

# **“INSURING” THE RAILROAD’S GENERAL LIABILITY RISKS:**

## **PRACTICAL CONSIDERATIONS WHEN NEGOTIATING WITH OUTSIDE CONTRACTORS**

**Midwest Claims Conference  
Bloomington, Minnesota  
October 27-28, 2005**

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**“INSURING” THE RAILROAD’S GENERAL LIABILITY RISKS:  
PRACTICAL CONSIDERATIONS WHEN NEGOTIATING WITH OUTSIDE CONTRACTORS<sup>1</sup>**

Risks associated with railroads are unique. Because railroad rights-of-way intersect thousands of non-railroad-owned properties and thoroughfares, there are endless potentials for liability. Risks associated with railroad properties which do not involve rights-of-way are only slightly less due to the unique nature of the industry.

The risks are compounded when a railroad allows contractors to access railroad property. This access can occur when the contractor performs work for the railroad, or when a contractor must access or traverse railroad properties or rights-of-way in order for those contractors to perform work for others. Once a loss occurs, it is not uncommon to see a contractor’s employee sue the Railroad, a third party sue the Railroad, or even the contractor itself bring suit against the Railroad.

Railroads are, for the most part, self-insured, and thus highly motivated to offload liability in as many ways as possible. *Commercial Liability Insurance* (International Risk Management Institute, Inc.), at VI.R.1 (July 2002). Railroad risk management is most effective when it can prospectively offload its risk to another. Through insightful risk management, Railroads have effectively utilized the following strategies to either offload or avoid potential liabilities:

- Indemnification agreements with the Contractor’s Commercial General Liability (“CGL”) policy insuring the obligation:

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<sup>1</sup> These materials address contractor and insurance considerations which relate to Commercial General Liability issues. Therefore, the scope of these materials does not include additional considerations for the Railroad in regards to additional risks such as Commercial Automobile issues.

- This protection insulates the Railroad against claims brought by others to, at a minimum, indemnify the Railroad for the Contractor’s fault in causing injury to a third person, or, if permissible, to indemnify the Railroad for the Railroad’s own fault in causing the loss.
- Additional Insured status under the Contractor’s CGL policy:
  - This protection is intended to provide the Railroad with direct insurance coverage for the loss at issue.
- Purchasing Railroad protective liability policies:
  - This protection provides direct primary occurrence coverage to the Railroad for risks which may otherwise be excluded under commercial general liability policies.

These materials overview each of these risk management tools, discuss how each separate tool provides maximum (and many times duplicative) protection to the Railroad, and address some practical considerations for use in the Railroad’s negotiation with Contractors. In addition, these materials outline a series of clauses and endorsements the Railroad should look for in Contractor policies once they are obtained.

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### **INDEMNIFICATION AGREEMENTS**

Indemnification agreements contractually obligate one party to indemnify, and many times defend, another against losses arising from the subject matter of the contract. Most jurisdictions interpret the construction and effect of indemnification agreements as a matter of law. See e.g., Art Goebel, Inc., v. North Suburban Agencies, 567 N.W.2d 511, 515 (Minn. 1997). “A party may

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contract to indemnify another for damages or injuries caused by the negligence of the indemnitee and beyond the control of the indemnitor.” Christy v. Menasha Corp., 297 Minn. 334, 211 N.W.2d 773, 777 (1973). Most courts will enforce the scope of an unambiguous indemnification agreement even if it indemnifies for the indemnitee’s own negligence unless it runs afoul of public policy or statutory considerations. Therefore, it is important to understand how the state law of the jurisdiction involved will interpret the provision before it is proposed in a Contractor Agreement.

Typically, some form of nexus or connection between the liability and the project is required in order to enforce the indemnification agreement. Minnesota, for example, requires that there be a temporal and geographic nexus, or a causal nexus, between the contractor’s work and the injuries or damages at issue. Anstine v. Lake Darling Ranch, 305 Minn. 243, 249, 233 N.W.2d 723, 727 (1975), overruled on other grounds, Farmington Plumbing & Heating Co. v. Fischer Sand and Aggregate, Inc., 281 N.W.2d 838, 840 n. 4 (Minn. 1979). A temporal nexus exists between the contractor’s work and the injury where the worker’s injury occurs while the worker is preparing for work, or in the process of working, but not after the completion of the work. Fossum v. Kraus-Anderson Const. Co., 372 N.W.2d 415, 418 (Minn. App. 1985). A geographic connection exists between the injury and the contractor’s work if the injury is sustained on the job site, regardless of its cause. Id. at 417-18. Alternatively, a causal nexus exists when, “but for” the work, the injury would not have occurred. National Hydro Systems v. M. A. Mortenson, 528 N.W.2d 690, 693 (Minn. 1995).

As noted above, indemnification agreements, and especially those which seek to indemnify a Railroad for its own negligence, may be void or unenforceable either because of public policy or

statutory considerations. The most common statutory prohibition against indemnification for an indemnitee's own fault are the Construction Anti-Indemnification Statutes now in place in well over 40 states. 3 Bruner and O'Connor on Construction Law, § 10:77, p. 917 (2002). Specific statutory prohibitions vary from state to state, and therefore the jurisdiction's statute should be consulted if the Contractor will be engaging in construction activities. The statutes generally either prohibit the indemnitee from assuming the indemnitor's sole negligence, limit the indemnitee's protection to only the amount of fault of the indemnitor, or contain atypical or miscellaneous limitations. *Id.* Minnesota's statute, for example, is uniquely formatted to prohibit a Contractor from indemnifying a Railroad in a construction contract unless the Contractor obtain a policy to insure the indemnification obligation. Minn. Stat. Ch. 337.

Some jurisdictions may void an indemnification contract under various public policy reasons. An ambiguous clause may limit the scope of an indemnification agreement. In addition, some courts look to whether, at the time of contracting, there was a great disparity of bargaining power between the parties. For example, in *Cook v. Southern Pacific Trans. Co.*, 623 P.2d 1125 (Or. App. 1981), a court invalidated an indemnification clause where the agreement was on a form prepared by the railroad, did not specifically allocate risk of third-party negligence (the cause of the injury to the railroad's employee), and the railroad was under a broad duty of care pursuant to the Federal Employers Liability Act ("FELA"). Despite these "legal" reasons, it appears what motivated the court was the fact the Contractor was financially unable to actually perform the indemnification obligation as he was a single individual who took on a job to demolish and remove an abandoned

station house for the sum of \$1,500. Assuming what in effect was the railroad's liability under FELA was just too great of a disparity to allow the court to enforce the agreement.

Despite careful drafting, many indemnification agreements do not fully detail the scope of the obligation imposed on the Contractor, and therefore may be considered ambiguous by a later-reviewing Court. For example, typical indemnification agreements impose an obligation for the Contractor to "defend" or "fully defend" the Railroad. These words, however, may only obligate the contractor to defend the Railroad for the claims actually indemnified. This scope of defense, as discussed below, is a much more narrow than that provided by an insurance policy. These obligations also raise the question of which party, the Contractor or the Railroad, will control the defense of the claim or suit. In addition, it may be unwise to have an indemnitor "defend" a Railroad in situations where the Contractor is also a party to the lawsuit.

Another concern about indemnification agreements typically utilized in Railroad/Contractor Agreements is that the scope of the type of injury indemnified may not be as broad as the Railroad requires. Typically, indemnification agreements require "bodily injury" and "property damage" to be the basis for the damages sought and for which the Contractor indemnifies the Railroad. However, especially in an age where security concerns predominate the industry, the Railroad may have additional exposures beyond physical injury to a person or property. There may be situations where a person may claim a more intangible injury such as those alleged in false arrest, detention or malicious prosecution matters. There may well be other matters involved with a project which potentially involves a constructive eviction of a property owner adjacent to the project, or some type

of libel or slander. Indemnification Agreements should be looked at to determine if the scope of the injury involved needs to be expanded to include protection from claims of personal injury or advertising injury such as these.

Finally, indemnification agreements raise collectability issues in that the Contractor may not be in a position later to deliver the bargained-for right of the Railroad.

### **INSURING THE INDEMNIFICATION OBLIGATION**

The Railroad's indemnification right is only as valuable as the Contractor's balance sheet, or the Contractor's ability to insure the obligation. Since many contractors' balance sheets are not attractive to a railroad, the latter option is the only viable means of assuring the railroad that the obligation will be performed if needed.

Normally, the Contractor's CGL Policy will contain some form of coverage for indemnification agreements. However, the coverage may not be sufficient to insure the agreement with the Railroad. Therefore, the Railroad should insist that the Contractor procure contractual liability coverage which is sufficient to protect the obligation provided to the Railroad. This duty to procure clause may also assist the Railroad in defeating a state's Anti-Indemnification Statute. See e.g., Minn. Stat. § 337.05, Subd. 2; *Holmes v. Watson-Forsberg Co.*, 488 N.W.2d 473 (Minn. 1992).

The indemnification obligation running in favor of the Railroad (unlike other parties) often runs afoul of the Contractor's CGL Policy's Contractual Liability Exclusion. Specifically, typical CGL coverage for bodily injury or property damage is excluded if "the insured is obligated to pay

damages by reason of the assumption of liability in a contract or agreement.” See e.g., Insurance Services Organization (“ISO”) Commercial General Liability Form CG 00 01 10 01 at p. 2.<sup>2</sup> Therefore, unless an exception to the exclusion applies, the main provision of this exclusion bars coverage for the Contractor’s liability to indemnify the Railroad.

