

BNSF RAILWAY COMPANY
INDUSTRY TRACK AGREEMENT

THIS AGREEMENT ("Agreement") made as of this ____ day of _____, 2009, ("**Effective Date**") by and between **BNSF RAILWAY COMPANY**, a Delaware corporation ("**Railroad**"), and **THE PORT OF SEATTLE**, a Washington municipal corporation ("**Port**"), and **SSA TERMINALS, LLC**, a Delaware limited liability company ("**SSAT**", and together with the Port collectively, the "**Port Parties**").

RECITALS

A. The Port owns or controls certain real property located in Seattle, Washington and depicted on Exhibit A attached hereto (the "**T-18 Port Rail Premises**") and the Port has entered into a lease for the operation of that portion of the T-18 Port Rail Premises depicted on Exhibit B attached hereto (the "**T-18 Terminal Premises**") with SSAT.

B. Railroad, the Port, and Union Pacific Railroad Company ("**UP**") entered into that certain Industry Track Agreement dated June 9, 1988 (the "**1988 ITA**"), relating to the construction, maintenance, and operation of certain tracks within the T-18 Port Rail Premises commonly known as the "**North Intermodal Yard Tracks**" as depicted on Exhibit A.

C. Railroad, the Port, and UP entered into that certain Memorandum of Agreement ("**MOA**"), that certain Rail Facilities Lease and Real Property License ("**Lease**"), that certain Assignment of Railroad Franchise ("**Assignment**"), and that certain Indemnity Agreement ("**Indemnity**", and together with the MOA, Lease, and Assignment collectively, the "**Original T-18 Agreements**"), all dated September 7, 1999, relating to the expansion of the T-18 Port Rail Premises, as described in the Original T-18 Agreements.

D. The Lease and Indemnity were terminated by delivery of notice dated July 7, 2004, effective October 31, 2004, and therefore, are no longer included as part of the Original T-18 Agreements.

E. Railroad and UP assigned certain franchise rights to the Port in order for the Port to construct, own, and maintain certain rail facilities within such franchise property, defined in the Original T-18 Agreements as the "**Franchise R&D Tracks**". Railroad and/or UP are to be permitted to use the Franchise R&D Tracks after entering into an ITA with the Port.

F. The Port further constructed additional support tracks within the T-18 Port Rail Premises pursuant to the Original T-18 Agreements (the "**Additional Tracks**", and together with Franchise R&D Tracks and North Intermodal Yard Tracks, collectively the "**Track**").

G. The expansion of the T-18 Port Rail Premises pursuant to the Original T-18 Agreements included the relocation of certain trackage improvements described under the Lease and jointly owned by Railroad and UP. The Port surrendered these trackage improvements to Railroad and UP pursuant to the terms of the Lease upon termination, and the trackage improvements are not included in the Track under this Agreement.

H. To satisfy the request of the mutual customers of the Railroad and SSAT, the Port Parties and the Railroad now desire that Railroad operate over the Track to provide on-dock rail service at the T-18 Port Rail Premises, and Railroad desires to provide such service, subject to the terms of this Agreement.

NOW, THEREFORE, in consideration of the mutual covenants contained herein, the parties agree as follows:

1. **OWNERSHIP**. The Port Parties own or control the Track, subject to the terms and conditions of the Original T-18 Agreements.

2. **MAINTENANCE AND OPERATION**.

(a) The Port Parties shall be responsible for obtaining, without expense to Railroad, all necessary real property rights and public authority and permission, including applicable permits, for the construction, maintenance, and operation of the Track. The Port Parties shall strictly comply with all applicable laws, statutes, regulations, ordinances, orders, covenants, restrictions, or decisions of any court of competent jurisdiction, including, without limitation, those pertaining to environmental matters, and other reasonable Railroad requirements, relating to the use of the Track, Facilities or Equipment (collectively, "**Legal Requirements**").

(b) The Port Parties shall maintain the Track subject to FRA Class 2 terms and conditions, at a minimum, and shall maintain the Track and all Facilities and Equipment (defined below) (if any) in a safe, good, and workmanlike condition in compliance with all applicable Legal Requirements and consistent with Industry Best Practices, which shall, for purposes of this Agreement, mean those measures generally acknowledged and agreed among the majority of North American Class I railroads to be tried, tested and proven to be safe and efficient rules and standards for maintenance of similarly situated track, facilities and equipment assuming usual and customary operating conditions. Maintenance means keeping the Track, Facilities, Equipment, and surrounding property in good working order and condition, including without limitation: (i) providing proper drainage along the Track, (ii) keeping the Track free

and clear of snow, ice, vegetation, structures, and other obstacles, (iii) maintaining grade crossing warning devices, passive warning signs, gates, fences, barriers, roadways, track drainage facilities, lighting and track and other signals; and (iv) and maintaining proper traffic control, safety, and security measures addressing motor vehicle, truck traffic, or entry of any parties into the T-18 Port Rail Premises which may cross, come in contact with, or approach the vicinity of any Track operated or occupied by Railroad. Without relieving the Port Parties from any of their obligations under this Agreement, Railroad may, but is not obligated to, refuse to operate over the Track or use or enter the Facilities or contact the Equipment whenever Railroad, in its sole discretion, determines that the same is unsafe or unsatisfactory for Railroad's operation, entry or contact. Railroad shall have no duty of inspection of the Track, Facilities, Equipment, or any other property within the T-18 Port Rail Premises, which duty of inspection shall be the sole responsibility of the Port Parties. If and when the Port Parties have remedied such condition(s) to Railroad's sole satisfaction, Railroad may resume operation over the Track or use of or entry into the Facilities or contact with the Equipment. Railroad's operation over the Track or use of or entry into any Facility or contact with any Equipment with knowledge of a substandard or unsatisfactory condition shall not constitute a waiver of the Port Parties' obligations contained herein or of Railroad's right to recover for or be indemnified and defended against damages to property or injury to or death of persons that may result therefrom.

