

Sponsor:

*Brown/Smith*

**ORDINANCE NO. 36-13**

**AN ORDINANCE AUTHORIZING THE MAYOR AND THE SERVICE AND SAFETY DIRECTOR OF THE CITY OF JACKSON TO ENTER INTO A LEASE AGREEMENT WITH THE INDIANA EASTERN RAILROAD DBA OHIO SOUTH CENTRAL RAILROAD AND DECLARING AN EMERGENCY.**

WHEREAS, the City has engaged in negotiations with the Indiana Eastern Railroad, dba Ohio South Central Railroad (hereinafter referred to as OSCR), to arrive at a lease agreement, a copy of which is attached, whereby OSCR will operate the City owned rail line; and

WHEREAS, the City of Jackson and OSCR have reached an agreement and both parties now desire to have the lease agreement approved and adopted as the lease between the City and OSCR; and

WHEREAS, finalizing the contract between the City and the OSCR is necessary to preserve the health, safety and welfare of the City and its citizens and for the further reason that an application must be made to the Surface Transportation Board in Washington, D.C. and the process should be started at the earliest possible date, this matter constitutes an emergency.

NOW, THEREFORE, BE IT RESOLVED BY THE LEGISLATIVE AUTHORITY OF THE CITY OF JACKSON THAT THE MAYOR AND SERVICE AND SAFETY DIRECTOR OF THE CITY ARE HEREBY AUTHORIZED TO EXECUTE THE LEASE AGREEMENT WITH THE OSCR, AS ATTACHED HERETO, AND DECLARING AN EMERGENCY.

In the event this Ordinance receives a majority vote for passage but fails to receive the required number of votes to pass as an emergency, then this Ordinance shall be deemed to have passed but with no emergency clause, and shall take effect at the earliest time permitted by law.

It is hereby found and determined that all formal acts of this council concerning and relating to adoption of this resolution were adopted in an open meeting of this council and that the deliberations of the council and any of its committees resulted in such formal action, were in meeting open to the public, in compliance with all legal requirements including Section 121.22 of the Ohio Revised Code.

PASSED AND ADOPTED by the Legislative Authority of the Political Subdivision on this 26<sup>th</sup> day of August 2013.

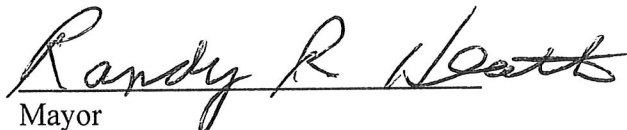
*Ronald B. Seacrow*  
President

ATTEST:



Clerk of the Legislative Authority

Approved this 20<sup>th</sup> day of August, 2013.



Mayor

## **LEASE AND OPERATING AGREEMENT**

THIS LEASE AND OPERATING AGREEMENT ("Agreement") is made this \_\_\_\_ day of \_\_\_\_\_, 2013 ("Effective Date"), between the CITY OF JACKSON, hereinafter referred to as "Lessor", with principal offices at 145 Broadway Street, Jackson, Ohio, 45640; and INDIANA EASTERN RAILROAD DBA OHIO SOUTH CENTRAL RAILROAD, hereinafter referred to as "OSCR" with principal offices at 412 West 4<sup>th</sup> Street, Edwardsville, Illinois 62025.

IN CONSIDERATION of the covenants and agreements herein contained and other good and valuable consideration, and intending to be legally bound, the parties agree as follows:

### **Article I. DESCRIPTION OF PROPERTY.**

Section 1.01 The Jackson Line and related properties are listed below:

- (a) From Mile Post 32.75 near Firebrick, Ohio to Mile Post 4.64 near Wellston, Ohio;
- (b) Thence from Mile Post 4.64 near Wellston, Ohio to Mile Post 0.00 at Hamden, Ohio;
- (c) Thence from Mile Post 127.8 near Hamden, Ohio to Mile Post 112.3 at West Junction, Ohio;
- (d) Thence from Mile Post 95.5 at West Junction, Ohio to Mile Post 91.6 at RA Junction near Vauces Yard on the north-south main line of CSX Railroad;
- (e) Thence from Mile Post 127.71 near Hamden, Vinton County, Ohio on the CSX Main Line, to Mile Post 136.71 near Red Diamond, Vinton Count, Ohio.

The above properties are collectively are referred to as the "Jackson Line," and are further described in attached "Exhibit A".

### **Article II. COMMON CARRIER RIGHTS.**

Section 2.01 Subject to other terms and conditions of this Agreement, OSCR shall have full right and responsibility to provide common carrier rail service on the Jackson Line, and to use and manage the Jackson Line for all purposes consistent with the duties, rights, obligations and responsibilities of a rail carrier under the jurisdiction of the Surface Transportation Board (the "STB"), the Federal Railroad Administration (the "FRA"), and other governing bodies or laws. Such rights shall include, but shall not be limited to, all rights of a rail carrier under the Revised Interstate Commerce Act, 49 United States Code § 10101, et seq. and the ICC Termination Act (Public Law 104-88, 109 Stat. 803).

Section 2.02 LESSOR shall not undertake, and, subject to the terms of this Agreement, hereby waives any right it may have to conduct, or hold itself out to conduct, common carrier rail service on the Jackson Line, for the term of this Agreement. OSCR shall not grant overhead rights, operating rights or trackage rights on the Jackson Line to any party without the advance written consent of the LESSOR. Notwithstanding anything herein to the contrary, OSCR shall retain the right to provide haulage services to third parties. Subject to the provisions of this

Agreement, LESSOR shall provide OSCR with quiet enjoyment of the Jackson Line throughout the term of this Agreement.

### **Article III. TERM.**

Section 3.01 The term of this Agreement shall for a period of twenty-five (25) years (the "Initial Term") unless sooner terminated in accordance with the provisions of this Agreement, to begin on the earliest date when both the Surface Transportation Board approves a Change in Operator application and recognizes OCSR as the successor of US Rail Corporation and US Rail Corporation vacates the line.

Section 3.02 After the Initial Term, this Agreement shall automatically renew for five (5) years ("Renewal Term") unless terminated by either party upon one (1) year advance written notice to the other party prior to the end of the Initial Term, provided any such termination shall meet STB regulatory requirements.

