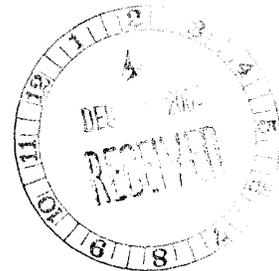


212834

BEFORE THE  
SURFACE TRANSPORTATION BOARD



Calumet Transload and Railroad, L.L.C. )

) Finance Docket Number: FD34639

VERIFIED NOTICES OF EXEMPTION  
UNDER 49 C.F.R. § 1150.31

By: David C. Dillon  
Dillon & Nash, Ltd.  
111 West Washington Street  
Suite 719  
Chicago, Illinois 60602  
(312) 782-9025

Calumet Transload and Railroad, L.L.C.  
16807 South Park  
South Holland, Illinois 60473

*Attorney for Applicant  
in Finance Docket No. FD34639*

*Applicant in Finance Docket No. FD34639*

DATE FILED: December 21, 2004

**FILED**

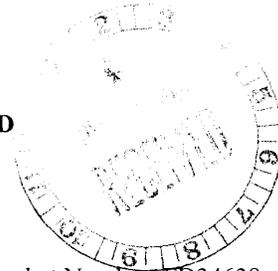
DEC 22 2004

ENTERED  
Office of Proceedings

DEC 29 2004

Part of  
Public Record

BEFORE THE  
SURFACE TRANSPORTATION BOARD



\_\_\_\_\_  
Calumet Transload and Railroad, L.L.C. )

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Finance Docket Number: FD34639

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**VERIFIED NOTICE OF EXEMPTION  
UNDER 49 C.F.R. § 1150.31**

Pursuant to 49 C.F.R. § 1150.31, *et. seq.* and 49 U.S.C. § 10502(a), Calumet Transload and Railroad, L.L.C. (CTRR), a noncarrier, hereby provides verified notice of exemption from 49 U.S.C. § 10901 for CTRR's acquisition by operating agreement from Calumet Transload, L.L.C. (CT), and operation pursuant to operating agreement with CT of approximately 1 mile of existing railroad right-of-way and trackage and transloading and warehousing facilities owned by CT, in Chicago, Illinois ("Calumet River Facility trackage"). The Calumet River Facility trackage is more specifically described and depicted in Appendix 1-A (description) and Appendix 1-B (map) attached to this notice.

**THE CALUMET TRANSLOAD AND RAILROAD, L.L.C. TRackage IS A LINE OF RAILROAD THAT QUALIFIES FOR THE CLASS EXEMPTION FROM 49 U.S.C. § 10901, RATHER THAN TRACK EXCEPTED FROM BOARD ACQUISITION AND OPERATION AUTHORITY UNDER § 10906**

\_\_\_\_\_  
Calumet Transfer, L.L.C. (CT) owns the Calumet River Facility trackage. The trackage is used in conjunction with interchanging to and from Norfolk Southern Railroad, carloads of inbound coal and related products for transloading and outbound shipments by water through loading of

barges and ships in the immediately adjacent Calumet River. Some various grades of coal will be mixed on site and then transferred to hopper cars. This will be an entirely new coal transload operation with on-site switching performed by locomotives and crews provided via Calumet Transload and Railroad.

There is currently 14,000 linear feet of track located on the Calumet River Facility. There are plans to phase in additional track that Calumet Transload and Railroad, L.L.C. will operate. (Phase 1 and Phase 4 are attached as Appendix 1-B hereto. Phase 1 is as the Calumet River exists currently; Phase 4 is future track construction.)

In those circumstances, the Calumet Transload Facility trackage is properly considered to be a line of railroad under 49 U.S.C. § 10901 pursuant to the Board's tenant-use test, rather than spur, switching or side tracks excepted from Board authority over their acquisition and operation by virtue of 49 U.S.C. § 10906. The tenant-use test is described in the Board's decision denying reconsideration in *Effingham Railroad Company - Petition for Declaratory Order - Construction at Effingham, IL*, STB Docket No. 41986 and embraced proceedings, 1998 STB LEXIS 253, decision served September 18, 1998; *aff'd sub nom. United Transp. Union v. Surface Transportation Board.*, 183 F.3d 606 (7<sup>th</sup> Cir. 1999).