(c) The Port Parties shall, at their sole expense, pay all costs for changes, repairs or alterations to the Track that may be necessary to conform to any changes of grade and/or relocation of Railroad's track at the point of connection with the Track, if such change of grade or relocation is required to comply with any Legal Requirement, is related to construction by or for any governmental agency, or is made for any other reason beyond Railroad's reasonable control.

(d) If the Port Parties install any gates or fencing across the Track, or a track scale, unloading pit, loading or unloading device, adjustable loading dock, warehouse door, or any other structure (collectively, "**Facilities**") affecting the Track, the Port Parties shall be solely responsible for assuring the safe and satisfactory condition of the same and shall not allow any Facilities to be a source of danger to the safe operation of the Track. The Port Parties shall also be solely responsible for assuring the safe and satisfactory condition of all of the Port Parties' equipment touching, used in conjunction with or otherwise affecting the Track ("**Equipment**") and shall not allow any Equipment to be a source of danger to the safe operation of the Track. Before utilizing or unloading any equipment spotted onto the Track, the Port Parties shall inspect the same and all other Equipment and Facilities for the safety of persons working on or about these items to assure compliance with the foregoing. The Port Parties shall utilize all Facilities, Equipment and spotted equipment so as not to negatively affect safe and efficient operation over the Track. Subject to all Legal Requirements, including, without limitation, all laws and regulations administered by the United States Department of Homeland Security and any other applicable governmental agencies, the Port Parties shall, among other things: keep any gates across the Track open whenever necessary, in the reasonable judgment of Railroad, to enable Railroad to safely and efficiently operate over the Track; keep unloading pits securely covered when not in actual use and at all times when the Track is being switched by Railroad; keep all doors firmly secured; and keep adjustable loading docks at warehouses securely fastened in an upright position when not in actual use and at all times when the Track is being switched by Railroad.

(e) Railroad may require for safety purposes that the Port Parties, at their sole cost and expense, provide flaggers, lights, traffic control devices, automatic warning devices, or any such safety measure (collectively, "**Safety Measures**") that Railroad deems appropriate in connection with the use of the Track located on the T-18 Terminal Premises. Railroad, at its sole cost and expense, shall be responsible for providing flaggers, lights, traffic control devices, automatic warning devices, or any such safety measure that Railroad deems appropriate in connection with the use of the Track located outside of the T-18 Terminal Premises. With regard to the use of the Track located on the T-18 Terminal Premises, if the Railroad provides the Port Parties notice that the Safety Measures deployed by the Port Parties on the T-18 Terminal Premises are not adequate and if the Port Parties fail to provide Safety Measures meeting the Railroad's requirements for the next train scheduled to be taken onto the T-18 Terminal Premises, the Port Parties shall reimburse Railroad for all of Railroad's costs within thirty (30) days of receipt of a bill rendered therefor, including but not limited to the furnishing of Railroad's flaggers and any vehicle rental costs incurred. With regard to the use of the Track located on the T-18 Terminal Premises, the cost of flagger services and other safety measures provided by Railroad, when deemed necessary by the Railroad's representative pursuant to the terms of this paragraph, will be borne by the Port Parties. The cost for flaggers shall include, but not be limited to, the following: pay for at least an eight (8) hour basic day with time and one-half or double time for overtime, rest days and holidays (as applicable), vacation allowance, paid holidays (as applicable), Railroad and unemployment insurance, public liability and property damage insurance, health and welfare benefits, transportation, meals, lodging and supervision. Negotiations for Railroad labor or collective bargaining agreements and rate changes authorized by appropriate Federal authorities may increase flagging rates. The flagging rate in effect at the time of performance by the flaggers will be used to calculate the flagging costs pursuant to this **Section 2(e)**.

(f) In the event the public authority having jurisdiction thereover orders the separation of the grade of the Track and any street, road, highway, other rail line or the like, the Port Parties hereby consent to the removal and/or relocation of the Track and shall reimburse Railroad all expenses in connection with the removal and/or relocation of the Track.

(g) The Port Parties shall not place nor knowingly permit to be placed by any party other than a Railroad Indemnitee any permanent or temporary material, structure, pole, container, storage vessel, above-ground or underground tank, or other obstruction (collectively, "**Obstructions**") within eight and one-half (8-½) feet laterally from the center (nine and one-half (9-1/2) feet on either side of the centerline of curved Track) or within 23 and one-half (23-1/2) feet vertically from the top of the rail of said Track

("Minimal Clearances"), provided that if any Legal Requirement requires greater clearances than those provided for in this Section 2(g), then the Port Parties shall strictly comply with such Legal Requirement. Furthermore, in addition to their obligations in previous sentence, the Port Parties shall not permit to be placed, or allow to remain, any Obstructions within the Minimum Clearances within the T-18 Terminal Premises. The Port Parties shall not place, nor allow any non-Railroad invitee or licensee of a Port Party, nor knowingly permit any non-Railroad party to place any freight car within 250 feet of either side of any at-grade crossings on the Track. **THE PORT PARTIES SHALL INDEMNIFY, DEFEND, AND HOLD HARMLESS RAILROAD INDEMNITEES FROM AND AGAINST ANY AND ALL LIABILITIES (AS DEFINED BELOW) ARISING OR GROWING OUT OF LOSS OF OR DAMAGE TO PROPERTY OR INJURY TO OR DEATH OF PERSONS OCCURRING DIRECTLY OR INDIRECTLY BY REASON OF ANY REDUCED CLEARANCE THAT THE PORT PARTIES ARE RESPONSIBLE TO AVOID UNDER THIS PARAGRAPH, EXCEPT TO THE EXTENT SUCH LIABILITIES ARE PROXIMATELY CAUSED BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF ANY RAILROAD INDEMNITEE.** Railroad's operation over the Track with knowledge of an unauthorized reduced clearance will not be a waiver of the covenants of the Port Parties contained in this Section 2(g) or of Railroad's right to recover and be indemnified and defended against such damages to property, or injury to or death of persons that may result therefrom.

