

## AGENDA REPORT

**Ordinance:** Authorize the Executive Director to Approve the 8<sup>th</sup> Supplement to the Lease with Burlington Northern Santa Fe Railway Company at the Joint Intermodal Terminal, Extending the Term of the Lease through December 31, 2023, Which Would Generate an Average Annual Minimum Revenue of Approximately \$3.4 Million; and Authorize the Executive Director to Approve the First Amendment to the Tail Track Operating Agreement with BNSF to Modify Track Infrastructure; Which Together Will Result in a One-Time Expenditure of \$550,000 of Port Funds **(Maritime)**

**MEETING DATE:** 1/24/2019

**AMOUNT:** \$3.4 million annually (average minimum)  
Revenue

\$550,000 one-time  
Operating Expense

**PARTIES INVOLVED:** Burlington Northern Santa Fe, Fort Worth, Texas  
Brandt Ring, Executive Vice President

**SUBMITTED BY:** John C. Driscoll, Director of Maritime

**APPROVED BY:** Danny Wan, Acting Executive Director

**ACTION TYPE:** Ordinance

### **EXECUTIVE SUMMARY**

Burlington Northern Santa Fe Railway Company ("BNSF") leases the 85-acre Joint Intermodal Terminal from the Port, for the purposes of operating an intermodal rail yard serving cargo that is imported or exported through the Port's Maritime Area ("Seaport"). The lease agreement is currently in hold over (month to month) since its expiration in September 2014. Staff requests the Board's approval of an 8<sup>th</sup> Supplement to the lease, that would extend the term through December 31, 2023, and generate about \$3.4 million of average annual minimum revenue, modify maintenance responsibilities, and clarify miscellaneous other terms. Staff also requests approval of a First Amendment to a related agreement to modify certain track infrastructure outside BNSF's leasehold.

### **BACKGROUND**

#### **Joint Intermodal Terminal**

Burlington Northern Santa Fe Railway Company ("BNSF") has leased the Joint Intermodal Terminal Facility ("JIT", also known as Oakland International Gateway or "OIG") since 2002.

The Port built the 85-acre facility (the “Premises”) in the early 2000s, at a cost of about \$71 million partially offset by about \$22 million of grant funding. The JIT is located in the heart of the Seaport, north of Middle Harbor Road and south of the former Oakland Army Base (see Exhibit A).

BNSF has moved over 1.7 million containers through the JIT since it opened in 2002, which represents approximately 8% of all seaport cargo activity over that same time period. Activity at the JIT has generally been declining, from a historic high of 203,427 lifts in 2005 to 98,286 lifts in 2015, and 77,803 lifts in 2017. However, based on activity year-to-date, this downward trend has reversed and BNSF is forecast to handle about 100,000 TEUs in calendar year 2018. Most of the activity is empty containers, but BNSF pays for all lifts, full or empty.

BNSF and the Port amended the lease agreement for the Premises (“Lease”) seven times since its commencement in 2002. The Lease has been in month-to-month holdover since September 30, 2014. In holdover, the Port has the right to modify compensation from time to time. Staff increased compensation several times during holdover, including on January 1, 2019. Although Port Staff and BNSF have been negotiating for a new long-term (10+ years) agreement since 2014, the parties have not been able to reach consensus on the terms of such an agreement. However, the parties have reached agreement on a 5-year term extension, which is the subject of this Report.

### **Tail Track**

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 OIG 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. The Tail Track Agreement is co-terminus with the Lease and does not need to be amended for purposes of the 8<sup>th</sup> Supplemental Agreement. However, separately, Staff needs may need to modify the Tail Track Agreement to reflect the modification of certain infrastructure on the Tail Track, if such work is not within the Port’s rights under the existing agreement.

## **ANALYSIS**

### **Joint Intermodal Terminal**

BNSF is a critical Port business, along with Union Pacific Railroad, 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 a competitive offering through service by both Class I railroads, BNSF can offer its customers rail service at all U.S. West Coast container ports. Most ocean carriers calling the Port contract with BNSF.