The Contractual Liability Exclusion does contain an exception which restores coverage for liabilities “assumed in a contract or agreement that is an ‘insured contract,’ provided the bodily injury or property damage occurs subsequent to the execution of the contract or agreement.” *Id.* The standard insurance form’s definition of an “Insured Contract,” however, does not include indemnity obligations which would arise in most scenarios where the Contractor would either be doing work for the Railroad, or be accessing Railroad property to perform work for another. Specifically, while an indemnification agreement taken on in a sidetrack agreement would be covered, similar obligations in an easement or license agreement are not covered when the agreement is “in connection with construction or demolition operations on or within 50 feet of a railroad.” *Id.* Also, the indemnification obligation in favor of the Railroad is not insured when the “‘bodily injury’ or ‘property damage’ aris[es] out of construction or demolition operations, within 50 feet of any railroad

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<sup>2</sup> The Insurance Services Organization (“ISO”) publishes “standard” insurance forms which are promulgated from time to time by the industry. “CG” forms address commercial general liability risks. Each CG form is designated by a set of four two-digit numbers. The first two sets of numbers (here 00 01) describe the type of form involved (here, the commercial general liability base coverage form). The second two sets of numbers describe the edition date of the form (here 10 01 (October 2001)). It is absolutely imperative that ISO forms be identified, not just by the form number, but by the edition date as significant changes have taken place to all forms in the years since each form was originally issued.



property and affecting any Railroad bridge or trestle, tracks, road beds, tunnel, underpass, or crossing.”

The insurance industry recognizes that Railroads require coverage for the indemnification set forth in its Contractor Agreements. Therefore, insurers will usually agree to have the Contractor’s CGL Policy endorsed with a standard ISO Form, number CG 24 17 10 01 (“Contractual Liability – Railroads”), to eliminate Railroad-related limitations to Insured Contract coverage discussed above. Form CG 24 17 10 01 is a scheduled form which requires the Railroad to be listed on the form, as well as a description of the “Designated Job Site.” The “Designated Job Site” description should be sufficiently broad to encompass all potential areas which might be impacted by the Contractor’s operations or work.

However, simply because the “Contractual Liability – Railroads” form is available does not mean that the insurer will automatically add the Endorsement to the Contractor’s policy. As more fully discussed below, in 2004, the insurance industry modified several of its “Additional Insured” standard endorsement forms to potentially severely limit the scope of coverage available under a Contractor’s CGL policy. This modification has also been implemented in the industry’s revisions to the “Insured Contract” definition in the endorsements addressing a Contractor’s contractual liability to a railroad. In conjunction with these changes, ISO issued a new form CG 24 26 07 04 designed to limit an indemnitee’s contractual liability coverage to only bodily injury or property damage that “is caused, in whole or in part, by [the Contractor] or by those acting on your behalf.” Id. This restricts a Contractor’s coverage for its indemnification obligation in two respects. First,

the standard form Insured Contract definition did not contain any nexus requirement between the Contractor's acts or omissions and the injury or damage. Therefore, so long as the contract was an Insured Contract, there was coverage, even if the Contractor was not at fault. This Endorsement requires that there be a causal link between the bodily injury or property damage and the (negligent?) acts or omissions of the Contractor. Second, coverage designed to protect a Contractor from its indemnification obligation is now lost if the indemnitee is solely at fault for the injury or damage at issue.

For some reason, when the ISO changes to the Additional Insured forms and the Insured Contract definition were implemented in 07 04, ISO failed to revise the "Contractual Liability – Railroads" form discussed above. ISO sought to remedy this problem with the issuance of a new form, CG 24 27 03 05, which is designed to replace CG 24 17. This new form mirrors the changes discussed in regards to the 07 04 Amendment of the Insured Contract Definition. The Contractor's contractual liability coverage for bodily injury or property damage only applies if the injury or damage is caused in whole or in part by the named insured or those acting on behalf of the named insured. This restricts a Contractor's coverage for its indemnification obligation to the Railroad in the same two respects as discussed above. First, Form CG 24 17 10 01 did not contain any nexus requirement between the Contractor's acts or omissions and the injury or damage. Therefore, so long as the contract was an Insured Contract, there was coverage, even if the Contractor was not at fault. Second, indemnification coverage for the Contractor is now lost if the Railroad is solely at fault for the injury or damage at issue.

### **Limited Contractual Liability Coverage for Personal and Advertising Injury**

**Endorsement:** If the Railroad expands the scope of the indemnification involved in the agreement to include personal and advertising injuries, an additional ISO Form may be of interest. The Contractor's CGL Policy, if it follows standard language, will likely include coverage for personal injury and advertising injury. However, this protection contains a broad exclusion to bar coverage for personal injury and advertising injury "for which the insured has assumed liability in a contract or agreement." Form CG 00 01 10 01 at p. 6. Therefore, even if the Railroad bargained for indemnification of these additional liabilities, there would not usually be coverage available for the Contractor for the obligation.

The insurance industry has recognized that contractual liability coverage for at least some of these liabilities is marketable. ISO has issued a Form CG 22 74 10 01, entitled "Limited Contractual Liability Coverage for Personal and Advertising Injury" to address this issue. This is a scheduled form which requires the designated contract or agreement to be listed on the endorsement. If the endorsement is attached to the Contractor's policy, the Contractor would have coverage for an indemnification agreement which assumes the Railroad's liability for personal injury related to false arrest, detention and imprisonment.

Because the insurance industry has this limited endorsement, it may well be that the Contractor's CGL carrier would reject attempts to expand the exceptions in this endorsement on a manuscript basis to have the Contractor covered for all contractually-assumed personal injury and

advertising injury liability. However, this limited indemnification coverage for some personal injury and advertising injury offenses is better than nothing.

**Defense Fees and Costs Payment:** Even if there is Insured Contract coverage for settlements or judgments under the Contractor's CGL policy for bodily injury, property damage or other injury, there is a question as to how the Railroad's defense fees, costs and disbursements will be paid. The Contractor's CGL policy contains two separate provisions which may be applicable to those amounts. The first provision is found in the standard CGL Policy's "Supplementary Payments" provision. This provision states that, so long as the following conditions are met, the Contractor's CGL carrier will defend the Railroad in an action where both the contractor and the Railroad are named as defendants:

- a. The "suit" against the Railroad seeks damages for which the insured has assumed the liability of the Railroad in a contract or agreement that is an "insured contract";
- b. The Contractor's CGL policy applies to the liability assumed by the Contractor;
- c. The obligation to defend, or the cost of the defense of, the Railroad has also been assumed by the Contractor in the same "insured contract";
- d. The allegations in the "suit" and the information the Carrier knows about the "occurrence" are such that no conflict appears to exist between the Railroad's and Contractor's interests;
- e. The Railroad and the Contractor each ask the Carrier to conduct and control the defense of the Railroad, and further agree that the Carrier may assign the same counsel to defend both the Contractor and the Railroad; and
- f. The Railroad:

- (1) agrees in writing to:
  - (a) cooperate with the Carrier in the investigation, settlement or defense of the “suit”;
  - (b) immediately send the Carrier copies of any demands, notices, summonses or legal papers received in connection with the “suit”;
  - (c) notify any other Insurer whose coverage is available to the Railroad; and
  - (d) cooperate with the Carrier with respect to coordinating other applicable insurance available to the Railroad; and
- (2) provides the Carrier with written authorization to:
  - (a) obtain records and other information related to the “suit”; and
  - (b) conduct and control the defense of the Railroad in such “suit.”

ISO Form CG 00 01 10 01 at p. 8.

So long as these numerous conditions are met, the carrier will pay the defense expenses “in addition to limits” of the Contractor’s indemnity coverage (i.e., the defense expenses will not erode the indemnity limits of insurance).

If the Supplementary Payments provisions do not apply, there is another provision which is available to pay for the defense fees and costs. This language is found in the policy’s bodily injury and property damage “Contractual Liability Exclusion:”

“Solely for the purposes of liability assumed in an “insured contract,” reasonable attorneys’ fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of ‘bodily injury’ or ‘property damage,’ provided:

- (a) Liability to such party for, or for the cost of, that party's defense has also been assumed in the same 'insured contract'; and
- (b) Such attorneys' fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceedings in which damages to which this insurance applies are alleged."

ISO Form CG 00 01 10 01 at p. 2.

This provision provides fallback protection for the Railroad-indemnitee to confirm that, if defense expenses are not paid under the contractor's CGL policy's supplemental payments provisions, the defense costs will nonetheless be paid. This language is much more passive than the onerous conditions set forth in the policy's Supplementary Payments provision. Most importantly, payments of defense fees and costs are not conditioned on the Insurer controlling the defense. However, this comes at a "cost" of the defense fees and costs coming out of the CGL policy's indemnity limits, thereby eroding those limits.

Of note, there is no similar provision contained in the personal injury and advertising injury Contractual Liability Exclusion. This is logical given that the exclusion is very broad based and does not contain the exceptions set forth in the policy's bodily injury and property damage counterpart. However, the concept of paying defense fees and costs seen is not in the Limited Contractual Liability Coverage for Personal and Advertising Injury Endorsement discussed above either.

The changes to the Supplementary Payment Provisions and the Contractual Liability Exclusion addressing defense expenses are a fairly recent addition to the standard form CGL coverage. Prior to these provisions being part of the policy, numerous coverage disputes arose as to whether defense expenses were included within the "assumption of tort liability of another." As

a practical matter, these provisions now, at a minimum, allow the CGL carrier to immediately pick up the Railroad's defense, subject to resolving whether the defense is in addition to limits or eroding the coverage, depending on the applicability of these parts of the policy.

