

UNION PACIFIC RAILROAD  
1400 Douglas Street, Stop 1580  
Omaha, Nebraska 68179

P 402 544 4735  
jberman@up.com

Jeremy M. Berman Assistant General Attorney

November 26, 2014

**Via UPS Overnight**

Ms. Cynthia T. Brown  
Chief, Section of Administration  
Office of Proceedings  
Surface Transportation Board  
395 E Street, SW  
Washington, D.C. 20024

237129

ENTERED  
Office of Proceedings  
November 28, 2014  
Part of  
Public Record



**Re: STB Docket No. FD 35884; Union Pacific Railroad Company – Temporary Trackage Rights Exemption – BNSF Railway Company**

Dear Ms. Brown

Enclosed for filing in the above proceeding are the following:

1. An original and ten (10) copies of a Verified Notice of Exemption and Caption Summary (Exhibit 3 to the Notice) pursuant to the trackage rights class exemption, 49 C.F.R. § 1180.2(d)(8).
2. A payment form in the amount of \$1,700.00 for the filing fee required by 49 C.F.R. § 1002.2(f).
3. Twenty (20) unbound copies of the Exhibit 1 map.

Please indicate receipt of the enclosed materials by returning a stamped copy of this letter in the self-addressed, stamped envelope enclosed for this purpose.

Sincerely,

  
Jeremy M. Berman

FILED  
November 28, 2014  
Surface Transportation Board

FEE RECEIVED  
November 28, 2014  
Surface Transportation Board





**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**DOCKET NO. FD 35884**

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**UNION PACIFIC RAILROAD COMPANY  
-- TEMPORARY TRACKAGE RIGHTS EXEMPTION --  
BNSF RAILWAY COMPANY**

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**VERIFIED NOTICE OF EXEMPTION**

UNION PACIFIC RAILROAD COMPANY

Jeremy M. Berman  
1400 Douglas Street  
STOP 1580  
Omaha, NE 68179  
(402) 544-4735  
(402) 501-3773 (FAX)  
jmberman@up.com

**Dated:** November 26, 2014

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**DOCKET NO. FD 35884**

---

**UNION PACIFIC RAILROAD COMPANY  
-- TEMPORARY TRACKAGE RIGHTS EXEMPTION --  
BNSF RAILWAY COMPANY**

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**VERIFIED NOTICE OF EXEMPTION**

Union Pacific Railroad Company ("UP") submits this Verified Notice of Exemption, pursuant to 49 C.F.R. § 1180.2(d)(8), for exemption of temporary overhead trackage rights over a line of railroad of BNSF Railway Company ("BNSF") between Milepost 579.3 near Mill Creek, Oklahoma on BNSF's Creek Subdivision and Milepost 631.0 near Joe Junction, Texas on BNSF's Madill Subdivision for a total distance of approximately 51.7 miles.

Under 49 C.F.R. § 1180.2(d)(8), the acquisition of temporary trackage rights by a rail carrier over lines owned or operated by any other rail carrier or carriers is exempt if the rights are (i) based on written agreements, (ii) not filed or sought in responsive applications in rail consolidation proceedings, (iii) for overhead operations only, and (iv) scheduled to expire on a specific date not to exceed 1 year from the effective date of the exemption. The trackage rights covered by this Notice: (i) are based on a written agreement, (ii) are not filed or sought a responsive application in a rail consolidation proceeding, (iii) are for overheard operations only, and (iv) will expire on November 30, 2015, a date that does not exceed 1 year from the effective date of the exemption. As such, the § 1180.2(d)(8) exemption is applicable.

In accordance with the requirements of 49 C.F.R. § 1180.4(g), UP submits the following information:

**§ 1180.6(a)(1) Description of the Proposed Transaction**

The transaction covered by this Notice is the acquisition of temporary overhead trackage rights by UP over approximately 51.7 miles of BNSF's trackage extending between Mill Creek, Oklahoma (Milepost 579.3 on BNSF's Creek Subdivision) and Joe Junction, Texas (Milepost 631.0 on BNSF's Madill Subdivision). These temporary trackage rights are granted for the sole purpose of allowing UP to move loaded and empty unit ballast trains. The ballast will be solely used for UP maintenance of way projects, have no commercial value and cannot be interchanged with another railroad.

**§ 1180.6(a)(1)(i) Summary of the Proposed Transaction**

See answer to § 1180.6(a)(1), above.

