

**RIGHT OF ENTRY AND INDEMNITY AGREEMENT
FOR BRIDGE PAINTING
(State of Texas Form)**

THIS RIGHT OF ENTRY AND INDEMNITY AGREEMENT FOR BRIDGE PAINTING (the "Agreement") is made this ____ day of _____, 2009, by and between the (ENTER CITY NAME) (the "City") and UNION PACIFIC RAILROAD COMPANY ("UP").

WHEREAS, UP controls and operates a right-of-way and bridge (the "Premises") in the City of (ENTER CITY NAME AND STATE);

WHEREAS, the City desires the right to: (i) clean and paint UP's (ENTER BRIDGE NAME AND DESCRIBE THE WORK);

WHEREAS, UP is willing to permit the City to perform the Work in accordance with the terms and conditions herein set forth; and

NOW, THEREFORE, in consideration of the sum of One Dollar (\$1.00) in hand paid, other good and valuable consideration the receipt and sufficiency of which is hereby acknowledged, and the mutual covenants and promises herein contained, it is agreed between the parties as follows:

1. From the period starting from the date of execution of this Agreement, through the date that is one year from such date (the "Term"), the City, through its employees, agents, contractors, subcontractors, and/or other representatives, may, only once (meaning not on a repetitive basis) perform the Work. Notwithstanding the foregoing, providing that UP shall first have approved the specifications therefore, as set forth in Section 2 hereof, the City may also engage in periodic spot painting to remove graffiti (the "Spot Painting").
2. All specifications for the Work or Spot Painting, including but not limited to paint color and temporary attachment specifications (if any), must be submitted by the City to UP for review and approval at least thirty (30) days prior to starting the Work or Spot Painting. No Work or Spot Painting may begin until UP has approved the specifications. Upon receipt of the specifications, UP's authorized representative will determine and inform the City whether a flagman need be present and whether the City need implement any special protective or safety measures, including the use of reflective vests as well as other requirements enumerated in the section covering safety instructions. The City shall perform the Work and Spot Painting so as not to interfere with the continuous and uninterrupted use of UP tracks or other operations (the "Operations"). If the handling of the Work or Spot Painting may cause interference with the Operations, the City shall obtain written instructions from UP's authorized representative as to the proper method of handling of the Work or Spot Painting.
3. The specifications for Spot Painting must include the paint color (which must be compatible with the most recent paint applied), application method (e.g. spray, brush, etc.), and structure access/reach equipment type (e.g. ladders, man-made lifts, etc.). UP may require paint removal prior to Spot Painting for safety reasons; if so, the City must also submit a paint removal method (e.g. sand-blasting, chemical removal, etc.) to UP for approval.
4. The City may not begin the Work or Spot Painting unless the City has provided at least two (2) weeks prior written notice to UP of the intended Work or Spot Painting start date.

5. Safety is of paramount importance. The City shall take all reasonable precautions and is solely responsible for the safety of, and shall provide protection to prevent damage, injury, or loss to, all persons who should reasonably be expected to be affected by the Work or Spot Painting, including individuals performing the Work or Spot Painting, employees of UP and its consultants, visitors to the Premises, and members of the public who may be affected by the Work or Spot Painting.
6. Upon the City's request, UP will provide the City with approximate daily train schedules to assist City with planning the Work or Spot Painting schedule.
7. At no time will anyone performing the Work or Spot Painting be allowed beyond the bridge abutments on UP's property or be allowed on top of the bridge unless accompanied by UP personnel.
8. The City shall: (i) remove from the Premises upon completion of the Work or Spot Painting all supplies, equipment, waste materials, rubbish or temporary facilities used in the City's performance of the Work or Spot Painting; and (ii) restore the Premises to its original condition prior to the City's commencement of the Work or Spot Painting.
9. The City agrees to and understands that all costs associated with the Work or Spot Painting will be paid solely by the City and that UP will not make any financial contribution to the Work or Spot Painting; provided that UP shall pay for any flaggers determined by UP to be required pursuant to Section 2 of this Agreement.
10.

A. TO THE EXTENT PERMITTED BY LAW, AND SUBJECT TO SECTION 10(B) BELOW, THE CITY SHALL FULLY INDEMNIFY AND HOLD UP HARMLESS, AND DEFEND UP AGAINST ANY AND ALL LIABILITY, CLAIMS, SUITS, DEMANDS AND LOSSES ARISING FROM THE CITY'S OWN ACTS OR OMISSIONS OR FAULT RELATING TO OR ARISING OUT OF THIS AGREEMENT, THE WORK OR SPOT PAINTING.