### **Article IV. NON-EXCLUSIVE FREIGHT OPERATIONS.**

Section 4.01 This Agreement does not convey to OSCR exclusive freight rights to use the Jackson Line. LESSOR, in its sole discretion, may grant to other rail freight carrier(s) the right to jointly use all, or any portion of, the Jackson Line as provided in this Article IV, Non-Exclusive Freight Operations and as stated below.

Section 4.02 LESSOR may grant joint use access to another rail freight carrier if OSCR has petitioned the STB for authority to abandon or discontinue operations over all, or any portion of the Jackson Line, or has ceased to provide common carrier rail service over all, or a portion of the Jackson Line for a period of three consecutive months, other than pursuant to a lawful embargo or because of lack of demand for service.

Section 4.03 Under other conditions not identified in Section 4.02 above, LESSOR may only grant other freight rail carrier(s) limited access to jointly use any portion of the Jackson Line, if such other carrier:

- (a) agrees in writing to defend, indemnify and hold OSCR and its subsidiaries, parent and affiliates, harmless against any and all liability arising in any way whatsoever from the other carrier(s) use of the Jackson Line;
- (b) is an existing rail freight carrier or newly created and can demonstrate its financial, insurance (including as set forth in Article XVI) and operational capabilities to competently operate a railroad. In determining the operational capabilities of a carrier, the following items will be considered by the LESSOR, in its sole discretion, however with input from OSCR: safety record, accident and incident records, management expertise, personnel expertise, operating rules and practices, suitability of equipment, and capacity to make capital investments necessary to operate at the proposed traffic levels. Other criteria may be considered in addition to those listed above;



- (c) agrees that at all times, the operations of the other freight rail carrier(s) shall be conducted in a manner which does not unduly interfere with OSCR's operations and shall be in compliance with all dispatching orders, operating rules, safety rules, directives and schedules of OSCR;
- (d) agrees to pay to OSCR : 1) a maintenance fee per each car and locomotive moved by such other user based on actual costs of maintaining the Jackson Line; and 2) a usage fee per each car and locomotive moved by such other user. The actual cost component for the maintenance fee per car is hereinafter referred to as "Actual Costs Per Car" and shall be defined and calculated as follows: for the first three (3) years of this Agreement, the Actual Costs Per Car shall be determined by LESSOR in consultation with OSCR, and for each year after the first three (3) years of this Agreement, the Actual Costs Per Car shall be the total maintenance and capital improvement costs expended by OSCR, with its own funds, not counting any expenditure of public funds, for the maintenance and improvement of track, fixtures, and appurtenances on the Jackson Line for the three year period defined below, divided by the total number of loaded cars for this same three year period. Beginning January 1, 201, and occurring every year thereafter, the Actual Costs Per Car will be recalculated. A locomotive will be treated as the equivalent of a single car using the same formulas as delineated above. By February 15th of each year, OSCR shall provide the Actual Costs Per Car as well as the data evidencing the calculation to the LESSOR. The usage fee per each car and locomotive moved by the other carrier across the Jackson Line shall be an amount equal to OSCR's current payment under Section 5.01(a) on an annual basis divided by the number of cars moved by OSCR on the Jackson Line that originate or terminate on the Jackson Line. By February 15th of each year, OSCR shall provide such usage fee as well as the data evidencing the calculation to the LESSOR;
- (e) Agrees to pay a per car payment to the LESSOR equal to ten dollars (\$10.00) per car without taking into account any reductions in Fixed Rent or Variable Rent based upon the provisions in Section 5.03;
- (f) In the event other freight rail carrier(s) agrees to meet and comply with Sections 4.03 (a) to (d) above, OSCR will make reasonable good faith efforts to accommodate the other carrier(s) operational requests.

Section 4.04 Any other provision of this Article notwithstanding, any joint use or operations over the Jackson Line by any freight carrier other than OSCR shall be subject to such prior approval of the STB or other governmental bodies with jurisdiction over the premises as may be required under otherwise applicable law.

Section 4.05 Any other provision of this Article notwithstanding, LESSOR shall in no event grant any rail freight carrier other than OSCR the right to jointly use or operate over the Jackson Line during the term of this Agreement pursuant to the above provisions for the purpose of (1) providing transportation service of any kind to an Existing Rail User; (2) utilizing the Jackson Line as a through route without serving a Rail User or (3) transporting traffic that is the subject of a valid contract between OSCR and a shipper. For purpose of this Agreement, "Existing Rail User" is defined as any shipper, customer, facility or rail patron (irrespective of ownership)

located along the Jackson Line that shipped or received a rail car or cars via OSCR over the Jackson Line at any time during the three years prior to the request of service and a "Rail User" is a shipper, customer, facility or rail patron (irrespective of ownership) located along the Jackson Line that has not shipped or received a rail car or cars via OSCR over the Jackson Line at any time during the three years prior to the request of service. For the avoidance of doubt, a plant or facility that changes ownership after that plant or facility has been closed for the period of two years shall not be considered an Existing Rail User for the purposes of this Article IV.

The procedure by which LESSOR will determine whether to grant limited operating rights under the above provisions to a freight rail carrier other than OSCR pursuant to this Article shall be as follows:

- (a) The freight rail carrier shall first engage in discussion with OSCR to move the rail cars under normal commercial terms. Only when the freight rail carrier has demonstrated that the commercial terms cannot be met in a cooperative manner will this section be applicable. Normal commercial terms will include joint line freight rates, haulage, limited trackage rights agreed to by the parties and/or any other means by which the parties can agree acting reasonably.
- (b) Upon receipt of a written request for limited rights to jointly use any portion of the Jackson Line under provisions of this Article IV, NON-EXCLUSIVE FREIGHT OPERATIONS, LESSOR will provide a copy of the request to OSCR.
- (c) Within forty-five (45) days after receipt of the request, OSCR shall (i) provide LESSOR and the requesting freight rail carrier with a written explanation of the terms and conditions (excluding terms already defined in this Agreement) that will apply to the requesting freight rail carrier's operations over the Jackson Line, consistent with this Article IV; and (ii) at OSCR's option, discuss with LESSOR a confidential proposal of terms, including, where appropriate, rates or division of rates under which OSCR would agree to provide the service proposed to be provided by the requesting freight rail carrier. In the event OSCR provides a more advantageous proposal, in the opinion of the customer, to the customer than the requesting freight rail carrier, the requesting freight rail carrier will not be entitled to jointly use any portion of the Jackson Line.
- (d) If the requesting freight rail carrier objects to terms or conditions provided by OSCR under Paragraph 4.05 (c) above, it shall so inform LESSOR and promptly thereafter LESSOR shall confer with OSCR with respect to the establishment of revised terms and conditions. If OSCR and LESSOR have not agreed upon such revised terms or conditions within thirty (30) days after OSCR's response under Paragraph 4.05(c) above, then subject to Paragraph (d), below, LESSOR, acting reasonably, may determine the revised terms and conditions that will apply.
- (e) In making its determination whether to grant joint rights to a requesting railroad under this Article IV, Non-Exclusive Freight Operations, LESSOR shall consider the following:

