

RESOLUTION NO. R-84-13

**A RESOLUTION AUTHORIZING THE EXECUTION OF  
AN AGREEMENT BETWEEN THE CITY OF WHEATON AND  
THE UNION PACIFIC RAILROAD COMPANY  
FOR THE USE, MAINTENANCE AND RECONSTRUCTION OF  
THE CHASE STREET PEDESTRIAN UNDERPASS**

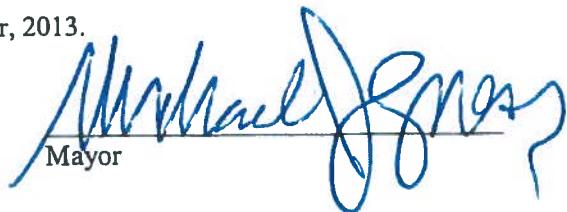
**WHEREAS**, the City of Wheaton, DuPage County, Illinois ("City") and the Union Pacific Railroad Company, a Delaware Corporation ("Railroad"), are desirous of constructing a pedestrian underpass at Chase Street in Wheaton, Illinois (Railroad Mile Post 24.23 – Geneva Subdivision, DuPage County, Illinois) ("Project") in conjunction with the closing of the at-grade street crossing at Chase Street; and

**WHEREAS**, Illinois Commerce Commission ("ICC") has made by order dated June 23, 2010 in their Docket T10-0037 that the City and Railroad shall enter into an agreement for the use, maintenance and reconstruction the Chase Street Pedestrian Underpass in return for the Railroad receiving funding provided through the Illinois Department of Transportation ("IDOT") Grade Crossing Protection Fund ("GCPF") for the construction of Project; and

**WHEREAS**, it is in the best interests of the City and Railroad to enter into an agreement for the use, maintenance and reconstruction of the Chase Street Pedestrian Underpass to establish mutual responsibilities for the Project and comply with the order of the ICC for funding of the Project.

**NOW, THEREFORE BE IT RESOLVED** by the Mayor and City Council of the City of Wheaton, DuPage County, Illinois that the Mayor is hereby authorized to execute an agreement between the City and Union Pacific Railroad Company for the use, maintenance and reconstruction of the Chase Street Pedestrian Underpass.

**ADOPTED** this 4<sup>th</sup> day of November, 2013.



Michael Gresk  
Mayor

ATTEST:



Sean Bennett  
City Clerk

Ayes: Roll Call Vote:  
Councilman Rutledge

Councilman Saline  
Mayor Gresk  
Councilwoman Pacino Sanguinetti  
Councilman Scalzo  
Councilman Suess

Nays: None  
Absent: None

Motion carried Unanimously



UPRR Folder No.: \_\_\_\_\_

# CHASE PEDESTRIAN UNDERPASS CROSSING AGREEMENT

BETWEEN

UNION PACIFIC RAILROAD COMPANY

AND THE

CITY OF WHEATON, ILLINOIS

COVERING THE

USE, MAINTENANCE, AND RECONSTRUCTION OF THE  
CHASE PEDESTRIAN UNDERPASS CROSSING

AT

RAILROAD MILE POST 24.23 – ON THE GENEVA SUBDIVISION  
DOT NO.: 174-954C

IN

THE CITY OF WHEATON,  
DuPAGE COUNTY, ILLINOIS



## CHASE PEDESTRIAN UNDERPASS CROSSING, EASEMENT, USE, MAINTENANCE AND RECONSTRUCTION AGREEMENT

Chase Pedestrian Underpass – DOT No.: 174-954C  
Railroad Mile Post 24.23 – Geneva Subdivision in the City of Wheaton  
DuPage County, Illinois

THIS AGREEMENT ("Agreement") is made this \_\_\_\_\_ day of \_\_\_\_\_, 2012, by and between UNION PACIFIC RAILROAD COMPANY, a Delaware Corporation ("Union Pacific") and the CITY OF WHEATON, a municipal corporation of the State of Illinois ("City").

In accordance with the findings and ordering paragraphs of the decision of the Illinois Commerce Commission dated June 23, 2010 in Docket T10-0037, Union Pacific and City, hereby agree to use, maintain and reconstruct the subject Chase Pedestrian Underpass, as hereinafter defined, and related facilities in accordance with the following terms and conditions:

1. In consideration of a one-time fee in the sum of **TEN DOLLARS (\$10.00)** to be paid by City to Railroad, upon the execution and delivery of this Agreement, the payment of the costs and expenses to be incurred by Railroad and/or City pursuant to this Agreement, and subject to the terms and conditions of this Agreement, Railroad hereby grants to City, its successors and assigns, an easement to use, maintain, repair, renew and reconstruct a public pedestrian and bicycle underpass on, along and under Railroad's right-of-way, tracks and bridge at Railroad's Mile Post 24.23 on Railroad's Geneva Subdivision in the City of Wheaton, DuPage County, Illinois, in the location shown on the Railroad Location Print, marked **Exhibit A**, and as detailed on the Detailed Print marked **Exhibit A-1**, each attached hereto and hereby made a part hereof (hereinafter, "Chase Pedestrian Underpass").

2. The cost and expense of future maintenance, repair and reconstruction of the superstructure, the supporting bridge abutments, and the substructure portion of the Chase Pedestrian Underpass, including the concrete U-Wall shall be the responsibility of the Union Pacific. Union Pacific shall also be responsible for track elements above the Chase Pedestrian Underpass, including but not limited to, rail, ties, ballast, track related drainage facilities, and railroad communication and signal systems. Except as otherwise provided in paragraph 3, below, Union Pacific shall also be responsible for the cost and expense of future maintenance, repair and reconstruction of the Pedestrian Path stairways and ramp walking surface (the "Pedestrian Path") and Pedestrian Path retaining walls (the "Pedestrian Path retaining walls") which makeup the approach portions of the Chase Pedestrian Underpass.

3. The cost and expense of future maintenance, repair and reconstruction of:  
(i) lighting, fixtures and handrails; (ii) emergency phone and communication installations;  
(iii) utility hookups for lighting and emergency communication devices; (iv) signage;  
(v) landscape and beautification elements; (vi) underground drainage and storm water management facilities; and (vii) Routine Cleaning, as hereinafter defined, of or for the Chase



Pedestrian Underpass, the Pedestrian Path and the Pedestrian Path retaining walls as described on Exhibit A-1 shall be the responsibility of the City (collectively, "City Work").

