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February 18, 2005

VIA FEDERAL EXPRESS

Mr. Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W., Room 700
Washington, DC 20006



Re: **Finance Docket No. 34646 (Sub-No. 1)**
D&I Railroad Company – Trackage Rights
Exemption – Sioux Valley Regional Railroad Authority

Dear Secretary Williams:

Enclosed for filing in the above-captioned proceeding are eleven copies of the fully executed **Trackage Rights Agreement Between the Sioux Valley Regional Railroad Authority and D&I Railroad Company**, referenced as Exhibit 2 in the Verified Notice of Exemption previously filed in this matter on December 29, 2004.

One extra copy of this transmittal letter is enclosed. I would request that you date-stamp this copy to show receipt of this filing and return it to me in the provided envelope.

If you have any questions regarding this filing, please feel free to contact me. Thank you for your assistance on this matter. Kind regards.

Respectfully submitted,

Myles L. Tobin

MLT: arw

Enclosures

cc: Adrian L. Steel, Jr.

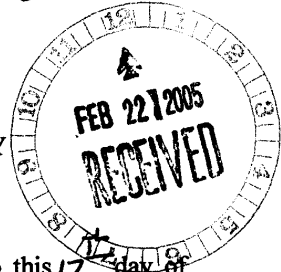
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213364

**TRACKAGE RIGHTS AGREEMENT BETWEEN THE
SIOUX VALLEY REGIONAL RAILROAD AUTHORITY
AND
D&I RAILROAD COMPANY**



THIS TRACKAGE RIGHTS AGREEMENT, made and entered into this 17th day of January, 2005, by and between Sioux Valley Regional Railroad Authority, hereinafter referred to as "Authority", and the D&I Railroad Company, hereinafter referred to as "D&I".

WITNESSETH:

WHEREAS, the Authority has leased from the State of South Dakota ("State") certain rail lines between Beresford and Hawarden, and Canton and Elk Point, South Dakota, and between Elk Point, South Dakota and Sioux City, Iowa, and has been granted certain operating rights on State owned rail lines between Elk Point, South Dakota and Sioux City, Iowa; and

WHEREAS, the Authority and D&I desire that D&I operate the overhead trackage rights on the Rail Facilities described in Paragraph 1 below on behalf of Authority, in common with the State's operator of said Rail Facilities, The Burlington Northern and Santa Fe Railway Company ("BNSF");

NOW, THEREFORE, Authority and D&I do hereby mutually agree as follows:

1. Facility Description. The "Rail Facilities" for which the rights in this agreement are granted extend from milepost 533.4 (also known as milepost 0.0 near East Wye Jct.) near Elk Point, South Dakota to milepost 511.90 in Sioux City, Iowa, including such yardtracks, sidetracks, and connecting tracks as are reasonable and necessary to interchange railcars with BNSF, the Union Pacific Railroad Company ("UP"), and the Canadian National Railway Company ("CN"), and their successors and assigns, at Sioux City.

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Public Record

It is understood and agreed that the Rail Facilities are in an "as is" condition. The Authority shall have no responsibility to make any improvements, modification, rehabilitation, maintenance or other change to the Rail Facilities for the purpose of this Agreement.

2. Operating Rights. Subject to the terms and conditions, herein contained, the Authority grants to D&I the non-exclusive right to operate, in overhead freight service only, its trains, locomotives, cars and equipment with its own crews over the Rail Facilities. D&I shall not perform any local freight service whatsoever on any point located on the Rail Facilities.

D&I's use of the Rail Facilities shall be in common with BNSF and any other user of the Rail Facilities designated by the Authority and the State. D&I shall not have any right to grant other persons rights of any nature in the Rail Facilities.

Except as may otherwise be provided by this Agreement, D&I shall not use any part of the Rail Facilities for the purpose of storage or servicing of cars or equipment.

D&I shall have the right to operate in either direction over the Rail Facilities.