**§ 1180.6(a)(1)(i) Name, Business Address and Telephone Number of Applicant, and the Name of Counsel to whom Questions can be Addressed**

The name and business address of the applicant is:

Union Pacific Railroad Company  
1400 Douglas Street  
Omaha, NE 68179

Questions regarding this transaction are to be addressed to the representative named below:

Jeremy Berman  
1400 Douglas Street  
Union Pacific Railroad Company  
STOP 1580  
Omaha, NE 68179  
(402) 544-4735  
(402) 501-3773 (FAX)  
jmberman@up.com

**§ 1180.6(a)(1)(ii) Consummation Date**

The agreement will be consummated sometime after the effective date of this Notice of Exemption.

**§ 1180.6(a)(1)(iii) Purpose of the Transaction**

The temporary overhead trackage rights covered by this Notice will allow UP to move loaded and empty unit ballast trains to be used for UP maintenance of way projects.

**§ 1180.6(a)(5) States in which the Applicant Operates**

UP operates in the states of Arizona, Arkansas, California, Colorado, Idaho, Illinois, Iowa, Kansas, Louisiana, Minnesota, Missouri, Montana, Nebraska, Nevada, New Mexico, Oklahoma, Oregon, Tennessee, Texas, Utah, Washington, Wisconsin, and Wyoming.

**§ 1180.6(a)(6) Map (Exhibit 1)**

A map is provided as Exhibit 1.

**§ 1180.6(a)(7)(ii) Agreement (Exhibit 2)**

A copy of the executed temporary trackage rights agreement between UP and BNSF is attached as Exhibit 2.

**§ 1180.4(g)(1)(i) Labor Protection**

The applicable labor protection conditions are those imposed in Norfolk and Western Ry. Co. -- Trackage Rights -- BN, 354 I.C.C. 605 (1978), as modified in Mendocino Coast Ry., Inc. -- Lease and Operate, 360 I.C.C. 653 (1980). The applicable labor protective conditions for the discontinuance component of the temporary trackage rights are those set forth in Oregon Short Line R.R. Co. -- Abandonment -- Goshen, 360 I.C.C. 91 (1979).

**§ 1180.4(g)(2)(i) Caption Summary (Exhibit 3)**

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

**§ 1180.4(g)(3) Environmental Documentation**

Environmental documentation is not required for this transaction. See 49 C.F.R. § 1105.6(c)(4) (no environmental documentation required for common use of rail terminals and trackage rights). UP's proposed temporary trackage rights acquisition also is exempt from historic preservation reporting requirements. See 49 C.F.R. § 1105.8(b)(3).

Respectfully submitted,

UNION PACIFIC RAILROAD COMPANY

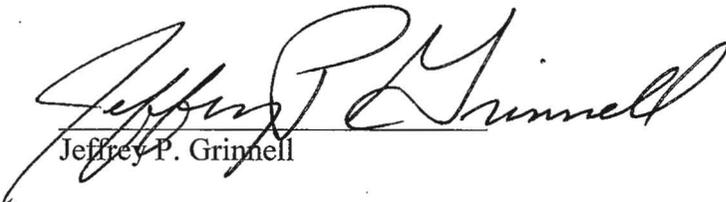
By: 

Jeremy M. Berman  
1400 Douglas Street  
STOP 1580  
Omaha, NE 68179  
(402) 544-4735  
(402) 501-3773 (FAX)  
jmberman@up.com

**VERIFICATION**

I, Jeffrey P. Grinnell, Director Joint Facilities for Union Pacific Railroad Company, under penalty of perjury, declare and verify that I am authorized to make this verification and I have read the foregoing Notice of Exemption, know the facts stated therein, and believe that said facts are true as stated to the best of my knowledge, information and belief.

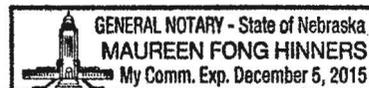
Dated: November 25, 2014

  
Jeffrey P. Grinnell

SUBSCRIBED AND SWORN TO  
before me this ~~25th~~ day  
of November, 2014.

  
Notary Public

My Commission expires:



# Exhibit 1

FD 35884

## Temporary Trackage Rights - UP on BNSF

Mill Creek, OK to Joe Junction, TX

January 1, 2015 through November 30, 2015



**Section 8. TERM AND TERMINATION**

Subject to the provisions of Section 7.2, 7.3 and 7.4 of Exhibit B this Agreement shall become effective upon the date UP first commences operations over the Joint Trackage pursuant to this Agreement, subsequent to having secured all necessary consent, approval or authority from appropriate governmental agencies upon terms and conditions satisfactory to UP, and shall remain in effect for the period of time specified in Section 2 hereof.

