

CONTRACT OPERATOR SERVICES AGREEMENT

THIS **CONTRACT OPERATOR SERVICES AGREEMENT** (“Agreement”) is made and entered into as of _____, 2020 (“Execution Date”), by and between BURLINGTON JUNCTION RAILWAY, INC., an Iowa corporation (“BJRY”) and the CITY OF ROCHELLE, ILLINOIS (“City”) and shall be effective on the Commencement Date set forth herein.

RECITALS:

City owns certain real estate in the City of Rochelle, IL and also owns City of Rochelle Railroad (“CIR”), a common carrier with trackage and related appurtenances that connects with trackage owned and operated by BNSF Railway Company (“BNSF”) and Union Pacific Railroad Company (“UP”) (collectively referred to as “Connecting Carriers”).

BJRY currently performs rail switching services for CIR as a contract carrier pursuant to an amended Switching Services Agreement which terminates on December 31, 2020.

City and BJRY desire to terminate the existing Switching Services Agreement and enter into a new agreement providing for switching services as well as other services designed to improve and expand the rail and related services available to customers located on or using the CIR rail lines.

AGREEMENT:

For good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties agree as follows:

1. **Defined Terms.** The following definitions are used in this Agreement:

(a) **Accessorial Charges:** Charges for services not directly associated with linehaul, switching, or demurrage transportation service charges, such as charges assessed by the City for storage on CIR track (not associated with a specific storage lease or agreement), charges for transloading, intermodal fees or other charges not included in the agreed upon revenue sharing formula set forth in Exhibit A.

(b) **Applicable Laws.** All present and future federal, state and local laws, codes, ordinances, rules, regulations and requirements of any governmental authority which apply to or affect the Line, the business of BJRY or City, or the performance of the obligations of the parties, or their respective employees, agents or subcontractors, under this Agreement, including, but not limited to, regulations enforced by FRA or OSHA.

(c) **Governmental Approvals.** All permits, licenses, consents and approvals of any governmental authority which are required by Applicable Laws in connection with this Agreement.

(d) **Hazardous Materials.** Any substances defined as hazardous in Title 49, Code of Federal Regulations, Part 100, *et seq.* or as defined by any other Applicable Laws, including, but not limited to, asbestos; urea formaldehyde; petroleum hydrocarbons and other petroleum products (including gasoline, diesel fuel, fuel oil, crude oil and motor oil and constituents of those products); crude oil, ethanol; tetrachloroethylene; polychlorinated benzyls; polychlorinated biphenyls; biological hazards; nuclear fuel or materials; chemical, biological or medical wastes; radioactive materials; explosives; and known carcinogens.

- (e) Line Industries: Industries which connect via spur tracks to the Line.
- (f) Line: Trackage and related appurtenances owned by City and connecting with trackage owned and operated by BNSF Railway Company and Union Pacific Railroad Company.
- (g) Industry Track Agreement: An agreement entered into between a Line Industry and City to provide, among other things, rail freight service via the Line to Connecting Carriers.
- (h) Rochelle Industrial Park: The Rochelle Rail Industrial Park which includes that area bounded on the north by the Union Pacific Railroad mainline running east/west from Caron Road to I-39; on the east by I-39 running north/south from the I-39/ Union Pacific intersection to the I-39 interchange at Perry Road; on the south by the Village of Steward city limit line between I-39 and the City right-of-way adjacent to the BNSF mainline; and on the west by the BNSF mainline running from the Steward city limit line to the Union Pacific Railroad mainline.
- (i) Rochelle Transload Center. Truck-rail transload site located on the CIR.
- (j) FRA: Federal Railroad Administration
- (k) OSHA: Occupational Safety and Health Administration
- (l) STB: Surface Transportation Board
- (m) AAR: Association of American Railroads

2. Exclusive Operator. Except as otherwise stated in this Agreement, City grants to BJRY the exclusive right to provide switching and other rail and rail-related services for the operation and marketing of the Line as further set forth in Sections 3 to 6 of this Agreement (collectively “Services”). BJRY shall provide Services hereunder as an independent agent and as a contract carrier, not a common carrier. In the event the City constructs or acquires additional rail line segments connected to the existing Line following the Execution Date hereof, such additional rail line segments shall automatically become a part of the Line, and BJRY shall perform the Services thereon as provided in this Agreement

3. Switching Services. BJRY shall perform, or arrange to have performed by qualified contractors, Switching Services to and from all CIR track as set forth below and shall further comply with all obligations, responsibilities and covenants related to the City’s common carrier obligations to provide inbound and outbound rail switching from Connecting Carriers to and from Line Industries and track upgrade, maintenance and repair services related thereto, for compensation as set forth in herein and in Exhibit A, attached hereto and made a part hereof, as follows:

(a) Rehabilitation/ Maintenance. Except as otherwise stated in this Section 3(a), BJRY shall, at all times, and at its sole cost and expense, inspect, keep and maintain the Line and all associated real property, rights of way, trackage, fixtures, switches, crossings (including but not limited to crossbucks, signals, gates, and other crossing warning devices, materials and FRA testing and equipment) in good and working condition and repair and shall keep and maintain all trackage on the Line in accordance with Applicable Laws, to a minimum of FRA Class I standards and free of debris and other materials, including, but not limited to, leakage or spilling from locomotives or railcars such as diesel oil, sand, pellets, or similar material. City shall maintain the grade crossing roadway surface and all highway signage and markings. All trackage on the Line shall be maintained and kept by BJRY in compliance with FRA Class I standards or such other standards as may be required by law or by Connecting Carriers. BJRY shall provide City with detailed quarterly report of items, locations and expenses incurred by BJRY

for rehabilitation or maintenance. Additionally, BJRY will provide an AAR-certified railcar mechanic at the Rochelle Industrial Park to provide such repairs as can be adequately provided on-site.

