

AGENDA REPORT

Resolution: 7th Supplemental Agreement with BNSF Railway Company for the Joint Intermodal Terminal (**Maritime**)

MEETING DATE: 10/08/2015

AMOUNT: Rent Varies with Cargo Activity (minimum rent \$500,000/yr)

PARTIES INVOLVED: BNSF Railway Company,
Carl R. Ice, CEO

SUBMITTED BY: John C. Driscoll, Director of Maritime

APPROVED BY: J. Christopher Lytle, Executive Director

ACTION TYPE: Ordinance

EXECUTIVE SUMMARY

BNSF Railway has leased the 85-acre Joint Intermodal Terminal since 2002. Staff has negotiated a Supplemental Agreement with BNSF Railway which would modify current compensation terms and extend the lease through December 31, 2019, with an option to further extend through December 31, 2024 subject to mutual agreement on compensation provisions. If BNSF elects to exercise its option, and the parties cannot agree on the compensation provisions, rent will be determined by an arbitration procedure.

BACKGROUND

In 2002, the Port completed construction on the Joint Intermodal Terminal (JIT), an 85-acre railyard developed as part of the Vision 2000 Program, which redeveloped the U.S. Navy Fleet Industrial Supply Center Oakland into new Port maritime (seaport) facilities. During railyard planning in the 1990s, the Port was in discussions with Union Pacific (UP) and Southern Pacific to consolidate their operations into a jointly operated intermodal rail terminal on the former Navy base. During that same time, railroad consolidated resulted in UP acquiring Southern Pacific, while other railroad companies merged with Burlington Northern Railroad, creating the Burlington Northern & Santa Fe Railroad (BNSF). To ensure competition, UP and BNSF granted each other numerous trackage rights to operate on each others' tracks, including at the seaport, and more specifically the planned JIT. UP chose to consolidate operations in the seaport area and build a new facility on its own property, the current Railport terminal adjacent to Port maritime land (see Exhibit 1). In 2001, BNSF and

the Port reached agreement for BNSF to lease the JIT, bringing BNSF trains directly into the seaport, rather than serving the seaport from its terminal in the City of Richmond.

The original lease with BNSF for the JIT had a term of 10 years and expired in 2012. The Port and BNSF entered into six supplemental agreements which, among other things, extended the term of the lease to September 30, 2014 (collectively referred to as the "Lease"). The Lease has been in holdover since that time.

Associated with the Lease is a Tail Track Operating Agreement (Tail Track Agreement), which covers BNSF's use of the tail tracks east of Maritime Street. These tracks support BNSF's JIT operations but also facilitate access to rail spurs that serve (or have the potential to serve) other Port tenants. Under the Lease, the Port is responsible for pavement maintenance and BNSF is responsible for all other maintenance. Under the Tail Track Agreement, the Port is responsible to pay for and perform tail track maintenance.

BNSF has moved over 1.4 million containers through the JIT since it opened in 2002, which represents approximately 9% of all seaport cargo activity over that same time period.

ANALYSIS

BNSF is a critical Port business, along with UP, in linking the seaport to cargo points of origin and destination across the country. The Lease with BNSF has been beneficial for both the Port and BNSF; the Port is able to provide and grow competitive, efficient intermodal rail service from both Class I railroads and BNSF can offer its customers rail service at all U.S. West Coast container ports. The proposed 7th Supplemental Agreement would maintain the terms of the current Lease, except as discussed below. Staff is not proposing any changes to the Tail Track Agreement.

Length of Term. The proposed Supplemental Agreement would extend the term through December 31, 2019. BNSF would have one option to extend the term through 2024, subject to the Port and BNSF agreeing on compensation terms for the option period. The term of the Tail Track Agreement is coterminous with the term of the Lease; therefore, extension of the Lease automatically extends the Tail Track Agreement.

Compensation Structure. Under the current Lease, BNSF pays the greater of (i) a minimum annual guarantee ("MAG") or (ii) one or more agreed-upon rates ("Container Charge") times the number of containers (lifts) handled at the JIT each year. The MAG is currently \$500,000 and will remain unchanged in the proposed 7th Supplemental Agreement. However, the Container Charges would increase 3% per year and be implemented retroactively to January 1, 2014. Additionally, the annual volume thresholds (i.e., the annual number of container movements/lifts) or "breakpoints" that would trigger changes in the Container Charges would also change as described below. The proposed schedule of Container Charges for years 2013 through 2019 is as follows:

Contract Year	Container Charge Per Movement/Lift		
	0 – 96,753 lifts/yr	96,754 – 200,000 lifts/yr	Above 200,000 lifts/yr
2002-2013	\$25.00	\$10.00	NA ¹
2014	\$25.75	\$10.30	\$5.00
2015	\$26.52	\$10.61	\$5.15
2016	\$27.32	\$10.93	\$5.30
2017	\$28.14	\$11.26	\$5.46
2018	\$28.98	\$11.60	\$5.63
2019	\$29.85	\$11.95	\$5.79

The current Lease does not include increases in either the MAG or the Container Charges, so the inclusion of annual increases in the Container Charges is more desirable than current terms.

Option to Extend the Term. BNSF would have one option to extend the term five additional years, through 2024. Should BNSF exercise its option, the Port would propose a “Market Rent” for the 5-year term extension. If BNSF disagreed with the Port’s Market Rent proposal, it would make a counter rent proposal. If the parties cannot reach agreement, the Port and BNSF would resolve the dispute on the Market Rent through an arbitration process using a common appraisal-based of arbitration process.