4. The City and UP specifically agree that Routine Cleaning ("Routine Cleaning") shall include, but shall not be limited to, the removal of ice, snow, water and debris, and the removal from or painting over of graffiti from all component surfaces of the Chase Pedestrian Underpass, including without limitation, the substructure portion of the Chase Pedestrian Underpass and the Pedestrian Path and Pedestrian Path retaining walls. Union Pacific shall have no obligation whatsoever with regard to graffiti removal from the Chase Pedestrian Underpass, including without limitation, the substructure portion of the Chase Pedestrian Underpass and the Pedestrian Path and Pedestrian Path retaining walls.

5. City, at its sole expense, agrees to patrol, or cause the Chase Pedestrian Underpass, the Pedestrian Path and the Pedestrian Path retaining walls to be patrolled by police officers with lawful citation authority, and to vigorously enforce the prohibition against trespass of Union Pacific's property adjacent to the Chase Pedestrian Underpass, the Pedestrian Path and the Pedestrian Path retaining walls.

6. Before entering upon the superstructure, supporting bridge abutments and/or track elements of the Chase Pedestrian Underpass to perform any inspection or work, the City shall first notify UP no less than seventy-two (72) hours prior to performing any such inspection or work including but not limited to cleaning and/or graffiti removal or painting activity. If deemed necessary by or on behalf of the UP's Chief Engineer, flagging, at the City's sole cost and expense, to assure safety of pedestrians, workers and trains shall be required before City or City's contractor performs maintenance, cleaning and/or graffiti removal or painting. Notwithstanding the foregoing, if any City Work requires digging in or around or removal of any portion of the Chase Pedestrian Underpass, the Pedestrian Path and/or Pedestrian Path retaining walls, such City Work shall be governed by the following:

A. The City confirms that all City Work described herein, will be performed by a contractor or contractors hired by the City. The City agrees to require each of its contractors, (and their respective subcontractors), to execute Union Pacific's standard form of Contractor's Right of Entry Agreement, the current copy of which is attached hereto as Exhibit B and hereby made a part hereof, and to provide Union Pacific the insurance binders or certificates set forth in said Contractor's Right of Entry Agreement before commencing any City Work on any Union Pacific property.

B. The City shall also require its contractors/subcontractors to perform their portion of the City Work in such a manner so as not to endanger or delay the movement of trains, engines or cars of Union Pacific, and so as not to injure or endanger Union Pacific's officers, agents, employees or damage their property. The City shall also require its contractors/subcontractors to give precedence to the movement of trains, engines and cars of Union Pacific, over the movement of vehicles or equipment or construction activities of the City's contractors/subcontractors.

C. If at any time during the performance of the City Work, Union Pacific deems it necessary that flagging protection is necessary, such flagging shall be provided by



Union Pacific at no cost to Union Pacific as set forth in said Contractor's Right of Entry Agreement above.

7. The rights granted herein are made subject to and subordinate to the prior and continuing right and obligation of Union Pacific, its successors and assigns, to use all of the Union Pacific Property, tracks and railroad facilities adjacent to underlying and above the Chase Pedestrian Underpass in the performance of Union Pacific's duty as a common carrier, and there is reserved unto Union Pacific, and its successors and assigns, the right (consistent with the rights granted herein to City) to construct, reconstruct, maintain, repair, use and operate existing, future and/or additional railroad tracks, and railroad facilities, including but not limited to track appurtenances, fiber optic or signal lines and facilities, pipe, and wire lines over, under and across Union Pacific property including the Chase Pedestrian Underpass.

8. To enable Union Pacific to perform construction, operation or maintenance work on Union Pacific Property and tracks, and railroad facilities, including but not limited to track appurtenances, right of way, bridge, embankments, or other improvements on, about, over, under and adjacent to the Chase Pedestrian Underpass, from time to time as Union Pacific, in its sole discretion may deem necessary or convenient, Union Pacific may temporarily close the Chase Pedestrian Underpass after reasonable notice to City, unless such work is of an emergency nature in which event Union Pacific may close the Chase Pedestrian Underpass without prior notice to City. In the event of such an emergency, Union Pacific will immediately notify City.

9. Fiber optic cable systems may be buried on Union Pacific's property. Protection of the fiber optic cable system is of extreme importance since any break could disrupt service to users resulting in business interruption and loss of revenue and profits. City, or its contractors, shall telephone Union Pacific during normal business hours (7:00 a.m. to 5:00 p.m., Central Time, Monday through Friday, except for holidays) at 1-800-336-9193 (also a 24-hour seven day number for emergency calls) to determine if fiber optic cable is buried anywhere on the Union Pacific Property to be used by City. If it is, City, or its contractors, will telephone the telecommunications company(ies) involved, arrange for a cable locator, and make arrangements for relocation or other protection of the fiber optic cable prior to beginning any work on Union Pacific Property.

10. If City, its successors and assigns, shall abandon the Chase Pedestrian Underpass, for the purpose set forth herein for a continuous period of twelve (12) months, then this Agreement and the rights granted herein shall cease automatically and terminate with respect to the Chase Pedestrian Underpass.

This Agreement shall be binding upon and inure to the benefit of the parties hereto, their successors and assigns, but City shall not assign this Agreement or any rights herein to any party without the prior written consent of Union Pacific.

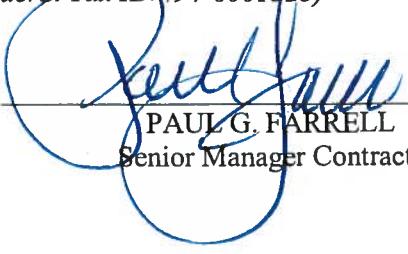
If there is a conflict regarding the maintenance responsibilities outlined in the ICC decision in Docket T10-0037 and the maintenance responsibilities under this Agreement, the terms of this Agreement shall govern.



IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed in duplicate as of the day and year first above written.

**UNION PACIFIC RAIROAD COMPANY**  
(Federal Tax ID #94-6001323)

By

  
PAUL G. FARRELL  
Senior Manager Contracts

STATE OF Nebraska )  
COUNTY OF Douglas ) SS:

I, the undersigned, a Notary Public in and for said county, in the State aforesaid, do hereby certify, that Paul G. Farrell, personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person, and acknowledged that he signed, sealed and delivered the said instrument as his free and voluntary act, for the uses and purposes therein set forth, including the release and waiver of the right to homestead.

