

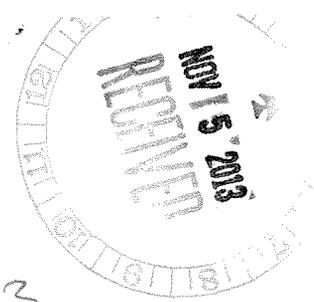
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FD 35712

**TRACKAGE RIGHTS AGREEMENT
BNSF on PCPA in Hayti, MO**



235043

THIS TRACKAGE RIGHTS AGREEMENT, (hereinafter called "Agreement") is entered into this 15th of September, 2013. ("the Execution Date") by and between **BNSF Railway Company**, a Delaware corporation (hereinafter called "BNSF" or "User") and **Pemiscot County Port Authority** (hereinafter called "PCPA" or "Owner").

RECITALS:

WHEREAS, PCPA is the owner and operator of certain railroad lines connecting with the BNSF River Subdivision near MP 212.22 as described in the attached Exhibit A;

WHEREAS, PCPA and BNSF entered into an Industry Track Agreement pursuant to which BNSF has provided, and will continue to provide, contract carrier operations over the PCPA railroad lines;

WHEREAS, PCPA is willing to grant BNSF trackage rights upon PCPA railroad lines subject to the terms and conditions set forth herein.

NOW, THEREFORE, in consideration of the mutual covenants, obligations and agreements set forth herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereby agree as follows:

Section 1. INCORPORATION OF RECITALS, DEFINITIONS

The Parties mutually agree that the recitals of this Agreement are hereby incorporated into and made a part of this Agreement. Any capitalized terms used in the body of this Agreement but not specifically defined herein shall have the meanings given to such terms in the general conditions (hereinafter called "General Conditions") set forth in **Exhibit "B,"** attached to and made a part of this Agreement. Additionally, the parties agree that for the purposes of this Agreement, the following terms shall have the meanings indicated below:

- (a) "Environmental and Safety Requirements" means and includes all Legal Requirements relating to the protection, preservation or conservation of the environment and/or public or worker health or safety including, without limitation, any Legal Requirements covering the handling, storage, treatment and disposal of Hazardous Materials; and
- (b) "Legal Requirements" means and includes all applicable statutes, laws, rules, regulations, ordinances, orders, codes, permits, licenses, and requirements (including consent decrees, judicial decisions and administrative orders) of all federal, state and local governments, departments, commissions, agencies and boards, including, without limitation, laws, statutes, regulations or rules respecting the operation, condition, inspection or safety of trains, locomotives, cars and equipment and all applicable Environmental and Safety Requirements, all as amended or supplemented.

Section 2. TRACKAGE SUBJECT TO AGREEMENT

BNSF's trackage rights under this Agreement will be over the PCPA lines and tracks shown on Exhibit "A," attached to and made a part of this Agreement. The PCPA tracks and lines shown on Exhibit "A" are included in the definition of Joint Trackage set forth in the General Conditions.

Section 3. GENERAL CONDITIONS, CONFLICTS BETWEEN PROVISIONS

The trackage rights granted in this Agreement are subject to the terms and conditions herein and the General Conditions. In the event there is a conflict between the terms in the body of this Agreement and the General Conditions, then the terms contained in the body of this Agreement shall prevail.

Section 4. GRANT OF TRACKAGE RIGHTS

(a) Subject to the terms and conditions contained herein, PCPA grants to BNSF the nonexclusive right to use the Joint Trackage for the limited operation of Equipment. BNSF's use of the Joint Trackage shall be in common with PCPA and any other railroad company or companies or any entities that use or access the Joint Trackage, now or in the future, pursuant to authorization by PCPA.

(b) The parties understand and agree that BNSF shall not have the right to:

- (i) Permit or admit any third party to use all or any portion of the Joint Trackage, nor have the right to detour trains of any other railroad over or upon the Joint Trackage; or
- (ii) Enter into or make a contract or agreement for the handling of BNSF Equipment over or upon the Joint Trackage, or any portion thereof, or the Equipment of any third party which in the normal course of business would not be considered the Equipment of BNSF, including but not limited to BNSF performing haulage services for a third party; provided, however, that the foregoing shall not prevent BNSF, pursuant to a run-through agreement with any other railroad, from using the locomotives of another railroad as its own under this Agreement;

(c) BNSF agrees to perform its operations (hereinafter called "**BNSF's Operations**") and handle its Equipment in a manner that will not unreasonably interfere with or impair the use of the Joint Trackage by PCPA or other parties.

(d) BNSF shall have the right to serve all existing industries now located on the Joint Trackage and any new industries that may locate on the Joint Trackage through direct service or via reciprocal switch through PCPA or their agent.