**Section 9. CHOICE OF LAW**

This Agreement shall be governed by and construed in accordance with the laws of the State of Texas.

**Section 10. NON-WAIVER OF RIGHTS AND OBLIGATIONS**

The failure of either party to this Agreement, in any one or more than one instance, to insist upon the performance of any of the terms of conditions of this Agreement, or to exercise any rights or privileges under this Agreement, or the waiver by either party to this Agreement of any breach of the terms or conditions of this Agreement, shall not be construed thereafter as waiving any such terms, covenants, rights, privileges or obligations, but the same shall continue and remain in full force and effect as if no such forbearance or waiver had occurred.

**Section 11. ENTIRE AGREEMENT**

This Agreement constitutes the entire understanding of the parties with respect to the temporary trackage rights granted herein. No amendment, change or modification of this Agreement shall be valid unless in writing and signed by the parties hereto.

*Signature page follows*

*Signature page for November 24, 2014, Temporary Trackage Rights Agreement to Mill Creek, OK*

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

**WITNESS:**

*Susan Down*

**BNSF RAILWAY COMPANY**

By: *[Signature]*

**WITNESS:**

*Madeline Martin*

**UNION PACIFIC RAILROAD COMPANY**

By: *Jeffrey P. Sunell*

connected with User's operations on or along the Joint Trackage. Pending qualification of train and engine crews of User, Owner shall furnish a pilot or pilots, at the expense of User, as deemed necessary by owner to assist in operating trains of User over the Joint Trackage.

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

If the disciplinary action is appealed by an employee of User to the National Railroad Adjustment Board or other tribunal lawfully created to adjudicate such cases, and if the decision of such board or tribunal sustains the employee's position, such employee shall not thereafter be barred from service on the Joint Trackage by reason of such occurrence.

2.16 If any Equipment of User is bad ordered en route on the Joint Trackage and it is necessary that it be set out, such bad ordered Equipment shall, after being promptly repaired, be promptly picked up by User. Unless otherwise agreed, Owner may, upon request of User and at User's expense, furnish the required labor and material and perform light repairs to make such bad ordered Equipment safe for movement. The employees and Equipment of Owner while in any manner so engaged or while en route to or returning to Owner's terminal from such an assignment shall be considered sole employees of User and sole property of User. However, should Owner after repairing such Equipment for User, move directly to perform service for Owner's benefit rather than return to Owner's terminal, then User's exclusive time and liability will end when owner's employees depart for work to be performed for Owner's benefit. In the case of such repairs by Owner to freight cars in User's account, billing therefor shall be in accordance with the Field and Office Manuals of the Interchange Rules adopted by the Association of American Railroads, hereinafter called "Interchange Rules," in effect at the date of performance of the repairs. Owner shall then prepare and submit billing directly to and collect from the car owner for car-owner responsibility items as determined under said Interchange Rules. Owner shall also submit billing to and collect from User any charges for repair to freight cars that are car-owner responsibility items, as determined under said Interchange Rules, should said car owner refuse or otherwise fail to make payment therefor.

2.17 If Equipment of User shall become derailed, wrecked, or otherwise disabled while upon the Joint Trackage, it shall be re-railed or cleared by Owner, except that employees of User

may re-rail User's derailed Equipment on the Joint Trackage whenever use of motorized on or off track equipment is not required and prior permission has been granted by Owner. The costs and expenses of clearing derailments and wrecks shall be at User's expense unless otherwise provided for in allocation of liability in Section 5 of this Exhibit B.

**2.18** In the event Equipment of User shall be forced to stop on Joint Trackage, and such stoppage is due to insufficient hours of service remaining among User's employees, or due to mechanical failure of User's Equipment, or any other cause not resulting from an accident or derailment, and such Equipment is unable to proceed, or if a train of User fails to maintain the speed required by Owner on the Joint Trackage, or if in emergencies, crippled or otherwise defective Equipment is set out of User's trains on the Joint Trackage, Owner shall have the option to furnish motive power or such other assistance (including but not limited to the right to re-crew User's train) as may be necessary to haul, help or push such Equipment, or to properly move the disabled Equipment off the Joint Trackage. The costs and expenses of furnishing motive power or of rendering such other assistance shall be at User's expense.

