

BEFORE THE SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35453

ELKHART & WESTERN RAILROAD CO.

TRACKAGE RIGHTS EXEMPTION

FULTON COUNTY, LLC,
d/b/a FULTON COUNTY RAILROAD



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VERIFIED NOTICE OF EXEMPTION

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Elkhart & Western Railroad Co.
1318 S. Johanson Road
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Dated: December 9, 2010.

FILED

JAN 24 2011

SURFACE
TRANSPORTATION BOARD



BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35453

ELKHART & WESTERN RAILROAD CO.
TRackage RIGHTS EXEMPTION
FULTON COUNTY, LLC,
d/b/a FULTON COUNTY RAILROAD

VERIFIED NOTICE OF EXEMPTION

I. Comes now Elkhart & Western Railroad Co. ("EWR"), and files this Verified Notice of Exemption pursuant to 49 C.F.R. §1180.2(d)(7). Under this Notice, EWR will obtain local trackage rights from Fulton County, LLC, d/b/a Fulton County Railroad ("FCRR") between Rochester, Fulton County, Indiana (MP I-95.6) and Argos, Marshall County, Indiana (MP I-108.6), a distance of approximately 13 miles. The trackage rights are for the purpose of providing service to the customers of FCRR and will allow that traffic to directly interchange with Norfolk Southern Railway Co. ("NS") at Argos, Indiana. Since EWR leased the NS line between Argos and Walkerton, Indiana (FD No. 35347, Served February 19, 2010), FCRR traffic has not had a direct interchange with NS, and FCRR believes the trackage rights agreement will provide more efficient and cost-effective service to its customers.

The acquisition of these trackage rights is based on a written agreement.

II. The following information is provided as required by 49 C.F.R. §1180.4(g)(1)(i):

Section 1180.6(a)(1)(i)-(iii)

FCRR has granted overhead trackage rights to EWR between Rochester, Fulton County, Indiana (MP I-95.6) and Argos, Marshall County, Illinois (MP I-108.6). EWR will operate its own trains with its own crews over the FCRR line under the trackage rights.

The carriers involved in this transaction and their business addresses are as follows:

Elkhart & Western Railroad Co.
1318 S. Johanson Road
Peoria, Illinois 61607

Fulton County, LLC
1827 Lucas Street
Rochester, Indiana 46975

Questions regarding this exemption should be sent to: Daniel A. LaKemper, General Counsel, Elkhart & Western Railroad Co., 1318 S. Johanson Road, Peoria, Illinois 61607. The telephone number is (309) 697-1400.

The Trackage Rights Agreement has been signed and will become effective upon the effective date of this Exemption. Operations under this exemption will begin soon thereafter. The purpose of the trackage rights is for the purpose of continuing rail service to the customers on FCRR, and to allow the interchange of FCRR customers' traffic directly with NS.

Section 1180.6(a)(5).

The trackage involved in the trackage rights agreement is located in the state of Indiana.

Section 1180.6(a)(6)

The required map is attached as Exhibit No. 1.

Section 1180.6(a)(7)(ii)

A copy of the trackage rights agreement covering this transaction is attached hereto as Exhibit 2.

Applicants are agreeable to the imposition of the standard labor protective conditions imposed by the Board

This transaction does not require the filing of an environmental report or an historic report under 49 C.F.R. §1105.6(c) (4) and §1105.8(b) (3), respectively.

Respectfully submitted,



Daniel A. LaKemper, Esq.
Elkhart & Western Railroad Co.
1318 S. Johanson Road
Peoria, Illinois 61607
Tel.: (309) 697-1400

SURFACE TRANSPORTATION BOARD

Notice of Exemption

Finance Docket No. 35453

**ELKHART & WESTERN RAILROAD CO.
TRackage RIGHTS EXEMPTION
FULTON COUNTY, LLC,
d/b/a FULTON COUNTY RAILROAD**

Fulton County, LLC (“FCRR”) has agreed to grant local trackage rights to Elkhart & Western Railroad Railroad Co. (“EWR”) between Rochester, Indiana (MP I-95.6) and Argos, Indiana (MP I-108.6), a distance of approximately 13 miles.

The trackage rights will allow EWR to serve customers on FCRR and interchange traffic with the Norfolk Southern Railway Co. (“NS”), at Argos, Indiana, and will be effective thirty days from the date of filing of this Exemption, with operations commencing on or shortly after that date.

This Notice is filed under 1180.2(d)(7). Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not stay the transaction.

Dated: December , 2010

By the Board,
Vernon A. Williams,
Secretary.

VERIFICATION

I, Daniel A. LaKemper, verify under penalty of perjury, that I have read the above and foregoing Notice of Exemption and that the contents thereof are true and correct to the best of my knowledge and belief. Further, I certify that I am qualified and authorized to file this Verification.


