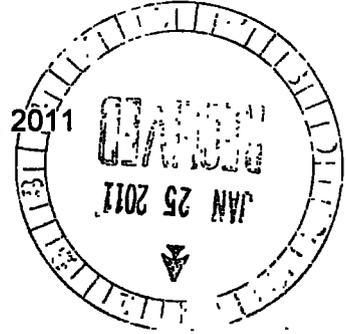


UNION PACIFIC RAILROAD  
1400 Douglas Street, STOP 1580  
Omaha, Nebraska 68179

Elisa B. Davies General Attorney

P 402 544 1658  
F 402 271 3773  
elisadavies@up.com

January 24, 2011



**VIA UPS OVERNIGHT**

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

**Re: Finance Docket No. 35462; Union Pacific Railroad Company – Trackage Rights Exemption – California Northern Railroad Co.**

Ladies and Gentlemen:

*228674*

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)(7).
2. A payment form in the amount of \$1,200.00 for the filing fee required by 49 C.F.R. § 1002.2(f), Part IV (40).
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. Thank you very much for your attention to this matter.

Sincerely,

Elisa Davies  
1400 Douglas Street  
STOP 1580  
Omaha, NE 68179  
(402) 544-1658  
(402) 271-3773 (FAX)  
elisadavies@up.com

**FILED**

JAN 25 2011

**SURFACE  
TRANSPORTATION BOARD**

**FEE RECEIVED**

JAN 25 2011

**TRANSPORTATION BOARD**

cc: (w/attachments)  
Don Seil  
California Northern Railroad Co.  
1801 Hanover Dr., Ste. D  
Davis, CA 95616

ENTERED  
Office of Proceedings

JAN 25 2011

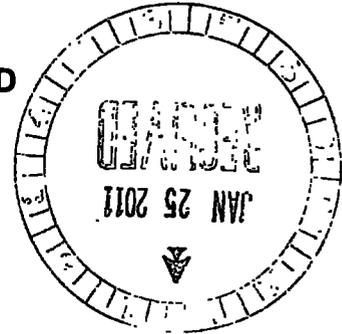
Part of  
Public Record



**Contains Color Images**

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

\_\_\_\_\_  
**FINANCE DOCKET NO. 35462**  
\_\_\_\_\_



**UNION PACIFIC RAILROAD COMPANY  
-- TRACKAGE RIGHTS EXEMPTION --  
CALIFORNIA NORTHERN RAILROAD CO.**  
\_\_\_\_\_

**VERIFIED NOTICE OF EXEMPTION**

**UNION PACIFIC RAILROAD COMPANY**

Elisa Davies  
1400 Douglas Street  
STOP 1580  
Omaha, NE 68179  
(402) 544-1658  
(402) 271-3773 (FAX)  
elisadavies@up.com

**Dated:** January 24, 2011  
**Filed:** January 25, 2011

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**FINANCE DOCKET NO. 35462**

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**UNION PACIFIC RAILROAD COMPANY  
– TRACKAGE RIGHTS EXEMPTION –  
CALIFORNIA NORTHERN RAILROAD 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)(7) for exemption of an overhead trackage rights agreement over approximately 1.8 miles between Milepost 83.0 (Tracy, CA) and Milepost 84.8 (Lyoth, CA) on the California Northern Railroad Co.'s (CFNR) Los Banos Subdivision.

Under 49 C.F.R. § 1180.2(d)(7), the acquisition of 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, and (ii) not filed or sought in responsive applications in rail consolidation proceedings. The trackage rights covered by this Notice are based on the written agreement attached as Exhibit 2, and are not filed or sought in responsive applications in a rail consolidation proceeding. As such, the § 1180.2(d)(7) 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 overhead trackage rights by UP over approximately 1.8 miles of CFNR's trackage extending between Tracy, CA (CFNR Milepost 83.0) and Lyoth, CA (CFNR Milepost 84.8).

**§ 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:

Elisa Davies  
1400 Douglas Street  
Union Pacific Railroad Company  
STOP 1580  
Omaha, NE 68179  
(402) 544-1658  
(402) 271-3773 (FAX)  
elisadavies@up.com

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

The agreement will be consummated on February 25, 2011.<sup>1</sup>

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

The overhead trackage rights are to permit UP the overhead movement of trains between UP's Oakland Subdivision and UP's Tracy Industrial Lead.

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<sup>1</sup> The date of the trackage rights agreement is July 10, 2010. UP acknowledges, however, that the trackage rights cannot become effective until February 25, 2011, which is 30 days from the filing date of this notice of exemption.

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

UP operates in the states of Arizona, Arkansas, California, Colorado, Idaho, Illinois, Indiana, 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 trackage rights agreement 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).

**§ 1180.4(g)(2)(iii) 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).

Respectfully submitted,

UNION PACIFIC RAILROAD COMPANY

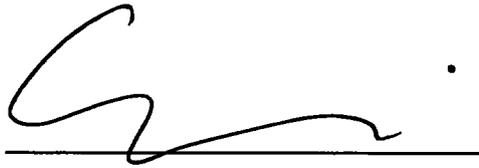
A handwritten signature in black ink, appearing to read 'Elisa', is written over a solid horizontal line.

By: Elisa Davies  
1400 Douglas Street  
STOP 1580  
Omaha, NE 68179  
(402) 544-1658  
(402) 271-3773 (FAX)  
elisadavies@up.com

**VERIFICATION**

I, Elisa Davies, General Attorney of Union Pacific Railroad Company, under penalty of perjury, declare and verify that I have read the foregoing Notice of Exemption in Finance Docket No. 35462, know the facts stated therein, and believe that said facts are true as stated.

Dated: January 24, 2011

A handwritten signature in black ink, appearing to be 'E. Davies', is written over a horizontal line. A small black dot is located to the right of the signature.

**CERTIFICATE OF SERVICE**

I certify that I have this day served a copy of the foregoing document upon the following by first class United States mail:

California Northern Railroad Co.  
1801 Hanover Drive, Suite D  
Davis, CA 95616

Dated at Omaha, Nebraska this 24th day of January, 2011.

A handwritten signature in black ink, consisting of a large, stylized 'S' followed by a horizontal line that extends to the right.

## TRACKAGE RIGHTS AGREEMENT

THIS AGREEMENT, made and entered into this 1<sup>st</sup> day of July, 2010 by and between CALIFORNIA NORTHERN RAILROAD CO., a Delaware corporation, hereinafter called "CFNR" or "Lessec", and UNION PACIFIC RAILROAD COMPANY, a Utah corporation, hereinafter called "UP" or "User".

### WITNESSETH:

WHEREAS, CFNR and UP entered into a Lease Agreement dated August 27, 1993 (the "Lease"), whereby CFNR leases certain property from UP including the Los Banos Branch.