Expansion Planning. When BNSF activity levels exceed 200,000 lifts annually, the proposed 7th Supplemental Agreement stipulates that the parties will discuss expansion planning for additional capacity, including development at the former Oakland Army Base (OAB). Current activity levels are approximately half that amount; however they can vary widely from year to year. BNSF activity peaked in 2005 at 200,000 lifts, in part due to congestion at Southern California port/rail facilities.

Business Development and Marketing Plan. Under the 7th Supplemental Agreement, BNSF and the Port would commit to work towards a domestic container transload program (international cargo transloaded from international containers into domestic containers) for the JIT. Such a program could facilitate additional rail activity through the Port while offering more value-added services to interested cargo owners. BNSF currently handles only international containers at the seaport, and uses its Stockton, CA terminal for domestic container movements. The transload program is not a fixed commitment on the part of BNSF or the Port to implement, but rather to investigate and consider the opportunity.

¹ The Lease did not include a breakpoint at 200,000 lifts. This breakpoint is new to the 7th Supplemental Agreement. Under the Lease, had volume exceeded 200,000 lifts/yr, the Container Charge would have been \$10 (same Charge as for the preceding breakpoint).

BUDGET & STAFFING

The proposed 7th Supplemental Agreement provides for a MAG of \$500,000 per year, plus additional variable rent based on cargo activity. Total revenue from the JIT is budgeted at approximately \$2.4 million in FY 2016, and would grow modestly as a result of the 3% annual increases in the Container Charges. Revenue is based on activity, which fluctuates from year to year, due to the competitive nature of intermodal cargo (i.e., this type of cargo can be routed through several port gateways).

No staffing changes or additional expenses are anticipated as a result of the proposed action.

MARITIME AVIATION PROJECT LABOR AGREEMENT (MAPLA)

The proposed action would authorize a property agreement, which does not authorize any capital improvements, so the MAPLA is not applicable. To the extent BNSF and/or the Port agree to perform capital improvements in the future, those improvements would be subject to separate negotiations and Board approvals, including the potential applicability of MAPLA.

STRATEGIC PLAN

The action described herein would help the Port achieve the following goals and objectives in the Port's Strategic Plan (<http://www.portofoakland.com/pdf/about/strategicPlan2011-2015.pdf>)

- Goal A: Objective 1: Maximize the use of existing assets.
- Goal B: Objective 1: Retain existing customers and tenants.
- Goal B: Objective 3: Price Port services to provide a highly competitive value.

LIVING WAGE

Living wage requirements, in accordance with the Port's Rules and Regulations for the Implementation and Enforcement of the Port of Oakland Living Wage Requirements (the "Living Wage Regulations"), apply to this agreement as the tenant employs 21 or more employees working on Port-related work and the tenancy agreement is greater than \$50,000. In addition, for future construction work under this agreement, prevailing wage requirements will apply.

ENVIRONMENTAL

The proposed 7th Supplemental Agreement with BNSF was reviewed in accordance with the requirements of the California Environmental Quality Act (CEQA), and the Port CEQA Guidelines. This Lease extension is categorically exempt from CEQA pursuant to the Port CEQA Guidelines, Section 15301(p), which exempts renewals, extensions or amendments to leases or license and concession agreements where the premises or licensed activity was previously leased or licensed to the same or another person, and involving negligible or no

expansion of use beyond that previously existing. The lease premises include a small parcel that was formerly under the oversight of the Regional Water Quality Control Board (RWQCB) since it was an underground storage tank site (no. 331N) at the former Fleet and Industrial Supply Center Oakland. However, the site is now classified as “completed,” and the case was closed by the RWQCB as of September 15, 2000 (site T0607592078).

GENERAL PLAN

This action does not change the use of any existing facility, make alterations to an existing facility, or create a new facility; therefore, a General Plan conformity determination pursuant to Section 727 of the City of Oakland Charter is not required.

OWNER-CONTROLLED INSURANCE PROGRAM (OCIP)/PROFESSIONAL LIABILITY INSURANCE PROGRAM (PLIP)

The OCIP/PLIP does not apply since the action does not involve any capital improvement. If a capital improvement were to be undertaken in the future, the OCIP/PLIP may apply.

OPTIONS

Staff has identified the following options for the Board:

1. Authorize a 7th Supplemental Agreement with BNSF Railway Company for continued lease of the Port’s Joint Intermodal Terminal through December 31, 2019, with one, five-year option to extend the term further to December 31, 2024. This is the recommended action.
2. Do not authorize a 7th Supplemental Agreement and direct staff to negotiate different terms and conditions with BNSF Railway Company.
3. Do not authorize a 7th Supplemental Agreement and direct staff to identify another party to lease and operate the Joint Intermodal Terminal. Staff views BNSF as a key service provider at the seaport and has not identified any other party that would be better-suited to lease the Joint Intermodal Terminal while achieving the Port’s goals of maintaining and growing competitive rail service to and from the seaport.

RECOMMENDATION

Staff recommends that the Board:

Authorize a 7th Supplemental Agreement with BNSF Railway Company for continued lease of the Port’s Joint Intermodal Terminal through December 31, 2019, with one, five-year option to extend the term further to December 31, 2024.

Attachments: Exhibit 1 - Map of JIT within seaport