

MICROFILM DIVIDER

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Deanna Waller
Operator's Signature

10/22/03

Date

2003 SENATE TRANSPORTATION

SB 2358

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Date

2003 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2358

Senate Transportation Committee

Conference Committee

Hearing Date 2-13-03

Tape Number	Side A	Side B	Meter #
1	X		20-end
1		X	0-1935

Committee Clerk Signature *Mary K. Monson*

Minutes:

Chairman Senator Thomas Trenbeath opened the hearing on SB 2358 relating to railroad rights of way.

Senator Mutch: (District 19) Introduced SB 2358.

Keith Brandt: (President of the ND Grain Dealers Association and the General Manager of the Plains Grain and Agronomy Company at Enderlin ND) Testimony in support of SB 2358 is attached. He also submitted the attached letter supporting SB 2358 from Darryl Berg, representing the North Central Bean Dealers Association.

Brian Bjella: (Legal Counsel for ND Grain Dealers Association) See attached testimony in support of SB 2358 including a proposed amendment..

(Meter 1560) Discussion. The state is being asked to intercede in the right of contract between companies or individuals. The railroads have more bargaining power and the right of way users have to come to the state for relief. If this statute is adopted it would be only to agreements

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Senate Transportation Committee
Bill/Resolution Number SB 2358
Hearing Date 2-13-03

signed after the effective date. The ND statute that was repealed with respect to fires caused by the railroad was repealed in the 70's.

Jim Neubauer: (City Administrator of Mandan) See attached testimony in support of SB 2358.

(Meter 2030) Discussion on the city of Mandan negotiating language out of their contract.

Lowell Berntson: (Chairman of the Ag Coalition) (Meter 2330) Supports SB 2358. This is an economic issue. The property turns into a liability.

Dave Kuntz: (Burlington Northern Santa Fe Railway Company) Requested to have three representatives of BNSF address some of the issues related to this bill.

Dave Rankin: (Attorney with BNSF) (Meter 2620) Spoke in opposition to SB 2358. The effect of this bill will not help those people it is intended to help. When people want to lease property on the railroad, cross the railroad, or have a license on the railroad, they go to the railroad because there is value to being located close to the railroad. In many instances, the value to the railroad of these people being so close to the railroad, the rents and licenses the railroad receives, in no way compensates the railroad for the added risk. Spoke about lease agreements and the ability to get insurance. With respect to environmental risks, the railroads are not trying to shift the risk to other parties. There is increased risk to the railroads when people are so close to railroad property. The railroad needs to account for those risks. The lessees need to be responsible for the environmental conditions they cause or they aggravate.

Senator Taylor asked about how much risk there is.

Dave Rankin: (Meter 3450) He answered that the risk of having someone close to the railroad is not compensated by the rents they are receiving. They feel the rents they are charging are

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Hearing Date 2-13-03

appropriate if they are not also forced to assume the added risks. Addressed the subject of lease forms and the fact that they have become more complicated.

Senator Mutch asked how old leases are automatically brought up to date. (Meter 3625)

Dave Rankin responded that old leases on the books are not updated. The only time those leases would be modified by the railroad is if the lessee initiates a change. Then the new form would probably be used because the old leases would not cover risks such as environmental risks.

Senator Nething stated that earlier testimony cited real problems and asked what he thought the committee should do. (Meter 3850) Discussion followed concerning the benefits of customers to the railroads and rents not being in line with the risk involved. If insurance is not carried by the tenants, then the railroad would have to obtain that insurance resulting in higher rents or they would not be able to continue having people on their property.

Senator Trenbeath asked about the lease and indemnification for the railroads action.

Dave Rankin (Meter 4800) Responded that there are 5 things that are indemnified. 1) Things that are related to the lease. 2) Rights granted pursuant to the lease, their occupation and use of the premises. 3) The environmental condition of the premises caused by, aggravated, or contributed by the lessee. 5) The negligence of the lessee.

Dan Crothers: (Attorney in Fargo) See attached testimony in opposition of SB 2358. Does some work for BNSF railroad company although the bulk of his work is done for clients other than BNSF.

Dave Schneider: (General Director of Real Estate BNSF) (Tape1 Side B Meter 305) If this bill is passed, the increase in liability would almost shut down any leasing program or sales program that the railroad has.

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Hearing Date 2-13-03

Senator Trenbeath asked if BNSF has a formula for determining lease rates and whether the formulas differ between the customers of BNSF and non customers.

Dave Schneider answered that there is a formula and there is a difference.

(Tape 1 Side B Meter 545) The problem of abandoned property was talked about.

David Drach: (Canadian Pacific Railway) See attached testimony opposing SB 2358.

Senator Nething agreed that there is high risk and wondered if there would be a way of sharing the extra high risk. (Tape 1 Side B Meter 1510) Discussion followed.

The hearing on SB 2358 was closed.

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2003 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2358

Senate Transportation Committee

Conference Committee

Hearing Date 2-14-03

Tape Number	Side A	Side B	Meter #
1		X	970-5075

Committee Clerk Signature *Mary K. Monson*

Minutes:

Chairman Senator Thomas Trenbeath opened SB 2358 for additional testimony.

Brian Bjella (Attorney in Bismarck) Representing the ND Grain Dealers Association.

(Attached e-mail from Steve Strege) This bill was put in by the Grain Dealers because of all the problems that their members have experienced in the past years with the leases and with the railroads. They feel they have no place else to go to seek relief. That is one reason for section 3 of the bill, to provide a grievance procedure. Submitted a proposed amendment (attached).

This is a compromised proposal to share liability.

Senator Nething questioned some of the wording on line 2 of the proposed amendment. The word "any" in "indemnification of and any shall not be liable" should be taken out.

Senator Espgaard asked for clarification of property.

Brian Bjella clarified that this bill only deals with the lessees property. It doesn't apply to the railroad property.

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Hearing Date 2-14-03

Senator Nething stated that what really bothers him is that there is a different degree of risk.

Doesn't think the elevator should be responsible for the "greater risk". This seems to be an effort to keep the "greater risk" the responsibility of the railroad and the "risk" the responsibility of the elevator.

(Meter 1800) Some discussion on the availability of insurance for elevators to indemnify for the railroads negligence.

Dan Kuntz (BNSF) Addressed Section 3. It would give the Public Service Commission the authority to basically strike what it deemed to be burdensome and unreasonable or onerous provisions of a lease. There is already an entire chapter dealing with proposed leases that allows elevators to go to the District Court or the Public Service Commission to set the lease prices for a particular provision. He is concerned with the law going so far as to tell the railroads what terms they have to lease under. Pointed out to the committee that the majority of the leases on the railroad are not by shippers. Most are restaurants, gas stations, etc. They located there because they wanted access to roads not because they want to be on railroad property. The railroads would rather not have those business on their right of way. All they bring to the railroad is the rent and the risk. Railroads are self-insured and can't just add the leases on. The risk of being on the railroad right of way is separate from the businesses own actions and somebody has to pay for that risk. If the railroad absorbs it they will either increase the lease prices or not write the lease. The bill doesn't change the risk or the premiums. .

Senator Trenbeath asked about the inability to cover the risk.

Dan Kuntz answered that the general commercial liability policy allows for contracted risk coverage.

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(Meter 2975) Discussion on doing a study on not only leasing practices but also the sale of abandoned and surplus property.

Senator Trenbeath asked about wording for a study.

Dan Kuntz suggested to look at a study of the lease and sale of abandoned and surplus railroad right of way.

Senator Nething voiced a desire to amend, do a 2 year sunset on them, and do a study.

He clarified that it would only be prospective, pertaining to those leases that come up,

Senator Nething moved to adopt the amendment submitted on 2-13-03 and the amendment submitted on 2-14-03. Seconded by Senator Mutch. Roll call vote 6-0-0.

Senator Nething moved to add a sunset clause which will terminate in 2 years. Seconded by Senator Epegard. Roll call vote 6-0-0.

Senator Nething moved to request a study resolution to study the lease and sale of abandoned and surplus railroad right of way. Seconded by Senator Mutch. Discussion clarified that the study resolution be specifically worded "shall" and not "may" or "requested to". Roll call vote 6-0-0.

Senator Nething moved a Do Pass as amended. Seconded by Senator Taylor. Roll call vote 6-0-0. Passed. Floor Carrier is Senator Nething.

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10/22/03
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FISCAL NOTE
 Requested by Legislative Council
 01/28/2003

Bill/Resolution No.: SB 2358

1A. State fiscal effect: Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.

	2001-2003 Biennium		2003-2005 Biennium		2005-2007 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues	\$0	\$0	\$0	\$0	\$0	\$0
Expenditures	\$0	\$0	\$0	\$0	\$0	\$0
Appropriations	\$0	\$0	\$0	\$0	\$0	\$0

1B. County, city, and school district fiscal effect: Identify the fiscal effect on the appropriate political subdivision.

2001-2003 Biennium			2003-2005 Biennium			2005-2007 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts
\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0

2. Narrative: Identify the aspects of the measure which cause fiscal impact and include any comments relevant to your analysis.

This bill expands the authority of the PSC over lease disputes regarding railroad rights-of-way. No fiscal impact is expected.

3. State fiscal effect detail: For information shown under state fiscal effect in 1A, please:

A. Revenues: Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.

B. Expenditures: Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.

C. Appropriations: Explain the appropriation amounts. Provide detail, when appropriate, of the effect on the biennial appropriation for each agency and fund affected and any amounts included in the executive budget. Indicate the relationship between the amounts shown for expenditures and appropriations.

