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January 17, 2013

FEE RECEIVED

JAN 17 2013

Karl Morell
Of Counsel

kmorell@balljanik.com

BY HAND DELIVERY

**SURFACE
TRANSPORTATION BOARD**

ENTERED
Office of Proceedings

Cynthia Brown
Chief, Section of Administration
Surface Transportation Board
Office of Proceedings
395 E Street, SW
Washington, DC 20423

JAN 17 2013

Part of
Public Record

Re: Finance Docket No. 35712, BNSF Railway Company -
Trackage Rights Exemption - Pemiscot County Port Authority

Dear Ms. Brown:

Attached for filing with the Board please find the original and ten copies of the Verified Notice of Exemption pursuant to the provisions of 49 C.F.R. § 1180.2(d)(7). Enclosed is a check in the amount of \$1,100 to cover the filing fee.

Also attached is a CD containing the Notice of Exemption and Summary.

Please time and date stamp the extra copy of the Notice and return it with our messenger.

Respectfully submitted,

Karl Morell

Karl Morell
Of Counsel

Enclosures

FILED

JAN 17 2013

**SURFACE
TRANSPORTATION BOARD**

1

Portland, Oregon

Bend, Oregon

Seattle, Washington

Washington, DC

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO 35712

BNSF RAILWAY COMPANY
-- TRACKAGE RIGHTS EXEMPTION --
PEMISCOT COUNTY PORT AUTHORITY

VERIFIED NOTICE OF EXEMPTION
Pursuant to 49 C.F.R. § 1180.2(d)(7)



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Office of Proceedings

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SURFACE
TRANSPORTATION BOARD

Tyler White
Assistant General Attorney
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Fort Worth, TX 76131

Karl Morell
Of Counsel
Ball Janik LLP
Suite 225
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 638-3307

Attorneys for:
BNSF Railway Company

Dated: January 17, 2013

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO 35712

BNSF RAILWAY COMPANY
-- TRACKAGE RIGHTS EXEMPTION --
PEMISCOT COUNTY PORT AUTHORITY

VERIFIED NOTICE OF EXEMPTION
Pursuant to 49 C.F.R. § 1180.2(d)(7)



BNSF Railway Company ("BNSF"), submits this Notice of Exemption pursuant to the class exemption at 49 C.F.R. § 1180.2(d)(7), for trackage rights over a rail line owned by Pemiscot County Port Authority ("PCPA").

In Finance Docket No. 35685, *Rail Switching Services, Inc – Operation Exemption – Pemiscot County Port Authority* (not printed), served January 8, 2013, the Surface Transportation Board ("Board") urged BNSF Railway Company ("BNSF") "to seek promptly any needed Board authority for its operations over the" PCPA Line. Slip op. at 5, note 21

Under 49 C.F.R. § 1180.2(d)(7), the acquisition, renewal or modification of trackage rights by a rail carrier over the lines owned or operated by any other rail carrier or carriers is exempt if the rights are (i) based on a written agreement, and (ii) not filed or sought in a responsive application in rail consolidation proceedings. BNSF and PCPA are currently negotiating a trackage rights agreement. A copy of the agreement will be filed with the Board within 10 days of its execution. Also, the trackage rights are not being sought in a responsive

application in a rail consolidation proceeding Under these circumstances, the Section 1180.2(d)(7) class exemption is applicable

Pursuant to the Board's regulations at 49 C.F.R. § 1180.4(g), BNSF submits the following information:

Section 1180.6 Supporting Information

(a)(1)(i) Description of Proposed Transaction

The agreement between BNSF and PCPA will grant BNSF local trackage rights over the rail line located between its connection with the BNSF near BNSF milepost 212.22, at Hayti, MO and extending eastward to the Pemiscot Port Harbor on the Mississippi River a distance of 49 miles (the "Line").

Name and address of tenant railroad:

BNSF Railway Company
2650 Lou Menk Drive
Fort Worth, Texas 76131

Questions regarding this transaction are to be addressed to BNSF's counsel:

Karl Morell
Of Counsel
Ball Janik LLP
Suite 225
655 Fifteenth Street, N.W.
Washington, DC 20005
(202) 638-3307

(a)(1)(ii) Consummation Date

The trackage rights will be consummated after the effective date of this Notice of Exemption

(a)(1)(iii) Purpose Sought to be Accomplished

The trackage rights are intended to permit BNSF to provide common carrier service to any future customers locating along the Line.