Daniel A. LaKemper

EXHIBIT 1

MAP

EXHIBIT 2
AGREEMENT

**TRACKAGE RIGHTS AGREEMENT
ROCHESTER, IND TO ARGOS, IND.**

THIS TRACKAGE RIGHTS AGREEMENT ("Agreement") made and entered into as of this ___ day of October, 2010, by and between ELKHART & WESTERN RAILROAD CO., "User"), an Iowa corporation, with principal offices at 1318 S. Johanson Road, Peoria, Illinois 61607, and FULTON COUNTY, LLC, a/k/a FULTON COUNTY RAILROAD, ("Owner"), an Indiana limited liability company with principal offices at 1827 E. Lucas Street, Rochester, Indiana 46975;

WHEREAS, Owner is authorized by the Surface Transportation Board (STB) to provide common carrier rail service between Milepost I-95.6 at Rochester, Indiana, and Milepost I-108.6 at Argos, Indiana, a distance of approximately 13 miles; and,

WHEREAS, Owner's rail line connects at Argos with a rail line owned by Norfolk Southern Railway Company (NS), which is leased and operated by User; and,

WHEREAS, until recently Owner provided rail service over its line using a locomotive leased from NS; and,

WHEREAS, NS terminated the lease of that locomotive in accordance with the applicable Lease Agreement; and

WHEREAS, in order to fulfill its common carrier service obligation, Owner has entered into a Switching Services Agreement with User whereby User is subleasing a locomotive and train crew to enable Owner to provide rail service in its own name; and

WHEREAS, Owner intends to negotiate with User for sale of its rail line to User for continued rail operation, except for a 1.3-mile segment between a point 200 feet north of 18th Street and the southern terminus of the line at the northwest property line of Wabash Avenue at Rochester, Indiana (Milepost Nos. 96.9 to 95.6), for which a class exemption for abandonment has become effective; and

WHEREAS, if negotiation for sale to User of Owner's 11.7-miles rail line between Argos and a point 200 feet north of 18th Street at Rochester, i.e., between Milepost Nos. 108.6 and 96.9, ("the Rail Line") is not successful, Owner intends to negotiate for sale of the Rail Line to other entities for continued rail operation; and

WHEREAS, if all such negotiations for sale of the Rail Line for continued rail operation are not successful, Owner intends to seek authority from the STB to abandon the Rail Line; and

WHEREAS, User has requested that Owner grant User local trackage rights over the Rail Line to be applicable during the period of time when Owner is negotiating for sale of the Rail Line for continued rail operation, and Owner is willing to grant such local trackage rights in accordance with the terms of this Agreement;

NOW, THEREFORE, in consideration of these mutual covenants and agreements, and other good and valuable consideration hereinafter contained, it is agreed as follows:

SECTION 1. DEFINITIONS

1.1 "Agreement" shall mean this Trackage Rights Agreement, including any amendments, addendums and modifications thereof.

1.2 "AAR" shall mean the Association of American Railroads.

1.3 "Car" shall mean one (1) freight railcar; "Cars" shall mean more than one railcar.

1.4 "Changes in and/or Additions to" shall mean work projects, the cost of which is chargeable in whole or in part to Property Accounts as defined by Uniform System of Accounts for Railroad Companies as prescribed by the STB as of Commencement.

1.5 "Commencement" shall mean the commencement of User's operation of the Rail Line. Owner and User shall jointly agree on the date and time of such Commencement, as provided in Section 12.

1.6 "Environmental Problem" shall mean any condition caused by the spill, release, or leak of any toxic, hazardous or explosive material, in any form, or the violation or alleged violation of the Resource Conservation and Recovery Act ("RCRA"), the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), The Clean Water Act, the Oil Pollution Act, or any similar federal, state or local statute or mandate concerning pollution or environmental protection.

1.7 "Equipment" shall mean trains, locomotives, rail cars (loaded or empty), cabooses, vehicles, and machinery that are capable of being operated on railroad tracks, or on right-of-way for purpose of the operation, inspection, maintenance, repair, construction or rehabilitation of the Rail Line.

1.8 "Force Majeure" shall mean any uncontrollable event or condition, including natural disasters, strikes and labor disputes, criminal acts of third parties, war, terrorism, actions by governmental or military authorities, and actions by other rail carriers, or other third parties upon which one or the other party reasonably relies.

1.9 "FRA" shall mean the Federal Railroad Administration (or any successor agency having authority to regulate railroad safety).

1.10 "Interchange" shall mean transfer of railcars from one rail carrier to another. Cars shall be deemed to be Interchanged upon the physical delivery of the subject railcar to the interchange track, at/near Argos, Indiana, and the transmission of data to the connecting carrier, via Electronic Data Interchange ("EDI") pursuant to AAR Rules.

1.11 "Rail Line" shall mean all trackage of Owner between Mile Post 96.9, a point 200 feet north of 18th Street at Rochester, Indiana, and Mile Post 108.6 at/near Argos, Indiana, including rail, ties, ballast, roadbed, other track material, switches, spurs (including, but not limited to, the quarry spur track), side tracks, passing tracks, culverts, bridges, the right-of-way and all structures, facilities, appurtenances, signals, communications, and support facilities and all Changes in and/or Additions to said track structure now or in the future located as are required or desirable for the provision of rail service over the Rail Line.

