

**LEASE AND OPERATING AGREEMENT**

THIS LEASE AND OPERATING AGREEMENT ("Agreement") is made and entered into this 11 day of DECEMBER, 2008, by and between the PORT OF TACOMA, a duly organized Port District of Pierce County, Washington, hereinafter referred to as "Port", and UNION PACIFIC RAILROAD COMPANY, a Delaware corporation, with an address of 1400 Douglas Street, Omaha, Nebraska 68179, hereinafter referred to as "UP".

RECITALS:

WHEREAS, pursuant to that certain Lease Agreement (the "Prime Lease") between the City of Tacoma, Department of Public Utilities ("Prime Landlord") as landlord and Port as tenant, dated August 30, 1984, and amended October 24, 1985, Prime Landlord leased that certain Tacoma South Intermodal Yard property (the "SIM Yard") containing approximately 16.7 acres to Port, which SIM Yard is depicted on **Exhibit A** attached hereto and incorporated herein by reference, and which Prime Lease is attached as **Exhibit B** hereto and incorporated herein by reference; and

WHEREAS, Port desires to grant to UP certain use and operating rights on and in such SIM Yard, upon the terms and conditions set forth herein; and

WHEREAS, Port owns that certain property (the "Container Yard") containing approximately 27 acres, and that certain support yard property (the "Support Yard"), which Container Yard and Support Yard are also depicted (and, in the case of the Container Yard, described) on **Exhibit A**; and

WHEREAS, Port and UP desire that Port lease to UP a portion of the Container Yard, and that Port grant to UP certain use and operating rights on and in such Support Yard, in each case upon the terms and conditions set forth herein.

WITNESSETH:

NOW, THEREFORE, in consideration of the covenants, conditions and obligations set forth herein, Port and UP hereby agree as follows:

1. Premises: The Port hereby leases and rents to UP, and UP rents and leases from the Port, subject to the terms and conditions herein contained, the following described land, which land is a portion of the Container Yard, together with all improvements (other than the portable building of PRS, as noted below) located thereon (the "Premises"), in the Port of Tacoma, Tacoma, Pierce County, Washington: consisting of approximately ten (10) acres, as also depicted and described on **Exhibit A**. The Premises shall include non-exclusive access rights over private roads as depicted on **Exhibit A** as needed to get access from the Premises to and from public roads, and non-exclusive access over any rail connections not already owned or controlled by UP for movement by UP of its trains to and from tracks otherwise owned or controlled by UP for

Bom may

connection with UP's national rail network. If Milwaukee Way, which Port represents is currently a public right-of-way, is vacated during the term hereof, the Port shall cause UP to have vehicular and pedestrian rights of access to and from the Premises over Milwaukee Way to access the SIM Yard and Lincoln Avenue. The access rights granted to UP in this paragraph shall be non-exclusive but at all times shall take priority over other users subject to commercially reasonable accommodation by UP of other users.

During the entire term of this Agreement, Port also grants to UP the non-exclusive right to operate UP's intermodal trains, as designated generally by UP, to and from the SIM Yard, via trackage identified on **Exhibit A**, which rights shall include the right of vehicular and pedestrian access to and from public rights-of-way and the SIM Yard and the Support Yard and the right to have the Port's operator at the SIM Yard (the "Operator"), currently Pacific Rail Services ("PRS"), load and unload containers onto and from UP's trains as and when directed by UP and move containers for or from UP's trains to and from the Premises as and when directed by UP (at volume levels directed by UP), following safety and other procedures reasonably acceptable to UP, in UP's sole discretion subject to commercially reasonable accommodation by UP of other users of the SIM Yard and Support Yard. Port's costs for the Operator shall be passed on to UP only to the extent of the fees otherwise payable by UP under Section 4 below. During the entire term of this Agreement, Port also grants to UP the non-exclusive right to operate its intermodal trains in the Support Yard, including any operations elected by UP, as and when elected by UP, in UP's sole discretion subject to commercially reasonable accommodation by UP of other users of the SIM Yard and Support Yard. UP's costs for its operating rights in the Support Yard shall be solely those set forth in Section 4 below. UP's operating rights in the SIM Yard and Support Yard shall not be exclusive, but at all times shall take priority over other users of the SIM Yard and Support Yard subject to commercially reasonable accommodation by UP of other users of the SIM Yard and Support Yard.

UP acknowledges that the Premises are subject to that certain agreement between the Port and PRS under which PRS possesses and maintains a portable building on the Premises, together with rights of access to and from such portable building. The Port shall prevent PRS from interfering with any operations of UP at the Premises.

Upon not less than six (6) months written notice to Port by UP, UP may increase the land included in the Premises from time to time during the term of this Agreement up to a total of 25 acres in the Premises. Such additional land shall be added from land contiguous to the then-Premises, in the area shown on **Exhibit A** as Lot 2 and Premises Expansion Area. Any such increases shall be made in five-acre increments. Upon UP's notice of increase to Port, Port shall relocate any tenant then located on such Lot 2, so that UP's Premises shall be one contiguous area, not separated completely or partially by other property; provided that the Premises may be partially separated by an electrical substation or other utility facilities.

