

ADMINISTRATION, COORDINATION, AND LICENSE AGREEMENT

This administration, coordination, and license agreement (the "Agreement") is dated as of September 27, 2012, and is between the Santa Cruz County Regional Transportation Commission (the "Commission"), a public agency created under California law, and Santa Cruz and Monterey Bay Railway Company, a California corporation ("Railway").

The Commission purchased the Santa Cruz Branch railroad line (the "Property") from Union Pacific Railroad Company ("UP"), via an August 20, 2010, Purchase and Sale Agreement (the "Purchase and Sale Agreement"); and

UP reserved an easement to conduct common carrier freight railroad operations on and over the Property (the "Freight Easement"), which Freight Easement is set forth in the Quitclaim Deed by which UP, as grantor, quitclaimed all of its right, title and interest in and to the Property to the Commission, as grantee; and

UP has quitclaimed all of its right, title, and interest in and to the Freight Easement to Railway and Railway is the sole freight rail operator on the Freight Easement;

Railway needs a long-term agreement of at least 10 years, covering all facets of railroad operations, in order to justify its investment of time and money needed to conduct such railroad operations; and

Railway and the Commission desire to establish their respective rights and obligations with respect to the Property and the Freight Easement by entering into this Agreement.

The parties therefore agree as follows:

1. Definitions

- 1.1 The term "Commission" is defined in the introductory paragraphs of this Agreement and includes its directors, officers, employees, agents, parents, subsidiaries, affiliates, commonly controlled entities, and all others acting under its or their authority.
- 1.2 The term "Coordination Committee" is defined as the committee established by the parties pursuant to Section 11.
- 1.3 The term "FRA" is defined as the United States Federal Railroad Administration or its regulatory successor.
- 1.4 The term "Freight Easement" is defined in the introductory paragraphs of this Agreement.

- 1.5 The term “Freight Easement Property” is defined as the portion of the Property subject to the Freight Easement consisting of all real and personal property within 10 feet of the centerline of any track on the Property except where roadways, buildings, or Property boundary lines reduce such distance to less than 10 feet, and except for any retained rights and personal property described herein.
- 1.6 The term “Freight Service” is defined as any and all common carrier rail freight operations, rights, or obligations as to the Freight Easement Property including freight transportation, switching, temporary rail car storage (subject to the conditions of Section 2.5), transloading freight and dispatching.
- 1.7 The term “Hazardous Materials” is defined as any substance: (a) that now or in the future is regulated or governed by, requires investigation or remediation under, or is defined as any hazardous waste, hazardous substance, bio-hazard, medical waste, pollutant, or contaminant under any governmental statute, code, ordinance, regulation, rule, or order, or any amendment thereto, including the Hazardous Material Transportation Act 49 U.S.C. § 5101 *et seq.*, the Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. § 9601 *et seq.*, and the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.*, or (b) that is toxic, explosive, corrosive, flammable, radioactive, carcinogenic, dangerous, or otherwise hazardous, including gasoline, diesel, petroleum hydrocarbons, polychlorinated biphenyls (PCBs), asbestos, radon, and urea formaldehyde foam insulation.
- 1.8 The term “Hazardous Materials Laws” means all present and future governmental statutes, codes, ordinances, regulations, rules, orders, permits, licenses, approvals, authorizations, and other requirements of any kind applicable to Hazardous Materials.
- 1.9 The terms “include”, “includes”, and “including” are to be read as if they were followed by the phrase “without limitation.”
- 1.10 The term “Loss” is defined as any loss, damage, claim, demand, action, cause of action, penalty, fine, payment, cost, liability, or expense of whatsoever nature, including court costs and reasonable attorneys’ fees, resulting from or related to: (a) any injury to or death of any person, including officers, agents, and employees of the Commission or Railway; or (b) damage to or loss or destruction of any property, including the Property, any adjacent property, and the roadbed, tracks, equipment, other property of the Commission or Railway, and any property in the Commission’s or Railway’s care or custody.

- 1.11 The term "Property" is defined as the entire Santa Cruz Branch railroad line right-of-way purchased from UP by the Commission, including all improvements thereto, whether now existing or hereafter constructed.
- 1.12 The term "PUC" is defined as the California Public Utilities Commission.
- 1.13 The term "Railroad Facilities" is defined as all tracks and other railroad property and fixtures, including ties, switches, trackbeds, bridges, trestles, retaining walls, culverts, railroad signs, switch mechanisms, signals, grade crossings, active and passive grade crossing warning devices and other appurtenances associated with the trackage described on Exhibit A and located on the Freight Easement Property.
- 1.14 The term "Railway" is defined in the introductory paragraphs of this Agreement and includes its directors, officers, employees, agents, parents, subsidiaries, affiliates, commonly controlled entities, any other related persons and entities, and all others acting under its or their authority.
- 1.15 The term "STB" is defined as the United States Surface Transportation Board or its regulatory successor.
- 1.16 The term "Tourist Service" is defined as the transportation of tourists by rail. Tourist Service does not include regularly-scheduled passenger transit or commuter service.
- 1.17 The term "UP" is defined in the introductory paragraphs of this Agreement.

2. Commission Grants Rights

- 2.1. Freight Service. The Commission grants Railway the exclusive right and obligation to provide Freight Service on the Freight Easement Property. Railway's rights and obligations to provide Freight Service under this Agreement are limited to those set forth in the Freight Easement or in this Agreement. Railway may not, in performing such Freight Service, exceed the maximum speeds authorized by applicable law for the existing track conditions or transport rail cars exceeding the applicable track and bridge weight limits.
- 2.2. Trackage License. The Commission grants Railway an exclusive license to use, maintain, repair, and operate all of the Railroad Facilities for all Freight Service purposes. Notwithstanding their location on the Freight Easement Property, buildings and other

fixtures which are not appurtenances associated with the tracks and related railroad property are not included as part of this license.

2.3. No Material Interference with Freight Service. Notwithstanding the rights retained by the Commission under this Agreement, the exercise of such rights by the Commission may not materially interfere with Railway's Freight Service rights and obligations under federal law, or rights under the Freight Easement, unless first approved by the STB.

2.4. Tourist Service and Other Third-Party Licenses.

2.4.1. Railway Tourist Service. The Commission grants Railway a non-exclusive license to use the Freight Easement Property and Railroad Facilities to provide Tourist Service between Milepost 18.74 in Santa Cruz and the northern end of the Freight Easement Property; provided that prior to the commencement of operations (a) the Commission has approved in writing a detailed plan from Railway describing such Tourist Service, (b) the Tourist Service will not materially conflict with, and will be subject and subordinate to Freight Service, and (c) Railway has obtained any governmental authorizations required under applicable law for such Tourist Service. Railway's Tourist Service plan shall include, at a minimum, the proposed seasons, dates and times of operation (including a proposed train schedule), a financial plan and a marketing plan. The parties acknowledge that Railway desires to operate Tourist Service over other segments of the Freight Easement Property as well. Commission approval of a plan for Tourist Service over such other segments, if any, will be subject to the Commission's prior receipt of public comments.

2.4.2. Third-Party Licenses. The Commission reserves the right to grant additional licenses over the Freight Easement Property and the Railroad Facilities (excluding licenses for temporary rail car storage or repairs on the Railroad Facilities), provided that any such licenses: (a) do not materially conflict with, and are subject and subordinate to, Railway's right to use, maintain, repair, and operate all of the Railroad Facilities for all Freight Service purposes, (b) do not materially conflict with, and are subject and subordinate to, any other license granted Railway hereunder having a plan previously approved in writing by the Commission, (c) require the licensee to pay its proportionate share of Railway's costs (including labor

costs, materials costs, equipment costs — using equivalent rental costs as a proxy for capital and maintenance and repair costs — travel, fuel, contract labor, and appropriate overhead) to maintain and repair the portion of the Freight Easement Property and Railroad Facilities used by the licensee, and (d) require the licensee to (i) provide insurance equal to or better than that required of Railway in Section 9 and (ii) indemnify and hold harmless Railway and the Commission as to any Loss arising out of or related to licensee's operations.

2.4.2.1. For a period of three years after the effective date of this Agreement, any third-party license for Tourist Service between Milepost 20.9 and the northern end of the Freight Easement Property will be deemed to materially conflict with Railway's Tourist Service license, except in the case of special Tourist Service events as described in Section 2.4.2.9. The provisions of this Section 2.4.2.1 are conditioned on the following (all dates are measured following the effective date of this Agreement):

- a. Within 6 months: Railway shall submit its plan for its initial Tourist Service to the Commission pursuant to Section 2.4.1.
- b. Within 3 months after Commission approval of initial plan: Railway shall ensure that the Railroad Facilities for its initial Tourist Service meet and are maintained to Class 1 track standards and obtain appropriate FRA and PUC inspections to verify the same.
- c. Within 5 months after Commission approval of initial plan: Railway shall secure all permits and agreements required to operate its initial Tourist Service.
- d. Within 6 months after Commission approval of initial plan: Railway shall initiate its initial Tourist Service.
- e. Levels of Service: Railway's Tourist Service shall carry the following numbers of revenue passengers:
 - I. First Year of Service: 5,000 passengers.

II. Second Year of Service: 10,000 passengers.

III. Third Year of Service: 15,000 passengers.

2.4.2.2. Following the date that is three years after the effective date of this Agreement, a third-party license for Tourist Service will be deemed to materially conflict with another license granted Railway hereunder under a plan previously approved in writing by the Commission if the third party (a) operates on a substantially similar portion of the Freight Easement Property and Railroad Facilities covered by the previously-approved license/plan, (b) permits an activity that is substantially similar to the previously-approved license/plan and (c) operates during substantially similar seasons, and on substantially similar days and times of day, as the previously-approved license/plan.

2.4.2.3. If Railway or any third-party licensee ("Tourist Operator") fails to initiate and continue to operate Tourist Service substantially in accordance with the plan approved by the Commission, then the applicable Tourist Operator's operations may, at the Commission's option, lose priority over any other operations, but only to the extent of such failure to operate.

2.4.2.4. If Railway constructs capital improvements to the portion of the Freight Easement Property and Railroad Facilities used by a third party licensee, the Commission shall promptly and reasonably determine (i) the benefit of such improvements to such licensee, (ii) the cost apportionment of such improvements between Railway and such licensee, and (iii) the appropriate amortization period for such improvements (for capital improvements the Commission shall make such determination concurrently with its approval of such capital improvements pursuant to Section 6.2). The Commission's contract with such licensee will (i) require the licensee to pay amounts due within 30 days following receipt of written notice from Railway and (ii) name Railway as a third-party beneficiary with rights of enforcement. As used in this Agreement, the term "capital improvement"

means any improvement or repair that is subject to the capital depreciation rules of the Internal Revenue Service.

2.4.2.5. Each third-party licensee's proportionate share of Railway's costs shall be calculated in advance by Railway (based on the prior year's maintenance and repair costs plus any reasonably anticipated extraordinary maintenance and repair costs, and the parties' relative need or usage during the licensee's operating season) on a car-mile basis as to the portion of the Freight Easement Property and Railroad Facilities used by such licensee. (As used in this subsection, "repair costs" refers to the cost of repairs that maintain property in good operating condition and not to repairs that are "capital improvements," which are dealt with in Subsection 2.4.2.4.) Such licensee shall pay its proportionate share of costs monthly in advance during the months of the licensee's operations. Railway shall at the end of each calendar year reconcile the amounts paid to the actual costs incurred. The Commission's contract with such licensee will (i) provide that if the actual costs exceed the amount charged to such licensee, such licensee will, within 30 days following receipt of written notice of such reconciliation from Railway pay the additional amount to Railway and (ii) name Railway as a third-party beneficiary with rights of enforcement. If the actual costs are less than the amount charged to such licensee, Railway will within 30 days following such reconciliation refund the balance to such licensee.

2.4.2.6. If the Commission, in its discretion, elects to require a lower level of insurance coverage for the licensee than the level of coverage then required of Railway under Section 9, the Commission shall correspondingly lower the limits of coverage required of Railway under Section 9, provided that if Railway elects to reduce the levels of its insurance, it shall also reduce the self-insured retention to the level required of the third-party licensee.