D&I shall not permit or admit any third-party to use of all or any portion of the Rail Facilities, nor under the guise of doing its own business, contract or make any agreement to handle as its own trains, locomotives or cars over or upon the rail facilities, or any portion thereof, the trains, locomotives or cars of any such third-party which in the normal course of business would not be considered as the trains, locomotives or cars of D&I; provided, however, that the foregoing shall not prevent D&I, pursuant to a run-through agreement with any railroad, from using the locomotives of another railroad as its own under this Agreement.

D&I shall have the right, in conjunction with Authority and the State, to construct, as necessary, switches and connecting tracks on the Rail Facilities at Sioux City, Iowa which are sufficient to facilitate the interchange of 110-car trains between D&I and BNSF, the UP and the CN at Sioux City.

3. Government Approval. D&I shall prepare and file such documents as may be required to secure operational approval from the Surface Transportation Board ("STB") for operation of the Rail Facilities. D&I shall permit the Authority to review prior to filing all documents proposed by D&I to be filed with the STB or any court to secure legal approval for operating approval.
4. Administration of Rail Facilities. Notwithstanding any provision of this Agreement, the State of South Dakota shall retain exclusive control of the management of the Rail Facilities, subject to that certain Operating Agreement, dated July 10, 1986, between the State and BNSF, as amended.
5. Payment. D&I hereby agrees to make annual payments to the Authority based on a percentage of the gross freight revenues earned from traffic moved by D&I over the Rail Facilities, in accordance with the following percentages:

<u>For That Portion of Gross Freight Revenue:</u>	<u>Percentage Payment to the Authority:</u>
a. \$36 million and under	1%
b. Between \$36 million and \$45 million	5%
c. Between \$45 and \$55 million	6%
d. In excess of \$55 million	7%

D&I's Trackage Rights Payment to the Authority shall be reduced by the lease payment (1% of gross revenues) paid to the Authority by D&I, pursuant to the parties' March 22, 2004 Sublease Agreement (or successor agreements), for cars

which move over both (1) the Rail Facilities and (2) the Beresford-Hawarden and/or Canton-Elk Point trackage leased by D&I.

A portion of the funds payable to the Authority by D&I shall be allocated and paid to BNSF for maintenance of the Rail Facilities. In the event D&I's movement of loaded cars over the Rail Facilities in a calendar year exceeds 12,200 loaded cars ("maintenance threshold"), D&I shall pay to BNSF 30 cents per loaded car mile ("maintenance allocation") for each loaded car of non-aggregate commodities moved via the Rail Facilities that is interchanged to/from either the UP or the CN at Sioux City, Iowa; provided, however, no per mile charge shall be paid to the extent that the loaded cars moved by D&I fall below the 12,200 car threshold. (For example, assume 12,300 loaded cars move via the Rail Facilities in a calendar year; further assume that 200 of those cars consist of non-aggregate commodities which are interchanged between D&I and UP or CN; the per mile allocation shall be made for the movement of 100 cars).

70% of this BNSF per car mile maintenance allocation shall be subject to annual increase or decrease commencing on January 1, 2006, and January 1 of each year thereafter, based on the relationship of the Association of American Railroads (or successor organization) indexes of railroad material prices and wage rates for railroads of Class 1, Western District (material prices, wage rates and supplements combined, excluding fuel) hereinafter called "AAR Indexes" for each preceding year (2004 = 100). In the event the maintenance payment to BNSF equals or exceeds the amount that would be otherwise due and payable to the Authority in any year pursuant to this Agreement, no additional sums shall be payable to the Authority for that year.

The maintenance threshold shall be increased by .7% on January 1, 2007, and January 1st of each year thereafter.

Further, the Authority and D&I agree that either party reserves the right to renegotiate the payments under this trackage rights agreement on or before the annual anniversary date of this Agreement of each year that this Agreement is in effect by giving the other notice, in writing, at least thirty (30) days prior to the annual anniversary date of any year that the notifying party intends to renegotiate the fee.

The payments made by D&I to the Authority herein shall be in addition to the \$0.03 surcharge payable by D&I to the Authority pursuant to the parties' March 22, 2004 Sublease Agreement. Nothing herein shall be construed as altering D&I's requirement to pay the aforesaid surcharge.

