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**BAKER & MILLER PLLC**Office of Proceeding  
November 9, 2012  
Part of Public  
Record

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November 9, 2012

**VIA E-FILING**Cynthia T. Brown, Chief  
Section of Administration, Office of Proceedings  
Surface Transportation Board  
395 E Street, SW  
Washington DC 20423-0001Re: *Rail Switching Services, Inc. – Operation Exemption – Line Of Pemiscot County  
Port Authority In Pemiscot County, Missouri, FD 35685*

Dear Ms. Brown:

On November 8, 2012, BNSF Railway Company (“BNSF”), evidently seeking at this juncture to intervene in this proceeding,<sup>1</sup> filed a letter addressing two pleadings filed by Pioneer Railcorp and its subsidiary, Rail Switching Services, Inc. (“RSS”), on November 5, 2012. BNSF argues as follows: (1) BNSF has contractual authority to operate over the subject line of railroad owned by Pemiscot County Port Authority (“PCPA”); (2) RSS included misleading statements in its October 15, 2012 Notice; and (3) the Board does not have jurisdiction over RSS’s operations as a contract carrier. RSS briefly responds to each of these arguments.

In its November 5 reply to PCPA’s Petition to Reject, RSS stated in footnote 18 that “BNSF, the only carrier connecting to PCPA’s rail lines, has no STB authority to operate over the PCPA line (which is a common carrier line subject to the Board’s jurisdiction) to serve directly new customers located there, and thus BNSF has no license to “invade new territory.” This statement was and remains completely true. Indeed, BNSF admits that it “has no STB

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<sup>1</sup> BNSF is not a party of record in this proceeding and has not requested permission to intervene pursuant to the standards set forth at 49 CFR §1112.4. BNSF neither mentions nor makes an effort to meet those standards. As such, the Board would be fully within its rights to ignore or reject BNSF’s letter and should do so. Nonetheless, in the interest of a full record, RSS will respond to BNSF’s letter.

authority to operate over the PCPA line.” But to gloss over what is clearly a glaring regulatory oversight, BNSF insists that the contractual rights it has secured from PCPA are all that BNSF needs to permit it to provide rail service to new customers located on PCPA’s line of railroad.

BNSF’s claim that its 2003 Industry Track Agreement (“ITA”)(attached hereto) – an agreement that BNSF typically would use to secure the right to operate over private industrial tracks owned by a noncarrier entity – is all BNSF needs to operate over PCPA’s line is wrong. To extend its service reach as it proposes to do here, BNSF needs both the negotiated-for contractual right and STB-issued authority to legally operate over another common carrier. First, the ITA does not give BNSF valid STB common carrier rights on the line despite BNSF’s claim that it has both the right to “provide common and contract carriage” over PCPA’s line. That agreement, which is attached, is no clearer about the conveyance of common carrier operating rights than is the RSS-PCPA agreement that is the source of the dispute that PCPA wants the Board to adjudicate. On its face, and consistent with the usual purpose of an ITA, the agreement grants BNSF the right to operate over what the parties to that agreement (mistakenly) refer to as PCPA’s “industry track.”

This leads to the second problem with BNSF’s argument – PCPA’s track is not industry track, but a fully Board-regulated line of railroad. Back in 2003, BNSF and PCPA may have thought that it was industry tracks, giving rise to the ITA and to BNSF’s incorrect assumption that it needed no STB authority to operate pursuant to the ITA’s terms, but all parties now acknowledge that PCPA’s track is a common carrier line of railroad. Upon becoming aware of the line’s legal status, and before it could legally begin operations over the line to serve Marquis Marine Terminal, LLC (“MMT”), BNSF should have sought STB authority to operate over PCPA’s line. The statute (and precedent) is clear that one common carrier cannot give another operating rights or trackage rights to access customers on the former’s lines without the latter carrier obtaining STB authority.<sup>2</sup> Until BNSF obtains STB authority, and giving it the benefit of the doubt that the 2003 ITA is an “agreement” for purposes of obtaining STB authority and that agreement also grants it the right to serve MMT (assumptions that RSS disagrees with), BNSF cannot legally operate over PCPA’s rail line. If BNSF is serving MMT now, it is doing so illegally in violation of the ICC Termination Act of 1995.

BNSF’s arguments regarding RSS’s Notice must also fail. There was nothing false or misleading in the Notice. RSS’ agreement with PCPA gives RSS the exclusive right to “retrieve

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<sup>2</sup> 49 U.S.C. §11323(a)(2) or (a)(6); and see, e.g., Louisville and Jefferson County Riverport Authority and CSX transportation, Inc. – Construction and Operation Exemption – In Jefferson City, KY, ICC Docket No. FD 31136 (ICC served Dec. 16, 1987) (in permitting Riverport authority to construct a new line of railroad and licensing an existing third-party carrier’s operations over that new line, the agency noted that any other carrier seeking to operate over that new line of railroad to serve customers located on that line would also need separate agency authority to do so).

from or deliver cars [from any shipper on the line] to the BNSF.”<sup>3</sup> Were RSS merely to switch unloaded rail cars to/from BNSF for car storage, then BNSF would be correct: RSS wouldn’t need STB authority for facilitating car storage, even if the service were provided over common carrier track. The circumstances changed, however, when RSS discovered that PCPA’s track is an STB-regulated line of railroad, and that MMT would be locating on the line and would need rail service to and from BNSF. As RSS is the only carrier with the contractual right to provide that service for MMT, RSS determined that, by force of circumstance, and consistent with its agreement with PCPA,<sup>4</sup> it would have to be the rail carrier providing that service. It is undisputed that RSS is a rail carrier. Similarly, anticipating that it would be providing MMT with “common carrier railroad transportation for compensation,” it needs STB authority to do so, just as BNSF needs such STB authority to lawfully serve MMT.<sup>5</sup>

Thus, regardless of whether MMT is served by BNSF or RSS (a question requiring interpretation of the ITA and the RSS-PCPA agreements that is not, and should not be, before the Board), either BNSF or RSS (or possibly both) require STB authority to provide rail service over PCPA’s rail line. To put it another way, because MMT is located on a common carrier line of railroad, unless PCPA provides common carrier service to MMT, which it is not doing nor has said it has any plans to do, then neither BNSF nor RSS can legally provide that service to MMT without STB authority. RSS is seeking that authority, and as that authority is permissive only, STB issuance of the exemption that RSS has invoked does not harm BNSF, MMT, or PCPA in any way.