**2.19** In the event any accident, derailment, or wreck, hereinafter called "derailment" involving Units on or in a train operated by User or for User by Owner carrying hazardous materials, substances, or wastes, as defined pursuant to federal or state law, hereinafter called "Hazardous Materials" shall occur on any segment of the Joint Trackage, any report required by federal, state or local authorities shall be the responsibility of User. User shall also advise the owner/shipper of the Hazardous Materials involved in the derailment, and Owner, immediately.

Unless otherwise agreed by the parties, Owner shall assume responsibility for cleaning up any release of such Hazardous Materials from User's cars in accordance with all federal, state, or local regulatory requirements. User may have representatives at the scene of the derailment to observe and provide information and recommendations concerning the characteristics of Hazardous Materials release and the cleanup effort. Such costs shall be borne in accordance with Section 4 of the General Conditions.

If Hazardous Materials must be transferred to undamaged cars, User shall perform the transfer, provided, however, that if the Hazardous Materials are in damaged cars that are blocking the Joint Trackage, Owner, at its option, may transfer the Hazardous Materials. Transfers of Hazardous Materials by User shall only be conducted after being authorized by Owner.

### **Section 3. BILLING DEFAULT**

**3.1** Billing shall be accomplished on the basis of data contained in a billing form mutually agreed to between the parties. Such billing form shall contain sufficient detail to permit computation of payments to be made hereunder. Billing shall be prepared according to the rules, additives, and equipment rental rates as published by the Owner. User shall pay to Owner at the Office of the Treasurer of Owner or at such other location as Owner may from time to time designate, all the compensation and charges of every name and nature which in and by the

Agreement User is required to pay in lawful money of the United States within sixty (60) days after the rendition of bills therefor. Bills shall contain a statement of the amount due on account of the expenses incurred and services rendered during the billing period.

3.2 Errors or disputed items in any bill shall not be deemed a valid excuse for delaying payment, and payments shall be made subject to subsequent adjustment; provided no exception to any bill shall be honored, recognized, or considered if filed after the expiration of three (3) years from the last day of the calendar month during which the bill is rendered and no bill shall be rendered later than three (3) years (i) after the last day of the calendar month in which the expense covered thereby is incurred, or (ii) if in connection with a project for which a roadway completion report is required, after the last day of the calendar month in which the roadway completion report is made covering such project, with retirements and additions being reflected as appropriate adjustments to valuation bases retroactive up to three (3) years from date of billing, or (iii) in the case of claims disputed as to amount or liability, after the amount is settled and/or the liability(ies) established. This provision shall not limit the retroactive adjustment of billing made pursuant to retroactive adjustment of wage rates and settlement of wage claims.

3.3 So much of the books, accounts, and records of each party hereto as are related to the subject matter of the Agreement shall at all reasonable times be open to inspection by the authorized representatives and agents of the parties hereto.

All books, accounts, and records shall be maintained to furnish readily full information for each item in Accordance with 49 U.S.C. Section 11161 et seq. and the related regulations of the STB in 49 C.F.R. Part 1201, 1-3, et seq.

3.4 Should any amount become payable by Owner to User under the Agreement, the provisions of Section 3.1 through 3.3 of this Exhibit B shall apply with User as the billing party and Owner as the paying party.

3.5 Should User fail to make any payment when due which User is obligated to make under the Agreement, or fail in any other respect to perform as required under the Agreement, and such default shall continue for a period of six (6) months after notice in writing of such default is given by Owner to User, owner may at its election exclude User from the use of the Joint Trackage. Thereupon User shall surrender to Owner all said Joint Trackage and shall have no claim or demand upon it, by suit at law or otherwise, on account of said exclusion, provided that failure to make any payment which is the subject of arbitration or litigation between the parties shall not be deemed, pending the decision in such arbitration or litigation, cause of forfeiture hereunder.

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

**Section 4. COMPLIANCE WITH LAWS**

4.1 User shall not treat, store or dispose of petroleum products or hazardous waste or hazardous substances, as defined in (i) the Resource Conservation and Recovery Act, as amended, or (ii) the Comprehensive Environmental Response Compensation and Liability Act, as amended, or (iii) subsequent legislation regulating discharges into the environment, on the Joint Trackage.

4.2 Responsibility for Environmental Claims (as defined in Section 4.6, below) as between the parties shall be borne as follows:

a) User shall be responsible for Environmental Claims to the extent they result from (i) the use of, or presence upon, the Joint Trackage by User or its contractors or invitees, or (ii) the negligence or willful misconduct of User, its contractors or invitees in operations on or over the Joint Trackage.

b) Owner shall be responsible for Environmental Claims to the extent that User is not responsible for such claims pursuant to Section 4.2.a, above.