(h) The Port Parties shall be solely responsible for vessel off-loading and loading of rail equipment provided for on-dock rail service, and shall ensure offloading and loading of rail equipment shall be properly performed in a good and workmanlike manner, consistent with all Legal Requirements and the operating plan attached as Exhibit C hereto (the "Operating Plan"). The Port Parties shall ensure all loaded rail equipment shall be properly secured. All loading operations shall be accomplished within the timeframes specified in the Operating Plan, and the Port Parties shall provide prompt notice to Railroad of availability of a loaded train for departure in accordance with such Operating Plan. The Port Parties acknowledge that Railroad may from time to time stage and leave locomotives and other equipment unattended on the Track between operations as contemplated in the Operating Plan, and agree that the Port Parties shall have no rights to operate or otherwise use any such locomotives and other equipment and shall be responsible for any damage thereto or Liabilities arising in connection therewith as and to the extent set forth in more detail in Section 4 below.

(i) At the request of Railroad, the Port Parties shall permit the Railroad or independent contractors to access the T-18 Terminal Premises and shall provide reasonable space, free of charge, for operations and storage of appropriate equipment necessary to provide train air testing services and/or equipment on site in order to accommodate the rail services contemplated herein.

(j) Railroad shall not be required to provide any services with respect to any Toxic or Poisonous Inhalation substances and Port Parties shall not load onto rail equipment any such substances unless Railroad shall have been provided reasonable advance notice of such commodities for off-loading and written agreement of Railroad to accept same.

3. **TERM.** Unless earlier terminated as provided herein, this Agreement will be in force for the term of ONE MONTH from the Effective Date and will automatically continue thereafter until terminated by either party pursuant to the terms herein or by giving to the other party thirty (30) days' written notice.

4. **INDEMNITY.**

(a) For purposes of this Agreement: (i) "**Railroad Indemnitees**" means Railroad and Railroad's affiliated companies, partners, successors, assigns, legal representatives, officers, directors, shareholders, employees and agents; (ii) "**Port Parties Indemnitees**" means the Port, SSAT, their respective affiliated companies, partners, successors, assigns, legal representatives, officers, directors, shareholders, employees and agents; (iii) "**Liabilities**" means all claims, liabilities, fines, penalties, costs, damages, losses, liens, causes of action, suits, demands, judgments and expenses (including, without limitation, court costs, attorneys' fees and costs of investigation, removal and remediation and governmental oversight costs) environmental or otherwise; and (iv) "**Port Parties Entities**" include the Port Parties or the Port Parties' officers, agents, invitees, licensees, employees, or contractors, or any party directly or indirectly employed by any of them, or any party they control or exercise control over. Notwithstanding the foregoing definitions or any other provision in this Agreement, none of the officers, directors, shareholders, or employees of Railroad or the Port Parties shall have any personal liability under this Agreement, including any duty to indemnify the Railroad Indemnitees or the Port Parties Indemnitees pursuant to the indemnity obligations created under this Agreement; provided that the limitation expressed in this sentence shall not alter any obligation otherwise arising under any Legal Requirements or any obligation created under any agreement outside of this Agreement.

(b) **THE PORT PARTIES SHALL RELEASE, INDEMNIFY, DEFEND, AND HOLD THE RAILROAD INDEMNITEES HARMLESS FROM AND AGAINST ANY LIABILITIES UNDER CERCLA OR OTHER ENVIRONMENTAL LAWS ARISING OUT OF OR RELATED TO (IN WHOLE OR IN PART) ANY CLAIM THAT BY VIRTUE OF THE USE OF THE TRACK CONTEMPLATED IN THIS AGREEMENT RAILROAD IS (I) AN "OWNER", "OPERATOR", "ARRANGER" OR "TRANSPORTER" OF THE TRACK OR THE T-18 PORT RAIL PREMISES, OR (II) OTHER THAN A COMMON CARRIER WITH RESPECT TO THE TRACK REGARDLESS OF ANY NEGLIGENCE OR STRICT LIABILITY OF ANY RAILROAD INDEMNITEE.**

(c) **IF ANY EMPLOYEE OF ANY PORT PARTIES ENTITY CLAIMS HE OR SHE IS AN EMPLOYEE OF ANY**

RAILROAD INDEMNITEE, THE PORT PARTIES SHALL INDEMNIFY AND HOLD THE RAILROAD INDEMNITEES HARMLESS FROM AND AGAINST ANY LIABILITIES ARISING OUT OF OR RELATED TO (IN WHOLE OR IN PART) ANY SUCH CLAIM INCLUDING, BUT NOT LIMITED TO, CLAIMS RELATED TO PROCEEDINGS UNDER OR RELATED TO THE FEDERAL EMPLOYERS' LIABILITY ACT, THE SAFETY APPLIANCE ACT, THE LOCOMOTIVE INSPECTION ACT, THE OCCUPATIONAL SAFETY AND HEALTH ACT, THE RESOURCE CONSERVATION AND RECOVERY ACT, AND ANY SIMILAR STATE OR FEDERAL STATUTE AND REGARDLESS OF ANY NEGLIGENCE OR STRICT LIABILITY OF ANY RAILROAD INDEMNITEE RELATED TO SUCH CAUSES OF ACTION.

