

Michigan Central Railway, LLC ("Michigan Central") has agreed to grant limited local trackage rights to Norfolk Southern Railway Company ("NSR") between points of connection between them, and (i) the General Motors facilities at Grand Rapids and Lansing, MI, and (ii) the RSDC of Michigan LLC automotive steel processing facility at Holt, MI, as follows:

- Between Milepost KH 1.4 at Elkhart, IN and Milepost KH 27.4 at Three Rivers, MI;
- Between Milepost FB 27.3 at Three Rivers and Milepost FB 101.5 at Grand Rapids, MI;
- Between Milepost KY 0.0 at Gibson, MI and Milepost KY 0.3 at CP BO in Kalamazoo, MI;
- Between Milepost MH 143.03 at CP BO in Kalamazoo, MI and Milepost MH28 at CP Ypsi; and
- Between Milepost LZ 0.0 at Jackson, MI and Milepost LZ 35.0 at Holt, MI.

The trackage rights will become effective on a date mutually agreed to in writing between NSR and Michigan Central, which shall not occur until the effective date of this Notice (including compliance with any condition(s) imposed by the STB in connection with this Notice). The trackage rights covered by this Notice may be exercised by NSR only in the event of certain occurrences described in the parties' agreement.

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

Dated:

By the Board.

Vernon A. Williams,  
Secretary