2.4.2.7. The Commission or its designee shall have the right to review, obtain, and copy all books, records,

computer records, accounts, documentation and any other materials (collectively "Records") pertaining to Railway's costs that are subject to apportionment under this section, including any Records in the possession of any subcontractors, for the purpose of monitoring, auditing, or otherwise verifying said costs. Railway agrees to provide the Commission or its designees with any Records requested for this purpose and shall permit the Commission or its designees access to its premises, upon reasonable notice, during normal business hours, for the purpose of inspecting and copying such Records. Railway further agrees to maintain such Records for a period of three years. The Commission acknowledges and agrees that these Records constitute Railway's confidential information and shall not be disclosed to any third-party without Railway's prior written approval, except as otherwise required by applicable law.

2.4.2.8. Railway will reasonably cooperate with any third party holding rights to use the Property, including, without limitation, any third-party Tourist Service operator seeking to secure the necessary certification or qualification required by applicable law to operate on the Railroad Facilities, provided such cooperation does not require significant unreimbursed expense for Railway.

2.4.2.9. In addition to all other rights of Commission under this Agreement, and notwithstanding anything to the contrary in this Agreement, the Commission reserves the right to use the Freight Easement Property and Railroad Facilities for special events. Such special events shall be subject to the provisions of Sections 2.4.2.(a) and (b), provided that such special events will only be deemed to materially conflict with another Tourist Service license granted Railway hereunder under a plan previously approved in writing by the Commission if they operate during the same season, and on the same days and times of day, as the previously-approved license/plan. The Commission will consult with Railway regarding Railway's willingness and ability to operate such special events.

If the Commission and Railway jointly decide that Railway should operate the special event, Railway will operate the special event for a commercially reasonable all-inclusive fee based on Railway's documented costs (including, without limitation, locomotive, fuel, trainset, labor and overhead costs) plus ten percent (10%). If the Commission elects to have another operator operate the special event, the Commission will pay, or cause to be paid to Railway a fee of \$2,500 per day (the "Special Event Fee"), which fee shall cover all services to be provided by Railway to support an event operated by a third party including, but not limited to, dispatching, inspections, and maintenance (but excluding Railway's provision of any locomotive, trainset, crew, and fuel). The Special Event Fee shall be adjusted annually as of July 1st of each year to an amount calculated by multiplying the Special Event Fee specified above by a fraction, the numerator of which shall be the United States Department of Labor's Bureau of Labor Statistics Consumer Price Index, All Urban Consumers, All Items, San Francisco-Oakland-San Jose, CA (1982-84=100), or the successor of such index (the "CPI"), for the month immediately preceding such adjustment, and the denominator of which shall be the CPI for June 2010. Nothing in this paragraph shall preclude the Commission and Railway from negotiating other arrangements for special events (e.g., special events for which there is a different operational or fee structure, including events for which Railway is both the operator and receives all or a portion of the fare revenue).

- 2.5. Temporary Rail Car Storage. Subject to the terms and conditions of this Agreement, Railway may enter into agreements with any party for temporary rail car storage or repairs on the Railroad Facilities consistent with the provisions of Sections 2.5.1 and 2.5.2; provided that Railway shall deliver a copy of each such agreement to the Commission promptly following execution thereof. The Commission acknowledges that such agreements are Railway's proprietary information ("Confidential Information") and the Commission shall not disclose any matters contained therein to any person or entity, except as required by law, or to RTC's directors, officers, employees, consultants or advisors. If Commission is requested in any judicial or administrative proceeding, or pursuant to the California Public Records Act

(California Government Code 6250 et seq.), to disclose any Confidential Information, the Commission shall promptly notify Railway of such request so that Railway may resist such disclosure or seek an appropriate protective order or other remedy. If, in the absence of such a protective order or other remedy, the Commission is nonetheless compelled to disclose Confidential Information, Commission may disclose such Confidential Information without liability hereunder.

- 2.5.1. Unless otherwise expressly agreed by the Commission in writing, Railway will not (i) store more than 100 rail cars, (ii) store rail cars in locations other than those marked on Exhibit B (which locations are intended to substantially avoid visibility from Highway 1 and blocking designated public beach access), or (iii) store any rail car for more than six months. Absent the Commission's prior written consent, which consent may be withheld in the Commission's sole discretion, Railway may not store railcars that have been used to transport Hazardous Materials unless such railcars are empty or contain only residual amounts of Hazardous Materials.
- 2.5.2. Following the earlier of (i) Railway's institution of Tourist Service pursuant to Subsection 2.4.1, or (ii) three years after the effective date of this Agreement, Railway shall not exercise its right to use the Freight Easement Property or Railroad Facilities for temporary rail car storage or repair in a manner that materially affects the ability of any third-party Tourist Service licensee to access the Railroad Facilities for the purpose of exercising its licensed rights.
- 2.5.3. The provisions of Subsections 2.5.1 and 2.5.2 apply to future storage agreements as well as storage agreements existing as of the effective date of this Agreement.

2.6. Investigation.

- 2.6.1. Railway hereby acknowledges that (a) it has satisfied itself at the time of this Agreement with respect to the condition of the Freight Easement Property and Railroad Facilities and their suitability for Railway's intended use; (b) it has made such investigations as it deems necessary with respect to the Freight Easement Property and Railroad Facilities, as they exist at the time of this Agreement, and assumes responsibility therefor as to its occupancy and use thereof; and (c) neither the Commission nor any of the Commission's agents has made any oral or written

representations or warranties with respect to the Freight Easement Property or Railroad Facilities.

2.6.2. The Commission acknowledges that Railway cannot make any investigation, or satisfy itself, with respect to how the Property or the public's use of the Property may change following the Commission's purchase of the Property from UP. In the event that any public use of the Property, or illegal activities by third parties, including trespassing, cause any significant economic or operational problems for Railway, Railway may terminate this Agreement, provided Railway complies with the provisions of Section 8.3.

2.7. As-Is, Where-Is. Railway shall take the Freight Easement Property in an "as-is, where-is" condition and without any express or implied warranties, including, but not limited to, any warranties of merchantability, fitness for a particular purpose or volume or quality of traffic on the Freight Easement Property, and subject to: (i) encroachments or other existing conditions, (ii) all existing ways, alleys, privileges, rights, appurtenances and servitudes, howsoever created, and (iii) the Commission's rights hereunder.

2.8. Release. Railway, for itself, its successors and assigns, to the maximum extent permitted by law, hereby waives, releases, remises, acquits and forever discharges the Commission, its officers, employees, agents, successors and assigns, from any Loss in any way arising out of, or connected with, the known or unknown, existing or future physical or environmental condition of the Freight Easement Property and Railroad Facilities (including any Hazardous Materials contamination in, on, under, or adjacent to, the Freight Easement Property, or any clearance constraints on the Freight Easement Property), or any federal, state, or local law, ordinance, rule or regulation applicable thereto.

2.8.1. Railway hereby grants to Commission, on behalf of any insurer providing property, general liability, or automobile liability insurance to either Railway or Commission with respect to the operations of Railway, a waiver of any right to subrogation which any such insurer of Railway may acquire against Commission by virtue of the payment of any loss under such insurance.

2.8.2. If any Loss described in Section 2.8 is caused by a third party under contract with the Commission, the Commission shall, at its option, (i) pursue any claim it may have against the third party contractor, or (ii) assign to Railway any such claim, provided that Railway shall not

be obligated to pursue such claim. Any amounts recovered as a result of any such claim shall, to the extent they exceed any fees and costs incurred in pursuing such claim, be used to repair or replace any of the following that are damaged or destroyed in connection with the subject Loss:

2.8.2.1. First, Freight Easement Property and Railroad Facilities;

2.8.2.2. Then, railroad equipment.

If Railway commences abandonment proceedings for the subject portion of the Property under Section 8.3, the Commission will not assign any such claim to Railway and neither party will have any further responsibility under this Subsection 2.8.2 as to such claim. If Railway's abandonment application is withdrawn, or not approved by the STB, the Commission may assign such claim to Railway, as provided above.

2.8.3. The provisions of this Section 2.8 shall survive the termination or expiration of this Agreement.

2.9. The rights granted by the Commission under Sections 2.1 - 2.5 are subject to all existing licenses, leases, easements, restrictions, conditions, covenants, encumbrances, liens and claims of title that may affect the Property and the word "grant" as used herein shall not be construed as a covenant against the existence of any thereof.

3. Limitation and Subordination of Rights Granted

3.1. Commission's Use of Property. The foregoing granted rights are subject and subordinate to the Commission's prior and continuing right to use and maintain the Property for any purpose that is not inconsistent with this Agreement. Without limiting the generality of the foregoing, the Commission may construct, maintain, repair, renew, use, operate, change, modify or relocate public projects of any kind, railroad tracks, signals, communication equipment, fiber optics, pipelines, or other facilities upon, along, or across any or all of the Property, all or any of which the Commission may freely do at any time or times without liability to Railway for compensation or damages; provided, however, that the Commission may not materially interfere with Railway's rights and operations under this Agreement or Railway's Freight Service rights and obligations under federal law or under the Freight Easement, unless first approved by the STB; and provided, further, that the Commission shall to the extent possible notify Railway as soon as practicable of

any such planned or actual interference and provided that the Commission takes all practicable measures to minimize any such interference. Railway shall reasonably cooperate with the Commission in implementing the foregoing uses of the Property. If the Commission or its designee requests Railway's assistance to transport materials or to perform other transportation or construction services for public projects, Railway will provide such assistance at rates reasonably to be determined between the parties.

- 3.2. Commission's Inspection Access; Access for Maintenance. The Commission may, as reasonable and as coordinated in advance with Railway, (i) inspect the Freight Easement Property and the Railroad Facilities, including any rail-yard or maintenance facility used in connection with Freight Service or Tourist Service, and (ii) access the Freight Easement Property and Railroad Facilities (including access with Commission or third party rail vehicles) as necessary to maintain areas of the Property outside of the Freight Easement Property that are not otherwise reasonably accessible. The Commission shall defend, indemnify and hold Railway, its officers, directors, employees, and agents, harmless from and against Loss arising from injuries to or death of the Commission's officers, directors, employees, agents, invitees, and contractors relating to such inspections, regardless of the cause of such injuries, death, or damage and regardless of the negligence of any person, except to the extent caused by the willful misconduct or gross negligence of Railway, its employees, or agents. The Commission shall ensure that any of its officers, directors, employees, agents, invitees, and contractors involved in such inspections are trained in all safety requirements and qualified for any operations related to work conducted on or near railroad operations.
- 3.3. Future At-Grade Crossings. The parties acknowledge that (i) local governments may desire to create future at-grade public crossings of the Freight Easement Property, and (ii) the Aptos Village Plan, dated February 23, 2010, specifically includes a future at-grade roadway crossing of the Freight Easement Property at approximately Milepost 12.55. Railway shall, at no cost or expense to itself, cooperate with the efforts of any applicable local governments to secure PUC approval of such crossings; provided, however, that Railway shall be entitled to raise any reasonable safety concerns related to such crossings. The fees and costs associated with the construction, maintenance, and repair of such crossings shall be set either by agreement between Railway and the applicable local government (which agreement shall become a

Railway Agreement under Sections 4.2 and 4.3), or by the PUC pursuant to Public Utilities Code Section 1202, *et seq.*

4. Assignment of certain Contracts and Agreements

- 4.1. Upon close of escrow under the Purchase and Sale Agreement, Union Pacific will assign (i) to Railway, certain agreements concerning the operation of the Railroad Facilities, including all track agreements, grade crossing agreements, and other operating agreements set forth in Exhibit C hereto (all such agreements hereinafter referred to as the “Railway Agreements”), and (ii) to the Commission, all other agreements relating to the Property, including all easements, licenses, and leases (all such agreements hereinafter referred to as the “Commission Agreements”). For any assigned Railway Agreements that grant third-party rights of access to, or use of, the Freight Easement or Railroad Facilities, Railway will instruct the holders of such agreements to name the Commission as an additional insured on their insurance policies.
- 4.2. Subject to the provisions of Section 2.3, which prohibit material interference with Railway’s Freight Service rights and obligations under federal law or under the Freight Easement, unless first approved by the STB, any new Railway Agreement granting third-party rights of access to, or use of, the Freight Easement or Railroad Facilities, or contemplating alterations thereto, is subject to the Commission’s prior written consent. Such Railway Agreements will be documented by Railway using forms approved by the Commission, which forms shall, among other things, include provisions indemnifying the Commission and holding it harmless from any Loss in connection with the exercise of rights under such agreements, and the construction, maintenance, or operation, of any facilities constructed in connection with such agreements.
- 4.3. Railway is not, without the Commission’s prior written consent (subject to the provisions of Section 2.3, which prohibit material interference with Railway’s Freight Service rights and obligations under federal law or under the Freight Easement, unless first approved by the STB), to execute any new Railway Agreements affecting the Freight Easement Property or Railroad Facilities for a term exceeding the term of this Agreement.
- 4.4. Railway is not, without the Commission’s prior written consent, to terminate or modify any Railway Agreement granting third-party rights of access to, or use of, the Freight Easement or Railroad Facilities, or contemplating alterations thereto.

