

MISCELLANEOUS RECORD No. 8

WERTHEIMER & DEGEN FEED YARDS, INC. :
 AND :
 UNION PACIFIC RAILROAD COMPANY :
 Agreement \$4.25 Pd. ✓ :

Filed August 25, 1933, at 10 o'clock A. M.

County Clerk

THIS AGREEMENT, made and entered into this 10th day of August, 1933, by and between WERTHEIMER & DEGEN FEED YARDS, INC., a corporation of the State of Nebraska, with its principal place of business at Avery, Nebraska, (hereinafter called "Feeding Company"), party of the first part, and UNION PACIFIC RAILROAD COMPANY, a corporation of the State of Utah (hereinafter called "Railroad Company"), party of the second part,

WITNESSETH:

RECITALS:

The Feeding Company owns and operates a feed yard on property adjacent to and westerly of the Railroad Company's right of way in the SW $\frac{1}{4}$ of the SW $\frac{1}{4}$ of Section 23 and the NW $\frac{1}{4}$ of the NW $\frac{1}{4}$ of Section 26, Township 14 North, Range 13 East of the 6th P. M., at Avery, Sarpy County, Nebraska, and, in order to secure an adequate supply of water for said feed yard, desires to construct and maintain a 4-inch water main (hereinafter called "Pipe Line") extending from a connection with the water main of the Metropolitan Utilities District in Bellevue Boulevard, located approximately one-half mile east of said right of way, to said feed yard.

The Railroad Company requires a supply of water for its facilities at Avery and the construction and maintenance of the Pipe Line by the Feeding Company will be of some benefit to the Railroad Company, in view of which the Railroad Company is willing to participate in the cost of the construction of the Pipe Line and to permit the Feeding Company to construct and maintain a part of the Pipe Line on said right of way in the location shown by dashed yellow lines on the print hereto attached, dated August 2, 1932, marked "Exhibit A", and hereby made a part hereof.

AGREEMENT:

NOW THEREFORE, it is mutually agreed by and between the parties hereto as follows:
 Section 1. RAILROAD COMPANY GRANTS RIGHT TO FEEDING COMPANY.

In consideration of the covenants and agreements herein contained to be by the Feeding Company kept, observed and performed, the Railroad Company hereby grants to the Feeding Company the right to construct and thereafter, during the term hereof, to maintain and use the portion of the Pipe Line on said right of way and underneath the tracks of the Railroad Company in the location shown by dashed yellow lines on Exhibit A.

The foregoing grant is subject and subordinate to the prior and continuing right and obligation of the Railroad Company to use and maintain its entire railroad right of way in the performance of its public duty as a common carrier, and is also subject to the right and power of the Railroad Company to construct, maintain, repair, renew, use, operate, change, modify or relocate railroad tracks, telegraph, telephone, signal or other pole and wire lines, pipe lines and other facilities upon, along or across any or all parts of said right of way, all or any of which may be freely done, at any time or times, by the Railroad Company without liability to the Feeding Company or to any other party for compensation or damages.

The foregoing grant is also subject to all outstanding superior rights (including those in favor of telegraph and telephone companies, lessees of said right of way, and others) and the right of the Railroad Company to renew and extend the same.

Section 2. CONSTRUCTION AND MAINTENANCE OF PIPE LINE.

The Feeding Company shall construct, maintain, repair and renew the Pipe Line. All work on said right of way in connection with the construction and maintenance of the Pipe Line shall be done under the supervision and to the satisfaction of the Railroad Company.

The Feeding Company shall procure and furnish, without expense to the Railroad Company, all public authority and permits and all right of way outside the limits of the property of the Railroad Company which are necessary for the construction, maintenance and use of the Pipe Line.

The portion of the Pipe Line located underneath the tracks of the Railroad Company shall be placed at a depth of not less than four feet below the base of the rails of said tracks. Prior to the commencement of any work in connection with the construction, maintenance, repair, renewal, modification, relocation, reconstruction or removal of the portion of the Pipe Line underneath said tracks, the Feeding Company shall submit plans to the Railroad Company setting out the method and manner of handling the work and shall not proceed with the work until such plans have been approved by the Chief Engineer of the Railroad Company and then only under the supervision of said Chief Engineer or his representative.