(a)(5) List of States in which the Party's Property is Situated

The involved trackage rights are located in the State of Missouri

(a)(6) Map

Maps illustrating the trackage rights are attached as Exhibit A.

(a)(7)(ii) Agreement

A copy of the agreement will be filed with the Board within 10 days of its execution.

Labor Protection

BNSF is agreeable to the labor protection conditions generally imposed in trackage rights proceedings as found in *Norfolk and Western Ry Co. – Trackage Rights – BN*, 354 I.C.C. 605 (1978), as modified by *Mendocino Coast Ry, Inc. – Lease and Operate*, 360 I.C.C. 653 (1980).

Environmental and Historic Matters

Environmental and historical impacts associated with trackage rights transactions generally are considered to be insignificant. Therefore, an environmental and historical report and documentation normally need not be submitted for this type of transaction, pursuant to 49 C.F.R §§ 1105.6(c)(4) and 1105.8(b)(3).

Conclusion

BNSF continues to believe that the 2003 Industry Track Agreement between BNSF and PCPA authorizes BNSF to provide common and contract carrier operations over the PCPA Line. BNSF also believes that its use of the PCPA Line does not require prior approval of the Board. The construction, acquisition, lease or use of track to serve customers situated within the same territory already served by the carrier is not subject to the Board's licensing authority. *Texas &*

Pacific Railway Co v Gulf, Colorado & Santa Fe Railway Co, 270 U.S. 266, 278 (1978).

Moreover, tracks can be deemed excepted track under 49 U.S.C. § 10906 for one carrier and a line of railroad for another carrier. For example, in *Chicago Rail Link, L L C – Lease and Oper – Union Pacific RR Co.* 2 S.T.B. 534 (1997), *aff'd sub nom., United Transp Union-Illinois v STB*, 169 F.3d 474 (7th Cir 1999), a particular section of track was considered a line of railroad for the lessee and yard track for the lessor. In 2003, the PCPA Line was constructed adjacent to a BNSF mainline and no other railroad served that territory. For PCPA, the PCPA Line was subject to the Board's licensing authority because PCPA was proposing to construct and operate in territory not previously served and the proposal constituted its entire operation. See *Effingham RR Co – Pet. For Declaratory Order*, 2 S.T.B. 606 (1997), *aff'd sub nom., United Transport. Union v STB*, 183 F.3d 606, 613 (7th Cir 1999). For BNSF, the newly constructed line constituted an industry track or spur track. The PCPA Line is approximately 4.9 miles in length and has been used to serve only a single customer.

In any event, all of the operations performed by BNSF to date over the PCPA Line have been pursuant to a contract under 49 U.S.C. § 10709, and the Board does not have jurisdiction over contract carriage. See *Consolidated Rail Corp. – Petition For Declaratory Order*, 1 I.C.C.2d 284 (1984). See also *Texas v United States*, 730 F.2d 409, 417 (5th Cir. 1984) (“railroads are common carriers when they serve all comers at a general publicly disclosed rate, and contract carriers when they enter into private contracts...); *Conrail Abandonment in Jeannette, PA*, 366 I C C 384 (1982)(Conrail contract service no subject to ICC licensing authority); STB Finance Docket No. 34133, *S.D. Warren Company D/B/A Sappi Fine Paper North America – Acquisition and Operation Exemption – Maine Central Railroad Company and Springfield Terminal Railway Company* (not printed), served September 30, 2002 (third party

contractor operations found beyond scope of Board jurisdiction); STB Finance Docket No. 34277, *H&M International Transportation, Inc. – Petition For Declaratory Order* (not printed), served November 12, 2003 (operations performed pursuant to a contract with UP not subject to Board licensing authority)

Notwithstanding the foregoing, BNSF is hereby filing to acquire trackage rights over the PCPA Line out of an abundance of caution and in light of the concerns expressed by the Board in Finance Docket No. 35685. BNSF will use the trackage rights should any common carrier operations materialize at some future date along the PCPA Line. At present, BNSF will continue to rely on its 2003 Industry Track Agreement to support the contract carriage operations.