Even if a court were to determine that BNSF can supply rail service to MMT (and assuming BNSF had requisite STB authority to do so) and avoid using RSS, that still doesn’t mean that RSS doesn’t need common carrier authority. PCPA is actively marketing its line for future economic growth, and as such, other shippers may locate on PCPA’s line. To the extent they do and they desire RSS service, RSS would need to have STB authority in place. RSS – (1)

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<sup>3</sup> Neither BNSF nor PCPA dispute that RSS is the only rail carrier with the exclusive authority to retrieve from or deliver cars to BNSF.

<sup>4</sup> The contract between RSS and PCPA included a specific provision that required RSS to obtain STB authority if such authority was required (¶7). This was recognition by PCPA that RSS might indeed need STB authority someday. Why would PCPA agree to this provision if it was merely contracting with a private rail switching and storage operator? Clearly, all parties envisioned the prospect that there may someday be common carrier traffic on the line. It was the prospect of such common carrier traffic that provided RSS with the incentive to agree to pay PCPA monthly payments for what RSS knew would be minimal car storage and switching revenue. Now, four years that partnership, and after PCPA accepted timely payments and service from RSS, PCPA has decided that it can get a better deal from MMT and BNSF and thus it no longer desires to honor its contract with RSS.

<sup>5</sup> In fact, PCPA’s counsel advised counsel for RSS that it was also his belief that BNSF needed some form of STB authority, most likely trackage rights authority, in order for BNSF to operate over PCPA’s tracks.

has a contract giving it the exclusive right to handle cars between BNSF and any shipper on the line; (2) will hold itself as a carrier for hire (i.e. providing switching services on a common carrier line of railroad); and (3) will receive compensation for the rail services it provides to shippers located on PCPA's lines now and in the future. RSS still intends to hold itself out in this manner regardless of the outcome of MMT's claim that it need not use RSS's service. Under these circumstances, RSS requires STB authority.<sup>6</sup>

Finally, BNSF conveniently ignores clear STB precedent establishing that a rail carrier that operates as a common carrier's contractor must itself obtain STB authority unless it serves as the incumbent carrier's agents. Kansas City Transportation Company LLC – Lease And Assignment Of Lease Exemption – Kansas City Terminal Railway Company And Kaw River Railroad, Inc., STB Docket No. FD 34830 (STB served May 30, 2006 and May 23, 2007)(collectively, "KCT"). It is surprising that BNSF would overlook such precedent, because its counsel was involved in the KCT cases. There, this same counsel argued unsuccessfully that contract carriers of common carriers do not need STB authority in their own right. In rejecting that argument, the Board explained that only an entity clearly acting as an incumbent carrier's agent did not need independent STB authority to operate. See id., (citing Assoc. Of P&C Longshoremens v. The Pitts. & Conneaut, 8 I.C.C. 2d 280 (1992)(“P&C Dock”) and Effingham RR Co. – Pet. For Declaratory Order, 2 S.T.B. 606, 609-610 (1997), aff'd sub nom. United Transportation Union v. STB, 183 F.3d 606 (7<sup>th</sup> Cir. 1999)(“Effingham”). RSS is not PCPA's agent. RSS does not intend to simply transport its own cars or facilitate car storage, and its agreement with PCPA does not restrict RSS to such activity. RSS will be holding itself out to provide service to existing or future shippers on the line. Under the precedent set forth in KCT, P&C Dock, and Effingham, since an active shipper has located on the line (and others are expected to emerge), the nature of RSS's services changed, and RSS was required to obtain STB authority for its proposed operations, notwithstanding any conflicting language in its agreement with PCPA.

RSS now recognizes that BNSF and PCPA want to bar RSS from providing the switching services that PCPA had contracted for RSS to provide. PCPA, mistakenly assuming it owned private industry track, accepted BNSF's ITA terms in 2003. PCPA later (in 2008 and again in 2012) granted RSS a contract to provide exclusive switching services between BNSF and any shipper that located on the line. PCPA later gave MMT a contract to use PCPA's the line for obtaining service from BNSF. In the midst of all of this, PCPA had preserved for itself the right to operate on the line as a rail common carrier. PCPA has created a contractual mess. But the Board should not get dragged into a dispute over that mess. BNSF and PCPA would have the

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<sup>6</sup> Ohio Valley; Kaw River Railroad, Inc. – Acquisition and Operation Exemption – The Kansas City Southern Railway Company, STB Docket No. FD 34509 (STB served May. 3, 2005) (“Kaw River”) (an entity intending to hold itself out as a common carrier pursuant to certain lease transactions requires advance STB authorization to do so. That entity will hold out service to the public, its customers are new to It, and much therefore obtain Board authority to commence operations); and Rock River Railroad, Inc. – Acquisition And Operation Exemption – Rail Lines Of Renew Energy, LLC, STB Docket No. FD 35016, et al. (STB served May 10, 2007).

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Board review the contracts, side with them, and reject RSS's exemption. They want the Board to do this even though the Board does not interpret contracts, RSS's permissive exemption authority does BNSF and PCPA no harm, and in the face of clear Board precedent that RSS does need authority to fulfill what it regards as its rail service obligations under its contract. The Board should refuse to take BNSF's and PCPA's bait, and should instead simply adhere to a time-tested agency practice – allow the permissive Notice to take effect, allowing the parties to sort out contractual issues underlying the Notice in court.