5. Maintenance and Operation of Railroad Facilities

5.1. Initial Rehabilitation and Repair Projects. The Commission may, subject to the Commission's contracting policies, rules, and procedures and to the terms of this Agreement, including Section 6.1, perform any rehabilitation of, or repairs to, the Railroad Facilities required to be performed under the terms of the Purchase and Sale Agreement.

5.2. Maintenance of Freight Easement Property and Railroad Facilities.

5.2.1. Freight Easement Property and Railroad Facilities. Railway, at its expense, shall keep the Freight Easement Property and Railroad Facilities used by Railway (including occasional use, or use for rail car storage or lay down space) in good repair and in a good and safe condition in conformity with applicable law or any Railway Agreement.

5.2.2. Weeds, Trash, Drainage and Graffiti. The parties agree that Railway shall be responsible for: (i) drainage and culvert maintenance and clearance on the Property unless a third person or entity is contractually responsible for such maintenance and clearance, and (ii) weed abatement, vegetation management, and trash collection over the Freight Easement Property as required by applicable law. The Commission grants Railway a license to enter all portions of the Property as necessary to perform such maintenance; Railway shall be required to repair any damage caused as the result of Railway's performance of any such maintenance. Except as required by applicable law, Railway shall not be responsible for the prevention, removal, or abatement of graffiti wherever it may occur. Railway shall also not be responsible for drainage maintenance, weed abatement, vegetation management, or trash collection related to any construction by the Commission (except for Railroad Facilities that Railway is entitled to use), or necessitated by the actions of any third party authorized by the Commission to be on the Property, or related to any actions, omissions, or situations off or outside of the Property.

5.2.3. Slopes, Trees and Other Conditions outside of Freight Easement Property. Railway may, at its option, enter portions of the Property outside the Freight Easement Property to maintain or repair slopes, clear fallen trees and branches, or address other conditions, as necessary to

ensure the safety and efficiency of Railway's operations. The Commission grants Railway a license to enter all portions of the Property as necessary to perform such work; Railway shall be required to repair any damage caused as the result of Railway's performance of any such maintenance. The Commission shall have no liability to Railway for maintenance of portions of the Property outside of the Freight Easement Property and Railway's exclusive remedies for damage to the Freight Easement Property or Railroad Facilities shall be limited to those set forth in Sections 5.5.3 and 8.3. However, this section shall not apply to any claims to the extent they result from the active negligence or willful misconduct of the Commission or its officers, directors, employees, agents, contractors, or a third party under contract with the Commission, in which case Railway's exclusive remedies are those set forth in Section 2.8.2, 8.3 and 14.2.

5.2.4. Scope of Maintenance. For purposes of this section 5.2, the maintenance and repairs to be performed by Railway include, as required by applicable law, (a) inspections, testing, track profiling, adjustments, lubricating, welding, re-spiking surfacing, tamping, and any other tasks constituting customary and routine maintenance of track structures; (b) repair, renewal, replacement, or other customary and routine work required to ensure the safety of Railroad Facilities, including compliance with any applicable bridge safety management program regulations that may be promulgated by the Secretary of Transportation pursuant to Public Law 110-432, Section 417, including the regulations set forth in 49 CFR Part 237; (c) weed and brush control and drainage management; and (d) compliance with all mandated reporting. Railway shall not be in default under this Agreement if it does not perform tie replacement programs or upgrades of rail, switches, bridges, or other track material provided that (e) Railway's failure to perform such replacement programs or upgrades does not violate applicable law or Railway's specific maintenance obligations under this Agreement, and (f) Railway uses reasonable diligence to seek outside funding sources for such work. The Commission shall have no responsibility to maintain the trackage, structures, or any other Railroad Facilities.

5.2.5. Concurrently with the execution of this Agreement, both parties shall execute and deliver to the FRA a written notice of the assignment of track inspection and maintenance

responsibilities, and bridge safety management responsibilities, to Railway in accordance with 49 CFR § 213.5(c) and 49 CFR § 237.3. The notice of assignment shall attach a copy of this Agreement.

- 5.2.6. Limits of Commission Liability. Notwithstanding the limitations on the Commission's maintenance responsibilities set forth in Section 5.2, the Commission shall be responsible for the maintenance of any improvement it constructs on any portion of the Property. As used in this subsection, the term "improvement" excludes improvements made to the Railroad Facilities, unless such improvement is made at the request of a third-party, in which case such third-party shall be responsible for the incremental increase in the maintenance cost thereof. Notwithstanding the foregoing, maintenance responsibility for improvements to public crossings shall be governed by the provisions of Section 3.3.
- 5.3. Ownership of Track Materials. All track materials installed by Railway as part of the Railroad Facilities shall be of equal or better quality than those track materials existing at the time of execution of this Agreement, or after completion of rehabilitation and repair projects by the Commission, including the projects described in Section 5.1, and shall become the Commission's property. All materials removed by Railway from the Railroad Facilities and replaced as part of maintenance, repairs, or capital improvements shall, if the decision to remove them was Railway's, become the property of Railway. Railway shall not, without the prior written approval of Commission, remove track materials or other improvements from the Property unless they are replaced as provided in this section. Railway shall keep a written record of track materials and other improvements removed from, or installed upon, the Property and shall provide an updated copy of the record to the Commission on or before the end of each calendar quarter.
- 5.4. Clearing of Obstructions, Derailments, and Wrecks. Railway shall as soon as practicable clear any obstructions, derailments, and wrecks of railroad equipment on Railroad Facilities.
- 5.4.1. To the extent that any such obstruction, derailment, or wreck damages the Property, Railway shall as soon as practicable restore the Property to the condition it was in prior to the obstruction, derailment, or wreck.
- 5.4.2. If Railway fails to comply with the provisions of this section, the Commission may perform the required action

and charge Railway the reasonable cost thereof. Notwithstanding the foregoing, the Commission shall not charge Railway for the restoration of any damage caused by any third party to any bridge or if in the Commission's reasonable judgment, such damage does not expose the Commission to potential liability to the FRA, PUC, or any other third party, and either (A) such damage does not obstruct or interfere with any roadway or other property or facility used by the Commission or another third party, or (B) Railway abandons the subject portion of the Property under Section 8.3. In addition, the Commission shall not charge Railway for the restoration of any damage caused by the Commission's contractors, or any third party granted access to the Property by specific agreement with the Commission.

- 5.4.3. Nothing in this section is intended to preclude legal action by Railway or the Commission against any third party causing such obstruction, derailment, or wreck.

5.5. Responsibility for Repair or Replacement.

- 5.5.1. Damage Caused by Freight Operations. Except as otherwise set forth in this Agreement, Railway will be responsible to repair or replace any damage to the Freight Easement Property or Railroad Facilities caused by, or related to, Railway's operations.
- 5.5.2. Damage Caused by Commission. Railway will not be responsible to repair or replace any damage to the Freight Easement Property or Railroad Facilities caused by the Commission, its officers, directors, employees, agents, or contractors.
- 5.5.3. Damage Caused by Acts of God or Other Factors beyond Railway's Control. If any portion of the Freight Easement Property or the Railroad Facilities are damaged or destroyed by flood, fire, civil disturbance, earthquake, earth movement, storm, sabotage, act of God, terrorism, accident or any other event beyond Railway's reasonable control, including damage or destruction caused by third parties, even if said damage or destruction originates outside of the Freight Easement Property, then Railway may, but shall not be required to, at no cost or expense to the Commission, (a) repair, or cause to be repaired, the damaged or destroyed portion of the Railroad Facilities; (b) replace, or cause to be replaced, such portion of the Freight Easement Property or

the Railroad Facilities; or (c) seek to abandon Tourist Service or Freight Service over all or such portion of the Property as Railway deems appropriate as set forth in Section 8.3.

6. Construction, Relocation, or Removal of Railroad Facilities

6.1. By the Commission.

- 6.1.1. The license herein granted is subject to the Commission's needs and requirements to improve and use the Property. Subject to Railway's rights under this Agreement, the Commission, at its sole cost and expense, may add to or remove any portion of the Railroad Facilities, or change or relocate them to new locations as reasonably designated by the Commission, whenever, in the furtherance of the Commission's needs and requirements, the Commission finds such action to be necessary.
- 6.1.2. In the course of performing such work, the Commission may not materially reduce, or otherwise materially interfere with, Railway's rights and operations under this Agreement or Railway's Freight Service rights and obligations under federal law or rights under the Freight Easement, unless first approved by the STB. The Commission shall to the extent possible notify Railway as soon as practicable of any such planned or actual interference and take all practicable measures to minimize any such interference.
- 6.1.3. Railway shall in such cases provide the Commission with a fixed-price quote for performing any related work, and the Commission shall have the option of accepting Railway's quote and having Railway perform the work, performing the work itself, or having another qualified rail contractor perform such work. If the Commission selects a third-party contractor, the contractor shall execute Railway's Right of Entry Agreement (a copy of which is attached as Exhibit D).
- 6.1.4. The Commission shall have the right to salvage, stockpile, or otherwise dispose of any Railroad Facilities removed pursuant to this section; provided, however, that if the removed Railroad Facilities are reusable elsewhere on the Freight Easement Property, then Railway shall have the right to so reuse them. Any Railroad Facilities not so reused on the Freight Easement Property shall be returned

to the Commission upon expiration or termination of this Agreement and may not be sold to third parties or used elsewhere.

6.1.5. All such work performed, and any installation of Railroad Facilities, shall be in conformance with all applicable laws. If the Commission relocates any portion of the tracks used for Freight Service, the centerline of the Freight Easement Property shall, upon completion of the relocation work, be deemed to have been modified to coincide with the centerline of the realigned tracks.

6.2. By Railway. Railway may, at its cost and expense, modify or improve the Freight Easement Property and Railroad Facilities as needed to accommodate its Freight Service or Tourist Service; provided, however, that Railway first obtains the Commission's written approval of Railway's plans for such modifications and improvements, subject to the provisions of Section 2.3, which prohibit material interference with Railway's Freight Service rights and obligations under federal law, or rights under the Freight Easement, unless first approved by the STB. Subject to the provisions of Section 2.3, which prohibit material interference with Railway's Freight Service rights and obligations under federal law, or rights under the Freight Easement, unless first approved by the STB, Railway's modification or improvement of the Freight Easement Property and Railroad Facilities will be coordinated with existing or future legal public uses of the Property that the Commission may authorize. Railway may, upon the termination of this Agreement or upon the abandonment of any applicable section of the Freight Easement Property or portion of the Railroad Facilities, remove any modifications or improvements to such Freight Easement Property or Railroad Facilities that were paid for by Railway, that do not constitute any repair or replacement to such Freight Easement Property or Railroad Facilities, and that have not become fixtures to such Freight Easement Property or Railroad Facilities.

6.3. The Commission understands that Railway requires locations outside of the Freight Easement Property at which to store and maintain equipment and materials necessary for Railway's Freight Operations including a locomotive pit. The parties agree that Railway may store equipment and materials at the location known as Wrigley's, located between Swift Street and Natural Bridges Drive at or about Milepost 21.5. The parties agree that Railway will need to identify and construct additional maintenance and storage locations on the Property, which Railway may do as needed, subject to applicable law and the Commission's prior

written consent (subject to the provisions of Section 2.3, which prohibit material interference with Railway's Freight Service rights and obligations under federal law, unless first approved by the STB).

- 6.4. The terms, conditions, and stipulations expressed in this Agreement as to the Freight Easement Property and Railroad Facilities shall apply to the Freight Easement Property and Railroad Facilities as they may at any time be expanded, added to, modified, changed, or relocated.

7. License Fees

- 7.1. For consideration of the rights granted under this Agreement, Railway shall pay the Commission the following fees as calculated on a quarterly basis:

7.1.1. Freight Service:

7.1.1.1. First 500 carloads per quarter: \$0.00;

7.1.1.2. Any additional carloads per quarter: 5% of Railway's handling revenue for such carloads.

7.1.1.3. Storage: Fifty percent (50%) of Railway's storage revenue in excess of \$2.00 per car per storage day per quarter.

