



KAPLAN KIRSCH ROCKWELL

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Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-0001

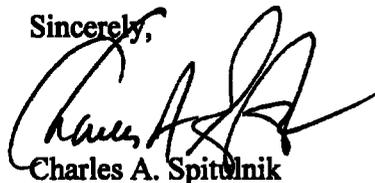
Re: *San Francisco Bay Railroad – Mare Island Petition for Declaratory Order –
Lennar Mare Island, and Pursuant to 49 U.S.C. § 11123 and 49 C.F.R.
§ 1146.1(b)(1)(i) for Expedited Relief Due to Unauthorized Cessation of
Operations; STB Finance Docket No. 35360*

Dear Ms. Brown:

I am enclosing the Reply of City of Vallejo in Opposition to Request for Expedited Relief
in the above-referenced proceeding.

Thank you.

Sincerely,



Charles A. Spitznik

Enclosure

cc: All Parties of Record

278479

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 35360

**SAN FRANCISCO BAY RAILROAD- MARE ISLAND
PETITION FOR DECLARATORY ORDER-LENNAR MARE ISLAND,
AND PURSUANT TO 49 U.S.C. §11123 AND 49 C.F.R. § 1146.1(b)(1)(i) FOR
EXPEDITED RELIEF DUE TO UNAUTHORIZED CESSATION OF
OPERATIONS**

**REPLY OF CITY OF VALLEJO IN OPPOSITION TO REQUEST FOR
EXPEDITED RELIEF**

Communications with respect to this
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Dated: March 22, 2010

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OPERATIONS**

**REPLY OF CITY OF VALLEJO IN OPPOSITION TO REQUEST FOR
EXPEDITED RELIEF**

The City of Vallejo, (hereinafter "City") hereby submits its reply to that portion of the Petition of San Francisco Bay Railroad (SFBR) for Declaratory Order and for Expedited Relief ("the SFBR Petition") that requests emergency relief pursuant to 49 U.S.C. §11123. The City will respond to the substantive allegations that relate to the Petition for Declaratory Order in due course.

However, in response to the Petition for Expedited Relief, the City respectfully submits that SFBR's request should be denied. There is no emergency here.

SFBR creates a false sense of urgency because it failed to secure all of the rights it

needs to fulfill the promises of service it made to putative shippers. The extensive factual submission that SFBR submitted requires time and attention to detail before this Board issues any order in response to it. Notwithstanding SFBR's explanations to the contrary, this matter does not meet the standards for expedited relief pursuant to 49 U.S.C. § 11123 and 49 C.F.R. § 1146.1(b)(1)(i).

INTRODUCTION

City is the owner of certain real property and associated railroad trackage consisting of approximately 2.5 miles of right-of-way of varying width, beginning on or near "G" Street in Mare Island and continuing across the Wichels Causeway "Causeway" (contained within Parcel XXI-A as indicated in the U.S. Dept of Navy's Finding Of Suitability to Transfer (FOST)), turning northward, proceeding roughly parallel to Couch Street until it meets up with a second set of tracks (which it believes is currently leased or owned by California Northern Railroad (CNFR)) in the vicinity of the Flosden Yard near El Sendero Ct. in Vallejo. The city-owned portion of the rail line, which features no direct connections to rail shippers, connects Mare Island with the national rail system. The remainder of the line is located on the former naval base property, which is owned by Lennar Mare Island, LLC (LMI) pursuant to an existing Acquisition Agreement and Development Agreement whereby LMI has agreed to clean the land, develop it,

installing infrastructure, and deeding back to the City appropriate rights of way and other property interests as the development process progresses.

Common carrier rail service historically has not existed on the subject track. For many years, the track was owned and operated by the federal government to serve the Mare Island Naval Base. Except for the recent filing by San Francisco Bay Rail (SFBR) in FD 35304 *San Francisco Bay Railroad-Mare Island--Operation Exemption--California Northern Railroad*, City is not aware of any filing with the Board, or its predecessor, the Interstate Commerce Commission, that authorized common carrier service over this line. It appears that CNFR may have provided some service over the line for several years ending in early 2008 without benefit of a Certificate of Public Convenience and Necessity from this Board. While the City is supportive of the provision of rail service to Mare Island, the City is concerned with the approach that Petitioner appears to be taking to gain access to this line, by prematurely seeking operational authority from the Board prior to reaching a long term agreement with the City or any agreement with the City's master developer on Mare Island, Lennar Mare Island (LMI), and then using the authority obtained in that filing as leverage in the negotiation of those legal agreements to obtain an unfair advantage over the parties. Now, through its Petition, SFBR seeks to use the authority of the Board to assist it in negotiating the terms of these agreements.

The City further wishes to counter the impression, which was made in SFBR's Petition, that Petitioner has obtained any rights from California Northern Railroad (CNFR) to operate over the City-owned portion line. Significantly, Petitioner references no document that transfers rights from CNFR to Petitioner to operate over the line. Such a transfer, had it occurred, would likely have been fraudulent and in contravention of the property rights the City obtained from the federal government. The City notes that the acquisition exemption referenced as Exhibit D to SFBR's Petition (*CNFR Operating Company, Inc.--Acquisition And Operation Exemption--ParkSierra Corp. (FD-34199)*) features a list of specific rail lines (and branch lines) that were transferred from Union Pacific Railroad to CNFR which does not reference this line. The only reference to the line in that filing is a line on the pre-printed map that was attached as Petitioner's Exhibit A on Page 9 to the CNFR acquisition exemption. Based on this very thin record, Petitioner seeks to position itself as the operator of freight rail service to Mare Island.

In its response to the Petition for Declaratory Order, the City will explain in detail its response to the substantive issues SFBR's pleading presents. In short, while the City disputes the presence of any pre-existing common carrier rights or obligations on the line, it is fully supportive of a common carrier initiating service on the line, provided that the interests of the City (as a property owner of its

segment of the line and as a party to a development agreement governing the LMI property) are properly protected through contractual arrangements with the carrier.

At the present time, the only agreement between SFBR and the City for use of its rail line is set to expire on March 31, 2010. It should be recognized that the existing short-term agreement between City and Petitioner, as shown on Petitioner's Exhibit K, would have expired on January 1, 2010 except that such term was extended until March 31, 2010. (See City Exhibit B). The City entered into this short term agreement to allow Petitioner to provide immediate private service to a single shipper, the Alstom rail car maintenance facility, which had requested that Petitioner service its facility on Mare Island. Although the City has negotiated the terms of a long term agreement with Petitioner, (See City Exhibit A, which is slightly different than Petitioner's Exhibit L), given the dispute between LMI and Petitioner regarding operations on Mare Island, the City is reluctant to make a long-term commitment to Petitioner without some assurance as to its ability to operate service to Mare Island on a long term basis and as to its willingness to comply with reasonable terms and conditions for such use that the parties may negotiate. The expiration of its short-term agreement with Petitioner may or may not coincide with the Board's action in this matter. Therefore, City opposes any order of this Board which would require the City to allow Petitioner to trespass over its land absent a reasonable long-term agreement.

ARGUMENT

SFBR has failed to meet the requirements for issuance of an emergency service order under 49 U.S.C. §11123 and 49 C.F.R. 1146.1. Putting aside for the moment the serious substantive and factual issues raised by SFBR's Petition, there is no emergency here and the resolution of this matter should await thorough review of the matter by this Board.

The Board's regulations that implement Section 11123 confirm that the SFBR has not made – and indeed can not make – the showings required to secure emergency relief. 49 C.F.R. §1146.1 states the following as the threshold for securing this emergency relief:

Alternative rail service will be prescribed under 49 U.S.C. 11123(a) if the Board determines that, over an identified period of time, there has been a substantial, measurable deterioration or other demonstrated inadequacy in rail service *provided by the incumbent carrier.*

49 C.F.R. §1146.1(a) (emphasis supplied).

There is no “incumbent carrier” here. As the City has explained, CFNR had no right to operate on the tracks at issue here. No documents presented in this proceeding or previously by CFNR or its predecessors showed the lines on Mare Island as part of the interstate rail network.

