

FIRST TERM AND OPEN END MORTGAGE

THIS FIRST TERM AND OPEN END MORTGAGE (being hereinafter referred to as the "Mortgage") dated as of the 1st day of August, 1989, made by ABC RAIL CORPORATION, a Delaware corporation (the "Mortgagor"), having its chief executive office at 200 South Michigan Avenue, Chicago, Illinois 60604, in favor of THE FIRST NATIONAL BANK OF CHICAGO ("FNBC"), a national banking association having its chief executive office in Chicago, Illinois and THE FIRST NATIONAL BANK OF CHICAGO (CANADA) ("FNBC Canada"), with an office located at 4256 Portage Road, Niagara Falls, Ontario, Canada M5X 1E4 (FNBC and FNBC Canada, collectively, the "Mortgagees" and individually, a "Mortgagee").

WITNESSETH:

WHEREAS, pursuant to that certain Second Restated and Amended Loan and Security Agreement (as further amended from time to time, the "Loan Agreement") of even date herewith by and between the Mortgagor and FNBC, FNBC has agreed to extend certain loans and other financial accommodations to Mortgagor, including, without limitation, a bridge loan evidenced by that certain Bridge Loan Note ("Bridge Loan Note") of even date herewith in the principal amount of Twenty One Million Dollars (\$21,000,000.00) and revolving loans evidenced by that certain Revolving Loan Note ("Revolving Loan Note") of even date herewith in the original principal amount of up to Twenty-Eight Million Dollars (\$28,000,000);

WHEREAS, the Bridge Loan Note shall mature no later than August 31, 1996 and the Revolving Loan Note shall mature no later than August 31, 1996, each bearing interest at the rate specified in the Loan Agreement;

WHEREAS, pursuant to that certain loan and security Agreement of even date herewith (as the same may from time to time be amended, the "Canadian Loan Agreement") between ABC Rail Limited and FNBC Canada, FNBC Canada has agreed to make revolving loans to ABC Rail Limited up to a maximum of \$2,500,000.00 (Can.) and a short term loan to ABC Rail Limited up to a maximum amount of \$1,000,000.00 (U.S.) and ABC Rail Limited has executed and delivered

This document prepared by and after recording return to:
Sara Elizabeth Bartlett
Sidley & Austin
One First National Plaza
Chicago, Illinois 60603

PKA 32-21-116-022
32-21-116-021
32-21-116-020

89359756

BOX 334

89-00841
CH 16536

8900841

UNOFFICIAL COPY

8 9 3 5 9 / 5 6

to FNBC Canada that certain Revolving Loan Note in the original principal amount of Two Million Five Hundred Thousand Canadian Dollars (\$2,500,000.00 (Can.) and that certain Bridge Loan Note in the original principal amount of One Million U.S. Dollars (\$1,000,000.00 (U.S.)) (collectively, the "Canadian Notes"); and

WHEREAS, the Canadian Notes shall mature no later than August 31, 1996 and shall bear interest at the rate specified in the Canadian Loan Agreement;

WHEREAS, pursuant to that certain Guaranty and Security Agreement of even date herewith (as the same may from time to time be amended, the "Guaranty") executed by the Mortgagor, the Mortgagor has guaranteed the "Liabilities" (as defined in the Canadian Loan Agreement), including, without limitation, the Canadian Notes; and

WHEREAS, the Mortgagees have required as a condition, among others, to their execution and delivery of the Loan Agreement and the Canadian Loan Agreement and in order to secure the payment and performance of all of Mortgagor's (i) "Liabilities" (as defined in the Loan Agreement) including, without limitation, the Bridge Loan Note and Revolving Loan Note, (ii) "Obligations" (as defined in the Guaranty) and (iii) all of Mortgagor's payment and performance obligations hereunder (such payment and performance obligations as referred to in clauses (i), (ii) and (iii) above, collectively, the "Liabilities"), that Mortgagor execute and deliver this Mortgage to the Mortgagees; and

WHEREAS, the Liabilities secured hereby shall not exceed an aggregate amount, at any one time outstanding, of Fifty Five Million Dollars (\$55,000,000.00), provided that the foregoing limitation shall apply only to the lien upon real property created by this Mortgage, and it shall not in any manner limit, affect or impair any grant of a security interest in any personal property in favor of any of the Mortgagees, or under any other security agreement at any time executed by Mortgagor.

