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July 19, 2016

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VIA E-FILING

Cynthia T. Brown, Chief
Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington DC 20423-0001

ENTERED
Office of Proceedings
July 19, 2016
Part of
Public Record

Re: FD 35842, New England Central Railroad Inc. – Trackage Rights
Order -- Pan Am Southern LLC

Dear Ms. Brown:

Enclosed is Pan Am Southern LLC's Reply to New England Central Railroad, Inc.'s Opening Statement And Evidence ("Reply"). This Reply contains two volumes. Volume I contains the legal argument and the verified statements of Pan Am Southern's ("PAS") witnesses. Volume II contains documents produced in discovery and other selected documents cited in Volume I. PAS is also filing a "Highly Confidential" and a "Public Version" of both volumes. Finally, PAS is submitting via hand delivery a package with a USB containing the Highly Confidential workpapers of PAS witness Michael R. Baranowski, a Senior Managing Director at FTI Consulting and the head of FTI's Network Industries Strategies group within the Economic Consulting division. If there are any questions about this matter, please contact me directly, either by telephone: (202) 663-7823 or by e-mail: wmullins@bakerandmilller.com.

Sincerely,



William A. Mullins

cc: Parties of Record

**PUBLIC VERSION
VOLUME I
BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 35842

**NEW ENGLAND CENTRAL RAILROAD, INC.
– TRACKAGE RIGHTS ORDER –
PAN AM SOUTHERN LLC**

**REPLY TO NEW ENGLAND CENTRAL RAILROAD, INC.'S
OPENING STATEMENT AND EVIDENCE**

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Attorneys for Pan Am Southern LLC

Dated: July 19, 2016

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BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 35842

**NEW ENGLAND CENTRAL RAILROAD, INC.
– TRACKAGE RIGHTS ORDER –
PAN AM SOUTHERN LLC**

**REPLY TO NEW ENGLAND CENTRAL RAILROAD, INC.’S
OPENING STATEMENT AND EVIDENCE**

BACKGROUND

Since 1988 and through an arrangement imposed by the Interstate Commerce Commission (“ICC”), New England Central Railroad (“NECR”) and Pan Am Southern LLC (“PAS”)¹ competed against each other for certain traffic that originates, terminates, and traverses the Line that is the subject of this proceeding.² This arrangement was formalized in Amtrak II

¹ PAS and NECR are referred to collectively as “the parties.”

² The “Line” consists of three different segments all currently owned by NECR. PAS has trackage rights over all three segments. The upper segment is a 13.4-mile line between White River Junction, Vermont and Windsor, Vermont (“Northern Segment”). It connects to the 48.8 mile line between Windsor, Vermont and Brattleboro, Vermont (“Connecticut River Line”, also referred to as the “Middle Segment” or the “Former B&M Line”). The lower segment is a 10.6-mile line between Brattleboro, Vermont and East Northfield, Massachusetts (“Southern Segment”) (collectively, all three segments are referred to as the “Line.”).

The Former B&M Line was previously owned by PAS’s predecessor company, Boston & Maine Corporation (“B&M”). The ICC approved various transactions whereby the Former B&M Line was taken from B&M against B&M’s wishes and conveyed to the National Passenger Railroad Corp. (“Amtrak”), who then conveyed it to B&M’s competitor, Central Vermont Railway (“CV”), the predecessor of NECR. B&M was then charged a rental fee to operate over what had previously been its own line. See National Railroad Passenger Corp.—Conveyance of Boston and Maine Corp. Interests in Connecticut River Line in Vermont & New Hampshire, 4 I.C.C. 2d 761, 1988 ICC LEXIS 233 (1988) (“Amtrak I”); The National Railroad Passenger Corp.—Conveyance of Boston & Maine Corp. Interests in Connecticut River Line in Vermont & New

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via a twenty-year trackage rights order attached as an appendix to that decision (“TO”).³

Although the TO expired in 2010, the parties have continued to operate under it.

The TO has benefited shippers and connecting shortlines on the Line, who enjoy lower rates, increased service offerings, and greater efficiencies and innovations as a result of strong competition between the two parties. The TO also has worked relatively well for the parties. NECR’s dissatisfaction with the TO is a recent phenomenon, wholly unrelated to the competitive benefits it has produced for the Northeast transportation market.

In December of 2012, however, NECR came under the control and ownership of Genesee & Wyoming Inc.;⁴ and in early 2014, NECR lost a significant propane customer to PAS.⁵ After these two events and twenty plus years of relatively good relations between NECR and PAS, NECR began to impose impediments to, and restrictions on, PAS’s ability to operate on the Line.⁶ NECR also sought to significantly increase the trackage rights fee that PAS pays. The Board deemed some of NECR’s unilateral measures unreasonable,⁷ but instituted this proceeding to set new terms and conditions.

Hampshire, 1990 ICC LEXIS 52 (1990) (“Amtrak II”) (collectively, “Amtrak Decisions”). PAS acquired the assets of B&M in 2009.

³ By agreement of the parties at the time, the TO covered all three segments of the Line. The TO was attached as Exhibit A to NECR’s Opening Statement And Evidence filed on June 4, 2015.

⁴ See Genesee & Wyoming Inc. – Control – RailAmerica, Inc., et. al., FD 35654 (STB served Dec. 20, 2012) (“G&W/RailAmerica Transaction”).

⁵ See Verified Statement of Michael P. Bostwick, Chief Commercial Officer for PAS, attached hereto as Exhibit A (“VS Bostwick”), at 2.

⁶ VS Bostwick at 4-5 (describing waybill production requirements, speed limits, and haulage prohibitions designed to “hamstring PAS’s ability to compete effectively against NECR on the Line”).

⁷ See New England Central Railroad Inc. – Trackage Rights Terms and Conditions – Pan Am Southern LLC, FD 31250 (Sub-No. 1); New England Central Railroad Inc. – Trackage Rights Order – Pan Am Southern LLC, FD 35842 (STB served Dec. 23, 2014) (“December 23rd”).

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After the mediation between the parties proved unsuccessful, NECR filed its Opening Statement and Evidence (“Opening Statement”) on June 4, 2015. In its Opening Statement, NECR claims that this is a run-of-the-mill SSW Compensation⁸ case and sets forth a value-in-place methodology (“VIP”) to calculate PAS’s new trackage rights fee. NECR’s VIP yields a 1,389% increase on PAS’s trackage rights fee.⁹ NECR also seeks substantial changes to the terms and conditions of the TO, by preventing PAS from performing haulage service and imposing onerous operating, insurance, and liability provisions. The sum of these changes would have the effect of materially diminishing the efficacy of the trackage rights granted years ago to ensure strong competition between two carriers on the Line.¹⁰

Decision”). After the December 23rd Decision, PAS requested mediation. NECR refused to mediate unless PAS agreed to a retroactivity provision. As will be discussed later in this Reply, PAS no longer supports the retroactive application of any newly established trackage rights fee.

⁸ The four methodologies for setting trackage rights compensation were set forth in St. Louis Southwestern Ry. Co. - Trackage Rights Over Missouri Pacific Railroad Company – Kansas City to St. Louis, 1 I.C.C. 2d 776, 1984 ICC LEXIS 347 (1984) (“SSW I”) and St. Louis Southwestern Ry. Co. – Trackage Rights Over Missouri Pacific Railroad Company – Kansas City to St. Louis Trackage Rights Compensation, 4 I.C.C. 2d 668, 1987 ICC LEXIS 15 (1987) (“SSW II”) (collectively, “SSW” or “SSW Compensation”). The four approved methodologies are: (1) the Capitalized Earnings Approach (“CE” or “CE Approach”); (2) Replacement Cost New Less Depreciation (“RCNLD”); (3) the comparable line segments approach; and (4) the stand alone cost method. VIP is an alleged variant of RCNLD.

⁹ NECR claims that PAS should not pay \$0.45 (2014) per car mile, as it had done before this dispute, but rather should pay \$6.70 per car mile. See Verified Statement of Mr. Baranowski, attached hereto as Exhibit B (“VS Baranowski”) at 3.

¹⁰ PAS sought discovery on the VIP approach. PAS also sought discovery relevant to all of the SSW methodologies. NECR provided discovery relevant to VIP, but vigorously opposed all other discovery on the other methodologies. After the Board’s February 12, 2016 decision allowing discovery on all of the methodologies, an initial discovery conference in front of an Administrative Law Judge (“ALJ”), and several months of continued delay, NECR finally produced the requested materials relevant to all of the methodologies.

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SUMMARY OF ARGUMENT**

This is not a run-of-the-mill SSW case. In fact, SSW should not apply to this proceeding. SSW was not used in Amtrak I and Amtrak II. Application of SSW now would contravene the fundamental designs and assumptions of the Amtrak Decisions, which were carefully crafted to ensure full compensation to B&M and competitive parity and equal treatment of both parties on the Line. Application of NECR's VIP would contradict the assumptions underlying the takings compensation and disrupt the competitive parity between PAS and NECR. The Surface Transportation Board ("STB" or "Board") should recognize that NECR seeks to use this proceeding as a means to substantially increase PAS's costs to operate on the Line and thereby prevent PAS from competing effectively against NECR.

The Board should reject both NECR's clear, and subtle, proposals for changing the ICC's carefully crafted competitive arrangement. There is no legitimate basis to deviate from this arrangement. The Board should simply renew the TO, including the existing methodology for calculating the trackage rights fee, and adopt small changes to some of the terms and conditions that both parties could support.

Although PAS does not believe the fee should be set under the standard SSW approach, PAS has nonetheless examined NECR's VIP in relation to applicable precedent. PAS hired Michael Baranowski, Senior Managing Director, Economic Consulting, FTI Consulting ("FTI"), to review the evidence, develop an appropriate VIP, and, if possible, calculate a going concern value for NECR and apply the CE method to determine the interest rental component. Mr. Baranowski has done both.¹¹

¹¹ See VS Baranowski Sections III and IV.

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Consistent with precedent and Mr. Baranowski's analysis, it is clear that NECR's VIP is not a valid substitute for RCNLD. Even if it were, NECR's VIP must be substantially modified to reflect Board precedent in three key ways: (1) value the real property held in easement at zero; (2) deduct the value of any infrastructure improvements funded by state and federal grants to accommodate passenger operations, which infrastructure NECR does not even own;¹² and (3) account for the value of the NECR infrastructure based on the value placed on those assets in the G&W/RailAmerica Transaction. With these key changes to NECR's VIP, a market-adjusted restated VIP ("Restated VIP") can be developed. Under Restated VIP, FTI calculates a trackage rights fee of \$0.41 per car mile, which is slightly lower than the existing fee of 45 cents per car mile.

In addition to Restated VIP, and cognizant of the Board's preference for the CE Approach in an SSW case involving a going concern,¹³ FTI also calculated a fee based on CE. Under CE, FTI calculates a trackage rights fee of \$0.61 per car mile, which is higher than the existing fee.

In addition to NECR's proposed 1,389% increase in the trackage rights fee, NECR's proposed changes to the TO, if adopted, would significantly increase PAS's costs, limit PAS's

¹² As discussed in more detail later in this Reply, PAS should not have to pay NECR for the cost of implementing and maintaining assets that are publicly financed and placed into service solely intended to benefit interstate passenger service.

¹³ See SSW II, at *14-17 (noting that while there are several valuation methods available, the Board prefers the CE Approach because the CE Approach best values the asset as a going-concern business with income-producing potential); St. Louis Southwestern Railway Company – Trackage Rights Over Missouri Pacific Railroad Company – Kansas City to St. Louis, FD 30,000 (Sub-No. 16), 5 I.C.C. 2d 525; 1989 ICC LEXIS 126, at *10 (ICC May 17, 1989) (“[W]e believe the use of the capitalized earnings approach (as modified here) represents a practical and reasonable measure of the specific assets required, or consumed, as a result of access.”); Arkansas and Missouri Railroad Company v. Missouri Pacific Railroad Company, FD 31281, 6 I.C.C. 2d 619, 1990 ICC LEXIS 110, at *24 (STB served March 23, 1990) (“A&M-I”) (noting the advantages of using CE to evaluate a going concern business).

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ability to compete, and create several avenues for NECR to unilaterally impose additional costs and operating conditions on PAS, not generally applicable to itself or to Amtrak. These changes would undermine PAS's ability to compete.

The Amtrak Decisions recognized that a large portion of the Line used to be owned by B&M and, therefore, that B&M should have substantially the same rights as CV to compete for shipper's traffic. The Board should not disrupt this competitive arrangement: PAS should have substantially the same rights as NECR to compete on the Line. For example, PAS's rights should continue to encompass access to all existing shippers, the right to fully compete against NECR for any new shippers, and the right to provide haulage services, as PAS has previously done and NECR has previously allowed. PAS further believes that there should be one agreement governing all three segments of the Line. PAS has attached, as Exhibit C hereto, a redline of its proposed trackage rights terms as compared to NECR's proposal. The differences are not great in number, but are significant in effect insofar as PAS has removed the anticompetitive provisions proposed by NECR. PAS's changes are fully explained herein.

In summary, in 1988 and in 1990, fully aware of the remarkable powers it was exercising in allowing Amtrak to take the Former B&M Line and sell it to a competitor,¹⁴ the ICC was extremely diligent in crafting an arrangement to ensure that B&M was adequately compensated for the taking and to ensure competitive parity between NECR and PAS on the Line. Nothing has changed to warrant modifications to that arrangement; and, NECR has not even attempted to

¹⁴ The decisions were considered by the D.C. Circuit, Congress, and the Supreme Court. See Boston and Maine Corporation v. ICC, 911 F.2d 743 (D.C. Cir. 1990), rehearing denied, Boston & Maine Corp. v. ICC, 925 F.2d 427 (D.C. Cir. 1991); Railroad Passenger Service Act, Pub. L. 101-641, Section 9(b); National R.R. Passenger Corp. v. Boston & Me. Corp., 503 U.S. 407 (1992). Even the ICC acknowledged that its decision was "extraordinary." See Amtrak I, 1988 ICC LEXIS 233, at *16 ("Amtrak acknowledges this is an extraordinary proceeding. We agree.").

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argue that the Amtrak Decisions should be reopened or reconsidered. Nor could it. As intended, the Amtrak Decisions have succeeded in creating a competitive environment benefiting shippers and shortlines on the Line. NECR simply wants to extract more money from PAS and to impose burdensome operating restrictions on PAS in order to weaken PAS as a competitor—in direct conflict with the purpose of the Amtrak Decisions. Accordingly, the Board should reject NECR's proposal in its entirety. PAS should pay what it is paying now and should be able to operate as it is operating now.

ARGUMENT

I. NECR'S SSW PROPOSAL WOULD CONTRAVENE THE FUNDAMENTAL DESIGNS AND PREMISES OF THE AMTRAK DECISIONS, WITHOUT ADEQUATE JUSTIFICATION.

In Amtrak I, the ICC required B&M to convey its Connecticut River Line to Amtrak, subject to the requirement that Amtrak grant specified trackage rights back to B&M. The ICC also authorized CV to acquire the Connecticut River Line from Amtrak and to operate it, subject to B&M's trackage rights. Finally, CV and B&M were directed to negotiate a trackage rights agreement.¹⁵ When the parties were unable to agree, the ICC issued its decision in Amtrak II, adopting the TO.

Amtrak I and Amtrak II were not ordinary decisions. This was the first time the ICC exercised its authority to restructure the ownership and operation of a private freight rail line, impose joint passenger and freight use, and create conditions to foster competition between two carriers. As such, the ICC carefully crafted its decisions after vigorous input from the parties.¹⁶

¹⁵ See Amtrak I, 1988 ICC LEXIS 233, at *104-09.

¹⁶ For example as part of its compensation, B&M was given the exclusive right to serve all (a) existing shipper facilities that were located on the Connecticut River Line and that had received or tendered rail shipments during the 12 months prior to the line's conveyance to CV; and (b)

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It carefully designed an arrangement to ensure that CV and B&M could compete on equal terms in the future and based its takings compensation formula on certain fundamental assumptions regarding future maintenance and capital expenses, as discussed in more detail below. NECR's proposal to apply SSW would violate these fundamental goals and assumptions of the Amtrak Decisions.

A. Amtrak Decisions Had Key Fundamental Goals and Assumptions.

1. Competitive Parity

Language throughout the Amtrak Decisions and the TO confirms the ICC's intent for CV and B&M to operate as equal competitors on the Line. For example, Amtrak I described how the transaction would increase transportation options so that new shippers would not be captive to one railroad,¹⁷ specifically noting that it "would result in B&M being no worse off competitively after the taking than before."¹⁸ Similarly, Amtrak II prescribed that both CV and B&M would have equal rights "to compete for and to interchange traffic at Bellows Fall, VT, with the GMRC [a shortline]" and to "compete for and interchange traffic at Claremont Junction with the CCR [another shortline]."¹⁹ Finally, the TO provided that CV's and B&M's trains should be operated in a manner "without prejudice or partiality" to any one party.²⁰ Thus, the Amtrak Decisions and

any and all new shippers that located at such existing facilities on the Connecticut River Line after September 9, 1988. For any new shippers and new facilities not meeting those terms, CV and B&M were to be able to equally compete for this traffic. See also Rymes Heating Oils, Inc. – Petition For Declaratory Order, FD 34098 (STB served July 19, 2002) ("Rymes").

¹⁷ See Amtrak I, 1988 ICC LEXIS 233, at *81-85.

¹⁸ Id. at *95-96.

¹⁹ Amtrak II, 1990 ICC LEXIS 52, at *13-14.

²⁰ TO, §5.1.

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the TO clearly reveal that the ICC intended for CV and B&M—and now NECR and PAS—to operate as equal competitors on the Line.

2. Maintenance and Capital Expenses

The compensation that Amtrak had to pay B&M for taking the Connecticut River Line was premised on certain fundamental assumptions regarding future capital and maintenance expenditures and the future trackage rights fees. In Amtrak II, the ICC made clear that B&M had no obligation to contribute “in any way” to the costs of planned upgrades for Amtrak service.²¹ Second, the ICC also capped the maintenance fees that B&M was required to pay, absent certain conditions,²² and specifically prohibited CV from “allocat[ing] additional costs of routine maintenance to B&M.”²³ Notably, the ICC only required B&M to pay for maintenance sufficient to maintain the Line at Federal Railroad Administration (“FRA”) Class 2 standards.²⁴ Furthermore, the agreed-upon trackage rights fee was deemed to be in “full satisfaction of any and all obligations of B&M to pay for the trackage rights provided herein or contribute towards the costs of dispatching, maintenance and repair of the Line.”²⁵ The ICC’s going concern value (“GCV”), which was used to determine the appropriate takings compensation, was based upon these assumptions and was specifically designed to “make the B&M ‘whole’ (or no better or worse off) after the taking as opposed to before the taking.”²⁶

²¹ Amtrak II, 1990 ICC LEXIS 52, at * 16-17.

²² Id. at *18-22.

²³ Id. at *30.

²⁴ Id.

²⁵ Id. at *52; TO, § 3.3.

²⁶ Amtrak I, 1988 ICC LEXIS 233, at *63-*64.

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As discussed by Mr. Baranowski, in establishing the takings value of \$2,373,286 to be paid to B&M, the ICC used certain assumptions regarding future cash flows, future maintenance payments, and B&M's future obligation to pay for capital upgrades. These fundamental assumptions were extended into perpetuity. All other things equal, if application of SSW results in higher maintenance payments and trackage rights fees higher than the assumptions underlying the takings compensation, the savings the ICC calculated that B&M would achieve under the taking would be reduced. Because these calculated savings were deducted from the GCV at the time of the transaction, lower calculated savings, if known at the time, would have resulted in less of a deduction from the GCV and more compensation to B&M. Thus, if the changes recommended by NECR result in PAS paying more than what was assumed under the Amtrak Decisions, then B&M should be entitled to additional compensation for the taking. VS Baranowski at 10 .

The Board's GCV calculation also assumed that B&M would be relieved of any obligation to pay an interest rental component over the Connecticut River Line. In Amtrak II, and as part of CV's efforts to obtain more money from B&M, CV proposed that, beginning in the sixth year of the trackage rights arrangement, B&M must pay CV a proportionate share, based on B&M's percentage of total traffic on the Line, of the costs of capital projects required to preserve the line at FRA Class 2 standards.²⁷ CV argued that its proposal was not an attempt to circumvent the ICC's maintenance payment cap, but rather, was an interest rental charge for B&M's long-term use of CV's depreciating capital assets. As NECR argues today, CV argued that it must be able to earn a long-term return on its capital investment.

²⁷ See Amtrak II, 1990 ICC LEXIS 52, at *26-*30.

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The ICC specifically rejected CV's proposal, affirming that its GCV calculation—which extended into perpetuity—precluded any additional interest rental component.²⁸ The ICC noted that the original Amtrak/CV trackage rights proposal of April 4, 1988 expressly provided that B&M shall not be required to pay any interest rental payments to CV.²⁹ Furthermore, the ICC explained that the takings compensation B&M received from Amtrak would need to be higher if B&M were required to pay such interest rental payments to CV.³⁰

B. NECR's SSW Proposal Undermines These Fundamental Goals and Assumptions.

It should be noted that the TO was intended to run in perpetuity, although either party was granted the right to seek minor modifications after the initial term expired, which was in 2010.³¹ However, nothing in the Amtrak Decisions indicates that a parties' right to seek modification meant that, under the guise of SSW, a party was free to fundamentally alter the presumptions underlying the takings compensation and the scope of the competitive parity.

NECR seeks to do just that. NECR's proposal would (1) require PAS to pay for maintenance above and beyond FRA Class 2 standards; (2) require PAS to pay for upgrades necessary for Amtrak service, not freight service; (3) eliminate the cap on PAS's maintenance obligations; (4) require PAS to pay an interest rental component; (5) force PAS to purchase insurance at extraordinary amounts; (6) prohibit PAS from performing haulage service; (7)

²⁸ Id. at *28-31.

²⁹ Id.

³⁰ Id. at*28.

³¹ It is telling that even though the TO permitted modifications at any time after 2010, NECR only sought modifications in 2013—after it came under the control and ownership of new management, after it lost key business to PAS, and after the Board invalidated its unilateral attempts to restrict PAS's ability to compete.

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increase PAS's trackage rights fee by 1,389%; and (8) retain the right to unilaterally impose additional costs on PAS.

Through these proposals, NECR first seeks to fundamentally alter the competitive parity achieved by the Amtrak Decisions. As discussed in more detail in the VS Bostwick, the strong competition between PAS and NECR on the Line, as a result of the Amtrak Decisions, has benefited shippers and connecting shortlines by providing lower rates, increased efficiencies, alternative routing options, and continuing innovations.³² As Mr. Bostwick notes, "[i]t is simple math to know that PAS cannot bear a 1,389% increase in the trackage rights fees it pays."³³ By imposing exorbitant costs and haulage restrictions on PAS, NECR's proposals would eliminate PAS's ability to compete against NECR, to the detriment of rail customers and the public interest, as discussed *infra* in Part II.³⁴ Thus, NECR's changes are directly contrary to the requirement that PAS and NECR should be treated "without prejudice or partiality" and have the "equal right to compete."

Furthermore through these proposals, NECR also seeks to fundamentally alter the assumptions of the GCV calculation in the Amtrak Decisions without an adequate adjustment to the taking compensation originally paid to B&M. As discussed above in Part I.A, the ICC specifically held that PAS is *not* required to pay for maintenance above and beyond FRA Class 2 standards, upgrades necessary for Amtrak service, or an interest rental component and is generally subject to a cap on its maintenance obligations and expenditures. NECR's proposals turn the ICC's holdings on their head.

³² See VS Bostwick at 1-3.

³³ VS Bostwick at 6.

³⁴ See VS Bostwick at 4-6.

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And, as discussed by Mr. Baranowski, the assumptions underlying the ICC's GCV calculation must be honored to ensure that B&M was properly compensated for the taking of the Connecticut River Line.³⁵ All other things equal, if application of SSW results in a trackage rights fee higher than that calculated pursuant to the GCV assumptions, the savings the ICC calculated that B&M would achieve under the taking would be reduced. Because these calculated savings were deducted from the GCV at the time of the transaction, lower calculated savings, if known at the time, would have resulted in less of a deduction from the GCV and more compensation to B&M. Thus, if NECR's changes result in PAS paying a higher trackage rights fee than what was assumed in the Amtrak Decisions, B&M (PAS) should be entitled to additional compensation for the taking.

In sum, the Board should reject NECR's changes because they would fundamentally undermine and contradict the Amtrak Decisions.³⁶ Instead, the Board should simply renew the TO, including the existing methodology for calculating the trackage rights fee, and adopt small changes to some of the terms and conditions that both parties could support, in order to preserve the competitive balance carefully crafted in the Amtrak Decisions which has benefited shippers and connecting shortlines on the Line over the past two decades.

³⁵ See VS Baranowski at 6-10.

³⁶ If NECR wants to reopen and reconsider the Amtrak Decisions, it must meet the standards of 49 U.S.C. 722(c), which requires NECR to meet its burden of showing material error, new evidence, or changed circumstances. NECR has not made such a showing.

The only justification offered by NECR is that PAS should pay a higher trackage rights fee because the Line is now at FRA Class 3 standards and can handle more cars. However, this is not a sufficient justification to ignore the Amtrak Decisions, especially when doing so would disadvantage shippers and harm the public interest. See VS Bostwick at 3-6; Part II, *infra*.

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II. NECR'S SSW PROPOSAL WOULD RESULT IN SIGNIFICANT PUBLIC INTEREST HARMS.

It is axiomatic that if PAS's costs to operate over the Line (as a result of a 1,389% increase in the trackage rights fee, increased maintenance obligations, and higher insurance requirements), then PAS would need to raise rates to cover costs—let alone make a profit. This outcome would adversely affect shippers and connecting shortlines by eliminating PAS as a competitive rail alternative to NECR.³⁷ As such, this outcome is not in the public interest and is contrary to the United States Rail Transportation Policy ("RTP").

First, with respect to the shippers PAS serves exclusively, to the extent these shippers cannot switch to other modes, their rates would increase. This increase would not be a result of market forces, but rather a result of direct regulatory intervention from the Board's adoption of NECR's proposals in this proceeding. PAS would be forced to increase rates to recoup the 1,389% increase in its trackage rights fee as well as higher maintenance and insurance expenditures. Such a result is directly contrary to the RTP goals to allow competition to set rates, to the maximum extent, and to minimize federal regulatory control over the rail industry.³⁸

Second, to the extent PAS exclusive shippers could do so, they would switch to other modes. As the Board noted in Amtrak I, the Northeast market served by both NECR and PAS is highly susceptible to competition from other modes, especially trucking and for many (but perhaps not all), this would be the result.³⁹ This aspect of the Northeast market has not changed in the years since Amtrak I. As Mr. Bostwick notes, the vast majority of the traffic PAS serves is

³⁷ See VS Bostwick at 4-6.

³⁸ 49 U.S.C. §10101.

³⁹ See Amtrak I, 1988 ICC LEXIS 233, *82-85.

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subject to intense modal competition.⁴⁰ As such, for most of the traffic that PAS serves exclusively, rates are already set as low as possible because they are constrained by modal competition.⁴¹ Therefore, any increase in rates above existing levels risks losing this modal-competitive traffic to other modes.⁴² Such a result harms the public health and safety; given the general consensus that rail is safer, more efficient, and more environmentally friendly than truck.⁴³ Such a result also is directly contrary to the RTP goals to ensure a sound rail system competitive with other modes, to ensure the public health and safety, and to promote energy conservation.⁴⁴

Finally, for those rail-dependent shippers with access to both PAS and NECR, such as Rymes, PAS's inability to price competitively against NECR would effectively reduce these shippers' rail options from two to one. And, for those shippers utilizing PAS haulage service, NECR's restrictions on PAS's haulage again would force these shippers to rely exclusively on NECR haulage services and routings.⁴⁵ Indeed, for this competitive rail-dependent traffic, it would have been precisely because PAS could offer lower rates and better service that PAS

⁴⁰ See VS Bostwick at 3-4.

⁴¹ Id.

⁴² Id.

⁴³ See Comparative Evaluation of Rail and Truck Fuel Efficiency on Competitive Corridors Final Report, FEDERAL RAILROAD ADMINISTRATION (Nov. 19, 2009), *available at* <https://www.fra.dot.gov/eLib/details/L04317>; The Environmental Benefits of Moving Freight By Rail, ASSOCIATION OF AMERICAN RAILROADS (Apr. 2016), *available at* <https://www.aar.org/BackgroundPapers/Environmental%20Benefits%20of%20Moving%20Freight%20by%20Rail.pdf>.

⁴⁴ 49 U.S.C. §10101.

⁴⁵ See VS Bostwick at 5-6. In fact, PAS has also been approached by Vermont Rail System, a shortline, regarding a potential haulage arrangement, but this proposal has been on hold pending the outcome of the proceeding. Id. at 3. If NECR is successful in restricting haulage, VRS is just one of many entities that would suffer from a loss of competitive options over the Line.

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would have won the traffic from NECR. Adopting NECR's proposals to increase only PAS's costs to operate on the Line results in a sub-optimal, inefficient outcome, again directly contrary to the RTP goals to maximize competitive pricing and minimize federal regulatory control.⁴⁶

Shippers, connecting shortlines, and public entities fully understand the adverse consequences of any decision that would increase PAS's costs, thereby forcing PAS to raise its rates. The Vermont Secretary of Transportation argues that imposing rates that are not reasonable and represent industry norms would be no less than "a disservice to the public."⁴⁷ The 1,389% increase in PAS's rates, as proposed by NECR, is not reasonable and does not represent the industry norm by any accounts, as discussed in more detail *infra*.

These concerns were echoed by the Commissioner for the New Hampshire Department of Transportation who described the TO as a "unique provision" allowing shippers to benefit from two competitive railroads:

Should NECR prevail in its efforts to substantially increase the trackage rights fees, PAS could not effectively compete for customers on the line. That would deprive those customers of the competitive option imposed by the ICC in the Amtrak taking case. The lack of competition would likely lead to increased transportation costs and less efficient service to customers on the line.⁴⁸

Similarly, two connecting shortlines —the Washington County Railroad Company ("WACR") and the Green Mountain Railroad Corporation ("GMRC", and together with WACR, "VRS")—publicly opposed NECR's prior efforts to restrict PAS's ability to compete in FD 35842, explaining that its customers benefit from VRS's ability to interchange with both PAS

⁴⁶ 49 U.S.C. §10101.

⁴⁷ See Letter from Susan Minter, Secretary of Transportation, State of Vermont, FD 35842 (filed Aug. 28, 2015) ("Minter Letter").

⁴⁸ See Letter from Victoria F. Sheehan, Commissioner, Department of Transportation, State of New Hampshire, FD 35842 (filed Apr. 19, 2016) ("Sheehan Letter").

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and NECR.⁴⁹ VRS's comments illustrate how any disruptions to PAS's ability to compete would upset the goals of the Amtrak Decisions with significant adverse impacts for customers. And, NECR's prior efforts, involving demands for the production of confidential revenue waybills, speed limits for PAS but not itself, and a self-declared prohibition on PAS's performance of haulage, pale in comparison to NECR's current efforts to restrict PAS's ability to compete.

Similarly, in FD 35482, Central Maine & Quebec Railway US Inc. ("CMQR") submitted comments specifically urging the Board to ensure "that reasonable business terms and conditions continue as originally outlined in the [TO] issued by the [ICC]" in Amtrak II.⁵⁰ CMQR specifically noted how important it was to maintain "the unrestrained and equal competitive access" between the two carriers.⁵¹

In sum, the Board should reject NECR's SSW proposal because it would result in significant public interest harms. Instead, the Board should simply renew the TO, including the existing methodology for calculating the trackage rights fee, and adopt small changes to some of the terms and conditions that both parties could support, in order to preserve the competitive balance carefully crafted in the Amtrak Decisions which has benefited shippers and connecting shortlines on the Line over the past two decades.

III. IF THE BOARD APPLIES SSW, NECR'S VALUE-IN-PLACE METHODOLOGY SHOULD BE MODIFIED TO REMEDY SUBSTANTIAL FLAWS.

As a preliminary matter, as discussed above in Parts I and II, application of SSW would be completely contrary to the fundamental goals and assumptions of the Amtrak Decisions and

⁴⁹ See Comments filed by Eric Benson, attorney for VRS, FD 35842 (filed July 22, 2014).

⁵⁰ See Comments filed by Jeremy R. Fischer, Esq., Drummond Woodsom, attorney for Central Maine & Quebec Railway US Inc., FD 35842 (filed Sept. 22, 2014).

⁵¹ Id.

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would result in significant public interest harms. Thus, the Board should not apply SSW in this proceeding. It simply does not fit the facts of this proceeding. SSW was developed by the ICC to set compensation for trackage rights imposed to redress the anticompetitive effects of a railroad merger.⁵² A&M-I extended SSW to expired voluntary trackage rights agreements where the parties could not reach agreement on the new terms and conditions.⁵³ However, neither of these circumstances exists in the current proceeding. PAS's trackage rights are not a remedy for anticompetitive effects of a rail merger. And, the TO does not represent a voluntary trackage rights agreement—it represents a government-mandate for joint use of the Line and a government-imposed compensation scheme. SSW has never been applied in a similar factual situation.⁵⁴ Furthermore, SSW was not applied when the ICC first determined the compensation to be paid by B&M for its trackage rights over CV.⁵⁵ Based on the foregoing reasons, there is no reason to apply it now.

⁵² See North Carolina Railroad – Petition to Set Trackage Compensation and Other Terms and Conditions – Norfolk Southern Railway Company, FD 33134, 1997 STB LEXIS 123, *10 (STB served May 29, 1997) (“NCR”).

⁵³ See A&M-I at *24. Commissioner Emmett dissented on the basis that the Board had no jurisdiction to set terms and conditions over private, voluntary agreements that had expired on their terms.

⁵⁴ In the closest analogous case to the existing situation, NCR, the Board declined to apply SSW. There, because the tenant-lessee was the line's exclusive operator, the Board concluded that application of SSW would not be appropriate. Similarly, here, PAS retained the exclusive right to serve some shippers while both NECR and PAS were given certain other rights to jointly serve other shippers. See NCR, 1997 STB LEXIS 123 at *9-*10.

⁵⁵ SSW was decided before Amtrak II, so the Board could have used SSW to set the trackage rights fee. It did not. Instead, the Board adopted a negotiated fee that the Board determined was appropriate for these unique circumstances and that was designed to be in “full satisfaction” of PAS's obligations.

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A. NECR's VIP Is Not RCNLD.

If the Board is going to apply SSW, which it should not, the Board should not adopt NECR's VIP approach. The VIP approach has never been approved by the Board. And to PAS's knowledge, it has never been specifically applied to a trackage rights compensation dispute. NECR itself acknowledges that VIP is merely "an approximation of RCNLD."⁵⁶ But, this statement does not go far enough. NECR's VIP is neither a substitute for nor an approximation of RCNLD because of fundamental flaws in its methodology.

NECR's expert, Mr. Charles Banks, describes his method as follows: "VIP in the context of this analysis was defined as the retail market value of all rail assets as if they were available for sale assuming market prices on September 2, 2014, combined with the estimated value of in-place fixed infrastructure, again as of September 2, 2014."⁵⁷ This method conflates notions of RCNLD and NLV by applying separate valuation techniques to what are described as "marketable" rail assets and fixed in-place infrastructure assets. As discussed in Mr. Baranowski's verified statement, there are several problems with this approach.⁵⁸

Specifically, for rail related assets, the VIP approach assumes that the rail currently in place in the NECR track structure is removed and sold on after-markets. Yet, Mr. Banks does not include any costs of removing these assets or transporting them to any mysterious markets. The only way to realize the VIP market value for these "marketable assets" would be to dismantle the railroad. For the "fixed in place" assets, such as bridges and tunnels, he applies a

⁵⁶ New England Central Railroad, Inc. Motion for Preliminary Determination of Appropriate Methodology and for Protective Order filed July 15, 2015 in this proceeding on page 7 "NECR prepared an approximation of RCNLD...."

⁵⁷ Opening Statement, Verified Statement of R.L. Banks & Associates, Inc. ("VS RLBA") at 6.

⁵⁸ See VS Baranowski at 18-20.

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valuation generally more aligned with RCNLD but assigns values by applying assumed and otherwise undocumented unit costs to generalized groups of assets and guessing about their current condition. The values resulting from this method are then arbitrarily discounted by 50% to “reflect normal wear resulting from being in service.”⁵⁹ There were no workpapers in support of the values or support for discounting the asset value by 50%. It is simply unexplained. For the underlying right-of-way, NECR’s VIP assumes that the entire corridor is held in fee simple title, regardless of NECR’s own admission that the right-of-way is easement.⁶⁰

Overall, Mr. Banks has provided no meaningful documentation or other support for the vast majority of the inputs he used in NECR’s VIP to establish values. NECR’s VIP valuations are nothing more than arbitrary assessments divorced from any actual market values of the NECR system as a whole or any actual replacement costs. NECR’s own testimony indicates that its VIP only “*attempts to provide the current value*” for the Line.⁶¹ It does not represent the actual values. As a result, it should be summarily rejected by the Board. If the Board declines to reject the approach outright, then critical adjustments must be made to align the valuation with prior Board precedent and established measures of market value for the NECR.

In contrast, RCNLD calculates actual replacement costs and then depreciates those costs to reflect existing valuations. But the information provided in NECR’s Opening Statement and by NECR in discovery would not suffice for an accurate RCNLD analysis. Accordingly, if the

⁵⁹ Id at 20.

⁶⁰ Opening Statement, Verified Statement of RLBA at 9.

⁶¹ Id. at 8. Opening Statement, Verified Statement of RLBA, Track Infrastructure Valuations, Page 8 of 13. Indeed, NECR refuses to place a true market value on the NECR as an independent railroad system, despite the fact that NECR was sold as part of the G&W/RailAmerica Transaction and documents produced in discovery allow for a calculation of the NECR value as part of that transaction.

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Board were to apply SSW, which PAS emphasizes it should not, PAS has two realistic options: (1) analyze and modify NECR's VIP; or (2) submit a CE analysis. PAS has done both, with the assistance of Mr. Baranowski.

B. NECR's VIP Would Need To Be Modified To Reflect STB Precedent and Actual Market Values.

As discussed herein and in the VS Baranowski, if the Board is inclined to adopt VIP, which it should not, it should substantially modify that methodology in three key ways: (1) reflect that the real property is held in easement rather than fee simple and assign a zero value to it; (2) reduce the value of any infrastructure improvements attributed to passenger operations, especially since NECR does not even own this infrastructure; and (3) account for the value of the NECR system as determined from the G&W/RailAmerica Transaction and other actual market values. As explained below and in his statement, with these modifications to NECR's VIP, Mr. Baranowski calculates a trackage rights fee of \$0.41 per car mile.

1. Most of the Property Is Held in Easement.

A key component of NECR's VIP analysis is its real estate valuation.⁶² This real estate valuation is fundamentally flawed because it assumes that NECR owns the Line in fee simple. In fact, as admitted by NECR, NECR owns a permanent, unencumbered easement, which

⁶² According to NECR, which based its valuation on studies performed by RLBA and a real estate appraisal performed by Gary R. Anglemeyer ("Appraisal"), NECR's real estate valuation for the right-of-way is \$10,460,000.00. The three RLBA studies included: (1) a rail asset valuation employing the VIP Methodology; (2) a real estate valuation employing Across the Fence ("ATF") value and Corridor Factor valuation methodologies; and (3) an annual, steady state, infrastructure maintenance cost estimation. See VS RLBA at 3.

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easement would be extinguished if NECR were to cease rail operations.⁶³ STB precedent is clear on this issue: in valuation cases, right-of-way held via easement should be valued at zero.

Over the past 20 years, the valuation of easements has been established in numerous rate, feeder line, and crossing cases. Historically, the ICC assigned a zero cost to property acquired by a carrier in easement where the railroad failed to show that any cost was incurred for procuring or keeping the easement. For example in Wisconsin Power, the Board held that the costs to acquire an easement property cannot be included when constructing a stand-alone railroad, unless the defendant railroad actually incurred such costs.⁶⁴ And in KJRY, the Board again recognized that the valuation of a right-of-way held in easement property should be set at zero.⁶⁵ In McCarty Farms, the Board specifically rejected Burlington Northern's ("BN") argument that easements should have value, regardless of whether the railroad paid for the easement, because standard appraisal practice is to value easements characterized by exclusive use and indefinite duration as if the land were held in fee simple.⁶⁶ NECR cannot prevail on the same argument here. The Board should not depart from its well-established precedent.⁶⁷

⁶³ Opening Statement, Vol. 1, at 12 ("The appraisal recognizes that NECR owns only an easement and not fee title."); Opening Statement, Vol. 2, VS RLBA at 9 ("NECR owns a permanent, unencumbered easement.").

⁶⁴ See Wis. Power & Light Co. v. Union Pac. R.R., 5 S.T.B. 955, 1019 (2001), aff'd sub nom. Union Pac. R.R. v. STB, 62 F. App'x 354 (D.C. Cir. 2003) ("Wisconsin Power"). See also Texas Municipal Power Agency v. the Burlington Northern and Santa Fe Railway Company, NOR 42056, 2003 STB LEXIS 153, at *173-74 (STB served March 24, 2003) (rejecting an attempt by BNSF to substitute the value of land held in fee simple for land held in easement).

⁶⁵ See Keokuk Junction Railway Company – Feeder Line Acquisition – Line of Toledo Peoria and Western Railway Corporation between La Harpe and Hollis, IL, FD 34335, 2004 STB LEXIS 694, at *39-40 (STB served Oct. 28, 2004) ("KJRY").

⁶⁶ See McCarty Farms, Inc., Et. Al. vs. Burlington Northern, Inc., FD 37809, 1997 STB LEXIS 198, at *79, *85 (STB served Aug. 20, 1997) ("McCarty Farms").

⁶⁷ See KJRY.

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In fact, the Board considered this precise issue, i.e. the value of PAS's former right-of-way, in the Amtrak Decisions. In the context of determining how much B&M should be paid, B&M argued that its entire right-of-way should be valued as if held in fee simple. The ICC rejected B&M's valuation because the right-of-way included land subject to reversionary interests, which receives zero value. Instead, the ICC accepted Amtrak's valuation which assigned value only to that land actually held in fee simple.⁶⁸ Here, NECR repeats B&M's mistake by failing to distinguish between real estate owned in fee simple versus in easement.⁶⁹

In sum, NECR's value for the Line should be reduced by \$10,460,000 (approximately 10%) to account for the Board's precedent regarding the valuation of easements.

2. Most Infrastructure Improvements Were Funded by Amtrak And State Governments for Passenger Operations.

The remaining portion of NECR's VIP reflects in large part the value of infrastructure improvements that (1) were specifically put in place to benefit passenger operations, not freight; (2) were funded by federal and state grant money; and (3) are not even owned by NECR.⁷⁰ STB

⁶⁸ See Amtrak I, 1988 ICC LEXIS 233 at *51-*63.

⁶⁹ The Appraisal states that NECR did not provide Mr. Anglemyer any title information upon which to make a reliable market valuation. Opening Statement, Vol. 3, Appraisal at 2-3; and 14-15. Instead, Mr. Anglemyer based his appraisal on the "extraordinary assumption" that all right-of-way was held in fee. Opening Statement, Vol. 3, Appraisal at 2-3; 14-15; and 41. In a footnote, NECR alleges that it has a contractual right to purchase the trackage rights line for nominal consideration of \$1.00. NECR Opening Statement, at 12. PAS cannot evaluate this statement because the contract to purchase was not included in the discovery response, although pursuant to Document Request Nos. 1 and/or 26, it should have been. Given that Amtrak I found the right-of-way to consist largely of easement, even if NECR exercised its option to purchase, it could only buy what Amtrak acquired. As such, under Board precedent, the right-of-way cannot be valued as fee simple because it consists largely of easement.

⁷⁰ The Vermont Standard Rail Agreement ("VT Agreement"), included in Volume II, explicitly states the purpose of the VT Agreement is to "meet the goals of the State, as stated in 5 V.S.A. § 3002(1), by providing construction assistance from the FRA and the State to Railroad, in accordance with applicable federal and state laws and regulations and to reduce the travel time

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precedent is again clear on this issue: in valuation cases, infrastructure not necessary for a carrier's freight operations should not be included when determining that carrier's rental.

In A&M-II, the Board stated:

Our prior finding did not assume that a railroad was never entitled to earn a reasonable return on property donated by government. We have not previously taken such a position and do not take this position here. We are, however, required to consider whether carriers are under "honest, economical, and efficient management." *This, in turn, means that railroads are not entitled to a return on capital that is not used or useful in the business. Here, it is undisputed that the lift span is not used or useful for rail use.* When we discussed the fact that the lift span was financed by the Corps of Engineers, our intent was not to imply that this automatically rendered the asset ineligible for a return. Rather, our intent was to call attention to the fact that the span was constructed by a third party for river navigation purposes, not for rail purposes. Thus, rail users should neither directly nor indirectly be required to bear the capital cost of a return on the value, donated or not, of the lift span.⁷¹

In this case, the infrastructure improvements on the Line were designed for the sole purpose of increasing track speeds to FRA Class 3 standards or higher to enhance the efficiency of passenger operations.⁷² As noted above, under the Amtrak Decisions, PAS is not required to pay for upgrades related to Amtrak service and or above FRA Class 2 standards.⁷³ But even setting aside the Amtrak Decisions, PAS still should not have to pay the cost to maintain infrastructure to accommodate passenger operations. PAS does not conduct any passenger

for intercity passenger service between East Northfield and St. Albans, VT by approximately 27 minutes." NECR_000981.

⁷¹ Arkansas and Missouri Railroad Company v. Missouri Pacific Railroad Company, 7 I.C.C. 2d 164, 1990 ICC LEXIS 374, at *17 (international citation omitted) (emphasis supplied) ("A&M II").

⁷² NECR initially failed to specify that such improvements were made to accommodate passenger operations, not freight; and, PAS only uncovered this fact during discovery See NECR_0019196 and NECR_0019201.

⁷³ As will be discussed further in reviewing the terms and conditions of the trackage rights agreement proposed by NECR, NECR proposes to eliminate any obligation it would have to PAS to maintain the track to any minimum levels whatsoever.

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operations. Accordingly, consistent with A&M-II, PAS should “neither directly nor indirectly be required to bear the capital cost of a return” on the value of infrastructure improvements related to passenger operations.

This conclusion is reinforced by the fact that NECR was awarded \$50,000,000 in federal funds⁷⁴ to accomplish the infrastructure improvements related to passenger operations.⁷⁵ This was augmented by state grants as well. The Minter Letter indicates that there was approximately \$60 million of total federal and state public investment into the Line primarily for passenger operations; and, the Sheehan Letter also references significant public investments into the Line for passenger rail purposes.⁷⁶ The Minter Letter states that it would be patently unfair to Vermont shippers if PAS’s trackage rights fee were increased as a result of the \$60 million in federal and state investments in the Line. Likewise, the Sheehan Letter asserts that NECR is seeking increased trackage rights compensation based on an artificially inflated valuation derived

⁷⁴ See Project Benefits/Services Outcome Agreement by and among National Railroad Passenger Corporation, the State of Vermont and a State of Vermont (the “Service Outcome Agreement”), Vol. II, NECR_001181 to NECR_001194 (describing the award of grants pursuant to the American Recovery and Reinvestment Act of 2009 and the Passenger Rail Investment and Improvement Act of 2008 and describing the fact that the FRA had provided additional funding beyond that described in the original Service Outcome Agreement).

⁷⁵ Service Outcome Agreement at NECR_001181, VT Agreement at 000981 (“The purpose of this Agreement is to meet the goals of State ... by providing construction assistance from the FRA and State to Railroad ... to reduce the travel time for intercity passenger service....”) and NECR_000992 (committing that NECR will keep the rail line in Class III and Class IV standards for the passenger service). See also, Operating Agreement between National Railroad Passenger Corporation and New England Central Railroad, Inc. (“Amtrak/ NECR Host Agreement”), Vol. II, NECR_001274 to NECR_001326, specifically NECR_001728 [REDACTED]

⁷⁶ It is unclear how much of NECR’s VIP was paid for by grants from the State of New Hampshire. Despite being requested to do so in discovery, NECR failed to produce any agreements or documents reflecting grants from New Hampshire. But, the existence of these grants is apparent from the Sheehan Letter.

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from public investments in the Line for passenger rail purposes. PAS should not have to pay NECR for expenses which NECR did not even incur.

This conclusion further is reinforced by the fact that NECR has no ownership interest in the infrastructure improvements:

[NECR] is a trustee of all property, equipment, and supplies acquired with Grant Funds paid under the terms of this Agreement. Said property, equipment, and supplies is to be used to provide general public service throughout its useful life. *Railroad shall have no ownership interest in said property under Rail Section Manager determines the useful life is at an end and relinquishes State and FRA property rights in writing.*⁷⁷

Consistent with A&M-II, a freight rail carrier should not receive a return on infrastructure when that infrastructure was put in place primarily to accommodate passenger operations, was not funded by the carrier, and is not even owned by the carrier.

NECR also cites A&M II, but instead argues that “the ICC made it clear that the owning railroad is entitled to earn a return on property donated by government that is used or useful in the railroad business provided by the owning railroad.” Opening Statement at 13. NECR misinterprets the precedent. In this case, the TO required NECR and its predecessor to maintain the property to an FRA Class II condition.⁷⁸ The only reason the public funding was provided was because it would be useful in Amtrak’s business, not the railroad business provided by the owning railroad.

⁷⁷ NECR_000993 (emphasis added). The useful life of the property acquired is defined by the agreement as twenty (20) years. NECR_000992.

⁷⁸ TO at Section 3.2 (“CV shall keep the Line, at all times throughout the term of this Agreement or any extensions thereof, in not less than FRA Class II condition”). Without explanation, NECR proposes to eliminate this provision of the TO.

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In sum, and as further explained in the Baranowski, NECR's value for the Line should be reduced by \$22,197,099⁷⁹ to account for the Board's precedent regarding infrastructure improvements not necessary for freight operations.

3. NECR System Value Should Be Based on Actual Market Values, Including from the G&W/RailAmerica Transaction.

FTI also makes further adjustments to NECR's VIP to reflect the actual market value of the remaining infrastructure, after excluding easements and infrastructure improvements as discussed above, primarily to account for the economic obsolescence of assets over time. This adjusted market value was obtained as a result of materials produced in discovery related to the G&W/RailAmerica Transaction, which materials [[REDACTED]

]] The G&W/RailAmerica Transaction is relatively recent and involved a voluntary agreement between two parties. As such, it best reflects the value that a willing seller and a willing buyer placed on NECR.

The materials produced in discovery define [[REDACTED]]⁸¹ The report recognizes that [[REDACTED]

⁷⁹ This figure includes \$19,652,873 of the \$50 million awarded by the federal government and State of Vermont plus five other projects necessary only for passenger operations on the Line funded with public grants. VS Baranowski at 27. The deducted amount likely should be higher, given that NECR has not yet disclosed the amounts received from the State of New Hampshire.

⁸⁰ [[REDACTED]]
]] See VS Baranowski at 26 and 31-32.

⁸¹ NECR_0027894.

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C. NECR's Maintenance Calculations Should Reflect NECR's Actual Maintenance Expenses.

If SSW applies, which it should not, it does require a “tenant” railroad⁸⁶ to contribute towards maintenance expenses, allocated by usage. FTI has determined, however, that RLBA grossly inflated the annual maintenance amounts in order to justify a substantial increase in the existing trackage rights fee. FTI has adjusted the maintenance component to reflect actual, and not normalized, maintenance expenses.

RLBA calculated “the estimated level [annual] amount to maintain the trackage rights line (and each of the segments) in its current FRA Class 3 condition.”⁸⁷ RLBA’s analysis included costs for what it calls “program maintenance” and “routine maintenance.”⁸⁸ However, as discussed above, the analysis should focus only on maintaining the Line to FRA Class 2 standards.⁸⁹ Perhaps anticipating this argument, RLBA did calculate maintenance at the FRA Class 2 standards, but even this number is highly inflated. This is because RLBA calculated and applied a *normalized* maintenance estimate even though SSW requires application of *actual* maintenance of way expenditures per track mile.⁹⁰

NECR’s actual maintenance of way expenditures result in a significantly lower figure. Mr. Baranowski concludes that the RLBA’s “normalized maintenance estimate is wildly inflated as compared to NECR’s actual maintenance of way expenditures per track mile – which already

⁸⁶ As noted earlier, this situation does not involve a tenant/landlord relationship for which SSW was originally designed. PAS is much more than a tenant.

⁸⁷ Opening Comments at 9; VS RLBA at 10-11.

⁸⁸ Id.

⁸⁹ See Amtrak II at *16-*19; TO, Section 3.2.

⁹⁰ Under SSW, the “most appropriate means of sharing M&O expenses is to allocate a portion of the actual expense incurred by MP to DRGW on a percentage use basis.” SSW I, 1984 ICC LEXIS 347 at *39.

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include costs to maintain the trackage rights segments to FRA Class 3 standards.”⁹¹ According to Mr. Baranowski, the cost per mile developed by RLBA of [[REDACTED]] is “more than [[REDACTED]] times higher than the NECR actual maintenance of way expenditures on a per mile basis.”⁹² One significant reason for this disconnect is that RLBA’s normalized estimate includes capital maintenance expenditures funded by grants and not actually incurred by NECR, in violation of SSW.

Accounting for all of the deficiencies in RLBA’s analysis,⁹³ Mr. Baranowski developed an actual maintenance expenditure (plus property taxes per car mile) of \$0.37 per car mile.⁹⁴ This is in stark contrast to RLBA’s overinflated value of \$1.14 per car mile.

D. Summary Conclusion Of FTI’s Market Adjusted Value-In-Place And Resulting SSW Calculation.

If the Board is going to apply the SSW methodology and adopt VIP as a substitute for RCNLD, which PAS maintains it should not, NECR’s VIP valuation needs to be substantially adjusted to remedy various fundamental flaws. It needs to be adjusted to reflect that the real property is held in easement rather than fee simple, to deduct the value of any infrastructure improvements attributed to passenger operations, and to adjust the remaining infrastructure values to reflect actual market values, including values established in the G&W/RailAmerica Transaction. Likewise, NECR’s maintenance expenses need to reflect actual costs necessary to maintain the line for freight operations, or to the extent those are not calculable, should be adjusted consistent with Uniform Railroad Costing System (“URCS”). Finally, consistent with

⁹¹ VS Baranowski at 13.

⁹² Id.

⁹³ See VS Baranowski at 13-18.

⁹⁴ Given that FTI used actual maintenance at a FRA Class 3 standards, which was the only information available, even the FTI estimate of actual maintenance expenditures is overstated.

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the ICC's decision in Amtrak II, PAS should not have to pay an interest rental component to operate over the Former B&M Line.⁹⁵

When these changes to VIP are accounted for, Mr. Baranowski calculates a Restated VIP trackage rights fee of \$0.41 per car mile. This is actually lower than the existing fee of \$0.45 per car mile and is substantially lower than the \$6.70 per car mile (2014) that NECR seeks to have the Board impose.

The fact that the Restated VIP trackage rights fee is lower than the existing fee confirms PAS's argument that SSW is not, and should not, be applicable to this case. SSW was not used originally. As argued above, applying SSW fundamentally alters the goals and assumptions of the Amtrak Decisions, without any justification for reopening or reconsidering those decisions. Instead, the Board should simply renew the TO, including the existing methodology for calculating the trackage rights fee, and adopt small changes to some of the terms and conditions that both parties could support, in order to preserve the competitive balance carefully crafted in the Amtrak Decisions which has benefited shippers and connecting shortlines on the Line over the past two decades.

IV. AN SSW TRACKAGE RIGHTS FEE CAN BE CALCULATED USING A CE APPROACH, BUT CE SHOULD NOT BE APPLIED.

Purely for comparison purposes, recognizing that Board policy favors the use of the CE Approach in SSW cases, FTI also calculated a trackage rights fee using CE.

A. FTI's Approach Was Consistent with Board Precedent.

NECR wrongly asserted that it was not possible to calculate CE in this proceeding. The waybill records⁹⁶ and traffic reports produced by NECR allowed Mr. Baranowski to determine

⁹⁵ Amtrak II, 1990 ICC LEXIS 52 at *28-*31.

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earnings and allocate NECR's revenues between the respective trackage rights segments and the residual NECR. His CE analysis was consistent with the Board precedent. He used the Average Total Cost method to allocate revenues among different segments based on relative URCS costs. Once calculated, the trackage rights segments' earnings were divided by the 2014 STB Pre-Tax Cost of Capital of 14.77% to calculate a capitalized earnings valuation. Mr. Baranowski then used the resulting valuation to calculate an annual interest rental amount by multiplying the valuation by the same cost of capital rate. This interest rental component was then applied to the Line. His application of the CE Approach is fully explained in his verified statement and in his workpapers, which are being submitted as part of his statement.

The CE Approach produces an interest rental fee of \$0.71 for the Northern Segment and \$0.82 for the Southern Segment. Consistent with the Amtrak Decisions, he did not apply an interest rental component to the Middle Segment. These fees combined with the actual maintenance expenses for all three segments (which actual expenses were discussed *infra* in Part III.C) and the variable cost for each segment produces an overall per car mile trackage rights fee of \$0.61. Clearly, this is higher than either the Restated VIP or the existing trackage rights fee.

B. CE Should Not Apply in this Proceeding.

As discussed above in Part III.D, SSW should not apply to this case. Specifically, CE should not apply because, as discussed above in Parts I and II, applying the SSW methodologies to justify any excessive increases in PAS's trackage rights fee threatens PAS's ability to compete against NECR and other modes with corresponding public interest harms—in direct contravention of the Amtrak Decisions and many aspects of the RTP. Instead, the Board should

⁹⁶ For purposes of this analysis, Mr. Baranowski limited the waybill records to the 2014 records with positive revenues and complete routing information. A total of [[REDACTED]] VS Baranowski at 35.

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simply renew the TO, including the existing methodology for calculating the trackage rights fee, and adopt small changes to some of the terms and conditions that both parties could support, in order to preserve the competitive balance carefully crafted in the Amtrak Decisions which has benefited shippers and connecting shortlines on the Line over the past two decades.

V. IF CHANGES TO THE TRACKAGE RIGHTS ORDER ARE NEEDED, THE BOARD SHOULD REJECT MANY OF THE PROPOSED NECR'S CHANGES AS UNNECESSARY, UNJUSTIFIED, AND GENERALLY ANTI-COMPETITIVE.

NECR attaches to its Opening Statement a proposed trackage rights agreement. In its Opening Statement, NECR characterizes its changes to the TO as falling into two categories: “clarifications” and “updates.” In many cases, that is exactly what NECR has done – clarified and updated the agreement. But in some cases those two terms are simply not applicable. In fact, some changes NECR proposes constitute a wholesale revision of the agreement from one that supports and enables head-to-head competition to one that enables NECR to stifle it at every turn. In the sections that follow, PAS addresses each of the changes that NECR has proposed to the TO, section by section.⁹⁷

Section 0 – Definitions

Section 0.1 – Definition of “Agreement”.

Both the NECR and PAS proposed agreements substitute the new parties. PAS does not oppose the NECR modifications.

⁹⁷ NECR did not bother to address each change it proposed. In some cases, that would seem to be reasonable, but in others it is not, because the proposed change would fundamentally alter the relationship between NECR and PAS. In order to address all issues, and to more quickly permit the Board to arrive at an agreement it deems reasonable to impose, PAS will address each and every change proposed, regardless of whether PAS simply agrees, or disagrees, with the proposal. In addition, in order to make the most efficient use of the Board’s resources, PAS will simply use the NECR proposed agreement as the basis for its comments, rather than propose a new draft.

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Section 0.7 – Definition of “CV Lines”.

NECR inserts the phrase “and which are currently owned by NECR,” at this point with reference to the CV Lines. PAS opposes the addition.

As discussed above, however, NECR admits that “NECR owns only an easement and not fee title”.⁹⁸ Further, NECR provides no support for inclusion of this new provision. Rather than engage in a variety of rhetorical questions and hypotheticals with regard to the potential future impact of this phrase, PAS simply notes that (1) the added phrase otherwise does not add anything necessary to the agreement and its meaning, (2) its addition is not supported by either the facts or NECR argument, and (3) there is a potential for mischief in adding it. The addition potentially introduces a meaning that is not otherwise intended by the parties. PAS opposes the addition.

Section 0.8 – Definition of “Effective Date”.

This is a new provision added by NECR that attempts to have the compensation provisions imposed retroactively. PAS does not support imposition, by the STB, of retroactive compensation in this proceeding. For the reasons stated in Section VI below, imposing a trackage rights fee retroactively in this case is both unfair and unreasonably chills competition.

Section 0.9 – Definition of “Former B&M Line”.

NECR again inserts the phrase “and which are currently owned by NECR,” this time with reference to the Former B&M Line. As discussed above, with regard to the definition of the CV Lines, PAS opposes the addition.

⁹⁸ Opening Statement at 12

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Section 0.11 – Definition of “Hazardous Substance”.

NECR inserts a definition of “Hazardous Substances” which is entirely subjective and incredibly broad and could conceivably cover any substance that could be on a PAS train or in the possession of PAS crews. PAS would submit that due to the extensive state and federal environmental regulatory scheme that objectively regulates releases or threats of releases adequately addresses the concerns raised by NECR and, as discussed in Section 9(b) below, this definition and the procedures proffered by NECR are not warranted. Should the Board elect to adopt any definition, however, PAS would propose the standard definition of “Hazardous Materials” contained at 49 C.F.R. §171.8. This definition is not only clear and objective, but also arises out of the regulations promulgated pursuant to the Hazardous Materials Transportation Act, 49 U.S.C. § 5101 et seq. and related hazardous materials regulations contained in 49 CFR Parts 100-180, which regulates the movement of such materials by rail carriers.

Section 0.13 – Definition of the “Line”.

NECR again inserts the phrase “and which are currently owned by NECR,” this time with reference to the Line. For the reasons noted above with regard to the definition of the CV Lines, PAS opposes the addition.

Sections 0.14, 0.16, and 0.18 – Definitions of “NECR”, “PAS” and “STB”.

PAS has no objection to these modifications.

Section 1 – Grant of Trackage Rights.

Sections 1.1, 1.2, 1.3,1.3.3, 1.4, 1.4.1, 1.5, 1.6, and 1.8 – Grant of Trackage Rights.

PAS has no objection to the modifications in these subsections.

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Section 1.9 --- Grant of Trackage Rights.

NECR has introduced an entirely new subsection here, and that subsection would have a significant impact on the trackage rights. NECR, in its Opening Statement, addresses only one of those impacts, and that is described below. First, however, it is important to describe the full extent of the new provision and the breadth of its potential effect.

Subsection 1.9(a) contains part, but not all, of the provisions that NECR would impose in order to eliminate haulage from the commercial arrangements available to PAS and its customers for competition on the Line. PAS objects to this addition, and provides a consolidated response to this new restriction below, when discussing the changes to section 10.7.

Subsections 1.9(b) through (d) are reasonable operational limitations and prohibitions on PAS from making unilateral changes to NECR's Line. PAS has no objection to the additions in these three subsections.

Subsection 1.9(e) would impose fueling prohibitions on PAS and loading/unloading limits on PAS that are not equally applicable to NECR or any other tenant railroad. PAS objects to this unequal treatment and proposes that any rules regarding fueling, loading/unloading, and the like should be of general applicability to NECR and other tenant railroads. Further, although there is reference to "except as permitted under this Agreement and in accordance with the terms and conditions herein," there seems to be no other provisions in the Agreement that actually permits fueling or the loading, unloading or storing of materials on the Line. As such, this clause is meaningless and should be deleted.

Subsection 1.9(f) deals with liability, and in a manner that is different than is provided for in the existing Section 7 release and indemnification. Rather than having competing liability

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provisions in different sections of the agreement, PAS proposes to continue to have all of the liability provision in one section.

Section 2 - Term

Section 2.1 – Term and Termination.

PAS has no objection to the modifications set forth in this subsection other than is discussed above in addressing Section 0.8 with regard to the definition of “Effective Date.”

Section 2.2 – Term and Termination.

NECR proposes to reduce the reopening period from twenty (20) years to ten (10) years. PAS opposes this reduction. NECR’s proposal would introduce a significant amount of uncertainty into the process, to the detriment of the shipping public. When the ICC initially imposed a twenty (20) year reopening term, it did so with full knowledge of the complexities of railroad operations, projections, service, and customer service contracts. Reducing the reopening provision down by half significantly undermines the ability of PAS and its customers to plan, and would undermine the value of the competitive access provided for in this agreement. Further, when one considers the NECR proposal with regard to the definition of “Effective Date,” the effect of this NECR proposal would to allow this entire process to be reinitiated in only eight (8) years. NECR has provided no justification for this modification.

Sections 2.3 and 2.4 – Term and Termination.

PAS has no objection to the modifications set forth in these two subsections.

Section 3 – Compensation.

For the most part, PAS addresses the development of compensation numbers above. Notwithstanding, the previous discussion does not address the many changes that NECR

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proposes in this Section 3 that would also have a material effect on the compensation paid under this agreement. Those changes are discussed hereinafter.

Section 3.2 – Compensation.

NECR proposes to eliminate a provision that requires it to keep the Line in a minimal operational status. NECR does not justify this. For several reasons PAS opposes this deletion.

First, PAS is paying for this maintenance. In this and other provisions (specifically what is proposed to be added in Section 1.9(e)), NECR reserves to itself and its discretion the right to downgrade and potentially place out of service trackage that PAS is using and paying for. This provides NECR with a new and powerful tool to beat down competition and punish customers who attempt to have PAS service. Second, the provision that NECR proposes to delete only imposes a minimum standard, not a maximum standard, and so cannot be opposed by NECR as requiring a level of maintenance not previously required of it under the TO.

Section 3.3 – Compensation.

NECR proposes to add a provision that allows it to add costs to PAS on top of what it proposes in this proceeding, and to do so in a manner that is not subject to any review or oversight. PAS opposes this addition.

As noted above, any such increase in costs undermines the taking compensation and competitive parity established in the Amtrak Decisions; and, NECR has not provided any justification for reopening or reconsidering those decisions. NECR has had two years to present its case, and it should live with that case.

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Section 3.4 – Compensation.

NECR proposes to add a provision that would have the effect, over time, of inflating the compensation amounts far out of proportion to the actual costs of service. PAS opposes this addition.

By providing that “in no event shall the annual rate adjustment be less than 0%,” NECR would completely eliminate from consideration any decrease in the cost of service, and by default magnify any subsequent increase in the cost of service. To present a hypothetical example, assume that application of the index under the old agreement (and without the new provision of section 3.4) reflected the following over a four year period: \$1, \$0.75, \$0.95, \$1.05. Under NECR’s proposed new Section 3.4 language, the compensation would instead be: \$1, \$1, \$1.20, \$1.30. Rather than a four year absolute increase of 5%, the new language would impose an absolute increase of 30%. There is no justification for this other than to introduce, over time, a provision that makes PAS’s operations over the Line progressively more and more expensive, and less and less competitive.

Section 3.5 – Compensation.

PAS has no objection to the changes proposed in this subsection.

Section 3.6 – Compensation.

In this section, the original TO calls for a bill to be submitted by the fifteenth of each month, and payment on that bill within two (2) weeks. Given the gravity of the potential for missing this two week window and the routine need for accounting and other business processes, PAS proposes that the time for the payment be extended to forty-five days.

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Section 3.7 – Compensation.

NECR proposes that PAS be required to subsidize “any major capital project ... which may become ... desirable in NECR’s discretion in the ordinary course.” PAS opposes this addition.

Here again NECR seeks to introduce the ability to transfer new costs over to PAS and to force PAS to subsidize NECR’s operations and capital. If PAS seeks to construct a piece of infrastructure to help access PAS’s customer, PAS bears the full cost. If NECR were to seek to build the same piece of infrastructure to help NECR access an NECR customer, however, NECR proposes that PAS bear a proportion of the cost. This new provision harms competition and is not consistent with the spirit and intent of the Amtrak Decisions or the original trackage rights agreement.

Section 3.8 – Compensation.

As an initial matter, NECR is being somewhat disingenuous here. It knows whether it is consolidated with its parent corporation for tax purposes, but leaves that issue unresolved with regard to the applicable tax rate. For that reason, it is rather hard to figure out just what NECR proposes.

Section 3.9 – Compensation.

In this new provision, NECR seeks the unilateral right to audit any and all “records and activities” for verification – not just the compensation terms of the proposed agreement – but all of the provision of the agreement. PAS opposes this addition.

This new provision would permit NECR to do exactly what the STB has told NECR that it does not have the right to do – review the revenue waybills of traffic PAS moves over the Line. And, it would do so much more. It would permit NECR to review PAS customer contracts. It

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would permit NECR to review employee records. Neither the fact that the proposed provision is in the compensation section nor the fact that NECR later in Section 3.9 speaks to car counts justifies the broad expanse of the proposed subsection’s opening statement and further clause in the second sentence (“Without limiting the generality of the foregoing…”).

Section 4 – Additions and Alterations.

PAS has no objection to the proposed substitutions.

Section 5 – Scheduling of Trains and Maintenance; Operating Rules

Section 5.1 – Scheduling of Trains and Maintenance; Operating Rules.

PAS has no objection to the proposed changes in this subsection except for the substitution NECR proposes with regard to scheduling work for upgrades. The ICC imposed an obligation in the original agreement to ensure that the owner use its best efforts to schedule upgrades and maintenance in a manner that would minimize interference with or disruption of PAS’s operations over the line. Without justification, NECR proposes to downgrade that obligation. PAS opposes that change, again based on the spirit and intent of the Amtrak Decisions.

Sections 5.2 and Section 5.3 – Scheduling of Trains and Maintenance; Operating Rules.

PAS has no objection to the proposed substitutions.

Section 5.5 – Scheduling of Trains and Maintenance; Operating Rules.

NECR proposes to add an entirely new subsection that would permit it to impose– in its sole discretion – any operating rule regardless of whether it was imposed for an anticompetitive purpose or not. Further, NECR requires compliance with all “special rules governing the transportation of Hazardous Materials” whether those “special rules” are of generally application

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or not. PAS objects to this subsection, noting that any such operating or HazMat rules should be of general applicability.

As we have seen, NECR does not hesitate to impose more restrictive rules on so-called “foreign” railroads that it does not impose on itself. The STB has already addressed similar NECR rules in the form of an NECR speed restriction placed only on “foreign railroads” but not on itself or Amtrak. The STB held that such a speed restriction was unreasonable. Therefore, permitting NECR’s currently proposed provision would lend STB consent to exactly the type of behavior that it previously prohibited.

Certainly a railroad has to have the ability to impose requirements of general applicability, but that is not the case with NECR’s proposal. Given NECR’s past behavior under the TO, and given the need to ensure balanced competition on the Line, it is significantly more appropriate to ensure that any operating rule imposed is one of general application. Such a provision is not unusual. For example, in the trackage rights agreement governing Norfolk Southern Railway Company’s rights over the Southern Electric Railroad Company, the parties agreed that:

User in its use of the Subject Trackage shall comply in all respects with its own safety and general conduct rules, equipment operation and train handling rules, and hazardous materials instructions. While using the Subject Trackage, User shall comply in all respects with its own operating rules, timetables, and special instructions, and the movement of User's trains, locomotives, cars, and equipment over the Subject Trackage shall at all times be subject to the orders of User's transportation officers; *provided, however, that such operating rules, timetables, and special instructions and orders of User's transportation officers shall not unjustly discriminate between the parties.*⁹⁹

⁹⁹ See Norfolk Southern Railway Company – Trackage Rights Exemption – Southern Electric Railroad Company, FD 36020(Filed April 11, 2016), see Section 9.8. Included in Vol. II. See also the trackage rights agreement submitted in Soo Line Railroad Company – Trackage Rights Exemption – Dakota, Minnesota & Eastern Railroad Company, FD 35906 (Filed March 30, 2015), also included in Vol. II, specifically Section 6.5 of that agreement (“The operation of

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Section 6 – Clearing of Derailments and Wrecks.

PAS has no objection to the proposed substitutions.

Section 7 – Release and Indemnification.

Section 7.2 – Release and Indemnification.

PAS has no objection to the proposed substitutions.

Section 7.3 – Release and Indemnification.

NECR has made changes that on the surface look minor, but which in practice would have a far-reaching impact on the allocation of liability that has governed operations over the Line for decades. PAS opposes the changes to this section.

First, NECR would have PAS defend and indemnify NECR for Amtrak passenger injuries (covered in NECR’s proposed “and third party injuries (including death).” Such a provision was not included in the original trackage rights agreement and is not something that was allocated to B&M (despite the fact that Amtrak was known to operate on the line).

Furthermore, [REDACTED].¹⁰⁰

Second, NECR has introduced the concept of indemnification for claims made against it, rather than actual damages sustained. This would enable NECR to settle each and every claim made against it, regardless of the nature of that claim or whether it was even remotely valid, with

SOO over the Subject Line shall at all times be in accordance with the rules, instructions and restrictions of DM&E, provided, however, that such rules, instructions and restrictions shall be reasonable, just and fair between all parties using the Subject Line and shall not unjustly discriminate against any of them. These rules and instructions shall include, but not be limited to, operating and safety rules, timetables, special instructions, bulletins, general orders and authoritative directions of train dispatchers and operating officers. Other than those restrictions provided for herein, DM&E will not make any rule or restriction applying to SOO's trains that does not apply with equal force to DM&E's trains.”)

¹⁰⁰ See, Amtrak/NECR Host Agreement at NECR_001738 ([REDACTED])

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the comfort that it would not be impacted in any way – instead only its rail competitor PAS would be damaged, and to the extent of the claim made against it. Again, such a provision was not included in the original trackage rights agreement and is not something that was allocated to B&M (despite the fact that Amtrak was known to operate on the line).

NECR does not even attempt, in its Opening Statement, to justify these changes.

Section 7.6 – Release and Indemnification.

PAS has no objection to the proposed substitutions.

Section 8 – Default; Payment Delinquency.

PAS has no objection to the proposed substitutions.

Section 9 – Insurance and Hazardous Substances.

a. Insurance

Despite the fact that no insurance coverage was mandated by the ICC in the Amtrak Decisions, NECR now asks the Board to establish and impose specific insurance levels. PAS objects to this wholesale change.

