



COUNCIL ORDINANCE NO. 20663

**AN ORDINANCE GRANTING TO BNSF RAILWAY COMPANY A
NON-EXCLUSIVE FRANCHISE TO USE THE PUBLIC WAY TO
CONSTRUCT AND MAINTAIN PRIVATE COMMERCIAL
FACILITIES WITHIN THE CITY OF EUGENE.**

ADOPTED: November 22, 2021

SIGNED: December 1, 2021

PASSED: 8:0

REJECTED:

OPPOSED:

ABSENT:

EFFECTIVE: January 1, 2022



ORDINANCE NO. 20663

AN ORDINANCE GRANTING TO BNSF RAILWAY COMPANY A NON-EXCLUSIVE FRANCHISE TO USE THE PUBLIC WAY TO CONSTRUCT AND MAINTAIN PRIVATE COMMERCIAL FACILITIES WITHIN THE CITY OF EUGENE.

The City Council of the City of Eugene finds that:

A. On December 10, 2001, the Eugene City Council adopted Ordinance No. 20241 granting to Burlington Northern and Santa Fe Railway Company a non-exclusive 20-year Franchise to use the public way to construct and maintain private commercial facilities within the City of Eugene. That Franchise will expire on January 9, 2022.

B. In or around 2005, Burlington Northern and Santa Fe Railway Company changed its name to BNSF Railway Company.

C. The City of Eugene has determined that it serves the public welfare to enter into the new Franchise agreement with BNSF Railway Company set forth below.

NOW, THEREFORE,

THE CITY OF EUGENE DOES ORDAIN AS FOLLOWS:

Section 1. Definitions. As used in this Ordinance, the following words and phrases mean:

City. The City of Eugene, Oregon.

City Manager. The City Manager of the City or his or her designee.

Facilities. All tracks and associated structures located in the public way specified in Section 2 of this Franchise that are owned by Grantee for use by Grantee in providing rail services.

Grantee. BNSF Railway Company, a Delaware corporation, and its successors and assigns, and each of their respective lessees or rail operators.

Public way. Any street, road, alley, right-of-way, pedestrian or bicycle easement or utility easement for public use that is controlled by City.

Section 2. Use of Public Way. Subject to the provisions and restrictions of this Ordinance, the Eugene Code, 1971, and the applicable provisions of the Interstate Commerce Commission Termination Act of 1995 and other federal laws, rules and regulations as amended or replaced, City grants to Grantee the non-exclusive privilege to lay, construct, and maintain its present tracks and its present facilities, and to operate trains and cars thereover, and to transport passengers, freight and other materials upon the following named streets and places in the City:

Across all intervening streets southerly and easterly of the intersection of the right-of-way of Grantee and the northern city limits of the City, and extending southeasterly to the easterly line of the intersection of Grant Street and 5th Avenue, including the crossings of Grant Street, Garfield Street, Roosevelt Boulevard, Bethel Drive and Prairie Road.

Grantee agrees that, except in unusual circumstances such as equipment failures, it will not switch trains or cars on the streets of the City except as necessary to serve warehouses or other loading places. Grantee shall at all times maintain its facilities in a state of reasonably good repair and shall obtain and maintain a subscription to the Oregon Utility Notification Center (OUNC) for the duration of this franchise. All underground facilities shall be located and marked as required under OUNC standards.

Section 3. Use of Private Property. To the extent, if any, that it needs to do so and is authorized to do so, City grants to Grantee the right to maintain and operate cars over all private tracks and private property now occupied by it.

Section 4. Construction and Repairs in Public Way.

4.1 Grantee. City grants to Grantee the right to construct, re-erect, reconstruct, and maintain poles, wires, and other necessary and convenient equipment for the purpose of preserving and maintaining its present equipment for conveying power and electrical current for its own use, upon the designated streets, subject to reasonable and normal utility installation

requirements. It shall be Grantee's responsibility to locate and avoid all utilities located within Grantee's construction area, and Grantee shall be liable for any costs to repair or replace any utilities that may be damaged due to Grantee's construction or location of its facilities.