- (i) The profitability of OSCR, especially any increase in OSCR operating or maintenance costs resulting from the provision of rights to the requesting railroad.
- (ii) The ability of OSCR to continue to meet the requirements of this Agreement, including track maintenance and repairs, OSCR's ability to invest in needed capital improvements on the Jackson Line, and the ability of OSCR to provide effective service to Jackson Line shippers. The extent to which the requesting railroad is willing to trade rights on the Jackson Line for rights of OSCR or its affiliated railroads to operate over lines of the requesting railroad at terms and values similar to those the requesting railroad seeks from LESSOR on the Jackson Line.
- (f) If LESSOR grants joint rights to freight rail carriers, in no event shall OSCR be obligated to bear any additional capital, maintenance or repair costs associated with the grant of such rights.
- (g) OSCR agrees, however, that OSCR shall fully cooperate as needed with LESSOR before the STB, and/or any other federal or state entity with jurisdiction over the granting of joint rights, by providing any OSCR filings or documentation which is required for LESSOR to grant joint use rights as allowed in this Article. LESSOR agrees that any agreement with another carrier will require such other carrier to enter into an Operating Agreement with OSCR (the "Operating Agreement"). The Operating Agreement shall require the other carrier to: (i) defend, indemnify and hold harmless OSCR, and its subsidiaries, parents and affiliates, for actions of the other carrier and provide joint rights as described in this Article; (ii) pay fees as described in Section 4.03 (d) hereof; and (iii) meet the insurance requirements in Article XVI hereof, including providing proof of such insurance that includes LESSOR and OSCR as an additional insured. LESSOR shall retain the exclusive right to grant joint rights to freight rail carriers other than OSCR, subject to the terms and conditions of this Article.
- (h) Any other provision of this Agreement notwithstanding, and subject to any necessary regulatory approval, in the event that LESSOR grants joint rights to another freight rail carrier under this Article IV, Non-Exclusive Operations over OSCR's objection, OSCR shall have the right to terminate this Agreement without further obligation to LESSOR, except for the duty to facilitate the orderly change in service from OSCR to another carrier, and cease to operate over the Jackson Line, upon one hundred eighty (180) days prior written notice to LESSOR.

Section 4.06 OSCR will grant emergency detour rights to other rail carriers when requested in line with normal industry standard terms and conditions (as summarized in Appendix X).

Section 4.07 Sections 4.03 through 4.05 of this Article IV shall not take effect until January 1, 2019. This Section 4.07 shall not apply if the Rail User is a new rail user who brings a minimum 50 jobs and \$20,000,000 of investment to their contemplated facility.

## **Article V. RENT.**

Section 5.01 The following payments must be paid by OSCR to LESSOR:

- (a) Fixed Rent. On \_\_\_\_ 1<sup>st</sup> of each year, OSCR shall pay LESSOR the amount of five thousand dollars (\$5,000) for administering the terms of this Agreement
- (b) Variable Rent. Variable Rent shall be paid to LESSOR on March 1 of each year and calculated as follows:

Cumulative revenue carloads originated on, or terminated on the Jackson Line (including storage cars which have accrued more than \$100 in revenue) for the preceding fiscal year, based on the following table:

Carloads	Per Car Cost
0-3000	\$0
3001+	\$10

For example, a total of 10,000 cars would be calculated as follows: 3000 cars at \$0, 7000 cars at \$10/car for a total payment of \$70,000 for the 10,000 cars.

The per car cost of traffic that neither originates nor terminates on the Jackson Line shall be negotiated between LESSOR and OSCR, should this traffic be contemplated.

- (c) In addition to the amount calculated in Section 5.01 (b) above, the Variable Rent shall include a payment to LESSOR on March 1 of each year for Storage Cars for the same corresponding period of 5% of the total revenue received by OSCR for Storage Cars on the Jackson Line. This revenue shall not include fees charged by OSCR for moving cars on and/or off the Jackson Line.

**Section 5.02** The Payments required by Section 5.01(a) and (b) shall be subject to annual escalation from January 1, 2015, based upon the annual percentage change in the published Consumer Price Index for All Urban Consumers (CPI-U) published by the United States Department of Labor, Bureau of Labor Statistics. The adjustment will be based on the percentage change in the published CPI-U for the month of December 2014 as compared to the month of December 2013 and will be applied to the payments above to arrive at the applicable rates for Calendar Year 2014. Future adjustments will be made in the same manner with the CPI-U applied to the rates in effect for the previous calendar year.

**Section 5.03** The Variable Rent may be reduced in any one year and on a carryover basis based on Extraordinary Capital Expenditures (as hereinafter defined), subject to LESSOR approval.

**Section 5.04** "Extraordinary Capital Expenditures" means OSCR individual investments on The Jackson Line in track and fixture, excluding publicly-funded improvements, beyond the activities and investments needed to maintain the Jackson Line pursuant to Article XII of this Agreement including:

- (a) Significant expenditures which are in an amount equal to or greater than 33% of OSCR average of capital and maintenance expenditures for the previous three calendar years, beginning after the conclusion of the third year of this Agreement;

- (b) Expenditures which are only required to be done periodically in normal circumstances (i.e. every 30 years or more) or as a result of unfunded legislative mandates, including but not limited to positive train control and bridge regulations;
- (c) Expenditures which result from an Act of God or from a natural or manmade disaster and for which OSCR does not receive reimbursement for expenses from an insurance provider or any unit of government; or
- (d) Grade crossing surface reconstructions; or
- (e) Expenditures, including economic development investments, which are considered extraordinary by the Executive Director of LESSOR.