(b) Operations. BJRY shall provide and maintain sufficient locomotive power (including at least two locomotives, one with a minimum of 1,000 horsepower, and one with a minimum 1500 horsepower), fuel, and crews required to perform the switching and related operations on the Line in accordance with this Agreement. BJRY shall also provide operations management personnel sufficient to control the switching operations and to coordinate directly with Line Industries on a day-to-day basis, to assure prompt and reasonable switching for the Line Industries in accordance with Industry Track Agreements and the performance standards set forth herein. It is understood that nothing contained herein shall prevent any Line Industry from electing to perform its own railcar movement at its facility with its own equipment, or by contract with a third party for such service, in which case BJRY's operations shall be limited to sorting railcars designated for such industry and setting railcars on and removing them from the designated point of delivery. Prior to removing railcars from a Line Industry facility where the Line Industry has elected to do its own railcar movement, BJRY shall assure that railcars are reasonably clean and safe to move or have not been damaged beyond reasonable wear and tear. In the event any Line Industry requests BJRY to perform railcar movement within its facility as a third party contractor, BJRY shall first request approval of the City Manager to engage in such work, which approval shall not be unreasonably withheld.

(c) BJRY Personnel. BJRY shall employ all persons and furnish all equipment necessary to perform all Services contemplated by this Agreement and such personnel shall be and remain the agents, representatives or employees of BJRY. City shall have no control whatsoever over the employment, discharge, compensation or benefits of or service rendered by such agents, representatives or employees of BJRY. BJRY shall indemnify, defend and save harmless the City from and against any Losses (as defined in Section 14 hereof) arising from a claim by an employee of BJRY, or an employee of any of BJRY's subcontractors, that such employee is acting in the capacity of an employee of the City or CIR.

(d) Switching Service. BJRY shall switch, handle and deliver to the Line Industries at a mutually agreed upon delivery point, or on the designated industry spur track, all railcars delivered to BJRY by Connecting Carriers. BJRY shall promptly (and without discrimination among Line Industries) move both loaded and empty railcars between the lines of the Connecting Carriers and the Line Industries' tracks. BJRY will communicate by oral, written or electronic means, in coordination with each Line Industry, on an agreed upon basis, all information relating to the daily switching requirements of that Line Industry. Written reports based upon electronic switching data shall, upon request, be made available to the City by BJRY.

(e) Weed Spraying and Brush Cutting. BJRY shall provide weed spray for vegetation up to ten feet (10') from the center line of all CIR track and shall be responsible for cutting brush that is within twenty feet (20') of the center line of the track.

(f) Clerical and Administrative Services. BJRY shall provide all clerical and administrative functions associated with rail operations on the Line including, but not limited to, input into the RMI Railconnect or equivalent system, publication of applicable rules and rates, billing and accounting services, car hire accounting, AAR and FRA reporting, waybill issuance, dispatching, generation of switch lists or reports of railcars stored on the Line and all other clerical and administrative functions normally associated with rail operations. BJRY will invoice Connecting Carriers and disburse payments to City in accordance herewith and as set forth in Exhibit A. BJRY will generate reports required by the City or that are otherwise necessary and customary to support the clerical and administrative services set forth herein.

(g) Industry Track Agreements. The City has entered or may enter into Industry Track Agreements with the Line Industries. City shall be responsible for negotiating and maintaining all Industry Track Agreements with Line Industries and shall consult with BJRY prior to executing any agreement, or amendment to an existing agreement, not in effect on the Execution Date of this Agreement. BJRY agrees not to enter into any agreement or understanding with any Line Industry covering the same subject matter as such present or future Industry Track Agreements. BJRY acknowledges it has reviewed the terms of the existing Industry Track Agreements, and agrees that its obligations under this Agreement shall be deemed to include performance of the City's obligations under the existing Industry Track Agreements and future Agreements which are substantially in the form of existing Agreements. Neither the City nor BJRY shall have any responsibility under this Agreement for maintenance of trackage owned by any of the Line Industries, including maintenance of spur tracks or switches, weed control, alignment, gauging and the periodic oiling of all moving parts of the switches unless the same is assumed under an executed Industry Track Agreement.

(h) Interchange Agreements. BJRY shall perform and comply with all obligations, responsibilities and covenants of the City related to interchange agreements with Connecting Carriers. Any amendments, revisions or new agreements will be subject to BJRY review.

(i) Performance Standards.

(1) BJRY shall provide the following minimum Performance Standards:

a. At least two railcar movers at ninety (90%) percent availability

b. Minimum hours of switching services:

Monday-Saturday	12 hours per day
Sunday and Holidays	As required

c. Maximum response time after request for switching service:

From Shipper	60 minutes
From Class I Railroad	120 minutes

(2) Notwithstanding the foregoing Performance Standards, or any other provisions of this Agreement, BJRY acknowledges it has reviewed all existing Industry Track Agreements with respect to Line Industries, and the Performance Standards set forth therein. In the event that BJRY materially violates the Performance Standards of any Line Industry in effect on the Execution Date of this Agreement, or the Performance Standards set forth in Section (i) above, or materially violates the Performance Standards set forth in any subsequently executed Industry Track Agreements (which standards will be agreed to by BJRY prior to execution thereof), the City shall notify BJRY in writing of the material failure. If the violation is not cured by BJRY within thirty (30) days of the date of the notification, then City shall have the right to terminate this Agreement as to BJRY on five (5) days' notice to BJRY and substitute another operator in lieu thereof.