SFBR's recitation of the factors articulated by the Board in F.D. No. 34890, *Pyco Industries, Inc. -- Feeder Line Application -- Lines of South Plains Switching*,

Ltd. (Service Date August 31, 2007) does not bring the current situation any closer to meeting the basic threshold requirement set forth in the Board's rules. Indeed, SFBR's presentation of factors for evaluating the proposed forced sale of a line of railroad under 49 U.S.C. §10907 has no relevance to the Board's consideration of a request for expedited relief. Without presenting any explanation as to the applicability of those factors to the question whether an emergency service order under Section 11123 is appropriate, since the cited factors relate to an entirely different and wholly irrelevant section of Title 49, SFBR attempts to explain why its proposal meets those requirements. While the decision in *Pyco* was in fact preceded by orders permitting alternative local service under 49 C.F.R. §1146.1,¹ nothing about the decision upon which SFBR relies suggests that the Board looked at the factors in 49 U.S.C. 10907 as the basis for determining whether expedited service would be appropriate under the facts presented here. This Board should not be misled by SFBR's factually inaccurate pleading that misrepresents the standards relied upon by this Board in making decisions as to whether to grant requests for emergency relief. No emergency relief is warranted, and none should be granted.

¹ See, e.g., Finance Docket No. 34802, *Pyco Industries, Inc.—Alternative Rail Service—South Plains Switching, Ltd. Co.*, (Service Date January 25, 2006).

To be clear, however, the City is willing to enter into discussions with SFBR towards a long term arrangement. Notwithstanding SFBR's attempts to short circuit negotiations through its filing containing both factual errors and erroneous descriptions of the holdings of prior STB decisions, and its attempts to create an appearance of an emergency out of a situation that is mostly of its own making, the City is willing to participate in discussions with SFBR. The City is supportive of long term rail service on the railroad tracks which span the City's property as described in Exhibit A, and would be supportive of SFBR's or another operator's operation as a common carrier to provide long term rail service on Mare Island provided that, among other requirements:

1. Any such service allows LMI, as Master Developer for Mare Island, to fulfill its obligations under the existing agreements, including specifically the Acquisition Agreement and Development Agreement, as amended, and develop the property consistent with the Mare Island Reuse Plan and the Mare Island Specific Plan; and
2. Such service is consistent with and protects the City's existing land use policy articulated in the Mare Island Reuse Plan and the Mare Island Specific Plan which contemplate the City's ability, through LMI, to develop

and subdivide the land², install infrastructure, and accommodate rail service to Mare Island; and

3. Such service allows LMI to continue to parcelize, install infrastructure and accommodate rail service consistent with the Mare Island Specific Plan, and
4. Such service allows LMI to complete its obligations related to environmental clean up, and
5. Such service on specific tracks is geographically defined and limited to encompass track in areas that are logically needed to operate rail service, but excludes track in areas which would interfere with existing agreements or current development plans.

CONCLUSION

The City's goal remains to ensure rail service to Mare Island, taking into account the City's interests. After the heat generated by SFBR's pleading cools, the parties will need to enter into discussions of both the substantive points that SFBR has raised as well as of a way of addressing the interests of all of the parties affected by SFBR's proposal. The City proposes both to respond within the time set by the Board's regulations to the Petition for Declaratory Order, and to engage in negotiations with SFBR and LMI with a goal towards finding a resolution that

² Pursuant to the Subdivision Map Act, Ca Gov't Code section 66411 *et seq.*

addresses the best interests of all of the several parties involved here. However, the path to finding that solution is not one that involves an emergency order by this Board. There is no emergency, and SFBR can not satisfy the first and most important threshold question for granting emergency orders that this Board's regulations articulates.

Accordingly, the City requests this Board to: (1) deny the request for expedited and/or emergency relief; (2) establish a schedule for a proceeding in which the facts related to rail service on Mare Island can be developed fully; and (3) acknowledge the validity of the City's articulated goals and interests and takes such into account when formulating any decision which may affect the City.

Respectfully submitted,

Dated: March 22, 2010,

FREDERICK G. SOLEY

Vallejo, CA City Attorney

A handwritten signature in black ink, appearing to read 'C. Quintana', written over a horizontal line.

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Attorneys for the City of Vallejo, CA

VERIFICATION

I, Craig Whittom, Assistant City Manager / Community Development Director of the City of Vallejo, declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that I have reviewed the brief attached hereto and the factual statements are true based upon my personal knowledge, based upon documents I have seen, and where I do not have personal or direct knowledge, I believe the assertions to be correct.

A handwritten signature in black ink, appearing to read 'C. Whittom', written over a horizontal line.

Craig Whittom

Exhibit A

TRACK LEASE AGREEMENT FOR MARE ISLAND TRACK

THIS LEASE AGREEMENT, dated as of the 1st of January 2010, by and between the City of Vallejo, a municipal corporation, hereinafter called "City," and SAN FRANCISCO BAY RAILROAD-MARE ISLAND, a Delaware Corporation, hereinafter called "SFBR-MI." City and SFBR-MI are collectively referred to herein as the "Parties."

RECITALS

The Parties entered into a preceding Rail Agreement dated October 9, 2009, to allow SFBR-MI to provide limited rail service to a single shipper, which Rail Agreement is superseded in all respects by this Lease Agreement.

The Parties now desire to enter into this Lease Agreement setting forth terms and conditions for the use and management of the Leased Premises as defined in Section 1.02 below.

City obtained ownership of the Leased Premises by means of that certain ~~agreement~~ agreement with the United States Department of the Navy ("Navy") on ~~10/10/09~~ ~~10/10/09~~. Prior to that time, the rail line was operated by the Navy to serve its own facilities and was not part of the national rail system. City believes that the Navy was not operating as common carrier and that until the present, the Leased Premises have not been the subject of any application by any carrier to be operated as an interstate rail facility, regulated by either the Interstate Commerce Commission or its successor, the Surface Transportation Board of the U. S. Department of Transportation ("STB").

In order to facilitate the economic development of the former Mare Island Naval Base, City is willing to lease the Leased Premises to SFBR-MI, an interstate rail carrier, to allow it to conduct common carrier rail operations on the Leased Premises. In so doing, City expressly disclaims any intent to become a rail carrier or to take on residual common carrier obligations, but is merely making its property available to SFBR-MI to allow it to conduct such operations.

NOW, THEREFORE, in consideration of the foregoing and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties do hereby agree as follows:

SECTION I

LEASED PREMISES

SECTION 1.01 - City does hereby lease to SFBR-MI and SFBR-MI does hereby lease from City a rail track of approximately 2.5 miles in length ("City Track") that is part of the Leased Premises. City Track is partially contained on City property within Zone 19 (Railroad Spur) as shown in Figure 1 attached to this Agreement. There is a structure within Zone 19, a 95-year-old steel bridge (Sacramento Street Overpass) "Bridge" which spans the railroad spur at Sacramento Street and Farragut Avenue. Zone 19 is located in the City of Vallejo and is bounded by

commercial and residential parcels to the east and west; to the north by the Southern Pacific Railroad Right-of-Way and to the south by Tennessee Street and Wilson Avenue junction

SECTION 1.02 - The "Leased Premises" shall mean all of City's right, title and interest in and to the following (subject to the exclusions and reservations contained in this Lease Agreement): (a) the Land (as defined below); (b) "Track" meaning all rail and fastenings, switches and frogs complete, ties, ballast and signals located on the Land; (c) "Track Support Structures" meaning all appurtenances to the Track, including without limitation bumpers, roadbed, embankment, bridges (including the Bridge), trestles, underpasses, culverts and any other structures or things necessary for support or construction thereof, and, if any portion thereof is located in a thoroughfare, pavement, any crossing planks and other similar materials or facilities used in lieu of pavement or other street surfacing material at vehicular crossings of tracks, culverts, drainage facilities, crossing warning devices; and (d) any and all work required by lawful authority during the term of this Lease Agreement in connection with construction, renewal, maintenance and operation of said Track and Track Support Structures and all additions thereto. However, other than that portion of the Track, which is located on the Causeway (as defined below), the Causeway is not part of the Leased Premises.

