

**UNDERPASS EASEMENT AGREEMENT**

THIS UNDERPASS EASEMENT AGREEMENT ("**Easement Agreement**") is made and entered into as of the \_\_\_\_ day of \_\_\_\_\_ 20\_\_ ("**Effective Date**"), by and between BNSF RAILWAY COMPANY, a Delaware corporation ("**Grantor**"), and CITY OF LA CROSSE, WISCONSIN, a Wisconsin municipal corporation ("**Grantee**").

**RECITALS**

A. Grantor owns or controls certain real property situated at or near the vicinity of City of La Crosse, County of La Crosse, State of Wisconsin, at Mile Post \_\_\_\_\_, as described or depicted on **Exhibit "A"** attached hereto and made a part hereof (the "**Premises**").

B. Grantor and Grantee have entered into that certain Master Relocation Agreement dated as of \_\_\_\_\_ concerning improvements on or near the Premises (the "**Master Agreement**"). The Master Agreement is attached hereto as **Exhibit "D"**.

C. Grantee has requested that Grantor grant to Grantee an easement over the Premises for the Easement Purpose (as defined below).

D. Grantor has agreed to grant Grantee such easement, subject to the terms and conditions set forth in this Easement Agreement.

**AGREEMENTS**

NOW, THEREFORE, for and in consideration of the foregoing recitals which are incorporated herein, the mutual promises contained herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

**Section 1 Granting of Easement.**

1.1 Easement Purpose. The "**Easement Purpose**" shall be the maintenance, repair and use of the Underpass Pathway, Underpass Surface Drainage and Mechanized Underpass Drainage Facilities (as such terms are more particularly defined and described in the Master Agreement and, together with any related improvements, collectively referred to hereinafter as the "**Improvements**") by Grantee in strict accordance with the terms of this Easement Agreement and the Master Agreement. The Improvements for which Grantee is responsible under this Easement Agreement expressly exclude the Bridge (as defined in the Master Agreement). Grantee expressly acknowledges and agrees that the Easement Purpose does not include, and no rights are granted hereunder, for an elevated roadway or related improvements or any subsurface rights.

1.2 Grant. Grantor does hereby grant unto Grantee a non-exclusive easement ("**Easement**") over the Premises for the Easement Purpose and for no other purpose. The Easement is granted subject to any and all restrictions, covenants, easements, licenses, permits, leases and other encumbrances of whatsoever nature whether or not of record, if any, relating to the Premises and subject to all Laws (as hereinafter defined), including without limitation zoning laws, regulations, and ordinances of municipal and other governmental authorities, if any.

1.3 Reservations by Grantor. Grantor excepts and reserves the right, to be exercised by Grantor and any other parties who may obtain written permission or authority from Grantor:

- (a) to install, construct, maintain, renew, repair, replace, use, operate, change, modify and relocate any existing pipe, power, communication, cable, or utility lines and appurtenances and other facilities or structures of like character (collectively, "**Lines**") upon, over, under or across the Premises;

- (b) to install, construct, maintain, renew, repair, replace, use, operate, change, modify and relocate any tracks or additional facilities or structures upon, over, under or across the Premises; and
- (c) to use the Premises in any manner as the Grantor in its sole discretion deems appropriate, provided Grantor uses all commercially reasonable efforts to avoid material interference with the use of the Premises by Grantee for the Easement Purpose.

1.4 Term of Easement. The term of the Easement, unless sooner terminated under provisions of this Easement Agreement, shall be perpetual.

**Section 2** Compensation. This Easement is given in partial consideration for Grantee's agreement to enter into the Master Agreement. Therefore, no separate fee is being charged as compensation for this Easement.

**Section 3** No Warranty of Any Conditions of the Premises. Grantee acknowledges that Grantor has made no representation whatsoever to Grantee concerning the state or condition of the Premises, or any personal property located thereon, or the nature or extent of Grantor's ownership interest in the Premises. Grantee has not relied on any statement or declaration of Grantor, oral or in writing, as an inducement to entering into this Easement Agreement, other than as set forth herein. GRANTOR HEREBY DISCLAIMS ANY REPRESENTATION OR WARRANTY, WHETHER EXPRESS OR IMPLIED, AS TO THE DESIGN OR CONDITION OF ANY PROPERTY PRESENT ON OR CONSTITUTING THE PREMISES, ITS MERCHANTABILITY OR FITNESS FOR ANY PARTICULAR PURPOSE, THE QUALITY OF THE MATERIAL OR WORKMANSHIP OF ANY SUCH PROPERTY, OR THE CONFORMITY OF ANY SUCH PROPERTY TO ITS INTENDED USES. GRANTOR SHALL NOT BE RESPONSIBLE TO GRANTEE OR ANY OF GRANTEE'S CONTRACTORS FOR ANY DAMAGES RELATING TO THE DESIGN, CONDITION, QUALITY, SAFETY, MERCHANTABILITY OR FITNESS FOR ANY PARTICULAR PURPOSE OF ANY PROPERTY PRESENT ON OR CONSTITUTING THE PREMISES, OR THE CONFORMITY OF ANY SUCH PROPERTY TO ITS INTENDED USES. GRANTEE ACCEPTS ALL RIGHTS GRANTED UNDER THIS EASEMENT AGREEMENT IN THE PREMISES IN AN "AS IS, WHERE IS" AND "WITH ALL FAULTS" CONDITION, AND SUBJECT TO ALL LIMITATIONS ON GRANTOR'S RIGHTS, INTERESTS AND TITLE TO THE PREMISES. Grantee has inspected or will inspect the Premises, and enters upon Grantor's rail corridor and property with knowledge of its physical condition and the danger inherent in Grantor's rail operations on or near the Premises. Grantee acknowledges that this Easement Agreement does not contain any implied warranties that Grantee or Grantee's Contractors (as hereinafter defined) can successfully operate the Improvements.