(j) Bridge Maintenance. BJRY shall maintain all bridges on the Line which are the responsibility of the City, including the new Johns Creek Bridge, in accordance with BJRY's Bridge Maintenance Plan (BMP) and shall maintain such Plan in compliance with FRA regulations. In addition to periodic inspections by BJRY personnel, BJRY shall arrange for an independent railroad bridge engineering firm to perform annual inspections of the bridge.

4. Rochelle Transload Center (“RTC”). BJRY shall manage, operate, and maintain the RTC pursuant to transload agreements entered into between BJRY and RTC users for compensation to the City as set forth in Exhibit A and in accordance with CIR tariffs. All agreements are subject to prior approval of City Manager (which approval shall not be unreasonably withheld), except for opportunities of less than 25 carloads annually or 5 carloads monthly, and shall include language fully indemnifying, defending, releasing and holding the City harmless from any and all Losses (as defined in Section 14) regardless of any negligence, strict liability, or other acts or omissions of City. No Agreement shall be entered into that exceeds the termination date hereof without the written consent of City. Notwithstanding anything stated herein, City reserves the right to enter into agreements between itself and RTC users for transload services, provided the City first confers with BJRY on terms and conditions governing services, if any, to be provided by BJRY beyond Switching Services set forth in Section 3. In the event BJRY desires to place improvements on to provide Services to RTC users, such request shall be subject to prior approval of the City Manager and shall further be subject to whatever terms and conditions the City imposes thereon, including execution of a separate lease, license or other land use agreement, which agreement shall be governed by its terms and shall be separate from the terms and conditions of this Agreement.

5. Intermodal Services. BJRY shall manage, operate, and maintain all intermodal services on or adjacent to the Line or on property owned by the City for compensation to the City as set forth in Exhibit A. BJRY shall have the right to assess and retain a lifting fee, as agreed to by the City, to adequately compensate for BJRY overhead in managing and/or performing intermodal services. No Agreement shall be entered into that exceeds the termination date hereof without the written consent of City. Notwithstanding anything stated herein, City reserves the right to enter into agreements between itself and customers of intermodal services, provided the City first confers with BJRY on terms and conditions governing services, if any, to be provided by BJRY beyond Switching Services set forth in Section 3.

6. Economic Development. As part of Services provided pursuant to this Agreement, BJRY shall, in conjunction with City, market and develop the use of the Rochelle Industrial Park, the RTC, and intermodal options (“CIR Rail Service”) to both existing and new Customers. Services shall include, but not be limited to, development and distribution of marketing materials to encourage use of and location on the Line, development and maintenance of websites designed to advertise the Industrial , the RTC, and intermodal services, attending and networking rail or rail-related industry, regularly meetings with current Line Industries to review existing business and discuss growth options, meetings with potential new Line Industries or RTC or intermodal customers, and attending customer, networking or other meetings regarding the Line as requested by the City. Both City and BJRY shall commit, at a minimum, up to five percent (5%) of all revenue derived annually pursuant to this Agreement to direct marketing of CIR Rail Service. The City and BJRY shall meet at least once per year on or before September 15th of each year to outline strategic planning for the following year, including, but not limited to, an assessment of current tariff rates and the need for any changes, discussion of future business and rail system development, evaluation of prior year efforts, and determination of a budget to meet the next year’s goals and objectives. Nothing contained herein shall preclude the City from retaining the services of independent marketing or economic development persons or firms to assist in marketing and expanding the Rochelle Industrial Park, the RTC or intermodal services.

7. Services Excluded From This Agreement. This Agreement excludes: (1) services provided by BJRY on real estate not owned or leased by the City, including BJRY’s lease of the Wausau Lumber Yard (except to the extent such service includes Switching Services defined herein which shall remain subject to this Agreement) and (2) any agreement entered into between BJRY and Line Industries to perform intra-plant services on track owned by such Line Industries. Excluded services hereunder shall be pursuant to written agreement between BJRY and the third party, which agreement shall provide that

the parties shall indemnify, defend, release and hold the City harmless from any Losses (as defined in Section 14) related to such excluded services regardless of any negligence, strict liability or other acts or omissions of the City. Agreements must be approved by City Manager to assure compliance with the terms hereof.

8. Capital Improvements.

(a) Both parties acknowledge that capital investment is critical to the provision of Services hereunder and the growth of rail business on the City Line. As used herein, "Capital Improvements" include, but are not limited to, additional rail lines, acquisition of additional real estate for rail and rail-related development, enhancement of the RTC, improvements to expand the use of the RTC or the Line for intermodal service, capital upgrades to current facilities, determination by the State of Illinois that warning devices at public crossings on the Line should be upgraded or installed, or matching funds needed to secure grant funds or loans for the City to carry out all such Capital Improvements. .

(b) In furtherance of the above, and as material consideration for this Agreement, BJRY commits one million dollars (\$1,000,000.00) to Capital Improvements over the Term of this Agreement. The funds will be deposited into an account maintained by BJRY specifically for such Improvements and disbursed to the City upon request for Improvements to the Line, the RTC, projects designed to encourage rail use of the Rochelle Industrial Park, or other Capital Improvements as defined above. BJRY shall annually deposit into the account the sum of \$100,000 payable in advance on or before the anniversary date of each year of the Term commencing with January 1, 2021 and notify the City that such deposit has been made; provided, however, BJRY shall commit the entire amount, or any outstanding balance of the amount, immediately upon demand from the City in the event such amount is needed to carry out the Capital Improvements described herein, including providing matching funds for grants applied for by the City.

