

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

State of Illinois, Illinois Department of Transportation,
Petitioner,

v.

The Terminal Railroad Association of St. Louis (TRRA),
Respondent.

T09-0074

Petition for an Order granting authority to construct two grade separation structures carrying relocated Interstate Route 70 (FAP Route 999) over and across TRRA's property, including TRRA's Wiggins #2 yard tracks at Railroad Mile Post 1.9 Wiggins Main, near the Village of Brooklyn in St. Clair County, Illinois.

ORDER

By the Commission:

On June 9, 2009, the Illinois Department of Transportation ("Petitioner" or "IDOT") filed a Petition with the Illinois Commerce Commission ("Commission") requesting authority to construct two grade separation structures, naming the Terminal Railroad Association of St. Louis ("TRRA") as Respondent. The Petition sought approval from the Commission for the construction of two grade separation structures near the Village of Brooklyn, St. Clair County, Illinois, to carry the eastbound and westbound traffic lanes of relocated Interstate Route 70 over and across TRRA's property, including its Wiggins #2 railroad yard tracks located at approximate Railroad Milepost 1.9 Wiggins Main ("subject property"). Pursuant to leave granted by a duly authorized Administrative Law Judge ("ALJ") of the Commission, on August 14, 2009, IDOT amended the Petition to correctly allege that the record fee owner of the subject property in this proceeding is Wiggins Ferry Company, a wholly-owned subsidiary of TRRA, which leases the subject property to TRRA.

PROCEDURAL HISTORY

Pursuant to notice as required by Law and the rules and regulations of the Commission, the matter came on for hearings before the duly authorized Chief Administrative Law Judge ("CALJ") of the Commission on July 10, 2009, July 30, 2009, August 5, 2009 and August 13, 2009, at the Commission's offices in Springfield, Illinois. IDOT, as Petitioner, and TRRA, as Respondent, were represented by counsel. John Blair, Assistant Rail Safety Program Administrator, appeared representing Commission Staff ("Staff"). During evidentiary hearings conducted on July 30, 2009 and August 5, 2009, IDOT presented testimony.

At the initial hearing held on the Petition in this case, the Parties advised the CALJ that they had essentially reached agreement on most of the issues involved in the construction project while negotiating a Grade Separation Agreement between IDOT and TRRA. At the time of hearing, the only outstanding issues contested between the Parties concerned the two issues of fencing on the interstate bridge structure and lighting beneath the spans of the structure. The case proceeded to evidentiary hearing on those two issues alone. As set forth above, evidentiary hearings proceeded on July 30, 2009, and August 5, 2009.

Before the start of a final evidentiary hearing on August 13, 2009, which had been scheduled to hear evidence to be presented by Respondent TRRA, counsel for IDOT and counsel for TRRA advised the CALJ that the Parties had reached agreement on all provisions of the proposed Grade Separation Agreement, including those issues which were initially contested by and between the Parties. As a result of the negotiated agreement, it was not necessary to continue with TRRA's presentation of evidence, and at the conclusion of the August 13, 2009 hearing, the record was marked "Heard and Taken."

PROJECT BACKGROUND AND AGREED ORDER

The Petition, as amended, concerns part of the "main span" portion of the new Mississippi River Bridge Project ("MRB Project"). As alleged in Paragraphs 4 and 5 of the Petition, IDOT and the Missouri Highways and Transportation Commission ("MHTC") entered into a Bi-State Agreement on February 28, 2008. Under this agreement, IDOT and MHTC propose to construct a new interstate highway bridge across the Mississippi River in order to relocate Interstate Route 70 ("I-70"), also known as FAP Route 999. The "main span" portion of the MRB Project is depicted on Petitioner's Exhibit 2, of evidence in the case.

The Petition alleges that due to IDOT's desire to construct a new bridge over the Mississippi River to relocate I-70, two new highway overpass structures must be constructed to carry relocated I-70 over TRRA's Wiggins #2 yard tracks near the Village of Brooklyn, St. Clair County, Illinois. Furthermore, the Petition alleges that the construction project is necessary to improve the safety of the traveling public across the Mississippi River and for public convenience and necessity.

The estimate of construction costs for the main span of the Mississippi River Bridge Project, including the two grade separation structures located in Illinois, is approximately two hundred eighty-eight million dollars (\$288,000,000). All of the funding for the project will be the responsibility of IDOT and MHTC through federal, Illinois and Missouri funding sources. MHTC contemplates a bid letting in September 2009 in order to qualify for receiving the federal funding. No Grade Crossing Protection Funds are requested or involved in the case. The total cost of the overall Mississippi River Bridge Project is estimated at approximately six hundred forty million dollars (\$640,000,000).