The "Land" shall mean all of the land of City generally described as follows and shown on Figure 1 to this Lease Agreement, and as herein defined, consisting of approximately 2.5 miles of City-owned track of varying width, beginning on or near "G" Street in Mare Island and continuing across the Wichels Causeway "Causeway" (contained within Parcel XXI-A as indicated in the Navy's Finding Of Suitability to Transfer (FOST)), turning northward, proceeding along roughly paralleling Couch Street until it meets up with a second set of tracks (currently owned by another entity) in the vicinity of the Flodden Yard near El Sendero Court, reserving unto City the rights specified in Section XII hereof.

SECTION 1.03 - Except as otherwise expressly provided herein, SFBR-MI shall lease the Leased Premises in "as is, where is" condition and without any representation or warranty, either express or implied, as to any matter whatsoever, including without limitation the design or condition of the Leased Premises, its merchantability or its fitness or suitability for any particular purpose, the quality of the material or workmanship of the Leased Premises or conformity of the Leased Premises to its intended use. Except as otherwise expressly provided herein, SFBR-MI also agrees to lease the Leased Premises subject to the interests set forth in subsections 1.03(a-d) below, none of which interests individually or collectively would materially interfere with SFBR-MI's ability to conduct rail freight operations on the Leased Premises as set forth herein.

- (a) reservations or exceptions of minerals or mineral rights, and all private and public easements and rights-of-way, however created, for crossings, pipelines, wire lines, fiber optic facilities, roads, streets, highways and other legal purposes;
- (b) applicable federal, state, county, municipal and local laws, ordinances and regulations;
- (c) encroachments or other conditions that may be revealed by a survey, title search or inspection; and
- (d) all existing ways, alleys, privileges, rights, appurtenances and servitudes, however created, liens of mortgage or deeds of trust, and City's exclusive right to approve or

deny any and all future easements, leases, licenses or rights of occupancy in, on, under, through, above, across or along the Leased Premises, or any portion thereof so long as such future easements, leases, licenses or rights of occupancy do not unreasonably interfere with SFBR-MI's rail operations.

SECTION 1.04 - SFBR-MI understands and agrees to maintain the Leased Premises to the standard specified in the Maintenance Standards, attached as Exhibit B.

SECTION II LEASE TERM

SECTION 2.01 - SFBR-MI shall commence freight rail operations on the Leased Premises on or prior to January 1, 2010. (The date on which SFBR-MI actually commences freight rail operations on the Leased Premises shall be the "Commencement Date".) The initial term for this Lease Agreement shall commence on the Commencement Date and shall end on December 31, 2030.

SECTION 2.02 - This Lease Agreement shall automatically be extended for successive ten (10) year extended terms commencing January 1, 2031, unless either Party notifies the other that this Lease Agreement shall not be so extended at least six (6) months prior to the commencement date of any such extended term.

SECTION 2.03 - Upon the commencement of freight rail operations on the Leased Premises, that certain Rail Agreement between the Parties, dated October 9, 2009, and any amendments, shall terminate.

SECTION III RAIL SERVICE

SECTION 3.01 - Beginning on the Commencement Date and throughout the term of this Lease Agreement, SFBR-MI shall be the sole and exclusive provider of rail freight service. Except as provided in Section 2.04 and Section 3.01(b), SFBR-MI may not use the Leased Premises to provide any type of passenger service; provided, however, that the term "passenger service" shall not include the transportation of officers, employees or invitees of SFBR-MI or the use of Equipment utilized for the transportation of such persons. During the term hereof, City shall not have the right to operate freight trains over the Leased Premises or otherwise exercise rights over the Leased Premises except as specifically set forth herein. City warrants that, as of the Commencement Date of this Lease Agreement, there is no other rail carrier to which City or any other party with an interest in the Leased Premises has granted rights to use the Leased Premises. From the date of this Lease Agreement through the termination hereof, neither City nor SFBR-MI shall grant to any third party any rights whatsoever to conduct rail freight operations on the Leased Premises during the term of this Lease Agreement and any extension hereof without the prior, written consent of the other Party.

SECTION 3.02

(a) City has advised SFBR-MI that City retains the right to make its track available for the operation of rail passenger service on the Leased Premises. City is entitled to exercise this right whenever it is feasible, subject to this section. City may seek to have either SFBR-MI or a heretofore-unknown third party (Rail Passenger Service Provider, hereinafter 'RPSP'), assist the City by providing rail passenger service on the Leased Premises on terms and conditions mutually acceptable to City, RPSP and SFBR-MI. SFBR-MI shall not withhold its acceptance of conditions unreasonably.

(b) In the event that City solicits proposals for the operation of passenger service on the Leased Premises, SFBR-MI may submit a proposal to provide such service on such terms and conditions as are acceptable to SFBR-MI in its reasonable discretion. City may engage either RPSP or SFBR-MI to provide private or common carrier rail passenger service upon terms and conditions agreed upon by and between City, SFBR-MI and RPSP. SFBR-MI agrees to cooperate fully with City and RPSP in the provision of such rail passenger service.

SECTION 3.03 - During the term of this Lease Agreement, SFBR-MI shall not suspend, abandon or discontinue its operation as a common carrier by rail over all or any part of the Leased Premises without first applying, paying for and obtaining from the STB and any other regulatory agency with jurisdiction, any necessary certificate of public convenience and necessity or other approval or exemption from regulation for such discontinuance of operations over the Leased Premises or portion thereof; SFBR-MI shall not seek any such regulatory authority or take any action to suspend, abandon or discontinue its operations on the Leased Premises, as of a date prior to the expiration or termination of this Lease in accordance with its terms, without first receiving written concurrence from City, which shall not be unreasonably withheld. Such concurrence shall not be required for a suspension or discontinuance resulting from an event of force majeure or a lawful embargo not resulting from SFBR-MI's failure to conduct normalized maintenance of the trackage or in connection with the expiration or termination of this Lease in accordance with its terms. If SFBR-MI desires a suspension or discontinuance of service, City shall take one of the following courses of action: (a) concur with such request; (b) waive concurrence and not oppose or encourage opposition of such request; or (c) elect to subsidize continued operation in accordance with 49 USC 10905. No rail that is a part of the Track shall be replaced with lesser weight rail without the prior written consent of City.

SECTION 3.04 - During the term of this lease agreement, and in those portions of the Leased Premises which are exclusively used for rail freight service, SFBR-MI shall perform all normalized maintenance with respect to the Track and Track Support Structures as required by applicable law, at its sole cost and expense, and to the specifications that are required by law, and shall maintain the Leased Premises to the standards specified in the Maintenance Standards (Exhibit B). SFBR-MI shall bear the expense of the initial rehabilitation of the Track and Track Support Structures as may be required. As long as the Leased Premises are exclusively used for rail freight service, SFBR-MI shall perform such rehabilitation, restoration and replacement of the Track and Track Support Structures (including without limitation maintenance of bridges, other than the "Causeway") over and above normalized maintenance as is required to maintain the Track and Track Support Structures to a safe and useable condition clear of weeds, garbage and obstructions.

SECTION 3.05 - SFBR-MI shall comply with all laws affecting the Leased Premises or requiring any alterations or improvements to be made thereon; shall not commit or permit waste

thereof; shall not commit, suffer, or permit any act upon the Leased Premises in violation of law and shall do all other acts which from the character or use of the Leased Premises for rail freight operations may be reasonably necessary, the specific enumeration herein not excluding the general. Without limiting the generality of the foregoing, and hereof, SFBR-MI expressly agrees that it shall perform all trash, waste and weed and waste abatement as required by law and as additionally specified in the attached Maintenance Standards (Exhibit B) in connection with the freight operations on the Leased Premises.