In that case, as here pertinent, Agracel Corporation transloaded beer from rail to truck at a warehouse that it operated in an industrial park at Effingham, IL. Agracel owned approximately 206 feet of right-of-way and track that extended between its warehouse and trackage owned and operated by Conrail. Previously, Conrail had operated over the Agracel trackage to provide service to Agracel. It was proposed that Effingham Railroad Company (ERRC), a noncarrier, substitute for Conrail as provider of the rail service over the Agracel trackage. ERRC filed a notice of exemption

under 49 C.F.R. § 1150.31 for its operation over that trackage. The United Transportation Union (UTU) contended that the Board lacked authority over the proposed operation because Agracel trackage is spur, switching or side track excepted from Board operation authority under 49 U.S.C. § 10906.

In finding that the Agracel trackage was a line of railroad under 49 U.S.C. § 10901, the Board said (1998 STB LEXIS 253, at 8-9 (emphasis in original)):

...(I)n those cases where a tenant railroad's intended use of a track segment is different from the use made by the railroad owning the track, we have determined that the tenant's use, rather than the character of the trackage itself, is controlling with regard to its own operations, subject to consideration of the purpose and effect of the construction under *Texas & Pacific* (citations omitted).

In the initial notice, even under its new approach, ERRC became the operator of a line of track connecting Conrail to the site of the industrial park. Conrail clearly had operated this short track segment as an exempt siding or spur. However, because it was ERRC's initial railroad operation, this track segment became ERRC's entire line of railroad and was not, as to ERRC, a siding or spur. This small piece of trackage initiated ERRC's service from a connection or interchange point with Conrail to a shipper's facility within the industrial park. Thus ERRC's becoming the operator was the proper subject of the initial notice of exemption and was not statutorily exempt under section 10906.

It is apparent from the Board's decision in that case that the tenant-use test also applies when a new rail carrier is using trackage pursuant to an operating agreement rather than a lease, and when the prior use of the track was by a third-party carrier rather than by the shipper-owner of the trackage. In upholding the Board's decision in that case, the reviewing court held that it was reasonable for the Board to classify the trackage by virtue of the tenant's use. *United Transp. Union vs. Surface Transportation Bd.*, *supra*. 193 F.3d at 614. *Accord: Chicago Rail Link LLC - Lease & Oper. - Union Pacific R.R. Co.*, 2 S.T.B. 534 (1997), *aff'd sub nom. United Transp. Union - Illinois v. Surface Transp.*, 169 F.3d 474 (7<sup>th</sup> Cir. 1999).

Inasmuch as the subject transaction will be CTRR's initial railroad acquisition, and the Calumet River Facility trackage will constitute the entire line of railroad of CTRR, it follows that the Calumet River Facility trackage is a line of railroad under 49 U.S.C. § 10901, rather than spur, switching or side tracks excepted from Board acquisition and operation authority by virtue of 49 U.S.C. § 10906.

**INFORMATION REQUIRED BY 49 C.F.R. § 1150.33**

(a) *The full name and address of the applicant;*

The full name and address of the applicant in Finance Docket Number FD34639 is Calumet Transload and Railroad, L.L.C. 16807 South Park, South Holland, Illinois 60473.

(b) *The name, address, and telephone number of the representative of the applicant who should receive correspondence;*

CTRR representative is David C. Dillon, Dillon & Nash, Ltd., 111 West Washington Street, Suite 719, Chicago, Illinois, 60602, 312-782-9025.