4.3 Each party shall release the other party to the extent it is responsible for an Environmental Claim, and, to the extent of such responsibility, shall defend, indemnify, protect and save harmless such other party from and against such Environmental Claim and costs associated therewith, including, but not limited to, environmental consultant fees, Attorneys' fees and third party claims.

4.4 In the event of any incident, accident, derailment, or vehicle striking or being struck by Equipment (hereinafter "Derailment") involving Equipment operated by a party hereto carrying (i) hazardous materials, substances or wastes, as defined pursuant to Federal or State Law, or (ii) pollutants (hereinafter collectively referred to as "Hazardous Materials") shall occur on the Joint Trackage, any report required by Federal, State or local authorities shall be the responsibility of such party. Each party shall advise the other party immediately of the occurrence of a Derailment involving Equipment operated by the party carrying Hazardous Materials.

Unless otherwise agreed by the parties Owner shall undertake any Response Action (as defined in Section 4.5, below) in accordance with all Federal, State, or local regulatory requirements necessitated by a release of Hazardous Materials on Owner's right of way underlying the Joint Trackage from Equipment operated by either party hereto upon the occurrence of a Derailment. User shall have data or a representative available at the scene of any Derailment involving Equipment operated by it to provide information concerning the characteristics of Hazardous Materials released.

If following a Derailment upon the Joint Trackage Hazardous Materials must be transferred to undamaged cars or other vehicles, unless otherwise agreed by the parties, the party

whose Equipment was involved in such Derailment shall perform the transfer; provided, however, that if the Hazardous Materials are in damaged cars of a train of User that are blocking the Joint Trackage, Owner shall transfer the Hazardous Materials; provided further that transfers of Hazardous Materials by User shall only be conducted after being authorized by Owner.

4.5 In the event any cleanup, response, removal or remediation of any environmental condition on the Joint Trackage is necessary (collectively referred to herein as "Response Action"), neither party shall be entitled to any damages, actual or consequential, by reason of the Response Action's interference with the other party's use of the Joint Trackage. Owner and its contractors shall have full, unrestricted and unconditional access to the Joint Trackage for the purpose of completing or engaging in a Response Action for which Owner has any responsibility or, at Owner's option, a Response Action which Owner has undertaken should User fail to diligently pursue and complete such Response Action to the satisfaction of Owner; provided, however, that any Response Action (i) shall be undertaken and completed pursuant to a work plan (including a schedule) submitted to the other party for its review and, in the case of Owner, approval, and (ii) shall not unreasonably, in terms of duration or otherwise, restrict the other party's use of the Joint Trackage. Either party's completion of any of the other party's obligations hereunder shall not be deemed a waiver of such obligations under the Agreement. Owner shall have the right, but not the obligation, to conduct reasonable inspections of any Response Action of User and User shall provide Owner all information requested by Owner regarding any Response Action of User or any Environmental Claims for which User is responsible.

4.6 The term "Environmental Claim" means the direct costs of any cleanup, response, removal, remediation, natural resource damage, closure and/or post-closure required by any environmental conditions affecting the air, soil, surface waters, ground waters, streams, sediments and similar environmental conditions caused by, resulting from, arising out of, or occurring in connection with this Agreement.

4.7 The liability and indemnity provisions of this Section 4 shall continue in full force and effect regardless of whether this Agreement is terminated pursuant to any other provision, or the Joint Trackage is abandoned and vacated by User.

4.8 The total cost of clearing a Derailment, cleaning up any Hazardous Materials released during such Derailment, and/or repairing the Joint Tracks or any other property damaged thereby shall be borne by the party or parties liable therefor pursuant to the allocation of liability in Section 5 of this Exhibit "B."

## **Section 5. LIABILITY**

5.1 Owner shall not be held liable for or on account of any loss, damage, or delay, to the trains, engines, cars or other property of any kind of either company, nor to freight, baggage or other property of any kind carried in or upon such trains, engines or cars, nor for or on account