B. NOTHING CONTAINED IN THIS SECTION OR ANY OTHER PART OF THIS AGREEMENT SHALL BE CONSTRUED TO CONSTITUTE AN AGREEMENT OR OBLIGATION OF THE CITY TO INDEMNIFY UP AGAINST LIABILITY OR LOSSES ARISING FROM UP'S OWN ACTS OR OMISSIONS OR FAULT, OR TO BE OR TO CREATE A DEBT IN VIOLATION OR ARTICLE XI, SECTION 5 OF THE TEXAS CONSTITUTION.

C. NOTWITHSTANDING SECTION 10(B) ABOVE, TO THE EXTENT NOT OTHERWISE CONTRARY TO LAW, THE CITY SHALL INDEMNIFY AND HOLD UP HARMLESS AND DEFEND UP AGAINST LIABILITY, CLAIMS, SUITS, DEMANDS AND LOSS FOR DAMAGE THAT ARE CAUSED BY OR RESULT FROM THE SOLE, JOINT OR CONCURRENT NEGLIGENCE OF UP OR ITS AGENT OR EMPLOYEE AND ARISES FROM THE BODILY INJURY OR DEATH OF AN EMPLOYEE OF:

 - (I) THE CITY;
 - (II) THE CITY'S SUBCONTRACTOR, SUPPLIER OR EQUIPMENT LESSOR;

(III) ANY LOWER-TIER SUBCONTRACTOR, SUPPLIER OR EQUIPMENT LESSOR OF THE CITY'S SUBCONTRACTOR;

(IV) ANY INDEPENDENT CONTRACTOR DIRECTLY RESPONSIBLE TO A PERSON DESCRIBED IN THESE IMMEDIATELY PRECEDING SUBPARTS "I" THROUGH "III" HEREOF.

D. IF UP NOTIFIES THE CITY OF A CLAIM FOR INDEMNIFICATION, THE CITY SHALL RESPOND IN WRITING WITHIN THIRTY (30) DAYS, UNEQUIVOCALLY ACCEPTING UP'S DEMAND AND UNDERTAKING TO INDEMNIFY UP, OR, IF THE CITY REJECTS THE DEMAND, THE CITY SHALL STATE SPECIFICALLY THE GROUNDS FOR REJECTION.

11. Any contract between the City and its contractor to perform the Work or Spot Painting herein described will include the insurance requirements for contractors set forth on Exhibit A hereto, which is incorporated by reference herein.
12. The City shall comply with all federal, state and local environmental laws and regulations in its work at the Premises and shall perform the Work or Spot Painting in an environmentally protective manner. Specifically, the City shall:
 - A. Prevent releases and spills of any materials that could harm human health or the environment, including but not limited to, hydrocarbon products, anti-freeze, spent mechanical draining, solvents, hazardous substances and hazardous wastes as defined in the Comprehensive Environmental Response, Compensation and Liability Act and the Resource Conservation and Recovery Act, respectively ("Environmental Substances").
 - B. In the event of a release or spill of an Environmental Substance, clean up such release by excavating contaminated soil, stockpiling it on an impermeable surface (i.e., Visqueen), and thereafter, properly dispose of such contaminated soil off of the Premises.
 - C. Prevent any released Environmental Substances from spreading and/or entering waterways by keeping a supply of absorbent materials on site (i.e., oil absorbent pads and booms) which shall be used for such purposes.
 - D. Furnish a copy of the bill of lading or hazardous waste manifest for any shipment of Environmental Substances off-site to UP's facility manager.
 - E. Obtain any environmental permits and prepare any environmental plans required as a result of the Work or Spot Painting and make them available to UP upon request.
 - F. Remove and properly dispose of all solid waste and rubbish on a regular basis.

The City, at its expense, shall assume all responsibility for the investigation and cleanup of any release or discharge of any Environmental Substance at the Premises that arises from the City's performance of any work, presence or other activity at the Premises. In addition to other liability terms contained in this Agreement, the City agrees to indemnify, defend and hold harmless UP, its officers, agents and employees, from and against all environmental costs and expenses, including without limitation, all environmental analysis and cleanup expenses, fines and claims, or penalties arising from any work, presence or activity of the City at the Premises.

The employees of the City shall at all times be and remain the sole employees of the City and subject to the direction, supervision and control of the City.