NOW, THEREFORE, in consideration of the premises contained herein and to secure payment of the Liabilities and in consideration of One Dollar (\$1.00) in hand paid, receipt whereof is hereby acknowledged, Mortgagor does hereby grant, remise, release, alien, convey, mortgage and warrant to the Mortgagees, their successors and assigns, and grant a security interest to the Mortgagees, their successors and assigns, in and to the following described real estate (the "Land") in Cook County, Illinois:

See Exhibit A attached hereto and by this reference made a part hereof

which Land, together with all right, title and interest, if any, which Mortgagor may now have or hereafter acquire in and to all improvements, buildings and structures thereon of every nature whatsoever, is herein called the "Premises."

UNOFFICIAL COPY

89359756

TOGETHER WITH all right, title and interest, if any, including any after-acquired right, title and interest, and including any right of use or occupancy, which Mortgagor may now have or hereafter acquire in and to (a) all easements, rights of way, gores of land or any lands occupied by streets, ways, alleys, passages, sewer rights, water courses, water rights and powers, and public places adjoining said land, and any other interests in property constituting appurtenances to the Premises, or which hereafter shall in any way belong, relate or be appurtenant thereto, and (b) all hereditaments, gas, oil, minerals (with the right to extract, sever and remove such gas, oil and minerals), and easements, of every nature whatsoever, located in or on the Premises and all other rights and privileges thereunto belonging or appertaining and all extensions, additions, improvements, betterments, renewals, substitutions and replacements to or of any of the rights and interests described in subparagraphs (a) and (b) above (hereinafter the "Property Rights").

TOGETHER WITH all right, title and interest, if any, including any after-acquired right, title and interest, and including any right of use or occupancy, which Mortgagor may now or hereafter acquire in and to all fixtures and appurtenances of every nature whatsoever now or hereafter located in, on or attached to, and used or intended to be used in connection with, or with the operation of, the Premises, including, but not limited to (a) all apparatus, machinery and equipment of Mortgagor; and (b) all extensions, additions, improvements, betterments, renewals, substitutions and replacements to or of any of the foregoing (the items described in the foregoing (a) and (b) being the "Fixtures"); as well as all personal property and equipment of every nature whatsoever now or hereafter located in or on the Premises, including but not limited to (c) all screens, window shades, blinds, wainscoting, storm doors and windows, floor coverings, and awnings of Mortgagor; (d) all apparatus, machinery, equipment and appliances of Mortgagor not included as Fixtures; (e) all items of furniture, furnishings and personal property of Mortgagor; and (f) all extensions, additions, improvements, betterments, renewals, substitutions and replacements to or of any of the foregoing (c)-(e) (the items described in the foregoing (c)-(f) and any other personal property referred to in this paragraph being the "Personal Property") and in and to the proceeds of the Personal Property. It is mutually agreed, intended and declared that the Premises and all of the Property Rights and Fixtures owned by Mortgagor (referred to collectively herein as the "Real Property") shall, so far as permitted by law, be deemed to form a part and parcel of the Land and for the purpose of this Mortgage to be real estate and covered by this Mortgage. It is also agreed that if any of the property herein mortgaged is of a nature so that a security interest therein can be perfected under the Uniform Commercial Code, this instrument shall constitute a security agreement, fixture filing and financing statement, and Mortgagor agrees to execute, deliver and file or refile any financing statement, continuation statement, or other instruments the Mortgagees may reasonably require from time to time

89359756

to perfect or renew such security interest under the Uniform Commercial Code. To the extent permitted by law, (i) all of the Fixtures are or are to become fixtures on the Land; and (ii) this instrument, upon recording or registration in the real estate records of the proper office, shall constitute a "fixture-filing" within the meaning of Sections 9-313 and 9-402 of the Uniform Commercial Code. Subject to the terms and conditions of the Loan Agreement and the Guaranty, the remedies for any violation of the covenants, terms and conditions of the agreements herein contained shall be as proscribed herein or by general law, or, as to that part of the security in which a security interest may be perfected under the Uniform Commercial Code, by the specific statutory consequences now or hereafter enacted and specified in the Uniform Commercial Code, all at the Mortgagees' sole election.

