



Contract Number: 2021.1 PS

Right of Entry, Release of Claim and Indemnity Agreement

This Right of Entry, Release of Claim and Indemnity Agreement (this "**Agreement**") is entered into as of Jan 5, 2021 (the "**Effective Date**"), by and between **BNSF RAILWAY COMPANY** ("**Railroad**") and **City of Aurora Illinois** ("**Permittee**"). This Agreement acknowledges the receipt of a request from Aurora and its agents, contractors and invitees (hereinafter collectively called "**Permittee**") for right of entry permission from Railroad.

1) Scope

Permittee's access to Railroad's property at MP 37.4 on the Aurora Subdivision in Aurora Illinois will be limited to painting of a mural on the north side of the viaduct wall on New York Street beneath the BNSF Railroad. Permittee will be standing on public sidewalk and painting on BNSF property and shall be solely for the purpose of painting a public mural. (the "**Project**"). In no event shall Permittee access Railroad's property at any location other than that expressly described herein, and in no event shall Permittee access Railroad's property at track level.

2) Risk

Permittee fully realizes that its presence on Railroad's premises involves danger and risk to Permittee, including the possibility of Permittee's injury or death and damage to or loss of its property. Permittee also realizes that its presence may be a cause of damage to property of Railroad or others or injury or death to other persons, including employees of Railroad.

3) Terms and Conditions

Railroad will grant Permittee's request for right of entry, but only in consideration of the condition that Permittee agrees to the following terms and conditions:

- a) By acceptance of this Agreement, Permittee agrees to release Railroad from any claims arising from the performance of this Agreement which Permittee, Permittee's company or any of its employees, subcontractors, agents or invitees could otherwise assert against Railroad, regardless of the negligence of Railroad, except to the extent that such claims are proximately caused by the intentional misconduct or gross negligence of Railroad.

Permittee further agrees to indemnify and save harmless Railroad for all judgments, awards, claims, demands, and expenses (including attorneys' fees), for injury or death to all persons including both Permittee's and Railroad's officers and employees, and for loss or damage to property belonging to any person, arising from Permittee's acts or omissions or failure to perform any obligation hereunder. **THE LIABILITY ASSUMED BY PERMITTEE SHALL NOT BE AFFECTED BY THE FACT, IF IT IS A FACT, THAT THE DESTRUCTION, DAMAGE, DEATH, OR INJURY WAS OCCASIONED BY OR CONTRIBUTED TO BY THE NEGLIGENCE OF RAILROAD, ITS AGENTS, SERVANTS, EMPLOYEES OR OTHERWISE, EXCEPT TO THE EXTENT THAT SUCH CLAIMS ARE PROXIMATELY CAUSED BY THE INTENTIONAL MISCONDUCT OR GROSS NEGLIGENCE OF RAILROAD.**



Contract Number: 2021.1 PS

- b) Permittee shall keep and maintain Railroad's premises in a safe and sanitary condition, restoring the premises upon cancellation of this agreement to essentially the same condition when first utilized by Permittee, and to the satisfaction of Railroad.
- c) Permittee will not interview, talk with, or in any way disturb any of Railroad's employees.
- d) Except with the express permission of Railroad, Permittee will not operate, lift, move, manipulate, board, or pass between any of Railroad's equipment or other property.
- e) In using the premises, Permittee shall comply with any and all requirements imposed by federal or state statutes or by ordinances, orders, or regulations of any governmental body having jurisdiction there over.
- f) Railroad retains the right to refuse any Permittee access to Railroad property or to require any Permittee to exit Railroad property at any time with or without cause. Railroad shall have the right to terminate this agreement immediately if Railroad finds that Permittee is acting in an unsafe manner in any way.
- g) If, while Permittee is on the property of Railroad, Permittee is required to be accompanied by a flagger in accordance with Railroad's requirements attached hereto as Exhibit B, Permittee shall provide notice to Railroad and Permittee shall be accompanied by a flagger designated by Railroad. Permittee agrees to reimburse Railroad, within thirty (30) days after receipt of written advice from Railroad, for all cost and expense incurred by Railroad in connection with Permittee's presence on the premises, including but not limited to the furnishing of Railroad's flagger. The estimated cost for one flagger is approximately \$800.00-\$1,600.00 for an eight (8) hour basic day with time and one-half or double time for overtime, rest days and holidays. Negotiations for Railroad labor or collective bargaining agreements and other rate changes may increase actual or estimated flagging rates.