(d) TO THE FULLEST EXTENT PERMITTED BY LAW, THE PORT PARTIES SHALL RELEASE, DEFEND, INDEMNIFY, AND HOLD HARMLESS THE RAILROAD INDEMNITEES FROM ALL LIABILITIES ARISING OUT OF OR RELATING TO ACTS, OMISSIONS AND EVENTS OCCURRING DURING THE TERM OF THIS AGREEMENT THAT RELATE IN ANY WAY TO (i) THE DESIGN, CONSTRUCTION, MAINTENANCE, OR CONDITION OF ALL OR ANY PORTION OF THE T-18 PORT RAIL PREMISES, INCLUDING WITHOUT LIMITATION THE TRACK AND ANY FACILITIES OR EQUIPMENT, (ii) THE USE OF AND OPERATION BY RAILROAD UPON THE PORT PARTIES' PROPERTY, INCLUDING WITHOUT LIMITATION THE STAGING OR OTHER PRESENCE OF LOCOMOTIVES OR OTHER EQUIPMENT THEREON, AND, WITHIN THE T-18 TERMINAL PREMISES, ANY UNAUTHORIZED USE OF SUCH LOCOMOTIVES OR OTHER EQUIPMENT, OR VANDALISM OR OTHER DAMAGE THERETO, AND BEYOND THE T-18 TERMINAL PREMISES, ANY UNAUTHORIZED USE OF SUCH LOCOMOTIVES OR OTHER EQUIPMENT, OR VANDALISM OR OTHER DAMAGE THERETO, BY ANY PORT PARTY INDEMNITEE, CONTRACTOR, OR LICENSEE (iii) THE ENVIRONMENTAL CONDITION AND STATUS OF THE TRACK OR RAILROAD'S PROPERTY CAUSED OR AGGRAVATED BY, OR CONTRIBUTED TO, IN WHOLE OR IN PART, BY THE PORT PARTIES ENTITIES, (iv) THE ENVIRONMENTAL CONDITION AND STATUS OF THE T-18 PORT RAIL PREMISES, (v) THE PORT PARTIES' OCCUPATION AND USE OF PROPERTY PURSUANT TO THE ORIGINAL T-18 AGREEMENTS, INCLUDING WITHOUT LIMITATION, CLAIMS AND CAUSES OF ACTION ASSERTED AGAINST ANY RAILROAD INDEMNITEE BY ANY INSURER OF SAID PROPERTY, (vi) ANY DEFAULT OR BREACH OF ANY COVENANT, CONDITION, OR REPRESENTATION OF PORT PARTIES IN THIS AGREEMENT, AND/OR (vii) ANY NEGLIGENT OR WILLFUL ACT OR OMISSION OF ANY PORT PARTIES ENTITIES. EXCEPT TO THE EXTENT OTHERWISE PROVIDED IN SECTION 2(g), THE FOREGOING OBLIGATIONS TO RELEASE, DEFEND, INDEMNIFY, AND HOLD HARMLESS THE RAILROAD INDEMNITEES FOR LIABILITIES THAT RELATE IN ANY WAY TO ITEMS (i) AND (iv) ABOVE SHALL APPLY EXCEPT TO THE EXTENT SUCH LIABILITIES ARE PROXIMATELY CAUSED BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF ANY RAILROAD INDEMNITEE. EXCEPT AS EXPRESSLY PROVIDED OTHERWISE IN THE PRECEDING SENTENCE, THE FOREGOING OBLIGATIONS TO RELEASE, DEFEND, INDEMNIFY, AND HOLD HARMLESS THE RAILROAD INDEMNITEES FOR LIABILITIES THAT RELATE IN ANY WAY TO ITEMS (ii), (iii), (v), (vi), AND (vii) ABOVE, BUT NOT CONTRIBUTED TO, BY ANY OF THE ITEMS DESCRIBED IN ITEMS (i) AND (iv) ABOVE, SHALL APPLY EXCEPT TO THE EXTENT SUCH LIABILITIES ARE PROXIMATELY CAUSED BY THE NEGLIGENT ACTS OR OMISSIONS OF ANY RAILROAD INDEMNITEE. THE PORT PARTIES SPECIFICALLY AND EXPRESSLY WAIVE ANY IMMUNITY THEY MAY HAVE UNDER WASHINGTON INDUSTRIAL INSURANCE, TITLE 51 RCW.

(e) WITH RESPECT TO ANY LIABILITIES ARISING OUT OF OR RELATING TO EVENTS FOR WHICH THE PORT PARTIES ARE OBLIGATED TO INDEMNIFY THE RAILROAD INDEMNITEES UNDER PARAGRAPHS 2(g) AND 4(d)(i) AND (iv) ABOVE, TO THE FULLEST EXTENT PERMITTED BY LAW, RAILROAD SHALL RELEASE, DEFEND, INDEMNIFY, AND HOLD HARMLESS THE PORT PARTIES INDEMNITEES FROM ALL LIABILITIES ARISING OUT OF OR RELATING TO ACTS, OMISSIONS AND EVENTS TO THE EXTENT PROXIMATELY CAUSED BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF ANY RAILROAD INDEMNITEE. WITH RESPECT TO ANY LIABILITIES ARISING OUT OF OR RELATING TO ANY EVENTS NOT COVERED IN THE PRECEDING SENTENCE, TO THE FULLEST EXTENT PERMITTED BY LAW, RAILROAD SHALL RELEASE, DEFEND, INDEMNIFY, AND HOLD HARMLESS THE PORT PARTIES INDEMNITEES FROM ALL LIABILITIES ARISING OUT OF OR RELATING TO ACTS, OMISSIONS AND EVENTS OCCURRING DURING THE TERM OF THIS AGREEMENT TO THE EXTENT PROXIMATELY CAUSED BY AND NOT CONTRIBUTED TO BY ANY OF THE ITEMS DESCRIBED IN ITEMS 4(d)(i) AND (iv) ABOVE, THE NEGLIGENCE OR WILLFUL MISCONDUCT OF ANY RAILROAD INDEMNITEE.