TOGETHER WITH all the estate, right, title and interest of Mortgagor in and to (i) all judgments, insurance proceeds, awards of damages and settlements resulting from condemnation proceedings or the taking of the Real Property, or any part thereof, under the power of eminent domain or for any damage (whether caused by such taking or otherwise) to the Real Property, or any part thereof, or to any rights appurtenant thereto, and all proceeds of any sales or other dispositions of the Real Property or any part thereof; and (except as otherwise provided herein or in the Loan Agreement and the Guaranty) each of the Mortgagees is hereby authorized to collect and receive said awards and proceeds and to give proper receipts and acquittances therefor, and to apply the same as provided in the Loan Agreement and the Guaranty; and (ii) all contract rights, general intangibles, actions and rights in action relating to the Real Property including, without limitation, all rights to insurance proceeds and unearned premiums arising from or relating to damage to the Real Property; and (iii) all proceeds, products, replacements, additions, substitutions, renewals and accessions of and to the Real Property. (The rights and interests described in this paragraph shall hereinafter be called the "Intangibles.")

As additional security for the liabilities secured hereby, Mortgagor does (i) hereby pledge and assign to the Mortgagees from and after the date hereof (including any period of redemption), primarily and on a parity with the Real Property, and not secondarily, all the rents, issues and profits of the Real Property and all rents, issues, profits, revenues, royalties, bonuses, rights and benefits due, payable or accruing (including all deposits of money as advance rent, for security or as earnest money or as down payment for the purchase of all or any part of the Real Property) (the "Rents") under any and all present and future leases, contracts or other agreements relative to the ownership or occupancy of all or any portion of the Real Property, and (ii) except to the extent such a transfer or assignment is not permitted by the terms thereof, does hereby transfer and assign to the Mortgagees all such leases and agreements (including all Mortgagor's rights under any contracts for the sale of any portion of the Mortgaged Property and all revenues and royalties under any

89359756

UNOFFICIAL COPY

89039756

oil, gas and mineral leases relating to the Real Property) (the "Leases"). The Mortgagees hereby grant to Mortgagor the right to collect and use the Rents as they become due and payable under the Leases, but not more than one (1) month in advance thereof, unless a "Default" (as defined in the Loan Agreement) shall have occurred provided that the existence of such right shall not operate to subordinate this assignment to any subsequent assignment, in whole or in part, by Mortgagor, and any such subsequent assignment shall be subject to the rights of the Mortgagees under this Mortgage. Mortgagor further agrees to execute and deliver such assignments of leases or assignments of land sale contracts as the Mortgagees may from time to time request. In the event of Default under the Loan Agreement (1) Mortgagor agrees, upon demand, to deliver to the Mortgagees all of the Leases with such additional assignments thereof as the Mortgagees may request and agrees that the Mortgagees may assume the management of the Real Property and collect the Rents, applying the same upon the Liabilities in the manner provided in the Loan Agreement and the Guaranty, and (2) Mortgagor hereby authorizes and directs all tenants, purchasers or other persons occupying or otherwise acquiring any interest in any part of the Real Property to pay the Rents due under the Leases to the Mortgagees upon request of the Mortgagees. Mortgagor hereby appoints each of the Mortgagees as its true and lawful attorney in fact to manage said property and collect the Rents, with full power to bring suit for collection of the Rents and possession of the Real Property, giving and granting unto said Mortgagee and unto its agent or attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in the protection of the security hereby conveyed; provided, however, that (i) this power of attorney and assignment of rents shall not be construed as an obligation upon said Mortgagee to make or cause to be made any repairs that may be needful or necessary and (ii) the Mortgagees agree that until such Default as aforesaid, the Mortgagees shall permit Mortgagor to perform the aforementioned management responsibilities. Upon the Mortgagees' receipt of the Rents, at the Mortgagees' option, it may pay: (1) reasonable charges for collection thereof, costs of necessary repairs and other costs requisite and necessary during the continuance of this power of attorney and assignment of rents, (2) general and special taxes, insurance premiums, and (3) the balance of the Rents pursuant to the provisions of the Loan Agreement and the Guaranty. This power of attorney and assignment of rents shall be irrevocable until this Mortgage shall have been satisfied and released of record and the releasing of this Mortgage shall act as a revocation of this power of attorney and assignment of rents. The Mortgagees shall have and hereby expressly reserves the right and privilege (but assumes no obligation) to demand, collect, sue for, receive and recover the Rents, or any part thereof, now existing or hereafter made, and apply the same in accordance with the provisions of the Loan Agreement and the Guaranty.

All of the property described above, and each item of property therein described, not limited to but including the Land, the Premises, the Property Rights, the Fixtures, the Personal

89359756

UNOFFICIAL COPY

89359756

Property, the Real Property, the Intangibles, the Rents and the Leases, is herein referred to as the "Mortgaged Property."