**Section 5.05** In order for an Extraordinary Capital Expenditure to qualify for a deduction from the Variable Rent:

- (a) OSCR must submit a written proposal to the Executive Director of LESSOR prior to undertaking the project(s). The proposal must include, at a minimum, a description of the work being undertaken, the need for it, the estimated cost to complete the project, and the proposed amount and timing of the requested deduction from the Variable Rent.
- (b) The Executive Director of LESSOR will review the proposal, determine whether the project will be eligible for a deduction, and notify OSCR in writing of the decision.
- (c) The LESSOR will review the request within sixty (60) days of the receipt of a deduction request.
- (d) Within eighty (80) days of the request, the LESSOR shall notify OSCR in writing of the amount the Variable Rent for the following quarter of the Agreement will be reduced because of the Extraordinary Capital Expenditures made by OSCR.
- (e) Within sixty (60) days of the completion of a project qualifying for a reduction in Variable Rent under this paragraph, OSCR shall provide the LESSOR with a final accounting of all project costs. LESSOR may inspect the completed project and may modify the amount of the Fixed Rent reduction based on the final project costs.

**Section 5.06** LESSOR will review on an expedited basis any request that, absent eligibility of deduction as an Extraordinary Capital Expenditure, will require a cessation in service by OSCR.

## **Article VI. PERFORMANCE MEASURES.**

**Section 6.01** At two (2) year intervals throughout the term of this Agreement LESSOR shall conduct a review of OSCR performance in relation to this Agreement, and such review will consist of the following:

- (a) **Track Maintenance:** LESSOR shall deem OSCR's performance to be satisfactory in this category if OSCR maintains the Jackson Line in accordance with the standards set out in Article XII of this Agreement.
- (b) **Liquidity:** LESSOR shall deem OSCR's performance to be satisfactory in this category if OSCR demonstrates that it has a Current Asset Ratio which is more than 0.75 for the previous twelve (12) month period or calendar year. LESSOR shall calculate this Current Asset Ratio using the financial statements provided by OSCR under Section 8.01(f),

below. The Current Asset Ratio will be calculated as follows: Current Assets divided by Current Liabilities. For the purposes of this calculation a line of credit debt shall be treated as long-term debt.

- (c) No Arrears: LESSOR shall deem OSCR's performance to be satisfactory in this category if OSCR is not in arrears on (other than usual and customary payment terms) and has no undisputed liens due to non-payment on any of the following:
  - (i) Federal, state, and local taxes, fees or penalties, including but not limited to claims under the Federal Employers Liability Act and unemployment claims;
  - (ii) monies due contractors or vendors for performance of work on, or providing materials and equipment used on, the Jackson Line;
  - (iii) any monies due other railroads for charges resulting from operations on the Jackson Line.
  - (iv) Any items covered under this Section that are the subject of valid disputes by OSCR, whether in a court of competent jurisdiction, arbitration, or other appropriate forum are expressly to be considered by LESSOR as satisfactory, provided that OSCR deposits any disputed payments in an escrow account suitable to LESSOR.
- (d) Bankruptcy: LESSOR shall deem OSCR's performance to be satisfactory in this category as long as OSCR is not declared insolvent and/or there are no filings against OSCR of a petition for relief or reorganization in bankruptcy or insolvency under the laws of any jurisdiction.
- (e) Business Development: LESSOR shall deem OSCR's performance to be satisfactory in this category if OSCR follows the marketing plan submitted with OSCR's response to LESSOR's Request for Proposals ("RFP") dated May 3, 2013, modified July 12, 2013 and incorporated by reference.

In the event that LESSOR deems OSCR's performance in all of the categories included in this Section 6.01 to be satisfactory, the Agreement shall continue in its current form. In the event that LESSOR deems OSCR's performance unsatisfactory in categories (a)-(c) included in this Article 6.01, LESSOR will then conduct a review of that category on an annual basis. If, after three consecutive years of additional review, OSCR's performance is still unsatisfactory, OSCR will be considered in default under Article XXV of this Agreement. In the event that LESSOR deems OSCR's performance unsatisfactory in category (d), OSCR will be considered in default under Article XXV of this Agreement.

**Section 6.02** At two (2) year intervals throughout the term of this Agreement, LESSOR shall conduct a review of OSCR performance in relation to this Agreement, and such review will consist of the following:

- (a) Shipper Satisfaction: OSCR shall provide overall satisfaction survey results to the LESSOR for the Jackson Line. These results shall be based upon a survey developed by LESSOR with input from OSCR. LESSOR shall deem the performance of OSCR to be satisfactory in this category if the overall satisfaction for the customers on the Jackson Line is above 80% as determined by the survey. Customer survey results shall be weighted according to carloads, with the percentage of total carloads shipped, by customer, on the Jackson



Line used to weight the survey results. OSCR and LESSOR agree that the first survey will be conducted eighteen (18) months after the execution of this Agreement.

- (b) Safety: LESSOR will examine OSCR's safety performance five years after the effective date of this Agreement and every two years thereafter. LESSOR will examine the safety performance by contacting the Federal Railroad Administration ("FRA") to determine the following ratios, for which LESSOR will examine OSCR's safety record: FRA Employee On Duty Rate per 200,000 person hours worked (Deaths and Nonfatal Injuries and Illnesses); and the Total Train Accidents per Million Train Miles Operated. LESSOR shall deem OSCR's performance to be satisfactory if the five year OSCR averages for these categories are lower than the five year average of the appropriate FRA classification of railroad types based on OSCR train miles operated and employee hours worked for the period being examined. The "Fifth Year" for purposes of this Agreement shall be the latest full year for which the FRA safety data has been gathered, with the other four years being the previous four years. Injuries or accidents that were induced by third party events, as determined by LESSOR, will be removed from the calculation of FRA injury rates and Train Accidents. In addition, in any five year period, up to two non-fatal accidents may be removed from the injury rate calculation at the discretion of LESSOR in order to account for the small sample size of OSCR's operations.

In the event that LESSOR deems OSCR's performance unsatisfactory in any category included in this Section 6.02, LESSOR will then conduct a review of that category on an annual basis, for a period of three years, and corrective actions as agreed to by OSCR and LESSOR per (c) and (d) below shall be implemented. If the results in either of the categories are not satisfactory after three years, OSCR will face a penalty of \$10,000 per year per violation, subject to annual escalation from January 1, 2015, based on the annual percentage change in the Consumer Price Index for All Urban Consumers (CPI-U) published by the United States Department of Labor, Bureau of Labor Statistics. The adjustment will be based on the percentage change in the published CPI-U for the month of December 2014 as compared to the month of December 2013 and will be applied to the penalty above to arrive at the applicable penalty for Calendar Year 2015. Future adjustments will be made in the same manner with the CPI-U applied to the penalty in effect for the previous calendar year. The performance in this Article will be reviewed at the end of the following year. If the performance of OSCR remains unsatisfactory after period of three additional years of penalty payments and implementing the corrective actions as agreed to by OSCR and LESSOR per (c) and (d) below, OSCR may be considered in default under Article XXV of this Agreement.