Name:	Ilona A. Jeffcoat-Sacco	Agency:	PSC
Phone Number:	328-2407	Date Prepared:	01/29/2003

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30771.0101
Title.0200

Adopted by the Transportation Committee
February 14, 2003

CB
2-17-03
10/2

PROPOSED AMENDMENTS TO SENATE BILL NO. 2358

Page 1, line 4, replace "and" with "to provide for a legislative council study;" and after "application" insert "; and to provide an expiration date"

Page 1, line 11, after the second "a" insert "nonrailroad"

Page 1, line 18, after "the" insert "nonrailroad"

Page 2, line 4, after "damage" insert "other than property damage subject to Public Law No. 104-88 [109 Stat. 847; 49 U.S.C. 11706]"

Page 2, after line 9, insert:

"3. Notwithstanding any other provision of law, a railroad may require indemnification of and is not liable for any loss, liability, or damage to any purchaser, lessee, licensee, or other contracting party, their employees, agents, or invitees."

Page 2, line 13, after "whatsoever" insert "with"

Page 2, line 24, remove "lease"

Page 2, line 25, replace "right-of-way leases for any purpose" with "proposed agreements"

Page 2, line 26, replace "lessees" with "a nonrailroad purchaser, lessee, or other user for any purpose, of a right of way"

Page 2, line 27, after "any" insert "term of a proposed right-of-way purchase agreement, crossing agreement."

Page 2, line 28, remove "right-of-way", replace the first "term" with an underscored comma, and replace "term is" with "agreement, or other agreement for use of right of way, including the purchase price, fee, or rent to be paid are"

Page 2, line 29, after the first "the" insert "nonrailroad purchaser," and after the underscored comma insert "or other users, or do not equate to fair market value in the vicinity."

Page 2, line 30, replace "lease" with "agreement" and replace "modified to the extent necessary" with "prescribe modifications to that term so as"

Page 3, after line 9, insert:

"SECTION 4. LEGISLATIVE COUNCIL STUDY - ABANDONED AND SURPLUS RAILROAD RIGHTS OF WAY. The legislative council shall consider studying, during the 2003-04 Interim, the sale and lease of abandoned and surplus railroad rights of way. The legislative council shall report its findings and recommendations, together with any legislation required to implement the recommendations, to the fifty-ninth legislative assembly."

Page 3, after line 13, insert:

Page No. 1

30771.0101

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"SECTION 6. EXPIRATION DATE. This Act is effective through July 31, 2005,
and after that date is ineffective."

2012

Renumber accordingly

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10/22/03

Date

REPORT OF STANDING COMMITTEE (410)
February 18, 2003 8:32 a.m.

Module No: SR-31-3039
Carrier: Nothing
Insert LC: 30771.0101 Title: .0200

REPORT OF STANDING COMMITTEE

SB 2358: Transportation Committee (Sen. Trenbeath, Chairman) recommends AMENDMENTS AS FOLLOWS and when so amended, recommends DO PASS (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2358 was placed on the Sixth order on the calendar.

Page 1, line 4, replace "and" with "to provide for a legislative council study;" and after "application" insert "; and to provide an expiration date"

Page 1, line 11, after the second "a" insert "nonrailroad"

Page 1, line 18, after "the" insert "nonrailroad"

Page 2, line 4, after "damage" insert "other than property damage subject to Public Law No. 104-88 [109 Stat. 847; 49 U.S.C. 11706]"

Page 2, after line 9, insert:

"3. Notwithstanding any other provision of law, a railroad may require indemnification of and is not liable for any loss, liability, or damage to any purchaser, lessee, licensee, or other contracting party, their employees, agents, or invitees."

Page 2, line 13, after "whatsoever" insert "with"

Page 2, line 24, remove "lease"

Page 2, line 25, replace "right-of-way leases for any purpose" with "proposed agreements"

Page 2, line 26, replace "lessees" with "a nonrailroad purchaser, lessee, or other user for any purpose of a right of way"

Page 2, line 27, after "any" insert "term of a proposed right-of-way purchase agreement, crossing agreement,"

Page 2, line 28, remove "right-of-way", replace the first "term" with an underscored comma, and replace "term is" with "agreement, or other agreement for use of right of way, including the purchase price, fee, or rent to be paid are"

Page 2, line 29, after the first "the" insert "nonrailroad purchaser," and after the underscored comma insert "or other users, or do not equate to fair market value in the vicinity,"

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Page 3, after line 9, insert:

"SECTION 4. LEGISLATIVE COUNCIL STUDY - ABANDONED AND SURPLUS RAILROAD RIGHTS OF WAY. The legislative council shall consider studying, during the 2003-04 interim, the sale and lease of abandoned and surplus railroad rights of way. The legislative council shall report its findings and recommendations, together with any legislation required to implement the recommendations, to the fifty-ninth legislative assembly."

Page 3, after line 13, insert:

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Module No: SR-31-3039
Carrier: Nothing
Insert LC: 30771.0101 Title: .0200

"SECTION 6. EXPIRATION DATE. This Act is effective through July 31, 2005,
and after that date is ineffective."

Renumber accordingly

(2) DESK, (3) COMM

Page No. 2

SR-31-3039

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2003 HOUSE TRANSPORTATION

SB 2358

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2003 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2358

House Transportation Committee

Conference Committee

Hearing Date March 13, 2003

Tape Number	Side A	Side B	Meter #
1	x		0.1 to end
		x	0.1 to 54.3
Committee Clerk Signature <i>Laurie B. Fink</i>			

Minutes:

Rep. Weisz opened the hearing on SB 2358, a bill for an Act to create and enact section 49-16-01.1 of the North Dakota Century Code, relating to indemnity provisions on transfer of railroad rights of way; to amend and reenact sections 49-16-05 and 60-06-06.1 of the North Dakota Century Code, relating to prohibition of railroad indemnity agreements in right-of-way leases; to provide for a legislative council study; to provide for application; and to provide an expiration date.

Sen. Nething: Representing District 12 was assigned to carry SB 2358 in the Senate. He wanted to let the committee what they in the Senate had done and why. The bill is the result of perceived abuse by the railroads in North Dakota in its leases and also sales agreements. He used perceived because the one lessor or the corporation selling does not think its a problem but the people who are the lessees and the purchasers do think it is a problem. If there is a problem how should the legislators address the solutions. The abuse that is felt is that as it was relayed to the legislators is

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Bill/Resolution Number SB 2358
Hearing Date March 13, 2003

the high cost of leases and the extremely high sales costs. Again -- this doesn't mean that it occurs in every lease or sale -- but it is part of the perception. The other problem the bill encompasses is the shifting of liability from the railroads to the business customer that is the lessee. Here again the lessor believes that they should have the customer carry their liability. The lessee says no we don't think so. So, what our amendments did was basically four things: 1) On proposed leases for the next two years we give the Public Service Commission the "refereeing" authority. It doesn't cover leases in effect -- only those proposed within the next two years -- the reason was to try to keep the new leases fair and reasonable; 2) Required the Railroad to be responsible for their own liability and the business customer to be responsible for their own liability; 3) we set a limit of two years on this bill-- the reason is there has to be a time for this to work and a time for better business relations to be established; and 4) to propose an interim study so the legislature would be kept abreast of all of the development throughout the interim. Now, going to the bill itself, there was testimony from the railroad business customers indicating their concerns for the lack of fairness in negotiating leases. that is why we wanted to bring the PSC in. The business customers object to being responsible for railroads own actions since the railroad's own testimony indicates the high risks they have in operating a railroad. There is a high risk in running a railroad. The customers feel that the railroad risk is much greater than the risk of running a grain elevator for example in their business. The difference in the two risk levels -- the grain elevators with risk at a lower level and the railroad at a higher level of risk -- what did we did was to make each responsible for them respective liability. The interim study will provide all the parties including the legislators a better understanding of the problems. Also there is the sunset provision. We want to keep pressure on all parties to help them resolve their

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Bill/Resolution Number SB 2358
Hearing Date March 13, 2003

problems. There are some amendments -- first he distributed a copy of a letter to a lessee stating what one railroad sees as a problem with this bill -- and also a copy of a story than ran the Fargo Forum the describes the situation pretty clearly. Now the amendment -- I went farther than preparing for this committee -- prepared additional copies for those attending this hearing because they will want to follow what I am saying. The amendment is basically designed to deal with this subject of bad faith --" The railroad may not negotiate in bad faith with a non-railroad purchaser lessee licensee or other contracting parties in relation to a purchase agreement, deed , bill of sale, or other agreement pertaining to the sale, lease, license or other use of the right of way or other adjoining parties." We tried to cover all the pieces -- between the lessee and the lessor. " Prima fascia evidence of bad faith is the significant increase in the burden on a non-railroad party from any previous terms agreed to by the parties or if there are not any previous terms, from the terms offered to the other parties before January 1, 2003 and adjusted for inflation." "For purposes of this section a previous term includes section 49-16-01.1 " That refers back on the engrossed bill before to line 9 page 1 . So we encompass that in this amendment and the reason is -- but the amendment actually goes to 49 - 09 and this bill is in section 49-16 so that's why the amendments relates back over there. The railroads have use 49-16 as the basis for the burden of the non-railroad party as bad faith. To determine bad faith the PSC shall use the procedure in section 60-06-06.1 . He distributed a copy of that section of the code. copies of all these distributions are attached here. The million dollar amount of penalty might be a bit arbitrary but we thought it would an attention getter -- if there is bad -- what should the amount be?