GIVEN, under my hand and official seal, this 8<sup>th</sup> day of November, 2013

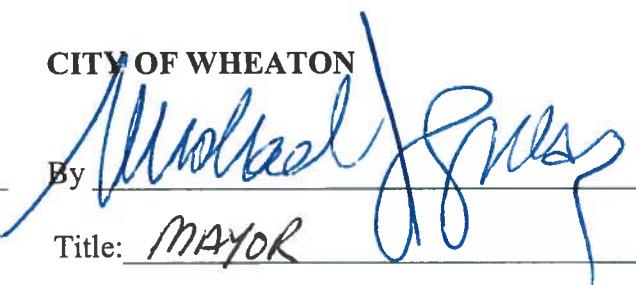
  
Notary Public

Commission Expires: Sept 18, 2017

WITNESS:

By Sharon Bennett Hagan

CITY OF WHEATON

  
Title: Mayor

(Seal)

Pursuant to Authority Provided in City:

Resolution No. R-84-13

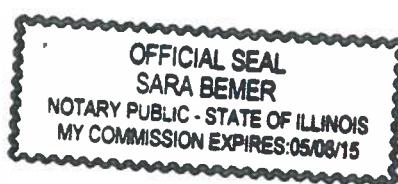
dated 11-04-13



STATE OF \_\_\_\_\_ )  
COUNTY OF \_\_\_\_\_ ) SS:  
 )

I, the undersigned, a Notary Public in and for said county, in the State aforesaid, do hereby certify, that Michael Gresh, personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person, and acknowledged that he/she signed, sealed and delivered the said instrument as his/her free and voluntary act, for the uses and purposes therein set forth, including the release and waiver of the right to homestead.

GIVEN, under my hand and official seal, this 4<sup>th</sup> day of November, 20 13.



*Sara Bemer*

Notary Public

Commission Expires: 5-6-15

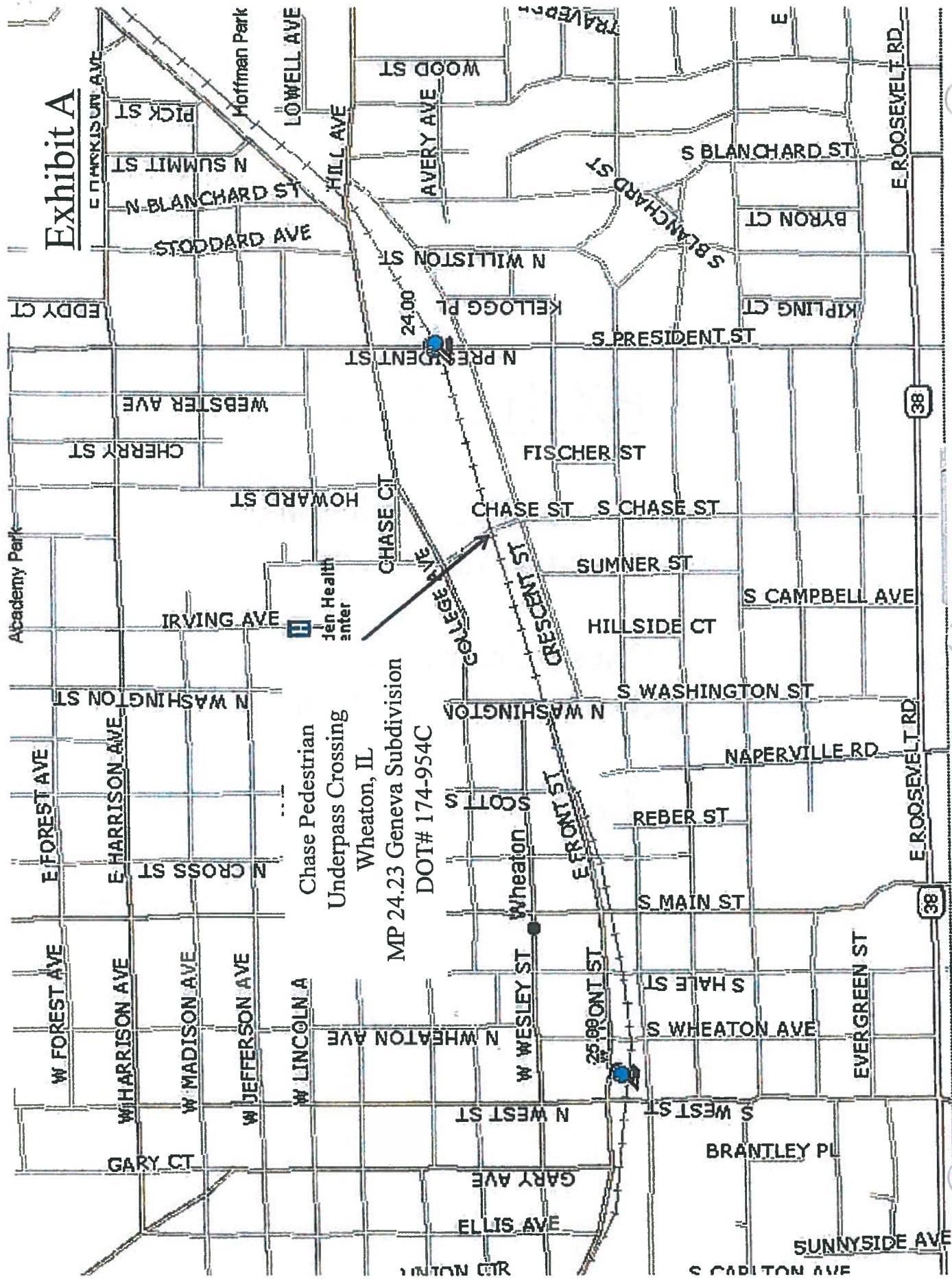
# EXHIBIT A

## Chase Pedestrian Underpass Crossing Agreement

Cover Sheet for the  
Railroad Location Print  
and  
Legal Description

## Exhibit A

Chase Pedestrian  
Underpass Crossing  
Wheaton, IL  
MP 24.23 Geneva Subdivision  
DOT# 174-954C



# Exhibit A

Route :  
Section:  
County: DuPage  
Job :  
Parcel :  
Sta. 1285+29.01  
Owner : Union Pacific Railroad

## Index No.

That part of the Northeast Quarter of Section 16, Township 39 North, Range 10 East of the Third Principal Meridian, in DuPage County, Illinois, as described as follows:

A 30.00 foot wide easement, being 15.00 feet on both sides of the following described easement centerline: Commencing at the center of said Section 16; thence easterly along the Quarter line of said Section 16, 742.30 feet to a point of intersection with the northerly right-of-way line of the Union Pacific Railroad; thence northeasterly along said northerly right-of-way line a distance of 612.20 feet to the point of beginning of the easement centerline; thence deflecting 90 degrees right from said northerly right-of-way line a distance of 100 feet to a point on the southerly right-of-way line of the Union Pacific Railroad and the terminal point of the easement centerline.