- 7.1.2. Temporary Use of Laydown Space. Railway may from time to time make arrangements with a temporary shipper by rail for the use of otherwise unused laydown space (open space outside of the Freight Easement Property next to railroad track). The parties agree that Railway will need to identify such temporary laydown locations on the Property, which Railway may do as needed, subject to applicable law and the Commission's prior written consent. Railway shall also notify the Commission of the expected duration of each such use. If subsequently the Commission reasonably objects to any specific use of laydown space by Railway or its shipper, the Commission will make available an alternative laydown location reasonably acceptable to Railway and shipper, and Railway shall as soon as practicable discontinue that use of such laydown space and move to the alternative laydown location. Railway shall, in addition to the license fees set forth above, pay the Commission 20% of all revenue (if any) received by

Railway by such shippers for such use of such laydown space.

7.1.3. Tourist Service: 5% of passenger ticket revenue on ticket revenue over and above \$300,000 per quarter.

7.2. Railway shall, within 60 days following the end of each calendar quarter, determine the amounts payable to the Commission arising from the preceding calendar quarter and shall provide the Commission with a statement describing all amounts due the Commission during the quarter. Railway shall also, upon reasonable request from the Commission, make available for inspection and copying all documents and receipts upon which such fees are based.

7.3. Railway shall, within 60 days following the end of each calendar quarter, pay the Commission all amounts due the Commission for the prior calendar quarter.

8. Term and Termination

8.1. This Agreement shall become effective when fully executed and delivered to the parties in accordance with Section 27.4, and shall continue in full force and effect for a period of 10 years unless otherwise terminated as provided herein.

8.2. If (i) Railway does not regularly use the Freight Service or Tourist Service rights in accordance with the plan approved by the Commission (other than railcar storage rights) herein granted over any segment of the Freight Easement Property, or the Railroad Facilities on such segment, for a period of one year without the Commission's prior written approval, or (ii) Railway remains in default in its performance of any covenant or agreement contained herein for a period of 30 days after written notice from the Commission to Railway specifying such default, the Commission may, at its option, forthwith terminate this Agreement by written notice; provided however, that if such default cannot reasonably be cured within 30 days after such notice, the Commission may not terminate this Agreement provided that Railway begins to cure the default within the 30-day notice period and proceeds diligently to complete such cure. Upon expiration or termination of this Agreement by either party, Railway shall proceed to abandon Freight Service in accordance with section 8.3; provided, that no expiration or termination of this Agreement shall be effective unless and until the STB has approved such abandonment. As used in this Section 8.2, the term "regularly use" means revenue train operations for either Freight Service or Tourist Service

consisting of a minimum of 40 freight cars per year, or 15,000 passengers per year (beginning with the third year following the effective date of this Agreement), as applicable.

8.2.1. The parties recognize that there are currently little or no revenue train operations on the Freight Easement Property or Railroad Facilities and that it may take time for Railway to develop such operations, if they can be developed. The Commission thus agrees that it shall not terminate this Agreement due to the lack of any such revenue train operations for a period of three years from the effective date of this Agreement.

8.2.2. The Commission also agrees that it shall not terminate this Agreement due to Railway's failure to use the rights herein granted with respect to any segment of the Freight Easement Property or Railroad Facilities that is necessary to support any Freight Service or Tourist Service over any regularly-used portion of the Freight Easement Property north of any unused segment.

8.3. Abandonment.

8.3.1. Railway may at any time, in its sole and absolute discretion, immediately and without any liability to the Commission: (a) abandon Tourist Service over all or such portion of the Property as Railway deems appropriate, and (b) seek STB approval to abandon Freight Service over all or such portion of the Property as Railway deems appropriate. In the event that Railway seeks to abandon Freight Service, Railway shall provide the Commission with 90 days advance notice of Railway's intention and shall, at no cost to Railway, cooperate with the Commission's efforts to take upon itself all Freight Service operations relating to the Property, to appoint another person or entity to do so, or to rail bank any portion of the Property as to which Railway intends to abandon Freight Service. Nothing in this Agreement is intended by the parties to limit these rights on the part of Railway and the Commission agrees that it will cooperate with Railway in Railway's efforts to so abandon any Tourist Service or Freight Service. No such abandonment, transfer of Freight Service operations, or rail banking, shall be effective unless and until the STB has issued its approval thereof. In addition, this Agreement shall not terminate with respect to all or any portion of the Property unless and until the STB has issued such approval.

- 8.3.2. Any abandonment proceedings instituted by Railway shall comply with the abandonment provisions set forth in the Freight Easement, including the railbanking/OFA provisions thereof.
- 8.3.3. To the extent the STB approves abandonment of Freight Service over all or any part of the Freight Easement Property or Railroad Facilities, this Agreement and any other rights and obligations of Railway to the Commission, shall, at the time of consummation of such abandonment, terminate with respect to any abandoned portions of the Freight Easement Property and Railroad Facilities. Upon the effective date of such abandonment, Railway shall, if so requested by the Commission, (i) assign to the Commission any Railway Agreements affecting the abandoned portions of the Freight Easement Property and Railroad Facilities, (ii) quitclaim the abandoned portion of the Freight Easement to the Commission, and (iii) execute any additional documents reasonably necessary to effectuate the purpose and intent of this Agreement.
- 8.4. All obligations incurred by the parties prior to the termination of this Agreement shall be preserved until satisfied. Notwithstanding the foregoing, if Railway terminates this Agreement as to any portion of the Freight Easement Property or Railroad Facilities after damage to the same by any third party, or because the cost to maintain, repair, or replace the same is not economical, Railway shall thereafter have no liability to the Commission for the cost to perform any related obligations.
- 8.5. Upon the effective date of termination of this Agreement, Railway shall, if so requested by the Commission, (i) assign to the Commission all Railway Agreements, (ii) quitclaim the Freight Easement to the Commission, and (iii) execute any additional documents reasonably necessary to effectuate the purpose and intent of this Agreement.
9. **Insurance.** Railway and the Commission shall obtain the insurance set forth below, to be kept in force during the life of this Agreement. All insurance policies must be written by a reputable insurance company reasonably acceptable to the Commission, or with a current Best's Insurance Guide Rating of A- and Class VII or better, and authorized to do business in California. The limits of insurance coverage required under this section shall be increased every five years during the term hereof and any extended term based on any increases or decreases in the Producer Price Index, or any successor index.

9.1. Railway Insurance: Railway shall, at its own cost and expense, provide and procure Railroad Liability and Workman's Compensation insurance.

9.1.1. The insurance policy providing bodily injury, including death, personal injury and property damage coverage shall have a limit of not less than \$25 million each occurrence and an aggregate limit of not less than \$50 million. The self-insured retention may not exceed \$250,000 (as that value is periodically adjusted by the Consumer Price Index from and after the effective date of this Agreement.) Prior to the execution of this Agreement, Railway shall provide the Commission with a certificate of insurance on a standard ACORD form, or other form reasonably acceptable to the Commission, substantiating the required coverages and limits set forth herein. Upon request by the Commission, Railway shall immediately furnish a complete copy of any policy required hereunder, including all endorsements, with said copy certified by the insurance company to be a true and correct copy of the original policy.

9.1.2. The insurance policy must include the Commission as an "additional insured."

9.1.3. Required Provisions: The insurance policy shall contain, or be endorsed to contain, the following provisions:

9.1.3.1. For any claims related to this Agreement, Railway's insurance coverage shall be primary insurance as respects the Commission, its directors, officers, employees, and agents and any insurance or self-insurance maintained by the Commission, its directors, officers, employees, or agents, shall be in excess of Railway's insurance and shall not contribute to it. However, this section shall not apply to any claims that result from the sole negligence or willful misconduct of the Commission or its officers, directors, employees, agents, or invitees; as to any such claim, the Commission's insurance shall be primary and any insurance or self-insurance maintained by Railway, its directors, officers, employees, or agents, shall be in excess of Commission's insurance and shall not contribute to it.

9.1.3.2. Any failure by Railway to comply with reporting or other provisions of the policies, including breaches of warranties, shall not affect coverage provided to the Commission, its directors, officers, employees, or agents.

9.1.3.3. Railway's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability.

9.1.3.4. Each insurance policy required by this Agreement shall be endorsed to state that coverage shall not be suspended, voided, canceled, reduced in coverage or in limits except after 30 days' prior written notice by certified mail, return receipt requested, has been given to the Commission.

9.1.4. Workers' Compensation insurance shall cover any statutory liability as determined to be applicable by the compensation laws of the State of California or FELA, as applicable, with a limit of at least \$1 million.

9.1.5. The fact that insurance is obtained by Railway or by the Commission on behalf of Railway will not be deemed to release or diminish Railway's liability, including liability under the indemnity provisions of this Agreement. Damages recoverable by the Commission from Railway or any third party will not be limited by the amount of the required insurance coverage.

9.2. Commission Insurance: The Commission shall, at its own cost and expense, provide and procure such Commercial General Liability ("CGL") and Workman's Compensation insurance as it deems necessary to cover its obligations under this Agreement.

10. **Notices.** All correspondence, notices, and other papers shall be delivered either in person or by certified or registered mail, postage prepaid, to the parties hereto at the following addresses:

If to Railway:	President Santa Cruz and Monterey Bay Railway Co. 118 S. Clinton St., Suite 400 Chicago, IL 60661 Attn: Ed Ellis and Kevin Busath Fax: 312-466-9589
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If to Commission: Executive Director
Santa Cruz County Regional Transportation
Commission
1523 Pacific Avenue
Santa Cruz, CA 95060
Fax: 831-460-3215

11. Coordination Committee

- 11.1. In order to ensure the safety and efficiency of all operations on the Property, the parties shall establish a Coordination Committee. The Coordination Committee shall be composed of two representatives from each party (and any other persons or entities as the parties may mutually agree) and shall (a) serve as a forum to coordinate the parties' activities and resolve questions or disputes (but only to the extent the parties' representatives have been so authorized), and (b) be responsible to make recommendations to the parties. The Coordination Committee shall meet on a regular schedule to be determined by the parties, but may be convened for special meetings by either party upon 10 days written notice to the other party. Following each meeting, the Coordination Committee shall deliver written minutes of such meeting to Railway and the Commission.

12. Claims and Liens for Labor and Material

- 12.1. Railway agrees to pay in full for all materials joined or affixed to the Property, to pay in full all persons who perform labor upon the Property, and not to permit or suffer any mechanic's or materialman's lien of any kind or nature to be enforced against the Property, as to any work done or materials furnished thereon by Railway or at Railway's request. Railway shall indemnify, hold harmless and defend Commission (with counsel reasonably acceptable to Commission) against and from any and all liens, claims, demands, costs and expenses of whatsoever nature in any way connected with or growing out of such work done, labor performed or materials furnished.

13. Property Taxes

- 13.1. So far as it lawfully may do so, the Commission shall assume, bear, and pay all property and other taxes and assessments of whatsoever nature or kind (whether general, local, or special) levied or assessed upon or against the Property, excepting taxes levied upon and against any Freight Easement Property or Railroad Facilities. Railway shall assume, bear, and pay all property and other taxes and assessments of whatsoever nature or kind (whether general, local, or special) levied or assessed upon or against any

Freight Easement Property or Railroad Facilities, including possessory interest taxes under California Revenue and Taxation Code section 107 *et seq.*, unless applicable law otherwise excuses payment of taxes due to the Commission's ownership of the Property, the Freight Easement Property, or the Railroad Facilities.

14. Indemnity

- 14.1. Railway shall indemnify, defend and hold harmless the Commission from any Loss which is due to or arises from: (a) Railway's operation, maintenance, repair, or use of the Freight Easement Property, Railroad Facilities, any appurtenances thereto, or any part thereof; (b) Railway's provision of Freight Service or Tourist Service; or (c) Railway's failure to comply with or perform any of the terms and conditions set forth in this Agreement; except to the extent that the Loss is caused by the sole negligence or willful misconduct of the Commission, its officers, agents, or employees, or a breach of an express material warranty of the Commission. The provisions of this section shall survive the termination or expiration of the term of this Agreement.
- 14.2. The Commission shall indemnify, defend and hold harmless Railway from any Loss which is due to or arises from the sole negligence or willful misconduct of the Commission, its officers, agents, employees, and contractors. For purposes of this Section 14.2 only, the term "Loss" is limited to any loss, damage, claim, demand, action, cause of action, penalty, fine, payment, cost, liability, or expense of whatsoever nature, including court costs and reasonable attorneys' fees, resulting from or related to: (a) any injury to or death of any person, including officers, agents, and employees of the Commission or Railway; or (b) damage to or loss or destruction of Railway's equipment, rolling stock and any items being transported on behalf of Railway's customers. Any Loss related to damage to or destruction of the Freight Easement Property or Railroad Facilities is subject to the provisions of Section 2.8. The provisions of this section shall survive the termination or expiration of the term of this Agreement.
- 14.3. Each party's obligations to the other under Sections 14.1 and 14.2 respectively are subject to the following conditions: (a) the party seeking indemnification (the "Indemnified Party") shall, following Indemnified Party's discovery of a Loss for which Indemnified Party seeks indemnification, or of circumstances that may reasonably result in such a Loss, promptly deliver notice to the other party (the "Indemnifying Party") describing such Loss or circumstances, (b) the Indemnified Party shall make reasonable efforts to mitigate the effect of such Loss or circumstances, (c) the

Indemnified Party shall give the Indemnifying Party every opportunity to control the defense against such Loss, and shall not compromise or settle such Loss without the Indemnifying Party's prior written consent, and (d) in no event shall either party be liable to the other for consequential, incidental, indirect or punitive damages, even if notified of the possibility of such damages, unless such damages are included in any third-party claim against the Indemnified Party.