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Bill/Resolution Number SB 2358
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Rep. Weisz: (12.1) In your reading of the amendment -- is a termination -- does it fall under this?

Sen. Nething: If it is done in bad faith. If someone is aggrieved -- that is why we set up the PSC to arbitrate these disputes.

Rep. Weisz: You definitely feel it would cover a termination?

Sen. Nething: I think so. If there is some additional help on this the legislative counsel staff is there.

Rep. Weisz: You brought out the different levels of liability between the lessee and the lessor -- instead of several insurance companies -- would one insurance company -- would that address the problem ?

Sen. Nething: It would be a benefit if you could have it all in one place -- actually the would be a matter then of letting the railroad pay the over -- or extra cost of have the higher benefit coverage in the lessee's policy.

Rep. Hawken: What is the Public Service Commission's role is now?

Sen. Nething: Never having been a party to their proceedings -- I don't know what that is -- but the current law I distributed to you is the authority they have. It would be much better for them to speak for themselves since they are here.

Rep. Bernstein: Isn't the railroad self insured ?

Sen. Nething: To some degree -- but they I think buy overage insurance. As I recall I think there is a difference with the different railroad as how they insure.

Rep. Dosch: What prompted this bill in the first place.

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Sen. Nething: There were a series of incidents and I guess the bill sponsor if he were here could tell about a specific instance in his district.

Keith Brandt representing the North Dakota Grain Dealer Association asked the they have their legal counsel Brian Bjella to speak for them. A copy of his prepared remarks are attached.

Brian Bjella: (22.2) Speaking for the grain dealers gave more information on the contents of the bill and what they considered in drafting the bill. A copy of his prepared remarks are attached. He covered indemnity clauses in the railroad leases and cited cases. He not only covered leases but also cases and concerns about liability. He related parts of the bill to these examples.

Rep. Delmore: (31.0) As I look at the letter from Steve Stregge - - It seems that partial liability to both parties is what you are looking at - how expensive is that insurance ?

Brian Bjella: It isn't a case of costs -- I don't have those costs but it is question if they can get it at all.

Rep. Thorpe: Is indemnity limit to the elevator -- the premises -- how about anhydrous -- is it limited to the premises or does it cover goods and services?

Brian Bjella: Are you asking if the accident occurred off the main line -- is that you question (yes) then the elevator would have the liability.

Rep. Weisz: Have these contracts changed significantly in the past 10 -20 years?

Brian Bjella: Yes in my experience there is more and more indemnity.

Rep. Price: (33.6) We have talked about elevators here but what about other business -- what like the spill in Minot --effect have on other businesses on the right of way?

Brian Bjella: They would be covered by this bill. It would depend upon the lease terms

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that they have but I suspect they have similar indemnification provisions.

Rep. Weisz: Can you expand a bit -- what if a car tipped onto leased property who would be liable for damages? and the clean up?

Brian Bjella: I can't speak as to what the railroad might assert -- if it occurred on the main line it ordinarily be the railroads -- if it occurred on the leased property -- they would probably assert that it was the lessees.

Jim Neubauer: City Manager of the City of Mandan: He addressed Mandan's problem with the diesel spills and their ground water problems and their problems in dealing with the railroad. A copy of his prepared remarks is attached..

Rep. Delmore: I keep coming back to the cost of this insurance -- you carry no insurance now for any liability?

Jim Neubauer: The city of Mandan is insured through the North Dakota Reserve Fund -- when they looked at this earlier -- some of the provisions are not insurable.

Rep. Delmore: Under this bill though -- if you are a part of that liability your are going to have to be insured -- do other states have something like that available?

Jim Neubauer: The gist here is that the people who are leasing property are more than willing to accept indemnification provisions and liability actions that they have control over. I don't have dollar figure for you.

Rep. Weisz: You are insured for risks on that leased property?

Jim Neubauer: Yes

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Rep. Schmidt: In 1985 the railroad signed a consent that they were responsible for cleaning up the property and then along came this imaginary line according to your testimony -- the railroad said no we are not going north of that line -- who is -- the State Health Department?

Jim Neubauer: There was now geographical boundaries like -- there was no imaginary line drawn down main street at that point in time -- I believe in 2002 or within the last couple of years there was further investigation done on other properties of was actually contained in the spill -- I believe the railroad is contending that all of the spill is south of main street and that north of main street is not theirs. They had to pick a line somewhere.

Lowell Bernson: A farmer at Kulm, North Dakota and now representing the Ag Coalition spoke in support of the bill on behalf of the rural areas.

Stewart Carlson: He represents a large rural water district and system in northeastern North Dakota. He spoke in favor of the bill as he could envision problems of being denied or having to pay heavily for pipeline crossings on railroad property.

Rep. Weisz: How would you be effected if your could not negotiate a crossing or access to railroad right of way?

Stewart Carlson: It would be devastating -- having to go on either side of a railroad would be the wrong side.

Rep. Weisz: Another question, if the railroad would have a derailment that would tear up your pipeline and contaminate the water -- would you have liability insurance to cover that?

Stewart Carlson: The chance of a derailment causing a pipeline break eight feet under ground isn't likely but what the bill does talk about is a fair market value and to have the process speed

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up so that we can meet that limit window of production when installing so we can get the project done.

Opposition Testimony - Tape 1 Side A (52.4)

David Drach: Manager of Real Estate with the Canadian Pacific Railway. We do have some problems with this bill. we understand there are some concerns with leasing agreements. We are not going to try to brush that off. It would be cavalier to say they just don't want to pay the insurance. There have been some things said -- when it comes right down to it this is a very complicated issue to discuss. At this stage of the game so many factors have been brought in -- and it goes beyond grain dealers -- we have many types of lessees on our properties and only some of them are grain dealers --

End of tape -- go to Side B

David Drach: - continued - People think that one set of agreements should apply to all -- it doesn't work that way -- our lease say especially that the lessee is responsible for the damage that could occur to their property as the result of railroad operation and for their acts and commissions. For the things they do and could expect to happen because they are located on a railroad right of way. In your traditional setting when you go rent an office or store space the agreement is worded a little different -- it says that you will be responsible for your acts and the owner will be responsible for his. In reality what the landlord does is he goes and gets insurance policy and then charges the cost back in the rent. So it doesn't say that you are responsible but in essence it is a cost of doing business. But our business isn't traditional -- we want move 50,000 tons of steel at 40 - 50 mph, piloted buy two people and then we have a person who wants to build a wood shed along side of that operation -- we then say you are going to have to accept

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inherent risk. Our agreements do not provide for them to cover us -- again our agreement provide that they cover them -- their stock -- not our stock -- they don't pay for any broken locomotives, broken rails and stuff like that. If a carload of anhydrous goes onto their property we pay and we pay -- Their insurance covers them but not us. In our agreements we have covenants which say they promise not to do things and for certain operations we required insurance -- a minority of our agreement require insurance -- I guess what we want to bring a carload of propane and park it 25 feet from the tracks -- we say well OK but you are going to insurance to cover that. It covers in the sense that when bad thing happen -- then someone must be negligent but this is not a traditional operation -- in 100 years we have never said the railroading is a safe operation. Railroads have been in North Dakota since before statehood and we have a sibling relationship -- we need each other but this bill is not good for North Dakota.

Rep. Weisz: From your testimony -- you are telling us that that leases don't require the lessee to indemnify the railroad but your lease reads differently -- what is there in section 1 that your find objectionable --

David Drach: What our agreement says is that you recognize that railroading is a dangerous business inherently and that you accept that -- the way the law if passes then we will go with that but we will take out insurance to cover those risks -- you can't let a tenant into a building if it is going to cost you more than the rent is -- or more exposure than you are going to get from it. That is basic economics. Our concern of passing the insurance onto the lessee is simply not good for the lessee.

Rep. Weisz: If I am understanding you correctly your main objection is the idea that if the railroad causes the loss --using the railroad and elevator as an example -- if the train derails and

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hits the elevator -- your idea is that they carry insurance to cover their elevator because it is on the railroad and you will cover your loss.

David Drach: Under a traditional situation the landlord would carry the insurance and charge it back but we are not a traditional industry.

Rep. Weisz: Let me expand upon that -- what your position who is responsible for the engine? who should be?

David Drach: We pay. They do not pay for our rolling stock, our track etc. There are some exception for our employs if they are injured under certain circumstances. I don't want to get into those types of specifics. It happens under employees not being able to sue their employer and they sue and sue on an end around -- so the sue us and there are a lot of such suits.

Rep. Thorpe: (13.4) If there is a bad chemical spill and there is a derailment in the proximate area -- they tank cars hit the elevator and the bad spills -- who is responsibility.

David Drach: In most cases we would be responsible and pay because it was caused by our rolling stock but it would depend upon our leases it may be that you had or were required to have insurance coverage and then how that coverage would cover.

Rep. Thorpe: The reason for my question was because I was thinking in a scenario like that there can be some million dollar law suit and it would be pretty had for an elevator to insure for that kind of money.

David Drach: The way our agreements are written they wouldn't be out that much -- they are reasonable for their building and we are responsible for the rest.

Rep. Weisz: If there was a hazardous spill who would be responsible for the clean up?

David Drach: Under our language we are responsible for that.

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Rep. Hawken: (16.6) Three quick questions -- the permit section -- is there a way to work that out?

David Drach: I guess I would have to look at that -- I haven't studied it.

Rep. Hawken: Do you presently work with the PSC .

David Drach: In real estate cases I haven't worked with the PSC in North Dakota.

Rep. Hawken: Could you speak to the letter -- that has caused some --

David Drach: My boss who wrote that letter is here. He's a lot smarter than I am.