Said permanent easement containing 0.069 acre, more or less.

Said permanent easement to be used for access purposes.

# EXHIBIT A-1

## Chase Pedestrian Underpass Crossing Agreement

Cover Sheet for the  
Detail Prints  
of  
Chase Pedestrian Underpass,  
Pedestrian Path  
Pedestrian Path Retaining Walls



## EXHIBIT B

Chase Pedestrian Underpass  
Crossing Agreement

Cover Sheet for the  
Contractor's Right of Entry Agreement

**CONTRACTOR'S  
RIGHT OF ENTRY AGREEMENT**

THIS AGREEMENT is made and entered into as of the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_,  
by and between UNION PACIFIC RAILROAD COMPANY, a Delaware corporation ("Railroad"); and \_\_\_\_\_,  
a \_\_\_\_\_ corporation ("Contractor").

**RECITALS:**

Contractor has been hired by \_\_\_\_\_ to perform work relating  
to \_\_\_\_\_

(the "work"), with all or a portion of such work to be performed on property of Railroad in the vicinity of Railroad's Milepost \_\_\_\_\_ on Railroad's \_\_\_\_\_ [Subdivision] [Branch] [at or near DOT No. \_\_\_\_\_] located at or near \_\_\_\_\_, in \_\_\_\_\_ County, State of \_\_\_\_\_, as such location is in the general location shown on the print marked **Exhibit A**, attached hereto and hereby made a part hereof, which work is the subject of a contract dated \_\_\_\_\_ between Railroad and \_\_\_\_\_.

Railroad is willing to permit Contractor to perform the work described above at the location described above subject to the terms and conditions contained in this Agreement

**AGREEMENT:**

**NOW, THEREFORE**, it is mutually agreed by and between Railroad and Contractor, as follows:

**ARTICLE 1 - DEFINITION OF CONTRACTOR.**

For purposes of this Agreement, all references in this agreement to Contractor shall include Contractor's contractors, subcontractors, officers, agents and employees, and others acting under its or their authority.

**ARTICLE 2 - RIGHT GRANTED; PURPOSE.**

Railroad hereby grants to Contractor the right, during the term hereinafter stated and upon and subject to each and all of the terms, provisions and conditions herein contained, to enter upon and have ingress to and egress from the property described in the Recitals for the purpose of performing the work described in the Recitals above. The right herein granted to Contractor is limited to those portions of Railroad's property specifically described herein, or as designated by the Railroad Representative named in Article 4.

**ARTICLE 3 - TERMS AND CONDITIONS CONTAINED IN EXHIBITS B, C AND D.**

The terms and conditions contained in **Exhibit B**, **Exhibit C** and **Exhibit D**, attached hereto, are hereby made a part of this Agreement.

**ARTICLE 4 - ALL EXPENSES TO BE BORNE BY CONTRACTOR; RAILROAD REPRESENTATIVE.**

A. Contractor shall bear any and all costs and expenses associated with any work performed by Contractor, or any costs or expenses incurred by Railroad relating to this Agreement.

B. Contractor shall coordinate all of its work with the following Railroad representative or his or her duly authorized representative (the "Railroad Representative"):

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C. Contractor, at its own expense, shall adequately police and supervise all work to be performed by Contractor and shall ensure that such work is performed in a safe manner as set forth in Section 7 of **Exhibit B**. The responsibility of Contractor for safe conduct and adequate policing and supervision of Contractor's work shall not be lessened or otherwise affected by Railroad's approval of plans and specifications involving the work, or by Railroad's collaboration in performance of any work, or by the presence at the work site of a Railroad Representative, or by compliance by Contractor with any requests or recommendations made by Railroad Representative.

**ARTICLE 5 - TERM; TERMINATION.**

A. The grant of right herein made to Contractor shall commence on the date of this Agreement, and continue until \_\_\_\_\_, unless sooner terminated as herein provided, or at such time as Contractor has completed its work on Railroad's property, whichever is earlier. Contractor agrees to notify the Railroad Representative in writing when it has completed its work on Railroad's property.

B. This Agreement may be terminated by either party on ten (10) days written notice to the other party.

**ARTICLE 6 - CERTIFICATE OF INSURANCE.**

A. Before commencing any work, Contractor will provide Railroad with the (i) insurance binders, policies, certificates and endorsements set forth in **Exhibit C** of this Agreement, and (ii) the insurance endorsements obtained by each subcontractor as required under Section 12 of **Exhibit B** of this Agreement.

B. All insurance correspondence, binders, policies, certificates and endorsements shall be sent to:

Union Pacific Railroad Company

[Insert mailing address]

Attn: \_\_\_\_\_

Folder No. \_\_\_\_\_

**ARTICLE 7 - DISMISSAL OF CONTRACTOR's EMPLOYEE.**

At the request of Railroad, Contractor shall remove from Railroad's property any employee of Contractor who fails to conform to the instructions of the Railroad Representative in connection with the work on Railroad's property, and any right of Contractor shall be suspended until such removal has occurred. Contractor shall indemnify Railroad against any claims arising from the removal of any such employee from Railroad's property.

**ARTICLE 8 - ADMINISTRATIVE FEE.**

Upon the execution and delivery of this Agreement, Contractor shall pay to Railroad \_\_\_\_\_ Dollars (\$\_\_\_\_\_) as reimbursement for clerical, administrative and handling expenses in connection with the processing of this Agreement.

**ARTICLE 9 - CROSSINGS.**

No additional vehicular crossings (including temporary haul roads) or pedestrian crossings over Railroad's trackage shall be installed or used by Contractor without the prior written permission of Railroad.

**ARTICLE 10.- EXPLOSIVES.**

Explosives or other highly flammable substances shall not be stored or used on Railroad's property without the prior written approval of Railroad.

**IN WITNESS WHEREOF**, the parties hereto have duly executed this agreement in duplicate as of the date first herein written.

**UNION PACIFIC RAILROAD COMPANY**

By: \_\_\_\_\_  
Title: \_\_\_\_\_

\_\_\_\_\_  
(Name of Contractor)

By: \_\_\_\_\_  
Title: \_\_\_\_\_

EXHIBIT A

Exhibit A will be a print showing the general location of the work site.