Sincerely,



William A. Mullins

Attachment

cc: J. Michael Carr  
Hon. Charles "Chip" Nottingham  
Parties of Record

**THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY**  
**INDUSTRY TRACK AGREEMENT**

**THIS AGREEMENT** ("Agreement") made as of this 11th day of November, 2003, ("**Effective Date**") by and between **THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY**, a Delaware corporation ("**Railroad**"), and **PEMISCOT COUNTY PORT AUTHORITY**, a political subdivision of the State of Missouri ("**Industry**").

**WHEREAS**, Industry desires that Railroad: (i) maintain and operate over certain rail, ties, ballast, and appurtenances thereto shown as heavy solid on Exhibit "A" attached hereto and incorporated herein ("**Railroad Track**"); and (ii) operate over certain additional track shown as heavy hatched on Exhibit "A" ("**Industry Track**"), (Railroad Track and Industry Track collectively, together with all appurtenances, called "**Track**"), located at Hayti, County of Pemiscot, State of Missouri, to serve a facility operated by Industry ("**Plant**"), and Railroad desires to provide such service, subject to the terms of this Agreement.

**NOW, THEREFORE**, in consideration of the mutual covenants contained herein, the parties agree as follows:

1. **OWNERSHIP**. Railroad shall own the Railroad Track and Industry shall own the Industry Track.
2. **MAINTENANCE AND OPERATION**.
  - (a) Industry shall be responsible for obtaining, without expense to Railroad, all necessary real property rights and public authority and permission, including applicable permits, for the maintenance and operation of the Track. Industry shall strictly comply with all laws, statutes, regulations, ordinances, orders, covenants and restrictions, including, without limitation, those pertaining to environmental matters (collectively, "**Legal Requirements**") and other Railroad requirements relating to the use of the Track, Facilities or Equipment. Prior to entering Railroad's property, Industry shall and shall cause its contractor(s) to comply with all Railroad's applicable safety rules and regulations. Prior to commencing any work on Railroad's Property, Industry shall complete and shall require its contractor to complete the safety training program at the Railroad's Internet Website "<http://contractororientation.com>". This training must be completed no more than one year in advance of Industry's entry on Railroad's property.
  - (b) Railroad shall, for the accommodation of and at the sole risk and expense of Industry, maintain the Railroad Track. Industry shall at all times, and at its sole risk and expense, maintain, or cause to be maintained, the Industry Track and all Facilities and Equipment (defined below) (if any) in a safe and satisfactory condition and in compliance with all applicable Legal Requirements (defined below). Maintenance means, among other things, providing proper drainage along the relevant portion of the Track, keeping the Track free and clear of snow, ice, vegetation, structures, and other obstacles, maintaining grade crossing warning devices, passive warning signs, gates, fences, barriers, roadways, track drainage facilities, lighting and track and other signals. Without relieving Industry from any of its obligations under this Agreement, Railroad may refuse to operate over the Industry Track or use or enter the Facilities or contact the Equipment whenever Railroad, in its sole discretion, determines that the same is unsatisfactory for Railroad's operation, entry or contact. If and when Industry has remedied such condition to Railroad's sole satisfaction, Railroad shall resume operation over the Industry Track or use of or entry into the Facilities or contact with the Equipment. Railroad's operation over the Track or use of or entry into any Facility or contact with any Equipment with knowledge of an unsatisfactory condition is not a waiver of Industry's obligations contained herein or of Railroad's right to recover for or be indemnified and defended against such damages to property or injury to or death of persons that may result therefrom.
  - (c) Industry shall, at its sole expense, pay all costs for changes, repairs or alterations to the Industry Track that may be necessary to conform to any changes of grade or relocation of the Railroad Track at the point of connection with the Industry Track, if such change of grade or relocation is required to comply with any Legal Requirement or is made for any other reason beyond Railroad's reasonable control.
  - (d) If Industry installs any gates or fencing across the Track, or a track scale, unloading pit, loading or unloading device, adjustable loading dock, warehouse door, or any other structure (collectively, "**Facilities**") affecting the Track, Industry shall be solely responsible for assuring the safe and satisfactory condition of the same and shall not allow any Facilities to be a source of danger to the safe operation of the Track. Industry shall also be solely responsible for assuring the safe and satisfactory condition of all of Industry's equipment touching, used in conjunction with or affecting the Track ("**Equipment**") and shall not allow any Equipment to be source of danger to the safer operation of the Track. Before utilizing or unloading any equipment spotted onto the Track, Industry shall inspect the same and all other Equipment and Facilities for the safety of persons working on or about these items to assure compliance with the foregoing. Industry shall utilize all Facilities, Equipment and spotted equipment so as not to affect negatively safe and efficient operation over the Track. Industry shall,

among other things: keep any gates across the Track open whenever necessary, in Railroad's sole judgment, to enable Railroad to safely and efficiently operate over the Track; keep unloading pits securely covered when not in actual use and at all times when the Track is being switched by Railroad; keep all doors firmly secured; and keep adjustable loading docks at warehouses securely fastened in an upright position when not in actual use and at all times when the Track is being switched by Railroad.