NECR provides no real justification for the need now to include insurance requirements where none were found before.¹⁰¹ Although, NECR outlines specifically the types and levels of insurance required, it does nothing to justify the astonishing levels demanded other than to link the liability insurance levels to Amtrak operations on the Line.¹⁰² If the Board were to decide to wade into the specifics of the insurance that it would impose, it would have to first dissect the

¹⁰¹ NECR merely asserts that, apparently unlike 1988, “It is now standard for trackage rights agreement to include insurance provisions to back up the liability and indemnity provisions....” Opening Statement at 17. Of course, if one did a survey of trackage rights agreements filed in 1988 and again today, one would come to the correct conclusion that insurance provisions are included when the parties have negotiated them, and not when they have not.

¹⁰² Id.

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proposed insurance provision to see what would be required and what would not,¹⁰³ and at what levels.

Further, the one justification NECR has placed before the Board – claiming that “[t]he level of insurance is directly linked to the operations of Amtrak over the trackage rights line, and correlates with the Amtrak liability statute”¹⁰⁴ –ignores the extensive liability protections afforded it in Operating Agreement between Amtrak and NECR. Indeed, Amtrak indemnifies NECR, irrespective of any fault of NECR, for substantial liability,¹⁰⁵ making it highly unlikely that NECR would be responsible for a claim arising from Amtrak intercity passenger operations, and even less likely that NECR would face potential liability for such claims due to an act or omission of PAS.

Moreover, the premise that insurance provisions are “standard” in recent years is simply incorrect. For example, an affiliate of NECR granted trackage rights to another rail carrier pursuant to an agreement silent as to insurance levels despite allocating liability.¹⁰⁶ In another case, another affiliate of NECR received trackage rights over another carrier, and the host railroad merely required a continuation of the coverage that NECR’s affiliate was already carrying for its own purposes on its own trackage.¹⁰⁷ Accordingly, agreements entered into by

¹⁰³ For example, NECR would require “products and completed operations” coverage, when that coverage is usually only for manufacturers placing products into the marketplace.

¹⁰⁴ Id.

¹⁰⁵ See NECR_001738.

¹⁰⁶ Union Pacific Railroad Company—Trackage Rights Exemption—California Northern Railroad Co., FD 35462 (Filed January 25, 2011).

¹⁰⁷ Arkansas Midland Railroad Co., Inc.--Trackage Rights Exemption—Caddo Valley Railroad Co., FD 35530 (Filed June 7, 2011).

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NECR's own affiliates confirm that insurance arrangements vary throughout the industry and are generally not in the form or amounts sought by NECR in this proceeding.

Moreover, NECR seeks to significantly alter the existing insurance program covering PAS, including dictating a specific amount of self-insured liability retention. The self-insurance retention requirement itself would result in substantial additional cost to PAS were it even able to procure it.¹⁰⁸ Not only would NECR also require that PAS insure NECR's property, despite no previous requirement, it also would reserve the right of NECR to request changes to the PAS insurance program, fueling further uncertainty and cost in the insurance marketplace. The Board should therefore refrain from requiring PAS to undertake these wholesale changes to its insurance program.

b. Hazardous Substances

Ignoring the comprehensive state and local regulation of the transportation of hazardous materials, NECR proposes to adopt an overly broad definition of Hazardous Substances and impose on PAS a set of procedures for addressing the transportation of Hazardous Substances over the Line. PAS objects to NECR's proposals.

NECR's proposed procedures are largely duplicative of environmental reporting and response requirements contained in applicable federal and state laws, and are not necessary to protect the interests of NECR, the environment, or the public health and safety around the Line. For example, hazardous materials release reporting requirements are established by multiple laws such as 49 C.F.R. § 171.15 (incidents required to be reported to the National Response Center); Vt. Admin. Code § 16-3-202:7-105 (Vermont requirements for reporting releases of hazardous

¹⁰⁸ A self-insurance retention acts much like a deductible for other insurances. The smaller it is, the greater the cost to policy holder.

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materials); and 310 MA ADC § 40.0331 (Massachusetts requirements for reporting releases of hazardous material). Similarly, there are also extensive state and federal environmental laws that govern response actions in the event of a release of hazardous materials or substances, such as 42 U.S.C. § 9604 (governing response and removal actions arising under CERCLA); Vt. St. Ann. § 6615b (governing response actions in the event of a hazardous materials incident in Vermont); and M.G.L.A c. 21E, § 4 (governing response actions in the event of a hazardous materials incident in Massachusetts). And, these federal and state laws generally define what constitutes a hazardous material subject to their requirements.¹⁰⁹

In short, Section 9.2(a) addresses any concerns that NECR may have regarding the reporting and remediation of hazardous substances by requiring PAS to comply with applicable environmental laws. The extensive regulatory scheme already ensures timely reporting of incidents involving hazardous materials and the response to such incidents. That is all that is necessary to ensure the protection of NECR's interests, of the environment, and of the public health and safety.

Nevertheless, NECR seeks to have the discretion to impose additional environmental reporting and remediation requirements on PAS that are unnecessary, onerous, and subject to abuse. For example, NECR proffers Section 9.2(d) to require PAS to undertake notification to emergency responders in the event of any accident or derailment involving a PAS rail car. Such a requirement would mean that PAS would need to notify emergency responders even if there is a two wheel derailment or some other minor event. Neither NECR nor Amtrak would otherwise be required to provide such notification. Additionally, NECR also seeks the right to require PAS

¹⁰⁹ See, e.g., 49 C.F.R. § 171.15(b) (defining when a report is required in circumstances involving radioactive materials, infectious substances, marine pollutants, or evolutions of heat).

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to undertake response actions while giving NECR the discretion to determine if such actions are acceptable to NECR (Sections 9.2(vi) & (vii)). Thus, NECR seeks the discretion to be able to force PAS to incur substantial costs and delays in remediating environmental conditions to a standard not required by applicable laws.

Simply requiring PAS to comply with applicable environmental laws raises no concerns that NECR will abuse any discretion granted to it, as it has done in the past. In short, NECR can show no compelling need for either adopting an overly broad definition of Hazardous Substances or to creating reporting and remediation requirements that are not governed by applicable law. Consequently, the most that PAS should be required to do would be to comply with those applicable laws.

Section 10 – General Provisions.

With the exception of new provisions that NECR has inserted into Section 10.7, PAS has no objections to the changes that NECR has made to this Section 10.

Section 10.7 – General Provisions.

NECR has inserted an entirely new provision into Section 10.7, specifically prohibiting the performance of haulage. Language to the same effect has been inserted into Section 1.9(a). For all of the reasons discussed herein, PAS opposes the provisions inserted into Section 10.7 and Section 1.9(a).

Specifically, NECR proposes to add the following language to the renumbered Section 10.7:

By way of clarification, the foregoing does not imply that PAS may handle trains, cars or equipment in haulage service for another carrier, except where the cars or equipment in haulage service for another rail carrier, except where the cars or equipment are being transported under a haulage arrangement for Norfolk Southern Railway for interchange with NECR.

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NECR also proposes to add a new Section 1.9, a portion of which reads:

Notwithstanding anything to the contrary contained in this Agreement or otherwise agreed by the parties hereto prior to the Effective Date, PAS (or any agents or affiliates acting on their behalf) shall not: (a) permit or admit, without permission in writing from NECR, any third party to the use of all or any part of the Line, nor contract, or make any agreement to provide haulage over the Line of trains or cars of any third party which in the normal course of business would not be considered as the trains or cars of PAS or ST, as applicable....”

The original TO contained no restriction on the commercial terms of the traffic that could be carried. The original carriers and the ICC knew what haulage was, and could have imposed a condition prohibiting haulage had they wished, but they did not. In fact, Section 8(a) of the Agreement covering Joint Section White River Junction – Brattleboro, between Boston and Maine Railroad and Central Vermont Railway, Inc., January 1, 1930, (the “1930 Agreement”), included in Vol. II, dealt with one party performing haulage for the other.¹¹⁰ Further, and as explained above in Footnote 16, some shippers on the Line would be served exclusively by B&M. And as discussed above, prohibiting only PAS from performing haulage service, while allowing NECR to continue to provide haulage service, would disrupt the competitive parity intended by the Amtrak Decisions.

Further, the newly numbered Section 10.7 (in the original TO, Section 9.7, and hereinafter “Section 10.7 Language”) is a standard term found in most trackage rights agreements. It provides guidance on application of liability, car counts, and other provisions in

¹¹⁰ [

] NECR_001202. See also, Id., [

] NECR_001208. The 1930 Agreement (NECR_001195 to NECR_001222) is included in its entirety in Volume II.

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an industry that involves sharing of locomotives and rail cars that are owned by a variety of carriers, private car fleet companies, and customers. It was not, and is not, a restriction on the commercial terms that the tenant railroad can engage in while using the trackage rights.

For example, a nearly verbatim counterpart to the Section 10.7 Language is found in Section 22(g) of the trackage rights agreement filed in Norfolk Southern Railway Company – Trackage Rights Exemption – Delaware and Hudson Railway Company, Inc., FD 34209 (Sub-No. 1), filed November 17, 2014, included in Vol. II. However, the parties in that case further included a Section 3(f) which specifically dealt with haulage:

Notwithstanding any other provision of this Agreement to the contrary, NSR may not permit or admit any third party to the use of all or any part of the Subject Trackage, nor may NSR contract or make any agreement to provide haulage over the Subject Trackage of train, locomotives, cars or cabooses of any third party which, in the normal course of business, would not be considered as the trains, locomotives, cars or cabooses of NSR, or in any other way provide haulage service for other carriers over the Subject Trackage; provided, however, that this Section 3(f) shall not be construed to prohibit NSR from using the locomotives, cars and cabooses of another railroad as its own in NSR trains pursuant to a run-through agreement with any railroad, or a bona fide equipment lease.

Such language has become commonplace in trackage rights agreements today. Parties know that such language does not relate to commercial restrictions on the use of trackage rights.¹¹¹

NECR offers no justification sufficient to explain these two provisions. Instead, it points to the STB's decision in the show cause portion of this proceeding as indicating that PAS did not

¹¹¹ See, e.g., the trackage rights agreement filed in Canadian Pacific Railway Company – Trackage Rights Exemption – Norfolk Southern Railway Company, Buffalo, NY, FD 34561 (Filed October 1, 2004), included in Vol. II, see Section 22(g) (Section 10.7 Language) and Section 3(f) (no haulage). See also, the trackage rights agreement filed in BNSF Railway Company – Trackage Rights Exemption – Union Pacific Railroad Company, FD 35770 (Filed September 26, 2013), and included in Vol. II, see Section 2(a) (where in the introduction the provision deals operationally with “Equipment in BNSF’s account” but later in that same provision restricting the commercial use of the rights to provide haulage under subsection (iv)) and Section 2.2(a) (same, with regard to “Equipment in UP’s account”).

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bother to presented rebuttal to rebut NECR's claims that haulage was precluded under the original agreement. NECR, however, mischaracterizes the record and the STB decision.

On June 17, 2014, NECR filed a request to set new terms and conditions for the trackage rights. In conjunction with that, NECR instituted two new anti-competitive operating rules. First, NECR placed speed restrictions on PAS trains that were not generally applicable to its trains or to the trains of Amtrak. Second, NECR required the production of revenue (not operational) waybill information for all PAS cars moving over the Line. Clearly the Board recognized, in its decision served on October 2, 2014, that "PAS argues that NECR is violating the terms and conditions established in Amtrak II by imposing improper conditions on PAS's operations that negatively impact the ability of PAS to serve its customers." PAS did not point by point attempt to rebut the arguments NECR presented in its pleadings, but nevertheless the Board found that the unilateral imposition of new terms and conditions was not justified. As the Board did with regard to other changes that NECR wanted imposed, the Board ordered the parties to negotiate to see if common ground could be found.

There is no evidence in the record for believing the parties intended Section 10.7 to mean anything else than it does, and no evidence that the new restriction is justified in any manner. Commercial haulage by a carrier is not an operational issue generally governed by the STB, or the ICC before it, and would not be a commercial restriction that would be imposed absent a reason to do so. Haulage certainly was not precluded for B&M prior to having the Line removed from its ownership. There is no reason to add a commercial restriction on the trackage rights at this later date.

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Section 10.8 – Assignment.

NECR seeks to impose new restrictions on the trackage rights agreement. In the original TO, B&M’s rights were assignable to any affiliate of B&M “following consultation with CV.” NECR now seeks to require PAS to obtain NECR’s written consent to such an assignment. NECR has not justified this modification to what was imposed by the ICC in 1988. PAS objects to this change.

VI. IF THE BOARD APPLIES THE SSW METHODOLOGY WITH A RESULTING INCREASE IN THE TRACKAGE RIGHTS FEE, THE HIGHER FEE SHOULD NOT BE RETROACTIVE.

PAS states above that it opposes the imposition, by the STB, of retroactive application of trackage rights compensation. Imposing a trackage rights fee retroactively in this case is both unfair and unreasonably chills competition. Of course, should the Board accept PAS’s view that there should be no change in the compensation methodology set forth in the TO, the Board need not even address this issue.

NECR has previously requested that the trackage rights fee should be made retroactive to December 23, 2014, the date the Board instituted this proceeding to set new terms and conditions. PAS previously agreed to NECR’s request for retroactivity only in order to facilitate mediation. At the time, both parties felt that mediation would be successful and that any period of retroactivity would be short and not create disruptions in the marketplace.

That no longer is the case. Not only are the premises under which PAS agreed to retroactivity no longer applicable, retroactivity would be harmful to the public and to competition. While an agreement to permit retroactive imposition of a trackage rights fee to incentivize expeditious resolution of a proceeding is in the public interest, the same cannot be said the promise of retroactivity morphs into an incentive to prolong the proceeding and creates

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substantial uncertainty, especially one where one party is proposing to increase the production costs of its competitor by a factor of 1,389%.¹¹² Therefore, PAS no longer supports the retroactive application of any newly established fee.

NECR has repeatedly engaged in conduct designed to prolong this proceeding. After mediation failed, PAS served discovery on NECR on June 11, 2015. Not only did NECR resist discovery, but it also sought to limit discovery by filing a request for a preliminary determination as to the appropriate methodology to be used in calculating the trackage rights compensation and a request to be protected from having to produce discovery on any other SSW methodology. This request precipitated a long series of back and forth pleadings and argument. NECR did eventually produce discovery materials, but limited those materials only to its VIP methodology. Even worse, many of the documents that NECR did produce were inadequate and had to be reproduced, resulting in additional delays.¹¹³ It was only after the Board issued its February 12, 2016 decision and assigned an ALJ to discovery disputes that NECR began to cooperate

¹¹² PAS would have to pay the higher trackage rates fee with respect to all of the the traffic it moved under its previously existing competitive rates which were in place when it benefited from competitive parity with NECR as a result of the appropriate trackage rights fee from the TO. See, e.g., NCR, 1997 STB LEXIS 123 at *15 (“We will not, however, accede to an indefinite delay of the proceeding. NS cannot reasonably be expected to provide rail service indefinitely at current freight rates while NCR seeks a lease compensation prescription at a significantly higher level and requests that it be made retroactive to the expiration of the lease agreements.”)

¹¹³ The initial information provided by NECR was inadequate because NECR extensively redacted even “Highly Confidential” documents or produced tables as a .pdf rather than in native form, rendering them incomprehensible.

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somewhat.¹¹⁴ Even then, it still took an additional three months and PAS filing a supplemental motion to compel for PAS to receive adequate responses to its initial discovery requests.¹¹⁵

Over the nearly eleven months that NECR obstructed discovery and unnecessarily dragged out the proceeding, PAS made business decisions, moved traffic, priced shipments, and collected revenues based upon the existing trackage rights fee. If the Board rejects PAS's arguments and imposes a higher fee, it should not make its decision retroactive. PAS cannot go back and collect this higher fee from its shippers. Likewise, PAS should not have to come up with the money to cover the difference between the old fee and the new fee due to the fact that it was NECR's own actions that unnecessarily delayed this proceeding. If the Board ordered retroactive trackage rights compensation over PAS's objection, it would be rewarding NECR for its delay and obstruction.

Similarly, as a result of NECR's delay and obstruction in this proceeding, PAS is in a quandary with regard to pricing traffic on the Line. Just how much of the 1,389% increase demanded by NECR should PAS factor into proposed rates? This uncertainty certainly has an effect on the shipping public that is not consistent with the public interest.

Clearly, given the extensive delays caused by NECR, the incentive that the retroactivity concessions were designed to encourage, *i.e.*, a quick resolution of the dispute with little to no impact on shippers, is no longer relevant. In fact, it is quite the opposite. Retroactivity at this stage would harm both PAS as well as its past, current, and potential shippers. That, in turn,

¹¹⁴ See New England Central Railroad, Inc. – Trackage Rights Order – Pan Am Southern LLC, FD 35842, Decision 44759 (STB served February 12, 2016).

¹¹⁵ Of course, it is still not clear that NECR has, indeed, responded to all discovery requests. It was not until NECR filed its Opening Statement that PAS learned that NECR “owns only an easement and not fee title” to property. NECR Opening Statement at 12. PAS would not previously been in position to question whether the details of this would have had to been disclosed pursuant to one or more of its discovery requests prior to this point in the proceeding.

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harms competition. Further, in other cases, involving passenger operations, the Board has gone so far as to say it is without jurisdiction to impose retroactivity absent the parties' consent. In sum, PAS does not consent to retroactively; and, it should be not be bound by its prior consent.¹¹⁶

CONCLUSION

Since 1988, NECR and PAS have competed against each other on the Line, on equal terms, as a result of the carefully crafted Amtrak Decisions. This competitive parity benefited shippers and shortlines, who enjoy lower rates, increased service offerings, and greater efficiencies and innovations as a result of strong competition between the two parties. This competitive parity also worked relatively well for the parties—until NECR came under new ownership and lost a key customer to PAS, that is. Only after these two events did NECR seek to change the terms and conditions of PAS's trackage rights.

Driven purely by internal revenue considerations, and under the guise of SSW, NECR seeks to use this proceeding to substantially increase PAS's costs, thereby threatening if not wholly eliminating PAS's ability to compete with NECR. First, such a result is directly at odds with the Amtrak Decisions, which were designed to ensure that the parties should be treated "without prejudice or partiality." And, there is no basis for reopening or reconsidering the Amtrak Decisions—nor has NECR provided one. Second, such a result is directly at odds with the public interest and many aspects of the RTP. Accordingly, the Board should reject NECR's

¹¹⁶ See also National R. Pass. Corp. and UP Tracks & Facilities, 348 I.C.C. 926, 935-37 (1977)("In the absence of consent by the parties, this Commission is without jurisdiction to fix compensation retroactively."); National R. Pass. Corp. application under section 402(a) of the Rail Passenger Service Act, FD 30426. 1 I.C.C. 2d 243; 1984 MCC LEXIS 210, at *13 (ICC served Oct. 25, 1984). If the Board accepts PAS's view that there should be no change in the compensation methodology set forth in the TO, the Board need not even address this issue.

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proposals. Instead, the Board should simply renew the TO, including the existing methodology for calculating the trackage rights fee, and adopt small changes to some of the terms and conditions that both parties could support, in order to preserve the competitive balance carefully crafted in the Amtrak Decisions which has benefited shippers and connecting shortlines on the Line over the past two decades.

If the Board rejects PAS arguments, at most, the Board should not adopt NECR's VIP methodology or proposed fee thereunder. This Reply and the Verified Statement of Michael Baranowski discuss why NECR's VIP approach is fundamentally flawed. It grossly exaggerates the value of NECR's right-of-way, includes infrastructure improvements not used in freight operations, fails to account for the actual market value of the NECR system, and overinflates the maintenance costs necessary to maintain the Line at FRA Class 2. If the Board is inclined to use VIP, it should adopt the Restated VIP methodology and proposed fee of \$0.40 per car mile thereunder.

Although PAS also offered a CE analysis, cognizant of the Board's preference, PAS believes adoption of the fee calculated thereunder could impair PAS's ability to compete against NECR, again contrary to the goals of the Amtrak Decisions, the public interest, and the RTP.

NECR also has proposed several changes to the existing TO. Many of these changes, if adopted, would increase costs (in addition to any fee increase) and limit PAS's ability to fully compete. Given that a large portion of the Line used to be owned by PAS, PAS should have substantially the same rights as NECR to compete for traffic. That was the intent of the ICC in the Amtrak Decisions, and that should remain the Board's intent in this proceeding. PAS's rights should continue to encompass access to all existing shippers, the right to fully compete

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against NECR for any new shippers, and the right to provide haulage services, as PAS has previously done and NECR has previously allowed.

In conclusion, in 1988 and in 1990, fully aware of the remarkable powers it was exercising in allowing Amtrak to take PAS's line and sell it to NECR, the ICC implemented a carefully orchestrated arrangement to ensure competitive parity between NECR and PAS. This arrangement has benefited rail customers ever since. NECR should not be allowed to disrupt this arrangement in the public interest simply because it wants more money and a government-endorsed competitive advantage over PAS. The Board should reject NECR's proposal.

Respectfully submitted,

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July 19, 2016

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of Pan Am Southern LLC's Reply to New England Central Railroad, Inc.'s Opening Statement And Evidence by mailing copies of the Reply via prepaid first class mail to all parties of record in this proceeding or by more expeditious means of delivery.

Dated at Washington, D.C. this 19th day of July, 2016.



William A. Mulhins
Attorney for Pan Am Southern LLC

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 35842

**NEW ENGLAND CENTRAL RAILROAD, INC.
– TRACKAGE RIGHTS ORDER –
PAN AM SOUTHERN LLC**

**REPLY TO NEW ENGLAND CENTRAL RAILROAD, INC.'S
OPENING STATEMENT AND EVIDENCE**

EXHIBIT A

VERIFIED STATEMENT OF MICHAEL P. BOSTWICK

My name is Michael P. Bostwick. I have served as Chief Commercial Officer for Pan Am Southern LLC (“PAS”), since 2009. I have been employed by Springfield Terminal Railway Company (“ST”) in the Marketing and Sales Department since 1996, and in my current position I am responsible for all business development and pricing for ST in its role as a contract operator providing rail service to PAS. PAS is a Class II regional carrier that operates over 436 miles of track in New York, Vermont, Massachusetts, New Hampshire, and Connecticut.¹

Since 2009, PAS and New England Central Railroad (“NECR”) have competed against each other for certain traffic that originates, terminates, and traverses over the Line.² This competitive arrangement was the outcome of several Interstate Commerce Commission decisions, Congressional action, and a Supreme Court decision.³ In those actions, the ICC carefully crafted the Amtrak Decisions to ensure absolute parity between PAS and NECR over the Line. And, this competitive arrangement was eventually codified in a trackage rights agreement between PAS and NECR (“Agreement”). Pursuant to this Agreement, PAS utilizes overhead rights over the upper and lower segments to access the middle portion, where PAS has

¹ PAS’s main line stretches from Mechanicville, NY to Ayer, MA, with a secondary route from White River Jct., VT to New Haven, CT crossing near the operational hub at East Deerfield, MA. PAS also operates branches to Waterbury and Derby, CT, Adams, MA, and Rotterdam Jct., NY.

² The “Line” consists of three different segments: (1) the upper segment is a 13.4 mile line between White River Jct., VT and Windsor, VT; (2) the middle segment is a 48.8 mile line between Windsor, VT and Brattleboro, VT (“Connecticut River Line”, also referred to as the “Former B&M Line” because the line was originally owned by B&M); and (3) the lower segment is a 10.6 mile line between Brattleboro, VT and East Northfield, MA.

³ See National Railroad Passenger Corp.—Conveyance of Boston and Maine Corp. Interests in Connecticut River Line in Vermont & New Hampshire, 4 I.C.C. 2d 761, 1988 ICC LEXIS 233 (1988) (“Amtrak I”); The National Railroad Passenger Corp.—Conveyance of Boston & Maine Corp. Interests in Connecticut River Line in Vermont & New Hampshire, 1990 ICC LEXIS 52 (1990) (“Amtrak II”, and with Amtrak I, the “Amtrak Decisions”); Railroad Passenger Service Act (PL 101-641, 9(a) and (b)); and, National R.R. Passenger Corp. v. Boston & Me. Corp., 503 U.S. 407 (1992).

the exclusive right to serve certain customers as well as the right to compete with NECR for other customer traffic. Today, PAS serves customers on the middle portion of the Line by transporting traffic from its staging yard in East Deerfield, Massachusetts over the lower portion of the Line. In addition, PAS also utilizes the upper portion of the Line to access White River Junction Yard for interchange of traffic with NECR and the Vermont Rail System as well as staging of traffic for delivery to PAS customers.

The Agreement has resulted in a strong presence on the Line for both NECR and PAS, with each competing to provide rail service to customers on the middle portion of the Line. In particular, PAS competed with NECR for the right to serve a significant propane customer located at Claremont, New Hampshire, and in late 2013 that customer elected to end its longstanding relationship with NECR and utilize PAS for its rail service. To obtain this business, PAS offered a competitive rate and service package designed to provide more efficient service at lower cost to the customer than it previously had received from NECR.

Of course, this competitive environment was not created solely for the benefit of PAS and its predecessors. Rather, the competitive environment was also created for the benefit of the State, its business community, and their customers. For example, in 2002 another propane customer obtained an order from the Board declaring that it had the right to utilize both NECR and the predecessor of PAS for rail service at its Claremont, New Hampshire location.⁴ Consequently, the customer elected to utilize NECR for rail service to and from its facility, though PAS continues to have the right to compete for this business. The strong competition between PAS and NECR to serve this customer is a great example of how the competitive

⁴ Rymes Heating Oils, Inc. – Petition For Declaratory Order, FD 34098 (STB served July 19, 2002).

environment first set up by the ICC has directly benefited these shippers and shortlines with, until recently, little conflict between PAS and NECR.

Another aspect of the competitive advantage that the Agreement provides shippers is through haulage arrangements between PAS and other rail carriers. Currently, PAS provides haulage services to Norfolk Southern for certain commodities to Brattleboro, Vermont for interchange with NECR.⁵ PAS has also been approached by Vermont Rail System (“VRS”) regarding haulage arrangements between Bellows Falls and White River Junction, but this proposal has been on hold pending confirmation that PAS indeed has the right to perform haulage over the Line. Haulage is just another commercial option available for rail shippers when a serving carrier has developed a haulage package with connecting carriers. When available, this provides the shipper with a valuable option to those normally available to it – either interline joint rates or negotiations with each individual carrier in the route. This reduces overall cost of such transport for customers and is utilized for several locations throughout the PAS system.⁶

It is important to note that rail service in the Northeast region is highly susceptible to intense multi-modal competition. Because most traffic is open to both NECR and PAS,⁷ the presence of two competitive rail carriers has resulted in reduced rates for rail-dependent shippers and has preserved a cost-effective, efficient alternative for those rail shippers that can use other

⁵ Of course, if NECR was able to restrict the right of PAS to provide haulage, any customers wishing to use haulage would be forced to only deal with carriers having a haulage agreement with NECR, cutting PAS completely out of an important rail market.

⁶ Interestingly, NECR does not oppose the right of PAS to provide haulage services to customers in coordination with moves for Norfolk Southern, but does so for customers in coordination with all other railroads.

⁷ For most of the traffic that PAS serves exclusively, rates are already set as low as possible because they are constrained by modal competition.

modes. Raising PAS's trackage rights fee beyond existing market levels would either eliminate or significantly hamper PAS's ability to compete; yet, that is the very outcome which NECR now seeks.⁸

As I have said, over the years, the Agreement has worked relatively well. In fact, the formation of PAS coincided with the conclusion of the initial 20 year term of the Agreement when either party was permitted to seek changes to the Agreement. Nevertheless, in discussions with NECR regarding the consent of NECR to an assignment of the Agreement to PAS, NECR never requested or sought wholesale changes to the Agreement. Rather, NECR simply requested the right to perform haulage of PAS traffic—at the discretion of PAS—and for the establishment of a new interchange location at Millers Falls, Massachusetts. At no time did NECR raise the issue of the adequacy of trackage rights fees or the imposition of operating restrictions. Nor did NECR challenge the haulage arrangements between PAS and NS to Brattleboro.

In early 2014, however, soon after it became public knowledge that PAS would be serving the propane shipper in Claremont, NH, NECR's tone began to change. In fact, NECR began to impose significant restrictions on PAS's operations through waybill production requirements, speed limits imposed on PAS but not itself, and a prohibition on the performance of haulage. These NECR-imposed burdens served to increase PAS's operating costs and decrease the quality and range of PAS's service by forcing PAS to hold trains pending production of waybills. In my opinion as a seasoned marketing professional, NECR's

⁸ NECR has already partially achieved its goal through the several procedural and other disputes created by NECR that have stretched this proceeding out significantly longer than contemplated by PAS. These delays have created uncertainty in the business climate by hindering the ability of PAS to accurately price movements today and to market PAS rail service to customers without knowing the costs and conditions to which PAS may be subject in the future and retroactively.

restrictions were a blatant attempt to hamstring PAS's ability to compete effectively against NECR on the Line. The STB agreed, finding NECR's restrictions to be an unreasonable practice in violation of the Amtrak Decisions.⁹

Having been unsuccessful in its unilateral efforts to impede the ability of PAS to compete on the Line, it appears that NECR now seeks the STB's blessing to hamstring PAS's ability to do so. On June 17, 2014, NECR filed a Request to Set Trackage Rights Terms and Conditions with the STB.¹⁰ NECR seeks a whopping 1,388% increase in the trackage rights fee PAS pays, according to calculations by PAS's economic analysts based on NECR's Opening Statement and Evidence filed on June 4, 2015,¹¹ and seeks to eliminate PAS's ability to provide haulage over the Line. These are but two of the changes that would directly violate the Amtrak Decisions to the direct harm of shippers and connecting shortlines on the Line.

A 1,388% increase—or any significant increase—in the trackage rights fee PAS pays would severely threaten—if not wholly eliminate—the effective competition between PAS and NECR on the Line. PAS would no longer be able to support rates competitive with NECR or other modes as the cost of providing complete service on the Line would be prohibitive. As NECR and other modes would no longer be constrained by PAS's competition, shippers and connecting shortlines would suffer from a vicious feedback loop of higher rates and decreased efficiencies. Furthermore, the connecting shortlines and shippers listed above would no longer

⁹ New England Central Railroad, Inc. – Trackage Rights Terms and Conditions – Pan Am Southern LLC, FD 31250 (Sub-No. 1) (STB served Dec. 23, 2014).

¹⁰ On December 23, 2014, the Board instituted a proceeding in FD 35842 after NECR invoked the provision of the Agreement that left open the establishment of revised terms and conditions after twenty years.

¹¹ NECR claims that PAS should pay \$6.71 per car mile as compared to the \$0.45 (2014) per car mile previously paid.

benefit from PAS's haulage services. The end result is clear: PAS would no longer be able to compete on the Line as a result of NECR's requests to the detriment of rail customers.

It is simple math to know that PAS cannot bear a 1,388% increase in the trackage rights fees it pays. Based upon my review of PAS's existing traffic, of the relevant competitive landscape, and of general market conditions, I have determined that PAS likely could bear a small increase in its trackage rights fee. However, any increase on the order demanded by NECR would risk substantially impairing PAS's ability to compete.

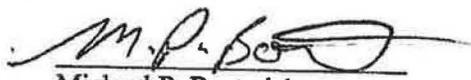
Given the clear intent of the Amtrak Decisions to install PAS as an equally effective competitor with NECR on the line, the STB should be mindful of this fact as it sets the terms and conditions for PAS's trackage rights with NECR.

VERIFICATION

I, Michael P. Bostwick, Chief Commercial Officer for Pan Am Southern LLC, verify under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Further, I certify that I am qualified and authorized to file this Verified Statement.

Executed this 19th day of July, 2016.


Michael P. Bostwick

PUBLIC VERSION

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 35842

**NEW ENGLAND CENTRAL RAILROAD, INC.
– TRACKAGE RIGHTS ORDER –
PAN AM SOUTHERN LLC**

**REPLY TO NEW ENGLAND CENTRAL RAILROAD, INC.'S
OPENING STATEMENT AND EVIDENCE**

EXHIBIT B

VERIFIED STATEMENT OF MICHAEL R. BARANOWSKI

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I. INTRODUCTION

I am Michael R. Baranowski, a Senior Managing Director at FTI Consulting and the head of FTI's Network Industries Strategies group within the Economic Consulting division. I have over thirty years of experience in railroad regulatory matters, including analyzing railroad traffic and revenue patterns, evaluating railroad operations, calculating and projecting the costs of all aspects of railroad service, including the provision of trackage rights, analyzing contribution and profitability, analyzing damage claims and determining the reasonableness of railroad rates and charges. I have testified numerous times before the Interstate Commerce Commission ("ICC") and the Surface Transportation Board ("STB"), arbitration panels and other federal and state regulatory agencies regarding economic issues related to transportation. A copy of my Curriculum Vitae is included as Attachment 1 to this verified statement.

I have been asked by counsel for the Pan Am Southern ("PAS") to evaluate the trackage rights compensation claims made by New England Central Railroad ("NECR") and its witnesses in NECR's Opening Statement And Evidence ("Opening"). My task was to apply precedent and identify and correct flaws in that evidence. I was then asked to develop appropriate trackage rights charges taking into account all relevant Board precedent related to this matter and employing the appropriate formulation of trackage rights compensation.

In Section II, I explain the premises governing Amtrak's original taking of the Connecticut River Line¹ I also discuss the explicit assumptions and representations made by the ICC and Amtrak in those earlier proceedings that limit the amount of trackage rights compensation to which Amtrak and its successors are entitled. In Section III, I review and

¹ The Connecticut River Line is referred to in this proceeding as the "Middle Segment" or the "Former B&M Line" because the line was originally owned by Boston & Maine Corporation, PAS's predecessor.

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critique the inputs and assumptions used by NECR witnesses Dave Ebbrecht, Charles Banks, and John Ireland to develop their estimates of trackage rights compensation. I restate their estimates of the maintenance expense to reflect actual, not normalized, maintenance expenses, adjust the “Value-In-Place” (“VIP) values to reflect Board precedent and actual market values, and then apply an interest rental component to that adjusted VIP. In Section IV, I calculate a going concern value (“GCV”) and apply an interest rental component based upon the capitalized earnings (“CE”) approach. Finally, in Section V, I summarize my calculations of the appropriate trackage rights compensation payable by PAS to NECR.

Based upon the above approaches for VIP and CE, I have developed the appropriate trackage rights compensation per car mile for 2014 for each methodology. My results are summarized in Table 1 below.

Table 1
Summary of Trackage Rights Compensation by Segment

	PAS Trackage Rate Per Car Mile (2014)		
	Southern Segment	Middle Segment	Northern Segment
Restated Banks Value In Place Approach “Restated Banks VIP Approach”	\$0.51	\$0.38	\$0.50
GCV/Capitalized Earnings Approach	\$1.26	\$0.38	\$1.09

See Baranowski Workpaper “Trackage Rate Calculations.xlsx”, tab “Trackage Rates”

The above rates, when weighted by respective car-miles over each segment, yield overall average rate levels of \$0.41 per car mile under the Restated Banks VIP Approach and \$0.61 per car mile under a GCV/CE approach.

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II. OVERVIEW OF SSW BASED TRACKAGE RIGHTS CHARGES APPLICABLE TO TRACKAGE RIGHTS SEGMENTS

A. Historical Overview of PAS Trackage Rights

According to the Opening, NECR is a Class III railroad that operates approximately 394 miles of rail lines between New London, Connecticut and Alburgh, Vermont.² I accept their representation. PAS operates over a 73-mile main line portion of NECR's line between East Northfield, Massachusetts and White River Junction, Vermont (the "Line" or "trackage right segments").³ PAS operations are governed by a series of ICC decisions and a trackage rights order (the "TO") imposed by the ICC. Under the existing TO, PAS currently pays NECR a \$0.45 per car mile as of 2014. NECR in its opening submission is advocating a more than 10-fold increase in that rate to \$6.70 per car mile.

B. Description of SSW Trackage Rights Compensation Formulation

For trackage rights cases where the Board has imposed trackage rights as a condition to a merger or where a voluntary trackage rights agreement between two parties expires and the Board is requested to set new terms and conditions, in the setting the trackage rights fee paid by the tenant, the Board applies its "SSW Compensation methodology."⁴ There are three essential elements of the SSW Compensation methodology:

² Opening, Verified Statement of RLBA ("RLBA VS") at 3.

³ The 73 miles actually constitutes three segments: the Southern Segment (10.6 miles between East Northfield, Massachusetts and Brattleboro, Vermont), the Middle Segment (48.8 miles between Brattleboro, Vermont and Windsor, Vermont), and the Northern Segment (13.4 miles between Windsor, Vermont and White River Junction, Vermont). I will refer to the segments in the same manner.

⁴ This methodology was developed in a series of cases involving St. Louis Southwestern Railway Company ("SSW") beginning with St. Louis Southwestern Ry. Co. - Trackage Rights Over Missouri Pacific Railroad Company – Kansas City to St. Louis, 1 ICC 2d 776, 1984 ICC LEXIS 347 (1984) ("SSW I"); and St. Louis Southwestern Ry. Co. – Trackage Rights Over Missouri Pacific Railroad Company – Kansas City to St. Louis Trackage Rights Compensation, 4 ICC 2d 668, 1987 ICC LEXIS 15 (1987) ("SSW II") (collectively, "SSW" or "SSW Compensation").

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- 1) the variable cost that is incurred by the owning carrier but attributable to the tenant carrier's operations;
- 2) the tenant carrier's usage-proportionate share of track maintenance and operating expenses; and
- 3) an interest or rental component to compensate the owning carrier for tenant carrier's use of capital dedicated to the track by the owning carrier; determined by multiplying the value of the assets by a rate of return equal to the railroad's current pre-tax nominal cost of capital.

As explained in more detail below, prior precedent related to the creation of the trackage rights at issue in this proceeding largely renders the Board's SSW methodology inapplicable. Nonetheless, in the event SSW was applied, I was asked to apply SSW to both NECR's VIP approach, and if possible, develop a trackage rights fee based upon the capitalized earnings of NECR, which is a going concern. In my view, NECR's calculation grossly overstates both the maintenance expenses and the appropriate VIP for which to calculate the interest rental component.

C. Summary of PAS Relative Usage Share on NECR Trackage Rights Segments

The Board's SSW Compensation formulation requires an assessment of relative usage of the trackage rights segment(s) of the tenant railroad. As Mr. Ebbrecht explained in his opening verified statement, three rail carriers operate over the trackage rights segments - NECR, PAS and Amtrak. Mr. Ebbrecht calculated PAS's share of usage of the trackage rights segments as a percentage of usage of each of the three trackage rights segments. I have accepted Mr.

While SSW-I involved the establishment of compensation for trackage rights to redress effects of a merger, the methodology has been extended to other situations, including in situations where the parties wanted the trackage rights to continue but could not agree on compensation. See Arkansas and Missouri Railroad Company v. Missouri Pacific Railroad Company, 6 ICC 2d 619, 1990 ICC LEXIS 110 (STB served March 23, 1990) ("A&M-I"), and Arkansas and Missouri Railroad Company v. Missouri Pacific Railroad Company, 7 ICC 2d 164; 1990 ICC LEXIS 374 (STB served Nov. 13, 1990)("A&M-II").

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Ebbrecht’s calculation of relative car-miles for each rail carrier over each of the trackage rights segments.

Table 2 below summarizes the car miles by segment for each of the users of the trackage rights segments as well as the results of my calculations of the PAS usage percentages both including and excluding Amtrak.⁵

Table 2
Trackage Rights Segments User Car Miles and PAS Relative Usage Percentage



See Baranowski Workpaper “Trackage Rate Calculations.xlsx”, tab “Usage” and
NECR_004591

D. Effects of FD 31250 – August 4, 1988 Decision On Current Compensation

As NECR witness Ebbrecht explains, a large segment of the Line was the subject of an earlier ICC Amtrak proceedings. Specifically, the 48.8 mile Former B&M line from Brattleboro, VT to Windsor, VT known as the Connecticut River Line was the subject of a taking by Amtrak and subsequent transfer to NECR’s predecessor the CV. In that initial B&M valuation decision, which is referred to as Amtrak I, the ICC determined that of the valuation methodologies

⁵ As described in more detail later in this statement, certain of my calculations exclude passenger operations and therefore do not incorporate Amtrak financial data. The results my analyses are split only between the freight users -- NECR and PAS.

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submitted, GCV and net liquidation value (“NLV”) were most appropriate for establishing the just compensation for the transfer of the line to Amtrak.⁶ Compensation to B&M was ultimately determined based on the calculated GCV.

The ICC explained the conceptual application of GCV in that proceeding as follows: GCV is usually defined as the value of a business based on the expected profits that the business will generate in the future, i.e., the net present value of future profits. Here, however, Amtrak reasons that the only compensation to which B&M is entitled is the NPV of the annual changes in net revenue as a result of Amtrak’s taking of the line. The NPV of “taking changes” represents the amount of compensation that would make the B&M “whole” (or no better or worse off) after the taking as opposed to before the taking. For our purposes here, this “before and after” approach is an acceptable variation of the usual definition of GCV. The loss of profits as a result of the loss of the line is a fair measure here of the contribution the line is currently making.”

Id. at *63-*64.

It is important to note that under the GCV approach, in establishing the takings value of \$2,373,286 to be paid to B&M, the ICC used certain assumptions regarding future cash flows and maintenance payments. These fundamental assumptions were extended into perpetuity Amtrak I at *68. In Amtrak II, both B&M proposed and CV agreed that the term of the trackage rights agreement was to be perpetual and that after 20 years either party may seek modifications from the other, including the right to seek imposition of a new agreement by the Commission.⁷

Any such modifications to the trackage rights compensation amounts cannot, however, ignore two key elements of the initial compensation terms:⁸

⁶ See National Railroad Passenger Corp.—Conveyance of Boston and Maine Corp. Interests in Connecticut River Line in Vermont & New Hampshire, 4 ICC 2d 761, 1988 ICC LEXIS 233 (1988) (“Amtrak I”)

⁷ See The National Railroad Passenger Corp.—Conveyance of Boston & Maine Corp. Interests in Connecticut River Line in Vermont & New Hampshire, 1990 ICC LEXIS 52 at *14-*15 (1990) (“Amtrak II”) (Amtrak I and Amtrak II are referred to collectively as “Amtrak Decisions.”)

⁸ See Amtrak II, 1990 ICC LEXIS 52 at *26-*30.

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- The determination of the fair compensation of \$2.4 million paid to B&M incorporates an explicit assumption that payments by B&M for trackage rights will be capped at \$75,000 beginning in year 4 and into perpetuity.
- Under the terms of the involuntary taking by Amtrak of the Former B&M Line, the fair compensation of \$2.4 million paid to B&M precluded payment of any interest rental component. Similar to the \$75,000 cap, the fair value determination assumed explicitly that there would be no interest rental payments into perpetuity.
 1. Accounting for Perpetual \$75,000 Maintenance of Way Cap Into Perpetuity in Current Trackage Rights Compensation

In its calculation of the GCV payable to B&M by Amtrak for its taking of the line, the ICC's calculations assumed that payments made by B&M for access via trackage rights would be capped at \$75,000 annually forever.⁹,¹⁰ As the ICC explained, as part of the quid pro quo in the forced divestiture ordered in Amtrak, the Commission granted B&M continued access over this line along with a payment cap.¹¹ All other things equal, if application of NECR's SSW methodology approach results in future B&M payments for trackage rights higher than the assumed cap, the savings that the ICC assumed B&M would incur as a result of the taking would be reduced. Because these calculated savings were deducted from the GCV at the time of the transaction, lower calculated savings would have resulted in less of a deduction from the GCV and more compensation to B&M.

Because the compensation paid to B&M cannot now be changed, the assumptions used to determine the original takings amounts cannot simply be jettisoned. Application of SSW as applied by NECR jettisons those assumptions. Instead, any determination of adjusted trackage rights compensation must account for the perpetual assumptions in the initial valuation. This means that the B&M payment cap for usage of the Former B&M Line in connection with PAS

⁹ See Baranowski Workpaper "Amtrak Decision Compensation.xlsx", tab "Calculation"

¹⁰ The \$75,000 cap was subject to adjustment for future inflation. *Id.* at *26.

¹¹ *Id.* at 21-22.

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trackage rights should continue to apply in a manner consistent with the initial terms.¹² A simple application of SSW, as proposed by NECR, is not consistent with the assumptions in the initial takings decisions. As a result, one cannot simply argue that SSW as developed and applied in other cases is likewise applicable in this proceeding.

If SSW is to be applied, then there needs to be an adjustment to the cap so as to not change the underlying assumptions of the Amtrak calculations. Based on the trackage rights compensation level that we have established for the Middle Segment of \$0.38 per car mile and the PAS historical average miles per car using the Middle Segment, the inflation adjusted cap for the Middle Segment of \$170,522 will be reached at approximately 12,479 carloads¹³. As such, PAS cars in excess of 12,479 and below the 32,500 car cap included in the original Amtrak Decisions should not incur any trackage rights fees for moving over the Middle Segment. Cars in excess of the 32,500 cap should incur the \$0.38 trackage rights fee. To put this cap into some perspective, PAS 2014 cars moving over the Middle Segment totaled 6,301¹⁴.

2. To Be Consistent With The Amtrak Decisions, PAS Should Not Have To Pay An Interest Rental Component To Traverse The Former B&M Line

In its efforts to increase the amount of the payments received from B&M under the forced trackage rights arrangement sanctioned by the ICC in Amtrak I, the CV proposed an additional payment to the agreement. CV proposed that beginning in the sixth year, B&M should pay to CV a proportionate share, based on B&M's percentage of total traffic on the line, of the costs of capital projects required to preserve the line at FRA Class 2 condition.¹⁵ When

¹² The payment cap included a provision for an inflation adjustment to the cap as well as a limit on the number of cars that could benefit from the trackage rights under the cap.

¹³ See Baranowski Workpaper "Trackage Rate Calculations.xlsx", tab "Payment Cap"

¹⁴ See Baranowski Workpaper "Trackage Rate Calculations.xlsx", tab "Payment Cap"

¹⁵ See Amtrak II, 1990 ICC LEXIS 52 at *26-*30.

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pressed on the reason for what appeared to be an end run around the maintenance-of-way cap used to determine the GCV of the line, CV argued that its proposal was not a disguised maintenance charge outside the applicable payment cap, but rather was an interest-rental charge for B&M's long-term use of CV's depreciating capital assets. As it does today, CV argued that it must be able to earn a long-term return on its capital investment and that an interest-rental component on capital applicable to the Former B&M line was the most reasonable solution.

The ICC rejected CV's request. In doing so, the ICC in Amtrak II cited a passage from then Amtrak/CV expert, Charles H. Banks, explaining that

as a result of this proceeding, Amtrak (or its successor) will incur costs for which it will receive either partial compensation or none at all * * *. Amtrak (or its successor) will not be compensated to any extent in any year for interest rental * * *. Stated differently, there are ownership costs currently incurred by B&M which, in the future, will be incurred by Amtrak (or its successor)."

Id. at 29.

In other words, in justifying the original takings compensation value, Mr. Banks was noting that B&M would not be required to pay an interest rental component because Amtrak would incur the sole costs for such capital investment and upgrades.

Today, his prior testimony notwithstanding, Mr. Banks tells a different story. On behalf of NECR, Mr. Banks now advocates PAS paying a substantial interest rental component. Nowhere in his opening submission in this proceeding does Mr. Banks explain his change of heart. This is because there is no justification for applying such an interest rental component. If one were to be applied today, then doing so would violate the underlying assumptions in the Amtrak Decisions.

In affirming its determination of the fair compensation payable to B&M based on the inputs and assumptions from the GCV value – calculations that were presumed to extend into

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perpetuity and that precluded any additional interest rental payment -- the ICC acknowledged that the original Amtrak/CV trackage rights proposal of April 4, 1988 expressly provided that B&M shall not be required to pay any interest rental payments to CV. It noted that had such interest rental payments been incorporated into its GCV calculations, the valuation amount that B&M would have received for the line would have been higher.¹⁶ Accordingly, the Board cannot now apply an interest rental component for PAS's use of the Middle Segment without violating the Amtrak Decisions. If it does, the Board would need to reopen the Amtrak Decisions and award additional takings compensation to PAS.

Application of the standard SSW approach would violate these two fundamental assumptions applied in the Amtrak Decisions – the cap and no interest rental component for the Middle Segment. To avoid doing so, I would advocate that SSW should not be applied and that the compensation formulas should remain as they are today. Nonetheless, if the Board is inclined to apply SSW, its application here needs to be modified to reflect the premises of the underlying Amtrak Decisions. I have developed Chart 1 below for that purpose. This Chart provides an overview of the SSW components applicable to the NECR trackage rights segments at issue in this proceeding, adjusted to account for the assumptions in the Amtrak Decisions.

¹⁶ B&M in that proceeding calculated the amount as \$485,000 higher – or approximately 20 percent more than the \$2.4 million GCV paid to B&M by Amtrak. Id. at *28.

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SSW Compensation Methodology Limitations as Applied to NECR Trackage Segments			
	<u>South</u>	<u>Middle</u>	<u>North</u>
	E. Northfield, MA to Brattleboro, VT 10.6 Miles	Brattleboro, VT to Windsor, VT 48.8 Miles	Windsor VT, to White River Jct, VT 13.4 Miles
<i>SSW Compensation Component:</i>			
Variable Cost Attributable to PAS Operations	✓	✓	✓
PAS Share of Track Maintenance & Operating Expenses	✓	Capped	✓
Interest/Rental Component	✓	Prohibited	✓

III. REVIEW AND CRITIQUE OF NECR DEVELOPEMNT OF TRACKAGE RIGHTS COMPENSATION

In its Opening, NECR has developed an estimate of trackage rights compensation under its interpretation of the Board’s SSW trackage right compensation formula. As described in more detail below, NECR calculations include two significant flaws: (1) its development of maintenance of way related expenses to be allocated to PAS was based upon normalized maintenance and not actual maintenance expenses; and (2) its determination of market value for its proposed interest rental additive under its novel VIP approach is not calculated consistent with Board precedent and includes assets not even owned by NECR. In the remainder of this section, I describe in details the flaws in the Opening’s evidence, correct its calculations where possible and provide restated trackage rights charges that are consistent with the Board’s SSW methodology.

A. Evaluation and Restatement of Variable Cost Component of SSW Trackage Rights Compensation Developed by NECR

NECR has included in the variable cost component of its SSW compensation calculations costs attributable to dispatching. This is consistent with precedent. As such, I have accepted NECR’s estimates of this component in my restatement of trackage rights compensation.

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B. Evaluation and Restatement of PAS Share of Track Maintenance and Operating Expenses

For the track maintenance and operating expense components of the SSW Compensation formulation, NECR proposes on opening that PAS pay a share of property taxes developed by witness Ebbrecht and track maintenance costs based on a normalized maintenance estimate of the forward looking cost to maintain the trackage rights segments to the FRA Class 3 standards required by Amtrak. Table 3 summarizes the components:

Table 3
Summary of Maintenance and Operating Expenses for the
Trackage Rights Segments Developed by NECR on Opening¹⁷

Category	2014 Cost	Per Car Mile	Per Mile
+ Program Maintenance	\$1,780,600	\$0.64	\$24,459
+ Routine Maintenance	\$1,309,173	\$0.47	\$17,983
= Maintenance Subtotal:	\$3,089,773	\$1.11	\$42,442
+ Property Taxes	\$72,328	\$0.03	\$994
= Total	\$3,162,101	\$1.14	\$43,918

See Baranowski Workpaper “Trackage Rate Calculations.xlsx”, tab “Maintenance”

NECR’s proposed use of a normalized maintenance estimate instead of actual maintenance of way related expenditures conflicts with the SSW compensation methodology. The ICC has previously explained that “the most appropriate means of sharing M&O expenses is to allocate a portion of the actual expense incurred by MP to DRGW on a percentage use basis.”¹⁸ The key word there is “actual” expenses. That is all that PAS should be required to pay. In addition and as previously affirmed by the ICC, PAS should not be required to pay for planned capital improvements required to improve Amtrak’s performance over the line.¹⁹ By

¹⁷ Maintenance numbers and property taxes are derived from RLBA VS at 3, Opening at 10.

¹⁸ SSW I, 1984 ICC LEXIS 347 at *38.

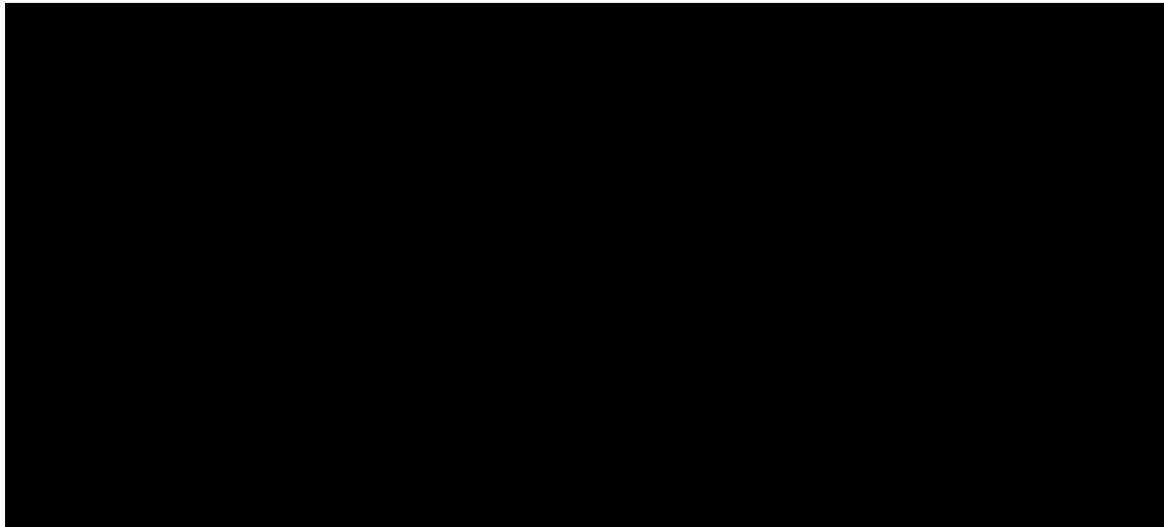
¹⁹ See Amtrak II, 1990 ICC LEXIS 52 at *27-*28.

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developing a normalized maintenance estimate to maintain the trackage rights to FRA Class 3 standards, NECR is proposing to require the successor PAS to pay for elements that are not consistent with the SSW methodology or with the Board’s previous Amtrak decisions.

The Banks’ normalized maintenance estimate is wildly inflated as compared to NECR’s actual maintenance of way expenditures per track mile – which already include costs to maintain the trackage rights segments to FRA Class 3 standards. Table 4 shows that Banks has hypothesized a 2014 maintenance of way cost for the 73-mile Line that is [REDACTED] to NECR’s total maintenance costs for the entire NECR route mile system and it more than [[REDACTED]] times higher than the NECR actual maintenance of way expenditures on a per mile basis.

Table 4
Comparison of NECR Actual Maintenance of Way Costs to Banks’
Estimated Normalized Maintenance Costs [[



]]

See Baranowski Workpaper “Trackage Rate Calculations.xlsx”, tab “Maintenance” and NECR_0019974 and NECR_004586.

Banks provides no explanation of why or how his normalized maintenance costs became so inflated compared to NECR’s actual experience. I have determined that one significant

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reason for this disconnect is that the Banks' normalized maintenance estimate includes costs for program maintenance that are at odds with actual expenditures paid for by NECR. The limited information NECR provided in discovery regarding capital maintenance expenditures shows that NECR's actual capital maintenance spending is far below the levels Banks proposes PAS fund via trackage payments.²⁰ NECR is seeking PAS to pay a usage percentage of capital maintenance expenditures far above what NECR has incurred. This is not consistent with SSW.

The below document excerpt from discovery (NECR_004586)²¹ shows that between 2008 and 2013 NECR only spent [[REDACTED]] on capital maintenance compared with over [[REDACTED]] funded by grants that NECR excludes from the amount "applicable to joint facility."²²

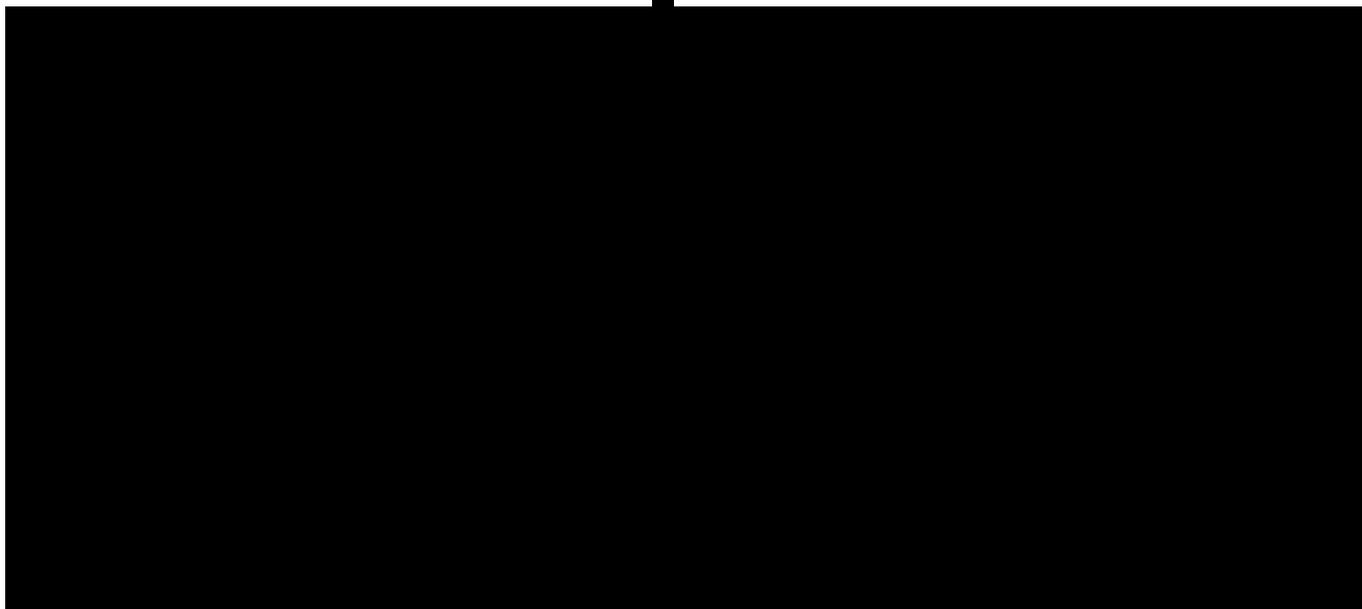
²⁰ NECR's level of capital maintenance spending is likely influenced by the grant funding it receives for track improvements since such improvements may offset and supplement capital maintenance requirements

²¹ To make viewing easier, this table is reproduced from the original discovery document NECR_004586.

²² See Mullins 4/1/2016 email to Hocky asking whether NECR_004586 was NECR's "intended response to capital maintenance cost details requested" and Hocky 4/14/2016 email to Mullins confirming "We believe that information...does provide the capital cost information you requested".

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Table 5
Excerpt of Capital Expenditure Data From NECR Discovery



In my restatement of SSW related maintenance of way expenditures attributable to the trackage rights segments, I reject NECR's proposed use of a hypothetical normalized maintenance estimate. I rely instead on NECR actual maintenance of way operating expenses for 2014 and average capitalized maintenance expenditures between 2008 and 2013. Even this approach overstates the actual maintenance costs PAS should pay because it includes all the costs necessary to maintain the trackage rights to the FRA Class 3 standards demanded by Amtrak, which under the Amtrak precedent, PAS is not obligated to incur. PAS is only required to pay its proportionate share of actual maintenance expenses to maintain the Line at a FRA Class 2 standard.

To allocate NECR's system-wide maintenance of way expenditures to the trackage rights segments, I adopt the method used by the Board to allocate system-wide expenditures to individual line segments in its standard internal cross subsidy test. That approach, which uses URCS regression equations for track maintenance and track maintenance overheads, accounts for both relative usage via the gross ton mile based variable cost component and relative capacity via

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the track mile fixed cost component. Specifically, for both the entire railroad and specific line segments, the URCS equations calculate expenditures that vary with changes in traffic levels and those that remain fixed. Cost allocation percentages are then developed based on resulting total expenditures for a specific line segment compared to those of the entire railroad. I derived NECR gross-ton miles and track miles from materials provided by NECR in discovery.²³ Using this approach, the below table summarizes the resulting cost allocation percentages for each of the trackage segments. Details of the below calculations are included in my workpapers.

Table 6
Development of Percentages for Allocating NECR System-Wide Maintenance of Way
Expenditures to Trackage Rights Segments Using URCS Regression Formulas

[[



See Baranowski Workpaper “Trackage Rate Calculations.xlsx”, tab “Maintenance”

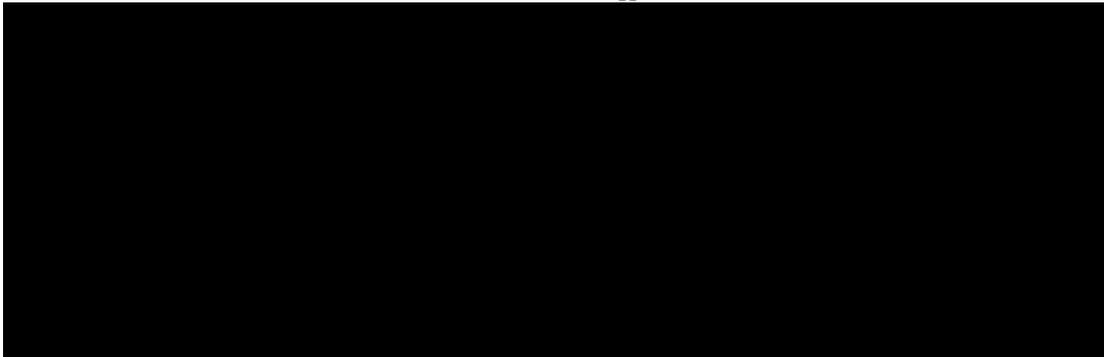
²³ See Baranowski Workpaper “Trackage Rate Calculations.xlsx”, tab “Maintenance”, at lines 43-44GTMs were calculated using a GTM/NTM factor NECR produced in discovery for the PAS trackage segment applied to all net ton miles as estimated in the ATC revenue allocation procedure.

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I apply the resulting cost allocation percentages for each segment to NECR’s system-wide maintenance expenditures, divide by segment car-miles, and add in the costs per car mile for property taxes developed in the Opening to calculate the total costs per car mile for maintenance and other operating costs.

Table 7
Allocation of NECR System Wide Variable and Fixed Maintenance of Way
Expenditures to Trackage Rights Segments

[[



]]

See Baranowski Workpaper “Trackage Rate Calculations.xlsx”, tab “Maintenance”

My workpapers include details of these calculations²⁴.

C. Corrections to Trackage Rights Interest Rental Component Derived from VIP

1. The VIP Concept is Not RCNLD and Overstates the Market Value of the Trackage Rights Lines

The VIP methodology described by NECR’s expert witness Banks is not a commonly defined valuation method nor one that has been approved in past Board precedent. The method Banks describes is as follows: “VIP in the context of this analysis was defined as the retail market value of all rail assets as if they were available for sale assuming market prices on September 2, 2014, combined with the estimated value of in-place fixed infrastructure, again as of September 2, 2014.” (RLBA VS at 6).

²⁴See Baranowski Workpaper “Trackage Rate Calculations.xlsx”, tab “Maintenance”

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This method conflates notions of RCNLD and NLV by applying separate valuation techniques to what are described as “marketable” rail assets and fixed in-place infrastructure assets. Specifically, for rail related assets, the VIP approach assumes that the rail currently in place in the NECR track structure is removed and sold on after-markets. Mr. Banks explains: “The most significant marketable materials reflected in the rail asset valuations were steel track components, assumed to be sold for railroad reuse or as steel mill scrap” (RLBA VS Track Report, page 5)

Yet, Mr. Banks does not include any costs of removing these assets or transporting them to any mysterious markets. His methodology only assesses the asset condition where it sits and then assigns a market price for comparable assets ready for purchase from a supplier. Although NECR’s VIP approach resembles some elements of NLV, witness Banks attempts to rationalize its departure from NLV with the misplaced assertion that NLV is not applicable. Specifically, NECR stated: “The ICC has made clear that ‘net liquidation value’ is not a method that should be used because calculation of the value of the use by the tenant railroad would be inconsistent with use of an operating line of a going concern railroad.” (Opening at page 12).

Bank’s approach for these marketable assets is NLV, but without subtracting the salvage costs. He must include those costs to get his “market values.” The only way to realize the VIP market value for these “marketable assets” would be to dismantle the railroad. The Railroad Accounting Principles Board defined NLV in its report as “the net realizable proceeds from an orderly disposition of assets. As an exit value, it represents the funds available for other investment opportunities”. (RAPB Volume II, page 40)

After applying what is in effect a NLV to the “marketable assets,” for the “fixed in place” assets, such as bridges and tunnels, he applies a valuation generally more aligned with RCNLD.

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For these assets, NECR assigns value by applying assumed and otherwise undocumented unit costs to generalized groups of assets and guessing about their current condition. For example, for bridge values in place, Banks groups steel girder, steel truss, and concrete/stone bridges together, estimates the linear feet for each group, then applies “an estimated value of material per linear foot” that is “synthesized from several recent RLBA projects involving bridge construction and valuation.” (RLBA VS Track Report, page 8). The values resulting from this method are then arbitrarily discounted by 50% to “reflect normal wear resulting from being in service.” (RLBA VS Track Report, page 8). There were no workpapers in support of the values nor support for discounting the asset value by 50%. It is simply unexplained.

Overall, witness Banks has provided no meaningful documentation or other support for the vast majority of the inputs he used in his VIP to establish values. As a result, there is no basis upon which to develop a meaningful critique. As such, NECR’s VIP valuation approach should be summarily rejected by the Board. If the Board declines to reject the approach outright, then critical adjustments must be made to align the valuation with prior Board precedent and established measures of market value for the NECR.

2. Specific Examples of Deficiencies in VIP Approach, Assumptions and Documentation

As discussed in the prior section, as a threshold matter, the Banks valuation lacks sufficient documentation to justify its many questionable assumptions. Moreover, the NECR valuation approach assigns values to assets using high-level generalities such that it would be impossible to consider reliable. The clearest examples of these shortcomings are bridges and tunnels, which respectively represent 49% and 12% of the Banks track/infrastructure valuation.

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Table 8
NECR Summary of Total Bridge, Tunnel and Other Assets Value
for the Trackage Rights Segments

Segment	Bridges	Tunnels	Other	All Assets
Southern Segment	\$1,199,000	\$0	\$1,199,000	\$6,699,000
Middle Segment	\$34,540,500	\$10,000,000	\$24,540,500	\$67,405,000
North Segment	\$6,950,000	\$0	\$6,950,000	\$12,677,000
Line	\$42,689,500	\$10,000,000	\$32,689,500	\$86,781,000
Percent of Total	49%	12%	38%	100%

See Baranowski Workpaper “Review of Banks VIP.xlsx”, tab “Cost Summary”

The below table summarizes the NECR bridge characteristics valued by Banks, along with the simplistic cost per foot method applied to estimate their total value.

Table 9
Overview of NECR Development of Bridge Values

	Steel Plate Girder	Steel Truss	Concrete/Stone
Bridge Count	16	3	31
Average Length	139	226	19
Minimum Length	20	190	4
Maximum Length	750	508	100
Total Linear Feet	2,371	905	594
Cost/Ft	\$9,500	\$19,000	\$5,000
Banks Cost	\$22,524,500	\$17,195,000	\$2,967,500

See Baranowski Workpaper “Review of Banks VIP.xlsx”, tab “Bridge Summary”

As the above table illustrates, the Banks method takes no consideration of the relative length of each bridge or any other relevant characteristics such as height, span spacing, or type of abutment. The estimate simplistically applies the same cost per foot to every foot of bridge within a specific category, regardless of length or steel quality. The Table shows the steel plate girders on the bridges on the trackage rights segments as ranging in size from 20 feet to 750 feet. Banks assumes the same unit cost for both the shortest and longest bridge, and all other in between. Further, Banks verified statement indicates that he assumes for bridges a 50 percent

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condition assessment. However, nowhere in his submission of his bridge cost evidence does he reduce the calculated bridge by a 50 percent condition assessment. Because of the lack of documentation in the Banks submission, it is impossible to determine whether the failure to apply the condition assessment is an oversight or if the bridge unit costs he has assumed already incorporate a condition assessment adjustment. If it is indeed the latter, than the actual bridge costs per foot used by Banks are twice those reflected in Table 9.

To put his assumed bridge costs per linear foot into some perspective, Table 10 compares Banks costs per bridge foot to the bridge unit costs developed by the Board for proposed use in Simplified SAC proceedings, indexed to 2014 levels.²⁵

Table 10
Comparison of Banks Assumed Bridge Cost Per Linear Foot with EP 646 Costs

Banks Bridge Category	Banks Stated Cost Per Foot	Corresponding Bridge Category for Costs Developed in EP 646 Based on Previous Western SAC Cases	Average Cost per Foot Indexed to 2014 Levels
Steel Plate Girder	\$9,500	Type II—Steel Deck Plate Girder Bridges	\$5,197
Steel Truss	\$19,000	Type III—Steel Through Plate Girders	\$6,494
Concrete/Stone	\$5,000	Type I—Pre-stressed Concrete Girder Bridges	\$5,033

See Baranowski Workpaper “Review of Banks VIP.xlsx”, tab “Bridge Costs”

If the Banks costs are already net of the condition assessment adjustment, his cost per foot would double and the Table 10 comparison would show his numbers to be astronomically high when compared to the SSAC costs. A similar issue exists regarding Banks’ tunnel costs, for which he includes a \$10,000,000 investment for the one 500-foot tunnel on the NECR trackage

²⁵ In Ex Parte 657, the Board changed its approach for determining replacement costs in Simplified SAC Proceedings and no longer relies on the average costs from prior full-SAC proceedings represented in Table 10.

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segment based on the unsupported assumption that it costs \$20,000 per foot to reproduce this tunnel. He purports that this cost has been adjusted by an assumed 50 percent condition as well.

3. NECR's Assertion That It is Entitled to an Economic Return for the Easement Over Which It Accesses Its Right of Way

The Banks appraiser values all land as if it were fee simple because he argues "NECR owns a permanent, unencumbered easement and has rights to use the property for its highest and best use," and because he believes "NECR has the right to acquire the property in fee simple for a nominal consideration of \$1." (RLBA VS Track Report, page 9). The only relevant document NECR produced in discovery related to the easement rights at issue explains that the easement is intended "for the purpose of conducting railroad freight operations, the Montrealer passenger service, local commuter or excursion operations, and for all purposes necessary or directly related thereto." (NECR_002548 or 50 comparable documents produced in response to Discovery Request 27).

PAS's legal counsel informs us that the ICC has held that real estate held under the easement instrument at issue here, absent any further demonstration of having a marketable title, must be excluded from the valuation because it is subject to reversionary interests. I have accepted counsel's legal conclusions regarding the value of easements.

I further note that counsel's conclusion is bolstered by the fact that in the Amtrak proceedings, the ICC already determined that the Former B&M Line was mainly easement and afforded value only to the small parcels that were held in fee.

We reject B&M's appraisal and accept Amtrak's appraisal for purposes of determining the FMV of the real estate here. B&M, by its own admission, has included land subject to reversionary interest. B&M has failed to demonstrate that it has marketable title to this land so it must be excluded from our valuation.

Amtrak I, 1988 ICC LEXIS 233 at *51-*63

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NECR has characterized its easement as “permanent and unencumbered,” but it does not explain how this changed from the reversionary interest the B&M described for the same easement in the previous proceeding. Absent demonstration of what changed, the ICC’s former holding still stands. As such, accepting counsel’s legal conclusions and the previous findings in Amtrak I, I have excluded from my adjusted VIP any valuation for the right-of-way.

4. NECR Is Not Entitled to Receive Interest Rental on Assets Acquired With Public Grant Monies

NECR’s VIP also reflects in large part the value of infrastructure improvements that (1) were specifically put in place to benefit passenger operations, not freight; (2) were funded by federal and state grant money; and (3) are not even owned by NECR.²⁶ According to counsel, in valuation cases, infrastructure that is not necessary for a carrier’s freight operations should not be included when determining that carrier’s rental, citing A&M-II where the Board stated:

Our prior finding did not assume that a railroad was never entitled to earn a reasonable return on property donated by government. We have not previously taken such a position and do not take this position here. We are, however, required to consider whether carriers are under “honest, economical, and efficient management.” *This, in turn, means that railroads are not entitled to a return on capital that is not used or useful in the business. Here, it is undisputed that the lift span is not used or useful for rail use.* When we discussed the fact that the lift span was financed by the Corps of Engineers, our intent was not to imply that this automatically rendered the asset ineligible for a return. Rather, our intent was to call attention to the fact that the span was constructed by a third party for river navigation purposes, not for rail purposes. Thus, rail users should neither directly nor indirectly be required to

²⁶ The Vermont Standard Rail Agreement (“VT Agreement”) explicitly states the purpose of the VT Agreement is to “meet the goals of the State, as stated in 5 V.S.A. § 3002(1), by providing construction assistance from the US Department of Transportation’s Federal Railroad Administration (“FRA”) and the State to Railroad, in accordance with applicable federal and state laws and regulations and to reduce the travel time for intercity passenger service between East Northfield and St. Albans, VT by approximately 27 minutes.” NECR_000981.

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bear the capital cost of a return on the value, donated or not, of the lift span.²⁷

In this case, the vast majority of infrastructure improvements on the Line were designed for the sole purpose of increasing track speeds to FRA Class 3 standards or higher to enhance the efficiency of passenger operations.²⁸ As noted above, under the Amtrak Decisions, PAS is not required to pay for upgrades related to Amtrak service and or above FRA Class 2 standards.²⁹ But even setting aside the Amtrak Decisions, I agree with counsel that PAS should not have to pay the cost to maintain infrastructure to accommodate passenger operations. PAS does not conduct any passenger operations. Accordingly, consistent with A&M-II, PAS should “neither directly nor indirectly be required to bear the capital cost of a return” on the value of infrastructure improvements related to passenger operations.

