

PORT ORDINANCE NO. 4618

ORDINANCE APPROVING AND AUTHORIZING THE EXECUTIVE DIRECTOR TO ENTER INTO A NINTH SUPPLEMENTAL AGREEMENT WITH BNSF RAILWAY COMPANY AT THE JOINT INTERMODAL TERMINAL TO EXTEND THE TERM THROUGH DECEMBER 31, 2024, MODIFY CERTAIN COMPENSATION RESULTING IN \$3,800,000 OF ADDITIONAL FIXED REVENUE, AND MODIFY CERTAIN DEFERRED MAINTENANCE OBLIGATIONS.

WHEREAS, the Board of Port Commissioners of the City of Oakland ("Board") has reviewed and evaluated the Agenda Report for Agenda Item 6.5, dated September 30, 2021, (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 proposed action as described herein, was reviewed in accordance with the requirements of the California Environmental Quality Act ("CEQA"), and the CEQA Guidelines. This action is categorically exempt from CEQA pursuant to the CEQA Guidelines, Section 15301, which exempts the operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of existing public or private structures, facilities, mechanical equipment, or topographical features, involving negligible or no expansion of existing or former use.

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

C. The Port and BNSF have amended the Lease eight times since 2002 with the last amendment in April 2019.

D. The Port and BNSF have reached agreement on the terms of a Ninth Supplemental Agreement to the Lease ("9<sup>th</sup> Supplement") that includes the following material terms and as is further described in the Agenda Report:

1. **Term:** The Lease will terminate on December 31, 2024.
2. **Compensation:** Fixed (minimum) compensation and activity-based compensation as follows:

Contract Year (CY)	CY Start Date	1 <sup>st</sup> BP (lifts)	2 <sup>nd</sup> BP (lifts)	Rate 1 (Rate to 1 <sup>st</sup> BP)	Rate 2 (Rate to 2 <sup>nd</sup> BP)	Rate 3 (Rate above 2 <sup>nd</sup> BP)	MAG (\$ millions)
21	1/1/22	80,348	96,753	\$44.37	\$44.37	\$17.75	\$3,565,040.76
22	1/1/23	80,348	96,753	\$45.70	\$45.70	\$18.28	\$3,671,903.60
23	1/1/24	80,348	96,753	\$47.53	\$47.53	\$19.01	\$3,818,779.74

3. **Maintenance:** BNSF performs all maintenance, including all pavement maintenance inclusive of deferred maintenance. BNSF agrees to perform deferred maintenance no later than December 31, 2023. Deferred maintenance will be performed in accordance with an annual survey of pavement conditions ("Pavement Conditions Map") and an accompanying workplan ("Work Type Map"), and as further set forth in the 9<sup>th</sup> Supplement.

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

A. Execute the proposed 9<sup>th</sup> Supplement with BNSF to extend the term, modify compensation, and modify certain deferred maintenance responsibilities as described herein and as further described in the Agenda Report, subject to approval as to form and legality by the Port Attorney.

**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 Port. 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.

**Section 5.** This ordinance shall take effect on the date of its final adoption; provided, however, that if a petition protesting the adoption of this ordinance is timely and duly submitted to the elections official of the City of Oakland in the manner required under California Elections Code § 9237, the effective date of this ordinance shall be suspended, and all actions authorized by this Ordinance shall be null and void.

The Board of Port Commissioners, Oakland, California, September 30, 2021. Passed to print for one day by the following vote: Ayes: Commissioners Butner, Colbruno, Lee, Leslie, Martinez, Story and President Cluver - 7. Noes: 0.

Daria Edgerly

Secretary of the Board