**Section 4** Nature of Grantor's Interest in the Premises. GRANTOR DOES NOT WARRANT ITS TITLE TO THE PREMISES NOR UNDERTAKE TO DEFEND GRANTEE IN THE PEACEABLE POSSESSION OR USE THEREOF. NO COVENANT OF QUIET ENJOYMENT IS MADE. In case of the eviction of Grantee by anyone owning or claiming title to or any interest in the Premises, or by the abandonment by Grantor of the affected rail corridor, Grantor shall not be liable to refund Grantee any compensation paid hereunder.

**Section 5** Construction of Improvements. As more particularly described in the Master Agreement, the Underpass Pathway shall be constructed by Grantee, and the Underpass Surface Drainage and Mechanized Underpass Drainage Facilities (if any) will be constructed by Grantor, all in accordance with the terms and conditions of the Master Agreement, including without limitation the Final Plans and Specifications (as defined in the Master Agreement) reviewed and approved by the parties.

**Section 6** Maintenance of Improvements.

6.1 Maintenance Upon Completion of Construction.

- (a) Upon Completion (as defined in the Master Agreement) of construction of the Improvements, Grantee shall at all times during the term of this Easement Agreement, at Grantee's sole cost and expense, keep and maintain the Improvements located upon the Premises in a structurally safe and sound condition, in good repair and in compliance with the Final Plans and Specifications, the Master Agreement and this

Easement Agreement. Grantee shall also promptly repair any damage to the Premises or the Improvements caused, either in whole or in part, by Grantee Parties (as hereinafter defined). Grantee shall not cause or permit another person to cause any damage to the Premises or the Improvements, and Grantee shall be responsible for any such damage which may occur as a result of any act or omission of any Grantee Party; provided the foregoing obligation of Grantee shall not apply to the extent any damage is proximately caused by the negligence or willful misconduct of any Indemnitee. Grantee shall not permit the existence of any nuisance or the accumulation of junk, debris or other unsightly materials on the Premises and shall keep the Premises in a clean and safe condition. Grantee shall, at its sole cost and expense, remove ice and snow from the Premises. Grantee shall keep the Premises free and clear from combustible materials and to cut and remove or cause to be cut and removed at its sole expense all weeds and vegetation on the Premises, said work of cutting and removal to be done at such times and with such frequency as to comply with local Laws and regulations and abate any and all hazard of fire. Grantor shall have no obligation whatsoever, monetary or non-monetary, to maintain the Improvements in the Premises.

- (b) If Grantee contracts with a Grantee Party for any maintenance or repair of the Improvements, Grantee shall require such Grantee Party to execute the "**C Documents**" attached hereto as **Exhibit "C-1"**. Grantee must require Grantee's Contractors to notify Grantor's Roadmaster at least thirty (30) calendar days prior to requesting Grantor's flagman in accordance with the requirements of the C Documents attached hereto. Additionally, Grantee must require Grantee's Contractors to notify Grantor's Manager of Public Projects thirty (30) calendar days prior to commencing work on Grantor's property or near Grantor's tracks.
- (c) Prior to performing any maintenance with its own personnel, Grantee shall: (i) comply with all of Grantor's safety rules and regulations, (ii) require any Grantee employee performing maintenance to complete the safety training program at [www.BNSFcontractor.com](http://www.BNSFcontractor.com), (iii) notify Grantor when, pursuant to the requirements of the C Documents, a flagger is required to be present, and (iv) procure, and have approved by Grantor's Risk Management Department, Railroad Protective Liability insurance.

6.2 **No Interference.** During any subsequent maintenance performed on, operation of, or removal of, all or any portion of the Improvements, Grantee, at Grantee's sole cost, shall perform all activities and work on or near Grantor's rail corridor or property and/or the Premises in such a manner as to preclude injury to persons or damage to the property of Grantor, or any party on or with property on Grantor's rail corridor or property, and shall ensure that there is no interference with the railroad operations or other activities of Grantor, or anyone present on Grantor's rail corridor or property with the authority or permission of Grantor. Grantee shall not disturb any improvements of Grantor or Grantor's existing lessees, licensees, license beneficiaries or lien holders, if any, or interfere with the use of such improvements. Grantor may direct one of its field engineers to observe or inspect the maintenance, operation or removal of the Improvements, or any portion thereof, at any time to ensure such safety and noninterference, and to ensure that the Improvements comply with the Final Plans and Specifications. If any Grantee Party is ordered at any time to leave the Premises or to halt any activity on the Premises, then the party conducting that activity immediately shall cease such activity and leave the Premises, if the order was issued by Grantor's personnel to promote safety, such noninterference with other activities or property, or because the Improvements were not in compliance with this Easement Agreement. Notwithstanding the foregoing right of Grantor, Grantor has no duty or obligation to observe or inspect, or to halt work on, the Premises, it being solely Grantee's responsibility to ensure that the Improvements are maintained, operated and removed in strict accordance with all Laws, safety measures, such noninterference and the Final Plans and Specifications and in compliance with all terms hereof and those terms and conditions of the Master Agreement. Neither the exercise nor the failure by Grantor to exercise any right set forth in this **Section 6.2** shall alter the liability allocation set forth in this Easement Agreement.

6.3 **No Alterations.** Except as may be shown in the Final Plans and Specifications, Grantee may not make any alterations to the Premises, or permanently affix anything to the Premises, without Grantor's prior written consent. If Grantee desires to change either the location of any of the Improvements or any other aspect

of the Final Plans and Specifications of any of the Improvements, Grantee shall submit such change and modified Plans and Specifications to Grantor in writing for its approval in the same manner as provided for in Section 2.2 of the Master Agreement. Grantee shall have no right to commence any such change until after Grantee has received Grantor's approval of such change in writing.

