

This Settlement Agreement (Agreement) is entered into between the STATE OF CALIFORNIA AIR RESOURCES BOARD (ARB) and BNSF RAILWAY COMPANY (BNSF), 2650 Lou Menk Drive, Fort Worth, TX 76131-2830.

## RECITALS

1. The Legislature empowered ARB to address toxic air contaminants, including diesel particulate matter. (Health & Saf. Code §39650 et seq.) Pursuant to that authority, ARB adopted the Drayage Truck Regulation. (13 Cal. Code Regs. §2027.)
2. The Drayage Truck Regulation is crucial to reduce emissions and exposure to diesel particulate matter, oxides of nitrogen, and other air contaminants by setting emission standards for heavy-duty diesel-fueled vehicles transporting cargo to and from California ports and intermodal rail facilities. The regulation also requires railyard operators such as BNSF to report quarterly to ARB the details of each non-complying truck that calls at its facility, thus facilitating ARB's enforcement.
3. In particular, the regulation at section 2027(d)(6) requires the railyard operator to report, for each non-complying truck that enters the railyard, specified information regarding the dispatching motor carrier, as well as the following vehicle-specific information:
  - a. entry date and time;
  - b. registered owner's name;
  - c. operator's name;
  - d. operator's license number;
  - e. drayage license plate number; and
  - f. drayage truck's vehicle identification number (VIN).
4. Failure to submit any information required by the regulation is a violation. (13 Cal. Code Regs. §2027(g).)
5. California Health & Safety Code section 39674 provides that one who violates the Drayage Truck Regulation is strictly liable for a penalty of up to \$10,000 for each violation.
6. ARB contends that for the reporting periods 2010 – 2016 BNSF failed to comply with the regulation by failing to report all of the information required by section 2017(d)(2) of the regulation, including Vehicle Identification Numbers (VINs), accurate license plate numbers for the non-complying trucks, and failing to correctly differentiate compliant from noncompliant trucks calling at the company's six intermodal railyards. Those errors and omissions impaired ARB's ability to enforce the Drayage Truck Regulation.
7. In reaching this settlement, ARB considered a variety of circumstances, including whether the company self-reported the violation, the size and complexity of the violator's operations, the nature, magnitude, and duration of the violation, any harm to

the environment or the regulatory program, efforts the violator took to prevent the violation and to correct it, and the financial burden to the violator.

8. In this matter, there were a number of mitigating factors, including that this is the first time ARB has noted the company as being in violation, the company has cooperated with ARB's investigation, and the company has agreed to employ new equipment and practices expected to allow for a high degree of compliance in future quarterly reports.

9. To resolve these alleged violations, BNSF has taken, or agreed to take, the actions enumerated below. ARB accepts this Agreement in termination and settlement of this matter.

10. In consideration of the foregoing, and of the promises and facts set forth herein, the parties desire to settle and resolve all claims, disputes, and obligations relating to the above-listed violations, and voluntarily agree to resolve this matter by means of this Agreement. Specifically, ARB and BNSF agree as follows.

#### **TERMS**

11. BNSF will make the payments set forth in this paragraph and paragraph 12. First, BNSF will pay a penalty of \$95,000. Within 60 days following execution by all parties of this Agreement, BNSF shall deliver a cashier's check or money order in the sum of \$95,000 made payable to the "Air Pollution Control Fund."

The check should note "BNSF 2017 Drayage Settlement" in the memo section. BNSF shall send (1) a copy of the signed settlement agreement, (2) check, and (3) the payment transmittal form (Attachment A) to:

Air Resources Board, Accounting Office  
P.O. Box 1436  
Sacramento, CA 95812-1436

and send the original settlement agreement and copy of the check to:

Debbi Klossing  
Manager  
Enforcement Division  
Air Resources Board  
9480 Telstar Avenue, Suite 8  
El Monte, California 91731

12. In addition, as mitigation for past violations, within 60 days of executing this Agreement, BNSF will sign and comply with the Memorandum of Agreement, attached,

regarding Air Filtration Systems. Pursuant to that agreement, BNSF shall send a check in the amount of \$625,000 to the South Coast Air Quality Management District.

13. It is further agreed that the payments described in the prior paragraphs are payable to a governmental unit and punitive in nature, rather than compensatory. Therefore these payments, arising from the facts described in recital paragraphs 1 – 9, are non-dischargeable under 11 United States Code §523(a)(7).

14. Beginning July 1, 2017, when drayage trucks arrive at any BNSF intermodal railyards subject to the Drayage Truck Regulation, in each case BNSF will either:

- a. record the information required by section 2027(d)(6) of the Drayage Truck Regulation for subsequent reporting to ARB (if the vehicle is not registered in the Drayage Truck Registry and fully compliant with the Drayage Truck Regulation);  
or
- b. divert the vehicle from the facility.