While it is the Permittee's responsibility to notify the Railroad when a flagger is required pursuant to this policy, the Railroad does not foresee the need for a flagger for any component of this project as it has been described to Railroad by Permittee.

- h) Before entering onto Railroad property, Permittee must conduct a thorough safety briefing. The briefing **must** include the Railroad's flagger (if one is required) or Railroad's Project Representative named in Section 7 below (if no flagger is required) and include the procedures the Permittee will use to protect its agents, contractors and invitees from any equipment adjacent to or moving across any Railroad tracks.
- i) Each Permittee that is an individual must be at least 18 years of age and must, prior to entering on any property of Railroad, sign a Personal Release and Waiver on the form attached hereto as Exhibit A.
- j) Permittee shall require compliance with the obligations set forth in this Agreement, including Exhibit C and Exhibit C-1, and incorporate in each prime contract for construction of the Project the provisions set forth in Exhibit C and Exhibit C-1, attached hereto and by reference made a part hereof.



Contract Number: 2021.1 PS

- k) Permittee shall notify Railroad's Project Representative named in Section 7 below at least two (2) days in advance when Permittee plans to clean, wash or prepare Railroad's property for the Project. Railroad's Project Representative must be in attendance for all preparatory work and may stop any such work and advise Permittee if a less abrasive procedure needs to be used.
- l) Permittee shall be required to provide design and description details of the Project to the Railroad or its designee for its written approval, as well as secure any permits or approvals required by the City of Aurora and shall have secured approval from the City of Aurora and any other applicable government agency(ies) for the design of the Project. A copy of the design and description details of the Project shall be attached hereto as Exhibit D. If the Railroad or the City of Aurora at any time revokes its respective approval of the Project for any reason, Permittee shall, at its sole cost and expense, immediately remove the Project and return Railroad's property to its original condition.
- m) **Permittee understands that Railroad may in the future do repairs or replacement of portions of Railroad property where the Project is located and that Railroad will not be required to restore all or any portion of the Project that is impacted by such Railroad work.**
- n) Permittee shall be responsible for any future maintenance or repairs to the Project, including but not limited to removal of graffiti and must secure Railroad's permission prior to conducting any maintenance or repairs. If Permittee fails to maintain the Project in its original condition, including the prompt removal of any graffiti, Railroad shall have the right to require the Permittee, at Permittee's sole cost and expense, to immediately remove the Project and return Railroad's property to its original condition. For maintenance or repair work, Permittee shall additionally abide by the requirements listed in Section 4 below.
- o) Access to Railroad's property by Permittee for the purposes of installing, repairing, and maintaining the Project contemplated herein shall only take place during daylight hours.
- p) Permittee shall complete project on Railroad property beginning August 21, 2021, the start of the project, and no later than September 3, 2021. Notwithstanding the foregoing, Permittee's right to access Railroad property pursuant to this Agreement shall terminate upon completion of the project.

4) Future Maintenance

- a) Before Permittee enters upon the property of Railroad in order to perform its maintenance obligations hereunder, each Permittee that is an individual must be at least 18 years of age and must, prior to entering on any property of Railroad, sign a Personal Release and Waiver on the form attached hereto as Exhibit A.
- b) Before Permittee enters upon the property of Railroad in order to perform its maintenance obligations hereunder, Permittee must provide and maintain in effect insurance, at Permittee's expense, as described in Section 5 below.

5) Insurance

Before entering upon the property of Railroad, Permittee must provide and maintain in effect insurance, at Permittee's expense, as described below:



Contract Number: 2021.1 PS

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

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

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

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

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

No other endorsements limiting coverage as respects to obligations under this Agreement or services being performed under this Agreement may be included on the policy.

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

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

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

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

- c) Workers Compensation and Employers Liability insurance including coverage for, but not limited to:



Contract Number: 2021.1 PS

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

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

- Waiver of subrogation in favor of and acceptable to Railroad.

d) Other Requirements:

Where allowable by law, all policies (applying to coverage listed above) shall contain no exclusion for punitive damages.