Respectfully submitted,



Tyler White
Assistant General Attorney
BNSF Railway Company
2500 Lou Menk Drive, AOB-3
Fort Worth, TX 76131

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Of Counsel
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655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 638-3307

Attorneys for:
BNSF Railway Company

Dated: January 17, 2013

SURFACE TRANSPORTATION BOARD

NOTICE OF EXEMPTION

FINANCE DOCKET NO 35712

**BNSF RAILWAY COMPANY
-- TRACKAGE RIGHTS EXEMPTION --
PEMISCOT COUNTY PORT AUTHORITY**

Pemiscot County Port Authority ("PCPA") has agreed to grant local trackage rights to BNSF Railway Company ("BNSF"), over the rail line located between its connection with the BNSF main line near BNSF milepost 212.22, at Hayti, MO, and extending eastward to the Pemiscot Port Harbor on the Mississippi River a distance of 4.9 miles

The trackage rights will be consummated on or after February ____, 2013.

This notice is filed under 49 C.F.R. § 1180.2(d)(7). Petitions to revoke the exemption under 49 U.S.C. § 10502(d) may be filed at any time. The filing of a petition to revoke will not stay the transaction.

Dated:

By the Board,

TRACKING NO. _____

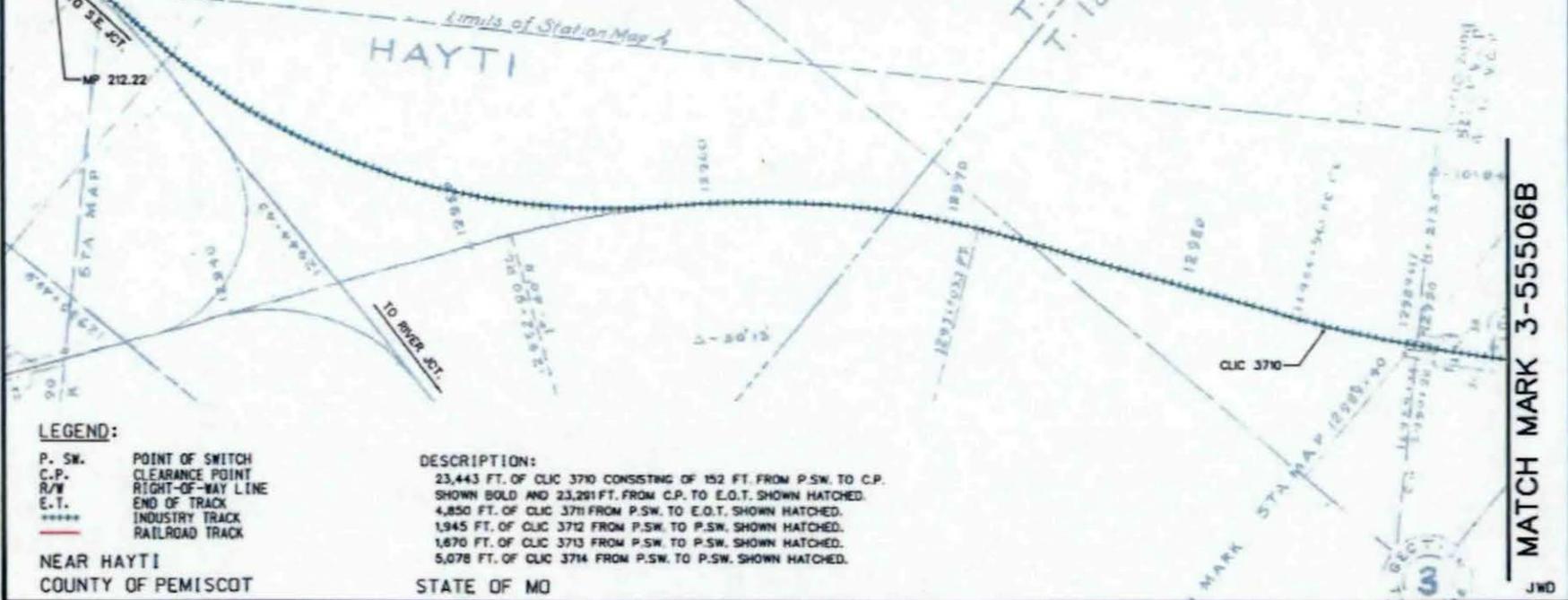
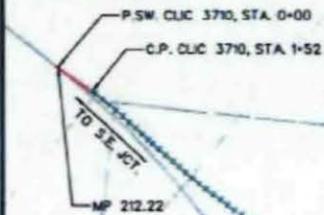
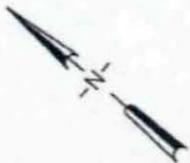
EXHIBIT "A"
ATTACHED TO CONTRACT BETWEEN
BNSF RAILWAY COMPANY
AND