The majority of the relevant public funding for NECR is a \$50 million grant by the FRA, as funded by the American Recovery and Re-investment Act, which included substantial work on the trackage segments for specific improvements related to passenger service. The scope of work funded by this grant is described as follows:

[[REDACTED]]

²⁷ A&M II, 7 I.C.C. 2d 164, 1990 ICC LEXIS 374, at *17 (international citation omitted) (emphasis supplied).

²⁸ NECR initially failed to specify that such improvements were made to accommodate passenger operations, not freight; PAS only uncovered this fact during discovery. NECR_0019196 and NECR_0019201.

²⁹ As will be discussed further in reviewing the terms and conditions of the trackage rights agreement proposed by NECR, NECR proposes to eliminate any obligation it would have to PAS to maintain the track to any minimum levels whatsoever.

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(NECR_001096). PAS should not have to pay NECR for expenses which NECR did not even incur and PAS derives no benefit.

This conclusion further is reinforced by the fact that NECR has no ownership interest in the infrastructure improvements:

[NECR] is a trustee of all property, equipment, and supplies acquired with Grant Funds paid under the terms of this Agreement. Said property, equipment, and supplies is to be used to provide general public service throughout its useful life. Railroad shall have no ownership interest in said property under Rail Section Manager determines the useful life is at an end and relinquishes State and FRA property rights in writing.³⁰

I am not suggesting that a railroad should never be entitled to a return on property donated by the government, but in this case, PAS should not receive a return on infrastructure when that infrastructure was put in place primarily to accommodate passenger operations, was not funded by the carrier, and is not even owned by NECR. As such, it is inconsistent with SSW to provide NECR an interest rental return on these assets.

5. NECR Failed to Account for Market Factors and Economic Obsolescence That Were Quantified at the Time of the G&W Acquisition in 2012 and Are Equally Applicable Today

Another flaw in Banks' "market value" valuation is that it does not account for the economic obsolescence of NECR assets. In materials produced in discovery related to the recent transaction in which G&W purchased NECR and a number of other railroads from RailAmerica,

³⁰ NECR_000993.

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G&W's valuation experts applied an economic obsolescence factor. In particular, a [[REDACTED]]
[[REDACTED]]
[[REDACTED]]
[[REDACTED]]
[[REDACTED]] makes an adjustment for economic obsolescence that is necessary to align the estimate to the fair market value. This valuation was informed by the purchase price that G&W agreed to pay for the NECR and is supported by corresponding materials produced in discovery.

The [[REDACTED]]
[[REDACTED]] (NECR_0027894) and recognizes that
[[REDACTED]]
[[REDACTED]] (NECR_0027845). After developing
[[REDACTED]]
[[REDACTED]]
[[REDACTED]] (NECR_0027894). Regarding the transaction value, the [[REDACTED]]
report lists a purchase price of NECR of [[REDACTED]]
[[REDACTED]] (NECR_0027932).³¹

³¹ Further confirming the accuracy of this estimate was a similar valuation produced in discovery that was conducted as part of the overall sale price G&W paid to acquire RailAmerica. This study performed [[REDACTED]]
[[REDACTED]] (NECR_0028045).

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In light of this transaction value, along with other considerations implied by the transaction, the [[REDACTED]] accordingly adjusts the calculated RCNLD amounts by an economic obsolescence factor to reach a fair value determination for the underlying property and equipment assets described as follows:

[[REDACTED]]

(NECR_0027896)]

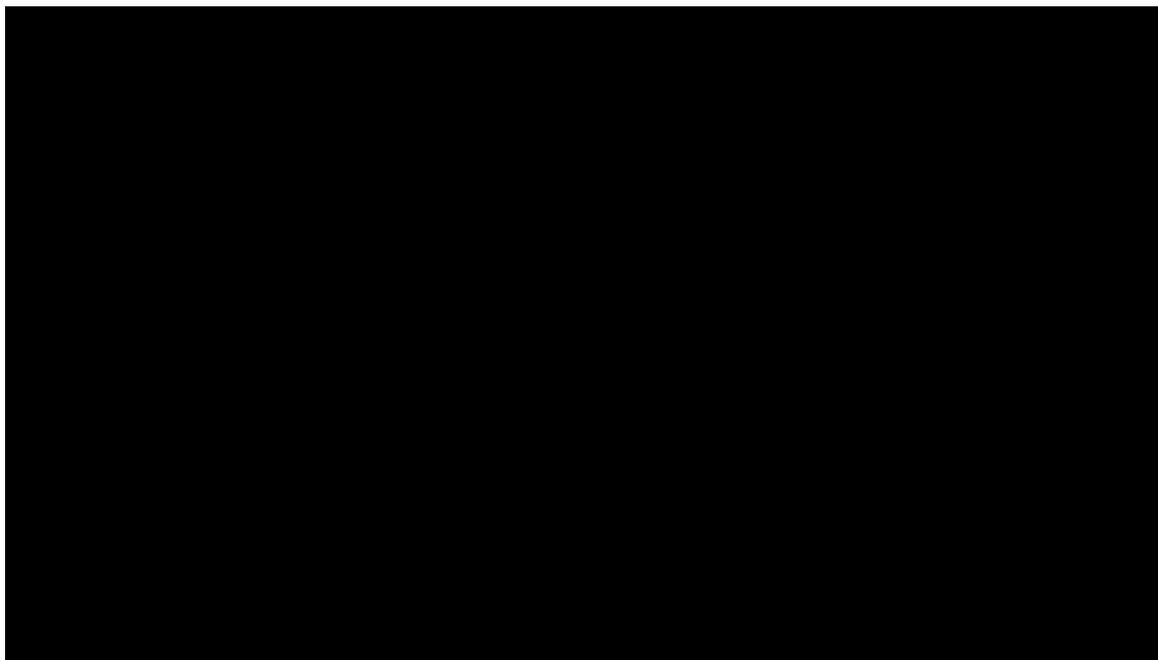
The below table depicts the RCNLD estimate of [[REDACTED]] million for the entire NECR prepared by [[REDACTED]] for NECR's railroad property, equipment and land assets, and the resulting economic obsolescence adjustment to determine the fair value of [[REDACTED]] million for these assets. It should be noted that NECR also produced a [[REDACTED]]

[[REDACTED]]

[[REDACTED]] (NECR_0026773).

Table 11

[[[REDACTED]



(Source: NECR_0027960)

6. Review NECR proposed application of pre-tax cost of capital vis-à-vis prior Board precedent.

NECR proposes using the STB's 2013 railroad industry cost of capital on a pre-tax basis as the interest rental rate to be applied to the valuation base to derive an interest rental payment. This approach is consistent with SSW compensation methodology. I have updated NECR's calculations to instead use the STB's 2014 of capital, adjusted to pre-tax levels, which is consistent with the valuation base calculated as of 2014. Further, I correct an error in NECR's opening pre-tax adjustment calculation that incorrectly adjusts both debt and equity components of the capital structure, whereas the correct application of a pre-tax adjustment to the STB's railroad industry cost of capital only affects the equity component³².

³² See Baranowski Workpaper "Trackage Rate Calculations", tab "Cost of Capital"

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7. Restatement of NECR Valuation and Interest Rental Component

NECR's VIP valuation must be adjusted to account for the flaws noted above so as to provide a meaningful valuation for purposes of determining the interest rental trackage compensation.

First, all value attributable to land should be removed from the Banks valuation because NECR has not demonstrated that any of the right-of-way is held in fee simple and admits that the right-of-way is easement. As easement, under STB precedent, it should have no value in this type of proceeding. This adjustment may be done by simply deducting the entire appraised land value from the Banks valuation for each segment.

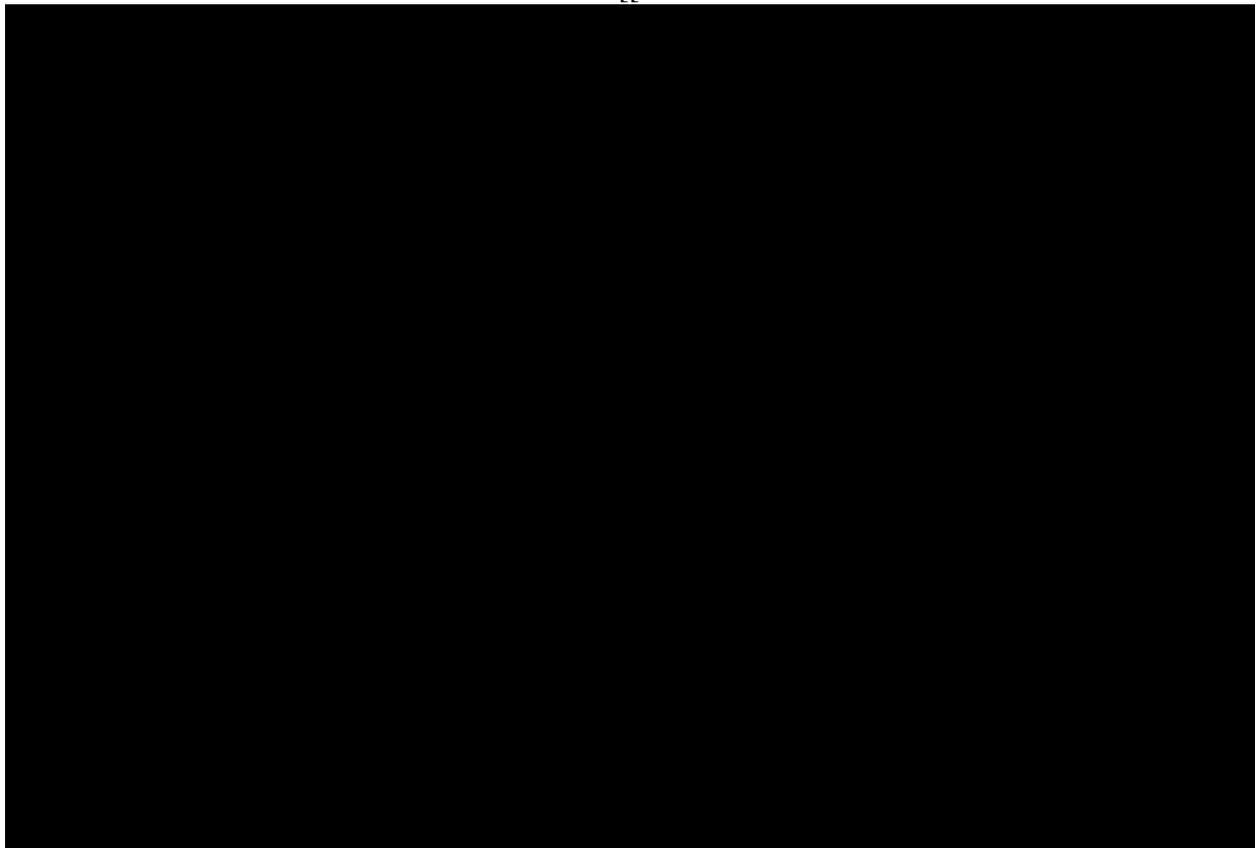
Second, assets funded by public monies should be removed from the Banks valuation because NECR is not entitled to receive a return on them from PAS. This adjustment requires allocating the \$50 million Vermonter grant to the various portions of the NECR system as a whole where work was performed, some of which fall on the PAS trackage segments, and then subtracting the portion allocated to the trackage segments from the VIP calculation. I have done so.

Costs for various project items were allocated to specific trackage and other NECR segments based on their share of total miles covered by the project item. For items where specific construction quantities were stated by subdivision, such as linear feet rail and tons of ballast, the allocation shares for each segment on the Palmer and Roxbury subdivisions were weighted by the relative quantities on each subdivision. The below table summarizes the overall allocation of grant funding between the Line and other portions of the NECR. Segment specific details are included in my workpapers.

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Table 12
Allocation of NECR Public Funding to Trackage Rights Segments

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Source: NECR_001097-1103 and NECR_001414 and NECR_001421 and Baranowski Workpaper “Public Funding Allocation.xlsx, tab “Vermont”

Five other projects funded with public grants were also identified on the Line. I assigned these grant funding amounts to the specific trackage segments where they occurred. Adding together these amounts with the allocated amounts of funding from the Vermont grant provides the total value that should be deducted from the Banks track valuation, as shown by the below table. My workpapers include details on a segment specific basis³³.

³³ See Baranowski Workpaper “Public Funding Allocation.xlsx, tab “Vermont”

PUBLIC VERSION

Table 13
Summary of Total Amount of Public Funding Removed from VIP
[[



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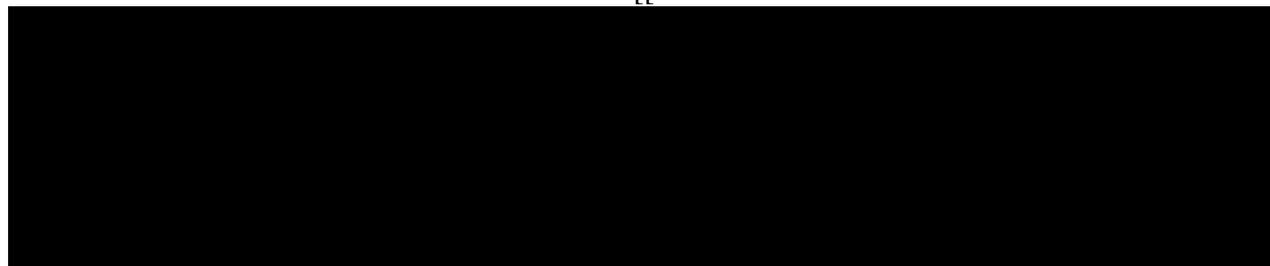
See Baranowski Workpaper “Public Funding Allocation.xlsx, tab “Summary” and NECR_000545-6, NECR_000556, NECR_000638, NECR_000870, and NECR_001030

Third, the RCNLD valuation performed by Banks should be adjusted to account for economic obsolescence. The most practicable and reliable way to do this is to derive an adjustment factor consistent with [[REDACTED]] to apply to the track/infrastructure component of the Banks valuation. The below table calculates an adjustment factor of [[REDACTED]] to apply to Banks’ track/infrastructure valuation to account for economic obsolescence.

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Table 14
Application of GAAP Obsolescence Factors to Trackage Rights Segments

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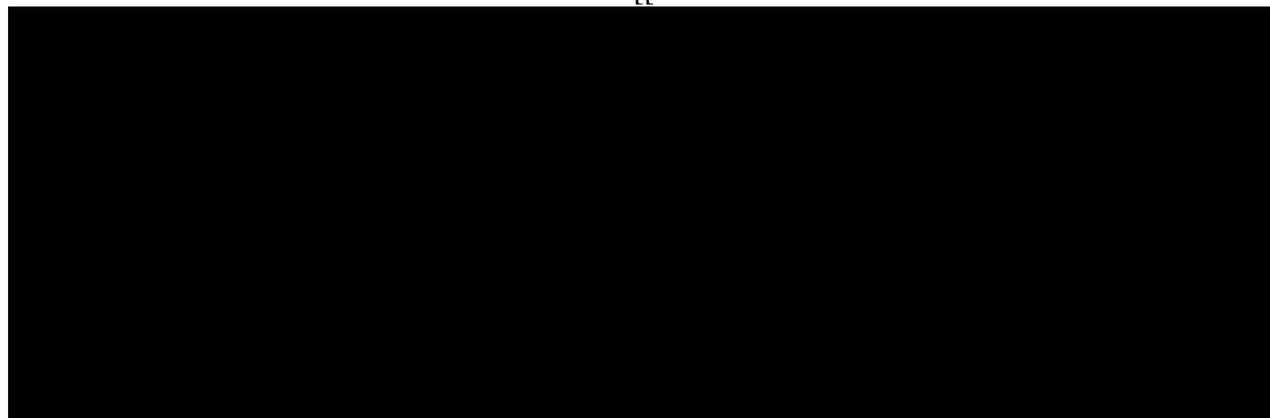
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See Baranowski Workpaper “Trackage Rate Calculations.xlsx”, tab “VIP Approach” and NECR_0027960

The below table summarizes the effects on the Banks valuation of applying the above three adjustments to all three segments.

Table 15
Restated Banks VIP Approach

[[

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See Baranowski Workpaper “Trackage Rate Calculations.xlsx”, tab “VIP Approach”

My workpapers include the above adjustments to the valuation base on a segment specific basis and the resulting per car mile costs for the interest rental component³⁴. As discussed above, interest rental costs are not included for the Middle Segment.

³⁴ See Baranowski Workpaper “Trackage Rate Calculations.xlsx”, tab “VIP Approach”

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IV. DEVELOPMENT OF INTEREST RENTAL COMPONENT BASED ON CAPITALIZED EARNINGS OF TRackage RIGHTS SEGMENTS

A. Capitalized Earnings Approach Under SSW

GCV, or capitalized earnings (“CE”), is defined generally as the value of a business based on the expected profits that the business will generate in the future, *i.e.*, the net present value (“NPV”) of future profits. In SSW, the ICC applied the GCV concept to a portion of the overall railroad. I have followed generally that approach and have determined GCVs separately for the northern, middle and southern segments.³⁵

At an overview level, the approach I employed to determine the GCVs for the northern, middle and southern segments started with system wide traffic, revenue and operating expense data for the entire NECR. From this data, I first developed densities for full year 2014 over all of NECR’s lines. I then used the Board’s Average Total Cost (“ATC”) methodology to allocate system wide revenues to the three individual segments. The ATC methodology generally allocates revenues geographically over a railroad’s lines based on the relative cost. It uses both variable costs and fixed costs in its allocation formula. As explained in more detail below, I developed variable costs using the Board’s Uniform Rail Cost System (“URCS”) costs for the Eastern Region. I calculated NECR’s fixed costs per mile using the relative mix of variable and fixed costs from the Eastern Region URCS applied to NECR costs.

To allocate operating expenses to the three segments, I again relied on existing Board procedures and used the URCS regression formulas in a manner consistent with the approach

³⁵ As discussed above, prior precedent in this proceeding relieved B&M and its successors from the burden of paying interest rental on the Middle Segment. As such, there would be no need to calculate the GCV for this segment. Nonetheless, in this section, I have developed a GCV for the Middle Segment for completeness, but have not included the resulting interest rental component to the trackage rights compensation for the Middle Segment.

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used by the Board in Otter Tail³⁶ to allocate system-wide standalone operating expenses to the segment being evaluated for an internal cross subsidy. These formulas have a variable and fixed component to ensure that all costs are allocated in accordance with relevant service units. I then capitalized the difference between the allocated revenues and operating expenses by dividing by the Board's cost of capital to determine the total GCV for each segment. That value was converted to an annual interest rental by multiplying it by the Board's cost of capital.

B. Processing of Data Produced by NECR in Discovery to PAS

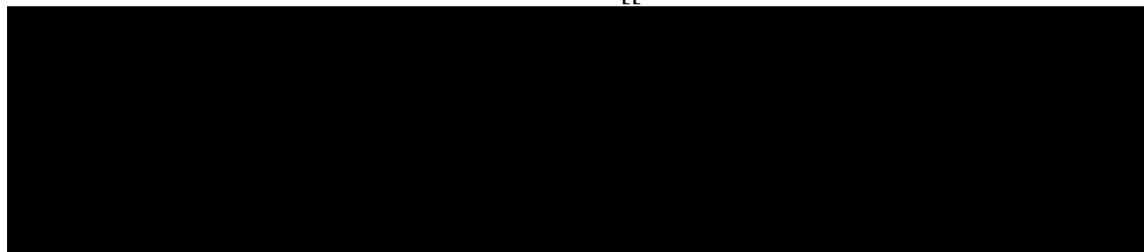
NECR provided waybill records and traffic reports in discovery. This information was sufficient to determine and allocate NECR's revenues between the PAS trackage segments and the residual NECR consistent with the Board's ATC method of allocating revenues among different segments of a move on the same railroad based on relative URCS variable and fixed costs. The waybill records include detailed shipment information, including shipment weight and size, commodity and car type, and NECR revenues. The waybill records also include some location fields identifying where the shipment came on and off the NECR and the type of movement (e.g., local, bridge, forwarded, received, or empty). I supplemented the location information in the waybill records with routing code data provided by NECR in a separate traffic report file by aligning the records based on common year and waybill number. This allowed complete identification of where the movement began and ended on the NECR, and whether each move was local to the NECR or interlined. Some of the records contained no revenue or faulty routing data as summarized in the table below.

³⁶ Otter Tail Power Co. v. BNSF Ry., NOR 42058, slip op. at 11-13 (STB served Jan. 27, 2006), aff'd sub nom. Otter Tail Power Co. v. STB, 484 F.3d 959 (8th Cir. 2007) ("Otter Tail").

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Table 16
Summary of Waybill Data Provided by NECR in Discovery

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See Baranowski Workpaper “Waybill Processing.xlsx”, tab “Summary” and NECR_0021557, NECR_0024715, and NECR_0025738

The records with no routing information could not be assigned directly to the NECR line segments. In order to ensure that the segment specific revenues that I developed tally to NECR total 2014 revenues, as described below, I trued up my allocation of revenues using the ATC formula to NECR’s total reported 2014 revenue.³⁷

C. Separation of Line Into Three Separate Segments for Capitalized Earnings Determinations.

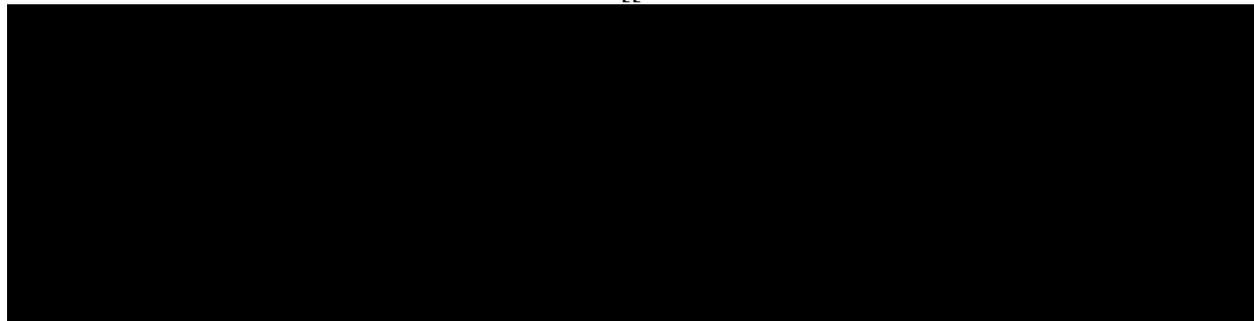
Next, based on the shipment’s beginning and end locations on the NECR, I assigned operating miles over North, Middle, South, and non-PAS segments of the NECR using mileages calculated in PCMiler and confirmed by timetables produced by NECR in discovery. I also assigned interchange and industry switches to the associated trackage rights segments where they occurred, which was determined based on the move type and beginning and ending location information for each shipment. The below table shows the resulting NECR car miles, net ton miles, and switches on each segment.

³⁷ See Table 21

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Table 17
NECR Car Miles by Segment

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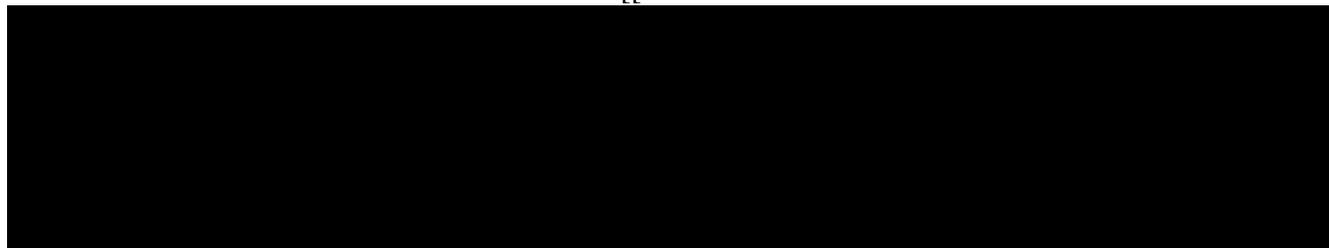
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See Baranowski Workpaper “ATC Earnings Calculation”, tab “Results”

To verify my buildup of movement data by segment, I compared my statistics by segment to the limited operating statistics provided by NECR in discovery for the PAS trackage segments (NECR_004591). As Table 17 below shows, my bottom up approach produced segment operating statistics that are generally aligned with NECR reported data.

Table 18
Comparison of Cars and Car Miles Calculated from Data Produced by NECR in Discovery to Other Reported Statistics

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See Baranowski Workpaper “ATC Earnings Calculation”, tab “Results”

D. Calculation of Trackage Rights Segment Earnings

1. The ATC methodology to allocate NECR revenues to the Trackage Rights Segments

The Board’s ATC methodology allocates revenues for a given shipment proportional to the total costs for the shipment as determined in URCS. This includes a variable URCS cost that is calculated on a shipment-specific basis in URCS Phase III, as well as an allocated share of the

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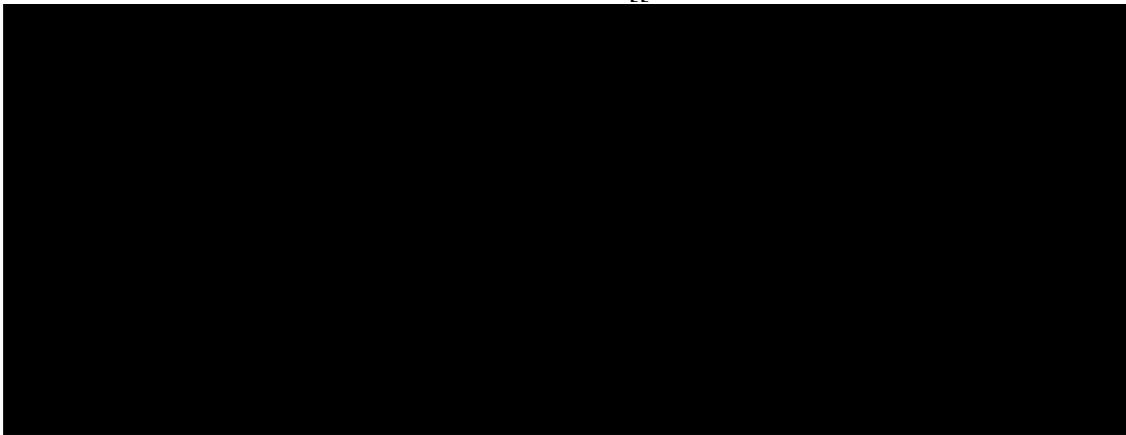
total fixed costs per mile that is derived from URCS Phase II and applied based on the density of the line segments over which the shipment traverses. For the present calculation, I used the Board’s 2014 URCS for the Eastern Region.

I calculated URCS variable costs for each shipment based on the operating miles, movement type, and other relevant shipment parameters derived from the above described data (including shipment weight, number of cars, car type, car ownership, and commodity). The resulting variable costs were split into costs related to switch events, including non I&I SEMs and associated make wholes, and other variable costs. Costs related to switch events were assigned to the trackage rights segments where the switch occurred, based on the relative SEMs of each switch event and associated make whole costs. Other variable costs were apportioned relative to the operating miles on each of the trackage right segments for each shipment. I also calculated fixed costs for the NECR by multiplying the fixed to variable cost ratio from URCS to calculate NECR’s variable costs, and then divided the total resulting NECR fixed costs by NECR’s route miles.

The below table depicts this calculation.

Table 19
Calculation of NECR Fixed Costs for ATC Allocation

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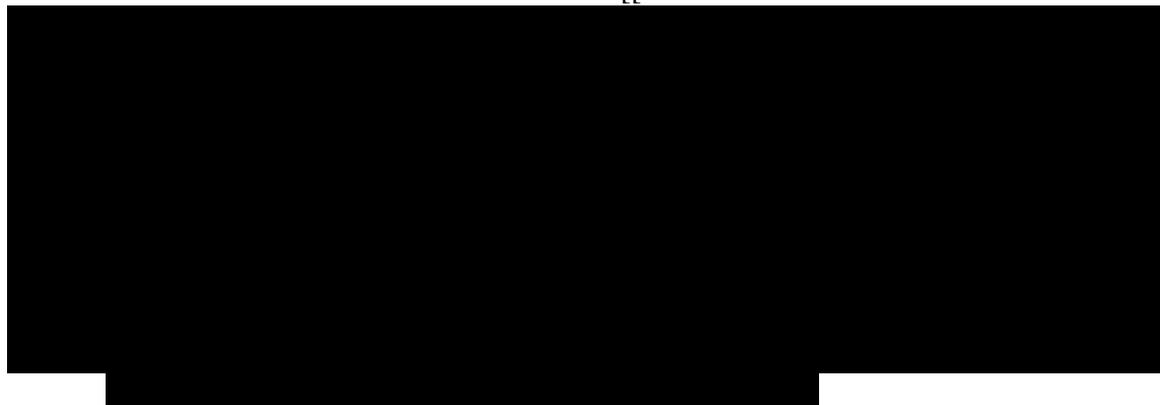
See Baranowski Workpaper “ATC Earnings Calculation”, tab “Results”

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The resulting fixed costs per mile were distributed over all net tons traversing a given NECR segment to determine URCS fixed costs for each shipment.

Table 20
NECR Fixed Costs Per Net Ton Mile

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See Baranowski Workpaper “ATC Earnings Calculation”, tab “Results”

The variable and fixed costs were added together to determine total costs, and revenues were allocated among NECR segments proportionally to their relative total costs. If revenues were less than variable costs, I allocated revenue proportional to the relative variable costs. I adjusted all allocated revenues upwards by the same percentage to ensure they equaled total NECR non trackage revenues reported for 2014³⁸.

2. Regional URCS regression formulas to allocate operating expenses to trackage rights segments

I allocated total NECR non-trackage pre-tax operating expenses for 2014 proportional to the relative URCS variable costs assigned to each segment³⁹. Deducting allocated revenues from allocated operating expenses yields NECR pre-tax earnings specific to each segment, as summarized in the below table.

³⁸ NECR_0019974

³⁹ This approach conservatively excludes various allocation expenses identified under “Other Income/(Expenses)” on NECR’s 2014 financial statement. See Baranowski Workpaper “ATC Earnings Calculation.xlsx”, tab “NECR-F”, at lines 37 to 40.

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Table 21
Calculation of NECR Earnings by Segment

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See Baranowski Workpaper “ATC Earnings Calculation”, tab “Results”

3. Estimated PAS Earnings

NECR rejects CE as a viable measure of value in this proceeding claiming “trackage rights line specific earnings are not available” and because “PAS is permitted to provide local service on the Middle Segment and PAS’ earnings are not available to NECR.”⁴⁰ The above section develops NECR’s earnings for specific trackage segments using a reliable and Board-approved method. NECR’s other criticism that PAS’ earnings should be added to the CE value is inapplicable to the Former B&M Line because those earnings have already been accounted for as part of the valuation in the forced divestiture of B&M to Amtrak discussed above. PAS’ earnings attributable to its bridge traffic over the southern and northern segments may be relevant to an appropriate determination of CE based valuation.⁴¹ To estimate PAS’s bridge traffic earnings, I extrapolated NECR earnings for the southern and northern segments to the

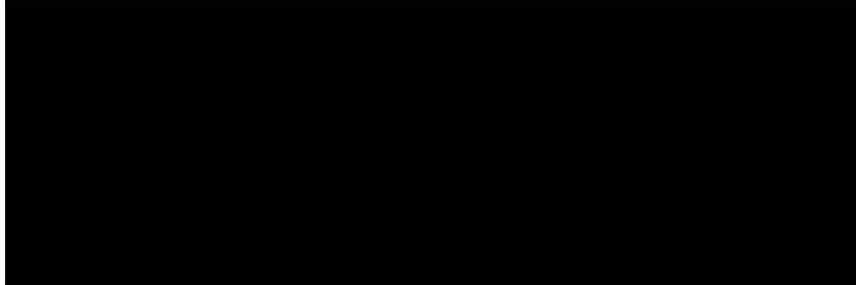
⁴⁰ Opening at Page 11

⁴¹ The SSW methodology necessarily does not include the tenant carrier’s earnings as part of the trackage line’s earnings because the order involved prospective trackage rights not yet exercised. See SSW I, 1984 ICC LEXIS 347 (1984).

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PAS traffic over those lines. The below table develops an extrapolation of PAS earnings to factor into the capitalized earnings valuation for the southern and northern segments.

Table 22
Effects of Including Estimate of PAS Earnings on Southern and Northern Segments
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See Baranowski Workpaper “Trackage Rate Calculation.xlsx”, tab “GCV Approach”

4. Calculate GCV

a. Calculation and Capitalization of Trackage Rights Segment Earnings

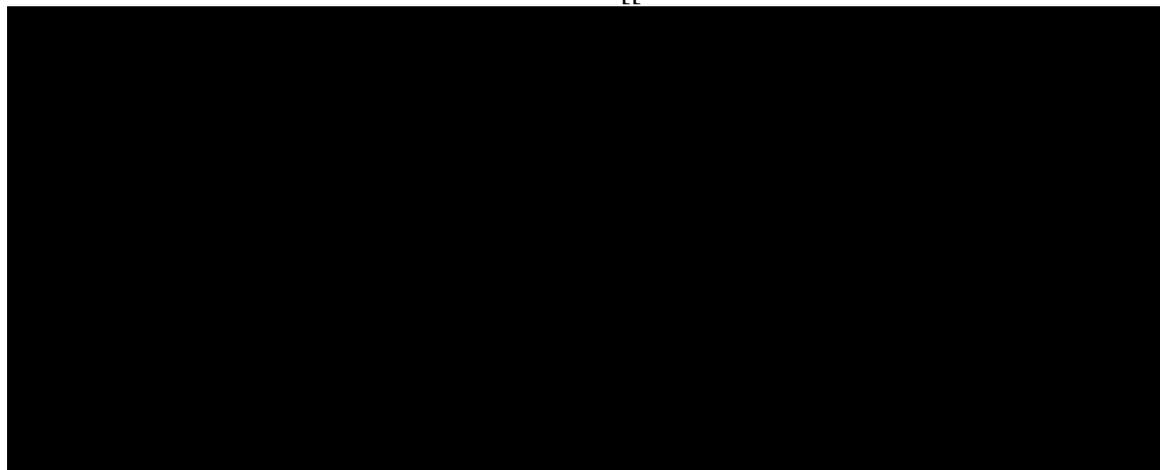
Based on the calculated pre-tax earnings of the PAS trackage line for each segment, I capitalized the earnings using the Board’s 2014 pre-tax cost of capital. This is consistent with the approach used by the ICC in the SSW Decisions⁴². I next calculated an annual interest rental amount by multiplying the valuation by the same cost of capital rate. This calculation effectively cancels itself out and simplifies to dividing annual segment earnings, which equals annual interest rental, by the total car-miles on the segment to calculate an interest rental per car mile figure. The below table summarizes the results.

⁴² SSW II, at 677

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Table 23
Summary of Capitalized Earnings for Southern and Northern Segments

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See Baranowski Workpaper “Trackage Rate Calculation.xlsx”, tab “GCV Approach”

V. SUMMARY OF CORRECTED TRACKAGE RIGHTS COMPENSATION

The below tables summarizes the components of proposed trackage compensation per car mile under both a Restated Banks VIP Approach and a CE approach to the interest rental component.

Table 24

Proposed Rate Under Restated Banks VIP Approach (2014)			
	Southern Segment	Middle Segment	Northern Segment
Variable Dispatching	\$0.02	\$0.02	\$0.02
Maintenance/Operating	\$0.42	\$0.36	\$0.36
Interest Rental	\$0.07	\$0.00	\$0.12
Total per Car Mile	\$0.51	\$0.38	\$0.50

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Table 24

Proposed Rate Under CE Approach (2014)			
	Southern Segment	Middle Segment	Northern Segment
Variable Dispatching	\$0.02	\$0.02	\$0.02
Maintenance/Operating	\$0.42	\$0.36	\$0.36
Interest Rental	\$0.82	\$0.00	\$0.71
Total per Car Mile	\$1.26	\$0.38	\$1.09

See Baranowski Workpaper “Trackage Rate Calculation.xlsx”, tab “Trackage Rates”

When weighted by respective car-miles over each segment, the result is an overall average rate level of \$0.41 per car mile under the Restated Banks VIP Approach and \$0.61 per car mile under a GCV/CE approach.

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VERIFICATION

I, Michael R. Baranowski, a Senior Managing Director at FTI Consulting and the head of FTI's Network Industries Strategies group within the Economic Consulting division, verify under penalty of perjury under the laws of the United States that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement.

Executed this 18th day of July, 2016.


Michael R. Baranowski

PUBLIC VERSION

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 35842

**NEW ENGLAND CENTRAL RAILROAD, INC.
– TRACKAGE RIGHTS ORDER –
PAN AM SOUTHERN LLC**

**REPLY TO NEW ENGLAND CENTRAL RAILROAD, INC.'S
OPENING STATEMENT AND EVIDENCE**

**EXHIBIT B
ATTACHMENT 1**

VERIFIED STATEMENT OF MICHAEL R. BARANOWSKI

Michael R. Baranowski

Senior Managing Director – Economic Consulting

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EDUCATION

B.S. in Accounting, Fairfield
University

Supplemental Finance Studies,
Kean College

Mike Baranowski heads FTI's Network Industries Strategies practice and provides strategic, financial and economic consulting services to the telecommunications and railroad and pipeline transportation industries. He has special expertise in analyzing and developing complex costing and cash flow models, conducting detailed operations analysis, and transportation engineering. Much of his work involves providing oral and written expert testimony before courts, arbitration panels and regulatory bodies.

He is a recognized expert in railroad regulatory economics and has assisted FTI's railroad clients in a broad range of litigation and regulatory engagements involving pricing of services, contract disputes, damage calculations and analyses of the specific effects of pending or proposed changes in policy or regulation.

Some of Mr. Baranowski's representative experience includes:

- Development of strategic litigation approach for large railroad rate proceedings based on the theory of Constrained Market Pricing and the Stand-Alone cost test. Theory assumes the existence of a hypothetical, efficient competitor and involves detailed analysis of railroad operations, expenses, capital expenditures and revenues.
- Development of a suite of modeling tools to assess the regulatory risk of railroad rates for a mix of commodities based on key cost drivers and forecasts.
- Design and development of modeling tools designed to simulate the cost of competitive entry into local telecommunications markets and directing the efforts of a nationwide team of testifying experts presenting the cost model results in multiple proceedings across the country.
- Detailed analysis, critique and restatement of complex cost models developed for the railroad, telecommunications, pipeline and trucking industries.
- Designing modeling tools for use in calculating the costs of competitive entry into railroad, telecommunications and pipeline markets.
- Conducting detailed analyses of railroad operations and developing the associated capital requirements and operating expenses attributable to specific movements and the incremental capital and operating expense requirements attributable to major changes in anticipated traffic levels.

Mr. Baranowski holds a B.S. in Accounting from Fairfield University in Fairfield, Connecticut and has pursued supplemental finance studies at Kean College in Union, New Jersey.

SELECT RAILROAD TESTIMONY

Surface Transportation Board

May 1, 2006	Docket No. Ex Parte 657 (Sub-No. 1) Major Issues in Rail Rate Cases, Verified Statement Supporting Comments of BNSF Railway Company
May 31, 2006	Ex Parte 657 (Sub-No. 1) Major Issues in Rail Rate Cases; Verified Statement Supporting Reply Comments of BNSF Railway Company
June 15, 2006	Docket No. 42088 Western Fuels Association, Inc. and Basin Electric Power Cooperative, Inc. v. BNSF Railway Company, Reply Supplemental Evidence of BNSF Railway Company
June 15, 2006	Docket No. 41191 (Sub 1) AEP Texas North Company v. BNSF Railway Company, Reply Supplemental Evidence of BNSF Railway Company
June 30, 2006	Docket No. Ex Parte 657 (Sub-No. 1) Major Issues in Rail Rate Cases; Verified Statement Supporting Rebuttal Comments of BNSF Railway Company
February 4, 2008	Docket No. 42099 E.I. DuPont De Nemours and Company v. CSX Transportation, Inc., Opening Evidence of CSX Transportation, Inc.
February 4, 2008	Docket No. 42100 E.I. DuPont De Nemours and Company v. CSX Transportation, Inc., Opening Evidence of CSX Transportation, Inc.
February 4, 2008	Docket No. 42101 E.I. DuPont De Nemours and Company v. CSX Transportation, Inc., Opening Evidence of CSX Transportation, Inc.
May 1, 2008	Docket No. Ex Parte 679 Petition of the AAR to Institute a Rulemaking Proceeding to Adopt a Replacement Cost Methodology to Determine Railroad Revenue Adequacy, Verified Statement of Michael R. Baranowski
July 14, 2008	Docket No. 42088 Western Fuels Association, Inc. and Basin Electric Power Cooperative, Inc. v. BNSF Railway Company, Third Supplemental Reply Evidence of BNSF Railway Company
July 14, 2008	Docket No. AB-515 (Sub-No. 2) Central Oregon & Pacific Railroad, Inc. -- Abandonment and Discontinuance of Service -- in Coos, Douglas, and Lane Counties, Oregon (Coos Bay Rail Line)
August 8, 2008	Docket No. 41191 (Sub-No. 1) AEP Texas North Company v. BNSF Railway Company, Fourth Supplemental Evidence of BNSF Railway Company
August 11, 2008	Docket No. 42104 Entergy Arkansas, Inc. and Entergy Services, Inc. v Union Pacific Railroad Company and Missouri & Northern Arkansas Railroad Company, Inc.; Finance Docket No. 32187 Missouri & Northern Arkansas Railroad Company, Inc. – Lease, Acquisition and Operations Exemption – Missouri Pacific Railroad Company and Burlington Northern Railroad Company, Reply Evidence and Argument of Union Pacific
September 5, 2008	Docket No. 41191 (Sub-No. 1) AEP Texas North Company v. BNSF Railway Company, Fourth Supplemental Reply Evidence of BNSF Railway Company
September 12, 2008	Docket No. AB-515 (Sub-No. 2) Central Oregon & Pacific Railroad, Inc. -- Abandonment and Discontinuance of Service -- in Coos, Douglas, and Lane Counties, Oregon (Coos Bay Rail Line); Rebuttal to Protests
August 24, 2009	Docket No. 42114 US Magnesium, L.L.C. v. Union Pacific Railroad Company, Opening Evidence of Union Pacific Railroad Company

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October 22, 2009	Docket No. 42114 US Magnesium, L.L.C. v. Union Pacific Railroad Company, Rebuttal Evidence of Union Pacific Railroad Company
January 19, 2010	Docket No. 42110 Seminole Electric Cooperative, Inc. v. CSX Transportation, Inc., Reply Evidence of CSX Transportation, Inc.
May 7, 2010	Docket No. 42113 Arizona Electric Power Cooperative, Inc. v. BNSF Railway Company and Union Pacific Railroad Company, Joint Reply Evidence of BNSF Railway Company and Union Pacific Railroad Company
November 22, 2010	Docket No. 42088 Western Fuels Association, Inc. and Basin Electric Power Cooperative, Inc. v. BNSF Railway Company, BNSF Comments on Remand, Joint Verified Statement of Michael R. Baranowski and Benton V. Fisher
January 6, 2011	Docket No. 42056 Texas Municipal Power Agency v. BNSF Railway Company, BNSF Reply to TMPA Petition for Enforcement of Decision, Joint Verified Statement of Michael R. Baranowski and Benton V. Fisher
October 28, 2011	Docket No. FD 35506 Western Coal Traffic League - Petition for Declaratory Order, Opening Evidence of BNSF Railway Company, Joint Verified Statement of Michael R. Baranowski and Benton V. Fisher
November 10, 2011	Docket No. 42127 Intermountain Power Agency v. Union Pacific Railroad Company, Reply Evidence of Union Pacific Railroad Company
November 28, 2011	Docket No. FD 35506 Western Coal Traffic League - Petition for Declaratory Order, Reply Evidence of BNSF Railway Company, Joint Reply Verified Statement of Michael R. Baranowski and Benton V. Fisher
May 10, 2012	Docket No. 42056 Texas Municipal Power Agency v. BNSF Railway Company, BNSF Reply to TMPA Petition to Reopen and Modify Rate Prescription, Joint Verified Statement of Michael R. Baranowski and Benton V. Fisher
November 30, 2012	Docket No. 42125 E.I. DuPont De Nemours & Company v. Norfolk Southern Railway Company, Reply Evidence of Norfolk Southern Railway Company
December 7, 2012	Docket No. Ex Parte 715, Rate Regulation Reforms, Reply Comments of the Association of American Railroads, Verified Statement of Michael R. Baranowski
January 7, 2013	Docket No. 42130 SunBelt Chlor Alkali Partnership v. Norfolk Southern Railway Company, Reply Evidence of Norfolk Southern Railway Company
March 1, 2013	Ex Parte No. 711 Petition for Rulemaking to Adopt Revised Competitive Switching Rules, Opening Comments of the Association of American Railroads, Verified Statement of Michael R. Baranowski and Richard W. Brown
April 12, 2013	Docket No. 42136 Intermountain Power Agency v. Union Pacific Railroad Company, Reply Evidence of Union Pacific Railroad Company
April 30, 2013	Ex Parte No. 711 Petition for Rulemaking to Adopt Revised Competitive Switching Rules, Reply Comments of the Association of American Railroads, Verified Statement of Michael R. Baranowski and Richard W. Brown
June 20, 2013	Ex Parte No. 431 (Sub-No. 4) Review of the General Purpose Costing System, Comments of the Association of American Railroads, Joint Verified Statement of Michael R. Baranowski and Benton V. Fisher

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- September 5, 2013 Ex Parte No. 431 (Sub-No. 4) Review of the General Purpose Costing System, Reply Comments of the Association of American Railroads, Joint Verified Statement of Michael R. Baranowski and Benton V. Fisher
- July 21, 2014 Docket No. 42121 Total Petrochemicals & Refining USA, Inc. v. CSX Transportation, Inc., Reply Evidence of CSX Transportation, Inc.
- September 5, 2014 Ex Parte No. 722 Railroad Revenue Adequacy, Opening Comments of Norfolk Southern Railway Company, Verified Statement of Michael R. Baranowski
- November 4, 2014 Ex Parte No. 722 Railroad Revenue Adequacy, Reply Comments of Norfolk Southern Railway Company, Verified Statement of Michael R. Baranowski
- September 4, 2015 Docket No. FD 35743 Application of the National Railroad Passenger Corporation Under 49 U.S.C. § 24308(a) - Canadian National Railway Company, Opening Evidence of Illinois Central Railroad Company and Grand Trunk Western Railroad, Joint Verified Statement of Michael Baranowski and Benton Fisher
- October 7, 2015 Docket No. 42121 Total Petrochemicals & Refining USA, Inc. v. CSX Transportation, Inc., Supplemental and Compliance Evidence of CSX Transportation, Inc.
- October 23, 2015 Docket No. FD 33760 (Sub-No. 46) BNSF Railway Company - Terminal Trackage Rights -- Kansas City Southern Railway Company and Union Pacific Railroad Company, BNSF Rebuttal Statement, Verified Statement of Michael R. Baranowski
- November 20, 2015 Docket No. 42121 Total Petrochemicals & Refining USA, Inc. v. CSX Transportation, Inc., Reply to Supplemental and Compliance Evidence
- March 7, 2016 Docket No. 42142 Consumers Energy Company v. CSX Transportation, Inc., Reply Evidence of CSX Transportation, Inc.

US District Court for Northern District of Oklahoma

- January 2, 2007 Case No. 06-CV-33 TCK-SAJ, Grand River Dam Authority v. BNSF Railway Company; Report of Michael R. Baranowski
- February 2, 2007 Case No. 06-CV-33 TCK-SAJ, Grand River Dam Authority v. BNSF Railway Company; Reply Report of Michael R. Baranowski

Circuit Court of Pulaski County, Arkansas

- August 17, 2007 Case No. CV 2006-2711, Union Pacific Railroad v. Entergy Arkansas, Inc. and Entergy Services, Inc., Expert Witness Report of Michael R. Baranowski
- December 14, 2007 Case No. CV 2006-2711, Union Pacific Railroad v. Entergy Arkansas, Inc. and Entergy Services, Inc., Reply Expert Witness Report of Michael R. Baranowski

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- February 15, 2008 Case No. 06-C-0515, Wisconsin Electric Power Company v. Union Pacific Railroad Company, Expert Reply Report of Michael R. Baranowski

Arbitrations and Mediations

March 7, 2005	Arbitration Case #181 Y 00490 04 BNSF Railway Company and J.B. Hunt Transport, Inc., Expert Report on behalf of BNSF Railway Company
March 28, 2005	Arbitration Case #181 Y 00490 04 BNSF Railway Company and J.B. Hunt Transport, Inc., Rebuttal Expert Report on behalf of BNSF Railway Company
April 12, 2005	Arbitration Case #181 Y 00490 04 BNSF Railway Company and J.B. Hunt Transport, Inc., Supplemental Expert Report on behalf of BNSF Railway Company
April 19, 2005	Arbitration Case #181 Y 00490 04 BNSF Railway Company and J.B. Hunt Transport, Inc., Supplemental Rebuttal Expert Report on behalf of BNSF Railway Company
April/May 2005	Arbitration Case #181 Y 00490 04 BNSF Railway Company and J.B. Hunt Transport, Inc., Hearings before Arbitration Panel
February 20, 2007	In the Matter of the Arbitration between the Detroit Edison Company, et al, and BNSF Railway Company, Expert Report of Michael R. Baranowski on behalf of BNSF Railway Company
March 19, 2007	In the Matter of the Arbitration between the Detroit Edison Company, et al, and BNSF Railway Company, Supplemental Expert Report of Michael R. Baranowski on behalf of BNSF Railway Company
February 12, 2009	In the Matter of the Arbitration between Wisconsin Public Service Corporation and Union Pacific Railroad Company, Rebuttal Expert Report of Michael R. Baranowski on behalf of Union Pacific Railroad Company
October 16, 2009	In the Matter of Arbitration Between Norfolk Southern Railway Company and Drummond Coal Sales, Inc., Expert Report of Michael R. Baranowski on behalf of Norfolk Southern Railway Company
July 25, 2011	American Arbitration Association Case No. 58 147 Y 0031809, BNSF Railway Company and Kansas City Southern Railway Company, Expert Report of Michael R. Baranowski on behalf of BNSF Railway Company
April 25, 2013	JAMS REF #1340009009, Union Pacific Railroad vs. Canadian Pacific and Dakota, Minnesota & Eastern Railroad Arbitration, Expert Report of Michael R. Baranowski on behalf of Union Pacific Railroad Company
September 6, 2013	IN JAMS ARBITRATION, Case No. 1220044715, Union Pacific Railroad Company v. BNSF Railway Company, Expert Report of Michael R. Baranowski
October 25, 2013	IN JAMS ARBITRATION, Case No. 1220044715, Union Pacific Railroad Company v. BNSF Railway Company, Expert Reply Report of Michael R. Baranowski
January 1, 2014	IN JAMS ARBITRATION, Case No. 1220044715, Union Pacific Railroad Company v. BNSF Railway Company, BNSF Post-Argument Submission, Affidavit of Michael R. Baranowski

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 35842

**NEW ENGLAND CENTRAL RAILROAD, INC.
– TRACKAGE RIGHTS ORDER –
PAN AM SOUTHERN LLC**

**REPLY TO NEW ENGLAND CENTRAL RAILROAD, INC.'S
OPENING STATEMENT AND EVIDENCE**

EXHIBIT C

**REDLINE OF PAS VERSION OF NEW TRACKAGE RIGHTS
AGREEMENT COMPARED TO THE PROPOSED NECR VERSION**

PROPOSED TRACKAGE RIGHTS TERMS AND CONDITIONS

0. DEFINITIONS

As used herein, the following capitalized terms have the following meanings (any other capitalized terms being defined in context hereafter):

0.1 “Agreement” means the terms and conditions of trackage rights as a whole set forth herein, as ~~though the instant terms and conditions had been~~ agreed to contractually by PAS and NECR.

0.2 “Amtrak” means the National Railroad Passenger Corporation.

0.3 “B & M” mean Boston and Maine Corporation, a corporation with its principal office at Iron Horse Park, North Billerica, MA 01862.

0.4 “CCR” means Claremont and Concord Railway (including its successors and assigns).

0.5 “Conveyance Date” means September 9, 1988, the date on which B & M conveyed the Former B & M Line to Amtrak, and on which Amtrak conveyed the same to CV, pursuant to the Order.

0.6 “CV” means Central Vermont Railway, Inc., a corporation with its principal office at 2 Federal Street, St. Albans, VT 05478.

0.7 “CV Lines” means the approximately 13.4-mile rail line between White River Junction, Vermont, and Windsor, Vermont, and the approximately 10.6-mile rail line between Brattleboro, Vermont, and East Northfield, Massachusetts, both of which belonged to CV before the Conveyance Date, ~~and which are currently owned by NECR.~~

~~0.8 “Effective Date” means with respect to the compensation terms in Section 3 hereof, June 17, 2014, the date on which the parties agreed revised compensation would be effective, and with respect to other terms and conditions hereunder.~~ 0.8 “Effective Date” means the effective date established by order of the STB.

0.9 “Former B & M Line” means the approximately 48.8-mile rail line between Windsor, Vermont, and Brattleboro, Vermont, conveyed by B & M to Amtrak, and by Amtrak to CV, on the Conveyance Date pursuant to the Order, ~~and currently owned by NECR.~~

0.10 “GMRC” means the Green Mountain Railroad Corporation (including its successors and assigns).

~~0.11 “Hazardous Substance” means any substance which is hazardous to persons or property and includes, without limiting the generality of the foregoing (i) radioactive, explosive, poisonous, corrosive, flammable or toxic substances; (ii) substances that endanger the health and safety of persons; and (iii) substances declared to be hazardous, toxic or dangerous under any law or regulation now or hereafter enacted by any governmental authority having jurisdiction.~~

0.11 [Intentionally omitted.]

0.12 “ICC” means the U.S. Interstate Commerce Commission.

0.13 “Line” means the CV Lines and the Former B & M Line together, ~~currently owned by NECR.~~

0.14 “NECR” means New England Central Railroad, Inc., a corporation with its principal office at [INSERT ADDRESS].

0.15 “Order” means the decision of the ICC in National Railroad Passenger Corporation—Conveyance of Boston and Maine Corporation Interests in Connecticut River Line in Vermont and New Hampshire, dated August 4, 1988, served August 9, 1988, and published at pages 761 through 817 of volume 4 of the ICC Reports, Second Series.

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0.16 "PAS" means Pan Am Southern LLC, a limited liability company with its principal office at [INSERT ADDRESS].

0.17 "ST" means the Springfield Terminal Railway Company (including its successors and assigns).

0.18 "STB" means the U.S. Surface Transportation Board (including any successor agencies).

1. GRANT OF TRACKAGE RIGHTS

1.1 Subject to the terms and conditions of this Agreement, PAS shall have the nonexclusive right to operate PAS's trains, locomotives, cars and equipment with PAS's own crews over the Line, as more particularly defined as follows:

All main line track and passing sidings between a point at the interlocking at East Northfield, Massachusetts (approximately MP NECR MP 110.51) to the Bank switch at White River Junction, Vermont (approximately NECR MP 13.40).

1.2 PAS shall have only overhead running rights over the CV Lines.

1.3 PAS shall have the exclusive right to serve all existing shippers and shippers' facilities that were located on the Former B & M Line as of the Conveyance Date, including any and all new shippers that locate at such existing facilities after the Conveyance Date, provided that PAS makes available a minimum three day per week service along the Line. PAS must consult with the shippers and ensure their needs are met up to three day per week service.

1.3.1 For purposes of this Section 1.3, "existing shippers and shippers' facilities" shall mean industries and facilities at rail sidings which received or tendered rail shipments during the twelve months immediately prior to the Conveyance Date.

1.3.2 For purposes of this Section 1.3, "three day per week service" shall mean the provision of local set-off and pick-up service to shippers on the Former B & M Line at least three times per week (Monday through the following Sunday) in each direction.

1.3.3 NECR shall be permitted to commence service to existing shippers and shippers' facilities upon PAS's failure to make available three day per week service during two weeks out of any four week period, unless such failure is excused by Section 10.6.

1.4 Except as provided in Section 1.3, NECR and PAS shall each have the right to compete for and serve the following shippers and shippers' facilities on the Former B & M Line:

- (a) shippers and shippers' facilities located on the Former B & M Line which did not receive or tender rail shipments during the twelve months immediately prior to the Conveyance Date;
- (b) any other new shippers;
- (c) any existing shippers and shippers' facilities to which PAS does not provide a minimum three day per week service, as specified in Section 1.3.

[[1.4.1 NECR shall, upon request by PAS, provide reciprocal switching to permit PAS to serve such shippers and shippers' facilities as PAS may serve hereunder. NECR shall not be required to switch cars on PAS's behalf at shippers' facilities which NECR serves by virtue of PAS's failure to make available a minimum three day per week service along the Line as specified by Section 1.3, but PAS shall retain the right to provide service directly to such shippers and shippers' facilities. PAS shall pay to NECR a per switch charge as established by NECR, provided that such per switch charge is not greater than 180% of the NECR variable cost of providing such switching service computed using NECR's costs computed in accordance with formulas generally used or accepted in STB proceedings-]]

1.5 NECR and PAS shall each have the right to compete for and to interchange traffic at Bellows Falls, Vermont, with GMRC and at Claremont Junction, New Hampshire, with the CCR. PAS shall have the exclusive right to interchange traffic at Charlestown, New Hampshire, with the ST.

1.6 PAS shall have the right of entry over the Line for any and all PAS employees, agents or representatives, machinery, vehicles or equipment which PAS may deem necessary or convenient for the purposes of inspecting the Line, clearing any derailments or wrecks of PAS trains on the Line or otherwise conducting its operations over the Line; provided in each case that such entry shall not unreasonably interfere with operations on the Line by other carriers.

1.7 [Intentionally Omitted – No Longer Applicable].

1.8 Except as provided herein, this Agreement does not diminish in any way NECR's right to use the Line, or NECR's right to lease or otherwise allow another carrier to use the Line.

1.9 Notwithstanding anything to the contrary contained in this Agreement or otherwise agreed by the parties hereto prior to the Effective Date, PAS (or any agents or affiliates acting on their behalf) shall not:

~~(a) permit or admit, without permission in writing from NECR, any third party to the use of all or any part of the Line, nor contract, or make any agreement to provide haulage over the Line of trains or cars of any third party which in the normal course of business would not be considered as the trains or cars of PAS or ST, as applicable;~~

(a) [Intentionally omitted];

(b) obstruct or leave any train or locomotive unattended on the Line, or stop its trains or locomotives on the Line except in the case of mechanical failure or emergency;

(c) construct or alter tracks connecting to the Line, including the construction, installation or alteration of any switches from the Line without the express written consent of NECR; or

(d) construct, erect or place, or cause to be constructed, erected or placed on or near the Line, any structure, signage, fixture or any other work without the prior written consent of NECR;

~~(e) fuel locomotives on the Line, or load, unload or store any Hazardous Substance on the Line, except as permitted under this Agreement and in accordance with the terms and conditions herein; or~~

~~(f) by reason of failure or neglect on the part of NECR to maintain, repair or renew the Line, have or make any claim or demand against NECR or its parent corporation, subsidiaries or affiliates, or their respective directors, officers, agents or employees, for any injury to or death of any person or persons whatsoever, or for any damage to or loss or destruction of any property whatsoever, or for loss of any nature suffered by PAS resulting from such failure or neglect including without limitation any interruption or delay as PAS' usage of the Line shall be at its own risk and on an "as is" basis. (c) _____ [Intentionally omitted.]~~

(f) [Intentionally omitted.]

2. TERM AND TERMINATION

2.1 The term of this Agreement shall commence as of 7:00 a.m. Eastern Time, on the Effective Date.

2.2 Except as provided in Section 2.3 and Section 8.1, and subject to the provisions of this section, the term of this Agreement shall be perpetual. After ~~40~~twenty (20) years from the Effective Date, either party to this Agreement may seek modifications from the other and, if satisfactory modifications are not agreed to after a reasonable period for

negotiation, may apply to the STB for modifications. Nothing in this section shall authorize the STB to impose arbitration requirements upon either party to this Agreement.

2.3 PAS may terminate this Agreement immediately upon written notice to NECR.

3. COMPENSATION

~~3.1 PAS shall be obligated to pay for and contribute towards (i) the cost of continued maintenance and operating costs, and variable costs attributable to PAS' usage of the Line through payments set forth in Section 3.3 below; (ii) emergency repairs, capital upgrades and material alterations and additions not included in routine and program maintenance set forth in Section 3.7 below; and (iii) interest rental due to NECR set forth in Section 3.8 below.~~

~~3.1 PAS shall be obligated to pay the compensation set forth in Appendix A.~~

3.2 NECR shall be solely responsible for dispatching all operations over the Line and for the maintenance and repair of the Line, including the signals and the signal and dispatching system which controls operations on it. NECR shall keep the Line, at all times throughout the term of this Agreement or any extensions thereof, in not less than FRA Class II condition.

~~3.3 In full satisfaction of any and all obligations of PAS to pay for the trackage rights provided herein or contribute towards the costs of dispatching, maintenance and repair of the Line (including the maintenance, repair and operation of the signals and the signal and dispatching system which controls operations on it), PAS shall pay to NECR [] per car mile (whether loaded or empty including locomotives, cabooses and work equipment) of traffic actually operated by PAS (or its assignee) over the Line. Additionally, if NECR identifies additional variable costs attributable to PAS' use of the Line, the per car mile fee shall be adjusted by the annual amount of such variable costs divided by PAS' car miles during the previous 12 months.~~

~~3.3 [[Intentionally omitted.]]~~

3.4 Except as otherwise provided herein, all payments to be made by PAS under this Agreement shall be adjusted on March 31st of each year during the term of the Agreement, for price level changes from July 1, 2015, (using Second Quarter 2015) based on the relationship of the most recent quarter's Association of American Railroads (AAR) Eastern District, Quarterly Indices of Chargeout Prices and Wage Rates (Table C)—“Material prices, wage rates and supplements combined (excluding fuel)” to comparable indices of the quarter twelve months previous, ~~provided however that in no event shall the annual rate adjustment be less than 0%.~~ The first adjustment to be made shall be based on the comparison of the Second Quarter 2015 index value to the Second Quarter 2016.

3.5 PAS shall have responsibility for and shall report and pay directly to the owner of the cars, all mileage, car hire and other charges accruing on cars in PAS's trains on the Line.

3.6 NECR shall issue its bill to PAS for the payments specified by Sections 1.4 and Section 3.3 and Section 3.8 hereof by the fifteenth (15) day of each month for the traffic transported during the preceding calendar month. PAS shall pay to NECR the amount shown on such bill by the last day of the month following in which such bill is issued. Payments not received by PAS by such last day of the month in which the bill is issued will accrue interest at the rate of one and one-half (1.5%) percent per month for each month or portion of a month by which the payment is late.

3.7 In the event that NECR is required to undertake any major capital projects (not generally included in routine or program maintenance) which may become necessary ~~or desirable in NECR's discretion in the ordinary course or~~ due to changes in applicable local, state or federal statutes, ordinances or regulations, or by catastrophic occurrences on the Line, including but not limited to, floods, washouts or destruction of bridges, or implementation of Positive Train Control, PAS or its assignee shall pay its proportionate share of the expenditures actually made by NECR for such capital projects based upon the percentage of total car miles on the Line attributable to PAS's (or its assignee's) average traffic volume during the ~~two (2) year period preceding the capital project. NECR shall issue its bill to PAS for the payments specified by this Section 3.7 as soon as practicable following the acceptance of a bid or commencement of the capital project. Payments not received by PAS by such last day of the month in which the bill is issued will accrue interest at the rate of one and one-half (1.5%) percent per month for each month or portion of a~~

month by which the payment is late five (5) year period preceding the capital project.

~~3.8 In full satisfaction of any and all obligations of PAS to pay for the interest rental component for the use of the Line, PAS shall pay to NECR \$[] monthly during the term of this Agreement. The interest rental component shall be adjusted each year based on changes in NECR's pre-tax cost of capital, as determined by considering the post-tax cost of capital as determined by the STB, and the effective tax rate of NECR, or its parent company if NECR is consolidated with its parent for tax purposes.~~

~~3.9 NECR reserves the right to audit the records and activities of PAS solely for the purpose of verifying PAS's compliance with the provisions of this Agreement. Without limiting the generality of the foregoing, PAS shall keep and maintain true and correct books, records and accounts with respect to its volume of cars along with any annual statements and summaries, for a period of three (3) years after the term of this Agreement. PAS shall, upon request of NECR, make available on reasonable advance notice and during normal business hours and permit NECR during such period to inspect, make copies of, and audit all such records. If there is any revision to charges as a result of an audit, payment shall be made within thirty (30) days of the audit. The provisions of this Section 3.9 shall survive the termination of this Agreement.3.8 [Intentionally omitted.]~~

4. ADDITIONS AND ALTERATIONS

4.1 NECR shall pay for and be responsible for the construction, maintenance, repair and renewal of any additional connections to the Line which it may require.

4.2 If PAS determines that changes in or additions and betterments to the Line, including changes in communication, dispatching or signal facilities as they existed immediately prior to the Effective Date, are required to accommodate PAS's operations beyond that required by NECR to accommodate NECR's and Amtrak's operations over the Line, PAS shall pay for the construction of such additional or altered facilities, including the annual expense of maintaining, repairing, and renewing such additional or altered facilities. Notwithstanding the foregoing, NECR shall have the right to approve of any such addition or alteration prior to its construction, which approval shall not be unreasonably withheld, and such addition or alteration shall be constructed in such a manner as to minimize interference with NECR's or Amtrak's operations over the Line.

5. SCHEDULING OF TRAINS AND MAINTENANCE; OPERATING RULES

5.1 The trains, locomotives, cars and equipment of PAS, NECR, Amtrak, and any other present or future user of the Line or any portion thereof, shall be operated without prejudice or partiality to any party to this Agreement or any such other user and in such a manner as will result in the most economical and efficient manner of movement of all traffic; provided, however, that NECR shall give priority to intercity rail passenger trains of Amtrak to the extent required by Section 402 of the Rail Passenger Service Act. Notwithstanding the foregoing, PAS shall have the right, in consultation with NECR, to establish the schedules of PAS's trains over the Line. Trains performing local work, whether PAS, NECR or otherwise, are not entitled to priority over trains that are not performing such work. NECR shall establish NECR's train schedules with due regard to the trains to be operated by PAS. Each party shall use reasonable efforts to provide five (5) days' notice of changes in its traffic and operating patterns and procedures which may affect the Line. NECR shall coordinate with PAS and use its reasonablebest efforts in scheduling the work required for any upgrades of the Line and any future maintenance or repair of the Line to minimize any interference with or disruption of PAS's operations over the Line.

5.2 Any and all training that may be required to qualify PAS operating personnel as to NECR's operating rules (after the initial training of such personnel, which will be provided by NECR) shall be performed by PAS, and the determination as to whether such operating personnel are qualified under NECR's operating rules shall be made in the discretion of PAS (giving consideration to any comments or recommendations of NECR). NECR shall train, and periodically recertify in accordance with NECR's operating rules, PAS operating personnel who act as instructors for PAS personnel regarding NECR's operating rules.

5.3 NECR operating rules shall govern all operations over the Line, and NECR shall report to PAS any incidents of violation of such rules by a PAS employee. NECR may at its option, for good cause shown, exclude such employee

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from the Line.

5.4 In the event that any dispute arises as to the interpretation of any operating rules, the interpretations of the Uniform Code of Operating Rules, as amended, shall govern.

~~5.5 For the avoidance of doubt, NECR's 'operating rules' means NECR's operating and safety rules, timetables, special instructions, bulletins, general orders, authoritative directions and amendments, and special rules governing the transportation of Hazardous Materials, and any supplements and replacements thereto as communicated from time to time by NECR's designated operating officer to PAS's designated operating office.~~

6. CLEARING OF DERAILMENTS AND WRECKS

6.1 In the event of any derailment or wreck of a PAS train, PAS shall clear the Line to allow for the passage of other trains within a reasonable time. PAS shall perform any rerailling wrecking or wrecking train service as may be required in connection with such derailment or wreck, in accordance with its customary practices. Except as provided in Section 7, the cost liability, and expense of the foregoing, including, without limitation, loss of, damage to, or destruction of any property whatsoever and injury to or death of any person or persons whomsoever resulting therefrom, shall be the responsibility of PAS. In the event that PAS does not begin rerailling operations for passage of trains over the Line within twelve (12) hours of an occurrence or does not complete the process of clearing the Line within a reasonable time, NECR may clear the Line for passage of trains, and PAS shall reimburse NECR for all reasonable costs NECR incurs in performing such service.

7. RELEASE AND INDEMNIFICATION

7.1 Save as herein otherwise provided, each party hereto shall be responsible for and shall assume all loss, damage or injury (including injury resulting in death) to persons or property, including the cost of removing any trackage, repairing trackage and correcting environmental damage, which may be caused by its engines, cars, trains or other on-track equipment (including damage by fire originating therefrom) whether or not the condition or arrangement of the trackage contributes in any manner or to any extent to such loss, damage or injury, and whether or not a third party may have caused or contributed to such loss, damage or injury, and for all loss or damage to its engines, cars, trains or other on-track equipment while on said trackage from any cause whatsoever, except in the case of collision, in which event the provisions of Section 7.2 shall apply.

7.2 In the event of a collision between NECR's and PAS's engines, cars, trains or other on-track equipment while on the Line, the apportionment of liability between the parties hereto for all loss, damage or injury (including injury resulting in death) to any person (including NECR's or PAS's employees, agents or representatives) or property shall be governed by the following provision:

7.2.1 If the employees of one party are solely at fault, that party shall be responsible for all such loss, damage or injury including the cost of removing wreckage, repairing trackage, and correcting environmental damage.

7.2.2 If the employees of both parties hereto are at fault, or if the cause of the accident is so concealed that it cannot be determined whose employees are at fault, each party shall bear and pay for all such loss, damage or injury which its own engines, cars, trains or other on-track equipment and their contents or property in its custody, or its employees or others claiming for them, may have suffered by reason or in consequence of the accident. Responsibility for all other such loss, damage or injury shall be apportioned equally between the parties hereto.

7.2.3 The words "all other such loss, damage or injury" referred to in this Section 7.2 shall be deemed to include but not be limited to the cost of removing wreckage, repairing trackage, correcting environmental damage, and third party claims.

7.2.4 As between the parties hereto, the foregoing provisions of this Section 7.2 shall be applicable whether or not a third party may have caused or contributed to the accident.

7.2.5 The words "trackage" referred to in this Section 7 shall be deemed to include but not be limited to the tracks, structures or facilities pertaining to operation of the Line.

7.3 Without in any way restricting the terms of this Section 7, in the case of a collision or accident between the train of either party to this Agreement and the property of a third person or other entity, including ~~Amtrak, including~~ any action done in the process of trying to avoid an accident or a collision, such party shall save harmless and indemnify ~~and defend~~ the other party forthwith for all damages suffered by ~~(or claimed against)~~ the other party including damages to equipment and structures ~~and third party injuries (including death)~~ or injuries (including death) to the employees or agents of the other party (including also the results of those actions done in the process of avoiding a collision or accident), and irrespective of the ~~ordinary negligence or fault~~ of either party or such third person or other entity, and with a right of subrogation in favor of such party against any such third person or other entity.

7.4 Each party hereto shall forever indemnify and save harmless the other party, from and against all claims, liability or judgments by reason or on account of any injury to or death of any person or of any loss or damage to property, the liability for which is herein assumed by such first mentioned party, and such first mentioned party shall pay and discharge any judgment that may be obtained by reason thereof, and all costs, charges and expenses payable thereunder, including legal counsel fees.

7.5 The parties shall settle, as between themselves, any claim for loss or damage according to the terms of this Agreement, notwithstanding any judgment or decree of any court or other tribunal in a proceeding brought by other parties. In case a suit or proceeding shall be commenced by any person or corporation against either party hereto for or on account of any loss, damage or injury for which the other party hereto is liable under the provisions of this Agreement, the party so sued or proceeded against shall give to the other party reasonable notice, in writing, of the pendency of such suit or proceeding and thereupon the other party shall assume the defense of such suit or proceeding or shall save and hold the party so sued harmless from all loss and costs by reason thereof. Neither party hereto shall be bound by any judgment against the other party unless it shall have reasonable notice that it is so required to defend and has reasonable opportunity to make such defense. When such notice and opportunity has been given, the party notified shall be bound by the judgment as to all matters that could have been litigated in such suit or proceeding.

7.6 In every case of death or injury suffered by an employee of either PAS or NECR, when compensation to such employee or employee's dependents is required to be paid under any workmen's compensation, occupational disease, employer's liability or other law, and either of said parties, under the provisions of this Agreement, is required to pay such compensation, if such compensation is required to be paid in installments over a period of time, such party shall not be released from paying such future installments by reason of the expiration or other termination of this Agreement prior to any of the respective dates upon which any such future installments are to be paid.

8. DEFAULT; PAYMENT DELINQUENCY

8.1 In the event of a material breach by PAS of the terms and conditions of this Agreement which continues for a period of forty-five (45) days after notice thereof from NECR, NECR shall have the right to terminate this Agreement upon ninety (90) days' notice.

8.2 If PAS becomes delinquent in payment of any amount by more than fourteen (14) days under the terms of Section 3, NECR shall be entitled to receive advance payment from PAS for each PAS train seeking access to the Line until PAS satisfies the delinquency in full. If PAS fails to tender the advance payment, NECR shall be further entitled to exclude and eject PAS from the Line until PAS tenders the advance payment. NECR shall be entitled to these remedies for delinquencies even if PAS has disputed the billed amount by invoking arbitration or otherwise. During the pendency of any such exclusion or ejection, NECR shall nevertheless accept PAS cars for interchange at any point on the Line.

9. ~~INSURANCE AND HAZARDOUS SUBSTANCES~~[Intentionally Omitted.]