13. In accordance with the Hazard Communication Standard (the "HCS") issued by the Occupational Safety and Health Administration ("OSHA") (29 CFR, Part 1910.1200), UP has developed and implemented its Hazard Communication Program. At the specific UP facilities where potentially hazardous chemicals may be present, UP maintains a copy of its Hazard Communication Written Plan (the "Written Plan") which, among other things, includes a list of the hazardous chemicals that may be present at the facility involved and the availability of Material Safety Data Sheets ("MSDS"). The Written Plan is available for review by the City.

The City shall determine if the Work or Spot Painting, under normal conditions or in a foreseeable emergency, will expose the City, its officers, employees or agents to any hazardous chemicals on UP's property as listed in the Written Plan, and if so shall: (1) review the Written Plan for the specific facility involved; and (2) inform its officers, employees and agents of such hazardous chemicals and that they may review UP's Written Plan and obtain copies of applicable MSDS.

The HCS also requires that the parties to this Agreement exchange MSDS, as well as any additional information about precautionary measures necessary to protect both parties' employees where exposure may occur. The City shall provide such information to UP, its officers, employees and agents, before the City uses any hazardous chemicals (as defined in the HCS) in, on or about the Premises.

14. The City recognizes that the Premises may contain lead paint or other lead components, and the City assumes all risk and liability associated with the presence of such lead paint or other lead components. In the event that the City (or its members, agents, employees, contractors, subcontractors, and or representatives) performs surface preparation activities in connection with painting, including but not limited to chipping, scraping, or abrasive blasting of any kind, then the City shall ensure that proper lead containment measures are taken.
15. The retention of contractors by the City does not relieve the City of its obligation under the Agreement. The City shall be responsible for all work of contractors and all contractors shall be governed by the terms of this Agreement.
16. The City shall pay in full all persons who perform labor upon or provide services or materials in connection with the Work or Spot Painting. The City shall not create, permit or suffer any mechanic's or materialmen's liens of any kind or nature to be created or enforced against any property of UP for any such Work or Spot Painting performed.
17. Any notice given or required to be given to the City or UP pursuant to any provisions of this Agreement shall be given in writing and shall be personally delivered, transmitted electronically or sent by U.S. registered mail, with necessary postage prepaid, and shall be deemed to have been duly given: (a) when delivered by hand; (b) one (1) day after delivery by receipted overnight delivery; or (c) three (3) days after being mailed by certified mail or registered mail with return receipt requested, to the following:

If to the City:

(ENTER CITY NAME)

Attn: _____

Phone: () ____ - ____
Fax: () ____ - ____
Email: _____

If to UP:

Union Pacific Railroad Company
Attn: _____
1400 Douglas Street, Mail Stop ____
Omaha, NE 68179
Phone: () ____ - ____
Fax: () ____ - ____
Email: _____

18. This Agreement constitutes the entire agreement between the parties with respect to the subject matter described herein. No modification or alteration of the terms hereof shall be binding unless such modification or alteration is in writing and executed by the parties. If any provision of this Agreement is determined to be invalid, illegal or unenforceable, the remaining provisions of this Agreement remain in full force, if the essential terms and conditions of this Agreement for each party remain valid, binding, and enforceable.
19. This Agreement shall be binding upon the parties hereto and upon all persons successor in interest to said parties. This Agreement shall not be assignable by the City without the express written consent of UP.
20. This Agreement shall be governed by and in accordance with the laws of the State of Texas in the state and federal courts of _____ County, Texas.
21. The failure of any party hereto to enforce at any time any of the provisions of this Agreement or to exercise any right or option which is herein provided shall in no way be construed to be a waiver of such provision(s) as to the future, nor in any way to affect the validity of this Agreement or any part hereof or the right of either party to thereafter enforce each and every such provision and to exercise any such right or option. No waiver of any breach of this Agreement shall be held to be a waiver of any other or subsequent breach.

IN WITNESS WHEREOF, this Agreement is executed this ____ day of _____, 2009.

UNION PACIFIC RAILROAD COMPANY

(ENTER CITY NAME)

By: _____

By: _____

Its: _____

Its: _____

Attest: _____

Attest: _____

Title: _____

Title: _____

EXHIBIT A

INSURANCE REQUIREMENTS

The City shall, at its sole cost and expense, procure and maintain during the life of this Agreement (except as otherwise provided in this Agreement) the following insurance coverage:

A. **Commercial General Liability Insurance.** Commercial general liability (CGL) with a limit of not less than \$1,000,000 each occurrence and an aggregate limit of not less than \$2,000,000. CGL insurance must be written on ISO occurrence form CG 00 01 12 04 (or substitute form providing equivalent coverage).