6.4 Approvals; Compliance with Laws and Safety Rules.

- (a) In addition to requirements under the Master Agreement, Grantee shall take, in a timely manner, all actions necessary and proper to the lawful establishment, operation, and maintenance of the Improvements, including such actions as may be necessary to obtain any required permits, approvals or authorizations from applicable governmental authorities.
- (b) Prior to entering the Premises for any maintenance of the Improvements, Grantee shall comply, and shall cause its contractor, any subcontractor, any assignee, and any contractor or subcontractor of any assignee performing work on the Premises or entering the Premises on behalf of Grantee (collectively, "**Grantee's Contractors**"), to comply, with all applicable federal, state and local laws, regulations, ordinances, restrictions, covenants and court or administrative decisions and orders, including Environmental Laws (defined below) (collectively, "**Laws**"), and all of Grantor's applicable safety rules and regulations including those noted below in **Section 6.4(c)**.
- (c) No Grantee Party may enter the Premises without first having completed Grantor's safety orientation found on the website: [www.BNSFcontractor.com](http://www.BNSFcontractor.com).

6.5 Other Improvements. In the event any repair, maintenance, work or other use of the Premises by Grantee will affect any Lines, fences, buildings, improvements or other facilities (collectively, "**Other Improvements**"), Grantee will be responsible at Grantee's sole risk to locate and make any adjustments necessary to such Other Improvements. Grantee must contact the owner(s) of the Other Improvements notifying them of any work that may damage these Other Improvements and/or interfere with their service and obtain the owner's written approval prior to so affecting the Other Improvements. Grantee must mark all Other Improvements on the Final Plans and Specifications and mark such Other Improvements in the field in order to verify their locations. Grantee must also use all reasonable methods when working on or near Grantor property to determine if any Other Improvements (fiber optic, cable, communication or otherwise) may exist.

6.6 Flagging and Other Costs. Grantee shall not conduct any activities on, or be present on, any portion of the Premises or Grantor's rail corridor or property that is within twenty-five (25) feet of any active railroad track, except in the presence of a flagman. In any case where a flagman or flagmen are required in connection with the presence of individuals on Grantor's rail corridor or the Premises, Grantee shall provide as much advance notice as possible prior to any entry upon the Premises. Grantor shall arrange for the presence of the flagman or flagmen as soon as practicable after receipt of such notice from Grantee. Grantee shall reimburse to Grantor, within forty-five (45) days following Grantee's receipt of each bill therefor, Grantor's costs in arranging for and providing the flagman or flagmen, which shall be billed to Grantee at Grantor's then applicable standard rate. The estimated cost of one flagger as of the Effective Date is \$600 for an eight hour basic day with time and one-half or double time for overtime, rest days and holidays, plus the cost of any vehicle rental costs or other out-of-pocket costs. Grantee agrees to reimburse Grantor (within forty-five (45) days after receipt of a bill therefor) for all other costs and expenses incurred by Grantor in connection with Grantee's use of the Premises or the presence, construction, maintenance, and use of the Improvements situated thereon.

6.7 No Unauthorized Tests or Digging. Grantee, and Grantee's Contractors, must not conduct any tests, investigations or any other activity using mechanized equipment and/or machinery, or place or store any mechanized equipment, tools or other materials, within twenty-five (25) feet of the centerline of any railroad track on Grantor's rail corridor or property (whether or not such centerline is located within the Premises), except after Grantee has obtained written approval from Grantor, and then only in strict accordance with the terms and any conditions of such approval.

6.8 Boring. Prior to conducting any boring work on or near Grantor's rail corridor or property (which shall only be permitted within the Premises), Grantee and Grantee's Contractors shall explore the proposed location for such work with hand tools to a depth of at least three (3) feet below the surface of the ground to determine whether pipelines or other structures exist below the surface, provided, however, that in lieu of the foregoing, Grantee shall have the right to use suitable detection equipment or other generally accepted industry practice (e.g., consulting with the Underground Services Association) to determine the existence or location of pipelines and other subsurface structures prior to drilling or excavating with mechanized equipment. Upon Grantee's written request, which shall be made thirty (30) business days in advance of Grantee's proposed construction or modification of Improvements, Grantor will provide to Grantee any information that Grantor has in the possession of its Engineering Department concerning the existence and approximate location of Grantor's underground utilities and pipelines at or near the vicinity of the proposed Improvements. Prior to conducting any boring work, Grantee, and Grantee's Contractors, shall review all such material. Grantor does not warrant the accuracy or completeness of information relating to subsurface conditions and Grantee's, and Grantee's Contractors', operations at all times shall be subject to the liability provisions set forth herein. For all bores greater than 20 inches in diameter and at a depth less than ten (10) feet below the bottom of a rail, Grantee, and Grantee's Contractors, shall perform a soil investigation which must be reviewed by Grantor prior to construction. This study is to determine if granular material is present, and to prevent subsidence during the installation process. If the investigation determines in Grantor's reasonable opinion that granular material is present, Grantor may select a new location for Grantee's use, or may require Grantee, and Grantee's Contractors, to furnish for Grantor's review and approval, in Grantor's sole discretion, a remedial plan to deal with the granular material. Once Grantor has approved any such remedial plan in writing, Grantee, and Grantee's Contractors, at Grantee's sole cost, shall carry out the approved plan in accordance with all terms thereof and hereof. Any open hole, boring or well constructed on the Premises by Grantee, or Grantee's Contractors, shall be safely covered and secured at all times when anyone who is not creating it, working in it or using it as permitted hereunder is present in the actual vicinity thereof. Following completion of that portion of the work, all holes or borings constructed on the Premises shall be promptly filled in by Grantee and Grantee's Contractors to surrounding ground level with compacted bentonite grout, or otherwise secured or retired in accordance with any applicable Laws. No excavated materials may remain on Grantor's rail corridor or property for more than ten (10) days, and must be properly disposed of by Grantee and Grantee's Contractors in accordance with applicable Laws.