15. **Removal of Railway Equipment, Personnel, and Property upon Termination of Agreement.** Prior to, or upon, the termination of this Agreement, Railway shall, at its sole expense, remove its equipment, personnel, and other property from the Freight Easement Property and Railroad Facilities and shall restore, to the Commission's reasonable satisfaction, such portions of the Freight Easement Property and Railroad Facilities used by Railway to as good a condition as they were in at the beginning of this Agreement or after the completion of rehabilitation and repairs by the Commission, including the projects specified in Section 5.1, excepting normal wear and tear. If Railway fails to do the foregoing, the Commission may do such work at the cost and expense of Railway. Railway may not remove any property, including the Railroad Facilities, that is or becomes the property of the Commission under this Agreement.

16. **Hazardous Substances and Wastes**

- 16.1. Railway shall not be liable or responsible for any Hazardous Materials present on, in, or under the Property, or other problems relating to the Property, prior to the commencement date of its operations on the Freight Easement Property, except to the extent Railway's activities exacerbate the contamination of any such pre-existing Hazardous Materials.
- 16.2. Railway shall comply with all applicable laws in its occupancy, operation, and maintenance of the Freight Easement Property and Railroad Facilities. Without first obtaining the Commission's written permission (which may be withheld in the Commission's sole reasonable discretion), Railway shall not treat or dispose of Hazardous Materials on the Freight Easement Property or Railroad Facilities. Railway shall not release any Hazardous Materials on or at the Freight Easement Property or Railroad Facilities, including through any drainage or sewer systems. Railway assumes all responsibility for the investigation and cleanup of any such release or exacerbation by Railway and shall indemnify, defend, and hold harmless the Commission and its property, its officers, agents, and employees, for all costs, including reasonable environmental consultant and reasonable attorneys' fees, and claims resulting from or associated with any such release or exacerbation by

Railway. Railway shall assume all responsibility for and shall indemnify, defend, and hold harmless Commission against all costs and claims associated with a release or leak of Hazardous Materials, or exacerbation of pre-existing Hazardous Materials, occurring between the commencement date of its operations on the Freight Easement Property, and the expiration or sooner termination of this Agreement, and related to Railway's use of the Freight Easement Property and Railroad Facilities, unless such event was caused by the sole negligence or willful misconduct of the Commission, its officers, employees, or agents.

- 16.3. Railway shall not install any above-ground or underground storage tanks without the Commission's prior written consent, which consent may be granted or withheld in Commission's sole and absolute discretion. If such consent is granted, Railway shall obtain any necessary permits, notify the proper authorities, and provide the Commission with copies of any such permits and notifications. Railway shall assume all responsibility for and shall indemnify, defend, and hold harmless the Commission against all costs and claims associated with a release or leak of the contents of any such tank occurring between the commencement date of its operations on the Freight Easement Property, and the expiration or termination of this Agreement, unless such event was caused by the sole negligence or willful misconduct of the Commission, its officers, employees, or agents.
- 16.4. The Commission understands and acknowledges that the regular operation and maintenance of railroad equipment and tracks involve the storage, use, and release of *de minimus* amounts of Hazardous Materials, including petroleum products, creosote, and chromated copper arsenate. The Commission agrees that Railway shall not be liable or responsible for the *de minimus* release of any such Hazardous Materials, unless (i) such release violates applicable law, or (ii) the Commission is otherwise entitled to defense and indemnity under Section 14.1.
- 16.5. If Railway knows, or has reasonable cause to believe, that any Hazardous Materials have come to be located under or about the Freight Easement Property or Railroad Facilities, other than as specifically provided herein or as previously consented to in writing by the Commission, Railway shall immediately give the Commission written notice thereof, together with a copy of any statement, report, notice, registration, application, permit, business plan, license, claim, action, or proceeding given to or received from any governmental authority or private party concerning the presence, spill, release, discharge of, or exposure to, such Hazardous Materials.

- 16.6. This Section 16 shall continue in full force and effect regardless of whether this Agreement is terminated pursuant to any other provision or the Freight Easement Property and Railroad Facilities are abandoned and vacated by Railway.
17. **Trespassers and Dangerous Conditions.** Railway shall not be required to take any action or incur any expense (including posting signage or warnings, providing fencing or other security) as to or against trespassers on the Property, or invitees of the Commission, other than to promptly notify local law enforcement and the Commission concerning any trespassers observed on the Property by Railway personnel. If Railway becomes aware of any dangerous conditions on or about the Property, Railway shall promptly notify the Commission of such conditions.
18. **Waivers.** The failure of either party hereto to enforce any of the provisions of this Agreement, or to enforce any right or option which is herein provided, shall in no way be construed to be a waiver of such provision(s) as to the future, nor in any way to affect the validity of this Agreement or any part hereof, or the right of either party to thereafter enforce each and every such provision and to exercise any such right or option. No waiver of any breach of this Agreement shall be held to be a waiver of any other or subsequent breach.
19. **Consent.** Unless expressly provided to the contrary elsewhere in this Agreement, whenever the consent, approval, judgment, or determination (collectively, "consent") of a party is required or permitted under this Agreement, the consenting party shall exercise good faith and reasonable judgment in granting or withholding such consent. No party may unreasonably withhold or delay its consent; consent shall be deemed to have been withheld if a party fails to consent to the other party within 30 days of having been given written notice of the other party's intention to take any action as to which consent is required or permitted.
20. **Non-binding Mediation**
- 20.1. If at any time a question or controversy shall arise between the parties hereto in connection with this Agreement and upon which the parties cannot agree, such question or controversy shall be submitted to a single mediator within 20 days after written notice by one party to the other party of its desire for mediation. The parties shall in good faith consult to select a mutually acceptable mediator. The mediator so selected shall be a person with at least one-year of exposure to the concepts of railroad operations and maintenance.
- 20.2. Upon selection of the mediator, said mediator shall with reasonable diligence determine the questions as disclosed in said notice of

demand for mediation and shall give both parties reasonable notice of the time and place of any mediation. Until the completion of mediation, performance under the Agreement shall continue in the manner and form existing prior to the rise of such question.

20.3. The compensation, cost, and expenses of the mediator shall be paid in equal shares by the parties.

21. **Entire Agreement.** This document, and the exhibits attached hereto, constitute the entire agreement between the parties, all oral agreements being merged herein, and supersedes all prior representations, agreements, arrangements, understandings, or undertakings, whether oral or written, between or among the parties relating to the subject matter of this Agreement that are not fully expressed herein.
22. **Modification to Agreement.** The provisions of this Agreement may be modified at any time by agreement of the parties hereto, provided such modification is in writing and signed by all parties to this Agreement. Any agreement made after the date of this Agreement and related to the subject matter contained herein shall be ineffective to modify this Agreement in any respect unless in writing and signed.
23. **No Assignment Absent Consent.** Except as specifically provided in this Agreement, Railway shall not assign this Agreement, in whole or in part, or any rights herein granted, without the Commission's prior written consent.
24. **Successors and Assigns.** Subject to the provisions of Section 23, this Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, executors, administrators, successors, and assigns.
25. **Venue and Choice of Law**
- 25.1. Any and all disputes, controversies, or claims arising out of, relating to, or in connection with this Agreement shall be instituted and maintained in a competent court in San Francisco County, California and the parties hereby consent to the jurisdiction of any such court and to service of process by any means authorized under California law.
- 25.2. This Agreement shall be governed, construed, and enforced in accordance with the laws of the State of California, without reference to its conflicts of laws provisions. The prevailing party in any claim or action arising out of or connected with this Agreement shall be entitled to recover all reasonable attorneys' fees and related costs, in addition to any other relief that may be awarded by any court or other tribunal of competent jurisdiction.

26. **Acts of God and Other Disruptions of Service.** Neither party shall be deemed to be in default of this Agreement if any failure to meet any condition or to perform any obligation or provision hereof is caused by, a result of, or due to strikes, insurrections, acts of God, or any other causes beyond the party's control; provided, however, that performance shall only be excused for as long as the disruption persists.

27. **Miscellaneous**

27.1. In the event that any of the provisions of this Agreement are held by a court or other tribunal of competent jurisdiction to be invalid or unenforceable, the remaining portions hereof shall remain in full force and effect and any invalid or unenforceable provisions shall be enforced to the maximum extent possible so as to effect the intent of the parties and shall be reformed to the extent necessary to make such provisions valid and enforceable. Without limiting the generality of the foregoing, if the requirement in Section 5.2 that Railway comply with applicable bridge safety management program regulations (under Public Law 110-432, Section 417) is held to be a non-delegable duty of the Commission, the Commission may, at its option, (i) undertake this obligation and charge Railway for the cost thereof, or (ii) terminate this Agreement.

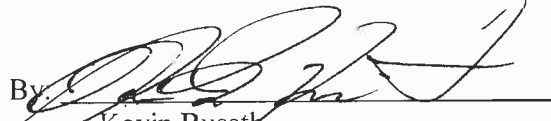
27.2. Each party has participated in negotiating and drafting this Agreement so if an ambiguity or a question of intent or interpretation arises, this Agreement is to be construed as if the parties had drafted it jointly, as opposed to being construed against a party because it was responsible for drafting one or more provisions of this Agreement.

27.3. Each party acknowledges that the officer executing this Agreement has the authority to enter into this Agreement on behalf of the party and in so doing is authorized to bind the party on whose behalf he is signing, to the terms and conditions of this Agreement.

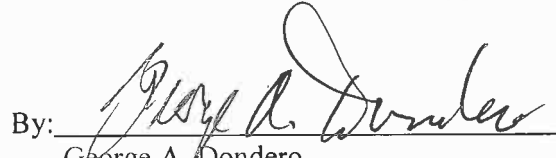
27.4. This Agreement may be executed in one or more counterparts and by facsimile signature, each of which shall be deemed an original, but all of which together constitute one and the same instrument. Each party shall deposit the executed Agreement into escrow with instructions to deliver the Agreement upon close of escrow under the Purchase and Sale Agreement.

In witness whereof, the parties hereto have caused this Agreement to be executed as of the date first herein written.

**SANTA CRUZ AND MONTEREY BAY
RAILWAY COMPANY**

By: 
Kevin Busath
Vice President, Strategic Planning

**SANTA CRUZ COUNTY REGIONAL
TRANSPORTATION COMMISSION**

By: 
George A. Dondero
Executive Director

The undersigned, Iowa Pacific Holdings, LLC, being the parent company of Railway, hereby acknowledges and agrees that in the event Railway fails to fully perform any of its obligations under the Agreement, the undersigned will, upon the Commission's written demand therefor, promptly perform such obligation to the extent of such failure.