Section 3. NOTICE OF COMMENCEMENT OF WORK.

The Feeding Company shall notify the Railroad Company at least forty-eight hours in advance of the commencement of any work of said right of way in connection with the con-

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struction, maintenance, repair, renewal, modification, reconstruction, relocation or removal of the Pipe Line

Section 4. MODIFICATION OR RELOCATION OF PIPE LINE ON RIGHT OF WAY.

The Feeding Company shall, at its sole expense, make any and all modifications or changes in the portion of the Pipe Line located on said right of way or move all or any part thereof to such new location as may be required by the Railroad Company, at any time, in connection with the construction, maintenance, repair, renewal, use, operation, change, modification or relocation of railroad tracks, telegraph, telephone, signal or other pole and wire lines, pipe lines and other facilities of the Railroad Company upon said right of way.

All the terms, conditions and stipulations herein expressed with reference to the portion of the Pipe Line on said right of way in the location shown by dashed yellow lines on Exhibit A shall apply to the Pipe Line as modified, changed or relocated within the contemplation of this section.

Section 5. NO INTERFERENCE WITH RAILROAD OPERATIONS.

The Pipe Line shall be constructed, maintained, repaired, renewed, operated, used, modified, reconstructed and relocated in such manner as to cause no interference whatsoever with the constant, continuous and uninterrupted use of the tracks and other property of the Railroad Company, and nothing shall be done or suffered to be done by the Feeding Company that would, in any manner, impair the safety of said tracks or other property.

Section 6. CLAIMS AND LIENS FOR LABOR AND MATERIALS.

The Feeding Company shall not permit or suffer any mechanic's or materialman's lien of any kind or nature to be enforced against the Pipe Line or against said right of way; and the Feeding Company shall indemnify and hold harmless the Railroad Company from and against any and all liens, claims, demands, costs and expenses of whatsoever nature in any way connected with or growing out of any work done, labor performed or materials furnished in connection with the construction, maintenance, repair and renewal of the Pipe Line.

Section 7. LIABILITY OF FEEDING COMPANY.

The Feeding Company shall indemnify and hold harmless the Railroad Company from and against and all liability, loss, damage, claims, demands, costs and expenses of whatsoever nature, including court costs and attorneys' fees, which may result from injury to or death of persons whomsoever, or damage to or loss or destruction of property whatsoever, when such injury, death, loss, destruction or damage grows out of or arises from the bursting of or leaks in the Pipe Line, or any other way whatsoever is due to, or arises because of, the existence of the Pipe Line or the construction, use, maintenance, repair, renewal, modification, reconstruction, relocation or removal of the Pipe Line or any part thereof, or to the contents therein or therefrom. And the Feeding Company does hereby release the Railroad Company from all liability for damages on account of injury to the Pipe Line from any cause whatsoever.

Section 8. RAILROAD COMPANY'S CONNECTIONS.

The Railroad Company shall have the right, at its own cost and expense, to construct, install, maintain and use two service connections with the Pipe Line in the locations indicated by green lines on Exhibit A. Each of said service connections shall be provided with a suitable shut-off valve and a hydrant and a water meter of a make and type acceptable to said Metropolitan Utilities District. For convenience said two connections, together with said shut-off valves, hydrants, water meters and other appurtenances thereof, are hereinafter referred to as "Service Connections".

Section 9. FEEDING COMPANY TO FURNISH WATER TO RAILROAD COMPANY.

The Feeding Company shall, during the term hereof, furnish and deliver to the Railroad Company from the Pipe Line into the Service Connections all water required by the Railroad Company in connection with the use and operation of its facilities at Avery and for supplying the needs and requirements of its employes, tenants and patrons occupying or using the houses and other buildings of the Railroad Company at Avery; it being understood and agreed, however, that the use of the Pipe Line for conveying water to and into the Service Connections shall be subordinate to the needs and requirements of the Feeding Company.