SECTION 3.06 - City shall have the right during normal business hours, upon reasonable notice and from time to time to inspect the Leased Premises for conformity with the standards of maintenance contained in this Lease Agreement; provided, that such inspections shall not unreasonably interfere with SFBR-MI's operations; that all persons conducting such inspections shall execute appropriate release of liability waivers; and that SFBR-MI or its appointed representative shall accompany City or its representatives during such inspections. In the event that as a result of City's inspection of the Leased Premises it is determined in the reasonable judgment of City that any Track or Track Support Structure or any other facility fails to meet the standard of maintenance required by this Lease Agreement, City shall so advise SFBR-MI of the steps necessary to bring the Track, Track Support Structure or other facility into conformity with the applicable standard of maintenance. Thereafter, SFBR-MI shall have a reasonable period of time, such time to be mutually agreed upon, within which to take such corrective action.

SECTION 3.07 -

(a) SFBR-MI shall maintain such full and complete records of all maintenance, rehabilitation, track relocation or removal performed on the Leased Premises as shall reasonably be required by City and shall keep all track profiles and track charts up to date so as to show all program maintenance and rehabilitation performed on the Track and Track Support Structures. Copies of updated records and track charts shall be provided by SFBR-MI to City annually not later than September 30th of each calendar year and promptly upon any other reasonable request of City.

(b) SFBR-MI shall manage, control and dispatch all rail operations on the Leased Premises.

SECTION 3.08 - SFBR-MI shall provide a copy of all reports of track inspections by Federal Railroad Administration ("FRA") or California Public Utilities Commission ("CPUC") inspectors to the City Engineer, promptly upon receipt of said reports; the term "reports" shall include all notices or citations alleging deficiencies from FRA track standards.

SECTION 3.09 - In the event that City undertakes to provide passenger operations on the Leased Premises, either directly or through the designation of a passenger service operator, SFBR-MI and City shall enter into an agreement (the "Coordination Agreement") that describes in detail the respective rights and obligations of the Parties with respect to maintenance, capital expenditures, dispatching, scheduling of operations and other matters concerning the joint use of the Leased Premises. SFBR-MI and City shall negotiate the Coordination Agreement in good faith so as to ensure that passenger operations have reasonable priority over freight operations, provided that freight service continues to be provided on the

Leased Premises in a manner that meets the needs of the shippers on the line, and that passenger operations disrupt SFBR-MI's freight operations to the minimum extent possible.

SECTION IV

LEASE PAYMENTS

SECTION 4.01 - SFBR-MI shall make annual Lease Payments in the amount of \$35.00 per loaded railcar after the first 250 railcars up to 1,000 loaded railcars in any calendar year, and \$45.00 per loaded railcar for all railcars above 1,000 railcars. This amount shall be adjusted on July 1st of each year following execution of this Agreement by the Annual Average Percentage increase for "all urban consumers/ all items" in the U.S. Department of Labor Consumer Price Index for the San Francisco-Oakland-San Jose Area for the preceding calendar year.

SECTION 4.02 -- SFBR-MI shall make all Lease Payments, and all other payments required by this Lease Agreement, to City at the following mail address, or at such other location or to such individual as may be designated by City in writing from time to time:

City of Vallejo
Attn: City Manager
555 Santa Clara Street
Vallejo, CA 94590

By the 10th of every month, SFBR-MI shall provide City with a summary of the monthly car loadings for the previous month, and SFBR-MI shall pay the City the amount due for that month.

SECTION 4.03 - If SFBR-MI fails to pay any installment of rent or any other payment required hereunder when due, and such failure continues for thirty (30) days, SFBR-MI shall pay interest at the lower of the annual rate of 2% over the prime rate of BANK OF AMERICA, N.A. or the highest annual rate allowed by law, in effect on the day the rent or other payment was due, which interest shall accrue from the due date until the date of payment.

SECTION 4.04 -- Acceptance by City, its successors, assigns or designees of rent or other payments shall not be deemed to constitute a waiver of any provision of this Lease Agreement.

SECTION V

CONDITIONS PRECEDENT

The following are conditions precedent to the commencement of SFBR-MI's rail freight operations hereunder:

SECTION 5.01 – The parties agree that the Leased Premises meet the standard set forth in the attached Maintenance Standards (Exhibit B) and that it is SFBR-MI's responsibility to continually meet those standards for the duration of this Agreement.

SECTION 5.02 - SFBR-MI shall have obtained the necessary authority or exemption from the STB to become a Class III rail and from the STB to conduct rail freight service over the Track and Track Support Structures located on the Leased Premises, and shall have obtained such judicial, administrative agency or other regulatory approvals, authorizations or exemptions as may be necessary to enable it to undertake its obligations hereunder.

SECTION 5.03 - City and SFBR-MI shall not be prevented from fulfilling their respective obligations under this Lease Agreement as a result of legislative, judicial or administrative action.

SECTION 5.04 - No substantive condition unacceptable to SFBR-MI or to City shall have been imposed in connection with the regulatory approvals, authorizations and exemptions contemplated by Section 5.02.

SECTION 5.05 - SFBR-MI shall have provided satisfactory documentation showing its compliance with the insurance requirements of Section 10.02.

SECTION 5.06 - Each Party's representations and warranties shall be true and correct in all material respects, and each Party shall have performed its covenants hereunder to the extent such covenants are required under this Lease Agreement to be performed prior to the Commencement Date.

SECTION 5.07 - SFBR-MI shall not have discovered any contract, agreement, award, judgment, title defect or condition of the Leased Premises which would prevent SFBR-MI from operating a rail freight operation on the Leased Premises as contemplated under this Lease, or which would have a material, adverse effect on SFBR-MI's business plan. Upon execution hereof, City shall make available for SFBR-MI's inspection and review all contracts, agreements, documents, records and correspondence, including but not limited to items relating to environmental matters, pertaining to or affecting the Leased Premises. SFBR-MI shall notify City in writing within thirty (30) days from date of execution hereof whether or not its review of City's records and the Leased Premises have satisfied this condition precedent. Failure to so notify City shall be deemed a satisfaction of this condition. During the thirty (30) day period following the date of this Lease Agreement, City shall provide SFBR-MI with access to City's books and records concerning the Leased Premises and to the real property that comprises the Leased Premises. Without limiting the foregoing, SFBR-MI may conduct at its own expense such environmental tests on the Leased Premises as it deems necessary; provided, however, SFBR-MI may not provide such test results to any party without the prior written consent of City.

SECTION 5.07 - SFBR-MI shall be satisfied that it has adequate rail access to service all industrial customers on Mare Island without unreasonable physical or economic constraints.

SECTION 5.08 SFBR-MI shall be satisfied with the condition of title to the entire track.

SECTION VI

ACCOUNTING AND REPORTING

SECTION 6.01 – SFBR-MI shall submit a yearly report, due on July 30th of each year, showing its total car loadings and movements in support of the amount proffered as lease payments, pursuant to section IV, for the preceding year. City and its agents shall have the right at any time upon reasonable notice to inspect SFBR-MI's records, bills of lading, or any other relevant reports or supporting documents or materials necessary to determine compliance with any provisions of this Lease Agreement. Such inspection shall be conducted during normal business hours and SFBR-MI shall make its facilities available to City's inspectors to permit such inspection without undue interference with SFBR-MI's operations. Any direct expense arising from the inspection shall be borne by City.

SECTION VII

MODIFICATIONS AND IMPROVEMENTS

SECTION 7.01 - SFBR-MI shall not use nor permit the use of the Leased Premises in any manner that will tend to create waste or a nuisance or would materially interfere with the continued commercial, industrial or transportation corridor uses of the Leased Premises. In using the Leased Premises, and in constructing, maintaining operating and using the Track and Track Support Structures, SFBR-MI shall comply with any and all requirements imposed by applicable federal or state statutes, local ordinances, orders or regulations or any governmental body having jurisdiction there over,

SECTION 7.02 - Subject to Section III hereof, SFBR-MI may construct or relocate sidetracks or industrial spur tracks on the Leased Premises as required in the ordinary course of business so long as such work is done in conformity with applicable governmental regulations. Sidetracks or industrial spurs in place on the Leased Premises as of the Commencement Date may not be removed from the Leased Premises without consent of City, which consent will not be unreasonably withheld and in the event any tracks are removed and track materials sold for salvage, the net proceeds (after removal costs) of such sale shall belong to City unless otherwise agreed to in writing except in cases where track is replaced with improved track and the proceeds of the sale of scrap materials are used entirely as part payment for such improvement or where scrap materials are used elsewhere on the system, including the rail lines on Mare Island; provided that SFBR-MI may remove sidetracks and industrial spurs it installs on and after the Commencement Date, and retain the proceeds from the sale of such materials, without obtaining the prior consent of City.