Current fixed (minimum) revenue is about \$3.0 million per year and the per-lift rates below and above the breakpoint are \$37.57 and \$15.03, respectively. Based on current activity projections, the Port expects to receive about \$3.7 million of total revenue in calendar year 2018, of which \$3.0 million is fixed revenue. If approved, the proposed 8<sup>th</sup> Supplemental

Agreement would grow revenue and otherwise modify the existing Lease, as detailed in Exhibit B. Highlights of the key terms are as follows:

Term: Effective April 1, 2019, and expiring on December 31, 2023. No options to extend.

Compensation: Under the 8<sup>th</sup> Supplement, fixed (minimum) revenue would grow about 4% percent annually on average, from about \$3.0 million in 2018 to about \$3.7 million in 2023. The per-container rates below and above the breakpoint will increase about 4% per year on average. The breakpoint of 96,753 lifts would not change.

Security Deposit: BNSF currently has no security deposit. BNSF requested a continued waiver of the deposit, which Staff has tentatively agreed to, as consideration for BNSF's agreement to perform substantial deferred maintenance by June 2021 (see below).

Maintenance: BNSF will assume responsibility for all pavement maintenance, including deferred maintenance, which is currently the Port's obligation. The Port will reimburse BNSF a maximum of \$500,000 (estimated to occur in FY19 or FY20), for such maintenance.

Environmental: BNSF will comply with the Port's current form of Environmental Exhibit, including requirements to provide data to and confer with the Port regularly about air quality initiatives.

### **Tail Track**

The Port is obligated to maintain ingress/egress access rights to East Bay Municipal Utility District ("EBMUD") Pump Station "L," from Middle Harbor Road, which serves the Port's tenants. The location of one bumping post at the east end of the tail track has become an operational concern for EBMUD. Relocating the bumping post will allow BNSF to continue to provide safe and continuous 24/7 access for EBMUD's emergency and operations & maintenance of this sanitary sewer pump station. Staff is proposing to relocate the bumping post at a cost of about \$50,000, and amend the Tail Track Agreement to reflect the relocation of the bumping post and related modifications. Staff is not proposing any other changes to the Tail Track Agreement.

### **BUDGET & STAFFING**

The proposed compensation terms would result in the revenue (calendar year unless noted otherwise) shown in the table below. There is no impact on budgeted revenues in FY 2018-19. Please refer to the table below.

	Minimum Compensation	Compensation if Activity = Breakpoint <sup>1</sup>	Compensation Assuming 1% Activity Growth <sup>2</sup>
<b>Revenue</b>			
2018 (for reference)	\$3,018,400	\$3,635,010	\$3,683,813
2019	\$3,169,000	\$3,815,938	\$3,882,956
2020	\$3,296,000	\$3,968,808	\$4,055,075
2021	\$3,428,000	\$4,127,483	\$4,234,570
2022	\$3,565,000	\$4,292,931	\$4,422,637
2023	\$3,672,000	\$4,421,612	\$4,574,214
2019-2023 total	\$17,130,000	\$20,626,772	\$21,169,452
2019-2023 average	\$3,426,000	\$4,125,354	\$4,233,890
<b>Expense (Lease + Tail Track)</b>			
2019 or 2020	(\$550,000)	(\$550,000)	(\$550,000)
<b>Net Revenue</b>			
2019-2023	\$16,580,000	\$20,076,772	\$20,619,452

There is no staffing impact from the proposed action.

### **MARITIME AVIATION PROJECT LABOR AGREEMENT (MAPLA)**

The proposed approvals of the agreements with BNSF do not fall within the scope of the Port of Oakland Maritime and Aviation Project Labor Agreement ("MAPLA") and the provisions of the MAPLA do not apply. The MAPLA also does not apply to the Tail Track work to be performed by the Port. However, the work performed by BNSF, or its contractors, may fall within the scope of the MAPLA and the provisions of such may apply.

### **STRATEGIC PLAN**

The action described herein would help the Port achieve the following goals and objectives in the Port's Strategic Business Plan (2018-2022).