6.9 Drainage of Premises and Property. Any and all cuts and fills, excavations or embankments necessary in the construction, maintenance, or future alteration of the Premises shall be made and maintained by Grantee in such manner, form and to the extent as will provide adequate drainage of and from the Premises and Grantor's adjoining right of way; and wherever any such fill or embankment shall or may obstruct the natural and pre-existing drainage from the Property and Grantor's adjoining right of way, Grantee shall construct and maintain such culverts or drains within the Premises as may be requisite to preserve such natural and pre-existing drainage. Grantee shall wherever necessary, construct extensions of existing drains, culverts or ditches through or along the Premises, such extensions to be of adequate sectional dimensions to preserve flowage of drainage or other waters, and/or material and workmanship equally as good as those now existing. The parties acknowledge that construction of the Underpass Surface Drainage and Mechanized Underpass Drainage Facilities (if any) on the Premises is addressed in the Master Agreement.

6.10 Taxes and Recording Fees. Grantee shall pay when due any taxes, assessments or other charges (collectively, "**Taxes**") levied or assessed upon the Improvements by any governmental or quasi-governmental body or any Taxes levied or assessed against Grantor or the Premises that are attributable to the Improvements. Grantee agrees to purchase, affix and cancel any and all documentary stamps in the amount prescribed by statute, and to pay any and all required transfer taxes, excise taxes and any and all fees incidental to recordation of the Memorandum of Easement. In the event of Grantee's failure to do so, if Grantor shall become obligated to do so, Grantee shall be liable for all costs, expenses and judgments to or against Grantor, including all of Grantor's legal fees and expenses.

6.11 Modification, Relocation or Removal of Improvements. If at any time, Grantor desires the use of its rail corridor in such a manner that, in Grantor's reasonable opinion, would be interfered with by any portion of the Improvements or the Easement, Grantor, at Grantor's sole cost, has the right to make such changes in the Improvements and/or Premises that, in the sole discretion of Grantor, are necessary to avoid interference with the proposed use of Grantor's property, including, without limitation, modifying or relocating the

Improvements on the Premises or onto Grantor's adjacent property; provided further, however, that any modification and/or relocation of the Improvements will be made by Grantor in such a manner as to provide the same access and functionality as before any modification and/or relocation of the existing Improvements. Grantee hereby waives any rights that it may have to use condemnation Laws to keep Improvements in place and not relocate or remove the Improvements where relocation or removal is required by Grantor.

**Section 7      Indemnification.**

7.1      For purposes of this Easement Agreement: (a) "**Indemnitees**" means Grantor and Grantor's affiliated companies, partners, successors, assigns, legal representatives, officers, directors, shareholders, employees, and agents; (b) "**Liabilities**" means all claims, liabilities, fines, penalties, costs, damages, losses, liens, causes of action, suits, demands, judgments, and expenses (including, without limitation, court costs, reasonable attorneys' fees, costs of investigation, removal and remediation, and governmental oversight costs) environmental or otherwise; and (c) "**Grantee Parties**" means Grantee or Grantee's officers, agents, invitees, licensees, employees, or Grantee's Contractors, or any party directly or indirectly employed by any of them, or any party they control or exercise control over.

**7.2      TO THE FULLEST EXTENT PERMITTED BY LAW, GRANTEE SHALL, AND SHALL CAUSE GRANTEE'S CONTRACTORS TO, RELEASE, INDEMNIFY, DEFEND AND HOLD HARMLESS INDEMNITEES FOR, FROM, AND AGAINST ANY AND ALL LIABILITIES OF ANY NATURE, KIND, OR DESCRIPTION DIRECTLY OR INDIRECTLY ARISING OUT OF, RESULTING FROM, OR RELATED TO (IN WHOLE OR IN PART):**

- (i)      **GRANTEE'S OCCUPATION AND USE OF THE PREMISES;**
- (ii)     **THE ENVIRONMENTAL CONDITION AND STATUS OF THE PREMISES CAUSED BY OR CONTRIBUTED TO BY GRANTEE; OR**
- (iii)    **ANY ACT OR OMISSION OF ANY GRANTEE PARTY.**

**7.3      TO THE FULLEST EXTENT PERMITTED BY LAW, GRANTEE NOW AND FOREVER WAIVES ANY AND ALL CLAIMS THAT BY VIRTUE OF ENTERING INTO THIS EASEMENT AGREEMENT, GRANTOR IS A GENERATOR, OWNER, OPERATOR, ARRANGER, OR TRANSPORTER FOR THE PURPOSES OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT, AS AMENDED ("CERCLA") OR OTHER ENVIRONMENTAL LAWS (DEFINED BELOW). GRANTEE WILL INDEMNIFY, DEFEND, AND HOLD THE INDEMNITEES HARMLESS FROM ANY AND ALL SUCH CLAIMS CAUSED BY OR CONTRIBUTED TO BY GRANTEE. NOTHING IN THIS EASEMENT AGREEMENT IS MEANT BY EITHER PARTY TO CONSTITUTE A WAIVER OF ANY INDEMNITEE'S COMMON CARRIER DEFENSES AND THIS EASEMENT AGREEMENT SHOULD NOT BE SO CONSTRUED. IF ANY AGENCY OR COURT CONSTRUES THIS EASEMENT AGREEMENT TO BE A WAIVER OF ANY INDEMNITEE'S COMMON CARRIER DEFENSES, GRANTEE AGREES TO INDEMNIFY, HOLD HARMLESS, AND DEFEND INDEMNITEES FOR ANY LIABILITIES RELATED TO THAT CONSTRUCTION OF THIS EASEMENT AGREEMENT. IN NO EVENT AS BETWEEN GRANTOR AND GRANTEE AS TO USE OF THE PREMISES AS CONTEMPLATED BY THIS EASEMENT AGREEMENT SHALL GRANTOR BE RESPONSIBLE TO GRANTEE FOR THE ENVIRONMENTAL CONDITION OF THE PREMISES.**