SECTION VIII

REPRESENTATIONS AND WARRANTIES

SECTION 8.01 - City represents and warrants that, as of the date hereof and of the Commencement Date:

- (a) It is a municipal corporation duly organized, validly existing in the State of California.
- (b) It has full statutory power and authority to enter into this Lease Agreement and to carry out the obligations of City hereunder.

- (c) This Lease Agreement and the Related Agreements have been duly authorized, executed and delivered by City and are the legal, valid and binding agreements of City, enforceable against City in accordance with their terms.

SECTION 8.02 - SFBR-MI represents and warrants that, as of the date hereof and as of the Commencement Date:

- (a) It is a corporation, duly organized, validly existing, and in good standing under the laws of the State of Delaware and able to do business in the State of California.
- (b) It has full power and authority to enter into this Lease Agreement, and subject to necessary regulatory authority, to carry out the obligations of SFBR-MI hereunder.
- (c) SFBR-MI has satisfied itself as to the state of title to the Leased Premises, the physical condition of the Leased Premises and their suitability for the uses proposed by SFBR-MI. In so doing, SFBR-MI has relied solely upon its own inspection and investigation and not upon any representation or warranty made or furnished by City or any of its agents or other representatives, except as expressly stated in any representation or warranty contained in this Lease Agreement.

SECTION IX

OBLIGATIONS OF THE PARTIES

SECTION 9.01 - Except as provided below, during the term hereof, SFBR-MI shall pay all bills for utilities, including without limitation those for water, sewer, gas and electric service to the Leased Premises. If the Leased Premises are not billed separately but as a part of a larger tract or parcel, SFBR-MI shall pay that portion of such bills as is attributable to usage on or in connection with Leased Premises.

SECTION 9.02 - SFBR-MI shall at its sole cost and expense protect and defend City's title against all persons claiming against or through SFBR-MI and at all times keep the Leased Premises free from any legal process or encumbrance whatever, including without limitation mechanics, and execution liens, attachments and levies (except any created by or under or through City), and shall give City immediate written notice of any such legal process or encumbrance and shall indemnify, defend, protect and hold harmless City from same and from any loss caused thereby, except those arising prior to the Commencement Date.

SECTION 9.03 - During the term of the Lease Agreement, SFBR-MI shall substantially comply with all federal, state, and local laws, rules, regulations, and ordinances applicable to the Leased Premises, including but not limited to those controlling air, water, noise, hazardous waste, solid waste, and other pollution or relating to the storage, transport, release, or disposal of hazardous materials, substances, waste, or other pollutants. Except to the extent that such activities are the sole responsibility of City, SFBR-MI, at its sole cost and expense shall make all modifications, repairs, or additions to the Leased Premises, and implement and bear the expense of any and all fencing, structures, devices, equipment, or any remedial or monitoring actions which may be required under any such laws, rules, regulations, ordinances, or judgments, which if

attached to the land shall become owned by City; provided, however, that except in cases in which the fencing, structure, device, equipment or remedial or monitoring actions are required as a result of an act or omission of SFBR-MI that is contrary to law or SFBR-MI's undertakings hereunder, the cost of same shall be subject to Section 3.03 hereof. During the term of this Lease Agreement, neither Party shall dispose of hazardous wastes of any kind on the Leased Premises. SFBR-MI shall not handle or store hazardous waste or hazardous substances or rail cars containing the same on the Leased Premises other than as may be used by SFBR-MI in its operations in the normal course of business or as may be transported by SFBR-MI in its capacity as a common carrier by rail.

Without limiting the generality of the foregoing, the following obligations are due to the City:

- 1) At each location that SFBR-MI parks its locomotives for overnight storage or longer, it shall implement appropriate contamination containment procedures with respect to fuel drippings within three (3) months after the Commencement Date.
- 2) SFBR-MI may not store, park or leave any rail car containing any hazardous waste or hazardous substance for any length of time on the Leased Premises beyond what time is necessary for the normal transportation of such rail car, but in no event longer than 7 days.
- 3) SFBR may not store, park or leave any rail car (which does not contain hazardous substances or hazardous waste) on the Leased Premises for more than 7 days under any circumstances.

SECTION 9.04 - California law requires the disclosure of the presence or potential presence of certain Hazardous Materials. Accordingly, SFBR-MI is hereby advised that Hazardous Materials (as herein defined) may be present on or near the City Track, including, but not limited to vehicle fluids, janitorial products, tobacco smoke, and materials commonly used in construction of rail track containing chemicals, such as lead and formaldehyde. Further, as required by the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) Section 120(h)(1) and 120(h)(3) and implemented by 40 Code of Federal Regulations 373.3, this subsection provides the required Hazardous Substances Notification for Zone 19, which contains the City Track. The following known Hazardous Materials is present on the property: Lead based paint, as further described in the Finding of Suitability to Transfer for Zone 19 (Railroad Spur) prepared by the Department of the Navy, Final, December 17, 1999, a copy of which has been delivered to or made available to SFBR-MI. By execution of this Rail Agreement, SFBR-MI acknowledges that the notice set forth in this section satisfies the requirements of California Health and Safety Code Section 25359.7 and related statutes. SFBR-MI must disclose the information contained in this Subsection to any sub licensee, licensee, transferee, or assignee of SFBR-MI's interest in this City Track. SFBR-MI also acknowledges its own obligations pursuant to California Health and Safety Code Section 25359.7 as well as the penalties that apply for failure to meet such obligations.

SECTION XX

INDEMNIFICATION AND INSURANCE

SECTION 10.01 - Railroad's Indemnity

(a) Indemnity and Exculpation. SFBR-MI shall indemnify and hold City, including, but not limited to, its Council and all its members, boards, commissions, departments, agencies, and other subdivisions and their respective employees and agents (collectively, "Indemnified Parties") harmless from, and, if requested, shall defend them, with counsel approved by indemnified parties, without cost to the Indemnified Parties, against any and all liabilities, injuries, losses, costs, claims, judgments, settlements, damages, liens, fines, penalties and expenses, including without limitation, direct and vicarious liability of any kind ("Claims"), arising directly or indirectly out of: (a) any accident, injury to or death of any person, including any agents and/or invitees of SFBR-MI, or loss or damage to or destruction of any property occurring in, on or about the City Track as a result of SFBR-MI's use or operations or (b) any default by SFBR-MI in the observance or performance of any of the terms, covenants or conditions of this Rail Agreement, or (c) the use or manner of use of the City Track or the activities therein by SFBR-MI, its agents, or invitees, or (d) any construction or other work undertaken by SFBR-MI on the City Track, or (e) any acts, omissions or negligence of SFBR-MI, its agents or invitees, in, on or about the City Track or (f) any residual common carrier liability imputed to the City except where a adverse abandonment petition is brought against SFBR-MI by the City, which SFBR-MI opposes.

(b) Hazardous Materials Indemnity. SFBR-MI shall indemnify, defend and hold the Indemnified Parties harmless from, without cost to the Indemnified Parties, any and all Claims which arise during or after the term of this Rail Agreement as a result of the presence, Handling, Release, or threatened Release of Hazardous Materials by the SFBR-MI from, on or about the Leased Premises during SFBR-MI's use of the Leased Premises, except where such presence is caused by the sole negligence or willful misconduct of the Indemnified Parties and SFBR-MI has not exacerbated the Hazardous Material condition. SFBR-MI's obligation to indemnify, defend and hold the Indemnified Parties harmless shall include without limitation, all costs of investigating and remediating the same, damages for diminution in the value of the affected City property surrounding the Leased Premises, damages for the loss or restriction on use of rentable or usable space or of any amenity of the Leased Premises, damages arising from any adverse impact on marketing of any such space and sums paid in settlement of Claims, attorneys' fees, consultant fees and expert fees.