PEMISCOT COUNTY PORT AUTHORITY

TRIM LINE

SCALE: 1 IN. = 400 FT.
SPRINGFIELD DIV.
RIVER SUBDIV. L.S. 1025
DATE 07/23/2012

SECTION: 34
TOWNSHIP: 19N
RANGE: 12E
MERIDIAN: 5PM



LEGEND:

- P. SW. POINT OF SWITCH
- C.P. CLEARANCE POINT
- R/W RIGHT-OF-WAY LINE
- E.T. END OF TRACK
- INDUSTRY TRACK
- +++++ RAILROAD TRACK

DESCRIPTION:

- 23,443 FT. OF CLIC 3710 CONSISTING OF 152 FT. FROM P.S.W. TO C.P. SHOWN BOLD AND 23,291 FT. FROM C.P. TO E.O.T. SHOWN HATCHED.
- 4,850 FT. OF CLIC 3711 FROM P.S.W. TO E.O.T. SHOWN HATCHED.
- 1,945 FT. OF CLIC 3712 FROM P.S.W. TO P.S.W. SHOWN HATCHED.
- 1,670 FT. OF CLIC 3713 FROM P.S.W. TO P.S.W. SHOWN HATCHED.
- 5,078 FT. OF CLIC 3714 FROM P.S.W. TO P.S.W. SHOWN HATCHED.

NEAR HAYTI
COUNTY OF PEMISCOT

STATE OF MO

MATCH MARK 3-55506B

MAP REF. R67350

EXHIBIT A

JWD

DRAWING NO. 3-55506A

TRACKING NO. _____

EXHIBIT "A"

ATTACHED TO CONTRACT BETWEEN
BNSF RAILWAY COMPANY
AND

PEMISCOT COUNTY PORT AUTHORITY

TRIM LINE

SCALE: 1 IN. = 400 FT.
SPRINGFIELD DIV.
BLVER SUBDIV. L.S. 1025
DATE 07/23/2012

SECTION: 2,3
TOWNSHIP: 18N
RANGE: 12E
MERIDIAN: 5PM



MATCH MARK 3-55506A

MATCH MARK 3-55506C

LEGEND:

- P. SW. POINT OF SWITCH
- C.P. CLEARANCE POINT
- R/W RIGHT-OF-WAY LINE
- E.T. END OF TRACK
- INDUSTRY TRACK
- +++ RAILROAD TRACK