WHEREAS, pursuant to the terms of the Lease, CFNR is the Lessee and operator of a certain line of railroad on CFNR's Los Banos Subdivision extending between a connection with the UP at Milepost 83.0 to Milepost 141.17; and

WHEREAS, UP desires to obtain trackage rights over said line of railroad between Milepost 83.0 (Tracy) and Milepost 84.8 (Lyoth), a distance of 1.8 miles, for the sole purpose of the overhead movement of freight trains between UP's Oakland Subdivision and UP's Tracy Industrial Lead; and

WHEREAS, CFNR is agreeable to said trackage rights but only on the terms and conditions hereinafter set forth.

NOW, THEREFORE, it is mutually agreed by and between the parties.

### Section 1. TRACKAGE SUBJECT TO AGREEMENT.

Attached hereto, marked Exhibit "A" and by this reference incorporated herein, is print dated November 12, 2010, which depicts the portion of line of railroad of CFNR over which UP will be granted trackage rights between points "A" and "B", hereinafter referred to as the "Joint Trackage" (as further defined in Exhibit "B" of this agreement, attached hereto and by this reference incorporated here).

### Section 2. GRANT OF TRACKAGE RIGHTS.

The General Conditions covering the grant of trackage rights are set forth in Exhibit "B". If any conflict between Exhibit "B" and this agreement shall arise, the provisions of this agreement shall prevail. Subject to the terms and conditions of Exhibit "B" and this agreement, CFNR grants to UP the nonexclusive right to use the Joint Trackage for the operation by its employees of the Equipment (as defined in Exhibit "B" of this agreement) that is in UP's account while moving over the Joint Trackage in common with CFNR and such other railroad company or companies as CFNR has heretofore admitted or may hereafter at any time admit to the joint use of any and all of the Joint Trackage, such other railroad company or companies to hereinafter be considered CFNR for the purpose of this agreement.

It is understood and agreed that UP shall not have the right to:

(a) set out, pick up or store cars, or switch upon the Joint Trackage, or any part thereof, except as necessary for handling Equipment that is bad ordered en route; or

(b) serve any industry, team or house track now existing or hereafter served from the Joint Trackage which heretofore has not been served by UP; or

(c) permit or admit any third party to the use of all or any portion of the Joint Trackage, nor have the right to detour trains of any other railroad over or upon the Joint Trackage, nor under the guise of doing its own business contract or make an agreement to handle as its own Equipment over or upon the Joint Trackage, or any portion thereof, the Equipment of any third party which in the normal course of business would not be considered the Equipment of UP; provided, however, that the foregoing shall not prevent UP, pursuant to a run-through agreement with any railroad, from using locomotives and cabooses of another railroad as its own under this agreement.

(d) UP's use of the trackage is limited to two trains per day in each direction.

(e) handle UP Detour Trains, Bypass Trains or Passenger Trains under this Agreement. In the event UP needs to run Detour Trains over this trackage, CFNR and UP will utilize a Standard Form Detour Agreement for UP's use of the Joint Trackage.

### Section 3. MAINTENANCE AND OPERATION OF TRACKAGE.

CFNR, at its expense, shall maintain the Joint Trackage to standards set out in Schedule 3.03A of the Agreement. CFNR shall keep and maintain the Joint Trackage in reasonably good condition for the use herein contemplated, but CFNR does not guarantee the condition of the Joint Trackage or that operations thereover shall not be interrupted. CFNR shall take all reasonable steps to ensure that any interruptions shall be kept to a minimum. Furthermore, except as may be otherwise provided in this Trackage Rights Agreement, UP shall not by reason of failure or neglect on the part of CFNR to maintain, repair or renew the Joint Trackage, have or make any claim or demand against CFNR or its parent corporation, subsidiaries or affiliates, or their respective directors, officers, agents or employees for any injury to or death of any person or persons whomsoever, or for any damage to or loss or destruction of any property whatsoever, or for any damages of any nature suffered by UP resulting from any such failure or neglect. In the event that for operating convenience, necessity or emergency, CFNR permits or directs UP to use adjacent CFNR track and track connections between or beyond the terminal of the Joint Trackage as an alternative route, then and in such event, such trackage, track connections and appurtenances shall be deemed to be part of the Joint Trackage and shall be governed by all the provisions of this Agreement.

Section 4. COMPENSATION.

The parties have agreed to defer UP's trackage rights use payments for a period of fifteen (15) years until July 1, 2025 in return for UP forgiving CFNR's sister railroad, the Central Oregon & Pacific Railroad, payment of certain Eugene Yard derailment expenses owed to UP.

Starting July 1, 2025, UP will pay CFNR trackage rights fees as noted in this Section 4. Although payment is deferred until January 1, 2025, payment rates as noted in this Section 4, will be increased annually beginning July 1, 2011 to reflect annual increases in the RCCR index. For and in consideration of the limited rights herein granted, UP shall pay to CFNR, in addition to the expenses herein elsewhere provided, the annual rate based on number of cars transported by UP in either direction upon or over the Joint Trackage. Said annual rate shall be adjusted on July 1, 2011 and on each July 1 thereafter by utilization of the Annual Indices of Charge-Out Prices and Wage Rates (1977=100), Series RCR, included in the "AAR Railroad Cost Recovery Index", and supplements thereto, issued by the Association of American Railroads. In making such adjustment, the final "material prices, wage rates and supplements combined (excluding fuel)" Index for the Western District for the calendar year 2009 shall be compared to the final Index for the calendar year immediately preceding the year in which such adjustment is to become effective. Said annual rate shall then be adjusted by the percentage of increase or decrease, as the case may be, in the Index of the year to be escalated as related to the year 2009, provided, however, that said annual rate shall never be less than \$2000.00, the annual rate set out in this Section 4. . Payments made by UP will be based on the following incremental car volumes. In the event UP handles more than 1,000 car per year over this track, rates will escalate as follows:

0 to 1,000 cars	\$2,000.00
1,001 to 2,000 cars	\$4,000.00
2,001 to 3,500 cars	\$6,000.00

or at the request of either party if more than 3,501 cars per year are handled, the parties will renegotiate a per car rate.

Section 5. CONNECTIONS AND ADDITIONS.

The entire cost of construction of any connection necessary for the implementation of the Trackage Rights granted in this agreement shall be at UP's expense. CFNR, at UP's expense, shall construct, own and maintain the part of any connection on CFNR's leased property. Any future Additions (as defined in Exhibit "B" of this agreement) to the Joint Trackage, such as, but not limited to, sidings, CTC, grade separations and new connections, shall be handled as up front expenditures. When any future Addition is made that is for the benefit of both parties, then both parties shall share in the cost of the Addition in the proportion which the number of its cars that are run over the Joint Trackage during the previous twelve month period immediately prior to the date work on the project is commenced, bears to the total number of cars for both parties that are run over the Joint Trackage during the same period; provided, however, that in the event an Addition is necessitated by the additional use of the Joint Trackage by UP, then the entire cost thereof shall be paid by UP. Should any future Addition be for the sole benefit of CFNR, then CFNR shall pay the entire cost of such Addition.