**EXHIBIT B**  
**TO**  
**CONTRACTOR'S RIGHT OF ENTRY AGREEMENT**

**Section 1. NOTICE OF COMMENCEMENT OF WORK - FLAGGING.**

A. Contractor agrees to notify the Railroad Representative at least ten (10) working days in advance of Contractor commencing its work and at least thirty (30) working days in advance of proposed performance of any work by Contractor in which any person or equipment will be within twenty-five (25) feet of any track, or will be near enough to any track that any equipment extension (such as, but not limited to, a crane boom) will reach to within twenty-five (25) feet of any track. No work of any kind shall be performed, and no person, equipment, machinery, tool(s), material(s), vehicle(s), or thing(s) shall be located, operated, placed, or stored within twenty-five (25) feet of any of Railroad's track(s) at any time, for any reason, unless and until a Railroad flagman is provided to watch for trains. Upon receipt of such thirty (30)-day notice, the Railroad Representative will determine and inform Contractor whether a flagman need be present and whether Contractor needs to implement any special protective or safety measures. If flagging or other special protective or safety measures are performed by Railroad, Railroad will bill Contractor for such expenses incurred by Railroad, unless Railroad and a federal, state or local governmental entity have agreed that Railroad is to bill such expenses to the federal, state or local governmental entity. If Railroad will be sending the bills to Contractor, Contractor shall pay such bills within thirty (30) days of Contractor's receipt of billing. If Railroad performs any flagging, or other special protective or safety measures are performed by Railroad, Contractor agrees that Contractor is not relieved of any of its responsibilities or liabilities set forth in this Agreement.

B. The rate of pay per hour for each flagman will be the prevailing hourly rate in effect for an eight-hour day for the class of flagmen used during regularly assigned hours and overtime in accordance with Labor Agreements and Schedules in effect at the time the work is performed. In addition to the cost of such labor, a composite charge for vacation, holiday, health and welfare, supplemental sickness, Railroad Retirement and unemployment compensation, supplemental pension, Employees Liability and Property Damage and Administration will be included, computed on actual payroll. The composite charge will be the prevailing composite charge in effect at the time the work is performed. One and one-half times the current hourly rate is paid for overtime, Saturdays and Sundays, and two and one-half times current hourly rate for holidays. Wage rates are subject to change, at any time, by law or by agreement between Railroad and its employees, and may be retroactive as a result of negotiations or a ruling of an authorized governmental agency. Additional charges on labor are also subject to change. If the wage rate or additional charges are changed, Contractor (or the governmental entity, as applicable) shall pay on the basis of the new rates and charges.

C. Reimbursement to Railroad will be required covering the full eight-hour day during which any flagman is furnished, unless the flagman can be assigned to other Railroad work during a portion of such day, in which event reimbursement will not be required for the portion of the day during which the flagman is engaged in other Railroad work. Reimbursement will also be required for any day not actually worked by the flagman following the flagman's assignment to work on the project for which Railroad is required to pay the flagman and which could not reasonably be avoided by Railroad by assignment of such flagman to other work, even though Contractor may not be working during such time. When it becomes necessary for Railroad to bulletin and assign an employee to a flagging position in compliance with union collective bargaining agreements, Contractor must provide Railroad a minimum of five (5) days notice prior to the cessation of the need for a flagman. If five (5) days notice of cessation is not given, Contractor will still be required to pay flagging charges for the five (5) day notice period required by union agreement to be given to the employee, even though flagging is not required for that period. An additional thirty (30) days notice must then be given to Railroad if flagging services are needed again after such five day cessation notice has been given to Railroad.

**Section 2. LIMITATION AND SUBORDINATION OF RIGHTS GRANTED**

A. The foregoing grant of right is subject and subordinate to the prior and continuing right and obligation of the Railroad to use and maintain its entire property including the right and power of Railroad to construct, maintain, repair, renew, use, operate, change, modify or relocate railroad tracks, roadways, signal, communication, fiber optics, or other wirelines, pipelines and other facilities upon, along or across any or all parts of its property, all or any of which may be freely done at any time or times by Railroad without liability to Contractor or to any other party for compensation or damages.

B. The foregoing grant is also subject to all outstanding superior rights (whether recorded or unrecorded and including those in favor of licensees and lessees of Railroad's property, and others) and the right of Railroad to renew and extend the same, and is made without covenant of title or for quiet enjoyment.

### **Section 3. NO INTERFERENCE WITH OPERATIONS OF RAILROAD AND ITS TENANTS.**

A. Contractor shall conduct its operations so as not to interfere with the continuous and uninterrupted use and operation of the railroad tracks and property of Railroad, including without limitation, the operations of Railroad's lessees, licensees or others, unless specifically authorized in advance by the Railroad Representative. Nothing shall be done or permitted to be done by Contractor at any time that would in any manner impair the safety of such operations. When not in use, Contractor's machinery and materials shall be kept at least fifty (50) feet from the centerline of Railroad's nearest track, and there shall be no vehicular crossings of Railroads tracks except at existing open public crossings.

B. Operations of Railroad and work performed by Railroad personnel and delays in the work to be performed by Contractor caused by such railroad operations and work are expected by Contractor, and Contractor agrees that Railroad shall have no liability to Contractor, or any other person or entity for any such delays. The Contractor shall coordinate its activities with those of Railroad and third parties so as to avoid interference with railroad operations. The safe operation of Railroad train movements and other activities by Railroad takes precedence over any work to be performed by Contractor.

### **Section 4. LIENS.**

Contractor shall pay in full all persons who perform labor or provide materials for the work to be performed by Contractor. Contractor shall not create, permit or suffer any mechanic's or materialmen's liens of any kind or nature to be created or enforced against any property of Railroad for any such work performed. Contractor shall indemnify and hold harmless Railroad from and against any and all liens, claims, demands, costs or expenses of whatsoever nature in any way connected with or growing out of such work done, labor performed, or materials furnished. If Contractor fails to promptly cause any lien to be released of record, Railroad may, at its election, discharge the lien or claim of lien at Contractor's expense.