IOWA PACIFIC HOLDINGS LLC

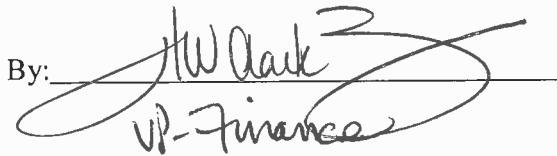
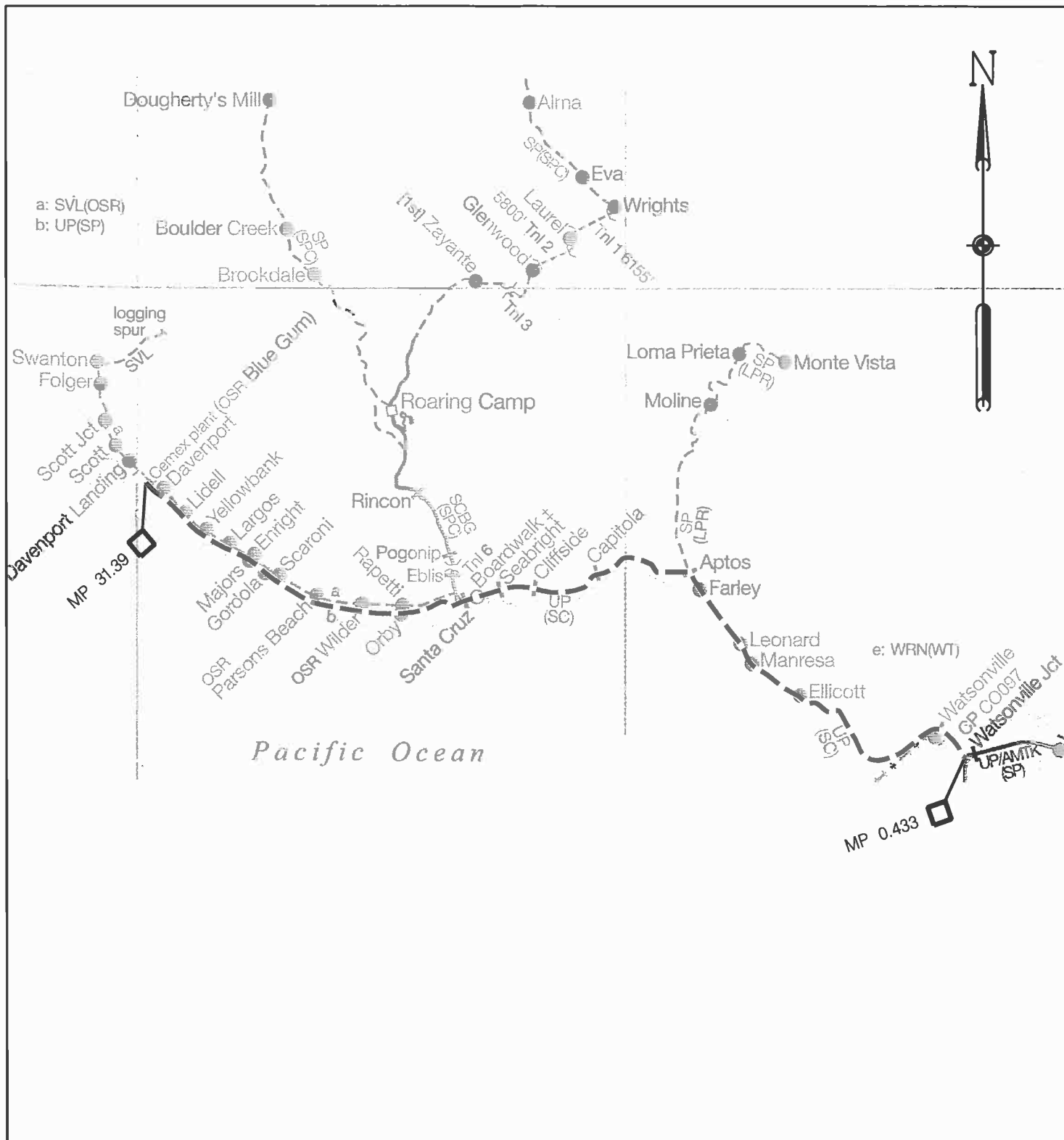
By: 
VP-Finance

Exhibit A
Map of Railroad Facilities



NOT TO SCALE

LEGEND

LINE TO BE LEASED SHOWN
MP 0.433 - 31.39



EXHIBIT "A"

UNION PACIFIC RAILROAD CO.

TO ACCOMPANY AGREEMENT WITH
SIERRA NORTHERN RAILWAY
WATSONVILLE JCT - DAVENPORT, CA.
M.P. 0.433 - 31.39 +/- SANTA CRUZ SUB.
SP CA V72 /1-6 & V89 /1-7
REAL ESTATE DEPARTMENT OMAHA NE.
FILE #1728-03 DATE: 11-2-2009 T.D.A.

Exhibit B
Permitted Rail Car Storage Locations

Santa Cruz Branch Rail Line

Rail Car Storage (Map A)



Santa Cruz Branch Rail Line

Rail Car Storage (Map B)



Exhibit C
Railway Agreements

Exhibit C: Railway Agreements																
Assigned by U.P.R.R. REAL ESTATE DEPARTMENT																
MILE POST NO. 0.433																
FOLDER NO. 0172803																
PROJECT	AUDIT	FOLDER	# of FNET I	LEG STAT	PARTY NAME	PURPOSE	MANAGER	COUNTY	CITY	ST	SUBDV	MP START	ANNUAL AMT	DISPOSITION	CONTAINED	
186878	207416	158035	1	Active	CITY OF WATSONVILLE	Crossing - Public Roadway	Paul G. Farrell	Santa Cruz	WATSONVILLE	CA	Mojave	102.62	\$0	Assigned	Totally	
190837	202098	161195	1	Active	SANTA CRUZ CITY OF	Warning Devices - Public Roadway	Paul G. Farrell	Santa Cruz	SANTA CRUZ	CA	SANTA CRUZ BRANC	119.4	\$0	Assigned	Totally	
200142	S155932		1	Active	APTOS SEASCAPE CORP	Crossing - Private Roadway	Kylan Crawford	Santa Cruz	APTOS	CA	SP Route Code EC	111.04	\$0	Assigned	Totally	
200154	S157723		1	Active	SANTA CLARA COUNTY OF	Crossing - Public Roadway	Paul G. Farrell	Santa Cruz	APTOS	CA	SP Route Code EC	111	\$0	Assigned	Totally	
200156	S156717		1	Active	SANTA CRUZ COUNTY OF	Crossing - Public Roadway	Paul G. Farrell	Santa Cruz	APTOS	CA	SP Route Code EC	113.7	\$0	Assigned	Totally	
200157	S157786		1	Active	SANTA CRUZ COUNTY OF	Crossing - Public Roadway	Paul G. Farrell	Santa Cruz	APTOS	CA	SP Route Code EC	108	\$0	Assigned	Totally	
203028	S158150		1	Active	SANTA CRUZ CITY OF	Crossing - Public Roadway	Paul G. Farrell	Santa Cruz	ORBY	CA	SP Route Code EL	81.4	\$0	Assigned	Totally	
203789	S163007		1	Active	SANTA CRUZ PORT DISTRI	Crossing - Private Roadway	Kylan Crawford	Santa Cruz	SEABRIGHT	CA	SP Route Code EC	119.09	\$0	Assigned	Totally	
206269	S032513	250763	1	Active	COUCH DISTRIBUTING CO INC	Track: Industry Track Agreement	John Herdzina	Santa Cruz	WATSONVILLE	CA	SP Route Code EC	103.1	\$0	Assigned	Totally	
210408	S189267		1	Active	SANTA CRUZ COUNTY OF	Crossing - Private Roadway	Kylan Crawford	Santa Cruz	CLIFFSIDE	CA	SP Route Code EC	118.1	\$0	Assigned	Totally	
211518	S012360		1	Active	TOBEYS RASP SERVICE INC	Track	John Herdzina	Santa Cruz	SANTA CRUZ	CA	SP Route Code EL	80.7	\$0	Assigned	Totally	
231292	S194780		2	Active	RESETAR, ANTHONY P / PILO, MARY	Crossing - Private Roadway	Kylan Crawford	Santa Cruz	WATSONVILLE	CA	SP Route Code EC	102	\$0	Assigned	Totally	
235323	S191872		1	Active	TRESTLE BEACH ASSOCIATES	Crossing - Private Roadway	Kylan Crawford	Santa Cruz	APTOS	CA	SP Route Code EC	109.6	\$0	Assigned	Totally	
238757	S182045		1	Active	CALIFORNIA UNIVERSITY REGENTS	Crossing - Private Roadway	Kylan Crawford	Santa Cruz	ORBY	CA	SP Route Code EL	81.8	\$10	Assigned	Totally	
239770	S161499		1	Active	SULLIVAN, R. & A.	Crossing - Private Roadway	Kylan Crawford	Santa Cruz	APTOS	CA	SP Route Code EC	109.07	\$10	Assigned	Totally	
245617	S171658		1	Active	GARCIA, R.L.	Crossing - Private Roadway	Kylan Crawford	Santa Cruz	CAPITOLA	CA	SP Route Code EC	115.6	\$10	Assigned	Totally	
245622	S212398	206085	1	Active	HOLCOMB CORPORATION	Crossing - Private Roadway	Kylan Crawford	Santa Cruz	APTOS	CA	SP Route Code EC	110.54	\$134.98	Assigned	Totally	
252817	S157272		1	Active	LORENZI, G,B,LO & ZEIH, K	Crossing - Private Roadway	Kylan Crawford	Santa Cruz	MAJORS	CA	SP Route Code EL	86.51	\$10	Assigned	Totally	
253187	S184589		1	Active	SANDOVAL SALVADOR	Crossing - Private Roadway	Kylan Crawford	Santa Cruz	ORBY	CA	SP Route Code EL	80.2	\$0	Assigned	Totally	
256900	S181065		1	Active	SANTA CRUZ COUNTY CA	Crossing - Public Roadway	Paul G. Farrell	Santa Cruz	CLIFFSIDE	CA	SP Route Code EC	117.1	\$0	Assigned	Totally	
256902	S192311		1	Active	SANTA CRUZ COUNTY CA	Crossing - Private Roadway	Kylan Crawford	Santa Cruz	APTOS	CA	SP Route Code EC	112.81	\$0	Assigned	Totally	
257860	S211909	181663	1	Active	SANTA CRUZ CITY OF	Crossing - Private Roadway	Kylan Crawford	Santa Cruz	SANTA CRUZ	CA	SP Route Code EC	120.41	\$80	Assigned	Totally	
260304	S708852	195115	3	Active	CASCADE REFRIGERATED NORTHERN CALIF., INC.	Track: Track Lease (Non-Haz)	John Herdzina	Santa Cruz	WATSONVILLE	CA	SP Route Code EC	102.01	\$2,160	Assigned	Totally	
367101	207254	58589	1	Active	MARTINELLI & COMPANY	Crossing - Private Roadway	John S. Hertzler		SYSTEM	CA		0	\$130.48	Assigned	Totally	
410634	S015548	250762	2	Active	DEL MAR FOOD PRODUCTS CORPORATION	Track: Industry Track Agreement	John Herdzina	Santa Cruz	WATSONVILLE	CA		103.1	\$0	Assigned	Totally	
412823	S000771		2	Active	PISTA, B.	Track	John Herdzina	Santa Cruz	WATSONVILLE	CA			\$0	Assigned	Totally	
446570	S017462		2	Active	SANTA CRUZ COUNTY OF	Crossing Public Roadway Grade Separation	Paul G. Farrell	Monterey	APTOS	CA			\$	Assigned	Totally	
455863	S080717		3	Active	COUNTY OF SANTA CRUZ	Crossing - Public Roadway	Paul G. Farrell	Monterey	APTOS	CA			\$	Assigned	Totally	
457023	S087624		1	Active	CAPITOLA, CITY OF	Crossing - Public Roadway	Paul G. Farrell	Santa Cruz	CAPITOLA	CA			\$	Assigned	Totally	
457497	S091557		1	Active	CAPITOLA, CITY OF	Crossing - Public Roadway	Paul G. Farrell	Santa Cruz	CAPITOLA	CA			\$	Assigned	Totally	
459511	S108176		1	Active	COAST DAIRIE & LAND CO.	Crossing - Private Roadway	Kylan Crawford	Santa Cruz	DAVENPORT	CA			\$	Assigned	Totally	
465104	SPA7491		1	Active	SANTA CRUZ COUNTY OF	Warning Devices - Public Roadway	Paul G. Farrell	Monterey	APTOS	CA		112.8	\$	Assigned	Totally	
514595	211721	76287	1	Active	SANTA CRUZ , CITY OF	Crossing - Public Roadway	Paul G. Farrell	Santa Cruz	SANTA CRUZ	CA			\$	Assigned	Totally	
655249	227449	211468	2	Active	SANTA CRUZ, CITY OF	Crossing - Public Roadway	Paul G. Farrell	Santa Cruz	SANTA CRUZ	CA	Santa Cruz Sub.	20.78	\$	Assigned	Totally	
655250	227485	211469	3	Active	SANTA CRUZ, CITY OF	Crossing - Public Roadway	Paul G. Farrell	Santa Cruz	SANTA CRUZ	CA	Santa Cruz Sub.	20.75	\$0	Assigned	Totally	
655251	228377	211470	1	Active	SANTA CRUZ, CITY OF	Crossing - Public Roadway	Paul G. Farrell	Santa Cruz	SANTA CRUZ	CA	Santa Cruz Sub.	19.02	\$	Assigned	Totally	
690096	242123	232126	1	Active	SANTA CRUZ, CITY OF	Crossing - Public Roadway	Paul G. Farrell	Santa Cruz	SANTA CRUZ	CA	Santa Cruz Lead	22.09	\$	Assigned	Totally	
702125	253471	252215	1	Active	SILVER CREEK YUBA I, LLC	Crossing - Private Roadway	Kylan Crawford	Santa Cruz	WATSONVILLE	CA	Santa Cruz	9.4	\$0	Assigned	Totally	
702128	253472	252218	1	Active	SILVER CREEK YUBA I, LLC.	Crossing - Private Roadway	Kylan Crawford	Santa Cruz	WATSONVILLE	CA	Santa Cruz	9.57	\$0	Assigned	Totally	
716300	259047	267911	5	Active	CALIFORNIA, STATE OF	Crossing - Public Roadway	Paul G. Farrell	Santa Cruz	DAVENPORT	CA	Santa Cruz Lead	31.28	\$0	Assigned	Totally	
719596	261655	271611		Active	SANTA CRUZ, BIG TREES & PACIFIC RAILWAY	Trackage Rights &Interchange Agreement	Melissa Grosz	Santa Cruz	SANTA CRUZ	CA			\$0	Assigned	Totally	