6. Payment of Bills, Records Retention and Audit. D&I shall pay the Authority and BNSF all trackage rights and maintenance fees due under this Agreement within thirty (30) days of the end of each calendar year.

D&I shall maintain records of operations and activities conducted pursuant to this Agreement (including but not limited to waybills generated by D&I, contracts and evidence of all freight revenues earned) for a period of at least four (4) years from the date of each applicable shipment.

Upon reasonable notice, D&I shall allow the State of South Dakota and the Authority or their authorized representatives to inspect the operations and activities of D&I pursuant to this Agreement, and to examine applicable records of D&I at its principal place of business during normal business hours for the purpose of verifying D&I's compliance with the terms and conditions of this Agreement, the amount of traffic moved by D&I over the Rail Facilities, and the gross freight revenues earned therefrom.

7. Liability of D&I. D&I shall indemnify, hold harmless, and protect the State of South Dakota and the Authority, their individual subdivisions and members, and their representatives, officers, employees, successors, and assigns, from all suits, actions, or claims of any character brought because of any injuries or damage or death received or sustained by any person, persons, or property, including State or Authority owned property, on account of any negligent act, omission, neglect or misconduct of the D&I's representatives, officers, employees or agents.
8. Insurance. D&I shall maintain a Commercial General form of insurance covering liability in connection with any of its activities or operations on or near the Rail Facilities in South Dakota, including but not limited to Public Liability, Personal Injury and Property Damage; which insurance must contain a specific waiver of the insurance company's subrogation rights against the State and the Authority, with such limits (consistent with the terms set forth below), deductibles and exclusions as Authority may agree are satisfactory, provided however, that: (i) such limits shall not be less than \$5 million per occurrence; and (ii) policy terms shall not exclude or limit coverage where activities or operations are on or near railroad tracks. The State and the Authority shall be named as additional insureds on such liability insurance policy. Any coverage afforded to the State and the Authority, as additional insureds, shall apply as primary insurance of the State and the Authority, and shall not be deemed to be excess to any insurance issued in the name of the State and the Authority. Such liability insurance must be purchased from an insurance company licensed to do business in South Dakota, and possessing a current Best's Insurance Guide Rating of A and Class X, or better.

D&I shall furnish to the Authority an Accord Certificate of Insurance satisfactory to the Authority, certifying the issuance to D&I of the policies of insurance providing the types of insurance and limits of liability prescribed above, and stating that the Authority, shall be given not less than thirty (30) days' written notice by U.S. Certified Mail (postage prepaid), prior to any material change, substitution or cancellation prior to normal expiration dates.

D&I shall provide the Authority with evidence of the liability insurance coverage required by this Agreement before D&I operates along the Rail Facilities and D&I shall supply the Authority with copies of its insurance policies and any amendments, as soon as they are available, and with evidence of continued insurance coverage on January 1 of each year. D&I acknowledges that the purchase of insurance as required by this Paragraph shall not in any way limit the liability of D&I or any lessee or other operator to the State and Authority, as set forth herein.