Rep. Price: I am getting some conflict messages from the testimony and it would be helpful to have a copy of you present leases.

David Drach: We have a lot of leases in effect -- some go back quite awhile but we can make available to you a copy of our current up to date lease for but you understand we do have various forms of leases still in effect out there.

Rep. Price: You have one lease agreement?

David Drach: Yes we have one standard form and then there is some tailoring to fit the situation. We do have some clauses that need to be added for tank farms, insurance, etc.

John Nail: (20. 6) I am Director of Real Estate for the Canadian Pacific Railway out of Minneapolis. I am the one who sent out the love letter to so many of our tenants. Let me explain that letter. There needs to be some background -- when we testified before the Senate we told them at the time the language in the bill was so contrary to the agreements we have in place that it would change the business terms by which we made those agreements -- that if the terms that were precedent to our making that agreement -- in the first place -- in other words couldn't have had those agreements -- if we didn't have those terms -- our tenants wouldn't be on our property.

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And all of a sudden through an action of the state through regulation -- now those term which were so important to us to allow them on the property in the first place are null and void so that we have to re-weigh our assesment and the risk of having those people on our property. And if the risk the risk out weighs the benefits because of this action then we might have to terminate some of our agreements. Basically this is cause and effect. Let me give you one example of indemnity that is very clear -- take a fiber optic cable -- a fiber optic line has a repeater station every 10 or 15 miles -- if we take out a repeater station with our operations -- everything that fiber optic station is hooked up to is down. I am sure that you have all heard about when the fiber optics line in Minneapolis was cut a few years ago -- Northwest Airlines was out of business for eight hours. The liability is tremendous -- millions of dollars a minute -- when we negotiate with fiber optics companies -- yes you can come onto our property but if we have an accident and its our fault but because you come onto our property the liability is so great that unless you indemnify us we can not allow it. It is jus that simple. It is two business people who decide to do it -- its in play but now all of a sudden one of the parties to the agreement doesn't like it -- gets the law changed -- now the reason for me allowing this company to be on our property. What am I to do? Realistically -- we expressed this to the Senate -- we told them this is so serious that we might have to go back and cancel our leases -- I know that people are aggravated at us but what if we had waited until after the law had passed -- then came and said we are starting to terminate leases. Wouldn't you like to know there is a problem and that maybe we can deal with it.

I realize there are some problems but I commit to you today that I will sit down with you and work these things out -- I sat down last evening and talked with the Farm Bureau -- I will come up next week -- next year , what have you let's address these problems -- I didn't know there was

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a problem from the real estate program until this bill surfaced. And I am head of the real Estate Division and I did not know we had a problem.

Rep. Weisz: I appreciate and hear your frustration -- I see it in your letter-- You have been here since the first of the last century -- businesses have established here and now they get your -- they have thirty days -- no negotiating power to stand up to the railroads -- if you have million dollar business and you have thirty days to get it off your right of way -- in many cases those leases are implied agreements from fifty - sixty years ago -- the terms today didn't apply back then - - and they built and did accordingly -- so we do have an issue and understand your concerns -- especially right of way, utilities and some of these other issues -- it points out the frustration and some of the issues -- it isn't the case of you sitting down with an utility and your can make a business decision but we have business decisions which were made 40 - 50- 60 years ago -- prior and now being subjected to terms and conditions that are evolving which in a sense are all on one side and that is where the concerns come from -- I hope you can understand that ---

John Nail: I can understand and the response that I have is -- yes times have evolved and --yes -- our agreements 30 - n4- -5- years ago -- the world has changed -- indemnity has changes - the courts view liability has changed -- we both the railroads and the business has changed -- 30 - 40 years ago there wasn't the Super Fund out their-- we didn't have the environmental liability, so no we have address environmental conditions a lot differently -- I realize it -- we do not want to kick anybody off our property -- I reiterate that we will sit down in good faith and negotiate with anybody-- obviously there will be things that we will not or can not agree with other people on -- I don't intend to negotiate as an 800 pound gorilla. Anybody who really knows me knows that is not the way I do business. If that is the way it is perceived -- I am sorry but I pledge to you --I

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pledged to the grain dealers last night -- I will sit down in good faith and negotiate -- there is an opportunity to negotiate and the next legislative session. Use the opportunity to do that. I told them last night you can come back in two years and tell them that the big bad guys wouldn't negotiate. But please don't do something so bad that we can't do business here.

Rep. Thorne : What I sense here from your letter -- it is hard to negotiator with somebody who carries a big stick.

John Nail: I mean this in a personal sense -- you know sometimes --sometimes it pays -- a statement that is a little strong gets the attention. Whether our letter was taken as a threat or not -- it was not meant that way -- I do apologize to anybody that took it that way -- the intent was to raise the level that there is a concern out there and everybody should be aware of the concern -- please be concerned with the issue -- if you think something need to be done -- then help us in addressing the issue -- that really what we want -- again -- I had a shipper who sent me a barn burner of a letter and ask for an apology -- I wrote him an apology that he took it the way he did but I did not apologize for calling your attention to the perceived problem we have.

Rep. Weisz: I will admit the letter did raise the level of concern.

John Nail: With all due respect I am glad that it did because we do have concern here.

Dan Kuntz: (30.6) Representing the Burlington Northern Santa Fe Railway -- I do have some amendments I want to present and discuss with the committee but first I would ask that Brian Sweeney, our legal counsel to testify.

Brian Sweeney: I am Executive Director for Government Affairs for BNSF. First in full disclosure and in fairness to the Canadian Pacific -- I should acknowledge that while we did not send out letters -- we have suspended real estate activities in North Dakota. We put that into

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effect as soon the day this bill came out of committee in the Senate. the reason is major --major change in the landscape. It really changes things -- the prospects of being able to do business in North Dakota. I would also like to begin by answering a few questions. One was posed by Rep. Price -- regarding lessees in Minot -- would they have to pay the costs if this would have happened on leased property -- as I read the agreement --no. Chairman Weisz had a question -- if the railroad did a spill of hazardous material -- solely the railroad's fault onto leased property would the lessee's responsibility -- the answer you they could argue with the -- or they would attempt to argue -- and potentially could be asserted -- we could potentially assert until the cows come home but we would probably lose. the reason being that when portions of our lease were read to you -- at a critical point -- the words skipping down were used -- it was there some pretty important stuff was skipped over -- it was provision "resulting from or relating to in whole or in part" skipping down skipped over "this lease without limitations of environmental provisions to any rights or interest granted pursuant to this lease, lessee's occupation and use of the premises, the environmental condition and status of the premises cause by aggravated by or contributed in whole or in part by lessee or any act or omission lessee's officers may -- the answer is NO.

There seemed to be some misunderstanding how indemnification works -- first its a transfer of risk and it is done by various parties -- Paused to treat a nose bleed -- when a third party makes a claim -- it puts the insurance of the lessee first and then the claim goes to the assets of the lessee and then to the railroad -- what we want to do is make sure that you increase liability risk created by somebody else's use of our property does not fall on us -- this is important -- our language in our agreements says "it is understood by the lessee that the premises maybe in dangerous proximity to railroad tracks including the lessor's track's and persons and property whether real

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or personal on the premises will be in danger of death or destruction incident to the operation of the railroad" and then it goes on -- but we say flat out this is not the safest place in the world to do business -- you are assuming a certain level of risk when you come onto the property. As I said this is very common --it is common even to the State of North Dakota --I have heard the term 'unconscionable' used but the North Dakota Risk Management Manual section on contracts and agreements -- has a section about indemnification provisions and how they should be used in state contracts and it says it has different categories --limited, intermediate, broad, intergovernmental, -- the most common it says is the intermediate which requires contractors to be responsible for its own liability and the joint liability of the contractor and the state -- this is the most commonly used form of the indemnification clause'.

Under this bill we can't even do what the state does to protect ourselves. Who are the lessee's -- less than half are customers -- most have no need to be in proximity to the tracks -- these people are unfortunately are the most hurt -- generally they pay low rent -- on the average of \$2000 a year only about half of which goes to the railroad -- so in exchange for that we are being asked to accept millions of dollars of liability. We have some outfits that even the state will not take -- for example power lines -- can not be within a certain distance of the right of way without the consent of the DOT -- yet they can now come onto our property with now liability protection ---

Note. He had to be excused because of his nose bleed and couldn't continue.