Section 6. LIABILITY

Any liability for loss, damage, injury or death which arises from the operation under this Agreement shall be assumed, settled and paid as provided by Exhibit "B", General Conditions, attached hereto.

Section 7. TERM AND TERMINATION.

Subject to the provisions of Section 7.2, 7.3 and 7.4 of Exhibit "B", this agreement shall become effective on July 1, 2010, subsequent to UP having secured all necessary consent, approval or authority from appropriate governmental agencies upon terms and conditions satisfactory to CFNR and UP, and shall run concurrent with the term of the Lease Agreement, except UP shall have the right at any time to terminate upon not less than one hundred and eighty (180) day's written notice to CFNR. Upon the giving of one hundred and eighty (180) day's written notice, CFNR shall have the right to cancel this Agreement effective upon the date of expiration of the aforesaid initial term or at any time thereafter.

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

WITNESS:

*[Signature]*

CALIFORNIA NORTHERN RAILROAD CO.

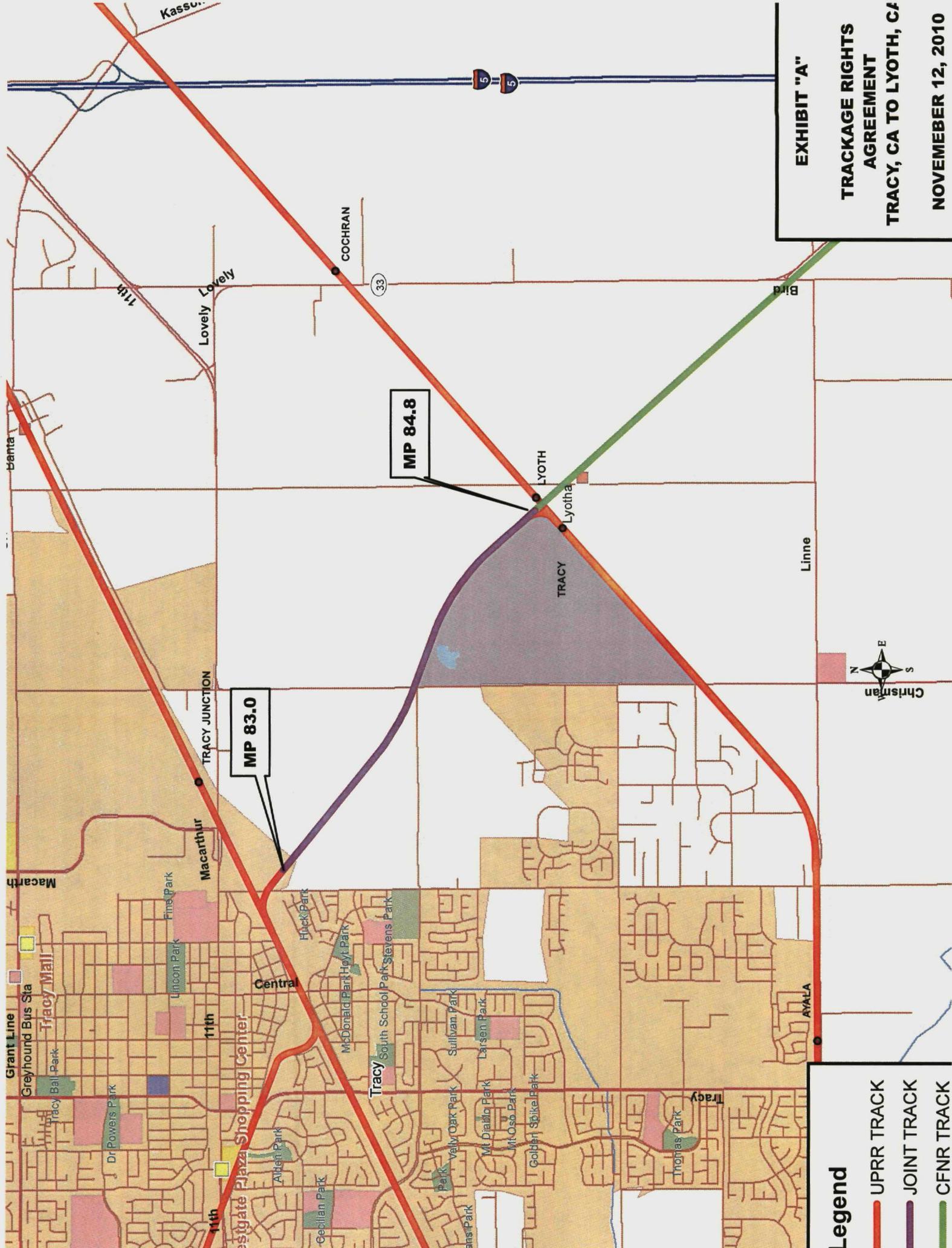
By: *[Signature]*  
Vice President

WITNESS:

*[Signature]*

UNION PACIFIC RAILROAD COMPANY

By: *[Signature]*  
DIR JOINT FACILITIES



**EXHIBIT "A"**  
**TRackage RIGHTS**  
**AGREEMENT**  
**TRACY, CA TO LYOTH, CA**  
**NOVEMBER 12, 2010**

- Legend**
- UPRR TRACK
  - JOINT TRACK
  - CFNR TRACK



**MP 84.8**

**MP 83.0**

Map labels include: Grant Line, Greyhound Bus Sta, Tracy Mall, Dr Powers Park, 11th, MacArthur, Tracy Junction, Central, 11th, Regate Plaza Shopping Center, Alben Park, Geblan Park, Lincoln Park, Huck Park, McDonald Park, Heyl Park, South School Park, Stevens Park, Tracy, Vally Oak Park, Sullivam Park, Mt Diablo Park, Larsen Park, Mt Osb Park, Gobert Spikel Park, Thomas Park, Tracy, Ayala, Linne, Lyoth, Lyotha, TRACY, LOVELY, COCHRAN, 33, 5, 5, Banta, Kassu., and Bird.

**EXHIBIT "B"**  
**GENERAL CONDITIONS**



**Section 1. DEFINITIONS**

1.1 "Agreement" shall mean that certain agreement dated July 1, 2010, to which this Exhibit "B" is appended.

1.2 "Annual" shall mean a calendar year.

1.3 "Car" shall mean one (1) rail car; provided, however, that each platform in an articulated rail car of two (2) or more platforms shall be counted as one (1) rail car, subject to modification by mutual agreement of the parties based upon changes in railroad technology.