(c) The City agrees to set aside forty percent (40%) of its gross revenue hereunder for Capital Improvements. The set aside and expenditure of such funds shall be as authorized by the City Manager.

9. Safety. BJRY shall exercise all due reasonable care and precaution for prevention of accidents or damage while performing Services hereunder in accordance with BJRY's Operating and Safety rule book. Additionally, BJRY shall comply with all Applicable Laws regarding safety to employees, the general public and rail operations, and require that its contractors do the same, including, but not limited to, compliance with FRA, OSHA and AAR requirements. Further, BJRY and its agents, employees and subcontractors shall perform the services provided for herein in a timely, expeditious and workmanlike manner, and each shall be duly trained, certified and licensed, with the requisite physical and mental capabilities and skills necessary for the performance of BJRY's obligations hereunder.

10. Compensation.

(a) BJRY will publish switching charges made to the Connecting Carriers and charges assessed to Line Industries. All such charges shall be established by City following consultation with BJRY, which consultation shall take place at the annual meeting referred to in Section 6 or as otherwise agreed by the parties. Charges will be billed to and paid by the Connecting Carriers (BNSF, UP or their successors) to BJRY. Switching charges will apply to loaded incoming and loaded outgoing rail cars and shall not discriminate among the Line Industries except to the extent necessary to appropriately reflect the distance between the lines of the Connecting Carriers, the point of destination on the Line for each Line Industry, or other cost or service differentiation. Except as provided in subsection 4(c) below, or otherwise agreed to in writing between BJRY and City, in no event shall any charge be made by BJRY to the Line Industries for services required hereunder.

(b) Acting as City's independent agent, BJRY shall collect from the Connecting Carriers the amounts due under 4(a) above and, on or before the last day of each calendar month, BJRY shall pay to City, and deposit into the Fund, an amount calculated as set forth in Exhibit A, attached hereto, for each railcar for which BJRY has completed handling (including both pick-up and delivery to and from Connecting Carriers) in the preceding month. Payment shall be based upon those railcars that have been cleared by the UP or BNSF's electronic switching system data. BJRY shall provide documentation on the number of railcars handled and payment received not later than the twenty-fifth (25th) day of the calendar month following the calendar month in which such railcars were handled and payment received. BJRY shall also provide City with a copy of all statements received from the UP and BNSF or their successors relating to the number of railcars handled and payment made therefor.

(c) Switching Charge Absorption. In the event a Connecting Carrier modifies its current practice of absorbing the switching tariff charges identified in Section 4(a), then BJRY will collect the same unabsorbed switching tariff charges directly from the applicable Line Industries affected thereby.

(d) Storage of Railcars Per Written Agreement with City. Storage of railcars on any track or tracks(s) of the Line pursuant to a written lease or storage agreement therefor between City and lessee or track user, and storage or other charges related thereto, shall not be part of this Agreement but shall be the exclusive purview of City, except that such revenue received by the City shall be included in the calculation of the City's annual guaranteed revenue set forth in Exhibit A. Further, BJRY shall receive switch fees pursuant to CIR Tariff for the movement of stored railcars to and from the designated storage tracks, which shall be included in switching revenue for the purposes of revenue sharing as set forth in Exhibit A.

(e) All Other Storage of Railcars. Storage of railcars on the Line not subject to lease or storage agreement as described in (d) above shall be subject to CIR tariff rates and terms, which shall be included in revenue collected and disbursed by BJRY as set forth in Exhibit A. BJRY shall generate and provide the City with monthly reports setting forth what railcars are located on designated storage tracks.

(e) Accessorial Charges. Accessorial Charges, as defined herein, shall be included in revenue collected and disbursed by BJRY as set forth in Exhibit A.

(f) Guaranteed Payment. BJRY shall guarantee minimum annual revenue to City of One Million Dollars (\$1,000,000) ("Guaranteed Annual Revenue" or "GAR") calculated as set forth in Exhibit A. In the event, in any given year, revenues applied to the GAR are less than One Million Dollars ("Shortfall Revenue"), BJRY shall pay such Shortfall Revenue to City on or before February 1 of each year of the Term.

(g) Revenue Not Included in Compensation. Any revenue collected by BJRY to reimburse BJRY for expenses paid to Connecting Carriers or car owners shall not be deemed revenue hereunder and not included in revenue calculations referenced in Exhibit A. This shall include any car hire or demurrage charges paid by BJRY to Connecting Carriers or car hire paid to car owners, and collected back by BJRY from Line Industries. In the event demurrage or other assessments are collected from Line Industries or other customers for other than reimbursement purposes, the same shall be deemed revenue hereunder and part of the revenue sharing formula in Exhibit A.

11. Term and Termination.

(a) Term. The term of this Agreement (the "Term") shall commence at 12:01 a.m. on January 1, 2021 (the "Commencement Date") and shall expire on the date which is ten (10) years after the Commencement Date, unless extended by mutual agreement of the parties.

(b) Termination for Cause. In addition to all rights and remedies available at law or in equity, and unless otherwise specified in this Agreement, upon sixty (60) days written notice to BJRY, City shall have the right to terminate this Agreement for cause in the event of a material breach by BJRY of any specific provision of this Agreement, or in the event performance under this Agreement fails to satisfy the reasonable requirements of the City. A material breach shall include, but not be limited to, failure to provide capital funds as set forth in Section 8 or failure to procure and maintain insurance as required by Section 16.