Nothing herein contained shall be construed as constituting any of the Mortgagees a mortgagee-in-possession in the absence of the taking of actual possession of the Mortgaged Property by such Mortgagee. Nothing contained in this Mortgage shall be construed as imposing on the Mortgagees any of the obligations of the lessor under any lease of the Mortgaged Property in the absence of an explicit assumption thereof by the Mortgagees. In the exercise of the powers herein granted the Mortgagees, except as provided in the Loan Agreement or the Guaranty, no liability shall be asserted or enforced against the Mortgagees, all such liability being expressly waived and released by Mortgagor.

TO HAVE AND TO HOLD the Mortgaged Property, properties, rights and privileges hereby conveyed or assigned, or intended so to be, unto the Mortgagees, its beneficiaries, successors and assigns, forever for the uses and purposes herein set forth. Mortgagor hereby releases and waives all rights under and by virtue of the Homestead Exemption Laws, if any, of the State of Illinois (the "State") and Mortgagor hereby covenants, represents and warrants that, at the time of the sealing and delivery of these presents, Mortgagor is well seised of the Mortgaged Property in fee simple and with lawful authority to sell, assign, convey and mortgage the Mortgaged Property, and that the title to the Mortgaged Property is free and clear of all encumbrances, except as described on Exhibit B attached hereto and made a part hereof, and that, except for the encumbrances set forth on Exhibit B, Mortgagor will forever defend the same against all lawful claims.

The following provisions shall also constitute an integral part of this Mortgage:

1. Payment of Taxes on the Mortgage. Without limiting any of the provisions of the Loan Agreement or the Guaranty, Mortgagor agrees that, if the United States or any department, agency or bureau thereof or if the State or any of its subdivisions having jurisdiction shall at any time require documentary stamps to be affixed to this Mortgage or shall levy, assess, or charge any tax, assessment or imposition upon this Mortgage or the credit or indebtedness secured hereby or the interest of the Mortgagees in the Premises or upon the Mortgagees by reason of or as holders of any of the foregoing then, Mortgagor shall pay for such documentary stamps in the required amount and deliver them to the Mortgagees or pay (or reimburse the Mortgagees for) such taxes, assessments or impositions. Mortgagor agrees to exhibit to the Mortgagees, at any time upon request, official receipts showing payment of all taxes, assessments and charges which Mortgagor is required or elects to pay under this paragraph. Mortgagor agrees to indemnify the Mortgagees against liability on account of such documentary stamps, taxes, assessments or impositions, whether such liability arises before or after payment of the liabilities and regardless of whether this Mortgage shall have been released.

89359756

2. Leases Affecting the Real Property. Mortgagor agrees faithfully to perform all of its obligations under all present and future leases or other agreements relative to the occupancy of the Real Property at any time assigned to the Mortgagees as additional security, and to refrain from any action or inaction which would result in termination of any such leases or agreements, or in the diminution of the value thereof or of the rents or revenues due thereunder. All future lessees under any lease of the Real Property, or any part thereof, made after the date of recording of this Mortgage shall, at the Mortgagees' option and without any further documentation, attorn to the Mortgagees as lessor if for any reason the Mortgagees become lessors thereunder, and, upon demand, pay rent to the Mortgagees, and the Mortgagees shall not be responsible under such lease for matters arising prior to the Mortgagees becoming lessors thereunder.

3. Use of the Real Property. Mortgagor agrees that it shall not permit the public to use the Real Property in any manner that might tend, in the Mortgagees' reasonable judgment, to impair Mortgagor's title to such property or any portion thereof, or to make possible any claim or claims of easement by prescription or of implied dedication to public use.

4. Indemnification. Mortgagor shall not use or permit the use of any part of the Real Property for an illegal purpose, including, without limitation, the violation of any environmental laws, statutes, codes, regulations or practices. Without limiting any indemnification Mortgagor has granted in the Loan Agreement or the Guaranty, Mortgagor agrees to indemnify and hold harmless the Mortgagees from and against any and all losses, suits, liabilities, fines, damages, judgments, penalties, claims, charges, costs and expenses (including reasonable attorneys' and paralegals' fees, court costs and disbursements) which may be imposed on, incurred or paid by or asserted against the Real Property by reason or on account of or in connection with (i) the construction, reconstruction or alteration of the Real Property, (ii) any negligence or misconduct of Mortgagor, any lessee of the Real Property, or any of their respective agents, contractors, subcontractors, servants, employees, licensees or invitees, (iii) any accident, injury, death or damage to any person or property occurring in, on or about the Real Property or any street, drive, sidewalk, curb or passageway adjacent thereto, or (iv) any other transaction arising out of or in any way connected with the Mortgagor Property.