(c) *A statement that an agreement has been reached or details when an agreement will be reached;*

An agreement between Calumet Transfer, L.L.C., and Calumet Transload and Railroad, L.L.C. of the Calumet Transfer Facility trackage will be reached within thirty (30) days, and an agreement in principle has been reached. (A copy of a draft Operating Agreement is provided herewith.)

(d) *The operator of the property;*

CTRR will be the operator of the property.

(e) *A brief summary of the proposed transaction, including:*

(1) *The name and address of the railroad transferring the subject property,*

The above entity in Finance Docket Number FD34639 is Calumet Transfer, L.L.C., a non-railroad corporation, 16807 South Park, South Holland, Illinois, 60473.

(2) *The proposed time schedule for consummation of the transaction,*

The operating agreement and operation are proposed to be consummated on January 1, 2005, provided that this notice of exemption has been filed at least seven days prior to that date.

(3) *The mile-posts of the subject property, including any branch lines, and*

The Calumet River Facility trackage is not described by milepost numbers. That trackage is described and depicted in Appendix 1-A and 1-B attached to this Notice.

(4) *The total route miles being acquired;*

A total of approximately 2.651 miles of trackage is to be operated under an operating agreement.

(f) *A map that clearly indicates the area to be served, including origins, termini, stations, cities, counties, and States:*

The required map is attached to this Notice as Appendix 1-B.

(g) *A certificate that applicant's projected revenues do not exceed those that would qualify it as a Class III carrier.*

The required certificate is attached to this Notice as Appendix 2.

#### **CAPTION SUMMARY**

A caption summary required by 49 C.F.R. § 1150.34 for Finance Docket Number 34289 is attached to this Notice as Appendix 3.

#### **ENVIRONMENTAL AND HISTORIC REPORT**

The proposed acquisition and operation do not require environmental and historic reporting. See 49 C.F.R. § 1105.6(c)(2)(i) and 49 C.F.R. § 1105.8(b)(1).

**LABOR PROTECTION**

Pursuant to 49 U.S.C. § 10901(c), labor protection requirements do not apply to this transaction.

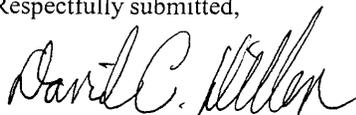
**VERIFICATION**

The verification is attached to this Notice as Appendix 4.

**CONCLUSION AND REQUESTED RELIEF**

WHEREFORE, within 30 days of the filing of this Notice, the Director of the Board's Office of Proceedings should publish notices in the Federal Register of the filing of notices of exemption in Finance Docket No. FD34639. See 49 C.F.R. § 1150.32(b).

Respectfully submitted,



Calumet Transload and Railroad, L.L.C.

By: David C. Dillon  
Dillon & Nash, Ltd.  
111 West Washington Street  
Suite 719  
Chicago, Illinois 60602  
(312) 782-9025