(f) Upon written notice from Railroad, the Port Parties agree to assume the defense of any lawsuit or other proceeding brought against any Railroad Indemnatee by any entity, relating to any matter covered by this Agreement for which the Port Parties have an obligation to assume liability for and/or save and hold harmless any Railroad Indemnatee. The Port Parties shall pay all costs incident to such defense, including, but not limited to, attorneys' fees, investigators' fees, litigation and appeal expenses, settlement payments, and amounts paid in satisfaction of judgments. Likewise, upon written notice from the Port or SSA, Railroad agrees to assume the defense of any lawsuit or other proceeding brought against any Port Parties Indemnatee by any entity, relating to any matter covered by this Agreement for which Railroad has an obligation to assume liability for and/or save and hold harmless any Port Parties Indemnatee. Railroad shall pay all costs incident to such defense, including, but not limited to, attorneys' fees, investigators' fees,

litigation and appeal expenses, settlement payments, and amounts paid in satisfaction of judgments.

5. **INSURANCE.** The Port Parties shall, at their sole cost and expense, procure and maintain during the life of this Agreement the following insurance coverage:

- A. Commercial General Liability insurance that contains broad form contractual liability with a combined single limit of a minimum of \$5,000,000 each occurrence and an aggregate limit of at least \$10,000,000. Coverage must be purchased on a post 1998 ISO occurrence or equivalent and include coverage for, but not limited to, Bodily Injury and Property Damage, Products and completed operations. The definition of insured contract shall be amended to remove any exclusion or other limitation for any work being done within 50 feet of railroad property.
- B. Workers Compensation and Employers Liability insurance including coverage for, but not limited to:
 - ◆ Port Parties' statutory liability under the worker's compensation laws of the state(s) in which the work is to be performed. If optional under State law, the insurance must cover all employees anyway.
 - ◆ Employers' Liability (Part B) with limits of at least \$500,000 each accident, \$500,000 by disease policy limit, \$500,000 by disease each employee.

In addition, Port Parties shall comply with the following additional requirements with respect to such insurance:

Any insurance policy shall be written by a reputable insurance company with a current Best's Guide Rating of A- and Class VII or better, and authorized to do business in the state(s) in which the service is to be provided. If any portion of the operation is to be subcontracted by Port Parties, Port Parties shall require that the subcontractor provide and maintain insurance coverage as set forth herein.

Prior to commencing operations governed by this Agreement, Port Parties shall furnish to Railroad an acceptable certificate(s) of insurance including an original signature of the authorized representative evidencing the required coverage, endorsements, and amendments and referencing the contract audit/folder number if available. The policy(ies) shall contain a provision that obligates the insurance company(ies) issuing such policy(ies) to notify Railroad in writing at least 30 days prior to any cancellation or non-renewal with such provision indicated on the certificate of insurance. In the event of a claim or lawsuit involving Railroad arising out of this agreement, Port Parties will make available any required policy covering such claim or lawsuit.

Failure to provide evidence as required by this section shall entitle, but not require, Railroad to terminate this Agreement immediately. Acceptance of a certificate that does not comply with this section shall not operate as a waiver of Port Parties' obligations hereunder. The fact that insurance (including, without limitation, self-insurance) is obtained by Port Parties shall not be deemed to release or diminish the liability of Port Parties including, without limitation, liability under the indemnity provisions of this Agreement. Damages recoverable by Railroad shall not be limited by the amount of the required insurance coverage.

If any portion of the operation is to be subcontracted by the Port Parties, the Port Parties shall require that the subcontractor shall provide and maintain insurance coverage(s) as set forth herein, naming Railroad as an additional insured, and shall require that the subcontractor shall release, defend and indemnify Railroad to the same extent and under the same terms and conditions as the Port Parties are required to release, defend and indemnify Railroad herein.

6. **DEFINITION OF COST AND EXPENSE.** For the purpose of this Agreement, "cost" or "costs" "expense" or "expenses" includes, but is not limited to, actual labor and material costs including all assignable additives, and material and supply costs at current value where used. In the event that the Port Parties or Railroad shall fail to pay any monies due to the other within thirty (30) days after the invoice date, then the obligated party shall pay interest on such unpaid sum from such due date until paid at an annual rate equal to the lesser of (i) the prime rate last published in *The Wall Street Journal* in the preceding December plus two and one-half percent (2 1/2%), or (ii) the maximum rate permitted by law.

7. **RIGHT OF RAILROAD TO CONSTRUCT FUTURE FACILITIES.** Railroad retains the right, without liability to the Port Parties or any other party, to construct or allow to be constructed upon its property other facilities, and to use its property in any manner, provided Railroad uses all commercially reasonable efforts to avoid material interference with the use of the Track as described herein.