The Parties advised the CALJ that they had reached agreement on all of the terms and conditions of the Grade Separation Agreement which sets forth the scope of the project and responsibilities of the Parties for various phases of the project over and across the subject property. The agreed Grade Separation Agreement is attached as Exhibit 1 to this Order, and is incorporated herein by reference.

AGREED ORDER

Pursuant to agreement, the Parties and Staff drafted an agreed Order granting the Petition, as amended. Petitioner Illinois Department of Transportation filed the draft agreed Order in the docket of this case on August 18, 2009. Thereafter, on August 19, 2009, Staff filed its written concurrence to the draft agreed Order. On that same date Respondent, The Terminal Railroad Association of St. Louis filed its written concurrence to the draft agreed Order in the docket. This final Order incorporates all of the substance of the matter contained in the draft agreed Order, as well as the entire Grade Separation Agreement entered into by and between the Parties and attached as Exhibit 1 to this final Order.

STAFF'S POSITION

Staff concurs with the Grade Separation Agreement negotiated by and between the Parties, and is also of the opinion that the construction project is necessary to improve the safety of the traveling public across the Mississippi River and for public convenience and necessity. Staff supports this agreed Order granting the Petition.

COMMISSION FINDINGS AND ORDERS

The Commission, having considered the entire record herein, and being fully advised in the premises, is of the opinion and finds that:

- (1) the Commission has jurisdiction of the subject matter and the Parties hereto;
- (2) IDOT, as Petitioner, and MHTC propose to construct two new highway overpass structures carrying relocated Interstate Route 70 (FAP Route 999) over and across TRRA's property, including TRRA's Wiggins #2 yard tracks at approximately Railroad Mile Post 1.9 near the Village of Brooklyn, St. Clair County, Illinois;
- (3) the proposed two grade separation structures are part of the new Mississippi River Bridge Project;
- (4) the new Mississippi River Bridge Project is a public project and serves a public purpose and necessity, namely, the construction of relocated Interstate Route 70;

- (5) the proposed grade separation structures are part of the new Mississippi River Bridge improvement project for relocated Interstate Route 70 and are necessary to preserve the safety of the public and for public convenience and necessity;
- (6) the cost of the project shall be borne by IDOT and by MHTC pursuant to the February 28, 2008 Missouri Highways and Transportation Commission and Illinois Department of Transportation Bi-State Agreement;
- (7) IDOT and TRRA agree as fully set forth in the Grade Separation Construction and Maintenance Agreement attached hereto as Exhibit 1 and incorporated herein by reference;
- (8) Chapter 625 ILCS 5/18c-1702 and 5/18c-1704 require each "person" as defined by Section 5/18c-1104, to comply with every regulation or order of the Commission; these sections further provide that any person who fails to comply with a Commission regulation or order shall forfeit to the State not more than \$1,000 for each such failure, with each day's continuance of the violation being considered a separate offense; while the Commission expects all Parties to comply with this Order in all matters addressed herein and in a timely manner, the Commission advises that any failure to comply may result in the assessment of such sanctions;
- (9) Any person making a request for an extension of time up to thirty (30) days to complete a project ordered by the Commission must file a request with the Director of Processing and Information no later than fourteen (14) days in advance of the scheduled deadline and an Administrative Law Judge will consider and decide the request;
- (10) any person making a request for an extension of time to complete a project that exceeds thirty (30) days must file a Petition for Supplemental Order with the Director of Processing and Information no later than twenty-one (21) days in advance of the scheduled deadline and the Commission will decide Petitions for Supplemental Orders;
- (11) requests for extension of time and Petitions for Supplemental Orders must include the reason(s) the additional time is needed to complete the work and the time within which the project will be completed;
- (12) prior to submitting a request for extension of time or a Petition for Supplemental Order, the person must notify the Commission's Rail Safety Program Administrator that it is unable to complete the project within the ordered timeframe;
- (13) the Commission or its Administrative Law Judge reserves the right to deny Petitions for Supplemental Orders and requests for extension of time, if the reason(s) supporting the request is (are) insufficient or where it appears the

person has not made a good faith effort to complete the project within the allotted time; and failure of the Commission or Administrative Law Judge to act on a pleading prior to the deadline means the originally ordered completion date remains in effect.