2. Term: The term of this Agreement shall be ten (10) years commencing January 12, 2009 ("commencement date"), and terminating on January 11, 2019. However, UP shall have the right, upon not less than 180 days' notice to Port, to terminate this Agreement effective not earlier than January 11, 2014.

Bom moy

3. Relocation during the term of the Agreement: UP acknowledges Port may need to relocate UP's operations to another location at the Port of Tacoma near the Premises at some point after the conclusion of the initial five years of the term of this Agreement. Accordingly, at Port's option, Port may upon one hundred eighty (180) days prior written notice to UP, effective not earlier than the fifth (5<sup>th</sup>) anniversary of the commencement date of this Agreement, relocate UP's operations to other premises at the Port of Tacoma, provided that such other premises are located in an intermodal terminal facility (which may be a joint use facility) with the capability to handle the volumes then being handled and then projected by UP for its future use at the Premises; comparable, in UP's reasonable judgment, in size, layout, track configuration, access to UP's through lines in Tacoma, and suitability for UP's operations at the Premises, taking into account UP's operations at the Premises, SIM Yard and Support Yard, as of the date of such relocation; or as otherwise mutually agreed by Port and UP. In the event of any such relocation pursuant to this Section 3, the substitute premises shall be improved by Port at its expense, with improvements at least equal in quantity and quality to those in the then-Premises, and including an operating yard equivalent to the SIM Yard, a container yard equivalent to the Premises, and a support yard equivalent to the Support Yard, and Port shall pay all of UP's costs of relocating from the Premises to the other premises including, without limitation, the cost of moving UP's fixtures, equipment and containers, administrative expenses, reprinting of letterhead, business interruption, or any other indirect costs incidental to such relocation; provided, however, that (i) UP shall cooperate with Port and use commercially reasonable efforts to minimize the same, (ii) the amount to be paid by Port pursuant to this sentence shall [be mutually agreed upon by Port and UP, but shall] in no event exceed \$200,000.00, and (iii) if Port reimburses UP for (and UP does not waive) its costs of relocating from the Premises to other premises, UP shall be deemed to have waived its right to terminate this Agreement for the five-year period beginning on the date UP actually relocates its operations hereunder.

4. Rent and Fees: UP agrees to pay, and Port agrees to accept, rental and other fees in the amount of:

a) At the commencement of the term of this Agreement, when the Premises include ten (10) acres of fenced, paved yard space, UP shall pay rental at a rate equal to \$.12/sq.ft. of Premises per month, for a base rental of \$52,272.00 per month. The monthly rental payable under this Section 4(a) shall increase each year on the anniversary of the commencement of the term of this Agreement by a percentage equal to the percentage by which the Consumer Price Index for the Seattle-Tacoma-Bremerton area, all Urban Consumers, all items, has increased over the most recently reported 12-month period, adjusted to the nearest one-tenth of one percent. If the Seattle-Tacoma-Bremerton index is no longer published, then the closest comparable index shall be used. The fees payable hereunder for use of the SIM Yard and Support Yard are set forth in Section 4(e) below.

b) At such time as the Premises are expanded to include additional land, UP shall pay an increased monthly rental amount by adding to the then-current monthly rental an amount per square foot per month then paid for the Premises multiplied

Bon mon

by the amount of such additional land in the Premises.

c) Such monthly rental shall be payable on the first (1<sup>st</sup>) day of every month in advance at Port's office in Tacoma, Washington.

d) UP shall deposit with Port prior to the commencement of the term of this Agreement, and shall thereafter maintain throughout the term of this Agreement, a cash deposit, blocked or assigned account, bond, or other form of security, in form and on terms acceptable to Port, in an amount equal to Six Hundred Twenty-Seven Thousand Two Hundred Sixty-Four Dollars (\$627,264.00), which Port acknowledges is equal to one (1) year's lease rental for the initial ten (10) acres of Premises, to ensure compliance by UP with all terms of this Agreement. The amount of the deposit shall be adjusted to reflect rental adjustments or other changes affecting the value or term of this Agreement. Such deposit, together with any interest earned thereon to be credited to UP, if applicable, and not already paid to UP, shall be refunded to UP within ninety (90) days after the termination or expiration of this Agreement, less any portion necessarily applied by Port to the cure of any breach by UP under this Agreement.

e) Other fees

i) Lift Fee – The Lift Fee is the fee charged for either lifting a container or trailer of UP onto or off of a rail car at the SIM Yard. The lift fee shall be defined as including drayage from the rail ramp to the Premises or from the Premises to the rail car being loaded. The Lift Fee charged by the Port to UP shall be \$50 per lift for each lift of a container or trailer which is moved through the SIM Yard by UP, up to a cumulative total of 72,000 lifts per year. The Lift Fee shall be \$45 per lift for each lift over a cumulative total of 72,000 lifts per year, for each container or trailer which is moved through the SIM Yard by UP.