Exhibit D

Form of Railway Right of Entry Agreement

CONTRACTOR OCCUPANCY/ACCESS AGREEMENT

This Agreement (hereinafter "Agreement") made this «DateofAgreement» by and between «RailroadName», its successors, assigns or affiliated companies (hereinafter "RAILROAD"), whose address is «RailroadAddress», and «ContractorName» (hereinafter "CONTRACTOR"), whose address is «ContractorAddress».

WITNESSETH:

1. Upon payment of a **one time** fee of \$«ROEFee» and compliance with the provisions herein contained, RAILROAD hereby permits CONTRACTOR to enter the property of RAILROAD, at or near Mile Post «Milepost», at or near the Town of «LocationCity», in the County of «LocationCounty», State of «LocationState», for purpose of installation, maintenance, renewal or removal (hereinafter referred to as "WORK"), of an «DescriptionofWork» (hereinafter "Structure"). Said permit is granted for a period not to extend beyond **sixty (60) days from the date of execution of this Agreement by RAILROAD**. Provided, however, this permit may be canceled by RAILROAD at any time CONTRACTOR is deemed by RAILROAD not to be in compliance with any of the terms herein.
2. The term "Contractor" shall be used to identify the party that will perform the WORK as described in Section 1, whether or not Contractor is signatory to «ContractNo». If Contractor is not a party to «ContractNo», Contractor warrants to RAILROAD that Contractor has entered into a "Contract" with «LesseeName» (hereinafter termed "Third Party") covering the WORK to be performed in connection with Structure at said location(s), being Mile Post «Milepost».
3. As additional consideration, CONTRACTOR agrees to reimburse RAILROAD for all cost and expense incurred by RAILROAD in connection with the WORK. Such costs and expenses shall include, but are not limited to, furnishing of inspectors, watchmen and flagmen as RAILROAD deems necessary to protect its property, tracks, engines, trains and cars and the operation thereof, the installation and removal of any necessary falsework beneath the tracks of RAILROAD and the restoration of RAILROAD property. No vehicular crossing over RAILROAD'S tracks shall be installed or used by CONTRACTOR without prior written permission of RAILROAD.
4. CONTRACTOR shall give RAILROAD at least five (5) days' notice in advance of any work done upon or adjacent to RAILROAD property under this Agreement. CONTRACTOR shall notify RAILROAD General Manager at «RailroadAddress», phone «RailroadPhone», in advance of the start of the WORK, give the General Manager notification of the date said WORK is completed, and also the date the Contractor's work is accepted by Third Party. Upon completion of the WORK, CONTRACTOR shall promptly remove from RAILROAD property all tools, equipment and materials placed thereon by CONTRACTOR and CONTRACTOR'S agents. CONTRACTOR shall restore RAILROAD property to the same state and condition as when CONTRACTOR entered thereon and shall leave said property in a clean and presentable condition. CONTRACTOR, after completion of construction or termination of work, at its sole cost, hereby agrees to restore in a good and workman like manner all property disturbed by CONTRACTOR'S use or construction or maintenance activities from the date of execution of this document. Said restoration shall include, but not be limited to, any and all harm, damage or injury done to RAILROAD property and/or to any other public or private property by acts or occurrences subject to Federal, State or local environmental enforcement or regulatory jurisdiction, and shall include necessary and appropriate testing and cleanup.
5. CONTRACTOR'S work shall be performed in accordance with plans and specifications approved by RAILROAD and in such manner and at such times as shall not endanger or interfere with the safe operation of the tracks and other facilities of RAILROAD at said location. No materials, tools or equipment shall be stored within ten (10) feet of the centerline of any track. The regulations of RAILROAD and the instructions of its representatives shall be complied with relating to the proper manner of protecting the tracks, pipelines, wire lines, signals and all other property at said location, the traffic moving on such tracks and the removal of tools, equipment and materials. No bailment shall be created by the storage of any materials, tools or equipment on RAILROAD property.
6. Before commencing said WORK, CONTRACTOR shall, at its sole cost and expense, obtain all necessary authority from any public authorities having jurisdiction in the premises, and shall thereafter observe and comply with the requirements of such public authority or authorities and all applicable laws and regulations. CONTRACTOR shall secure written approval by RAILROAD of plans and/or specifications submitted to RAILROAD prior to the commencement of any WORK.

7. The Structure shall be installed, maintained, renewed or removed pursuant to the Work, at the sole risk, cost and expense of CONTRACTOR, in accordance with American Railway Engineering Association Specifications or other Industry Standard Specifications as may apply or be appropriate for the use and Work intended. Said specifications are incorporated herein and made a part hereof by reference. Approval of plans or completed work by RAILROAD'S designated representative shall not, in itself, be considered acknowledgment that said project is in conformity with said standards.
8. CONTRACTOR AGREES TO DEFEND, INDEMNIFY AND HOLD HARMLESS RAILROAD, PERMIAN BASIN RAILWAYS, INC., IOWA PACIFIC HOLDINGS, LLC, AND THEIR OFFICERS, AGENTS, AND EMPLOYEES FROM AND AGAINST ANY AND ALL CLAIMS, DEMANDS, LOSSES, DAMAGES, CAUSES OF ACTION, SUITS, AND LIABILITIES OF EVERY KIND (INCLUDING REASONABLE ATTORNEYS' FEES, COURT COSTS, AND OTHER EXPENSES RELATED THERETO) FOR INJURY TO OR DEATH OF A PERSON OR FOR LOSS OF OR DAMAGE TO ANY PROPERTY, ARISING OUT OF OR IN CONNECTION WITH ANY WORK DONE, ACTION TAKEN OR PERMITTED BY CONTRACTOR, ITS SUBCONTRACTORS, AGENTS OR EMPLOYEES UNDER THIS CONTRACT.

IT IS THE EXPRESS INTENTION OF THE PARTIES HERETO, BOTH CONTRACTOR AND RAILROAD, THAT THE INDEMNITY PROVIDED FOR IN THIS PARAGRAPH INDEMNIFIES RAILROAD FOR ITS OWN NEGLIGENCE, WHETHER THAT NEGLIGENCE IS ACTIVE OR PASSIVE, OR IS A CONCURRING CAUSE OF THE INJURY, DEATH OR DAMAGE; PROVIDED THAT SAID INDEMNITY SHALL NOT PROTECT RAILROAD FROM LIABILITY FOR DEATH, INJURY OR DAMAGE ARISING SOLELY OUT OF THE NEGLIGENCE, WILLFUL MISCONDUCT OR CRIMINAL ACTIONS OF RAILROAD, ITS' OFFICERS, AGENTS AND EMPLOYEES. IT IS STIPULATED BY THE PARTIES THAT RAILROAD OWES NO DUTY TO CONTRACTOR, ITS CLIENT, OR THEIR DIRECTORS, OFFICERS, EMPLOYEES AGENTS OR INVITEES, TO PROVIDE A SAFE WORK PLACE AND THAT ALL PARTIES ENTERING ONTO RAILROAD PROPERTY DO SO AT THEIR SOLE RISK.

9. Should RAILROAD bring suit to compel performance of or to recover for breach of any covenant or condition contained herein, CONTRACTOR shall pay to RAILROAD the reasonable attorneys' fees it incurs, whether pre- or post-judgment, in addition to the amount of any judgment and costs.
10. Prior to the performance of any work upon or adjacent to RAILROAD'S property under this Agreement:
 - (a) CONTRACTOR shall furnish RAILROAD, at CONTRACTOR's expense, a certified copy of a public liability and property damage liability insurance policy issued in the name of CONTRACTOR covering the contractual liability assumed by CONTRACTOR under Section 8 hereof. The form, substance and limits of said insurance policy shall be subject to the approval of RAILROAD and shall be in compliance with the provisions contained in the insert marked Exhibit "A", hereto attached and made a part hereof.
 - (b) CONTRACTOR shall furnish RAILROAD, at CONTRACTOR expense, a certificate of Workers Compensation coverage, including Federal Employee Liability Act coverage if applicable, for its workers and subcontractors in accordance with the requirements of the State or States in which said work is to be performed.
 - (c) CONTRACTOR shall furnish a policy of Railroad Protective coverage in the amount of Two million and no/100 dollars (\$2,000,000.00) per occurrence, Six million and no/100 dollars (\$6,000,000.00) in the aggregate with named insured as outlined in Exhibit "A" hereto. **WARNING: ONLY A POLICY OF RAILROAD PROTECTIVE INSURANCE WHICH SPECIFICALLY NAMES RAILROAD, PERMIAN BASIN RAILWAYS, INC., AND IOWA PACIFIC HOLDINGS, LLC, AS THE INSURED PARTIES IS ACCEPTABLE AND A COPY OF SAID POLICY MUST BE RECEIVED PRIOR TO THIS PERMIT BEING APPROVED ON BEHALF OF RAILROAD.**

CONTRACTOR shall keep said insurance in full force and effect until all work to be performed upon or adjacent to RAILROAD property under said contract is completed to the satisfaction of and accepted by Third Party and thereafter until CONTRACTOR has fulfilled the provisions of this Agreement with respect to the removal of tools, equipment and materials from RAILROAD property. Said policy shall name RAILROAD as additional insured.

11. The permission herein given shall not be assigned by CONTRACTOR without the prior written consent of RAILROAD, except in the case of subcontractors who shall be deemed agents of CONTRACTOR, subject to the terms of this Agreement. RAILROAD's requirements for CONTRACTOR working on RAILROAD Right-of-Way are attached hereto as Exhibit "B" and made a part hereof. Failure to comply with all of said requirements shall be grounds for cancellation of this Agreement at the sole option of RAILROAD.
12. **CONSTRUCTION PROVISIONS: In relation to RAILROAD's track and operations:**
- (a) **CONTRACTOR warrants it will place no bore pit closer than 25 feet from the end of the ties of the nearest track, as measured at right angles from said track; that all of the lines to be installed under RAILROAD'S track shall be a minimum of five feet six inches below the base of the rail; that carrier pipe(s) and/or wire lines shall be encased in Steel Casing Pipe in accordance with Exhibit "D" attached hereto, the casing criteria attached hereto; and that casing shall extend a minimum of 25 feet from the center line of the outside track on each side of said crossing, measured at a right angle to said track.**
 - (b) **CONTRACTOR shall be solely liable for location and protection of any subgrade railroad signal wires or other railroad facilities, which may be impacted by CONTRACTOR's Work. If the same shall be damaged by such Work, Contractor shall, at its own expense, immediately cause said damage to be corrected. CONTRACTOR shall be solely liable to RAILROAD for any and all costs resulting for any interruption of train service resulting from CONTRACTOR's Work.**
 - (c) **The foregoing provisions shall prevail over any lesser provision or standard set out for occupancy of adjoining or underlying lands.**

THIS AGREEMENT IS hereby declared to be binding upon the parties hereto.