An example of the difficulties caused by the lack of this additional language and the supplementary payments in the contractual liability exclusion is seen in a recent Minnesota case, Soo Line Railroad Co. v. Brown's Crew Car of Wyoming, 694 N.W.2d 109 (Minn. App. 2005). In Brown's, the contractor agreed to indemnify and defend the railroad for any loss related to the car transportation services provided by the contractor. An automobile accident injured two of the railroad's employees, who later sued several third parties. One of the third parties in turn sued the railroad for indemnification or contribution. The railroad tendered the suit to the contractor under the indemnification agreement in place between the parties. The contractor refused to defend the railroad. Ultimately, the underlying case was settled, apparently without the railroad participating in funding any part of the settlement.

The carrier challenged the railroad's claim the carrier owed the contractor for the contractor's obligation to defend the railroad. The carrier argued that the contractor's assumption of the obligation to pay defense fees and costs was not an assumption of "tort liability" of the railroad, especially when the railroad was not found at fault in the underlying litigation. Such an interpretation, which had support in at least one other jurisdiction, would have left the contractor obligated to pay the railroad's defense expenses in any situation where the railroad was ultimately not found at fault

(either because of settlement without contributing to the settlement or by court Judgment) despite the fact the railroad had been sued for tort liability.

The court rejected the CGL carrier's technical application of the Insured Contract language. In so doing, the Court determined that defense costs are inseparable from the underlying events of the accident which gave rise to the indemnification claim. Since the fees and costs were incurred in defense of a tort claim, they are compensable to the railroad under the indemnification agreement, and are insured under the exception to the Contractual Liability Exclusion as an "Insured Contract." The Court was not swayed by the carrier's argument that the attorneys' fees and legal expenses were not a claim for liability to pay for bodily injury, but were a claim for liability to pay fees and expenses, items which are not bodily injury.

In sum, Brown's is noteworthy for the types of problems policyholders faced prior to the time the Supplementary Payment Provision and the Contractual Liability Exclusion were changed to address defense expenses. These modifications no doubt meet with a Railroad's expectation of being reimbursed in a timely fashion for defense expenses which are subject to the indemnification agreement. Therefore, it is likely scenarios such as Brown's should not arise with any frequency in the future.

**Control of the Railroad's Defense Pursuant to the Indemnification Agreement:** An indemnification agreement generally will contain language compelling the indemnitee to "defend" or "fully defend" the indemnitor. What does this language mean, especially if a Railroad drafts the provision such that a Contractor can argue the words are ambiguous? It is not unheard of for a



Contractor to try to limit its defense obligation to only those claims for which the Railroad may obtain indemnity. Therefore, if multiple claims are brought against the Railroad, some of which are subject to the indemnification clause and some are not, a Contractor may well be required to *only* defend the Railroad on those claims for which indemnity may later be sought. This would ultimately require a tedious allocation of attorneys' fees and costs by defense counsel between covered and uncovered claims in order to determine which entity may be responsible for paying the defense expenses. Therefore, the Railroad may want to consider adding a clause to the indemnification provision requiring the Contractor to fully defend the insured on all claims or causes of action asserted so long as any one claim or cause of action is subject to the defense obligation. In addition, the Railroad may wish to include a provision in the Contractor Agreement which permits the Railroad to control its defense subject to the Railroad's consenting to a waiver of that right.

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#### **ADDITIONAL INSURED COVERAGE**

An additional time-tested approach to offload the Railroad's risk is to compel the Contractor to add the Railroad as an Additional Insured on the Contractor's CGL policy. Additional Insured status provides the Railroad with an attractive risk transference mechanism, usually at minimal costs incurred by the Contractor. The practice is widespread and well accepted within the insurance industry.

Despite its “common” nature, there are numerous pitfalls involved with the Additional Insured status which could limit or render the protection illusory. Therefore, a Railroad should be mindful of the snares which await an attempt to obtain, and then later collect on, Additional Insured coverage.

Preliminarily, a few states have enacted versions of their Anti-Indemnification Statutes to not only prohibit the transference of the obligation to pay the indemnitee’s fault through an indemnification agreement, but to also prohibit the indemnitee from compelling the Contractor to procure CGL coverage by adding the indemnitee as an Additional Insured under its CGL policy. Two examples of such statutes are seen in Oregon and New Mexico. Oregon’s Anti-Indemnification Statute, Ore. Stat. § 30.140, has recently been interpreted in Walsh Constr. Co. v. Mutual of Enumclaw, 104 P.3d 1146 (Or. Jan. 27, 2005) in just such a fashion. In Walsh Constr., the Oregon Supreme Court held that Oregon’s Anti-Indemnification Statute in construction contracts is drafted in a manner which voids any clause compelling the indemnitor to also name the indemnitee as an Additional Insured under its Commercial General Liability policy. Therefore, it is incumbent to determine if the jurisdiction’s statutes and caselaw permit the imposition of an Additional Insured status in the Contractor’s CGL policy.

The Railroad also should consider whether the endorsement utilized actually provides the coverage intended by the parties. This involves an analysis of the Contractor’s CGL policy provisions to determine what “standard” language is being used by the Contractor’s Carrier. ISO has developed several Additional Insured forms which are used in various situations. Typically, a Railroad will see a Carrier has endorsed a version of ISO Form CG 20 10, or Form CG 20 26, onto its Contractor’s

CGL policy in response to a request for Additional Insured status. Form CG 20 10 is the most common endorsement utilized. *Commercial Liability Insurance* (International Risk Management Institute, Inc.), at VI.H.10 (Nov. 2004). There are other Additional Insured forms which are available, but are generally not considered appropriate in a Railroad/Contractor situation. All Additional Insured forms are scheduled forms which require the Endorsement to name the Additional Insured in the schedule before coverage can attach.

In 2004, the insurance industry made comprehensive changes to its Additional Insured Endorsements. All Additional Insured forms were “updated” in “07 04” editions to “clarify” the scope of coverage the Additional Insured is provided under the Contractor’s CGL policy. Unfortunately, this “clarification” likely has the result of reducing, sometimes severely, the scope of CGL coverage the Railroad may have under the Contractor’s CGL policy. The following details how these changes impact the scope of coverage.

Prior to the insurance industry’s 2004 standard policy language revisions, Additional Insured status conveyed coverage to a Railroad with respect to liability “arising out of” either the Contractor’s “work” or “ongoing operations” (depending on the edition of the form) performed for a Railroad. “Arising out of” is not the same as a “proximate cause” or even a “causal” relationship. Instead, it denotes a more tenuous relationship under which coverage would not be provided “but for” the connection between the Named Insured Contractor’s activities and the Additional Insured Railroad’s liability. “Arising out of” in essence means originating from, or having its origin in,

growing out of, or flowing from. See, Associated Indep. Dealers, Inc., v. Mutual Serv. Ins. Cos., 304 Minn. 179, 182, 229 N.W.2d 516, 518 (1975).

An example of this “but for” interpretation is seen in Andrew W. Youngquist v. Cincinnati Ins. Co., 625 N.W.2d 178 (Minn. App. 2001). In Youngquist, a subcontractor’s employee was injured on a building construction site while providing subcontracted-for electrical work. There did not appear to be any fault or negligence on either the employee or the subcontractor. The contractor was listed as an Additional Insured under the subcontractor’s policy. The endorsement utilized to add the contractor as an Additional Insured utilized the “arising out of” language. Under these circumstances, the court had no problem in finding that the subcontractor’s policy insured the contractor for CGL coverage as the injury arose out of the subcontractor’s work. Moreover, the court did not require that the contractor be vicariously liable for the injury in order for the coverage to attach.

Recent changes in all ISO Additional Insured forms attempt to narrow the circumstances under which the CGL carrier will be required to cover the Additional Insured. First, the 2004 editions eliminate the “arising out of” language, and replace it with the term “caused . . . by.” Under these new forms, there must be more than a tenuous “but for” relationship between the Contractor’s ongoing operations and the loss in order for the Railroad to be covered.

The second narrowing of the Additional Insured status seen in the 2004 editions of the Additional Insured forms is the elimination of coverage when the Additional Insured is solely at fault or otherwise negligent for the loss. The forms create this “exclusion” by stating that the bodily injury,

property damage, or personal injury and advertising injury must, “in whole or in part,” be caused by the Contractor’s acts or omissions, or those acting on the Contractor’s behalf, in the performance of the contractor’s ongoing operations at the scheduled locations, for the Railroad to be an additional insured under the policy. See e.g., ISO Form CG 20 10 07 04. In other words, even if the Railroad bargained for Additional Insured status under the Contractor’s CGL policy, and the agreement passes muster under the jurisdiction’s statutes and caselaw, the Railroad will not have coverage under the Contractor’s policy if the Contractor is solely at fault for the loss at issue.

**Completed Operations Considerations:** There are additional limitations in the ISO Additional Insured forms which the Railroad should consider when negotiating with Contractors. In situations where the project involves mere access to or across Railroad property, the Railroad may not need to be directly insured for risks associated with putting the project to use after construction is completed. However, if the Contractor Agreement involves a project on Railroad premises, the Railroad would be highly interested and motivated in obtaining completed operations coverage for some length of time after the completion of the project.

When the Additional Insured endorsement Form CG 20 10 debuted in 1985, the Additional Insured received coverage with respect to “liability arising out of ‘your work’ performed for that insured by or for you.” ISO Form CG 20 10 11 85. “Your work” was and is generally defined as the work or operations performed by the Contractor for the Railroad. Therefore, this early Additional Insured form provided not only coverage in relation to the Contractor’s operations while being performed, but also provided coverage for the Contractor’s *completed operations* once the project

was put to use. This “completed operations” coverage was valuable additional protection for the Railroad if, for some reason, injury or damage arose after the project was completed.