**7.4      IF ANY EMPLOYEE OF ANY GRANTEE PARTY ASSERTS THAT HE OR SHE IS AN EMPLOYEE OF ANY INDEMNITEE, TO THE FULLEST EXTENT PERMITTED BY LAW, GRANTEE SHALL, AND SHALL CAUSE GRANTEE'S CONTRACTORS TO, RELEASE, INDEMNIFY, DEFEND, AND HOLD THE INDEMNITEES HARMLESS FROM AND AGAINST ANY LIABILITIES ARISING OUT OF OR RELATED TO (IN WHOLE OR IN PART) ANY SUCH ASSERTION INCLUDING, BUT NOT LIMITED TO, ASSERTIONS OF EMPLOYMENT BY AN INDEMNITEE RELATED TO THE FOLLOWING OR ANY PROCEEDINGS THEREUNDER: THE FEDERAL EMPLOYERS' LIABILITY ACT, THE SAFETY APPLIANCE ACT, THE LOCOMOTIVE INSPECTION ACT, THE OCCUPATIONAL SAFETY AND HEALTH ACT, THE RESOURCE CONSERVATION AND RECOVERY ACT, AND ANY SIMILAR STATE OR FEDERAL STATUTE.**

**7.5 THE FOREGOING OBLIGATIONS OF GRANTEE SHALL NOT APPLY TO THE EXTENT LIABILITIES ARE CAUSED BY OR CONTRIBUTED TO BY THE NEGLIGENCE OR WILLFUL MISCONDUCT OF ANY INDEMNITEE, BUT SHALL APPLY TO ALL OTHER LIABILITIES (AS SUCH TERM IS DEFINED ABOVE IN SECTION 7.1).**

7.6 Upon written notice from Grantor, Grantee agrees to assume the defense of any lawsuit or other proceeding brought against any Indemnitee by any entity, relating to any matter covered by this Easement Agreement for which Grantee has an obligation to assume liability for and/or save and hold harmless any Indemnitee. Grantee shall pay all costs and expenses incident to such defense, including, but not limited to, reasonable attorneys' fees, investigators' fees, litigation and appeal expenses, settlement payments, and amounts paid in satisfaction of judgments. Nothing in this Easement Agreement shall be construed to waive either parties' limitations of liability and/or immunities available to it pursuant to Wisconsin Statutes or other applicable federal or state law. The aggrieved party shall promptly notify the indemnifying party in writing of any Liabilities for which indemnification is sought (which written notification shall in any case be within one (1) year after the occurrence of the event giving rise to such Liabilities). The indemnifying party shall have sole control of, and the aggrieved party shall reasonably cooperate in all respects, in the defense of any Liabilities for which indemnification is sought. The aggrieved party shall not make any admission or disclosure or otherwise take any action with respect to the Liabilities for which indemnification is sought that would be prejudicial to the indemnifying party except as required by law. Grantor represents that, as of the Effective Date to the current actual knowledge of James A. Ball, Senior Manager - Real Estate of Grantor, Grantor has no notice or knowledge of any Liabilities asserted or threatened by any third party with respect to the matters contemplated by this Easement Agreement. Grantee represents that, as of the Effective Date to the current actual knowledge of \_\_\_\_\_(name), \_\_\_\_\_(title) of Grantee, Grantee has no notice or knowledge of any Liabilities asserted or threatened by any third party with respect to the matters contemplated by this Easement Agreement.

**Section 8 Insurance.** Subject to Grantee's right to self-insure described below in **Section 8.6**, Grantee shall, at its sole cost and expense, procure and maintain during the life of this Easement Agreement the following insurance coverage:

8.1 Commercial General Liability Insurance. This insurance shall contain broad form contractual liability with a combined single limit of a minimum of \$2,000,000 each occurrence and an aggregate limit of at least \$4,000,000 but in no event less than the amount otherwise carried by Grantee. Coverage must be purchased on a post 2004 ISO occurrence or equivalent and include coverage for, but not limited to, the following:

- ◆ Bodily Injury and Property Damage
- ◆ Personal Injury and Advertising Injury
- ◆ Fire legal liability
- ◆ Products and completed operations

This policy shall also contain the following endorsements or language, which shall be indicated on the certificate of insurance:

- ◆ The definition of insured contract shall be amended to remove any exclusion or other limitation for any work being done within 50 feet of railroad property.
- ◆ Waiver of subrogation in favor of and acceptable to Grantor.
- ◆ Additional insured endorsement in favor of and acceptable to Grantor and Jones Lang LaSalle Brokerage, Inc.
- ◆ Separation of insureds.
- ◆ The policy shall be primary and non-contributing with respect to any insurance carried by Grantor.

It is agreed that the workers' compensation and employers' liability related exclusions in the Commercial General Liability insurance policy(s) required herein are intended to apply to employees of the policy holder and shall not apply to Grantor employees.

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No other endorsements limiting coverage may be included on the policy.

8.2 Business Automobile Insurance. This insurance shall contain a combined single limit of at least \$1,000,000 per occurrence, and include coverage for, but not limited to the following:

- ◆ Bodily injury and property damage
- ◆ Any and all vehicles owned, used or hired

This policy shall also contain the following endorsements or language, which shall be indicated on the certificate of insurance:

- ◆ Waiver of subrogation in favor of and acceptable to Grantor.
- ◆ Additional insured endorsement in favor of and acceptable to Grantor.
- ◆ Separation of insureds.
- ◆ The policy shall be primary and non-contributing with respect to any insurance carried by Grantor.

8.3 Workers Compensation and Employers Liability Insurance. This insurance shall include coverage for, but not limited to:

- ◆ Grantee's statutory liability under the worker's compensation Laws of the state(s) in which the work is to be performed. If optional under State Law, the insurance must cover all employees anyway.
- ◆ Employers' Liability (Part B) with limits of at least \$500,000 each accident, \$500,000 by disease policy limit, \$500,000 by disease each employee.

This policy shall also contain the following endorsements or language, which shall be indicated on the certificate of insurance:

- ◆ Waiver of subrogation in favor of and acceptable to Grantor.