8. **PUBLIC ASSESSMENTS.** The Port Parties shall timely pay all compensation, assessments and levies required at any time by any public authority, entity, or person for the privilege of maintaining and operating the Track, and shall not cause or permit any liens to be filed against any Railroad property. In the event any such liens are filed, the Port Parties shall cause such liens to be released within fifteen (15) days.

9. **NOTIFICATION REQUIREMENTS**

- (a) The Port Parties shall give immediate notice to Railroad's Resource Operations Center at (800) 832-5452 of any release of

hazardous substances on or from the Track, violation of environmental Legal Requirements, or inspection or inquiry by governmental authorities charged with enforcing environmental Legal Requirements with respect to the use of the Track. The Port Parties shall use reasonable commercial efforts to promptly respond to any release on or from the Track. The Port Parties also shall give Railroad immediate notice of all measures undertaken on behalf of the Port Parties to investigate, remediate, respond to or otherwise cure such release or violation.

(b) In the event that the Port Parties have notice of a release or violation of Environmental Laws on or from the Track which occurred or may occur during the term of this Agreement, the Port Parties, at the Port Parties' sole risk and expense, shall take timely measures to investigate, remediate, respond to or otherwise cure such release or violation.

(c) The Port Parties shall promptly report to Railroad in writing any conditions or activities upon the T-18 Port Rail Premises or the Track which create a risk of harm to persons, property or the environment and shall take whatever action is necessary to prevent injury to persons or property arising out of such conditions or activities; provided, however, that the Port Parties' reporting to Railroad shall not relieve the Port Parties of any obligation whatsoever imposed on them by this Agreement or by any Legal Requirement. The Port Parties shall promptly respond to Railroad's request for information regarding said conditions or activities.

10. **DEFAULT.** The following events shall constitute defaults hereunder: (a) creating or allowing to remain any condition, including without limitation, any environmental condition, on or about the Track, which in Railroad's sole judgment interferes with or endangers the operations of Railroad; (b) except as permitted herein, assignment or transfer by operation of law of the Port Parties' rights or obligations under this Agreement; (c) defaults on any of the covenants, representations, or agreements of the Port Parties contained in this Agreement.

11. **TERMINATION.**

(a) In addition to the parties' termination rights set forth elsewhere in this Agreement, and in addition to all other remedies available at law or in equity, Railroad may, without incurring any liability to the Port Parties, suspend and/or terminate, this Agreement immediately on written notice to Port Parties and discontinue the operation of the Track, in the event of any of the following events:

- (i) any default as described in Sections 10(a) or (b) occurs;
- (ii) any default as described in Section 10(c) occurs and persists for thirty (30) days following written notice from Railroad;
- (iii) any work stoppage by employees or contractors of Port Parties or Railroad (but not including any strike or management lockout involving longshore labor);
- (iv) Railroad is authorized by competent public authority to abandon its line to which said Track is connected; or
- (v) Railroad is dispossessed of the right to operate over the Track or its connecting track or any part thereof.

(b) Upon the expiration or earlier termination of this Agreement as provided herein, the parties' rights and obligations with respect to the Track shall be as set forth in the Original T-18 Agreements.

(c) The Port Parties hereby agree to waive and release all claims, rights, and causes of action that they have or may have against Railroad because of the discontinuance of operation of the Track as provided in this Section 11.

12. **ASSIGNMENT.** This Agreement will inure to the benefit of and be binding upon the successors and assigns of the parties hereto; provided, however, that neither the Port Parties nor Railroad may assign this Agreement without the prior written consent of the other party, which may be withheld in the reasonable judgment of the other party. Notwithstanding the foregoing, SSAT may assign its rights and obligations under this Agreement without consent of Railroad to a subsidiary of SSAT to which SSAT assigns its interest in the Lease. Either party hereto may assign any receivables due them under this Agreement; provided, however, that such assignments will not relieve the assignor of any of its rights or obligations under this Agreement.

13. **NOTICES.** Any notice required or permitted to be given hereunder must be in writing and the same shall be given and will be deemed to have been given if (i) placed in the United States mail, certified, return receipt requested, or (ii) deposited into the custody of a nationally recognized overnight delivery service, addressed to the party to be notified at the address specified below, or to such other address as the party to be notified may designate by giving the other party no less than thirty (30) days' advance written notice. The address for such notice shall be the address set forth below each party's signature, which may be changed by written notice to the other party.

14. **SURVIVAL.** Neither termination nor expiration will release either party from any liability or obligation under this Agreement, whether of indemnity or otherwise, resulting from any acts, omissions or events happening prior to the date of termination or expiration.

15. **MISCELLANEOUS.**

(a) This Agreement shall not be placed of public record.

(b) To the maximum extent possible, each provision of this Agreement must be interpreted in such manner as to be effective and valid under applicable law, but if any provision of this Agreement is prohibited by, or held to be invalid under, applicable law, such provision will be ineffective solely to the extent of such prohibition or invalidity, and this will not invalidate the remainder of such provision or any other provision of this Agreement. All questions concerning the interpretation or application of provisions of this Agreement must be decided according to the laws of the State of Washington.

(c) This Agreement and the Original T-18 Agreements are the full and complete agreement between Railroad and the Port Parties with respect to all matters relating to the maintenance and operation of the Track and supersede the 1988 ITA and all other agreements between the parties hereto relating to the maintenance and operation of the Track. However, nothing herein is intended to terminate any surviving obligation of the Port Parties or the Port Parties' obligation to defend and hold Railroad harmless in any prior written agreement between the parties. It is the intent of the parties that to the maximum extent possible the terms of this Agreement shall be construed in harmony with and as supplemental to the terms of the Original T-18 Agreements that remain executory. However, in the event of a clear and direct conflict between the terms of this Agreement and the terms of the Original T-18 Agreements, the terms of this Agreement shall govern as between and among the parties hereto. Nothing in this Agreement shall affect any rights of UP under the 1988 ITA, Original T-18 Agreements or otherwise, or modify that certain Joint Agreement dated November 28, 1945, as supplemented by Supplemental Agreement dated July 27, 1993, between UP and Railroad.