- (e) Railroad may require for safety purposes that Industry, at its sole cost and expense, provide flagmen, lights, traffic control devices, automatic warning devices, or any such safety measure that Railroad deems appropriate in connection with the Industry's use of the Track. Railroad will notify Industry of such requirements and the estimated costs of such measures ("Safety Measures"). Industry shall have ten (10) days to approve such Safety Measures. Industry's failure to approve such Safety Measures shall be a material breach of this Agreement and Railroad may terminate this Agreement immediately. With respect to expenditures Industry has approved, Industry shall reimburse Railroad within thirty (30) days of receipt of bill therefor for all costs expended by Railroad, including but not limited to the cost of Railroad's Flagman (\$500.00 per eight hour day, \$95.00 per hour thereafter) in connection with this Section 2(e).
  - (f) In the event the public authority having jurisdiction thereover orders the separation of the grade of the Track and any street, road, highway, other rail line or the like, Industry hereby consents to the removal and/or relocation of the Track and shall reimburse Railroad all expenses in connection with the removal and/or relocation of the Track.
  - (g) Industry shall not place, permit to be placed, or allow to remain, any permanent or temporary material, structure, pole, container, storage vessel, above-ground or underground tank, or other obstruction within 8½ feet laterally from the center (nine and one-half (9-1/2) feet on either side of the centerline of curved Track) or within 24 feet vertically from the top of the rail of said Track ("Minimal Clearances"), provided that if any Legal Requirement requires greater clearances than those provided for in this Section 2(g), then Industry shall strictly comply with such Legal Requirement. Industry shall not place or allow to be placed any freight car within 250 feet of either side of any at-grade crossings on the Track. Railroad's operation over the Track with knowledge of an unauthorized reduced clearance will not be a waiver of the covenants of Industry contained in this Section 2(g) or of Railroad's right to recover and be indemnified and defended against such damages to property, or injury to or death of persons, that may result therefrom.
3. **TERM.** Unless earlier terminated as provided herein, this Agreement will be in force for the term of ONE MONTH from its date and will automatically continue thereafter until terminated by either party giving to the other thirty (30) days' written notice.
4. **INDEMNITY.**
- (a) For purposes of this Agreement: (i) "**Indemnitees**" means Railroad and Railroad's affiliated companies, partners, successors, assigns, legal representatives, officers, directors, shareholders, employees and agents; (ii) "**Liabilities**" means all claims, liabilities, fines, penalties, costs, damages, losses, liens, causes of action, suits, demands, judgments and expenses (including, without limitation, court costs, attorneys' fees and costs of investigation, removal and remediation and governmental oversight costs) environmental or otherwise; and (iii) "**Industry Parties**" means Industry or Industry's officers, agents, invitees, licensees, employees, or contractors, or any party directly or indirectly employed by any of them, or any party they control or exercise control over.
  - (b) **INDUSTRY SHALL RELEASE, INDEMNIFY, DEFEND, AND HOLD THE INDEMNITEES HARMLESS FROM AND AGAINST ANY LIABILITIES ARISING OUT OF OR RELATED TO (IN WHOLE OR IN PART) ANY CLAIM THAT BY VIRTUE OF THE USE OF THE TRACK CONTEMPLATED IN THIS AGREEMENT, UNDER CERCLA OR OTHER ENVIRONMENTAL LAWS RAILROAD IS (I) AN "OWNER", "OPERATOR", "ARRANGER" OR "TRANSPORTER" OF THE INDUSTRY TRACK OR THE PLANT, OR (II) OTHER THAN A COMMON CARRIER WITH RESPECT TO THE TRACK REGARDLESS OF ANY NEGLIGENCE OR STRICT LIABILITY OF ANY INDEMNITEE.**
  - (c) **IF ANY EMPLOYEE OF ANY INDUSTRY PARTY CLAIMS HE OR SHE IS AN EMPLOYEE OF ANY INDEMNITEE, INDUSTRY SHALL INDEMNIFY AND HOLD THE INDEMNITEES HARMLESS FROM AND AGAINST ANY LIABILITIES ARISING OUT OF OR RELATED TO (IN WHOLE OR IN PART) ANY SUCH CLAIM INCLUDING, BUT NOT LIMITED TO, CLAIMS RELATED TO PROCEEDINGS UNDER OR RELATED TO THE FEDERAL EMPLOYERS' LIABILITY ACT, THE SAFETY APPLIANCE ACT, THE BOILER INSPECTION ACT, THE OCCUPATIONAL HEALTH AND SAFETY ACT, THE RESOURCE CONSERVATION AND RECOVERY ACT, AND ANY SIMILAR STATE OR FEDERAL STATUTE AND REGARDLESS OF ANY NEGLIGENCE OR STRICT LIABILITY OF ANY INDEMNITEE RELATED TO SUCH CAUSES OF ACTION.**
  - (d) Upon written notice from Railroad, Industry agrees to assume the defense of any lawsuit or other proceeding brought against

any Indemnitee by any entity, relating to any matter covered by this Agreement for which Industry has an obligation to assume liability for and/or save and hold harmless any Indemnitee. Industry shall pay all costs incident to such defense, including, but not limited to, attorneys' fees, investigators' fees, litigation and appeal expenses, settlement payments, and amounts paid in satisfaction of judgments.

(e) In the event Industry causes any improvement of material or labor to be effected upon the Railroad's Property, Industry shall, at its sole cost and expense, furnish to Railroad, in a form acceptable to Railroad, a fully executed Performance and Payment Bond, by a surety or sureties approved by Railroad, in the amount of [150% of the cost of the improvement], as security for the faithful performance of this Agreement and for payment of all persons performing labor or furnishing materials or equipment in connection therewith.

5. **INSURANCE.** Industry shall, at its sole cost and expense, procure and maintain during the life of this Agreement the following insurance coverage:

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

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

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

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

Failure to provide evidence as required by this section shall entitle, but not require, Railroad to terminate this Agreement immediately. Acceptance of a certificate that does not comply with this section shall not operate as a waiver of Industry's obligations hereunder. The fact that insurance (including, without limitation, self-insurance) is obtained by Industry shall not be deemed to release or diminish the liability of Industry including, without limitation, liability under the indemnity provisions of this Agreement. Damages recoverable by Railroad shall not be limited by the amount of the required insurance coverage.

6. **DEFINITION OF COST AND EXPENSE.** For the purpose of this Agreement, "cost" or "costs" "expense" or "expenses" includes, but is not limited to, actual labor and material costs including all assignable additives, and material and supply costs at current value where used. In the event that Industry shall fail to pay any monies due to Railroad within thirty (30) days after the invoice date, then Industry shall pay interest on such unpaid sum from such due date until paid at an annual rate equal to the lesser of (i) the prime rate last published in *The Wall Street Journal* in the preceding December plus two and one-half percent (2 1/2%), or (ii) the maximum rate permitted by law.