5. Insurance. Mortgagor shall, at its sole expense, obtain for, deliver to, assign and maintain for the benefit of the Mortgagees, until the Liabilities are paid in full, insurance policies as specified in the Loan Agreement. In the event of a casualty loss, the net insurance proceeds from such insurance policies shall be paid and applied as specified in the Loan Agreement.

89359756

UNOFFICIAL COPY

8 9 5 8 9 7 5 6

6. Condemnation Awards. Mortgagor hereby assigns to the Mortgagees, as additional security, all awards of damage resulting from condemnation proceedings or the taking of or injury to the Real Property for public use, and Mortgagor agrees that the proceeds of all such awards shall be paid and applied as specified in the Loan Agreement.

7. Remedies. Subject to the provisions of the Loan Agreement and the Guaranty, upon the occurrence of Default under the terms of the Loan Agreement, in addition to any rights and remedies provided for in the Loan Agreement and the Guaranty, and to the extent permitted by applicable law, the following provisions shall apply:

(a) The Mortgagees' Power of Enforcement. It shall be lawful for the Mortgagees to (i) immediately sell the Mortgaged Property either in whole or in separate parcels, as prescribed by the State law, under power of sale, which power is hereby granted to the Mortgagees to the full extent permitted by the State law, and thereupon, to make and execute to any purchaser(s) thereof deeds of conveyance pursuant to applicable law or (ii) immediately foreclose this Mortgage by judicial action. The court in which any proceeding is pending for the purpose of foreclosure of this Mortgage may, at once or at any time thereafter, either before or after sale, without notice and without requiring bond, and without regard to the solvency or insolvency of any person liable for payment of the liabilities secured hereby, and without regard to the then value of the Mortgaged Property or the occupancy thereof as a homestead, appoint a receiver (the provisions for the appointment of a receiver and assignment of rents being an express condition upon which the Loan hereby secured is made) for the benefit of the Mortgagees, with power to collect the Rents, due and to become due, during such foreclosure suit and the full statutory period of redemption notwithstanding any redemption. The receiver, out of the Rents when collected, may pay costs incurred in the management and operation of the Real Property, prior and subordinate liens, if any, and taxes, assessments, water and other utilities and insurance, then due or thereafter accruing, and may make and pay for any necessary repairs to the Real Property, and may pay all or any part of the liabilities or other sums secured hereby or any deficiency decree entered in such foreclosure proceedings. Upon or at any time after the filing of a suit to foreclose this Mortgage, the court in which such suit is filed shall have full power to enter an order placing the Mortgagees in possession of the Real Property with the same power granted to a receiver pursuant to this subparagraph and with all other rights and privileges of a mortgagee-in-possession under applicable law.

(b) The Mortgagees' Right to Enter and Take Possession, Operate and Apply Income. The Mortgagees shall, at their option, have the right, acting through their agents or attorneys, either with or without process of law, forcibly or otherwise, to enter upon and take possession of the Real Property, expel and remove any persons, goods, or chattels occupying or upon the same, to collect

or receive all the Rents, and to manage and control the same, and to lease the same or any part thereof, from time to time, and, after deducting all reasonable attorneys' fees and expenses, and all reasonable expenses incurred in the protection, care, maintenance, management and operation of the Real Property, distribute and apply the remaining net income in accordance with the terms of the Loan Agreement and the Guaranty or upon any deficiency decree entered in any foreclosure proceedings.

8. Application of the Rents or Proceeds from Foreclosure or Sale. In any foreclosure of this Mortgage by judicial action, or any sale of the Mortgaged Property by advertisement, in addition to any of the terms and provisions of the Loan Agreement and the Guaranty, there shall be allowed (and included in the decree for sale in the event of a foreclosure by judicial action) to be paid out of the Rents or the proceeds of such foreclosure proceeding and/or sale:

(a) Liabilities. All of the Liabilities and other sums secured hereby which then remain unpaid; and

(b) Other Advances. All other items advanced or paid by the Mortgagees pursuant to this Mortgage; and