(c) Termination for Change in Control. City shall have the right to terminate this Agreement upon seven (7) days written notice to BJRY in the event that BJRY, or any parent or affiliate thereof, is a party to any transaction that will result or results in any change, directly or indirectly, in the ownership or control of BJRY. BJRY shall provide written notice to City in the event it anticipates a change in control as defined herein.

12. Compliance With Applicable Laws, Rules, and Regulations. BJRY shall comply with all Applicable Laws, including but not limited to, regulations of the FRA, OSHA, the STB and any and all other rules or regulations applicable to railroad operations, including, but not limited to, the AAR Interchange Rules, and assure that its contractors do likewise.

13. City's Right to Inspect. City shall have the right to enter upon the Line or any other property owned or leased by the City and make inspections to determine compliance with the terms of this Agreement, provided that City shall indemnify BJRY for any acts or omissions of City during such inspection that result in Losses as defined in Section 14. In no event shall City be obligated to make any such inspections, and City shall not be liable for any failure to make any inspections.

14. Liability and Indemnity.

(a) Definition of Losses. In this Agreement the term, "Losses" shall include all damages, losses, costs, expenses, fees, or liabilities of, or in any way related to the following:

- i. Any violation of Applicable Laws;
- ii. Any damage to property, the environment, or to natural resources;
- iii. Any bodily injury or death of any person;
- iv. Any claim based on the City's status as owner of the Line except as otherwise stated in Section 7 above;
- v. Any freight loss and damage claims occurring on the Line or for which any party hereto is determined to be liable; or
- vi. The breach of this Agreement.

"Losses" shall include, but not be limited to, any and all costs of claims or suits, activities in response to enforcement, damages, judgments, awards, orders, decrees, payments, fines, penalties, assessments, court costs, and reasonable attorney, consultant and expert witness fees related thereto, including any Losses assessed for violation of City's common carrier obligation, provided that in no event shall the definition of Losses include, and no party shall be liable to the other for, any special, incidental, punitive or consequential damages of any kind or nature, including but not limited to business interruption, arising directly or indirectly under this Agreement, however caused and regardless of legal theory or

foreseeability. The parties agree that any Losses related to violation of City's common carrier duty shall not be deemed to be special, incidental, punitive or consequential.

(b) General Liability and Indemnity. To the extent consistent with Illinois law governing non home-rule communities, BJRY shall indemnify, protect and hold harmless City, its elected and appointed officials, officers, employees, agents, contractors, successors, and assigns, from and against any and all Losses resulting from: (1) any injuries to or death of persons whomsoever or damage to property whatsoever because of any act or omission of BJRY, or their respective representatives, subcontractors, officers, employees, or agents in the performance of their respective duties and obligations under this Agreement, except in the event such Losses are caused solely by the acts or omissions of City; (2) breach of contract; (3) Losses related to work performed by BJRY when acting as a contractor for a Line Industry or (4) liens, fines, penalties, or claims for which BJRY might be or become liable, or to which the Line or other property of BJRY or the City might be or become subject as a result of the acts or omissions of BJRY in the performance of their respective duties and obligations hereunder.

(c) Environmental Liability and Indemnity. To the extent consistent with Illinois law governing non home-rule communities, BJRY shall not create or permit any condition on the Line or any real property or improvements used in connection with the Line that could present a threat to human health or to the environment. BJRY shall be responsible for, and shall indemnify, protect and hold harmless City from, any and all Losses (including special, incidental, punitive or consequential) alleged to have been caused in whole or in part by any hazardous or dangerous condition resulting, in whole or in part, from BJRY's use of the Line or violation of any Applicable Laws related to the performance of services under this Agreement or related to the release of Hazardous Materials from railcars on the Line. BJRY shall bear the expense of all practices or work, preventive or remedial, which may be required because of their respective obligations under this Section. City shall be responsible for, and shall indemnify, protect and hold harmless BJRY from and against, any environmental conditions caused or created by City prior to August 29, 2006. The City represents and warrants to BJRY that it does not have any knowledge of any Hazardous Materials on the Line, or any lack of compliance with any Applicable Laws related to the Line, prior to August 29, 2006. BJRY expressly agrees that the indemnification and hold harmless obligations assumed hereunder shall survive the termination or expiration of this Agreement. Statutory limitation periods on actions to enforce the obligations set forth herein shall not be deemed to commence until a party discovers, or reasonably should have discovered, any such environmental condition, and each hereby knowingly and voluntarily waives the benefit of any shorter limitation period. BJRY acknowledges that City has provided them with full access to inspect the Line.

(d) Hazardous Materials Handling. BJRY agrees to comply with all Applicable Laws and the terms of any Governmental Approvals concerning handling and disposal of Hazardous Materials subsequent to the Execution Date of this Agreement.

(e) Assumption of Defense. Upon written notice from City, BJRY agrees to assume the defense of any lawsuit or other proceeding brought against the City by any person or entity for Losses relating to any matter covered by this Agreement for which BJRY has an obligation to indemnify, protect and hold harmless the City hereunder and to pay all costs incident to such defense, including, but not limited to, attorneys' fees, litigation and appeal expenses, settlement payments and amounts paid in satisfaction of judgments. This section shall survive termination of this Agreement.