1.12 "STB" shall mean the Surface Transportation Board of the United States Department of Transportation, or any successor agency having regulatory authority over railroads (or, in the appropriate case, its predecessor agency, the Interstate Commerce Commission).

1.13 "NS" shall mean the Norfolk Southern Railway Company, and any successor entity with which the Rail Line interchanges with at/near Argos, Indiana.

SECTION 2. RIGHTS OF USER

A. Subject to the terms and conditions contained herein and subject to User obtaining the necessary regulatory authority provided for herein, Owner grants to User local trackage rights over the Rail Line for the operation of Equipment (as defined in Section 1, above) in User's account, it being understood and agreed that User shall have the right to:

- (i) Set out, pick up or store Equipment, or switch customers upon the Rail Line, or any part thereof; and
- (ii) Serve any industry, team, or house track, intermodal or automobile facility now existing or hereafter located along the Rail Line, provided, however, that User shall not store cars on the Lucas Street sidetrack ("Sidetrack") located approximately between Milepost Nos. 98.1 and 98.4. User may use said Sidetrack as a "runaround track" or for the provision of rail service to Owner. Owner shall be responsible for the maintenance of said Sidetrack, and shall indemnify User for any liability in connection with Owner's use, occupancy, or maintenance of said Sidetrack, except that User agrees that, to the extent it uses said Sidetrack, it shall be at its own risk. User shall indemnify Owner from the costs and expenses of any derailment or accident, including injury to User's employees, except to the extent such derailment is caused by the active negligence of Owner's personnel or property. As used in this subsection, "Owner" shall be construed to include Owner's successors and affiliates, including, but not limited to Wilson Fertilizer & Grain Co., and their respective officers, directors, employees and agents.
- (iii) Connect the Rail Line to any industry track, spur, side track or similar facility owned by Owner.

- (iv) Interchange Cars with any other carrier having connections now or in the future with the Rail Line.

B. It is understood and agreed that User shall not have the right to admit any third party to the Rail Line for the purpose of operating any rail equipment, without the prior written consent of Owner, except that User may admit other rail carriers for the limited purpose of interchange, detour, temporary train storage, or similar purposes not involving switching any on-Line customer.

C. It is understood that trackage extending westward from the Rail Line at approximately Milepost 98 is not owned by Owner, and is not included in this Trackage Rights Agreement. That trackage is owned by Wilson Grain & Fertilizer Company.

SECTION 3. TERM

3.1 User's operation over the Rail Line pursuant to the local trackage rights granted in this Agreement shall begin at Commencement as defined in Section 12.3 of this Agreement and shall terminate upon either of the following dates: (1) the closing date of a sale of the Rail Line to User or to a third party for continued rail operation, or (2) the date of consummation of an abandonment and discontinuance of rail service pursuant to trackage rights, as authorized or exempted by the STB, provided, however, that either party can terminate this Agreement by providing 180 days' written notice of termination, provided, however, that in no event shall this Agreement terminate less than 180 days after Commencement, unless the parties agree thereto.

3.2 In the event of sale of the Rail Line to User for continued rail operation, User's trackage rights would automatically be discontinued. In the event of a sale of the Rail Line to a third party for continued rail operation, User shall seek STB authority or an exemption for discontinuance of rail service pursuant to the trackage rights covered by this Agreement. In the event that Owner is unable to sell the Rail Line for continued rail operation and thus seeks STB authority or an exemption for abandonment of the Rail Line, User shall join Owner to seek STB authority or an exemption for discontinuance of rail service pursuant to the Trackage Rights covered by this Agreement.

SECTION 4. CHARGE FOR USE OF THE RAIL LINE

A. User shall pay to Owner a fee of \$50.00 per loaded car originated or terminated on the Rail Line and interchanged to NS, and \$50.00 for each empty storage car switched onto the Rail Line. In addition, User shall pay to Owner \$1.00 per day per Railcar stored on the Rail Line. Said fees shall be payable on a calendar month basis, due on the first of the second month following the service month (ie. if this provision takes effect March 15, the first fee shall be due May 1, for the calendar month of March, and the first of every month thereafter, for the term of this Agreement), provided, however, that User shall not be required to pay any such fees for any cars that User is not paid for, due to bankruptcy, or similar situation that renders the car uncollectible.

SECTION 5. USE AND OPERATION.

5.1 The Rail Line shall be used and operated by User in its business as a common carrier under the provisions of the Interstate Commerce Act, as amended, and for the conduct of any other incidental business, enterprise or activity not prohibited by law. User shall initiate its operations at Commencement, as provided herein

5.2 At Commencement, Owner shall cease active operation of the Rail Line, subject to its residual common carrier obligation to resume operations should User discontinue operations. Owner shall not be in the routing of any shipments, or be responsible under AAR Rules, for any Car interchanged to User during the term of this Agreement. Owner shall cooperate with User in acquiring any federal, state or local assistance to repair or rehabilitate the Rail Line, and shall assign any federal or state tax credits available for any sums invested by User. Owner and User shall otherwise cooperate with each other as to any on-going matters or matters pertaining to the Rail Line which necessarily involve both parties.