1.4 "Changes in and/or Additions to" shall mean work projects and retirements, the cost of which is chargeable in whole or in part to Property Accounts during the term of this Agreement.

1.5 "Equipment" shall mean trains, locomotives, rail cars (loaded or empty), intermodal units (loaded or empty), cabooses, vehicles, and machinery which are capable of being operated on railroad tracks or on right-of-way for purpose of the maintenance or repair of such railroad tracks.

1.6 "Joint Trackage" shall mean the properties and track structure of Lessee as described in the Agreement including necessary right-of-way and all appurtenances, signals, communications, and facilities of Lessee and all Changes in and/or Additions to said track structure now or in the future located as are required or desirable for the operation of the Equipment of the parties hereto.

1.7 "Lessee" shall have the meaning given to it in the Agreement.

1.8 "Property Accounts" shall mean accounts so designated under the Uniform System of Accounts for Railroad Companies prescribed by the STB, or any replacement of such system prescribed by the applicable federal regulatory agency, if any, and used by the parties hereto.

1.9 "STB" shall mean the Surface Transportation Board of the United States Department of Transportation or any successor agency.

1.10 "User" shall have the meaning given to it in the Agreement.

**Section 2. MAINTENANCE, ADDITIONS, OPERATION, AND CONTROL**

2.1 Lessee shall have sole charge of the maintenance and repair of the Joint Trackage with its own supervisors, labor, materials and equipment. Lessee, from time to time, may make such Changes in and/or Additions to the Joint Trackage as shall be required by any law, rule, regulation or ordinance promulgated by any government body having jurisdiction, or as Lessee, in its sole discretion, shall deem necessary, subject to Section 2.2. Such Changes in and/or Additions to the Joint Trackage shall become a part of the Joint Trackage or in the case of retirements shall be excluded from the Joint Trackage.

2.2 Unless otherwise mutually agreed to by the parties in writing, Lessee shall, (i) keep and maintain the Joint Trackage consistent with Schedule 3.03A of the Lease Agreement. In the event that User desires that the Joint Trackage be improved to a condition in excess of the standard set forth in this Section 3.03A of the Lease Agreement, or desires that other Changes in and/or Additions to be made to the Joint Trackage, Lessee agrees to make such Changes in and/or Additions to the Joint Trackage if funded in advance by and at the sole cost and expense of User. Thereafter, such Changes in and/or Additions to the Joint Trackage shall become part of the Joint Trackage and shall be maintained by Lessee in such improved condition.

2.3 Lessee shall employ all persons necessary to construct, operate, maintain, repair and renew the Joint Trackage. Lessee shall be bound to use reasonable and customary care, skill and diligence in the construction, operation, maintenance, repair and renewal of the Joint Trackage and in managing of the same. Lessee shall make its best effort to ensure that User is given the same advance notice of maintenance plans and schedules as is provided to Lessee's personnel.

2.4 The trackage rights granted hereunder shall give User access to and joint use of the Joint Trackage equal to that of Lessee. The management, operation (including dispatching) and maintenance of the Joint Trackage shall, at all times, be under the exclusive direction and control of Lessee, the movement of Equipment over and along the Joint Trackage shall at all times be subject to the exclusive direction and control of Lessee's authorized representatives and in accordance with such reasonable operating rules as Lessee shall from time to time institute, but in the management, operation (including dispatching) and maintenance of the Joint Trackage, Lessee and User shall be treated equally. User shall, at User's sole cost and expense, obtain, install and maintain necessary communication equipment to allow User's Equipment to communicate with Lessee's dispatching and signaling facilities the same as Lessee's trains so utilize. Lessee shall consult with User prior to the adoption of new communication or signaling systems to be employed on the Joint Trackage, which have not theretofore been generally adopted in the railroad industry.

2.5 If the use of the Joint Trackage shall at any time be interrupted or traffic thereon or thereover be delayed for any cause, neither party shall have or make any claim against the other for loss, damage or expense caused by or resulting solely from such interruption or delay.

2.6 Lessee may from time to time provide any track or tracks on the Joint Trackage other than those delineated in Exhibit A to the Agreement for use by User provided there shall at all times be afforded User a continuous route of equal utility for the operation of its Equipment between the termini of the Joint Trackage. When such tracks which are not part of the Joint Trackage are used as provided herein, the Agreement shall govern for purposes of direction and control and liability as if all movement had been made over the Joint Trackage.

2.7 Each party shall be responsible for furnishing, at its sole cost and expense, all labor, fuel and train and other supplies necessary for the operation of its own Equipment over the Joint Trackage. In the event a party does furnish such labor, fuel or train and other supplies to another party, the party receiving the same shall promptly, upon receipt of billing therefor, reimburse the party furnishing the same for its reasonable costs thereof, including customary additives.

2.8 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 Joint Trackage. Except as may be specifically provided for in this Agreement, nothing herein contained is intended to change practices with respect to interchange of traffic between the parties or with other carriers on or along the Joint Trackage.

2.9 Except as otherwise may be provided in the Agreement, User shall operate its Equipment over the Joint Trackage with its own employees, but before said employees are assigned or permitted to operate Equipment over the Joint Trackage as herein provided, and from time to time thereafter as and when reasonably requested by Lessee, they shall be required to pass the applicable rules examinations required by Lessee of its own employees. Lessee shall delegate to specified User's officers the conduct of such examinations in the event User chooses to conduct such examinations. If an Lessee officer conducts such examinations of employees of User, User shall pay Lessee a reasonable fee for each employee so examined, such fee to be mutually agreed upon by the parties from time to time in a separate agreement. Notwithstanding any such examination, User shall be responsible for ensuring that its employees are qualified and have taken all such rules examinations. Upon request of User, Lessee shall qualify one or more of User's supervisory officers as pilots and such supervisory officer or officers so qualified shall qualify employees of User engaged in or connected with User's operations on or along the Joint Trackage. At User's request, Lessee shall furnish a pilot or pilots, at the expense of User, to assist in operating trains of User over the Joint Trackage. Should Lessee ever require a pilot on User's Equipment on a frequent basis, that matter shall be referred to the Committee for resolution.