9. Personal Liability of Public Officials. In carrying out any of the provisions of this Trackage Rights Agreement, or in exercising any power or authority granted to D&I by or within the scope of this Trackage Rights Agreement, there shall be no liability upon any member of the Authority, or their authorized representatives, either personally or as officials of the Authority, it being understood that in all such matters they act solely as agents and representatives of a political subdivision of the State of South Dakota.
10. Laws to be Observed. D&I shall keep fully informed of all Federal and Authority laws, all local laws, ordinances and regulations, injunctions and all final orders and decrees of bodies of tribunals having any jurisdiction or authority, which in any way affect the performances of this Trackage Rights Agreement, including without limitation any laws, ordinances, regulations, orders, or decrees, identified herein. D&I shall at all times observe and comply with all such laws, ordinances, regulations, and all final orders and decrees, and shall protect, hold harmless and indemnify the Authority and the State and their representatives against any claim or liability arising from or based on the violation of any such law, ordinance, regulation, injunction, or final order or decree.
11. Assignment. D&I shall not assign its rights or delegate its duties under this Trackage Rights Agreement or any part thereof, without prior written consent of the Authority and the South Dakota Railroad Board or its designee.
12. Amendment. No term or provision of this Trackage Rights Agreement may be changed, waived, discharged or terminated, except by an instrument in writing signed by the party against which the enforcement of the change, waiver, discharge or termination is sought; provided however, that when an emergency situation arises, changes in this Agreement may be made orally by representatives of both parties by mutual agreement subject to immediate confirmation by telegram or other delivered writing.
13. Complaint Resolution Procedure. In the event the South Dakota Railroad Board or South Dakota Office of Air, Rail, and Transit receives a written complaint regarding the conduct of operations on the facilities described herein, the South Dakota Railroad Board may conduct a hearing to consider the allegations contained in the complaint. Reasonable prior notice of such hearing shall be provided to all interested parties, including, but not limited to, the party filing the

complaint, the program manager of the South Dakota Office of Air, Rail, and Transit, the Authority, and the D&I, or any other railroad conducting operations on the facilities pursuant to a sublease agreement with the Authority. Any hearing held pursuant to this provision shall be informal in nature and not subject to the requirements of SDCL 1-26, and acts amendatory thereto. All interested parties shall be allowed to present oral and written information to the Board. After considering all information presented, the Board shall issue a written decision, which shall be binding on all parties to this agreement as if incorporated as a provision therein. The decision of the South Dakota Railroad Board shall be final and no party hereto shall be entitled to any right of appeal from its decision.

14. Term. This Agreement shall continue in full force and effect perpetually; provided, however, in the event D&I ceases to be the Authority's designated operator of the Canton-Elk Point and Beresford-Hawarden lines, this trackage rights agreement shall automatically terminate as to D&I and shall be transferred to Authority's new designated operator pursuant to Paragraph 20 hereof. Upon termination of this Agreement, the Rail Facilities shall be returned to the Authority in the same general condition, less normal wear and tear, as existed on the effective date of this Agreement. In the event this Agreement is terminated for any reason whatsoever, D&I agrees to formally relinquish its right to the trackage rights in a proceeding before the Surface Transportation Board.
15. Termination for Fault. Should either the Authority or D&I substantially fail to perform its obligations under this Trackage Rights Agreement, and continue in such default for a period of ninety (90) days, the party not in default shall have the right, at its option, after first giving thirty (30) days written notice thereof by Certified Mail to the party in default, and notwithstanding any waiver by the party giving notice of any prior breach thereof, to terminate this Trackage Rights Agreement. The liability provisions in Section 2 of Attachment 1 shall apply as between Authority's operator, on the one hand, and BNSF and the other carrier operating on the Rail Facilities, on the other hand.

It is further agreed that inadequate substandard performance by the D&I which persists in excess of one hundred twenty (120) days after the D&I has been made aware of the inadequate or substandard conduct, shall constitute a basis upon which the Authority may terminate this Trackage Rights Agreement under this paragraph.

16. BNSF Operations.
 - A. D&I understands that BNSF currently operates on the Rail Facilities. Accordingly, D&I agrees that, as between itself and BNSF (and any other rail carrier operating on the Rail Facilities), D&I will abide by the provisions contained in Attachment No. 1 to this Agreement, and any other reasonable operating conditions required by BNSF.

B. Nothing herein is intended to diminish D&I's rights and responsibilities pursuant to that certain Transportation and Switching Agreement between D&I and BNSF, dated September 4, 1986, as amended.

17. Notice. Except as expressly provided otherwise, all notices or other communications hereunder shall be in writing and shall be deemed duly given, if delivered in person or by Certified or Registered Mail, return receipt requested, first class, postage prepaid to the person specified herein as entitled to receive such notice, or to their duly authorized representatives unless notice of a change of address is given pursuant to the terms of this provision.