5.3 Any personal property on the Rail Line, including any parts, supplies, and materials, if owned by Owner, shall be removed from the Rail Line prior to Commencement, or listed on a schedule, not less than twenty four hours prior to Closing, as belonging to a third party. Any personal property not removed or shown as belonging to a third party (such as railcars in transit), and remaining on the Rail Line at Commencement, shall be deemed to be part of the Rail Line, and shall be available for the use of User without further compensation.

SECTION 6. MAINTENANCE AND ADDITIONS

6.1 User, at its expense, shall perform all ordinary maintenance on the Rail Line during the term of this Agreement. This shall include all track inspections, bridge inspections, inspection of signals and crossing protection devices, brush and weed control, as well as the dispatch and operational control of all train movements over the Rail Line, and all FRA documentation. User shall use its own supervision, labor, fuel, materials, and equipment, or that of its agents and/or contractors. User may, from time to time, make such Changes in and/or Additions to the Rail Line as may be necessary or appropriate to its continued operation. Such Changes in and/or Additions to the Rail Line shall become a part of the Rail Line, provided, however, that User shall not, except with Owner's prior approval, make any Additions to the Rail Line in excess of \$50,000 per year. Owner shall not unreasonably withhold approval for additions necessary to attract/retain customers. Nothing herein shall in any manner restrict or limit the User's ability to maintain the Rail Line. User shall acquire title to all salvaged materials, including but not limited to crossties and rail, replaced by User during the maintenance and rehabilitation of the Rail Line, provided, however, that such salvaged materials shall be replaced by materials having equal to or greater utility and quality. In fulfilling its responsibility to maintain the Rail Line, User shall be bound to use ordinary and reasonable care for a Class III rail carrier. Owner acknowledges that the Rail Line is currently classified as FRA "excepted" track, and that User has no obligation to reclassify the Line, or to maintain the Line to a higher standard.

6.2 The parties acknowledge that certain signals and crossing protection devices at crossings along the Rail Line are not in compliance with applicable standards. The signals and crossing protection devices at crossings over which User will operate to serve Prairie Mills, Inc. shall be promptly brought into compliance with applicable standards. Owner agrees to bring the other non-compliant signals and crossing protection devices into compliance within a reasonable period of time after Commencement of this Trackage Rights Agreement. Toward that end, Owner has made arrangements with a Contractor to perform the work necessary for such compliance. That Contractor has agreed to perform that work in due course

6.3 User shall be responsible for the reporting and payment of any mileage, per diem, use, or rental charges accruing on Equipment in User's account on the Rail Line.

6.4 Before User allows anyone to operate Equipment over the Rail Line, as herein provided, such persons shall be required to pass the applicable rules examinations required by User under FRA regulations. Owner shall, without charge, give User's train and engine crews appropriate and necessary familiarization rides prior to Commencement.

6.5 Owner will, upon request, join in and cooperate with any application or request for financial assistance for projects involving the Rail Line, from appropriate governmental entities.

6.6 In the event a bridge, culvert, crossing, or significant part of the Rail Line is substantially destroyed or impaired by an event of Force Majeure, or becomes in need of extraordinary work, restoration, rehabilitation, reconstruction or alteration, User may seek governmental or other disaster assistance, or may embargo or seek to discontinue service over that portion of the Rail Line so affected, and shall have no liability for such work, reconstruction, alteration, repair or replacement over that portion of the Rail Line affected by such event or condition.

SECTION 7. LIABILITY AND INDEMNIFICATION

7.1 General. The provisions of this Section 7 shall apply only as between the parties hereto and their affiliated persons and entities, successors and permitted assigns, and are solely for their benefit. Nothing herein is intended to be for the benefit of any person or entity other than such parties. It is the explicit intention of the parties hereto that no person or entity other than such parties is or shall be entitled to bring any action to enforce any provision hereof against any of the parties hereto, and the assumptions, indemnities, covenants, undertakings and agreements set forth herein shall be solely for the benefit of, and shall be enforceable only by, such parties hereto.

Notwithstanding anything contained in this Section 7, no provisions hereof shall be deemed to deprive Owner or User of the right to enforce or shall otherwise restrict any remedies to which they would otherwise be entitled under other provisions of this Agreement as a result of the other party's failure to perform or observe any other obligation or duty created by this Agreement.

7.2 Definitions. The parties agree that for the purposes of this Section 7:

(a) The term "Employee(s)" of a party shall mean all officers, directors, agents, employees, affiliates, contractors and employees of contractors of that party.

(b) "Claim" or "Claims" shall mean any and all claims, suits, actions, causes of action, demands, losses, liabilities, fines, judgments, penalties, costs and expenses whatsoever (including, but not limited to, attorney fees and court costs and expenses).