(c) Costs, Fees and Other Expenses. All court costs, reasonable attorneys' and paralegals' fees and expenses, appraiser's fees, advertising costs, filing fees and transfer taxes, notice expenses, expenditures for documentary and expert evidence, stenographer's charges, publication costs, and costs (which may be estimated as to items to be expended after entry of the decree) of procuring all abstracts of title, title searches and examinations, title guarantees, title insurance policies, Torrens certificates and similar data with respect to title which the Mortgagees in the reasonable exercise of its judgment may deem necessary. All such expenses shall become additional liabilities secured hereby when paid or incurred by the Mortgagees in connection with any proceedings, including but not limited to probate and bankruptcy proceedings, to which the Mortgagees shall be a party, either as plaintiff, claimant or defendant, by reason of this Mortgage or any indebtedness hereby secured or in connection with the preparations for the commencement of any suit for the foreclosure, whether or not actually commenced, or sale by advertisement. The proceeds of any sale (whether through a foreclosure proceeding or the Mortgagees's exercise of the power of sale) shall be distributed and applied in accordance with the terms of the Loan Agreement and the Guaranty.

9. Cumulative Remedies; Delay or Omission Not a Waiver. Each remedy or right of the Mortgagees shall not be exclusive of but shall be in addition to every other remedy or right now or hereafter existing at law or in equity. No delay in the exercise or omission to exercise any remedy or right accruing on the occurrence or existence of any Default shall impair any such remedy or right or be construed to be a waiver of any such Default or

89359756

UNOFFICIAL COPY

8 9 3 1 9 / 5 6

acquiescence therein, nor shall it affect any subsequent Default of the same or different nature. Every such remedy or right may be exercised concurrently or independently and when and as often as may be deemed expedient by the Mortgagees.

10. The Mortgagees' Remedies against Multiple Parcels. If more than one property, lot or parcel is covered by this Mortgage, and if this Mortgage is foreclosed upon, or judgment is entered upon any Liabilities secured hereby, or if the Mortgagees exercises its power of sale, execution may be made upon or the Mortgagees may exercise its power of sale against any one or more of the properties, lots or parcels and not upon the others, or upon all of such properties or parcels, either together or separately, and at different times or at the same time, and execution sales or sales by advertisement may likewise be conducted separately or concurrently, in each case at the Mortgagees' election.

11. No Merger. In the event of a foreclosure of this Mortgage or any other mortgage or deed of trust securing the Liabilities, the Liabilities then due the Mortgagees shall not be merged into any decree of foreclosure entered by the court, and the Mortgagees may concurrently or subsequently seek to foreclose one or more mortgages or deeds of trust which also secure said Liabilities.

12. Notices. Except as otherwise provided herein, any notices, demands, consents, requests, approvals, undertakings or other instruments required or permitted to be given in connection with this Mortgage (and all copies of such notices or other instruments as set forth below) shall be in writing, and shall be deemed to have been validly served, given or delivered if hand-delivered or if sent by a nationally recognized overnight delivery service, charges prepaid, or if mailed (effective three (3) business days following deposit thereof at any main or branch United States Post Office or Canadian Post Office) by United States or Canadian registered or certified mail, postage prepaid, return receipt requested, addressed to the party so notified as follows:

if to Mortgagor:

ABC Rail Corporation
200 South Michigan Avenue
Chicago, Illinois 60604
Attn: Mr. Glenn E. Stinson

with a copy to:

Jones, Day, Reavis & Pogue
225 West Washington Street
Chicago, Illinois 60606
Attn: Mr. Douglas H. Walter

if to FNBC:

UNOFFICIAL COPY

3 9 3 9 7 3 6

The First National Bank of Chicago
One First National Plaza
Suite 0094
Chicago, Illinois 60670
Attn: Mr. Dennis E. Harrison

with a copy to:

Sidley & Austin
One First National Plaza
Chicago, Illinois 60603
Attn: Mr. James L. Marovitz

if to FNBC Canada:

The First National Bank of Chicago (Canada)
1256 Portage Road
Niagara Falls, Ontario, Canada M5X 1E4

with a copy to:

Sidley & Austin
One First National Plaza
Chicago, Illinois 60603
Attn: Mr. James L. Marovitz

Mortgagor or the Mortgagees shall, from time to time, have the right to specify as the proper addressee and/or address for the purposes of this Mortgage any other party or address in the United States or Canada upon giving five (5) days' written notice thereof.