This indemnification of the Indemnified Parties by SFBR-MI includes, but is not limited to, costs incurred in connection with any investigation of site conditions or any clean-up, remediation, removal or restoration work requested by City or required by any federal, state or local governmental agency or political subdivision because of Hazardous Materials present in the soil or groundwater in, on, under or about the affected City property surrounding the City Track which Hazardous Materials were introduced or Released in, on, under or about the affected City property surrounding the City Track beginning during SFBR-MI's occupancy, except where such presence is caused by the sole negligence or willful misconduct of the Indemnified Parties. SFBR-MI's obligation to indemnify, defend and hold the Indemnified Parties harmless shall include without limitation, any and all causes in which SFBR-MI had whole or partial responsibility. SFBR-MI's obligations hereunder shall survive the expiration or earlier termination of this Rail Agreement.

(c) General Indemnity Provision. Except as explicitly provided below in Subsection B, the indemnification obligations of SFBR-MI set forth in this Rail Agreement shall be enforceable regardless of the active or passive negligence of the Indemnified Parties, and regardless of whether liability without fault is imposed or sought to be imposed on the Indemnified Parties. The indemnification obligations of SFBR-MI set forth in this Rail Agreement shall be enforceable except to the extent that such indemnity is void or otherwise unenforceable under applicable law in effect on, or validly retroactive to, the date of this Rail Agreement. The indemnification obligations of SFBR-MI set forth in this Rail Agreement includes all Claims, including loss predicated in whole or in part, upon the active or passive negligence of the Indemnified Parties except as explicitly provided below in Subsection 4. The indemnification obligations of SFBR-MI set forth in this Lease Agreement shall exclude claims, liability, damage or loss resulting solely and exclusively from the willful misconduct of the Indemnified Parties which is not contributed to by any act of, or by any omission to perform some duty imposed by law or agreement on, SFBR-MI, its Agents or Invitees.

(d) Defense of Claims. In addition to SFBR-MI's obligation to indemnify the Indemnified Parties, SFBR-MI specifically acknowledges and agrees that it has an immediate and independent obligation to defend the Indemnified Parties from any Claim which actually or potentially falls within the indemnification obligations of SFBR-MI set forth in this Lease Agreement, even if the allegations are or may be groundless, false or fraudulent. SFBR-MI's obligation to defend, with defense counsel to be approved by City, shall arise at the time such claim is tendered to SFBR-MI by the Indemnified Parties and shall continue at all times thereafter.

(e) Scope of Indemnification. The indemnification obligations of SFBR-MI set forth in this Lease Agreement shall include without limitation, indemnification from all Claims. This indemnification by SFBR-MI shall begin from the first notice that any claim or demand is or may be made. The provisions of this Article XIX shall survive the expiration or earlier termination of this Rail Agreement.

(f) Exculpation. SFBR-MI, as a material part of the consideration to be rendered to City, hereby waives any and all Claims against the Indemnified Parties and agrees to hold the Indemnified Parties harmless from any Claims for damages to goods, wares, goodwill, merchandise, equipment or business opportunities and by persons in, upon or about City Track for any cause arising at any time, including without limitation all Claims arising from the joint or concurrent, active or passive, negligence of the Indemnified Parties, but excluding any intentionally harmful acts committed solely by the Indemnified Parties.

(g) Limits of Indemnity Obligations. The Indemnified Parties shall not be responsible for or liable to SFBR-MI, and SFBR-MI hereby assumes the risk of, and waives and releases the Indemnified Parties from all Claims for, any injury, loss or damage to any person or property in or about the City Track by or from any cause whatsoever including, without limitation, (i) any act or omission of persons occupying adjoining City properties or of other City tenants that are served by SFBR-MI, (ii) theft, (iii) explosion, fire, steam, oil, electricity, water, gas or rain, pollution or contamination, (iv) stopped, leaking or defective systems, and (v) any other acts, omissions or causes, except where the presence of any of the above conditions have preceded the Commencement Date. Nothing in this Article XIX shall relieve the Indemnified Parties from liability caused by the sole gross negligence or willful misconduct of the Indemnified Parties, but

the Indemnified Parties shall not be liable under any circumstances for any consequential, incidental or punitive damages.

(h) **Attorney's Fees.** It is the express intent of City and SFBR-MI that SFBR-MI shall protect, defend, hold harmless, and indemnify City from and against any and all demand, liability, damage, expense, cost, claim or suit, including reasonable attorney's fees (collectively, "Liability"), incurred by or assessed against City, its agents, employees, affiliated companies and its successors and assigns on account of injuries, death, or property loss or damage arising from (i) SFBR-MI's use, operation or maintenance of the Leased Premises, (ii) failure by SFBR-MI to perform any of its covenants under this Lease Agreement, (iii) failure of any representation or warranty of SFBR-MI under this Lease Agreement to be true and correct in all material respects as of the date made;

SECTION 10.02 - SFBR-MI shall, at its sole cost and expense, procure the following kinds of insurance, maintaining them for the term of this Lease Agreement effective on Commencement Date and promptly pay when due all premiums for that insurance. Upon the failure of SFBR-MI to maintain insurance as provided herein, City shall have the right after giving SFBR-MI ten (10) days written notice to obtain insurance and SFBR-MI shall promptly reimburse City for that expense. The City of Vallejo, its officers, officials, employees, agents and volunteers are to be covered as additional insureds as respects; liability, including defense costs, arising out of activities performed by or on behalf of SFBR-MI; products and completed operations of SFBR-MI; premises owned, occupied or used by SFBR-MI; or automobiles owned, leased hired or borrowed by SFBR-MI. The following minimum insurance coverage shall be kept in force during the term of this Lease Agreement, which SFBR-MI must maintain in force, during the full term of this Lease Agreement:

1. Comprehensive Railroad Liability Insurance: \$5,000,000
2. Automobile Liability Insurance: \$1,000,000
3. Worker's Compensation; Employer's Liability: \$1,000,000
4. Railroad Protective Liability: \$5,000,000
5. Contractor's Pollution: \$5,000,000
6. Professional Legal Liability Insurance: \$5,000,000.

SECTION 10.03- Compliance with City's Risk Manager's Requirements. SFBR-MI shall not do anything, or permit anything to be done, unless compelled by applicable law, in or about the City Track that would be prohibited by or would not be covered by the insurance policies then in place or subject City to potential liability. SFBR-MI shall faithfully observe, at no cost to City, any and all requirements of City's Risk Manager with respect to SFBR-MI's use of the City Track, so long as such requirements do not unreasonably interfere with SFBR-MI's use of the City Track or are otherwise connected with standard prudent commercial practices and Industry Standards.

SECTION 10.04 - SFBR-MI shall furnish to City certificates of insurance evidencing the required coverage and endorsement(s) and upon written request of City, SFBR-MI shall provide

certified duplicate copies of any policy. The insurance company(ies) issuing such policy(ies) shall notify City in writing of any material alteration including any change in the retroactive date in any "claims made" policies or substantial reduction of aggregation limits, if such limits apply, or cancellation thereof at least thirty (30) days prior thereto.

SECTION 10.05 - The insurance policy(ies) shall be written by a reputable insurance company or companies acceptable to City or with current Best's Insurance Guide Rating of B and Class VII or better. Such insurance company shall be authorized to transact business in the State of California. If requested, SFBR-MI must furnish a certified copy all insurance policy(ies) and endorsement(s) to City within seven (7) days of such request.

SECTION XI

TERMINATION

SECTION 11.01 - This Lease Agreement may be terminated as follows:

(a) By either City or SFBR-MI upon not less than forty-five (45) days' written notice following SFBR-MI's obtaining all necessary regulatory approvals or exemptions to permit SFBR-MI to discontinue or abandon rail freight operations and otherwise in accordance with Section 3.02; and (2) pursuant to Section XIII; and

(b) By City or SFBR-MI, as applicable, prior to the Commencement Date, for nonfulfillment of a condition precedent in accordance with Section V hereof. .