8.4 Railroad Protective Liability Insurance. This insurance is required if there is any construction or demolition activities. This insurance shall name only the Grantor as the Insured with coverage of at least \$2,000,000 per occurrence and \$6,000,000 in the aggregate. The policy shall be issued on a standard ISO form CG 00 35 12 03 and include the following:

- ◆ Endorsed to include the Pollution Exclusion Amendment (ISO form CG 28 31 10 93)
- ◆ Endorsed to include the Limited Seepage and Pollution Endorsement.
- ◆ Endorsed to include Evacuation Expense Coverage Endorsement.
- ◆ No other endorsements restricting coverage may be added.
- ◆ The original policy must be provided to the Grantor prior to performing any work or services under this Easement Agreement
- ◆ Definition of "Physical Damage to Property" shall be endorsed to read: "means direct and accidental loss of or damage to all property owned by any named insured and all property in any named insured's care, custody and control arising out of the acts or omissions of the contractor named on the Declarations."

If available and in lieu of providing a Railroad Protective Liability Policy, Grantee may participate in the Grantor's Blanket Railroad Protective Liability Insurance Policy available to Grantee or Grantee's Contractor. The limits of coverage are the same as above.

8.5 Other Requirements.

- (a) Where allowable by law, all policies (applying to coverage listed above) shall contain no exclusion for punitive damages.
- (b) Grantee agrees to waive its right of recovery against Grantor for all claims and suits against Grantor, per the indemnity provisions of this Easement Agreement. In addition, Grantee's insurers, through the terms of the policy or a policy endorsement, must waive



their right of subrogation against Grantor for all claims and suits, and the certificate of insurance must reflect the waiver of subrogation endorsement. Grantee further waives its right of recovery, and its insurers must also waive their right of subrogation against Grantor for loss of its owned or leased property or property under its care, custody, or control.

- (c) Prior to commencing work, Grantee shall furnish to Grantor an acceptable certificate(s) of insurance including an original signature of the authorized representative evidencing the required coverage, endorsements, and amendments (or written evidence of its self-insurance program in accordance with **Section 8.6**). Grantee shall notify Grantor in writing at least 30 days prior to any cancellation, non-renewal, substitution or material alteration. In the event of a claim or lawsuit involving Grantor arising out of this Easement Agreement, Grantee will make available any required policy covering such claim or lawsuit.
- (d) Any insurance policy shall be written by a reputable insurance company acceptable to Grantor or with a current Best's Guide Rating of A- and Class VII or better, and authorized to do business in the state(s) in which the service is to be provided.
- (e) Grantee represents that this Easement Agreement has been thoroughly reviewed by Grantee's insurance agent(s)/broker(s), who have been instructed by Grantee to procure the insurance coverage required by this Easement Agreement. Allocated Loss Expense shall be in addition to all policy limits for coverages referenced above.
- (f) Not more frequently than once every five years, Grantor and Grantee may reasonably agree to modify the required insurance coverage to reflect then-current risk management practices in the railroad industry and underwriting practices in the insurance industry.
- (g) If any portion of the operation is to be subcontracted by Grantee, Grantee shall require that the subcontractor shall provide and maintain insurance coverages as set forth herein, naming Grantor as an additional insured, and shall require that the subcontractor shall release, defend and indemnify Grantor to the same extent and under the same terms and conditions as Grantee is required to release, defend and indemnify Grantor herein.
- (h) Failure to provide evidence as required by this **Section 8** shall entitle, but not require, Grantor to terminate this Easement immediately. Acceptance of a certificate that does not comply with this **Section 8** shall not operate as a waiver of Grantee's obligations hereunder.
- (i) The fact that insurance (including, without limitation, self-insurance in accordance with **Section 8.6**) is obtained by Grantee shall not be deemed to release or diminish the liability of Grantee including, without limitation, liability under the indemnity provisions of this Easement Agreement. Damages recoverable by Grantor shall not be limited by the amount of the required insurance coverage.
- (j) For purposes of this **Section 8**, Grantor shall mean "Burlington Northern Santa Fe, LLC", "BNSF Railway Company" and the subsidiaries, successors, assigns and affiliates of each.
- (k) If the "Grantee" is subject to statute(s) limiting its liability, insured or otherwise, and/or limiting its ability to obtain or provide insurance as required by this Easement Agreement, those statutes shall apply.

**8.6 Self-Insurance.** Notwithstanding anything in this **Section 8** to the contrary, Grantee is allowed to self-insure for the coverages required under this **Section 8**. Prior to commencing work, Grantee will furnish

written evidence of its self-insurance program to Grantor. Grantee's self-insured retention is consistent with that of other municipal corporations of similar operations and size. Any self-insured retention or other financial responsibility for claims shall be covered directly by Grantee in lieu of insurance. Any and all Grantor liabilities that would otherwise, in accordance with the provisions of this Easement Agreement, be covered by Grantee's insurance will be covered as if Grantee elected not to include a self-insured retention or other financial responsibility for claims. For the avoidance of doubt, requirements (a) - (k) in **Section 8.5** above apply to all Grantee Parties (other than Grantee) required to obtain insurance under this Agreement; provided, however, to the extent Grantee self-insures for the coverages required under this **Section 8**, Grantee shall not be required to comply with requirement (a), the second sentence of requirement (b), requirements (c) - (e) and requirement (h) of **Section 8.5** above for so long as Grantee self-insures such coverages.

**Section 9**     **Environmental.**

9.1     Compliance with Environmental Laws. Grantee shall strictly comply with all federal, state and local environmental Laws in its use of the Premises, including, but not limited to, the Resource Conservation and Recovery Act, as amended (RCRA), the Clean Water Act, the Oil Pollution Act, the Hazardous Materials Transportation Act, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and the Toxic Substances Control Act (collectively referred to as the "**Environmental Laws**"). Grantee shall not maintain a "treatment," "storage," "transfer" or "disposal" facility, or "underground storage tank," as those terms are defined by Environmental Laws, on the Premises. Grantee shall not handle, transport, release or suffer the release of "hazardous waste" or "hazardous substances", as "hazardous waste" and "hazardous substances" may now or in the future be defined by any Environmental Laws.