Section 5. REPRESENTATIONS OF PCPA

This Trackage Rights Agreement is intended to supersede the Industrial Track Agreement previously entered into between PCPA and BNSF.

Section 6. RESERVED

Section 7. COMPENSATION

(a) In addition to other payments to be made under this Agreement, BNSF shall pay PCPA (hereinafter called, "**Per Car Rate**") delivered to an industry located on Joint Trackage. BNSF shall remit to Owner the Per Car Rate compensation on a monthly basis for its access to and use of the Joint Trackage. The Per Car Rate includes Ordinary Maintenance and Programmed Maintenance, operating expenses, interest rental, depreciation and taxes.

(b) The Per Car Rate shall be adjusted July 1, 2014 and each July 1 thereafter, using AAR's Annual Indexes of Chargeout Prices and Wage Rates (1977=100), for the Western District and specifically by the Index of Material Prices, Wage Rates and Supplements Combined (excluding fuel) ("**Index**") for the year 2013, which shall be used as the base year, compared to the calendar year immediately prior to the year in which the change is to be made effective. Thus, the percentage change from the year 2013 to the year 2014 will be used to adjust the charge July 1, 2014.

Additionally, in calculating adjustments, (i) all published values will be rounded to a thousandth of an index point; (ii) all percent change calculations will be rounded to a tenth of a percent; and (iii) the Per Car Rate will be rounded to the nearest whole cent. The Parties agree that the rounding rule used will be that any fraction less than one-half will be dropped, while any fraction equal to or greater than one-half will be rounded up to the next higher value.

In the event the AAR (or any successor organization) ceases to publish the Index, the Parties shall determine a substitute index. The substitute index shall be the index that most closely matches the Index. The substitute index shall be used for the remainder of the term of the Original Agreement. If the Parties cannot agree on a substitute index within ninety (90) days after the cancellation of the Index, either Party may submit the matter to be determined by binding arbitration.

All rates/charges/fees will be adjusted up or down depending on the Index, but under no circumstances shall the Per Car Rate ever decrease below the base rate(s) published herein through application of the adjustment formula provided herein.

Section 8. CAPACITY IMPROVEMENTS AND CHANGES IN AND/OR ADDITIONS TO THE JOINT TRACKAGE

If the event that Legal Requirements require Changes and/or Additions to the Joint Trackage or, PCPA in its sole judgment determines that Capacity Improvements and/or Additions to the Joint Trackage, including, but not limited to, construction of additional main trackage, crossovers, sidings, powered switches, signal facilities, centralized traffic control, grade separations, and future connections are required for the safe and

efficient operation on, over or along the Joint Trackage, then PCPA shall make such Capacity Improvements, Changes and/or Additions at PCPA's expense.

Section 9. APPLICABLE LAW

This Agreement and any claims, disputes or controversies arising hereunder shall be governed by and construed in accordance with the laws of the state of Missouri, without regard to its conflicts of laws provisions.

Section 10. GOVERNMENTAL OR REGULATORY APPROVALS

BNSF shall be responsible for obtaining, at BNSF's sole cost and expense, the consent, approval or authority of applicable governmental agencies or departments, including, but not limited to the STB (hereinafter collectively called "**Government Approvals**"), necessary for BNSF's use and operation on, over or along the Joint Trackage pursuant to this Agreement and Legal Requirements. In the event any applications, petitions or filings by PCPA are required for BNSF to obtain the necessary Government Approvals pursuant to the preceding sentence, then PCPA will cooperate with BNSF and undertake and diligently prosecute any applications, petitions or filings by PCPA at PCPA's expense.

In the event BNSF is unable to obtain the Government Approval necessary for its use and operation on, over or along the Joint Trackage within a reasonable amount of time, then this Agreement shall immediately terminate. PCPA shall have the right, but not the obligation, to review any BNSF applications, petitions, filings or requests for the Government Approvals described in this Section. BNSF shall provide PCPA with advance written copies of any such applications, petitions, filings or requests. The parties further agree that the advance Government Approvals that this Agreement may expire by its terms is a fundamental condition to the effectiveness of this Agreement without which the trackage rights set forth herein shall not be granted to BNSF and in such event, this Agreement shall immediately terminate.

Section 11. TERM AND TERMINATION

(a) This Agreement is conditioned upon and becomes effective upon the effective date contained in the necessary Government Approvals consenting to or authorizing the trackage rights granted hereunder.

(b) Unless terminated earlier pursuant to the terms and conditions set forth herein or the General Conditions, this Agreement shall remain in effect for a period of five (5) years from the Execution Date of this Agreement (hereinafter called "**Term**") and will thereafter continue in full force and effect until terminated by either party with six (6) months written notice.