7. **RIGHT OF RAILROAD TO CONSTRUCT FUTURE FACILITIES.** Railroad retains the right, without liability to the Industry or any other party, to construct or allow to be constructed upon its property other facilities, and to use its property in any manner, provided Railroad uses all commercially reasonable efforts to avoid material interference with the use of the Track as described herein.

8. **PUBLIC ASSESSMENTS.** Industry shall timely pay all compensation, assessments and levies required at any time by any public authority, entity, or person for the privilege of maintaining and operating the Track, and shall not cause or permit any liens to be filed against the Railroad Track or any Railroad property. In the event any such liens are filed, Industry shall cause such liens to be released within fifteen (15) days.

9. **NOTIFICATION REQUIREMENTS**

- (a) Industry shall give immediate notice to Railroad's Resource Operations Center at (800) 832-5452 of any release of hazardous substances on or from the Track, violation of environmental Legal Requirements, or inspection or inquiry by governmental authorities charged with enforcing environmental Legal Requirements with respect to Industry's use of the Track. Industry shall use the best efforts to promptly respond to any release on or from the Track. Industry also shall give Railroad immediate notice of all measures undertaken on behalf of Industry to investigate, remediate, respond to or otherwise cure such release or violation.
  - (b) In the event that Railroad has notice from Industry or otherwise of a release or violation of Environmental Laws on the Track which occurred or may occur during the term of this Agreement, Railroad may require Industry, at Industry's sole risk and expense, to take timely measures to investigate, remediate, respond to or otherwise cure such release or violation affecting the Track or Railroad's property.
  - (c) Industry shall promptly report to Railroad in writing any conditions or activities upon the Plant or Track which create a risk of harm to persons, property or the environment and shall take whatever action is necessary to prevent injury to persons or property arising out of such conditions or activities; provided, however, that Industry's reporting to Railroad shall not relieve Industry of any obligation whatsoever imposed on it by this Agreement. Industry shall promptly respond to Railroad's request for information regarding said conditions or activities.
10. **DEFAULT.** The following events shall constitute defaults hereunder: (a) creating or allowing to remain any condition, including without limitation, any environmental condition, on or about the Track, which in Railroad's sole judgment interferes with or endangers the operations of Railroad; (b) assignment or transfer by operation of law of Industry's rights or obligations under this Agreement; (c) defaults on any of the covenants or agreements of Industry contained in this document.
11. **TERMINATION.**
- (a) In addition to all other remedies available at law or in equity, Railroad may, without incurring any liability to Industry, terminate this Agreement and discontinue the maintenance and operation of the Track and remove the Railroad Track, in the event of any of the following events:
    - (i) any default as described in Sections 10(a) or (b) occurs;
    - (ii) any default as described in Section 10(c) occurs and persists for 30 days following written notice from Railroad;
    - (iii) Industry fails to utilize rail service from Railroad to or from the Plant for a period of eight (8) months in any period of twelve (12) months;
    - (iv) Railroad is authorized by competent public authority to abandon its line to which said Track is connected; or
    - (v) Railroad is dispossessed of the right to operate over the Track or its connecting track or any part thereof, Railroad may terminate this Agreement effective immediately by written notice to Industry.
  - (b) Upon the expiration or earlier termination of this Agreement as provided herein, Industry shall, at its sole cost and expense, remove any Facilities, Equipment or improvements upon, over, or under the portion of the Track on Railroad's property and restore the Railroad's property to substantially the state in which it was on the Effective Date of this Agreement. In the event Industry fails within thirty (30) days after the date of such termination to make such removal and restoration, the Railroad may, at its option, remove the Facilities, Equipment or improvements and otherwise restore its property, and in such event Industry shall, within thirty (30) days after receipt of a bill therefor, reimburse Railroad for any costs incurred.
  - (c) Industry hereby agrees to waive and release all claims, rights, and causes of action that Industry has or may have against Railroad because of the discontinuance of operation and removal of the Railroad Track as provided in this Section 11.
12. **ASSIGNMENT.** This Agreement will inure to the benefit of and be binding upon the successors and assigns of the parties hereto; provided, however, that Industry may not assign this Agreement without the prior written consent of Railroad, which may be withheld in Railroad's sole discretion. Either party hereto may assign any receivables due them under this Agreement; provided, however, that such assignments will not relieve the assignor of any of its rights or obligations under this Agreement.
13. **NOTICES.** Any notice required or permitted to be given hereunder must be in writing and the same shall be given and will be deemed to have been given if (i) placed in the United States mail, certified, return receipt requested, or (ii) deposited into the custody of a nationally recognized overnight delivery service, addressed to the party to be notified at the address specified below, or to such other address as the party to be notified may designate by giving the other party no less than thirty (30) days' advance written notice. The address for such notice shall be the address set forth below each party's signature, which may be changed by written notice to the other party.
14. **SURVIVAL.** Neither termination nor expiration will release either party from any liability or obligation under this Agreement,

whether of indemnity or otherwise, resulting from any acts, omissions or events happening prior to the date of termination or expiration, or, if later, the date when the Track, Facilities, Equipment and improvements are removed and the right-of-way is restored to its condition as of the Effective Date.

15. MISCELLANEOUS.

- (a) This Agreement must not be placed of public record.
- (b) To the maximum extent possible, each provision of this Agreement must be interpreted in such manner as to be effective and valid under applicable law, but if any provision of this Agreement is prohibited by, or held to be invalid under, applicable law, such provision will be ineffective solely to the extent of such prohibition or invalidity, and this will not invalidate the remainder of such provision or any other provision of this Agreement. All questions concerning the interpretation or application of provisions of this Agreement must be decided according to the laws of the State of Missouri.
- (c) This Agreement is the full and complete agreement between Railroad and Industry with respect to all matters relating to the maintenance and operation of the Track and supersedes all other agreements between the parties hereto relating to the maintenance and operation of the Track. However, nothing herein is intended to terminate any surviving obligation of Industry or Industry's obligation to defend and hold Railroad harmless in any prior written agreement between the parties.
- (d) In the event that the Industry consists of two or more parties, all covenants and agreements of Industry herein contained shall be the joint and several covenants and agreements of such parties.
- (e) The waiver by Railroad of the breach of any provision herein by Industry shall in no way impair the right of Railroad to enforce that provision for any subsequent breach thereof. All remedies provided hereunder are cumulative and are in addition to all other remedies available at law or in equity.
- (f) This Agreement is also made for the benefit of such other railroads that, either by agreement with Railroad or order of competent public authority, have the right to use the Track, all of which railroads shall be deemed "Railroad" under this Agreement.