Permittee agrees to waive its right of recovery against Railroad for all claims and suits against Railroad. In addition, its insurers, through the terms of the policy or policy endorsement, waive their right of subrogation against Railroad for all claims and suits. Permittee further waives its right of recovery, and its insurers also waive their right of subrogation against Railroad for loss of its owned or leased property or property under Permittee's care, custody or control.

Allocated Loss Expense shall be in addition to all policy limits for coverages referenced above.

Permittee is not allowed to self-insure without the prior written consent of Railroad. If granted by Railroad, any self-insured retention or other financial responsibility for claims shall be covered directly by Permittee in lieu of insurance. Any and all Railroad liabilities that would otherwise, in accordance with the provisions of this Agreement, be covered by Permittee's insurance will be covered as if Permittee elected not to include a deductible, self-insured retention or other financial responsibility for claims.

Prior to commencing services, Permittee shall furnish to Railroad an acceptable certificate(s) of insurance from an authorized representative evidencing the required coverage(s), endorsements, and amendments.

Permittee shall notify Railroad in writing at least 30 days prior to any cancellation, non-renewal, substitution or material alteration.

Any insurance policy shall be written by a reputable insurance company acceptable to Railroad or with a current Best's Guide Rating of A- and Class VII or better, and authorized to do business in the state(s) in which the service is to be provided.

If coverage is purchased on a "claims made" basis, Permittee hereby agrees to maintain coverage in force for a minimum of three years after expiration, cancellation or termination of this contract. Annually Permittee agrees to provide evidence of such coverage as required hereunder.



Contract Number: 2021.1 PS

Permittee represents that this Agreement has been thoroughly reviewed by Permittee's insurance agent(s)/broker(s), who have been instructed by Permittee to procure the insurance coverage required by this Agreement.

Not more frequently than once every five years, Railroad may reasonably modify the required insurance coverage to reflect then-current risk management practices in the railroad industry and underwriting practices in the insurance industry.

If any portion of the operation is to be subcontracted by Permittee, Permittee shall require that the subcontractor shall provide and maintain insurance coverage(s) as set forth herein, naming Railroad as an additional insured, and shall require that the subcontractor shall release, defend and indemnify Railroad to the same extent and under the same terms and conditions as Permittee is required to release, defend and indemnify Railroad herein.

Failure to provide evidence as required by this section shall entitle, but not require, Railroad to terminate this Agreement immediately. Acceptance of a certificate that does not comply with this section shall not operate as a waiver of Permittee's obligations hereunder.

The fact that insurance (including, without limitation, self-insurance) is obtained by Permittee shall not be deemed to release or diminish the liability of Permittee including, without limitation, liability under the indemnity provisions of this Agreement. Damages recoverable by Railroad shall not be limited by the amount of the required insurance coverage.

In the event of a claim or lawsuit involving Railroad arising out of this agreement, Permittee will make available any required policy covering such claim or lawsuit.

For purposes of this section, "Railroad" shall mean "Burlington Northern Santa Fe LLC", "BNSF Railway Company" and the subsidiaries, successors, assigns and affiliates of each.

6) Environmental

- a) Environmental Policy. Railroad's policy is to operate in a way that protects and enhances the environment, protects the health and safety of employees and the communities where we operate, complies with environmental laws and regulations and continuously improves our environmental performance – including monitoring and measuring environmental indicators and goals. Permittee shall not place, deposit, spill, or discard any material on Railroad property or otherwise take any action that may negatively impact Railroad property or the health and safety of Railroad employees.
- b) Compliance with Environmental Laws. Permittee shall strictly comply with all federal, state and local environmental Laws in its use of the premises, including, but not limited to, the Resource Conservation and Recovery Act, as amended (RCRA), the Clean Water Act, the Oil Pollution Act, the Hazardous Materials Transportation Act, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and the Toxic Substances Control Act (collectively referred to as the "**Environmental Laws**"). Permittee shall not handle, transport, release or suffer the release of "hazardous waste" or "hazardous substances", as "hazardous waste" and "hazardous substances" may now or in the future be defined by any Environmental Laws.