Section 12. NOTICES

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

If intended for BNSF:

AVP Contracts and Joint Facilities
2600 Lou Menk Drive
P.O. Box 961034
Fort Worth, Texas 76161-0034
Email: JointFacilities@BNSF.com

If intended for PCPA:

John Ferguson II
Vice President/Director of Operations
111 East 3rd Street
Caruthersville, MO 63830
Phone: 573-333-4125

Notice of address change may be given any time pursuant to the provisions of this Section 12.

Section 13. SURVIVAL

Termination of this Agreement shall not relieve, release or excuse either party hereto from any obligations assumed or from any liability which may have arisen or been incurred by either party under the terms of this Agreement prior to the termination hereof.

Section 14. ENTIRE AGREEMENT

This Agreement together with its exhibits or appendices constitutes the final agreement between the parties concerning the subject matter herein. It is the complete and exclusive expression of the parties' agreement on the matters contained in this Agreement. All prior and contemporaneous negotiations and agreements between the parties on matters contained in this Agreement are expressly merged into and superseded by this Agreement. The provisions of this Agreement may not be explained, supplemented, or qualified through evidence of trade usage or prior course of dealings. In entering into this Agreement, neither party has relied upon any statement, representation, warranty, or agreement of the other party except for those expressly contained in this Agreement.

Section 15. SEVERABILITY

If any provision in this Agreement is held invalid, illegal or unenforceable, the remaining provisions of this Agreement remain in full force, if the essential terms and conditions of this Agreement for each party remain valid, binding, and enforceable. If any provision is held invalid, illegal or unenforceable, the parties agree to negotiate a revised or replacement provision.

Section 16. CONFIDENTIALITY

This Agreement is strictly confidential between the parties. No party shall disclose the terms and conditions of this Agreement other than as required by law or as otherwise agreed in writing between the

parties. The party making disclosure will notify the other parties in advance of such disclosure.