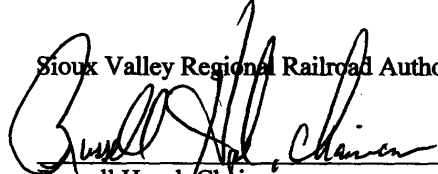
For the Authority: Chairman
Sioux Valley Regional Railroad Authority
P.O. Box 511
Beresford, South Dakota 57004

For the D&I: President
D&I Railroad Company
P.O. Box 5829
Sioux Falls, South Dakota 57117

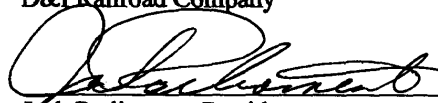
18. Severability. In the event any section, paragraph, sentence, clause or phrase contained herein shall be determined, declared or adjudged invalid, illegal, unconstitutional or otherwise unenforceable, such determination, declaration or adjudication shall in no manner affect the other sections, paragraphs, sentences, clauses or phrases of this Trackage Rights Agreement, which shall remain in full force and effect as if the section, paragraph, sentence, clause or phrase declared, determined or adjudged, invalid, illegal, unconstitutional or otherwise enforceable was not originally a part thereof.
19. Entire Agreement. This Trackage Rights Agreement and the Attachment No. 1 attached hereto represent the entire agreement between the parties, and all previous communications, understandings or agreements between the parties are hereby abrogated and withdrawn except as provided herein.
20. Cessation of D&I as Designated Operator. In the event D&I ceases to be the Authority's designated operator of the Canton-Elk Point and Beresford-Hawarden Lines, this Agreement shall automatically be transferred to the new designated operator of those lines, and D&I shall cooperate in all respects in effectuating that transfer.

IN WITNESS WHEREOF, the parties hereto have caused this Trackage Rights Agreement to be executed and notarized by their duly authorized officers on the date and year first above written.

Sioux Valley Regional Railroad Authority


Russell Hazel, Chairman

D&I Railroad Company

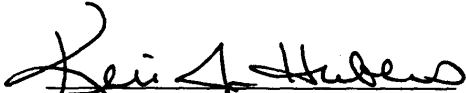

Jack Parliament, President

ACKNOWLEDGED

STATE OF SOUTH DAKOTA)

minnehaha : SS
COUNTY OF ~~LINCOLN~~)

On this 17 day of January 2005, before me, a Notary Public within and for said County and State, personally appeared Russell Hazel, known to me to be the person who executed the above document and acknowledged to me that he did sign the foregoing document for the purposes herein stated.


NOTARY PUBLIC
My Commission Expires: 11-18-05

ACKNOWLEDGED

STATE OF SOUTH DAKOTA)

: SS
COUNTY OF MINNEHAHA)

On this 17 day of January 2005, before me, a Notary Public within and for said County and State, personally appeared Jack Parliament, known to me to be the person who executed the above document and acknowledged to me that he did sign the foregoing document for the purposes herein stated.


NOTARY PUBLIC
My Commission Expires: 11-18-05

ATTACHMENT 1

Section 1. CONSTRUCTION, REPAIRS, MAINTENANCE, ADDITIONS AND OPERATIONS, CONTROL OF THE JOINT TRACKAGE.

1.1 Except as provided to the contrary in Section 2 of the Trackage Rights Agreement, the construction, maintenance, repair and renewal of the Rail Facilities shall be under the exclusive direction and control of BNSF. BNSF shall make any Additions or Retirements to the Rail Facilities which BNSF deems necessary or desirable for the safe, efficient, and economical use of the Rail Facilities by the parties, and these shall progressively during construction become part of the Rail Facilities.

1.2 The operation of the Rail Facilities shall be under the exclusive direction and control of BNSF and shall be reasonable, just, and fair between all parties using the Rail Facilities and shall not unjustly discriminate against any of them. Subject to the aforementioned principles, BNSF shall have the unrestricted power to change the operations on and over the Rail Facilities as in its judgment may be necessary, expedient or proper for the operations thereof herein intended. Prior to use for movements to or from Sioux City, D&I shall secure the necessary approval from BNSF's dispatchers located at Fort Worth, Texas.