**2.10 If any employee of User shall neglect, refuse or fail to abide by Lessee's rules, instructions and restrictions governing the operation on or along the Joint Trackage, such employee shall, upon written request of Lessee, 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, Lessee and User shall promptly hold a joint investigation in which the parties concerned shall participate and bear the expense for their respective officers, counsel, witnesses and employees. Notice of such investigations to User's employees shall be given by User's officers, and such investigations shall be conducted in accordance with the terms and conditions of schedule agreements between User and its employees. If, in the judgment of Lessee, the result of such investigation warrants, such employee shall, upon written request by Lessee, be withdrawn by User from service on the Joint Trackage, and User shall release and indemnify Lessee from and against any and all claims and expenses arising from 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 disciplinary action.**

**2.11 If any Equipment of User is bad ordered enroute on the Joint Trackage and (i) it is necessary that it be set out, and (ii) only light repairs to the Equipment are required, such bad ordered Equipment shall be promptly repaired, and, thereafter, be promptly removed from the Joint Trackage by User. Lessee may, upon request of User and at User's sole cost and 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 Lessee while in any manner so engaged or while enroute to or returning to Lessee's terminal from such an assignment shall be considered Sole Employees (as hereinafter defined) of User and Sole Property (as hereinafter defined) of User. However, should Lessee's employees after repairing such bad ordered Equipment for User move directly to perform service for Lessee's benefit rather than return to Lessee's terminal, then User's exclusive time and liability will end when Lessee's employees depart for work to be performed for Lessee's benefit. In the case of such repairs by Lessee to freight cars in User's account, billing therefore shall be in accordance with the Field and Office Manuals of the Interchange Rules, adopted by the Association of American Railroads ("AAR"), hereinafter called "Interchange Rules", in effect on the date of performance of the repairs. Lessee shall then prepare and submit billing directly to and collect from the car Lessee for car Lessee responsibility items as determined under said Interchange Rules, and Lessee shall prepare and submit billing directly to and collect from User for handling line responsibility items as determined under said Interchange Rules. Lessee also shall submit billing to and collect from User any charges for repair to freight cars that are User's car Lessee responsibility items as**

determined under said Interchange Rules, should said car Lessee refuse or otherwise fail to make payment therefor. Repairs to locomotives shall be billed as provided for in Section 3 of these General Conditions.

2.12 If Equipment of User shall become derailed, wrecked, or otherwise disabled while upon the Joint Trackage, it shall be re-railed or cleared by Lessee, 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; however, in any such case, employees of User shall consult with and be governed by the directions of Lessee. Lessee reserves the right to re-rail Equipment of User when, in the judgment of Lessee, Lessee deems it advisable to do so to minimize delays and interruptions to train movement. The reasonable costs and expenses of rerailing or clearing derailed, wrecked or disabled Equipment shall be borne by the parties in accordance with Section 5 of these General Conditions. Services provided under this section shall be billed in accordance with Section 3 of these General Conditions.

2.13 In the event Equipment of User shall be forced to stop on the 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 (other than bad ordered Equipment subject to light repairs pursuant to Section 2.12), or to any other cause not resulting from an accident or derailment (including the failure of User to promptly repair and clear bad ordered Equipment pursuant to Section 2.12), and such Equipment is unable to proceed, or if a train of User fails to maintain the speed required by Lessee on the Joint Trackage, or if, in emergencies, disabled Equipment is set out of User's trains on the Joint Trackage, Lessee 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 reasonable costs and expenses of rendering such assistance shall be borne by User. Services provided under this section shall be billed in accordance with Section 3 of these General Conditions.

2.14 User shall pay to Lessee reasonable expenses incurred by Lessee in the issuance of timetables made necessary solely by changes in the running time of the trains of User over the Joint Trackage. If changes in running time of trains of Lessee or third parties, as well as those of User, require the issuance of timetables, then User shall pay to Lessee that proportion of the expenses incurred that one bears to the total number of parties changing the running time of their trains. If changes in running time of trains of Lessee or third parties, but not those of User, require the issuance of timetables, then User shall not be required to pay a proportion of the expenses incurred in connection therewith.

2.15 User, at Lessee's request, shall be responsible for reporting to Lessee the statistical data called for in the Agreement, which may include, but is not limited to, the number of cars and type of Equipment operated on the Joint Trackage.

### **Section 3. BILLING**

**3.1 Billing shall be accomplished on the basis of data contained in a billing form mutually agreed to between the parties. Such billing forms 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 Lessee. User shall pay to Lessee at the Office of the Treasurer of Lessee, or at such other location as Lessee may from time to time designate in writing, 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, properties and facilities provided 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, but shall be paid 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) in the case of claims disputed as to amount or liability, after the amount is settled and/or the liability is established. This provision shall not limit the retroactive adjustment of billing made pursuant to exception taken to original accounting by or under authority of the STB or 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 this 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 any applicable laws or regulations.**

**3.4 Should any payment become payable by Lessee to User under the Agreement, the provisions of Sections 3.1 and 3.2 of these General Conditions shall apply with User as the billing party and Lessee as the paying party.**

**3.5 Either party hereto may assign any receivables due it under this Agreement; provided, however, that such assignments shall not relieve the assignor of any rights or obligations under the Agreement.**

### **Section 4. COMPLIANCE WITH LAWS**

**4.1 With respect to operation of Equipment on the Joint Trackage, each party shall comply with all applicable federal, state and local laws, rules, regulations, orders, decisions and ordinances ("Standards"), 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 reimburse and 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 cost, charge and expense to the other party.

4.2 User agrees to comply fully with all applicable Standards concerning "hazardous waste" and "hazardous substances" ("Hazardous Materials"). Except with Lessee's prior written consent, User covenants that it shall not treat or dispose of Hazardous Materials on the Joint Trackage. User further agrees to furnish Lessee (if requested) with proof, satisfactory to Lessee, that User is in such compliance.

In the event any accident, bad ordered Equipment, derailment, vandalism or wreck (for purposes of this Section 4.2 and 4.3 hereinafter called collectively "Derailment") involving Equipment of or a train operated by User carrying 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 Lessee/shipper of the Hazardous Materials involved in the Derailment, and Lessee, immediately.

In the event of a Derailment, Lessee shall assume responsibility for cleaning up any release of Hazardous Materials from User's Equipment 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 5 of these General Conditions.

If a Hazardous Materials release caused by a derailment involving Equipment of User, or on a train operated by User, results in contamination of real property or water on the Joint Trackage or on real property or water adjacent to the Joint Trackage (whether such real property or water is owned by Lessee or a third party), Lessee shall assume responsibility for emergency cleanup conducted to prevent further damage. User shall be responsible for performing cleanup efforts thereafter. Any costs associated with cleaning up real property or water on or adjacent to the Joint Trackage contaminated by Hazardous Materials shall be borne in accordance with Section 5 of these General Conditions.

If Hazardous Materials must be transferred to undamaged Equipment or trucks as a result of a release caused by a derailment involving Equipment of User, or on a train operated by User, User shall perform the transfer; PROVIDED, HOWEVER, that if the Hazardous Materials are in damaged Equipment that is blocking the Joint Trackage, Lessee, at its option, may transfer the Hazardous Materials with any costs associated with such transfer borne in accordance with Section 5 of these General Conditions. Transfers of Hazardous Materials by User shall only be conducted after being authorized by Lessee.