Port currently has an agreement with PRS to be the Operator through June 30, 2014. On or about June 30, 2014, Port or UP shall attempt to renegotiate the agreement with PRS or some other third party to serve as operator of the SIM Yard after June 30, 2014. Port and UP shall work together in an attempt to reach an agreement for the reduction of the Lift Fee payable under this Section 4(e), provided UP shall have the right to negotiate directly with PRS or any other prospective operator, if UP elects, but if UP negotiates directly with PRS or any other prospective operator then any agreement reached in such negotiations shall be subject to the approval of both the Port and UP.

ii) Facility Use Fee – The Facility Use Fee is defined as the cost per container of providing infrastructure at the Premises, SIM Yard and Support Yard by Port to UP, including covering certain fixed costs for rental of the SIM Yard by Port from the Prime Landlord. During the term hereof, the Facility Use Fee shall be as established by Port from time to time (currently \$20 per container), and adjusted each year in the same manner as rent under Section 4(a) above, and shall be payable by UP to Port for each container which is brought into the SIM Yard by UP through the gate or into the SIM Yard by UP by train and lifted off into the SIM Yard. Such Facility Use Fee shall be

Bom

may

payable at the time a container is brought in through the gate or lifted off of a train.

iii) Gate Fee – The Port shall charge UP the Port's actual costs for such inspection (as documented for UP by Port), not to exceed \$17.50 per trailer or combination chassis/container per inspection, unless otherwise mutually agreed by UP and the Port.

5. Volume Commitments: UP shall move containers through the SIM Yard at a level requiring 35,000 lifts per year in the first year of the term of this Agreement, increasing to a level of 45,000 lifts per year in the second year of the term of this Agreement, and then further increasing by five percent (5%) each year during the term of this Agreement. In the event that UP does not meet such lift levels for any year during the term of this Agreement, Port's sole remedy shall be to receive from UP the Facility Fee payable under Section 4(d)(iii) for each lift by which the total number of lifts falls short of the level set forth herein.

6. Use: The Premises shall be used for the following purpose, and no other, except by written consent of the Port, which consent shall not be unreasonably withheld, conditioned or delayed: Operation of an intermodal facility and related supporting use, including storage of loaded and empty containers on wheels (chassis), trailers, and miscellaneous equipment necessary to operate the rail ramp and other uses incidental to such use or otherwise permissible under applicable law. UP shall not stack containers or ground containers without Port's prior written consent, which consent shall not be unreasonably withheld, conditioned or delayed if UP provides Port with evidence that UP's proposed method of stacking (including UP's investment of any necessary infrastructure for such stacking) has been conducted safely at other locations.

7. Condition of Premises: UP has inspected the Premises, is aware of their condition, and accepts them as they are. UP has inspected the SIM Yard, Support Yard, and related access areas for UP operational purposes and accepts them as they are for such purposes. At the expiration or sooner termination of this Agreement, UP shall return the Premises to the Port in the same condition in which received (or, if altered by UP with the Port's consent, then the Premises shall be returned in accordance with Paragraph 19 herein), reasonable wear and tear and other casualty excepted.

8. Maintenance: Subject to Port's obligations hereunder, UP shall maintain the Premises in a safe condition and in compliance with all applicable laws, regulations and ordinances. The Port shall maintain the SIM Yard and Support Yard consistent with industry standards and safe intermodal rail yard operations. UP shall pay the Port within thirty (30) days from presentation of invoice the reasonable cost of repairing or replacing any damage to the SIM Yard, Support Yard, or any facilities located therein, caused by UP or its employees, agents, contractors, operators with whom UP has a contractual relationship, customers, licensees or invitees, other than reasonable wear and tear from normal operations.

9. Taxes: UP agrees to pay or cause to be paid to Port all leasehold excise taxes assessed on this Agreement on the date hereof, which UP acknowledges are

Ban

MDN

currently assessed at 12.84% of the rental payable for the Premises. In addition, UP agrees to pay or cause to be paid any other tax imposed on the land included in the Premises or any portion or component thereof, or on the interest of either party in the Premises during this Agreement, or imposed on the parties or either of them based on this Agreement, or imposed on other sums payable by UP hereunder. Further, UP shall pay any personal property taxes on personal property or improvements owned by UP and located at the Premises, including any buildings, trailers or containers owned or installed by UP at the Premises.

10. Inspection and Access: UP will allow Prime Landlord, Port or their agent free access at reasonable times and upon reasonable prior written notice to UP to the Premises for the purpose of inspection, provided each of Prime Landlord, Port, or the agent shall not interfere with UP's operations at the Premises. Port shall have the right to place and maintain "For Rent" signs in a conspicuous place on the Premises for thirty (30) days prior to the expiration of this Agreement.