(c) Any rail carrier hereafter admitted by User to the use of any portion of the Rail Line (for purposes of interchange, detour, or the like), shall, as between the parties hereto, be regarded in the same light as the User. Without limiting the generality of the foregoing, Owner does not assume any responsibility to the User under the provisions of this Agreement for any Claims occasioned by the acts or omissions of any employees of any such other rail carrier, or for any Claims which such other rail carrier shall be obligated to assume in whole or in part pursuant to law or any agreement relating to such other rail carrier's use of any portion of the Rail Line;

7.3 Retention of A/R and A/P. Owner shall retain its accounts receivable and accounts payable, and User shall not assume any liability, responsibility or obligation related to said accounts, nor shall User have any claim on said receivables.

7.4 Recognition of Revenue. Owner shall realize, as earned (accounts receivable or otherwise) those revenues attributable to inbound loaded Cars delivered to receiving customers and outbound loaded Cars Interchanged to NS prior to Commencement. Owner shall not collect any transportation charges, or recognize any such charges as an account receivable, for inbound loaded Cars not delivered to the customer, or for outbound loaded Cars not Interchanged to NS by Owner prior to Commencement. Empty Cars unloaded on the Rail Line, but remaining at Commencement will be returned to Interchange by User without charge, and User shall collect all transportation charges related to undelivered and un-Interchanged loads on the Rail Line at Commencement. Storage cars on the Rail Line at Commencement shall be transferred to the account of User, and User shall be entitled to daily storage fees beginning at the date of Commencement, and User shall be entitled to the outbound switch fees for such cars. If either party receives a payment after Commencement (or Owner has collected any outbound switch fees for storage cars prior to Commencement for cars remaining on the Rail Line at Commencement) that belongs to the other party hereunder, that party will send the payment to the other party within five (5) business days of receipt (or after Commencement, whichever is later).

7.5 Employees of Owner. Owner shall be responsible for any and all wages, salaries, fees or benefits due Owner's Employees, contractors or agents as of Commencement, or which become due on account of this Agreement. Owner acknowledges that User is under no obligation to hire any of Owner's Employees, contractors or agents, and any contractual, severance, unemployment, or similar payment that may become due any Owner Employee, contractor or agent shall be solely the responsibility of Owner.

7.6 Indemnification by User. User accepts the current condition of the Rail Line and shall indemnify and hold harmless Owner, its parents, subsidiaries, affiliated entities, and their respective officers, directors, employees, agents, insurers, attorneys, successors and assigns, from any and all Claims arising out of, related to, or based upon any act or omission of User in the operation of the Rail Line after Commencement, including any Claims related to the investigation, mitigation or clean-up of wrecks, derailments, spills, or Environmental Problems occurring after Commencement.

7.7 Indemnification by Owner. Owner shall indemnify and hold harmless User, its parents, subsidiaries, affiliated entities, and their respective officers, directors, employees, agents, insurers, attorneys, successors and assigns, from any and all Claims arising out of, related to, or based upon any act or omission of Owner in the operation of the Rail Line prior to Commencement, including any Claims related to the investigation, mitigation or clean up of wrecks, derailments, spills, or Environmental Problems occurring or existing prior to Commencement.

7.8 Each party hereto shall promptly handle any Claims for which such party shall be responsible under the provisions of this Section 7. If any suit shall be brought against one of the parties hereto, and the other party shall under the provisions of this Agreement be responsible for such Claim, then the party sued shall give prompt and full notice to the responsible party, so that the responsible party may assume such defense, but any sums which the non-responsible party shall, in good faith expend in such defense (such as a motions to be dismissed from the suit), the responsible party shall promptly repay on demand.

7.9 In the event both parties hereto may be liable for any Claim, including, but not limited to Environmental Problems that both parties may have contributed to, the parties shall cooperate in the defense of such Claim. No party hereto shall be conclusively bound by any judgment against the other party, unless the former party shall have had reasonable notice requiring or permitting it to investigate and defend and reasonable opportunity to make such defense. When such notice, and opportunity shall have been given, the party so notified and the other party shall be conclusively bound by the judgment as to all matters which could have been litigated in such suit, including without limitation a determination of the relative or comparative fault of each.

7.10 Owner and User acknowledge that one or more persons or other entities (such as contractors or insurance companies) who are Employees of or otherwise affiliated with Owner may become Employees of or otherwise affiliated with User. To the extent that this Section 7 gives such persons or entities rights of indemnification from Owner or User, it is the intent of the parties that such indemnification shall not extend to such acts or omissions committed while employed or affiliated with the responsible party (ie. Owner shall not be required to indemnify a contractor of Owner's for Claims prior to Commencement, by virtue of the fact that such contractor may be a contractor of User, and User shall not be required to indemnify User's contractor for Claims after Commencement, by virtue of the fact that such contractor may have been a contractor of Owner). OWNER AND USER EXPRESSLY INTEND THAT WHERE ONE PARTY IS TO INDEMNIFY THE OTHER PURSUANT TO THE TERMS OF THIS AGREEMENT, SUCH INDEMNITY SHALL NOT INCLUDE (1) INDEMNITY FOR THE

SOLE NEGLIGENCE, WHETHER ACTIVE OR PASSIVE, OF THE INDEMNIFIED PARTY WHERE THAT NEGLIGENCE IS A CAUSE OF THE CLAIM; or (2) INDEMNITY FOR STRICT LIABILITY OF THE INDEMNIFIED PARTY RESULTING FROM A VIOLATION OR ALLEGED VIOLATION OF ANY FEDERAL, STATE OR LOCAL LAW OR REGULATION BY THE INDEMNIFIED PARTY.