4.3 The total cost of clearing a Derailment, cleaning up any Hazardous Materials released during such Derailment, and/or repairing the Joint Trackage or any other property damaged thereby shall be borne by the party or parties liable therefor in accordance with Section 5 of these General Conditions.

4.4 In the event of release of Hazardous Materials caused by faulty Equipment or third parties, cleanup will be conducted as stated in Sections 4.2 and 4.3 of these General Conditions.

Section 5. LIABILITY

5.1 General. The provisions of this Section 5 shall apply only as between the parties hereto and are solely for their benefit. Nothing herein is intended to be for the benefit of any person or entity other than the parties hereto. It is the explicit intention of the parties hereto that no person or entity other than the parties hereto 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, the parties hereto. Notwithstanding anything contained in this Section 5, no provisions hereof shall be deemed to deprive Lessee 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. The provisions of this Section 5 shall apply as between the parties hereto irrespective of the terms of any other agreements between the parties hereto and other railroads using the Joint Trackage, and the allocation of liabilities provided for herein shall control as between the parties hereto.

5.2 Definitions and Covenants. The parties agree that for the purposes of this Section 5:

- (a) The term "Employee(s)" of a party shall mean all officers, agents, employees and contractors of that party. Such Employees shall be treated either as "Sole Employees" or "Joint Employees", as hereinafter specified;
- (b) "Sole Employees" and "Sole Property" shall mean one or more Employees, Equipment, tools and other equipment and machinery while engaged in, en route to or from, or otherwise on duty incident to performing service for the exclusive benefit of one party. Pilots furnished by Lessee to assist in operating Equipment of User shall be considered the Sole Employees of User while engaged in such operations. Equipment shall be deemed to be the Sole Property of the party receiving the same at such time as deemed interchanged under AAR rules or

applicable interchange agreements, or when such party is responsible for the car hire or per diem for the Equipment under agreement between the parties;

- (c) **"Joint Employee"** shall mean one or more Employees while engaged in maintaining, repairing, constructing, renewing, removing, inspecting or managing the Joint Trackage or making Changes in and/or Additions to the Joint Trackage for the benefit of both of the parties hereto, or while preparing to engage in, en route to or from, or otherwise on duty incident to performing such service for the benefit of both parties;
- (d) **"Joint Property"** shall mean the Joint Trackage and all appurtenances thereto, and all Equipment, tools and other equipment and machinery while engaged in maintaining, repairing, constructing, renewing, removing, inspecting, managing or making Changes in and/or Additions to the Joint Trackage for the benefit of both of the parties hereto, or while being prepared to engage in, en route to or from, or otherwise incident to performing such service;
- (e) **"Loss and/or Damage"** shall mean injury to or death of any person, including Employees of the parties hereto, and loss or damage to any property, including property of the parties hereto and property being transported by the parties, which arises out of an incident occurring on, the Joint Trackage and shall include liability for any and all claims, suits, demands, judgments and damages resulting from or arising out of such injury, death, loss or damage, except liability for punitive and exemplary damages, as specified in the next following sentence. Loss and/or Damage shall include all costs and expenses incidental to any claims, suits, demands and judgments, including attorneys' fees, court costs and other costs of investigation and litigation. Loss and/or Damage shall further include the expense of clearing wrecked or derailed Equipment and the costs of environmental protection, mitigation or clean up necessitated by such wreck or derailment and shall include any liabilities for any third-party claims for personal injury or death, property damage, natural resource damage, or any penalties, judgments or fines associated with a release of any contaminants resulting from such wreck or derailment. Loss and/or Damage shall be reduced by any amount recovered from third parties;
- (f) Operating Employees of Lessee whose service may be jointly used by the parties hereto for the movement of trains over the Joint Trackage, including, but not limited to, train dispatchers, train order operators, operator clerks and watchmen shall at the time of performing their services be deemed to be Sole Employees of the party hereto for whose benefit said services may be separately rendered (during the time they are

so separately rendered) and be deemed to be Joint Employees of the parties hereto at such time as their services may be rendered for the parties' joint benefit;

- (g) All Employees, Equipment, tools and other equipment and machinery other than as described in (b), (c), (d) or (f) above or in Section 5.4. shall be deemed the Sole Employees of the employing party and the Sole Property of the using party;
- (h) Any railroad not a party to this Agreement heretofore or hereafter admitted to the use of any portion of the Joint Trackage, shall, as between the parties hereto, be regarded in the same light as a third party. Without limiting the generality of the foregoing, neither of the parties hereto assumes any responsibility to the other under the provisions of this Agreement for any Loss and/or Damage occasioned by the acts or omissions of any employees of any such other railroad, or for any Loss and/or Damage which such other railroad shall be obligated to assume in whole or in part pursuant to law or any agreement relating to such other railroad's use of any portion of the Joint Trackage;
- (i) For the purpose of this Section 5, Equipment of foreign lines being detoured over the Joint Trackage, and all persons other than Joint Employees engaged in moving such Equipment, shall be considered the Equipment and Employees of the party hereto under whose detour agreement or other auspices such movement is being made.

**5.3 Reimbursement and Defense.** The parties agree that:

- (a) Each party hereto shall pay promptly Loss and/or Damage for which such party shall be liable under the provisions of this Section 5, and shall indemnify the other party against such Loss and/or Damage, including reasonable attorneys' fees and costs. If any suit or suits shall be brought against either of the parties hereto and any judgment or judgment shall be recovered which said party is compelled to pay, and the other party shall under the provisions of the Agreement be solely liable therefor, then the party which is so liable shall promptly repay on demand to the other party paying the same any monies which it may have been required to pay, whether in the way of Loss and/or Damage, costs, fees or other expenses; and if the Loss and/or Damage in such case or cases is joint or allocated between the parties to the Agreement, the party defendant paying the same or any costs, fees or other expenses shall be reimbursed by the other party as allocated pursuant to this Agreement;
- (b) Each party covenants and agrees with the other party that it will pay for all Loss and/or Damage, both as to persons and property, and related costs

which it has herein assumed, or agreed to pay, the judgment of any court in a suit by third party or parties to the contrary notwithstanding, and will forever indemnify and save harmless the other party, its successors and assigns, from and against all liability and claims therefor, or by reason thereof, and will pay, satisfy and discharge all judgments that may be rendered by reason thereof, and all costs, charges and expenses incident thereto;