(d) In the event that the Port Parties consist of two or more parties, all covenants and agreements of the Port Parties herein contained shall be the joint and several covenants and agreements of such parties.

(e) The waiver by Railroad of a Default and/or breach of any provision herein by the Port Parties shall in no way impair the right of Railroad to enforce that provision for any subsequent breach thereof. All remedies provided hereunder are cumulative and are in addition to all other remedies available at law or in equity.

(f) This Agreement may not be modified or amended except by an instrument in writing signed by all parties.

(g) This Agreement is made and intended for the benefit of the parties hereto and their respective successors and permitted assigns and for no other parties.

16. **ARBITRATION.**

(a) If at any time a question or controversy shall arise between the parties hereto in connection with this Agreement upon which the parties cannot agree, either party shall have the right to require a meeting of designated representatives with authority to settle the matter within thirty (30) days of written notice of a desire to meet; if it cannot be resolved within thirty (30) days of the meeting of the parties, then the aggrieved party may demand arbitration. Unless other procedures are agreed to by the parties, arbitration between the parties shall be governed by the rules and procedures set forth in this Section 16.

(b) If the parties to the dispute are able to agree upon a single competent and disinterested arbitrator within twenty (20) days after written notice by one party of its desire for arbitration to the other party, then the question or controversy shall be submitted to and settled by that single arbitrator. Otherwise, any party (the notifying party) may notify the other party (the noticed party) in writing of its request for arbitration and nominating one arbitrator. Within twenty (20) days after receipt of said notice, the noticed party shall appoint an arbitrator and notify the notifying party in writing of such appointment. Should the noticed party fail within twenty (20) days after receipt of such notice to name its arbitrator, said arbitrator may be appointed by the American Arbitration Association, which shall designate said appointment from the CPR Panel of Distinguished Neutrals, or other similar body of competent neutral arbitrators which may be agreed upon between the parties, upon application by either party after ten (10) days' written notice to the other party. The two arbitrators so chosen shall select one additional arbitrator to complete the board. If the arbitrators so chosen fail to agree upon an additional arbitrator, the same shall, upon application of a party, be appointed in the same manner hereto before stated.

(c) Upon selection of the arbitrator(s), said arbitrator(s) shall, with reasonable diligence, determine the questions as disclosed in said notice of arbitration, shall give both parties reasonable notice of the time and place (of which the arbitrator(s) shall be the judge) of hearing evidence and argument, may take such evidence as the arbitrator(s) shall deem reasonable or as either party may submit with witnesses required to be sworn, and hear arguments of counsel or others. In no event shall the arbitrator(s) have authority to award indirect, special, consequential, punitive or exemplary damages. If an arbitrator declines or fails to act, the party (or parties in the case of a single arbitrator) by whom the arbitrator was chosen or the American Arbitration Association, as the case may be, shall appoint another to act in the arbitrator's place.

(d) After considering all evidence, testimony and arguments, said single arbitrator or the majority of said board of arbitrators shall promptly state such decision or award and the reasoning for such decision or award in writing which shall be final, binding, and conclusive on all parties to the arbitration when delivered to them. The award rendered by the arbitrator(s) may be entered as a

judgment in any court in the United States of America having jurisdiction thereof and enforced as between the parties without further evidentiary proceeding, the same as entered by the court at the conclusion of a judicial proceeding in which no appeal was taken. Until the arbitrator(s) shall issue the first decision or award upon any question submitted for arbitration, performance under this Agreement shall continue in the manner and form existing prior to the rise of such question. After delivery of said first decision or award, each party shall forthwith comply with said first decision or award immediately after receiving it.

(e) Each party to the arbitration shall pay all compensation, costs, and expenses of the arbitrator appointed in its behalf and all fees and expenses of its own witnesses, exhibits, and counsel. The compensation, cost, and expenses of the single arbitrator or the additional arbitrator in the board of arbitrators shall be paid in equal shares by all parties to the arbitration.

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

(g) Interest computed annually, at a rate equal to the Prime Rate plus two (2) percentage points (or the maximum interest allowed by applicable law, if lower), shall be applied to any and all arbitration awards requiring the payment of money and shall be calculated from thirty (30) days following the date of the applicable arbitration decision. The term "**Prime Rate**" shall mean the minimum commercial lending rate charged by banks to their most credit-worthy customers for short-term loans, as published daily in the Wall Street Journal.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement to be effective as of the Effective Date above.