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

BNSF RAILWAY COMPANY

By: *M J Igoe*

Printed: M J Igoe

Title: Reg VT Operations

PEMISCOT COUNTY PORT AUTHORITY

By: *Duane S. Michie*

Printed: Duane Michie

Title: Board Chairman

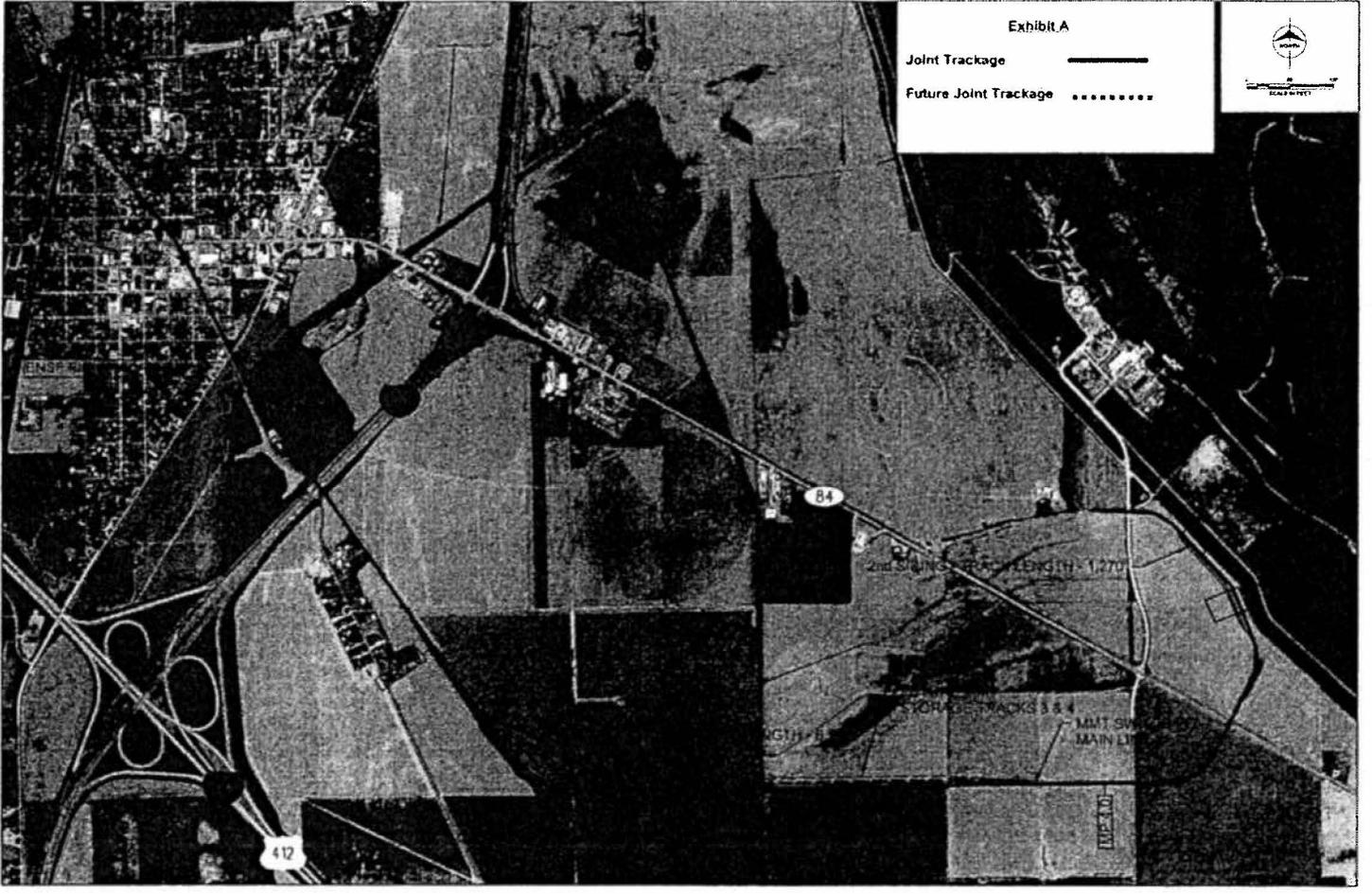


EXHIBIT "B"

GENERAL CONDITIONS TRACKAGE RIGHTS AGREEMENT

Section 1. DEFINITIONS

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

- 1.1 "AAR" shall mean the Association of American Railroads.
- 1.2 "Agreement" shall mean that certain Trackage Rights Agreement between Owner and User effective on the Execution Date, to which this Exhibit "B" is attached.
- 1.3 "Annual" shall mean a calendar year.
- 1.4 "BNSF Service Interruption Desk" shall mean the call desk used for emergency situations to coordinate derailment and hazmat response that may be reached at 817-352-2832 or 817-352-2833.
- 1.5 "Capacity Improvements" shall mean projects or improvements that expressly increase the capacity or through-put over the Joint Trackage or a portion thereof and provide utility beyond ordinary and/or programmed maintenance, the cost of which is chargeable in whole or in part to Property Accounts under STB accounting standards in effect as of the effective date of the Agreement.
- 1.6 "Car" shall mean one (1) rail car except in the case of an articulated rail car where the number of cars shall be determined by the AAR Car Type Code as defined in the Universal Machine Language Equipment Register Specification Manual or such successor manual, if any. The second character in the Car Type Code field covering codes "Q" and "S" will be factors used to determine the car count for an articulated unit. For example, AAR Car Type Code S566 would be equal to five (5) cars as an articulated rail car with a Car Type Code of S566 has five wells capable of handling 40' to 48' containers in each well. Notwithstanding the foregoing, car count data for articulated units are subject to change upon further development of technology for separate units using car numbers. Each locomotive shall be counted as two (2) cars.
- 1.7 "Cars Handled Proportion" shall mean the Cars handled over the Joint Trackage by or for a party divided by the total number of Cars handled by or for all parties using the Joint Trackage, during the same period. For the purpose of computing such Cars Handled Proportion, Equipment engaged in work service pertaining to construction, maintenance or operation of the Joint Trackage, Capacity Improvements or Changes in and/or Additions to the Joint Trackage shall not be counted and Cars of third parties shall be attributed to the Owner.
- 1.8 "Changes in and/or Additions to" shall mean line changes to or realignment of the Joint Trackage or a portion thereof and/or new infrastructure on the Joint Trackage that is not otherwise a replacement for existing infrastructure, the cost of which is chargeable in whole or in part to Property Accounts

(defined below) under STB (defined below) accounting standards in effect as of the effective date of the Agreement.

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

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

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

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

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

1.14 "**Owner**" shall have the meaning given to such term in the Agreement.

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

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

1.17 "**STB**" shall mean the Surface Transportation Board of the United States Department of Transportation or any successor agency.

1.18 "User" shall have the meaning given to such term in the Agreement.