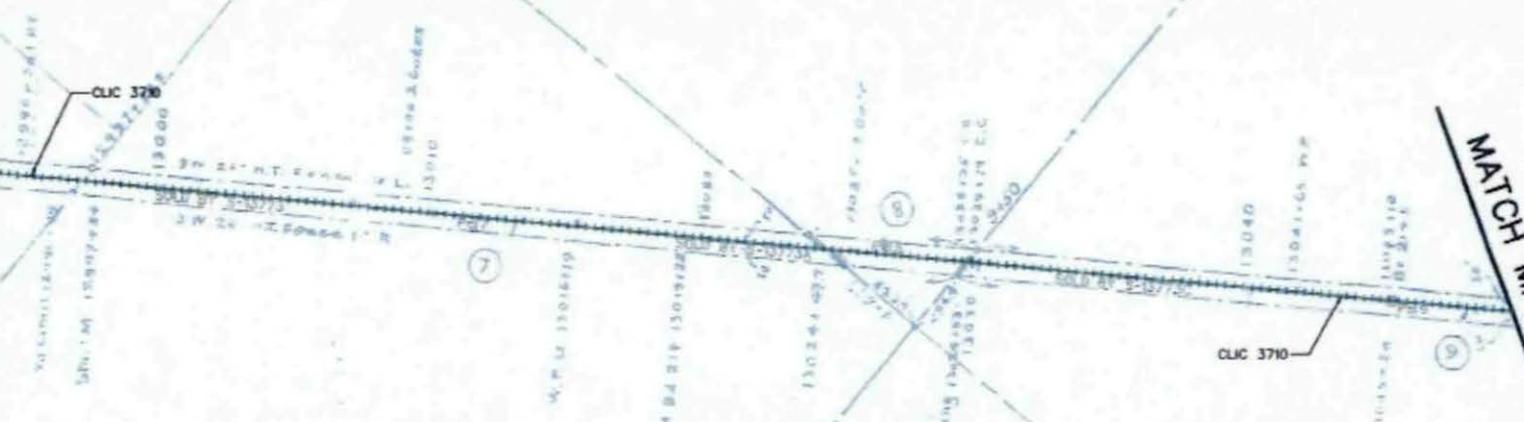
NEAR HAYTI
COUNTY OF PEMISCOT

STATE OF MO

JWD

DRAWING NO. 3-55506B

MAP REF. R67350



TRACKING NO. _____

EXHIBIT "A"

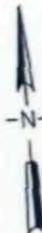
ATTACHED TO CONTRACT BETWEEN
BNSF RAILWAY COMPANY
AND

PEMISCOT COUNTY PORT AUTHORITY

TRIM LINE

SCALE: 1 IN. = 400 FT.
SPRINGFIELD DIV.
RIVER SUBDIV. L.S. 1025
DATE 07/23/2012

SECTION: 11.12
TOWNSHIP: 18N
RANGE: 12E
MERIDIAN: SPM



MATCH MARK 3-55506B

CLIC 3710

P.S.W. CLIC 3714, STA. 0+00

CLIC 3710

MATCH MARK 3-55506D

MAP REF. R67350

LEGEND:

- P. SW. POINT OF SWITCH
- C.P. CLEARANCE POINT
- R/W RIGHT-OF-WAY LINE
- E.T. END OF TRACK
- +++++ INDUSTRY TRACK
- RAILROAD TRACK

NEAR HAYTI
COUNTY OF PEMISCOT

STATE OF MO

MATCH MARK

JWD

DRAWING NO. 3-55506C

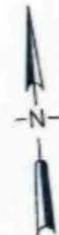
TRACKING NO. _____

EXHIBIT "A"
ATTACHED TO CONTRACT BETWEEN
BNSF RAILWAY COMPANY
AND

PEMISCOT COUNTY PORT AUTHORITY

SCALE: 1 IN. = 400 FT.
SPRINGFIELD DIV.
RIVER SUBDIV. L.S. 1025
DATE 07/23/2012

SECTION: 11.12
TOWNSHIP: 18N
RANGE: 12E
MERIDIAN: 5PM



TRIM LINE

MATCH MARK 3-55506E

MATCH MARK 3-55506C

CLIC 3714
CLIC 3710

CLIC 3710

P.S.W. CLIC 3714, STA. 50+78

PSW CLIC 3711
STA. 00+00

MVP REF. R67350

LEGEND:

- P. SW. POINT OF SWITCH
- C.P. CLEARANCE POINT
- R/W RIGHT-OF-WAY LINE
- E.T. END OF TRACK
- ++++ INDUSTRY TRACK
- RAILROAD TRACK

NEAR HAYTI
COUNTY OF PEMISCOT

STATE OF MO

JWD

DRAWING NO. 3-55506D

TRACKING NO. _____

EXHIBIT "A"