*Attorney for Applicant  
in Finance Docket No. FD34639*

*Applicant in Finance Docket No. FD34639*

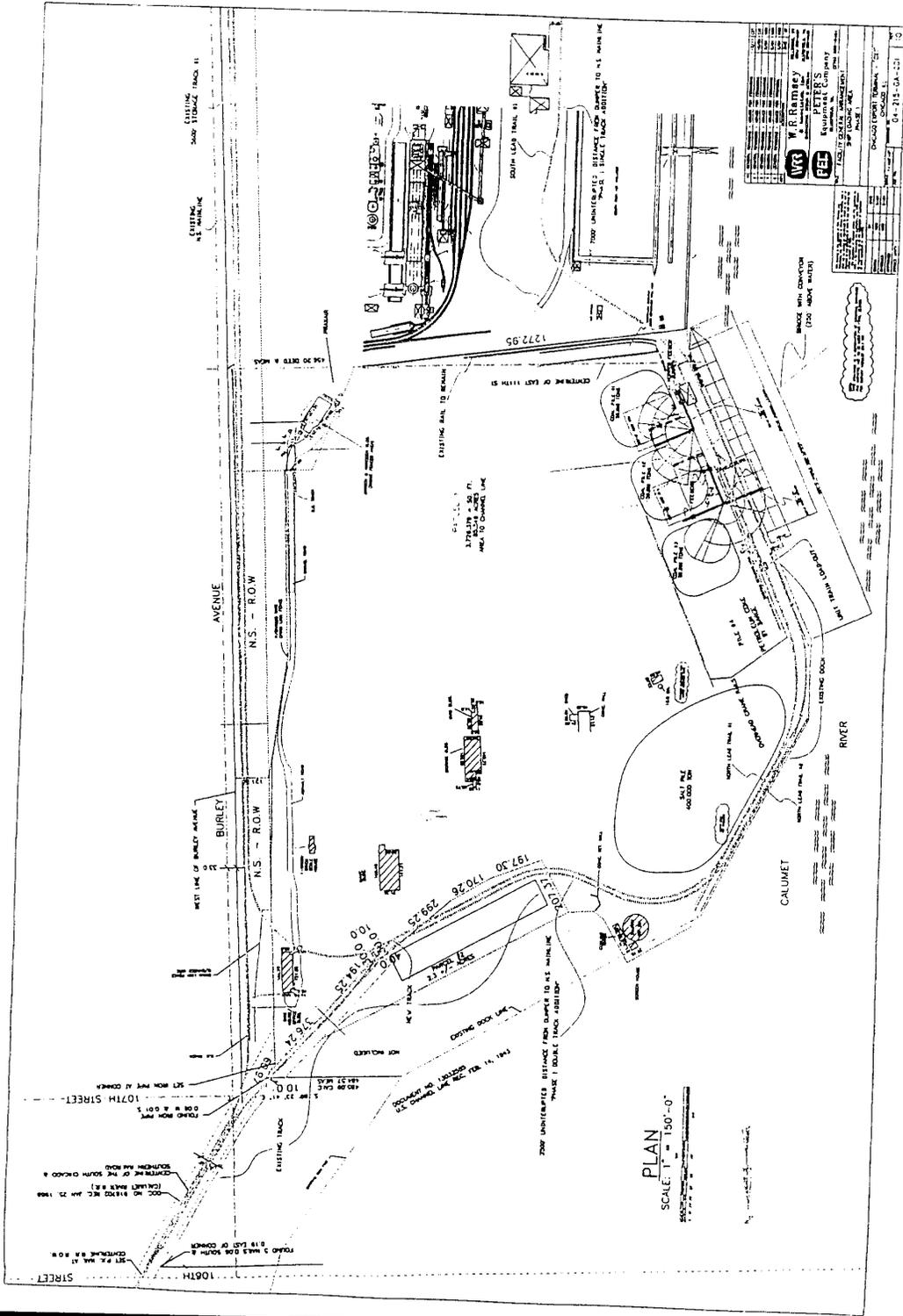
DATE FILED: December 21, 2004

Finance Docket Number: FD34639

Appendix 1-A

LENGTH OF CALUMET TRANSLOAD AND RAILROAD  
CHICAGO FACILITY TRACK

Total Track: 5,000 linear feet = 0.946 mile of track  
9,000 linear feet = 1.705 miles of trackage rights





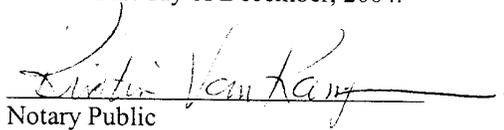
**CERTIFICATION UNDER 49 C.F.R. § 1150.33(g)**

Calumet Transload and Railroad, L.L.C. hereby certifies under 49 C.F.R. § 1150.33(g), that the projected revenues from the acquisition and operation proposed in this matter do not exceed those that would qualify it as a Class III rail carrier.



David C. Dillon  
*Authorized Representative of*  
*Calumet Transload and Railroad, L.L.C.*

SUBSCRIBED AND SWORN TO before  
me this 21st day of December, 2004.