9.2     Notice of Release. Grantee shall give Grantor immediate notice to Grantor's Resource Operations Center at (800) 832-5452 of any release of hazardous substances on or from the Premises, violation of Environmental Laws, or inspection or inquiry by governmental authorities charged with enforcing Environmental Laws with respect to Grantee's use of the Premises. Grantee shall use its best efforts to promptly respond to any release on or from the Premises. Grantee also shall give Grantor immediate notice of all measures undertaken on behalf of Grantee to investigate, remediate, respond to or otherwise cure such release or violation.

9.3     Remediation of Release. If Grantor has notice from Grantee or otherwise of a release or violation of Environmental Laws arising in any way with respect to the Premises which occurred or may occur during the term of this Easement Agreement, Grantor may require Grantee to take timely measures to investigate, remediate, respond to or otherwise cure such release or violation affecting the Premises or Grantor's right-of-way that is caused by or contributed to by Grantee or a Grantee Party or is otherwise Grantee's responsibility under **Section 7.2**.

9.4     Preventative Measures. Grantee shall promptly report to Grantor in writing any conditions or activities upon the Premises known to Grantee which create a risk of harm to persons, property or the environment and shall take whatever action is necessary to prevent injury to persons or property arising out of such conditions or activities; provided, however, that Grantee's reporting to Grantor shall not relieve Grantee of any obligation whatsoever imposed on it by this Easement Agreement. Grantee shall promptly respond to Grantor's request for information regarding said conditions or activities.

9.5     Evidence of Compliance. Grantee agrees periodically to furnish Grantor with proof satisfactory to Grantor that Grantee is in compliance with this **Section 9**.

**Section 10**     **PERSONAL PROPERTY WAIVER. ALL PERSONAL PROPERTY, INCLUDING, BUT NOT LIMITED TO, FIXTURES, EQUIPMENT, OR RELATED MATERIALS UPON THE PREMISES WILL BE AT THE RISK OF GRANTEE ONLY, AND NO INDEMNITEE WILL BE LIABLE FOR ANY DAMAGE THERETO OR THEFT THEREOF, EXCEPT TO THE EXTENT CAUSED BY OR CONTRIBUTED TO BY THE NEGLIGENCE OR WILLFUL MISCONDUCT OF ANY INDEMNITEE.**

**Section 11**     **Default and Termination.**

11.1     Grantor's Performance Rights. If at any time Grantee, or Grantee's Contractors, fails to properly

perform its obligations under this Easement Agreement, Grantor, in its sole discretion, may: (i) seek specific performance of the unperformed obligations, or (ii) at Grantee's sole cost, may arrange for the performance of such work as Grantor deems necessary for the safety of its rail operations, activities and property, or to avoid or remove any interference with the activities or property of Grantor, or anyone or anything present on the rail corridor or property with the authority or permission of Grantor. Grantee shall promptly reimburse Grantor for all costs of work performed on Grantee's behalf upon receipt of an invoice for such costs. Grantor's failure to perform any obligations of Grantee or Grantee's Contractors shall not alter the liability allocation set forth in this Easement Agreement.

11.2 Grantor's Termination Rights. Grantor may, at its option, terminate this Easement Agreement by serving five (5) business days' notice in writing upon Grantee: (i) if Grantee fails to keep or perform any of Grantee's covenants, agreements, or obligations contained in this Easement Agreement, and such failure continues for more than thirty (30) days after written notice thereof is provided to Grantee by Grantor; provided, however, if such failure cannot reasonably be cured within such 30-day period, Grantee shall not be deemed in default so long as Grantee commences to cure within the 30-day period and diligently pursues such cure to completion within a total of ninety (90) days; (ii) in case of any assignment or transfer of the Easement by operation of law; or (iii) if Grantee should abandon or cease to use the Premises for the Easement Purpose. Any waiver by Grantor of any default or defaults shall not constitute a waiver of the right to terminate this Easement Agreement for any subsequent default or defaults, nor shall any such waiver in any way affect Grantor's ability to enforce any section of this Easement Agreement.

11.3 Effect of Termination or Expiration. Neither termination nor expiration will release Grantee from any liability or obligation under this Easement, whether of indemnity or otherwise, resulting from any acts, omissions or events happening prior to the date of termination or expiration, or, if later, the date the Premises are restored as required by **Section 12**.

11.4 Non-exclusive Remedies. The remedies set forth in this **Section 11** shall be in addition to, and not in limitation of, any other remedies that Grantor may have under the Master Relocation Agreement, at law or in equity.

## **Section 12**     **Surrender of Premises.**

12.1 Removal of Improvements and Restoration. Upon termination of this Easement Agreement, whether by abandonment of the Easement or by the exercise of Grantor's termination rights hereunder, Grantee shall, at its sole cost and expense, immediately perform the following within one hundred twenty (120) days:

- (a) remove all or such portion of Grantee's Improvements and all appurtenances thereto from the Premises, as Grantor directs at Grantor's sole discretion;
- (b) repair and restore any damage to the Premises arising from, growing out of, or connected with Grantee's use of the Premises;
- (c) remedy any unsafe conditions on the Premises created or aggravated by Grantee; and
- (d) leave the Premises in the condition which existed as of the Effective Date.

12.2 Limited License for Entry. If this Easement Agreement is terminated, Grantor may direct Grantee to undertake one or more of the actions set forth above, at Grantee's sole cost, in which case Grantee shall have a limited license to enter upon the Premises to the extent necessary to undertake the actions directed by Grantor. The terms of this limited license include all of Grantee's obligations under this Easement Agreement. Termination will not release Grantee from any liability or obligation under this Easement Agreement, whether of indemnity or otherwise, resulting from any acts, omissions or events happening prior to the date of termination, or, if later, the date when Grantee's Improvements are removed and the Premises are restored to the condition that existed as of the Effective Date. If Grantee fails to surrender the Premises to Grantor upon any termination of the Easement, all liabilities and obligations of Grantee hereunder shall continue in effect until the Premises are surrendered.