~~9.2 Insurance. PAS shall maintain the insurance coverage required by Schedule "A" attached hereto.~~

~~9.2 Transport of Hazardous Substances. In the event that PAS transports Hazardous Substances over the Line, PAS shall:~~

- ~~(a) comply with all applicable federal, state and municipal laws, rules and regulations including, but not limited to, applicable rules and regulations as set forth by the Federal Railroad Administration (FRA), the Pipeline and Hazardous Materials Safety Administration (PHMSA), the Surface Transportation Board, and the Association of American Railroads (AAR) respecting the handling and transporting of Hazardous Substances; and~~
- ~~(b) ensure its personnel comply with such applicable laws, rules and regulations and meet all the requirements and qualifications for training and certification set forth by such laws.~~

- ~~(c) prepare and have at all times, an Emergency Response Plan with respect to its response to incidents or derailments involving Hazardous Substances over the Line and upon request provide a copy to NECR. The Emergency Response Plan must include at a minimum: (i) reporting and response procedures in the event of a derailment, accident or spill on the Line; (ii) emergency response service providers and contacts and their phone numbers; and (iii) incident reporting phone numbers including phone numbers for NECR incident reporting and local NECR personnel.~~
- ~~(d) In the event any accident or derailment involving PAS rail cars, including rail cars carrying Hazardous Substances shall occur on any segment of the Line, PAS agrees to:~~
- ~~(i) immediately notify local emergency response service providers (including the local fire stations) in accordance with its Emergency Response Plan, and ensure that such local emergency response service providers have appropriate information.~~
 - ~~(ii) immediately report any release, leak, deposit or spill of a Hazardous Substance (e.g. fuel spill from an accident) to NECR dispatch, whether or not such releases are required to be reported to any federal, state or local authority, and to any regulatory authorities as required by law.~~
 - ~~(iii) promptly respond to an accident, or a leak, spill or deposit of any substance (including without limitation any Hazardous Substance, waste or pollutant), except to the extent such leak, spill or deposit is *de minimis* in nature and results from the day to day operation of trains by PAS over the Line. PAS shall take all reasonable actions to contain the spill and respond in accordance with its Emergency Response Plan; provided, however that NECR may elect to reasonably remediate, repair and restore the roadbed, track and related structures impacted by any Hazardous Substance, at the expense of the PAS.~~
 - ~~(iv) provide a written follow up report to NECR within five (5) working days of any release, leak, deposit or spill on the Line, or any event on or affecting NECR property which constitutes an offence or is reportable under any laws, by laws, or regulations relating to the protection of the environment, or is in breach thereof. Such follow up report will describe the incident, substance and volume released, and measures undertaken or planned to clean up and remove the released substance and any contaminated soil, water and materials and waste.~~
 - ~~(v) provide NECR with copies of any and all reports made to any governmental agency that relate to such incidents and/or releases. In addition, PAS shall provide NECR with a copy of any alleged violation of applicable environmental laws relating to such incident on the Line, as well as a copy of any written responses made by PAS to governmental authorities regarding said violations.~~
 - ~~(vi) commence and complete, at NECR's request, the cleanup, disposal, and remediation of any spill or environmentally unsound condition occurring on the Line as a result of PAS's operations over the Line. PAS shall completely clean up any such spill or condition; shall dispose of any contaminated soil or waste in a properly licensed disposal facility; and shall replace contaminated soils with clean fill as appropriate under the circumstances. PAS shall demonstrate to NECR's reasonable satisfaction that any impacted lands and any impacted adjacent lands have been restored to a condition existing immediately prior to the contamination.~~
 - ~~(vii) if PAS and NECR are in disagreement as to whether any such release has been completely cleaned up, the contaminated soil or waste properly disposed of and replaced with appropriate clean fill, to retain a reputable environmental consulting firm to review PAS's activities and report whether PAS has fulfilled its obligations. If PAS's obligations have not been fulfilled, PAS shall take further action as is necessary to rectify any deficiencies and obtain a report from the environmental consultant verifying the same.~~
 - ~~(viii) be solely responsible for all costs related to the clean-up and remediation of any releases or incidents resulting from PAS's operations on the Line.~~

~~(e) NECR may from time to time perform inspections and environmental, safety, risk and security assessments of the Line. NECR may at any time implement any environmental, safety or security measures, procedures or requirements that it considers necessary or desirable, in its reasonable opinion. NECR agrees to notify PAS regarding any such measures, procedures or requirements and PAS agrees to cooperate, as necessary, in implementing such measures.~~

10. GENERAL PROVISIONS

10.1 No Waiver. Waiver of any provision of this Agreement, in whole or in part, in any one instance shall not constitute a waiver of any other provision in the same instance, nor any waiver of the same provision in another instance, but each provision shall continue in full force and effect with respect to any other then existing or subsequent breach.

10.2 Notice. Any notice required or permitted under this Agreement shall be given in writing to the parties at their respective addresses specified above, or at such other address for a party as that party may specify by notice as provided herein, by (i)(A) delivery in hand or by postage prepaid, United States first class mail and (B) registered or certified mail, return receipt requested, or (ii)(A) telefax and (B) registered or certified mail, return receipt requested, or (iii)(A) Federal Express or other form of expedited mail that provides for delivery to the sender of a signed receipt, or (iv) telegram. Notice so sent shall be effective upon receipt.

10.3 Integration. This Agreement constitutes the entire agreement of the parties with respect to its subject matter, superseding all prior oral and written communications, proposals, negotiations, representations, understandings, courses of dealing, agreements, contracts and the like between the parties in such respect. Except for any and all obligations incurred or causes of action accrued thereunder prior to or as of the Effective Date, , all prior trackage rights agreement between the parties or their predecessors with respect to the Line or any segments of the Line, including the Trackage Rights Order imposed by the ICC by decision dated February 6, 1990 in ICC Finance Docket No. 31250, are hereby terminated. Any provisions of any other agreement(s) between NECR and PAS which are not inconsistent with the provisions of this Agreement shall remain are hereby terminated.

10.3.1 [Intentionally Omitted- No Longer Applicable]

10.4 Miscellaneous. This Agreement: (i) may be amended, modified, or terminated, and any right under this Agreement may be waived in whole or in part, only by a writing signed by both parties; (ii) contains headings only for convenience, which headings do not form part of and shall not be used in construction of this Agreement; and (iii) is not intended to inure to the benefit of any party not a party to this Agreement.

10.5 Availability of Equitable Relief. The obligations imposed by this Agreement are unique. Breach of any of such obligations would injure the parties to this Agreement; such injury is likely to be difficult to measure; and monetary damages, even if ascertainable, are likely to be inadequate compensation for such injury. Protection of the respective interests provided herein would require equitable relief, including specific performance and injunctive relief, in addition to any other remedy or remedies that the parties may have at law or under this Agreement.

10.6 Force Majeure. No party to this Agreement shall be responsible for delays or errors in its performance or other breach under this Agreement occurring by reason of circumstances beyond its control, including acts of civil or military authority, national emergencies, fire, major mechanical breakdown, labor disputes, flood or catastrophe, acts of God, insurrection, war, riots, delays in suppliers, derailments or failure of transportation, communication or power supply.

10.7 Trains, Locomotives, Cars or Equipment. 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 one of the parties and includes such trains, locomotives, cars and equipment which are owned by, leased to, or in the account of such party. ~~By way of clarification, the foregoing does not imply that PAS may handle trains, cars or equipment in haulage service for another rail carrier, except where the cars or equipment are being transported under a haulage arrangement for Norfolk Southern Railway for interchange with NECR.~~ Whenever such trains, locomotives, cars or equipment are owned or leased by one party to this Agreement and are in the possession or account of, or under the control of the

other party to this Agreement, such trains, locomotives, cars and equipment shall be considered those of the other party.

10.8 Assignment. This Agreement shall bind and inure to the benefit of the parties and their respective legal representatives, successors and assigns. PAS shall have the right to assign any or all of PAS's rights and obligations under this Agreement to any affiliate of PAS, following ~~written consent of consultation with NECR, which shall not be unreasonably withheld~~ and ~~the~~ receipt of any required regulatory or other ~~necessary~~ approvals, ~~including from the STB.~~

10.9 Governing Law. This Agreement is imposed and entered into in, and shall be governed by the laws of, the District of Columbia.

SCHEDULE "A"
Insurance Coverage

1.1 General

PAS, at its sole cost and expense, shall take out and keep in full force and effect and pay all premiums for, throughout the term and during such other time as this Agreement remains in force, the following insurances:

- ~~(a) Railroad Liability insurance with a limit of not less than Two Hundred Million Dollars (\$200,000,000) for any one loss or occurrence for personal injury, bodily injury, or damage to third party, including but not limited to NECR property including loss of use thereof, and a self insured retention of not more than One Million Dollars (\$1,000,000). This policy shall by its wording or by endorsement include but not be limited to the following:
 - ~~(i) NECR and its associated or affiliated companies (and the directors, officers, employees, agents and trustees of all of the foregoing) as an additional insured with respect to obligations of PAS under this Agreement and incidental thereto;~~
 - ~~(ii) "cross liability" or "severability of interest" clause which shall have the effect of insuring each entity named in the policy as an insured in the same manner and to the same extent as if a separate policy had been issued to each;~~
 - ~~(iii) blanket contractual liability, to include the insurable liabilities assumed by PAS under this Agreement;~~
 - ~~(iv) shall not exclude operations on or in the vicinity of the railway right of way, if applicable;~~
 - ~~(v) products and completed operations;~~
 - ~~(vi) insure against all Federal Employer's Liability Act claims for liability arising out of PAS's operations under this Agreement; and~~
 - ~~(vii) sudden and accidental pollution, or named perils pollution including the release or dispersal of pollutants as a result of a collision, overturning or derailment of any vehicle or railway rolling stock.~~~~
- ~~(b) Automobile Liability insurance covering bodily injury and property damage in an amount not less than One Million (\$1,000,000) Dollars per accident, covering the ownership, use and operation (including the loading and unloading) of any motor vehicles and trailers which are owned, non-owned, leased or controlled by PAS and used in regards to this Agreement.~~
- ~~(c) "All Risks" property insurance covering PAS's owned property and the property of NECR in the care, custody, or control of PAS, or for which PAS has assumed liability, on a replacement cost basis. With respect to the property of NECR, such policy shall contain a loss payable clause in favor of NECR, and include NECR as an additional insured.~~

~~Not more frequently than once every three years, NECR may request reasonable changes to the required insurance coverage to reflect then current risk management practices in the railroad industry and underwriting practices in the insurance industry.~~

~~PAS agrees that the insurance it maintains is primary and not excess of any other insurance that may be available.~~

~~PAS shall provide NECR with written notice and all reasonable particulars and documents related to any damages, losses, incidents, claims and potential claims concerning this Agreement as soon as practicable~~

~~after the damage, loss, incident or claim has been discovered. PAS is responsible for any deductible and excluded loss under the insurance.~~

~~If PAS fails to maintain the insurance required under this Agreement, NECR may at its option terminate this Agreement.~~

~~1.2 — **Replacement Insurance**~~

~~If the insurance procured by PAS pursuant to this Schedule A takes the form of a claims made policy and is cancelled or allowed to expire without renewal, PAS shall provide evidence of replacement insurance that provides coverage as required by Section 1.1. Such coverage must be retroactive to the original inception date of the cancelled or non-renewed policy. PAS further agrees to promptly give notice to NECR's Risk Manager of any claim or notice of incident, or notice of potential claim related to this Agreement, that is required to be reported to PAS's liability insurance company.~~

~~1.3 — **Notice to NECR**~~

~~Each policy of insurance obtained by PAS pursuant to Section 1.1 shall contain provisions requiring that the insurance carrier to endeavor to give NECR, through its Risk Manager, at least 30 days' notice in writing of any proposed cancellation of any policy PAS is required to maintain pursuant to this Schedule A. Such notice shall be by registered mail to the specific attention of: [INSERT ADDRESS].~~

~~1.4 — **Certificate of Insurance**~~

~~All policies of insurance stipulated in this Schedule A will be with insurers with a minimum A.M. Best Rating of "A-VII" and in a form satisfactory to NECR, and PAS will see that a copy of all certificates of insurance are delivered to NECR prior to the date that PAS commences operations and prior to any insurance renewal thereof. NECR shall have no obligation to examine such certificate(s) or to advise PAS in the event its insurances are not in compliance herewith. Acceptance of such certificate(s) which are not compliant with the stipulated coverages shall in no way whatsoever imply that NECR has waived its insurance requirements.~~

~~1.5 — **No Limitation**~~

~~Neither compliance with the requirements of this Schedule A nor NECR's approval of the terms and conditions of any such policy will in any way limit or modify the obligation of PAS to provide specific insurance coverage as required by Section 1.1 of this Schedule A. The insurance coverage acquired by PAS pursuant to this Schedule A shall not in any manner restrict or limit the liabilities assumed by PAS under this Agreement.~~

PUBLIC VERSION

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 35842

**NEW ENGLAND CENTRAL RAILROAD, INC.
– TRACKAGE RIGHTS ORDER –
PAN AM SOUTHERN LLC**

**REPLY TO NEW ENGLAND CENTRAL RAILROAD, INC.'S
OPENING STATEMENT AND EVIDENCE**

VOLUME II

**PUBLIC DOCUMENTS PRODUCED IN DISCOVERY
AND OTHER RELEVANT DOCUMENTS**

**Robert B. Culliford
PAN AM SOUTHERN LLC
1700 Iron Horse Park
North Billerica, MA 01862
Tel: (978) 663-1126**

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

Attorneys for Pan Am Southern LLC

Dated: July 19, 2016

CHARLESTON, W.VA.
M.P. 148.93 Palmer Sub
DOT # 052-781C

Signal Department Estimate

Labor

Signalman	5 days @ \$121.84 day	\$607.92
Field Engineering	8 days @ \$200.00 day	\$1,600.00
Sub total labor		\$2,207.92
Payroll Burden 62%		\$1,368.91
Stop & Protect order	5 days @ \$250.00 day	<u>\$1,250.00</u>
Total labor		\$4,826.83

Equipment

Truck 3/4ton Hyrail	5days @ \$74.00 day	\$370.00
Truck Pickup	8 days @ \$40.00	<u>\$320.00</u>
Total equipment		\$690.00

Stone for grading

\$750.00

Personal expense

Meals	8 days @ \$35.00 day	\$280.00
Lodging	7 days @ 95.00 day	<u>\$665.00</u>
Total personal expense.		\$945.00

Engineering

Office	3 days @ \$200.00	\$600.00
Clerical	1 days @ \$120.00	\$120.00
Payroll burden @62%		<u>\$464.40</u>
Total engineering		\$1,166.40

Total C&S charges	\$8,378.23
Harmon Industries Signal Material and Installation Quote	\$127,309.00
Total NECR C&S charges for project.	\$135,687.23

STATE OF VERMONT

Contract #06RA03

STANDARD STATE-RAILROAD CONTRACT (STATE AND FEDERAL FUNDS)

1. Parties. This is a contract between the State of Vermont, Agency of Transportation (hereinafter called "State"), and New England Central Railroad, Inc., with its principal place of business at 2 Federal Street, Suite 201, St. Albans, Vermont 05478-2003, (hereafter called "Railroad"). Railroad's form of business organization is a Delaware corporation. Railroad (is/is not) required by law to have a Business Account Number from the Vermont Department of Taxes. Account Number is (#030304403001/~~not required by law~~).

2. Subject Matter. The subject matter of this contract is the following:

Name of Project	Bellows Falls Railroad Tunnel Modifications
Town/County	Rockingham/Windham County
Highway Route No./Milemarker	Bridge Street (TH #6) Mill Street (TH #422)
R.R. Subdivision/R.R. Milepost	New England Central Railroad/R. R. Milepost 144.56
Work to be Performed by R.R.	<input type="checkbox"/> Preliminary engineering and engineering services <input checked="" type="checkbox"/> Construction

Detailed services to be provided by the Railroad are described in Attachment A.

3. Maximum Amount. In consideration of the services to be performed by Railroad, the State agrees to pay Railroad, in accordance with the payment provisions specified in Attachment B, a sum not to exceed One Million Nine Hundred Seventy-two Thousand Six Hundred Ninety-six and no/100 Dollars (\$1,972,696.00).

4. Contract Term. The period of Railroad's performance shall begin on September 5, 2006 and end on June 1, 2007.

5. Prior Approvals. If approval by the Attorney General's Office or the Secretary of Administration is required (under current law, bulletins, and interpretations), neither this contract nor any amendment to it is binding until it has been approved by either or both such persons.

- Approval by the Attorney General's Office /is/is not/ required.
- Approval by the Secretary of Administration /is/is not/ required.

6. Amendments. No changes, modifications, or amendments in the terms and conditions of this contract shall be effective unless reduced to writing, numbered and signed by the duly authorized representatives of the State and Railroad.

7. Cancellation. This contract may be canceled by either party by giving written notice at least thirty (30) days in advance.

Drill Sealing leaks: Rock	50 QAJ, at \$130.00	Mix and apply hydraulic cement to leak area until water flow is stopped	Total	\$	6,500.00
10114 Temporary Pumping (per 0/17 reduce quantity from 30 days)	5 Day at \$ 807.00	Have dewatering pump with hoses available on-site set up and maintain pumping operation until water condition is eliminated	Total	\$	4,035.00
Excavation soil Sub-base for track: Bridge to tunnel/north approach	150 LF at \$64.00	Excavate soil to design subgrade profile Load and haul waste to temporary storage site Load and haul waste from temporary storage area to off-site disposal location	Total	\$	9,600.00
Excavation soil Sub-base for track: South approach	100 LF at \$60.00	Excavate soil to design subgrade profile Load and haul waste to temporary storage site Load and haul waste from temporary storage area to off-site disposal location	Total	\$	6,000.00
Track removal	580 LF at \$45.00	Disconnect and remove 15' track panels from tunnel prior to installing new track Transport to and store track panels in staging area Dismantle track panels and separate components Provide work area lighting for nighttime operation Dispose of used ties	Total	\$	26,100.00
Install track inside tunnel	440 LF at \$68.00	Unload track materials upon delivery at staging area Build steel tie track panels Place and rough-grade new ballast Transport track panels to tunnel Slide track panels into place Weld panel rail joints Install drainage Grade ballast Temp ballast and surface track to vertical and horizontal alignment Re-adjust installed track Provide work area lighting for nighttime operation	Total	\$	30,260.00
Install track outside tunnel	140 LF at \$82.00	Unload track materials upon delivery at staging area Build wood tie track panels Place and rough-grade new ballast Transport track panels to installation area Set track panels in place Weld panel rail joints Install drainage Grade ballast with ballast regulator Temp ballast and surface track to vertical and horizontal alignment Re-adjust installed track Provide work area lighting for nighttime operation	Total	\$	11,480.00
Track Surfacing	850 TF at \$48.00	Surfacing following track replacement	Total	\$	40,800.00
Bridge Ties - Dig and install includes walkway repair	20 EA at \$840	Unload tie material upon delivery Measure each stringer for dipping depth and spacing Number dipped ties for installation sequence Layout dipping on each tie Drill ties for bolting Cut dipping into ties Secure with J-bolts Repair bridge equipment Repair bridge walkway	Total	\$	16,800.00
Mill Street Grade Crossing Includes track and concrete crossing	1 CA \$ 34,845.00	Unload track material upon delivery Build wood tie crossing panel Set crossing panel in place Install temporary flangeway for winter season Remove temporary crossing material and prep for concrete panel Install concrete crossing panel in Spring '07 Install rail seat Install conduit Install drainage Support Bazin Brothers	Total	\$	\$ 34,845.00
Tunnel Ventilation	20 Days at \$300			\$	6,000.00
Mill Street water, sewer and storm relocation and street repaving	1 EACH			\$	146,530.00
		Total of above listed items		\$	31,168,463
Thomas Drilling & Blasting portion Acme Waterproofing NECR track materials estimate	11,125 cu at \$26.30			\$	290,262.50
				\$	429,185.00
				\$	55,804.00
		PROJECT TOTAL		\$	1,972,696.00

**AGREEMENT
FOR SYNCHRONIZATION OF RAILROAD-GRADE-CROSSING
AND HIGHWAY TRAFFIC-CONTROL DEVICES
BETWEEN
THE STATE OF VERMONT
NEW ENGLAND CENTRAL RAILROAD, INCORPORATED
AND THE TOWN OF BRATTLEBORO
FOR
BRATTLEBORO STP 2000(24) CONTRACT NO. RA0028
CFDA 20.205 EA/Subjob: 2000024/100**

THIS AGREEMENT, is made and entered this 16 day of MARCH, 2010, by and between the State of Vermont, a sovereign state, acting through its Agency of Transportation, with its principal office at 1 National Life Drive, Montpelier, Vermont 05633-5001 (State), New England Central Railroad, Incorporated, a Delaware corporation, with its principal office at 2 Federal Street, Suite 201, St. Albans, Vermont 05478-2003 (NECR), and the Town of Brattleboro, Vermont, a chartered municipality in the County of Windham, Vermont with its town offices at Municipal Center, 230 Main Street, Brattleboro, Vermont 05301-2840 (Town), collectively referred to herein as the Parties.

WITNESSETH:

WHEREAS, the State has submitted to the Federal Highway Administration of the United States Department of Transportation (the FHWA), for approval, and the FHWA has approved, a federal-aid project (Project), namely Brattleboro STP 2000(24), which is further described as follows:

This project consists of the replacement of existing traffic signals located on U.S. Route 5 (Main Street) and the installation of new traffic signals located at the intersection of U.S. 5/VT 142/VT 119, requiring preemptive coordination with the railroad grade crossing located immediately east of this intersection on VT 119;

and

WHEREAS, the State and the Town desire NECR to install train-activated railroad grade crossing traffic control devices (railroad crossing devices) at the railroad/highway grade crossing on VT 119, which crosses at grade the right of way and tracks of NECR at Railroad Subdivision Palmer / Mile Post 121.12 in the Town; and

WHEREAS, an existing highway-to-highway intersection exists adjacent to and in close proximity to the aforementioned grade crossings; and

CROSSING WARNING SYSTEM - Signals

DATE: 8/24/2009

RR Code: (NECR)
 Location: BRATTLEBORO, (Windham), VT
 Crossing Name: VT 119 (Bridge Street)
 AAR/DOT#: 247794V
 RR Milepost: 121.12
 RR Project #: TBA
 XORAIL Project #: VEM09-22895A

OFFICE OF THE DIRECTOR OF SIGNALS AND COMMUNICATIONS

ESTIMATED COST FOR HIGHWAY CROSSING WARNING DEVICES AT VT 119 (Bridge Street).
 This estimate should be considered void after one (1) year.

MATERIAL	UNIT COST	UNITS	TOTAL COST
GATE ASSEMBLIES	\$0.00	0 EA.	\$0.00
GATES	\$0.00	0 EA.	\$0.00
GATE FOUNDATIONS	\$0.00	0 EA.	\$0.00
ADDITIONAL FLASHING LIGHTS	\$0.00	0 EA.	\$0.00
CANTILEVERS 40'	\$0.00	0 EA.	\$0.00
CANTILEVER FOUNDATIONS	\$0.00	0 EA.	\$0.00
6' X 6' WIRED CASE, WITH HXP-3R2	\$74,100.00	1 EA.	\$74,100.00
GENERATOR CASE W/ TRANSFER SWITCH	\$0.00	0 EA.	\$0.00
BATTERY BOX	\$0.00	0 EA.	\$0.00
BATTERIES, SAFT SPL340	\$375.00	20 EA.	\$7,500.00
MISC. GROUND MATERIAL	\$2,137.32	1 PKG.	\$2,137.32
CONDUIT & DIRECTIONAL BORE	\$45.00	40 FT.	\$1,800.00
TRENCHING (INCLUDES RENTAL EQUIPMENT)	\$100.00	1 UN.	\$100.00
CABLE	\$7,405.00	1 PKG.	\$7,405.00
MISCELLANEOUS RELAY EQUIPMENT	\$1,120.00	1 PKG.	\$1,120.00
POWER SERVICE	\$1,800.00	1 EA.	\$1,800.00
MONITORING EQUIPMENT	\$2,600.00	1 PKG.	\$2,600.00
INSULATE GAUGE RODS	\$75.00	2 EA.	\$150.00
INSULATE RAIL JOINTS	\$0.00	0 EA.	\$0.00
INSULATE RAIL SWITCH	\$75.00	1 EA.	\$75.00
TRACK BONDING (DOUBLE BONDS)	\$52.00	175 EA.	\$9,100.00
SANITATION & DISPOSAL	\$1,500.00	1 PKG.	\$1,500.00
FREIGHT & HANDLING			\$5,394.37
TAX @ 6.5%			<u>\$6,407.00</u>
TOTAL MATERIALS			\$121,188.69
EXCAVATING EQUIPMENT PER DAY	\$417.10	5 DAYS	\$2,085.50
EQUIPMENT RENTAL PER DAY	\$200.00	5 DAYS	\$1,000.00
FOREMAN'S TRUCK PER DAY	\$224.70	5 DAYS	\$1,123.50
GANG TRUCK PER DAY	\$647.30	5 DAYS	\$3,236.50
SUPERVISORS TRUCK PER DAY	\$142.60	5 DAYS	<u>\$713.00</u>
EQUIPMENT TOTAL			\$8,159.00
ENGINEERING	\$7,500.00	1	<u>\$7,500.00</u>
ENGINEERING TOTAL			\$7,500.00
CONSTRUCTION SUPERVISION	\$364.00	5 DAYS	\$1,820.00
LABOR ADDITIVE			<u>\$1,051.00</u>
SUPERVISION TOTAL			\$2,871.00
LABOR PER DAY	\$1,286.24		\$6,431.00
NUMBER OF DAYS	5		
LABOR ADDITIVE			<u>\$3,781.00</u>
TOTAL LABOR			\$10,212.00
GANG EXPENSES PER DAY	\$602.00		
NUMBER OF DAYS	5		
TOTAL GANG EXPENSES			\$3,010.00
SUB-TOTAL			\$152,940.69
CONTINGENCIES 5%			<u>\$7,647.00</u>
TOTAL			\$160,590.00

**State of Vermont
Standard Rail Agreement**

Agreement #00GRX

1. Parties: This is a Rail Agreement (hereinafter called "Agreement") between the State of Vermont, Agency of Transportation, Operations Division, Rail Section (hereinafter called "State"), and New England Central Railroad, Inc., with its principal place of business at 2 Federal Street, Suite 201, St. Albans, Vermont 05478 (hereinafter called "Railroad"). Railroad is required by law to have a Business Account Number from the Vermont Department of Taxes.

2. Subject Matter: The subject matter of this Agreement is providing railroad support to improve services upon the railroad. Details of services to be provided by the Railroad are described in Scope of Work (Attachment A). The purpose of this Agreement is to meet the goals of State, as stated in 5 V.S.A. § 3002(1), by providing construction assistance from US Department of Transportation's Federal Railroad Administration ("FRA") and State to Railroad, in accordance with applicable federal and state laws and regulations and to reduce the travel time for intercity passenger service between East Northfield and St. Albans, Vermont by approximately 27 minutes.

The role of State, with the advice, assistance, and approval of the FRA, is to evaluate and select Projects and coordinate and administer grant agreements to carry out selected projects.

Railroad agrees to abide by all laws regulations that govern the use of such grant funds, including, but not limited to 49 U.S.C. and Vermont law, including 19 V.S.A. § 10e, (Statement of policy; railroads), 5 V.S.A. Chapter 56 (Intercity Rail Passenger Service), and additional criteria referenced in this Agreement, all of which, including their internal references to other regulations and guidelines, are incorporated herein by reference.

Railroad shall use the Grant Funds obtained through this Agreement as described in Attachment A, which set forth the purpose of this Agreement.

3. Maximum Amount: In consideration of the services to be performed by Railroad, the State agrees to pay Railroad, in accordance with the payment provisions specified in Attachment B, a sum not to exceed as identified below:

Total Federal Funds	\$50,000,000
Total Railroad Funds	\$19,298,004
Maximum Limiting Amount (All Funds)	\$69,298,004

4. Grant Term: The period of Railroad's performance shall begin on and end on June 30, 2012.

5. Sources of Funds (check all applicable):

State Grant Funds:

Vermont State Railroad Funds

VT Agency of Transportation AUG 25 2010 Operations Division

Federal Grant Funds:

U.S. DOT Appropriations Act 2009, Public Law 111-8; Capital Assistance to States - Intercity Passenger Rail Service (CFDA 20.317) EA # **RR11AR02-400**

6. These are NOT research and development grants.
7. Amendment: No changes, modifications, or amendments in the terms and conditions of this Agreement shall be effective unless reduced in writing, numbered, and signed by the duly authorized representative of the State, including the Attorney General, and Railroad.
8. Cancellation: This Agreement may be suspended or cancelled by either party by giving written notice at least thirty (30) days in advance.
9. Contact Person: The Railroad's contract person for this is: Charles Hunter, President; Telephone Number: 802-527-3434; E-mail address: Charles.hunter@railamerica.com
10. Fiscal Year: The Railroad's fiscal year starts January 1 and ends December 30.
11. Attachments: This Agreement includes the following attachments that are incorporated herein:
 - Attachment A – Scope of Work
 - Attachment B – Payment Provisions
 - Attachment C – Standard State Provisions for Contracts and Grants
 - Attachment D – Other Provisions
 - Attachment E – Definitions
 - Attachment F – Procurement Procedures
 - Attachment G – Reporting Forms

WE, THE UNDERSIGNED PARTIES, AGREE TO BE BOUND BY THIS RAIL AGREEMENT.

**STATE OF VERMONT
AGENCY OF TRANSPORTATION**

**NEW ENGLAND CENTRAL
RAILROAD, INC.**

By:

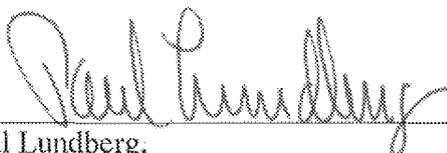


David C. Dill,
Secretary of Transportation
Duly Authorized Agent

Date:

8/26/10

By:



Paul Lundberg,
Vice President and Duly Authorized Agent

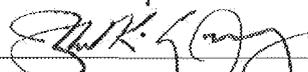
Date:

24 August 2010

APPROVED AS TO FORM

Date:

8/25/2010



ASST. ATTORNEY GENERAL
STATE OF VERMONT

New England Central Railroad, Inc.
Rail Agreement #RR11AR02-400
Page 2 of 37

ASSISTANT ATTORNEY GENERAL

The following information is required for Grants funded in whole or in part with monies from the federal American Recovery & Reinvestment Act of 2009.

Legal Name and D-U-N-S® Number on File with the federal Central Contractor Registration⁽¹⁾:

Print Legal CCR Name

D-U-N-S® Number⁽²⁾

- 1) The Central Contractor Registration (CCR) is the primary registrant database for the U.S. Federal Government. CCR collects, validates, stores and disseminates data in support of agency acquisition missions. FREE registration is available at:
<http://www.ccr.gov/Default.aspx>.
- 2) The D-U-N-S Number is a unique nine-digit identification number assigned and maintained solely by Dun & Bradstreet (D&B). D-U-N-S Number assignment is FREE for all businesses required to register with the US Federal government (see #1 above) for contracts or grants. Created in 1962, the Data Universal Numbering System or D-U-N-S® Number is D&B's copyrighted, proprietary means of identifying business entities. Register at:
https://eupdate.dnb.com/requestoptions.asp?cm_re=HomepageB*TopNav*DUNSNumberTab

ATTACHMENT A – SCOPE OF WORK

Railroad shall undertake and complete the Project described in this Scope of Work in commercially reasonable standards consistent with industry practice, and in accordance with the provisions of this Agreement, approved Project Budget, Project schedules, and all applicable laws, regulations, and published policies.

General Description of Project:

In accordance with the Transportation, Housing and Urban Development, and Related Agencies Appropriations Act, 2008, Public Law 110-161, as amended by Department of Transportation Appropriations Act, 2009, Public Law 111-8, federal funds provided Railroad under this Rail Agreement are to provide financial assistance to fund capital improvements necessary to support improved or new intercity passenger rail service.

The Project includes track, bridge and signal work between Vernon and St. Albans, Vermont as detailed in the Statement of Work attached hereto as **Attachment G**.

To perform the work assigned to Railroad under this Rail Agreement, Railroad will use Railroad forces and outside contractors.

The Railroad shall notify the State's Project Manager at least two (2) days in advance when work is scheduled for the Project, to include locations of railroad mileposts and/or valuation stations and the nature of the work.

All work shall be reviewed, done to satisfaction and certified by the State's Resident Engineer or authorized representative prior to Railroad receiving reimbursement from the State.

Railroad is responsible for obtaining all permits and/or clearances; however, the State will cooperate with Railroad and assist as reasonably required.

Railroad shall remove all ties, rail and OTM along the project corridor that are not needed for the operations of the Rail that were generated from this project or that are in environmentally sensitive areas by the end of this project term.

Upon completion of the projects described above the Railroad commits that the service outcomes identified in the original project grant application totaling 27 minutes in the project area, shall be achieved for each intercity passenger train operating on the improved line.

ATTACHMENT B – PAYMENT PROVISIONS

Description:

Railroad shall use funds provided under this Rail Agreement for eligible capital improvement costs as defined in Attachment A – Scope of Work located in this Agreement.

NECR HSR GRANT SCOPE

PROJECT	QUANTITIES	UNITS	ACTUAL
BALLAST	39.10	MILES	\$998,971.45
RAIL	1,479,456	LIN FEET	\$47,393,598.14
TIES	90,000	EA	\$5,398,738.82
SCRAP TIE DISPOSAL	200,000	EA	\$1,933,515.81
SURFACING	167	MILES	\$2,246,567.68
BRIDGES 286k	VAR		\$1,524,973.00
BRIDGE MNTCE	VAR		\$2,763,304.35
TURNOUTS 28 Turnouts & 1 diamond	29	EA	\$2,151,444.53
SIGNALS			\$2,847,257.50
CROSSINGS (36 Public and 17 Farm & Private)	53	EA	\$2,039,632.73
TOTAL PROJECT COST			\$69,298,004.00
CREDIT NECR PROJECT MATCH OF 10 % OF FRA \$50M GRANT AND CREDIT FOR SALVAGE			(\$ 19,288,004.00)
CREDIT FRA HSR GRANT			(\$50,000,000.00)
TOTAL PROJECT VARIENCE			\$0.00

*Overhead Rate will be adjusted accordingly once an audited overhead rate document is submitted and approved by VTrans.

Payment Provisions:

Funds paid to the Railroad under this Rail Agreement shall consist of Federal Funds in an amount not to exceed approximately seventy-two percent (72.1521%) of actual cost of approved authorized work, including labor, materials and equipment (including any subcontractors approved by State) required for the Project up to the Maximum Limiting Amount identified in this Agreement. The balance of the project shall be paid by Railroad contribution of approximately seven and a half percent (7.2152%) and salvage value from materials removed of approximately twenty and a half percent (20.6326%).

Following each two (2) week period during which the Railroad incurs costs eligible for reimbursement under this Agreement, Railroad will submit an invoice to the VTrans Resident Engineer/Project Manager at: Vermont Agency of Transportation, 1 National Life Drive, Montpelier, VT 05633-5001.

The Invoice, or its attachments, shall provide sufficient detail to justify payment. At a minimum, this includes the following on Railroad letterhead:

- 1) Dated and numbered invoice; including identification of the grant, EA & Sub/Job number;
- 2) Detailed description, including any technical and/or cost problem(s) encountered or anticipated that will affect completion of the grant within the time and fiscal constraints as set forth in this Agreement and an outline of work and activities planned for the next billing period;
- 3) Certification said work has been completed;
- 4) Total cost,
- 5) Amount requested for reimbursement, and
- 6) Invoice signed by the Railroad's Chief Executive Officer or other authorized signatory.

All Invoices shall be supported by documentation. Documentation includes, but is not limited to, accurate and properly executed payrolls, time records, invoices, contracts, or vouchers, evidencing in detail the nature and propriety of costs incurred for this Agreement. Railroad also agrees to maintain accurate records of all Program Income derived from Project implementation. Railroad shall keep supporting documentation, and all other project records, documents, reports, and files readily accessible and clearly identified with this Agreement for at least three (3) years following payment of the final Invoice, closeout of the Project, including any extensions of the term of this Agreement, or completion of the final audit of this Agreement, whichever is latest. Railroad shall establish and maintain, either within its accounting system, or independently, separate, clearly identifiable records for this Project that meet or exceed the minimum record keeping requirements of State, FRA and/or FHWA, as cited in this Agreement.

The railroad will complete and submit to VTrans Rail Project Manager the Daily Force Account Report as work progresses during the Project. This Daily Force Account Report will be submitted by the Railroad with other documentation when requesting reimbursement of expenses.

The State will make every effort to process reimbursement of expenses from the Railroad within 30 days, unless insufficient documentation is not received.

Vermont Sales and Use Tax Exemption:

The Vermont Sales and Use Tax (32 V.S.A. Chapter 233) exempts “[t]angible personal property to be incorporated in a rail line in connection with the construction, maintenance, repair, improvement, or reconstruction of the rail line.” See 32 V.S.A. § 9741(44). Accordingly, no sales and use tax shall be included in the cost of materials purchased for the Project. The Railroad is responsible for maintaining records sufficient to justify eligibility for sales and use tax exemption.

The State may withhold reimbursement if Railroad is not current with the required reports and invoice structure attached to this Agreement.

ATTACHMENT C – STANDARD STATE PROVISIONS

1. **Entire Agreement:** This Agreement, whether in the form of a Contract, State Funded Grant, or Federally Funded Grant, represents the entire agreement between the parties on the subject matter. All prior agreements, representations, statements, negotiations, and understandings shall have no effect.
2. **Applicable Law:** This Agreement will be governed by the laws of the State of Vermont.
3. **Definitions:** For purposes of this Attachment, “Party” shall mean the Contractor, Railroad, or Subrecipient, with whom the State of Vermont is executing this Agreement and consistent with the form of the Agreement.
4. **Appropriations:** If this Agreement extends into more than one fiscal year of the State (July 1 to June 30), and if appropriations are insufficient to support this Agreement, the State may cancel at the end of the fiscal year, or otherwise upon the expiration of existing appropriation authority. In the case that this Agreement is a Grant that is funded in whole or in part by federal funds, and in the event federal funds become unavailable or reduced, the State may suspend or cancel this Rail Agreement immediately, and the State shall have no obligation to pay Subrecipient from State revenues.
5. **No Employee Benefits for Party:** The Party understands that the State will not provide any individual retirement benefits, group life insurance, group health and dental insurance, vacation or sick leave, workers compensation or other benefits or services available to State employees, nor will the state withhold any state or federal taxes except as required under applicable tax laws, which shall be determined in advance of execution of the Agreement. The Party understands that all tax returns required by the Internal Revenue Code and the State of Vermont, including but not limited to income, withholding, sales and use, and rooms and meals, must be filed by the Party, and information as to Agreement income will be provided by the State of Vermont to the Internal Revenue Service and the Vermont Department of Taxes.
6. **Independence, Liability:** ~~The Party will act in an independent capacity and not as officers or employees of the State.~~

~~The Party shall defend the State and its officers and employees against all claims or suits arising in whole or in part from any act or omission of the Party or of any agent of the Party. The State shall notify the Party in the event of any such claim or suit, and the Party shall immediately retain counsel and otherwise provide a complete defense against the entire claim or suit.~~

~~After a final judgment or settlement the Party may request recoupment of specific defense costs and may file suit in Washington Superior Court requesting recoupment. The Party shall be entitled to recoup costs only upon a showing that such costs were entirely unrelated to the defense or any claim arising from an act or omission of the Party.~~

The Party shall indemnify the State and its officers and employees in the event that the State, its officers or employees become legally obligated to pay any damages or losses arising from any act or omission of the Party.

7. **Insurance:** Before commencing work on this Agreement the Party must provide certificates of insurance to show that the following minimum coverages are in effect. It is the responsibility of the Party to maintain current certificates of insurance on file with the state through the term of the Agreement. No warranty is made that the coverages and limits listed herein are adequate to cover and protect the interests of the Party for the Party's operations. These are solely minimums that have been established to protect the interests of the State.

~~*Workers Compensation:* With respect to all operations performed, the Party shall carry workers' compensation insurance in accordance with the laws of the State of Vermont.~~

~~*General Liability and Property Damage:* With respect to all operations performed under the contract, the Party shall carry general liability insurance having all major divisions of coverage including, but not limited to:~~

~~Premises—Operations
Products and Completed Operations
Personal Injury Liability
Contractual Liability~~

The policy shall be on an occurrence form and limits shall not be less than:

~~\$1,000,000 Per Occurrence
\$1,000,000 General Aggregate
\$1,000,000 Products/Completed Operations Aggregate
\$50,000 Fire/Legal/Liability~~

Party shall name the State of Vermont and its officers and employees as additional insureds for liability arising out of this Agreement.

~~*Automotive Liability:* The Party shall carry automotive liability insurance covering all motor vehicles, including hired and non-owned coverage, used in connection with the Agreement. Limits of coverage shall not be less than: \$1,000,000 combined single limit.~~

Party shall name the State of Vermont and its officers and employees as additional insureds for liability arising out of this Agreement.

8. **Reliance by the State on Representations:** All payments by the State under this Agreement will be made in reliance upon the accuracy of all prior representations by the Party, including but not limited to bills, invoices, progress reports and other proofs of work.
9. **Requirement to Have a Single Audit:** In the case that this Agreement is a Grant that is funded in whole or in part by federal funds, and if this Subrecipient expends \$500,000 or

more in federal assistance during its fiscal year, the Subrecipient is required to have a single audit conducted in accordance with the Single Audit Act, except when it elects to have a program specific audit.

The Subrecipient may elect to have a program specific audit if it expends funds under only one federal program and the federal program's laws, regulating or grant agreements do not require a financial statement audit of the Party.

A Subrecipient is exempt if the Party expends less than \$500,000 in total federal assistance in one year.

The Subrecipient will complete the Certification of Audit Requirement annually within 45 days after its fiscal year end. If a single audit is required, the sub-recipient will submit a copy of the audit report to the primary pass-through Party and any other pass-through Party that requests it within 9 months. If a single audit is not required, the Subrecipient will submit the Schedule of Federal Expenditures within 45 days. These forms will be mailed to the Subrecipient by the Department of Finance and Management near the end of its fiscal year. These forms are also available on the Finance & Management Web page at: <http://finance.vermont.gov/forms>.

10. **Records Available for Audit:** The Party will maintain all books, documents, payroll papers, accounting records and other evidence pertaining to costs incurred under this agreement and make them available at reasonable times during the period of the Agreement and for three years thereafter for inspection by any authorized representatives of the State or Federal Government. If any litigation, claim, or audit is started before the expiration of the three year period, the records shall be retained until all litigation, claims or audit findings involving the records have been resolved. The State, by any authorized representative, shall have the right at all reasonable times to inspect or otherwise evaluate the work performed or being performed under this Agreement.
11. **Fair Employment Practices and Americans with Disabilities Act:** Party agrees to comply with the requirement of Title 21 V.S.A. Chapter 5, Subchapter 6, relating to fair employment practices, to the full extent applicable. Party shall also ensure, to the full extent required by the Americans with Disabilities Act of 1990 that qualified individuals with disabilities receive equitable access to the services, programs, and activities provided by the Party under this Agreement. Party further agrees to include this provision in all subcontracts.
12. **Set Off:** The State may set off any sums which the Party owes the State against any sums due the Party under this Agreement; provided, however, that any set off of amounts due the State of Vermont as taxes shall be in accordance with the procedures more specifically provided hereinafter.
13. **Taxes Due to the State:**
 - a. Party understands and acknowledges responsibility, if applicable, for compliance with State tax laws, including income tax withholding for employees performing services within the State, payment of use tax on property used within the State, corporate and/or personal income tax on income earned within the State.

- b. Party certifies under the pains and penalties of perjury that, as of the date the Agreement is signed, the Party is in good standing with respect to, or in full compliance with, a plan to pay any and all taxes due the State of Vermont.
- c. Party understands that final payment under this Agreement may be withheld if the Commissioner of Taxes determines that the Party is not in good standing with respect to or in full compliance with a plan to pay any and all taxes due to the State of Vermont.
- d. Party also understands the State may set off taxes (and related penalties, interest and fees) due to the State of Vermont, but only if the Party has failed to make an appeal within the time allowed by law, or an appeal has been taken and finally determined and the Party has no further legal recourse to contest the amounts due.

14. Child Support: (Applicable if the Party is a natural person, not a corporation or partnership.) Party states that, as of the date the Agreement is signed, he/she:

- a. is not under any obligation to pay child support; or
- b. is under such an obligation and is in good standing with respect to that obligation; or
- c. has agreed to a payment plan with the Vermont Office of Child Support Services and is in full compliance with that plan.

Party makes this statement with regard to support owed to any and all children residing in Vermont. In addition, if the Party is a resident of Vermont, Party makes this statement with regard to support owed to any and all children residing in any other state or territory of the United States.

- 15. Sub-Agreements:** Party shall not assign, subcontract or subgrant the performance of this Agreement or any portion thereof to any other Party without the prior written approval of the State. Party also agrees to include all subcontract or subgrant agreements and a tax certification in accordance with paragraph 11 above.
- 16. No Gifts or Gratuities:** Party shall not give title or possession of any thing of substantial value (including property, currency, travel and/or education programs) to any officer or employee of the State during the term of this Agreement.
- 17. Copies:** All written reports prepared under this Agreement will be printed using both sides of the paper.
- 18. Certification Regarding Debarment:** Party certifies under pains and penalties of perjury that, as of the date that this Agreement is signed, neither Party nor Party's principals (officers, directors, owners, or partners) are presently debarred, suspended, proposed for debarment, declared ineligible or excluded from participation in federal programs or programs supported in whole or in part by federal funds.

(End of Standard Provisions)

ATTACHMENT D – OTHER PROVISIONS

- 1. Property, Equipment and Supplies:** All property acquired by Railroad, partially or wholly funded under this Agreement, is to benefit the public. Railroad is a trustee of said property and acknowledges that they will meet the project service outcomes as defined in the Statement of Work – Attachment G. The useful life of property, equipment, and supplies in this project is twenty (20) years.

Unless otherwise approved by FRA, the following conditions apply to property, equipment, and supplies financed under this Agreement:

- a. **Use of Property.** The Railroad agrees that Project property, equipment, and supplies shall be used for the provision of the Project activity for the duration of its useful life, as determined by State and FRA. Should the Railroad unreasonably delay or fail to use Project property, equipment, or supplies during its useful life, the Railroad agrees that State may require the Railroad to return the depreciated value according to paragraph 40 below of FRA assistance expended on that property, equipment, or supplies. The Railroad further agrees to notify State immediately when any Project property or equipment is withdrawn from use in the Project activity or when such property or equipment is used in a manner substantially different from the representations made by the Railroad in its Application or the text of the Project description.
- b. **General Federal Requirements.**
 - a. A subrecipient that is a governmental entity agrees to comply with the property management standards of 49 C.F.R. §§ 18.31, 18.32, and 18.33, including any amendments thereto, and other applicable guidelines or regulations that are issued.
 - b. A subrecipient that is not a governmental entity agrees to comply with the property standards of 49 C.F.R. §§ 19.30 through 19.37 inclusive, including any amendments thereto, and other applicable guidelines or regulations that are issued. Exceptions to the requirements of 49 C.F.R. §§ 18.31, 18.32, and 18.33, and 49 C.F.R. §§ 19.30 through 19.37 inclusive, must be specifically approved by FRA, through the State.
- c. **Maintenance.** The Railroad agrees to maintain the Project property and equipment in good operating order in accordance with Class III standards except for Windsor to West River which will be Class IV standards excluding permanent speed restricted areas, and in accordance with any guidelines, directives, or regulations.
- d. **Records.** The Railroad agrees to keep satisfactory records in accordance with paragraph 10 of Attachment C with regard to the use of the property, equipment, and supplies, and submit to State, upon request, such information as may be required to assure compliance with this section of this Agreement.
- e. **Withdrawn Property.** If any Project property, equipment, or supplies are not used for the Project for the duration of its useful life, as determined by State or FRA, whether by planned withdrawal, misuse or casualty loss, the Railroad agrees to notify State immediately. Disposition of withdrawn property, equipment, or supplies shall be in accordance with 49 C.F.R. §§ 18.31 and 18.32 for a subrecipient that is a governmental entity, or 49 C.F.R. §§ 19.30 through 19.37 inclusive, for a subrecipient that is an institution of higher education or a private organization.

- f. Encumbrance of Project Property. Unless expressly authorized in writing by State or FRA, the subrecipient agrees to refrain from:
 - a. Executing any new transfer of title, lease, lien, pledge, mortgage, encumbrance, contract, grant anticipation note, alienation, or other obligation that in any way would affect State or FRA interest in any Project property or equipment; or
 - b. Obligating itself in any additional manner to any third party with respect to Project property or equipment.

The Railroad agrees to refrain from taking any action or acting in a manner that would adversely affect the State's or FRA's interest or impair the Railroad's continuing control over the use of Project property or equipment.

2. **Sale, Disposition, or Encumbrance of Project Property, Equipment & Supplies:** Railroad is a trustee of all property, equipment, and supplies acquired with Grant Funds paid under the terms of this Agreement. Said property, equipment, and supplies is to be used to provide general public service throughout its useful life. Railroad shall have no ownership interest in said property until Rail Section Manager determines the useful life is at an end and relinquishes State and FRA property rights in writing. Railroad may sell or dispose of property acquired under this Agreement only with prior written approval of State and in accordance with OMB regulations. Upon disposition, the Railroad shall refund to State seventy-two (72) percent of the fair market value of any item purchased under this agreement. State and FRA retain financial interests in real property, equipment, and supplies financed by this Agreement. This interest continues so long as the property so acquired continues to have a useful life or until it is disposed of in accordance with this Agreement. Railroad agrees it has no ownership rights in such property until State relinquishes State and FRA property rights in writing.

Railroad agrees that the proceeds from the disposition of any item of property acquired with Project funds with a remaining useful life, including insurance proceeds from property that is lost, stolen, destroyed, or otherwise rendered unfit for the purpose for which it was acquired, shall be used by State to offset the costs of the Program; provided, however, that any insurance proceeds paid to Railroad for damage to property acquired with Project funds may be used by Railroad to repair or replace the damaged property. FRA shall be reimbursed its share of the proceeds from disposition. Any property, with a remaining useful life, that is not used for the purposes for which it was acquired is considered disposed of. Railroad, in such cases, shall pay State an amount equal to seventy-two (72) percent of the fair market value of the property, at the date of its withdrawal from the active purposes of the Program. Such payment shall be made from non-governmental funding sources. Railroad shall obtain prior written approval of State before withdrawing property from the Project, as it would for any other disposition of property with a remaining useful life.

While State or the Federal Government retains a financial interest in the property and the project service outcomes, Railroad shall refrain from executing any transfer of title, lease, lien, pledge, mortgage, encumbrance, third-party contract, grant anticipation note,

alienation, or other obligation that, in any way, would affect State or Federal interest in any Project real property or equipment. This prohibition also extends to oral promises by Railroad that might tend to compromise State or Federal interests in the property. Railroad agrees to retain satisfactory continuing control of all Project real property and equipment.

3. **Salvaged Rail, Crossties and Bridge Timbers:** Railroad shall remove from the railroad right-of-way all rail, OTM, railroad crossties and bridge timbers treated with creosote that are within the Right-of-Way impacted by this project. Railroad shall treat crossties and bridge timbers that do not have commercial value as solid waste, following all regulations applicable to their disposal as identified in Attachment D – Other Provisions, #2. Railroad shall inform anyone acquiring salvaged railroad crossties or bridge timbers that they may contain creosote and cannot be burned, buried or discarded on embankments.
4. **Equipment Inspections:** Railroad shall permit authorized representatives of the State or Federal Government to inspect all vehicles, facilities, and equipment purchased by Railroad as part of the Project, all transportation services rendered by Railroad by the use of such vehicles, facilities, and equipment, and all relevant Project data records.
5. **Capital Equipment Inventory:** Railroad shall maintain and update a complete inventory of all Project items and submit a written inventory of all real property, vehicles, and equipment, acquired in whole or in part with Federal or State funds.

Donated items and items made in-house shall be listed at their fair market value and the record shall indicate that the item is either donated or made in-house. Railroad shall maintain inventory records for all items with an acquisition cost of five thousand dollars (\$5,000) or more and an expected useful life of one year or more. Acquisition cost includes freight-in and set-up cost. Major repairs, upgrades, and additions that become an integral part of the asset shall be added to the value of the asset and the expected useful life shall be adjusted accordingly. The inventory record shall be annotated with the date and nature of each significant change.

Inventory records shall be maintained throughout the useful life of the asset and for an additional three years, for three years after the end of this Agreement, or for three years after a close-out audit is sent to State, whichever is latest.

Railroad shall investigate any differences in quantities of equipment, as determined by physical inspection, and quantities of equipment recorded in State's or Railroad's records, to determine the cause of the discrepancy. Railroad shall, at the time of any physical inspection, verify the current use of and need for the equipment. Equipment not in use to further the program that funded its acquisition must be noted with an explanation.

Failure to provide a complete written inventory at the request of the State is an event of default and shall furnish grounds for State to withhold payments under this Agreement until Railroad provides an inventory that is acceptable to the Rail Section Manager. The physical inventory shall be less than two years old at the time of submission to the Rail Section Manager.

6. **Criteria:** The Railroad agrees to carry out the Project in a workmanlike manner, and in accordance with the provisions of this Agreement, grant guidance, the Application, the Approved Project Budget, the Statement of Work, Project schedules, and all applicable State and Federal laws, regulations, guidance, standards, any supplementary directives or regulations and published policies. This includes, but is not limited to the following, as applicable:
- U.S. DOT regulations, 49 CFR Part 19, Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and other Non-Profit Organizations (also applies to grants and agreements with private for-profit organizations), as amended;
 - U.S. DOT regulations, 49 CFR Part 18, Uniform Administrative Requirements for Grants and Agreements to State and Local Governments, as amended and applicable;
 - 49 CFR Part 23, Participation by Minority Business Enterprises in Department of Transportation Programs, as amended;
 - 48 CFR, Subpart 31, Contracts with Commercial Organizations, as amended;
 - OMB Circular 2 CFR 215, Uniform Administrative Requirements for Grants and Other Agreements with Institutions of Higher Education, Hospitals and Other Non-Profit Organizations, as amended;
 - OMB Circular 2 CFR 225, Cost Principles for State, Local and Indian Tribal Governments, as amended and applicable;
 - 42 USC 4601 et seq, Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended;
 - 49 CFR Part 24, Uniform Relocation and Real Property Acquisition for Federal and Federally Assisted Programs, as amended;
 - OMB Circular A-133, Audits of States, Local Governments and Non-Profit Organizations, as amended (outlines requirements of a Program-Specific Audit);
 - State of Vermont, Agency of Administration, Department of Finance and Management, Policy and Procedure Manual for Bulletin No. 5, Compliance with OMB Circular A-133, as amended;
 - 49 CFR Part 213, Track Safety Standards, as amended;
 - 49 CFR Part 214, Railroad Workplace Safety, as amended;
 - 49 CFR Part 234, Grade Crossing Signal System Safety, as amended; and
 - Current and revised State or Federal laws, regulations, policies, and related administrative practices applicable to this Agreement. Railroad agrees to establish and maintain for the Project a set of accounts within the framework of an established accounting system, in a manner consistent with 49 CFR § 18.20 or 49 CFR § 19.21, as amended, whichever is applicable.
7. **Documentation, Reports, and Public Information:** All information State requires to administer this Project shall be supplied by Railroad at such times, and in such manner, as the VTrans Rail Program Manager requests, provided that such documents relate to this Agreement or are required to be maintained by advance notice from the VTrans Rail Program Manager. Reporting requirements include, but are not limited to, those described in Federal Circulars cited above, as well as all bids and financial reports. Railroad shall report other data, in the format and at the times needed by State to monitor the projects in this Agreement.
8. **Consultant Studies:** Railroad shall submit a copy of any studies related to the Project done by external consultants during the Grant Term to VTrans Rail Project Manager.

9. **Status Reports:** Railroad shall report to the VTrans Rail Project Manager any significant trends and developments, during the Grant Term of this Agreement, which resulted from activities funded by this Agreement. This shall include progress reports on the Project, at such times and in such manner as VTrans Rail Project Manager may reasonably require, including meetings, reports, financial statements, data, proposals, contracts, and other records.
10. **Submitting Reports:** Railroad shall submit tax returns, reports, or studies to VTrans Rail Project Manager within thirty days of their filing or issue date. Railroad shall submit interim studies related to the Project to VTrans Rail Project Manager in a like manner. **Failure of Railroad to timely deliver any required information to State is an event of default under this Agreement.**
11. **Third Party Contracts:** Railroad shall permit State, or any of its agents, to inquire into any agreements between Railroad and any third party that directly pertain to this Agreement.
12. **Assignments:** Railroad shall not assign, transfer, convey, or subcontract, in whole or in part, sublet, or otherwise dispose of this Agreement without the express prior written consent of State. Such written consent does not release Railroad from any obligations of this Agreement. Railroad shall not enter into any contract for assistance in providing, operating, or managing of any activities specified in this Agreement without the express prior written consent of State. If Railroad assigns any portion of the work to be done under this Agreement or executes any agreement, amendment or change order or any other obligation of any nature with any third party that affects Railroad's rights and responsibilities under this Agreement in any way, Railroad shall include in all such assignments, agreements, amendments, change orders, obligations, and subcontracts all appropriate and applicable clauses of this Agreement. This required provision shall be included in any advertisement or invitation to bid for any procurement under this Agreement: "This Agreement is subject to a financial assistance contract between the State of Vermont and the US Department of Transportation."
13. **Certificates of Compliance with Laws and Permits:** Railroad shall give all notices and comply with all existing and future Federal, State, and municipal laws, ordinances, rules, regulations, and orders of any public authority bearing on the performance of this Agreement, including, but not limited to, the laws referred to in the provisions of this Agreement and in other Agreement documents. If any Agreement documents are at variance therewith in any respect, any necessary changes shall be incorporated by appropriate modification. Upon request, Railroad shall furnish to VTrans Rail Program Manager certificates of compliance with all such laws, orders, and regulations.
14. **Change in Condition or Law Affecting Performance:** Railroad shall immediately notify State of any change in conditions, local law, or any other event that may significantly affect its ability to perform any provisions of this Agreement. State reserves the right to terminate and cancel this Agreement, if State and US DOT agree that there is pending litigation which, in the reasonable opinion of State and US DOT, may jeopardize the Grant Funds, the agreement between State and US DOT, or this Agreement. No termination under this section shall take place based on pending litigation without prior consultation with Railroad

and consideration of the availability of insurance coverage available to mitigate any impact on the Grant Funds, the agreement between State and US DOT or this Agreement

15. **No Additional Waiver Implied:** If any term, provision, or condition contained in this Agreement is breached, by either Railroad or State, and, thereafter, such breach is waived by the other party, such waiver is limited to the particular breach so waived and is not be deemed to waive any other breach hereunder.
16. **Severability:** If any provision of this Agreement is held invalid or unenforceable by a court of competent jurisdiction, such holding does not affect the validity or enforceability of the remainder of this Agreement. All provisions of this Agreement are severable.
17. **Representations and Warranties Made by Railroad:** Railroad hereby represents and warrants that it has full power and authority to enter into this Agreement and to perform its obligations hereunder. Railroad hereby restates and confirms all statements, representations, covenants, and agreements contained in Railroad's Application for the Grant Funds awarded by this Agreement.
18. **Release and Indemnification:** Railroad covenants and agrees that US DOT, and its agents are not liable for, and covenants and agrees to indemnify and hold US DOT, and its agents harmless against, any loss, claim, cause of action, damages, liability (including, without limitation, strict or absolute liability in tort or by statute imposed), charge, cost, or expense (including, without limitation, counsel fees to the extent permitted by law) incurred in connection with, or arising out of, in any manner, any loss or damage to property, injury to, or death of any person, resulting from, or arising out of, any negligent acts or omissions of Railroad under this Agreement.
19. **Dispute Resolution:**
 - a. In case of disputes in the interpretation or implementation of the provisions of this Agreement, the parties shall first attempt to resolve such disputes by direct negotiation between representatives of the State and the Railroad. If this does not resolve a dispute, and no agreement is reached, the dispute may be referred to the VTrans Rail Program Manager by the Railroad for resolution. The Railroad shall provide a concise written statement of the dispute to the VTrans Rail Program Manager. The VTrans Rail Program Manager will provide a written decision concerning the dispute within thirty days of receipt of the referral.

An appeal of the decision of the VTrans Rail Program Manager to the Director shall be filed within thirty days of receipt of the VTrans Rail Program Manager's decision by filing a Notice of Appeal with the VTrans Rail Program Manager. An appeal may be on the record or *de novo* as determined by the Director. The Notice of Appeal shall concisely set forth the issues appealed and include copies of all supporting documentation.

The Director will endeavor to issue a written decision within forty-five days of receipt of the Notice of Appeal. An appeal of the Director's decision to the Secretary shall be filed within thirty days of receipt of the Director's decision by

filing a Notice of Appeal with the Director. The Notice of Appeal shall concisely set forth the issues appealed and include copies of all supporting documentation.

The Secretary shall provide the Railroad and State opportunity to present witnesses and other evidence at a hearing and to be represented at such hearing by counsel. At the hearing additional documentation not available when the Notice of Appeal to the Secretary was filed may be presented by the Railroad and State.

An appeal of the Secretary's decision shall be filed within thirty days of the Secretary's decision by filing a Notice of Appeal with the Secretary. The appealed to the State Transportation Board shall be on the record, as provided in 19 V.S.A. Section 5 (d) (4). The Secretary's decision shall contain instructions for filing further appeals, consistent with the preceding sentence.

- b. If a dispute involves a third party, Railroad shall avail itself of all legal and equitable remedies under any third-party contract that relates to the activities under this Agreement. Railroad also shall notify the VTrans Rail Program Manager in writing of all current or prospective litigation that directly or indirectly pertains to this Agreement.
- c. US DOT and State shall receive, respectively, the Federal Funds and State Funds, of proceeds derived from any third-party recovery for loss of property that was acquired with funds paid under this Agreement.

20. Default:

- a. Any failure of Railroad to comply with any material terms, provisions, or conditions of this or any other Grant Agreement entered into between State and Railroad, whether or not payment of Grant Funds has been fully or partially made, and any material misrepresentation made to State by Railroad in connection with any Grant Agreement shall be an "Event of Default," provided, however, if by reason of "*force majeure*," Railroad is unable, in whole or in part, to carry out its covenants contained herein, Railroad shall not be deemed in default during the continuance of such inability. The term "*force majeure*," as used herein, shall mean, without limitation: Acts of God, strikes, lockouts or other industrial disturbances; acts of public enemies; orders of any kind of the Federal Government or of State or any of their political subdivisions or any of their departments, agencies, or officials, or any civil or military authority; insurrections; riots; epidemics; landslides; lightning; earthquake; fire; hurricanes; storms; floods; washouts; droughts; arrests; restraint of government and people; civil disturbances; explosions; partial or entire failure of utilities, or any other cause not reasonably in the control of Railroad. Railroad shall remedy, with all reasonable dispatch, each cause that prevents Railroad from carrying out the covenants contained herein.
- b. Except as otherwise provided below, no remedy herein conferred upon or reserved by State is intended to be exclusive of any other available remedy, but each and every such remedy is cumulative and is in addition to every other remedy given under this Agreement now or hereafter existing at law or in equity.

- c. The failure of State to exercise any right accruing to it pursuant to this Agreement in any one instance shall not be deemed to be a waiver of such right in the event of a subsequent breach or default by Railroad.

21. Remedies upon an Event of Default:

- a. In the event of an Event of Default by Railroad, State may take one or more of the following remedial actions:
 - 1) withhold payments to Railroad;
 - 2) place Railroad on probationary status under this Agreement;
 - 3) suspend this Agreement;
 - 4) terminate this Agreement.

In addition to the above, State may pursue such other remedial action as may be available at law or equity; provided, however, that except where public safety or fraud is reasonably believed to be at issue, State shall not suspend or terminate this Agreement or take other legal action unless it has first given the Railroad an opportunity to cure through probation or payment withholding. Subject to the preceding sentence, the choice of remedial actions is within the discretion of State, except that in exercising its discretion, State shall take remedial action that reasonably responds to the asserted breach.

- b. Remedial Actions: Subject to the right to cure described in subsection (3), below, State may take one or more of the following remedial actions in an Event of Default
 - 1) Withhold payments under this Agreement to Railroad.

- 2) Place Railroad on probation. Any probation shall remain in effect until Railroad takes corrective action or undertakes a plan of corrective action satisfactory to State or until State suspends or terminates this Agreement. While under probation, Railroad shall not incur any new financial obligations, unless State expressly authorizes them in writing in the notice of probation or any amendment to that notice.

- 3) Suspend this Agreement in whole or in part.

Necessary and otherwise allowable costs that Railroad could not reasonably avoid during the suspension period shall be allowed if they result from obligations properly incurred by Railroad before the effective date of the suspension and are not in anticipation of suspension or termination.

State shall make appropriate adjustments to payments under the suspended Agreement either by withholding subsequent payments or by not allowing Railroad credit for disbursements made in payment of unauthorized obligations incurred during the suspension period.

- 4) Terminate this Agreement in whole or in part upon 30 days advance notice. Upon termination, State may issue such instructions under subsection 4 as may be appropriate to the circumstances.

- c. Opportunity to Cure Provisions: Not less than thirty (30) days prior to:
- 1) withholding payments;
 - 2) placing Railroad under probation; or
 - 3) suspending this Agreement, State shall give Railroad written notice of its intent to do so, along with the reasons for the decision to take the particular action and a statement of the corrective action that needs to be taken by Railroad to cure the asserted breach.

If Railroad takes any of the corrective action within the 30 day period referenced above, or within such other period as State and Railroad shall agree upon, including, where permitted by State, a "plan of correction," then State shall not take the proposed action. If Railroad fails to cure the asserted Event of Default, State may take further action without additional notice.

- d. Remedies upon Termination: If this Agreement is terminated as a result of an uncured Event of Default, then, subject to Railroad's rights under Dispute Resolution, State may take one or more of the following actions in connection with any termination of this Agreement:

- 1) direct Railroad to comply with such orders of disposition of Project Equipment as State may issue;
- 2) direct Railroad to return to State the percentage of the Federal Funds and State Funds of the remaining fair market value, if any, realized from Railroad's disposition of the Project Equipment;
- 3) refuse to pay any Invoices; and/or
- 4) require reimbursement from Railroad of all, or any portion of, the Grant Funds for any period that Railroad has been in default.

22. **Captions:** The section and article captions in this Agreement are for the convenience of reference only. They in no way define, limit, or describe the scope or intent of this Agreement, or any part hereof, and shall not be considered in any construction hereof.

23. **Offer Effective Date:** When transmitted by State to Railroad, this document constitutes an offer, which expires if not accepted, executed, and returned to State by Railroad within forty-five days of such transmittal, unless an extension is granted in writing by the VTrans Rail Program Manager at the written request of Railroad. This Agreement is effective on the effective date listed under Grant Term, irrespective of its date of execution, unless the parties specify to the contrary, and obligations of the parties hereunder begin as of the effective date.

24. **Equal Employment Opportunity:** Railroad shall not discriminate against any employee or applicant for employment because of race, color, religion, creed, sex, age, handicap, or national origin. Railroad shall take affirmative action to ensure that applicants are employed, and that employees are treated, during their employment, without regard to their

race, color, religion, creed, sex, age, or national origin. Such actions shall include, but not be limited to employment, upgrading, demotion, transfer, recruitment, advertising, layoff, termination, rates of pay, other forms of compensation, and selection for training, including apprenticeship. Railroad shall include a similar provision in all subcontracts.

25. **Section 504 Assurances and The Americans with Disabilities Act of 1990:** The Railroad shall comply with all the requirements imposed by the United States Department of Transportation regulations implementing the Rehabilitation Act of 1973, as amended, and the Americans with Disabilities Act of 1990 (and any subsequent amendments thereto) set forth in 49 CFR Subtitle A, Parts 27, 37, and 38, as well as all applicable regulations and directives issued pursuant thereto by other Federal Departments or agencies. Railroad shall keep on file for one year all complaints of non-compliance received. A record of such complaints must be submitted to the State within 90 days of the end of fiscal year (September 30, 2008) and kept for five years by the Railroad. An explanation of any such complaints and their resolution must be provided to the State upon request. Railroad agrees to include this provision in all subgrants.

26. **Civil Rights:**

The Railroad agrees to comply with all civil rights laws and regulations, in accordance with applicable Federal directives, except to the extent that the State determines otherwise in writing. These include, but are not limited to, the following: (1) Title VI of the Civil Rights Act of 1964 (P.L. 88-352)(as implemented by 49 C.F.R. Part 21), which prohibits discrimination on the basis of race, color or national origin; (b) Title IX of the Education Amendments of 1972, as amended (20 U.S.C. §§ 1681-1683, and 1685-1686), which prohibits discrimination on the basis of sex; (c) Section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. § 794), which prohibits discrimination on the basis of handicaps; (d) the Age Discrimination Act of 1975, as amended (42 U.S.C. §§ 1601-1607), which prohibits discrimination on the basis of age; (e) the Drug Abuse Office and Treatment Act of 1972 (P.L. 92-255), as amended, relating to nondiscrimination on the basis of drug abuse; (f) the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970 (P.L. 91-616), as amended, relating to nondiscrimination on the basis of alcohol abuse or alcoholism; (g) §§ 523 and 527 of the Public Health Service Act of 1912 (42 U.S.C. §§ 290 dd-3 and 290 ee-3), as amended, relating to confidentiality of alcohol and drug abuse patient records; (h) Title VIII of the Civil Rights Act of 1968 (42 U.S.C. §§ 3601 et seq.), as amended, relating to nondiscrimination in the sale, rental or financing of housing, (i) 49 U.S.C. § 306, which prohibits discrimination on the basis of race, color, national origin, or sex in railroad financial assistance programs.

27. **DBE: Participation by Small Business Concerns Owned and Controlled by Socially and Economically Disadvantaged Individuals.** FRA encourages the State and Railroad to utilize small business concerns owned and controlled by socially and economically disadvantaged individuals (as that term is defined by other DOT agencies in 49 C.F.R. Part 26) in carrying out the Project.
28. **Lobbying:** 31 U.S.C. Section 1352 provides in part that no appropriated funds may be expended by the recipient of a Federal contract, grant, loan or cooperative agreement to pay any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in the awarding of any Federal contract, the making of any

Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan or cooperative agreement. Railroad also agrees to abide by applicable State law on lobbying in 2 V.S.A. Sections 261 - 268, inclusive.

29. **Safety Oversight:** To the extent applicable, the Railroad agrees to comply with any regulation, laws, or policy and other guidance that FRA, US DOT or State may issue pertaining to safety oversight in general, and in the performance of this Agreement, in particular.
30. **Interest of Members of Congress and State:** No member or delegate to the Congress of the United States shall be admitted to any share or part of this Agreement or to any benefit arising from this Agreement. No member, officer, or employee of the State, during his or her tenure and for one year thereafter shall have any interest, direct or indirect, in this Agreement or the proceeds of this Agreement.
31. **Termination:** Upon completion of the services encompassed herein and payment of the agreed upon portion of the Project cost, this Agreement, with its mutual obligations, shall be considered evidence of satisfactory completion of the work. This Agreement may be terminated upon mutual agreement of State and Railroad. If this Agreement is terminated before the Project is completed, State shall pay Railroad for fees earned to the effective date of the notice of termination, less any payments previously made.
32. **Monitoring:** The State shall monitor and conduct fiscal and/or program audits of the Railroad and its contracts to verify the extent of services provided under the terms of this Agreement. Representatives of the State or Federal government shall have access to project facilities and records during Railroad's normal business hours. If a Summary of Corrective Actions is issued by the State as part of the State's monitoring efforts, the Railroad will correct these items as outlined in the said document before the next scheduled oversight meeting.
33. **Applicable Law:** This Rail Agreement will be governed by the laws of the State of Vermont. The Railroad must comply with all the federal requirements pertaining to the expenditure of federal funds. Railroad and all Project Contractors shall comply fully with all Federal, State, and local laws, rules, ordinances, executive orders, and other legal requirements.
34. **FELA Coverage:** With respect to all operations performed under this Agreement involving Railroad employees covered under the Federal Employer's Liability Act (FELA) (45 U.S.C. §§ 51-60), the Railroad shall carry insurance covering Railroad's liability under FELA, with limits of coverage required by federal law and at least \$1,000,000 per occurrence. To the extent that the workers' compensation of laws of Vermont are pre-empted by FELA, Railroad need not carry workers' compensation insurance.
35. **Notification:** The Railroad shall notify the State's Resident Engineer/Project Manager at least two (2) days in advance when work is scheduled for the Project, including locations of railroad mileposts and/or valuation stations and the nature of the work.

36. **Maintenance of Project Improvements:** Following completion of the Project, Project improvements will be maintained by the Railroad, unless, in the case of State-owned railroads, responsibility is assigned to the State under relevant provisions of the parties' current lease or operating agreement.
37. **Cost Principles, Accounting, Inspection and Auditing:** Railroad agrees to conduct all work in accordance with the regulations of the Federal Highway Administration, 23 C.F.R. Part 140 (Reimbursement), Subpart I (Reimbursement for Railroad Work) and 23 C.F.R. Part 646 (Railroads). Additionally, the Railroad agrees to the following:
- (a) **Records:** Railroad shall establish and maintain a separate account for the Project, either independently or within its existing accounting system, to be known as the Project Account. All checks, invoices, orders, or other accounting documents pertaining in whole or in part to the Project shall be clearly identified, readily accessible, and to the extent feasible, kept separate and apart from all other documents. Any check or other drawn by Railroad with respect to any item which is or will be chargeable against the Project Account will be supported in proper detail and clearly indicate its purpose and relationship to the Project.
 - (b) **Documentation of Project Costs:** All Project costs are to be determined by actual cost records kept by Railroad. All charges to the Project shall be supported by Railroad payroll time and attendance records, equipment rates as published in the "Blue Book for Railroad Equipment" or vouchers evidencing in proper detail the nature and propriety of the charges. Materials, equipment, supplies and other direct costs must be supported by properly executed vendor invoices or other documentary evidence. Indirect costs must be adequately supported by audited overhead schedule.
 - (c) **Reports:** Railroad agrees to provide Project cost and related financial information at such times and in such manner as the State may reasonably require, in addition to those reports specifically outlined within this Rail Agreement.
 - (d) **Direct Cost Certification:** Railroad, at its sole discretion, can submit a direct cost certification to VTrans Rail Program Manager indicating the Railroad will only request for reimbursement of labor, benefits, liability insurance, and taxes directly related to this Rail Agreement.
 - (e) **Audit:** Annual audit of the project is required by a competent entity of all project activity, including but not limited to, procurement, payroll, internal expenses, contractor invoicing, and project management. The audit shall certify that federal regulations and this agreement are being complied with or list areas of deficiencies. This audit shall be completed within six (6) months of fiscal year end for the Railroad.
 - (f) **Funds Received or Made Available for the Project:** Consistent with the provisions of 49 C.F.R. § 18.21, or 49 C.F.R. § 19.21, as amended, whichever is applicable, the Railroad agrees to record in the Project Account, and deposit in a financial institution all Project payments received by it from State pursuant to this Agreement and all other funds provided for, accruing to, or otherwise received on

account of the Project (Project Funds). The Railroad is encouraged to use financial institutions owned at least 50 percent by minority group members.