7.11 Owner shall remain responsible for the disposition of any wrecked railcars remaining on the Rail Line at Commencement. Any contractor performing work on removing said railcars shall obtain a right of entry permit from User, in accordance with User's normal practice.

SECTION 8. RECORDS, ERRORS, AND INSPECTION

8.1 User shall provide an Interchange Statement in sufficient detail to permit the computation of payments made pursuant to Section 4(A). The Statement shall accompany the appropriate monthly payment. Any errors shall be corrected on the next monthly Statement, or as soon thereafter as such error is discovered. "Error," as used herein shall be deemed to include a payment for a car later determined to be an uncollectible car.

8.2 All books, accounts and records of User related to the subject matter of this Section shall, upon reasonable notice, be open at all reasonable times to inspection by the authorized representatives of Owner.

8.3 Owner shall have a right to inspect the Rail Line, at its expense, upon reasonable notice, and at reasonable times, with due regard for the operations of User. Owner shall not, during the term of this Agreement, have the right to admit any third party to the Rail Line, for any purpose.

SECTION 9. COMPLIANCE WITH LAWS

Each party shall endeavor to comply with all applicable federal, state and local laws, rules, regulations, orders, decisions and ordinances, and if any failure on the part of any party to so comply shall result in a fine, penalty, cost or charge being imposed or assessed on or against another party, such other party shall give prompt notice to the failing party and the failing party shall promptly assume such liability and/or indemnify the other party for such fine, penalty, cost or charge and all expenses and reasonable attorneys' fees incurred in connection therewith, and shall, upon request of the other party, defend such action free of charge or expense to the other party.

SECTION 10. INSURANCE

User shall obtain and maintain railroad liability insurance, including Federal Employers' Liability coverage, with limits of not less than \$10,000,000. combined single limits for bodily injury and property damage.

Prior to entrance onto the Rail Line, User shall provide Owner with a Certificate of

Insurance evidencing that User has the required coverage in force and that Owner is listed as an additional insured on said policy(ies).

SECTION 11. TAXES AND ASSESSMENTS

Owner shall be responsible for payment of any real estate taxes, license fees, special assessments or other charges that may be levied or assessed against the Rail Line, provided, however, that Owner may, in good faith contest any such charges through the appropriate procedures.

SECTION 12. CONDITIONS AND COMMENCEMENT.

This Agreement is contingent upon the following conditions:

12.1. The authority (or exemption) of the Surface Transportation Board, without imposition of any material requirements not contained herein, including any labor conditions, on Owner or User, as a condition to any such authority. User shall initiate by appropriate application or petition and thereafter diligently prosecute proceedings for the procurement of such authority from the STB. Owner 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 authority. User and Owner agree to cooperate fully to procure all such necessary authority. User shall also make all necessary notifications to the FRA.

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

In the event that any third party objects or otherwise opposes the grant of authority (or exemption, as the case may be), such authority shall, at the option of User, for purposes of this Agreement, be deemed to have not taken effect until such objection or opposition is finally disposed of by the STB, regardless of whether or not the authority or exemption has taken effect in the meantime by operation of law.

12.2. User's conclusion of a due diligence review to confirm the condition of the Rail Line and the representations contained herein. In order to facilitate such review, Owner shall, promptly after the execution of this Agreement, provide to User copies of all inspections, notices, environmental reports, surveys, valuation maps, track charts, deeds, leases, licenses, contracts, easements, and other documents related to Rail Line or rail operations thereon. Owner shall also allow User to inspect the Rail Line by rail, and to inspect the structures and facilities thereon by such means as is reasonable. User shall have a right to terminate this Agreement, without liability, if, after such review, it has reasonable cause to believe that the operation of the Rail Line is not economically feasible, or that the property has an Environmental Problem it determines to be unacceptable, or that the Rail Line is encumbered or impaired to an extent that User is dissatisfied with Owner's title to the Rail Line. Such due diligence review shall be

completed not more than ten days after the effectiveness of STB authority as provided in Section 12.2.

12.3 Commencement shall be at a date and time agreed by the parties, not more than ten days after the effective date of STB authority. At a time and location agreed to by the parties, Owner shall provide User with copies of leases, licenses, easements, track, bridge and signal inspections, customer records, signal records, engineer certification records, and other documents relating to the Rail Line, and with Owner's switch keys. User shall, as soon as practical, remove Owner's switch locks and replace them with User's locks, and return Owner's switch locks and keys to Owner.

12.4 The parties further agree that they shall sign and deliver such other and further documents after Commencement as the other party may from time to time reasonably request, in order to carry out the intent and purposes of this Agreement.