of any injury to or death of passengers or employees of either company, or for or on account of any injury to the person or property of any other individual or individuals, company or companies, corporation or corporations whatsoever, which may be incurred or sustained by reason of such trains being operated on the Joint Trackage, or by reason of such trains being delayed in such operation, in whatever manner the same may be caused or occasioned, whether by or through the negligence of the Owner, its agents or servants, or by reason of defects in tracks, structures, or facilities furnished by Owner, or otherwise, it being understood and agreed that all risk of such delays, loss, damage, injury and death shall be and is hereby assumed by User, and User shall and will hold harmless Owner from and against all liabilities or claims for all such delay, loss, damage, injury and death and shall and will execute and deliver, or cause to be executed and delivered, to Owner, upon request, a full and complete release, satisfaction and discharge of all claims therefor, and will pay, or cause to be paid, all costs and expenses incurred by either party in the clearing of wrecks and repairs to equipment, track and property in which by reason of such movement covered by this Agreement the engines, trains, or cars of User are concerned, expenses and attorney's fees incurred in defending any action which may be brought against the Owner on account of any such claim or liability and any judgment which may be rendered against the Owner on account thereof. User shall pay all fines, penalties, costs and expenses imposed upon or incurred by Owner by reason of any violation by User of the Safety Appliance or other State or Federal Laws, and hold Owner harmless therefrom.

5.2 It is understood and agreed that a number of vehicular and pedestrian crossings of the Joint Trackage presently exist, or may be constructed. User agrees to accept all vehicular and pedestrian crossings in whatever condition they may be during the term of the Agreement and will not assert any claim, demand, or cause of action against Owner and will hold Owner harmless from any claim, demand, or cause of action arising out of any vehicular or pedestrian crossing accident on the Joint Trackage in which the engines, cars, or train of User is involved.

5.3 Each party hereto shall have the right to settle, or cause to be settled for it, all claims for damages for which such party shall be liable under the provisions of this Section 5 and to defend or cause to be defended all suits for recovery of any such damages.

In case a suit shall be commenced against either party hereto for or on account of damages for which the other party hereto may be solely or jointly liable under the provisions of this Section 5, the party so sued shall give notice to such other party of the pendency of such suit and thereupon such other party may assume or join in the defense of such suit.

In the event that more than one of the parties shall be liable hereunder for any damages and the same shall be settled by a voluntary payment of money or other valuable consideration by one of the parties so jointly liable therefor, release from liability shall be taken for and in the name of all parties so liable. In the event of any settlement in excess of Fifty Thousand Dollars (\$50,000), the settling party shall notify the other parties prior to settlement. Failure of the settling party to so notify the other parties prior to settlement shall not relieve the other parties of their obligation under the settlement agreement, so long as the settling party's failure to notify did not prejudice the other parties and then only to the extent of such prejudice.

If a judgment shall be recovered against and satisfied by one party involving a liability which should under the Agreement be borne entirely or participated in by the other parties, then all expensed of whatsoever nature, including costs and fees connected with such judgment and with the prosecution of the suit upon which it was based, shall be settled between the parties in strict accordance with the provisions of the Agreement and the party against which such judgment shall have been recovered shall be promptly reimbursed by such other parties to the extent to which the latter is indebted.

**5.4 THE LIABILITY ASSUMED BY USER SHALL NOT BE AFFECTED BY THE FACT, IF IT IS A FACT, THAT THE DAMAGE, INJURY OR DEATH WAS CAUSED OR CONTRIBUTED TO BY THE NEGLIGENCE OF OWNER OR ITS EMPLOYEES OR AGENTS, EXCEPT TO THE EXTENT SUCH DAMAGE, INJURY OR DEATH IS PROXIMATELY CAUSED BY THE WANTON, WILLFUL AND/OR INTENTIONAL ACTS OR THE GROSS NEGLIGENCE OF OWNER.**

**THE INDEMNIFICATION OBLIGATION ASSUMED BY USER SHALL INCLUDE (1) INDEMNITY FOR THE NEGLIGENCE OR ALLEGED NEGLIGENCE, WHETHER ACTIVE OR PASSIVE, WHERE THAT NEGLIGENCE IS A CAUSE OF THE LOSS OR DAMAGE; (2) INDEMNITY FOR STRICT LIABILITY RESULTING FROM VIOLATION OR ALLEGED VIOLATION OF ANY FEDERAL, STATE OR LOCAL LAW OR REGULATION, INCLUDING BUT NOT LIMITED TO THE FEDERAL EMPLOYERS' LIABILITY ACT (FELA), THE SAFETY APPLIANCE ACT, THE BOILER INSPECTION ACT, THE OCCUPATIONAL SAFETY AND HEALTH ACT (OSHA), THE RESOURCE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABILITY ACT (CERLA), THE CLEAN WATER ACT (CWA), THE OIL POLLUTION ACT (OPA), AND ANY SIMILAR STATE STATUTES IMPOSED OR IMPLEMENTING SIMILAR STANDARDS; AND (3) INDEMNITY FOR ACTS OR ALLEGED ACTS OF GROSS NEGLIGENCE OF OWNER FOR WHICH PUNITIVE DAMAGES MIGHT BE SOUGHT, EXCEPT TO THE EXTENT PROXIMATELY CAUSED BY THE WANTON, WILLFUL AND/OR INTENTIONAL ACTS OR THE GROSS NEGLIGENCE OF OWNER.**