Section 10. RAILROAD COMPANY TO PAY FOR WATER.

For all water furnished and delivered to the Railroad Company into and through the Service Connections, the Railroad Company shall pay to the Feeding Company amounts computed at the same rate per thousand gallons as the Feeding Company pays said Metropolitan Utilities District for the water delivered by said Metropolitan Utilities District into the Pipe Line. The amount of water furnished and delivered to the Railroad Company into the Service Connections shall be determined by said water meters, which shall be read periodically on the same day as said Metropolitan Utilities District reads the meter installed, or to be installed, in the Pipe Line at the connection thereof with said water main in Bellevue Boulevard.

Payments for water furnished and delivered to it hereunder shall be made by the Railroad Company to the Feeding Company within thirty days after rendition of bills therefor by the Feeding Company, which said bills shall be rendered

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after the Feeding Company shall have received bills from said Metropolitan Utilities District for water delivered into the Pipe Line.

Section 11. DEFAULT.

If the Feeding Company shall fail to keep, observe and perform all or any of the covenants and agreements herein contained to be by it kept, observed and performed and such default shall continue for a period of thirty days after written notice from the Railroad Company to the Feeding Company specifying such default, then the Railroad Company may, at its option, terminate this agreement forthwith.

In the event that the Railroad Company shall fail to keep, observe and perform all or any of the covenants and agreements herein contained to be by the Railroad Company kept, observed and performed and such default shall continue for a period of thirty days after written notice from the Feeding Company to the Railroad Company specifying such default, then the Railroad Company shall, within thirty days after receipt of written notice from the Feeding Company so to do, disconnect the Service Connections from the Pipe Line and thereupon, anything herein contained to the contrary notwithstanding, the Feeding Company shall be relieved from any further obligation to furnish and deliver water through the Pipe Line to the Railroad Company as herein contemplated.

Section 12. FEEDING COMPANY TO DISCONTINUE USE OF PIPE LINE UPON TERMINATION OF AGREEMENT.

Upon the termination of this agreement howsoever, the Feeding Company shall discontinue the use of the Pipe Line for conveying water across said right of way to said feed yard and shall, at its sole expense, disconnect the portion of the Pipe Line lying westerly of the Service Connections from the portion thereof lying easterly thereof, leaving intact, however, the portion of the Pipe Line from said connection with said water main of the Metropolitan Utilities District in Bellevue Boulevard to the Service Connections to the end that the Railroad Company can, by means thereof, continue to secure a supply of water from said Metropolitan Utilities District; and if the Feeding Company fails so to do, the Railroad Company may do such work of disconnecting the Pipe Line at the expense of the Feeding Company. In the event the Pipe Line is disconnected as in this section provided, the Railroad Company shall in no manner be liable to the Feeding Company for any damage sustained by the Feeding Company for or on account thereof, and such disconnection shall in no manner prejudice or impair any right of action for damage, or otherwise, that the Railroad Company may have ~~against~~ against the Feeding Company.

If, after the Pipe Line is disconnected as aforesaid, the Railroad Company discontinues the use thereof for securing water from said Metropolitan Utilities District, the Feeding Company shall have the right, at its own expense, to remove the Pipe Line from said right of way and shall, if such right be exercised, restore the premises at its own expense; such removal and restoration to be under the supervision and to the satisfaction of the Railroad Company.

Section 13. ABANDONMENT OF PIPE LINE BY FEEDING COMPANY.

No abandonment or disuse of the Pipe Line by the Feeding Company during the term hereof shall work a termination of this agreement or of the obligation of the Feeding Company to continue to maintain, repair and renew the Pipe Line and to furnish and deliver water to the Railroad Company as herein provided.

The Feeding Company shall not, at any time during the term hereof, disconnect or permit the disconnection of the Pipe Line from said water main of said Metropolitan Utilities District and shall not remove the portion of the Pipe Line between said connection with the water main of said Metropolitan Utilities District and the Service Connections.

Section 14. COST.