Dan Kuntz: For the record again I am Dan Kuntz representing the BNSF. First I want to hand out copies of several pages from the Risk Management Manual -- what this is as Mr. Sweeney says -- the state of North Dakota -- when you lease a piece of property from the State of North

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Dakota -- this manual says you need to get asked these indemnification provisions -- why I am handing these out is that I have highlighted some of the permanent provisions-- I pointed them out for several reasons - first this manual points out "these are very common provisions" -- the impression that the railroads are the only one requires these type of provisions for indemnification is totally false -- these are common provisions and the State of North Dakota requires the same thing as a matter of public policy. If the railroad shouldn't have these in their leases as a matter of policy then it seems then that the State of North Dakota shouldn't have them in their leases as a matter of public policy and virtually every other lessor as well. So I would urge you to take a look at some of that language --but the other reason I have pointed it out is that it ties back to some of the amendments we offer. the State of North Dakota says in their leases that you have to indemnify the State for any liability on that property even if caused by the negligence of the State unless it is the sole negligence of the State of North Dakota. I am going to hand out two pieces -- one is a marked up version of SB 2358 and I think it is lot easier to follow the proposed amendments as we walk through them than the formal language itself. a copy of his hand out is attached. He used hypotheticals to explain their reasoning --what if's -- most were scenarios that theoretically were the sole negligence of the railroad -- what we are suggesting with these amendments is one of the things -- is leave in the reference that the railroads could not require indemnification for its sole negligence -- that would put on par with what the state of North Dakota requires for their leases -- we could have the same thing that North Dakota has with respect to concurrent negligence -- the other thing we have changed is we say the lease is would be voidable -- we talking leases, deeds, and titles to property -- when you say these things are automatically void because they might have a provision in there -- these things support

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mortgages, -- you have all kinds of problems -- so we are suggesting that you use the word 'voidable' rather than 'void'. We are also limiting it to leases -- right now it would involve purchases, -- the situation over at Mandan -- we require indemnification in those situations to make sure any environmental damage -- you check it out -- we are not going to sell those particular pieces of property -- unless you have indemnity. In Mandan I don't think the railroad is selling any pieces of property because of the fuel situation. I also want to point out this bill has absolutely nothing to do with the Mandan situation -- no one has taken lessees to recover damages for the diesel fuel spill over there. I think we have heard a lot of apples and oranges being tossed about. We prefer limiting this bill to the leases and then the parties can decide whether they want to go through purchases or not. the other thing we are proposing is to limit it to public grain warehouses. There has been some discussion about other types of lessees but for the most part this has been an issue with the grain elevators -- we are proposing it be limited to state and federal licensed warehouses during the two year period --it would give a chance for the two years to study it. then the other types of lessees who don't need to be on the railroad property and may have different levels of risk the parties can negotiate on their own.

Those are the main changes on page one. On page two some of the same changes about removing the language -- for concurrent negligence and then we are replacing subsection three which was the amendment added over on the Senate side -- it was a last minute amendment and frankly it is very confusing and I think arguably broader than even the sponsors intended -- in one sense but one of things we needed to clarify in that particular section 3 was that we can still require that the lessee is still responsible for their own negligence and that we can require indemnification for things they do-- another major change there is the requirement that does allow indemnification --

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we need to have insurance. This gives me chance to cover how the railroad gets drug into these law suits and why insurance is important -- this is a law suit that our company was involved in a couple of years ago on the BNSF - - it happened on a railroad piece of property -- no -- on an elevator piece of property -- an elevator employee was pulling some cars for loading -- once we spot them it is up to the elevator to move them so they can load them -- they were using a small farm tractor to move these cars -- he started pulling them and the momentum of the cars over came the tractor and knocked the tractor over and unfortunately this gentlemen lost his leg. He couldn't sue the elevator because of Workers Compensation -- so he brought a law suit against the railroad -- the railroad was brought in on the premise that the railroad didn't properly supervise the how the elevator was using and had not properly trained that person -- that is how the railroad is brought into these suits against the elevator -- so the railroad had some percent of the liability because it happened on their property. You didn't make sure conditions on your property were safe therefore you should be liable. When you get to catastrophic injuries like that even 10% -- on a \$2 million loss it is significant. What happened in that particular case I that the elevator itself was in poor financial condition and when we negotiated and end up settling with the gentlemen based upon the insurance which was required under the indemnity clause. that how railroads get brought into these cases. That is by far and away the vast majority of the cases and types of claims the railroad has to defend -- you can talk about all these other hypothetical situations -- spills because of derailments -- these are the real life examples of what takes place -- accidents on our right of way. That is concurrent negligence and that is why we need the insurance for indemnification -- we can take out the sole negligence -- and that is what we are proposing by these amendments. The other exemption we have is a new subsection 4 -- is that

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need some reference to hazardous material if this particular lessee even if it is an elevator is going to be bringing hazardous material onto the property we need to be able to deal with that. Even with sole negligence -- if that lessee insists upon locating an anhydrous tank next to the tracks and that a lot bigger risk than if it is not there. Even if we have a derailment and it is our fault and happen to hit that tank and releases some poisonous gas -- that is a big risk than before that person put that on our property. We need the ability to be able to negotiate when dealing with hazardous materials. We also removed the portions about the PSC -- I think the idea of going to the PSC and having them to strike through some provisions in leases we have had negotiated -- for \$ 2 or \$3,000 lease just isn't going to work. If these warehouse think their leases are to high -- going before the PSC to the prices reviewed -- to my knowledge I believe that legislation has been in place for at least 25 years. I am not aware of an elevator that has gone before the PSC to have the prices reviewed. These extremely high prices -- if they are too high -- there is already legislation in place to deal with that.

Rep. Weisz: YOU brought up the anhydrous situation which I understand -- and I agree when you put property next to the railroad -- you are assuming some liability. At the same time he doesn't know all the things you are hauling -- so if you come by and hit a structure of his -- again I understand he is responsible for his own structure costs but now that clean up for taking care of that specific spill -- isn't your insurance supposed to cover hazardous material on his property?

Dan Kuntz: As I read the indemnification provisions, if we are going along -- have a derailment, a car spills, contaminates the property, -- I read it the same way Mr. Sweeney does -- we don't get to have indemnification for that. As I read is for the indemnification to be in force it has to be something the lessees doing or something being there -- in your scenario, the car tips over -- that

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Deanna Ball...
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10/22/03
Date

Page 21
House Transportation Committee
Bill/Resolution Number SB 2358
Hearing Date March 13, 2003

land would have been contaminated whether that lessee was there or not. Now if we ran into their tank that's a different situation because they put their tank next to the railroad -- thus but for their operation.

Rep. Weisz: But if you ran into their structure and there was a clean up required -- their indemnity is suppose to cover all of that? or just their costs?

Dan Kuntz: In that situation we required them to have insurance -- even in the amendments the grain dealers offered ran to their damages and we would look to them for their damages and their employees.

Rep. Weisz: How about the clean up costs?

Dan Kuntz: Now with the sole negligence exception we could shuck off some of that for sole negligence coverage as long -- or if it was the lessee's negligence or not.

Rep. Weisz: Can you modify the definition of sole negligence or can you assert the car was 500 pounds overloaded by someone else? So the lessee or the lessor -- is sole negligence?

Dan Kuntz: Sole negligence means 100% the fault of the person being sued. Would the plaintiff assert that -- I don't know -- If we thought it was the lessee's fault in some way we would argue to concurrent negligence. Then it would be up to the jury to decide if the lessee was a contributing force in that situation.

There being no other persons wishing to testify either for or against SB 2358, Chairman Weisz closed the hearing.

End of record for the hearing. (54.3)

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Dennis Waller
Operator's Signature

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2003 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2358 b

House Transportation Committee

Conference Committee

Hearing Date March 21, 2003

Tape Number	Side A	Side B	Meter #
1	x		5.3 to 30.9
Committee Clerk Signature <i>Lauren B. Finch</i>			

Minutes:

Rep Weisz opened the discussion in a work session to discuss SB 2358. He has had some discussions with both sides of the issues and they are still making progress. Therefore, no final action was planned to give the parties a little more time. In the mean time the committee was asked to look at the amendments which Senator Nething had proposed to be added to the bill. specifically the committee had before them LC xxx.0201. Of note was the \$1 million fine for negotiating in bad faith. Discussion about the amount of the fine and how bad faith would be determined or applied. There appeared to be some contradiction in the language as to whether the bad faith penalty would apply only to the railroads-- the way either party was stated from the title and until near the end of the bill. The other thing of question was the PSC 's role now and what it would be or whether their involvement was necessary. The committee had the benefit of Jon Mielke's expertise as he was present and answered questions. there was also considerable discussion of what the legislative intent is or how it would be interpreted. The possibility of

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Date

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House Transportation Committee
Bill/Resolution Number SB 2358 b
Hearing Date March 21, 2003

arbitration -- mediation could be contracted out by the PSC and the order by the presiding arbiter could assess the costs or contain the coverage of the cost by the parties--- therefore no or little cost to the PSC.

Steve Stregge also was present to discuss some aspects of the legislation .

The committee was advised to return on Thursday, March 27, 2003 at 9:00 AM.

No action was taken on amendments or wording -- no votes.

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2003 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2358 o

House Transportation Committee

Conference Committee

Hearing Date March 27, 2003

Tape Number	Side A	Side B	Meter #
1	x		0.6 to end
		x	all
2 & 3			nearly all .
Committee Clerk Signature <i>Laura M. Fink</i>			

Minutes:

Rep. Weisz, Chairman opened the discussion for action on SB 2358. Presented were extensive sets of amendment proposals: 1) prepared by Sen. Nething , 2) prepared by Rep. Weisz , 3) prepared by the North Dakota Grain Dealers , 4) prepared by the BNSF and CP Railroads and 5) the North Dakota Public Service Commission. Copies of these proposed amendments are attached. Available a resource persons were Jon Mielke, ND PSC; Dan Kuntz , BNSF and Tom Kelsch, CP ; and Steve Stregge and Brian Bjella , ND Grain Dealers. After presenting the amendments with his explanation of what the intent of each was and how they were developed, Chairman Weisz appointed a subcommittee to work out differences and recommendations to the whole committee. He appointed Rep. Hawken, Vice Chairman, Rep. Delmore and himself to the subcommittee. The committee was recessed as the subcommittee worked the balance of the forenoon and all afternoon until 5:00 PM with the exception of about one hour of floor time and one hour from 4:15 to nearly 5:00 PM for an informational 'Overview' presentation concerning

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10/22/03
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Page 2
House Transportation Committee
Bill/Resolution Number SB 2358
Hearing Date March 27, 2003

alternative revenue sources for matching added distributions of Federal Highway Construction funds to the state. The work of the subcommittee was scheduled to continue the next morning. The are recorded work sessions recorded on three tapes for the day. The 'Overview' session is covered on a separate tape.