Underground abandoned facilities shall be mapped and located as required in OUNC standards. Maps of all underground abandoned facilities shall be submitted to the City Engineer or designee for reference and shall not relieve the Grantee from the responsibility of locating or removing abandoned underground facilities. Grantee shall have the right to make all necessary excavations in any public way for the purpose of constructing and maintaining its facilities. To the extent not preempted by federal law, rules or regulations, Grantee's use of the public way shall comply with the standard specifications of the City, including, but not limited to the City of Eugene Manual on Traffic Control Devices, Signing, etc. for Construction and Maintenance on Streets and Highways, and the City of Eugene Policies and Procedures: Utility and Right-of-Way Permits, Construction Within and Use of the Public Way, and all other applicable Federal, State, and local laws, rules, and regulations. To the extent not preempted by federal law, rules or regulations, Grantee shall do no work affecting the public way without first obtaining the permits required by City, which may include plan submittal, approval and the payment of fees before work begins. Grantee shall furnish all necessary material and labor to install and maintain its facilities at its own expense.

4.2 City. Nothing in this Ordinance shall be construed in any way to prevent City from constructing and maintaining any public improvement in any public way, except that the City agrees that any public improvement in the public ways designated in Section 2 herein shall be constructed and maintained in such a manner as does not unreasonably interfere with the free and unobstructed use by Grantee of its facilities in the public ways.

4.3 Grantee shall construct and maintain its tracks in the public ways designated in Section 2 herein so that the top of the rails shall at all times conform to the street grade (except where the change made is separation of grades). The City hereby reserves the right to change the grade of any public way at any time. When the City shall change the grade of the public ways, Grantee hereby agrees to waive any and all damages that it may sustain on account of having to readjust its tracks by reason of the change of grade. Grantee makes this waiver upon condition that any change of grade hereafter made by the City to the public ways designated in Section 2 herein shall not be unreasonable or such as to interfere with the proper and practical operation of Grantee's facilities after adjustment to the new grade.

Section 5. Abandonment of Facilities. If Grantee ceases to make use of its facilities within the public way for the purposes authorized by this franchise for a continuous period of one year or more and Grantee does not then intend to operate the facilities and has no federal common carrier or other obligation to maintain service, the facilities shall be deemed abandoned. Upon written notice to Grantee at its address indicated in its acceptance of this Ordinance, City may then require Grantee to remove the facilities and restore the public way at Grantee's sole cost and expense. If Grantee fails to commence removal within 90 days and remove the facilities and restore the public way within one year of receipt of notice from City, City may, at its option and in its sole discretion, remove the facilities from the public way and require Grantee to pay for the full cost of removal and restoration of the public way, or City may assume possession and ownership of the facilities. If Grantee removes the facilities from the public way but fails to restore the public way to its prior condition, City may complete the repairs and bill Grantee for the full cost thereof. Whenever used in this Section, the term "Grantee" shall mean Grantee or any successor railroad.

Section 6. Operation of Trains.

To the extent not preempted by federal law, in the maintenance and operation of its trains and facilities, Grantee shall comply with all applicable federal state and City laws, rules and regulations.

Section 7. Term of Franchise. The privileges and franchise herein granted shall continue and be in force for a period of twenty (20) years from and after the date this Ordinance becomes effective; provided, however, that either City or Grantee may, upon at least thirty (30) days written notice to the other prior to the expiration of each ten (10) year period from the effective date of this franchise, open this agreement to negotiate provisions therein including the right-of-way use/occupancy fee; and provided, however, that either City or Grantee may, at any time but upon at least thirty (30) days written notice to the other, open this agreement as necessary to negotiate provisions to address significant changes in applicable laws or uses of additional rights-of-way by Grantee. The negotiations and dispute resolution, if any, shall be governed by the principle that, to the extent possible, the terms of this franchise shall be consistent with local, state and federal law in existence at the time of renegotiation.

Section 8. Effective Date. This Ordinance shall take effect and be in force thirty (30) days after its passage and approval by the Mayor, or upon acceptance by Grantee, whichever is later. Grantee shall, within thirty (30) days of the passage and Mayor's approval of this Ordinance, file with the City Recorder its written acceptance of all the terms and conditions of this Ordinance. If no such acceptance is filed, this Ordinance shall become null and void.

Section 9. Franchise Fee. In consideration of the privileges and franchise granted, Grantee shall pay annually by June 30 of each calendar year an amount equal to \$5.00 per linear foot of public way used. The parties agree that the rights-of-way described in Section 2 herein

total 280 feet.