IT IS THEREFORE ORDERED by the Illinois Commerce Commission that permission and authority be, and they are hereby, granted to the Illinois Department of Transportation to construct two new grade separation structures to carry relocated Interstate Route 70 (FAP Route 999) over TRRA's property, including TRRA's Wiggins #2 yard tracks at approximately Railroad Mile Post 1.9 Wiggins Main, near the Village of Brooklyn, St. Clair County, Illinois, as set forth in the plan sheets submitted by the Illinois Department of Transportation and attached hereto in the Grade Separation Construction and Maintenance Agreement.

IT IS FURTHER ORDERED that the costs for the work to be performed by the Illinois Department of Transportation, the Missouri Highways and Transportation Commission and TRRA to construct the new grade separation structures shall be assessed in accordance with the terms and conditions of the Grade Separation Construction and Maintenance Agreement attached hereto as Exhibit 1.

IT IS FURTHER ORDERED that the Illinois Department of Transportation and the Missouri Highways and Transportation Commission shall be responsible for the new grade separation structures, the highway approaches, and all other highway facilities, in accordance with the provisions of the February 28, 2008 Missouri Highways and Transportation Commission and Illinois Department of Transportation Bi-State Agreement.

IT IS FURTHER ORDERED that TRRA shall continue to be responsible for maintaining the existing railroad ballast, ties, rail, and all other railroad facilities.

IT IS FURTHER ORDERED that the Illinois Department of Transportation shall, at six (6) month intervals from the date of this Order, file with the Director of Processing, Transportation Division, Illinois Commerce Commission (the "Director of Processing"), written progress reports for the project herein authorized.

IT IS FURTHER ORDERED that the work herein required, specifically, the construction of the two grade separation structures over and across the subject property, shall be completed within sixty (60) months of the date of this Order.

IT IS FURTHER ORDERED that, within five (5) days after the completion of the work herein authorized, the Illinois Department of Transportation, as Petitioner, shall provide written notice thereof to the Director of Processing.

IT IS FURTHER ORDERED that any person making a request for extension of time up to thirty (30) days to complete a project ordered by the Commission must file a request with the Director of Processing no later than fourteen (14) days in advance of

the schedule deadline and an Administrative Law Judge will consider and decide the request.

IT IS FURTHER ORDERED that any person requesting an extension of time that exceeds thirty (30) days must file a Petition for Supplemental Order with the Director of Processing no later than twenty-one (21) days in advance of the scheduled deadline and the Commission will decide Petitions for Supplemental Orders.

IT IS FURTHER ORDERED that requests for extensions of time and Petitions for Supplemental Orders must include the reason(s) the additional time is needed to complete the work and the time within which the project will be completed. Prior to submitting a request for extension of time or a Petition for Supplemental Order, the person must notify the Commission's Rail Safety Program Administrator that it is unable to complete the project within the ordered time frame.

IT IS FURTHER ORDERED that the Commission or its Administrative Law Judge reserves the right to deny requests for extension of time and Petitions for Supplemental Orders if the reason(s) supporting the request is insufficient or where it appears the person has not made a good faith effort to complete the project within the allotted time. Failure of the Commission or Administrative Law Judge to act on a pleading prior to the deadline means the originally ordered completion date remains in effect.

IT IS FURTHER ORDERED that the Illinois Department of Transportation and the Terminal Railroad Association of St. Louis shall comply with the clearance requirements of 92 Ill. Adm. Code 1500.

IT IS FURTHER ORDERED that in accordance with 625 ILCS 5/18c-2201 and 5/18c-2206 of the Illinois Commercial Transportation Law, this is a final Order subject to the Administrative Review Law.

By Order of the Commission this 10th day of September 2009.


CHARLES E. BOX
CHAIRMAN

JUDGE
SECTION CHIEF

ORDERS SUPERVISOR

CCO FORM: N/A
Approved:
Revised:
Modified: 08/09 (DW)

I-70, Brooklyn, St. Clair County, IL
MHTC Job No. J610984C
MHTC Bridge No. A6500

**GRADE SEPARATION
CONSTRUCTION AND MAINTENANCE
AGREEMENT**

THIS AGREEMENT is made and entered into by and among the STATE OF ILLINOIS, acting by and through its Department of Transportation, hereinafter referred to as "IDOT", the MISSOURI HIGHWAYS AND TRANSPORTATION COMMISSION, hereinafter referred to as "MHTC", the TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, hereinafter referred to as "Terminal Railroad", and THE WIGGINS FERRY COMPANY, hereinafter referred to as "Wiggins". Terminal Railroad and Wiggins are collectively referred to herein as "TRRA". IDOT, MHTC, Terminal Railroad and Wiggins are collectively referred to hereinafter as "parties".