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

**RAILROAD:**

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

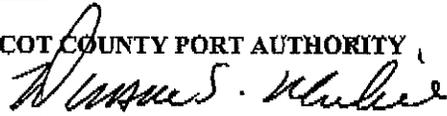
By:   
Name: Brian Bilderbach  
Title: Director Dev. & Acquisitions

*Address for notices:*

Staubach Global Services  
5650 N. Riverside Drive, Suite 101  
Ft. Worth, TX 76137  
Attn: Track Agreements

**INDUSTRY:**

**PEMISCOT COUNTY PORT AUTHORITY**

By:   
Name: Duane S. Michie  
Title: Chairman

*Address for notices:*

Pemiscot County Port Authority  
619 Ward Avenue  
Caruthersville, Missouri 63830

STATEMENT OF COVERAGE

MEMBER AGENCY

INTERESTED PARTY

Pemiscot County Port Authority  
619 Ward Ave.  
Caruthersville

MO 63830

The Burlington Northern and  
Santa Fe Railway Company,  
A Delaware Corporation  
Staubach Global Services, Inc.  
as acting agent

Memorandum Coverage Period: 12:01 a.m. January 1, 2003 12:01 a.m. January 1, 2004

Memorandum Number: 4031

GENERAL AND AUTOMOBILE LIABILITY -\$2,000,000 PER OCCURRENCE.

Comprehensive Form including:

- Premises and Operations
- Contractual
- Broad Form Property Damage
- Garage Liability
- Owned, Non-Owned or Hired Automobiles
- Underground, Explosion and Collapse Hazards
- Products/Completed Operations
- Nurses' Malpractice Liability
- Public Officials Errors and Omissions
- Personal Injury

AUTOMOBILE PHYSICAL DAMAGE

Actual Cash Value or Cost of Repair, whichever is less, minus

Comprehensive

\_\_\_\_\_ deductible for each covered automobile

Collision

\_\_\_\_\_ deductible for each covered automobile

THE INTERESTED PARTY SHOWN ABOVE IS INCLUDED AS:

Additional Covered Party

Loss Payee

DESCRIPTION OF OPERATIONS/LOCATIONS/VEHICLES/SPECIAL ITEMS:

But only with respect to the activities for or on behalf of the Member Agency. MOPERM will not release, indemnify, or hold harmless Additional Covered Party.

Should the above described Memorandum be cancelled before the expiration date thereof, MOPERM will endeavor to mail written notice to the Interested Party shown above, but failure to mail such notice shall impose no obligation or liability of any kind upon MOPERM or its representatives.

Issued by the Missouri Public Entity Risk Management Fund (MOPERM), P.O. Box 105080, 2010 Williams Street, Jefferson City, MO 65110-5080.

By: Judy M. Perovich

Date: 09/04/2003

**DALTON, TREASURE AND MOWRER**

**A T T O R N E Y S A T L A W**  
203 COLLEGE AVENUE  
P. O. BOX 529  
KENNETT, MISSOURI 63857-0529

JOHN HALL DALTON  
HAROLD B. TREASURE  
J. MICHAEL MOWRER  
JOHN HALL DALTON, JR.

GOV. JOHN M. DALTON  
(1900-1972)  
TELEPHONE (573) 888-4631  
FAX (573) 888-2127  
EMAIL: DTHLAW@PCLGW.NET

September 9, 2003

MR DAVID P MADISON  
PEMISCOT COUNTY PORT AUTHORITY  
619 WARD AVENUE  
CARUTHERSVILLE MO 63830

Re: Insurance Coverage

Dear David:

With respect to the proposed Industrial Track Agreement between the Port Authority and the BNSF Railroad, I have reviewed and examined the following:

1. Section 68.010 RSMo. (copy attached), which says Port Authorities are political subdivisions of the State of Missouri.
2. Section 537.610 RSMo. (copy attached), which provides that political subdivisions of the State of Missouri may purchase liability insurance for tort claims with the permitted coverage not to exceed two million dollars for a single occurrence. This Section further provides that sovereign immunity for the political subdivision is waived only to the maximum amount of and only for the purposes covered by the policy of insurance.
3. Memorandum of Coverage (Memorandum Number 4031) (copy attached) issued by Missouri Public Entity Risk Management Fund showing coverage of \$2,000,000.00 per occurrence for the period January 1, 2003 through January 1, 2004.

It is my opinion that with respect to the proposed Industry Track Agreement this insurance coverage is sufficient and is all that is permitted by Statute.

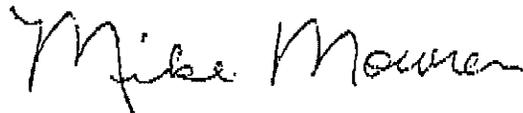
Once the Port begins rail operations additional coverage for those operations should be purchased.

I do not recommend that the Port sign any Agreement that goes beyond the scope of Section 537.610 RSMo.

At this time the Port does not have the "five or more employees" to be subject to the Missouri Workers Compensation Act and, therefore, Workers Compensation coverage is not required.

Yours very truly,

DALTON, TREASURE AND MOWRER

A handwritten signature in cursive script that reads "Mike Mowrer".