Notary Public



**CAPTION SUMMARY**

SURFACE TRANSPORTATION BOARD

Notice of Exemption

FINANCE DOCKET NO. FD34639

CALUMET TRANSLOAD AND RAILROAD, L.L.C.  
- ACQUISITION EXEMPTION -  
RAIL LINE OF CALUMET TRANSLOAD, L.L.C.  
AT CALUMET RIVER FACILITY, CHICAGO, ILLINOIS

Calumet Transload and Railroad, L.L.C. (CTRR), a noncarrier, has filed a Notice of Exemption to acquire and operate from Calumet Transload, L.L.C. approximately 1 mile of right-of-way and trackage and 1.7 miles of trackage rights at Calumet Transload, L.L.C.'s Calumet River, Chicago, Illinois facility. Comments must be filed with the Board and be served on CTRR's representative, David C. Dillon, Dillon & Nash, Ltd., 111 W. Washington Street, Suite 719, Chicago, IL, 60602, (312) 782-9025.

This Notice is filed under 49 C.F.R. § 1150.31. If the Notice contains false or misleading information, the exemption is void *ab initio*. Petitions to revoke the exemption under 49 U.S.C. §10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

By the Board

(Seal)

Vernon A. Williams, Secretary

**VERIFICATION**

STATE OF ILLINOIS     )  
  )  
COUNTY OF COOK        )

David C. Dillon, being duly sworn, states that he is an attorney for Calumet Transload and Railroad, L.L.C.; that he is familiar with the factual allegations made in the foregoing Notice of Exemption on behalf of CTRR; and that such allegations are true as stated.

  
\_\_\_\_\_  
David C. Dillon, Attorney for  
Calumet Transload and Railroad, L.L.C.

SUBSCRIBED AND SWORN to before  
me this 21st day of December, 2004.

  
\_\_\_\_\_  
Notary Public



**DRAFT**

**THIS AGREEMENT CONTAINS AN AUTOMATIC RENEWAL PROVISION**

**OPERATING AGREEMENT**

THIS AGREEMENT, made and entered into as of the 1<sup>st</sup> day of January, 2005, between CALUMET TRANSLOAD, L.L.C. (CT); AND CALUMET TRANSLOAD AND RAILROAD (CTRR).

**WITNESSETH:**

WHEREAS, CT has acquired by Access Agreement from CT approximately 1 mile of right-of-way and trackage and 1.7 miles of trackage rights located at CT's Calumet River Facility, in Chicago, Illinois, ("the Calumet River Facility trackage"); and

WHEREAS, CTRR desires to operate and maintain the Calumet River Facility trackage for the provision of rail service in the name of, and in behalf of, CT; and

WHEREAS, CT is agreeable to such operation and maintenance upon the terms and conditions herein contained.

NOW, THEREFORE, in consideration of the covenants and conditions contained herein the parties hereto agree as follows:

**ARTICLE ONE**

**GRANT OF RIGHT TO OPERATE AND  
MAINTAIN THE CALUMET RIVER FACILITY TRACKAGE**

Subject to the terms and conditions provided in the Access Agreement between CT and CTRR, (i) CT hereby grants to CTRR the right to operate its trains, locomotives, cars, and equipment with its crews over the Calumet River Facility trackage for the purpose of providing rail service to shippers and receivers located on such lines and to transport shipments by rail over such lines, and

to maintain the Calumet River Facility trackage, and (ii) CTRR agrees to operate and maintain the Calumet River Facility trackage. CTRR reserves the right to operate trains, locomotives, cars, and equipment on an as-needed basis, using leased locomotive(s) or a substitute, using its own personnel. CTRR will perform all necessary freight car switching at the Calumet River Facility and will operate all freight car loading and unloading facilities.