The policy must also contain the following endorsement, WHICH MUST BE STATED ON THE CERTIFICATE OF INSURANCE: Contractual Liability Railroads ISO Form CG 24 17 10 01 (or a substitute form providing equivalent coverage) showing "Union Pacific Railroad Company Property" as the Designated Job Site.

B. **Business Automobile Coverage Insurance.** Business auto coverage written on ISO form CA 00 01 10 01 (or substitute form providing equivalent liability coverage) with a limit of not less \$1,000,000 for each accident, and coverage must include liability arising out of any auto (including owned, hired, and non-owned autos).

The policy must contain the following endorsements, WHICH MUST BE STATED ON THE CERTIFICATE OF INSURANCE: Coverage For Certain Operations In Connection With Railroads ISO form CA 20 70 10 01 (or substitute form providing equivalent coverage) showing "Union Pacific Property" as the Designated Job Site.

C. **Workers' Compensation and Employers' Liability Insurance.** Coverage must include but not be limited to:

- Contractor's statutory liability under the workers' compensation laws of the state(s) affected by this Agreement.
- Employers' Liability (Part B) with limits of at least \$100,000 each accident, \$500,000 disease policy limit \$100,000 each employee.

If the City is self-insured, evidence of state approval and excess workers' compensation coverage must be provided. Coverage must include liability arising out of the U. S. Longshoremen's and Harbor Workers' Act, the Jones Act, and the Outer Continental Shelf Land Act, if applicable.

D. **Railroad Protective Liability Insurance.** Railroad Protective Liability insurance written on ISO occurrence form CG 00 35 12 04 (or a substitute form providing equivalent coverage) on behalf of UP as named insured, with a limit of not less than \$2,000,000 per occurrence and an aggregate of \$6,000,000. A binder stating the policy is in place must be submitted to UP before any work may be commenced and until the original policy is forwarded to UP.

E. **Umbrella or Excess Insurance.** If UP utilizes umbrella or excess policies, these policies must "follow form" and afford no less coverage than the primary policy.

F. **Pollution Liability Insurance.** If the City's scope of work includes, bring any form of "hazardous" materials, to include fuel oil or gasoline not contained within their motor vehicles, onto UP's

property which is injurious in or upon land, the atmosphere, or any watercourses; or may cause bodily injury at any time the City shall provide Pollution Liability Insurance.

If required pollution liability coverage must be written on ISO form Pollution Liability Coverage Form Designated Sites CG 00 39 12 04 (or a substitute form providing equivalent liability coverage), with limits of at least \$1,000,000 per occurrence and an aggregate limit of \$2,000,000.

Other Requirements

G. All policy(ies) required above (except workers' compensation and employers' liability) must include UP as "Additional Insured" using ISO Additional Insured Endorsements CG 20 26, and CA 20 48 (or substitute forms providing equivalent coverage), and shall not be limited by the City's liability under the indemnity provisions of this Agreement.

H. Punitive damages exclusion, if any, must be deleted (and the deletion indicated on the certificate of insurance), unless (a) insurance coverage may not lawfully be obtained for any punitive damages that may arise under this Agreement, or (b) all punitive damages are prohibited by all states in which this Agreement will be performed.

I. The City waives all rights against UP and its agents, officers, directors and employees for recovery of damages to the extent these damages are covered by the workers' compensation and employers liability or commercial umbrella or excess liability insurance obtained by the City required by this Agreement.

J. Prior to commencing any work, the City shall furnish UP with a certificate(s) of insurance (except for Railroad Liability Insurance), executed by a duly authorized representative of each insurer, showing compliance with the insurance requirements in this Agreement, and a Binder of Insurance showing compliance with the Railroad Protective Liability coverage required by this Agreement.

K. All insurance policies must be written by a reputable insurance company acceptable to UP or with a current Best's Insurance Guide Rating of A- and Class VII or better, and authorized to do business in the state(s) in which the work is to be performed.

L. The fact that insurance is obtained by the City or by UP on behalf of the City will not be deemed to release or diminish the liability of the City, including, without limitation, liability under the indemnity provisions of this Agreement. Damages recoverable by UP from the City or any third party will not be limited by the amount of the required insurance coverage.