13. Extension of Payments. Mortgagor agrees that, without affecting the liability of any person for payment of the Liabilities secured hereby or affecting the lien of this Mortgage upon the Mortgaged Property or any part thereof (other than persons or property explicitly released as a result of the exercise by the Mortgagees of its rights and privileges hereunder), the Mortgagees may at any time and from time to time, on request of the Mortgagor, without notice to any person liable for payment of any Liabilities secured hereby, but otherwise subject to the provisions of the Loan Agreement, the Canadian Loan Agreement and the Guaranty, extend the time, or agree to alter or amend the terms of payment of such Liabilities. Mortgagor further agrees that any part of the security herein described may be released with or without consideration without affecting the remainder of the Liabilities or the remainder of the security.

14. Governing Law. Mortgagor agrees that this Mortgage is to be construed, governed and enforced in accordance with the laws of the State. Wherever possible, each provision of this Mortgage shall be interpreted in such manner as to be effective and valid under applicable law, but if any provision of this Mortgage shall be prohibited by or invalid under applicable law, such

89359756

UNOFFICIAL COPY

89009756

provision shall be ineffective only to the extent of such prohibition or invalidity, without invalidating the remainder of such provision or the remaining provisions of this Mortgage.

15. Satisfaction of Mortgage. Upon full payment of all the Liabilities, at the time and in the manner provided in the Loan Agreement and the Guaranty, or upon satisfaction of the conditions set forth in the Loan Agreement and the Guaranty for release of the Mortgaged Property from this Mortgage, this conveyance or lien shall be null and void and, upon demand therefor following such payment or satisfaction of the conditions set forth in the Loan Agreement for release of the Mortgaged Property, as the case may be, a satisfaction of mortgage or reconveyance of the Mortgaged Property shall promptly be provided by the Mortgagees to Mortgagor.

16. Successors and Assigns Included in Parties. This Mortgage shall be binding upon the Mortgagor and upon the successors, assigns and vendees of the Mortgagor and shall inure to the benefit of the Mortgagees' successors and assigns; all references herein to the Mortgagor and to the Mortgagees shall be deemed to include their respective successors and assigns. Mortgagor's successors and assigns shall include, without limitation, a receiver, trustee or debtor in possession of or for the Mortgagor. Wherever used, the singular number shall include the plural, the plural shall include the singular, and the use of any gender shall be applicable to all genders.

17. Waiver of Appraisal, Valuation, Stay, Extension and Redemption Laws. Mortgagor agrees, to the full extent permitted by law, that at all times following a Default, neither Mortgagor nor anyone claiming through or under it shall or will set up, claim or seek to take advantage of any appraisal, valuation, stay, or extension laws now or hereafter in force, in order to prevent or hinder the enforcement or foreclosure of this Mortgage or the absolute sale of the Mortgaged Property or the final and absolute putting into possession thereof, immediately after such sale, of the purchaser thereof; and Mortgagor, for itself and all who may at any time claim through or under it, hereby waives, to the full extent that it may lawfully so do, the benefit of all such laws and any and all right to have the assets comprising the Mortgaged Property marshalled upon any foreclosure of the lien hereof and agrees that the Mortgagees or any court having jurisdiction to foreclose such lien may sell the Mortgaged Property in part or as an entirety. To the full extent permitted by law, Mortgagor hereby waives any and all statutory or other rights of redemption from sale under any order or decree of foreclosure of this Mortgage, on its own behalf and on behalf of each and every person acquiring any interest in or title to the Mortgaged Property subsequent to the date hereof.

18. Interpretation with Other Documents. Notwithstanding anything in this Mortgage to the contrary, in the event of a conflict or inconsistency between the Mortgage and the Loan Agreement, between the Mortgage and the Canadian Loan Agreement or

UNOFFICIAL COPY

3 9 3 5 9 7 5 6

between the Mortgage and the Guaranty, the provisions of the Loan Agreement, the Canadian Loan Agreement or the Guaranty, as applicable, shall govern.

19. Future Advances. This Mortgage is given for the purpose securing loan advances which the the Mortgagees may make to or for Mortgagor or guaranteed by Mortgagor pursuant and subject to the terms and provisions of the Loan Agreement and the Guaranty. The parties hereto intend that, in addition to any other debt or obligation secured hereby, this Mortgage shall secure unpaid balances of loan advances made after this Mortgage is delivered to the Recorder of Deeds, Cook County, Illinois, whether made pursuant to an obligation of the Mortgagees or otherwise, provided that such advances are within twenty (20) years from the date hereof and in such event, such advances shall be secured to the same extent as if such future advances were made on the date hereof, although there may be no advance made at the time of execution hereof and although there may be no indebtedness outstanding at the time any advance is made. Such loan advances may or may not be evidenced by notes executed pursuant to the Loan Agreement or the Canadian Loan Agreement.