11. Remedies: In case of default in any payment herein provided for to be made by UP and not cured within ten (10) days after written notice to UP by Port, it shall be lawful for Port to reenter the Premises and to remove all persons therefrom with process of law. UP hereby covenants, promises and agrees to pay the Port the rents herein provided for at the times and in the manner provided for, and to be primarily responsible for the rents and covenants herein contained, should any portion of the Premises herein involved be sublet or assigned to any third party. In the event of any default under this Agreement by Port, UP shall have the right to pursue any and all remedies available under applicable law, along with the right to reduce any payments otherwise due Port hereunder by the amount of any costs or damages incurred by UP due to Port's default.

12. Default: A default by a party under this Agreement shall occur if such party shall become insolvent, or shall allow placement of any liens arising out of any work performed, materials furnished or obligations incurred by such party with respect to the Premises and not released prior to foreclosure of such lien by the claimant, or shall make a transfer in fraud of creditors, or shall make an assignment for the benefit of creditors, or if a receiver, assignee or other liquidating officer is appointed for the business of such party, or if such party shall file a petition in bankruptcy under any section of the Bankruptcy Laws, or shall cause a breach or default under the Prime Lease, or shall fail to perform any other obligation under this Agreement within thirty (30) days after notice from the other party hereto, except in the event such performance reasonably requires more than thirty (30) days, and such party commences performance during such thirty (30)-day period and thereafter diligently pursues completion of such performance.

13. Hold Harmless and Indemnity: All personal property on the Premises, and all personal property owned by UP or being handled by UP or its employees, agents, or contractors at the SIM Yard or Support Yard, shall be at the sole risk of UP, except for personal property of Prime Landlord, Operator, or Port, if any, or except for any containers or other property for which Port or its agents or contractors are providing any inspection, lifting or other transportation services at or near the Premises, SIM Yard, or

BOM

MDN

Support Yard, or except as otherwise provided in this Agreement. Except as provided elsewhere in this Agreement, Port, its employees and agents shall not be liable for any injury to or death of any person, or damage to property, sustained or alleged to have been sustained by UP or others as a result of any condition (including future conditions) on the Premises, SIM Yard, or Support Yard; or as a result of the Premises, SIM Yard, or Support Yard becoming out of repair, or caused by fire or by the bursting or leaking of water, gas, sewer or steam pipes, or due to the happening of any accident from whatsoever cause in and about the Premises, SIM Yard, or Support Yard. Except as otherwise provided herein, UP agrees to indemnify, defend and hold Port, its employees and agents harmless from any and all claims for damages from any property damage, injury or death suffered on or about the Premises, SIM Yard, or Support Yard by any person, firm or corporation, to the extent such loss or damage results from the negligent act or omission of UP or its officers, employees, contractors, or agents, except to the extent such loss or damage results from the negligence of Port or its employees, contractors or agents. Port agrees to indemnify, defend and hold UP, its employees, officers and agents harmless from any and all claims for damages from any property damage, injury or death suffered on or about the Premises or SIM Yard or Support Yard by any person, firm or corporation, to the extent such loss or damage results from the negligent act or omission of Port or its employees, officers, contractors or agents. Port acknowledges that UP may self-insure any liability risks related to UP's operations at the Premises, subject to UP maintaining commercially-reasonable business policies and practices regarding such self-insurance, and subject to the Port approving such self-insurance (which approval by Port shall not be unreasonably withheld), or UP may carry such liability insurance as UP shall reasonably elect. Reasonably promptly following execution of this Agreement, UP shall provide Port with a letter from its Risk Management Department confirming UP's maintenance of a Risk Management Program.

14. Property and Casualty Insurance: UP may self-insure all of its personal property and fixtures on the Premises or kept or stored thereon or carry such property insurance as UP shall elect.

15. Property Conservation: [Intentionally omitted.]

16. Waiver of Subrogation: Port and UP each hereby release the other from any claim for any damage to property owned by Port or UP at the Premises, SIM Yard, or Support Yard caused by the other, to the extent such damage would have been insurable under any available insurance coverage, including any extended coverage endorsements thereto, regardless of whether such party in fact carries such coverage. If either party hereto carries any insurance coverage on its property, such party shall require its insurance company to waive any right of subrogation for any damage to any such property.

17. Right to Cure: At any time and upon notice to the other party, a party may, but need not, cure any failure by the other party to perform its obligations under this Agreement. Whenever a party chooses to do so, all reasonable costs and expenses incurred by such party in curing any such failure shall be paid by the other party to such party on demand.

Ban

mon/

18. Observance of Laws and Regulations: UP agrees to keep the Premises in a reasonably clean and safe condition. UP also agrees to conduct its operations in the SIM Yard and Support Yard in a manner that keeps those areas in a reasonably clean and safe condition. UP further agrees to comply with all police, sanitary and safety laws, and all applicable regulations and ordinances of all governmental bodies having authority over the Premises, SIM Yard, or Support Yard, or any activity conducted thereon including, but not limited to, those pertaining to stormwater, odor and dust emissions and noise.