WITNESSETH:

THAT, WHEREAS, IDOT and MHTC have lawful responsibilities for promoting the interstate transportation of passengers and property within and through their respective States by various modes, including transportation by motor vehicles upon the public highways; and

WHEREAS, Terminal Railroad is a railroad corporation and common carrier, which owns and operates a railroad, part of which is located within the State of Illinois, upon which Terminal Railroad regularly engages in the transportation of property for hire or compensation in interstate commerce; and Wiggins owns the relevant real property and certain related improvements, upon which Terminal Railroad conducts its railroading operations within the State of Illinois;

WHEREAS, IDOT and MHTC propose to construct FAP Route 999 (Relocated I-70), which will be open for public use as an interstate highway, and will be used in the transportation of passengers and property by motor vehicles in interstate commerce. As part of this proposed construction, dual grade separation structures will be necessary to carry the eastbound and westbound traffic lanes, respectively, of Relocated I-70 over and across TRRA's Wiggin's #2 Yard tracks at approximate RR Milepost 1.9 Wiggins Main, near the Village of Brooklyn in St. Clair County, Illinois. The construction of the proposed dual grade separation structures, together with the highway approaches to these structures and all related highway facilities within the State of Illinois, westward from the junction of I-70 and IL Route 3 in St. Clair County, Illinois, to the State boundary with Missouri, is hereinafter referred to as the "Project". The structure number for the proposed bridges is A6500; and

WHEREAS, MHTC and IDOT entered into a Bi-State Agreement dated February 28, 2008, regarding the construction and maintenance of Relocated I-70, which is hereinafter referred to as the "Bi-State Agreement". Pursuant to the Bi-State Agreement, MHTC is responsible for constructing and maintaining Relocated I-70 westward from its junction with IL Route 3 over and across the Mississippi River, including the dual grade separation structures, the highway approaches to these structures, and all related highway facilities, whether located within Missouri or Illinois, and IDOT is responsible for acquiring all necessary rights-of-way for

construction and maintenance of these structures and facilities located in the State of Illinois; and

WHEREAS, in the interest of public safety and convenience, MHTC proposes to construct these dual ten-span grade separation structures over and across TRRA's tracks, substantially as shown at the location on the general overview map and the general plan sheets marked Exhibit 1, which are attached hereto and made a part hereof; and

WHEREAS, the parties will address in separate right of way easements the obligations of all parties related to the construction and maintenance of the maintenance and access roadways that will be necessary to allow Contractor and maintenance access along and across the tracks owned or operated by TRRA for the purposes of constructing and maintaining the dual grade separation structures described in this Agreement. In addition, any other property rights to be granted to MHTC with reference to TRRA's property within the State of Missouri, and the terms and conditions agreed by and between TRRA and MHTC with reference to MHTC's construction and maintenance of the related structures located within the State of Missouri, will also be addressed in separate documents; and

WHEREAS, IDOT has petitioned the Illinois Commerce Commission in accordance with 92 Illinois Administrative Code 1500 to take Jurisdiction in this matter and to enter such orders as may be necessary; and

WHEREAS, the Project requires the services of TRRA that are described in Section 4 of this Agreement;

NOW, THEREFORE, in consideration of the premises and of the mutual covenants and agreements hereinafter contained, the parties hereto agree as follows:

SECTION 1. PROJECT PLANS AND SPECIFICATIONS. MHTC will prepare the plans and specifications for the construction of the proposed dual overpass structures, the highway approaches to these structures, and all related highway facilities on the Illinois side of the Mississippi River westward from the junction of I-70 and IL State Route 3 at MHTC's expense. MHTC will obtain written approval by TRRA's authorized representative of all such plans and specifications affecting the interests of TRRA, before MHTC's Contractor commences any work on TRRA's property described in Section 2 of this Agreement. TRRA's authorized representative shall not unreasonably withhold approval of MHTC's plans and specifications relating to this Project. TRRA shall not be construed or deemed to have ratified or adopted the plans as its own, as a result of any provision of this Agreement. None of the parties shall make any changes on any approved plans, specifications or Railroad Job Special Provisions, including but not limited to plans developed as part of the Alternate Technical Concepts process, without first obtaining the consent in writing of the other parties.