IN WITNESS WHEREOF, the undersigned have hereunto set their hand and seals this _____ day of _____ 20____.

WITNESS

RAILROAD

«RailroadName»

By: _____

Printed Name: _____

Title: _____

WITNESS

CONTRACTOR

«ContractorName»

By: _____

Printed Name: _____

Title: _____

CONTRACTOR OCCUPANCY/ACCESS AGREEMENT EXHIBIT "A"

The coverage afforded hereunder shall include the liability assumed by the named insured under the following indemnification provisions contained in an agreement in writing between the named insured and «RailroadName» (the "Agreement"), covering work to be performed upon or adjacent to its property at or near Mile Post «Milepost» ±, quoted hereinbelow for convenience:

CONTRACTOR AGREES TO DEFEND, INDEMNIFY AND HOLD HARMLESS RAILROAD, PERMIAN BASIN RAILWAYS, INC., IOWA PACIFIC HOLDINGS, LLC, AND THEIR OFFICERS, AGENTS, AND EMPLOYEES FROM AND AGAINST ANY AND ALL CLAIMS, DEMANDS, LOSSES, DAMAGES, CAUSES OF ACTION, SUITS, AND LIABILITIES OF EVERY KIND (INCLUDING REASONABLE ATTORNEYS' FEES, COURT COSTS, AND OTHER EXPENSES RELATED THERETO) FOR INJURY TO OR DEATH OF A PERSON OR FOR LOSS OF OR DAMAGE TO ANY PROPERTY, ARISING OUT OF OR IN CONNECTION WITH ANY WORK DONE, ACTION TAKEN OR PERMITTED BY CONTRACTOR, ITS SUBCONTRACTORS, AGENTS OR EMPLOYEES UNDER THIS CONTRACT.

IT IS THE EXPRESS INTENTION OF THE PARTIES HERETO, BOTH CONTRACTOR AND RAILROAD, THAT THE INDEMNITY PROVIDED FOR IN THIS PARAGRAPH INDEMNIFIES RAILROAD FOR ITS OWN NEGLIGENCE, WHETHER THAT NEGLIGENCE IS ACTIVE OR PASSIVE, OR IS A CONCURRING CAUSE OF THE INJURY, DEATH OR DAMAGE; PROVIDED THAT SAID INDEMNITY SHALL NOT PROTECT RAILROAD FROM LIABILITY FOR DEATH, INJURY OR DAMAGE ARISING SOLELY OUT OF THE NEGLIGENCE, WILLFUL MISCONDUCT OR CRIMINAL ACTIONS OF RAILROAD, ITS OFFICERS, AGENTS AND EMPLOYEES. IT IS STIPULATED BY THE PARTIES THAT RAILROAD OWES NO DUTY TO CONTRACTOR, ITS CLIENT, OR THEIR DIRECTORS, OFFICERS, EMPLOYEES AGENTS OR INVITEES TO PROVIDE A SAFE WORK PLACE AND THAT ALL PARTIES ENTERING ONTO RAILROAD PROPERTY DO SO AT THEIR SOLE RISK. "

The policy or policies shall provide coverage in amount of not less than Two Million Dollars (\$2,000,000.00) combined single limit for all damages arising out of bodily injury to or death of persons and for loss of or damage to property.

The policy or policies, where applicable and available, shall contain Insurance Services Office Standard Endorsement CG 2417.

No cancellation of this policy or modification of the coverage afforded under this endorsement shall be effective until ten (10) days' notice thereof has been given to: «RailroadName», Attn.: _____, 118 S. Clinton St., Suite 400, Chicago, Illinois 60661-5773; Facsimile (312) 466-9589.

The policy as required in section 10(a) of the Agreement shall name RAILROAD as an additional insured.

The policy as required in section 10(b) of the Agreement shall name RAILROAD and affiliates as listed below as additional insured with respect to F.E.L.A. coverage, and/or if applicable under the laws of the State in which the work is performed.

The policy as required in section 10(c) of the Agreement shall name «RailroadName», Permian Basin Railways, Inc., and Iowa Pacific Holdings, LLC as insured.

RAILROAD requires that each Insurance Carrier providing coverage must be reasonably acceptable to RAILROAD, or be authorized to do business in the State for which this Agreement is written and have an A.M. Best rating of "A-" or better and a financial class rating of 7 or better.

CONTRACTOR OCCUPANCY/ACCESS AGREEMENT

EXHIBIT "B"

Requirements for Contractors working on RAILROAD Right-of-Way:

- A.** In order to protect RAILROAD'S investment in its right-of-way and for the safety of persons coming onto RAILROAD property, RAILROAD has established certain requirements. The following constitute minimum requirements for all persons coming on or near RAILROAD right-of-way. CONTRACTOR is encouraged to develop their own safety rules that meet or exceed the following requirements. CONTRACTOR will not be allowed to occupy or work on RAILROAD right-of-way prior to signing and dating this Agreement and returning it to the RAILROAD contact person noted herein.
- B.** All permits and agreements must be in effect, required payments made and insurance certificates received and approved prior to CONTRACTOR entering RAILROAD right-of-way. Insurance must remain in effect during the entire project.
- C.** Any dewatering utilizing drains or ditches on RAILROAD property must be approved by RAILROAD.
- D.** CONTRACTOR's work hereunder is subject to the terms of the Administration, Coordination and License Agreement between the RAILROAD and the Santa Cruz County Regional Transportation Commission ("RTC") and CONTRACTOR must have "Construction Plans" approved by the RTC prior to commencing work on a project. Approved plans and any revisions thereto will be furnished to all parties prior to implementation of changes.
- E.** CONTRACTOR will incur all costs for track work, including flagging, etc., made necessary due to the WORK.
- F.** Pursuant to United States Federal law and regulation, flagging protection is always required when equipment crosses or is working within 25 feet of center of any live track. When deemed necessary by RAILROAD, a flagman may be required at all times while working on RAILROAD right-of-way.
- G.** Crossing of any RAILROAD tracks must be done at approved locations and must be over full depth timbers, rubber, etc. Any equipment with steel wheels, lugs or tracks must not cross steel rails without aid of rubber tires or other approved protection.
- H.** If temporary construction crossings are necessary, they must be covered by a "Private Roadway and Crossing Agreement", and must be barricaded when not in use. A Private Roadway and Crossing Agreement is prepared by RAILROAD under the same general terms as this Agreement.
- I.** CONTRACTOR must furnish details on how CONTRACTOR will perform work that may affect existing drainage and/or possible fouling of track ballast as well as removal of overhead bridges/structures. (Structures and bridge spans over tracks must be removed intact).
- J.** Absolutely no piling of construction materials or any other material, including dirt, sand, etc., within 15 feet of center on any secondary track (25 feet of Main Line and siding tracks) or on property of RAILROAD not covered by an existing Construction Easement, permit, lease or agreement. A 10' clear area on both sides of a main track must remain unobstructed at all times to allow for stopped train inspection.
- K.** All bore pits must be a minimum of 25 feet from the nearest outside rail of any track, measured at a 90 degree angle to said track and all undertrack bores shall be no less than six feet below the bottom of the ties.
- L.** No construction will be allowed within 15 feet of center of any track unless authorized by RAILROAD and as shown on plans approved by RAILROAD. This includes any excavation, slope encroachment and driving of sheet piles.
- M.** No vehicles or machines shall remain unattended within 15 feet of a secondary track or within 25 feet of a Main Line track.

N. Should CONTRACTOR in any way interfere with RAILROAD operations or damage property during construction operations over RAILROAD'S tracks and right-of-way, CONTRACTOR, upon demand by RAILROAD to CONTRACTOR, shall immediately stop work on RAILROAD'S right-of-way for a period of not less than 48 hours to allow RAILROAD to investigate. Any necessary repairs shall be made by RAILROAD at CONTRACTOR'S sole cost and expense. No work will proceed until authorized by RAILROAD.

O. CONTRACTOR'S safety rules, including rules regarding personal safety equipment, must not conflict with RAILROAD safety policies or rules.

P. The provisions of Exhibit "C" attached hereto are incorporated herein as though fully set-forth herein.

CONTRACTOR'S ACKNOWLEDGMENT: WORK SITE LOCATION

Company_____

Address:_____

By: _____

Town: _____

Title: _____

State:_____

Date: _____

Project No. _____

RAILROAD CONTACT PERSON:

«RailroadName»

«RailroadContact»
NAME

«RailroadContactTitle»
TITLE

«RailroadAddress»
ADDRESS,CITY, STATE, ZIP

«RRContactPhone»
TELEPHONE NUMBER

«RRContactFax»
FAX NUMBER

CONTRACTOR OCCUPANCY/ACCESS AGREEMENT EXHIBIT "C"

Statement of Conditions when Flagmen, Protective Services and Devices or other appropriate personnel will be furnished by RAILROAD at sole expense of CONTRACTOR:

- A.** RAILROAD flagmen will be required for, but not limited to, the following conditions:
1. When, in the sole opinion of RAILROAD, protection is necessary to safeguard RAILROAD'S trains, engines, facilities and property;
 2. When work is performed, in any way, over, under, or within 25 feet of tracks or any RAILROAD facilities;
 3. When work in any way interferes with the operation of trains at usual speeds or threatens, damages, or endangers track or RAILROAD facilities;
 4. When any hazard is presented to RAILROAD's communications, signal, electrical, or other facilities due to persons, material, equipment, or blasting in the vicinity; or
 5. When and where material is being hauled across tracks, provided, however, special clearance must be obtained from RAILROAD before moving heavy or cumbersome objects and equipment which might result in making the track impassable for any period of time.
- B.** Protective Services and Devices, Other Specialized Personnel shall be provided when, in the sole opinion of RAILROAD, such are necessary in addition to flagging.

COST OF FLAGGING AND OTHER PROTECTIVE SERVICES AND DEVICES.

- A.** Flagging.
1. Flagging shall be billed a minimum of **actual cost (please verify rates with the RAILROAD office)** per day plus any expenses incurred for each flagman required, for each day, or for any portion thereof, for up to eight hours in one shift Monday through Friday, excepting holidays recognized by RAILROAD in its personnel policy manual.
 2. Time worked in excess of eight hours in one shift Monday through Friday, or worked in any amount on Saturday, Sunday and on holidays recognized by RAILROAD in its personnel policy manual, shall be billed at the rate of **actual cost (please verify rates with the RAILROAD office)** per eight-hour day, per flagman required, for each day or portion thereof worked.
- B.** Communications Linemen, Signalmen, Protective Services and Devices.
- All services required shall be billed at RAILROAD'S contracted rate with service provider plus a 20 percent RAILROAD administrative fee.

CONTRACTOR OCCUPANCY/ACCESS AGREEMENT EXHIBIT "D"

MINIMUM WALL THICKNESS FOR CASING PIPES UNDER RAILROAD TRACKS

1. STEEL CASING PIPE (A.R.E.A. SPEC. 1964)

<u>NOMINAL DIAMETER</u> (Inches)	<u>NOMINAL WALL THICKNESS</u> (Inches)	
	<u>PROTECTED</u>	<u>NOT PROTECTED*</u>
Under 14	0.188	0.188
14 and 16	0.219	0.281 (9/32)
18	0.250	0.312
20	0.281	0.344
22	0.312	0.375
24	0.344	0.406
26	0.375	0.438
28 and 30	0.406	0.469
32	0.438	0.500
34 and 36	0.469	0.531
38, 40 and 42	0.500	0.562

Steel Pipe to have a minimum yield strength of 35,000 psi.

* When casing is installed without benefit of a protective coating and said casing is not cathodically protected, the wall thickness shall be increased to the nearest standard size which is a minimum of 0.063 inches greater than the thickness shown for protected pipe except for diameters under 12.75 inch.

2. CONCRETE PIPE

All diameters of concrete pipe under main tracks shall be specified, as A.S.T.M. C-76 (Latest Revision) Table V. Concrete pipe under siding and yard tracks may be Table IV. (Either Wall "B" or "C" is acceptable.

3. CORRUGATED METAL PIPE

Table shows permissible minimum and maximum height of cover for both riveted and helical pipe.

<u>NOMINAL DIAMETER</u> (Inches)	<u>16 GAGE</u>	<u>14 GAGE</u>	<u>12 GAGE</u>
12	4-53 (ft) 4-80 (ft)		
15	4-42	4-64	
18	4-34	4-53	
21	4-28	4-45	4-79 (ft)
24	5-23	4-40	4-70
30		4-31	4-56
36		5-23	4-46
42		4-49	4-78