- (g) Checks, Orders, and Vouchers. The Railroad agrees that all checks, payrolls, invoices, contracts, vouchers, orders, or other accounting documents pertaining in whole or in part to the Project shall be clearly identified, readily accessible, and, to the extent feasible, kept separate from documents not pertaining to the Project.
38. **Reporting of Project Benefits:** For a period of three (3) years following the placing in service of the improvements resulting from completion of the Project, the Railroad will cooperate with the State in furnishing quarterly (due the 25th day of the close of each calendar quarter) to the VTrans Rail Program Manager one (1) copy of a report on project benefits, prepared in accordance with the requirements set forth and identified as attached to this Rail Agreement. In addition to its right to receive such quarterly reports, FRA shall, for a period of twenty (20) years following the placing in service of the improvements resulting from completion of the Project, retain the right to receive (upon request) information and/or data from the State necessary to independently verify that the Project benefits referred to above are still being achieved. Railroad acknowledges this requirement and will cooperate with the State in responding to any such requests from the FRA.
39. **Maintenance Responsibility and Refunds:** Except as otherwise provided herein, the Railroad shall maintain Project property to the level of utility (including applicable FRA track safety standards) which existed when the Project improvements were placed in service (as set forth in the Scope of Work) for a period of twenty (20) years from the date such Project property was placed in service. In the event that all intercity passenger rail service making use of the Project property is discontinued during the twenty (20) year period, the Railroad shall continue to ensure the maintenance of the Project property, as set forth above, for a period of one (1) year to allow for the possible reintroduction of intercity passenger rail service. IN the event the Railroad fails to ensure the maintenance of project property, as set forth above, for a period of time in excess of six (6) months, the Railroad will refund to the State a pro-rata share of the Federal contribution, based upon the percentage of the twenty (20) year period remaining at the time of such original default.
40. **Project Use for Intercity Passenger Rail Service and Refunds:** The Railroad acknowledges that the purpose of the Project is to benefit intercity passenger rail service. In the event that all intercity passenger rail service making use of the Project property is discontinued due to (a) termination by Amtrak of the host or operating agreement between Amtrak and Railroad for Amtrak's operation on that portion of Railroad's line within the Project area and (b) resulting from a material breach by Railroad of an expressed term contained in such agreement at any time during a period of twenty (20) years after the date such Project property was placed in service, as set forth above, and (c) if such intercity passenger rail service is not reintroduced during a one (1) year period following such discontinuance ("Discontinuance Period"), the Railroad shall refund to the State a pro-rata share of the Federal contribution, based upon straight line amortization. Such amount to be refunded shall be calculated by dividing the Railroad's pro-rata share by the number of years remaining after the Discontinuance Period and with such sum being payable annually each January 15th

after expiration of the Discontinuance Period. Such pro-rata share due from the Railroad shall be offset by any capital investment made by the Railroad to the Project property during the twenty (20) year period. The State agrees that any amount refunded by Railroad shall be contingent on (i) the State making funding for the current NECR route its highest Amtrak/intercity passenger rail priority and (ii) the Federal Railroad Administration taking official action to enforce the State's obligation to repay the funding due to the discontinuance of intercity passenger rail service.

41. **Insurance:** Before commencing work on this contract the Railroad must provide certificates of insurance to show that the following minimum coverages are in effect. It is the responsibility of the Railroad to maintain current certificates of insurance on file with the state through the term of the contract. No warranty is made that the coverages and limits listed herein are adequate to cover and protect the interests of the Railroad for the Railroad's operations. These are solely minimums that have been established to protect the interests of the State.

Workers Compensation: With respect to all operations performed, the Railroad shall carry workers' compensation insurance in accordance with the laws of the State of Vermont, except when such laws are pre-empted by Federal Employers Liability Act (FELA).

General Liability and Property Damage: With respect to all operations performed under the contract, the Railroad shall carry general liability insurance having all major divisions of coverage including, but not limited to:

Premises - Operations

Products and Completed Operations

Personal Injury Liability

Contractual Liability

The policy shall be on an occurrence form and limits shall not be less than:

\$1,000,000 Per Occurrence

\$1,000,000 General Aggregate

\$1,000,000 Products/Completed Operations Aggregate

\$ 50,000 Fire/ Legal/Liability

Railroad shall name the State of Vermont and its officers and employees as additional insureds for liability arising out of this contract.

Automotive Liability: The Railroad shall carry automotive liability insurance covering all motor vehicles, including hired and non-owned coverage, used in connection with the contract. Limits of coverage shall not be less than:
\$1,000,000 combined single limit.

Railroad shall name the State of Vermont and its officers and employees as additional insureds for liability arising out of this contract.

Notwithstanding the above, the Railroad may self-insure for the levels of insurance required. If the Railroad is or intends to become a self-insurer, it shall so notify the State. If not reasonably satisfied that the Railroad is able to cover the risks assumed, the State may so notify the Railroad, in which event the Railroad

shall immediately obtain coverage from a licensed insurer, as described above.

42. **Independent Liability:** The Party will act in an independent capacity and not as officers or employees of the State.

The Party shall defend the State and its officers and employees against all claims or suits arising in whole or in part from any **[negligent or intentional]** act or omission of the Party or of any agent of the Party. The State shall notify the Party in the event of any such claim or suit, and the Party shall immediately retain counsel and otherwise provide a complete defense against the entire claim or suit.

After a final judgment or settlement the Party may request recoupment of specific defense costs and may file suit in Washington Superior Court requesting recoupment. The Party shall be entitled to recoup costs only upon a showing that such costs were entirely unrelated to the defense or any claim arising from an act or omission of the Party.

The Party shall indemnify the State and its officers and employees in the event that the State, its officers or employees become legally obligated to pay any damages or losses arising from any **[negligent or intentional]** act or omission of the Party.

43. **Cost of Materials:** Railroad will not buy materials and resell to the State at a profit.

44. **Availability of Federal Funds:** This Rail Agreement is funded in whole or in part by federal funds. In the event the federal funds supporting this contract become unavailable or are reduced, the State may cancel this contract immediately, and the State shall have no obligation to pay Railroad from State revenues.

45. **Davis-Bacon Act:** For projects using or proposing to use rights-of-way owned by a railroad, the Railroad shall comply with the provisions of 49 U.S.C. 24405(c) (2), with respect to the payment of prevailing wages consistent with the provisions of 49 U.S.C. 24312. For these purposes, wages in collective bargaining agreements negotiated under the Railway Labor Act are deemed to comply with Davis-Bacon Act requirements. For projects not using or proposing to use rights-of-way owned by a railroad, the Railroad will comply with the provisions of 40 U.S.C. 3141 et seq.

46. **Individually Identifying Information:** Railroad must not use or disclose any individually identifying information that pursuant to this Rail Agreement is disclosed by the State to the Railroad, created by the Railroad on behalf of the State, or used by the Railroad for any purpose other than to complete the work specifications of this Rail Agreement unless such use or disclosure is required by law, or when Railroad obtains permission in writing from the State to use or disclose the information and this written permission is in accordance with federal and state laws.

47. **Ownership of Project Supplies; Salvaged Materials:** If this contract involves a State-owned railroad, then upon full payment by the State all rails and other track materials purchased by the Railroad under this contract shall become the sole property of the State. In accordance with 23 C.F.R. § 646.216 (General Procedures), credits shall be made to the cost of the Project for all rails and other track materials salvaged as

a result of the Project. Before disposing of any such materials, the Railroad will notify the VTrans Rail Program Manager and the ~~Federal Highway Administration (FHWA)/~~ Federal Railroad Administration (FRA) and afford them a reasonable opportunity to inspect such materials.

48. **Supplemental Terms:** The parties acknowledge that US DOT may require supplements to the terms of the Agreement after its execution and, therefore, if after the signing of this Agreement, the VTrans Rail Project Manager receives any additional requirements from US DOT, the VTrans Rail Project Manager will immediately notify the Railroad and the Railroad will meet with representatives of the State to exercise reasonable efforts to mutually agree on such requirements.
49. **Replacement of Existing Intercity Passenger Rail Service:** Subject to the terms of this agreement, the Railroad shall comply with the provisions of 49 U.S.C. 24405(d), with respect to the provision of any intercity rail passenger service that was provided by Amtrak, including collective bargaining agreements, replacement services, and arbitration.
50. **Project Management Plan:** Subject to the terms of this agreement, the Railroad shall prepare and carry out a project management plan approved by the State and FRA. At a minimum, the Project Management Plan must include the items addressed in 49 U.S.C. 24403(a).
51. **Whistleblower Protection:** An employee of the Railroad may not be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing, including a disclosure made in the ordinary course of an employee's duties, to the Recovery Accountability and Transparency Board, an inspector general, the Comptroller General, a member of Congress, a State or Federal regulatory or law enforcement agency, a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct), a court or grand jury, the head of a Federal agency, or their representatives, information that the employee reasonably believes is evidence of – (1) gross mismanagement of an agency contract or grant relating to Recovery Act funds; (2) a gross waste of Recovery Act funds; (3) a substantial and specific danger to public health or safety related to the implementation or use of Recovery Act funds; (4) an abuse of authority related to the implementation or use of Recovery Act funds; or (5) a violation of law, rule, or regulation related to an agency contract (including the competition for or negotiation of a contract) or grant, awarded or issued relating to Recovery Act funds.
52. **False Claims Act:** The Railroad and any sub-grantee awarded funds made available under the Recovery Act and through this Agreement shall promptly refer to the Department of Transportation Inspector General any credible evidence that a principal, employee, agency, contractor, sub-grantee, subcontractor, or other person has submitted a false claim under the False Claims Act or has committed a criminal or civil violation of laws pertaining to fraud, conflict of interest, bribery, gratuity, or similar misconduct involving Recovery Act funds.
53. **Prohibited Activities:** None of the funds provided through this Agreement may be used for any casino or other gaming establishment, aquarium, zoo, golf course or

swimming pool.

54. Ethics: The Railroad agrees to maintain a written code or standards of conduct that shall govern the performance of its officers, employees, board members, or agents engaged in the award and administration of contracts supported by Federal funds. The code or standards shall provide that the Railroad's officers, employees, board members, or agents may neither solicit nor accept gratuities, favors or anything of monetary value from present or potential contractors or subgrantees. The Railroad may set minimum rules where the financial interest is not substantial or the gift is an unsolicited item of nominal intrinsic value. As permitted by State or local law or regulations, such code or standards shall provide for penalties, sanctions, or other disciplinary actions for violations by the Railroad's officers, employees, board members, or agents, or by contractors or subgrantees or their agents.

1) **Personal Conflict of Interest.** The Railroad's code or standards must provide that no employee, officer, board member, or agent of the Railroad may participate in the selection, award, or administration of a contract supported by Federal funds if a real or apparent conflict of interest would be involved. Such a conflict would arise when any of the parties set forth below has a financial or other interest in the firm selected for award:

- a. The employee, officer, board members, or agent;
- b. Any member of his or her immediate family;
- c. His or her partner; or
- d. An organization that employs, or is about to employ, any of the above.

2) **Organizational Conflicts of Interest.** The Railroad's code or standards of conduct must include procedures for identifying and preventing real and apparent organizational conflicts of interests. An organizational conflict of interest exists when the nature of the work to be performed under a proposed third party contract, may, without some restrictions on future activities, result in an unfair competitive advantage to the contractor or impair the contractor's objectivity in performing the contract work.

55. Relocation and Land Acquisition: The Railroad agrees to comply with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended, 42 U.S.C. §§ 4601 et seq.; and U.S. DOT regulations, "Uniform Relocation and Real Property Acquisition for Federal and Federally Assisted Programs," 49 C.F.R. Part 24.

56. Flood Hazards: The Railroad agrees to comply with the flood insurance purchase requirements of Section 102(a) of the Flood Disaster Protection Act of 1973, 42 U.S.C. § 4012a(a), with respect to any construction or acquisition Project.

57. Patent Rights (Not applicable):

a. If any invention, improvement, or discovery of the Railroad or any of its third party contractors is conceived or first actually reduced to practice in the course of or under this Project, and that invention, improvement, or discovery is patentable under the laws of the United States of America or any foreign country, the Railroad agrees to notify State immediately and provide a detailed report. The rights and responsibilities of the Railroad, third party contractors,

State and FRA with respect to such invention, improvement, or discovery will be determined in accordance with applicable Federal laws, regulations, policies, and any waiver thereof.

b. If the Railroad secures a patent with respect to any invention, improvement, or discovery of the Railroad or any of its third party contractors conceived or first actually reduced to practice in the course of or under this Project, the Railroad agrees to grant to FRA a royalty-free, non-exclusive, and irrevocable license to use and to authorize others to use the patented device or process for Federal Government purposes.

c. The Railroad agrees to include the requirements of the "Patent Rights" section of this Agreement in its third party contracts for planning, research, development, or demonstration under the Project.

58. Rights in Data and Copyrights (Not applicable):

a. The term "subject data" used in this section means recorded information, whether or not copyrighted, that is developed, delivered, or specified to be delivered under this Agreement. The term includes graphic or pictorial delineations in media such as drawings or photographs; test in specifications or related performance or design-type documents; machine forms such as punched cards, magnetic tape, or computer memory printouts; and information retained in computer memory. Examples include, but are not limited to: computer software, engineering drawings and associated lists, specifications, standards, process sheets, manuals, technical reports, catalog item identifications, and related information. The term does not include financial reports, cost analyses, and similar information incidental to Project administration.

b. The following restrictions apply to all subject data first produced in the performance of this Agreement:

i. Except for its own internal use, the Railroad may not publish or reproduce such data in whole or in part, or in any manner or form, nor may the Railroad authorize others to do so, without the written consent of the State, under such time as the State may have either released or approved the release of such data to the public; this restriction on publication, however, does not apply to grant agreements with academic institutions.

ii. As authorized by 49 C.F.R. § 18.34, or 49 C.F.R. § 19.36, as applicable, FRA reserves a royalty-free, non-exclusive and irrevocable license to reproduce, publish or otherwise use, and to authorize others to use, for Federal Government purposes:

1. Any work developed under a grant, cooperative agreement, sub-grant, sub-agreement, or third party contract, irrespective of whether or not a copyright has been obtained; and
2. Any rights of copyright to which the Railroad, subgrantee, or a third party contractor purchases ownership with Federal assistance.

c. When FRA provides assistance to a Grantee for a Project involving planning, research, or development, it is generally FRA's intent to increase the body of knowledge, rather than to limit the benefits of the Project to those parties that have participated therein. Therefore, unless FRA determines otherwise, the Railroad understands and agrees that, in addition to the rights set forth in preceding portions of this section of this Agreement, FRA may make available to any FRA Grantee, subgrantee, third party contractor, or third party subcontractor, either FRA's license in the copyright to the "subject data" derived under this

Agreement or a copy of the "subject data" first produced under this Agreement. In the event that such a Project which is the subject of this Agreement is not completed, or any reason whatsoever, all data developed under that Project shall become subject data as defined herein and shall be delivered as FRA may direct.

- d. Unless prohibited by State law, the Railroad agrees to indemnify, save and hold harmless FRA, its officers, agents, and employees acting within the scope of their official duties against any liability, including costs and expenses, resulting from any willful or intentional violation by the Railroad of proprietary rights, copyrights, or right of privacy, arising out of the publication, translation, reproduction, delivery, use, or disposition of any data furnished under this Agreement. The Railroad shall not be required to indemnify FRA for any such liability arising out of the wrongful acts of employees or agents of FRA.
- e. Nothing contained in this section on rights in data, shall imply a license to FRA under any patent or be construed as affecting the scope of any license or other right otherwise granted to FRA under any patent.
- f. The requirements of this section of this Agreement do not apply to material furnished to the Railroad by the State and incorporated in the work carried out under this Agreement, provided that such incorporated material is identified by the Railroad at the time of delivery of such work.
- g. Unless State determines otherwise, the Railroad agrees to include the requirements of this section of this Agreement in its third party contracts for planning, research, development, or demonstration under the Project.

59. Acknowledgment of Support and Disclaimer:

- a. An acknowledgment of State and FRA support and a disclaimer must appear in any Railroad publication, whether copyrighted or not, based on or developed under the Agreement, in the following terms: "This material is based upon work supported by the Vermont Agency of Transportation and Federal Railroad Administration under a grant/cooperative agreement, dated." (Fill-in appropriate identification of grant/cooperative agreement)
- b. All Railroad publications must also contain the following: "Any opinions, findings, and conclusions or recommendations expressed in this publication are those of the author(s) and do not necessarily reflect the view of the Federal Railroad Administration and/or U.S. DOT."
- c. The Railroad agrees to cause to be erected at the site of any construction, and maintain during construction, signs satisfactory to FRA identifying the Project and indicating that FRA is participating in the development of the Project.

60. Site Visits: State and/or FRA, through its authorized representatives, has the right, at all reasonable times, to make site visits to review Project accomplishments and management control systems and to provide such technical assistance as may be required subject to the existing Right of Entry Agreement. If any site visit is made by State and/or FRA on the premises of the Railroad, subgrantee, contractor, or subcontractor under this Agreement, the Railroad shall provide and shall required its subgrantees, contractors, or subcontractors to provide, all reasonable facilities and assistance for the safety and convenience of State and/or FRA representatives in the performance of their duties. All site visits and evaluations shall be performed in such a manner as will not unduly delay work being conducted by the Railroad, subgrantee, contractor, or subcontractor.

61. Project Completion, Settlement, and Closeout:

- a. **Project Completion.** Within 90 days of the Project completion date or termination by State, the Railroad agrees to submit a final Financial Report, a certification or summary of Project expenses, and third party audit reports, as applicable.
- b. **Remittance of Excess Payments.** If State has made payments to the Railroad in excess of the total amount of funding due, the Railroad agrees to promptly remit that excess and interest as may be required as required by the "Payment by FRA" section (attached by reference).
- c. **Project Closeout.** Project closeout occurs when all required Project work and all administrative procedures described in 49 C.F.R. Part 18, or 49 C.F.R. Part 19, as applicable, have been completed, and when State notifies the Railroad and forwards the final Federal assistance payment, or when State acknowledges the Railroad's remittance of the proper refund. Project closeout shall not invalidate any continuing obligations imposed on the Railroad by this Agreement or by the State's final notification or acknowledgement.

62. Environmental Protection:

a. All facilities that will be used to perform work under this Agreement shall not be so used unless the facilities are designed and equipped to limit water and air pollution in accordance with all applicable local, state and Federal standards.

b. The Railroad will conduct work under this Agreement, and will require that work that is conducted as a result of this Agreement be in compliance with the following provisions, as modified from time to time, all of which are incorporated herein by reference: section 114 of the Clean Air Act, 42 U.S.C. 7414, and section 308 of the Federal Water Pollution Control Act, 33 U.S.C. 1318, and all regulations issued thereunder. The Railroad certifies that no facilities that will be used to perform work under this Agreement are listed on the List of Violating Facilities maintained by the Environmental Protection Agency ("EPA"). The Railroad will notify the Project Manager as soon as it or any contractor or subcontractor receives any communication from the EPA indicting that any facility which will be used to perform work pursuant to this Agreement is under consideration to be listed on the EPA's List of Violating Facilities; provided, however, that the Railroad's duty of notification hereunder shall extend only to those communications of which it is aware, or should reasonably have been aware. The Railroad will include or cause to be included in each contract or subcontract entered into, which contract or subcontract exceeds Fifty Thousand Dollars (\$50,000.00) in connection with work performed pursuant to this Agreement, the criteria and requirements of this section and an affirmative covenant requiring such contractor or subcontractor to immediately inform the Railroad upon the receipt of a communication from the EPA concerning the matters set forth herein.

c. The Railroad may not expend any of the funds provided in this agreement on construction or other activities that represent an irretrievable commitment of resources to a particular course of action affecting the environment until after all environmental and historic preservation analyses required by the National Environmental Policy Act (42 U.S.C. 4332)(NEPA), the National Historic Preservation Act (16 U.S.C. 470(f)(NHPA), and related laws and regulations have been completed and the State has provided the Railroad with a written notice authorizing the Railroad to proceed.

d. The Railroad shall assist the State in its compliance with the provisions of NEPA, the Council on Environmental Quality's regulations implementing NEPA (40 C.F.R. Part 1500 et seq.), FRA's "Procedures for Considering Environmental Impacts" (45 Fed. Reg. 40854, June 16, 1980), as revised May 26, 1999, 64 Fed. Reg. 28545), Section 106 of the NHPA, and related environmental and historic preservation statutes and regulations. As a condition of receiving financial assistance under this agreement, the Railroad may be required to conduct certain environmental analyses and to prepare and submit to the State draft documents required

under NEPA, NHPA, and related statutes and regulations (including draft environmental assessments and proposed draft and final environmental impact statements).

e. No publicly-owned land from a park, recreational area, or wildlife or waterfowl refuge of national, state, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, state or local significance as so determined by such officials shall be used by the Railroad without the prior written concurrence of State. The Railroad shall assist the FRA in complying with the requirements of 49 U.S.C. §303(e).

f. The Railroad agrees to facilitate compliance with the policies of Executive Order No. 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations,” 42 U.S.C. 4321 note, except to the extent that the FRA determines otherwise in writing.

ATTACHMENT E - DEFINITIONS

The following terms, whenever set forth in initial capitals in this Agreement, shall have the meanings set forth in this Article, except as otherwise expressly provided in this Agreement.

- **Act** – Federal Railroad Act, as amended.
- **Administrative Expenses** – Allowable Costs under this Agreement that are neither Capital Expenses nor Operating Expenses. Administrative Expenses may be Direct Expenses or Indirect Expenses.
- **Agreement** – Any Grant Agreement or Cooperative Agreement, including all attachments..
- **Allowable Costs** – Costs which are incurred in the performance of the services described in Attachment A – Scope of Work, which satisfy the requirements of OMB Circular 2 CFR, Part 225 or 48 CFR, Part 31, as applicable to Railroad, and also satisfy additional requirements governing allowable costs of the FRA and the State of Vermont. Allowable Costs are ordinary and necessary to accomplish the purposes of this Agreement and are not of a type ineligible for reimbursement under Federal or State of Vermont Grant Agreements.
- **Americans with Disabilities Act of 1990** – The law passed by Congress in 1990 which makes it illegal to discriminate against people with disabilities in employment, services provided by state and local governments, public and private transportation, public accommodations and telecommunications.
- **Capital Expenses** – Costs of acquiring, constructing, and improving rail facilities and equipment needed for a safe, efficient, and coordinated rail services.
- **CFDA** – Catalog of Federal Domestic Assistance.
- **CFR** – Code of Federal Regulations.
- **Criteria** – All Federal and State laws, regulations, rules, and guidelines applicable to this Agreement, including, but not limited to 49 U.S.C. §§ 5301 - 5338 of the U.S.C., and other laws, regulations, rules, and guidelines cited in this Agreement. All citations not specifically excluded elsewhere in this Agreement are hereby incorporated by reference.
- **Direct Costs** – Allowable Costs that can be directly and readily identified with a final cost objective.
- **Director** – Director of the Operations Division, VTrans.
- **Disadvantaged Business Enterprise (DBE)** – A small business, at least 51 percent owned by one or more socially and economically disadvantaged persons, whose management and daily business operations are controlled by at least one socially and economically disadvantaged owner. To be recognized as a DBE under this Agreement, a business shall be certified as such by State's Civil Rights Office.
- **Eligible Assistance** – Expenditures that are reimbursable through this Agreement, including Capital, Administrative, and Operating Expenses (also known as Eligible Expenses).
- **EPA** – United States Environmental Protection Agency.
- **FRA** – Federal Railroad Administration of the US Department of Transportation.
- **Federal Funds** – Financial assistance from the federal government to assist in paying for Federal Railroad Administration costs of providing rail services.
- **Fair Market Value** – The amount that a willing buyer and a willing seller agree upon in an open and fair process for the purchase and sale of an item of property.
- **Final Audit** – A certified independently-prepared financial and program statement of all funding sources done upon completing this Agreement, conducted in accordance with U.S. Office of Management and Budget (OMB) Circular A-133, and other applicable auditing guidance, as further specified in this Agreement.

- **Fiscal Year** – Unless otherwise specified, the State of Vermont fiscal year, July 1 through June 30.
- **Grant Agreement** – A contract between State and a Railroad including, but not limited to, this Agreement.
- **Grant Funds** – Monies to carry out the Program under this Agreement. Grant Funds may come from several sources in amounts specified in the Agreement.
- **Railroad** – The recipient of an award of public funds. A Railroad shall comply with all terms and conditions of each award imposed by the awarding entity and by other organizations that provide funds or impose requirements on this Agreement.
- **High Risk** – A situation which, if continued, would jeopardize the future operation of the Railroad.
- **Invoice** – A request by the Railroad for reimbursement of expenses from Grant Funds.
- **Local Match** – Non-federal, non-State funds provided by the Railroad.
- **Maximum Limiting Amount** – The maximum amount of State and Federal funding for an Agreement. This consists of a Federal Amount plus a State Amount. It excludes local contributions (Local Match and Local Share for Capital Purchases).
- **OMB** – U.S. Office of Management and Budget.
- **Operating Expenses** – Allowable Costs directly related to routine system operations. Capital acquisitions, such as of land, structures, and motor vehicles, administrative expenses and maintenance expenses are not operating expenses.
- **Program** – US DOT Grants and State funded rail Projects administered by the State Rail Section.
- **Project** – Activities funded by this Agreement.
- **Project Contractor** – An independent supplier of services, whether public, private, or private nonprofit that has an agreement with the Railroad; a subcontractor.
- **Retroactive Grant** – A grant that pays Grant Funds for a specified past period.
- **Standard Assurances** – Required assurances set forth in FRA Circulars. Railroad must certify it complies with those assurances.
- **State** – State of Vermont, Agency of Transportation.
- **Total Agreement Cost** – Total funding from all sources identified in this Agreement.
- **US** – United States.
- **U.S.C.** – United States Code.
- **US DOT** – United States Department of Transportation or any of its component units.
- **US DOT Grant** – A grant issued by US DOT.
- **Vermont State Rail Funds** – Financial assistance obtained from the State to help cover costs for rail capital projects.
- **V.S.A.** – Vermont Statutes Annotated.
- **VTrans** – Vermont Agency of Transportation, an agency of the State of Vermont. (mailing address: 1 National Life Drive, Montpelier, VT 05633-5001).

ATTACHMENT F- PROCUREMENT REVIEW PROCEDURES

Any subcontracts or purchases, under this Agreement, which are expected to exceed \$100,000 and which are to be awarded as the result of a single bid or offer, from a sole source, for a specified brand name, or in any way other than to the apparent low bidder, and any contract modifications that change the Scope of Work of this Project, or increase a contract by \$100,000 or more and which are, wholly or partly, financed by this Agreement, shall have the prior written approval of the State.

Rail Section Manager shall approve Railroad's procurement process, in writing, before Railroad solicits bids, in accordance with these Procurement Review Procedures. State reserves the right to deny funding for items acquired without the prior written approval of the procurement process by the Rail Section Manager or purchased in violation of State or Federal procurement regulations. Railroad shall comply with 49 CFR § 18.36 or 49 CFR §§ 19.40 through 19.48 inclusive, whichever may be applicable, and with applicable supplementary US DOT, FRA or State directives or regulations.

Railroad is subject to the following Procurement Review procedures. All dollar figures cited below include freight-in, set up charges, licenses, registrations, inspections, painting, accessories, and all other costs incurred to make acquisitions ready for initial use. Similar items acquired or ordered within thirty days are considered a single acquisition in determining the dollar value of the acquisition.

1. Acquisitions of less than \$15,000 do not require a prior review by State. At the time of subcontract execution, the Railroad must place in the official procurement file a written explanation for selecting the subcontractor. Such explanation must include the following:
 - a. A description of the qualifications of the subcontractor that demonstrates that the vendor will provide high quality services or products.
 - b. A description of the prices charged by the vendor and an explanation as to why such charges are both cost effective and reasonable.
2. Acquisitions of at least \$15,000, but less than \$100,000 require Railroad to submit three written quotes to State before proceeding with the acquisition. Each quote shall include, as a minimum, a complete description of each proposed acquisition, per unit cost, and total cost of all items. Costs shall include all items and labor expenses needed to put the acquisitions into normal service. State will notify Railroad, within five business days of the receipt of a quote that the Railroad may or may not proceed. All notices by either State or Railroad shall be in writing. State shall make all reasonable efforts to resolve its questions and concerns promptly.
3. Acquisitions of \$100,000 or more require formal bidding in compliance with the provisions of the Vermont Agency of Administration's Bulletin No. 3.5 dated July 15, 2008, or as amended. (See http://www.adm.state.vt.us/sites/aoa/files/pdf/AOA-Bulletin_3_5.pdf) Railroad shall send State written bid specifications and the written request for proposal before making either document public or advertising the proposed acquisition. State shall respond to Railroad within two weeks, indicating whether to proceed, or if additional information is required. State may request additional documentation or visit Railroad's site for discussion and review of issues and concerns. Every effort shall be made by State to advise Railroad within the initial two-week review period of outstanding questions and concerns and what shall be done to resolve them. In no event may Railroad proceed with the acquisition before receiving written approval from State.

At its sole option, State may, after an in-depth review of Railroad's procurement policies and procedures, issue a waiver of the preceding prior review requirement. Such a waiver shall be limited in scope and in duration. All waivers are without force and effect if Railroad modifies its procurement policies and procedures after the issuance of said waiver or fails to follow the policies and procedures in effect at the time the waiver was issued.

ATTACHMENT G- STATEMENT OF WORK

Add when approved

ATTACHMENT G

STATEMENT OF WORK

VERMONTER REHABILITATION

BACKGROUND

On June 23, 2009, the Federal Railroad Administration (FRA) issued a Notice of Funding Availability (NOFA) in the *Federal Register* for the High-Speed Intercity Passenger Rail (HSIPR) Program. In response, the Vermont Agency of Transportation (VTrans) submitted an application to rehabilitate the New England Central Railroad (NECR) rail line traversed by Amtrak's Vermonter service in New Hampshire and Vermont (this application significantly expanded upon Vermont's 2008 Capital Assistance to States grant for \$450,000 to install 1 mile of new rail and make minor bridge repairs along this line). FRA reviewed VTrans's application for eligibility and ranking with the criteria outlined in the NOFA. On the basis of this evaluation, FRA selected the State of Vermont for an award, through a cooperative agreement between FRA and VTrans, of \$50,000,000 for the Vermonter rehabilitation project.

The Vermonter rehabilitation project was identified through the Vermont State Rail Policy Plan (2006), where the priority passenger rail recommendation is to preserve existing Amtrak service. The 117-mile stretch of the NECR rail line from White River Junction north is also an FRA-designated High-Speed Rail Corridor.

The Northeast is home to more than 60 million people. It represents approximately 6% of the nation's land mass and more than 20% of its population. The region's overall density of population is about 3.5 times the density of the country as a whole—a greater level of population density than that of any of the potential rail corridors in the nation. Travel in the Northeast is more likely to be interstate travel than in many other parts of the nation—as a result of population settlement patterns, political geography, and economic interdependence. With the exception of most commuter trips, the sheer scale of travel by all modes among States in the Northeast is significant.

The Vermonter service is now an integral transportation link between Washington, DC, New York City, and the State of Vermont. Ten Amtrak stations serve the State of Vermont along the Vermonter's route. In 2009, 67,000 travelers used Amtrak's Vermonter passenger train service to or from Vermont and ridership increased by 4% from 2008 to 2009. Also in 2009, the Vermonter had one of the highest on-time performances in the Amtrak system (88.9%).

NECR is headquartered in St. Albans, VT, and is a subsidiary of Rail America, Inc. NECR consists of 330 miles of main track in Vermont, New Hampshire, Massachusetts, and Connecticut. NECR connects/interchanges with 11 railroads, including class-I railroads such as Canadian National and CSX Transportation, as well as the Vermont Rail System.

DESCRIPTION OF WORK

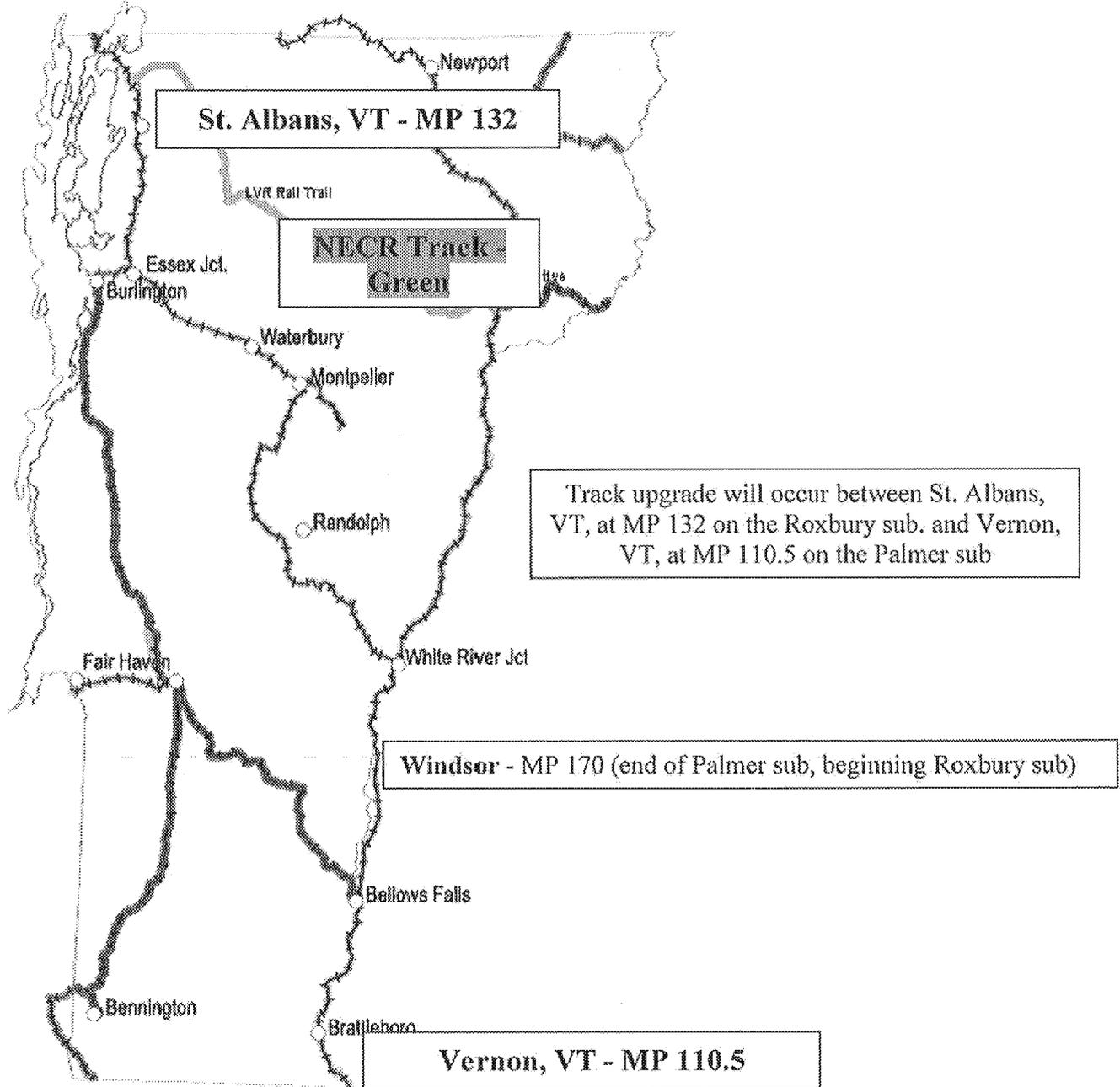
The Vermonter rehabilitation work will improve the conditions of the track, roadbed, grade crossings, and bridges along the current route of the Amtrak Vermonter service in Vermont and New Hampshire (the "Project"). The scope of work submitted with the HSIPR grant application was intended to improve the track infrastructure to operate a more efficient Amtrak passenger rail service while retaining a cost competitive proposal for the Track 1a application. However, a lower-than-expected price for rail and an allowance from FRA to use the salvage value of the existing rail as an additional funding source have allowed VTrans to broaden the scope of the Project. The scope of work being undertaken as part of this cooperative agreement will allow intercity passenger trains to increase track speeds from 59 to 79 mph for 25 miles on the Palmer subdivision between milepost (MP) 144.98 and MP 170.00 and from 55 to 59 mph over the remaining 168 miles (between MP 110.5 on the Palmer subdivision and MP 132.00 on the Roxbury subdivision). The installation of the new continuously welded rail (CWR) and new turnouts as well as the elimination of temporary and permanent slow orders will reduce the Vermonter's operating schedule by 27 minutes in Vermont and New Hampshire. The faster maximum travel speeds for passenger and freight traffic that stem from this Project will provide the capacity necessary to increase intercity passenger rail service frequency in the future.

The track work involves replacing the existing 100-, 112-, and 115-lb rail of a 1950s' vintage, which has reached 50% or more of its useful life, with new CWR, as well as the installation of 95,000 new ties. The new CWR will substantially improve the rail infrastructure's safety and will reduce delays through decreasing field failures and reducing future rail defects. Also, the installation of CWR (as opposed to joint welding of existing track) improves the fuel efficiency and quality of the ride for Amtrak passengers. This CWR will also position the corridor for additional speed increases above 59 mph that can be realized upon the installation of signals between the Roxbury subdivision at MP 0.0 to 132.0 and the Palmer subdivision at MP 110.5 to 122.2 (which is currently nonsignaled territory). In addition to the new CWR, turnouts, similar to the age of the existing rail, will also be replaced to improve safety and efficiency of operations. Ballast work will also occur along this section of the corridor to improve the drainage of water, to better distribute the load from the railroad ties, and to limit vegetation growth that interferes with the track structure.

The Project will also improve the safety of the rail line by strengthening and returning bridges to a state-of-good repair and by improving grade crossings. Improving the condition of highway-rail grade crossings, which have been damaged by the increased size of trucks and snow plows, will improve both safety and eliminate slow orders, and enhancing grade crossing warning devices on the line will reduce the annual probability of a train-vehicle accident.

The target timeframe for construction will take place over a two year period. The Project is planned for both the Roxbury (northern) subdivision and the Palmer (southern) subdivision of NECR that currently carries the Vermonter service. The northern Project limit is MP 132 on the Roxbury subdivision, and the southern limit is MP 110.5 on the Palmer subdivision. All construction activities will occur within the private right-of-way and to assets owned by NECR.

PROJECT LOCATION



Project work elements includes:

Work Element 1: Rail – This portion of the Project replaces 1,479,456 feet of existing 100-, 112-, and 115-lb jointed rail with new 115-lb CWR. The installation of the new 115-lb CWR will occur between Vernon and Windsor, VT (MP 110.5–170), on the Palmer subdivision and between Windsor and St. Albans, VT (MP 0–132), on the Roxbury subdivision for a total of 140.10 miles. Salvaged rail and other track material (OTM) that is removed from the right-of-

way will be loaded directly onto rail cars and sold. The rail and OTM retained for future use will be stored on the right-of-way at an approved storage area.

NECR will stockpile approximately 3,000 tons of existing 115-lb rail, valued at \$1.5 million, for future maintenance use along the NECR/intercity passenger rail corridor between Vernon and St. Albans, VT. NECR's valuation on the existing rail to be stockpiled for future maintenance or sold is based on \$500.00 per net ton, including transportation to the NECR interchange, which is based on a guaranteed minimum offer that NECR received through a competitive process. If NECR receives a higher price during the process of selling the salvaged materials, the additional value will be passed on to the Project. The existing 100-, 112-, and 115-lb rail removed will be inventoried listing the amount, weight, milepost location, and statement of general condition and will be provided to VTrans in the bimonthly Project report. When the inventoried rail retained for future maintenance work on the rail line between Vernon and St. Albans, VT, is to be used by NECR, NECR will send VTrans and FRA documentation stating the amount of rail that is to be used out of the total amount that has been retained for maintenance work, the location where the retained rail will be installed, and the amount of the retained rail remaining for future maintenance work.

SUBDIVISION	NEW REPLACING	NEW REPLACING	NEW REPLACING	TOTAL
	Existing 100 lb	Existing 112 lb	Existing 115 lb	
Palmer Subdivision MP 110.5 Vernon, VT, to MP 170 Windsor, VT	99,264	315,744	12,144	427,152
Roxbury Subdivision MP 0.00 Windsor, VT, to MP 132.0 St. Albans, VT	190,080		862,224	1,052,304
Total Lineal Feet	289,344	315,744	874,368	1,479,456
Total Track Miles	27.4	29.9	82.8	140.1

The locations where the new rail will be installed as part of this Project are identified in the previously submitted document, titled "New CWR Installation," on file with FRA.

Work Element 2: Cross ties – The Project will include replacement of 95,000 cross ties between Vernon, VT (MP 110.5 on the Palmer subdivision), and St. Albans, VT (MP 132 on the Roxbury subdivision). New ties will be off-loaded by rail car directly onto the rail right-of-way. Installation of cross ties will take place within the existing rail bed. Removed ties from this Project will be loaded onto rail cars for disposal. The cost of tie disposal is included in the Ties section of the Project budget.

Work Element 3: Surfacing – This work element will include the purchase and installation of ballast within the existing rail bed between Vernon, VT (MP 110.5 on the Palmer subdivision), and St. Albans, VT (MP 132 on the Roxbury subdivision).

Subdivision	Surfacing		Total Miles	Ballast Total
	Begin MP	End MP		
ROXBURY	0	132	132	39600
PALMER	110.5	170	35	10500

The locations where surface work will be performed as part of this Project are identified in the previously submitted document, titled “Surfacing Work,” on file with FRA.

Ballast will be delivered to site by rail cars from a source located outside the Project limits. NECR does not anticipate removing any existing ballast from the Project area. If existing ballast does need to be removed, VTrans will be consulted prior to removal. NECR will install approximately 50,000 tons of ballast within the Project area. NECR will lease ballast cars for transport of the stone to specified locations in the Project area. NECR will also provide work trains and crews to assist in this effort.

Work Element 4: Ballast Cleaning – This work element will include the purchase and installation of ballast within the existing rail bed between Vernon, VT (MP 110.5 on the Palmer subdivision), and St. Albans, VT (MP 132 on the Roxbury subdivision). In some locations the ballast is fouled, reducing the track bed’s ability to drain properly; therefore, cleaning the ballast is essential. NECR will incorporate an additional 19,500 tons of ballast into this process.

Removing and cleaning the ballast from the shoulder will be sufficient for this effort. A chain of specially designed rail cars will cut the ballast and pass it through a conveyor belt to a cleaning machine, which deposits the dirt and ballast into separate wagons for disposal and reuse, respectively.

The locations where ballast work will be performed as part of this Project are identified in the previously submitted document, titled “Ballast Cleaning,” on file with FRA.

Work Element 5: Turnouts – New turnouts, including switch stand, switch, guard rail, frog, rail, and OTM will be installed within the existing rail bed. Elements of the rebuilt turnouts will be salvaged for future use, scrapped, or properly disposed of from the Project prior to final inspection. Three existing power switch machines will be rebuilt. The upgraded power switches at MP 122.0, 145.0, and 162.0 will ensure that switch machines stay in compliance with FRA regulations, reduce unnecessary maintenance, and keep delays as a result of switch-related issues to a minimum. The rehabilitation of the turnouts (a list of the turnouts can be found in the previously submitted document, titled “Turnout Replacement,” on file with FRA) will contribute to the improved travel time of the Vermonter service.

Similar to the rail that will be retained for maintenance work on the NECR line, retained components of the existing turnouts will be inventoried for future use between Vernon and St.

Albans, VT. Upon use of these inventoried components, NECR will send VTrans and FRA documentation indicating the components' uses and their installation location.

Work Element 6: Grade Crossing Warning Devices – All incandescent crossing signal lights will be upgraded to highly visible LED crossing signal lights, which will ensure safety to the public because of added visibility, longer battery life if commercial power is lost, and reduction of bulb failure. Grade crossings at 49 locations will also have constant warning devices installed to replace 1980s' motion censor technology. The upgrade will provide a constant warning to the traveling public because the technology accounts for the varying speeds of both passenger and freight trains and thus will eliminate extended warning times.

Additionally, 7,740 feet of track wires and cables will be replaced during the upgrade of the grade crossing warning devices, which will reduce occurrences of patching or splicing old track wires and cables as well as reduce future cable troubles, thereby improving safety to the public. These crossing locations presently have 1950s' relay design. Steel houses will be replaced by aluminum bungalows, and new gate mechanisms will replace outdated equipment. The effort will also involve relocating the power lines for the grade crossings and signal system underground. This will eliminate power failures as a result of storm damage and will improve the safety of rail personnel by eliminating the need to climb poles to repair damage.

The list of highway grade crossing warning devices to be upgraded as part of this Project are identified in the previously submitted document, titled "Grade Crossing Warning Device Upgrades," on file with FRA.

Work Element 7: Rebuilds of At-Grade Crossings – The grade crossing rebuilds shall consist of the excavation of the existing crossing surfaces and sub-base and replacing the existing crossties. The NECR track supervisor, with concurrence from the VTrans resident engineer, will determine the extent of replacement. Panels for the grade crossings will be constructed prior to installation in proximity to the track and then lifted and secured into place as a way to reduce operational delays associated with the work (a photographed example of a constructed panel has been submitted to FRA and is available on file). On very limited occasions, because of lack of space for panel construction, the ties, rail, and OTM may be installed directly into track; however, because of the available right-of-way space on NECR, it is anticipated that all crossing work will be done by constructing the panel prior to installation. This decision will be at the discretion of the contractor.

This component consists of 53 public, private, and farm crossings. The rehabilitation of the crossings listed will contribute to the improved travel time of the Vermonter service.

The list of at-grade public and private crossings that will be rehabilitated as part of this Project are identified in the previously submitted document, titled "Rebuild of At-Grade Crossings," on file with FRA.

Work Element 8: Bridges – This portion of the Project consists of two components: 1) bridge maintenance activities and 2) structural strengthening activities, including replacement of bridge members.

Bridge maintenance improvements will include but are not limited to the design, replacement of bridge ties, walkway planks, and hand rails as well as the replacement of anchor bolts, timbers, and bearing seats and other minor improvements.

Structural strengthening improvements will include but are not limited to the design, replacement of poor posts, caps, and stringers, installation of cover plates on top and bottom flanges of stringers, repairs to truss bracing, replacement of missing lattice and rivets, and other minor improvements.

These activities will bring the bridges to a state-of-good repair and are intended to bring the bridges up to the current load-bearing standard.

The list of bridges undergoing maintenance and structural strengthening have been provided to and are on file with FRA.

PROJECT SCHEDULE

The target date period of performance for the above work shall be 24 months, beginning on September 13, 2010, and ending September 13, 2012.

NECR commits to the 2-year window of construction with the understanding that availability of materials, specialty contractors, the limited length of the construction season in northern New England, and the proposed start date of mid-September 2010 may have an impact on attaining the Project timeline.

A schedule for the Project elements will be submitted to FRA as the first deliverable, and FRA must give its written approval before the Grantee may proceed with the Project or receive any reimbursement for Project costs.

Amendments to the approved Project schedule must be approved by FRA in writing before any such amendment shall take effect.

PROJECT BENEFITS

This Project will result in a trip time reduction of 27 minutes in the Vermonter's schedule. This trip time reduction is to be reflected in a schedule approved by Amtrak, NECR, and VTrans and will be submitted to FRA for approval no later than 10 months after the cooperative agreement is signed. The submitted schedule is to be put into effect immediately upon completion of the Project. Modifications to the aforementioned Vermonter schedule submitted to FRA must maintain, at a minimum, a trip time reduction of 27 minutes over the 20-year life of the Project assets.

This Project will also improve the reliability of the Vermonter service through Vermont and New Hampshire. As a result, the on-time performance of the Vermonter service will be at least 90%

between St. Albans, VT, and East Northfield, MA, and the NECR-responsible delays (e.g., freight train interference and slow orders) between St. Albans, VT, and East Northfield, MA, will be no more than 13 minutes of delay per Amtrak trip during the life of the improved assets.

The NECR rail upgrade also improves, over the useful life of the Project, the capacity of the rail line, which will allow for additional frequencies of intercity passenger rail service on the NECR up to Montreal, QC, Canada.

NECR anticipates that yearly rail failure will be reduced because of the installation of new CWR, therefore improving safety; however, new CWR may still reveal some minor "mill" defects and plant welds during the first testing (such defects should diminish after the first test is concluded). NECR estimates, based on normal wear and tear, a minimum of approximately 15 defects per year going forward. As a comparison, NECR has had 420 rail failures in the past 3 years on the corridor.

REPORTING OF PROJECT BENEFITS

Amtrak and NECR will provide the following reports:

- On-time performance between St. Albans, VT and East Northfield, MA
- Freight Train Interference
- Amtrak Passenger Train Interference
- Slow Orders
- A detailed description of any differences in the schedule of intercity passenger rail services making use of the Project improvement versus the schedule in place during the same quarters in the 5 years immediately preceding the date of commencement of the Project.

Project Cost and Budget

The total cost of the Project is \$69,298,006, for which the FRA grant will contribute \$50,000,000 of the total cost. Any additional expense required beyond that provided in this grant to complete the Project shall be borne by the Grantee. A budget for the Project has been included below.

Amendments to the approved Project budget must be approved by FRA in writing before any such amendment shall go into effect.

The Project funding sources include the salvage value of rail and OTM for the amount of \$14,298,004 and the NECR contribution of \$5,000,000.

Vermont Rehabilitation Project Budget

PROJECT	QUANTITIES	UNITS	ACTUAL
Work Element 1: RAIL	1,479,456	LIN FEET	\$47,524,180
Work Element 2: TIES (disposal cost included)	95,000	EA	\$6,600,386
Work Element 3: SURFACING	167	MILES	\$2,246,568
Work Element 4: BALLAST (shoulder cleaning)	39	MILES	\$1,033,259
Work Element 5: TURNOUTS AND DIAMONDS	29		\$2,151,445
Work Element 6: GRADE CROSSING WARNING DEVICES			\$2,997,258
Work Element 7: REBUILD AT-GRADE CROSSINGS			\$2,111,265
Work Element 8: BRIDGES - MAINTENANCE			\$2,783,672
BRIDGES - STRENGTHENING			\$1,599,973
VERMONT ADMINISTRATION FEE			\$250,000
TOTAL PROJECT COST			\$69,298,006
PROJECT FUNDING SOURCES			
CREDIT FOR SALVAGE VALUE OF RELEASED RAIL & OTM	31,796	NET TONS	(\$14,298,006)
NECR CONTRIBUTION			(\$5,000,000)
FRA HSIPR Grant			(\$50,000,000)

PROJECT COORDINATION

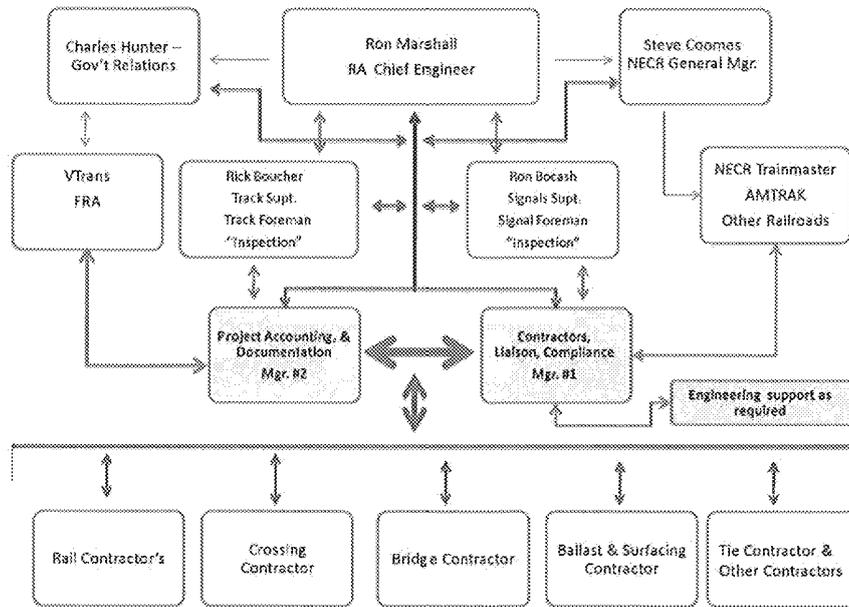
The NECR shall perform all tasks required for the Project through a coordinated process, including all railroad owners, operators, and funding partners involved with the Project. Listed below is a list of the companies and agencies involved:

- NECR
- Amtrak
- VTrans
- FRA

PROJECT MANAGEMENT

VTrans is the Grantee and the coordinating agency for the Project. A Project Management Plan has been submitted to FRA.

The organizational chart below shows the NECR staff involved. Trini Brassard, Assistant Director of Operations, will be managing this Project for VTrans.



**AMENDMENT #3
TO
STANDARD STATE-RAILROAD CONTRACT (STATE AND FEDERAL FUNDS)
BETWEEN
STATE OF VERMONT
AND
NEW ENGLAND CENTRAL RAILROAD, INC.
CONTRACT No. RA0007
EA-SUB 5309042-400**

This AMENDMENT #3, made this 29 day of April, 2010, by and between the State of Vermont, represented by its Agency of Transportation, with its principal office at National Life Building, Montpelier, Vermont 05633-5001, (hereinafter called "State"), and New England Central Railroad, Inc., with its principal place of business at 2 Federal Street, Suite 201, St. Albans, Vermont 05478, (hereinafter called "Railroad") is supplemental to the Agreement executed on May 5, 2009, Amendment #1 executed on July 9, 2009, and Amendment #2 executed on March 1, 2010.

WITNESSETH:

WHEREAS, the State and Railroad mutually agree that the May 5, 2009 Agreement, July 9, 2009 Amendment #1, and March 1, 2010 Amendment #2 should be modified;

WHEREAS, the work in original scope was completed with an unspent balance of \$185,843.46. The Federal Railroad Administration subsequently reviewed and approved the addition of Change Order #2 which amends the original scope-of-work to include:

1. Remove and replace 194 deck timbers at MP 4.44 Roxbury Sub..
2. Remove and replace 100 deck timbers at MP 41.6 Roxbury Sub.
3. Upgrade 11" tie plates to 14" on bridge deck at MP 41.6 Roxbury Sub in conjunction with deck tie replacement. 240 plates including approach ties to bridge.

NOW, THEREFORE, the May 5, 2009 Agreement, July 9, 2009 Amendment #1, and March 1, 2010 Amendment #2 are modified as follows:

1. Paragraph 3 on page one shall be deleted in its entirety and replaced with the following:
3. *Maximum Amount.* In consideration of the services to be performed by Railroad, the State agrees to pay Railroad, in accordance with the payment provisions specified in Attachment B, a sum not to exceed \$670,077.38.

Note: The \$670,077.38 represents the federal share of \$446,718.22 and the State share of \$223,359.16. Railroad is responsible for providing an additional \$223,359.16 in matching funds from non-federal, non-State sources.

2. Paragraph 4 on page one shall be deleted in its entirety and replaced with the following:
4. *Contract Term.* The period of Railroad's performance shall begin upon execution of this agreement and end on **September 30, 2010.**
3. ATTACHMENT A, paragraph 1 "Scope of Work to be Performed by Railroad." shall be modified by adding the following language (Change Order #2 - attached)::
 1. Remove and replace 194 deck timbers at MP 4.44 Roxbury Sub. Contractor to supply labor and materials.
 2. Remove and replace 100 deck timbers at MP 41.6 Roxbury Sub. Contractor to supply labor and materials.
 3. Upgrade 11" tie plates to 14" on bridge deck at MP 41.6 Roxbury Sub in conjunction with deck tie replacement. 240 plates including approach ties to bridge.

This work is in addition to the work required under the Capital Bridge Work Package 2 purchase order. Railroad's cost to complete the additional work is as follows:

MP 4.44 labor and materials	\$116,400.00
MP 41.6 labor and materials	\$60,000.00
<u>MP 41.6 tie plates 240x\$12.00 each</u>	<u>\$2,880.00</u>
Total	\$179,280.00

4. ATTACHMENT B, paragraph 3 "Reimbursement." shall be deleted in its entirety and replaced with the following:
 3. Reimbursement. The total amount of the expenditures for this Project is **\$893,436.54**: Federal Railroad Administration 50%, State 25%, Railroad 25%. Upon receipt of detailed invoices after the completion of authorized work, the State will reimburse the Railroad for 75% of actual costs eligible for reimbursement under this contract, [~~not including~~] [including] overhead, labor, materials and equipment (including any subcontractors approved by State as defined in Section 6 below) required for the Project up to a maximum limiting amount of **\$670,077.38**. Reimbursement of expenses for meals and travel shall be limited to the reimbursement offered to state employees. The State may withhold reimbursement if Railroad is not current with the progress reports required by Attachment A, Paragraph 3.

IN WITNESS WHEREOF, the parties hereto caused this Amendment to be duly executed on the day and year first written above.

WE THE UNDERSIGNED PARTIES AGREE TO BE BOUND BY THIS CONTRACT.

STATE OF VERMONT
"State"
AGENCY OF TRANSPORTATION

Signature: David C Dill
Name: David C Dill
Title: [Deputy] Secretary of Transportation
Date: 4/29, 2010

New England Central Railroad, Inc.
"Railroad"
Fed. ID/S. Sec. #

Signature: Steve Coomes
Name: Steve Coomes
Title: General Manager
Date: 4-21, 2010

APPROVED AS TO FORM:

DATE: 4/23/2010

[Signature]
ASSISTANT ATTORNEY GENERAL

State of Vermont
Standard Rail Agreement

Agreement #00GRX

1. Parties: This is a Rail Agreement (hereinafter called "Agreement") between the State of Vermont, Agency of Transportation, Operations Division, Rail Section (hereinafter called "State"), and New England Central Railroad, Inc., with its principal place of business at 2 Federal Street, Suite 201, St. Albans, Vermont 05478 (hereinafter called "Railroad"). Railroad is required by law to have a Business Account Number from the Vermont Department of Taxes.
2. Subject Matter: The subject matter of this Agreement is providing railroad support to improve services upon the railroad. Details of services to be provided by the Railroad are described in Scope of Work (Attachment A). The purpose of this Agreement is to meet the goals of State, as stated in 5 V.S.A. § 3002(1), by providing construction assistance from US Department of Transportation's Federal Railroad Administration ("FRA") and State to Railroad, in accordance with applicable federal and state laws and regulations and to reduce the travel time for intercity passenger service between East Northfield and St. Albans, Vermont by approximately 27 minutes.

The role of State, with the advice, assistance, and approval of the FRA, is to evaluate and select Projects and coordinate and administer grant agreements to carry out selected projects.

Railroad agrees to abide by all laws regulations that govern the use of such grant funds, including, but not limited to 49 U.S.C. and Vermont law, including 19 V.S.A. § 10e, (Statement of policy; railroads), 5 V.S.A. Chapter 56 (Intercity Rail Passenger Service), and additional criteria referenced in this Agreement, all of which, including their internal references to other regulations and guidelines, are incorporated herein by reference.

Railroad shall use the Grant Funds obtained through this Agreement as described in Attachment A, which set forth the purpose of this Agreement.

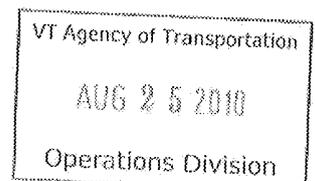
3. Maximum Amount: In consideration of the services to be performed by Railroad, the State agrees to pay Railroad, in accordance with the payment provisions specified in Attachment B, a sum not to exceed as identified below:

Total Federal Funds	\$50,000,000
Total Railroad Funds	\$19,298,004
Maximum Limiting Amount (All Funds)	\$69,298,004

4. Grant Term: The period of Railroad's performance shall begin on and end on June 30, 2012.
5. Sources of Funds (check all applicable):

State Grant Funds:

Vermont State Railroad Funds



- f. Encumbrance of Project Property. Unless expressly authorized in writing by State or FRA, the subrecipient agrees to refrain from:
 - a. Executing any new transfer of title, lease, lien, pledge, mortgage, encumbrance, contract, grant anticipation note, alienation, or other obligation that in any way would affect State or FRA interest in any Project property or equipment; or
 - b. Obligating itself in any additional manner to any third party with respect to Project property or equipment.

The Railroad agrees to refrain from taking any action or acting in a manner that would adversely affect the State's or FRA's interest or impair the Railroad's continuing control over the use of Project property or equipment.

2. **Sale, Disposition, or Encumbrance of Project Property, Equipment & Supplies:** Railroad is a trustee of all property, equipment, and supplies acquired with Grant Funds paid under the terms of this Agreement. Said property, equipment, and supplies is to be used to provide general public service throughout its useful life. Railroad shall have no ownership interest in said property until Rail Section Manager determines the useful life is at an end and relinquishes State and FRA property rights in writing. Railroad may sell or dispose of property acquired under this Agreement only with prior written approval of State and in accordance with OMB regulations. Upon disposition, the Railroad shall refund to State seventy-two (72) percent of the fair market value of any item purchased under this agreement. State and FRA retain financial interests in real property, equipment, and supplies financed by this Agreement. This interest continues so long as the property so acquired continues to have a useful life or until it is disposed of in accordance with this Agreement. Railroad agrees it has no ownership rights in such property until State relinquishes State and FRA property rights in writing.

Railroad agrees that the proceeds from the disposition of any item of property acquired with Project funds with a remaining useful life, including insurance proceeds from property that is lost, stolen, destroyed, or otherwise rendered unfit for the purpose for which it was acquired, shall be used by State to offset the costs of the Program; provided, however, that any insurance proceeds paid to Railroad for damage to property acquired with Project funds may be used by Railroad to repair or replace the damaged property. FRA shall be reimbursed its share of the proceeds from disposition. Any property, with a remaining useful life, that is not used for the purposes for which it was acquired is considered disposed of. Railroad, in such cases, shall pay State an amount equal to seventy-two (72) percent of the fair market value of the property, at the date of its withdrawal from the active purposes of the Program. Such payment shall be made from non-governmental funding sources. Railroad shall obtain prior written approval of State before withdrawing property from the Project, as it would for any other disposition of property with a remaining useful life.

While State or the Federal Government retains a financial interest in the property and the project service outcomes, Railroad shall refrain from executing any transfer of title, lease, lien, pledge, mortgage, encumbrance, third-party contract, grant anticipation note,

**State of Vermont
Standard Rail Agreement**

**Agreement #00GRX
RA0039**

1. **Parties:** This is a Rail Agreement (hereinafter called "Agreement") between the State of Vermont, Agency of Transportation, Operations Division, Rail Section (hereinafter called "State"), and New England Central Railroad, Inc., with its principal place of business at 2 Federal Street, Suite 201, St. Albans, Vermont 05478 (hereinafter called "Railroad"). Railroad is required by law to have a Business Account Number from the Vermont Department of Taxes.

2. **Subject Matter:** The subject matter of this Agreement is providing railroad support to improve services upon the railroad. Details of services to be provided by the Railroad are described in Scope of Work (Attachment A). The purpose of this Agreement is to meet the goals of State, as stated in 5 V.S.A. § 3002(1), by providing construction assistance from US Department of Transportation's Federal Railroad Administration ("FRA") and State to Railroad, in accordance with applicable federal and state laws and regulations and to reduce the travel time for intercity passenger service between East Northfield and St. Albans, Vermont by approximately 27 minutes.

The role of State, with the advice, assistance, and approval of the FRA, is to evaluate and select Projects and coordinate and administer grant agreements to carry out selected projects.

Railroad agrees to abide by all laws regulations that govern the use of such grant funds, including, but not limited to 49 U.S.C. and Vermont law, including 19 V.S.A. § 10e, (Statement of policy; railroads), 5 V.S.A. Chapter 56 (Intercity Rail Passenger Service), and additional criteria referenced in this Agreement, all of which, including their internal references to other regulations and guidelines, are incorporated herein by reference.

Railroad shall use the Grant Funds obtained through this Agreement as described in Attachment A, which set forth the purpose of this Agreement.

3. **Maximum Amount:** In consideration of the services to be performed by Railroad, the State agrees to pay Railroad, in accordance with the payment provisions specified in Attachment B, a sum not to exceed as identified below:

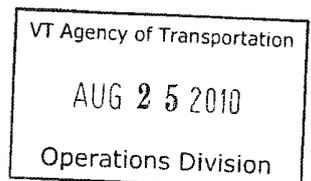
Total Federal Funds	\$50,000,000
Total Railroad Funds	\$19,298,004
Maximum Limiting Amount (All Funds)	\$69,298,004

4. **Grant Term:** The period of Railroad's performance shall begin on and end on June 30, 2012.

5. **Sources of Funds** (check all applicable):

State Grant Funds:

Vermont State Railroad Funds



Federal Grant Funds:

U.S. DOT Appropriations Act 2009, Public Law 111-8; Capital Assistance to States - Intercity Passenger Rail Service (CFDA 20.317) EA # RR11AR02-400

- 6. These are NOT research and development grants.
- 7. Amendment: No changes, modifications, or amendments in the terms and conditions of this Agreement shall be effective unless reduced in writing, numbered, and signed by the duly authorized representative of the State, including the Attorney General, and Railroad.
- 8. Cancellation: This Agreement may be suspended or cancelled by either party by giving written notice at least thirty (30) days in advance.
- 9. Contact Person: The Railroad's contract person for this is: Charles Hunter, President; Telephone Number: 802-527-3434; E-mail address: Charles.hunter@railamerica.com
- 10. Fiscal Year: The Railroad's fiscal year starts January 1 and ends December 30.
- 11. Attachments: This Agreement includes the following attachments that are incorporated herein:
 - Attachment A – Scope of Work
 - Attachment B – Payment Provisions
 - Attachment C – Standard State Provisions for Contracts and Grants
 - Attachment D – Other Provisions
 - Attachment E – Definitions
 - Attachment F – Procurement Procedures
 - Attachment G – Reporting Forms

WE, THE UNDERSIGNED PARTIES, AGREE TO BE BOUND BY THIS RAIL AGREEMENT.

**STATE OF VERMONT
AGENCY OF TRANSPORTATION**

**NEW ENGLAND CENTRAL
RAILROAD, INC.**

By: David C. Dill
David C. Dill,
Secretary of Transportation
Duly Authorized Agent

By: Paul Lundberg
Paul Lundberg,
Vice President and Duly Authorized Agent

Date: 8/26/10

Date: 24 August 2010

APPROVED AS TO FORM

Date: 8/25/2010
[Signature]
ASST. ATTORNEY GENERAL
STATE OF VERMONT

ASSISTANT ATTORNEY GENERAL

The following information is required for Grants funded in whole or in part with monies from the federal American Recovery & Reinvestment Act of 2009.

Legal Name and D-U-N-S® Number on File with the federal Central Contractor Registration⁽¹⁾:

NEW ENGLAND CENTRAL RAILROAD, INC.
Print Legal CCR Name

004860979
D-U-N-S® Number⁽²⁾

- 1) The Central Contractor Registration (CCR) is the primary registrant database for the U.S. Federal Government. CCR collects, validates, stores and disseminates data in support of agency acquisition missions. FREE registration is available at:
<http://www.ccr.gov/Default.aspx>.
- 2) The D-U-N-S Number is a unique nine-digit identification number assigned and maintained solely by Dun & Bradstreet (D&B). D-U-N-S Number assignment is FREE for all businesses required to register with the US Federal government (see #1 above) for contracts or grants. Created in 1962, the Data Universal Numbering System or D-U-N-S® Number is D&B's copyrighted, proprietary means of identifying business entities. Register at:
https://eupdate.dnb.com/requestoptions.asp?cm_re=HomepageB*TopNav*DUNSNumberTab

ATTACHMENT A – SCOPE OF WORK

Railroad shall undertake and complete the Project described in this Scope of Work in commercially reasonable standards consistent with industry practice, and in accordance with the provisions of this Agreement, approved Project Budget, Project schedules, and all applicable laws, regulations, and published policies.

General Description of Project:

In accordance with the Transportation, Housing and Urban Development, and Related Agencies Appropriations Act, 2008, Public Law 110-161, as amended by Department of Transportation Appropriations Act, 2009, Public Law 111-8, federal funds provided Railroad under this Rail Agreement are to provide financial assistance to fund capital improvements necessary to support improved or new intercity passenger rail service.

The Project includes track, bridge and signal work between Vernon and St. Albans, Vermont as detailed in the Statement of Work attached hereto as **Attachment G**.

To perform the work assigned to Railroad under this Rail Agreement, Railroad will use Railroad forces and outside contractors.

The Railroad shall notify the State's Project Manager at least two (2) days in advance when work is scheduled for the Project, to include locations of railroad mileposts and/or valuation stations and the nature of the work.

All work shall be reviewed, done to satisfaction and certified by the State's Resident Engineer or authorized representative prior to Railroad receiving reimbursement from the State.

Railroad is responsible for obtaining all permits and/or clearances; however, the State will cooperate with Railroad and assist as reasonably required.

Railroad shall remove all ties, rail and OTM along the project corridor that are not needed for the operations of the Rail that were generated from this project or that are in environmentally sensitive areas by the end of this project term.

Upon completion of the projects described above the Railroad commits that the service outcomes identified in the original project grant application totaling 27 minutes in the project area, shall be achieved for each intercity passenger train operating on the improved line.

ATTACHMENT B – PAYMENT PROVISIONS

Description:

Railroad shall use funds provided under this Rail Agreement for eligible capital improvement costs as defined in Attachment A – Scope of Work located in this Agreement.

NECR HSR GRANT SCOPE

PROJECT	QUANTITIES	UNITS	ACTUAL
BALLAST	39.10	MILES	\$998,971.45
RAIL	1,479,456	LIN FEET	\$47,393,598.14
TIES	90,000	EA	\$5,398,738.82
SCRAP TIE DISPOSAL	200,000	EA	\$1,933,515.81
SURFACING	167	MILES	\$2,246,567.68
BRIDGES 286k	VAR		\$1,524,973.00
BRIDGE MNTCE	VAR		\$2,763,304.35
TURNOUTS 28 Turnouts & 1 diamond	29	EA	\$2,151,444.53
SIGNALS			\$2,847,257.50
CROSSINGS (36 Public and 17 Farm & Private)	53	EA	\$2,039,632.73
TOTAL PROJECT COST			\$69,298,004.00
CREDIT NECR PROJECT MATCH OF 10 % OF FRA \$50M GRANT AND CREDIT FOR SALVAGE			(\$ 19,288,004.00)
CREDIT FRA HSR GRANT			(\$50,000,000.00)
TOTAL PROJECT VARIENCE			\$0.00

*Overhead Rate will be adjusted accordingly once an audited overhead rate document is submitted and approved by VTrans.

Payment Provisions:

Funds paid to the Railroad under this Rail Agreement shall consist of Federal Funds in an amount not to exceed approximately seventy-two percent (72.1521%) of actual cost of approved authorized work, including labor, materials and equipment (including any subcontractors approved by State) required for the Project up to the Maximum Limiting Amount identified in this Agreement. The balance of the project shall be paid by Railroad contribution of approximately seven and a half percent (7.2152%) and salvage value from materials removed of approximately twenty and a half percent (20.6326%).

Following each two (2) week period during which the Railroad incurs costs eligible for reimbursement under this Agreement, Railroad will submit an invoice to the VTrans Resident Engineer/Project Manager at: Vermont Agency of Transportation, 1 National Life Drive, Montpelier, VT 05633-5001.

The Invoice, or its attachments, shall provide sufficient detail to justify payment. At a minimum, this includes the following on Railroad letterhead:

- 1) Dated and numbered invoice; including identification of the grant, EA & Sub/Job number;
- 2) Detailed description, including any technical and/or cost problem(s) encountered or anticipated that will affect completion of the grant within the time and fiscal constraints as set forth in this Agreement and an outline of work and activities planned for the next billing period;
- 3) Certification said work has been completed;
- 4) Total cost,
- 5) Amount requested for reimbursement, and
- 6) Invoice signed by the Railroad's Chief Executive Officer or other authorized signatory.

All Invoices shall be supported by documentation. Documentation includes, but is not limited to, accurate and properly executed payrolls, time records, invoices, contracts, or vouchers, evidencing in detail the nature and propriety of costs incurred for this Agreement. Railroad also agrees to maintain accurate records of all Program Income derived from Project implementation. Railroad shall keep supporting documentation, and all other project records, documents, reports, and files readily accessible and clearly identified with this Agreement for at least three (3) years following payment of the final Invoice, closeout of the Project, including any extensions of the term of this Agreement, or completion of the final audit of this Agreement, whichever is latest. Railroad shall establish and maintain, either within its accounting system, or independently, separate, clearly identifiable records for this Project that meet or exceed the minimum record keeping requirements of State, FRA and/or FHWA, as cited in this Agreement.

The railroad will complete and submit to VTrans Rail Project Manager the Daily Force Account Report as work progresses during the Project. This Daily Force Account Report will be submitted by the Railroad with other documentation when requesting reimbursement of expenses.

The State will make every effort to process reimbursement of expenses from the Railroad within 30 days, unless insufficient documentation is not received.

