

PORT ORDINANCE NO. 4511

ORDINANCE APPROVING AND AUTHORIZING THE EXECUTIVE DIRECTOR TO ENTER INTO AN EIGHTH SUPPLEMENTAL AGREEMENT GENERATING APPROXIMATELY \$3.4 MILLION OF AVERAGE ANNUAL RENT AND EXTENDING THE TERM THROUGH DECEMBER 31, 2023 AND A FIRST AMENDMENT TO THE TAIL TRACK OPERATING AGREEMENT TO MODIFY TRACK INFRASTRUCTURE WITH BURLINGTON NORTHERN SANTA FE RAILWAY COMPANY FOR THE JOINT INTERMODAL FACILITY WHICH WILL RESULT IN A ONE-TIME EXPENDITURE OF \$550,000 OF PORT FUNDS.

WHEREAS, the Board of Port Commissioners of the City of Oakland ("Board") has reviewed and evaluated the Agenda Report for Agenda Item 6.1, dated January 24, 2019 (the "Agenda Report") and related agenda materials, has received the expert testimony of Port of Oakland ("Port") staff, and has provided opportunities for and taken public comment; now, therefore

BE IT ORDAINED by the Board of Port Commissioners of the City of Oakland as follows:

Section 1. In acting upon this matter, the Board has exercised its independent judgment based on substantial evidence in the record and adopts and relies upon the facts, data, analysis, and findings set forth in the Agenda Report and in related agenda materials and in testimony received.

Section 2. The Board hereby finds and determines as follows:

A. The Port originally entered into a lease (the "Lease") for the Joint Intermodal Terminal (the "Premises") with BNSF Railway Company ("BNSF") in 2002;

B. The Port and BNSF have amended the lease seven times since 2002 with the last amendment expiring as of September 2014. Since then, BNSF and the Port have been negotiating the terms of a Lease amendment. BNSF has been leasing the Premises in holdover status since September 2014;

C. Associated with the Lease, the Port and BNSF also entered into a Tail Track Operating Agreement ("Tail Track Agreement") that covers BNSF's use of the tail tracks east of Maritime Street;

D. The Port and BNSF have reached agreement on the terms of an Eighth Supplemental Agreement to the Lease ("8th Supplement") that includes the following material terms and as is further described in the Agenda Report:

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

2. Compensation: Fixed (minimum) compensation and activity-based compensation as follows:

CY	CY Start	Breakpoint (lifts)	Base Charge	Charge above BP	Min Rent
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

3. Maintenance: BNSF performs all maintenance, including all pavement maintenance inclusive of deferred maintenance. BNSF agrees to perform deferred maintenance no later than June 2021.
4. Domestic Cargo Limit: The limit changed from 10% to 15%.
5. Reporting: BNSF agrees to provide quarterly and annual statements that detail lifts throughout the Premises; and

E. The Port and BNSF need to modify the Tail Track Agreement to modify certain track infrastructure to allow access to the adjacent utilities; and

F. The Board hereby finds and determines that the proposed actions 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.

Section 3. The Board hereby authorizes the Executive Director of the Port ("Executive Director") or his designee to:

A. Execute the proposed 8th Supplement with BNSF to modify compensation, extend the term, and provide for maintenance and reporting responsibilities as described herein and as further described in the Agenda Report, subject to approval as to form and legality by the Port Attorney.

B. Execute an amendment to the Tail Track Agreement with BNSF to modify certain track infrastructure to accommodate adjacent utilities as described herein and as further described in the Agenda Report, subject to approval as to form and legality by the Port Attorney.

C. Approve expenditure of up to \$550,000 of Port funds for reimbursement of pavement maintenance expenses as provided for in the 8th Supplement and relocation of track infrastructure as needed for the Tail Track Agreement as further provided in the Agenda Report.

Section 4. This ordinance is not evidence of and does not create or constitute (a) a contract, or the grant of any right, entitlement or property interest, or (b) any obligation or liability on the part of the Board or any officer or employee of the Board. Unless and until a separate written agreement is duly executed on behalf of the Board as authorized by this ordinance, is signed as approved as to form and legality by the Port Attorney, and is delivered to the other contracting party, there shall be no valid or effective agreement.

The Board of Port Commissioners, Oakland, California, January 24, 2019. Passed to print for one day by the following vote: Ayes: Commissioners Colbruno, Cluver, Lee, Leslie, Martinez, Story and President Butner - 7. Noes: 0.

Daria Edgerly

Secretary of the Board