- (c) Shipper satisfaction survey results will be reviewed by LESSOR and OSCR in an effort to identify the areas of dissatisfaction expressed by shippers within OSCR's control. LESSOR acknowledges that not all issues raised by customers in the survey will be directly related to the specific service provided by OSCR. For example, a Shipper may express dissatisfaction with item such as freight rates, transit times, service schedules and other items that do not necessarily reflect on OSCR's service performance. Following identification of the correctable areas of dissatisfaction, OSCR will present a plan of corrective actions to LESSOR designed to improve on the areas under the control of OSCR, in a manner that allows OSCR to operate effectively and efficiently. OSCR will provide LESSOR with quarterly reports summarizing the implementation of this plan,

and additional actions taken by OSCR, if any. The shipper satisfaction survey will continue to be conducted annually until the results meet the requirements of 6.02(a) above, or to the satisfaction of the Executive Director of the LESSOR, based upon the completion of the plan of corrective action.

- (d) OSCR and LESSOR will review the injuries and incidents that occurred on OSCR, the actions taken by OSCR to rectify the causes of the events and the ongoing action plans to prevent such incidents in the future. LESSOR may monitor compliance with the action plan with the cooperation of OSCR as long as such cooperation does not adversely impact OSCR's attorney client privilege or legal standing in any pending or threatened litigation related to an injury or incident.

## **Article VII. INSPECTION AND AUDIT.**

Section 7.01 OSCR agrees that LESSOR, or its duly authorized representatives, shall, during OSCR normal business hours, upon reasonable notice, in accordance with OSCR safety rules and regulations, and accompanied by OSCR personnel, be permitted to inspect the Jackson Line.

Section 7.02 OSCR agrees that LESSOR, or its duly authorized representatives shall be permitted to:

- (a) Examine the records and data maintained by OSCR related to this Agreement as may be necessary to monitor OSCR's compliance with this Agreement; and
- (b) To request an interview with any employee of OSCR or any related companies regarding such records and data.

Section 7.03 OSCR and LESSOR agree that it is the interest of both parties to develop new business along the Jackson Line, including the facilitation of plant and business expansion, as well as the facilitation of new businesses locating along the line. Upon the written request of LESSOR, but not more often than once every year, OSCR shall provide to LESSOR a written narrative of the marketing and development efforts undertaken by OSCR in the previous year to advance business expansion and location along the Jackson Line.

## **Article VIII. INFORMATIONAL REQUIREMENTS.**

Section 8.01 OSCR shall annually provide LESSOR with the following documents:

- (a) Confidential carloading information in connection with operations over the Jackson Line by customer, commodity, origin and destination, and interchange point(s) as of the end of OSCR's fiscal year, and further, provide to LESSOR gross ton miles/mile information broken down by various segments as reasonably requested by LESSOR;
- (b) A summary report indicating the number of storage cars billed by month and the total annual revenue for storage cars. Storage cars shall be defined as cars stored for non-freight customers of OSCR. The summary report shall include all storage cars on OSCR located on the Jackson Line;
- (c) Annual bridge reports (as provided to the Public Utilities Commission of Ohio ("PUCO"));



- (d) Annual review of track investments, according to the categories enumerated in Section 12.02, below;
- (e) Any reports issued by FRA or PUCO on track, equipment or operational issues;
- (f) Audited financial statements or comparable financials for previous three (3) years of OSCR's operations;
- (g) Proforma profit/loss statements for operations taking place on the Jackson Line;
- (h) Copies of any liens, lawsuits, and any and all other legal actions taken against OSCR's operations, or filed by OSCR, regarding the Jackson Line; and
- (i) A detailed, tentative plan and capital budget for the next full year, exhibiting the investments that shall be made in the Jackson Line.

All reports as required by this Article VIII shall be provided by OSCR to LESSOR by March 1 after the end of each successive calendar year.

## **Article IX. CONFIDENTIALITY.**

Section 9.01 To the extent possible under applicable law, all aspects of LESSOR's exercise of audit rights under Section 7.01 and the results thereof, and any and all information disclosed by OSCR to the LESSOR under this Agreement, including without limitation under Sections 7.01-7.04 and Article VIII, shall at the request of OSCR be held confidential, and shall not be disclosed without OSCR's prior written consent. Nothing in this Agreement shall be construed to restrict the LESSOR from disclosing such confidential information as required by law or by court or administrative order, provided in each case the LESSOR shall timely inform OSCR, if legally permissible, of the request.

## **Article X. ALTERATIONS AND IMPROVEMENTS.**

Section 10.01 The prior written approval of the Executive Director of LESSOR shall be required before OSCR makes Alterations and Improvements. "Alterations and Improvements" shall mean any activity which substantially changes the nature of the Jackson Line, including but not limited to, the taking up of any portion of rail or track (mainline, branchline, or siding), or construction of significant new track, structure or appurtenances on or along the Jackson Line; for greater certainty, Alterations and Improvements shall not include Maintenance (hereinafter defined in Article XII). It is specifically understood and agreed to by the parties that all Alterations and Improvements to the Jackson Line are owned by LESSOR. Nothing in this Article shall be construed to grant to OSCR the right to sell, trade or otherwise profit from the removal of track, track structures or appurtenances. OSCR agrees that LESSOR reserves the right to be the sole beneficiary of the proceeds of any salvaging of any track, track structure or appurtenances on the Jackson Line; however, OSCR shall have the right to request in writing to the Executive Director of LESSOR that OSCR be allowed to salvage un-needed track or track structures. OSCR's written request shall contain the reasons why the track or track structures are no longer needed for the operation of the Jackson Line, an estimation of the Net Liquidation Value (as defined in 49 C.F.R. § 1152.34(c)) of the items to be salvaged, and a detailed description of the improvements to the Jackson Line which will be made with the

proceeds from the salvaging, including the exact location of such improvements. OSCR may commence with the salvaging of materials and retain the proceeds from such salvaging upon written permission to do so by the Executive Director of LESSOR. For purposes of this Article, the sale of materials removed in Maintenance activities or for Alterations and Improvements; provided, however, the materials so removed are replaced in like kind or better condition, shall not be considered salvage and such sale is permitted by this Agreement.