The insurance industry did not believe it should be covering Additional Insureds for its Named Insured’s completed operations. Therefore, ISO modified the Additional Insured endorsement Form CG 20 10 in its October 1993 edition to only convey Additional Insured coverage to “liability arising out of your *ongoing operations* performed for that insured.” ISO Form CG 20 10 10 93.<sup>3</sup> Despite the intent to eliminate “completed operations” coverage, many Additional Insureds continued to argue that the broad “arising out of” language, in conjunction with “ongoing operations,” continued to provide completed operations coverage to the Additional Insured once the project was completed, as the injury would not have occurred “but for” the Contractor’s operations.

To eliminate this possible ambiguous interpretation, ISO again modified the Additional Insured Form CG 20 10 in 2001 by adding explicit completed operations exclusions to the coverage:

“There is no coverage for injury or damage that occurs:

after all the work for the Additional Insured has been completed, or

after the portion of the work out of which the injury or damage occurs has been put to its intended use.”

ISO Form CG 20 10 10 01. This revision put to rest any effort for an Additional Insured to seek completed operations coverage under these endorsements.

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<sup>3</sup> There are modified versions of the 11 83 editions of the ISO Additional Insured forms which also contain this “ongoing operations” language. Therefore, a Railroad should carefully review the Contractor’s Additional Insured form language, even if it claims to be form CG 20 10 11 85, to determine whether “work” or “ongoing operations” is utilized in the form.

As will be seen below, and despite these changes, Railroads should continue to insist on utilizing the original language in Additional Insured endorsements which utilize “arising out of” and also “your work” to provide broad CGL coverage for both operations and completed operations. In addition, a Railroad may best be served by also requiring the Contractor to name the Railroad as an Additional Insured for a certain length of years following the project’s completion. Clearly, the Railroad could not request such an Additional Insured status indefinitely. However, Additional Insured status may well be appropriate for two to three years following the project’s completion. The exact length of time, however, should be considered on a case-by-case basis so as to not overburden any party with unreasonable clauses.

**Coverage Limits:** Another concern regarding the Additional Insured Endorsement is determining just how much coverage is available for a particular loss. Because the Contractor Agreement requires the Contractor to maintain coverage limits in some amount, there may be a difference in the Contractor’s liability limits already in place with its Carrier and the limits mandated by the Agreement. Further, the Contractor’s limits may be eroded by other claims without the Railroad’s knowledge. Therefore, it is important to consider whether the Contractor should notify the Railroad of the erosion of limits as of a certain point, and/or compelling the Contractor to replenish the limits at some additional point. As a practical matter, these “notice” provisions are cumbersome, and rely on a later events usually not occurring in the normal course of events. Therefore, it would be very easy for even a conscientious contractor to overlook providing the Railroad with mandated notice until it was too late to address the eroded limits issue.

Instead, a better approach is to demand that the Contractor's policy contain an amendment of limits form which provides for separate operations, and, where appropriate, completed operations, coverage limits to the specific project involved. There are a variety of forms to consider. For example, ISO Form CG 25 01 07 98 addresses Amendment of Limits of Insurance (Designated Project or Premises). This Endorsement has the ability to modify the limits of all the coverages available under the Contractor's policy to amounts that would be applicable to the specific project. However, this form does not create separate limits, and therefore the limits are subject to erosion from other claims against the Contractor for liability on other non-Railroad sites. This form is also impractical when the scheduled limits in the Contractor Agreement are actually less than the general liability limits of the Contractor; there is no reason to artificially limit the amount of coverage available for the project if the Contractor's insurance coverage limits are higher than those stated in the contract. The only appropriate time to potentially use this form is in situations where the Railroad mandates coverage limits that are higher than what the Contractor has in its CGL coverage. However, as noted above, there is no guarantee those limits would actually be available once a claim is made, as those limits could be eroded by non-project losses.

A possibly appropriate form to utilize is ISO form CG 25 03 03 97 ("Designated Construction Project General Aggregate Limits"), or its "locations" sibling, ISO form CG 25 04 03 97 ("Designated Location(s) General Aggregate Limits"). The former form is utilized when the Railroad is involved in construction projects. The latter form is utilized in situations where mere access to or through the Railroad premises is required in order for the Contractor to perform work for others.



These forms which schedule the “Designated Construction Project” provide a separate general aggregate limit for the Contractor’s policy which will be specifically and only applied to the scheduled project or location. In other words, only claims related to the Designated Construction Project will erode these separate limits. This form therefore assures the Railroad that these limits will be available if needed.

There are a few shortcomings with this form, however. First, the form itself does not alter the contractor’s CGL policy’s per-occurrence limits, should the Railroad wish to have these limits higher than what are stated in the policy. In addition, the forms do not provide a separate completed operations aggregate limit for the project or location, as the limits created only apply to “ongoing operations.” Also, this form does not provide a separate aggregate limit for personal injury and advertising injury exposures for offenses such as false arrest, detention, or imprisonment. Finally, the Railroad may still be faced with an issue as to whether the Contractor is compelled to refresh the separate aggregate limits if more than one claim is made involving the project.

These forms are all scheduled forms which require identification of the specific project. The preferred language for scheduling projects to avoid additional paperwork would be language utilized by the Contractor to automatically cover all projects in which it engages, regardless of whether it is with the Railroad or another entity. Example blanket language to avoid additional paperwork processing is as follows: “Apply separately to each of your projects away from premises owned by you or rented to you.” This in fact was the approach utilized in Form CG 25 03 before 1997. This language was omitted in the 1997 edition because of potential concern about a Contractor’s liability

which may relate to several projects such as when a Contractor stores materials or equipment at a single location, and liability arises because of the storage of that equipment. This particular concern, however, is not as much of an issue in the Railroad-Contractor context.

There are additional options available to obtain separate completed operations coverage limits if that is needed by the Railroad. The insurance industry recognizes certain “manuscript” forms which provide separate completed operations aggregates for a scheduled project. *Commercial Liability Insurance* (International Risk Management Institute, Inc.), at VII.E.3. An example manuscript form is as follows:

“Only with respect to your project’s schedule below, the General Aggregate Limit and the Products-Completed Operations Aggregate Limit under the Limits of Insurance (Section III) apply separately to each project.

“With respect to all your other projects, premises, and locations not specifically scheduled in this endorsement, the General Aggregate Limit and the Products-Completed Operations Aggregate Limit shown in the Declarations apply in accordance with the Limits of Insurance (Section III) of this policy.”

As seen, this form provides separate products-completed operations coverage for the project. However, it does not provide for a separate personal injury and advertising injury limit. Therefore, the Railroad may wish to consider modifying this manuscript form to include a requirement that a separate personal injury and advertising injury aggregate limit be included in this form.

**Policy Deductibles:** Many times a Contractor will employ a deductible or self-insured retention (“SIR”) feature in its policy in order to reduce its premium costs. The question therefore arises as to whether the Railroad could be compelled to pay the deductible or SIR if it makes a claim under the Contractor’s CGL policy. Such a self-insured exposure, either by deductible or SIR, is

likely not the intent of the Railroad when it compels the Contractor to name the Railroad as an Additional Insured in the Contractor Agreement.

The standard CGL policy forms do not contain provisions for SIRs or deductibles. These must be endorsed onto the Contractor's policy in order to apply. A typical ISO form providing for deductibles is Form CG 03 00 01 96, the "Deductible Liability Insurance" Endorsement. This form allows the Contractor to determine the amount of the deductible to apply for bodily injury, property damage, or for a combined deductible for both types of liability. The selection can be made on a "per-claim" basis, or a "per-occurrence" basis.

Under this form, the obligation to pay the deductible falls on the Named Insured under Part D of the endorsement:

*"We may pay any part or all of the deductible amount to effect settlement of any claim or 'suit' and, upon notification of the action taken, you shall promptly reimburse us for such part of the deductible amount as had been paid by us."*

Id. "You" is defined in the standard ISO CGL form as "the Named Insured shown in the declarations, and any other person or organization qualifying as a Named Insured under this policy." See e.g., CG 00 01 10 01 at p. 1. In other words, if the Railroad is added as an "Additional Insured" under the policy, Form CG 03 00 01 96 will only obligate the Contractor as Named Insured to pay the deductible. Moreover, if the carrier pays the deductible amount, its only recourse is to collect the deductible amount from the Contractor.

**Waiver of Subrogation:** Insurers rightfully also seek to offload risks to responsible parties in its insurance contracts. In addition to an insurer's common law right of subrogation, typical CGL

policies contain a “Transfer of Rights of Recovery Against Others to Us” clause in the conditions section of the policy. That condition states:

“If the insured has rights to recover all or part of any payment we have made under this Coverage Part, those rights are transferred to us. The insured must do nothing after the loss to impair them. At our request, the insured will bring ‘suit’ or transfer those rights to us and help us enforce them.”

See e.g., CG 00 01 10 01 at p. 12. This language underscores the concept that an insurer has obligations which attach at the time of the incident under which coverage is sought; however, it also has certain rights which attach at that time as well. Therefore, an insured cannot do anything *after the loss* to impair the carrier’s subrogation rights. However, since this is a temporal obligation (*after the loss*), an insured may compromise those subrogation or transfer rights *before* the loss.

The insurance industry recognizes this type of waiver is a legitimate business purpose, and therefore provides an Endorsement which can effectuate this intent. ISO Form CG 24 04 10 93. This form is a scheduled Endorsement which requires the Railroad’s identification in order to waive the transfer rights. However, a blanket scheduling on this Endorsement with the following language may suffice:

“Any person or organization to whom the Named Insured is obligated by contract or agreement to provide a waiver of subrogation or recovery.”

Id. The waiver under this Endorsement not only applies to a loss arising out of the contractor’s operations while they are being performed, but also applies to the contractor’s completed operations.