<https://www.portofoakland.com/wp-content/uploads/Port-of-Oakland-Strategic-Plan.pdf>

- Goal: Grow Net Revenues

<sup>1</sup> Breakpoint = 96,753 Lifts

<sup>2</sup> 1% growth from 100,000 lifts in 2018

## **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.

## **SUSTAINABILITY**

Port staff has reviewed the Port's 2000 Sustainability Policy and did not complete the Sustainability Opportunities Assessment Form. There are no sustainability opportunities related to this proposed action because it does not involve a development project, purchasing of equipment, or operations that present sustainability opportunities.

## **ENVIRONMENTAL**

CEQA Determination: The proposed 8th Supplemental Agreement with BNSF to extend the term through December 31, 2023, modify compensation, and change other Lease terms as described herein, was reviewed in accordance with the requirements of the California Environmental Quality Act (CEQA), and the Port CEQA Guidelines. This action 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.

## **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)**

This action is not subject to the Port's Owner Controlled Insurance Program (OCIP) as it is not a capital improvement construction project.

## **OPTIONS**

Staff has identified the following options for the Board's consideration:

- Approve the 8<sup>th</sup> Supplemental Agreement with BNSF to extend the term of the Lease through December 31, 2023, and modify other Lease terms as described herein; and approve the First Amendment to the Tail Track Operating Agreement. This is the recommended option.

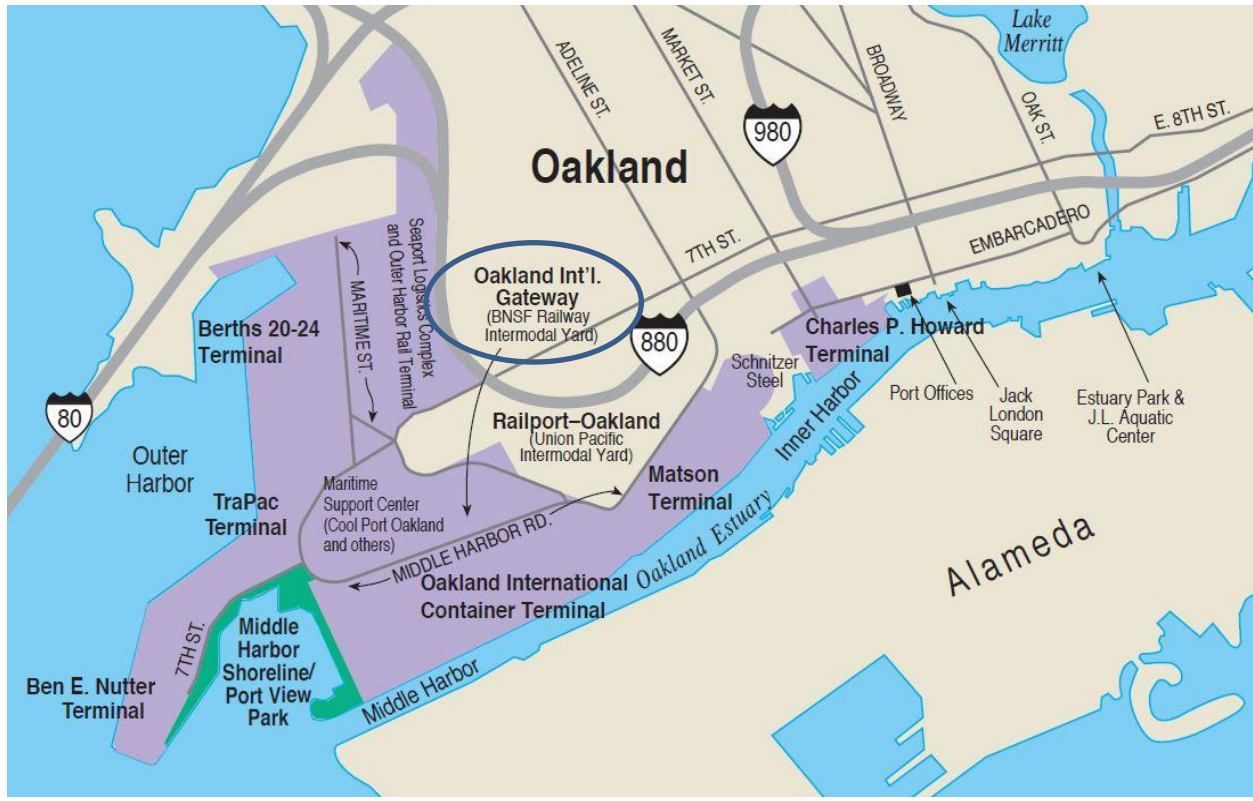
- Approve an 8<sup>th</sup> Supplemental Agreement and the First Amendment to the Tail Track Operating Agreement with different terms than those proposed, as may be directed by the Board.
- Do not approve an 8<sup>th</sup> Supplemental Agreement nor a First Amendment to the Tail Track Operating Agreement with BNSF. Under this option, BNSF could continue to occupy the Premises in month-to-month holdover; BNSF could vacate the Premises with 30 days' notice to the Port; or the Port could terminate the Lease with 30 days' notice to BNSF. Also, EBMUD may demand that the Port maintain Pump Station "L."