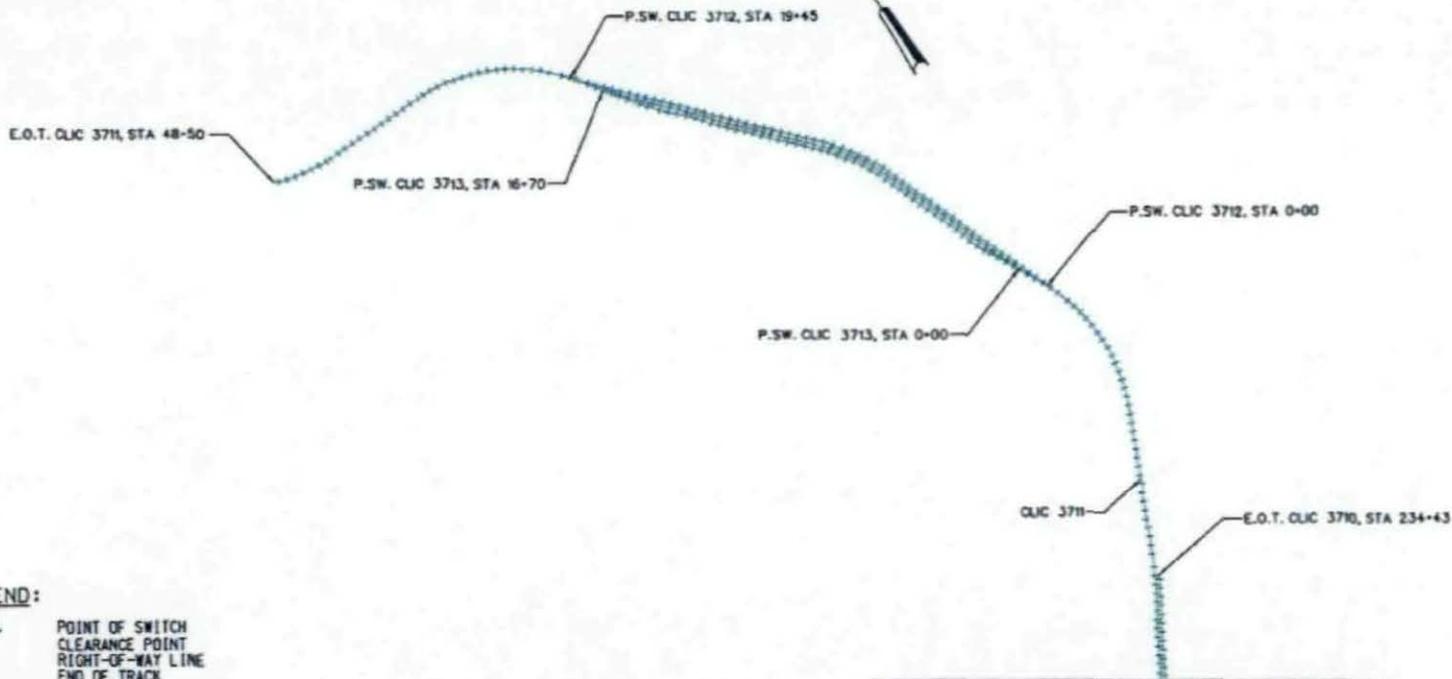
ATTACHED TO CONTRACT BETWEEN
BNSF RAILWAY COMPANY
AND

PEMISCOT COUNTY PORT AUTHORITY

TRIM LINE

SCALE: 1 IN. = 400 FT.
SPRINGFIELD DIV.
RIVER SUBDIV. L.S. 1025
DATE 07/23/2012

SECTION: 06, 07
TOWNSHIP: 18N
RANGE: 13E
MERIDIAN: 5PM



MAP REF. R67350

LEGEND:

- P. SW. POINT OF SWITCH
- C.P. CLEARANCE POINT
- R/W RIGHT-OF-WAY LINE
- E.T. END OF TRACK
- INDUSTRY TRACK
- RAILROAD TRACK

NEAR HAYTI
COUNTY OF PEMISCOT

STATE OF MO

MATCH MARK 3-55506D

JWD

DRAWING NO. 3-55506E