The payment of the franchise fee shall not be credited toward the payment of property taxes or payments in lieu thereof, nor toward any sales or income tax adopted by the City, nor toward any permit fees required by the Eugene Code, 1971.

Section 10. Taxes. Nothing in this Ordinance shall give Grantee any credit against any nondiscriminatory business tax or ad valorem property tax now or hereafter levied against real or personal property within City, or against any permit fees or inspection fees required by the construction Codes or other ordinances of City with are or may hereafter be adopted.

Section 11. Indemnification. Grantee shall indemnify, defend and save harmless the City and its officers, agents and employees from and against any and all claims, actions, suits, liability, loss, cost, expense, or damage of any kind or description which may accrue to or be suffered by the City by reason of the exercise of the rights and privileges herein by Grantee or Grantee's employees, agents or subcontractors.

Section 12. Insurance. Grantee shall have and maintain the insurance policies specified below. Each policy of insurance shall be written as a primary policy, not contributing with or in excess of any coverage which City may carry. A letter of self-insurance shall be delivered to City prior to performance pursuant to this Ordinance. The adequacy of all insurance policies for compliance with this Section shall be subject to approval by City's Risk Manager. Failure to maintain any insurance coverage required by this Ordinance shall be cause for immediate termination by City of the rights and privileges granted by this Ordinance.

12.1 Unless otherwise specified, each policy shall be written on an "occurrence" form with an admitted insurance carrier licensed to do business in the state of Oregon; and shall contain an endorsement entitling City to not less than 30 days prior written notice of

cancellation. In the event the statutory limit of liability of a public body for claims arising out of a single accident or occurrence is increased above the combined single limit coverage requirements specified below, City shall have the right to require that Grantee increase the coverage limits of all liability policies by the amount of the increase in the statutory limit with thirty (30) days written notice.

12.2 Commercial General Liability. Grantee shall maintain a broad form commercial general liability insurance policy, including railway liability coverage, reflecting limits of not less than \$2,000,000 combined single limit per occurrence, with an annual aggregate of \$3,000,000 for bodily injury, personal injury or property damage. Such limits may be met in combination with umbrella insurance coverage. Such policy shall contain a contractual liability endorsement to cover Grantee's indemnification obligations under this Ordinance. The policy shall also contain an endorsement naming City as an additional insured, in a form satisfactory to City (blanket endorsement acceptable), and expressly providing that the interest of City shall not be affected by Grantee's breach of policy provisions.

12.3 Federal Employers Liability Insurance. Grantee shall comply with the Federal Employers Liability Insurance Act. Grantee is allowed to self-insure for such policy of insurance. Grantee shall directly cover any self-insured retention or other financial responsibility for claims in lieu of insurance.

Section 13. Default and Termination. If Grantee fails to comply with or perform any of the requirements imposed on it by this franchise and City give written notice specifying the nature of Grantee's default and demanding that such default be remedied within a reasonable time to be fixed in such notice (but in no event less than 30 days), the rights and privileges granted by this franchise may be terminated and annulled by City if Grantee fails to remedy its

default within the time specified. No waiver of any breach of this franchise shall be held to be a waiver of any other or subsequent breach of this franchise.

Section 14. Interpretation; Dispute Resolution.

14.1 Interpretation. This franchise shall be governed by and interpreted in accordance with the laws of the State of Oregon without regard to principles of conflict of laws.

14.2 Dispute Resolution. Grantee and City shall use all reasonable attempts to resolve disputes informally through conferral and negotiation. In the event such efforts are unsuccessful, the parties may mutually agree to voluntary mediation, in which case the parties shall share equally in all common costs of mediation.

14.3 Any litigation between the City and Grantee that arises from or relates to this franchise shall be brought and conducted solely and exclusively within the Lane County Circuit Court; provided, however, if a dispute must be brought in a federal forum, then it shall be brought and conducted solely and exclusively within the United States District Court for the District of Oregon, Eugene Division. In no event shall this subsection be construed as a waiver by the City of any form of defense or immunity, whether sovereign immunity, governmental immunity or otherwise, from any claim or from the jurisdiction of any court.

Passed by the City Council this


Approved by the Mayor this

22nd day of November, 2021

 1 day of December, 2021



Deputy City Recorder



Mayor