“**Notice:**” Coverage under the Contractor’s CGL policy is only good if the scope of the coverage is applicable, *and* if the policy itself is in effect. There are numerous reasons why a policy

could be cancelled, changed, or even expire without the Railroad's knowledge. Therefore, the Railroad should consider how to be kept up to date on any changes to the Contractor's CGL Policy. One approach is to mandate that the policy cannot be altered or terminated without giving at least 60 days' notice to the Railroad. Sixty days is the length of time a Railroad Protective Liability Carrier provides cancellation notice to a Railroad under a Railroad Protective Liability Policy. Therefore, selecting a 60-day notice provision will make uniform all potential insurance notices the Railroad may have to address in its relationships with its Contractors.

**Primary Coverage:** There may be unique circumstances where a Railroad has the potential to access more than one CGL policy for a particular loss. At times, a Carrier may validly claim that its coverage for the Additional Insured is not first in line to respond with a defense, or with settlement or judgment monies. In those situations, Carriers may end up delaying payment of defense expenses in an effort to force other carriers to initially respond. Clearly, this type of "brinkmanship" between Carriers does not benefit the Additional Insured Railroad. Therefore, in order to avoid these types of inter-Carrier disputes, the Railroad may wish to consider including a clause in the Contractor Agreement which compels the Additional Insured coverage under the Contractor's CGL policy is "primary and noncontributing" so that the CGL Carrier must respond to a valid tender of defense and request for indemnity. Language which would impose such an obligation on the contractor is as follows:

"Such insurance afforded to the Railroad as 'Additional Insured' under the contractor's policies shall be primary insurance and not excess over, or contributing with, any insurance purchased or maintained by the Railroad."

This request will likely require the policy to be endorsed to change its “Other Insurance” clauses to reflect this primary and noncontributing status.

### **BREACH OF CONTRACT AS A REMEDY**

Ultimately, if the Contractor breaches any one of these obligations to the Railroad’s detriment, the Railroad technically would have a breach of contract claim against the Contractor. Unfortunately, such a breach of contract claim would not be covered by the Contractor’s CGL policy. However, if the Contractor is viable, the Railroad’s remedy would be to collect any judgment directly from the Contractor itself.

Given that many Contractors cannot afford to pay a judgment on a large exposure created by its breach of contract with the Railroad, it is a better practice to be sure the Contractor has complied with its obligations under the Contractor Agreement. The best approach to employ to confirm that all conditions have been complied with is to obtain a copy of the Contractor’s CGL policy as amended, and, if need be, coordinate with the Contractor’s insurance broker or Carrier to implement each and every one of the contractual clauses discussed above. Only in this way can the Railroad be comfortable with the notion that it is as protected as much possible by the mandating of an Additional Insured status under the Contractor’s CGL policy.

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## RAILROAD PROTECTIVE LIABILITY POLICIES

As intimated above, most standard form unendorsed CGL policies exclude Railroad-related risks assumed by the Contractor. Therefore, a market was created long ago for a Railroad-specific insurance product to address Railroad-specific risks. A Railroad Protective Liability (“RPL”) Policy provides additional protection for the Railroad, regardless of whether the Contractor is performing operations for the Railroad on Railroad property, or whether the Contractor’s operations are for others which merely require access to or through Railroad land to perform the operations.

RPL coverage is not a typical CGL policy, and its idiosyncrasies need to be appreciated in order to determine exactly what is and is not covered. The RPL policy is purchased by the Contractor, and not the Railroad. The purchase price, therefore, is part of the Contractor’s overhead in entering into the agreement with the Railroad. Despite the fact the Contractor purchased the policy, it is not an insured under the policy; the Railroad is the Named Insured.

ISO has issued a standard form for RPL policies. See e.g., ISO Form 00 35 10 01.<sup>4</sup> The RPL policy covers bodily injury or property damage which “arises out of acts or omission at the ‘job location’ which are related to or are in connection with the ‘work’ described in these Declarations.” Id. at p. 1. “Work” means “work or operations performed by the ‘contractor’ including materials, parts or equipment furnished in connection with the work or operations.” Id. at p. 7. “Contractor” is “the contractor designated in the Declarations and includes all subcontractors working directly or indirectly for that ‘contractor’ but does not include you.” Id. at p. 6. Typically, the contractor is the

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<sup>4</sup> ISO has apparently issued a 12 04 edition of form CH 00 35. However, its changes appear to not impact the analysis presented in these materials.

entity either performing operations for the Railroad, or performing operations for an adjacent landowner. “Job Location” is defined as “the job location defined in the Declarations including any area directly related to the ‘work’ designated in the Declarations. ‘Job location’ includes the ways next to it.”

**Scope of Coverage Afforded:** The coverage grant requires that the bodily injury or property damage “arises out of acts or omissions.” Therefore, the question arises as to whether the acts or omissions must be of the Railroad in order for coverage to attach, and whether the acts or omissions must have some fault implications for the actor. One Court addressed these issues in a case from Minnesota, Continental Cas. Co. v. Auto-Owners Ins. Co., 238 F.3d 941 (8th Cir. 2000). Continental Cas., a coverage case, determined which of four carriers were ultimately responsible to pay a settlement reached with an employee of a contractor (“Contractor A”) hired by the railroad to perform derailment salvage operations. The case was confounded by the presence of a second contractor involved with the derailment operations (“Contractor B”). Both contractors had purchased RPL policies, and each contractor had their own CGL policies which named the railroad as an additional named insured.

The Court ultimately determined that Contractor A’s CGL policy was responsible for the settlement. In doing so, the court first considered whether a contractor’s actions can constitute a relevant act or omission satisfying this element of the granting language. The Court noted that the acts or omissions must be related to, or be in connection with, the “work” described in the Declarations. Because work is the “work or operations performed by the ‘contractor,’ the liabilities



can arise from the contractor's specific conduct." *Id.* at 944. The Court then addressed whether the contractor's acts or omission must be fault based in order to invoke the coverage. The Court rejected any interpretation that required the contractor to be negligent or to have caused the actual injury in order to invoke RPL coverage. However, there does need to be some nexus between the acts or omissions of the contractor purchasing the RPL and the loss to invoke coverage for the railroad under the purchased RPL policy. Under this approach, the Court determined that there was insufficient proof to show that the loss arose out of Contractor B's work, and therefore the RPL policy purchased by Contractor B need not initially respond to protect the railroad.

Since this initial grant of coverage is broad, the RPL Policy's scope of protection is defined more accurately by what it does not cover. As noted above, the insurance industry has modified several Additional Insured forms, as well as the Insured Contract definition, in an effort to limit coverage for an indemnitee/Additional Insured if that entity is solely at fault for the injury or damage at issue. This concept to a degree has already been in place in RPL policies for several years, and is exhibited in the policy's "Acts or Omissions of Insured" Exclusion (or alternatively characterized as a "Sole Liability" Exclusion):

"[This insurance does not apply to:] 'Bodily injury' or 'property damage', the sole proximate cause of which is an act or omission of any insured . . . ."

ISO Form CG 00 35 10 01 at p. 2. This exclusion at first glance seems to gut the entire purpose for the RPL policy. However, on closer examination, it is clear that the exclusion applies narrowly to only bar coverage for the Railroad's liability essentially unrelated to the operations at the job location. This is accomplished by the next clause of the Sole Liability Exclusion:

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*"Insuring the Railroad's General Liability Risks:  
Practical Considerations When Negotiating With Outside Contractors  
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“[This insurance does not apply to:] ‘Bodily injury’ or ‘property damage’, the sole proximate cause of which is an act or omission of any insured *other than acts or omissions of any of your designated employees*’.”

Id. In other words, coverage is restored, despite the Railroad being solely at fault, if the sole liability for the injury or damage is caused by an act or omission of one of the Railroad’s “designated employees.” A “designated employee” is someone on the Railroad’s behalf who is involved directly with the Contractor’s work at the job location. These persons are supervisory employees, employees involved with Railroad equipment assigned exclusively to the Contractor, and other Railroad employees assigned to the project to prevent accidents or protect property. ISO Form 00 35 10 01 at p. 7. This underscores that coverage for the Railroad’s liability is barred if the liability is essentially unrelated to the operations at the job location.

The Sole Liability Exclusion goes on to also state:

“This exclusion does not apply to injury or damage sustained at the ‘job location’ by any of ‘your designated employees’ or employee of the ‘contractor’, or any employee of the governmental authority or any other contracting party (other than you) specified in the Declarations.”

ISO Form CG 00 35 10 01 at p. 2. Under this exception, the RPL coverage would apply to cover FELA claims asserted by the designated employees so long as they arise out of the operations at the job location. The coverage would also apply to claims of the employees of the Contractor (including Subcontractor employees), the government, or any other party to the contract necessitating the RPL policy so long as that entity is scheduled in the Declarations.

There is one more feature about how the “Sole Liability” Exclusion is worded which limits the effect of the exclusion. The exclusion does not bar coverage for the Railroad when the Railroad

is jointly liable with another (regardless of how the liability arises), or where the Railroad is merely vicariously liable due to the act or omission of the Contractor. Therefore, if the Railroad's liability is not based on acts or omissions of one of its Designated Employees, the Railroad will need to show that another entity is also at fault in order to invoke the RPL coverage.

The RPL policy's scope of coverage is limited in several additional ways. First, there is a temporal limitation to the policy. The RPL coverage is only available while the Contractor's operations are in progress. Therefore, once one of the following has happened, the RPL policy's coverage will cease:

- all work involving the project is completed;
- all work at the job location is completed; or
- the work at the job location has been put to its intended purpose.

Id. at p. 1. There is an exception to this termination of coverage when an injury is caused by tools, uninstalled equipment, or abandoned or unused materials. Id. This is a logical exception in that these items are remainders of the Contractor's "work."