## **Section 6. ARBITRATION**

**6.1 If at any time a question or controversy shall arise between the parties hereto in connection with the Agreement upon which the parties cannot agree, then, upon the written request of either party setting forth the issue in dispute, such question or controversy shall be submitted to arbitration. If the parties involved in such dispute are able to agree upon a single arbitrator experienced in matters of the character in dispute within thirty (30) days after the party desiring such arbitration (the "Demanding Party") shall notify in writing the other party or parties to such dispute (the "Noticed Parties"), such dispute shall be submitted to such single arbitrator. Otherwise, the Demanding Party shall appoint an arbitrator and notify the Noticed**

Parties in writing of such appointment. Within twenty (20) days after receipt of said notice, the Noticed Parties shall each appoint an arbitrator and notify the Demanding Party in writing of such appointment. Should any Noticed Party fail within twenty (20) days after receipt of such notice to name its arbitrator, the arbitrator for the Demanding Party and the arbitrators for the other Noticed Parties, if any, shall select one for the Noticed Party so failing and, if they cannot agree, said arbitrator may be appointed by the Chief Judge (or acting Chief Judge) of the United States District Court for the District in which the headquarters office of the Demanding Party is located upon application by any party after ten (10) days' written notice to all other parties. The arbitrators so chosen, if even in number, shall select one additional arbitrator to complete the board. If they fail to agree upon an additional arbitrator, the same shall, upon application of any party, be appointed by said judge in the manner heretofore stated.

Upon selection of the arbitrator(s), said arbitrator(s) shall with reasonable diligence determine the questions as disclosed in said notice of demand for arbitration, shall give all parties reasonable notice of the time and place (of which the arbitrator(s) shall be the judge) of hearing evidence and argument, may take such evidence as they deem reasonable or as either party may submit with witnesses required to be sworn, and may hear arguments of counsel or others. If any arbitrator declines or fails to act, the party (or parties in the case of a single arbitrator) by whom he was chosen or said judge shall appoint another to act in his place. After considering all evidence, testimony, and arguments, said single arbitrator or the majority of said board of arbitrators shall promptly state such decision or award in writing which shall be final, binding, and conclusive on all parties to the arbitration when delivered to them. Until the arbitrator(s) shall issue the first decision or award upon any question submitted for arbitration, performance under the Agreement shall continue in the manner and form existing prior to the rise of such question. After delivery of said first decision or award, each party shall forthwith comply with said first decision or award immediately after receiving it.

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

6.2 The books and papers of all parties, as far as they relate to any matter submitted for arbitration, shall be open to the examination of the arbitrator(s).

## **Section 7. GOVERNMENTAL APPROVAL, ABANDONMENT**

7.1 User shall, at its own cost and expense, initiate by appropriate application or petition and thereafter diligently prosecute proceedings for the procurement of all necessary consent, approval, or authority from any governmental agency for the sanction of the Agreement and the operations to be carried on by User thereunder. Owner, at its expense, shall assist and support said application or petition and will furnish such information and execute, deliver, and file such instrument or instruments in writing as may be necessary or appropriate to obtain such

governmental consent, approval, or authority. User and Owner agree to cooperate fully to procure all such necessary consent, approval, or authority.

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

7.3 Under the terms hereinafter stated, and to the extent that Owner may lawfully do so, owner reserves to itself the exclusive right, exercisable at any time during the life of the Agreement without concurrence of User, to elect to abandon all or any part of the Joint Trackage by giving six (6) months prior written notice to User of its intention so to do.