J. Michael Mowrer

JMM/sjs  
Attachments

MO ST 68.010  
V.A.M.S. 68.010

Page 1

**VERNON'S ANNOTATED MISSOURI STATUTES**  
**TITLE VI. COUNTY, TOWNSHIP AND POLITICAL SUBDIVISION GOVERNMENT**  
**CHAPTER 68. PORT AUTHORITIES**

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The statutes are current through West ID 178, 180 to 184, 186 to 187,  
189, 196 of the First Regular Session of the 92nd General Assembly (2003).

68.010. Cities and counties authorized to form port authorities, when

1. Every city or county which is situated upon, or adjacent to, or which embraces within its boundaries a navigable waterway, is hereby authorized to form a local port authority, and upon approval of the highways and transportation commission of the state of Missouri, the port authority shall be a political subdivision of this state. In every constitutional charter city not within a county, a local "Port Authority" is created by sections 68.010, 68.015, 68.025, 68.040, 68.045, 68.060 and 68.070 and shall become a political subdivision of this state September 28, 1975.

2. The highways and transportation commission of the state of Missouri is hereby authorized to accept applications, conduct hearings, and approve or disapprove applications for approval of local or regional port authorities as political subdivisions of this state, as provided herein, but in determining the approval or disapproval of such applications, the highways and transportation commission shall consider the following criteria:

- (1) The population of any city and/or county submitting the application;
- (2) The desirability and economic feasibility of having more than a single port authority within the same geographic area;
- (3) The technical and economic capability of participating cities and/or counties, as well as private interests, to plan and carry out port development within the proposed district;
- (4) The amount of actual and potential river traffic that would make use of any facilities developed by a port authority;
- (5) The potential economic impact on the immediate area from which the application originates; and
- (6) The potential impact on the economic development of the entire state and how the proposed port authority's developmental activities relate to any state plans.

Provided, however, any such application shall be granted if it is made by a city or county of at least three hundred thousand population, having a common boundary with the state of Kansas, or by a group of cities or counties at least one of which meets the aforesaid criteria, and if no proposed boundary of the port authority described in such application overlaps the boundary of any then existing port authority.

3. No city shall create a port authority under sections 68.010, 68.015, 68.025, 68.040, 68.045, 68.060 and 68.070 if said city is located within a county that has created a port authority which has received approval as a political subdivision of this state under sections 68.010, 68.015, 68.025, 68.040, 68.045, 68.060 and 68.070.

CREDIT(S)

1998 Main Volume

(L.1974, H.B. No. 1646, p. 734, § 1. Amended by L.1975, S.B. No. 135, p. 151, § 1.)

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Copy. © West 2003 No Claim to Orig. U.S. Govt. Works

MO ST 537.610  
V.A.M.S. 537.610

VERNON'S ANNOTATED MISSOURI STATUTES  
TITLE XXXVI STATUTORY ACTIONS AND TORTS  
CHAPTER 537. TORTS AND ACTIONS FOR DAMAGES  
SOVEREIGN IMMUNITY

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The statutes are current through West ID I78, I80 to I84, I86 to I87,  
I89, I96 of the First Regular Session of the 92nd General Assembly (2003).

537.610. Liability insurance for tort claims may be purchased, by whom-- limitation on waiver of immunity--maximum amount payable for claims out of single occurrence--exception--apportionment of settlements

1. The commissioner of administration, through the purchasing division, and the governing body of each political subdivision of this state, notwithstanding any other provision of law, may purchase liability insurance for tort claims, made against the state or the political subdivision, but the maximum amount of such coverage shall not exceed two million dollars for all claims arising out of a single occurrence and shall not exceed three hundred thousand dollars for any one person in a single accident or occurrence, except for those claims governed by the provisions of the Missouri workers' compensation law, chapter 287, RSMo, and no amount in excess of the above limits shall be awarded or settled upon. Sovereign immunity for the state of Missouri and its political subdivisions is waived only to the maximum amount of and only for the purposes covered by such policy of insurance purchased pursuant to the provisions of this section and in such amount and for such purposes provided in any self-insurance plan duly adopted by the governing body of any political subdivision of the state.

2. The liability of the state and its public entities on claims within the scope of sections 537.600 to 537.650, shall not exceed two million dollars for all claims arising out of a single accident or occurrence and shall not exceed three hundred thousand dollars for any one person in a single accident or occurrence, except for those claims governed by the provisions of the Missouri workers' compensation law, chapter 287, RSMo.

3. No award for damages on any claim against a public entity within the scope of sections 537.600 to 537.650, shall include punitive or exemplary damages.

4. If the amount awarded to or settled upon multiple claimants exceeds two million dollars, any party may apply to any circuit court to apportion to each claimant his proper share of the total amount limited by subsection 1 of this section. The share apportioned each claimant shall be in the proportion that the ratio of the award or settlement made to him bears to the aggregate awards and settlements for all claims arising out of the accident or occurrence, but the share shall not exceed three hundred thousand dollars.

5. The limitation on awards for liability provided for in this section shall be increased or decreased on an annual basis effective January first of each year in accordance with the Implicit Price Deflator for Personal Consumption Expenditures as published by the Bureau of Economic Analysis of the United States Department of Commerce. The current value of the limitation shall be calculated by the director of the department of insurance, who shall furnish that value to the secretary of state, who shall publish such value in the Missouri Register as soon after each January first as practicable, but it shall otherwise be exempt from the provisions of section 536.021, RSMo.

6. Any claim filed against any public entity under this section shall be subject to the penalties provided by supreme court rule 55.03.

CREDIT(S)

(L. 1978, H.B. No. 1650, p. 983, § 2. Amended by L. 1989, H.B. No. 161, § A, eff. July 14, 1989; L. 1999, S.B. Nos. 295 & 46, § A.)