Section 2. MAINTENANCE, ADDITIONS, OPERATION, AND CONTROL

2.1 Owner shall have sole charge of the maintenance and repair of the Joint Trackage with its own supervisors, labor, materials and equipment. Owner, from time to time, may make such Changes in and/or Additions to the Joint Trackage as shall be required by Legal Requirements, or as Owner, in its sole discretion, shall deem necessary, subject to Section 2.2. Such Changes in and/or Additions to the Joint Trackage shall become a part of the Joint Trackage or in the case of retirements shall be excluded from the Joint Trackage. At the request of Owner, User may inspect the Joint Trackage no more than four (4) times per year and provide Owner with a report of User's findings. Any such inspection by BNSF shall not be construed to mean that Joint Trackage is structurally sound or appropriate or that it complies with any applicable Legal Requirements. Owner hereby acknowledges and agrees that any inspections performed by User pursuant to this Section 2.1 are strictly advisory in nature and shall not (i) relieve Owner of its obligations as set forth in this Section 2, or (ii) alter the allocation of liability for the condition of the Joint Trackage as set forth in Section 5 of these General Conditions.

2.2 Unless otherwise mutually agreed to by the parties in writing, Owner shall, (i) keep and maintain the Joint Trackage on a consistent basis at no less than the track standard in effect on the date of the Agreement, including special instructions for the Joint Trackage as of the date of the Agreement, (ii) maintain at least the physical capacity of the Joint Trackage as of the effective date of the Agreement (i.e., number of main tracks, support tracks, signal systems, rail weight, line clearances, etc.). In the event that User desires that the Joint Trackage be improved to a condition in excess of the standard set forth in this Section 2.2, or desires that other Changes in and/or Additions to be made to the Joint Trackage, Owner may, in Owner's sole discretion, make such Changes in and/or Additions to the Joint Trackage if funded in advance solely by User. Thereafter, such Changes in and/or Additions to the Joint Trackage shall become part of the Joint Trackage and shall be maintained by Owner in compliance with the Agreement.

2.3 Owner shall have the exclusive right to perform all construction, operation, maintenance, repair and renewal of the Joint Trackage. Owner shall make reasonable efforts to ensure that User is given the same advance notice of maintenance plans and schedules as is provided to Owner's personnel.

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

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

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

2.7 Unless provided otherwise in the Agreement, each party shall be responsible for furnishing, at its sole cost and expense, all labor, fuel, train supplies and other supplies necessary for the operation of its own Equipment over the Joint Trackage. In the event a party furnishes labor, fuel or train and other supplies to another party, then the receiving party shall promptly, upon receipt of billing therefor, reimburse the furnishing party for its reasonable costs thereof, including customary additives.

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

2.9 If any Equipment of User is bad ordered enroute on the Joint Trackage and (i) it is necessary that it be set out, and (ii) only light repairs to the Equipment are required, then such bad ordered Equipment shall be promptly repaired and removed from the Joint Trackage by User.

2.10 If Equipment of User shall become derailed, wrecked, or otherwise disabled while being operated by User upon the Joint Trackage, it shall be re-railed or cleared by User. Any re-railing of Equipment by User shall be subject to, and User agrees to follow, directions of Owner. In all other circumstances, Owner shall re-rail any derailed, wrecked, or otherwise disabled Equipment. The reasonable costs and expenses of re-railing or clearing derailed, wrecked, or disabled Equipment and any Loss or Damage incidental thereto shall be borne by the parties in accordance with Section 5 of these General Conditions. Work and services performed under this Section shall be billed in accordance with Section 3 of these General Conditions.

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

Section 3. BILLING

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

3.2 Invoices and billings under the Agreement shall be in a mutually agreed upon format. Each invoice shall contain sufficient detail to permit computation of payments due thereunder. Invoices shall be

prepared according to the rules, additives, and equipment rental rates as published by the Owner. User shall pay Owner, at such location designated by Owner from time to time, all compensation and charges that User is required to pay pursuant to the terms and conditions of the Agreement. User shall pay invoices in United States money within thirty (30) days after the invoice date. Invoices shall include a statement of the amount due and services rendered during the applicable billing time period. In the event that either party hereto shall fail to pay any monies due to the other party hereto within thirty (30) days after the invoice date, then such first party shall pay interest on such unpaid sum from thirty (30) days after its invoice date to the date of payment by such first party at an annual rate equal to (i) the greater of (a) for the period January 1 through June 30, the prime rate last published in the *Wall Street Journal* in the preceding June plus two and one-half percent (2 ½%), or (b) twelve percent (12%), or (ii) the maximum rate permitted by law, whichever is less.

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

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

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

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

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

Section 4. COMPLIANCE

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

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

4.3 User shall be responsible for filing any reports required under Legal Requirements for any derailment, accident, incident, vandalism, bad ordered Equipment, wreck (hereinafter collectively called, for purposes of Section 4 and Section 5, "**Derailment**") involving Hazardous Materials on or along any segment of the Joint Trackage caused by Equipment while such Equipment is being operated by User. User shall promptly advise Owner and the owner/shipper of the Hazardous Materials involved in any Derailment.