19. Alterations and Improvements: UP will make no alterations, additions or improvements in or to the Premises without written approval of Port, but such approval will not be unreasonably withheld, conditioned or delayed. UP will make no alterations, additions or improvements in or to the SIM Yard or Support Yard without written approval of the Port, which approval may be withheld in the Port's sole and absolute discretion. UP acknowledges that the Port's approval of such alterations, additions or improvements shall be based on proper notice to the Port by UP, UP's obtaining the required permits for such alterations, additions or improvements, and the Port's review of the engineering plans for such alterations, additions or improvements. Port acknowledges UP's intention to place a building on the Premises temporarily and approves the addition of such building by UP. All alterations, additions and improvements made by UP and not removed by UP reasonably promptly after the expiration or termination hereof shall become the property of Port unless there is written agreement to the contrary attached to the Agreement. UP agrees that on termination of the tenancy created hereunder, all improvements placed by it on the Premises shall, at the election of the Port, be removed by UP at its expense. All trade fixtures including, but not limited to, trackage, shelving, portable partitions and cabinets, shall remain the property of UP and may be removed on or before the termination of this Agreement, or any renewal thereof, provided that UP makes any repairs necessary to restore the Premises to their condition on the date hereof upon removal. If not removed by UP, Port may remove at UP's expense or such items shall become the property of the Port upon expiration of this Agreement.

20. Utilities: UP shall be liable for, and shall pay throughout the term of this Agreement, all charges for all utility services furnished to the Premises, including, but not limited to, light, heat, electricity, gas, water, sewerage, storm sewer, garbage disposal and janitorial services. In the event that the Premises are part of any larger premises to which any utility services are furnished on a consolidated or joint basis, UP agrees to pay to Port UP's pro rata share of the cost of any such utility services. UP's pro rata share of any such services shall be computed by the Port on any reasonable basis, with reasonable documentation of Lessor's computation and supporting invoices to be provided to UP and separate metering or other exact segregation of cost shall not be required. All charges for additional utility installation requested by UP shall be for the expense of UP.

21. Attorneys' Fees: If either party to this Agreement brings an action before any Court or arbitrator to enforce or obtain a declaration of its rights under any provision of this Agreement, a reasonable attorneys' fee shall be awarded to the prevailing party in such litigation or arbitration.

22. Assignments and Subleases: UP shall not, except by prior written consent

Bon MON



of the Port, which consent shall not be unreasonably withheld, conditioned or delayed, assign this Agreement or sublease any portions of the Premises.

23. Hazardous Substances:

a) Hazardous Substances Defined: As used in the Agreement, the term "Hazardous Substance" means any hazardous, toxic, dangerous or extremely dangerous substance, material or waste, which is or becomes regulated by the United States Government, the State of Washington, or any local governmental authority. The term includes, without limitation, any substance containing constituents regulated as specified above.

b) Release Defined: As used in this Agreement, the term "release" shall be defined as provided in 42 U.S.C. 9601 and RCW 70.105D.020. In the event a conflict exists between the two definitions, the broader definition shall apply. For purposes of the Agreement, the term release shall also include a threatened release.

c) Use, Storage and Disposal: Notwithstanding any other provision of this Agreement, UP shall not use, store, treat, generate, sell or dispose of any Hazardous Substances in violation of applicable Laws on the Premises, SIM Yard, and Support Yard.

d) Compliance with Laws: Subject to Port's obligations hereunder, UP shall, at its sole cost and expense, comply with all laws, statutes, ordinances, regulations, rules, and other governmental requirements regarding the proper and lawful generation, use, sale, transportation, storage, treatment and disposal of Hazardous Substances (hereinafter "Laws") on the Premises, SIM Yard, and Support Yard.

e) Monitoring: Port or its designated agents may, at Port's sole discretion and at reasonable times, upon reasonable prior written notice and without interfering with UP's operations at the Premises, SIM Yard, or Support Yard, enter upon the Premises, SIM Yard, and Support Yard for the purpose of conducting environmental testing and sampling to determine compliance with applicable Laws and the terms of this Agreement. If such monitoring discloses the presence or release of Hazardous Substances in violation of either applicable Laws or this Agreement and shown by Port to have been caused by UP (but excluding in all cases any such Hazardous Substances existing at the time of the Port's acquisition of such certain land of which the Premises are a part from UP's predecessor in interest in 1995, whether or not such Hazardous Substances were released or discharged onto the Property by any predecessor in interest to UP (such Hazardous Substances existing at the time of such conveyance, the "Pre-existing Contamination")), the cost of such monitoring shall be paid by UP pursuant to subparagraph "h". In addition, within thirty (30) days of Port's written request following such disclosure to Port, UP shall provide Port with a detailed written description of UP's generation, use, sale, transportation, storage, treatment and disposal of Hazardous Substances (excluding any Pre-existing Contamination) on or which may otherwise affect the Premises, SIM Yard, or Support Yard, if any. Port's discretionary actions pursuant to this subparagraph shall not constitute a release, waiver or modification of UP's obligations otherwise specified in this Agreement.