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2003 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2358 d

House Transportation Committee

Conference Committee

Hearing Date March 28, 2003

Tape Number	Side A	Side B	Meter #
1	X		0.4 to 20.1

Committee Clerk Signature *Laura Sub. Zisk*

Minutes:

Rep. Weisz opened the discussion for action on the amendments and on Sen. 2358. He presented and explained the amendments drafted by the subcommittee. There were few question and answers.

Rep. Delmore a 'do pass' motion to approve the amendments. Rep. Price seconded the motion. Motion carried on a voice vote.

Rep. Hawken moved a 'Do Pass as amended' motion for SB 2358. Rep. Delmore seconded the motion. On a roll call vote the motion carried 10 Ayes 3 Nays 0 Absent.

Rep. Weisz was designated to carry SB 2358 on the floor.

End of record. (20.1)

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10/22/03
Date

30771.0201
Title.

Prepared by the Legislative Council staff for
Senator Nething
March 10, 2003

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2358

Page 1, line 1, after "enact" insert "a new section to chapter 49-09 and"

Page 1, line 2, after "provisions" insert "and bad faith"

Page 1, line 4, after "leases" insert "; to provide a penalty"

Page 1, after line 6, insert:

"SECTION 1. A new section to chapter 49-09 of the North Dakota Century Code is created and enacted as follows:

Bad faith in transfer of railroad right of way - Penalty. A railroad may not negotiate in bad faith with a nonrailroad purchaser, lessee, licensee, or other contracting party in relation to a purchase agreement, deed, bill of sale, lease, license, or other agreement pertaining to the sale, lease, license, or other use of right of way, or other adjoining property. Prima facie evidence of bad faith is a significant increase in the burden on a nonrailroad party from any previous terms agreed to by the parties or if there are not any previous terms, from the terms offered to other parties before January 1, 2003, adjusted for inflation. For purposes of this section, a previous term includes section 49-16-01.1. A railroad's use of section 49-16-01.1 as the basis of any significant increase in the burden on a nonrailroad party is bad faith. To determine a finding of bad faith, the commission shall use the procedure in section 60-06-06.1 and may create the terms of an agreement as if there was not any bad faith. The commission may impose a civil penalty up to one million dollars on any party found to have acted in violation of the duties imposed by this section.

Renumber accordingly

Page No. 1

30771.0201

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PROPOSED AMENDMENTS TO ENGROSSED
SENATE BILL NO. 2358

Page 1, line 2, replace "transfer" with "use", and remove "to amend and reenact"

Page 1, remove line 3

Page 1, line 4, remove "railroad indemnity agreements in right-of-way leases;"

Page 1, line 9, replace "void" with "voidable"

Page 1, line 10, remove "purchase agreement, deed, bill of sale," and after "other" insert "real estate", and after "agreement" insert "for the"

Page 1, line 11, remove "pertaining to the sale, lease, license or other" and after "use" insert "or occupancy"

Page 1, line 12, replace "nonrailroad purchaser," with "state or federal licensed public grain warehouse"

Page 1, line 13, remove "lessee, licensee, or other contracting party", and replace "void" with "voidable"

Page 1, line 17, remove "or concurrent"

Page 1, line 20, replace "nonrailroad purchaser, lessee, licensee, or other contracting" with "public grain warehouse"

Page 1, line 21, remove "party"

Page 1, line 23, remove "or concurrent"

Page 1, line 24, remove "; or coverage or other"

Page 2, remove lines 1 through 3

Page 2, line 4, remove "contractors"

Page 2, line 8, remove "or concurrent"

Page 2, line 9, remove ", or for any"

Page 2, remove line 10

Page 2, line 11, remove "agreement, deed, bill of sale, lease, license, or other agreement is entered"

Page 2, replace lines 13 through 15 with:

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3. Notwithstanding any other provision of law, including subsection 1, a railroad may require insurance, indemnification and defense of the railroad from any public grain warehouse for:

a. Liability, loss, or damages incurred by the public grain warehouse, and its agents, employees, or invitees, including any liability, loss or damages caused by the fault of the railroad, its agents, employees, invitees, and independent contractors.

b. Liability, loss, or damages incurred by third parties caused by the fault of the public grain warehouse, its agents, employees, and invitees.

Page 2, after line 15 insert:

4. This section shall not apply to materials brought on real property of the railroad by a public grain warehouse that if released would require reporting to any governmental agency having jurisdiction.

Page 2, remove lines 16 through 31

Page 3, remove lines 1 through 19

Page 3, line 25, remove "purchase agreement,"

Page 3, line 26, remove "deed, bill of sale," and after "other" insert "real estate"

Page 3, line 27, remove "oral or written"

Renumber accordingly

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NORTH DAKOTA GRAIN DEALERS ASSOCIATION
PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2358

Page 1, line 2, replace "transfer" with "use"

Page 1, line 10, replace "A purchase agreement, deed, bill of sale." with "Except as provided in this section, a term of a", and after "agreement" insert "for the".

Page 1, line 11, remove "pertaining to the sale, lease, license or other" and after "use" insert "or occupancy".

Page 1, line 12, replace "nonrailroad purchaser." with "state or federal licensed public grain warehouse".

Page 1, line 13, remove "lessee, licensee, or other contracting party"

Page 1, line 20, replace "nonrailroad purchaser, lessee, licensee, or other contracting" with "state or federal licensed public grain warehouse"

Page 1, line 21, remove "party"

Page 1, line 22, after "liability." insert "environmental damage"

Page 1, line 24, remove "; or coverage or other"

Page 2, remove lines 1-4

Page 2, line 10, remove "purchase"

Page 2, line 11, remove "agreement, deed, bill of sale"

Page 2, replace lines 13-15 with:

3. Notwithstanding any other provision of law, a railroad may require that any lessee, licensee or other contacting party, except for a purchaser, provide the following:
 - a. Standard ISO commercial general liability insurance, without additional endorsements except for contractual liability coverage, with a combined single limited of not more than Two Million and 00/100 Dollars (\$2,000,000.00) in coverage per occurrence for bodily injury and property damage liability arising out of the use of the property by the contracting party, naming the railroad as an additional insured with the requirement that this coverage be primary and without any right of contribution from any insurance providing coverage to the railroad.

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- b. Indemnification to the railroad for any personal injury to, or property damage suffered by, any lessee, licensee or other contacting party, their employees, agents, or invitees on the property covered by the contract unless the personal injury or property damage was caused solely by the acts or omissions of the railroad which are willful, wanton, or grossly negligent.

Page 2, line 31, remove "nonrailroad"

Page 3, line 1, replace "purchaser, lessee, or other user" with "state or federal licensed public grain warehouse"

Page 3, line 6, replace "nonrailroad purchaser, lessee, or other users." with "state or federal licensed public grain warehouse"

Page 3, line 22, remove "abandoned and surplus"

Page 3, line 25, remove "purchase agreement."

Page 3, line 26, remove "deed, bill of sale."

Re-number accordingly.

**BNSF & CP RAILROAD
PROPOSED AMENDMENTS TO SB 2358**

- Limits the insurance and indemnification provisions to leases to public grain warehouses. (Amendments to Page 1, lines 10-13, 20, 21)
- Prohibited terms would be void; not the lease instrument. (Amendment to Page 1, line 10)
- Removes redundant language on page 1, line 24 through page 2, line 3.
- Allows the railroad to require insurance and indemnification for all liability up to \$2 million.
 - railroad may require standard endorsements and policy language to assure protection of the railroad under the insurance policy.
 - indemnification is necessary to assure protection under the insurance policy and provide protection if warehouse doesn't maintain insurance or if railroad doesn't require insurance.
- Allows the railroad to require indemnification for all liability (above the \$2 million insurance coverage) for damages to the warehouse, its employees, and invitees.
- Allows the railroad to require pollution legal liability insurance if the railroad allows the warehouse to place hazardous substances on the property.
 - alternative is for railroad to prohibit the hazardous substance on the property.
- Allows the railroad to require indemnification and insurance for the environmental condition of the property that is caused by, aggravated by, or contributed to by the warehouse, its employees, invitees, agents or contractors.
 - Insurance is called Owner Controlled Environmental Insurance Program.
- Allows the railroad to require railroad protective liability insurance if construction or demolition is performed on the property.
 - risk exposure is increased during construction and demolition periods.
 - provides protection for actions of contractor.
- Removes PSC involvement in reviewing or determining lease and purchase contract provisions:
 - PSC already has jurisdiction to review railroad rents to public warehouses. (N.D.C.C. 60-06-15)
 - PSC can't change terms of existing contracts. (N.D. Const. Art. I, §18; U.S. Const. Art. I, §10)
 - PSC involvement in establishing lease and purchase provisions will limit availability of properties for sale or lease by the railroads.
- Applies to new leases and to written renewals and amendments modifying indemnity and insurance provisions.