15. Liens. BJRY shall promptly pay and discharge any and all liens arising out of any construction, alterations, or repairs done, suffered or permitted to be done by BJRY on the Line, and shall indemnify, defend, and hold harmless City from and against any Losses incurred by the City on account of such liens. The City shall have the right to post any notices or take any other action upon or with respect to the Line that is or may be permitted by law to prevent the attachment of any such liens to the

Line or the property owned by the City; provided, however, that failure of the City to take any such action shall not relieve BJRY of any obligation or liability under any provision of this Agreement. If, because of any act or omission of BJRY, any mechanic's lien or other lien, charge or order for the payment of money shall be filed against the City, or any property of either of the City, BJRY shall, at its own expense, cause the same to be discharged of record within thirty (30) days after written notice from the City to BJRY of the filing thereof, and shall indemnify and save harmless the City from and against all costs, liabilities, penalties, and claims, including legal expenses, resulting therefrom.

16. Insurance. BJRY shall, at its sole cost and expense, procure and maintain during the Term of this Agreement the following insurance coverage:

- (a) All risks property insurance covering all property of BJRY or the City in the care, custody or control of BJRY. Such insurance shall:
 - i. Be issued on a replacement cost basis providing for restoration to prior condition;
 - ii. Provide that the insurance shall not be invalidated by any action or inaction of the City or BJRY or any other person and shall insure the respective interests of BJRY and the City as they appear, regardless of any breach or violation of any warranty, declaration or condition contained in such policies by BJRY or any other person;
 - iii. Include a standard loss payable endorsement naming BJRY and the City as the loss payee, as its interests may appear;
 - iv. Include a waiver of subrogation in favor of the City;
 - v. Include coverage for property in the care, custody or control of BJRY, which is owned by the City.
- (b) Railroad liability policy of insurance acceptable, in its reasonable opinion, to the City in an amount of at least Thirty Million Dollars (\$30,000,000) per occurrence and an aggregate limit of at least Sixty Million Dollars (\$60,000,000). Such insurance shall include coverage for:
 - i. Injury to or death of persons whomsoever, Personal Injury, Federal Employers Liability Act, property damage liability including but not limited to, damage or destruction of any and all property including public liability, bill of lading, and foreign rolling stock;
 - ii. Contractual liability for the liability assumed in this Agreement; and
 - iii. Evacuation expense coverage.
- (c) Workers compensation insurance as required by Applicable Laws; provided that BJRY may self-insure where permitted by Illinois law.
- (d) Employers Liability insurance including coverage for, but not limited to:
 - i. 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;

- ii. All such coverage shall include coverage for the Federal Employers Liability Act.
- (e) Commercial general liability insurance, on occurrence form, in an amount of at least \$12,500,000 per occurrence and \$25,000,000 aggregate. Such insurance shall include coverage for the liabilities assumed in this Agreement, and name the City as an additional insured.
- (f) Business Automobile Liability insurance with a combined single limit of Five Million Dollars (\$5,000,000) naming the City as an additional insured.
- (g) Other Requirements.
 - i. All policies (applying to coverage listed above) shall contain no exclusion for punitive damages and certificates of insurance shall reflect that no exclusion exists.
 - ii. BJRY must waive and release any right of recovery against City for loss or damage to property of BJRY, or their respective employees, licensees and invitees, resulting from any cause which would be coverable by “all risk” property insurance, whether or not such insurance is actually in effect, and whether or not the loss or damage is caused by the negligence of City, its agents, employees or contractors. This waiver shall be binding on all insurers and other parties claiming by, through or under BJRY.
 - iii. BJRY’s insurance policies through policy endorsement must include wording which states the policy shall be primary and non-contributing with respect to any insurance carried by City.
 - iv. All policies required above shall include a severability of interest endorsement and shall name City as an additional insured with respect to work performed, or operations conducted, under this Agreement.
 - v. The fact that insurance is obtained by BJRY shall not be deemed to release or diminish its liability hereunder, including, without limitation, liability under the indemnity provisions of the Agreement. Damages recoverable by City shall not be limited by the amount of the required insurance coverage.
 - vi. The insurance limits set forth herein shall be subject to annual review by the City and may be increased at the sole discretion of City if BJRY’s risk history, commodities handled, Services provided warrant or City policies mandate an increase.

17 Assignments and Subcontracting. BJRY shall not assign this Agreement, in whole or in part, or any interest herein, or grant a security interest in any buildings or improvements on the Line, nor subcontract or delegate performance of any of their obligations under this Agreement nor enter into any agreements with Line Industries or other users of the Line, the Rochelle Industrial Park or the RTC, without the consent of the City Manager. No rights or interests under this Agreement shall pass to any successor, heir, executor, administrator, receiver, master, sheriff, trustee in bankruptcy, or other assignee by sale, transfer, or other operation of law, without the express prior written consent of City Manager in each instance. Any permitted assignee of BJRY’s rights under this Agreement, shall assume in writing all

To City: City of Rochelle
Attn: City Manager
420 North 6th St.
Rochelle, IL 61068

Notices shall be deemed given as of the date such notice is hand delivered or is placed with an express courier, if sent by express courier. If the last day for giving any notice or taking any action required or permitted under this Agreement would otherwise fall on a Saturday, Sunday, or legal holiday, that last day shall be postponed until the next legal business day.

22. Miscellaneous.

(a) Non-solicitation of BJRY employees. The City agrees that during the term of this Agreement and for one (1) year after the termination or expiration of this Agreement, unless BJRY provides written consent, the City and its affiliates will not solicit or hire any of the management employees of BJRY, or its affiliates with whom the City became acquainted by virtue of the provision of services under this Agreement. The City agrees that BJRY's damages resulting from a violation of this provision by the City would be real, but difficult to measure with certainty. Therefore, the City agrees that upon any violation of this provision, the City will pay liquidated damages to BJRY in an amount equal to one hundred fifty percent (150%) of the annual base pay of any employee hired in violation of this paragraph.