Section 10.02 Upon the written request of LESSOR, OSCR shall, at its sole cost and expense, remove any Alterations or Improvements and restore the Jackson Line to its condition previous to the construction of any Alterations or Improvements which were performed by OSCR without the express written consent of the Executive Director of LESSOR.

## **Article XI. UTILITIES.**

Section 11.01 OSCR, at its sole cost and expense, shall arrange for and obtain necessary water, electricity and other utility services required for its use. LESSOR shall not be liable for any such services, or the suspension of such services.

## **Article XII. MAINTENANCE AND REPAIRS**

Section 12.01 OSCR shall have the right and responsibility to maintain the Jackson Line and shall be allowed to perform normal Maintenance without prior approval of LESSOR. "Maintenance" includes, but is not limited to, tie replacement, surfacing, aligning, bolt tightening, replacement of rail, rail switches, or rail hardware (including signals), turning worn rail, replacing or augmenting ballast, maintaining proper drainage, normal bridge and tunnel maintenance, and other normal railroad maintenance activities.

Section 12.02 OSCR shall expend amounts consistent with the maintenance plan submitted with LESSOR's RFP dated May 3, 2013, modified July 12, 2013 and incorporated by reference.

Section 12.03 Inspections of the Jackson Line will be conducted every two (2) years. The class of track of all properties of the Jackson Line will be determined by PUCO inspectors or FRA inspectors, of which FRA's opinion shall be final on the matter in the event of a disagreement.

Section 12.04 OSCR has inspected and accepts the Jackson Line in its present condition and agrees that no representations or warranties with regard to condition and fitness for use of the Jackson Line have been made.

Section 12.05 OSCR agrees to put, keep, and maintain the Jackson Line in good order, repair and safe condition. OSCR agrees that the following level of FRA Track Class will be attained and maintained on the mainline track in the following segments (mileposts approximate):

- (a) Firebrick (MP 32.75) to Oak Hill (MP 25.9): Out of Service
- (b) Oak Hill (MP 25.9) to Jackson (MP 13.1): Out of Service
- (c) Jackson (MP 13.1) to Wellston (MP 4.64): Excepted

- (d) Wellston (MP 4.64) to Hamden (MP 0.0): Excepted
- (e) Hamden (MP 127.8) to West Junction (MP 112.3): Excepted
- (f) West Junction (MP 95.5) to RA Junction (MP 91.6): Excepted
- (g) Hamden (MP 127.71) to Red Diamond (MP 136.71): Excepted

In addition, should improvements be made to a segment listed above that results in the segment moving up in FRA class, OSCR shall maintain the segment at the new FRA class.

Section 12.06 OSCR may request in writing to the Executive Director of LESSOR that LESSOR downgrade any segment of the track at any time during the period of this Agreement. Such request may be approved at the sole discretion of the Executive Director of LESSOR.

### **Article XIII. PASSENGER AND EXCURSION SERVICE.**

Section 13.01 OSCR is prohibited from running passenger or excursion service over the Jackson Line without the prior written approval of the Executive Director of LESSOR.

### **Article XIV. ASSIGNMENT AND SUBLETTING.**

Section 14.01 This Agreement and all the terms and conditions hereof shall inure in favor of, and be binding upon, the parties hereto and upon their respective successors and permitted assigns.

Section 14.02 OSCR shall not assign or transfer this Agreement in whole or in part, or sublet the Jackson Line, or any part thereof, without the prior written consent of the Executive Director of LESSOR. An assignment, or transfer, or merger or consolidation by operation of law, or proceeding in equity, bankruptcy, insolvency or reorganization, or a transfer of any controlling interest of the stock and/or assets of OSCR to a person or persons not now in control, shall be deemed to be an assignment within the meaning of this provision; provided, however, OSCR shall be allowed to assign to a parent, subsidiary or corporate affiliate of OSCR and/or to a voting trustee under 49 C.F.R. Part 1013, a controlling interest of stock in OSCR without prior LESSOR approval.

### **Article XV. INSURANCE AND INDEMNIFICATION.**

Section 15.01 This Agreement is without force and effect until such time that OSCR demonstrates to the satisfaction of LESSOR that OSCR has liability insurance coverage (i.e., bodily injury and property damage coverage) in amounts not less than ten million dollars (\$10,000,000.00) for each individual claim with regard to the operation of the Jackson Line. Such insurance shall include Lessor and ORDC as an additional insured under such policy(ies). OSCR shall provide a certificate of insurance to LESSOR prior to operation of the Jackson Line. Each such policy of insurance shall be evidenced as follows: "Should any of the above described policies be cancelled before the expiration date thereof, the issuing insurer will endeavor to

mail 30 days written notice to the certificate holder named to the left, but failure to do so shall impose no obligation or liability of any kind upon the insurer, its agents or representatives.” OSCR shall deliver to LESSOR verification as to the replacement or renewal of each such policy prior to or upon the expiration (or other termination) date of any such policy.

Section 15.02 On every fifth anniversary after the Effective Date of this Agreement, the amount of insurance coverage required for OSCR shall be reviewed by LESSOR. This review shall be done by mutual agreement, or, if no mutual agreement can be obtained, LESSOR shall establish the level of insurance required by obtaining expert evaluation as to what the level of insurance should be. This expert evaluation shall include, but not be limited to, the following considerations: (1) the level of risk inherent in OSCR freight operations over the Jackson Line; (2) the costs to OSCR of the insurance premium compared to the risks of OSCR operations; (3) the insurance coverage being purchased by other comparable rail operations within the State of Ohio; and (4) the availability of insurance coverage in the market. LESSOR and OSCR must mutually agree to the person or firm, as well as the methodology, for providing LESSOR this expert evaluation. LESSOR shall undertake this expert evaluation at its sole cost and expense.

In the event that OSCR begins to carry Toxic Inhalation Hazard or Poison Inhalation Hazard (“TIH/PIH”) materials across the Jackson Line, LESSOR and OSCR shall meet no less than 60 days prior to the commencement of TIH/PIH service to determine the increased level of insurance needed to transport the TIH/PIH materials.