If a Hazardous Materials release is caused by a Derailment of Equipment while being operated by User, then Owner and User shall each immediately contact the BNSF Service Interruption Desk upon discovery of such release. Thereafter User shall assume the initial responsibility for the cleanup of such Hazardous Materials in accordance with any applicable Legal Requirements. Any costs associated with cleaning up real property or water on, along, or adjacent to the Joint Trackage in connection with such a Hazardous Materials release shall be governed by Section 5 of these General Conditions. Owner acknowledges and agrees that User's **assumption** of the initial responsibility for the cleanup of a Hazardous Materials release shall not affect the allocation of liability set forth in Section 5 of these General Conditions for any Loss and/or Damage (defined below) related to such a Hazardous Materials release.

If Hazardous Materials must be transferred to undamaged Equipment or trucks as a result of a release caused by a Derailment of Equipment while being operated User, User shall perform the transfer and any costs associated with such transfer shall be governed by Section 5 of these General Conditions. Transfers of Hazardous Materials by User shall only be conducted after being authorized by Owner.

4.4 Owner shall be responsible for filing any reports required under Legal Requirements for any Derailment involving Hazardous Materials on or along any segment of the Joint Trackage other than Derailments described in Section 4.3 and shall promptly advise User.

If a Hazardous Materials release on or along any segment of the Joint Trackage other than as described in Section 4.3 occurs, then Owner shall bear the initial responsibility for the cleanup of such Hazardous Materials in accordance with any applicable Legal Requirements. User shall provide Owner with a list of contractors, with contact information, capable of cleaning up and monitoring a Hazardous Materials release. Any Loss and/or Damage, or costs associated with cleaning up real property or water on, along, or adjacent to the Joint Trackage, in connection with such a Hazardous Materials release shall be governed by Section 5 of these General Conditions. User acknowledges and agrees that Owner's **assumption of the initial responsibility** for the cleanup of a Hazardous Materials release shall not affect the allocation of liability set forth in Section 5

of these General Conditions for any Loss and/or Damage (defined below) related to such a Hazardous Materials release.

If Hazardous Materials must be transferred to undamaged Equipment or trucks as a result of a release caused by a Derailment of Equipment while being operated Owner or any third party or otherwise, Owner shall perform the transfer and any costs associated with such transfer shall be governed by Section 5 of these General Conditions. Transfers of Hazardous Materials by Owner shall only be conducted after being authorized by User.

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

Section 5. LIABILITY

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

5.2 Definitions and Covenants. The parties agree that for the purposes of this Section 5, the following definitions shall apply:

(a) "**Loss and/or Damage**" shall mean all claims, liability (except liability for punitive and exemplary damages), cost, and expense of every character including, but not limited to, amounts paid or to be paid under any State or Federal compensation law (including without limitation, the Federal Employer's Liability Act) incident to loss or destruction of or damage to property (including, without limitation, property of the parties hereto and property being transported by the parties) and injury to and death of persons arising from the operation by the parties hereto on, over or along the Joint Trackage. Loss and/or Damage shall also include all costs and expenses incidental to any claims, suits, demands and judgments (including, without limitation, attorneys' fees, court costs and other costs of investigation and litigation), the expense of clearing wrecked or derailed Equipment and the costs of environmental protection, mitigation or clean up necessitated by such wreck or Derailments and any liabilities for any third party claims for personal injury or death, property damage, natural resource damage, or any penalties, judgments or fines associated with a release of any contaminants resulting from such wreck or Derailment. Loss and/or Damage shall be reduced by any amount recovered from third parties.

(b) "**Employee(s)**" of a party shall mean all officers, agents, employees and contractors of that party.

(c) Any railroad not a party to this Agreement heretofore or hereafter admitted to the use of any portion of the Joint Trackage, shall, as between the parties hereto, be regarded in the same light as a third party. Without limiting the generality of the foregoing, neither of the parties hereto assumes any responsibility to the other under the provisions of this Agreement for any Loss and/or Damage occasioned by the acts or omissions of any employees of any such other railroad, or for any Loss and/or Damage which such other railroad shall be obligated to assume in whole or in part pursuant to law or any agreement relating to such other railroad's use of any portion of the Joint Trackage.

(d) For the purpose of this Section 5, Equipment of foreign lines being detoured over the Joint Trackage, shall be considered the Equipment and Employees of the party hereto under whose detour agreement or other auspices such movement is being made.

5.3 Reimbursement and Defense. The parties agree that:

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

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

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

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

(e) In the event a claim or suit is commenced against any party hereto for or on account of Loss and/or Damage for which another party hereto is or may be liable under the provisions of this Section 5, the party against whom such claim or suit is commenced shall give to such other party prompt notice in writing of the pendency of such claim or suit, and thereupon such other party shall assume or join in the defense of such claim or suit.