Upon completion of the construction of the Pipe Line to the satisfaction of the Railroad Company and the furnishing to the Railroad Company by the Feeding Company of satisfactory evidence that the Pipe Line is free from liens, claims and other encumbrances, the Railroad Company shall pay to the Feeding Company the sum of eight hundred dollars (\$800.00) (less the amount of any and all expense incurred by the Railroad Company in connection with the construction of the Pipe Line for supervision, inspection or otherwise) which payment shall comprise the full and entire amount payable to the Feeding Company by the Railroad Company for the right to install and maintain the Service Connections and for the use of the Pipe Line for conveying water thereto.

All other expense of whatsoever nature in connection with the construction, maintenance, repair and renewal of the Pipe Line or the modification, reconstruction or relocation thereof shall be assumed and paid by the Feeding Company.

The Feeding Company shall, during the term hereof, promptly pay for all water delivered into the Pipe Line from said water main of the Metropolitan Utilities District, and shall indemnify and hold harmless the Railroad Company from and against any expense in connection therewith, other than such as may be directly assignable to the water actually furnished and delivered to the Railroad Company into the Service Connections.

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Section 15. AGREEMENT NOT TO BE ASSIGNED.

The Feeding Company shall not assign this agreement without the written consent of the Railroad Company.

Section 16. EFFECTIVE DATE - TERM.

This agreement shall take effect as of the 6th day of August, 1932, and, unless sooner terminated as herein provided, shall continue in full force and effect for a period of twenty-five (25) years and thereafter until terminated by written notice given (either before or after the expiration of said twenty-five year period) by either party hereto to the other on any date in such notice stated, not less, however, than ninety (90) days subsequent to the date on which such notice shall be given.

Section 17. SUCCESSORS AND ASSIGNS.

Subject to the provisions of Section 15 hereof, this agreement shall be binding upon and inure to the benefit of the Railroad Company, its successors and assigns, and the Feeding Company and its successors and assigns, and the Feeding Company and its successors and assigns; and all the conditions, covenants and agreements herein contained to be kept, observed and performed by the Feeding Company shall attach to and run with the title to the land of the Feeding Company in the SW $\frac{1}{4}$ of the SW $\frac{1}{4}$ of Section 23 and the NW $\frac{1}{4}$ of the NW $\frac{1}{4}$ of Section 26, Township 14 North, Range 13 East of the 6th P. M.

IN WITNESS WHEREOF, the parties hereto have caused this agreement to be executed in duplicate as of the date first herein written.

Witness:

F L Lang

Attest:

J J Regan
Secretary (SEAL)

WERTHEIMER & DEGEN FEED YARDS, INC.

By Sam Wertheimer

President

* WERTHEIMER & DEGEN FEED YARDS INC. *
* CORPORATE SEAL OMAHA, NEB. *

Witness:

H G Ross

Attest:

C. B. Matthal (SEAL)
Assistant Secretary

UNION PACIFIC RAILROAD COMPANY,

By W. M. Jeffers

Executive Vice President

* UNION PACIFIC RAILROAD COMPANY *
* UTAH 1897 *

Approved as to form

T W Bockes

for General Solicitor

APPROVED

Lem Adams

Chief Engineer

Approved as to form

John A Bennewitz

Approved as to condition:

John A Bennewitz

General Attorney R

STATE OF Nebraska)
COUNTY OF Douglas) ss

On this 10th day of August A.D. 1933, before me, a Notary Public duly commissioned and qualified in and for said County, personally came Sam Wertheimer, President of WERTHEIMER & DEGEN FEED YARDS, INC. who is personally known to me to be the identical person whose name is affixed to the foregoing instrument as President of said Wertheimer & Degen Feed Yards, Inc., and acknowledged said instrument to be his voluntary act and deed and the voluntary act and deed of said Wertheimer & Degen Feed Yards, Inc.

Witness my hand and notarial seal at Omaha, Nebraska in said County, on the day and year above mentioned.

My commission expires June 7th 1938.

F L Lang

Notary Public

* F.L.LANG NOTARIAL SEAL *
* DOUGLAS COUNTY, NEBRASKA *
* COMMISSION EXPIRES JUNE 7, 1933 *

Residing at Omaha, Nebraska.