Section 15.03 OSCR agrees to indemnify and hold Lessor, ORDC and the State of Ohio harmless from and against any loss, claim, damage, cause of action or absolute liability (including without limitation, reasonable counsel fees) caused by OSCR’s negligence, reckless, intentional or willful misconduct. OSCR shall inform Lessor in writing of any and all judgments, claims, actions, temporary restraining orders, injunctions, suits, proceedings, inquiries or investigations at law or in equity, before or by any judicial or administrative court or agency, pending or to the best knowledge of OSCR, threatened against or affecting, or involving the Jackson Line.

Section 15.04 In no event shall OSCR or any of its employees, agents, contractors or subcontractors be considered agents or employees of Lessor, ORDC or the State of Ohio. OSCR agrees to use its reasonable best efforts to ensure that none of its employees, agents, contractors or subcontractors hold themselves out as, or claim to be, agents, officers or employees of Lessor, ORDC and the State of Ohio, and will not, by reason of any relationship with Lessor, ORDC and the State of Ohio, make any claim, demand or application to any agent, officer or employee of the State of Ohio including, but not limited to, rights and privileges concerning worker’s compensation benefits, social security coverage or retirement membership or credit.

Section 15.05 The parties’ obligations under this Article shall survive the termination of this Agreement.

## **Article XVI. LEGAL REQUIREMENTS.**

Section 16.01 OSCR, in the execution of its duties and obligations under this Agreement, agrees to comply with all applicable federal, state and local law.

## **Article XVII. TERMINATION.**

Section 17.01 OSCR shall have the right to terminate this Agreement at its discretion upon written notification to the Executive Director of LESSOR three hundred sixty (360) days in advance of OSCR's actual cessation of service. LESSOR shall have the right to terminate this Agreement, or any renewal of this Agreement, in accordance with the provisions of Article XXV of this Agreement. Any termination shall meet STB regulatory requirements.

## **Article XVIII. TAXES AND ASSESSMENTS.**

Section 18.01 OSCR shall have the sole responsibility to pay all taxes and assessments arising after the Effective Date of this Agreement for the Jackson Line, or OSCR's use of the Jackson Line including, but not limited to, real estate taxes and other assessments if any, throughout the Initial Term and any Renewal Term of this Agreement. OSCR shall pay such taxes and assessments directly to the taxing or assessing authority before such payments become delinquent and shall certify to LESSOR that these tax obligations have been met. It is further agreed that OSCR shall have the right, at its sole cost and expense, to challenge the application, assessment or computation of any tax, as provided under applicable law. OSCR agrees to pay any penalties assessed to LESSOR or to OSCR due to lack of payment or late payment by OSCR of any taxes described in this Article.

## **Article XIX. FORCE MAJEURE**

Section 19.01 In the event of an occurrence beyond the reasonable control of OSCR, including but not limited to, a material derailment, an act of God, a flood, act of terrorism, a major explosion or fire, or an act of any government, which prevents or materially impairs OSCR's ability to provide rail service ("Force Majeure") over all or a part of the Jackson Line (the "Damaged Jackson Line"), OSCR's obligation to provide rail service over the Damaged Jackson Line under this Agreement is excused until such time as the Damaged Jackson Line becomes operational. In the event of such an occurrence, LESSOR and OSCR shall determine jointly and in good faith how the expense of repairing or rebuilding the Damaged Jackson Line shall be divided between LESSOR and OSCR; provided, however, that in the absence of LESSOR's commitment to pay for same, OSCR shall not be obligated to undertake any repair or replacement of asset or equipment that would not be required under otherwise applicable law. An incidence of Force Majeure shall excuse OSCR from its obligations under Article V Rent for the Damaged Jackson Line for the duration of the event, provided that OSCR's Fixed Rent Payments shall be pro-rated for the number of days a Force Majeure was declared in any year and the carload impact of the Force Majeure.

Section 19.02 It is expressly agreed that LESSOR or OSCR retains the option to terminate the Agreement in accordance with Article XVIII, Termination, upon the occurrence of any act deemed to be "Force Majeure" under this Article.

## **Article XX. PROPERTY MANAGEMENT**

Section 20.01 OSCR shall be obligated to fulfill all current, existing responsibilities, obligations, and duties in managing and negotiating all current, existing property leases, crossings and other similar agreements related to the property. OSCR may enter into new leases or other property management responsibilities, hereinafter referred to as Property Transactions, which LESSOR might enter into under the terms of this Agreement only after OSCR obtains written permission from the Executive Director of LESSOR. LESSOR shall have no obligations under such Property Transactions unless its Executive Director accepts such obligations in writing.

Section 20.02 Any and all fees acquired through Property Transactions shall be split 50%/50%, with OSCR keeping 50% of any fees and paying directly to LESSOR the remaining 50% of any fees. This Section shall not apply to negotiations involving public entities, transactions related to car storage, or engineering fees.

- (a) 100% of engineering fees incurred as a result of Property Transactions that arise under this Article XXI shall be collected by OSCR.
- (b) Transactions related to car storage are covered in Article V, Rent, above.
- (c) 100% of fees collected from public entities as a result of Property Transactions shall be paid directly to LESSOR. OSCR may retain from such fees reasonable expenses resulting from the transaction with the advanced written consent of LESSOR.

Section 20.03 Nothing in this Article XXI precludes LESSOR from entering into a Property Transaction involving the Jackson Line with parties of LESSOR's selection under terms and conditions consistent with this Agreement. However, LESSOR shall coordinate and cooperate with OSCR to ensure that the interests of OSCR are not unduly harmed before entering into the proposed Property Transaction. In the event that OSCR has an objection to a proposed LESSOR property Transaction, the decision of LESSOR shall be final.

Section 20.04 All Property Transactions shall be built and maintained according to AREMA specifications.

Section 20.05 Lessor agrees to work with OSCR to the fullest extent of the law regarding transitional matters and/or any pending actions, fines, penalties, or petitions from regulatory agencies which have been initiated against the Jackson Line or its former operator for conditions present prior to the time OSCR took operational control of the line.