(f) No party hereto shall be conclusively bound by any judgments against the other party, unless the former

party shall have had reasonable notice requiring or permitting it to investigate and defend and reasonable opportunity to make such defense. When such notice and opportunity shall have been given, the party so notified and the other party shall be conclusively bound by the judgment as to all matters which could have been litigated in such suit, including without limitation a determination of the relative or comparative fault of each.

5.4 Wrecks and Derailments. The cost and expense of repairing bad ordered Equipment, clearing wrecks or otherwise disabled Equipment or re-railing Equipment (and the costs of repair or renewal of damaged Joint Trackage or adjacent properties) shall be borne in accordance with Section 5.5.

5.5 Allocation of Liability for Loss and/or Damage.

(a) User shall bear all cost of, and indemnify, defend and hold Owner harmless from and against, any Loss and/or Damage to User's Equipment or Equipment in the control, custody or possession of User and to User's Employees, patrons, invitees and others on its equipment while operated by User on, over, or about the Joint Trackage, **UNLESS SUCH LOSS AND/OR DAMAGE IS THE RESPONSIBILITY OF OWNER UNDER SECTION 5.5(b).**

(b) Owner shall bear all cost of, and indemnify, defend and hold User harmless from and against, any Loss and/or Damage to User's Employees and Equipment or Equipment in the control, custody or possession of User while being operated by User over the Joint Trackage and to any third parties or Equipment of third parties, resulting from a derailment caused by a defect in the Joint Trackage, **OR A FAILURE OF OPERATION OF OWNER'S SIGNALS AT A SIGNALIZED CROSSING ON THE JOINT TRACKAGE OR THE GROSS NEGLIGENCE OF OWNER.**

(c) User shall bear all cost of, and indemnify, defend and hold Owner harmless from and against, any Loss and/or Damage to third parties, caused or contributed to by the acts or omissions, negligent, or otherwise of User with or without the concurring acts or omissions of Owner, **UNLESS SUCH LOSS AND/OR DAMAGE IS THE RESPONSIBILITY OF OWNER UNDER SECTION 5.5(b) OR IS CAUSED BY THE INTENTIONAL MISCONDUCT OF OWNER, IN WHICH CASE OWNER SHALL BEAR ALL LOSS AND DAMAGE ALLOCATED IN THIS SECTION 5.5(C).**

(d) As between the parties hereto only, except as expressly provided otherwise in Section 5.5(c) above, Loss and/or Damage to third parties (excepting property or personnel of third parties deemed to be the Property or Employees of a party), or Joint Trackage, involving User's Equipment or Equipment in the control, custody or possession of User where such Loss and/or Damage occurs in such a way that it cannot be determined how such Loss and/or Damage came about, or Loss and/or Damage not otherwise expressly covered by Sections 5.1 through 5.5(a) – 5.5(c) above, **SHALL BE SHARED BY THE PARTIES EQUALLY REGARDLESS OF THE CAUSE OF SUCH LOSS AND/OR DAMAGE.**

(e) **NOTWITHSTANDING THE FOREGOING, OWNER HEREBY AGREES NOT TO ATTEMPT TO HOLD USER RESPONSIBLE FOR ANY LOSS AND/OR DAMAGE ARISING OUT OF OR RELATED TO (IN WHOLE OR IN PART) ANY CLAIM THAT BY VIRTUE OF THE USE OF THE JOINT TRACKAGE CONTEMPLATED IN THIS AGREEMENT, UNDER CERCLA OR OTHER ENVIRONMENTAL LAWS USER IS (I) AN "OWNER", "OPERATOR", "ARRANGER" OR "TRANSPORTER" OF THE JOINT TRACKAGE, OR (II) OTHER THAN A COMMON CARRIER**

WITH RESPECT TO THE JOINT TRACKAGE REGARDLESS OF ANY NEGLIGENCE OR STRICT LIABILITY OF USER.

(f) Owner agrees to indemnify, defend, and hold User harmless from any claim by a railroad operator on the Joint Trackage (or any parent or subsidiary company of that railroad operator) that User has violated the terms of any other agreement concerning use of the Joint Trackage by entering into this Trackage Rights Agreement.

(g) In the event that User or Owner pursues an indemnity claim for all or part of the cost of any Loss and/or Damage, User and Owner shall abide by the final determination and award in arbitration and/or litigation and shall each pay their own costs of the arbitration and/or litigation (including without limitation attorneys' fees) and shall each pay an equal half of any arbitration fees.