Vermont Sales and Use Tax Exemption:

The Vermont Sales and Use Tax (32 V.S.A. Chapter 233) exempts “[t]angible personal property to be incorporated in a rail line in connection with the construction, maintenance, repair, improvement, or reconstruction of the rail line.” See 32 V.S.A. § 9741(44). Accordingly, no sales and use tax shall be included in the cost of materials purchased for the Project. The Railroad is responsible for maintaining records sufficient to justify eligibility for sales and use tax exemption.

The State may withhold reimbursement if Railroad is not current with the required reports and invoice structure attached to this Agreement.

ATTACHMENT C – STANDARD STATE PROVISIONS

1. **Entire Agreement:** This Agreement, whether in the form of a Contract, State Funded Grant, or Federally Funded Grant, represents the entire agreement between the parties on the subject matter. All prior agreements, representations, statements, negotiations, and understandings shall have no effect.
2. **Applicable Law:** This Agreement will be governed by the laws of the State of Vermont.
3. **Definitions:** For purposes of this Attachment, “Party” shall mean the Contractor, Railroad, or Subrecipient, with whom the State of Vermont is executing this Agreement and consistent with the form of the Agreement.
4. **Appropriations:** If this Agreement extends into more than one fiscal year of the State (July 1 to June 30), and if appropriations are insufficient to support this Agreement, the State may cancel at the end of the fiscal year, or otherwise upon the expiration of existing appropriation authority. In the case that this Agreement is a Grant that is funded in whole or in part by federal funds, and in the event federal funds become unavailable or reduced, the State may suspend or cancel this Rail Agreement immediately, and the State shall have no obligation to pay Subrecipient from State revenues.
5. **No Employee Benefits for Party:** The Party understands that the State will not provide any individual retirement benefits, group life insurance, group health and dental insurance, vacation or sick leave, workers compensation or other benefits or services available to State employees, nor will the state withhold any state or federal taxes except as required under applicable tax laws, which shall be determined in advance of execution of the Agreement. The Party understands that all tax returns required by the Internal Revenue Code and the State of Vermont, including but not limited to income, withholding, sales and use, and rooms and meals, must be filed by the Party, and information as to Agreement income will be provided by the State of Vermont to the Internal Revenue Service and the Vermont Department of Taxes.
6. **Independence, Liability:** The Party will act in an independent capacity and not as officers or employees of the State.

~~The Party shall defend the State and its officers and employees against all claims or suits arising in whole or in part from any act or omission of the Party or of any agent of the Party. The State shall notify the Party in the event of any such claim or suit, and the Party shall immediately retain counsel and otherwise provide a complete defense against the entire claim or suit.~~

~~After a final judgment or settlement the Party may request recoupment of specific defense costs and may file suit in Washington Superior Court requesting recoupment. The Party shall be entitled to recoup costs only upon a showing that such costs were entirely unrelated to the defense or any claim arising from an act or omission of the Party.~~

The Party shall indemnify the State and its officers and employees in the event that the State, its officers or employees become legally obligated to pay any damages or losses arising from any act or omission of the Party.

7. **Insurance:** ~~Before commencing work on this Agreement the Party must provide certificates of insurance to show that the following minimum coverages are in effect. It is the responsibility of the Party to maintain current certificates of insurance on file with the state through the term of the Agreement. No warranty is made that the coverages and limits listed herein are adequate to cover and protect the interests of the Party for the Party's operations. These are solely minimums that have been established to protect the interests of the State.~~

~~*Workers Compensation:* With respect to all operations performed, the Party shall carry workers' compensation insurance in accordance with the laws of the State of Vermont.~~

~~*General Liability and Property Damage:* With respect to all operations performed under the contract, the Party shall carry general liability insurance having all major divisions of coverage including, but not limited to:~~

~~Premises—Operations
Products and Completed Operations
Personal Injury Liability
Contractual Liability~~

~~The policy shall be on an occurrence form and limits shall not be less than:~~

~~\$1,000,000 Per Occurrence
\$1,000,000 General Aggregate
\$1,000,000 Products/Completed Operations Aggregate
\$ 50,000 Fire/Legal/Liability~~

~~Party shall name the State of Vermont and its officers and employees as additional insureds for liability arising out of this Agreement.~~

~~*Automotive Liability:* The Party shall carry automotive liability insurance covering all motor vehicles, including hired and non-owned coverage, used in connection with the Agreement. Limits of coverage shall not be less than: \$1,000,000 combined single limit.~~

~~Party shall name the State of Vermont and its officers and employees as additional insureds for liability arising out of this Agreement.~~

8. **Reliance by the State on Representations:** All payments by the State under this Agreement will be made in reliance upon the accuracy of all prior representations by the Party, including but not limited to bills, invoices, progress reports and other proofs of work.
9. **Requirement to Have a Single Audit:** In the case that this Agreement is a Grant that is funded in whole or in part by federal funds, and if this Subrecipient expends \$500,000 or

more in federal assistance during its fiscal year, the Subrecipient is required to have a single audit conducted in accordance with the Single Audit Act, except when it elects to have a program specific audit.

The Subrecipient may elect to have a program specific audit if it expends funds under only one federal program and the federal program's laws, regulating or grant agreements do not require a financial statement audit of the Party.

A Subrecipient is exempt if the Party expends less than \$500,000 in total federal assistance in one year.

The Subrecipient will complete the Certification of Audit Requirement annually within 45 days after its fiscal year end. If a single audit is required, the sub-recipient will submit a copy of the audit report to the primary pass-through Party and any other pass-through Party that requests it within 9 months. If a single audit is not required, the Subrecipient will submit the Schedule of Federal Expenditures within 45 days. These forms will be mailed to the Subrecipient by the Department of Finance and Management near the end of its fiscal year. These forms are also available on the Finance & Management Web page at: <http://finance.vermont.gov/forms>.

10. **Records Available for Audit:** The Party will maintain all books, documents, payroll papers, accounting records and other evidence pertaining to costs incurred under this agreement and make them available at reasonable times during the period of the Agreement and for three years thereafter for inspection by any authorized representatives of the State or Federal Government. If any litigation, claim, or audit is started before the expiration of the three year period, the records shall be retained until all litigation, claims or audit findings involving the records have been resolved. The State, by any authorized representative, shall have the right at all reasonable times to inspect or otherwise evaluate the work performed or being performed under this Agreement.
11. **Fair Employment Practices and Americans with Disabilities Act:** Party agrees to comply with the requirement of Title 21 V.S.A. Chapter 5, Subchapter 6, relating to fair employment practices, to the full extent applicable. Party shall also ensure, to the full extent required by the Americans with Disabilities Act of 1990 that qualified individuals with disabilities receive equitable access to the services, programs, and activities provided by the Party under this Agreement. Party further agrees to include this provision in all subcontracts.
12. **Set Off:** The State may set off any sums which the Party owes the State against any sums due the Party under this Agreement; provided, however, that any set off of amounts due the State of Vermont as taxes shall be in accordance with the procedures more specifically provided hereinafter.
13. **Taxes Due to the State:**
 - a. Party understands and acknowledges responsibility, if applicable, for compliance with State tax laws, including income tax withholding for employees performing services within the State, payment of use tax on property used within the State, corporate and/or personal income tax on income earned within the State.

- b. Party certifies under the pains and penalties of perjury that, as of the date the Agreement is signed, the Party is in good standing with respect to, or in full compliance with, a plan to pay any and all taxes due the State of Vermont.
- c. Party understands that final payment under this Agreement may be withheld if the Commissioner of Taxes determines that the Party is not in good standing with respect to or in full compliance with a plan to pay any and all taxes due to the State of Vermont.
- d. Party also understands the State may set off taxes (and related penalties, interest and fees) due to the State of Vermont, but only if the Party has failed to make an appeal within the time allowed by law, or an appeal has been taken and finally determined and the Party has no further legal recourse to contest the amounts due.

14. Child Support: (Applicable if the Party is a natural person, not a corporation or partnership.) Party states that, as of the date the Agreement is signed, he/she:

- a. is not under any obligation to pay child support; or
- b. is under such an obligation and is in good standing with respect to that obligation; or
- c. has agreed to a payment plan with the Vermont Office of Child Support Services and is in full compliance with that plan.

Party makes this statement with regard to support owed to any and all children residing in Vermont. In addition, if the Party is a resident of Vermont, Party makes this statement with regard to support owed to any and all children residing in any other state or territory of the United States.

- 15. Sub-Agreements:** Party shall not assign, subcontract or subgrant the performance of this Agreement or any portion thereof to any other Party without the prior written approval of the State. Party also agrees to include all subcontract or subgrant agreements and a tax certification in accordance with paragraph 11 above.
- 16. No Gifts or Gratuities:** Party shall not give title or possession of any thing of substantial value (including property, currency, travel and/or education programs) to any officer or employee of the State during the term of this Agreement.
- 17. Copies:** All written reports prepared under this Agreement will be printed using both sides of the paper.
- 18. Certification Regarding Debarment:** Party certifies under pains and penalties of perjury that, as of the date that this Agreement is signed, neither Party nor Party's principals (officers, directors, owners, or partners) are presently debarred, suspended, proposed for debarment, declared ineligible or excluded from participation in federal programs or programs supported in whole or in part by federal funds.

(End of Standard Provisions)

ATTACHMENT D – OTHER PROVISIONS

1. **Property, Equipment and Supplies:** All property acquired by Railroad, partially or wholly funded under this Agreement, is to benefit the public. Railroad is a trustee of said property and acknowledges that they will meet the project service outcomes as defined in the Statement of Work – Attachment G. The useful life of property, equipment, and supplies in this project is twenty (20) years.

Unless otherwise approved by FRA, the following conditions apply to property, equipment, and supplies financed under this Agreement:

- a. **Use of Property.** The Railroad agrees that Project property, equipment, and supplies shall be used for the provision of the Project activity for the duration of its useful life, as determined by State and FRA. Should the Railroad unreasonably delay or fail to use Project property, equipment, or supplies during its useful life, the Railroad agrees that State may require the Railroad to return the depreciated value according to paragraph 40 below of FRA assistance expended on that property, equipment, or supplies. The Railroad further agrees to notify State immediately when any Project property or equipment is withdrawn from use in the Project activity or when such property or equipment is used in a manner substantially different from the representations made by the Railroad in its Application or the text of the Project description.
- b. **General Federal Requirements.**
 - a. A subrecipient that is a governmental entity agrees to comply with the property management standards of 49 C.F.R. §§ 18.31, 18.32, and 18.33, including any amendments thereto, and other applicable guidelines or regulations that are issued.
 - b. A subrecipient that is not a governmental entity agrees to comply with the property standards of 49 C.F.R. §§ 19.30 through 19.37 inclusive, including any amendments thereto, and other applicable guidelines or regulations that are issued. Exceptions to the requirements of 49 C.F.R. §§ 18.31, 18.32, and 18.33, and 49 C.F.R. §§ 19.30 through 19.37 inclusive, must be specifically approved by FRA, through the State.
- c. **Maintenance.** The Railroad agrees to maintain the Project property and equipment in good operating order in accordance with Class III standards except for Windsor to West River which will be Class IV standards excluding permanent speed restricted areas, and in accordance with any guidelines, directives, or regulations.
- d. **Records.** The Railroad agrees to keep satisfactory records in accordance with paragraph 10 of Attachment C with regard to the use of the property, equipment, and supplies, and submit to State, upon request, such information as may be required to assure compliance with this section of this Agreement.
- e. **Withdrawn Property.** If any Project property, equipment, or supplies are not used for the Project for the duration of its useful life, as determined by State or FRA, whether by planned withdrawal, misuse or casualty loss, the Railroad agrees to notify State immediately. Disposition of withdrawn property, equipment, or supplies shall be in accordance with 49 C.F.R. §§ 18.31 and 18.32 for a subrecipient that is a governmental entity, or 49 C.F.R. §§ 19.30 through 19.37 inclusive, for a subrecipient that is an institution of higher education or a private organization.

- f. Encumbrance of Project Property. Unless expressly authorized in writing by State or FRA, the subrecipient agrees to refrain from:
 - a. Executing any new transfer of title, lease, lien, pledge, mortgage, encumbrance, contract, grant anticipation note, alienation, or other obligation that in any way would affect State or FRA interest in any Project property or equipment; or
 - b. Obligating itself in any additional manner to any third party with respect to Project property or equipment.

The Railroad agrees to refrain from taking any action or acting in a manner that would adversely affect the State's or FRA's interest or impair the Railroad's continuing control over the use of Project property or equipment.

2. **Sale, Disposition, or Encumbrance of Project Property, Equipment & Supplies:** Railroad is a trustee of all property, equipment, and supplies acquired with Grant Funds paid under the terms of this Agreement. Said property, equipment, and supplies is to be used to provide general public service throughout its useful life. Railroad shall have no ownership interest in said property until Rail Section Manager determines the useful life is at an end and relinquishes State and FRA property rights in writing. Railroad may sell or dispose of property acquired under this Agreement only with prior written approval of State and in accordance with OMB regulations. Upon disposition, the Railroad shall refund to State seventy-two (72) percent of the fair market value of any item purchased under this agreement. State and FRA retain financial interests in real property, equipment, and supplies financed by this Agreement. This interest continues so long as the property so acquired continues to have a useful life or until it is disposed of in accordance with this Agreement. Railroad agrees it has no ownership rights in such property until State relinquishes State and FRA property rights in writing.

Railroad agrees that the proceeds from the disposition of any item of property acquired with Project funds with a remaining useful life, including insurance proceeds from property that is lost, stolen, destroyed, or otherwise rendered unfit for the purpose for which it was acquired, shall be used by State to offset the costs of the Program; provided, however, that any insurance proceeds paid to Railroad for damage to property acquired with Project funds may be used by Railroad to repair or replace the damaged property. FRA shall be reimbursed its share of the proceeds from disposition. Any property, with a remaining useful life, that is not used for the purposes for which it was acquired is considered disposed of. Railroad, in such cases, shall pay State an amount equal to seventy-two (72) percent of the fair market value of the property, at the date of its withdrawal from the active purposes of the Program. Such payment shall be made from non-governmental funding sources. Railroad shall obtain prior written approval of State before withdrawing property from the Project, as it would for any other disposition of property with a remaining useful life.

While State or the Federal Government retains a financial interest in the property and the project service outcomes, Railroad shall refrain from executing any transfer of title, lease, lien, pledge, mortgage, encumbrance, third-party contract, grant anticipation note,

alienation, or other obligation that, in any way, would affect State or Federal interest in any Project real property or equipment. This prohibition also extends to oral promises by Railroad that might tend to compromise State or Federal interests in the property. Railroad agrees to retain satisfactory continuing control of all Project real property and equipment.

3. **Salvaged Rail, Crossties and Bridge Timbers:** Railroad shall remove from the railroad right-of-way all rail, OTM, railroad crossties and bridge timbers treated with creosote that are within the Right-of-Way impacted by this project. Railroad shall treat crossties and bridge timbers that do not have commercial value as solid waste, following all regulations applicable to their disposal as identified in Attachment D – Other Provisions, #2. Railroad shall inform anyone acquiring salvaged railroad crossties or bridge timbers that they may contain creosote and cannot be burned, buried or discarded on embankments.
4. **Equipment Inspections:** Railroad shall permit authorized representatives of the State or Federal Government to inspect all vehicles, facilities, and equipment purchased by Railroad as part of the Project, all transportation services rendered by Railroad by the use of such vehicles, facilities, and equipment, and all relevant Project data records.
5. **Capital Equipment Inventory:** Railroad shall maintain and update a complete inventory of all Project items and submit a written inventory of all real property, vehicles, and equipment, acquired in whole or in part with Federal or State funds.

Donated items and items made in-house shall be listed at their fair market value and the record shall indicate that the item is either donated or made in-house. Railroad shall maintain inventory records for all items with an acquisition cost of five thousand dollars (\$5,000) or more and an expected useful life of one year or more. Acquisition cost includes freight-in and set-up cost. Major repairs, upgrades, and additions that become an integral part of the asset shall be added to the value of the asset and the expected useful life shall be adjusted accordingly. The inventory record shall be annotated with the date and nature of each significant change.

Inventory records shall be maintained throughout the useful life of the asset and for an additional three years, for three years after the end of this Agreement, or for three years after a close-out audit is sent to State, whichever is latest.

Railroad shall investigate any differences in quantities of equipment, as determined by physical inspection, and quantities of equipment recorded in State's or Railroad's records, to determine the cause of the discrepancy. Railroad shall, at the time of any physical inspection, verify the current use of and need for the equipment. Equipment not in use to further the program that funded its acquisition must be noted with an explanation.

Failure to provide a complete written inventory at the request of the State is an event of default and shall furnish grounds for State to withhold payments under this Agreement until Railroad provides an inventory that is acceptable to the Rail Section Manager. The physical inventory shall be less than two years old at the time of submission to the Rail Section Manager.

6. **Criteria:** The Railroad agrees to carry out the Project in a workmanlike manner, and in accordance with the provisions of this Agreement, grant guidance, the Application, the Approved Project Budget, the Statement of Work, Project schedules, and all applicable State and Federal laws, regulations, guidance, standards, any supplementary directives or regulations and published policies. This includes, but is not limited to the following, as applicable:

- U.S. DOT regulations, 49 CFR Part 19, Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and other Non-Profit Organizations (also applies to grants and agreements with private for-profit organizations), as amended;
- U.S. DOT regulations, 49 CFR Part 18, Uniform Administrative Requirements for Grants and Agreements to State and Local Governments, as amended and applicable;
- 49 CFR Part 23, Participation by Minority Business Enterprises in Department of Transportation Programs, as amended;
- 48 CFR, Subpart 31, Contracts with Commercial Organizations, as amended;
- OMB Circular 2 CFR 215, Uniform Administrative Requirements for Grants and Other Agreements with Institutions of Higher Education, Hospitals and Other Non-Profit Organizations, as amended;
- OMB Circular 2 CFR 225, Cost Principles for State, Local and Indian Tribal Governments, as amended and applicable;
- 42 USC 4601 et seq, Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended;
- 49 CFR Part 24, Uniform Relocation and Real Property Acquisition for Federal and Federally Assisted Programs, as amended;
- OMB Circular A-133, Audits of States, Local Governments and Non-Profit Organizations, as amended (outlines requirements of a Program-Specific Audit);
- State of Vermont, Agency of Administration, Department of Finance and Management, Policy and Procedure Manual for Bulletin No. 5, Compliance with OMB Circular A-133, as amended;
- 49 CFR Part 213, Track Safety Standards, as amended;
- 49 CFR Part 214, Railroad Workplace Safety, as amended;
- 49 CFR Part 234, Grade Crossing Signal System Safety, as amended; and
- Current and revised State or Federal laws, regulations, policies, and related administrative practices applicable to this Agreement. Railroad agrees to establish and maintain for the Project a set of accounts within the framework of an established accounting system, in a manner consistent with 49 CFR § 18.20 or 49 CFR § 19.21, as amended, whichever is applicable.

7. **Documentation, Reports, and Public Information:** All information State requires to administer this Project shall be supplied by Railroad at such times, and in such manner, as the VTrans Rail Program Manager requests, provided that such documents relate to this Agreement or are required to be maintained by advance notice from the VTrans Rail Program Manager. Reporting requirements include, but are not limited to, those described in Federal Circulars cited above, as well as all bids and financial reports. Railroad shall report other data, in the format and at the times needed by State to monitor the projects in this Agreement.

8. **Consultant Studies:** Railroad shall submit a copy of any studies related to the Project done by external consultants during the Grant Term to VTrans Rail Project Manager.

9. **Status Reports:** Railroad shall report to the VTrans Rail Project Manager any significant trends and developments, during the Grant Term of this Agreement, which resulted from activities funded by this Agreement. This shall include progress reports on the Project, at such times and in such manner as VTrans Rail Project Manager may reasonably require, including meetings, reports, financial statements, data, proposals, contracts, and other records.
10. **Submitting Reports:** Railroad shall submit tax returns, reports, or studies to VTrans Rail Project Manager within thirty days of their filing or issue date. Railroad shall submit interim studies related to the Project to VTrans Rail Project Manager in a like manner. **Failure of Railroad to timely deliver any required information to State is an event of default under this Agreement.**
11. **Third Party Contracts:** Railroad shall permit State, or any of its agents, to inquire into any agreements between Railroad and any third party that directly pertain to this Agreement.
12. **Assignments:** Railroad shall not assign, transfer, convey, or subcontract, in whole or in part, sublet, or otherwise dispose of this Agreement without the express prior written consent of State. Such written consent does not release Railroad from any obligations of this Agreement. Railroad shall not enter into any contract for assistance in providing, operating, or managing of any activities specified in this Agreement without the express prior written consent of State. If Railroad assigns any portion of the work to be done under this Agreement or executes any agreement, amendment or change order or any other obligation of any nature with any third party that affects Railroad's rights and responsibilities under this Agreement in any way, Railroad shall include in all such assignments, agreements, amendments, change orders, obligations, and subcontracts all appropriate and applicable clauses of this Agreement. This required provision shall be included in any advertisement or invitation to bid for any procurement under this Agreement: "This Agreement is subject to a financial assistance contract between the State of Vermont and the US Department of Transportation."
13. **Certificates of Compliance with Laws and Permits:** Railroad shall give all notices and comply with all existing and future Federal, State, and municipal laws, ordinances, rules, regulations, and orders of any public authority bearing on the performance of this Agreement, including, but not limited to, the laws referred to in the provisions of this Agreement and in other Agreement documents. If any Agreement documents are at variance therewith in any respect, any necessary changes shall be incorporated by appropriate modification. Upon request, Railroad shall furnish to VTrans Rail Program Manager certificates of compliance with all such laws, orders, and regulations.
14. **Change in Condition or Law Affecting Performance:** Railroad shall immediately notify State of any change in conditions, local law, or any other event that may significantly affect its ability to perform any provisions of this Agreement. State reserves the right to terminate and cancel this Agreement, if State and US DOT agree that there is pending litigation which, in the reasonable opinion of State and US DOT, may jeopardize the Grant Funds, the agreement between State and US DOT, or this Agreement. No termination under this section shall take place based on pending litigation without prior consultation with Railroad

and consideration of the availability of insurance coverage available to mitigate any impact on the Grant Funds, the agreement between State and US DOT or this Agreement

15. **No Additional Waiver Implied:** If any term, provision, or condition contained in this Agreement is breached, by either Railroad or State, and, thereafter, such breach is waived by the other party, such waiver is limited to the particular breach so waived and is not be deemed to waive any other breach hereunder.
16. **Severability:** If any provision of this Agreement is held invalid or unenforceable by a court of competent jurisdiction, such holding does not affect the validity or enforceability of the remainder of this Agreement. All provisions of this Agreement are severable.
17. **Representations and Warranties Made by Railroad:** Railroad hereby represents and warrants that it has full power and authority to enter into this Agreement and to perform its obligations hereunder. Railroad hereby restates and confirms all statements, representations, covenants, and agreements contained in Railroad's Application for the Grant Funds awarded by this Agreement.
18. **Release and Indemnification:** Railroad covenants and agrees that US DOT, and its agents are not liable for, and covenants and agrees to indemnify and hold US DOT, and its agents harmless against, any loss, claim, cause of action, damages, liability (including, without limitation, strict or absolute liability in tort or by statute imposed), charge, cost, or expense (including, without limitation, counsel fees to the extent permitted by law) incurred in connection with, or arising out of, in any manner, any loss or damage to property, injury to, or death of any person, resulting from, or arising out of, any negligent acts or omissions of Railroad under this Agreement.
19. **Dispute Resolution:**
 - a. In case of disputes in the interpretation or implementation of the provisions of this Agreement, the parties shall first attempt to resolve such disputes by direct negotiation between representatives of the State and the Railroad. If this does not resolve a dispute, and no agreement is reached, the dispute may be referred to the VTrans Rail Program Manager by the Railroad for resolution. The Railroad shall provide a concise written statement of the dispute to the VTrans Rail Program Manager. The VTrans Rail Program Manager will provide a written decision concerning the dispute within thirty days of receipt of the referral.

An appeal of the decision of the VTrans Rail Program Manager to the Director shall be filed within thirty days of receipt of the VTrans Rail Program Manager's decision by filing a Notice of Appeal with the VTrans Rail Program Manager. An appeal may be on the record or *de novo* as determined by the Director. The Notice of Appeal shall concisely set forth the issues appealed and include copies of all supporting documentation.

The Director will endeavor to issue a written decision within forty-five days of receipt of the Notice of Appeal. An appeal of the Director's decision to the Secretary shall be filed within thirty days of receipt of the Director's decision by

filing a Notice of Appeal with the Director. The Notice of Appeal shall concisely set forth the issues appealed and include copies of all supporting documentation.

The Secretary shall provide the Railroad and State opportunity to present witnesses and other evidence at a hearing and to be represented at such hearing by counsel. At the hearing additional documentation not available when the Notice of Appeal to the Secretary was filed may be presented by the Railroad and State.

An appeal of the Secretary's decision shall be filed within thirty days of the Secretary's decision by filing a Notice of Appeal with the Secretary. The appealed to the State Transportation Board shall be on the record, as provided in 19 V.S.A. Section 5 (d) (4). The Secretary's decision shall contain instructions for filing further appeals, consistent with the preceding sentence.

- b. If a dispute involves a third party, Railroad shall avail itself of all legal and equitable remedies under any third-party contract that relates to the activities under this Agreement. Railroad also shall notify the VTrans Rail Program Manager in writing of all current or prospective litigation that directly or indirectly pertains to this Agreement.
- c. US DOT and State shall receive, respectively, the Federal Funds and State Funds, of proceeds derived from any third-party recovery for loss of property that was acquired with funds paid under this Agreement.

20. Default:

- a. Any failure of Railroad to comply with any material terms, provisions, or conditions of this or any other Grant Agreement entered into between State and Railroad, whether or not payment of Grant Funds has been fully or partially made, and any material misrepresentation made to State by Railroad in connection with any Grant Agreement shall be an "Event of Default," provided, however, if by reason of "*force majeure*," Railroad is unable, in whole or in part, to carry out its covenants contained herein, Railroad shall not be deemed in default during the continuance of such inability. The term "*force majeure*," as used herein, shall mean, without limitation: Acts of God, strikes, lockouts or other industrial disturbances; acts of public enemies; orders of any kind of the Federal Government or of State or any of their political subdivisions or any of their departments, agencies, or officials, or any civil or military authority; insurrections; riots; epidemics; landslides; lightning; earthquake; fire; hurricanes; storms; floods; washouts; droughts; arrests; restraint of government and people; civil disturbances; explosions; partial or entire failure of utilities, or any other cause not reasonably in the control of Railroad. Railroad shall remedy, with all reasonable dispatch, each cause that prevents Railroad from carrying out the covenants contained herein.
- b. Except as otherwise provided below, no remedy herein conferred upon or reserved by State is intended to be exclusive of any other available remedy, but each and every such remedy is cumulative and is in addition to every other remedy given under this Agreement now or hereafter existing at law or in equity.

- c. The failure of State to exercise any right accruing to it pursuant to this Agreement in any one instance shall not be deemed to be a waiver of such right in the event of a subsequent breach or default by Railroad.

21. Remedies upon an Event of Default:

- a. In the event of an Event of Default by Railroad, State may take one or more of the following remedial actions:
 - 1) withhold payments to Railroad;
 - 2) place Railroad on probationary status under this Agreement;
 - 3) suspend this Agreement;
 - 4) terminate this Agreement.

In addition to the above, State may pursue such other remedial action as may be available at law or equity; provided, however, that except where public safety or fraud is reasonably believed to be at issue, State shall not suspend or terminate this Agreement or take other legal action unless it has first given the Railroad an opportunity to cure through probation or payment withholding. Subject to the preceding sentence, the choice of remedial actions is within the discretion of State, except that in exercising its discretion, State shall take remedial action that reasonably responds to the asserted breach.

- b. Remedial Actions: Subject to the right to cure described in subsection (3), below, State may take one or more of the following remedial actions in an Event of Default
 - 1) Withhold payments under this Agreement to Railroad.

- 2) Place Railroad on probation. Any probation shall remain in effect until Railroad takes corrective action or undertakes a plan of corrective action satisfactory to State or until State suspends or terminates this Agreement. While under probation, Railroad shall not incur any new financial obligations, unless State expressly authorizes them in writing in the notice of probation or any amendment to that notice.

- 3) Suspend this Agreement in whole or in part.

Necessary and otherwise allowable costs that Railroad could not reasonably avoid during the suspension period shall be allowed if they result from obligations properly incurred by Railroad before the effective date of the suspension and are not in anticipation of suspension or termination.

State shall make appropriate adjustments to payments under the suspended Agreement either by withholding subsequent payments or by not allowing Railroad credit for disbursements made in payment of unauthorized obligations incurred during the suspension period.

- 4) Terminate this Agreement in whole or in part upon 30 days advance notice. Upon termination, State may issue such instructions under subsection 4 as may be appropriate to the circumstances.

- c. Opportunity to Cure Provisions: Not less than thirty (30) days prior to:
- 1) withholding payments;
 - 2) placing Railroad under probation; or
 - 3) suspending this Agreement, State shall give Railroad written notice of its intent to do so, along with the reasons for the decision to take the particular action and a statement of the corrective action that needs to be taken by Railroad to cure the asserted breach.

If Railroad takes any of the corrective action within the 30 day period referenced above, or within such other period as State and Railroad shall agree upon, including, where permitted by State, a “plan of correction,” then State shall not take the proposed action. If Railroad fails to cure the asserted Event of Default, State may take further action without additional notice.

- d. Remedies upon Termination: If this Agreement is terminated as a result of an uncured Event of Default, then, subject to Railroad’s rights under Dispute Resolution, State may take one or more of the following actions in connection with any termination of this Agreement:

- 1) direct Railroad to comply with such orders of disposition of Project Equipment as State may issue;
- 2) direct Railroad to return to State the percentage of the Federal Funds and State Funds of the remaining fair market value, if any, realized from Railroad’s disposition of the Project Equipment;
- 3) refuse to pay any Invoices; and/or
- 4) require reimbursement from Railroad of all, or any portion of, the Grant Funds for any period that Railroad has been in default.

22. **Captions:** The section and article captions in this Agreement are for the convenience of reference only. They in no way define, limit, or describe the scope or intent of this Agreement, or any part hereof, and shall not be considered in any construction hereof.

23. **Offer Effective Date:** When transmitted by State to Railroad, this document constitutes an offer, which expires if not accepted, executed, and returned to State by Railroad within forty-five days of such transmittal, unless an extension is granted in writing by the VTrans Rail Program Manager at the written request of Railroad. This Agreement is effective on the effective date listed under Grant Term, irrespective of its date of execution, unless the parties specify to the contrary, and obligations of the parties hereunder begin as of the effective date.

24. **Equal Employment Opportunity:** Railroad shall not discriminate against any employee or applicant for employment because of race, color, religion, creed, sex, age, handicap, or national origin. Railroad shall take affirmative action to ensure that applicants are employed, and that employees are treated, during their employment, without regard to their

race, color, religion, creed, sex, age, or national origin. Such actions shall include, but not be limited to employment, upgrading, demotion, transfer, recruitment, advertising, layoff, termination, rates of pay, other forms of compensation, and selection for training, including apprenticeship. Railroad shall include a similar provision in all subcontracts.

- 25. Section 504 Assurances and The Americans with Disabilities Act of 1990:** The Railroad shall comply with all the requirements imposed by the United States Department of Transportation regulations implementing the Rehabilitation Act of 1973, as amended, and the Americans with Disabilities Act of 1990 (and any subsequent amendments thereto) set forth in 49 CFR Subtitle A, Parts 27, 37, and 38, as well as all applicable regulations and directives issued pursuant thereto by other Federal Departments or agencies. Railroad shall keep on file for one year all complaints of non-compliance received. A record of such complaints must be submitted to the State within 90 days of the end of fiscal year (September 30, 2008) and kept for five years by the Railroad. An explanation of any such complaints and their resolution must be provided to the State upon request. Railroad agrees to include this provision in all subgrants.

26. Civil Rights:

The Railroad agrees to comply with all civil rights laws and regulations, in accordance with applicable Federal directives, except to the extent that the State determines otherwise in writing. These include, but are not limited to, the following: (1) Title VI of the Civil Rights Act of 1964 (P.L. 88-352)(as implemented by 49 C.F.R. Part 21), which prohibits discrimination on the basis of race, color or national origin; (b) Title IX of the Education Amendments of 1972, as amended (20 U.S.C. §§ 1681-1683, and 1685-1686), which prohibits discrimination on the basis of sex; (c) Section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. § 794), which prohibits discrimination on the basis of handicaps; (d) the Age Discrimination Act of 1975, as amended (42 U.S.C. §§ 1601-1607), which prohibits discrimination on the basis of age; (e) the Drug Abuse Office and Treatment Act of 1972 (P.L. 92-255), as amended, relating to nondiscrimination on the basis of drug abuse; (f) the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970 (P.L. 91-616), as amended, relating to nondiscrimination on the basis of alcohol abuse or alcoholism; (g) §§ 523 and 527 of the Public Health Service Act of 1912 (42 U.S.C. §§ 290 dd-3 and 290 ee-3), as amended, relating to confidentiality of alcohol and drug abuse patient records; (h) Title VIII of the Civil Rights Act of 1968 (42 U.S.C. §§ 3601 et seq.), as amended, relating to nondiscrimination in the sale, rental or financing of housing, (i) 49 U.S.C. § 306, which prohibits discrimination on the basis of race, color, national origin, or sex in railroad financial assistance programs.

- 27. DBE:** Participation by Small Business Concerns Owned and Controlled by Socially and Economically Disadvantaged Individuals. FRA encourages the State and Railroad to utilize small business concerns owned and controlled by socially and economically disadvantaged individuals (as that term is defined by other DOT agencies in 49 C.F.R. Part 26) in carrying out the Project.
- 28. Lobbying:** 31 U.S.C. Section 1352 provides in part that no appropriated funds may be expended by the recipient of a Federal contract, grant, loan or cooperative agreement to pay any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in the awarding of any Federal contract, the making of any

Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan or cooperative agreement. Railroad also agrees to abide by applicable State law on lobbying in 2 V.S.A. Sections 261 - 268, inclusive.

29. **Safety Oversight:** To the extent applicable, the Railroad agrees to comply with any regulation, laws, or policy and other guidance that FRA, US DOT or State may issue pertaining to safety oversight in general, and in the performance of this Agreement, in particular.
30. **Interest of Members of Congress and State:** No member or delegate to the Congress of the United States shall be admitted to any share or part of this Agreement or to any benefit arising from this Agreement. No member, officer, or employee of the State, during his or her tenure and for one year thereafter shall have any interest, direct or indirect, in this Agreement or the proceeds of this Agreement.
31. **Termination:** Upon completion of the services encompassed herein and payment of the agreed upon portion of the Project cost, this Agreement, with its mutual obligations, shall be considered evidence of satisfactory completion of the work. This Agreement may be terminated upon mutual agreement of State and Railroad. If this Agreement is terminated before the Project is completed, State shall pay Railroad for fees earned to the effective date of the notice of termination, less any payments previously made.
32. **Monitoring:** The State shall monitor and conduct fiscal and/or program audits of the Railroad and its contracts to verify the extent of services provided under the terms of this Agreement. Representatives of the State or Federal government shall have access to project facilities and records during Railroad's normal business hours. If a Summary of Corrective Actions is issued by the State as part of the State's monitoring efforts, the Railroad will correct these items as outlined in the said document before the next scheduled oversight meeting.
33. **Applicable Law:** This Rail Agreement will be governed by the laws of the State of Vermont. The Railroad must comply with all the federal requirements pertaining to the expenditure of federal funds. Railroad and all Project Contractors shall comply fully with all Federal, State, and local laws, rules, ordinances, executive orders, and other legal requirements.
34. **FELA Coverage:** With respect to all operations performed under this Agreement involving Railroad employees covered under the Federal Employer's Liability Act (FELA) (45 U.S.C. §§ 51-60), the Railroad shall carry insurance covering Railroad's liability under FELA, with limits of coverage required by federal law and at least \$1,000,000 per occurrence. To the extent that the workers' compensation of laws of Vermont are pre-empted by FELA, Railroad need not carry workers' compensation insurance.
35. **Notification:** The Railroad shall notify the State's Resident Engineer/Project Manager at least two (2) days in advance when work is scheduled for the Project, including locations of railroad mileposts and/or valuation stations and the nature of the work.

36. **Maintenance of Project Improvements:** Following completion of the Project, Project improvements will be maintained by the Railroad, unless, in the case of State-owned railroads, responsibility is assigned to the State under relevant provisions of the parties' current lease or operating agreement.
37. **Cost Principles, Accounting, Inspection and Auditing:** Railroad agrees to conduct all work in accordance with the regulations of the Federal Highway Administration, 23 C.F.R. Part 140 (Reimbursement), Subpart I (Reimbursement for Railroad Work) and 23 C.F.R. Part 646 (Railroads). Additionally, the Railroad agrees to the following:
- (a) **Records:** Railroad shall establish and maintain a separate account for the Project, either independently or within its existing accounting system, to be known as the Project Account. All checks, invoices, orders, or other accounting documents pertaining in whole or in part to the Project shall be clearly identified, readily accessible, and to the extent feasible, kept separate and apart from all other documents. Any check or other drawn by Railroad with respect to any item which is or will be chargeable against the Project Account will be supported in proper detail and clearly indicate its purpose and relationship to the Project.
 - (b) **Documentation of Project Costs:** All Project costs are to be determined by actual cost records kept by Railroad. All charges to the Project shall be supported by Railroad payroll time and attendance records, equipment rates as published in the "Blue Book for Railroad Equipment" or vouchers evidencing in proper detail the nature and propriety of the charges. Materials, equipment, supplies and other direct costs must be supported by properly executed vendor invoices or other documentary evidence. Indirect costs must be adequately supported by audited overhead schedule.
 - (c) **Reports:** Railroad agrees to provide Project cost and related financial information at such times and in such manner as the State may reasonably require, in addition to those reports specifically outlined within this Rail Agreement.
 - (d) **Direct Cost Certification:** Railroad, at its sole discretion, can submit a direct cost certification to VTrans Rail Program Manager indicating the Railroad will only request for reimbursement of labor, benefits, liability insurance, and taxes directly related to this Rail Agreement.
 - (e) **Audit:** Annual audit of the project is required by a competent entity of all project activity, including but not limited to, procurement, payroll, internal expenses, contractor invoicing, and project management. The audit shall certify that federal regulations and this agreement are being complied with or list areas of deficiencies. This audit shall be completed within six (6) months of fiscal year end for the Railroad.
 - (f) **Funds Received or Made Available for the Project:** Consistent with the provisions of 49 C.F.R. § 18.21, or 49 C.F.R. § 19.21, as amended, whichever is applicable, the Railroad agrees to record in the Project Account, and deposit in a financial institution all Project payments received by it from State pursuant to this Agreement and all other funds provided for, accruing to, or otherwise received on

account of the Project (Project Funds). The Railroad is encouraged to use financial institutions owned at least 50 percent by minority group members.

- (g) Checks, Orders, and Vouchers. The Railroad agrees that all checks, payrolls, invoices, contracts, vouchers, orders, or other accounting documents pertaining in whole or in part to the Project shall be clearly identified, readily accessible, and, to the extent feasible, kept separate from documents not pertaining to the Project.
38. **Reporting of Project Benefits:** For a period of three (3) years following the placing in service of the improvements resulting from completion of the Project, the Railroad will cooperate with the State in furnishing quarterly (due the 25th day of the close of each calendar quarter) to the VTrans Rail Program Manager one (1) copy of a report on project benefits, prepared in accordance with the requirements set forth and identified as attached to this Rail Agreement. In addition to its right to receive such quarterly reports, FRA shall, for a period of twenty (20) years following the placing in service of the improvements resulting from completion of the Project, retain the right to receive (upon request) information and/or data from the State necessary to independently verify that the Project benefits referred to above are still being achieved. Railroad acknowledges this requirement and will cooperate with the State in responding to any such requests from the FRA.
39. **Maintenance Responsibility and Refunds:** Except as otherwise provided herein, the Railroad shall maintain Project property to the level of utility (including applicable FRA track safety standards) which existed when the Project improvements were placed in service (as set forth in the Scope of Work) for a period of twenty (20) years from the date such Project property was placed in service. In the event that all intercity passenger rail service making use of the Project property is discontinued during the twenty (20) year period, the Railroad shall continue to ensure the maintenance of the Project property, as set forth above, for a period of one (1) year to allow for the possible reintroduction of intercity passenger rail service. IN the event the Railroad fails to ensure the maintenance of project property, as set forth above, for a period of time in excess of six (6) months, the Railroad will refund to the State a pro-rata share of the Federal contribution, based upon the percentage of the twenty (20) year period remaining at the time of such original default.
40. **Project Use for Intercity Passenger Rail Service and Refunds:** The Railroad acknowledges that the purpose of the Project is to benefit intercity passenger rail service. In the event that all intercity passenger rail service making use of the Project property is discontinued due to (a) termination by Amtrak of the host or operating agreement between Amtrak and Railroad for Amtrak's operation on that portion of Railroad's line within the Project area and (b) resulting from a material breach by Railroad of an expressed term contained in such agreement at any time during a period of twenty (20) years after the date such Project property was placed in service, as set forth above, and (c) if such intercity passenger rail service is not reintroduced during a one (1) year period following such discontinuance ("Discontinuance Period"), the Railroad shall refund to the State a pro-rata share of the Federal contribution, based upon straight line amortization. Such amount to be refunded shall be calculated by dividing the Railroad's pro-rata share by the number of years remaining after the Discontinuance Period and with such sum being payable annually each January 15th

after expiration of the Discontinuance Period. Such pro-rata share due from the Railroad shall be offset by any capital investment made by the Railroad to the Project property during the twenty (20) year period. The State agrees that any amount refunded by Railroad shall be contingent on (i) the State making funding for the current NECR route its highest Amtrak/intercity passenger rail priority and (ii) the Federal Railroad Administration taking official action to enforce the State's obligation to repay the funding due to the discontinuance of intercity passenger rail service.

41. **Insurance:** Before commencing work on this contract the Railroad must provide certificates of insurance to show that the following minimum coverages are in effect. It is the responsibility of the Railroad to maintain current certificates of insurance on file with the state through the term of the contract. No warranty is made that the coverages and limits listed herein are adequate to cover and protect the interests of the Railroad for the Railroad's operations. These are solely minimums that have been established to protect the interests of the State.

Workers Compensation: With respect to all operations performed, the Railroad shall carry workers' compensation insurance in accordance with the laws of the State of Vermont, except when such laws are pre-empted by Federal Employers Liability Act (FELA).

General Liability and Property Damage: With respect to all operations performed under the contract, the Railroad shall carry general liability insurance having all major divisions of coverage including, but not limited to:

Premises - Operations
Products and Completed Operations
Personal Injury Liability
Contractual Liability

The policy shall be on an occurrence form and limits shall not be less than:

\$1,000,000 Per Occurrence
\$1,000,000 General Aggregate
\$1,000,000 Products/Completed Operations Aggregate
\$ 50,000 Fire/ Legal/Liability

Railroad shall name the State of Vermont and its officers and employees as additional insureds for liability arising out of this contract.

Automotive Liability: The Railroad shall carry automotive liability insurance covering all motor vehicles, including hired and non-owned coverage, used in connection with the contract. Limits of coverage shall not be less than:
\$1,000,000 combined single limit.

Railroad shall name the State of Vermont and its officers and employees as additional insureds for liability arising out of this contract.

Notwithstanding the above, the Railroad may self-insure for the levels of insurance required. If the Railroad is or intends to become a self-insurer, it shall so notify the State. If not reasonably satisfied that the Railroad is able to cover the risks assumed, the State may so notify the Railroad, in which event the Railroad

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shall immediately obtain coverage from a licensed insurer, as described above.

42. **Independent Liability:** The Party will act in an independent capacity and not as officers or employees of the State.

The Party shall defend the State and its officers and employees against all claims or suits arising in whole or in part from any **[negligent or intentional]** act or omission of the Party or of any agent of the Party. The State shall notify the Party in the event of any such claim or suit, and the Party shall immediately retain counsel and otherwise provide a complete defense against the entire claim or suit.

After a final judgment or settlement the Party may request recoupment of specific defense costs and may file suit in Washington Superior Court requesting recoupment. The Party shall be entitled to recoup costs only upon a showing that such costs were entirely unrelated to the defense or any claim arising from an act or omission of the Party.

The Party shall indemnify the State and its officers and employees in the event that the State, its officers or employees become legally obligated to pay any damages or losses arising from any **[negligent or intentional]** act or omission of the Party.

43. **Cost of Materials:** Railroad will not buy materials and resell to the State at a profit.
44. **Availability of Federal Funds:** This Rail Agreement is funded in whole or in part by federal funds. In the event the federal funds supporting this contract become unavailable or are reduced, the State may cancel this contract immediately, and the State shall have no obligation to pay Railroad from State revenues.
45. **Davis-Bacon Act:** For projects using or proposing to use rights-of-way owned by a railroad, the Railroad shall comply with the provisions of 49 U.S.C. 24405(c) (2), with respect to the payment of prevailing wages consistent with the provisions of 49 U.S.C. 24312. For these purposes, wages in collective bargaining agreements negotiated under the Railway Labor Act are deemed to comply with Davis-Bacon Act requirements. For projects not using or proposing to use rights-of-way owned by a railroad, the Railroad will comply with the provisions of 40 U.S.C. 3141 et seq.
46. **Individually Identifying Information:** Railroad must not use or disclose any individually identifying information that pursuant to this Rail Agreement is disclosed by the State to the Railroad, created by the Railroad on behalf of the State, or used by the Railroad for any purpose other than to complete the work specifications of this Rail Agreement unless such use or disclosure is required by law, or when Railroad obtains permission in writing from the State to use or disclose the information and this written permission is in accordance with federal and state laws.
47. **Ownership of Project Supplies; Salvaged Materials:** If this contract involves a State-owned railroad, then upon full payment by the State all rails and other track materials purchased by the Railroad under this contract shall become the sole property of the State. In accordance with 23 C.F.R. § 646.216 (General Procedures), credits shall be made to the cost of the Project for all rails and other track materials salvaged as

a result of the Project. Before disposing of any such materials, the Railroad will notify the VTrans Rail Program Manager and the ~~Federal Highway Administration (FHWA)~~ Federal Railroad Administration (FRA) and afford them a reasonable opportunity to inspect such materials.

48. **Supplemental Terms:** The parties acknowledge that US DOT may require supplements to the terms of the Agreement after its execution and, therefore, if after the signing of this Agreement, the VTrans Rail Project Manager receives any additional requirements from US DOT, the VTrans Rail Project Manager will immediately notify the Railroad and the Railroad will meet with representatives of the State to exercise reasonable efforts to mutually agree on such requirements.
49. **Replacement of Existing Intercity Passenger Rail Service:** Subject to the terms of this agreement, the Railroad shall comply with the provisions of 49 U.S.C. 24405(d), with respect to the provision of any intercity rail passenger service that was provided by Amtrak, including collective bargaining agreements, replacement services, and arbitration.
50. **Project Management Plan:** Subject to the terms of this agreement, the Railroad shall prepare and carry out a project management plan approved by the State and FRA. At a minimum, the Project Management Plan must include the items addressed in 49 U.S.C. 24403(a).
51. **Whistleblower Protection:** An employee of the Railroad may not be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing, including a disclosure made in the ordinary course of an employee's duties, to the Recovery Accountability and Transparency Board, an inspector general, the Comptroller General, a member of Congress, a State or Federal regulatory or law enforcement agency, a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct), a court or grand jury, the head of a Federal agency, or their representatives, information that the employee reasonably believes is evidence of – (1) gross mismanagement of an agency contract or grant relating to Recovery Act funds; (2) a gross waste of Recovery Act funds; (3) a substantial and specific danger to public health or safety related to the implementation or use of Recovery Act funds; (4) an abuse of authority related to the implementation or use of Recovery Act funds; or (5) a violation of law, rule, or regulation related to an agency contract (including the competition for or negotiation of a contract) or grant, awarded or issued relating to Recovery Act funds.
52. **False Claims Act:** The Railroad and any sub-grantee awarded funds made available under the Recovery Act and through this Agreement shall promptly refer to the Department of Transportation Inspector General any credible evidence that a principal, employee, agency, contractor, sub-grantee, subcontractor, or other person has submitted a false claim under the False Claims Act or has committed a criminal or civil violation of laws pertaining to fraud, conflict of interest, bribery, gratuity, or similar misconduct involving Recovery Act funds.
53. **Prohibited Activities:** None of the funds provided through this Agreement may be used for any casino or other gaming establishment, aquarium, zoo, golf course or

swimming pool.

54. Ethics: The Railroad agrees to maintain a written code or standards of conduct that shall govern the performance of its officers, employees, board members, or agents engaged in the award and administration of contracts supported by Federal funds. The code or standards shall provide that the Railroad's officers, employees, board members, or agents may neither solicit nor accept gratuities, favors or anything of monetary value from present or potential contractors or subgrantees. The Railroad may set minimum rules where the financial interest is not substantial or the gift is an unsolicited item of nominal intrinsic value. As permitted by State or local law or regulations, such code or standards shall provide for penalties, sanctions, or other disciplinary actions for violations by the Railroad's officers, employees, board members, or agents, or by contractors or subgrantees or their agents.

1) **Personal Conflict of Interest.** The Railroad's code or standards must provide that no employee, officer, board member, or agent of the Railroad may participate in the selection, award, or administration of a contract supported by Federal funds if a real or apparent conflict of interest would be involved. Such a conflict would arise when any of the parties set forth below has a financial or other interest in the firm selected for award:

- a. The employee, officer, board members, or agent;
- b. Any member of his or her immediate family;
- c. His or her partner; or
- d. An organization that employs, or is about to employ, any of the above.

2) **Organizational Conflicts of Interest.** The Railroad's code or standards of conduct must include procedures for identifying and preventing real and apparent organizational conflicts of interests. An organizational conflict of interest exists when the nature of the work to be performed under a proposed third party contract, may, without some restrictions on future activities, result in an unfair competitive advantage to the contractor or impair the contractor's objectivity in performing the contract work.

55. Relocation and Land Acquisition: The Railroad agrees to comply with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended, 42 U.S.C. §§ 4601 et seq.; and U.S. DOT regulations, "Uniform Relocation and Real Property Acquisition for Federal and Federally Assisted Programs," 49 C.F.R. Part 24.

56. Flood Hazards: The Railroad agrees to comply with the flood insurance purchase requirements of Section 102(a) of the Flood Disaster Protection Act of 1973, 42 U.S.C. § 4012a(a), with respect to any construction or acquisition Project.

57. Patent Rights (Not applicable):

a. If any invention, improvement, or discovery of the Railroad or any of its third party contractors is conceived or first actually reduced to practice in the course of or under this Project, and that invention, improvement, or discovery is patentable under the laws of the United States of America or any foreign country, the Railroad agrees to notify State immediately and provide a detailed report. The rights and responsibilities of the Railroad, third party contractors,

State and FRA with respect to such invention, improvement, or discovery will be determined in accordance with applicable Federal laws, regulations, policies, and any waiver thereof.

b. If the Railroad secures a patent with respect to any invention, improvement, or discovery of the Railroad or any of its third party contractors conceived or first actually reduced to practice in the course of or under this Project, the Railroad agrees to grant to FRA a royalty-free, non-exclusive, and irrevocable license to use and to authorize others to use the patented device or process for Federal Government purposes.

c. The Railroad agrees to include the requirements of the "Patent Rights" section of this Agreement in its third party contracts for planning, research, development, or demonstration under the Project.

58. Rights in Data and Copyrights (Not applicable):

- a. The term "subject data" used in this section means recorded information, whether or not copyrighted, that is developed, delivered, or specified to be delivered under this Agreement. The term includes graphic or pictorial delineations in media such as drawings or photographs; test in specifications or related performance or design-type documents; machine forms such as punched cards, magnetic tape, or computer memory printouts; and information retained in computer memory. Examples include, but are not limited to: computer software, engineering drawings and associated lists, specifications, standards, process sheets, manuals, technical reports, catalog item identifications, and related information. The term does not include financial reports, cost analyses, and similar information incidental to Project administration.
- b. The following restrictions apply to all subject data first produced in the performance of this Agreement:
- i. Except for its own internal use, the Railroad may not publish or reproduce such data in whole or in part, or in any manner or form, nor may the Railroad authorize others to do so, without the written consent of the State, under such time as the State may have either released or approved the release of such data to the public; this restriction on publication, however, does not apply to grant agreements with academic institutions.
 - ii. As authorized by 49 C.F.R. § 18.34, or 49 C.F.R. § 19.36, as applicable, FRA reserves a royalty-free, non-exclusive and irrevocable license to reproduce, publish or otherwise use, and to authorize others to use, for Federal Government purposes:
 1. Any work developed under a grant, cooperative agreement, sub-grant, sub-agreement, or third party contract, irrespective of whether or not a copyright has been obtained; and
 2. Any rights of copyright to which the Railroad, subgrantee, or a third party contractor purchases ownership with Federal assistance.
- c. When FRA provides assistance to a Grantee for a Project involving planning, research, or development, it is generally FRA's intent to increase the body of knowledge, rather than to limit the benefits of the Project to those parties that have participated therein. Therefore, unless FRA determines otherwise, the Railroad understands and agrees that, in addition to the rights set forth in preceding portions of this section of this Agreement, FRA may make available to any FRA Grantee, subgrantee, third party contractor, or third party subcontractor, either FRA's license in the copyright to the "subject data" derived under this

Agreement or a copy of the “subject data” first produced under this Agreement. In the event that such a Project which is the subject of this Agreement is not completed, or any reason whatsoever, all data developed under that Project shall become subject data as defined herein and shall be delivered as FRA may direct.

- d. Unless prohibited by State law, the Railroad agrees to indemnify, save and hold harmless FRA, its officers, agents, and employees acting within the scope of their official duties against any liability, including costs and expenses, resulting from any willful or intentional violation by the Railroad of proprietary rights, copyrights, or right of privacy, arising out of the publication, translation, reproduction, delivery, use, or disposition of any data furnished under this Agreement. The Railroad shall not be required to indemnify FRA for any such liability arising out of the wrongful acts of employees or agents of FRA.
- e. Nothing contained in this section on rights in data, shall imply a license to FRA under any patent or be construed as affecting the scope of any license or other right otherwise granted to FRA under any patent.
- f. The requirements of this section of this Agreement do not apply to material furnished to the Railroad by the State and incorporated in the work carried out under this Agreement, provided that such incorporated material is identified by the Railroad at the time of delivery of such work.
- g. Unless State determines otherwise, the Railroad agrees to include the requirements of this section of this Agreement in its third party contracts for planning, research, development, or demonstration under the Project.

59. Acknowledgment of Support and Disclaimer:

a. An acknowledgment of State and FRA support and a disclaimer must appear in any Railroad publication, whether copyrighted or not, based on or developed under the Agreement, in the following terms: “This material is based upon work supported by the Vermont Agency of Transportation and Federal Railroad Administration under a grant/cooperative agreement, dated.” (Fill-in appropriate identification of grant/cooperative agreement)

b. All Railroad publications must also contain the following: “Any opinions, findings, and conclusions or recommendations expressed in this publication are those of the author(s) and do not necessarily reflect the view of the Federal Railroad Administration and/or U.S. DOT.”

c. The Railroad agrees to cause to be erected at the site of any construction, and maintain during construction, signs satisfactory to FRA identifying the Project and indicating that FRA is participating in the development of the Project.

60. Site Visits: State and/or FRA, through its authorized representatives, has the right, at all reasonable times, to make site visits to review Project accomplishments and management control systems and to provide such technical assistance as may be required subject to the existing Right of Entry Agreement. If any site visit is made by State and/or FRA on the premises of the Railroad, subgrantee, contractor, or subcontractor under this Agreement, the Railroad shall provide and shall required its subgrantees, contractors, or subcontractors to provide, all reasonable facilities and assistance for the safety and convenience of State and/or FRA representatives in the performance of their duties. All site visits and evaluations shall be performed in such a manner as will not unduly delay work being conducted by the Railroad, subgrantee, contractor, or subcontractor.

61. Project Completion, Settlement, and Closeout:

- a. **Project Completion.** Within 90 days of the Project completion date or termination by State, the Railroad agrees to submit a final Financial Report, a certification or summary of Project expenses, and third party audit reports, as applicable.
- b. **Remittance of Excess Payments.** If State has made payments to the Railroad in excess of the total amount of funding due, the Railroad agrees to promptly remit that excess and interest as may be required as required by the "Payment by FRA" section (attached by reference).
- c. **Project Closeout.** Project closeout occurs when all required Project work and all administrative procedures described in 49 C.F.R. Part 18, or 49 C.F.R. Part 19, as applicable, have been completed, and when State notifies the Railroad and forwards the final Federal assistance payment, or when State acknowledges the Railroad's remittance of the proper refund. Project closeout shall not invalidate any continuing obligations imposed on the Railroad by this Agreement or by the State's final notification or acknowledgement.

62. Environmental Protection:

a. All facilities that will be used to perform work under this Agreement shall not be so used unless the facilities are designed and equipped to limit water and air pollution in accordance with all applicable local, state and Federal standards.

b. The Railroad will conduct work under this Agreement, and will require that work that is conducted as a result of this Agreement be in compliance with the following provisions, as modified from time to time, all of which are incorporated herein by reference: section 114 of the Clean Air Act, 42 U.S.C. 7414, and section 308 of the Federal Water Pollution Control Act, 33 U.S.C. 1318, and all regulations issued thereunder. The Railroad certifies that no facilities that will be used to perform work under this Agreement are listed on the List of Violating Facilities maintained by the Environmental Protection Agency ("EPA"). The Railroad will notify the Project Manager as soon as it or any contractor or subcontractor receives any communication from the EPA indicting that any facility which will be used to perform work pursuant to this Agreement is under consideration to be listed on the EPA's List of Violating Facilities; provided, however, that the Railroad's duty of notification hereunder shall extend only to those communications of which it is aware, or should reasonably have been aware. The Railroad will include or cause to be included in each contract or subcontract entered into, which contract or subcontract exceeds Fifty Thousand Dollars (\$50,000.00) in connection with work performed pursuant to this Agreement, the criteria and requirements of this section and an affirmative covenant requiring such contractor or subcontractor to immediately inform the Railroad upon the receipt of a communication from the EPA concerning the matters set forth herein.

c. The Railroad may not expend any of the funds provided in this agreement on construction or other activities that represent an irretrievable commitment of resources to a particular course of action affecting the environment until after all environmental and historic preservation analyses required by the National Environmental Policy Act (42 U.S.C. 4332)(NEPA), the National Historic Preservation Act (16 U.S.C. 470(f)(NHPA), and related laws and regulations have been completed and the State has provided the Railroad with a written notice authorizing the Railroad to proceed.

d. The Railroad shall assist the State in its compliance with the provisions of NEPA, the Council on Environmental Quality's regulations implementing NEPA (40 C.F.R. Part 1500 et seq.). FRA's "Procedures for Considering Environmental Impacts" (45 Fed. Reg. 40854, June 16, 1980), as revised May 26, 1999, 64 Fed. Reg. 28545), Section 106 of the NHPA, and related environmental and historic preservation statutes and regulations. As a condition of receiving financial assistance under this agreement, the Railroad may be required to conduct certain environmental analyses and to prepare and submit to the State draft documents required

under NEPA, NHPA, and related statutes and regulations (including draft environmental assessments and proposed draft and final environmental impact statements.

e. No publicly-owned land from a park, recreational area, or wildlife or waterfowl refuge of national, state, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, state or local significance as so determined by such officials shall be used by the Railroad without the prior written concurrence of State. The Railroad shall assist the FRA in complying with the requirements of 49 U.S.C. §303(c).

f. The Railroad agrees to facilitate compliance with the policies of Executive Order No. 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations,” 42 U.S.C. 4321 note, except to the extent that the FRA determines otherwise in writing.

ATTACHMENT E - DEFINITIONS

The following terms, whenever set forth in initial capitals in this Agreement, shall have the meanings set forth in this Article, except as otherwise expressly provided in this Agreement.

- **Act** – Federal Railroad Act, as amended.
- **Administrative Expenses** – Allowable Costs under this Agreement that are neither Capital Expenses nor Operating Expenses. Administrative Expenses may be Direct Expenses or Indirect Expenses.
- **Agreement** – Any Grant Agreement or Cooperative Agreement, including all attachments..
- **Allowable Costs** – Costs which are incurred in the performance of the services described in Attachment A – Scope of Work, which satisfy the requirements of OMB Circular 2 CFR, Part 225 or 48 CFR, Part 31, as applicable to Railroad, and also satisfy additional requirements governing allowable costs of the FRA and the State of Vermont. Allowable Costs are ordinary and necessary to accomplish the purposes of this Agreement and are not of a type ineligible for reimbursement under Federal or State of Vermont Grant Agreements.
- **Americans with Disabilities Act of 1990** – The law passed by Congress in 1990 which makes it illegal to discriminate against people with disabilities in employment, services provided by state and local governments, public and private transportation, public accommodations and telecommunications.
- **Capital Expenses** – Costs of acquiring, constructing, and improving rail facilities and equipment needed for a safe, efficient, and coordinated rail services.
- **CFDA** – Catalog of Federal Domestic Assistance.
- **CFR** – Code of Federal Regulations.
- **Criteria** – All Federal and State laws, regulations, rules, and guidelines applicable to this Agreement, including, but not limited to 49 U.S.C. §§ 5301 - 5338 of the U.S.C., and other laws, regulations, rules, and guidelines cited in this Agreement. All citations not specifically excluded elsewhere in this Agreement are hereby incorporated by reference.
- **Direct Costs** – Allowable Costs that can be directly and readily identified with a final cost objective.
- **Director** – Director of the Operations Division, VTrans.
- **Disadvantaged Business Enterprise (DBE)** – A small business, at least 51 percent owned by one or more socially and economically disadvantaged persons, whose management and daily business operations are controlled by at least one socially and economically disadvantaged owner. To be recognized as a DBE under this Agreement, a business shall be certified as such by State's Civil Rights Office.
- **Eligible Assistance** – Expenditures that are reimbursable through this Agreement, including Capital, Administrative, and Operating Expenses (also known as Eligible Expenses).
- **EPA** – United States Environmental Protection Agency.
- **FRA** – Federal Railroad Administration of the US Department of Transportation.
- **Federal Funds** – Financial assistance from the federal government to assist in paying for Federal Railroad Administration costs of providing rail services.
- **Fair Market Value** – The amount that a willing buyer and a willing seller agree upon in an open and fair process for the purchase and sale of an item of property.
- **Final Audit** – A certified independently-prepared financial and program statement of all funding sources done upon completing this Agreement, conducted in accordance with U.S. Office of Management and Budget (OMB) Circular A-133, and other applicable auditing guidance, as further specified in this Agreement.

- **Fiscal Year** – Unless otherwise specified, the State of Vermont fiscal year, July 1 through June 30.
- **Grant Agreement** – A contract between State and a Railroad including, but not limited to, this Agreement.
- **Grant Funds** – Monies to carry out the Program under this Agreement. Grant Funds may come from several sources in amounts specified in the Agreement.
- **Railroad** – The recipient of an award of public funds. A Railroad shall comply with all terms and conditions of each award imposed by the awarding entity and by other organizations that provide funds or impose requirements on this Agreement.
- **High Risk** – A situation which, if continued, would jeopardize the future operation of the Railroad.
- **Invoice** – A request by the Railroad for reimbursement of expenses from Grant Funds.
- **Local Match** – Non-federal, non-State funds provided by the Railroad.
- **Maximum Limiting Amount** – The maximum amount of State and Federal funding for an Agreement. This consists of a Federal Amount plus a State Amount. It excludes local contributions (Local Match and Local Share for Capital Purchases).
- **OMB** – U.S. Office of Management and Budget.
- **Operating Expenses** – Allowable Costs directly related to routine system operations. Capital acquisitions, such as of land, structures, and motor vehicles, administrative expenses and maintenance expenses are not operating expenses.
- **Program** – US DOT Grants and State funded rail Projects administered by the State Rail Section.
- **Project** – Activities funded by this Agreement.
- **Project Contractor** – An independent supplier of services, whether public, private, or private nonprofit that has an agreement with the Railroad; a subcontractor.
- **Retroactive Grant** – A grant that pays Grant Funds for a specified past period.
- **Standard Assurances** – Required assurances set forth in FRA Circulars. Railroad must certify it complies with those assurances.
- **State** – State of Vermont, Agency of Transportation.
- **Total Agreement Cost** – Total funding from all sources identified in this Agreement.
- **US** – United States.
- **U.S.C.** – United States Code.
- **US DOT** – United States Department of Transportation or any of its component units.
- **US DOT Grant** – A grant issued by US DOT.
- **Vermont State Rail Funds** – Financial assistance obtained from the State to help cover costs for rail capital projects.
- **V.S.A.** – Vermont Statutes Annotated.
- **VTrans** – Vermont Agency of Transportation, an agency of the State of Vermont. (mailing address: 1 National Life Drive, Montpelier, VT 05633-5001).

ATTACHMENT F- PROCUREMENT REVIEW PROCEDURES

Any subcontracts or purchases, under this Agreement, which are expected to exceed \$100,000 and which are to be awarded as the result of a single bid or offer, from a sole source, for a specified brand name, or in any way other than to the apparent low bidder, and any contract modifications that change the Scope of Work of this Project, or increase a contract by \$100,000 or more and which are, wholly or partly, financed by this Agreement, shall have the prior written approval of the State.

Rail Section Manager shall approve Railroad's procurement process, in writing, before Railroad solicits bids, in accordance with these Procurement Review Procedures. State reserves the right to deny funding for items acquired without the prior written approval of the procurement process by the Rail Section Manager or purchased in violation of State or Federal procurement regulations. Railroad shall comply with 49 CFR § 18.36 or 49 CFR §§ 19.40 through 19.48 inclusive, whichever may be applicable, and with applicable supplementary US DOT, FRA or State directives or regulations.

Railroad is subject to the following Procurement Review procedures. All dollar figures cited below include freight-in, set up charges, licenses, registrations, inspections, painting, accessories, and all other costs incurred to make acquisitions ready for initial use. Similar items acquired or ordered within thirty days are considered a single acquisition in determining the dollar value of the acquisition.

1. Acquisitions of less than \$15,000 do not require a prior review by State. At the time of subcontract execution, the Railroad must place in the official procurement file a written explanation for selecting the subcontractor. Such explanation must include the following:
 - a. A description of the qualifications of the subcontractor that demonstrates that the vendor will provide high quality services or products.
 - b. A description of the prices charged by the vendor and an explanation as to why such charges are both cost effective and reasonable.
2. Acquisitions of at least \$15,000, but less than \$100,000 require Railroad to submit three written quotes to State before proceeding with the acquisition. Each quote shall include, as a minimum, a complete description of each proposed acquisition, per unit cost, and total cost of all items. Costs shall include all items and labor expenses needed to put the acquisitions into normal service. State will notify Railroad, within five business days of the receipt of a quote that the Railroad may or may not proceed. All notices by either State or Railroad shall be in writing. State shall make all reasonable efforts to resolve its questions and concerns promptly.
3. Acquisitions of \$100,000 or more require formal bidding in compliance with the provisions of the Vermont Agency of Administration's Bulletin No. 3.5 dated July 15, 2008, or as amended. (See http://www.adm.state.vt.us/sites/aoa/files/pdf/AOA-Bulletin_3_5.pdf) Railroad shall send State written bid specifications and the written request for proposal before making either document public or advertising the proposed acquisition. State shall respond to Railroad within two weeks, indicating whether to proceed, or if additional information is required. State may request additional documentation or visit Railroad's site for discussion and review of issues and concerns. Every effort shall be made by State to advise Railroad within the initial two-week review period of outstanding questions and concerns and what shall be done to resolve them. In no event may Railroad proceed with the acquisition before receiving written approval from State.

At its sole option, State may, after an in-depth review of Railroad's procurement policies and procedures, issue a waiver of the preceding prior review requirement. Such a waiver shall be limited in scope and in duration. All waivers are without force and effect if Railroad modifies its procurement policies and procedures after the issuance of said waiver or fails to follow the policies and procedures in effect at the time the waiver was issued.

ATTACHMENT G- STATEMENT OF WORK
Add when approved

ATTACHMENT G

STATEMENT OF WORK

VERMONT REHABILITATION

BACKGROUND

On June 23, 2009, the Federal Railroad Administration (FRA) issued a Notice of Funding Availability (NOFA) in the *Federal Register* for the High-Speed Intercity Passenger Rail (HSIPR) Program. In response, the Vermont Agency of Transportation (VTrans) submitted an application to rehabilitate the New England Central Railroad (NECR) rail line traversed by Amtrak's Vermonter service in New Hampshire and Vermont (this application significantly expanded upon Vermont's 2008 Capital Assistance to States grant for \$450,000 to install 1 mile of new rail and make minor bridge repairs along this line). FRA reviewed VTrans's application for eligibility and ranking with the criteria outlined in the NOFA. On the basis of this evaluation, FRA selected the State of Vermont for an award, through a cooperative agreement between FRA and VTrans, of \$50,000,000 for the Vermonter rehabilitation project.

The Vermonter rehabilitation project was identified through the Vermont State Rail Policy Plan (2006), where the priority passenger rail recommendation is to preserve existing Amtrak service. The 117-mile stretch of the NECR rail line from White River Junction north is also an FRA-designated High-Speed Rail Corridor.

The Northeast is home to more than 60 million people. It represents approximately 6% of the nation's land mass and more than 20% of its population. The region's overall density of population is about 3.5 times the density of the country as a whole—a greater level of population density than that of any of the potential rail corridors in the nation. Travel in the Northeast is more likely to be interstate travel than in many other parts of the nation—as a result of population settlement patterns, political geography, and economic interdependence. With the exception of most commuter trips, the sheer scale of travel by all modes among States in the Northeast is significant.

The Vermonter service is now an integral transportation link between Washington, DC, New York City, and the State of Vermont. Ten Amtrak stations serve the State of Vermont along the Vermonter's route. In 2009, 67,000 travelers used Amtrak's Vermonter passenger train service to or from Vermont and ridership increased by 4% from 2008 to 2009. Also in 2009, the Vermonter had one of the highest on-time performances in the Amtrak system (88.9%).

NECR is headquartered in St. Albans, VT, and is a subsidiary of Rail America, Inc. NECR consists of 330 miles of main track in Vermont, New Hampshire, Massachusetts, and Connecticut. NECR connects/interchanges with 11 railroads, including class-I railroads such as Canadian National and CSX Transportation, as well as the Vermont Rail System.

DESCRIPTION OF WORK

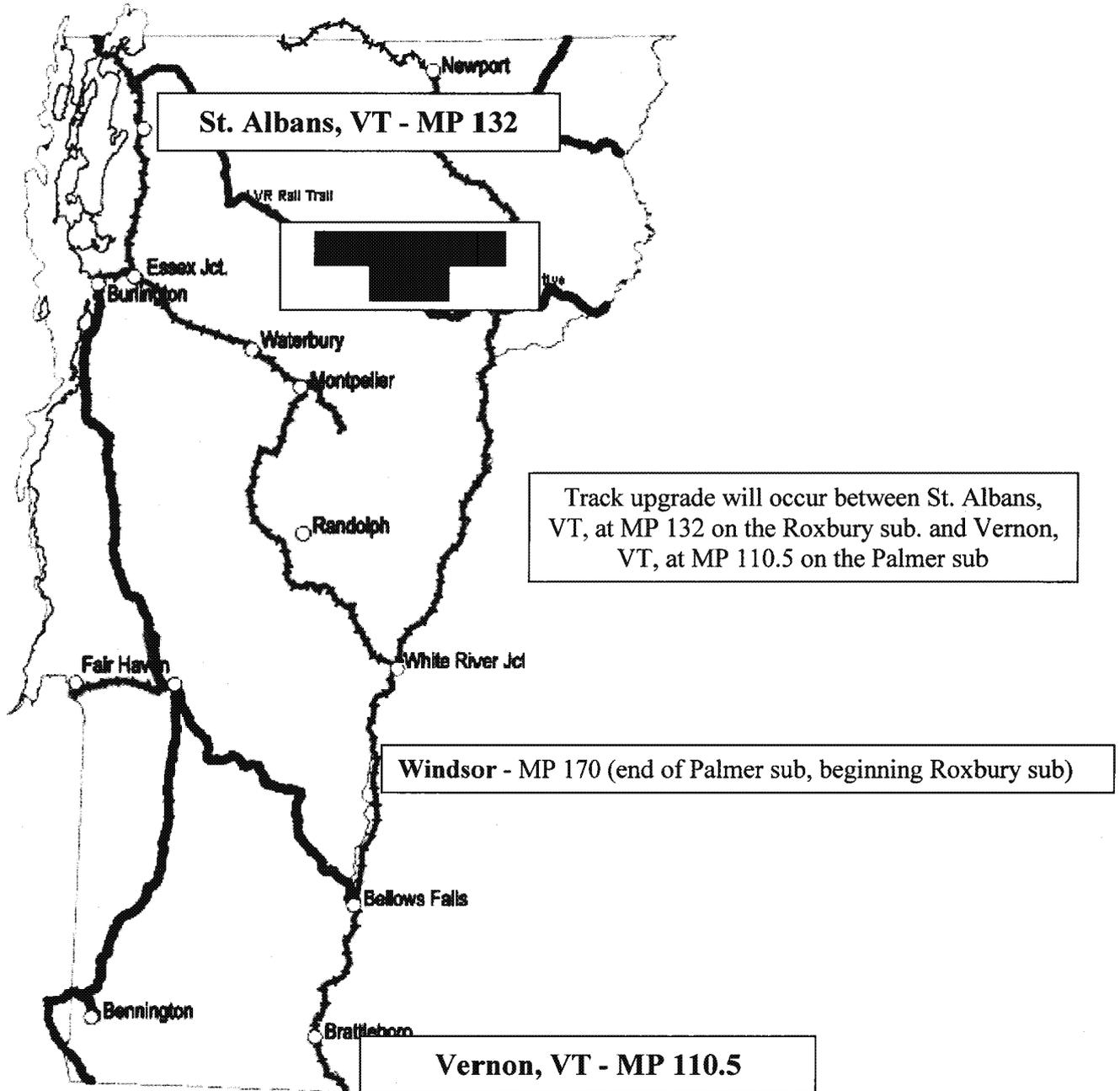
The Vermonter rehabilitation work will improve the conditions of the track, roadbed, grade crossings, and bridges along the current route of the Amtrak Vermonter service in Vermont and New Hampshire (the "Project"). The scope of work submitted with the HSIPR grant application was intended to improve the track infrastructure to operate a more efficient Amtrak passenger rail service while retaining a cost competitive proposal for the Track 1a application. However, a lower-than-expected price for rail and an allowance from FRA to use the salvage value of the existing rail as an additional funding source have allowed VTrans to broaden the scope of the Project. The scope of work being undertaken as part of this cooperative agreement will allow intercity passenger trains to increase track speeds from 59 to 79 mph for 25 miles on the Palmer subdivision between milepost (MP) 144.98 and MP 170.00 and from 55 to 59 mph over the remaining 168 miles (between MP 110.5 on the Palmer subdivision and MP 132.00 on the Roxbury subdivision). The installation of the new continuously welded rail (CWR) and new turnouts as well as the elimination of temporary and permanent slow orders will reduce the Vermonter's operating schedule by 27 minutes in Vermont and New Hampshire. The faster maximum travel speeds for passenger and freight traffic that stem from this Project will provide the capacity necessary to increase intercity passenger rail service frequency in the future.