- (c) Each party hereto shall have the sole right to settle, or cause to be settled for it, all claims for Loss and/or Damage for which such party shall be solely liable under the provisions of this Section 5, and the sole right to defend or cause to be defended all suits for the recovery of any such Loss and/or Damage for which such party shall be solely liable under the provisions of this Section 5;
- (d) User shall provide written notice to Lessee of any accidents or events resulting in Loss and/or Damage within seven (7) days of its discovery or receipt of notification of such occurrence;
- (e) In the event both parties hereto may be liable for any Loss and/or Damage under the provisions of this Section 5 ("Co-Liable"), and the same shall be settled by a voluntary payment of money or other valuable consideration by one of the parties Co-Liable therefor, release from liability shall be taken to and in the name of all the parties so liable; however, no such settlement in excess of the sum of One Hundred Thousand Dollars (\$100,000) shall be made by or for any party Co-Liable therefor without the written consent of the other parties so liable, but any settlement made by any party in consideration of One Hundred Thousand Dollars (\$100,000) or a lesser sum shall be binding upon the other parties and allocated in accordance with Section 5.5; and no party shall unreasonably withhold its consent to a settlement proposed by the other party; provided, however, that failure by a party to secure consent from the other shall not release such other party to the extent the party who failed to obtain such consent demonstrates that the other party was not prejudiced by such failure.
- (f) In case a claim or suit shall be commenced against any party hereto for or on account of Loss and/or Damage for which another party hereto is or may be solely liable or Co-Liable under the provisions of this Section 5, the party against whom such claim or suit is commenced shall give to such other party prompt notice in writing of the pendency of such claim or suit, and thereupon such other party shall assume or join in the defense of such claim or suit as follows: If the claim or suit involves Loss and/or Damage to the Sole Employees or Sole Property of a party or its invitee or property in its care, custody or control, that party shall assume and control

the investigation and defense of such claim or suit; if the claim or suit involves Loss and/or Damage to third parties, Joint Employees or the Joint Trackage, the party whose Sole Employees or Equipment were involved in the incident shall investigate and defend such claim or suit; and if such claim or suit involves Loss and/or Damage to third parties, Joint Employees or the Joint Trackage and neither or both party's Equipment and Sole Employees were involved in the incident, Lessee shall investigate and defend such claim or suit; provided that the other party also may participate in the defense of any of the foregoing if it may have liability as a result of such incident;

- (g) No party hereto shall be conclusively bound by any judgments 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.

5.4 Wrecks and Derailment. The cost and expense of repairing bad ordered Equipment, clearing wrecks or otherwise disabled Equipment or rerailling Equipment (and the costs of repair or renewal of damaged Joint Trackage or adjacent properties) shall be borne by the party whose Equipment was wrecked, disabled, or derailed or caused such damage. All Employees or Equipment, while engaged in, en route to or from, or otherwise incident to operating wrecker or work trains clearing wrecks, disabled Equipment or Derailments or engaged in repair or renewal of the Joint Trackage subsequent to any such wreck, disability or Derailment, shall be deemed to be Sole Employees and/or Sole Property of the party whose Equipment was wrecked, disabled or derailed. However, such Employees or Equipment, while en route from performing such clearing of wrecks, disabled Equipment or Derailments or repairing or renewing the Joint Trackage to perform another type of service, shall not be deemed to be performing service incident to the instant wreck, disability or Derailment.

5.5 Allocation.

- (a) Each party shall bear all costs of Loss and/or Damage to its Sole Employees or its Sole Property, or property in its care, custody or control or its invitees without regard to which party was at fault (whether or not contributed to by acts or omissions of Joint Employees or defect in Joint Property).
- (b) Loss and/or Damage to third parties (i.e., any person or entity other than a party hereto, a Sole Employee of either party, a Joint Employee or an invitee of either party) or their property, to Joint Employees or their

property or to Joint Property shall be borne by the parties hereto as follows:

(i) If the Loss and/or Damage is attributable to the acts or omissions of only one party hereto, or only one party is involved (whether or not contributed to by acts or omissions of Joint Employees or defect in Joint Property), that party shall bear and pay all of such Loss and/or Damage.

(ii) If such Loss and/or Damage is attributable to the acts or omissions of more than one party hereto, or occurs in such a way that it cannot be determined how such Loss and/or Damage (whether or not contributed to by acts or omissions of Joint Employees or defect in Joint Property) shall be apportioned between the two (2) parties to this Agreement, and any other party(ies) authorized to use the Joint Trackage as a trackage rights tenant, on a usage basis considering each party(ies) gross ton miles over the Joint Trackage for the month in which such Loss and/or Damage occurred. User shall not bear or incur any liability for claims, suits, demands, judgments, losses or damages resulting from environmental contamination of or hazardous material on or released from the Joint Trackage, except contamination or a release of hazardous materials from User's own Equipment or caused by or arising from the actions or omissions of User or User's Employees, and then only in accordance with the other provisions hereof.

(iii) Loss and/or Damage to third parties or Joint Employees occurring in such a way that it cannot be determined how such Loss and/or Damage came about shall be apportioned between the two (2) parties to this Agreement, and any other party(ies) authorized to use the Joint Trackage as a trackage rights tenant, on a usage basis considering each party(ies) gross ton miles over the Joint Trackage for the month in which such Loss and/or Damage occurred. User shall not bear or incur any liability for claims, suits, demands, judgments, losses or damages resulting from environmental contamination of or hazardous material on or released from the Joint Trackage, except contamination or a release of hazardous materials from User's own Equipment or caused by or arising from the actions or omissions of User or User's Employees, and then only in accordance with the other provisions hereof.

(c) It is understood and agreed that a number of vehicular crossings of the Joint Trackage presently exist, or may be constructed. User agrees to accept all crossings in whatever condition they may be during the term of this Agreement, and will not assert any claim, demand or cause of action against Lessee and will hold Lessee harmless from any claim, demand, or

cause of action arising out of any crossing accident on the Joint Trackage in which the engines, cars, or train of a user only is involved.

- (d) The parties agree that the characterization herein of certain Employees as "Sole Employees" or "Joint Employees" is only for the purpose of allocating Loss and/or Damage suffered by those Employees. Except as specified in subsection (a) of this Section 5.5. (which provides for the allocation of certain Loss and/or Damage between the parties without regard to fault), no party shall be liable for the acts or omissions (negligent or otherwise) of any other party's Employee.

5.6 LESSEE AND USER EXPRESSLY INTEND THAT WHERE ONE PARTY IS TO INDEMNIFY THE OTHER PURSUANT TO THE TERMS OF THIS AGREEMENT, SUCH INDEMNITY SHALL INCLUDE (1) INDEMNITY FOR THE NEGLIGENCE OR ALLEGED NEGLIGENCE, WHETHER ACTIVE OR PASSIVE, OF THE INDEMNIFIED PARTY WHERE THAT NEGLIGENCE IS A CAUSE OF THE LOSS OR DAMAGE; (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, 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 CONSERVATION AND RECOVERY ACT ("RCRA"), THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT ("CERCLA"), THE CLEAN WATER ACT ("CWA"), THE OIL POLLUTION ACT ("OPA"), AND ANY SIMILAR STATE STATUTE IMPOSING OR IMPLEMENTING SIMILAR STANDARDS; AND (3) INDEMNITY FOR ACTS OR ALLEGED ACTS OF GROSS NEGLIGENCE OF THE INDEMNIFIED PARTY, OR OTHER CONDUCT ON THE PART OF THE INDEMNIFIED PARTY FOR WHICH PUNITIVE DAMAGES MIGHT BE SOUGHT.