SECTION 13. CONDEMNATION, ENCUMBRANCES AND ABANDONMENT

13.1 If any attempt is made, including by condemnation or eminent domain, to take or otherwise involuntarily dispossess Owner and/or User of their respective rights to the Rail Line, Owner and User shall vigorously and in good faith oppose such attempt. Owner and User will cooperate in good faith with each other in such opposition.

13.2 Owner shall not abandon, sell, mortgage, hypothecate, or otherwise encumber or dispose of all or any part of the Line unless User gives its prior written approval to such transaction.

13.3 Abandonment/Discontinuance. Except pursuant to the provisions relating to expiration or termination of this Agreement herein, neither party shall file any petition to abandon or discontinue service over the Rail Line, or any portion thereof, except with the prior written consent of the other party.

SECTION 14. DEFAULT

14.1 Either party hereto claiming default of any of the provisions of this Agreement shall furnish notice and written demand to the other party for performance or compliance with the covenant or condition of this Agreement claimed to be in default, which notice shall specify wherein and in what respect such default is claimed to exist and shall specify the particular section or sections of this Agreement under which such claim of default is made.

14.2 If the alleged default relates to a good faith dispute over the interpretation of the provisions of this Agreement, the matter shall be submitted to arbitration pursuant to Section 15, provided that the arbitrator shall not have the authority to amend, modify or terminate this Agreement.

14.3 Failure of a party to claim a default shall not constitute a waiver of such default. Either party hereto entitled to claim default may waive any such default, but no action by such

party in waiving such default shall extend to or be taken to affect any subsequent defaults or impair the rights of either party hereto resulting therefrom.

14.4 Neither party shall be deemed in default of this Agreement, if it is prevented from performing its obligations due to Force Majeure.

14.5 In the case of a default other than one requiring arbitration, the aggrieved party may seek specific performance (and/or the payment of any sums owed) at the STB, or in accordance with Section 23.1,

SECTION 15. ARBITRATION

15.1 If at any time a good faith question or controversy ("Dispute") shall arise between the parties hereto in connection with the interpretation of this Agreement, then upon written request of either party, setting forth the issue(s) in dispute, such Dispute shall be submitted to arbitration. Unless other procedures are agreed to by the parties, such arbitration shall be governed by the rules and procedures set forth in this Section 15.

15.2 If the parties to the Dispute are able to agree upon a competent and disinterested arbitrator within thirty (30) days after written notice by one party of its desire for arbitration, then the Dispute shall be submitted to that Arbitrator. Otherwise, the Arbitrator may be appointed by the STB's Dispute Resolution Office, upon application by either party, after written notice to the other party.

15.3 Upon selection of the Arbitrator, said Arbitrator shall proceed with reasonable diligence; give both parties reasonable notice of the time and place of hearing evidence and argument; may take such evidence as the Arbitrator shall deem reasonable or as either party may submit with witnesses required to be sworn, and hear arguments of counsel or others. If the Arbitrator fails to act, the parties or the STB shall appoint another to act in the arbitrator's place.

15.4 After considering all evidence, testimony and arguments, the Arbitrator shall promptly make a decision or award and the reasoning for such in writing, which shall be binding on the parties when delivered to them. The award rendered by the Arbitrator may be entered as a judgment in any court having jurisdiction thereof and enforced as between the parties without further evidentiary proceeding, as if entered by a court at the conclusion of a judicial proceeding. The decision of the Arbitrator may be appealed, as if it were the decision of a trial court, to the United States District Court for the District of Columbia. Said Court shall have the authority to award costs and reasonable attorney fees as the Court deems just. Until the Arbitrator shall issue the decision or award upon any question submitted for arbitration, performance under this Agreement shall continue in the manner and form existing prior to the rise of such Dispute. After delivery of said decision or award, each party shall forthwith comply with said decision or award immediately after receiving it.

15.5 The compensation, cost, and expenses of the Arbitrator shall be divided equally between the parties.

15.6 Interest computed annually, at a rate equal to the Arkansas judgment interest rate shall be applied to any and all arbitrator's awards requiring the payment of money and shall be calculated from thirty (30) days following the date of the applicable arbitration decision.

15.7 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.

SECTION 16. RIGHTS AND DUTIES UPON EXPIRATION OR TERMINATION.

The expiration or termination of this Agreement shall not affect the liabilities or obligations of Owner or User that may have accrued prior to such expiration or termination. Title to any improvements or betterments to the Rail Line shall vest in the Owner and User shall have no claim therefor except under Section 18 and/or 20. In the event that the Agreement expires or is terminated, but User continues to operate the Line pending regulatory action, the parties agree to continue to observe the terms of this Agreement, until the STB enters further orders.

SECTION 17. RAIL CROSSINGS AND EASEMENTS.

17.1 The rights to use the Rail Line granted in this Agreement are accepted by User subject to those presently existing crossings and other licenses and easements, whether or not of record, provided, however, that User may, in good faith, contest any third party's claim of such rights through the appropriate procedures. Owner covenants, however, that no additional crossings, licenses or easements (road, pedestrian, pipeline, wireline, fiber optic cable or otherwise) were/shall be granted by the Owner after October 1, 2010.