(b) Entire Agreement: Enforceability. This Agreement, including any recitals and any attached Exhibits, all of which are made a part of this Agreement, contains the entire agreement of the parties concerning this subject matter. This Agreement should be read carefully because only those terms in writing in this Agreement are enforceable. No other terms or oral promises which are not in this Agreement may be legally enforced, and no promises, projections, inducements or representations made before the Execution Date will change the terms of this Agreement or be binding on any party. No promises or other terms shall be implied in this Agreement.

(c) Amendments. No amendment of this Agreement shall be binding unless it is in writing and signed by the party against whom enforcement is sought.

(d) Binding Effect: No Third Party Beneficiaries. This Agreement shall both bind and benefit the parties hereto and their respective heirs, personal representatives, successors, and permitted assigns. The parties do not intend that there be any third party or other beneficiaries of this Agreement.

(e) Waivers: Consents. A party shall not be deemed to have made a waiver, consent or approval under this Agreement unless it does so in writing, and the mere failure of a party to act to enforce any provision of this Agreement shall not be considered a waiver, consent or approval and shall not prevent that party from enforcing any provision of this Agreement in the future. Wherever this Agreement requires obtaining the waiver, consent or approval of any person or entity, such waiver, consent or approval may be granted or withheld in such person or entity's sole discretion, unless this Agreement expressly provides otherwise. Any waiver, consent or approval under this Agreement shall apply only to the matter expressly waived, consented to or approved, and shall not be deemed to be waiver, consent or approval of any subsequent breach or of any other provision of this Agreement. Wherever this Agreement provides for an action to be taken at a party's option, the decision whether or not to exercise such option shall be in such party's sole discretion. Approvals on behalf of City shall be granted by the City Manager.

(f) Severability. The invalidity or unenforceability of one provision of this Agreement will not affect the validity or enforceability of the other provisions.

(g) Captions. The section numbers and captions are inserted only as a matter of convenience, and do not in any way define, limit, or describe the scope or intent of this Agreement. Any references in this Agreement to a Section or subsection shall refer to such Section or subsection of this Agreement, unless expressly provided otherwise.

(h) Counterparts. This Agreement may be executed in several counterparts, each of which shall be deemed an original, and all of which together shall constitute one and the same instrument.

(i) Governing Law and Venue. This Agreement shall be governed by and construed in accordance with the laws of the State of Illinois. All actions arising, directly or indirectly, as a result or consequence of this Agreement and not resolved pursuant to Section 19, shall be instituted and litigated only in the Fifteenth Circuit Court the County of Ogle, Illinois or the U.S. District Court for the Northern District of Illinois, Western Division. The parties hereby consent to the exclusive jurisdiction and venue of said courts, and waive any objection based on forum non conveniens.

(j) Construction. This Agreement has been negotiated at arm's length, with both parties having the opportunity to be represented by counsel, and therefore should a dispute arise concerning the meaning of any provision of this Agreement, there shall be no presumption that such provision shall be construed against the party that drafted this Agreement.

(k) Records and Audit. At the end of each month, BJRY shall provide to City a financial record detailing the revenues and expenses associated with this Agreement. Each year, City shall have the right to audit BJRY's, or its respective subcontractors' records, solely with respect to operations on the Line and the services provided under this Agreement, and all expenses incurred with respect thereto. BJRY shall further keep and maintain all records required by any Applicable Laws for, at a minimum, the time periods required by such Laws. BJRY, and its respective subcontractors, shall make their records available to City during normal business hours, upon reasonable notice. BJRY shall maintain all records pertaining to this Agreement for a period of at least five (5) years after the date such records are created.

(l) Publicity. BJRY shall not use or publish in any format the name of the City of Rochelle or its logo or publicize the operations of the Line without the written consent of the City Manager. BJRY agrees that it will, upon request of City, display the logo or other depiction provided by City on its locomotives used for service provided pursuant to this Agreement in a prominent position that does not interfere with the BJRY logo or the safe use and operation of the locomotives.

23. No Offer. The submission of this Agreement for examination and negotiation does not constitute an offer to enter into an agreement, and this Agreement shall not be binding on any party until it is executed and delivered by each party to this Agreement.

24. Survival of Terms. Sections 14, 16, 22(a), and 26 shall survive termination of this Agreement

25. Dispute Mechanism/Arbitration. Any controversy, claim or dispute of whatever nature arising between the parties from or related to the Agreement, including the breach, termination, enforceability, scope or validity thereof, whether such claim existed prior to or arises on or after the execution date hereof ("Dispute") shall be resolved first by the signatory parties hereto meeting and attempting to resolve such Dispute within thirty (30) days of written notification by a party to the other

party setting forth the nature of the Dispute. In the event the Dispute cannot be resolved, the parties shall engage in Arbitration as set forth below.

Arbitration shall take place in Rochelle, IL and shall be binding for all Disputes where the amount in controversy does not exceed \$50,000. The party choosing to arbitrate shall do so by providing the other with written notification of the intent to invoke arbitration under this Section 18 and a description of the Dispute to be so arbitrated. Arbitration shall be conducted in accordance with such rules as may be agreed upon by the parties, or failing agreement within 30 days after arbitration is demanded, in accordance with the Commercial Arbitration Rules of the American Arbitration Association (“AAA”) in effect on the Execution Date, subject to any modifications contained in this Agreement. Except as otherwise set forth herein, arbitration shall be governed by the Federal Rules of Civil Procedure. The Dispute shall be determined by one arbitrator, except that if the Dispute involves an amount in excess of \$1,000,000 (exclusive of interest and costs), three arbitrators shall be appointed.