20. Invalid Provisions to Affect No Others. In the event that any of the covenants, agreements, terms or provisions contained in this Mortgage shall be invalid, illegal or unenforceable in any respect, the validity of the remaining covenants, agreements, terms or provisions contained herein, in the Guaranty or in the Loan Agreement shall not be in any way affected, prejudiced or disturbed thereby. In the event that the application of any of the covenants, agreements, terms or provisions of this Mortgage is held to be invalid, illegal or unenforceable, those covenants, agreements, terms and provisions shall not be in any way affected, prejudiced or disturbed when otherwise applied.

21. Changes. Neither this Mortgage nor any term hereof may be changed, waived, discharged or terminated orally, or by any action or inaction, but only by an instrument in writing signed by the party against which enforcement of the change, waiver, discharge or termination is sought. To the extent permitted by law, any agreement hereafter made by Mortgagor and the Mortgagees relating to this Mortgage shall be superior to the rights of the holder of any intervening lien or encumbrance.

22. Time of Essence. Time is of the essence with respect to the provisions of this Mortgage.

89359756

UNOFFICIAL COPY

3 9 3 3 9 7 5 6

IN WITNESS WHEREOF, this instrument is executed as of the day and year first above written by the person or persons identified below on behalf of Mortgagor (and said person or persons hereby represent that they possess full power and authority to execute this instrument).

THE MORTGAGOR HEREBY DECLARES AND ACKNOWLEDGES THAT THE MORTGAGOR HAS RECEIVED, WITHOUT CHARGE, A TRUE COPY OF THIS MORTGAGE.

MORTGAGOR:

ABC RAIL CORPORATION

By *[Signature]*
Its *Chairman*

Attest: *[Signature]*
Its Secretary

AFFIX CORPORATE SEAL

Property of Cook County Clerk's Office

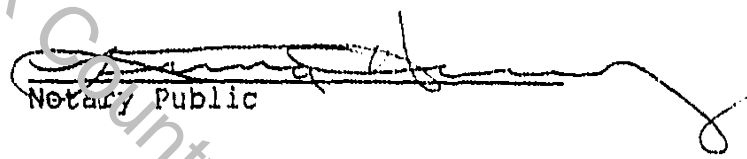
89359756

UNOFFICIAL COPY

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

I, the undersigned, a Notary Public, in and for the County and State aforesaid, DO HEREBY CERTIFY, that G.E. Stinson, personally known to me to be the Chairman, President of ABC Rail Corporation, a Delaware corporation and James F. Wine, personally known to me to be the _____ Secretary of said corporation, and personally known to me to be the same persons whose names are subscribed to the foregoing instrument, appeared before me this day in person and severally acknowledged that as such Chairman, President and _____ Secretary, they signed and delivered the said instrument and caused the corporate seal of said corporation to be affixed thereto, pursuant to authority given by the Board of Directors of said corporation, as their free and voluntary act, and as the free and voluntary act and deed of said corporation, for the uses and purposes therein set forth.

Given under my hand and official seal, this 1st day of August, 1989.


Notary Public

My commission expires:
11 / 1 / 89

Cook County Clerk's Office

89359756

UNOFFICIAL COPY

EXHIBIT A

Lots 38, 39, 40, 41 and 42 in Block 1 in Subdivision of that portion of Lots 1 and 3 in Block 240 in Chicago Heights lying South of a line drawn 33 feet North of and parallel to the East and West center line of the South 1/2 of the Northwest 1/4 of Section 21, Township 35 North, Range 14, East of the Third Principal Meridian, in Cook County, Illinois.

Property of Cook County Clerk's Office

89359756

UNOFFICIAL COPY

8 9 3 5 9 7 5 6

Chicago Heights, IL

EXHIBIT B

Permitted Title Exceptions:

Those title exceptions listed on the title commitment number 89-00841, dated July 20, 1989, issued by Lawyer's Title Insurance Corporation for the property described on Exhibit A hereof.

Property of Cook County Clerk's Office

DEPT-01 \$27.00
TH1111 TRAN 7234 08/04/89 14:30:00
47704 41 24 4-009-2157754
COOK COUNTY RECORDER

-89-259756

2700