RM mon/

f) Notifications: UP shall notify Port within twenty-four (24) hours of discovery of any release of Hazardous Substances by UP that may affect the Premises, SIM Yard, or Support Yard, and shall promptly provide Port with a copy of any notifications given by UP to any governmental entity regarding any such release. UP shall promptly provide Port with copies of any inspection report, order, fine, request, notice or other correspondence from any governmental entity regarding the release of Hazardous Substances (again, excluding any Pre-existing Contamination) that may affect the Premises, SIM Yard, or Support Yard. UP shall provide Port with a copy of all reports, manifest, material safety data sheets (MSDs), and identification numbers regarding Hazardous Substances at the Premises, SIM Yard, or Support Yard submitted to the appropriate governmental authorities after the date hereof.

g) Environmental Assessment: UP shall, upon written request from Port, based on a sufficient reason to believe there has been a release of Hazardous Substances at the Premises by UP during UP's tenancy, or at the Premises, SIM Yard, or Support Yard as a result of UP's use of those areas, within sixty (60) days following expiration or other termination of the Agreement, provide Port with an environmental assessment prepared by a qualified professional approved in advance by the Port.

h) Hold Harmless and Indemnity: UP shall defend, indemnify and hold Port and its agents harmless from any loss, claim, expenses, damages, fine or penalty arising from the release of Hazardous Substances on the Premises or the SIM Yard or the Support Yard or any violation of applicable Laws affecting the Premises or the SIM Yard or the Support Yard, whether occurring prior to or during the term hereof, but in each case solely to the extent caused by UP or its employees or agents. The obligation of UP to defend, indemnify and hold Port and its agents harmless shall include, but shall not be limited to, environmental response and remedial costs, other cleanup costs, environmental consultants' fees, attorneys' fees, fines and penalties, laboratory testing fees, claims by third parties and governmental authorities for death, personal injuries, property damage, business disruption, lost profits, natural resource damages and any other costs, and Port's expenses as provided in subparagraphs "d", "e" and "g" in each case to the extent required by applicable Laws and not otherwise remediated by UP. Provided, however, notwithstanding anything in this Section 23 to the contrary, UP shall have no obligation to Port with respect to any Pre-existing Contamination, and Port shall continue to have complete responsibility for any such Pre-existing Contamination and the related condition of the Premises, as set forth in the agreements between Port and UP's predecessor in interest relating to the conveyance of the Premises and other property to the Port in 1994 and 1995 and as set forth in Port's Prospective Purchaser Agreement with the State of Washington, Department of Ecology or other agreement related thereto. Port shall defend, indemnify and hold UP and its employees, officers and agents harmless from any loss, claim, expenses, damages, fine or penalty arising from the release of Hazardous Substances on or near the Premises or the SIM Yard or the Support Yard, or any violation of applicable Laws affecting the Premises or the SIM Yard or the Support Yard to the extent not caused by UP or its employees or agents, except in the case of Pre-existing Contamination, for which, along with any obligations of Port under any Prospective Purchaser Agreement with the State of Washington, Department of Ecology or other

BOM MON

agreement, Port shall also defend, indemnify and hold UP and its employees, officers and agents harmless hereunder. Such obligations shall include, but shall not be limited to, environmental response and remedial costs, other cleanup costs, environmental consultants' fees, attorneys' fees, fines and penalties, laboratory testing fees, claims by third parties and governmental authorities for death, personal injuries, property damage, business disruption, lost profits, natural resource damages and any other costs. UP's and Port's obligations pursuant to this subparagraph shall survive expiration or other termination of this Agreement.

UP shall have no obligation under this subsection "h" if the release or threat of release of a Hazardous Substance and the damages resulting therefrom were caused by:

- (1) An act of God;
- (2) An act of war;
- (3) An act or omission of a third party other than an employee or agent of UP, or one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with UP (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail); or
- (4) Any combination of the foregoing paragraphs.

i) Default and Cure: Notwithstanding any other provision of this Agreement, either party may, in event of a release of Hazardous Substances or a violation of applicable Laws affecting the Premises or SIM Yard or Support Yard for which such party is not responsible hereunder (Port hereby acknowledging its responsibility for Pre-existing Contamination), require the other party to investigate, report and remediate, as required by applicable Laws any such release of Hazardous Substances or violation of applicable Laws, upon which such other party shall reasonably promptly complete such required investigation, reporting or remediation.

j) Assignments and Subleases: Pursuant to Section 22 of this Agreement, UP shall not, except by prior written consent of the Port, which consent shall not be unreasonably withheld, conditioned or delayed, assign this Agreement or sublease any portions of the Premises. It shall be deemed reasonable for the Port to withhold its consent to any assignment, sublease, or other transfer if the proposed transferee's use of the Premises may involve the generation, storage, use, treatment, or disposal of Hazardous Substances, as defined in this agreement; provided, however, that the Port's withholding of consent on that basis shall not be deemed reasonable to the extent that the proposed transferee's use of the Premises is the same as that expressly permitted under Section 6 of this Agreement, and such proposed transfer, transferee, and use comply with all terms of this Agreement and all applicable laws, regulations, rules, ordinances, and orders.

k) Release of Hazardous Substances: In the event of a release of

Born WSN/

Hazardous Substances by UP on the Premises, the SIM Yard or the Support Yard subsequent to the date hereof or a failure to perform an obligation of UP under this Section 23, which in each case also rises to the level of a default under Section 12 above, without prejudice to any other remedy, the Port shall be entitled to the following rights and remedies, at Port's option:

(1) To recover any and all damages associated with the default, including but not limited to cleanup costs and charges, civil and criminal penalties and fees, and Port's attorneys' fees and costs, but expressly excluding any punitive, indirect consequential and exemplary damages.