The track work involves replacing the existing 100-, 112-, and 115-lb rail of a 1950s' vintage, which has reached 50% or more of its useful life, with new CWR, as well as the installation of 95,000 new ties. The new CWR will substantially improve the rail infrastructure's safety and will reduce delays through decreasing field failures and reducing future rail defects. Also, the installation of CWR (as opposed to joint welding of existing track) improves the fuel efficiency and quality of the ride for Amtrak passengers. This CWR will also position the corridor for additional speed increases above 59 mph that can be realized upon the installation of signals between the Roxbury subdivision at MP 0.0 to 132.0 and the Palmer subdivision at MP 110.5 to 122.2 (which is currently nonsignaled territory). In addition to the new CWR, turnouts, similar to the age of the existing rail, will also be replaced to improve safety and efficiency of operations. Ballast work will also occur along this section of the corridor to improve the drainage of water, to better distribute the load from the railroad ties, and to limit vegetation growth that interferes with the track structure.

The Project will also improve the safety of the rail line by strengthening and returning bridges to a state-of-good repair and by improving grade crossings. Improving the condition of highway-rail grade crossings, which have been damaged by the increased size of trucks and snow plows, will improve both safety and eliminate slow orders, and enhancing grade crossing warning devices on the line will reduce the annual probability of a train-vehicle accident.

The target timeframe for construction will take place over a two year period. The Project is planned for both the Roxbury (northern) subdivision and the Palmer (southern) subdivision of NECR that currently carries the Vermonter service. The northern Project limit is MP 132 on the Roxbury subdivision, and the southern limit is MP 110.5 on the Palmer subdivision. All construction activities will occur within the private right-of-way and to assets owned by NECR.

PROJECT LOCATION



Project work elements includes:

Work Element 1: Rail – This portion of the Project replaces 1,479,456 feet of existing 100-, 112-, and 115-lb jointed rail with new 115-lb CWR. The installation of the new 115-lb CWR will occur between Vernon and Windsor, VT (MP 110.5–170), on the Palmer subdivision and between Windsor and St. Albans, VT (MP 0–132), on the Roxbury subdivision for a total of 140.10 miles. Salvaged rail and other track material (OTM) that is removed from the right-of-

way will be loaded directly onto rail cars and sold. The rail and OTM retained for future use will be stored on the right-of-way at an approved storage area.

NECR will stockpile approximately 3,000 tons of existing 115-lb rail, valued at \$1.5 million, for future maintenance use along the NECR/intercity passenger rail corridor between Vernon and St. Albans, VT. NECR's valuation on the existing rail to be stockpiled for future maintenance or sold is based on \$500.00 per net ton, including transportation to the NECR interchange, which is based on a guaranteed minimum offer that NECR received through a competitive process. If NECR receives a higher price during the process of selling the salvaged materials, the additional value will be passed on to the Project. The existing 100-, 112-, and 115-lb rail removed will be inventoried listing the amount, weight, milepost location, and statement of general condition and will be provided to VTrans in the bimonthly Project report. When the inventoried rail retained for future maintenance work on the rail line between Vernon and St. Albans, VT, is to be used by NECR, NECR will send VTrans and FRA documentation stating the amount of rail that is to be used out of the total amount that has been retained for maintenance work, the location where the retained rail will be installed, and the amount of the retained rail remaining for future maintenance work.

SUBDIVISION	NEW REPLACING	NEW REPLACING	NEW REPLACING	TOTAL
	Existing 100 lb	Existing 112 lb	Existing 115 lb	
Palmer Subdivision MP 110.5 Vernon, VT, to MP 170 Windsor, VT	99,264	315,744	12,144	427,152
Roxbury Subdivision MP 0.00 Windsor, VT, to MP 132.0 St. Albans, VT	190,080		862,224	1,052,304
Total Lineal Feet	289,344	315,744	874,368	1,479,456
Total Track Miles	27.4	29.9	82.8	140.1

The locations where the new rail will be installed as part of this Project are identified in the previously submitted document, titled "New CWR Installation," on file with FRA.

Work Element 2: Crossties – The Project will include replacement of 95,000 crossties between Vernon, VT (MP 110.5 on the Palmer subdivision), and St. Albans, VT (MP 132 on the Roxbury subdivision). New ties will be off-loaded by rail car directly onto the rail right-of-way. Installation of crossties will take place within the existing rail bed. Removed ties from this Project will be loaded onto rail cars for disposal. The cost of tie disposal is included in the Ties section of the Project budget.

Work Element 3: Surfacing – This work element will include the purchase and installation of ballast within the existing rail bed between Vernon, VT (MP 110.5 on the Palmer subdivision), and St. Albans, VT (MP 132 on the Roxbury subdivision).

Subdivision	Surfacing		Total Miles	Ballast Total
	Begin MP	End MP		
ROXBURY	0	132	132	39600
PALMER	110.5	170	35	10500

The locations where surface work will be performed as part of this Project are identified in the previously submitted document, titled “Surfacing Work,” on file with FRA.

Ballast will be delivered to site by rail cars from a source located outside the Project limits. NECR does not anticipate removing any existing ballast from the Project area. If existing ballast does need to be removed, VTrans will be consulted prior to removal. NECR will install approximately 50,000 tons of ballast within the Project area. NECR will lease ballast cars for transport of the stone to specified locations in the Project area. NECR will also provide work trains and crews to assist in this effort.

Work Element 4: Ballast Cleaning – This work element will include the purchase and installation of ballast within the existing rail bed between Vernon, VT (MP 110.5 on the Palmer subdivision), and St. Albans, VT (MP 132 on the Roxbury subdivision). In some locations the ballast is fouled, reducing the track bed’s ability to drain properly; therefore, cleaning the ballast is essential. NECR will incorporate an additional 19,500 tons of ballast into this process.

Removing and cleaning the ballast from the shoulder will be sufficient for this effort. A chain of specially designed rail cars will cut the ballast and pass it through a conveyor belt to a cleaning machine, which deposits the dirt and ballast into separate wagons for disposal and reuse, respectively.

The locations where ballast work will be performed as part of this Project are identified in the previously submitted document, titled “Ballast Cleaning,” on file with FRA.

Work Element 5: Turnouts – New turnouts, including switch stand, switch, guard rail, frog, rail, and OTM will be installed within the existing rail bed. Elements of the rebuilt turnouts will be salvaged for future use, scrapped, or properly disposed of from the Project prior to final inspection. Three existing power switch machines will be rebuilt. The upgraded power switches at MP 122.0, 145.0, and 162.0 will ensure that switch machines stay in compliance with FRA regulations, reduce unnecessary maintenance, and keep delays as a result of switch-related issues to a minimum. The rehabilitation of the turnouts (a list of the turnouts can be found in the previously submitted document, titled “Turnout Replacement,” on file with FRA) will contribute to the improved travel time of the Vermonter service.

Similar to the rail that will be retained for maintenance work on the NECR line, retained components of the existing turnouts will be inventoried for future use between Vernon and St.

Albans, VT. Upon use of these inventoried components, NECR will send VTrans and FRA documentation indicating the components' uses and their installation location.

Work Element 6: Grade Crossing Warning Devices – All incandescent crossing signal lights will be upgraded to highly visible LED crossing signal lights, which will ensure safety to the public because of added visibility, longer battery life if commercial power is lost, and reduction of bulb failure. Grade crossings at 49 locations will also have constant warning devices installed to replace 1980s' motion sensor technology. The upgrade will provide a constant warning to the traveling public because the technology accounts for the varying speeds of both passenger and freight trains and thus will eliminate extended warning times.

Additionally, 7,740 feet of track wires and cables will be replaced during the upgrade of the grade crossing warning devices, which will reduce occurrences of patching or splicing old track wires and cables as well as reduce future cable troubles, thereby improving safety to the public. These crossing locations presently have 1950s' relay design. Steel houses will be replaced by aluminum bungalows, and new gate mechanisms will replace outdated equipment. The effort will also involve relocating the power lines for the grade crossings and signal system underground. This will eliminate power failures as a result of storm damage and will improve the safety of rail personnel by eliminating the need to climb poles to repair damage.

The list of highway grade crossing warning devices to be upgraded as part of this Project are identified in the previously submitted document, titled "Grade Crossing Warning Device Upgrades," on file with FRA.

Work Element 7: Rebuilds of At-Grade Crossings – The grade crossing rebuilds shall consist of the excavation of the existing crossing surfaces and sub-base and replacing the existing crossties. The NECR track supervisor, with concurrence from the VTrans resident engineer, will determine the extent of replacement. Panels for the grade crossings will be constructed prior to installation in proximity to the track and then lifted and secured into place as a way to reduce operational delays associated with the work (a photographed example of a constructed panel has been submitted to FRA and is available on file). On very limited occasions, because of lack of space for panel construction, the ties, rail, and OTM may be installed directly into track; however, because of the available right-of-way space on NECR, it is anticipated that all crossing work will be done by constructing the panel prior to installation. This decision will be at the discretion of the contractor.

This component consists of 53 public, private, and farm crossings. The rehabilitation of the crossings listed will contribute to the improved travel time of the Vermonter service.

The list of at-grade public and private crossings that will be rehabilitated as part of this Project are identified in the previously submitted document, titled "Rebuild of At-Grade Crossings," on file with FRA.

Work Element 8: Bridges – This portion of the Project consists of two components: 1) bridge maintenance activities and 2) structural strengthening activities, including replacement of bridge members.

Bridge maintenance improvements will include but are not limited to the design, replacement of bridge ties, walkway planks, and hand rails as well as the replacement of anchor bolts, timbers, and bearing seats and other minor improvements.

Structural strengthening improvements will include but are not limited to the design, replacement of poor posts, caps, and stringers, installation of cover plates on top and bottom flanges of stringers, repairs to truss bracing, replacement of missing lattice and rivets, and other minor improvements.

These activities will bring the bridges to a state-of-good repair and are intended to bring the bridges up to the current load-bearing standard.

The list of bridges undergoing maintenance and structural strengthening have been provided to and are on file with FRA.

PROJECT SCHEDULE

The target date period of performance for the above work shall be 24 months, beginning on September 13, 2010, and ending September 13, 2012.

NECR commits to the 2-year window of construction with the understanding that availability of materials, specialty contractors, the limited length of the construction season in northern New England, and the proposed start date of mid-September 2010 may have an impact on attaining the Project timeline.

A schedule for the Project elements will be submitted to FRA as the first deliverable, and FRA must give its written approval before the Grantee may proceed with the Project or receive any reimbursement for Project costs.

Amendments to the approved Project schedule must be approved by FRA in writing before any such amendment shall take effect.

PROJECT BENEFITS

This Project will result in a trip time reduction of 27 minutes in the Vermonter's schedule. This trip time reduction is to be reflected in a schedule approved by Amtrak, NECR, and VTrans and will be submitted to FRA for approval no later than 10 months after the cooperative agreement is signed. The submitted schedule is to be put into effect immediately upon completion of the Project. Modifications to the aforementioned Vermonter schedule submitted to FRA must maintain, at a minimum, a trip time reduction of 27 minutes over the 20-year life of the Project assets.

This Project will also improve the reliability of the Vermonter service through Vermont and New Hampshire. As a result, the on-time performance of the Vermonter service will be at least 90%

between St. Albans, VT, and East Northfield, MA, and the NECR-responsible delays (e.g., freight train interference and slow orders) between St. Albans, VT, and East Northfield, MA, will be no more than 13 minutes of delay per Amtrak trip during the life of the improved assets.

The NECR rail upgrade also improves, over the useful life of the Project, the capacity of the rail line, which will allow for additional frequencies of intercity passenger rail service on the NECR up to Montreal, QC, Canada.

NECR anticipates that yearly rail failure will be reduced because of the installation of new CWR, therefore improving safety; however, new CWR may still reveal some minor “mill” defects and plant welds during the first testing (such defects should diminish after the first test is concluded). NECR estimates, based on normal wear and tear, a minimum of approximately 15 defects per year going forward. As a comparison, NECR has had 420 rail failures in the past 3 years on the corridor.

REPORTING OF PROJECT BENEFITS

Amtrak and NECR will provide the following reports:

- On-time performance between St. Albans, VT and East Northfield, MA
- Freight Train Interference
- Amtrak Passenger Train Interference
- Slow Orders
- A detailed description of any differences in the schedule of intercity passenger rail services making use of the Project improvement versus the schedule in place during the same quarters in the 5 years immediately preceding the date of commencement of the Project.

Project Cost and Budget

The total cost of the Project is \$69,298,006, for which the FRA grant will contribute \$50,000,000 of the total cost. Any additional expense required beyond that provided in this grant to complete the Project shall be borne by the Grantee. A budget for the Project has been included below.

Amendments to the approved Project budget must be approved by FRA in writing before any such amendment shall go into effect.

The Project funding sources include the salvage value of rail and OTM for the amount of \$14,298,004 and the NECR contribution of \$5,000,000.

Vermont Rehabilitation Project Budget

PROJECT	QUANTITIES	UNITS	ACTUAL
Work Element 1: RAIL	1,479,456	LIN FEET	\$47,524,180
Work Element 2: TIES (disposal cost included)	95,000	EA	\$6,600,386
Work Element 3: SURFACING	167	MILES	\$2,246,568
Work Element 4: BALLAST (shoulder cleaning)	39	MILES	\$1,033,259
Work Element 5: TURNOUTS AND DIAMONDS	29		\$2,151,445
Work Element 6: GRADE CROSSING WARNING DEVICES			\$2,997,258
Work Element 7: REBUILD AT-GRADE CROSSINGS			\$2,111,265
Work Element 8: BRIDGES - MAINTENANCE			\$2,783,672
BRIDGES - STRENGTHENING			\$1,599,973
VERMONT ADMINISTRATION FEE			\$250,000
TOTAL PROJECT COST			\$69,298,006
PROJECT FUNDING SOURCES			
CREDIT FOR SALVAGE VALUE OF RELEASED RAIL & OTM	31,796	NET TONS	(\$14,298,006)
NECR CONTRIBUTION			(\$5,000,000)
FRA HSIPR Grant			(\$50,000,000)

PROJECT COORDINATION

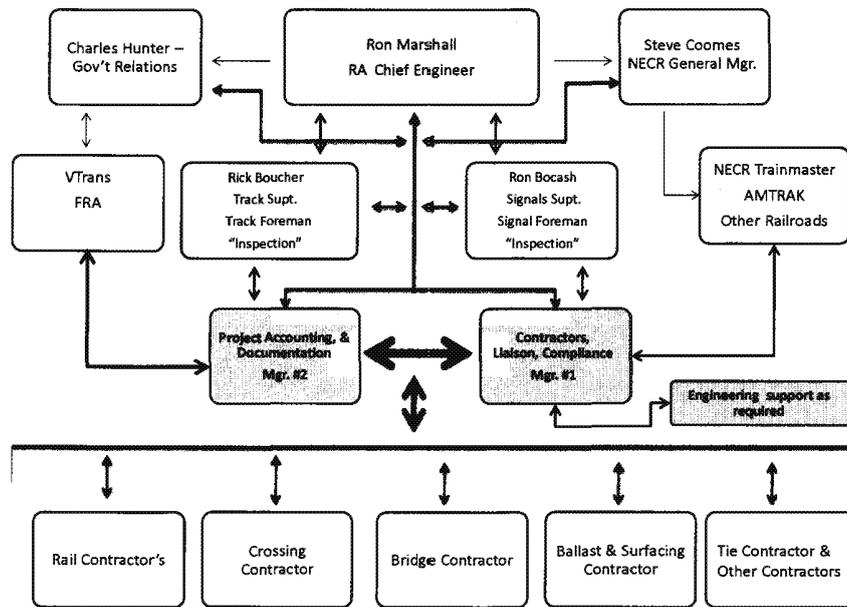
The NECR shall perform all tasks required for the Project through a coordinated process, including all railroad owners, operators, and funding partners involved with the Project. Listed below is a list of the companies and agencies involved:

- NECR
- Amtrak
- VTrans
- FRA

PROJECT MANAGEMENT

VTrans is the Grantee and the coordinating agency for the Project. A Project Management Plan has been submitted to FRA.

The organizational chart below shows the NECR staff involved. Trini Brassard, Assistant Director of Operations, will be managing this Project for VTrans.



**First Amendment to
Project Benefits/Service Outcomes Agreement By and Among National
Railroad Passenger Corporation, State of Vermont, And
New England Central Railroad, Inc.**

THIS FIRST AMENDMENT ("First Amendment") is made as of the 14th day of September, 2011, the effective date, by and among the **National Railroad Passenger Corporation**, a corporation organized under the Rail Passenger Service Act (recodified at 49 U.S.C. § 24101 et seq.) and the laws of the District of Columbia and having its principal office and place of business in Washington, DC (hereinafter referred to as "Amtrak"), the **State of Vermont**, acting by and through its **Agency of Transportation** (hereinafter referred to as the "State") and **New England Central Railroad, Inc.**, a Delaware corporation with offices in St. Albans, Vermont (the "Host"), referred to collectively as the "Parties."

WHEREAS, the Parties entered into a Project Benefits/Service Outcomes Agreement By and Among National Railroad Passenger Corporation, State of Vermont, And New England Central Railroad, Inc. dated August 27, 2010 (the "Agreement"); and

WHEREAS, the Federal Railroad Administration has notified the State of an award of additional funding to expand the scope of the Project, as defined in the Agreement; and

WHEREAS, the Parties wish to amend the Agreement to reflect such expanded scope and the benefits thereof.

NOW THEREFORE, in consideration of the premises and mutual covenants contained in this First Amendment, the Parties agree as follows:

1. Amendment to Exhibit 1. Exhibit 1 of the Agreement is hereby deleted in its entirety and replaced by Exhibit 1 dated September 14, 2011 attached to this First Amendment.

2. Amendment to Exhibit 2, Table 1. Exhibit 2, Table 1 only (the remainder of Paragraphs 1 – 5, including all footnotes to Table 1, remain unchanged) is hereby deleted in its entirety and replaced by Exhibit 2, Table 1 dated September 14, 2011 of this First Amendment.

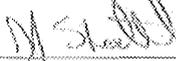
3. Amendment to Operating Agreement between Amtrak and Host. Prior to completion of the Project, Amtrak and Host shall amend the December 1, 2010 Operating Agreement between Amtrak and Host ("Amtrak-Host Agreement") such that in Appendix V, Footnotes 3 and 4, all references to "250 minutes" shall be replaced by "249 minutes".

4. Except as specifically modified via this First Amendment, the Agreement shall remain unchanged and in full force and effect.

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be

executed by their duly authorized representatives as of the day and year first hereinabove written.

NATIONAL RAILROAD PASSENGER CORPORATION

By: 
Name: DS Szybicki
Title: CHIEF FINANCIAL OFFICER

STATE OF VERMONT

By: 
Name: Brian Scarles
Title: Secretary of Transportation

NEW ENGLAND CENTRAL RAILROAD, INC.

By: 
Name: Joshua P. Stearns
Title: Vice President - Finance

APPROVED AS TO FORM:

DATE: 9/19/2011


ASSISTANT ATTORNEY GENERAL
STATE OF VERMONT

Exhibit 1

Rev. September 14, 2011

Project(s)

The Project(s) shall consist of the following:

Phase 2: Projects and improvements as detailed in the Standard Rail Agreement dated August 26, 2010.

Phase 3: Work Elements 9, 10, and 11 (CTC Extension and Upgrade, Upgrade Communication System, and Culvert Improvements/Ditching, respectively) as detailed in the "Amendment to Grant Agreement" dated as of September 14, 2011.

Exhibit 2, Table 1

Rev. September 14, 2011

Table 1: Service Outcomes:

Phase No.	Description (Upon Completion of Listed Project(s))	Minimum Amtrak Train Round Trips per Day Permitted by Host ^a	Maximum Scheduled Amtrak Train Trip Time Between East Northfield and St. Albans ^{**}	Delay Ceiling (Maximum Host-Responsible Delay Minutes per Amtrak Trip)
1	Baseline – Current Service	1	4hr 37 m	13.8
2	Projects as listed in Exhibit 1 “Phase 2”	1#	4hr 10m	13.0
3	Projects as listed in Exhibit 1 “Phase 3”	1#	4hr 09m	13.0

Project Benefits/Service Outcomes Agreement
By and Among
National Railroad Passenger Corporation,
State of Vermont,
And
New England Central Railroad, Inc.

THIS AGREEMENT is made as of the 27 day of August, 2010, the effective date, by and among the National Railroad Passenger Corporation, a corporation organized under the Rail Passenger Service Act (recodified at 49 U.S.C. § 24101 et seq.) and the laws of the District of Columbia and having its principal office and place of business in Washington, DC (hereinafter referred to as "Amtrak"), the State of Vermont, acting by and through its Agency of Transportation (hereinafter referred to as the "State") and New England Central Railroad, Inc., a Delaware corporation with offices in St. Albans Vermont (the "Host"), referred to collectively as the "Parties."

WHEREAS, the Federal Railroad Administration ("FRA") has notified the State of the proposed award of a grant for the Project defined below ("Project"), to be funded through the American Recovery and Reinvestment Act of 2009 ("ARRA") and the Passenger Rail Investment and Improvement Act of 2008 ("PRIIA"); and

WHEREAS, the Project will be implemented on right-of-way owned and/or controlled by the Host; and

WHEREAS, the primary purpose of the Project will be to benefit intercity passenger rail ("IPR") service; and

WHEREAS, the Parties have reached agreement concerning the benefits that will be realized upon completion of the Project ("Service Outcomes"), as well as a methodology for measuring the Service Outcomes; and

WHEREAS, Amtrak operates state funded IPR service (the "Service") along the right-of-way owned and controlled by the Host pursuant to an agreement between Amtrak and the State, "*National Railroad Passenger Corporation and The State of Vermont Agreement for the Provision of Rail Passenger Service From October 1, 2009 through September 30, 2010, dated October 1, 2009*", as amended or superseded ("Amtrak-State Agreement") on which the Project will be implemented; and

WHEREAS, Amtrak and the Host are Parties to an agreement "*Agreement Between New England Central Railroad and National Railroad Passenger Corporation, dated April 2, 1995*", as amended or superseded ("Amtrak-Host Agreement"); and

WHEREAS, the State and the Host are Parties to an agreement "*Standard Rail Agreement dated August 24, 2010*" ("State-Host Agreement") providing for the implementation of the Project on the Host's right-of-way, which sets forth terms and conditions that apply to the Project; and

WHEREAS, the Parties are all authorized by applicable law to enter into this Agreement on the terms and conditions hereinafter set forth.

NOW THEREFORE, in consideration of the premises and mutual covenants contained in this Agreement, the Parties agree as follows:

Operation of the Service shall be governed by the above-mentioned Agreements except as specifically provided below:

1. Project Defined. This Project is to be completed as detailed in the Standard Rail Agreement dated August 26, 2010 as may be amended and as listed in the following Exhibit 1.
2. Service Outcomes Resulting from the Project. The Service Outcomes to be realized upon completion of the Project are described in Exhibit 2.
3. Compliance with ARRA Requirements. Each of the Parties shall comply with grant requirements applicable to the Project which are mandated by ARRA, including the requirement that authorized representatives of the FRA, U.S. Department of Transportation and the Comptroller General shall, until three years after completion of the Project, have access to and the right to examine, audit and copy any Project information controlled by the State, Amtrak, the Host, and their respective contractors.
4. Modification of Amtrak-Host Agreement. Upon completion of the Project or portions of the Project ("Phases"), as listed in Exhibit 2, Amtrak and the Host shall amend the Amtrak-Host Agreement (or subsequent Amtrak-Host Agreement, should the April 2, 1995 agreement be renegotiated) as follows:
 - a) Modification of Appendix I of the Amtrak-Host Agreement to reflect the new Maximum Passenger Train Speeds permitted by the Project described in Exhibit 2, Table 2A of this Agreement.
 - b) Appendix V, Table 1 shall be modified such that the Scheduled Time from Origin equals the Phase 2 Scheduled Amtrak Train Trip Time.
 - c) Modification of Appendix IV, Section III, Item 1 of the Amtrak-Host Agreement to reflect incremental track maintenance payments as listed therein and adjusted according to that agreement.
5. (Reserved)
6. Discontinuance or Reduction of Service, Resumption of Service. If the Service is discontinued or reduced, the following shall apply:
 - a) Any Federal penalties or return of funds to the Federal Government shall be paid according to the Standard Rail Agreement dated August ~~XX~~26, 2010, and
 - b) Host shall, for no less than one year following such discontinuance or reduction of Service, maintain the Project in an operable condition that will allow resumption of service at the same level of utility as when the Service was discontinued.
7. (Reserved)
8. (Reserved)

9. Dispute Resolution. Any dispute, claim, or controversy between or among the Parties hereto relating to the interpretation, application, or implementation of this Agreement shall be resolved in the following manner:
- a) Disputes between Amtrak and the Host shall be resolved pursuant to the NRPC Arbitration Agreement dated April 16, 1971 and the Arbitration Rules of the National Arbitration Panel as revised April 8, 1975.
 - b) Disputes between the State and the Host shall be resolved pursuant to the dispute resolution procedures applicable under the State-Host Agreement.
 - c) Disputes between Amtrak and the State shall be resolved pursuant to the dispute resolution procedures in Section 12 of the Amtrak-State Agreement, which section is incorporated herein by reference.
 - d) With respect to disputes involving whether the Host delivered or failed to deliver the Service Outcomes described in Exhibit 2, Amtrak and the State shall have the right to specific performance of the agreed-upon Service Outcomes.
10. Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of Vermont, except to the extent the rights of FRA are affected, in which case Federal law shall apply if inconsistent with the laws of the State of Vermont.
11. Modification. This Agreement constitutes the entire agreement among the Parties and supersedes any and all prior representations, understandings or agreements among the Parties, whether oral or written, concerning the Project. This Agreement or any part hereof may not be changed, amended or modified, except by written agreement of the Parties, as signed by duly authorized representatives of all Parties. This Agreement shall not be materially amended without FRA's prior written consent.
12. Term. This Agreement shall remain in effect for a period of twenty (20) years beginning from the date of the Project's placement in service. The State may terminate this Agreement prior to twenty years, in which case the State shall notify FRA and provide FRA with a plan (subject to FRA approval) on how passenger service will continue or the schedule for the service to be discontinued, in which latter event, the State will be subject to the provisions of the Cooperative Agreement with FRA.
13. Successors and Assigns. This Agreement shall apply to and be binding upon the successors, assigns, subsidiaries, agents, affiliates, and lessees of the Parties hereto and any person acting under, through, or for the Parties.
14. Notices. Any notice, request or other communication to any Party by any other as provided for herein, shall be given in writing, sent by first-class mail, return receipt requested or by overnight courier, and shall be deemed given upon actual receipt by the addressee. Notices shall be addressed as follows:

If to Amtrak:

Senior Director Host Railroads

National Railroad Passenger Corporation
30th & Market Streets
Philadelphia, PA 19104

If to the State:

Director of Operations
Vermont Agency of Transportation
1 National Life Drive
Montpelier, VT 05633-6200

If to the Host:

General Manager
New England Central Railroad, Inc.
2 Federal Street
St. Albans, VT 05478

RailAmerica, Inc.
Legal Department
7411 Fullerton St., Ste. 300
Jacksonville, FL 32256

[Remainder of Page Blank]

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be executed by their duly authorized representatives as of the day and year first hereinabove written.

NATIONAL RAILROAD PASSENGER CORPORATION

By: *DJ Stadtler*
Name: DJ Stadtler
Title: Chief Financial Officer

STATE OF VERMONT

By: *David C Dill*
Name: David C. Dill
Title: Secretary of Transportation

NEW ENGLAND CENTRAL RAILROAD, INC.

By: _____
Name: _____
Title: _____

APPROVED AS TO FORM:

DATE: 8/27/2010
[Signature]
ASSISTANT ATTORNEY GENERAL
STATE OF VERMONT

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be executed by their duly authorized representatives as of the day and year first hereinabove written.

NATIONAL RAILROAD PASSENGER CORPORATION

By: _____
Name: _____
Title: _____

STATE OF VERMONT

By: David C. Dill
Name: David C. Dill
Title: Secretary of Transportation

NEW ENGLAND CENTRAL RAILROAD, INC.

By: _____
Name: _____
Title: _____

APPROVED AS TO FORM:

DATE: 8/27/2010

[Signature]
ASSISTANT ATTORNEY GENERAL
STATE OF VERMONT

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be executed by their duly authorized representatives as of the day and year first hereinabove written.

NATIONAL RAILROAD PASSENGER CORPORATION

By: _____
Name: _____
Title: _____

STATE OF VERMONT

By: _____
Name: David C. Dill
Title: Secretary of Transportation

NEW ENGLAND CENTRAL RAILROAD, INC.

By: Paul Lundberg
Name: Paul Lundberg
Title: Vice President

APPROVED AS TO FORM:

DATE: _____

ASSISTANT ATTORNEY GENERAL
STATE OF VERMONT

Exhibit 1

Project(s)

Projects and improvements as detailed in the Standard Rail Agreement dated August 24, 2010 as may be amended.

Exhibit 2

Service Outcomes

1. Upon completion of the Project listed in Exhibit 1 and in Table 1 below, the Host commits that the Service Outcomes identified in Table 1 below shall be achieved for each intercity passenger train operating on the Host between East Northfield, MA and St Albans, VT:

Table 1: Service Outcomes:

Phase No.	Description (Upon Completion of Listed Project(s))	Minimum Amtrak Train Round Trips per Day Permitted by Host*	Maximum Scheduled Amtrak Train Trip Time Between East Northfield and St. Albans**	Delay Ceiling (Maximum Host-Responsible Delay Minutes per Amtrak Trip)
1	<i>Baseline – Current Service</i>	1	4hr 37 m	13.8
2	<i>Projects as listed in Exhibit 1</i>	1#	4hr 10m	13.0

**Unless otherwise agreed by the Parties, approximate scheduled departure times from East Northfield and St. Albans for existing round trips shall be comparable to those in the public schedules in effect as of the effective date of this Agreement.*

Infrastructure improvements detailed in Vermont's HSIPR grant will allow for additional frequencies in the future. In the event additional frequencies are desired, the parties will negotiate in good faith for such intercity passenger rail service(s).

*** Service level attainment is dependent upon being allowed by FRA to operate the Service with a 4 inch cant deficiency, and operation of the Service with a consist containing no more than six coaches and powered by (2) P42 locomotives or their horsepower equivalent.*

- a. "Host-Responsible Delay Minutes" shall be measured using Amtrak's Conductor Delay Reports as the sum of the following delay categories: Freight Train Interference (FTI), Passenger Train Interference (PTI), Commuter Train Interference (CTI), Routing (RTE), Slow Orders (DSR), Signals (DCS), Maintenance of Way (DMW), Debris (DBS), and Detour (DTR).
- b. "Delay Ceiling" shall be the maximum allowable Host-Responsible Delay Minutes per one-way Amtrak train trip. The Host's compliance with the Delay Ceiling will be determined by comparing the Delay Ceiling to the Monthly Actual Average Host-Responsible Delay Minutes per trip for each Amtrak Train, which shall be calculated monthly for each Amtrak Train as the total Host-Responsible Delay Minutes for each calendar month divided by the number of Amtrak Train trips operated during that calendar month. Temporary adjustments

to the Delay Ceiling may be negotiated by the parties due to major track maintenance projects.

2. For purposes of this Exhibit 2, "Percentage of on time performance" will be the percentage of trains operating within the corridor from East Northfield to St. Albans within the Maximum Scheduled Amtrak Train Trip Time shown in Table 1. In a month that Percentage of on time performance falls below 90%, the Amtrak Conductor Delay Report data will be used to determine the Amtrak and Host factors that caused the performance to fall below 90%. The Host will review Host-Responsible causes of delay. For those delay minutes that are not one-time events, the Host will address the cause for delay in their operation.
3. If, at any time, the Percentage of on time performance, as outlined in #2 above, falls below 90% for a period exceeding four consecutive months, the following will apply for subsequent months until the next month that Percentage of on time performance is above 90%: The Host shall, at the Host's sole expense, take any necessary actions to reduce the Monthly Actual Average Host-Responsible Delay Minutes per trip on each Amtrak Train to or below the Delay Ceiling within two calendar months. If winter weather prohibits taking the necessary actions to reduce the Monthly Actual Average Host-Responsible Delay Minutes per trip on each Amtrak Train to or below the Delay Ceiling within two months, Host must file a plan of action within two calendar months with the State and receive concurrence, on how the Monthly Actual Average Host-Responsible Delay Minutes per trip will be reduced and then implement the plan within the first two months of non-winter weather that occur.
4. If Host's actions in Paragraphs 2 and 3 above fail to bring Monthly Actual Average Host-Responsible Delay Minutes per trip on each Amtrak Train to or below the Delay Ceiling within two calendar months, the Host, Amtrak, or the State may request that the Parties seek jointly to analyze potential corrective actions. Any joint findings or conclusions may be used in efforts to reduce delays and improve performance, but shall not prevent Amtrak or the State from seeking specific performance from Host.
5. The obligations of Host under this Exhibit 2 shall be subject to force majeure (which shall include strikes, riots, floods, accidents, extreme heat conditions, Acts of God, and other causes or circumstances beyond the reasonable control of Host), but only as long as, and to the extent that, such force majeure shall prevent performance of such obligations.

**AMENDMENT #1 to
 STANDARD RAIL AGREEMENT
 BETWEEN
 STATE OF VERMONT
 AND
 NEW ENGLAND CENTRAL RAILROAD, INC.
 FOR
 VERMONT "TRACK 1" REHABILITATION
 CONTRACT NO. RA0039**

THIS AMENDMENT, made and concluded this 5th day of January, 2012, by and between the State of Vermont, a sovereign state, acting through its Agency of Transportation, with its principal office at 1 National Life Drive, Montpelier, Vermont 05633-5001, (the "State"), and New England Central Railroad, Inc. a corporation duly organized and operating under the laws of the State of Vermont, with its principal office at 2 Federal Street, Suite 201, St. Albans, Vermont 05478 ("Railroad").

WITNESSETH:

WHEREAS, the STATE and RAILROAD mutually agree that the August 26, 2010 Agreement should be modified;

NOW, THEREFORE, the August 26, 2010 Agreement is modified as follows:

1. **Section 3: Maximum Amount**

Add the following project funds:

Add Federal Funds (includes \$250,000 State administration fee) - \$2,722,258

Add Railroad Funds \$664,451

Maximum Limiting Amount - (\$50,000,000 + \$2,472,258) **\$52,472,258**

Replace the Project funding table with the following:

Total Federal Funds (includes \$250,000 State administration fee)	\$52,722,258
Total Railroad Funds	\$19,962,455
Total Project Amount (All Funds)	\$72,684,713

2. **Section 4: Grant Term**

Change: The period of Railroad's performance is to begin February 1, 2010 and end on

~~June 30, 2012.~~ *Sept. 12, 2012* *(SJC)*

3. **Attachment A - Scope of Work**

Replace the following statement to the second paragraph under **General Description of Project**. The project includes track, ties, bridge, signal, crossings, turnouts, surfacing, ditching and culvert work between the Massachusetts and Vermont state border and St. Albans, VT as detailed in the Statement of Work attached hereto as **Attachment G**.

**AMENDMENT #2 to
STANDARD RAIL AGREEMENT
BETWEEN
STATE OF VERMONT
AND
NEW ENGLAND CENTRAL RAILROAD, INC.
FOR
VERMONT "TRACK 1" REHABILITATION
CONTRACT NO. RA0039 CFDA No. 20.319**

THIS AMENDMENT #2, made and concluded this 2nd day of JANUARY 2013, by and between the State of Vermont, a sovereign state, acting through its Agency of Transportation, with its principal office at 1 National Life Drive, Montpelier, Vermont 05633-5001, (the "State"), and New England Central Railroad, Inc. a corporation duly organized and operating under the laws of the State of Vermont, with its principal office at 2 Federal Street, Suite 201, St. Albans, Vermont 05478 ("Railroad").

WITNESSETH:

WHEREAS, the STATE and RAILROAD mutually agree that the August 26, 2010 Agreement and the January 5, 2012 Amendment #1 should be modified;

NOW, THEREFORE, the August 26, 2010 Agreement and the January 5, 2012 Amendment #1 are modified as follows:

1. Section 3: Maximum Amount

Replace the Project funding table with the following:

Total Federal Funds (includes \$250,000 State administration fee)	\$52,722,258
Total Railroad Funds	\$17,837,549
Total Project Amount (All Funds)	\$70,559,807

2. Section 4: Grant Term

Change: The period of Railroad's performance is to begin February 1, 2010 and end on January 13, 2013.

3. Section 5: Source of Funds
Add: CFDA number is 20.319
4. Attachment B – Payment Provisions, Description
Replace NECR HSR Grant Scope with the following:

Vermont Rehabilitation Project Budget			
Project	Quantities	Units	Actual
Work Element 1: Rail	1,571,414	LIN FEET	\$42,455,250
Work Element 2: Ties (disposal cost included)	130,000	EA	\$9,015,918
Work Element 3: Surfacing	222	MILES	\$3,188,701
Work Element 4: Ballast (shoulder cleaning)	39	MILES	\$1,273,973
Work Element 5: Turnouts and Diamonds	39	EA	\$3,103,970
Work Element 6: Grade Crossing Warning Devices			\$3,378,800
Work Element 7: Rebuild At-Grade Crossings	72		\$2,441,959
Work Element 8: Bridges – Maintenance	36	EA	\$1,687,785
Bridges – Strengthening	8	EA	\$949,685
Work Element 9: CTC Extension & Upgrade			\$1,589,708
Work Element 10: Communication & System Upgrade			\$532,558
Work Element 11: Culvert Improvements/Ditching			\$240,000
Work Element 12: Vermont Passenger Bussing			\$289,000
Vermont Administration Fee			\$250,000
Annual Audit	2	EA	\$100,000
Roadway Worker Insurance Provided by RR	1	EA	\$62,500
TOTAL PROJECT COST			\$70,559,807
PROJECT FUNDING SOURCES			
Credit for Salvage Value of Released Rail & OTM	27,969	NET TONS	\$12,837,549
NECR Contribution			\$5,000,000
FRA HSIPR Grant			\$52,722,258
Total Project Funding Sources			\$70,559,807

13	"Essex to Burlington, VT"
Map Titled:	Station Land Map or Track Map, Central Vermont Ry. Co. Operated By The Central Vermont Ry. Co.
Dated:	June 30, 1917
Prepared By:	Office of Valuation & Capital, Detroit, Michigan
Series:	V8C
Sheets:	T1, 2, 3, 4, 5, 6, 7, 8

The original of these plans are located for inspection at New England Central Railroad, Inc.'s principal place of business at 2 Federal Street, St. Albans, Vermont and copies marked "Record Copy, Central Vermont Railway, Inc. to NEW ENGLAND CENTRAL RAILROAD, INC.", have been delivered to:

Transportation Railway Administration
 Rail, Air and Public Division
 Department of Planning
 Transportation Agency
 National Life Building
 Montpelier, VT 05601

Each such plan is made a part hereof by reference.

The Easement Area is depicted on the plans as not shaded and the area between the shaded bands depicted on said plans. The herein conveyed property consists, in part, of a strip of land lying on both sides of the center line of the railroad tracks, presently physically located on said property. The width of the strip of land, as depicted on the plans, varies from place to place along the length thereof.

There are included herein, where necessary, easements for Grantee's benefit for flowage and drainage, and easements for access by vehicles and pedestrians to any portion of the Easement Area that is not accessible by public way, such easements are across the Burdened Property retained by the Grantor and not included in the Easement Area.

EXHIBIT B

EASEMENT PURPOSES:

NEW ENGLAND CENTRAL RAILROAD, INC., its successors and assigns, may use the Easement Area at any and all times for the purpose of conducting railroad freight operations, the Montrealer passenger service, local commuter or excursion operations, and for all purposes necessary or directly related thereto, including surveying, locating, building, constructing, using, operating, altering, improving, maintaining, and repairing its rail lines, depots, warehouses, stations houses, bridges, culverts, polelines and all necessary or directly related improvements or erections. (hereinafter and elsewhere referred to as the "Easement Purposes").

EXHIBIT C

By acceptance of the Operating Easement, NEW ENGLAND CENTRAL RAILROAD, INC., its successors and assigns, acknowledge and agree that the easement shall be limited by the following:

Title to Easement Area

The fee title or other underlying title interest to the Burdened Property and the Easement Area remains held by Central Vermont Railway, Inc., or its successors or assigns.

The title to the Burdened Property and the Easement Area is subject to all existing leases, easements, rights, licenses, contracts, and other matters and encumbrances in existence on the closing date, whether or not shown on the plans and whether or not recorded in the public land records and to all or any restrictions imposed, or which may be imposed, by existing or future common law, statutes, regulations, ordinances, permits, or all or any other restrictions imposed, or which may be imposed, by courts of law or equity or any governmental or other public body. It being understood that Central Vermont Railway, Inc. does not guaranty or warrant the title of the Easement Area. Central Vermont Railway, Inc. does represent and warrant that it has sufficient right, title and interest to occupy or use the Easement Area for the railroad uses currently being conducted and Central Vermont Railway, Inc. knows of no reason why the grant of the Operating Easement would materially interfere with the right to continue such railroad uses. The representations and warranties in this paragraph shall terminate six (6) months from the date of this instrument.

SIDLEY AUSTIN BROWN & WOOD LLP

BEIJING
BRUSSELS
CHICAGO
DALLAS
GENEVA
HONG KONG
LONDON

1501 K STREET, N.W.
WASHINGTON, D.C. 20005
TELEPHONE 202 736 8000
FACSIMILE 202 736 8711
www.sidley.com

LOS ANGELES
NEW YORK
SAN FRANCISCO
SHANGHAI
SINGAPORE
TOKYO
WASHINGTON, D.C.

ENTERED
Office of Proceedings
FOUNDED 1866

OCT 1 2004

Part of
Public Record

212123

WRITER'S DIRECT NUMBER
(202) 736-8198

WRITER'S E-MAIL ADDRESS
thynes@sidley.com

October 1, 2004

The Honorable Vernon Williams
Secretary
Surface Transportation Board
1925 K Street, NW
Washington, DC 20423

OCT 1 2004
RECEIVED

Re: STB Docket No. 34561, Canadian Pacific Railway Company – Trackage Rights Exemption – Norfolk Southern Railway Company, Buffalo, NY

Dear Secretary Williams:

Enclosed for filing in the above-captioned proceeding are an original and ten (10) copies of a Notice of Exemption (the "Notice") filed by Canadian Pacific Railway Company ("CPRC") pursuant to 49 C.F.R. § 1180.2(d)(7). Also enclosed, in accordance with 49 C.F.R. § 1180.6(a)(6), are twenty (20) unbound copies of the maps submitted as Exhibit 1 to the Notice, as well as a check in the amount of \$950.00 to pay the required filing fee.

A diskette containing an electronic version of the Notice is also enclosed.

Please acknowledge receipt of the Notice for filing by date-stamping the enclosed extra copies of the Notice and returning them via our messenger. If you have any questions, please contact the undersigned counsel.

FEE RECEIVED

OCT - 1 2004

SURFACE
TRANSPORTATION BOARD

FILED

OCT - 1 2004

SURFACE
TRANSPORTATION BOARD

Sincerely,

Terence M. Hynes
Terence M. Hynes
Gabriel S. Meyer

212/23

BEFORE THE
SURFACE TRANSPORTATION BOARD

OCT 1 2004
RECEIVED

FEE RECEIVED
OCT - 1 2004
SURFACE
TRANSPORTATION BOARD

Finance Docket No. 34561

CANADIAN PACIFIC RAILWAY COMPANY
--TRackage RIGHTS EXEMPTION--
--NORFOLK SOUTHERN RAILWAY COMPANY--
BUFFALO, NY

VERIFIED NOTICE OF EXEMPTION

ENTERED
Office of Proceedings
OCT - 1 2004
Part of
Public Record

FILED
OCT - 1 2004
SURFACE
TRANSPORTATION BOARD

Terence M. Hynes
Gabriel S. Meyer
Sidley Austin Brown & Wood LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
(202) 736-8711 (fax)

Counsel for Canadian Pacific Railway
Company

Dated: October 1, 2004

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 34561

**CANADIAN PACIFIC RAILWAY COMPANY
--TRackage RIGHTS EXEMPTION--
--NORFOLK SOUTHERN RAILWAY COMPANY--
BUFFALO, NY**



VERIFIED NOTICE OF EXEMPTION

Pursuant to 49 C.F.R. §§ 1180.2(d)(7) and 1180.4(g), Canadian Pacific Railway Company ("CPRC") files this Verified Notice of Exemption (the "Notice") from the prior approval requirements of 49 U.S.C. § 11323, *et seq.*, to permit CPRC to acquire, by assignment from its affiliate, Delaware and Hudson Railway Company, Inc. ("D&H"), and exercise overhead trackage rights over approximately 12.45 miles of track owned and operated by Norfolk Southern Railway Company ("NSR") in the vicinity of Buffalo, NY. The trackage rights are based upon a written agreement and are not filed or sought in a responsive application to a rail consolidation proceeding. Accordingly, they are exempt from the prior approval requirements of 49 U.S.C. § 11323.

CPRC files this Notice in furtherance of the transaction, and submits the following information in support thereof, in accordance with the Board's regulations set forth at 49 C.F.R. §§ 1180.4(g)(1) and 1180.6:

A. Correspondence

The person to whom correspondence with respect to this Notice should be sent is:

Terence M. Hynes
Sidley Austin Brown & Wood LLP
1501 K Street, N.W.
Washington, DC 20005
202 736-8000
202 736-8711 (fax)

B. Transaction Summary

The following is a summary of the transaction, its proposed timing, and the purpose of the transaction:

CPRC is a Canadian corporation whose business address and telephone number are:

Canadian Pacific Railway Company
Gulf Canada Square
401 9th Ave. SW
Calgary, Alberta T2P 4Z4
Canada
(403) 319-7000

CPRC is a Class I rail carrier which, in conjunction with its U.S. affiliates, D&H and Soo Line Railroad Company ("SOO"), operates a 14,000 mile railroad network in Canada and the United States.

The carrier that owns and operates the rail lines that are the subject of this Notice is NSR, a Virginia corporation, whose business address and telephone number are:

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

Under the proposed transaction, CPRC will acquire, by assignment from D&H, overhead trackage rights over the following NSR rail lines in the vicinity of Buffalo, NY:

1. NSR's Southern Tier Line between Milepost 413.0 ± and the western end of the Southern Tier Line at Milepost 419.8± (including tracks into NSR's Bison Yard), a distance of approximately 6.8 miles;
2. NSR's Bison Running Track between the point of connection with the Southern Tier Line at MP 419.8 ± and the point of connection with the lines of CSX Transportation, Inc. ("CSXT") at MP 423.3±, a distance of approximately 3.5 miles; and
3. NSR's Howard Street Running Track between the point of connection with the Bison Running Track at MP 420.15 ± and the point of connection with the lines of CSXT at MP 422.3 ±, a distance of approximately 2.15 miles, for a total distance of approximately 12.45 miles.

The trackage rights covered by this Notice may be used by CPRC only to deliver to, and to receive from, NSR at NSR's Bison Yard in Buffalo, NY (i) traffic interchanged between CPRC and NSR at Buffalo, NY; (ii) CPRC/D&H through traffic that will be handled by NSR between Buffalo, NY and Binghamton, NY pursuant to a haulage agreement between NSR and D&H, and (iii) traffic that will be switched by NSR for the account of D&H (or CPRC) between Bison Yard, on the one hand, and industries or points of interchange with other carriers in the Buffalo Terminal Area to which D&H has commercial access, on the other hand, pursuant to a switching agreement between NSR and D&H.

In a Petition for Exemption filed concurrently with this Notice in Docket No. AB-156 (Sub-No. 25X), *Delaware and Hudson Railway Company, Inc. – Discontinuance of Trackage Rights Between Lanesboro, PA and Buffalo, NY, In Susquehanna County, PA and Broome, Tioga, Chemung, Steuben, Allegany, Livingston, Wyoming, Erie and Genesee Counties, NY* (the "D&H Discontinuance Petition"), D&H seeks an exemption pursuant to 49 U.S.C. § 10502 from the prior approval requirements of 49 U.S.C. § 10903 *et seq.* for D&H to discontinue its existing trackage rights over NSR's lines between Lanesboro, PA (southeast of Binghamton, NY) and Buffalo, NY. As described more fully in the D&H Discontinuance Petition, the trackage rights acquired by CPRC pursuant to this Notice, in conjunction with the services provided to D&H by NSR under new haulage and switching agreements between D&H and NSR, will give D&H the same ability to access customers via switching in the Buffalo terminal area, and to interchange traffic with other railcarriers along the Southern Tier Line and in the Buffalo Terminal Area, as D&H has today under its current trackage rights and switching arrangements.

CPRC service under the trackage rights that are the subject of this Notice will commence on a date (the "Commencement Date") mutually agreed in writing between CPRC and NSR, which shall not occur until the effective date of any required Board authorization or exemption

of D&H's Discontinuance Petition in Docket No. AB-156 (Sub-No. 25X) (including compliance with any condition(s) imposed by the STB in connection with such approval or exemption).

C. Applicant's Location

CPRC and its United States affiliates, D&H and SOO, operate rail lines in the States of Illinois, Indiana, Kentucky, Maryland, Michigan, Minnesota, New Jersey, New York, North Dakota, Pennsylvania, South Dakota, and Wisconsin, and in the District of Columbia, as well as the Canadian Provinces of Alberta, British Columbia, Manitoba, Ontario, Quebec, and Saskatchewan.

D. Map

Pursuant to 49 C.F.R. § 1180.6(a)(6), a map depicting the trackage rights that are the subject of this Notice, and a system map showing the lines of CPRC and D&H in relation to the lines of NSR and other carriers in the territory, are attached hereto as Exhibit 1.

E. Agreement

A copy of the agreement under which CPRC will exercise the trackage rights that are the subject of this Notice (redacting confidential business terms) is attached hereto as Exhibit 2. Concurrently with this Notice, CPRC has filed a Petition for Protective Order relating to the terms of the trackage rights agreement between CPRC and NSR, as well as an unredacted version of the executed trackage rights agreement (filed under seal).

F. Labor Protection

Any employees who are adversely affected by the acquisition of the trackage rights that are the subject of this Notice are entitled to protection under the conditions imposed in *Norfolk and Western Railway Co. – Trackage Rights – Burlington Northern, Inc.*, 354 I.C.C. 605 (1978), as modified by *Mendocino Coast Railway, Inc.—Lease and Operate—California Western Railroad*, 360 I.C.C. 653 (1980).

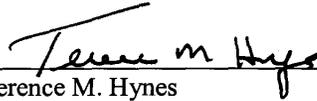
G. Environmental and Historical Reports

In accordance with 49 C.F.R. § 1105.6(c)(4), no environmental documentation is required in connection with the transaction that is the subject of this Notice. Likewise, in accordance with 49 C.F.R. § 1105.8(b)(3), no historical report is required in connection with the transaction that is the subject of this Notice.

H. Caption Summary

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

Respectfully submitted,



Terence M. Hynes
Gabriel S. Meyer
Sidley Austin Brown & Wood LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
(202) 736-8711 (fax)

Counsel for Canadian Pacific Railway Company

Dated: October 1, 2004

VERIFICATION

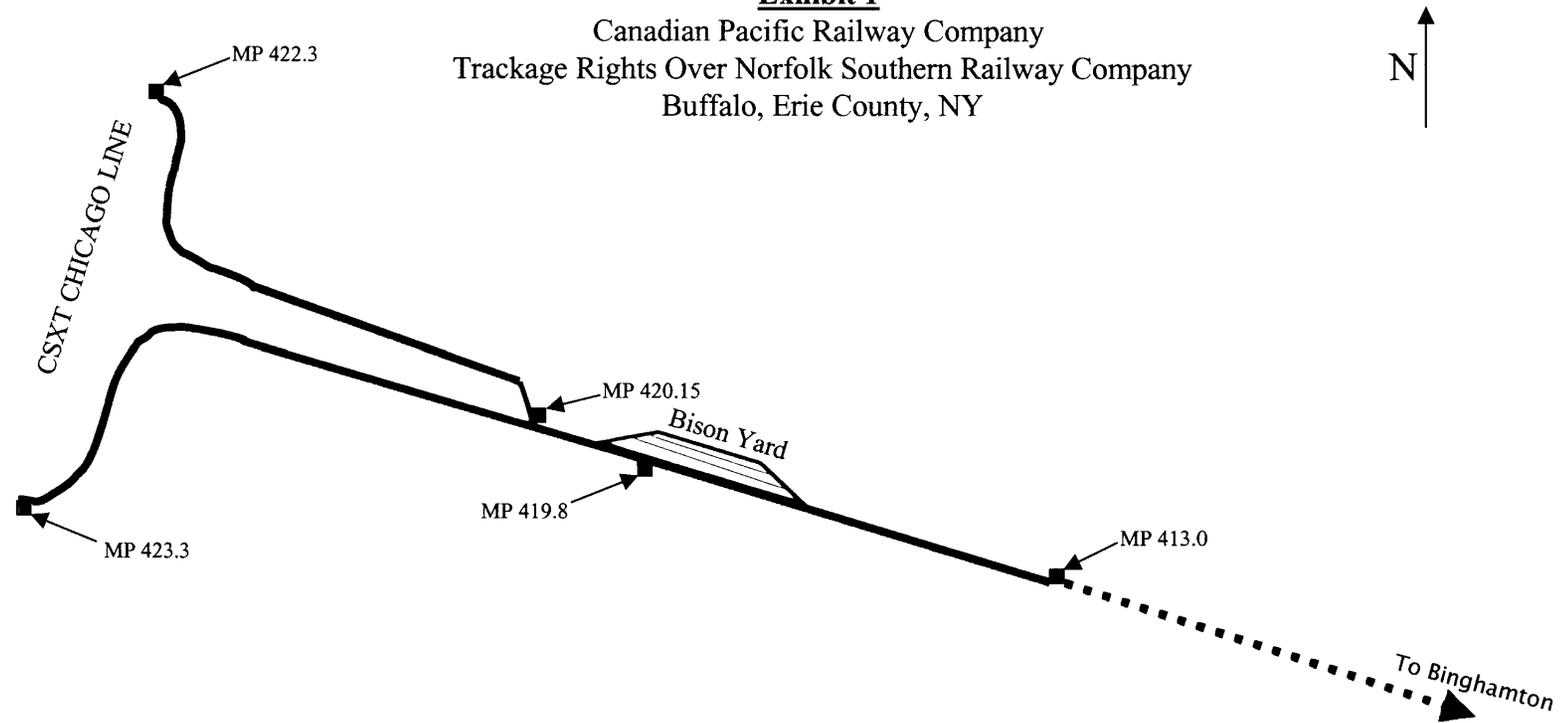
I, Fred Green, Executive Vice President – Operations and Marketing of Canadian Pacific Railway Company, hereby verify under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Notice of Exemption. Executed on September 30, 2004.



Fred Green
Executive Vice President
Operations and Marketing

EXHIBIT 1

Exhibit 1
Canadian Pacific Railway Company
Trackage Rights Over Norfolk Southern Railway Company
Buffalo, Erie County, NY



Description

- Bison Running Track Mile Post MP 423.3 to MP 419.8, including operation in Bison Yard.
- Howard Street Running Track MP 422.3 to 420.15.
- NS Southern Tier Line MP 413.0 at Buffalo to MP 217.0 at Binghamton, NY.
- Note: All mileposts are designated +/-

EXHIBIT 2

RESTATED BUFFALO TRACKAGE RIGHTS AGREEMENT

THIS TRACKAGE RIGHTS AGREEMENT (“Restated Buffalo Trackage Rights Agreement” or “Agreement”) is made this 30th day of September, 2004 by and between NORFOLK SOUTHERN RAILWAY COMPANY, a Virginia corporation (“Norfolk Southern”) and CANADIAN PACIFIC RAILWAY COMPANY, a Canadian corporation (“CPRC”). Norfolk Southern and CPRC are sometimes referred to hereinafter individually as a “Party” and collectively as the “Parties”.

WITNESSETH:

WHEREAS, Consolidated Rail Corporation and CPRC’s affiliate, Delaware and Hudson Railway Company, Inc. (“D&H”) are parties to that certain Agreement dated as of April 25, 1979 (the “1979 Agreement”) and that certain Supplemental Agreement dated as of December 13, 1990 (the “1990 Supplement”), pursuant to which D&H exercises trackage rights over certain lines of railroad now owned and operated by Norfolk Southern; and

WHEREAS, pursuant to that certain Partial Assignment of Trackage Rights (the “Assignment”) among D&H, CPRC and Norfolk Southern of even date herewith, D&H has assigned to CPRC, and CPRC has accepted from D&H assignment of, D&H’s existing trackage rights over certain lines of Norfolk Southern in the vicinity of Buffalo, NY, which D&H holds pursuant to the 1979 Agreement and the 1990 Supplement; and

WHEREAS, Norfolk Southern and CPRC desire to amend and restate the terms and conditions upon which CPRC shall exercise the trackage rights over Norfolk Southern’s lines in the vicinity of Buffalo, NY assigned to it by D&H pursuant to the Assignment;

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

SECTION 1. GRANT OF TRACKAGE RIGHTS

(a) On the terms and subject to the conditions herein provided, Norfolk Southern hereby grants to CPRC the right to operate its trains, locomotives, cars and equipment with its own crews (such rights being referred to hereinafter as the “Subject Trackage Rights”) over the following Norfolk Southern railroad lines, all as shown in detail on Exhibit A to this Agreement:

- (i) Norfolk Southern’s Southern Tier Line between MP 413.0 ± and the western end of the Southern Tier Line at MP 419.8±, including tracks into Norfolk Southern’s Bison Yard; and
- (ii) Norfolk Southern’s Bison Running Track between the point of connection with the Southern Tier Line at MP 419.8 ± and the point of connection between the lines of Norfolk Southern and the lines of CSX Transportation Inc. (“CSXT”) at MP 423.3±; and
- (iii) Norfolk Southern’s Howard Street Running Track between a point of connection with the Bison Running Track at MP 420.15 ± and the point of connection between

the lines of Norfolk Southern and the lines of CSXT at MP 422.3 ±. The lines described in this Section 1(a) are referred to collectively hereinafter as the "Subject Trackage."

SECTION 2. USE OF SUBJECT TRACKAGE

(a) CPRC's use of the Subject Trackage shall be in common with Norfolk Southern, and Norfolk Southern's right to use the Subject Trackage shall not be diminished by this Restated Buffalo Trackage Rights Agreement.

(b) CPRC may operate trains in either direction over the Subject Trackage.

(c) CPRC may use the Subject Trackage solely for the following purposes:

(i) delivering to, and receiving from, Norfolk Southern at Bison Yard rail cars interchanged between CPRC, on the one hand, and Norfolk Southern, on the other hand ("CPRC-NS Buffalo Interchange Cars");

(ii) delivering to, and receiving from, Norfolk Southern at Bison Yard D&H Haulage Cars (as defined in Section 1.01 of that certain Southern Tier Haulage Agreement between Norfolk Southern and D&H of even date herewith);

(iii) delivering to, and receiving from, Norfolk Southern at Bison Yard Buffalo Switch Cars (as defined in Section 2(b)] of that certain Bison Yard Terminal Services Agreement between Norfolk Southern, on the one hand, and CPRC and D&H, on the other hand, of even date herewith); and

(iv) turning locomotives used by CPRC in connection with the operations permitted by Sections 2(c)(i), (ii) and (iii).

(d) CPRC locomotives and crews operating over the Subject Trackage shall be equipped to communicate with Norfolk Southern on radio frequencies normally used by Norfolk Southern in directing train movements on the Subject Trackage.

(e) Procedures for qualification and occupancy of the Subject Trackage will be arranged by the local supervision of each carrier. CPRC's operations over the Subject Trackage shall at all times be subject to the direction and control of the Norfolk Southern operating officer in charge of the Subject Trackage and to applicable provisions of Norfolk Southern's safety and operating rules.

(f) Before a CPRC train enters the Subject Trackage, CPRC shall confirm to Norfolk Southern that the crew operating such CPRC train has the ability to make a complete and continuous movement over the Subject Trackage between the point of entry and Bison Yard (or vice versa).

(g) Norfolk Southern shall use its best efforts to allow, at no charge to CPRC, CPRC operating (train and engine) crews to utilize Norfolk Southern's personnel facilities at Bison Yard solely for changing crews on CPRC trains moving over the Subject Trackage. If

Norfolk Southern's existing personnel facilities are not adequate to accommodate both Norfolk Southern's and CPRC's personnel, Norfolk Southern shall permit CPRC to construct or locate its own facilities for such purpose at Bison Yard. In such event, CPRC shall pay the cost to establish such facilities at Bison Yard, and Norfolk Southern shall pay the cost of utilities provided to the facilities established by CPRC.

(h) Norfolk Southern shall provide CPRC equal access to the Norfolk Southern crew bus services in Buffalo, NY, if that is possible under Norfolk Southern's current contract for such services. If the provision of crew bus services to CPRC under Norfolk Southern's current contract is not possible, Norfolk Southern shall use its best efforts to obtain an amendment to its current contract to permit the provision of crew bus services to CPRC crews, and the incremental cost thereof shall be the responsibility of CPRC. If Norfolk Southern's current contract cannot be amended to permit the provision of crew bus services to CPRC, CPRC may arrange for its own crew bus services in Buffalo, NY.

(i) CPRC shall have the right to move in its own trains all dimensional loads and excess clearance rail cars which it may approve for movement over the Subject Trackage, subject to a clearance file (the "Clearance File") applicable to traffic of both Parties maintained by Norfolk Southern. Norfolk Southern shall promptly inform CPRC of any changes made to the Clearance File. Before any dimensional load or excess clearance rail car is proposed for movement by CPRC under this Agreement, it shall first notify Norfolk Southern in writing, giving all pertinent physical facts, and requesting verification. Norfolk Southern shall respond promptly either confirming the physical facts related to the proposed dimensional load(s) or excess clearance rail car(s) or specifically identifying the physical facts which would interfere with a planned move. In no event shall Norfolk Southern deny to CPRC the ability to tender a specific rail car for movement over the Subject Trackage and then subsequently grant approval for the same or similar movement over the Subject Trackage in a Norfolk Southern train unless CPRC receives timely notice that the limiting clearance or other reason for denial has been removed. The Parties shall cooperate to accommodate all dimensional loads and excess clearance rail cars, subject to compensation to Norfolk Southern for any special services necessary or advisable for the movement thereof at the rate charged by D&H to Norfolk Southern from time to time under that certain letter agreement between D&H and Norfolk Southern dated as of May 14, 2003.

SECTION 3. RESTRICTIONS ON USE

(a) The Subject Trackage Rights are granted for the sole purpose of CPRC using the Subject Trackage to operate its trains in overhead movements. CPRC trains may enter and exit the Subject Trackage only at (i) Milepost 422.3 ± of Norfolk Southern's Howard Street Running Track in Buffalo, NY, (ii) Bison Yard, and (iii) Milepost 423.3 + of Norfolk Southern's Bison Running Track in Buffalo, NY for the purpose of wying locomotives. The points of ingress and egress designated in this Section 3(a) are referred to herein as the "End Points." CPRC shall not have the right to enter or leave the Subject Trackage except at the End Points.

(b) CPRC shall not perform any local freight service whatsoever at any point located on Subject Trackage.

(c) CPRC shall not interchange any traffic with any other carrier, except with Norfolk Southern and D&H at Bison Yard, at any point on or along, or at the End Points of, the Subject Trackage. CPRC shall not have the right to serve existing or future shippers at facilities located on or along, or at the End Points of, the Subject Trackage.

(d) CPRC 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, cars or cabooses bad ordered en route, and to comply with customs requirements; provided, that CPRC shall use such auxiliary Subject Trackage as may be designated by NSR for such purposes.

(e) CPRC may not grant trackage rights of any nature on the Subject Trackage to other parties.

(f) Notwithstanding any other provision of this Restated Buffalo Trackage Rights Agreement to the contrary, CPRC may not permit or admit any third party to the use of all or any part of the Subject Trackage, nor may CPRC contract or make any agreement to provide haulage over the Subject Trackage of trains, locomotives, cars or cabooses of any third party which, in the normal course of business, would not be considered as the trains, locomotives, cars or cabooses of CPRC, or in any other way provide haulage service for other carriers over the Subject Trackage; provided, that this Section 3(f) shall not be construed to prohibit CPRC from using the locomotives, cars and cabooses of another railroad as its own in CPRC trains pursuant to a run-through agreement with any railroad, or a bona fide equipment lease.

(g) The Parties agree that rebilling of traffic in the Buffalo, NY area is not a permissible method of avoiding any direct traffic limitation set forth in this Agreement.

(h) This Restated Buffalo Trackage Rights Agreement is not intended to, and shall not operate to, expand or contract any Party's existing commercial access to, or right to serve (directly or through switching) any particular shipper facility. If, following the Commencement Date of this Agreement (as defined in Section 13(a) hereof), a new facility (including a transload facility) opens up, an existing facility expands or an existing facility changes ownership (in each case, a "New Facility"), CPRC's commercial access or right to serve such facility shall be the same as if such New Facility had existed prior to the Commencement Date of this Agreement, and shall be neither expanded nor reduced by this Agreement.

(i) The length of CPRC trains (including locomotives and other motive power units) operating on the Subject Trackage shall comply with operating policies applied to Norfolk Southern's own trains.

SECTION 4. SERVICE STANDARDS

(a) CPRC shall provide the Service Standards Committee notice of the schedules for regularly scheduled CPRC trains operating over the Subject Trackage, as well as any proposed modifications. CPRC shall provide the Service Standards Committee at least seven (7) days prior written notice of such changes in CPRC train schedules or frequencies, and notice as

reasonably practicable in the case of train annulments and extra trains necessitated by sudden or seasonal surges in traffic volumes.

(b) Norfolk Southern and CPRC shall establish a Service Standards Committee, consisting of appropriate operating personnel of each Party, which shall: (i) monitor, and periodically review, the performance of the Parties under this Restated Buffalo Trackage Rights Agreement, (ii) carry out such duties as may be assigned to it in this Agreement, including without limitation the prescription of protocols specifying the method and length of advance notice by CPRC to Norfolk Southern of train annulments and extra trains necessitated by sudden or seasonal surges in traffic volumes, (iii) review, and adjust as required from time to time, schedules for trains operating on the Subject Trackage, and (iv) address any other operating issues that may arise in connection with CPRC's operations hereunder. Meetings of the Service Standards Committee may be convened by either Party as required to fulfill its duties under this Agreement. The Service Standards Committee may meet by telephone or at such location as the Parties may agree.

SECTION 5. COMPENSATION

(a) []

SECTION 6. MAINTENANCE OF SUBJECT TRACKAGE

(a) Norfolk Southern shall be solely responsible for the maintenance, repair and renewal of the Subject Trackage. Norfolk Southern shall keep and maintain the Subject Trackage in reasonably good condition for the use herein contemplated, such condition not to be less than Federal Railroad Administration Class 2 (or any replacement of it), subject to slow orders and the like, but Norfolk Southern does not guarantee the condition of the Subject Trackage or that operations thereover will not be interrupted. Norfolk Southern shall take reasonable steps to ensure that any interruptions will be kept to a minimum and shall use its best efforts to avoid such interruptions.

(b) Norfolk Southern shall, in planning program maintenance of the Subject Trackage, take into account the schedule of CPRC trains on the Subject Trackage as well as Norfolk Southern trains. Norfolk Southern shall from time to time throughout the term of this Restated Buffalo Trackage Rights Agreement, through the Service Standards Committee, advise CPRC of its schedule for planned maintenance, and any revisions to such schedule, as soon as practicable after such maintenance plan is determined or revised. Norfolk Southern shall further provide the designated officer of CPRC with seven (7) days prior notice (or such lesser notice period as is reasonable in the circumstances) of substantial delays or line outages on the Subject Trackage due to planned maintenance.

SECTION 7. CONSTRUCTION AND MAINTENANCE OF CONNECTIONS

(a) 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.

SECTION 8. ADDITIONS, RETIREMENTS AND ALTERATIONS

(a) Norfolk Southern, 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. Such additions and betterments shall become a part of the Subject Trackage and such retirements shall be excluded from the Subject Trackage.

SECTION 9. MANAGEMENT AND OPERATIONS

(a) Norfolk Southern shall have exclusive control of the management and operation (including dispatching) of the Subject Trackage. Operation and control, including 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. For the purposes of dispatching, NSR's and CPRC's trains of the same class shall be treated with equal priority, with the four (4) classes of trains being:

1. Passenger
2. Intermodal and automotive
3. Regular (unit and freight trains not scheduled to set off/pick up en route)
4. 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 NSR dispatcher shall be empowered to deviate from the priorities set forth herein in order to employ best practices to efficiently move all trains.

(b) Norfolk Southern shall provide CPRC with read-only access to Norfolk Southern's Central Traffic Control screens covering the Subject Trackage in the offices of CPRC designated by CPRC. Norfolk Southern shall be responsible for the cost of modifying its system to the extent necessary to provide CPRC access to its Central Traffic Control screens, and CPRC shall be responsible for the cost of the communications link with CPRC and the costs to use such link incurred in CPRC's offices. Such access, and the information derived therefrom, shall be restricted to CPRC operating personnel designated by the Services Standards Committee, who shall only use said access, and the information derived therefrom, to monitor CPRC train movements and for no other purpose, and shall further protect the confidentiality of the information derived therefrom.

(c) CPRC 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. CPRC shall indemnify, protect, defend, and save harmless Norfolk Southern and its parent corporation, subsidiaries and affiliates, and all of their respective directors, officers, agents and employees from and against all fines, penalties and liabilities imposed upon Norfolk Southern or its parent corporation, subsidiaries or affiliates, or their respective directors, officers, agents and employees under such laws, rules, and regulations by any public authority or court having jurisdiction, when attributable solely to the failure of CPRC to comply with its obligations in this regard.

(d) CPRC in its use of the Subject Trackage shall comply in all respects with the safety rules, operating rules and other regulations of Norfolk Southern, and the movement of CPRC's trains, locomotives, cars, and equipment over the Subject Trackage shall at all times be subject to the orders of the transportation officers of Norfolk Southern; provided, however, that such safety rules, operating rules, other regulations and orders of the transportation officers of Norfolk Southern shall not unjustly discriminate between the Parties. Norfolk Southern will not make any rule or restriction applying to CPRC's trains that does not apply equally to Norfolk Southern's trains. CPRC'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 Norfolk Southern's operating rules and regulations, without the prior consent of Norfolk Southern. The Service Standards Committee shall make proper accommodation for exceptions, should that be reasonable, necessary and practicable. All CPRC trains shall be powered to permit operation at posted speeds.

(e) CPRC shall make such arrangements with Norfolk Southern 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. Norfolk Southern shall provide reasonable cooperation and assistance in the qualification of CPRC operating (train and engine) crews for service over the Subject Trackage as soon as the date such crews and Norfolk Southern personnel are available and the notice of exemption relating to the trackage rights governed by this Agreement has been filed with the STB. CPRC shall pay to Norfolk Southern, upon receipt of bills therefor, any cost incurred by Norfolk Southern in connection with the qualification of such employees of CPRC, as well as the cost of pilots furnished by Norfolk Southern until such time as such CPRC employees are deemed by the appropriate examining officer of Norfolk Southern to be properly qualified for operation as herein contemplated. CPRC or D&H supervisory personnel who have been qualified to operate over the Subject Trackage by an appropriate examining officer of Norfolk Southern may qualify other CPRC employees for operation of trains over the Subject Trackage.

(f) If any employee of CPRC shall neglect, refuse or fail to abide by the instructions and restrictions governing the operation on or along the Subject Trackage, Norfolk Southern shall so notify CPRC. Norfolk Southern shall have the right to require CPRC promptly to

withhold any CPRC employees from service over the Subject Trackage pending the results of a formal investigation of the alleged neglect, refusal or failure. After the notice is given to CPRC, CPRC and Norfolk Southern shall promptly hold a joint investigation, in which each of the Parties shall bear the expenses of its own employees and witnesses. Notice of such investigation to CPRC employees shall be given by CPRC officers. The investigation shall be conducted in accordance with any applicable terms and conditions of schedule agreements between CPRC and its employees. If the result of such investigation warrants, such employee shall, upon written request by Norfolk Southern, be restricted by CPRC from service on the Subject Trackage, and CPRC shall release and indemnify Norfolk Southern from and against any and all claims and expenses because of such withdrawal.

(g) In the event that a CPRC train shall be forced to stop on the Subject Trackage, due to mechanical failure of CPRC's equipment or any other cause (mechanical or otherwise) not resulting from an accident or derailment, and such train is unable to proceed, or if a CPRC train fails to maintain the speed required by Norfolk Southern on the Subject Trackage, or if in emergencies, bad ordered or otherwise defective cars are set out of a CPRC train on the Subject Trackage, Norfolk Southern shall have the option to furnish motive power or such other assistance (mechanical or otherwise) as may be necessary to haul, help or push such trains, locomotives or cars, or to properly move the disabled equipment off the Subject Trackage. CPRC shall reimburse Norfolk Southern for the cost of rendering any such assistance. If it becomes necessary to make repairs to or adjust or transfer the lading of such disabled or defective cars in order to move them off the Subject Trackage, Norfolk Southern shall arrange for such work to be done, and CPRC shall reimburse Norfolk Southern for the cost thereof.