1.3 BNSF shall employ all persons necessary to operate, maintain, repair and renew the Rail Facilities. BNSF shall be bound to use only reasonable and customary care, skill, and diligence in the operation, maintenance, repair, renewal or management of the Rail Facilities and D&I shall not, by reason of BNSF's performing or failing, or neglecting to perform any operation, maintenance, repair, renewal or management of the Rail Facilities, have or make against BNSF any claim or demand for any loss, damage, destruction, injury or death whatsoever resulting therefrom, except as otherwise provided in Section 2 hereof.

1.4 D&I, at its expense, shall install and maintain upon its trains, locomotives and cars such equipment or devices as may now or in the future be necessary or appropriate, in the reasonable judgment of BNSF, for the safe and efficient operation of trains upon the Rail Facilities.

1.5 If the use of the Rail Facilities shall at any time be interrupted or traffic thereon or thereover be delayed for any cause, BNSF shall, with reasonable diligence, restore the line for the passage of trains of the parties hereto. During the period of any such interruption or delay BNSF may, if in its sole judgment it deems it operationally feasible or convenient, provide D&I with an alternate route and, in such event and during such period, the terms and conditions of this Agreement shall apply as though such alternate route was a part of the Rail Facilities. Neither party hereto shall have or make any claim against the other for loss or damage of any kind resulting from such interruption or delay.

1.6 Each party shall be responsible for furnishing, at its own expense, all labor, fuel and train supplies necessary for the operation of its own trains over the Rail Facilities.

1.7 The operation of D&I on or along the Rail Facilities shall at all times be in accordance with the rules, instructions and restrictions of BNSF but such rules, instructions and restrictions shall be reasonable, just, and fair between all parties using the Rail Facilities and shall not unjustly discriminate against any of them.

1.8 Except as provided to the contrary in agreements between D&I and other rail carriers, D&I shall be responsible for all mileage allowances and car hire charges accruing on cars in D&I's account on the Rail Facilities and D&I shall report and pay same directly to the owners of such cars.

1.9 With respect to operation of trains, locomotives and cars on and over the Rail Facilities, each party shall comply with all applicable laws, rules, regulations, and orders promulgated by a municipality, board, commission or governmental agency having jurisdiction, and if any failure on the part of any party to so comply shall result in a fine, penalty, cost or charge being imposed or assessed on or against another party, such other party shall give prompt notice to the failing party and the failing party shall promptly reimburse and indemnify the other party for such fine, penalty, cost or charge, and all expenses and attorneys' fees incurred in connection therewith, and shall upon request of the other party defend such action free of cost, charge, and expense to the other party.

1.10 All employees of D&I engaged in or connected with the operations of D&I on or along the Rail Facilities shall be required to pass periodic examinations on the rules of BNSF, provided that with respect to such examinations, upon request of D&I, BNSF shall qualify one or more of D&I's supervisory officers on said rules and such supervisory officer or officers so qualified shall examine all employees of D&I engaged in or connected with D&I operations on or along the Rail Facilities. Pending qualification of train and engine crews of D&I, BNSF shall furnish a pilot or pilots, at the expense of D&I, as deemed necessary by BNSF to assist in operating trains of D&I over the Rail Facilities.

1.11 If any employee of D&I shall neglect, refuse or fail to abide by BNSF's rules, instructions or restrictions governing the operation on or along the Rail Facilities, BNSF shall, in writing, so notify D&I. BNSF shall have the right to require D&I to withhold any D&I employee from service on the Rail Facilities pending the result of formal investigation, who in BNSF's sole opinion shall have neglected, refused or failed to abide by BNSF's rules, instructions or restrictions governing operation on or along the Rail Facilities. Upon such notice presented in writing, BNSF and D&I shall promptly hold a joint investigation in which all parties concerned shall participate and bear the expense for its officers, counsel, witnesses and employees. Notice of such investigation to D&I employees shall be given by D&I's officers, and such investigation shall be conducted in accordance with the terms and conditions of D&I's disciplinary procedures and schedule agreements, if any, between D&I and its employees. If, in the judgment of BNSF, the result of such investigation warrants, such employee shall, upon written request by BNSF be restricted by D&I from operating on the Rail Facilities, and D&I shall release and indemnify BNSF from and against any and all claims and expenses because of such restriction.