The railyards subject to this paragraph currently are Oakland OIG, Los Angeles/Commerce, Hobart, Richmond, San Bernardino, and Stockton.

15. ARB will be granted access to observe intermodal railyard gate procedures at any time.

16. This Agreement shall apply to and be binding upon BNSF, and any receivers, trustees, successors and assignees, subsidiary and parent corporations and upon ARB and any successor agency that may have responsibility for and jurisdiction over the subject matter of this Agreement.

17. This Agreement constitutes the entire agreement and understanding between ARB and BNSF concerning the subject matter hereof, and supersedes all prior negotiations and agreements between ARB and BNSF concerning the subject matter hereof.

18. No agreement to modify, amend, extend, supersede, terminate, or discharge this Agreement, or any portion thereof, is valid or enforceable unless it is in writing and signed by all parties to this Agreement.

19. Each provision of this Agreement is severable, and in the event that any provision of this Agreement is held to be invalid or unenforceable, the remainder of this Agreement remains in full force and effect.

20. This Agreement shall be interpreted and enforced in accordance with the laws of the State of California, without regard to California's choice-of-law rules.

21. This Agreement is deemed to have been drafted equally by the Parties; it will not be interpreted for or against either party on the ground that said party drafted it.

### **The Penalty's Basis**

22. Health & Safety Code section 39619.7 requires ARB to explain the manner in which the penalty was determined, the law on which it is based, and whether that law prohibits emissions at a specified level. ARB has considered all relevant factors, including those listed at Health & Safety Code section 42403, has explained the manner in which the penalty amount was calculated, has identified the provision of law under which the penalty is being assessed, which provision does not prohibit the emission of pollutants at a specified level. That information, some of which is also elsewhere in this settlement agreement, is summarized here.

**The manner in which the penalty was determined, including any per-unit penalty.** Penalties must be set at levels sufficient to deter violations. The penalties in this matter were determined based on all relevant circumstances, including the unique circumstances of this case, and the eight factors specified in Health & Safety Code section 42403. ARB considered the reporting entity's size and complexity, the extent to which the monitoring and reporting deviated from requirements, the cause of any errors and omissions, and the magnitude of any errors. Those circumstances were considered together with the need to remove any economic benefit from noncompliance, the goal of deterring future violations and obtaining swift compliance, penalties sought in other cases, and the potential costs and risk associated with litigating these particular violations. Penalties in future cases might be smaller or larger.

In this matter the penalty plus the payment pursuant to paragraph 12 equates to \$10,000 for each incomplete quarterly report from BNSF's six intermodal railyards during the prior three years. The penalty was discounted based on the fact that the violation was a first time violation, and the company made diligent efforts to comply and to cooperate with ARB's investigation.

**The legal provisions under which the penalty was assessed and why those provisions are appropriate.** The penalty is based on Health & Safety Code section 39674, which governs violations of air toxic control measures such as the Drayage Truck Regulation.

**Whether the governing provisions prohibit emissions at a specified level.** The Drayage Truck Regulation prohibits drayage truck emissions above a stated level. Because details concerning the operation of non-compliant trucks at BNSF railyards are not available, it is not possible to calculate excess emissions.

23. The penalty was based on confidential settlement communications between ARB and BNSF. The penalty is the product of an arms length negotiation between ARB and the company and reflects ARB's assessment of the relative strength of its case against


the company, the desire to avoid the uncertainty, burden and expense of litigation, to obtain swift compliance with the law and to remove any unfair advantage that the company may have secured from its actions.

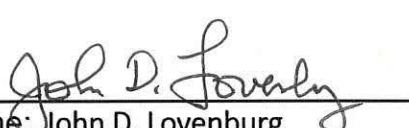
24. In consideration of the payments and undertakings in paragraphs 11, 12, and 14, above, ARB hereby releases BNSF and its receivers, trustees, successors and assignees, subsidiary and parent corporations from any claims the ARB may have based on the circumstances described in paragraph 6, above. Failure to fulfill the requirements in paragraphs 11, 12, and 14 shall void this agreement. Furthermore, any incentive funding conditioned on resolving outstanding compliance issues will be immediately repayable.

25. The undersigned represent that they have the authority to enter into this Agreement.

**California Air Resources Board**

**BNSF Railway Company**

By:   
Name: Richard W. Corey  
Title: Executive Officer

By:   
Name: John D. Lovenburg  
Title: Vice President, Environmental

Date: 4/17/2017

Date: April 4, 2017