## ARTICLE TWO

### TERM; TERMINATION

Section 2.01 Term. Subject to earlier termination as provided herein, the term of this Agreement shall be one year from the date of this Agreement shown above; provided, however, that this Agreement will be renewed automatically for additional one year periods unless, no later than 60 days before its expiration, either CT or CTRR provides written notice to the other party of its intent not to renew this agreement.

CT may terminate this Agreement upon ten (10) calendar days written notice if by any reason most of the circulating shares in CTRR with right to a vote are no longer property of CT, or its parent or affiliated companies, or if any shares in CTRR are owned, directly or indirectly, by a competitor of CT.

Section 2.02 Termination For Default. Either party may terminate this Agreement by written notice if the other party fails to perform any obligation required of it hereunder and fails to remedy such default within thirty (30) days after receipt of written notice of such default.

Section 2.03 Termination for Bankruptcy, Etc. Either party may immediately terminate this Agreement by written notice if the other party enters into or is placed in bankruptcy or receivership or is nationalized, become insolvent, or makes an assignment for the benefit of its creditors.

**ARTICLE THREE**

**GOVERNMENT APPROVAL, ETC.**

CTRR at its own expense shall obtain any and all governmental approvals, authorizations, permits, licenses, and exemptions that may be required for its operation and maintenance of the Calumet River Facility trackage.

**ARTICLE FOUR**

**INSURANCE**

CTRR shall be required to obtain and keep in force a commercial general liability insurance policy covering CTRR's operation and maintenance of the Calumet River Facility trackage, including public liability, personal injury, property damage, and contractual liability with per occurrence and aggregate limits of not less than \$2 million. CT shall be named as an additional insured in such policy. Upon reasonable request, CTRR shall make such policy available for inspection and review by CT.

**ARTICLE FIVE**

**MANAGEMENT AND OPERATIONS**

CTRR shall comply with the provisions of the Federal Safety Appliance Act, as amended, and all other federal, state, and local laws, regulations and rules respecting (i) the operations and maintenance of the Calumet River Facility trackage, (ii) the operation, condition, inspection and safety of CTRR's trains, locomotives, cars, and equipment while such trains, locomotives, cars, and equipment are being operated over the Calumet River Facility trackage. CTRR shall indemnify, protect, defend, and save harmless CT and its officers, agents and employees from and against all fines, penalties and liabilities imposed upon CTRR or its officers, agents and employees under such

laws, rules and regulations by any public authority or court having jurisdiction in the premises, when attributable in any manner to the failure of CTRR to comply with its obligations under this article.

## **ARTICLE SIX**

### **LIABILITY AND INDEMNITY**

Whenever any loss of, damage to, or destruction of any property whatsoever, or injury or death of any person or persons whomsoever, occurs with the trains, locomotives, cars, or equipment of, or in the account of CTRR, CTRR shall assume all liability therefore, and shall forever protect, defend, indemnify and save harmless CT and its officers, agents and employees from and against any such liability, cost and expense, except if such loss, damage, injury or death was caused by CT.

## **ARTICLE SEVEN**

### **ENVIRONMENTAL CONDITIONS**

CT shall indemnify CTRR for any and all Losses resulting from environmental conditions existing on the Calumet River Facility trackage as of the commencement of operations by CTRR. CTRR shall indemnify CT for any and all Losses resulting from environmental conditions occurring or arising on the Calumet River Facility trackage during the term of this Agreement except to the extent caused by the act or omission of CT.

## **ARTICLE EIGHT**

### **THIRD PARTY CLAIMS RELATING TO OWNERSHIP OPERATION**

CTRR shall not cause any lien, claim, or encumbrance to be placed against the Calumet River Facility trackage. If any such lien, claim or encumbrance shall be filed or placed against the Calumet River Facility trackage or any part thereof, CTRR agrees to discharge the same within 30 days after

CTRR has notice thereof. If CTRR fails to do so, CT shall have the right (but not the obligation) to pay or discharge any such liens, claims or encumbrances without inquiry as to their validity and any amount so paid, including interest, fees, charges, and expenses, shall be paid by CTRR to CT, as applicable.