The timing of the RPL policy's termination underscores a critical reason why a Railroad seeks multiple ways to protect itself when dealing with Contractors: The RPL policy could terminate at a point in time when the work at the job location has been put to its intended purpose, but risks could still remain which require coverage for the Railroad through other means. Therefore, Additional Insured status, especially for completed operations, and indemnification, can come into play to protect the Railroad for these later-in-time risks.

The RPL policy generally does not cover contractual liability for the Railroad unless it is assumed as part of an agreement to transport persons or goods for a charge or any inter-change contract or agreement respecting locomotives or rolling stock.

Finally, the RPL policy contains an exclusion for many types of pollution liability, subject to several exceptions. Included within the pollution exclusion is a prohibition of coverage for the discharge of pollutants brought onto the job location in connection with the designated operations, except for bodily injury or property damage arising out of the escape of fuels or lubricants *from* equipment used at the job location,<sup>5</sup> or arising out of heat, smoke, or fumes from a “hostile fire.” This particular exception relating to the escape of fuels and lubricants can be expanded by the inclusion of an ISO form, CG 28 31 07 98, which will expand the restoration of coverage to protect against property damage or bodily injury damages because of the discharge of fuels or lubricants brought onto the job location but which do not escape from equipment used at the job location (in other words, are stored at the job location).

**Scheduled Policy Considerations:** As seen by the granting language and definitions quoted above, the policy is a scheduled policy which requires specific information set out in the Declarations to confirm the exact scope and extent of the coverage afforded. Therefore, it is incumbent on the Railroad to be sure that the key items scheduled are correct when the policy is received from the insurance carrier. First, the “Description of Operations” must be clear and unambiguous, and fully describe the scope of work to be performed by the Contractor. Operations not described will not be

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<sup>5</sup> A modification of this language in form CG 00 35 12 04 clarifies this exclusion.

covered. Therefore, if the Contractor's "work" expands during the project, this Description of Operations must be amended in order to expand the coverage to protect against liability from these additional operations.

In addition, the "Job Location" must be clearly set forth in the RPL policy schedule. This requires a full, and from a Railroad's perspective, broad description of what physical areas will be impacted by the Contractor's work. The Railroad prefers this description be as broad as possible so that technical interpretations of the Job Location cannot be utilized to unreasonably limit the scope of coverage. It is true that the broader the description, the higher the premium is for the Contractor. However, premiums for RPL policies are relatively modest, and may not even be a factor if the project merely requires access to or through the Railroad property itself in order for the Contractor to perform operations for an adjacent landowner. As with the Description of Operations, the Job Location descriptor on the schedule must be amended if there is any change in the physical dimensions of the job so that expanded coverage to these additional Job Locations, even if the Job Location has expanded within a particular area, is provided under the policy.

Finally, in order to potentially cover claims asserted by other entities involved in the contract which required the access to Railroad property, the identities of the other entities involved with the contract need to be scheduled on the Declarations page.

**RPL Policy Conditions:** The RPL policy contains several conditions of note. First, the standard policy contains a cancellation clause which mandates that the Railroad be provided with 60 days' notice before the policy is cancelled. *Id.* at p. 3. Because this is as long of a notice period as

provided by the various insurance coverages potentially involved with contractor negotiations, it is prudent for the Railroad to utilize this 60-day time period for all policies in force as a result of the negotiations with the Contractor. This should provide the Railroad with sufficient time in which to address the issue of the impending policy lapse or termination.

The RPL Policy also contains a condition mandating that coverage is primary but for any other applicable RPL Policy. *Id.* at p. 4. This clause is quite favorable for the Railroad in that it forces the RPL Carrier to defend the Railroad immediately, and allows potential disputes with other carriers to be addressed after a defense has been provided by the RPL Carrier. Additionally, if more than one RPL Policy is involved, these policies should equally share defense expenses, and will generally harmoniously share contributions for judgments or settlements by equal shares up to the limits of their respective policies.

Another condition in the RPL Policy is the Transfer of Recovery Rights provision. *Id.* As noted above, these subrogation clauses are disfavored by Railroads if they can be utilized by other carriers to assert claims against the Railroad. Conversely, as part of the ability to maintain low RPL premiums, it is favorable for a Railroad to have this Transfer of Recovery Rights condition incorporated into the RPL policy. Many times, the likely party the RPL policy will subrogate against is the RPL Policy-purchasing Contractor who entered into the relationship with the Railroad. Despite the fact the Contractor purchased the RPL Policy, the RPL Carrier can, and often does, subrogate over against that particular Contractor under any of the contractual, tort or equitable (contribution and/or indemnity) rights the Railroad holds. For example, in Continental Cas., cited above, the RPL

Carrier initially held responsible to pay the settlement exercised the recovery rights transferred to the Carrier from the Railroad to enforce an indemnification agreement against Contractor A employing the Plaintiff. The indemnification agreement required Contractor A to protect the Railroad, even against its own negligence. Because the indemnification agreement was an “Insured Contract” under the Contractor’s CGL policy, the Court ultimately held that the Contractor’s CGL policy was liable for the settlement.

Of note, despite the fact the Railroad is also an insured under the Contractor’s CGL Policy, a Transfer of Recovery Rights Clause may not be a valid basis for the RPL Carrier to pursue a claim against the CGL Policy based on the Railroad’s Additional Insured status. This is because the RPL Policy’s “Other Insurance” clause mandates that it be primary coverage. Unless the CGL Policy has been endorsed to change its Other Insurance Clauses, those clauses may be interpreted to have the CGL coverage be excess over the RPL coverage. See e.g., Form CG 00 01 10 01 at p. 11. This may be of no moment to the Railroad, however. If the RPL and CGL Policies both apply, the CGL coverage would be available as excess protection over the RPL limits.

Contractors may attempt to have the Railroad agree to a waiver of subrogation clause similar to the type of concession Railroads seek from contractors. However, RPL Carriers and Railroads rarely agree to such a waiver, and it is not recommended that a Railroad agree to such a concession unless compelling reasons are provided.

Finally, RPL Policies generally contain extremely high limits. For example, limits of at least \$5 million per occurrence, and \$10 million aggregate coverage, are not unusual. The key for

determining the amount of RPL coverage to mandate for the Policy is to underwrite the risk at issue with the designated operations given the job location. In examining this risk, the Railroad should keep in mind that the RPL Carrier does not perform an exhaustive independent analysis of the risks in order to come to an independent determination of the level of appropriate limits. Moreover, the Railroad should consider whether the “per-occurrence” limits should be part of a combined single limit with the aggregate limit as the Policy may be called upon in a catastrophic situation to respond to multiple claimants involved with the one occurrence.

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#### **PRACTICAL CONSIDERATIONS WHEN NEGOTIATING WITH CONTRACTORS**

Several considerations have been touched on in these materials. The purpose of this section is to address some strategic questions raised in contractor negotiations in order to be sure the Railroad has maximum protection. In addition, this section ends with some proposed language to consider when implementing some of the considerations addressed above. While the following suggestions are not exhaustive, they provide a general set of guidelines which should apply in the majority of contractor negotiations.

**Scheduled Insurance Forms:** As referenced above, many of the amendatory endorsements discussed contain schedules which require specific language to extend protections in favor of the Railroad. Because these schedules must be correctly filled out in order to provide the Railroad with protection, it is important to understand how the language added to the schedule impacts the



coverage provided. Each schedule either must have the information fully filled out in the schedule itself, or the information required for the schedule must be on the Declarations page of the insurance policy. However, since most contractor CGL coverages will not provide this information in the Declarations page, most likely because the particular project at issue may not have been pending at the time of the policy's commencement, it is critical that the information be set forth in each schedule. Failure to have a fully-filled-out schedule risks a potential loss of protection for the Railroad.

It is for this reason that the Railroad should:

1. receive a copy of the RPL Policy; and
2. obtain a copy of the Contractor's CGL policy as amended pursuant to the requirements set out in the Contractor Agreement;

prior to the commencement of the project's work. The Railroad may then independently verify that the Contractor has satisfied the various requirements set forth in the Contractor Agreement. If not, the Railroad will have an opportunity to contact the Contractor's insurance broker and/or the Carriers to rectify the policies' errors or to learn why a Carrier is not abiding by the Railroad's reasonable requests.

**“Duty” to Defend Issues:** In a significant percentage of cases, a liability policy's defense coverage is more valuable to an insured than its indemnity protections to pay for judgments or settlements. The Railroad's goal is to have as many insurance policies provide the Railroad with an immediate defense so the Railroad does not end up fighting a “two-front war” between the underlying liability lawsuit and its putative insurance carriers.

The Railroad wants to determine early on if there will be any coverage disputes with the Carriers. Therefore, the claim or suit should be tendered to all potential Carriers as soon as possible in order to force the Carriers to provide the Railroad with an explanation as to why they may be reserving rights or denying coverage. The phrase “tender early and tender often” should be a polestar in a Railroad’s risk management practices. Repetitive tendering of the claim or suit, along with additional factual information about the matter gathered since the last tender, should occur even if a Carrier has previously denied coverage as there may be additional facts developed since the earlier tender which may change the Carrier’s coverage position.

Additional Insured Status Impacting the Duty to Defend: As outlined above, the Insurance Services Organization modified numerous Additional Insured Endorsements, as well as the Insured Contract definition in the CGL policy, in an effort to reduce the scope of coverage available under the Contractor’s CGL policy. These attempts to limit the scope of coverage also impact that Carrier’s duty to defend the Railroad as an Additional Insured if the most recent amendments of the ISO forms (07 04 editions) are utilized.

Often, the Railroad is sued by an injured Contractor’s employee. If this is the case, the RPL Policy should be ready to step up to defend the Railroad. However, especially if the exposure is extreme, the Railroad will want to be sure the CGL Carrier is ready to step in to defend and, if need be, indemnify the Railroad.