1.12 If any cars, cabooses or locomotives of D&I are bad ordered enroute on the Rail Facilities and it is necessary that they be set out, such cars, cabooses or locomotives shall, after being promptly repaired, be promptly picked up by D&I. Unless otherwise agreed, BNSF may upon request of D&I and at D&I's expense furnish required labor and material and perform light repairs to make such bad ordered equipment safe for movement. In the event BNSF shall perform any such repairs to freight cars in D&I's account, billing therefore shall be at rates prescribed in the Field and Office Manuals of the Interchange Rules, adopted by the Association of American Railroads, hereinafter called "Interchange Rules", in effect at the date of performance of the repairs and BNSF shall prepare and submit billing directly to and collect from the car owner for car owner responsibility items as determined under said Interchange Rules and BNSF shall prepare and submit billing directly to and collect from D&I for handling line responsibility items as described under said Interchange Rules. If BNSF shall perform repairs to D&I's equipment other than freight cars, BNSF shall prepare and submit billing directly to and collect from D&I as in this Agreement provided for. In the event cars delivered to D&I by BNSF shall become bad ordered on Authority trackage, D&I shall perform light repairs to make such bad ordered equipment safe for movement, and submit billing to BNSF in accordance with interchange rules.

Section 2. LIABILITY

2.1 For the purposes of this Section 2, the following definitions shall apply:

"Loss or Damage": Shall mean all claims, liability, cost and expense of every character incident to loss or destruction of or damage to property and injury to or death of persons, arising upon or as a result of the use of the Rail Facilities.

"Joint Employee": Shall mean any officer, agent, employee, or contractor while engaged in maintaining, repairing, renewing, removing, inspecting or operating Joint Property or in making Additions or Retirements therefrom, thereto, or in dispatching, giving orders for or directing the movement of trains, or performing other service, for the common benefit of the parties having the right to use the Rail Facilities.

"Joint Property": Shall mean the Rail Facilities and all trains, locomotives, cabooses, cars and equipment engaged in the maintenance, repair, renewal, removal, inspection or operation thereof for the common benefit of the parties having the right to use the Rail Facilities. Any equipment shall be deemed Joint Property while engaged in or incident to the performance of service, the cost of which is included in expense or Loss or Damage for which the parties having the right to use the Rail Facilities are jointly liable.

"Sole Employees" and "Sole Property": Shall mean employees, trains, locomotives, cabooses, cars and equipment while engaged or about to engage in switching or handling cars of one of the parties hereto, or in performing other services for the exclusive benefit of one of the parties hereto, shall, for the purpose of this section, be considered Sole Employees and Sole Property of such party. Pilots furnished by BNSF to assist in operating trains, locomotives, cabooses or cars of D&I as well as any other BNSF employees performing services for the exclusive benefit of D&I under the terms of this Agreement shall be considered

Sole Employees of D&I. Cars and the lading contained therein delivered to D&I by BNSF while being handled by D&I under this Agreement shall be considered Sole Property of D&I for purposes of apportioning liability expenses under Section 2 hereof.

2.2 If equipment of D&I shall become derailed or otherwise disabled upon the Rail Facilities, such that wrecking service is required to clear same, BNSF shall, unless otherwise agreed, arrange for such service. All employees of BNSF operating wrecker or work trains or assigned thereto or any wrecking service contractor, while clearing wrecks or derailments or engaged in the repair and renewal of the Rail Facilities subsequent to any such D&I wreck or derailment and any machinery, equipment, tools or other property of BNSF while engaged in such service, or while en route to such assignment or while returning to the home terminal, incident to the performance of such works shall be deemed the sole employees and equipment of the party whose employees, cars, locomotives, cabooses or trains were, in the first instance, solely involved in the accident; or, in the case of collision, or other accident involving the employees, equipment and lading of both parties hereto such employees and equipment shall be apportioned as provided in Section 2.3. Said employees and equipment shall not be deemed to be the employees and equipment of D&I while en route from the Rail Facilities for the purpose of performing further services for BNSF or a third-party.