SECTION 11.02 - In the event of expiration or termination of this Lease Agreement, SFBR-MI shall vacate the Leased Premises in an orderly manner.

SECTION 11.03 - SFBR-MI shall be able to cure an Event of Default (other than lack of insurance) by remedying the Event of Default within the respective notice period stated herein.

SECTION 11.04- Upon expiration or earlier termination of this Agreement, SFBR-MI shall leave the Leased Premises in a neat and clean condition satisfactory to City and free of all personal property of SFBR-MI. All repairs, alterations and/or other improvements made by SFBR-MI shall become the property of City, provided that City may, by written notice given to SFBR-MI on not less than 10 days prior to the expiration or termination of the Agreement, require SFBR-MI to remove any such alterations and improvements from the Leased Premises and to restore the Leased Premises to their original condition prior to termination of this Agreement which will be extended for a reasonable period to provide time to meet that condition.

SECTION XII

CITY'S RESERVED RIGHTS

SECTION 12.01 - City excepts from the Leased Premises and reserves unto itself, its successors and assigns, the following exclusive rights with respect to the Leased Premises

(provided, in each case that City or any person or entity claiming through City, shall not materially interfere with SFBR-MI's freight railroad operations on the Leased Premises or increase the expense, cost or liability of SFBR-MI in the exercise of such rights; that City shall provide SFBR-MI with reasonable prior written notice of the exercise of the reserved rights; that upon request of SFBR-MI, City shall meet with SFBR-MI to discuss the proposed exercise of City's reserved rights so as to minimize the effect of such exercise on rail freight operations on the Leased Premises; and that City shall ensure, upon request of SFBR-MI, that all persons exercising such rights provide to SFBR-MI an appropriate written release of liability):

(a) The right to construct, reconstruct, maintain, repair, operate, use, relocate and/or remove existing and/or future railroad, rail and railroad-related equipment, facilities, and transportation systems necessary for and related to passenger rail operations so long as such actions do not unreasonably interfere with the operations of SFBR-MI. City reserves the right to contract with SFBR-MI on mutually acceptable terms, or with a third party or third parties, for the operation of passenger rail service and liability will be specified in a future Cooperative Agreement. City shall be entitled to all revenues derived from all current and future agreements to which City is a party affecting passenger rail operations.

(b) The right to use all minerals and mineral rights, interests, and royalties, including, but not limited to, oil, gas and other hydrocarbon substances, timber, and metallic or other solid minerals, in and under the Leased Premises.

(c) The right to own, construct, reconstruct, maintain, operate, use and remove existing and future pipelines, communication systems, signboards and related facilities of every kind and nature, including, but not limited to, all existing pipelines and telephone, telegraph, television and fiber optic lines, signboard structures and related equipment and appurtenances.

(d) The right to use the Leased Premises for any other reasonable commercial, industrial or utility-related purpose (other than as a freight railroad), including, without limitation the right to enter into leases, easements, licenses or leases in respect of the Leased Premises for longitudinal or transverse occupancies or crossings, including the right to make its track available for the operation of rail passenger service on the Leased Premises. Subject to this agreement, City may seek to have either SFBR-MI or a heretofore-unknown third party (Rail Passenger Service Provider, hereinafter 'RPSP'), assist the City by providing rail passenger service on the Leased Premises on terms and conditions mutually acceptable to City, RPSP and SFBR-MI. SFBR-MI shall not withhold its acceptance of conditions unreasonably.

(e) A limited right-of-way and right of access across the Leased Premises, for purposes of the exercising any rights with respect to the Leased Premises as set forth in this Section 12.01 except that the City will be responsible for the full cost of installation of any new road crossings of the railroad and for the installation of safety equipment required or desirable for such crossing and no crossing may be installed in a location which materially interferes with the efficient operation of the railway or which creates a significant safety risk.

(f) Except as expressly set forth in this Lease Agreement, all improvements presently existing on or hereafter constructed on the Leased Premises shall remain the property of City. City shall be entitled to all revenues derived from all current and future agreements to which City is a party affecting the Leased Premises.

(g) The right to ensure, coordinate and maintain the flow of traffic along existing and future ways, streets, and thoroughfares, over, across and on the Leased Premises, including across Wichels Causeway, where the Leased Premises overlap an existing vehicular, bicycle and pedestrian traffic flow pattern, which Parties understand is meant to continue and co-exist with

this Lease Agreement. SFBR-MI operations across the Wichels Causeway shall not be conducted between the following peak travel hours:

1. Between 7:00 a.m. and 9:30 a.m. in the morning.
2. Between 4:30 p.m. and 7:00 p.m. in the evening.

(h) To manage, coordinate and maintain the Wichels Causeway Bridge, elevating and lowering such to permitting the flow of marine traffic underneath and through. To that end, SFBR-MI will, in good faith, coordinate with and meet all signaling and traffic requirements and any other applicable standard to aid in the flow of traffic across the Wichels Causeway, and elsewhere along the Leased Premises.

SECTION XIII

DEFAULT/REMEDIES/FORCE MAJEURE

SECTION 13.01 - Default of SFBR-MI. In the event that SFBR-MI shall fail to comply with or carry out any term, covenant, condition, or promise herein set forth, the City may elect to serve upon SFBR-MI a Notice of Default. If SFBR-MI fails to cure such default within five (5) days after receipt of said notice, or, if such default cannot be cured within such period and SFBR-MI does not commence to cure within such five (5) days and thereafter diligently pursue such cure to completion, then the City may elect to terminate this Agreement or, in the alternative, may cure the default (directly or indirectly) and bill SFBR-MI for all expenses incurred. If the City elects to terminate the Agreement, the termination shall be effective after a ten (10) day written notice to SFBR-MI.

(a) **Actual Damages.** In the event that the City elects not to serve a notice of termination of this Agreement or if such Notice is served but SFBR-MI's default is cured, then the City shall be entitled to recover from SFBR-MI any loss or damages which it may have incurred by reason of SFBR-MI's default.

(b) **Bankruptcy/Insolvency of SFBR-MI.** To the extent allowed by applicable law SFBR-MI shall be deemed to be in default of this Agreement in the event that SFBR-MI shall cease conducting business in the normal course and become insolvent, make a general assignment for the benefit of creditors, suffer or permit the appointment of a receiver which receiver fails to continue service or fails to adopt this agreement and/or shall otherwise avail itself of, or become the debtor in any proceeding under the Federal Bankruptcy Act or any other statute of any state of the United States or any other foreign country relating to the insolvency or the protection of rights of creditors, then at the option of the City should the receiver not continue service and then adopt this agreement and continue service within thirty days, this Agreement shall terminate and be of no further force and effect, and any property or rights of such other party, tangible or intangible, shall forthwith be returned to the City. Upon the occurrence of any of the foregoing events, the City shall have the right to terminate this Agreement forthwith and SFBR-MI, or its successor in interest by operation of law or otherwise, shall have no rights in or to this Agreement or to any of the privileges herein conferred other than to remove its equipment from the premises in an orderly fashion.

SECTION 13.02 Remedies. In the event that the City serves a Notice of Default on SFBR-MI and such default is subsequently cured, the City shall nevertheless be entitled to recover from SFBR-MI any loss or damage which the City actually incurred by reason of such default. The City shall have available to it the remedies provided for in this section as well as all remedies available in law and equity, to resolve its claim for loss or damage.

(a) **Rights of Parties Accrued Prior to Termination.** Termination of this Agreement shall not in any way affect the rights and obligations of the parties with respect to damages or amounts payable to the other party, which have accrued prior to such termination.

(b) **Other Remedies.** The exercise of the remedies provided for in this Agreement shall be cumulative and shall in no way affect any other remedy the parties may have available in law or equity. The exercise by either party of any of the options set forth in this paragraph shall not be deemed a waiver of its right to exercise any other option provided herein.