(h) Whenever CPRC's use of the Subject Trackage requires rerailling, wrecking service or wrecking train service, Norfolk Southern shall arrange for the provision of such service, including the repair and restoration of roadbed, the Subject Trackage and structures. The 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 11 hereof. All locomotives, cars, and 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 CPRC at the time of such wreck, shall be promptly delivered to it.

(i) If any cars, cabooses, or locomotives of CPRC are bad ordered en route on the Subject Trackage and it is necessary that they be set out, those cars, cabooses or locomotives shall, after being repaired, be picked up by CPRC. Norfolk Southern may, upon request of CPRC and at the expense of CPRC, 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.

(j) CPRC shall not have any claim against Norfolk Southern for liability on account of loss or damage of any kind in the event the use of the Subject Trackage by CPRC is interrupted or delayed at any time from any cause.

(k) Norfolk Southern shall make best efforts to provide the designated officer of CPRC with prompt notice of any unplanned substantial delays or line outages on the Subject Trackage, and shall promptly advise the designated officer of CPRC of the resumption of normal service on the Subject Trackage.

SECTION 10. MILEAGE AND CAR HIRE

(a) All mileage and car hire charges accruing on cars in CPRC's trains on the Subject Trackage shall be assumed by CPRC and reported and paid by it directly.

SECTION 11. LIABILITY

The responsibility between the Parties hereto for loss of, damage to, and destruction of any property whatsoever and injury to and death of any person or persons whomsoever, arising out of, incidental to or occurring in connection with this Restated Buffalo Trackage Rights Agreement, also expressly including, without limitation, all liabilities arising after the Commencement Date hereof under FELA and environmental laws but excluding consequential damages of any Party hereto (which are always borne by the Party which sustained them) and excluding claims for exemplary and punitive damages, hereinafter referred to as "Damage," shall be apportioned as follows without regard to fault or negligence:

(a) If Damage occurs involving solely the trains, locomotives, equipment or employees of one of the Parties, then that Party shall be solely responsible for such Damage, even if caused partially or completely by another Party.

(b) If Damage occurs involving the trains, locomotives, equipment and/or employees of both Norfolk Southern and CPRC, then (i) Norfolk Southern and CPRC each shall be solely responsible for any Damage to its own employees, locomotives and equipment and those cars in its own revenue account (including lading) ("Norfolk Southern Equipment" and "CPRC Equipment," respectively, and collectively, the "Equipment"), and (ii) the Parties shall each be responsible for 50 percent of the Damage to the Subject Trackage and associated facilities and any Damage sustained by third parties, regardless of the proportionate responsibility between them as to the cause of the Damage.

(c) For the purposes of assigning responsibility for Damage under this Section as between the Parties hereto, the trains of a third party or parties operating on the Subject Trackage shall be considered to be the trains of Norfolk Southern.

(d) Notwithstanding anything to the contrary in Sections 11(a), (b) and (c), above, when any damage to or destruction of the environment, including without limitation land, air, water, wildlife, and vegetation, occurs with one or more trains of the Parties involved, then, as between themselves, the Parties agree that (i) Norfolk Southern shall be solely responsible for any damage or destruction to the environment and to third parties which results solely from a

substance transported in Norfolk Southern Equipment from which there was a release, (ii) CPRC shall be solely responsible for any damage or destruction to the environment and to third parties which results solely from a substance transported in CPRC Equipment from which there was a release, and (iii) Norfolk Southern and CPRC shall be responsible, in proportion to the total number of pieces of Equipment of each Party from which there was a release, for any damage or destruction to the environment and to third parties which results solely from one or more substances transported in both Norfolk Southern Equipment and CPRC Equipment from which there was a release.

(e) CPRC and Norfolk Southern each shall be responsible for the payment, handling, administration and disposition of all Damage for which it bears exclusive responsibility under this Section 11, and CPRC and Norfolk Southern shall have joint responsibility for the payment, handling, administration and disposition of all Damage for which they are jointly responsible under this Section 11. In assigning joint responsibility to both CPRC and Norfolk Southern, it is not intended that CPRC and Norfolk Southern will, in all instances, actually act jointly, but rather that they will agree between themselves on the most practical and efficient arrangement for handling, administering, and disposing of Damage for which they bear joint responsibility, with the objective of eliminating unnecessary duplication of effort and minimizing overall costs.

(f) Each Party covenants and agrees (i) to indemnify and save harmless the other Party from and against any payments which are the responsibility of such Party under this Restated Buffalo Trackage Rights Agreement, and all expenses, including attorney's fees and expenses, and any other expenses of any court or regulatory proceeding, incurred by the indemnified Party in defending any claim for which the responsible Party is liable, and (ii) to defend such indemnified Party against such claims with counsel selected by the responsible Party and reasonably acceptable to the indemnified Party.

(g) Notwithstanding anything to the contrary in this Section 11, whenever Damage occurs with one or more trains being involved, and one or more of the involved trains is a CPRC train, and such Damage is attributable solely to the gross negligence or willful or wanton misconduct of only one of the Parties to this Agreement, and such gross negligence or willful or wanton misconduct is the direct or proximate cause of such 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 Damage. The Parties agree that, for purposes of this Section 11(g), "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."

(h) Notwithstanding any provision of this Section 11 to the contrary, each Party shall assume and bear all responsibility for any Damage caused by acts or omissions of any its employees while under the influence of drugs or alcohol.

(i) If any suit or action shall be brought against either Party for Damage which under the provisions of this Restated Buffalo Trackage Rights Agreement is in whole or in part

the responsibility of the other Party, said other 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 a proportionate part of the judgment and costs, expenses and attorneys' fees incurred in such suit according to its liability assumed hereunder.

(j) For purposes of determining liability under this Section 11, pilots furnished by Norfolk Southern to CPRC pursuant to this Restated Buffalo Trackage Rights Agreement shall be considered to be the employees of CPRC while such pilots are on board or getting on or off CPRC trains.

(k) Notwithstanding any provision of this Restated Buffalo Trackage Rights Agreement to the contrary, for the purpose of this Section 11, the word "Equipment" shall mean and be confined to (i) cabooses, (ii) vehicles and machinery which are capable of being operated on railroad tracks that, at the time of an occurrence, are being operated on the Subject Trackage, and (iii) vehicles and machinery that, at the time of an occurrence, are on the Subject Trackage or its right of way for the purpose of maintenance or repair thereof or the clearing of wrecks thereon.

SECTION 12. CLAIMS

(a) 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.

(b) Each of CPRC and Norfolk Southern 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 CPRC and Norfolk Southern 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 13. TERM, DEFAULT AND TERMINATION

(a) This Restated Buffalo Trackage Rights Agreement shall become effective ("Effective Date") as of the first date executed by each of the Parties. However, CPRC operations over the Subject Trackage shall not commence until a date (the "Commencement Date") mutually agreed in writing between NSR and CPRC, which shall not occur until the effective date of any required U.S. Surface Transportation Board ("STB") authorization or exemption of D&H's proposed discontinuance of trackage rights on NSR's line between Buffalo

and Binghamton, NY (including compliance with any condition(s) imposed by the STB in connection with such approval or exemption).

(b) This Restated Buffalo Trackage Rights Agreement shall remain in full force and effect until mutually terminated by the Parties. The Initial Term of this Agreement shall be twenty-five (25) years from the Commencement Date, and shall be renewable continuously thereafter for additional periods of ten (10) years ("Additional Term(s)"). At the end of the Initial Term, CPRC may, at its option, (i) extend this Agreement under the same terms and conditions for one Additional Term, or (ii) require renegotiation of the Agreement. At the end of the first (and any subsequent) Additional Term, either NSR or CPRC may extend the Agreement under the then-current terms and conditions, or require renegotiation of the agreement. In either case, the notice to continue the then-current terms and conditions or to require renegotiation shall be given by CPRC or NSR, as the case may be, by giving the other Party advance written notice at least six (6) months prior to the expiration of the then-current term. If the Parties cannot agree upon the terms and conditions upon which the trackage rights granted herein may be exercised by CPRC during such Additional Term, either Party may submit any open provisions to binding arbitration pursuant to Section 14. The arbitrator shall be instructed to take into consideration the relative economic positions of the Parties under this Agreement, and intent of the Parties, in each case at the time this Agreement was executed, as well as any significant operating, economic and/or technological changes that have occurred in the interim. The effective date for the new terms and conditions, whether reached by negotiation or arbitration, shall be deemed to be the first day of the relevant Additional Term.

(c) In the event that railroad operations, technology or other events create, in the view of one Party to this Agreement, a disparity such that the terms and conditions of this Agreement over time no longer reflect the intention of the Parties in a substantial and material way, and such disparity has a material and substantial adverse effect on said Party, that Party may give notice of such to the other Party, who shall negotiate in good faith modification of this Agreement in order to address and possibly remove said perceived disparity. Should the Parties fail to reach agreement with regard to such perceived disparity, the concerned Party may invoke mediation or other methods of non-binding alternative dispute resolution, in which the other Party agrees to participate in good faith.

(d) CPRC shall have the right to terminate this Restated Buffalo Trackage Rights Agreement upon giving Norfolk Southern at least thirty (30) days prior written notice of such termination. Such termination shall be considered to be a termination of both this Restated Buffalo Trackage Rights Agreement and the underlying right of movement.

(e) Termination of this Restated Buffalo Trackage Rights Agreement shall not relieve or release either 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 Restated Buffalo Trackage Rights Agreement prior to termination thereof.

(f) In the event of any substantial failure on the part of any Party to perform its obligations provided under the terms of this Restated Buffalo Trackage Rights Agreement and its continuance in such default for a period of sixty (60) days after written notice thereof by certified

mail from another Party, the non-defaulting Party shall have the right at its option, after first giving thirty (30) days written notice thereof by certified mail, and notwithstanding any waiver by such Party of any prior breach thereof, to refer such matter to arbitration pursuant to Section 14 and seek damages and/or specific performance of the terms of this Agreement from the defaulting Party. In the case of a substantial default by CPRC which continues after adjudication of such default through arbitration, Norfolk Southern may terminate this Restated Buffalo Trackage Rights Agreement and the underlying right of movement if CPRC fails to cure such substantial default within: (i) thirty (30) days of the receipt of notice of continued default in the case of such a default in an obligation to pay Norfolk Southern of CPRC, (ii) fourteen (14) days of the receipt of notice of continued default in the case of such a default under Section 3(b), (c), (d), (f), (g) or (h); and (iii) ninety (90) days of the receipt notice of continued default in the case of any other such default under this Restated Buffalo Trackage Rights Agreement.

SECTION 14. ARBITRATION

(a) Any dispute arising between the Parties with respect to this Restated Buffalo Trackage Rights Agreement 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 single arbitrator before the American Arbitration Association under the Commercial Arbitration Rules. The decision of the arbitrator shall be final and conclusive upon the Parties. 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 the Parties, with CPRC paying fifty (50) percent and Norfolk Southern paying fifty (50) percent. The arbitrator shall not have the power to award consequential or punitive damages or to determine violations of criminal or antitrust laws. Pending the award of the arbitrator, there shall be no interruption in the transaction of business under this Restated Buffalo Trackage Rights Agreement, and all payments in respect thereto shall be made 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 payment or restitution shall be made as required by the decision of the arbitrator.

SECTION 15. ABANDONMENT

(a) Norfolk Southern 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 Initial Term, or any Additional Term, of this Restated Buffalo Trackage Rights Agreement. Norfolk Southern shall provide CPRC no less than ninety (90) days prior notice of its intention to seek to abandon any Abandonment Segment.

(b) If Norfolk Southern elects to abandon an Abandonment Segment, Norfolk Southern shall, not less than ninety (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 such Abandonment Segment, offer CPRC the first right to purchase the Abandonment Segment for the fair market value of such Abandonment Segment at the time of purchase, and on such other terms and conditions as are customary with respect to line sales by Norfolk Southern at the time. CPRC shall have sixty (60) days

("Abandonment Notice Period") within which to advise Norfolk Southern 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 that CPRC wishes to purchase, either Party may refer the issue to arbitration pursuant to Section 14, which such arbitration shall determine all 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 a selection of the arbitrator 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.

(c) The Parties shall consummate the sale contemplated by this Section 15 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.

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

(i) In the event of a Waiver Notice, CPRC 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.

(e) A Waiver Notice shall constitute a waiver by CPRC of its statutory rights, if any at the time of the abandonment, to purchase or otherwise subsidize operations over the Abandonment Segment pursuant to an offer of financial assistance or other applicable method.

SECTION 16. SUCCESSORS AND ASSIGNS

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

(b) Except as provided in Section 16(c) and (d), CPRC may not assign this Agreement, or any of its rights, interests or obligations hereunder, including by operation of law, without the prior consent in writing of Norfolk Southern, which consent Norfolk Southern may withhold at its discretion.

(c) In the event of a sale of substantially all of the assets or business of CPRC, or the merger or consolidation of CPRC into a firm or corporation not controlled by CPRC, CPRC may assign this Agreement to such firm or corporation acquiring substantially all of the assets or business of CPRC, or merging or consolidating with CPRC.

(d) In the event of a sale or lease of substantially all of the assets or business of NSR, or the merger or consolidation of NSR into a firm or corporation not controlled by Norfolk

Southern Corporation, NSR may, without the prior consent of D&H, assign this Agreement to such firm or corporation acquiring the assets or business of NSR, or merging or consolidating with NSR.

SECTION 17. NOTICE

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

If to CPRC: General Manager – Interline Management
Canadian Pacific Railway Company
Gulf Canada Square
401 9th Avenue SW
Calgary, Alberta, Canada T2P 4Z4

with a copy to:

Manager Interline Agreement Management
Canadian Pacific Railway Company
Gulf Canada Square
401 9th Avenue SW
Calgary, Alberta, Canada T2P 4Z4

If to Norfolk Southern:

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

with a copy to:

Senior Director – Joint Facilities
Norfolk Southern Corporation
185 Spring Street, SW, Box 158
Atlanta, Georgia 30303

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

SECTION 18. FORCE MAJEURE

The obligations, other than payment obligations, of the Parties to this Agreement shall be subject to force majeure (including strikes, riots, floods, accidents, Acts of God, acts of terrorism, 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 Restated Buffalo Trackage Rights Agreement, said Party shall take all reasonable measures including providing routing over alternate rail lines to the extent practicable (subject to reimbursement for incremental costs), and granting the right to enter and exit the Subject Trackage at locations other than the End Points in the case of a necessary detour, to restore performance of its obligations in a timely manner.

SECTION 19. 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 Restated Buffalo Trackage Rights Agreement, or as may be necessary or appropriate for a Party hereto to enforce its rights under this Restated Buffalo Trackage Rights Agreement, during the Initial Term and any Additional Terms, the terms and provisions of this Restated Buffalo Trackage Rights 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 such Party's officers, employees, and attorneys, without the prior written approval of the other Party.

SECTION 20. INDEMNITY COVERAGE

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

SECTION 21. REGULATORY APPROVAL

(a) Upon execution of this Restated Buffalo Trackage Rights Agreement by each of the Parties hereto, CPRC shall promptly file with the STB, and diligently prosecute, an appropriate notice of exemption with respect to the trackage rights covered by this Agreement.

SECTION 22. GENERAL PROVISIONS

(a) This Restated Buffalo Trackage Rights Agreement and each and every provision hereof are for the exclusive benefit of the Parties hereto and not for the benefit of any other person. Nothing herein contained shall be taken as creating or increasing any right of any other person to recover by way of damages or otherwise against any of the Parties hereto.

(b) This Restated Buffalo Trackage Rights Agreement contains the entire understanding of the Parties hereto with respect to its subject matter and supersedes any and all other agreements (including without limitation the 1979 Agreement and the 1990 Supplement) and understandings between the Parties.

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

(d) Each definition in this Restated Buffalo Trackage Rights Agreement includes the singular and the plural, and references in this Restated Buffalo Trackage Rights 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 Restated Buffalo Trackage Rights Agreement, the word "including" means "without limitation", and the words "herein", "hereof" and "hereunder" refer to this Restated Buffalo Trackage Rights Agreement as a whole. All dollar amounts stated herein are in United States currency.

(e) All words, terms and phrases used in this Restated Buffalo Trackage Rights Agreement shall be construed in accordance with the generally applicable definition or meaning of such words terms and phrases in the railroad industry.

(f) The division of this Restated Buffalo Trackage Rights Agreement into 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 Restated Buffalo Trackage Rights Agreement. Unless the context otherwise requires, all references herein to sections are to sections in this Restated Buffalo Trackage Rights Agreement.

(g) As used in this Restated Buffalo Trackage Rights 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 one of the Parties and includes such trains, locomotives, cars and equipment which are owned by, leased to, or moving in the trains of such Party. Whenever such locomotives, cars or equipment are owned or leased by one Party, but are in the possession of, or are being operated in a train of the other Party, such locomotives, cars and equipment shall be considered those of that other Party in whose possession or train such locomotives, cars and equipment are located.

(h) This Restated Buffalo Trackage Rights Agreement is the product of mutual negotiations of the Parties hereto, none of whom shall be considered the drafter for purposes of contract construction.

(i) 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 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.

(j) If any provision of this Restated Buffalo Trackage Rights 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 Restated Buffalo Trackage Rights 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 which produces a result which is substantially equivalent to the terms of this Restated Buffalo Trackage Rights Agreement in all material respects.

(k) Nothing herein shall be interpreted as creating an association, partnership, joint venture or other joint undertaking between Norfolk Southern and CPRC.

(l) This Restated Buffalo Trackage Rights Agreement shall be governed and interpreted in accordance with the laws of the State of New York, without regard to application of the choice of law principles thereof.

(m) This Restated Buffalo Trackage Rights Agreement may be executed in several counterparts, each of which will be deemed an original, and such counterparts shall constitute one and the same instrument.

(n) If the STB, in approving or exempting (if so required) any of the transactions contemplated by this Agreement, the Bison Yard Terminal Services Agreement, the Partial Assignment of Trackage Rights Agreements, the Surrender of SK Yard Lease, or the discontinuance of D&H's trackage rights over the Southern Tier line, imposes any condition (other than standard labor protective conditions) which would, in the sole judgment of NSR or D&H, materially reduce the benefits to that Party from said transactions, then the materially affected Party may in its sole discretion: (a) accept the condition and proceed with said transactions; (b) terminate said transactions collectively, or (c) appeal such condition judicially and postpone the Commencement Date for up to thirty (30) months until final action on its appeal; and if such appeal is unsuccessful, either (i) reject the condition and terminate said transactions, or (ii) accept the condition and proceed with said transactions..

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

WITNESS:

NORFOLK SOUTHERN RAILWAY
COMPANY

W.E. Johnson

By Charles W. Moorman
Charles W. Moorman
~~Executive Vice President - Corporate~~
~~Planning & Services~~

WITNESS:

CANADIAN PACIFIC RAILWAY
COMPANY

By _____
Fred Green, Executive Vice President
Operations and Marketing

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

WITNESS:

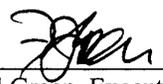
NORFOLK SOUTHERN RAILWAY
COMPANY

By _____

WITNESS:

CANADIAN PACIFIC RAILWAY
COMPANY

D. F. R. A.

By  _____

Fred Green, Executive Vice President
Operations and Marketing

EXHIBIT 3

Exhibit 3

SURFACE TRANSPORTATION BOARD

Notice of Exemption

Finance Docket No. 34561

Canadian Pacific Railway Company – Trackage Rights Exemption – Norfolk Southern Railway Company

Norfolk Southern Railway Company (“NSR”) has agreed to grant overhead trackage rights to Canadian Pacific Railway Company (“CPRC”) to permit CPR to operate over the following NSR lines in Buffalo, Erie County, NY,: (i) NSR’s Southern Tier Line between Milepost 413.0 ± and the western end of the Southern Tier Line at Milepost 419.8± (including tracks into and within NSR’s Bison Yard); a distance of approximately 6.8 miles; (ii) NSR’s Bison Running Track between the point of connection with the Southern Tier Line at MP 419.8 ± and the point of connection with CSX Transportation, Inc. (“CSXT”) at the western end of the Bison Running Track at MP 423.3±, a distance of approximately 3.5 miles; and (iii) NSR’s Howard Street Running Track between a point of connection with the Bison Running Track at MP 420.15 ± and the point of connection between the lines of NSR and the lines of CSXT at MP 422.3 ±, distance of approximately 2.15 miles, for a total distance of approximately 12.45 miles.

The trackage rights will be effective on a date mutually agreed in writing between CPRC and NSR, which shall not occur until the effective date of any required Board approval of the Petition for Exemption filed by CPRC’s affiliate, Delaware and Hudson Railway Company, Inc. in Docket No. AB-156 (Sub-No. 25X), *Delaware and Hudson Railway Company – Discontinuance of Trackage Rights Between Lanesboro, NY and Buffalo, NY* (including compliance with any condition(s) imposed by the STB in connection with such approval or exemption).

This notice is filed under Section 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

BAKER & MILLER PLLC

ATTORNEYS and COUNSELLORS
2401 PENNSYLVANIA AVENUE, NW
SUITE 300
WASHINGTON, DC 20037

TELEPHONE: (202) 663-7820
FACSIMILE: (202) 663-7849

WILLIAM A. MULLINS

237057
ENTERED
Office of Proceedings
November 17, 2014
Part of
Public Record

(202) 663-7823 (Direct Dial)
E-Mail: wmullins@bakerandmiller.com

November 17, 2014

BY HAND DELIVERY

Cynthia T. Brown, Chief
Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington DC 20423-0001

Re: *Norfolk Southern Railway Company – Trackage Rights Exemption -
Delaware and Hudson Railway Company, Inc.*, STB Docket No. F.D.
34209 (Sub-No. 1)

Dear Ms. Brown:

Enclosed for filing in the above-captioned proceeding are an original and 10 copies of a Verified Notice of Exemption for Norfolk Southern Railway Company, pursuant to 49 C.F.R. § 1180.2(d)(7). A check in the amount of \$1,200.00 is enclosed to cover the applicable filing fee.

Please acknowledge receipt of this filing by date-stamping the enclosed acknowledgment copy and returning it to our courier.

Sincerely,

FEE RECEIVED
November 17, 2014
SURFACE
TRANSPORTATION BOARD

FILED
November 17, 2014
SURFACE
TRANSPORTATION BOARD


William A. Mullins
Norfolk Southern Railway Company

Enclosures

cc: Maquiling Parkerson
Marc Kirchner



**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET 34209 (SUB-NO. 1)

**NORFOLK SOUTHERN RAILWAY COMPANY -
TRACKAGE RIGHTS EXEMPTION – DELAWARE AND HUDSON RAILWAY
COMPANY, INC.**

NOTICE OF EXEMPTION

**Maquiling B. Parkerson
General Attorney
Norfolk Southern Corporation
Three Commercial Place
Norfolk, Virginia 23510
Telephone: (757) 533-4939
Facsimile: (757) 533-4872**

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

**Attorneys for Norfolk Southern Railway
Company**

November 17, 2014



**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET 34209 (SUB-NO. 1)

**NORFOLK SOUTHERN RAILWAY COMPANY -
TRACKAGE RIGHTS EXEMPTION – DELAWARE AND HUDSON RAILWAY
COMPANY, INC.**

NOTICE OF EXEMPTION

Norfolk Southern Railway Company ("NS") submits this Notice of Exemption ("Notice"), pursuant to 49 C.F.R. § 1180.2(d)(7) and the procedures at 49 C.F.R. § 1180.4(g), to allow NS to retain approximately 17.45 miles of existing overhead trackage rights,¹ pursuant to a draft written trackage rights agreement (the "Agreement") between NS and Delaware and Hudson Railway Company, Inc. ("D&H"), a wholly owned, indirect subsidiary of Canadian Pacific Railway Company ("CP"). Per the Agreement, NS seeks to modify and retain approximately 17.45 miles of existing NS trackage rights over D&H's line between MP 484.85 ± in the vicinity of Schenectady, NY and CPF 467 in the vicinity of Mechanicville, NY, including the right to use such track(s) within D&H's Mohawk Yard as shall be designated from time to time by the D&H officer in charge of operations at Mohawk Yard.²

¹ The 17.45 miles of trackage rights which are being retained are a portion of the 284.6 miles of trackage rights originally authorized in Norfolk Southern Railway Company – Trackage Rights Exemption – Delaware And Hudson Railway Company, Inc., FD 34209 (STB served July 25, 2002).

² The proposed retention and modification of approximately 17.45 miles of existing overhead trackage rights is part of a simultaneously filed larger transaction, in which, NS has filed for acquisition and operation authority over 282.55 miles of D&H rail lines located in Pennsylvania and New York (the "D&H South Lines"), including any and all other tracks related to or auxiliary to the acquired lines. See Norfolk Southern Railway Company – Acquisition and

SECTION 1180.2 (d)(7)
GROUNDS FOR EXEMPTION

Under 49 C.F.R. § 1180.2(d)(7), the acquisition, renewal, or modification of trackage rights by a rail carrier over the lines owned or operated by any other rail carrier or carriers is exempt if the rights are: (i) based on a written agreement, and (ii) not filed or sought in a responsive application in rail consolidation proceedings. The trackage rights at issue in this proceeding are based upon a draft written agreement, a redacted version of which is attached hereto as Exhibit 2, and are not being sought in a responsive application in a rail consolidation proceeding.³ Thus, the Section 1180.2(d)(7) class exemption is applicable.

For a railroad to qualify for an exemption, it must file a verified notice of the transaction with the Board at least 30 days before the transaction is consummated indicating the proposed consummation date, and the notice must include the information required in § 1180.6(a)(1)(i)-(iii), (a)(5)-(6), and (a)(7)(ii), and indicate the level of labor protection to be imposed.⁴

SECTION 1180.6 (a)(1)(i)
SUMMARY OF PROPOSED TRANSACTION

Pursuant to a draft written Agreement between NS and D&H (attached hereto as Exhibit 2), NS seeks to retain approximately 17.45 miles of existing NS trackage rights over D&H's line between MP 484.85 ± in the vicinity of Schenectady, NY and CPF 467 in the vicinity of Mechanicville, NY, including the right to use such track(s) within D&H's Mohawk Yard as shall be designated from time to time by the D&H officer in charge of operations at Mohawk Yard. These rights are a portion of the 284.6 miles of trackage rights granted in

Operation – Certain Rail Lines of Delaware and Hudson Railway Company, Inc., FD 35873, filed concurrently with this Notice (the “Transaction”).

³ Pursuant to 49 C.F.R. §1180.6(a)(7)(ii), NS will submit, within 10 days of its execution, an executed copy of the Agreement.

⁴ See 49 C.F.R. § 1180.4(g).

FD 34209. If the Transaction in FD 35873 is approved, the portion of NS's existing rights between Sunbury, PA and Schenectady, NY authorized in FD 34209 will be subsumed into NS's ownership of that portion of the line authorized in that Transaction. However, NS will continue to need and use the portion of the previously authorized trackage rights between Schenectady and Mechanicville. As such, NS is modifying and amending the end point of the line so that its trackage rights will now be between MP 484.85 ± in the vicinity of Schenectady, NY and CPF 467 in the vicinity of Mechanicville, NY, including the right to use such track(s) within D&H's Mohawk Yard as shall be designated from time to time by the D&H officer in charge of operations at Mohawk Yard, which will ensure NS's continued access to NS's Mechanicville Terminal and NS's continued interchange with Pan Am Southern LLC ("PAS").

Name, business address, and telephone number of Applicant:

Norfolk Southern Railway Company
Three Commercial Place
Norfolk, VA 23510
Tel: (757) 533-4939

Questions regarding this transaction are to be addressed to Applicant's representatives:

William A. Mullins
Crystal M. Zorbaugh
BAKER & MILLER PLLC
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SECTION 1180.6 (a)(1)(ii)
PROPOSED TIME SCHEDULE FOR CONSUMMATION

NS intends to consummate this transaction no sooner than December __, 2014 (the anticipated effective date of the transaction), or when the related proceeding filed in FD 35873 is approved and consummated, whichever is later.

SECTION 1180.6 (a)(1)(iii)
PURPOSE SOUGHT TO BE ACCOMPLISHED BY TRANSACTION

The trackage rights are necessary for NS's continued access to its Mechanicville Terminal and NS's continued interchange with Pan Am Southern LLC. The Agreement is related to a larger transaction whereby NS seeks authority to acquire certain rail lines owned by D&H in order to enhance competition and improve operating efficiencies and service.

SECTION 1180.6 (a)(5)
STATES IN WHICH PROPERTY OF THE APPLICANT IS SITUATED

NS owns rail lines in the following 22 states: Alabama, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maryland, Michigan, Mississippi, Missouri, New Jersey, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, Virginia, and West Virginia.

SECTION 1180.6 (a)(6)
MAP

A map of the line subject to this transaction is attached hereto as Exhibit 1.

SECTION 1180.6 (a)(7)(ii)
AGREEMENT

A redacted version of the Agreement is attached as Exhibit 2, with highly confidential material redacted. An unredacted version of the Agreement will be provided to any party requesting it and upon issuance of an appropriate protective order.

SECTION 1180.4(g)(1)(i)
LABOR PROTECTIONS

NS does not anticipate any adverse labor impacts as a result of this transaction. However, NS agrees to imposition of the employee protective conditions established in Norfolk & Western Railway- Trackage Rights-Burlington Northern, Inc., 354 I.C.C. 605 (1978), as modified in Mendocino Coast Railway-Lease & Operate-California Western Railroad, 360 I.C.C. 653 (1980).

SECTION 1180.4(g)(2)(i)
CAPTION SUMMARY

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

SECTION 1180.4(g)(3)
ENVIRONMENTAL AND HISTORIC PRESERVATION MATTERS

Under 49 C.F.R. §§ 1105.6(c)(4) and 1105.8(b)(3), the proposed acquisition of trackage rights is exempt from environmental reporting requirements, and historic preservation reporting requirements.

Respectfully submitted,

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Attorneys for Norfolk Southern Railway Company

November 17, 2014

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET 34209 (SUB-NO. 1)

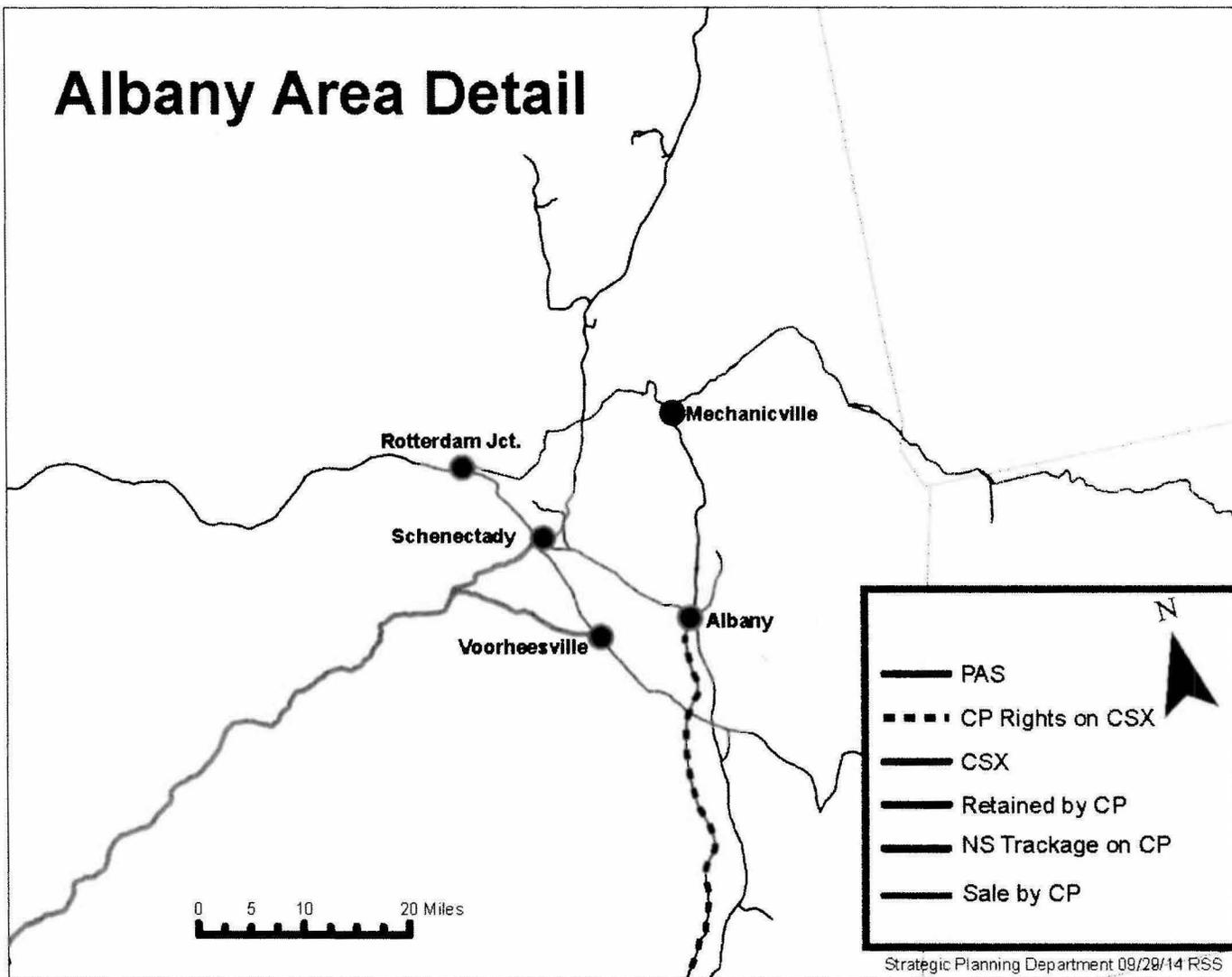
**NORFOLK SOUTHERN RAILWAY COMPANY -
TRACKAGE RIGHTS EXEMPTION – DELAWARE AND HUDSON RAILWAY
COMPANY, INC.**

NOTICE OF EXEMPTION

EXHIBIT 1

MAP

Albany Area Detail



**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET 34209 (SUB-NO. 1)

**NORFOLK SOUTHERN RAILWAY COMPANY -
TRACKAGE RIGHTS EXEMPTION – DELAWARE AND HUDSON RAILWAY
COMPANY, INC.**

NOTICE OF EXEMPTION

EXHIBIT 2

AGREEMENT (REDACTED)

**MODIFICATION AND RESTATEMENT OF
THE 2002 TRACKAGE RIGHTS AGREEMENT**

THIS MODIFICATION AND RESTATEMENT OF THE 2002 TRACKAGE RIGHTS AGREEMENT (“Agreement”) is made this ___ day of _____, 2014 by and between DELAWARE AND HUDSON RAILWAY COMPANY, INC., a Delaware corporation (“D&H”) and NORFOLK SOUTHERN RAILWAY COMPANY, a Virginia corporation (“NSR”). D&H and NSR are sometimes referred to hereinafter individually as a “Party” and collectively as the “Parties”.

RECITALS

A. NSR and D&H are parties to the Norfolk Southern/CPR Agreement on Northeast U.S. Restructuring dated June 27, 2002 (the “2002 Restructuring Agreement”), pursuant to which D&H agreed to grant trackage rights over its lines, including the segment from Sunbury/CP-Kase (Milepost CPF 752.0) to D&H’s connection with Pan Am Southern, LLC in Mechanicville, NY (Milepost CPF 467.40) (the “2002 Trackage Rights”).

B. NSR and D&H are parties to a Trackage Rights Agreement dated June 27, 2002, which contains the terms and conditions that apply to NSR’s trackage rights over the line segments specified in the 2002 Restructuring Agreement.

C. NSR and D&H are parties to the Asset Purchase Agreement (“APA”), dated _____, 2014 and related transaction documents pursuant to which D&H is selling to NSR, and NSR is purchasing from D&H and its subsidiaries, certain railroad properties, rights and facilities relating to a rail line between Sunbury/CP Kase, PA (Milepost CPF 752) and Schenectady, NY (Milepost CPF 484.85) (the “Transaction”).

D. Pursuant to the APA the Parties have agreed to modify NSR’s existing 2002 Trackage Rights over D&H’s line of railroad between Schenectady, NY and Mechanicville, NY (the “D&H Line”).

E. The Parties wish to modify and restate the terms and conditions upon which NSR may operate over the D&H Line.

NOW, THEREFORE, in consideration of the following mutual promises, the Parties agree as follows:

SECTION 1. GRANT OF TRACKAGE RIGHTS

(a) On the terms and subject to the conditions herein provided, D&H hereby grants to NSR the non-exclusive right to operate its overhead trains, locomotives, cars and equipment with its own crews (such rights being referred to hereinafter as the “Subject Trackage Rights”) over the following D&H railroad line, as shown in detail on Exhibit A to this Agreement:

D&H’s Freight Main Line between MP 484.85 ± in the vicinity of Schenectady, NY and CPF 467 in the vicinity of Mechanicville, NY, including the right to use such track(s)

within D&H's Mohawk Yard as shall be designated from time to time by the D&H officer in charge of operations at Mohawk Yard.

(b) The trackage described in this Section 1 is referred to as the "Subject Trackage."

SECTION 2. USE OF SUBJECT TRACKAGE

(a) NSR's use of the Subject Trackage shall be in common with D&H and any other user(s) of the Subject Trackage, and the rights of D&H's and such other user(s) to use the Subject Trackage shall not be diminished by this Agreement.

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

(c) NSR may use the Subject Trackage solely for the purpose of the overhead movement of trains consisting entirely of cars in the revenue waybill account of NSR.

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

(e) Procedures for qualification and occupancy of the Subject Trackage will be arranged by the local supervision of each carrier. NSR's operations over the Subject Trackage shall at all times be subject to the direction and control of the D&H operating officer in charge of the Subject Trackage and to applicable provisions of D&H's safety and operating rules.

(f) [REDACTED]

(g) NSR shall have the right to move in its own trains all dimensional loads and excess clearance rail cars which it may approve for movement over the Subject Trackage, subject to the clearance file ("Clearance File") maintained by D&H that is applicable to traffic of both Parties. D&H shall promptly inform NSR of any changes made to the Clearance File. Before any dimensional load or excess clearance rail car is proposed for movement by NSR under this Agreement, NSR shall first notify D&H in writing, giving all pertinent physical facts, and requesting verification. D&H shall respond promptly either confirming the physical facts related to the proposed dimensional load(s) or excess clearance rail car(s) or specifically identifying the physical facts which would interfere with a planned move. In no event shall D&H deny to NSR the ability to tender a specific rail car for movement over the Subject Trackage and then subsequently grant approval for the same or similar movement over the Subject Trackage in a D&H train unless NSR receives timely notice that the limiting clearance or other reason for denial has been removed. The Parties shall cooperate to accommodate all dimensional loads and excess clearance rail cars, subject to compensation to D&H in addition to the Trackage Rights Charges for any special services necessary or advisable for the movement thereof at the rate of [REDACTED], as escalated pursuant to the provisions of Section 5(b).

SECTION 3. RESTRICTIONS ON USE

(a) The Subject Trackage Rights are granted for the sole purpose of Norfolk Southern using the Subject Trackage to operate its trains in overhead movements. NSR trains may enter and exit the Subject Trackage only at Milepost 484.85 \pm of D&H's Freight Main Line in Schenectady, and Milepost CPF 467 \pm in Mechanicville. The points of ingress and egress designated in this Section 3(a) are referred to herein as the "End Points." NSR shall not have the right to enter or leave the Subject Trackage except at the End Points for the purpose of interchange with D&H at Mohawk Yard.

(b) NSR shall not perform any local freight service whatsoever at any point located on Subject Trackage.

(c) NSR shall not interchange any traffic with any other carrier, except with D&H at Mohawk Yard, at any point on or along, or at the End Points of, the Subject Trackage. NSR shall not have the right to serve existing or future shippers at facilities located on or along, or at the End Points of, the Subject Trackage.

(d) 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, cars or cabooses bad ordered en route; provided, that NSR may use such auxiliary Subject Trackage as may be designated by D&H for such purposes.

(e) NSR may not grant trackage rights of any nature on the Subject Trackage to other parties.

(f) Notwithstanding any other provision of this Agreement to the contrary, NSR may not permit or admit any third party to the use of all or any part of the Subject Trackage, nor may NSR contract or make any agreement to provide haulage over the Subject Trackage of trains, locomotives, cars or cabooses of any third party which, in the normal course of business, would not be considered as the trains, locomotives, cars or cabooses of NSR, or in any other way provide haulage service for other carriers over the Subject Trackage; provided, however, that this Section 3(f) shall not be construed to prohibit NSR from using the locomotives, cars and cabooses of another railroad as its own in NSR trains pursuant to a run-through agreement with any railroad, or a bona fide equipment lease.

(g) The Parties agree that rebilling of traffic in the Schenectady, NY area or the Mechanicville, NY area is not a permissible method of avoiding any direct traffic limitation set forth in this Agreement.

(h) This Agreement is not intended to, and shall not operate to, expand or contract any Party's existing commercial access to, or right to serve (directly or through switching) any particular shipper facility.

(i) The length of NSR trains (including locomotives and other motive power units) operating pursuant to this Agreement shall not exceed 9,200 feet, subject to compliance with operating policies applied to D&H's own trains. The maximum train length set forth in this

Section 3(i) may be adjusted by D&H and NSR from time to time consistent with D&H's governing operating practices and procedures.

(j) NSR's use of the Subject Trackage pursuant to this Agreement shall be subject to the following maximum volume limitation ("Maximum Volume Restriction"):

(i) [REDACTED]

(ii) [REDACTED]

(iii) If the Subject Trackage is unavailable to NSR due to a derailment, line outage or other interruption of service on the Subject Trackage, or if NSR experiences a derailment, an unintended line outage or other unintended interruption of service on its own lines connecting to, and necessary to reach, the Subject Trackage, in each case for a period of time (the "Outage Period") greater than twenty-four (24) hours, and no detour is available, then D&H shall cooperate and consult with NSR in order to address any resulting backlog of trains over a period of time ("Resolution Period") following the resolution of such derailment, line outage or other interruption of service (including the possibility of waiving the Maximum Volume Restriction set forth in this Section 3(j) for the Resolution Period as may be required to reduce such backlog of NSR trains), provided, however, that the Maximum Volume Restriction set forth in Section 3(j)(i) shall not be exceeded as measured over an average of the Outage Period plus the Resolution Period.

(k) If NSR develops further business such that additional NSR trains are required which necessitate the operation of trains in excess of the Maximum Volume Restriction ("Additional Trains"), NSR may request that D&H permit the operation of Additional Trains. D&H shall consider such a request in good faith and may in its discretion permit the operation of the number of Additional Trains specified by D&H. If D&H determines, through an Rail Traffic Controller capacity simulation (having regard to D&H's own present and future requirements and D&H's required reserve capacity), that facility changes, additions and betterments to D&H's line are necessary to accommodate the operation of Additional Trains ("Capacity Improvements"), D&H shall advise NSR of the required Capacity Improvements and the number of Additional Trains that would be permitted if the Capacity Improvements were constructed. If NSR wishes that the Capacity Improvements be made it shall request in writing that the Capacity Improvements be made by D&H at the sole cost and expense of NSR. If requested to do so by NSR, D&H shall construct the Capacity Improvements and upon completion of the construction of the Capacity Improvements and payment therefor by NSR, the Maximum Volume Restriction shall be amended to permit the operation of the number of Additional Trains specified by D&H.

SECTION 4. SERVICE STANDARDS

NSR shall provide D&H notice of the schedules for regularly scheduled NSR trains operating over the Subject Trackage, as well as any proposed modifications. NSR shall provide the Service Standards Committee at least seven (7) days prior written notice of such changes in NSR train schedules or frequencies, and notice as reasonably practicable in the case of train annulments and extra trains necessitated by sudden or seasonal surges in traffic volumes.

SECTION 5. COMPENSATION

(a) Generally.

(i) NSR shall compensate D&H for the use of the Subject Trackage by paying to D&H a sum computed by multiplying (a) the Trackage Rights Charges (as defined in Section 5(b) of this Agreement) by (b) the number of cars (loaded or empty) and locomotives moved over the Subject Trackage by (c) the miles of the Subject Trackage over which the cars and/or locomotives are moved (which are agreed to be 17.45 miles). In computing the compensation payable by NSR pursuant to this Section 5, cars that exceed ninety-six (96) feet in length shall be counted as one (1) car for each four (4) axles.

(b) The Trackage Rights Charges.

(i) The charge payable by NSR for use of the Subject Trackage shall initially be [REDACTED]

(ii) The Trackage Rights Charges shall be adjusted upward or downward effective July 1 each year, beginning July 1, 2016, to compensate D&H for one hundred percent (100%) of any increase or decrease in the cost of labor and material, excluding fuel, as reflected in the Annual Indexes of Charge-out Prices and Wage Rates (1977=100), Series RCR, included in "the AAR Railroad Cost Index" issued by the Association of American Railroads ("AAR"); provided, however, that the Trackage Rights Charges shall in no event be decreased to a level below those set forth in Section 5(b)(i) of this Agreement. In determining the amount (if any) of the annual adjustment, the final "Material prices, wage rates and supplements combined (excluding fuel)" index for the Eastern District shall be used, and the calendar year ending December 31, 2014 shall be deemed the "Base Calendar Year."

(iii) The first annual adjustment to the Trackage Rights Charges shall be computed by calculating the percentage of increase or decrease in the final index for the calendar year ending December 31, 2015, as related to the final index for the Base Calendar Year, and applying that percentage to the initial Trackage Rights Charges set forth in Section 5(b)(i). Subsequent annual adjustments will be computed by calculating the percentage of increase or decrease in the final index published for the calendar year immediately preceding the year in which the adjustment is to be applied, as related to the final index published for the Base Calendar Year, and applying that percentage to the initial Trackage Rights Charges set forth in Section 5(b)(i). By way of example, assuming "A" to be the "Material prices, wage rates and supplements combined

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(excluding fuel)” final index for the Base Calendar Year; “B” to be the “Material prices, wage rates and supplements combined (excluding fuel)” final index for the calendar year 2015; “C” to be the initial Trackage Rights Charges; “D” to be the percentage of increase or decrease, the adjusted Trackage Rights Charges to be applied on and after July 1, 2005 would be determined by the following formula:

(1) $(B - A) / A = D$

(2) $(C \times D) + C = \text{adjusted Trackage Rights Charges, effective July 1, 2016.}$

(iv) If the base for the “Annual Indices of Charge-out Prices and Wage Rates” issued by the AAR is changed from the year 1977, an appropriate revision shall be made in the base (established as herein provided) for the calendar year 1977. If the AAR or any successor organization discontinues publication of the “Annual Indices of Charge-out Prices and Wage Rates,” an equitable substitute for determining the annual percentage of increase or decrease shall be negotiated by the Parties. On or before the 15th day of each calendar month during the term of this Agreement, NSR shall prepare and deliver to D&H a statement setting forth the number of cars and miles operated on the Subject Trackage pursuant to this Agreement during the immediately preceding month (the “Monthly Statement”). The Monthly Statement shall be delivered to D&H’s Manager – Interline Agreement Management 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 respective End Points that the car moved between, (3) whether the car exceeded ninety-six (96) feet in length; (4) for each car exceeding ninety-six (96) feet in length, the number of axles on such car; and (5) any other information relating to such cars that D&H may reasonably request in connection with accounting for the use of the Subject Trackage Rights. D&H shall develop and present to NSR an invoice (the “Use Invoice”) computed in accordance with Section 5(a) for use of the Subject Trackage Rights covered by that Monthly Statement. NSR shall make payment to D&H within thirty (30) days after the date of such Use Invoice.

(v) 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 a 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 therefor is 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

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relevant Monthly Statement for statement adjustments and the date of the relevant Use Invoice for invoice adjustments.

(vi) NSR and D&H 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 Rights under this Agreement, and any Monthly Statement, Use Invoice or other invoice issued by NSR or D&H, respectively, pursuant to this Agreement, at any time within three (3) years of the date of the relevant Use Invoice or other invoice (as applicable) relating to use of the Subject Trackage Rights. All such audits shall be conducted at reasonable intervals, locations and times. Each Party agrees that, except as permitted by Section 19 of this Agreement, 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 as required by applicable law). Any adjustment resulting from an audit conducted pursuant to this Section 5(b)(vii) with respect to which the Parties are in concurrence shall be reflected in a subsequent Use Invoice.

(vii) Invoices rendered pursuant to the provisions of this Agreement, other than Use Invoices and charges under Section 9(i), shall include direct labor and material costs, together with the surcharges, overhead percentages and equipment rentals as specified by D&H at the time any work is performed by D&H for NSR, or shall include actual costs and expenses, upon mutual agreement of the Parties.

SECTION 6. MAINTENANCE OF SUBJECT TRACKAGE

(a) D&H shall be solely responsible for the maintenance, repair and renewal of the Subject Trackage. D&H shall keep and maintain the Subject Trackage in reasonably good condition for the use herein contemplated, such condition not to be less than Federal Railroad Administration class specification the Subject Trackage was as of the Effective Date of this Agreement, subject to slow orders and the like, but D&H does not guarantee the condition of the Subject Trackage or that operations thereover will not be interrupted. D&H shall take reasonable steps to ensure that any interruptions will be kept to a minimum and shall use its best efforts to avoid such interruptions.

(b) D&H shall, in planning program maintenance of the Subject Trackage, take into account the schedule of NSR trains on the Subject Trackage as well as D&H trains. D&H shall from time to time throughout the term of this Agreement, advise NSR of its schedule for planned maintenance, and any revisions to such schedule, as soon as practicable after such maintenance plan is determined or revised. D&H shall further provide the designated officer of NSR with seven (7) days prior notice (or such lesser notice period as is reasonable in the circumstances) of substantial delays or line outages on the Subject Trackage due to planned maintenance.

SECTION 7. CONSTRUCTION AND MAINTENANCE OF CONNECTIONS

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.

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(a) If, in the opinion of NSR, a new or upgraded connection is required at a point of permitted entry or exit other than the endpoints, or, if in the opinion of NSR, other upgrading, including but not limited to switches, power switches, signals, communications, is required for operational efficiency, then D&H will, subject to its own operational needs, cooperate and NSR will be responsible for funding that construction/upgrading at actual cost or a cost mutually agreed to by NSR and D&H. Such construction/ upgrading shall be progressed as follows:

(i) NSR or others shall furnish all labor and materials and shall construct such portions of the tracks located on the right-of-way of NSR or others, which connect the respective lines of the Parties.

(ii) D&H shall furnish all labor and material and shall construct such portions of the tracks located on the right-of-way operated by D&H, which connect the respective lines of the Parties. Upon termination of this Agreement, D&H may at its option remove any portion of trackage and appurtenances located on right-of-way, constructed as a result of this provision, at the sole cost and expense of NSR. D&H will release any salvage material removed to NSR or will credit NSR for the current fair market value of the salvage materials.

(iii) D&H will maintain, repair and renew the constructed/upgraded portions of the tracks located on the right of way operated by D&H that connect the respective lines of the Parties at the sole cost and expense of NSR.

SECTION 8. ADDITIONS, RETIREMENTS AND ALTERATIONS

(a) D&H, 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. Such additions and betterments shall become a part of the Subject Trackage and such retirements shall be excluded from the Subject Trackage.

(b) If the Parties agree that changes in or additions and betterment to the Subject Trackage, including changes in communication or signal facilities, are required to accommodate NSR's operations beyond that required by D&H to accommodate its operations, D&H shall construct the additional or altered facilities and NSR shall pay to D&H the cost thereof, including the annual expense of maintaining, repairing and renewing such additional or altered facilities.

SECTION 9. MANAGEMENT AND OPERATIONS

(a) D&H shall have exclusive control of the management and operation (including dispatching) of the Subject Trackage. Operation and control, including 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. For the purposes of dispatching, NSR's and D&H's trains of the same class shall be treated with equal priority, with the four (4) classes of trains being:

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1. Passenger
2. Intermodal and automotive
3. Regular (unit and freight trains not scheduled to set off/pick up en route)
4. 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 D&H dispatcher shall be empowered to deviate from the priorities set forth herein in order to employ best practices to efficiently move all trains.

(b) D&H shall provide NSR with read-only access to D&H's Central Traffic Control screens covering the Subject Trackage in the offices of NSR designated by NSR. D&H shall be responsible for the cost of modifying its system to the extent necessary to provide NSR access to its Central Traffic Control screens, and NSR shall be responsible for the cost of the communications link with D&H and the costs to use such link incurred in NSR's offices. Such access, and the information derived therefrom, shall be restricted to NSR operating personnel, who shall only use said access, and the information derived therefrom, to monitor NSR train movements and for no other purpose, and shall further protect the confidentiality of the information derived therefrom.

(c) NSR 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. NSR shall indemnify, protect, defend, and save harmless D&H and its parent corporation, subsidiaries and affiliates, and all of their respective directors, officers, agents and employees from and against all fines, penalties and liabilities imposed upon D&H or its parent corporation, subsidiaries or affiliates, or their respective directors, officers, agents and employees under such laws, rules, and regulations by any public authority or court having jurisdiction, when attributable solely to the failure of NSR to comply with its obligations in this regard.

NSR in its use of the Subject Trackage shall comply in all respects with the safety rules, operating rules and other regulations of D&H, 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 D&H; provided, however, that such safety rules, operating rules, other regulations and orders of the transportation officers of D&H shall not unjustly discriminate between the Parties. D&H will not make any rule or restriction applying to NSR's trains that does not apply equally to D&H's trains. 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 (which shall not be more restrictive than those in effect as of the Effective Date of this Agreement), 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 D&H's operating rules and regulations, without the prior consent of D&H. The Parties shall make proper accommodation for exceptions, should that be reasonable, necessary and practicable. All NSR trains shall be powered to permit operation at posted speeds.

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(d) NSR shall make such arrangements with D&H 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. D&H shall provide reasonable cooperation and assistance in the qualification of NSR operating (train and engine) crews for service over the Subject Trackage as soon as the date such crews and D&H personnel are available and the notice of exemption relating to the trackage rights governed by this Agreement has been filed with the U.S. Surface Transportation Board (“STB”). NSR shall pay to D&H, upon receipt of bills therefor, any cost incurred by D&H in connection with the qualification of such employees of NSR, as well as the cost of pilots furnished by D&H until such time as such NSR employees are deemed by the appropriate examining officer of D&H to be properly qualified for operation as herein contemplated. NSR or NSR supervisory personnel who have been qualified to operate over the Subject Trackage by an appropriate examining officer of D&H may qualify other NSR employees for operation of trains over the Subject Trackage.

(e) If any employee of NSR shall neglect, refuse or fail to abide by the instructions and restrictions governing the operation on or along the Subject Trackage, D&H shall so notify NSR. D&H shall have the right to require NSR promptly to withhold any NSR employees from service over the Subject Trackage pending the results of a formal investigation of the alleged neglect, refusal or failure. After the notice is given to NSR, D&H and NSR shall promptly hold a joint investigation, in which each of the Parties shall bear the expenses of its own employees and witnesses. Notice of such investigation to NSR employees shall be given by NSR officers. The investigation shall be conducted in accordance with any applicable 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 D&H, be restricted by NSR from service on the Subject Trackage, and NSR shall release and indemnify D&H from and against any and all claims and expenses because of such withdrawal.

(f) In the event that a NSR train shall be forced to stop on the Subject Trackage, due to any cause whatsoever (mechanical, crewing or otherwise) not resulting from an accident or derailment, and such train is unable to proceed, or if a NSR train fails to maintain the speed required by D&H on the Subject Trackage, or if in emergencies, bad ordered or otherwise defective cars are set out of a NSR train on the Subject Trackage, D&H shall have the option to furnish motive power or such other assistance (mechanical or otherwise) as may be necessary to haul, help or push such trains, locomotives or cars, or to properly move the disabled equipment off the Subject Trackage. NSR shall reimburse D&H for the cost of rendering any such assistance. If it becomes necessary to make repairs to or adjust or transfer the lading of such disabled or defective cars in order to move them off the Subject Trackage, D&H shall arrange for such work to be done, and NSR shall reimburse D&H for the cost thereof.

(g) Whenever NSR’s use of the Subject Trackage requires rerailling, wrecking service or wrecking train service, D&H shall arrange for the provision of such service, including the repair and restoration of roadbed, the Subject Trackage and structures. The 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 11 hereof. All locomotives, cars, and 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.

(h) If any cars, cabooses, or locomotives of NSR are bad ordered en route on the Subject Trackage and it is necessary that they be set out, those cars, cabooses or locomotives shall, after being repaired, be picked up by NSR. D&H 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.

(i) NSR shall not have any claim against D&H 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.

(j) D&H shall make best efforts to provide the designated officer of NSR with prompt notice of any unplanned substantial delays or line outages on the Subject Trackage, and shall promptly advise the designated officer of NSR of the resumption of normal service on the Subject Trackage.

SECTION 10. MILEAGE AND CAR HIRE

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

SECTION 11. LIABILITY

The responsibility between the Parties hereto for loss of, damage to, and destruction of any property whatsoever and injury to and death of any person or persons whomsoever, arising out of, incidental to or occurring in connection with this Agreement, also expressly including, without limitation, all liabilities arising after the Commencement Date hereof under FELA and environmental laws but excluding consequential damages of any Party hereto (which are always borne by the Party which sustained them) and excluding claims for exemplary and punitive damages, hereinafter referred to as "Damage," shall be apportioned as follows without regard to fault or negligence:

(a) If Damage occurs involving solely the trains, locomotives and Equipment, cars in the revenue account (including lading), or employees of one of the Parties, then that Party shall be solely responsible for such Damage, even if caused partially or completely by another party (including the other Party).

(b) If Damage occurs involving the trains, locomotives and Equipment, cars in the revenue account (including lading), and employees of both NSR and D&H, then (i) NSR and D&H each shall be solely responsible for any Damage to its own employees, locomotives and Equipment, and those cars in its own revenue account (including lading) (such cars (including lading) being referred to as "NSR Cars" and "D&H Cars," respectively, and collectively, the "Cars"), and (ii) the Parties shall each be responsible for 50 percent of the Damage to the Subject

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Trackage and associated facilities and any Damage sustained by third parties, regardless of the proportionate responsibility between them as to the cause of the Damage.

(c) For the purposes of assigning responsibility for Damage under this Section as between the Parties hereto, the trains of a third party or parties operating on the Subject Trackage shall be considered to be the trains of D&H.

(d) Notwithstanding anything to the contrary in Sections 11(a), (b) and (c), above, when any damage to or destruction of the environment, including without limitation land, air, water, wildlife, and vegetation, occurs with one or more trains of the Parties involved, then, as between themselves, the Parties agree that (i) 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 or NSR locomotives and NSR Equipment from which there was a release, (ii) D&H shall be solely responsible for any damage or destruction to the environment and to third parties which results solely from a substance transported in D&H Cars, or D&H locomotives and D&H Equipment from which there was a release, and (iii) NSR and D&H shall be responsible, in proportion to the total number of Cars, pieces of Equipment, and locomotives of each Party from which there was a release, for any damage or destruction to the environment and to third parties which results solely from one or more substances transported in both NSR Cars, NSR locomotives, and NSR Equipment and D&H Cars, D&H locomotives, and D&H Equipment from which there was a release.

(e) D&H and NSR each shall be responsible for the payment, handling, administration and disposition of all Damage for which it bears exclusive responsibility under this Section 11, and D&H and NSR shall have joint responsibility for the payment, handling, administration and disposition of all Damage for which they are jointly responsible under this Section 11. In assigning joint responsibility to both D&H and NSR, it is not intended that D&H and NSR will, in all instances, actually act jointly, but rather that they will agree between themselves on the most practical and efficient arrangement for handling, administering, and disposing of Damage for which they bear joint responsibility, with the objective of eliminating unnecessary duplication of effort and minimizing overall costs.

(f) Each Party covenants and agrees (i) to indemnify and save harmless the other Party from and against any payments which are the responsibility of such Party under this Agreement, and all expenses, including attorney's fees and expenses, and any other expenses of any court or regulatory proceeding, incurred by the indemnified Party in defending any claim for which the responsible Party is liable, and (ii) to defend such indemnified Party against such claims with counsel selected by the responsible Party and reasonably acceptable to the indemnified Party.

(g) Notwithstanding anything to the contrary in this Section 11, whenever Damage occurs with one or more trains being involved, and one or more of the involved trains is a NSR train, and such Damage is attributable solely to the gross negligence or willful or wanton misconduct of only one of the Parties to this Agreement, and such gross negligence or willful or wanton misconduct is the direct or proximate cause of such 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 Damage. The Parties agree that, for purposes of this

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Section 11(g), “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.”

(h) Notwithstanding any provision of this Section 11 to the contrary, each Party shall assume and bear all responsibility for any Damage caused by acts or omissions of any its employees while under the influence of drugs or alcohol. An FRA positive test for drugs or an FRA alcohol test of .04 or greater shall establish that an employee was “under the influence of drugs or alcohol,” for the purposes of this Agreement.

(i) If any suit or action shall be brought against either Party for Damage which under the provisions of this Agreement is in whole or in part the responsibility of the other Party, said other 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 a proportionate part of the judgment and costs, expenses and attorneys' fees incurred in such suit according to its liability assumed hereunder.

(j) For purposes of determining liability under this Section 11, pilots furnished by D&H to NSR pursuant to this Agreement shall be considered to be the employees of NSR while such pilots are on board or getting on or off NSR trains.

(k) Each of D&H and NS 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 D&H and NS 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.

(l) Notwithstanding any provision of this Agreement to the contrary, for the purpose of this Section 11, the word “Equipment” shall mean and be confined to (i) cabooses, (ii) vehicles and machinery which are capable of being operated on railroad tracks that, at the time of an occurrence, are being operated on the Subject Trackage, and (iii) vehicles and machinery that, at the time of an occurrence, are on the Subject Trackage or its right of way for the purpose of maintenance or repair thereof or the clearing of wrecks thereon.

SECTION 12. CLAIMS

(a) Under no circumstances will either Party assert a claim for punitive or exemplary damages against the other Party related to the matters contemplated by this Agreement.

(b) 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 Agreement

shall be included as costs and expenses in applying the liability provisions of Section 11. However, each Party shall bear the salaries or wages of its full-time agents, full-time attorneys, and other full-time employees engaged directly or indirectly in such work.

(c) 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 filed 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 [REDACTED]

(d) 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 13. TERM, DEFAULT AND TERMINATION

(a) This Agreement shall become effective (“Effective Date”) as of the first date executed by each of the Parties. However, NSR operations over the Subject Trackage shall not commence until a date (the “Commencement Date”) mutually agreed in writing between NSR and D&H, which shall not occur until the effective date of any required STB authorization or exemption of NSR’s trackage rights granted by this Agreement (including compliance with any condition(s) imposed by the STB in connection with such approval or exemption).

(b) This Agreement shall remain in full force and effect until mutually terminated by the Parties. The Initial Term of this Agreement shall be twenty-five (25) years from the Commencement Date, and shall be renewable continuously thereafter for additional periods of ten (10) years (“Additional Term(s)"). At the end of the Initial Term, NSR may, at its option, (i) extend this Agreement under the same terms and conditions for one Additional Term, or (ii) require renegotiation of the Agreement. At the end of the first (and any subsequent) Additional Term, either NSR or D&H may extend the Agreement under the then-current terms and conditions, or require renegotiation of the agreement. In either case, the notice to continue the then-current terms and conditions or to require renegotiation shall be given by D&H or NSR, as the case may be, by giving the other Party advance written notice at least six (6) months prior to the expiration of the then-current term. The Parties shall take into consideration the relative economic positions of the Parties under this Agreement, and intent of the Parties, in each case at the time this Agreement was executed, as well as any significant operating, economic and/or technological changes that have occurred in the interim. If the Parties cannot agree upon the terms and conditions upon which the trackage rights granted herein may be exercised by NSR during such Additional Term, either Party may invoke mediation or other methods of non-binding alternative dispute resolution, in which the other Party agrees to participate in good faith. If the Parties are unable to agree to new terms and conditions, then the then-existing terms shall continue to apply during the subsequent Additional Term.

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(c) In the event that railroad operations, technology or other events create, in the view of one Party to this Agreement, a disparity such that the terms and conditions of this Agreement over time no longer reflect the intention of the Parties in a substantial and material way, and such disparity has a material and substantial adverse effect on said Party, that Party may give notice of such to the other Party, who shall negotiate in good faith modification of this Agreement in order to address and possibly remove said perceived disparity. Should the Parties fail to reach agreement with regard to such perceived disparity, the concerned Party may invoke mediation or other methods of non-binding alternative dispute resolution, in which the other Party agrees to participate in good faith.

(d) NSR shall have the right to terminate this Agreement upon giving D&H at least thirty (30) days prior written notice of such termination. Such termination shall be considered to be a termination of both this Agreement and the underlying right of movement.

(e) Termination of this Agreement shall not relieve or release either 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 thereof.

(f) In the event of any substantial failure on the part of any Party to perform its obligations provided under the terms of this Agreement and its continuance in such default for a period of sixty (60) days after written notice thereof by certified mail from another Party, the non-defaulting Party shall have the right at its option, after first giving thirty (30) days written notice thereof by certified mail, and notwithstanding any waiver by such Party of any prior breach thereof, to file a lawsuit pursuant to Section 14 and seek damages and/or specific performance of the terms of this Agreement from the defaulting Party. In the case of a substantial default by NSR which continues after adjudication of such default through litigation described in Section 14, D&H may terminate this Agreement and the underlying right of movement if NSR fails to cure such substantial default within: (i) thirty (30) days of the receipt of notice of continued default in the case of such a default by NSR in an obligation to pay D&H, (ii) fourteen (14) days of the receipt of notice of continued default in the case of such a default under Section 3(b), (c), (d), (f), (g) or (h); and (iii) ninety (90) days of the receipt notice of continued default in the case of any other such default under this Agreement.

SECTION 14. DISPUTE RESOLUTION

Any dispute arising between the Parties with respect to this Agreement 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 commence litigation in a state or federal court in the State of Delaware. **THE PARTIES HEREBY IRREVOCABLY SUBMIT TO THE JURISDICTION OF SUCH COURTS IN ANY SUCH ACTION OR PROCEEDING AND IRREVOCABLY WAIVE THE DEFENSE OF AN INCONVENIENT FORUM TO THE MAINTENANCE OF ANY SUCH ACTION OR PROCEEDING. EACH OF THE PARTIES HEREBY WAIVES TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY WITH RESPECT TO ANY LITIGATION DIRECTLY OR INDIRECTLY ARISING OUT OF, UNDER OR IN CONNECTION WITH THIS AGREEMENT.**

SECTION 15. ABANDONMENT

(a) D&H 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 Initial Term, or any Additional Term, of this Agreement. D&H shall provide NSR no less than ninety (90) days prior notice of its intention to seek to abandon any Abandonment Segment.

(b) If D&H elects to abandon an Abandonment Segment, D&H shall, not less than ninety (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 such Abandonment Segment, offer NSR the first right to purchase the Abandonment Segment for the fair market value of such Abandonment Segment at the time of purchase, and on such other terms and conditions as are customary with respect to line sales by D&H at the time. The fair market value shall be no less than the greater of the net liquidation value of such line or the going concern value of such line, as used and defined by applicable STB regulations. NSR shall have sixty (60) days (“Abandonment Notice Period”) within which to advise D&H 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 that NSR wishes to purchase, either Party may refer the issue to mediation or binding arbitration before a single arbitrator who is a qualified expert on rail line value and appraisal (“ADR”). Any such arbitration shall be conducted on an expedited basis, with a selection of the arbitrator 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.

(c) The Parties shall consummate the sale contemplated by this Section 15 within forty-five (45) days of the latest of: (a) the date of the final decision or order, should issues related to the sale proceed to ADR; (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.

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

(e) 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.

(f) A Waiver Notice shall constitute a waiver by NSR of its statutory rights, if any at the time of the abandonment, to purchase or otherwise subsidize operations over the Abandonment Segment pursuant to an offer of financial assistance or other applicable method.

SECTION 16. 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 assigns.

(b) 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. The consenting party may not unreasonably withhold, condition, or delay its consent. Each Party may assign this Agreement to a parent or controlled subsidiary without the consent of the other Party.

SECTION 17. NOTICE

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

If to D&H: Canadian Pacific Railway Company
120 S. 6th Street, Suite 1000
Minneapolis, MN 55402
Facsimile: (612) 904-5981

with copies to:

Vice President - Operations
Canadian Pacific Railway Company
7550 Ogden Dale Road SE
Building 1
Calgary, AB T2C 4X9
Facsimile: (403) 319-7724

Vice-President, Legal Services
Canadian Pacific Railway Company
Building 1
7550 Ogden Dale Road SE
Calgary, AB T2C 4X9
Facsimile: (403) 319-3725

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If to NSR: Norfolk Southern Railway Company
c/o Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510-2191
Attn: Executive Vice President Operations
Facsimile: (757) 823-5371

with a copy to:

Norfolk Southern Railway Company
c/o Norfolk Southern Corporation
1200 Peachtree Street, NE – Box 158
Attn: Director – Joint Facilities
Atlanta, Georgia 30309
Facsimile: (757) 823-5927

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

SECTION 18. FORCE MAJEURE

The obligations, other than payment obligations, of the Parties to this Agreement shall be subject to force majeure (including strikes, riots, floods, accidents, Acts of God, acts of terrorism, 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 reasonable measures including providing routing over alternate rail lines to the extent practicable (subject to reimbursement for incremental costs), and granting the right to enter and exit the Subject Trackage at locations other than the End Points in the case of a necessary detour, to restore performance of its obligations in a timely manner.

SECTION 19. 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 Initial Term and any Additional Terms, 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 such Party's officers, employees, and attorneys, without the prior written approval of the other Party.

SECTION 20. INDEMNITY COVERAGE

As 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 shall also extend to and

indemnify the parent corporation, subsidiaries and affiliates of such other Party, and all of its directors, officers, agents and employees.

SECTION 21. REGULATORY APPROVAL

Upon execution of this Agreement by each of the Parties hereto, NSR shall promptly file with the STB, and diligently prosecute, an appropriate notice of exemption with respect to the trackage rights covered by this Agreement.

SECTION 22. GENERAL PROVISIONS

(a) This Agreement and each and every provision hereof are for the exclusive benefit of the Parties hereto and not for the benefit of any other person. Nothing herein contained shall be taken as creating or increasing any right of any other person 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 its subject matter and supersedes any and all other agreements and 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 of the Parties.

(d) 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.

(e) 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.

(f) The division of this Agreement into 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 herein to sections are to sections in this Agreement.

(g) 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 one of the Parties and includes such trains, locomotives, cars and equipment which are owned by, leased to, or moving in the trains of such Party. Whenever such locomotives, cars or equipment are owned or leased by one Party, but are in the possession of, or are being operated in a train of the other Party, such locomotives, cars and equipment shall be considered those of that other Party in whose possession or train such locomotives, cars and equipment are located.

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(h) This Agreement is the product of mutual negotiations of the Parties hereto, none of whom shall be considered the drafter for purposes of contract construction.

(i) 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 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.

(j) 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 which produces a result which is substantially equivalent to the terms of this Agreement in all material respects.

(k) Nothing herein shall be interpreted as creating an association, partnership, joint venture or other joint undertaking between NSR and D&H.

(l) The interpretation and performance of this Agreement shall be governed by the substantive and procedural laws of the State of Delaware, without giving effect to any choice or conflict of laws provision or rule (whether of the State of Delaware or any other jurisdiction) that would cause the application of laws of any jurisdiction other than the State of Delaware.

(m) This Agreement may be executed in several counterparts, each of which will be deemed an original, and such counterparts shall constitute one and the same instrument.

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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:

DELAWARE AND HUDSON RAILWAY
COMPANY, INC.

Title

By _____

WITNESS:

NORFOLK SOUTHERN RAILWAY
COMPANY

Title

By _____

EXHIBIT A

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET 34209 (SUB-NO. 1)

**NORFOLK SOUTHERN RAILWAY COMPANY -
TRACKAGE RIGHTS EXEMPTION – DELAWARE AND HUDSON RAILWAY
COMPANY, INC.**

NOTICE OF EXEMPTION

EXHIBIT 3

**DRAFT CAPTION SUMMARY
FEDERAL REGISTER NOTICE**

SURFACE TRANSPORTATION BOARD

NOTICE OF EXEMPTION

FINANCE DOCKET NO. 34209 (SUB-NO. 1)

NORFOLK SOUTHERN RAILWAY COMPANY
– TRACKAGE RIGHTS EXEMPTION –
DELAWARE AND HUDSON RAILWAY COMPANY, INC.

Delaware and Hudson Railway Company, Inc. (“D&H”), a wholly owned, indirect subsidiary of Canadian Pacific Railway Company, has agreed to continue to grant, subject to modification, overhead trackage rights to the Norfolk Southern Railway Company (“NS”) over D&H’s line between MP 484.85 ± in the vicinity of Schenectady, NY and CPF 467 in the vicinity of Mechanicville, NY, including the right to use such track(s) within D&H’s Mohawk Yard as shall be designated from time to time by the D&H officer in charge of operations at Mohawk Yard, which will ensure NS’s continued access to NS’s Mechanicville Terminal and NS’s continued interchange with Pan Am Southern LLC (“PAS”).

The trackage rights will be effective no sooner than December __, 2014.

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

Dated: _____

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET 34209 (SUB-NO. 1)

**NORFOLK SOUTHERN RAILWAY COMPANY -
TRACKAGE RIGHTS EXEMPTION – DELAWARE AND HUDSON RAILWAY
COMPANY, INC.**

NOTICE OF EXEMPTION

VERIFICATION

VERIFICATION

I, John H. Friedmann, Vice President – Strategic Planning of Norfolk Southern Corporation, hereby verify under penalty of perjury that to the best of my knowledge the foregoing trackage rights notice of exemption is true and correct. Further, I certify that I am qualified and authorized to make such verification on behalf of Norfolk Southern Railway Company in connection with this proceeding before the Surface Transportation Board.

Executed this 11th day of November 2014.



John H. Friedmann
Vice President – Strategic Planning
Norfolk Southern Corporation