## 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, such question or controversy shall be submitted to and settled by arbitration. Unless other procedures are agreed to by the parties, arbitration between the parties pursuant to this Section 6 shall be governed by the rules and procedures set forth in this Section 6.

6.2 If the parties to the dispute are able to agree upon a single competent and disinterested arbitrator within twenty (20) days after written notice by one party of its desire for arbitration to the other party, then the question or controversy shall be submitted to and settled by that single arbitrator. Otherwise, any party (the notifying party) may notify the other party (the noticed party) in writing of its request for arbitration and nominating one arbitrator. Within twenty (20) days after receipt of said notice, the

noticed party shall appoint an arbitrator and notify the notifying party in writing of such appointment. Should the noticed party fail within twenty (20) days after receipt of said notice to name its arbitrator, said arbitrator may be appointed by the Chief Judge (or acting Chief Judge) of the United States District Court for the District of Columbia upon application by either party after ten (10) days' written notice to the other party. The two arbitrators so chosen shall select one additional arbitrator to complete the board. If the arbitrators so chosen fail to agree upon an additional arbitrator, the same shall, upon application of a party, be appointed by said judge in the manner heretofore stated.

6.3 Upon selection of the arbitrator(s), said arbitrator(s) shall, with reasonable diligence, determine the questions as disclosed in said notice of arbitration, shall give both 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 the arbitrator(s) shall deem reasonable or as either party may submit with witnesses required to be sworn, and hear arguments of counsel or others. If an arbitrator declines or fails to act, the party (or parties in the case of a single arbitrator) by whom the arbitrator was chosen or the AAA shall appoint another to act in the arbitrator's place.

6.4 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 and the reasoning for such decision or award in writing which shall be final, binding, and conclusive on all parties to the arbitration when delivered to them. The award rendered by the arbitrator(s) may be entered as a judgment in any court having jurisdiction thereof and enforced as between the parties without further evidentiary proceeding, the same as entered by the court at the conclusion of a judicial proceeding in which no appeal was taken. 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.

6.5 Each party to the arbitration shall pay all 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.

6.6 The parties may obtain discovery and offer evidence in accordance with the Federal Rules of Civil Procedure Rules 26 - 37, and Federal Rules of Evidence, as each may be amended from time to time.

6.7 Interest computed annually, at a rate equal to the Prime Rate plus two (2) percentage points, 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. The term "Prime Rate" shall mean the minimum

commercial lending rate charged by banks to their most credit-worthy customers for short-term loans, as published daily in the Wall Street Journal.

**Section 7. GOVERNMENTAL APPROVAL and ABANDONMENT**

7.1 Lessee and User shall, at their respective 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 or conducted by User thereunder. User and Lessee agree to cooperate fully to procure all such necessary consent, approval or authority.

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

7.3 To the extent that Lessee may lawfully do so, Lessee 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 ("Notice of Abandonment").

7.4 Lessee 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 companies) including any amounts that either Lessee or User may be required to pay to its own respective employees pursuant to labor protective conditions imposed by the STB.

**Section 8. ASSIGNMENT**

Except as provided in Section 3.5 and in the sentence immediately following, the Agreement and any rights granted thereunder may not be assigned in whole or in part by Lessee or User without the prior written consent of the other. The Agreement may be assigned by Lessee or User without the prior written consent of the other only (i) as a result of a merger, corporate reorganization, consolidation, change of control or sale of substantially all of its assets, or (ii) to an affiliate of the assigning party where the term "affiliate" means a corporation, partnership or other entity controlled, controlling or under common control with the assigning party. In the event of an authorized assignment, the Agreement and the operating rights hereunder shall be binding upon the successors and assigns of the parties.

## **Section 9. DEFAULT**

**9.1 Notwithstanding the provisions of Section 3 of these General Conditions, either party hereto claiming default of any of the provisions of the Agreement (including these General Conditions) shall furnish notice and written demand to the other party for performance or compliance with the covenant or condition of the 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 the Agreement under which such claim of default is made.**

**9.2 If the default shall continue for an additional period of thirty (30) days after receipt of such written notice and demand, and such default has not been remedied within said thirty (30) day period, or reasonable steps have not been nor continue to be taken to remedy a failure or default which cannot reasonably be remedied within said thirty (30) day period, and such default relates to the provisions and terms of the Agreement, either party shall resort to binding arbitration provided that the arbitrator shall not have the authority to amend, modify or terminate the Agreement.**

**9.3 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 effect any subsequent defaults or impair the rights of either party hereto resulting therefrom.**

## **Section 10. OTHER CONSIDERATIONS**

**10.1 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.**

**10.2 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 shall make such other arrangements as will effect the purposes and intent of the Agreement.**

**10.3 In the event there shall be any conflict between the provisions of these General Conditions and the Agreement, the provisions of the Agreement shall prevail, except that the definition of Joint Trackage set forth in Section 1.8 of these General Conditions shall prevail.**

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

**11.5 Reference to any agency or other organization shall include any successor agency or organization, and reference to any index or methodology (e.g., RCAF-U, URCS, etc.), if such index or methodology ceases to exist or is no longer available, shall include any substantially similar index or methodology mutually selected by the parties or, if the parties fail to agree on such, one determined by binding arbitration under Section 6 of these General Conditions.**

**END OF EXHIBIT "B"**

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## **EXHIBIT 3**

**CAPTION SUMMARY**

**SURFACE TRANSPORTATION BOARD**

**NOTICE OF EXEMPTION**  
**FINANCE DOCKET NO. 35462**

**UNION PACIFIC RAILROAD COMPANY**  
**- TRackage RIGHTS EXEMPTION -**  
**CALIFORNIA NORTHERN RAILROAD COMPANY**



California Northern Railroad Co. ("CFNR") has agreed to grant overhead trackage rights to Union Pacific Railroad Company ("UP") between Tracy, CA (CFNR Milepost 83.0) and Lyoth, CA (CFNR Milepost 84.8) on the CFNR's Los Banos Subdivision. The trackage rights become effective on February 25, 2011.<sup>1</sup>

This Notice is filed under 49 C.F.R. § 1180.2(d)(7). 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:  
By the Board,

Rachael D. Campbell  
Director, Office of Proceedings

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<sup>1</sup> The date of the trackage rights agreement is July 10, 2010. UP acknowledges, however, that the trackage rights cannot become effective until February 25, 2011, which is 30 days from the filing date of this notice of exemption.