SECTION 13.03 Excuses from Performance due to Force Majeure. Neither SFBR-MI nor the City shall be excused from the performance of its obligation under this Agreement but the performance may be suspended due to an event of Force Majeure. Any suspension of performance by SFBR-MI or the City pursuant to this Article shall be only to the extent, and for a period of no longer duration than, required by the nature of the event, and the party claiming excuse from obligation shall use its best efforts in an expeditious and commercially reasonable manner to remedy its inability to perform, and mitigate damages that may occur as result of the event. The party claiming excuse shall deliver to the other party a written notice of intent to claim excuse from performance under this Agreement by reason of an event of Force Majeure. Notice required by this section shall be given no later than five (5) calendar days after the occurrence of the event. Such notice shall describe in detail the event of Force Majeure claimed, the expected length of time that the party expects to be prevented from performing, the steps which the party intends to take to restore its ability to perform, and other information as the other party reasonably requests. SFBR-MI

SECTION 13.04 - SFBR-MI shall have no obligation to operate over any portion of the Leased Premises as to which it is prevented or hindered from operating due to Acts of God, public authority, strikes, riots, labor disputes, or any cause beyond its control; provided, however, SFBR-MI shall use reasonable efforts to take whatever action is necessary or appropriate to be able to resume its operations.

SECTION XIV

MISCELLANEOUS

SECTION 14.01 - This Lease Agreement contains the entire agreement between the Parties and supersedes all prior oral or written agreements, commitments, or understanding with respect to the matters provided for herein, and no modification of this Lease Agreement shall be binding upon the Party affected unless set forth in writing and duly executed by the Party to be charged.

SECTION 14.02 - All notices, demands, requests, or other communications which may be or are required to be given, served or sent by either Party to the other pursuant to this Lease Agreement shall be in writing and shall be deemed to have been properly given or sent:

If intended for City, by mailing by registered or certified mail, return receipt requested, with postage prepaid, or by national overnight delivery service, prepaid, addressed to City at:

City Manager
City of Vallejo
555 Santa Clara Street
Vallejo, CA 94590

If intended for SFBR-MI, by mailing by registered or certified mail, return receipt requested, with postage prepaid, or by national overnight delivery service, prepaid, addressed to SFBR-MI at:

David Gavrich
President
San Francisco Bay Rail-MI
100 Cargo Way at Pier 96 Railyard
San Francisco, CA, 94124

SECTION 14.03 - Each notice, demand, request or communication which shall be mailed by registered or certified mail to either Party in the manner aforesaid shall be deemed sufficiently given, served or sent for all purposes at the time such notice, demand, request, or communication shall be either received by the addressee or refused by the addressee upon presentation. Either Party may change the name of the recipient of any notice, or his or her address, at any time by complying with the foregoing procedure.

SECTION 14.04 - This Lease Agreement shall be binding upon and inure to the benefit of City and SFBR-MI, and shall be binding upon the successors and assigns of City and SFBR-MI, subject to the limitations hereinafter set forth. SFBR-MI may not assign its right under this Lease Agreement or any interest therein, or attempt to have any other person assume its obligations under this Lease Agreement, without the prior written consent of City, which consent may be withheld in City's sole discretion. Prior to any proposed assignment, SFBR-MI shall secure any necessary approvals of the STB and such other regulatory approvals as may be then required. Nothing in this Section 14.04 shall affect City's right to terminate this Lease Agreement

SECTION 14.05 - SFBR-MI may terminate this Lease Agreement by giving six months' written notice to the City. In such event, SFBR-MI shall apply for, pay for and obtain from the STB and any other regulatory agency with jurisdiction, any necessary certificate of public convenience and necessity or other approval or exemption from regulation for such discontinuance of operations over the Leased Premises or portion thereof; SFBR-MI shall not

seek any such regulatory authority or take any action to suspend or discontinue its operations on the Leased Premises, as of a date prior to the expiration or termination of this Lease in accordance with its terms, without first receiving written concurrence from City.

SECTION 14.06 - If any action is brought to enforce the terms of this Lease Agreement, the prevailing Party shall be entitled to recover reasonable attorneys' fees from the other Party as part of the prevailing Party's costs, the amount of which fees shall be fixed by the court and shall be made a part of any judgment rendered. The "prevailing Party" will be the Party that prevails in obtaining the remedy or relief that most nearly reflects the remedy or relief that such Party sought.

SECTION 14.07 – SFBR-MI shall be responsible for all real property or possessory interest taxes, bonded or special assessments, which may be levied, assessed, or imposed on the Leased Premises.

IN WITNESS WHEREOF, the Parties have caused this Lease Agreement to be executed in duplicate as of the day and year first herein written.

Exhibit B

**FIRST AMENDMENT TO
THE RAIL AGREEMENT BETWEEN
CITY OF VALLEJO
AND
SAN FRANCISCO BAY RAILROAD**

This First Amendment to the Principal Agreement made and entered into on October 9, 2009, hereafter referred to as Agreement, between the San Francisco Bay Railroad a Delaware Corporation, therein referred to as Railroad, and the City of Vallejo, a municipal corporation, therein referred to as City, is made and entered into on this 17th day of December, 2009.

Railroad and City do mutually agree as follows:

1. Amendment to Article IV TERM.

Article IV Term of the Agreement shall be modified to read:

"This rail Agreement shall take effect on October 9, 2009 and shall continue in effect until March 31, 2010 or the Surface Transportation Board authorizes common carrier operation on the City Track and a successor agreement is signed, whichever is sooner."

2. Integration. This First Amendment contains the entire agreement between the parties with respect to its subject matter and supersedes whatever oral or written understanding they may have had prior to the execution of this First Amendment. This First Amendment shall not be amended or modified except by a written agreement executed by each of the parties. Except as specifically revised herein, all terms and conditions of the Agreement shall remain in full force and effect, and RAILROAD shall perform all duties, obligations and conditions required under the Agreement.

3. Inconsistencies. In the event of any conflict or inconsistency between the provisions of this First Amendment and the Agreement, the provisions of this First Amendment shall control in all respects.

4. Ambiguities. The parties have each carefully reviewed this First Amendment and have agreed to each term of this First Amendment. No ambiguity shall be presumed to be construed against either party.

5. Facsimile Signatures. This First Amendment shall be binding upon the receipt of facsimile signatures; provided, however, that any person transmitting his or her signature by facsimile shall promptly send an original signature to the other party.

6. **Authority.** The person signing this First Amendment for Railroad hereby represents and warrants that he or she is fully authorized to sign this First Amendment on behalf of Railroad.

IN WITNESS WHEREOF, the parties have entered into this First Amendment on the day and year first hereinabove appearing.

CITY OF VALLEJO,
a municipal corporation

San Francisco Bay Railroad-MI
A Delaware Corporation

BY: 

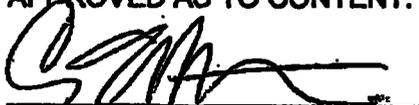
BY: 

Robert F.D. Adams
Acting City Manager

David Gavrich
President

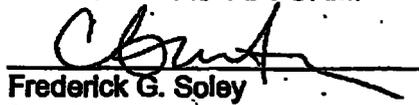
ATTEST: 
Aileen M Weddell
Interim City Clerk

APPROVED AS TO CONTENT:


Craig Whittom
Assistant City Manager/ Community Development Director

(City Seal)

APPROVED AS TO FORM:


Frederick G. Soley
City Attorney

Certificate of Service

I herby certify that on this 22nd day of March, 2010, caused to be served a copy of the foregoing REPLY OF CITY OF VALLEJO IN OPPOSITION TO REQUEST FOR EXPEDITED RELIEF, upon the following parties of record by first class mail with postage prepaid:

John F. McHugh
6 Water Street, Suite 401
New York, NY 10004

David L. Meyer
Karen E. Escalante
Morrison & Foerster LLP
2000 Pennsylvania Avenue, N.W.
Washington, DC 20006


Charles A. Spitulnik

Dated: March 22, 2010