## **Article XXI. NOTICES.**

Section 21.01 All notices, requests, demands, directions and other communications (collectively "notices") given to or made upon any party hereto under the provisions of this



Agreement shall be in writing (including electronic mail) and shall be delivered or sent by first class, certified, return receipt requested, or first class express mail or overnight air courier service, or by electronic mail with confirmation in writing mailed first class, in all cases with postage or charges prepaid, to the applicable party, addressed:

- (a) If to LESSOR: Executive Director, Ohio Rail Development Commission, 1980 West Broad Street, Mail Stop 3140, Columbus, Ohio 43223.
- (b) If to OSCR: Chief Executive Officer, Ohio South Central Railroad, 412 West 4<sup>th</sup> Street, Edwardsville, Illinois, 62025.

Section 21.02 Or, notice may be given to another party and/or at another address in accordance with any unrevoked written direction from any party to any other party hereto. Each such notice shall be deemed to have been given or received on the date sent except when sent by first class express mail or overnight air courier service, in which case on the next Columbus Banking Day thereafter, and except when sent by first class mail, in which case on the third Columbus Banking Day thereafter.

## **Article XXII. REMEDIES.**

Section 22.01 No remedy herein conferred upon or reserved by either party is intended to be exclusive of any other available remedy, but each and every such remedy shall be cumulative and shall be, in addition to every other remedy given under this Agreement now or hereafter existing at law or in equity.

## **Article XXIII.NO WAIVER.**

Section 23.01 No delay or omission to exercise any right or option accruing to either party upon any breach by the other party shall impair any such right or option or shall be construed to be waiver thereof, but any such right or option may be exercised from time to time and as often as may be deemed necessary by the non-breaching party. Further, if any term, provision, covenant or condition contained in this Agreement is breached by either party and thereafter such breach is waived by the other party, such waiver shall be limited to the particular breach so waived and shall not be deemed to waive any other breach hereunder. A written record of such waiver shall be included in the records of this Agreement.

## **Article XXIV. NO ABANDONMENT.**

Section 24.01 OSCR shall not apply for abandonment of or discontinuance of service over any portion of the Jackson Line without securing the advance written consent of the LESSOR.

## **Article XXV. DEFAULT.**

- (a) LESSORIn the event that OSCR does not comply with any of the Articles of this Agreement at any time during the term of this Agreement, LESSOR may notify OSCR in

writing of said default and the cure provisions of Section 25.02 shall apply, except with regards to the conditions and provisions enumerated in Section 25.01(b).

- (b) Conditions and provisions upon which noncompliance would constitute automatic default, without regards to the notice or cure period in Section 25.02 below and resulting in the immediate termination of the Agreement upon the actual date of the violation are:
  - (i) Article VI, Section 6.01(d) regarding insolvency and/or the filing against OSCR of a petition for relief or reorganization in bankruptcy or insolvency under the laws of any jurisdiction;
  - (ii) Article XIV: Assignment and Subletting;
  - (iii) Article XV: Insurance and Indemnification.

Section 25.02 In the event that LESSOR informs OSCR in writing of a OSCR default, OSCR shall have sixty (60) days from the date of the notice to cure the default except that for obligations that would be reasonably expected to take more than sixty (60) days to cure, OSCR shall begin steps to cure the default within thirty (30) days and thereafter make good faith efforts to prosecute same with due diligence so that the cure shall take place in a reasonable amount of time. If OSCR fails to so cure within this period, then LESSOR may terminate this Agreement. In the event LESSOR terminates this Agreement, in addition to any other action or remedy which LESSOR may have at law or in equity to recover damages or otherwise by reason of breach by OSCR of any provision of this Agreement, LESSOR shall have the right to remove OSCR from the Jackson Line and take possession thereof by all available legal means, including, but not limited to, the assignment of trackage operating rights to another carrier at LESSOR's discretion free and clear and discharged of this Agreement and of all rights of OSCR hereunder.

Section 25.03 At its discretion, LESSOR may request that OSCR continue operations on the line for an agreed upon period of time after LESSOR's termination of this Agreement because of OSCR default to facilitate the orderly change in service from OSCR to another carrier. Such continued operations shall be governed by the terms of this Agreement but shall not constitute a reinstatement of this Agreement.

## **Article XXVI. GOVERNING LAW AND VENUE.**

Section 26.01 This Agreement shall be construed, interpreted, and the right of all parties determined, in accordance with the laws of the State of Ohio. The parties agree that the exclusive venue for any dispute regarding this Agreement shall be in a court of competent jurisdiction located in Franklin County, Ohio.

## **Article XXVII. NO THIRD PARTY BENEFICIARIES.**

Section 27.01 This Agreement and each and every provision throughout are for the exclusive benefit of the parties to this Agreement and not for the benefit of any third party.



## **Article XXVIII. DRUG FREE WORKPLACE.**

Section 28.01 OSCR agrees to comply with all applicable state and Federal laws regarding drug-free workplace. OSCR shall make good faith efforts to ensure that all of its employees while working on the Jackson Line will not purchase, transfer, use or possess illegal drugs or alcohol or abuse prescription drugs in any manner.

## **Article XXIX. SEVERABILITY.**

Section 29.01 If any provision of this Agreement is held to be invalid or unenforceable by a court of competent jurisdiction, such holding shall not affect the validity or enforceability of the remainder of this Agreement. All provisions of this Agreement shall be deemed severable.

## **Article XXX. LIMITATIONS.**

Section 30.01 Notwithstanding anything stated in this Agreement to the contrary, any provision, agreement, condition, understanding, or the like contained in this Agreement which contravenes, violates, conflicts with or is not authorized by the Constitution or Statutes of the State of Ohio shall be void ab initio.

## **Article XXXI. ENTIRE AGREEMENT.**

Section 31.01 This Agreement and its attachments constitute the entire Agreement between the parties. All prior discussions and understandings between the parties are superseded by this Agreement. No terms shall be altered or otherwise amended except by an instrument in writing signed by each party hereto.

## **Article XXXII. CAPTIONS.**

Section 32.01 The article captions in this Agreement are for the convenience of reference only and in no way define, limit or describe the scope or intent of this Agreement or any part hereof and shall not be considered in any construction hereof.

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

**OHIO SOUTH CENTRAL RAILROAD:**

BY: \_\_\_\_\_

PRINT NAME: \_\_\_\_\_

TITLE: \_\_\_\_\_

DATE: \_\_\_\_\_

**CITY OF JACKSON:**

\_\_\_\_\_  
Mayor Randy Heath

Date: \_\_\_\_\_

**CITY OF JACKSON:**

\_\_\_\_\_  
William Sheward  
Service and Safety Director

Date: \_\_\_\_\_