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PROPOSED AMENDMENTS TO ENGROSSED
SENATE BILL NO. 2358

Page 1, line 2, replace "transfer" with "use"

Page 1, line 3, remove "and 60-06-06.1"

Page 1, line 9, replace "agreements" with "terms"

Page 1, line 10, replace "A purchase agreement, deed, bill of sale," with "Except as provided in this section, any provision of a," and after "other" insert "real estate", and after "agreement" insert "for the"

Page 1, line 11, remove "pertaining to the sale, lease, license or other" and after "use" insert "or occupancy", and after "or" insert "railroad"

Page 1, line 12, replace "nonrailroad purchaser," with "state or federal licensed public grain warehouse"

Page 1, line 13, remove "lessee, licensee, or other contracting party"

Page 1, line 20, replace "nonrailroad purchaser, lessee, licensee, or other contracting" with "public grain warehouse"

Page 1, line 21, remove "party"

Page 1, line 24, remove "; or coverage or other"

Page 2, remove lines 1 through 3

Page 2, line 4, remove "contractors"

Page 2, line 10, remove "purchase"

Page 2, line 11, remove "agreement, deed, bill of sale"

Page 2, replace lines 13 through 15 with:

3. Notwithstanding any other provision of law, a railroad may require that a lessee, licensee, or other party contracting for the use or occupancy of right of way, or other adjoining property, provide the following:

- a. Commercial general liability insurance of not more than two million dollars per occurrence coverage for bodily injury and property damage arising out of the use or occupancy of the property by the contracting party, including damage caused by the sole or concurrent fault of the railroad, its employees, agents and contractors, and naming the railroad as an additional insured with endorsement CG2010 (ed. 10-93), and with policy language or endorsements appropriate to protect the railroad's interests including removal of restrictions of coverage for activities on or

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near railroad right-of-way, inclusion of coverage for contractual liabilities, waiver of subrogation against the railroad, a requirement that the coverage be primary and without any right of contribution from any insurance providing coverage to the railroad, and inclusion of severability of interest language.

b. Indemnification and defense of the railroad, its employees and agents for all personal injury, property damage, and environmental damage claims and liability up to two million dollars per occurrence arising out of the use and occupancy of the property including claims and liability caused by the sole or concurrent fault of the railroad, its employees, agents and contractors.

c. Indemnification and defense of the railroad, its employees and agents for all personal injury, property damage, and environmental damage claims and liability to the lessee, licensee, or other contracting party, its employees, agents and invitees, arising from the use and occupancy of the property including claims and liability caused by the sole or concurrent fault of the railroad, its employees, agents and contractors unless caused solely by the acts or omissions of the railroad that are willful, wanton, or grossly negligent.

d. Pollution legal liability insurance to cover liabilities arising from hazardous substances or petroleum products brought on the property, or released on or near the property, or violations of environmental laws by the lessee, licensee, or other contracting party, its employees, agents and invitees.

e. Indemnification and insurance for liability resulting from the environmental condition and status of the property to the extent caused by, aggravated by, or contributed to by the lessee, licensee, or other contracting party, its employees, agents, and invitees.

f. Railroad protective liability insurance naming only the railroad as the insured if construction or demolition is to be performed on the property by the lessee, licensee, or contracting party, or its employees, agents, contractors and subcontractors. The policy shall include coverage for claims made under the Federal Employers Liability Act.

Page 2, remove lines 27 through 31

Page 3, remove lines 1 through 19

Page 3, line 22, remove "abandoned and surplus"

Page 3, line 25, remove "purchase agreement,"

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Date

Page 3, line 26, remove "deed, bill of sale," and after "other" insert "real estate", and after "agreement" insert "for the use or occupancy of railroad right of way or other adjoining property"

Page 3, line 27, remove "oral or", and replace ", continuation, or extension" with "or amendment"

Page 3, line 28, after "Act" insert "expressly modifying the insurance and indemnification provisions of the prior agreement"

Renumber accordingly

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Date

Proposed Amendments to 2358

SECTION 1. Section 49-X-X of the North Dakota Century Code is created and enacted as follows:

49-X-X. Lease Agreements with a Railroad.

Notwithstanding any other provision of the law, upon the non-renewal of leases where the lessee has buildings or structures on the leased property, arbitration through the Public Service Commission shall determine the reasonable terms of the new lease agreement. If the lessee does not agree to the new lease agreement, the lessee shall have a reasonable amount of time to remove or demolish their buildings or structures from the leased property and compensate the railroad at the monthly rate equal to the current or last lease terms. If the railroad does not agree to the new lease agreement, the railroad shall pay fair market value to lessee for the buildings or structures on the leased property.

SECTION 2. EMERGENCY. This Act is declared to be an emergency measure.

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Deanna Walcott
Operator's Signature

10/22/03
Date

Final Amendments to SB 2358

Page 1, line 2, replace "transfer" with "use"

Page 1, line 9, replace "agreements" with "terms"

Page 1, line 10, replace "A purchase agreement, deed, bill of sale." with "Except as provided in this section, any provision of a" and after "agreement" insert "for the"

Page 1, line 11, remove "pertaining to the sale, lease, license or other", after "use" insert "or occupancy", and after the first "of" insert "railroad"

Page 1, line 12, replace "nonrailroad purchaser." with "state or federal licensed public grain warehouse or potato warehouse"

Page 1, line 13, remove "lessee, licensee, or other contracting party"

Page 1, line 20, remove "nonrailroad purchaser, lessee, licensee, or other contracting" with "state or federal licensed public grain warehouse or potato warehouse"

Page 1, line 21, remove "party"

Page 1, line 24, replace "; or coverage or other" with an underscored period

Page 2, remove lines 1 through 4

Page 2, line 10, remove "purchase"

Page 2, line 11, remove "agreement, deed, bill of sale"

Page 2, replace lines 13 through 15 with:

- "3. Notwithstanding any other provision of law, a railroad may require that a lessee, licensee, or other party contracting for the use or occupancy of right of way, or other adjoining property, provide the following:
- a. Commercial general liability insurance of not more than two million dollars per occurrence coverage for bodily injury and property damage arising out of the use or occupancy of the property by the contracting party, including damage caused by the sole or concurrent fault of the railroad, its employees, agents, and contractors.
 - b. Indemnification and defense of the railroad, its employees and agents for all personal injury and property damage claims and liability up to two

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million dollars per occurrence arising out of the use and occupancy of the property including claims and liability caused by the sole or concurrent fault of the railroad, its employees, agents, and contractors.

- c. Indemnification and defense of the railroad, its employees and agents for all personal injury, property damage, and environmental damage claims and liability to the lessee, licensee, or other contracting party, its employees, agents, and invitees, arising from the use or occupancy of the property including claims and liability caused by the sole or concurrent fault of the railroad, its employees, agents, and contractors unless caused solely by the acts or omission of the railroad that are willful, wanton, or grossly negligent.
- d. Pollution legal liability insurance up to one million dollars, unless the lessee agrees to a greater amount, to cover liabilities arising from hazardous substances or bulk storage of petroleum products brought on the property, or released on or near the property, or violations of environmental laws, by the lessee, licensee, or other contracting party, its employees, agents, and invitees.
- e. The parties of the agreement shall indemnify and insure the other party for liability resulting from the environmental condition and status of the property to the extent caused by, aggravated by, or contributed to by the lessee, licensee, or other contracting party, its employees, agents, and invitees.

Page 2, line 30, remove "or to resolve disputes that arise"

Page 2, remove line 31

Page 3, line 1, remove "purchaser, lessee, or other user for any purpose, of a right of way"

Page 3, line 3, replace "If the commission finds that any term of a proposed right-of-way" with "The value of a leaseholder's improvements may not be considered in determining a reasonable lease rate or selling price. The parties to such a proceeding shall pay the expenses of the proceeding, as determined by the commission, directly to the entities owed. The commission may promulgate rules to carry out the provisions of this section."

Page 3, remove lines 4 through 8

Page 3, line 9, overstrike "The commission shall conduct each hearing required under"

Page 3, overstrike lines 10 through 19

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Deanna D. Hall
Operator's Signature

10/22/03
Date

Page 3, insert section 60-06-15 of the NDCC, and after "renewals" insert "or sale"

Page 3, line 22, remove "abandoned and surplus"

Page 3, line 25, remove "purchase agreement,"

Page 3, line 26, remove "deed, bill of sale," after "other" insert "real estate", and after "agreement" insert "for the use or occupancy of railroad right of way or other adjoining property"

Page 3, line 27, remove "oral or" and replace ", continuation, or extension" with "or amendment"

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Deanna Ballantyne
Operator's Signature

10/22/03

Date

30771.0202
Title.0300

Adopted by the Transportation Committee
March 28, 2003

House Amendments to Engrossed SB 2358 - Transportation Committee 03/31/2003

Page 1, line 2, replace "transfer" with "use"

Page 1, line 3, replace "and" with a comma and after "60-06-06.1" insert ", and 60-06-15"

Page 1, line 9, replace "agreements" with "terms"

Page 1, line 10, replace "A purchase agreement, deed, bill of sale," with "Except as provided in this section, any provision of a"

Page 1, line 11, replace "pertaining to the sale, lease, license or other" with "for the", after "use" insert "or occupancy", and after the first "or" insert "railroad"

Page 1, line 12, replace "nonrailroad purchaser," with "state or federal licensed public grain warehouse or potato warehouse"

Page 1, line 13, remove "lessee, licensee, or other contracting party"

Page 1, line 20, replace "nonrailroad purchaser, lessee, licensee, or other contracting" with "state or federal licensed public grain warehouse or a potato warehouse"

Page 1, line 21, remove "party"

Page 1, line 24, replace "; or coverage or other" with an underscored period

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Deanna Stalder
Operator's Signature

10/22/03
Date

House Amendments to Engrossed SB 2358 - Transportation Committee 03/31/2003

Page 2, remove lines 1 through 4

Page 2, line 10, remove "purchase"

Page 2, line 11, remove "agreement, deed, bill of sale."