SECTION 2. PROPERTY RIGHTS. The property rights that IDOT and MHTC, or either of them, will need from TRRA for this Project (hereinafter referred to in this Agreement and in Exhibit 2 to this Agreement as "TRRA's property") will be described in separate right of way easements between Terminal Railroad, Wiggins, and IDOT (hereinafter referred to as the "Easements"). TRRA will not allow any work by IDOT, MHTC, or any Contractor thereof, over TRRA's property until the Easements are acquired by IDOT.

SECTION 3. WORK BY MHTC.

- (I). MHTC shall furnish or cause to be furnished, at its expense and in accordance with the Bi-State Agreement and this Agreement (including without limitation the Railroad Job Special Provisions attached hereto as Exhibit 2 and incorporated herein by reference) and in accordance with the approved plans, specifications and Railroad Job Special Provisions, all the plans, engineering, supervision, labor, materials and work equipment required to perform and complete:
 - (a) The preliminary engineering required for preparation of plans, specifications and Railroad Job Special Provisions as set forth in Section 1 of this Agreement.
 - (b) The construction of two (2) ten-span grade separation overpass structures to carry the eastbound and westbound traffic lanes, respectively, of Relocated I-70 over TRRA's tracks, together with the highway approaches, and all related highway facilities westward from the junction of I-70 and IL Route 3 to the boundary of the State of Missouri (sometimes referred to herein as the "Bridge Structure").
 - (c) Construction engineering and inspection as set forth in Section 8 of this Agreement.
 - (d) Incidental work necessary to complete the items specified in Section 3 of this Agreement.
- (II) MHTC may engage competent and experienced contractors, engineers, design professionals and other consultants, including their subcontractors and employees, which are referred to in this Agreement as "Contractor", with adequate equipment, organization and finances to perform the work required of MHTC by Section 3 of this Agreement. MHTC will notify TRRA of the identity of each Contractor performing any work affecting TRRA's interest.
- (III) MHTC shall require its Contractor to perform its work upon TRRA's property in accordance with the final plans and specifications approved by TRRA, and in accordance with all applicable requirements of the Railroad Job Special Provisions set forth in Exhibit 2, or any later amendment to those Railroad Job Special Provisions that is approved by TRRA, IDOT and MHTC and becomes applicable in accordance with the provisions in paragraph (c) of this subsection or Section 9 of this Agreement. MHTC shall assign a representative to be present at the job site during construction, to certify the work and to assure that all work and materials meet the requirements set forth in the approved plans and specifications.
 - (a) MHTC shall cause its Contractor to prosecute and complete its work in a good and workmanlike manner according to the Contractor's own methods, and with and by the Contractor's own means and employees. MHTC shall require its Contractor to use all care and precaution necessary to avoid accident, damage or interference to TRRA 's tracks. MHTC's Contractor's work shall be free from any supervision, inspection, or control by TRRA, except only as may be necessary to enable TRRA to

determine whether work performed complies with the requirements of this Agreement, including without limitation, conformance to the approved plans and specifications and the Railroad Job Special Provisions. The parties intend that MHTC's Contractor shall be and remain an independent contractor and that no provision in this Agreement shall be construed as being inconsistent with that status.

- (b) Whenever MHTC enters into a contract with a Contractor to perform any work within four (4) years after the effective date of this Agreement, as described in subsection (I) within Section 3 of this Agreement, upon or over TRRA's property as described in the Easements, MHTC shall expressly incorporate into that contract, and shall require the Contractor expressly to incorporate into every subcontract made pursuant to that contract, all of the Railroad Job Special Provisions set forth in the attached Exhibit 2.
- (c) If MHTC's Contractor performs any work described in subsection (I) within Section 3 of this Agreement, upon or over TRRA's property as described in the Easements, more than four (4) years after the effective date of this Agreement, then MHTC shall require its Contractor to abide by the Railroad Job Special Provisions in force at the time when the Contractor performs that work, as mutually agreed between TRRA and MHTC in accordance with the provisions of Section 9 of this Agreement.

SECTION 4. WORK BY RAILROAD.