<General Materials (GM) - References, Annotations, or Tables>



MISSOURI PUBLIC ENTITY RISK MANAGEMENT FUND

**MEMORANDUM OF COVERAGE - DECLARATIONS**

*This Declaration cancels and replaces any previous ones issued: Reissued effective 01-01-03.*

MEMBER AGENCY NAME: <b>Pemiscot County Port Authority</b>		AGENCY NAME:	
MEMBER AGENCY ADDRESS: <b>619 Ward Ave.</b>		AGENCY ADDRESS:	
MEMBER AGENCY CITY, STATE AND ZIP CODE: <b>Caruthersville , MO 63830</b>		AGENCY CITY, STATE AND ZIP CODE:	
MEMORANDUM NUMBER: <u>4031</u>			
COVERAGE PERIOD: <u>12:01 A.M. January 1, 2003</u> TO <u>12:01 A.M. January 1, 2004</u>			
COVERAGE LIMITS: <b>\$2,000,000 per occurrence as set forth in Section II of the Memorandum of Coverage.</b>			
COVERAGE	DEDUCTIBLE (if applicable)	RETROACTIVE DATE* (if applicable)	
Errors and Omissions	\$0		
General Liability	\$0		
Employment Practice Liability	\$0		
Other available coverages applicable are shown by Endorsement only.			
*This Memorandum does not apply to any wrongful act which occurs before the retroactive date. (M200)			
Forms and endorsements contained in this Memorandum at inception:			
Additional Covered Party - Comp General		M601 (Ed. 1-00)	

Issued by Missouri Public Entity Risk Management Fund (MOPERM), P.O. Box 105080, 2010 Williams Street, Jefferson City, MO 65110-5080.

By: Judith M. Penovich

Date: 01/02/2003

**ADDITIONAL COVERED PARTY  
COMPREHENSIVE GENERAL AND AUTOMOBILE LIABILITY**

It is agreed that the "Who is a Covered Party" provision includes as a Covered Party the person or organization named on the Statement(s) of Coverage attached to and made a part of this Memorandum, to whom or to which the Member Agency is obligated by virtue of a written contract to provide coverage as is afforded by this agreement, but only with respect to operations performed by or on behalf of the Member Agency or facilities used by the Member Agency.

**SEE ATTACHED STATEMENT OF COVERAGE**

Issued by the Missouri Public Entity Risk Management Fund (MOPERM), P.O. Box 105080, 2010 Williams Street, Jetterson City, MO 65110-5080.

**EXHIBIT "A"**  
 ATTACHED TO CONTRACT BETWEEN  
**THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY**  
 AND  
**PEMISCOT COUNTY PORT AUTHORITY**

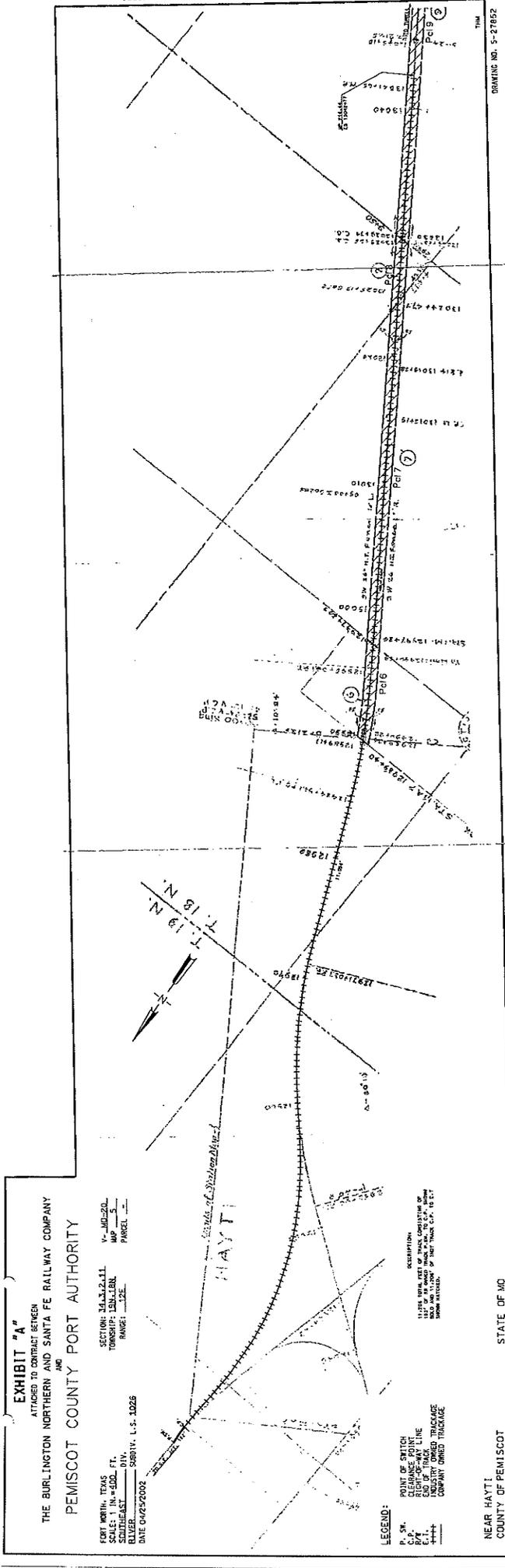
SECTION: 34.3, 2.11  
 TOWNSHIP: 15N, 18E  
 RANGE: 12E  
 MAP 5  
 PARCEL 1

FOOT NORTH, TEXAS  
 SCALE: 1 IN. = 500 FT.  
 DIV. SOUTHEAST  
 SHEET 5880V, L.S. 1025  
 DATE 04/23/2002

**HAYTI**  
*Remains of Old Hayti*

**LEGEND:**  
 B.M. BENCH MARK  
 C.P. CLEARANCE POINT  
 R.F. RIGHT-OF-WAY LINE  
 --- INDUSTRY OWNED TRACKAGE  
 +++ COMPANY OWNED TRACKAGE

11276 TOTAL AREA OF TRUCK COMPANY OF  
 MO. AND 15200 OF TRUCK C.P. 19 87  
 (SEE SHEET)



NEAR HAYTI,  
 COUNTY OF PEMISCOT,  
 STATE OF MO.

DRAWING NO. 5-27852