In instances where others sue the Railroad, there may be situations where the RPL Policy or the Contractor’s CGL Policy, as well as the Insured Contract coverage for the indemnification

agreement, simply do not respond to defend. This may be as a result of allegations in the Complaint that the Railroad is solely at fault by acts or omissions of Railroad employees other than Designated Employees. If the Railroad seeks a defense from the RPL Policy, or from the CGL Policy which contains a 07 04 edition of an Additional Insured Endorsement, the Carriers will immediately claim there is no coverage as the alleged sole fault is that of the Railroad. Moreover, the Carrier will likely initially deny Insured Contract coverage to the Contractor for its obligation to defend the Railroad.

The reason the Carrier may initially deny is because numerous states permit a Carrier to make an initial coverage determination based on the four corners of the Complaint, and any additional facts the Carrier may have in its possession at that time. In Minnesota, if the Complaint is the only source of “facts” provided to the Insurer, the Carrier is not obligated to investigate the claim beyond what is set forth in the Complaint in order to determine whether it may have a duty to defend. Garvis v. Employers Mut. Ins. Co., 497 N.W.2d 254 (Minn. 1993). Therefore, a Railroad will only be able to invoke defense coverage if it is able to submit to the Carrier facts beyond the Complaint which establish a good-faith basis on which to allege that the Named Insured Contractor, or another entity, is also at fault for the injury or damage. At that point, most jurisdictions will then compel a Carrier to consider the additional facts to determine whether another entity is at fault for the loss, and therefore activate the Additional Insured status and/or the Insured Contract status under the Contractor’s CGL policy to provide a defense, and/or activate the RPL defense obligation.

Who Controls the Defense?: Additional idiosyncrasies regarding defense obligations arise because of the contractual relationship between the Railroad and Contractor, and the potential

Additional Insured status under the Contractor's CGL policy. Ideally, when a Railroad is sued, it wishes to control the defense of the lawsuit. If the defense is assumed by an applicable RPL Carrier, the concern over control of the defense may not be as great as if no RPL policy applies. However, there is an inherent tension between the Contractor, the Contractor's CGL Carrier, and the Railroad when the Railroad is seeking the payment of defense expenses from the Contractor's CGL Carrier.

The "duty to defend" provided by insurance carriers is characterized in many jurisdictions as a service, and not merely an obligation to pay money. In other words, the duty to defend implies that the Carrier shall handle and control the defense of the litigation, subject to the cooperation of the insured defendant. This right and duty provides the Carrier, and not the Railroad, with the ability to develop and implement defense strategies, as well as to determine when and under what circumstances settlement may occur or whether the case should be taken to trial. This may not be the same strategy the Railroad would employ, especially if there are dynamics at issue beyond those involved with the specific litigation itself.

In many jurisdictions, certain situations can arise to convert the Insurer's "duty to defend" (provide a service) into a mere duty to reimburse defense expenses (with no "service" aspect to the obligation). Often, these scenarios arise when the Insurer agrees to defend under a reservation of its contractual rights. Under these circumstances, the Carrier may well lose the right to control the defense strategy, and therefore only have an obligation to pay fees and costs reasonably incurred in the defense of the claim or suit. This requires a very fact-specific analysis of the various jurisdictions' state law on the issue, an analysis of which is beyond the scope of this survey. However, the Railroad

should be ready to analyze the particular jurisdiction's caselaw to determine if this option is available, especially if it wishes to retain the right to control the defense.

The distinction between a "duty to defend" and a "duty to reimburse defense expenses" is seen in how the CGL Policy handles the payment of the Railroad's defense expenses pursuant to the indemnification agreement. As discussed above, the Railroad, as an indemnitee, is entitled to the Carrier's "defense" of the suit, so long as numerous conditions in the CGL Policy's Supplementary Payments Provisions are met. These conditions, in essence, require that the Contractor agree to defend the Railroad in the indemnification agreement, the coverage is applicable, and that circumstances are such that a conflict of interest does not exist between the Contractor and Railroad so that the Carrier may, at its sole option, and as part of the control of the defense of the action, assign the defense of both the Railroad the Contractor to a single law firm. Under these circumstances, the Carrier will pay the defense expenses in addition to the indemnity limits of the insurance policy and control the defense. In other words, the Railroad will have unlimited monies available to defend the lawsuit, so long as there is no conflict in the defense of the lawsuit with the Contractor and the Railroad is willing to abdicate its wish to control the defense of the lawsuit.

More often, however, a conflict does exist between the Contractor and the Railroad, most likely because there are disputes between the Railroad and Contractor over who is at fault. Alternatively, the Railroad may simply choose to control the defense of the lawsuit. In these circumstances, the "defense" of the Railroad assumed by the Contractor under the indemnification agreement is paid by the Carrier the under the provisions found in the exception to the Contractual

Liability Exclusion. Specifically, so long as the Contractor has agreed to defend the Railroad in the indemnification agreement, and coverage otherwise applies, the Carrier agrees to pay Railroad's reasonable defense fees and costs. However, these fees are paid out of the limits of the Contractor's policy, thereby eroding the CGL Policy's ability to pay judgments and settlements. In exchange for this compromise of the CGL limits, the Railroad retains the right to control the lawsuit's defense.

In large-exposure cases, and despite the fact the Railroad can control the defense under this scenario, the Railroad may be faced with a situation where its defense fees significantly impair the protection under the CGL policy. Therefore, if at all possible, the Railroad prefers to have the defense fees and costs paid by a potentially-eligible RPL Policy so the entire CGL limits remain intact to apply in excess of the RPL limits. The "cost" of this alternative, however, is that the RPL Carrier will then be able to control the defense. As a practical matter, an RPL carrier will likely be more in tune with the needs and desires of the Railroad as its insured than a CGL Carrier. This is especially so where the CGL Carrier seeks to have any conflict of interest waived between the Contractor and the Railroad in order to extend a defense in addition to limits under the CGL policy.

Scope of the Defense Obligation Under the Contractor's Indemnification Agreement:

Another potential shortcoming with the duty to defend is the scope of the defense obligation incurred by the Contractor in the indemnification agreement. Unlike a Carrier's duty to defend, a Contractor is normally only obligated to defend those portions of the claim or suit under which it is required to indemnify. Therefore, theoretically, it is possible some causes of action in the lawsuit may not be defended by the Contractor as it would not be required to indemnify those claims. Moreover, the

obligation's Insured Contract status in the CGL coverage has no impact on the scope of the underlying obligation to defend.

In order to provide the Railroad with as much defense protection as possible, it is recommended that the defense references in the indemnification clause include a provision which requires the indemnitor Contractor to "fully" defend the Railroad by also defending any causes of actions or theories under which no indemnification is permitted under the agreement so long as any one cause of action asserted against the Railroad is subject to the Contractor's obligation to indemnify. This type of language expands the Contractor's defense obligation to a scope similar to that mandated on insurance carriers. However, unlike a Carrier's defense obligation The Railroad should also insist that the case's defense be controlled by the Railroad.

In addition, the indemnification agreement should also require the contractor to indemnify the Railroad, not only for bodily injury and property damage, but for personal injury offenses and advertising offenses as well.

**Subcontractor Dynamics:** The Contractor involved with the project will often employ Subcontractors, frequently without knowledge of the Railroad. Additional entities have the potential of heightening the risks involved with that project. Therefore, the issue arises as to whether the Railroad should, and if so, to what extent, monitor the Contractor's subcontract relationships from the perspective of whether the Subcontractors have an impact on the protection mechanisms set forth above.

Many of the same dynamics discussed in these materials also arise in Contractor-Subcontractor relationships. Specifically, Contractors are also risk adverse and wish to offload as much of the project's risks onto Subcontractors as possible. Frequently, Contractors also have indemnification clauses in their agreements with their Subcontractors, and also compel the Subcontractors to name the Contractor as an Additional Insured under the Subcontractor's CGL policies. Often, however, these Contractor-Subcontractor agreements constitute construction contracts which run afoul of the statutory Anti-Indemnification provisions now enacted across the country. Therefore, many times a Contractor will simply not be able to offload its own tort liability on a Subcontractor.

One potential question is whether the Contractor may offload to the Subcontractor its "insured contract" liability to the Railroad. This generally should not be a concern. First, the Contractor's liability which it might attempt to lay off on the Subcontractor is a contractual liability, not a tort liability. Therefore, standard form Insured Contract definitions will not consider the assumption of contract liability to be an exception to the Contractual Liability Exclusion. Second, regardless of whether the Contractor is successful in laying off the liability assumed from the Railroad, the Railroad still has its indemnification obligation rights against the Contractor. If, in turn, the Contractor is unable to collect from the Subcontractor, either because there is no insurance coverage, or the Subcontractor is not financially viable, the risks of noncollection from the Subcontractor are with the Contractor, and not the Railroad. Therefore, the Railroad typically will not be left uncompensated, so long as it can collect from the Contractor.



Moreover, in 1986, an amendment to the “your work” definition in the standard CGL insurance policy operates to restore insurance coverage to a Contractor where the work at issue in the lawsuit is performed by a Subcontractor. See e.g., O’Shaughnessy v. Smuckler Corp., 543 N.W.2d 99 (Minn. App. 1996), rev. denied (Minn. Mar. 28, 1996). Therefore, the Contractor will likely have coverage for tort claims if the damage arises out of the Subcontractor’s work.

In addition, the Railroad’s Additional Insured status is unaffected by the Contractor hiring Subcontractors. The Railroad’s Additional Insured relationship is with the Contractor’s CGL Carrier. Therefore, even if the Contractor was named as an Additional Insured on the Subcontractor’s policy, and further was able to have the Subcontractor’s policy primarily respond to pay the Contractor’s fault, the Railroad would still have its rights against the Contractor’s CGL policy.