### **Section 5. PROTECTION OF FIBER OPTIC CABLE SYSTEMS.**

A. Fiber optic cable systems may be buried on Railroad's property. Protection of the fiber optic cable systems is of extreme importance since any break could disrupt service to users resulting in business interruption and loss of revenue and profits. Contractor shall telephone Railroad during normal business hours (7:00 a.m. to 9:00 p.m. Central Time, Monday through Friday, except holidays) at 1-800-336-9193 (also a 24-hour, 7-day number for emergency calls) to determine if fiber optic cable is buried anywhere on Railroad's property to be used by Contractor. If it is, Contractor will telephone the telecommunications company(ies) involved, make arrangements for a cable locator and, if applicable, for relocation or other protection of the fiber optic cable. Contractor shall not commence any work until all such protection or relocation (if applicable) has been accomplished.

b. In addition to other indemnity provisions in this Agreement, Contractor shall indemnify, defend and hold Railroad harmless from and against all costs, liability and expense whatsoever (including, without limitation, attorneys' fees, court costs and expenses) arising out of any act or omission of Contractor, its agents and/or employees, that causes or contributes to (1) any damage to or destruction of any telecommunications system on Railroad's property, and/or (2) any injury to or death of any person employed by or on behalf of any telecommunications company, and/or its contractor, agents and/or employees, on Railroad's property. Contractor shall not have or seek recourse against Railroad for any claim or cause of action for alleged loss of profits or revenue or loss of service or other consequential damage to a telecommunication company using Railroad's property or a customer or user of services of the fiber optic cable on Railroad's property.

### **Section 6. PERMITS - COMPLIANCE WITH LAWS.**

In the prosecution of the work covered by this Agreement, Contractor shall secure any and all necessary permits and shall comply with all applicable federal, state and local laws, regulations and enactments affecting the work including, without limitation, all applicable Federal Railroad Administration regulations.

## Section 7. SAFETY.

A. Safety of personnel, property, rail operations and the public is of paramount importance in the prosecution of the work performed by Contractor. Contractor shall be responsible for initiating, maintaining and supervising all safety, operations and programs in connection with the work. Contractor shall at a minimum comply with Railroad's safety standards listed in **Exhibit D**, hereto attached, to ensure uniformity with the safety standards followed by Railroad's own forces. As a part of Contractor's safety responsibilities, Contractor shall notify Railroad if Contractor determines that any of Railroad's safety standards are contrary to good safety practices. Contractor shall furnish copies of **Exhibit D** to each of its employees before they enter the job site.

B. Without limitation of the provisions of paragraph A above, Contractor shall keep the job site free from safety and health hazards and ensure that its employees are competent and adequately trained in all safety and health aspects of the job.

C. Contractor shall have proper first aid supplies available on the job site so that prompt first aid services may be provided to any person injured on the job site. Contractor shall promptly notify Railroad of any U.S. Occupational Safety and Health Administration reportable injuries. Contractor shall have a nondelegable duty to control its employees while they are on the job site or any other property of Railroad, and to be certain they do not use, be under the influence of, or have in their possession any alcoholic beverage, drug or other substance that may inhibit the safe performance of any work.

D. If and when requested by Railroad, Contractor shall deliver to Railroad a copy of Contractor's safety plan for conducting the work (the "Safety Plan"). Railroad shall have the right, but not the obligation, to require Contractor to correct any deficiencies in the Safety Plan. The terms of this Agreement shall control if there are any inconsistencies between this Agreement and the Safety Plan.

## Section 8. INDEMNITY.

A. To the extent not prohibited by applicable statute, Contractor shall indemnify, defend and hold harmless Railroad, its affiliates, and its and their officers, agents and employees (individually an "Indemnified Party" or collectively "Indemnified Parties") from and against any and all loss, damage, injury, liability, claim, demand, cost or expense (including, without limitation, attorney's, consultant's and expert's fees, and court costs), fine or penalty (collectively, "Loss") incurred by any person (including, without limitation, any Indemnified Party, Contractor, or any employee of Contractor or of any Indemnified Party) arising out of or in any manner connected with (i) any work performed by Contractor, or (ii) any act or omission of Contractor, its officers, agents or employees, or (iii) any breach of this Agreement by Contractor.

b. The right to indemnity under this Section 8 shall accrue upon occurrence of the event giving rise to the Loss, and shall apply regardless of any negligence or strict liability of any Indemnified Party, except where the Loss is caused by the sole active negligence of an Indemnified Party as established by the final judgment of a court of competent jurisdiction. The sole active negligence of any Indemnified Party shall not bar the recovery of any other Indemnified Party.

c. Contractor expressly and specifically assumes potential liability under this Section 8 for claims or actions brought by Contractor's own employees. Contractor waives any immunity it may have under worker's compensation or industrial insurance acts to indemnify the Indemnified Parties under this Section 8. Contractor acknowledges that this waiver was mutually negotiated by the parties hereto.

d. No court or jury findings in any employee's suit pursuant to any worker's compensation act or the Federal Employers' Liability Act against a party to this Agreement may be relied upon or used by Contractor in any attempt to assert liability against any Indemnified Party.

e. The provisions of this Section 8 shall survive the completion of any work performed by Contractor or the termination or expiration of this Agreement. In no event shall this Section 8 or any other provision of this Agreement be deemed to limit any liability Contractor may have to any Indemnified Party by statute or under common law.

## **Section 9. RESTORATION OF PROPERTY.**

In the event Railroad authorizes Contractor to take down any fence of Railroad or in any manner move or disturb any of the other property of Railroad in connection with the work to be performed by Contractor, then in that event Contractor shall, as soon as possible and at Contractor's sole expense, restore such fence and other property to the same condition as the same were in before such fence was taken down or such other property was moved or disturbed. Contractor shall remove all of Contractor's tools, equipment, rubbish and other materials from Railroad's property promptly upon completion of the work, restoring Railroad's property to the same state and condition as when Contractor entered thereon.

## **Section 10. WAIVER OF DEFAULT.**

Waiver by Railroad of any breach or default of any condition, covenant or agreement herein contained to be kept, observed and performed by Contractor shall in no way impair the right of Railroad to avail itself of any remedy for any subsequent breach or default.

## **Section 11. MODIFICATION - ENTIRE AGREEMENT.**

No modification of this Agreement shall be effective unless made in writing and signed by Contractor and Railroad. This Agreement and the exhibits attached hereto and made a part hereof constitute the entire understanding between Contractor and Railroad and cancel and supersede any prior negotiations, understandings or agreements, whether written or oral, with respect to the work to be performed by Contractor.