RAILROAD:

BNSF RAILWAY COMPANY

By: _____

Name:

Title:

Address for notices:

Jones Lang LaSalle Global Services
3017 Lou Menk Dr., Suite 100
Fort Worth, TX 76131-2800
Attn: Track Agreements

[[**with a copy to: [Address of applicable Regional Jones Lang LaSalle Office]]

PORT PARTIES:

THE PORT OF SEATTLE

By: _____

Name:

Title:

Address for notices:

SSA TERMINALS, LLC

By: _____

Name:

Title:

Address for notices:

1131 SW Klickitat Way
Seattle, WA 98134
Attn: President

PORT OF SEATTLE – TERMINAL 18 ON-DOCK OPERATIONS PLAN

SERVICE REQUIREMENTS

General Assumptions

- First vessel arrival date **June 7, 2009**
- CMA estimates 3-4 total EB trains per week w/growth potential to 2 trains per day
- Switching window calcs assume 5 MPH average switching speed
- Switching window calcs do not include bad order setout impacts
- Switching window calcs are based on assumed 8000' units w/uniform blocking to LPC/CHI
- Switching window calcs assume cross over installation and 8000' of storage on Harbor Island
- Switching window calcs assume empties are previously staged to Harbor Island
- Switching window calcs assume air & inspection prior to release to BNSF

Communication/Access Requirements

- The BNSF must have rail access to the Terminal at all times via communication with Port Security
- Real time communication is essential to the success of the rail operating plan – rail access delays will have additive effects on the switching window requirements
- All BNSF operating employees must have TWIC certified cards to enter the Terminal
- As part of the operating plan, BNSF rail access will be communicated via radio as follows...
 - Both the BNSF and Terminal Security personnel will have access to and use radio communication set to BNSF radio channel ___
 - BNSF operating crews will make access request via radio to Terminal Security in advance of the proposed rail movements – Terminal Security will acknowledge request in response via radio
 - Terminal access will be provided by Terminal Security at both the north and south rail access gates, based on the preceding radio communication, within 10 minutes of the radio communication
 - Upon completion of operational switching and necessary rail access, the BNSF operating crews shall make a follow up radio communication to Terminal Security as such
- Terminal security is the responsibility of SSAT during all rail access and operational switching

Mechanical requirements

- All strip tracks must be equipped with yard air and all cars must be on air while being loaded or unloaded
- BNSF to retain the services of a mechanical contractor to provide equipment, inspect cars and complete class 1 airbrake test prior to switching activity and out bound departure
- Bad order cars to be repaired on spot and/or staged for repair/reposition prior to switching activity and out bound departure, a local track must be specified in advance for bad order car set out

TERMINAL OPERATIONS

General Operations

- Inbound loads/empties staged on Harbor Island – 7000' clr on loop tracks and pending the desire to run 8000' trains and additional 1000' on Harbor Island will be required
- Loads/empties repositioned to 4 existing 2100' strip tracks
- Outbound departure via proposed new cross-over and existing Port lead

Phase 1 Operations Plan

- 1 unit train departing per day – starting first with 7000' train length with growth potential to 8000' pending Harbor Island staging capability
- Will require a minimum of one evening switching window from 22:30 to 06:30 for train assembly, out bound departure and empty reposition
- BNSF to call switch crew between the hours of 2230 and 2359 with the switching activities to cease 8 hours after the call time
- In bound trains and empties will be stored on the Port loop tracks and other Harbor Island trackage located outside the T18 facility until the switching window begins

- Switch crew comes on duty, gathers paperwork and vans to power. 1 hour after the switch crew is on duty the outbound train crew is called (2 hour call)
- The Switch crew will assemble out bound train from Strip tracks (***these cars should already have received a class 1 airbrake test from the mechanical contractor and a brake slip will be required for the outbound crew***). Pending completion of out bound train assembly the ETD will be armed and a brake pipe test will be completed in preparation for set and release for departure upon arrival of the out bound crew
- Following out bound departure, the Switch crew using either Road power if available on inbound train or switch power if necessary, will begin empty/load reposition to the 4 existing strip tracks
- Pending bad order handling, when completed the switch crew will move power to the BNSF Champion tracks for fueling and inspections

Phase 2 Operations Plan

- 2 unit trains per day – starting first with 7000' train length with growth potential to 8000' pending Harbor Island staging capability
- Will require a minimum of two 5-6 hr rail switching windows with adequate time between each window to support the required container unloading and loading activities
- All other operational details will be similar in nature as describe in Phase 1 above

SWITCHING WINDOW REQUIREMENTS

Inbound Empty Spot – Per Unit

- BNSF switch crew called in advance of actual window time – on duty, gathers paperwork, and vans to outbound power on Champion Tracks
- Inbound reposition move time = $(18,000 \text{ TF}) / (5,280 \text{ TF/Mi}) / (5 \text{ Mi/Hr}) * (60 \text{ Min/Hr}) = 41 \text{ Min}$
- Ancillary switching activities per move (turnout operation, pin pulling, brake set to spot, etc.) = $(15 \text{ Min/Move}) * (4 \text{ Moves}) = 60 \text{ Min}$
- Switch Crew Mandatory Break = 30 Min
- Switch Crew Mobilization Dwell = 15 Min
- Subtotal = 41 Min + 60 Min + 45 Min = 146 Mins
- Considering 90% Efficiency Rate = 162 Mins
- Total of 2 ½ to 3 hrs needed for inbound repositioning

Outbound Pull / Inspect / Depart – Per Unit

- Road crew called 1 hour after switch crew is on duty (2 hour call time)
- Switching / train make-up via switch crew to support outbound road crew departure – reverse of inbound spotting
- Outbound assembly move time = $(18,000 \text{ TF}) / (5,280 \text{ TF/Mi}) / (5 \text{ Mi/Hr}) * (60 \text{ Min/Hr}) = 41 \text{ Min}$
- Ancillary switching activities per move (turnout operation, coupling, air up, brake release, etc.) = $(15 \text{ Min/Move}) * (4 \text{ Moves}) = 60 \text{ Min}$
- ETD, Brake Pipe Test and Set/Release = 45 Min
- Subtotal = 41 Min + 60 Min + 45 Min = 146 Mins
- Considering 90% Efficiency Rate = 162 Mins
- Total of 2 ½ to 3 hrs needed for outbound move