### **RECOMMENDATION**

Authorize Executive Director to approve the 8th Supplement to the Lease and the First Amendment to the Tail Track Operating Agreement with Burlington Northern Santa Fe Railway Company ("BNSF") at the Joint Intermodal Terminal, extending the term of the Lease through December 31, 2023, and modifying certain tail track infrastructure, all of which would generate average annual minimum revenue of approximately \$3.4 million and result in a one-time expenditure of \$550,000 of Port funds.

## Exhibit A

### Location of Premises



## **Exhibit B**

### **Term Sheet for 8<sup>th</sup> Supplemental Agreement**

Term	<ul style="list-style-type: none"><li>• Effective date = April 1, 2019</li><li>• Termination date = December 31, 2023</li><li>• No options to extend</li></ul>					
Contract Year	January – December					
Compensation	CY	CY	Breakpoint	Base	Charge	Min Rent
		Start	(lifts)	Charge	above BP	
	18	1/1/19	96,753	\$39.44	\$15.78	\$3,169,000
	19	1/1/20	96,753	\$41.02	\$16.41	\$3,296,000
	20	1/1/21	96,753	\$42.66	\$17.06	\$3,428,000
	21	1/1/22	96,753	\$44.37	\$17.75	\$3,565,000
	22	1/1/23	96,753	\$45.70	\$18.28	\$3,672,000
Basis of Compensation	<ul style="list-style-type: none"><li>• Fixed (minimum) compensation <u>and</u> activity-based (variable) compensation. Shortfall between activity and fixed compensation, if any, is paid at end of the contract year</li><li>• Variable compensation is based on movements, which have been redefined as lifts (not gate counts)</li></ul>					
Performance Deposit	<ul style="list-style-type: none"><li>• None</li></ul>					
Maintenance	<ul style="list-style-type: none"><li>• Tenant performs all maintenance, including all pavement maintenance inclusive of deferred maintenance</li><li>• If tenant uses areas for stacking that are not designated for stacking, Tenant performs all repairs at Port’s direction whenever Port deems necessary.</li><li>• Tenant agrees to perform deferred maintenance no later than June 2021</li><li>• Port reimburses \$500k for pavement maintenance</li></ul>					
Reporting	<ul style="list-style-type: none"><li>• Quarterly &amp; Annual Statements that detail the lifts through the Premises, including a breakdown of (i) Full Import and Export Movements, (ii) Empty Import and Export Movements, (iii) total number of Movements, (iv) the total number of Movements by Rail Customer, and (v) the percentage of Movements (broken down per (i) and (ii)) that were Domestic Cargo</li><li>• Rail customer reporting is confidential to max extent allowed by law</li><li>• Annual maintenance/inspection reports</li></ul>					
Domestic Cargo Limit	<ul style="list-style-type: none"><li>• Changed from 10% to 15%, maximum allowable</li></ul>					
Environmental	<ul style="list-style-type: none"><li>• Port’s Standard Environmental Exhibit</li></ul>					