## **Section 12. ASSIGNMENT - SUBCONTRACTING.**

Contractor shall not assign or subcontract this Agreement, or any interest therein, without the written consent of the Railroad. Contractor shall be responsible for the acts and omissions of all subcontractors. Before Contractor commences any work, the Contractor shall, except to the extent prohibited by law; (1) require each of its subcontractors to include the Contractor as "Additional Insured" in the subcontractor's Commercial General Liability policy and Business Automobile policies with respect to all liabilities arising out of the subcontractor's performance of work on behalf of the Contractor by endorsing these policies with ISO Additional Insured Endorsements CG 20 26, and CA 20 48 (or substitute forms providing equivalent coverage); (2) require each of its subcontractors to endorse their Commercial General Liability Policy with "Contractual Liability Railroads" ISO Form CG 24 17 10 01 (or a substitute form providing equivalent coverage) for the job site; and (3) require each of its subcontractors to endorse their Business Automobile Policy with "Coverage For Certain Operations In Connection With Railroads" ISO Form CA 20 70 10 01 (or a substitute form providing equivalent coverage) for the job site.

**EXHIBIT C**  
**TO**  
**CONTRACTOR'S**  
**RIGHT OF ENTRY AGREEMENT**

**Union Pacific Railroad Company**  
**Insurance Provisions For**  
**Contractor's Right of Entry Agreement**

Contractor shall, at its sole cost and expense, procure and maintain during the course of the Project and until all Project work on Railroad's property has been completed and the Contractor has removed all equipment and materials from Railroad's property and has cleaned and restored Railroad's property to Railroad's satisfaction, the following insurance coverage:

A. **Commercial General Liability** insurance. Commercial general liability (CGL) with a limit of not less than \$5,000,000 each occurrence and an aggregate limit of not less than \$10,000,000. CGL insurance must be written on ISO occurrence form CG 00 01 12 04 (or a substitute form providing equivalent coverage).

The policy must also contain the following endorsement, which must be stated on the certificate of insurance:

- Contractual Liability Railroads ISO form CG 24 17 10 01 (or a substitute form providing equivalent coverage) showing "Union Pacific Railroad Company Property" as the Designated Job Site.
- Designated Construction Project(s) General Aggregate Limit ISO Form CG 25 03 03 97 (or a substitute form providing equivalent coverage) showing the project on the form schedule.

B. **Business Automobile Coverage** insurance. Business auto coverage written on ISO form CA 00 01 10 01 (or a substitute form providing equivalent liability coverage) with a combined single limit of not less \$5,000,000 for each accident and coverage must include liability arising out of any auto (including owned, hired and non-owned autos).

The policy must contain the following endorsements, which must be stated on the certificate of insurance:

- Coverage For Certain Operations In Connection With Railroads ISO form CA 20 70 10 01 (or a substitute form providing equivalent coverage) showing "Union Pacific Property" as the Designated Job Site.
- Motor Carrier Act Endorsement - Hazardous materials clean up (MCS-90) if required by law.

C. **Workers' Compensation and Employers' Liability** insurance. Coverage must include but not be limited to:

- Contractor's statutory liability under the workers' compensation laws of the state where the work is being performed.
- Employers' Liability (Part B) with limits of at least \$500,000 each accident, \$500,000 disease policy limit \$500,000 each employee.

If Contractor is self-insured, evidence of state approval and excess workers compensation coverage must be provided. Coverage must include liability arising out of the U. S. Longshoremen's and Harbor Workers' Act, the Jones Act, and the Outer Continental Shelf Land Act, if applicable.

The policy must contain the following endorsement, which must be stated on the certificate of insurance:

- Alternate Employer endorsement ISO form WC 00 03 01 A (or a substitute form providing equivalent coverage) showing Railroad in the schedule as the alternate employer (or a substitute form providing equivalent coverage).

D. **Railroad Protective Liability** insurance. Contractor must maintain "Railroad Protective Liability" (RPL) insurance written on ISO occurrence form CG 00 35 12 04 (or a substitute form providing equivalent coverage) on behalf of Railroad as named insured, with a limit of not less than \$2,000,000 per occurrence and an aggregate of \$6,000,000. The definition of "JOB LOCATION" and "WORK" on the declaration page of the policy shall refer to this Agreement and shall describe all WORK or OPERATIONS performed under this agreement." Contractor shall provide this Agreement to Contractor's insurance agent(s) and/or broker(s) and Contractor shall instruct such agent(s) and/or broker(s) to

procure the insurance coverage required by this Agreement. A BINDER STATING THE POLICY IS IN PLACE MUST BE SUBMITTED TO RAILROAD BEFORE THE WORK MAY COMMENCE AND UNTIL THE ORIGINAL POLICY IS FORWARDED TO UNION PACIFIC RAILROAD. [Ken - there is a closed quote in this paragraph but no open quote.]

- E. **Umbrella or Excess** insurance. If Contractor utilizes umbrella or excess policies, these policies must "follow form" and afford no less coverage than the primary policy.
- F. **Pollution Liability** insurance. Pollution liability coverage must be included when the scope of the work as defined in the Agreement includes installation, temporary storage, or disposal of any "hazardous" material that is injurious in or upon land, the atmosphere, or any watercourses; or may cause bodily injury at any time.

If required, coverage may be provided in separate policy form or by endorsement to Contractors CGL or RPL. In any form coverage must be equivalent to that provided in ISO form CG 24 15 "Limited Pollution Liability Extension Endorsement" or CG 28 31 "Pollution Exclusion Amendment" with limits of at least \$5,000,000 per occurrence and an aggregate limit of \$10,000,000.

If the scope of work as defined in this Agreement includes the disposal of any hazardous or non-hazardous materials from the job site, Contractor must furnish to Railroad evidence of pollution legal liability insurance maintained by the disposal site operator for losses arising from the insured facility accepting the materials, with coverage in minimum amounts of \$1,000,000 per loss, and an annual aggregate of \$2,000,000.