#### **ARTICLE NINE**

##### **FINANCIAL STATEMENTS**

If CT shall so request, CTRR shall be required on a quarterly basis to provide statements reflecting its financial condition, such as a balance sheet and profit-loss statement.

#### **ARTICLE TEN**

##### **CONFIDENTIALITY**

CTRR will keep secret and confidential at all times and will not disclose, divulge, or communicate any confidential or proprietary information provided by CT hereunder, in any manner, directly or indirectly, to any third party, except as permitted by this Agreement, and except where that information:

- (a) is or later become publicly known under circumstances involving no breach of this Agreement by CTRR;
- (b) was already known to CTRR at the time it was received from CT, not under an obligation of confidentiality, as evidenced by written documents in the possession of CTRR; or
- (c) is made available to CTRR by a third party without secrecy obligations and without breach of an obligation to CT.

CTRR may disclose confidential information only to those of its directors, officers, and employees who legitimately require it for the purposes permitted by this Agreement, and will use its best efforts to prevent any unauthorized disclosure by them.

Notwithstanding the termination of this Agreement, the obligations of CTRR under this Section 10 shall continue in force for ten (10) years after termination.

#### **ARTICLE ELEVEN**

##### **REAL PROPERTY TAXATION**

CTRR agrees to file Illinois Department of Revenue Railroad Property Tax Forms (including but not limited to PTAX 500 through 513 and 520A through 523, and 537), listing the Argo property defined in the "Access Agreement" as "railroad operating property" as defined in the applicable Illinois statutes. CTRR shall pay the resulting property taxes or immediately fully reimburse CT if CT pays such taxes.

#### **ARTICLE TWELVE**

##### **AMENDMENTS**

This Agreement represents the entire understanding between the parties and supersedes and replaces any and all prior agreements between the parties relating to the subject matter hereof. This Agreement may not be amended except by a written instrument signed on behalf of each party by its authorized representatives.

#### **ARTICLE THIRTEEN**

##### **ASSIGNMENT**

Neither party may assign this Agreement without the prior written consent of the other, except that CT may assign this Agreement to any entity which succeeds, by sale, merger, acquisition, transfer, or otherwise, to all or substantially all of its assets or business at its Calumet River Facility.

**ARTICLE FOURTEEN**

**MISCELLANEOUS**

Section 15.01 Notice. Any notices, requests, or other communications hereunder shall be in writing and shall be deemed to have been duly given when made upon a party by personal service at any place where they may be found or by mailing such notices, requests, or communications by certified mail, postage prepaid and return receipt requested, or by nationally recognized courier, or by transmitting such notice by facsimile, in each case to the following addresses or facsimile numbers, as the case may be:

If to CT: Calumet Transfer, L.L.C.  
16807 South Park  
South Holland, IL 60473  
Attention: President

If to CTRR: Calumet Transload and Railroad, L.L.C.  
16807 South Park  
South Holland, IL 60473  
Attention: President

Either party may provide changes in the above addresses to the other party by a notice given to the other party in this Section 15.01.

Section 15.02 Governing Law. This Agreement shall be construed and enforced in accordance with the laws of the State of Illinois.

Section 15.03. Severability. If any provision in this Agreement shall for any reason be determined to be invalid or unenforceable, the balance of such provision and the remaining provisions of this Agreement shall nevertheless continue to be valid and enforceable as though the invalid or unenforceable provision had not been a part hereof.

Section 15.4 Titles. The title of the sections and subsections of this Agreement are for convenience of reference only and are not to be considered in construing this Agreement.

IN WITNESS WHEREOF, this Agreement has been executed by the parties hereto on the day and year first above written.

**Calumet Transfer, L.L.C.**

By: \_\_\_\_\_  
Authorized Representative

**Calumet Transload and Railroad, L.L.C.**

By: \_\_\_\_\_  
Authorized Representative