Contract Number: 2021.1 PS

- c) Notice of Release. Permittee shall give Railroad immediate notice to Railroad's Resource Operations Center at (800) 832-5452 of any release of hazardous substances on or from the premises, violation of Environmental Laws, or inspection or inquiry by governmental authorities charged with enforcing Environmental Laws with respect to Permittee's use of the premises. Grantee shall use its best efforts to promptly respond to any release on or from the Premises. Grantee also shall give Grantor immediate notice of all measures undertaken on behalf of Grantee to investigate, remediate, respond to or otherwise cure such release or violation.
- d) Remediation of Release. In the event that Railroad has notice from Permittee or otherwise of a release or violation of Environmental Laws which occurred or may occur during the term of this Agreement, Railroad may require Permittee, at Permittee's sole risk and expense, to take timely measures to investigate, remediate, respond to or otherwise cure such release or violation affecting the premises.

7) Notices

Permittee shall notify Peter Skosey, Executive Director Public Affairs 773-673-3156 ("**Railroad's Project Representative**"), at least two (2) days in advance of any requested entry upon Railroad's premises. Railroad's Project Representative shall determine the appropriate date and time for Permittee to access Railroad's property. Railroad reserves the right to deny any request for access by Permittee with or without cause.

8) Duration

This Agreement shall become effective on the Effective Date and may be terminated at any time thereafter by either party upon five (5) days' notice in writing to be served upon the other party, stating therein the date that such termination shall take place. No termination shall release Permittee from any liability or obligation under this Agreement, whether of indemnity or otherwise, resulting from any acts, omissions or events occurring prior to the time of termination.

9) General Provisions

- a) To the maximum extent possible, each provision of this Agreement shall be interpreted in such manner as to be effective and valid under applicable law, but if any provision of this Agreement shall be prohibited by, or held to be invalid under, applicable law, such provision shall be ineffective solely to the extent of such prohibition or invalidity, and this shall not invalidate the remainder of such provision or any other provision of this Agreement.
- b) All the covenants and provisions of this Agreement shall be binding upon the heirs, legal representatives, successors and assigns of Permittee. No assignment by Permittee shall be binding upon Railroad without the written consent of Railroad in each instance.
- c) All questions arising under this Agreement shall be decided according to the laws of the State of Texas.



Contract Number: 2021.1 PS

10) Waiver

The waiver by Railroad of the breach of any provision herein by Permittee shall in no way impair the right of Railroad to enforce that provision or any other provision of this Agreement.

11) Entire Agreement

This Agreement is the full and complete agreement between Railroad and Permittee with respect to all matters covered herein and supersedes any and all other agreements between the parties with respect to such matters. No provision of this Agreement may be modified, waived or amended except by a written instrument executed by the parties hereto.



Contract Number: 2021.1 PS

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed as of the Effective Date.

BNSF RAILWAY COMPANY

Peter Skosey
(Name Signed)

Peter Skosey
(Name Printed)

Executive Director Public Affairs
(Title)

City of Aurora

(Name Signed)

(Name Printed)

(Title)

EXHIBIT A
Personal Release and Waiver

I, _____,
Print name

in consideration of the permission granted to me by BNSF Railway Company ("BNSF") to enter upon the premises of BNSF limited to the area of MP 37.4 on the Aurora Subdivision in Aurora Illinois will be limited to painting of a mural on the north side of the viaduct wall on New York Street beneath the BNSF Railroad, on or about August 21, 2021 to September 3, 2021, for the purpose of painting a public mural, hereby agree to the terms and conditions contained in this release.

I do hereby assume all risk of my personal injury or death, and loss of or damage to property in my custody or possession, which shall in any manner arise from my presence on or about the property of BNSF, regardless of cause, including but not limited to injury, death, loss or damage caused by defects in tracks, roadbed, structures, trains, engines, cars, or other equipment or by any accident or event of any kind whatsoever, however it may occur or be caused, WHETHER THE SAME BE CAUSED BY OR CONTRIBUTED TO BY THE NEGLIGENCE OF BNSF, ITS OFFICERS, EMPLOYEES, AGENTS, OR ANY THIRD PARTY; and I hereby, for myself, my heirs, and legal representatives, release and forever discharge BNSF and its subsidiaries and affiliated companies, and their respective officers, agents, and employees, from all claims, liabilities, and costs of every kind relating to or by reason of any such injury, death, loss or damage.