#### **Other Requirements**

- G. All policy(ies) required above (except worker's compensation and employers liability) must include Railroad as "Additional Insured" using ISO Additional Insured Endorsements CG 20 26, and CA 20 48 (or substitute forms providing equivalent coverage). The coverage provided to Railroad as additional insured shall, to the extent provided under ISO Additional Insured Endorsement CG 20 26, and CA 20 48 provide coverage for Railroad's negligence whether sole or partial, active or passive, and shall not be limited by Contractor's liability under the indemnity provisions of this Agreement.
- H. Punitive damages exclusion, if any, must be deleted (and the deletion indicated on the certificate of insurance), unless the law governing this Agreement prohibits all punitive damages that might arise under this Agreement.
- I. Contractor waives all rights of recovery, and its insurers also waive all rights of subrogation of damages against Railroad and its agents, officers, directors and employees. This waiver must be stated on the certificate of insurance.
- J. Prior to commencing the work, Contractor shall furnish Railroad with a certificate(s) of insurance, executed by a duly authorized representative of each insurer, showing compliance with the insurance requirements in this Agreement.
- K. All insurance policies must be written by a reputable insurance company acceptable to Railroad or with a current Best's Insurance Guide Rating of A- and Class VII or better, and authorized to do business in the state where the work is being performed.
- L. The fact that insurance is obtained by Contractor or by Railroad on behalf of Contractor will not be deemed to release or diminish the liability of Contractor, including, without limitation, liability under the indemnity provisions of this Agreement. Damages recoverable by Railroad from Contractor or any third party will not be limited by the amount of the required insurance coverage.

**EXHIBIT D**  
**TO**  
**CONTRACTOR'S RIGHT OF ENTRY AGREEMENT**

**MINIMUM SAFETY REQUIREMENTS**

The term "employees" as used herein refer to all employees of Contractor as well as all employees of any subcontractor or agent of Contractor.

**I. Clothing**

A. All employees of Contractor will be suitably dressed to perform their duties safely and in a manner that will not interfere with their vision, hearing, or free use of their hands or feet.

Specifically, Contractor's employees must wear:

- (i) Waist-length shirts with sleeves.
- (ii) Trousers that cover the entire leg. If flare-legged trousers are worn, the trouser bottoms must be tied to prevent catching.
- (iii) Footwear that covers their ankles and has a defined heel. Employees working on bridges are required to wear safety-toed footwear that conforms to the American National Standards Institute (ANSI) and FRA footwear requirements.

- B. Employees shall not wear boots (other than work boots), sandals, canvas-type shoes, or other shoes that have thin soles or heels that are higher than normal.
- C. Employees must not wear loose or ragged clothing, neckties, finger rings, or other loose jewelry while operating or working on machinery.

**II. Personal Protective Equipment**

Contractor shall require its employees to wear personal protective equipment as specified by Railroad rules, regulations, or recommended or requested by the Railroad Representative.

- (i) Hard hat that meets the American National Standard (ANSI) Z89.1 – latest revision. Hard hats should be affixed with Contractor's company logo or name.
- (ii) Eye protection that meets American National Standard (ANSI) for occupational and educational eye and face protection, Z87.1 – latest revision. Additional eye protection must be provided to meet specific job situations such as welding, grinding, etc.
- (iii) Hearing protection, which affords enough attenuation to give protection from noise levels that will be occurring on the job site. Hearing protection, in the form of plugs or muffs, must be worn when employees are within:
  - 100 feet of a locomotive or roadway/work equipment
  - 15 feet of power operated tools
  - 150 feet of jet blowers or pile drivers
  - 150 feet of retarders in use (when within 10 feet, employees must wear dual ear protection – plugs and muffs)
  -
- (iv) Other types of personal protective equipment, such as respirators, fall protection equipment, and face shields, must be worn as recommended or requested by the Railroad Representative.

### III. On Track Safety

Contractor is responsible for compliance with the Federal Railroad Administration's Roadway Worker Protection regulations – 49CFR214, Subpart C and Railroad's On-Track Safety rules. Under 49CFR214, Subpart C, railroad contractors are responsible for the training of their employees on such regulations. In addition to the instructions contained in Roadway Worker Protection regulations, all employees must:

- (i) Maintain a distance of twenty-five (25) feet to any track unless the Railroad Representative is present to authorize movements.
- (ii) Wear an orange, reflectorized workwear approved by the Railroad Representative.
- (iii) Participate in a job briefing that will specify the type of On-Track Safety for the type of work being performed. Contractor must take special note of limits of track authority, which tracks may or may not be fouled, and clearing the track. Contractor will also receive special instructions relating to the work zone around machines and minimum distances between machines while working or traveling.

### IV. Equipment

- A. It is the responsibility of Contractor to ensure that all equipment is in a safe condition to operate. If, in the opinion of the Railroad Representative, any of Contractor's equipment is unsafe for use, Contractor shall remove such equipment from Railroad's property. In addition, Contractor must ensure that the operators of all equipment are properly trained and competent in the safe operation of the equipment. In addition, operators must be:
  - Familiar and comply with Railroad's rules on lockout/tagout of equipment.
  - Trained in and comply with the applicable operating rules if operating any hy-rail equipment on-track.
  - Trained in and comply with the applicable air brake rules if operating any equipment that moves rail cars or any other railbound equipment.
- B. All self-propelled equipment must be equipped with a first-aid kit, fire extinguisher, and audible back-up warning device.
- C. Unless otherwise authorized by the Railroad Representative, all equipment must be parked a minimum of twenty-five (25) feet from any track. Before leaving any equipment unattended, the operator must stop the engine and properly secure the equipment against movement.
- D. Cranes must be equipped with three orange cones that will be used to mark the working area of the crane and the minimum clearances to overhead powerlines.

### V. General Safety Requirements

- A. Contractor shall ensure that all waste is properly disposed of in accordance with applicable federal and state regulations.
- B. Contractor shall ensure that all employees participate in and comply with a job briefing conducted by the Railroad Representative, if applicable. During this briefing, the Railroad Representative will specify safe work procedures, (including On-Track Safety) and the potential hazards of the job. If any employee has any questions or concerns about the work, the employee must voice them during the job briefing. Additional job briefings will be conducted during the work as conditions, work procedures, or personnel change.
- C. All track work performed by Contractor meets the minimum safety requirements established by the Federal Railroad Administration's Track Safety Standards 49CFR213.
- D. All employees comply with the following safety procedures when working around any railroad track:
  - (i) Always be on the alert for moving equipment. Employees must always expect movement on an track, at any time, in either direction.

- (ii) Do not step or walk on the top of the rail, frog, switches, guard rails, or other track components.
- (iii) In passing around the ends of standing cars, engines, roadway machines or work equipment, leave at least 20 feet between yourself and the end of the equipment. Do not go between pieces of equipment if the opening is less than one car length (50 feet).
- (iv) Avoid walking or standing on a track unless so authorized by the employee in charge.
- (v) Before stepping over or crossing tracks, look in both directions first.
- (vi) Do not sit on, lie under, or cross between cars except as required in the performance of your duties and only when track and equipment have been protected against movement.

E. All employees must comply with all federal and state regulations concerning workplace safety.