2.3 As between D&I, on the one hand, and BNSF or another rail carrier operating on the Rail Facilities, on the other hand, each party shall bear all Loss or Damage to its Sole Property, its Sole Employees, patrons and others on its engines, cars or trains, or on or about the Joint Property in transaction of business for or with such party, except when the acts or omissions of such party do not contribute to the Loss or Damage and it is due to acts or omissions of Sole Employees of another party or parties or defect in the Sole Property of another party (whether or not contributed to by acts or omissions of Joint Employees or defect in the Joint Property), in which event it shall be borne by the party or equally by the parties so responsible. Loss or Damage to third-parties or to Joint Property or Joint Employees shall, if caused by the acts or omissions of Sole Employees of fewer than all of the parties (whether or not contributed to by acts or omissions of Joint Employees or defect in the Joint Property), be borne by the party whose Sole Employee caused said Loss or Damage and if more than one party's Sole Employee (but fewer than all) caused said Loss or Damage, then equally by the parties whose Sole Employees caused such Loss or Damage. Such Loss or Damage not caused by acts or omissions of a Sole Employee or Employees shall, if the trains, locomotives, cabooses or cars of fewer than all of the parties are involved, be born by the party whose trains, locomotives, cabooses or cars are involved and if more than one, then equally by the parties whose trains, locomotives, cabooses or cars are involved. Such Loss or Damage caused by acts or omissions of Sole Employees of all of the parties or involving the trains, locomotives, cabooses or cars of all the parties (but not caused by acts or omissions of a Sole employee or employees), or involving only Joint Employees or Joint Property, or occurring in such a way that it cannot be determined how such Loss or Damage came about, shall be shared between the parties operating on the Rail Facilities based on a use proportion basis for the twelve (12) month period prior to the date of the incident or of the discovery.

2.4 It is understood and agreed that the number of vehicular crossings of the Rail Facilities presently exist, or may be constructed. D&I agrees to accept all crossings in whatever condition they may be during the term of this Agreement and will not assert any claim, demand

or cause of action against BNSF and will hold BNSF harmless from any claim, demand or cause of action arising out of any crossing incident on the Rail Facilities in which the engines, cars or trains of D&I only are involved.

2.5 Locomotives, cars, equipment, and other property being handled or used by any party hereto shall, unless Joint Property, be considered the Sole Property of that party for purposes of this Section 2.

D&I hereby agrees that the acts and decisions of BNSF in performing any management, maintenance, repair, renewal, removal, improvement, operation or similar function of or for the Joint Property shall be deemed the acts and decisions of a Joint Employee, except when such management, maintenance, repair, renewal, removal, improvement, operation or similar function is an overt action solely intended to harm D&I.

2.6 Each party hereto shall pay all Loss and Damage for which such party shall be liable under the provisions of this Section 2, and shall indemnify and save harmless the other party against such Loss and Damage, including any such damages awarded in any court action. Each party hereto shall have the right to settle, or cause to be settled for it, all claims for Loss or Damage for which such party shall be liable under the provisions of this Section 2, and to defend or cause to be defended all suits for the recovery of any such Loss or Damage.

In case a suit shall be commenced against either party hereto for or on account of Loss or Damage for which the other party hereto is solely or jointly liable under the provisions of this Section 2, the party so sued shall give to such other party notice in writing of the pendency of such suit, and thereupon such other party shall assume or join in the defense of such suit.

No party hereto shall be conclusively bound by any judgment against any other party, unless such party shall have had reasonable notice requiring it to defend and reasonable opportunity to make such defense. When such notice and opportunity shall have been given, the party so notified shall be conclusively bound by the judgment as to all matters which could have been litigated in such suit.