7.4 Upon termination of the Agreement, or any partial termination, as the applicable case may be, however the same may occur, User shall be released from any and all manner of obligations and shall be deemed to have forever relinquished, abandoned, surrendered, and renounced any and all right possessed by User to operate over that part of the Joint Trackage to which such termination applied, and as to such part, User shall forever release and discharge Owner of and from any and all manner of obligations, claims, demands, causes of action, or suits which User might have, or which might subsequently accrue to User growing out of or in any manner connected with, directly or indirectly, the contractual obligations of Owner under the Agreement, in all events provided, however, the aforesaid relinquishment, abandonment, surrender, renunciation, release, and discharge of User shall not in any case affect any of the rights and obligations of either Owner or User which may have accrued, or liabilities accrued or otherwise, which may have arisen prior to such termination or partial termination. Upon any termination, Owner will remove from Owner's right of way any connecting track, and any exclusive facility of User, at User's expense with salvage to be delivered to and retained by User. Upon any partial termination of the Agreement, however the same may occur, the terms and conditions hereof shall continue and remain in full force and effect for the balance of the Joint Trackage.

7.5 Each party shall be responsible for any labor claims of, and shall bear the cost of employee protection payable to, its own employees, and the employees of companies affiliated with it, to the extent resulting from the entry into or operation of the Agreement. However, in the event the parties agree that Owner should retain employees or provide additional employees for the sole benefit of User, the parties shall enter into a separate written agreement providing that User shall bear all cost and expense for any such retained or additional employees, including, without limitation, all cost and expense associated with labor protection payments which are made by Owner and which would not have been incurred had such retention or provision of employees for the sole benefit of User not been required.

**Section 8. OTHER CONSIDERATIONS**

**8.1** Nothing in the Agreement contained shall limit the right of Owner to admit other companies to the use of the Joint Trackage or any part thereof on such terms and conditions as are satisfactory to Owner, provided such admittance shall not materially hinder or obstruct the fair and reasonable exercise of the rights granted in the Agreement. Such other companies presently or hereafter admitted to the use of the Joint Trackage or any part thereof by Owner shall be considered Owner for the purpose of the Agreement. User shall have no right to admit any person, firm, or corporation to the use of the Joint Trackage.

**8.2** The Agreement shall be binding upon and inure to the benefit of the parties hereto, their respective successor lessees, and assigns, but no sale, assignment, mortgage, or lease by User of any interest or right given it under the Agreement, separate and apart from a corporate merger, sale, assignment, mortgage or lease of User's railroad in its entirety, shall be valid or binding without the prior written consent of Owner, which consent will not unreasonably be withheld.

**8.3** The Agreement and each and every provision hereof is for the exclusive benefit of the parties hereto and not for the benefit of any third party. Nothing herein contained shall be taken as creating or increasing any right in any third person to recover by way of damages or otherwise against any of the parties hereto.

**8.4** All notices, demands, requested, or submissions which are required or permitted to be given pursuant to the Agreement shall be given by either party to the other in writing by serving the same upon the Vice President of Operations of each company.

**8.5** If any covenant or provision of the Agreement not material to the right of User to use the Joint Trackage shall be adjudged void, such adjudication shall not affect the validity, obligation, or performance of any other covenant or provision which is in itself valid. No controversy concerning any covenant or provision shall delay the performance of any other covenant or provision. Should any covenant or provision of the Agreement be adjudged void, the parties will make such other arrangements as, under the advice of counsel, will effect the purposes and intent of the Agreement.

**8.6** In the event there shall be any conflict between the provisions of this Exhibit B and the Agreement, the provisions of the Agreement shall prevail.

**8.7** All Section headings are inserted for convenience only and shall not affect any construction or interpretation of the Agreement.

**End of Exhibit B**

**SURFACE TRANSPORTATION BOARD**

**NOTICE OF EXEMPTION  
DOCKET NO. FD 35884**

**UNION PACIFIC RAILROAD COMPANY  
-- TEMPORARY TRACKAGE RIGHTS EXEMPTION --  
BNSF RAILWAY COMPANY**

BNSF Railway Company ("BNSF") has agreed to grant temporary overhead trackage rights to Union Pacific Railroad Company ("UP") between Mill Creek, Oklahoma (BNSF Creek Subdivision Milepost 579.3) and Joe Junction, Texas (BNSF Madill Subdivision Milepost 631.0), a distance of approximately 51.7 miles. The temporary overhead trackage rights covered by this Notice are being granted solely to allow UP to move loaded and empty unit ballast trains to be used for UP maintenance of way projects.

The temporary trackage rights will become effective on or after December \_\_, 2015. The trackage rights are temporary in nature and will expire at midnight on November 30, 2015.

This Notice is filed under 49 C.F.R. § 1180.2(d)(8). Petitions to revoke the exemption under 49 U.S.C. § 10505(d) may be filed at any time. The filing of a petition to revoke will not stay the transaction.

Dated: December \_\_, 2014

By the Board,

Rachael D. Campbell  
Director, Office of Proceedings