**Section 13**    **Liens.** Grantee shall promptly pay and discharge any and all liens arising out of any alterations or repairs done, suffered or permitted to be done by Grantee on the Premises or attributable to Taxes that are the responsibility of Grantee pursuant to **Section 6**. Grantor is hereby authorized to post any notices or take any other action upon or with respect to the Premises that is or may be permitted by Law to prevent the attachment of any such liens to any portion of the Premises; provided, however, that failure of Grantor to take any such action shall not relieve Grantee of any obligation or liability under this **Section 13** or any other section of this Easement Agreement.

**Section 14**    **Tax Exchange.** Grantor may assign its rights (but not its obligations) under this Easement Agreement to Goldfinch Exchange Company LLC, an exchange intermediary, in order for Grantor to effect an exchange under Section 1031 of the Internal Revenue Code. In such event, Grantor shall provide Grantee with a notice of assignment ("**Notice of Assignment**"), and Grantee shall execute an acknowledgement of receipt of such Notice of Assignment.

**Section 15**    **Notices.** Any notice required or permitted to be given hereunder by one party to the other shall be in writing and the same shall be given and shall be deemed to have been served and given if (i) placed in the United States mail, certified, return receipt requested, or (ii) deposited into the custody of a nationally recognized overnight delivery service, addressed to the party to be notified at the address for such party specified below, or to such other address as the party to be notified may designate by giving the other party no less than thirty (30) days' advance written notice of such change in address.

If to Grantor:                    BNSF Railway Company  
    2500 Lou Menk Dr. – AOB3  
    Fort Worth, Texas 76131  
    Attn: Director of Real Estate

With a copy to:                    BNSF Railway Company  
    2500 Lou Menk Drive  
    Fort Worth, Texas 76131  
    Attn: \_\_\_\_\_

If to Grantee:                    City of La Crosse  
    400 La Crosse St.  
    La Crosse, WI 54601-3374  
    Attn: City Clerk

With a copy to:                    City of La Crosse  
    400 La Crosse St.  
    La Crosse, WI 54601  
    Attn: Director of Parks and Recreation

**Section 16**    **Recordation.** As of the Effective Date, a legal description of the Premises is not available. Grantee and Grantor shall work together in good faith to establish the legal description for the Premises. Once Grantor and Grantee have approved the legal description, Grantor and Grantee shall execute a Memorandum of Easement in the form attached hereto as **Exhibit "B"** (the "**Memorandum of Easement**"). The Memorandum of Easement shall be recorded in the real estate records in the county where the Premises are located. If a Memorandum of Easement is not executed by the parties and recorded as described above within \_\_\_\_ days of the Effective Date, Grantor shall have the right to terminate this Easement Agreement upon notice to Grantee. Grantor and Grantee agree to work in good faith and cooperate in executing and recording the Memorandum of Easement.

**Section 17**    **Miscellaneous.**

17.1    All aspects of this Easement Agreement shall be governed by the laws of the State of

Wisconsin. To the fullest extent permitted by law any dispute arising under or in connection with this Easement Agreement or related to any subject matter which is the subject of this Easement Agreement shall be subject to the sole and exclusive jurisdiction of the United States District Court for the Western District of Wisconsin. The aforementioned choice of venue is intended by the parties to be mandatory and not permissive. Each party hereby irrevocably consents to the jurisdiction of the United States District Court for the Western District of Wisconsin in any such dispute and irrevocably waives, to the fullest extent permitted by law, any objection that it may now have or hereafter have to the laying of venue in such court and that any such dispute which is brought in such court has been brought in an inconvenient forum.

17.2 In the event that Grantee consists of two or more parties, all the covenants and agreements of Grantee herein contained shall be the joint and several covenants and agreements of such parties. This instrument and all of the terms, covenants and provisions hereof shall inure to the benefit of and be binding upon each of the parties hereto and their respective legal representatives, successors and assigns and shall run with and be binding upon the Premises.

17.3 Intentionally Deleted.

17.4 If any provision of this Easement Agreement is held to be illegal, invalid or unenforceable under present or future Laws, such provision will be fully severable and this Easement Agreement will be construed and enforced as if such illegal, invalid or unenforceable provision is not a part hereof, and the remaining provisions hereof will remain in full force and effect. In lieu of any illegal, invalid or unenforceable provision herein, there will be added automatically as a part of this Easement Agreement a provision as similar in its terms to such illegal, invalid or unenforceable provision as may be possible and be legal, valid and enforceable.

17.5 This Easement Agreement is the full and complete agreement between Grantor and Grantee with respect to all matters relating to Grantee's use of the Premises, and supersedes any and all other agreements between the parties hereto relating to Grantee's use of the Premises as described herein. However, nothing herein is intended to terminate any surviving obligation of Grantee or Grantor's obligation to defend and hold Grantor harmless in any prior written agreement between the parties.

17.6 Time is of the essence for the performance of this Easement Agreement.

**END OF PAGE – SIGNATURE PAGE FOLLOWS**

BNSF DRAFT 10-23-14

Witness the execution of this Easement Agreement as of the Effective Date first set forth above.

**GRANTOR:**

BNSF RAILWAY COMPANY, a Delaware corporation

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

**GRANTEE:**

CITY OF LA CROSSE, a Wisconsin municipal corporation

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

EXHIBIT "A"

Premises

EXHIBIT "B"

Memorandum of Easement



BNSF DRAFT 10-23-14

EXHIBIT "C-1"

C Documents

BNSF DRAFT 10-23-14

EXHIBIT "D"

Master Relocation Agreement