Section 6. INSURANCE

6.1 Owner shall, at its sole cost and expense, procure and maintain during the life of this Agreement the following insurance coverage:

Commercial General Liability insurance that contains broad form contractual liability with a combined single limit of a minimum of \$1,000,000 each occurrence and an aggregate limit of at least \$2,000,000. Coverage must be purchased on a post 1998 ISO occurrence or equivalent and include coverage for, but not limited to, Bodily Injury and Property Damage, and Products and completed operations. The definition of insured contract shall be amended to remove any exclusion or other limitation for any work being done within 50 feet of railroad property.

6.2 In addition, Owner shall comply with the following additional requirements with respect to such insurance:

Any insurance policy shall be written by a reputable insurance company with a current Best's Guide Rating of A- and Class VII or better, and authorized to do business in the state(s) in which the service is to be provided. If any portion of the operation is to be subcontracted by Owner, Owner shall require that the subcontractor provide and maintain insurance coverage as set forth herein.

Prior to commencing operations governed by this Agreement, Owner shall furnish to User an acceptable certificate(s) of insurance including an original signature of the authorized representative evidencing the required coverage, endorsements, and amendments and referencing the contract audit/folder number if available. The policy(ies) shall contain a provision that obligates the insurance company(ies) issuing such policy(ies) to notify User in writing at least thirty (30) days prior to any cancellation or non-renewal with such provision indicated on the certificate of insurance. In the event of a claim or lawsuit involving User arising out of this agreement, Owner will make available any required policy covering such claim or lawsuit.

Failure to provide evidence as required by this section shall entitle, but not require, User to terminate this agreement immediately. Acceptance of a certificate that does not comply with this section shall not operate as a

waiver of Owner's obligations hereunder. The fact that insurance (including, without limitation, self-insurance) is obtained by Owner shall not be deemed to release or diminish the liability of Owner including, without limitation, liability under the indemnity provisions of this Agreement. Damages recoverable by User shall not be limited by the amount of the required insurance coverage.

Section 7. ARBITRATION

7.1 If at any time a question or controversy shall arise between the parties hereto in connection with this Agreement upon which the parties cannot agree, either party shall have the right to require a meeting of designated representatives with authority to settle the matter within thirty (30) days of written notice of a desire to meet; if it cannot be resolved within thirty (30) days of the meeting of the parties, then the aggrieved party may demand arbitration. Unless other procedures are agreed to by the parties, arbitration between the Parties shall be governed by the rules and procedures set forth in this Section 7.

7.2 If the parties to the dispute are able to agree upon a single competent and disinterested arbitrator within twenty (20) days after written notice by one party of its desire for arbitration to the other party, then the question or controversy shall be submitted to and settled by that single arbitrator. Otherwise, any party (the notifying party) may notify the other party (the noticed party) in writing of its request for arbitration and nominating one arbitrator. Within twenty (20) days after receipt of said notice, the noticed party shall appoint an arbitrator and notify the notifying party in writing of such appointment. Should the noticed party fail within twenty (20) days after receipt of such notice to name its arbitrator, said arbitrator may be appointed by the American Arbitration Association, which shall designate said appointment from the CPR Panel of Distinguished Neutrals, or other similar body of competent neutral arbitrators which may be agreed upon between the parties, upon application by either party after ten (10) days' written notice to the other party. The two arbitrators so chosen shall select one additional arbitrator to complete the board. If the arbitrators so chosen fail to agree upon an additional arbitrator, the same shall, upon application of a party, be appointed in the same manner hereto before stated.

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

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

immediately after receiving it.

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

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

7.7 Interest computed annually, at a rate equal to the Prime Rate plus two (2) percentage points (or the maximum interest allowed by applicable law, if lower), shall be applied to any and all arbitration awards requiring the payment of money and shall be calculated from thirty (30) days following the date of the applicable arbitration decision. For purposes of this Section 7, the term "**Prime Rate**" shall mean the minimum commercial lending rate charged by banks to their most credit-worthy customers for short-term loans, as published daily in the Wall Street Journal.

Section 8. ABANDONMENT

8.1 In the event Owner shall be involuntarily dispossessed, including by threat of condemnation by competent public authority, of the right to operate upon and/or maintain any portion of its Joint Trackage and Owner fails or declines to replace said Joint Trackage, Owner shall have no obligation hereunder to provide tracks in replacement of such Joint Trackage for User's use, and User shall have and shall make no claim of any kind, legal or otherwise, against Owner for failure to provide such Joint Trackage for User's use.

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

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

Section 9. CATASTROPHIC EXPENSE

Catastrophic expense to the Joint Trackage, such as, but not limited to, that arising from fire, flood, earthquake or other acts of God, or acts of vandalism, riots, insurrection, terrorist attack or events of a similar nature shall be the responsibility of PCPA.