(2) To renegotiate the terms of this Agreement to recover any return on expenditures made by the Port in order to insure that the Premises, SIM Yard, and Support Yard and the use thereof comply with all governmental rules, regulations and requirements.

24. Signs: All signs or symbols placed on the Premises, SIM Yard, or Support Yard by UP shall be subject to the approval of Port which shall not be unreasonably withheld, conditioned or delayed. Any signs so placed on the Premises, SIM Yard, or Support Yard shall be so placed upon the understanding and agreement that UP will remove the same at the termination of this Agreement and repair any damage or injury to the Premises, SIM Yard, or Support Yard caused thereby, and if not so removed by UP then Port may have the same so removed at UP's expense.

25. Representations: Port hereby represents and warrants to UP that attached hereto as **Exhibit B** is a complete copy of the Prime Lease; that there has been no action or event which constitutes, or with the passage of time or transmittal of notice or both would constitute, a breach or default by either party to the Prime Lease; that Port has obtained any and all consents from Prime Landlord under the Prime Lease and has full power and authority to enter into this Agreement and to perform all of Port's obligations hereunder; that there is no Hazardous Substance present on or under the Premises or SIM Yard or Support Yard as of the date hereof, except as has previously been disclosed by Port to UP or has been the subject of written correspondence between Port and UP; that there is no pending or threatened litigation with respect to the Premises or SIM Yard or Support Yard; that each of Prime Landlord, Operator, Port, Premises, SIM Yard and Support Yard are in compliance with all existing Laws, ordinances and regulations governing the Prime Landlord, Operator, Port or the Premises and SIM Yard and Support Yard; that Port has delivered to UP copies of all reports, documents, notices, or other materials in the possession or under the control of Port and related to the condition of the Premises or SIM Yard or Support Yard or surrounding property, including environmental reports, property condition reports, soil reports, and groundwater reports; that the zoning classification of the Premises and SIM Yard and Support Yard permits as of right the use of the Premises and SIM Yard and Support Yard and surrounding property as an intermodal rail terminal facility and all incidental uses related thereto, including operation of trains at all hours of the day and night, the generation of the corresponding noise, and the outdoor storage of containers and trailers; and that Premises, SIM Yard and Support Yard are all included in the land to which the Puyallup Indian Tribe and the United States

BOM

MSY

Government, as trustee for the Puyallup Indian Tribe, relinquish all claims under Article 9 A of the Agreement dated August 27, 1988 among United States of America, Puyallup Indian Tribe, Port of Tacoma, and various other parties including Union Pacific Railroad Company.

26. Quiet Enjoyment: As long as UP performs its obligations hereunder on UP's part to be performed, UP shall peaceably and quietly enjoy possession of the Premises and its operating rights in the SIM Yard and Support Yard.

27. Time is of the Essence: Time is of the essence with respect to each and every provision and obligation set forth in this Agreement.

28. Holding Over: If UP remains in possession of the Premises beyond the expiration date of this Agreement without the consent of Port, such possession shall be deemed a month-to-month tenancy, on the same terms and conditions as are otherwise set forth herein.

29. Prime Lease: This Agreement is subject and subordinate to the Prime Lease. UP shall not have any rights in the SIM Yard beyond those granted the Port under the Prime Lease. Port and UP acknowledge that the initial term of the Prime Lease terminates on August 31, 2015 and that Port has two (2) successive options to extend the Prime Lease for five-year terms on the same terms and conditions, exercisable on six months prior written notice to Prime Landlord. On or before January 1, 2015, Port shall send to Prime Landlord the notice required under the Prime Lease for the Port to renew the Prime Lease for an additional five (5) year term, and Port shall provide evidence to UP of the transmittal of such notice on or before February 1, 2015. Port shall not take any action or fail to take any action which by itself or with the passage of time or transmittal of notice or both shall constitute a breach or default under the Prime Lease, and except to the extent expressly provided to be an obligation of UP hereunder, Port shall be responsible for all obligations of Port as tenant concerning the SIM Yard under the Prime Lease. Port shall indemnify and hold harmless UP against any act or omission of Port which constitutes a breach or default under the Prime Lease.

30. Invalidity of Particular Provision: It is the intention of the parties that each term or provision of this Agreement be enforceable to the fullest extent permitted by law. If any term or provision of this Agreement or the application thereof to any person or circumstance is, to any extent, invalid or unenforceable, the remainder of this Agreement and the application of such term or provision to person or circumstances other than those as to which it is held invalid or unenforceable shall not be affected thereby and shall continue in full force and effect.