- (I) TRRA shall furnish or cause to be furnished, at the expense of MHTC through reimbursement as provided in this Agreement, and in accordance with the approved plans, specifications and special provisions, and the applicable requirements contained in the Federal-Aid Policy Guide, Chapter I, Subchapter B, Part 140, Subpart I, (23 CFR 140I) and supplements, all the labor, materials and work equipment required to perform and complete:
 - (a). Construction engineering as set forth in Section 8 of this Agreement.
 - (b). Flagging services and protective services and devices as provided in Section 6 of this Agreement and the Railroad Job Special Provisions.
 - (c). The relocation of TRRA's signal/communication wires, if necessary.
 - (d). Inspection of the construction of the Project as reasonably required to protect TRRA's facilities and traffic.
 - (e). Incidental work necessary to complete the items specified in Section 4 of this Agreement.
- (II) TRRA will provide cost estimates to MHTC for all reimbursable force account work to be performed by TRRA at MHTC's expense. Such estimates are to be provided for informational purposes only and shall not be deemed as a limitation of the MHTC's obligation to reimburse TRRA as set forth herein.

- (III) TRRA shall not commence construction work on this Project until it has received MHTC's written notice to proceed with the work. TRRA shall give MHTC 48 hours' advance notice before commencing the work required of TRRA by subsection (I) of Section 4 of this Agreement.

SECTION 5. INSURANCE. MHTC shall cause its Contractor at the Contractor's expense to obtain and maintain in force throughout the construction period the insurance specified in the Railroad Job Special Provisions.

SECTION 6. RAILROAD FLAGGING SERVICES. MHTC's Contractor shall request, and TRRA shall provide, flagging services in accordance with the Railroad Job Special Provisions. TRRA shall provide the railroad flagger or alternate means at MHTC's sole cost and expense. MHTC will reimburse TRRA directly for the cost of providing these flagging services in accordance with the Railroad Job Special Provisions.

SECTION 7. SCHEDULING RAILROAD FLAGGING SERVICES. MHTC will invite a representative of TRRA to MHTC's "Pre-construction Conference". At this Conference, MHTC's Contractor shall furnish TRRA the approximate dates when flagging services are needed. After this conference, MHTC's Contractor shall request flagging services in the manner described in the Railroad Job Special Provisions.

SECTION 8. ENGINEERING AND INSPECTION OF PROJECT. Each of the parties will provide the necessary construction engineering for carrying out its work as set forth in this Agreement. MHTC will bear the costs for these services, including costs reasonably incurred by TRRA for inspecting the work performed by MHTC that may affect TRRA's properties and facilities or the safety and continuity of train operations.

SECTION 9. MAINTENANCE OF HIGHWAY FACILITIES. MHTC shall maintain at its expense, or by agreement with others provide for the maintenance of, the dual highway overpass structures, the highway approaches to these structures, and all related highway facilities pursuant to this Agreement. MHTC shall have access to the dual grade separation structures and related highway facilities at all times for the performance of inspections, repair and maintenance, but this Agreement is not intended to alter the property rights or other terms set forth in the Easements. MHTC shall notify TRRA whenever it will perform maintenance work upon or over TRRA's property within 25 feet of TRRA's nearest track or that otherwise affects TRRA's railroad operations within the Project boundaries. In accordance with existing maintenance policies, MHTC will not cause snow, ice or other materials to be plowed over the sides of the structures. MHTC will require its Contractor, when performing work upon or over TRRA's property, to abide by all of the Railroad Job Special Provisions agreed upon by TRRA and MHTC, which are applicable to that work, in accordance with the following subsections:

- (I) Notwithstanding any provision in subsection (II) of this Section to the contrary, MHTC shall comply with the provisions in this subsection with reference to any contract to perform work required by this Agreement, which MHTC executes within forty-two (42) months after the effective date of this Agreement. MHTC shall require the Contractor to abide by the present version of these Railroad Job Special Provisions, as set forth in Exhibit 2, for all work the Contractor performs over or upon TRRA's property within four (4) years after the effective date of this Agreement. MHTC shall expressly incorporate those Railroad Job Special Provisions into every contract it makes with a Contractor to perform such work, and shall require each Contractor expressly to incorporate those Railroad Job

Special Provisions into every subcontract made pursuant to that contract. However, if the Contractor performs any work pursuant to that contract more than four (4) years after the effective date of this Agreement, then notwithstanding any provision in this Agreement to the contrary, MHTC shall require the Contractor to abide by the latest version of the Railroad Job Special Provisions that is approved by TRRA and MHTC and in force when the Contractor performs that work upon or over TRRA's property.