Finally, there is no particular reason from an RPL Policy standpoint to focus on the Subcontractors hired by the Contractor. The RPL Declarations requires the scheduling of the party for which the work is being done, and not the Subcontractors. Moreover, the RPL Policy’s “Contractor” definition “includes all subcontractors working directly or indirectly for the ‘contractor’ . . . .” See e.g., ISO Form CG 00 35 10 01. Therefore, a suit by a Subcontractor’s employee against the Railroad will invoke RPL protection as the exception to the “Sole Liability” Exclusion applies to restore coverage.

Given these dynamics, there appears to be no particular insurance-related reason for the Railroad to pay close attention to the Subcontractors retained by the Contractor. However, the

Railroad should utilize its usual risk management considerations to address any particular non-insurance-related issue which may arise from a Subcontractor's involvement with the project.

### **“PROSPECTIVE COMFORT”**

Several practical tips have been discussed throughout these materials. What follows are specific items to consider in future contractor negotiations.

**Indemnification Clause Tips:** Be sure the indemnification clause is clear and unambiguous. Review the provisions of the materials above addressing indemnification clauses, and consider how each insight may be applicable or advantageous to the Railroad.

Possible language to consider for an indemnification clause is as follows:

“Contractor shall indemnify, fully defend and hold harmless the Railroad for all judgments, awards, claims, demands, and expenses (including attorneys' fees and costs incurred in the defense of any matter), for injury or death to all persons, including Railroad's and Contractor's officers and employees, for any loss and damage to property belonging to any person, for any personal injury, and for any advertising injury, arising in any manner from Contractor's or any of Contractor's subcontractors' acts or omissions or failure to perform any obligation hereunder. THE LIABILITY ASSUMED BY CONTRACTOR SHALL NOT BE AFFECTED BY THE FACT, IF IT IS A FACT, THAT THE DESTRUCTION, DAMAGE, DEATH, OR INJURY WAS OCCASIONED BY OR CONTRIBUTED TO BY THE NEGLIGENCE OF THE RAILROAD, ITS AGENTS, SERVANTS, EMPLOYEES OR OTHERWISE, EXCEPT TO THE EXTENT THAT SUCH CLAIMS ARE PROXIMATELY OR DIRECTLY CAUSED BY THE SOLE WILFUL MISCONDUCT OF THE RAILROAD.

“THE INDEMNIFICATION OBLIGATION ASSUMED BY CONTRACTOR SHALL INCLUDE ANY CLAIMS, SUITS OR JUDGMENTS BROUGHT AGAINST THE RAILROAD UNDER THE FEDERAL EMPLOYEE'S LIABILITY ACT, INCLUDING CLAIMS FOR STRICT LIABILITY UNDER THE SAFETY

APPLIANCE ACT OR THE BOILER INSPECTION ACT, WHENEVER SO CLAIMED.

“Contractor agrees that its obligation to defend the Railroad shall be controlled by the Railroad, and that the Railroad shall, at its sole discretion, appear and defend any suits or actions brought against Railroad on any claim or cause of action arising out of or in any manner connection with any liability assumed by Contractor under this Agreement for which the Railroad is liable or is alleged to be liable. Contractor further agrees that its obligation to defend the Railroad shall extend to any and all causes of action or claims asserted against the Railroad so long as any one cause of action or claim asserted against the Railroad is subject to the Contractor’s defense obligation assumed above. Contractor also agrees that its obligation to defend the Railroad includes the adjustment or other handling of any claims which for which the Railroad is liable or is alleged to be liable.

“It is mutually understood and agreed that the assumption of liabilities and indemnification provided for in this Agreement shall survive any termination of this Agreement.”

Again, caution is urged in utilizing any “form” language for indemnification agreements. Before language is utilized, the Railroad should consult the jurisdiction’s statutes and caselaw to consider how any language will be interpreted by the jurisdiction’s courts.

**Duty to Procure Insurance Provisions:** Numerous clauses relating to the duty to procure insurance should be considered and implemented if the Railroad believes the protections are required, and the endorsements are commercially feasible. The following are a summary of some of the considerations outlined above:

The Railroad may wish to consider some of the following language which incorporates many of the topics discussed above in crafting the language compelling the Contractor to procure insurance:

- “Before commencing any work under this Agreement, Contractor must provide and maintain in effect throughout the term of this Agreement, insurance at Contractor's sole expense, covering all of the work and services

to be performed hereunder by Contractor and each of its subcontractors, as described below:

“(1) Commercial General Liability occurrence insurance covering liability, including but not limited to Public Liability, Bodily Injury, Property Damage, Premises, Operations, Completed Operations, Personal Injury, Advertising Injury, and Contractual Liability covering the obligations assumed by Contractor in the Indemnification Provisions above, with coverage of at least \$X,000,000 per occurrence and \$Y,000,000 in the aggregate for all coverages under separate per occurrence and aggregate limits for this designated project. The Commercial General Liability insurance described in this paragraph must specifically name the Contractor as the policy’s Named Insured, and further must specifically identify the Railroad as an Additional Insured under the policy or policies providing this insurance on ISO form CG 24 10 11 85 or equivalent language, and shall provide for the severability of the various insureds’ interests. In addition, the Contractor shall continue to identify the Railroad as an Additional Insured on Commercial General Liability insurance as described in this paragraph until the expiration of three (3) years after the Contractor’s completion of the Work described in this Agreement. Any coverage afforded the Railroad as an Additional Insured shall apply as primary and non contributing coverage and not excess to any other coverage issued in the name of the Railroad. Where explosion, collapse, or underground hazards are involved, exclusions limiting coverage for such hazards must be removed from the policy. The Commercial General Liability insurance described in this paragraph must contain an endorsement containing ISO Form CG 24 17 10 01 or equivalent language; in no case will the Commercial General Liability insurance described in this paragraph contain ISO Form CG 21 39 10 93 or equivalent language, or ISO Form CG 24 27 03 05 or equivalent language. The Commercial General Liability insurance described in this paragraph must contain a specific waiver of the insurance company's subrogation and recovery rights against the Railroad.

“(2) Railroad Protective Liability insurance stating Railroad is the Named Insured and covering all of the liability assumed by the Contractor under the provisions of this Agreement with coverage of at least \$A,000,000 per occurrence and \$B,000,000 in the aggregate.

Coverage shall be issued on a standard ISO form CG 00 35 10 01 and endorsed to include ISO form CG 28 31 10 93 and the Limited Seepage and Pollution Endorsement.

- “All insurance shall be placed with insurance companies licensed to do business in the States in which the work is to be performed, and with a current Best's Insurance Guide Rating of A- and Class VII, or better.”
- “The insurance Contractor is obligated to obtain under this Agreement shall be approved by the Railroad before any work is performed on Railroad's Property and shall be carried until all work required to be performed on or adjacent to Railroad's Property under the terms of the Contract is satisfactorily completed as determined by the Railroad, and thereafter until all tools, equipment and materials not belonging to the Railroad have been removed from the Railroad's Property and the Railroad's Property is left in a clean and presentable condition.”
- “The insurance Contractor is obligated to obtain under this Agreement shall guarantee that the policies will not be amended, altered, modified, canceled or expire insofar as the coverage contemplated hereunder is concerned, without at least 60 days notice mailed by registered mail to the Railroad in care of the following: [NAME, POSITION, ADDRESS].
- “It is further distinctly understood and agreed by the Contractor that its liability to the Railroad herein under Section 1 will not in any way be limited to or affected by the amount of insurance obtained and carried by the Contractor in connection with said Contract.”
- “The Contractor is fully obligated to pay all premiums for all insurance procured pursuant to this Agreement, and the Contractor will not be permitted to seek any charges related to insurance premiums as an add-on from the Railroad under this Agreement or in any other manner. Full compensation for all premiums which the Contractor is required to pay on all the insurance described hereinafter shall be considered as included in the prices paid for the various items of work to be performed under the Contract, and no additional allowance will be made therefore or for additional premiums which may be required by extensions of the policies of insurance.”
- “The Contractor shall provide the Railroad with a copy of each policy under with the Railroad is an Additional Insured. Additionally, immediately upon

Contractor's future receipt of any policy referenced herein which is required to name the Railroad as an Additional Insured, the Contractor shall immediately provide the Railroad with a copy of said policy."

Once the Contractor Agreement is in place, the Railroad should follow up with the Contractor to confirm that all policies involving the project have been provided to the Railroad, and not just Certificates of Insurance. Policies are preferred as Certificates of Insurance are mere evidence of insurance, and do not convey coverage absent extremely unique and rare situations in which an Insurer itself may have issued the certificate (but not under all circumstances). Therefore, the only assurance a Railroad has to full compliance with the Contractor's duty to procure insurance provisions is to obtain a full copy of the policy and analyze its specific provisions, endorsements and schedules. This will also allow the Railroad to maintain these policies in its archives in case a later suit is brought and the Contractor is no longer viable or for some other reason.

\* \* \* \* \*

### CONCLUSION

These materials provide the Railroad with a nonexhaustive set of considerations to weigh in negotiating with Contractors. The Railroad's protection is maximized when it:

- utilizes an effective indemnification agreement which is properly insured by the Contractor's CGL carrier;
- obtains Additional Insured status on the Contractor's CGL Policy with the appropriate Endorsements; and
- has the Contractor separately procure a high limit RPL Policy identifying the Railroad as the Named Insured.

If these risk management tools are effectively utilized, the Railroad can maximize its protection from risks arising from Contractors either performing work on the Railroad's property, or requiring access to, through, or across Railroad property when performing projects for others.

05-10-27 (updated 06-03-25) FINAL Written Materials (560514).wpd