17.2 Owner shall, upon execution of this Agreement, grant User the right to act as its agent for the negotiation of any new, extended or renewed leases, licenses, easements or similar rights to the Owner's real property. For acting as said agent, User shall receive a 35% commission on all lease, license, easement and similar revenues earned on the real property.

17.3 Owner shall not otherwise mortgage, pledge, or encumber any assets comprising the Rail Line during the term of this Agreement, except with the prior written consent of User.

17.4 It is understood and agreed that agreements, easements, and licenses between Owner and third parties existing at Commencement of this Trackage Rights Agreement shall not be affected by such Agreement.

SECTION 18. AGREEMENT TO REIMBURSE AND SECURITY

At the expiration or termination of this Agreement Owner shall reimburse User (either directly, or, if User purchases the Rail Line, as a credit against the purchase price) for the sums expended by the User for subsequent Changes in and/or Additions to the Rail Line during the term of this Agreement, pursuant to Section 6. The parties may, during the term hereof, agree to supplemental provisions relating to subsequent rehabilitation.

SECTION 19. WARRANTIES OF OWNER

Owner warrants that it is not aware of any Environmental Problem on the Rail Line, or the existence of any actions or threatened actions against Owner related to the Rail Line, by the FRA, or any other federal, state or local agency having jurisdiction,

Owner warrants that it has good and valid title to the Rail Line (either fee simple or railroad easement); that it has not, except as disclosed to User herein, sold, transferred, mortgaged, pledged, hypothecated, or otherwise encumbered or disposed of any part of all of said Rail Line, or any rights therein, and Owner will defend such title against the claims of any other party.

Owner further warrants that it will not sell, transfer, mortgage, pledge, hypothecate or otherwise encumber or dispose of any part or all of the Rail Line, or any rights therein, after the execution of this Agreement.

Owner warrants that no other party has any right to operate Equipment on the Rail Line.

SECTION 20. RAILS-WITH-TRAILS

Owner has verbally agreed with Nickel Plate Trails for a Rails-with-Trails operation along the Rail Line between East 18th Street and East 8th Street in Rochester, Indiana. User acknowledges the existence of that agreement and agrees to abide by it, provided that Nickel Plate Trails enters into User's standard Right of Entry Agreement, including indemnification from any and all liabilities, and provision of an acceptable Certificate(s) of Insurance.

SECTION 21. NOTICES

All notices, demands, and similar communications required or permitted under this Agreement shall be in writing and shall be deemed properly served if sent by a reputable national overnight courier service (ie.: UPS; FedEx) or if sent by United States Certified Mail, return receipt requested, addressed as follows:

If intended for Owner: **Fulton County Railroad
1827 E. Lucas Street
Rochester, Indiana 46975
ATTN: Jeff Zent**

If intended for User: **President
Elkhart & Western Railroad Co.
1318 S. Johanson Road
Peoria, Illinois 61607**

or at such other address which any party entitled to receive notice hereunder may designate to the other party in writing. Such Notice shall be effective one business day after dispatch by Courier, or three business days after mailing

SECTION 22. NON-ASSIGNMENT

This Agreement shall be binding and inure to the benefit of the parties hereto, their respective successors and assigns, provided however, that neither Owner nor User may, without the prior written consent of the other, assign this Agreement or any of its rights or obligations hereunder; provided, however, that the use of contractors to perform various functions for User in the ordinary course of business shall not be construed to be an assignment, and further provided that User may, in its discretion, assign this Agreement, to a common carrier affiliate.

SECTION 23. MISCELLANEOUS

23.1 This Agreement shall be governed by and construed according to the laws of the State of Indiana. Any litigation involving this Agreement shall be filed and heard in the United States District Court for the Northern District of Indiana, unless such Court holds that it lacks jurisdiction, in which case such litigation shall be heard in the Circuit Court of Marshall County, Indiana, and the parties consent to jurisdiction over their person and over the subject matter of such litigation in such Court(s).

23.2 The provisions of Sections 7, 16 and 18 shall survive the expiration, termination, or cancellation of this Agreement.

23.3 This Agreement and the provisions thereof are 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.

23.4 If any covenant or provision of this Agreement not material to the right of User to use the Rail Line 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 this Agreement be adjudged void, the parties shall make such other arrangements as will effect the purposes and intent of this Agreement.

23.5 When used herein, words having the singular form shall mean and include the plural and vice versa, unless the context requires otherwise.

23.6 When used herein, the term "including" shall be construed to mean, "including but not limited to," whether or not such phrase is used.

23.7 Terms used herein shall have the meaning normally given such terms in the railroad industry.

IN WITNESS WHEREOF, the parties have caused this Agreement to be duly executed by the duly authorized officers or officials.

FULTON COUNTY RAILROAD

By: 

ELKHART & WESTERN RAILROAD CO.

By: 