- (II) Notwithstanding any provision in subsection (I) of this Section to the contrary, MHTC shall comply with the provisions in this subsection with reference to any contract to perform work required by this Agreement, which MHTC executes more than forty-two (42) months after the effective date of this Agreement. MHTC shall require the Contractor to abide by the latest amended version of the Railroad Job Special Provisions that is approved by TRRA, IDOT and MHTC and in force on the effective date of that contract, for all work the Contractor performs over or upon TRRA's property within three (3) years after the effective date of that contract. MHTC shall expressly incorporate the same version of the Railroad Job Special Provisions into the contract with its Contractor, and shall require the Contractor expressly to incorporate the same version of the Railroad Job Special Provisions into every subcontract made pursuant to that contract. However, if the Contractor performs any work pursuant to that contract more than three (3) years after the effective date of that contract, then notwithstanding any provision in this Agreement to the contrary, MHTC shall require the Contractor to abide by the latest version of the Railroad Job Special Provisions that is approved by TRRA and MHTC and in force when the Contractor performs that work upon or over TRRA's property.
- (III) All Railroad Job Special Provisions approved by TRRA and MHTC shall be amended only by written agreement between TRRA and MHTC. Not later than forty-two (42) months after the effective date of this Agreement, TRRA and MHTC shall reach agreement upon any reasonable amendments to these Railroad Job Special Provisions that will become effective immediately after the expiration of four (4) years after the effective date of this Agreement. From time to time thereafter, TRRA and MHTC shall confer with each other and shall reach agreement upon any further amendments to the approved Railroad Job Special Provisions, which shall be reasonable under the conditions then applicable to their respective uses of TRRA's property as authorized by law. Neither TRRA nor MHTC shall unreasonably withhold their consent to any amendments proposed in good faith by the other. As soon as practicable after TRRA and MHTC reach agreement, in writing, upon any amendment to the Railroad Job Special Provisions, MHTC shall deliver a copy of the amended Railroad Job Special Provisions in writing to its Contractor and shall notify the Contractor of the effective date of that amendment. No amendment to the Railroad Job Special Provisions shall become effective less than sixty (60) days after approval by both TRRA and MHTC.
- (IV) In no event shall the terms of this Section be deemed to affect the terms, conditions and restrictions contained in the Easements, including without limitation terms, conditions and restrictions relating to MHTC's right to access various portions of TRRA's property at ground level.

SECTION 10. MAINTENANCE OF RAILROAD FACILITIES. TRRA shall maintain, at its own expense, its track and all railroad facilities. TRRA further shall comply with all applicable provisions of federal, state, and local law .

SECTION 11. RAILROAD RECORDKEEPING. TRRA shall keep an accurate and detailed account of the actual cost and expense as incurred by it, or for its account, in the performance of the work it herein agrees to perform. TRRA shall maintain all books, documents, papers, accounting records, and other evidence pertaining to its cost proposals and estimates and to all costs incurred by it in connection with this Project. TRRA shall make this information available for examination and audit by representatives of MHTC and/or the Federal Highway Administration (hereinafter referred to as "FHWA") at TRRA's offices during reasonable hours for a period of not less than three years after the date when TRRA receives payment of final reimbursement for this Project. TRRA shall furnish copies of this information if requested.

SECTION 12. STATEMENT OF COST. Not more frequently than once per month during the progress of TRRA's work requested by MHTC and as described in Section (4) of this Agreement, TRRA may submit progressive bills to MHTC for the actual cost and expense incurred by TRRA for this work. TRRA shall submit to MHTC at the earliest practical date, but not later than one hundred twenty (120) days after MHTC sends notice of project completion, a final and complete billing of all actual costs and expenses incurred by TRRA pursuant to this Agreement, which shall be ascertained in accordance with the provisions of 23 CFR 140 Subpart I, which by this reference is incorporated in this Agreement. All progressive bills and the final statement of costs shall be submitted in accordance with the requirements and provisions of the current Federal Aid Policy Guide (FAPG) issued by FHWA. TRRA may charge MHTC for relevant insurance expenses TRRA incurs, including the cost of employer's liability (including, without limitation, liability under the Federal Employers' Liability Act) in connection with the construction of this Project, by including these charges in the additive rates approved by FHWA for the Project pursuant to 23 CFR.