Unless the parties agree otherwise, arbitrators shall be members of the AAA Large, Complex Case Panel or a CPR Panel of Distinguished Neutrals, or who have professional credentials similar to those persons listed on such AAA or CPR panels. The arbitrator(s) shall base the award on the applicable law and judicial precedent of the State of Illinois and shall have no authority to render an award which is inconsistent therewith. The award shall be in writing and including the findings of fact and conclusions of law upon which it is based.

Unless the parties agree otherwise, for Disputes involving amounts in controversy less than \$150,000, discovery will be limited to an exchange of directly relevant documents. Depositions will not be taken except as needed in lieu of a live appearance or upon mutual agreement of the parties. The arbitrator(s) shall resolve any discovery disputes. The arbitrator(s) and counsel of record will have the power of subpoena process as provided by law. For Disputes subject to binding arbitration hereunder, the parties knowingly and voluntarily waive their rights to have any Dispute tried and adjudicated by a judge or a jury. Arbitration shall be governed by the substantive laws of the State of Illinois, without regard to conflicts-of-law rules, and by the arbitration law of the Federal Arbitration Act (Title 9, U.S. Code).

Judgment upon an arbitration award deemed to be binding hereunder may be entered in the District Court for Ogle County, IL or in the federal court for the Northern District of Illinois. Upon application by either party to such court for an order confirming, modifying or vacating the award, the court shall have the power to review whether, as a matter of law based on the findings of fact determined by the arbitrator(s), the award should be confirmed, modified or vacated in order to correct any errors of law made by the arbitrator(s). In the event a party so elects to apply to such court, in order to effectuate such judicial review limited to issues of law, the parties agree (and shall stipulate to the court) that the findings of fact made by the arbitrator(s) shall be final and binding on the parties and shall serve as the facts to be submitted to and relied upon by the court in determining the extent to which the award should be confirmed, modified or vacated.

Except as otherwise required by law, the parties and the arbitrator(s) agree to keep confidential, and not disclose to third parties, any information or documents obtained in connection with the arbitration process, including the resolution of the Dispute. If either party fails to proceed with arbitration as provided in this Agreement, or unsuccessfully seeks to stay the arbitration, or fails to comply with the arbitration award, or is unsuccessful in vacating or modifying the award pursuant to a petition or application for judicial review, the other party shall be entitled to be awarded costs, including reasonable attorney’s fees, paid or incurred in successfully compelling such arbitration or defending against the attempt to stay, vacate or modify such arbitration award and/or successfully defending or enforcing the award.

26. Statute of Limitations. Notwithstanding any statute of limitations that may apply to controversies regarding this Agreement, the parties agree that all Disputes shall be commenced hereunder within two (2) years of the date when the party commencing the action first knew or should have known of the Dispute.

IN WITNESS WHEREOF, the parties execute this Agreement as of the Execution Date.

**BURLINGTON JUNCTION
RAILWAY, INC.**

CITY OF ROCHELLE

By: _____

By: _____

Its: _____

Its: _____

Date: _____

Date: _____

Exhibit A

REVENUE SHARING FORMULA:

Revenue for purposes of the formulas below include all switching revenue (switching fees absorbed by Connecting Carriers and additional switching for Line Industries or other customers, such as switching to/from storage, cherry-picking fees, re-spotting charges, switching error cars, etc.), , accessorial charges, or other charges set forth in Section 10, except where specifically excluded below):

CIR TOTAL ANNUAL REVENUE FROM REVENUE SHARING FORMULA*	CITY SHARE	BJRY SHARE
\$0 - \$1,999,999 Million	50%	50%
\$2 - \$2,999,999 Million	48%	52%
\$3 - \$3,999,999 Million	46%	54%
\$4 - \$5,000,000 Million	44%	56%
Above \$5 Million	42%	58%

* City is guaranteed \$1Million in revenue per year as set forth in Section 10(f). This is in addition to funds for capital improvements set forth in Section 8(b). The Revenue Share Formulas above do not include excluded revenue set forth below; however, such excluded revenue to the City shall be included in the calculation of the City's GAR.

REVENUE EXCLUDED FROM THE REVENUE SHARE FORMULA:

■ ROCHELLE TRANSLOAD CENTER/INTERMODAL REVENUE:

TO THE CITY:

- \$75 user fee per loaded or unloaded railcar at the RTC.
- \$37.50/container for containers unloaded at the RTC.
- All fees or other charges for transloading (and related storage) of commodities not handled by BJRY (e.g., Wind Mill components moved through the RTC). [Note: exclude revenue does not include switching revenue collected by BJRY for movement of railcars to/from the transloading site or amounts related to other work performed by BJRY related to such commodities.]

TO BJRY:

- Transloading by BJRY of materials for customers in the RTC or other transloading locations on the CIR System.
- Lift on/Lift off intermodal fees.
- Revenue derived from Section 7 excluded services.

■ STORAGE REVENUE:

- All revenue derived from storage track leases or other written storage agreements for use of CIR track or for storage in the RTC Yard shall be 100% revenue to the City.
- All other railcar storage revenue not related to the above shall be collected by BJRY and shall be split 50/50 between City and BJRY. Such revenue to City shall be included in the calculation of the City's GAR.