31. Entire Agreement, Amendments: This Agreement constitutes the complete agreement between Port and UP regarding the subject matter contained herein. There are no terms, obligations, covenants or conditions other than those contained herein. No modification or amendment of this Agreement shall be valid and effective unless evidenced by an agreement in writing signed by both parties hereto.

Bom may

32. Waiver: No word, act or omission of a party hereto shall be deemed to be a waiver of any default or noncompliance by the other party under the terms of this Agreement or of any right of a party hereunder or of any notice given by such party hereunder unless such party so advises the other party in writing. The acceptance of rental by Port for any period or periods after a default or non-compliance by UP hereunder shall not be deemed a waiver of such default. No waiver by a party of any default or noncompliance hereunder by the other party shall be construed to be or act as a waiver of any subsequent default or noncompliance by such other party.

33. Notices: All notices required under this Agreement may be given by certified or registered mail at the following addresses, with such notice being effective three (3) days after deposit in the United States Postal Service or one business day following transmittal by facsimile:

UP: UNION PACIFIC RAILROAD COMPANY  
Attn: Tony K. Love, AVP-Real Estate  
1400 Douglas Street, STOP 1690  
Omaha, Nebraska 68179  
Phone: (402) 544-8640  
Fax: (402) 501-0340

with copy to: UNION PACIFIC RAILROAD COMPANY  
Attn: Barry D. Michaels, AVP-Premium Operations  
1400 Douglas Street, STOP 1160  
Omaha, Nebraska 68179  
Phone: (402) 544-4138  
Fax: (402) 501-0319

with copy to: UNION PACIFIC RAILROAD COMPANY  
Attn: Patrick R. McGill, Senior Counsel-Real Estate  
1400 Douglas Street, STOP 1580  
Omaha, Nebraska 68179  
Phone: (402) 544-5761  
Fax: (402) 997-3603

PORT: PORT OF TACOMA  
Attn: Real Estate Dept.  
P. O. Box 1837  
Tacoma, Washington 98401  
Phone: (253) 383-5841

with copy to: Goodstein Law Group PLLC  
1001 Pacific Ave, Ste 400  
Tacoma, WA 98402  
(253) 779-4000

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be

Bsm mny

executed by their proper officers thereunto authorized this 11<sup>th</sup> day of December, 2008.

PORT:

PORT OF TACOMA

Michael D. Reilly  
\_\_\_\_\_

By:

Its:

UP:

UNION PACIFIC RAILROAD COMPANY

By: Barry D. Michaels

Printed Name: Barry D. Michaels

Its: AVP - Premium Operations - Network

STATE OF Nebraska )  
COUNTY OF Douglas ) ss.

On this 11<sup>th</sup> day of December, 2008 personally appeared before me the undersigned, a Notary Public, in and for the State of Nebraska, duly commissioned and sworn, Michael D. Reilly to me known to be the Director, Internal Business of the PORT OF TACOMA, a municipal corporation, that executed the foregoing instrument and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that they are authorized to execute the said instrument and that the seal affixed is the seal of said municipal corporation.

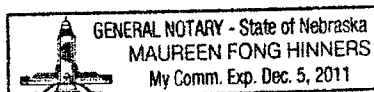
WITNESS MY HAND AND OFFICIAL SEAL hereto affixed the day and year first above written.

Maureen F. Hinner

Printed Name: Maureen F. Hinner

Notary Public in and for the State of Nebraska

My appointment expires: 12/5/2011



STATE OF \_\_\_\_\_ )  
COUNTY OF \_\_\_\_\_ ) ss.

BIDN MON

On this 11th day of December, 2008 personally appeared before me the undersigned, a Notary Public, in and for the State of Nebraska, duly commissioned and sworn, Barry D. Michaels, to me known to be the AVP - Premium Ops Notary of the UNION PACIFIC RAILROAD COMPANY, a Delaware corporation, that executed the foregoing instrument and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that they are authorized to execute the said instrument and that the seal affixed is the seal of said municipal corporation.

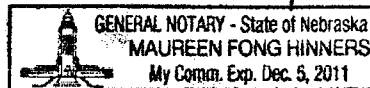
WITNESS MY HAND AND OFFICIAL SEAL hereto affixed the day and year first above written.

Maureen Fong Hinners

Printed Name: Maureen F. Hinners

Notary Public in and for the State of Nebraska

My appointment expires: 12/5/2011



**EXHIBIT A**

Please see attached sheet labeled "FIG-01", which depicts the location of the Premises and depicts the Premises Expansion Area as the "Expansion Area", along with their respective legal descriptions; the attached sheet labeled "**SIM YARD - 4 RAMPS TRACK, 8,645 FEET**", which depicts the SIM Yard generally outlined in yellow; and the attached sheet labeled "**SIM SUPPORT YARD - 7 INTERCHANGE TRACKS, 8,590 FEET**", which depicts the Support Yard outlined generally in yellow.

**EXHIBIT B**

Please see attached copy of the Prime Lease.

*Bon May*