SECTION 13. REIMBURSEMENT AND AUDIT. MHTC will reimburse TRRA for the cost and expense incurred by TRRA for the work described in Section 4 of this Agreement, as well as those amounts set forth in Section 14 below related to the Reimbursement Agreement. Reimbursement by MHTC for construction related costs will be limited to construction costs TRRA incurs after it has received MHTC's written notice to proceed with the work (except for those engineering, legal and other costs related to the Reimbursement Agreement which are reimbursable by MHTC in accordance with Section 14 below, for which a notice to proceed shall not be required). MHTC will pay TRRA the undisputed amount of TRRA's charges for this work within sixty (60) days after it receives TRRA's progressive bills, and within one hundred twenty (120) days after it receives TRRA's final bill, which TRRA shall conspicuously mark as "FINAL". Reimbursement is subject to final audit by MHTC and/or FHWA. If the audit reveals that MHTC has overpaid TRRA, then TRRA will immediately refund the overpayment amount to MHTC. If the audit reveals that MHTC has underpaid TRRA, then MHTC will immediately pay the underpayment amount to TRRA. TRRA agrees not to commence construction work for said Project until receipt from MHTC of written notice to proceed with the work, but said written notice to proceed shall not apply to the reimbursable expenses to be paid to Terminal by MHTC in accordance with Section 14 below.

SECTION 14. COMPLIANCE WITH FEDERAL REQUIREMENTS. The parties shall comply with all Federal laws, rules, regulations, orders and approvals pertaining to this Project, including the requirements applicable to all agreements, plans, estimates, specifications, award

of contract, acceptance of work and procedure in general. MHTC will reimburse TRRA as provided in this Agreement, for only such items of work and expense, and in such amounts and forms as are proper and eligible for payment, including all eligible preliminary engineering costs, legal fees and expenses that are properly reimbursable in accordance with 23 CFR Part 646 and subpart I of 23 CFR Part 140, which have been incurred since May 8, 2008, in excess of those amounts previously invoiced and paid pursuant to the preliminary engineering agreement between Terminal Railroad and IDOT, executed by IDOT on May 8, 2008 (the "Reimbursement Agreement"). It is understood and agreed that the limitations on the amount of reimbursement set forth in the Reimbursement Agreement have been exceeded by TRRA prior to the date hereof and that said categories of reimbursable costs set forth in the Reimbursement Agreement are intended to include legal fees and costs that are properly reimbursable in accordance with 23 CFR Part 646 and subpart I of 23 CFR Part 140. As a material inducement to TRRA entering into this Agreement, IDOT and MHTC have agreed to reimburse Terminal for said amounts pursuant to this Agreement whether incurred prior to, on or after the date hereof, without regard to any limitation on the total amount of reimbursable expenses set forth in the Reimbursement Agreement. Subject to verification of eligibility for reimbursement as set forth hereunder and in the Reimbursement Agreement, MHTC and IDOT hereby acknowledge that Terminal Railroad has already incurred amounts in excess of One Hundred Thousand Dollars (\$100,000.00), which have not been reimbursed pursuant to the Reimbursement Agreement and which may be reimbursable under this Agreement.

SECTION 15. NONDISCRIMINATION ASSURANCE.

- (I) TRRA, including any subrecipient or subcontractor of TRRA, shall not discriminate on the basis of race, color, national origin, or sex in the performance of this Agreement. TRRA shall carry out the applicable requirements of 49 CFR Part 26 in the award and administration of DOT-assisted contracts. TRRA's failure to carry out these requirements is a material breach of this Agreement, because of which MHTC may terminate this Agreement or pursue any other lawful remedy.
- (II) With regard to work under this Agreement, TRRA agrees as follows:
 - (a) Civil Rights Statutes: TRRA shall comply with all state and federal statutes relating to nondiscrimination, including but not limited to Title VI and Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000d and 2000e, *et seq.*), as well as any applicable titles of the Americans with Disabilities Act. In addition, if TRRA is providing services or operating programs on behalf of MHTC, then TRRA shall comply with all applicable provisions of Title II of the Americans with Disabilities Act.
 - (b) Administrative Rules: TRRA shall comply with the administrative rules of the United States Department of Transportation relative to nondiscrimination in federally-assisted programs of the United States Department of Transportation (49 CFR Subtitle A, Part 21) which are herein incorporated by reference and made part of this Agreement.
 - (c) Nondiscrimination: TRRA shall not discriminate on grounds of the race, color, religion, creed, sex, disability, national origin, age or ancestry of any individual in the selection and retention of subcontractors, including procurement of materials and leases of equipment. TRRA shall not