It is understood and agreed that execution of this release assures BNSF that my conduct while in, on, or about the equipment and property of BNSF will not conflict with general, safety, and operating rules as they apply to my activities while thereon. It is further understood that this includes, but is not restricted to, the prohibition of the use of alcohol or narcotics, or being under their influence while thereon, also playing of practical jokes, or scuffling, or other activities jeopardizing my safety or that of others. If any violation of the regulations of any and all governmental authorities having jurisdiction results in any fine or penalty by said regulatory authority, I shall promptly pay such fine and indemnify BNSF against the cost of any such fine or penalty, or otherwise handle such matter to a conclusion satisfactory to BNSF. I understand that the permission granted hereunder is revocable by BNSF at will.

Signature

Print Name:

BNSF Railway Company

By: Peter Skosey

Name: Peter Skosey

Title: Executive Director Public Affairs

EXHIBIT B

Flagger Requirements

** While it is the Permittee's responsibility to notify the Railroad when a flagger is required pursuant to this policy, the Railroad does not foresee the need for a flagger for any component of this project as it has been described to Railroad by Permittee.**

Permittee must give Railroad a minimum of thirty (30) calendar days advance notice when flagging services will be required so that the Roadmaster can make appropriate arrangements (i.e., bulletin the flagger's position). If flagging services are scheduled in advance by the Permittee and it is subsequently determined by the parties hereto that such services are no longer necessary, the Permittee must give the Roadmaster five (5) working days advance notice so that appropriate arrangements can be made to abolish the position pursuant to union requirements.

Unless determined otherwise by Railroad's Project Representative, the flagger will be required and furnished when Permittee's work activities are located over, under and/or within twenty-five (25) feet measured horizontally from centerline of the nearest track and when cranes or similar equipment positioned beyond 25-feet from the track centerline could foul the track in the event of tip over or other catastrophic occurrence, but not limited thereto for the following conditions:

- (a) When, upon inspection by Railroad's Project Representative, other conditions warrant.
- (b) When any excavation is performed below the bottom of tie elevation, if, in the opinion of Railroad's representative, track or other Railroad facilities may be subject to movement or settlement.
- (c) When work in any way interferes with the safe operation of trains at timetable speeds.
- (d) When any hazard is presented to Railroad's track, communications, signal, electrical, or other facilities either due to persons, material, equipment or blasting in the vicinity.
- (e) Special permission must be obtained from the Railroad before moving heavy or cumbersome objects or equipment which might result in making the track impassable.

Flagging services will be performed by qualified Railroad flaggers. Flagging crew generally consists of one employee. However, additional personnel may be required to protect Railroad Property and operations, if deemed necessary by the Railroad's Representative. While it is the Permittee's responsibility to notify the Railroad when a flagger is required pursuant to this policy, the Railroad does not foresee the need for a flagger for any component of this project as it has been described to Railroad by Permittee.

Each time a flagger is called, the minimum period for billing will be the eight (8) hour basic day. The cost of flagger services provided by the Railroad will be borne by the Permittee. The estimated cost for one (1) flagger is approximately between \$800.00-\$1,600.00 for an eight (8) hour basic day with time and one-half or double time for overtime, rest days and holidays. The estimated cost for each flagger includes vacation allowance, paid holidays, Railroad and unemployment insurance, public liability and property damage insurance, health and welfare benefits, vehicle, transportation, meals, lodging, radio, equipment, supervision and other costs incidental to performing flagging services. Negotiations for Railroad labor or collective bargaining agreements and rate changes authorized by appropriate Federal authorities may increase actual or estimated flagging rates. **THE FLAGGING RATE IN EFFECT AT THE TIME OF PERFORMANCE BY THE PERMITTEE HEREUNDER WILL BE USED TO CALCULATE THE ACTUAL COSTS OF FLAGGING PURSUANT TO THIS PARAGRAPH.**

EXHIBIT C

This page intentionally left blank

EXHIBIT C-1

This page intentionally left blank

EXHIBIT D
Project Design and Description

(Attach Project design and description here)



This image is representative of what the artists are being asked to create.