Page 2, replace lines 13 through 15 with:

- 3. Notwithstanding any other provision of law, a railroad may not require that a lessee, licensee, or other party contracting for the use or occupancy of right of way, or other adjoining property, provide the following:**
- a. Commercial general liability insurance of not more than two million dollars per occurrence coverage for bodily injury and property damage arising out of the use or occupancy of the property by the contracting party, including damage caused by the sole or concurrent fault of the railroad, its employees, agents, and contractors.**
 - b. Indemnification and defense of the railroad, its employees and agents for all personal injury and property damage claims and liability up to two million dollars per occurrence arising out of the use or occupancy of the property including claims and liability caused by the sole or concurrent fault of the railroad, its employees, agents, and contractors.**
 - c. Indemnification and defense of the railroad, its employees and agents for all personal injury, property damage, and environmental damage claims and liability to the lessee, licensee, or other contracting party, its employees, agents, and invitees, arising from the use or occupancy of the property including claims and liability caused by the sole or concurrent fault of the railroad, its employees, agents, and contractors unless caused solely by the acts or omission of the railroad that are willful, wanton, or grossly negligent.**
 - d. Pollution legal liability insurance up to one million dollars, unless the lessee agrees to a greater amount, to cover liabilities arising from hazardous substances or bulk storage of petroleum products brought on the property, or released on or near the property, or violations of environmental laws, by the lessee, licensee, or other contracting party, its employees, agents, and invitees.**
- 4. Each party to the agreement shall indemnify and insure the other party for liability resulting from the environmental condition and status of the property to the extent caused by, aggravated by, or contributed to by the lessee, licensee, or other contracting party, its employees, agents, and invitees.**

Page 2, line 30, remove "or to resolve disputes that arise"

Page 2, remove line 31

House Amendments to Engrossed SB 2358 - Transportation Committee 03/31/2003

Page 3, line 1, remove "purchaser, lessee, or other user for any purpose, of a right of way"

Page 3, line 3, remove "If the commission finds that any term of a proposed right-of-way"

Page 3, remove lines 4 through 8

Page 3, line 9, remove "and reasonable to both parties." and overstrike "The commission shall conduct each hearing required under"

Page 3, overstrike lines 10 through 18

Page 3, line 19, overstrike "the general fund in the state treasury." and insert immediately thereafter "The value of a leaseholder's improvements may not be considered in determining a reasonable lease rate or selling price. The parties to such a proceeding shall pay the expenses of the proceeding, as determined by the commission, directly to the entities owed. The commission may adopt rules to carry out this section."

SECTION 4. AMENDMENT. Section 60-06-15 of the North Dakota Century Code is amended and reenacted as follows:

60-06-15. Application to existing leaseholds. The provisions of this chapter apply to the renewal or sale of existing leaseholds on railroad rights of way, and to existing leaseholds on lands that have ceased to be used for railroad rights of way after the leasehold was first created, and so long thereafter as the lease site remains under the ownership or control of the railroad or an entity that was or is under common ownership or control of the railroad. The value of a leaseholder's improvements may not be considered in determining annual rental or the gross sum for the right, privilege, and easement sought."

Page 3, line 22, remove "abandoned and surplus"

Page 3, line 25, remove "purchase agreement,"

Page 3, line 26, remove "deed, bill of sale,", after "other" insert "real estate", and after "agreement" insert "for the use or occupancy of railroad right of way or other adjoining property"

Page 3, line 27, remove "oral or" and replace ", continuation, or extension" with "or amendment"

Re-number accordingly

Date: 3/28/03
Roll Call Vote #:

2003 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. SB 238 ~~235~~ 233

House TRANSPORTATION Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Pass & Amend

Motion Made By Rep Nelson Seconded By Rep Puci

Representatives	Yes	No	Representatives	Yes	No
Robin Weisz - Chairman			Lois Delmore		
Kathy Hawken - Vice Chairman			Arlo E. Schmidt		
LeRoy G. Bernstein			Elwood Thorpe		
Mark A. Dosch			Steven L. Zaiser		
Pat Galvin					
Craig Headland					
Clara Sue Price					
Dan J. Ruby					
Dave Weiler					

Total Yes _____ No ✓ Eric Carver

Absent _____

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:

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Operator's Signature Deanna Hall Date 10/22/03

Date: 3/28/03
 Roll Call Vote #: 1

2003 HOUSE STANDING COMMITTEE ROLL CALL VOTES
 BILL/RESOLUTION NO. SB 2358

House TRANSPORTATION Committee

Check here for Conference Committee

Legislative Council Amendment Number 30771.0200

Action Taken Do Pass as Amended

Motion Made By Rep. Hawken Seconded By Rep. Delmore

Representatives	Yes	No	Representatives	Yes	No
Robin Weisz - Chairman	✓		Lois Delmore	✓	
Kathy Hawken - Vice Chairman	✓		Arlo E. Schmidt	✓	
LeRoy G. Bernstein	✓		Elwood Thorpe	✓	
Mark A. Dosch		✓	Steven L. Zaiser		✓
Pat Galvin	✓				
Craig Headland	✓				
Clara Sue Price	✓				
Dan J. Ruby		✓			
Dave Weiler	✓				

Total Yes 10 No 3

Absent 0

Floor Assignment Rep. Weisz

If the vote is on an amendment, briefly indicate intent:

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Operator's Signature Deanna Walker Date 10/22/03

REPORT OF STANDING COMMITTEE (410)
March 31, 2003 9:06 a.m.

Module No: HR-57-6144
Carrier: Weisz
Insert LC: 30771.0202 Title: .0300

REPORT OF STANDING COMMITTEE

SB 2358, as engrossed: Transportation Committee (Rep. Weisz, Chairman) recommends AMENDMENTS AS FOLLOWS and when so amended, recommends DO PASS (10 YEARS, 3 DAYS, 0 ABSENT AND NOT VOTING). Engrossed SB 2358 was placed on the Sixth order on the calendar.

Page 1, line 2, replace "transfer" with "use"

Page 1, line 3, replace "and" with a comma and after "60-06-06.1" insert ", and 60-06-15"

Page 1, line 9, replace "agreements" with "terms"

Page 1, line 10, replace "A purchase agreement, deed, bill of sale," with "Except as provided in this section, any provision of a"

Page 1, line 11, replace "pertaining to the sale, lease, license or other" with "for the", after "use" insert "or occupancy", and after the first "of" insert "railroad"

Page 1, line 12, replace "nonrailroad purchaser," with "state or federal licensed public grain warehouse or potato warehouse"

Page 1, line 13, remove "lessee, licensee, or other contracting party"

Page 1, line 20, replace "nonrailroad purchaser, lessee, licensee, or other contracting" with "state or federal licensed public grain warehouse or a potato warehouse"

Page 1, line 21, remove "party"

Page 1, line 24, replace "; or coverage or other" with an underscored period

Page 2, remove lines 1 through 4

Page 2, line 10, remove "purchase"

Page 2, line 11, remove "agreement, deed, bill of sale."

Page 2, replace lines 13 through 15 with:

- "3. Notwithstanding any other provision of law, a railroad may not require that a lessee, licensee, or other party contracting for the use or occupancy of right of way, or other adjoining property, provide the following:
 - a. Commercial general liability insurance of not more than two million dollars per occurrence coverage for bodily injury and property damage arising out of the use or occupancy of the property by the contracting party, including damage caused by the sole or concurrent fault of the railroad, its employees, agents, and contractors.
 - b. Indemnification and defense of the railroad, its employees and agents for all personal injury and property damage claims and liability up to two million dollars per occurrence arising out of the use or occupancy of the property including claims and liability caused by the sole or concurrent fault of the railroad, its employees, agents, and contractors.
 - c. Indemnification and defense of the railroad, its employees and agents for all personal injury, property damage, and environmental damage.

(2) DESK, (3) COMM

Page No. 1

HR-57-6144

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Deanna M. Hall
Operator's Signature

10/22/03
Date

claims and liability to the lessee, licensee, or other contracting party, its employees, agents, and invitees, arising from the use or occupancy of the property including claims and liability caused by the sole or concurrent fault of the railroad, its employees, agents, and contractors unless caused solely by the acts or omission of the railroad that are willful, wanton, or grossly negligent.

d. Pollution legal liability insurance up to one million dollars, unless the lessee agrees to a greater amount, to cover liabilities arising from hazardous substances or bulk storage of petroleum products brought on the property, or released on or near the property, or violations of environmental laws, by the lessee, licensee, or other contracting party, its employees, agents, and invitees.

4. Each party to the agreement shall indemnify and insure the other party for liability resulting from the environmental condition and status of the property to the extent caused by, aggravated by, or contributed to by the lessee, licensee, or other contracting party, its employees, agents, and invitees.

Page 2, line 30, remove "or to resolve disputes that arise"

Page 2, remove line 31

Page 3, line 1, remove "purchaser, lessee, or other user for any purpose, of a right of way"

Page 3, line 3, remove "If the commission finds that any term of a proposed right-of-way"

Page 3, remove lines 4 through 8

Page 3, line 9, remove "and reasonable to both parties." and overstrike "The commission shall conduct each hearing required under"

Page 3, overstrike lines 10 through 18

Page 3, line 19, overstrike "the general fund in the state treasury." and insert immediately thereafter "The value of a leaseholder's improvements may not be considered in determining a reasonable lease rate or selling price. The parties to such a proceeding shall pay the expenses of the proceeding, as determined by the commission, directly to the entities owed. The commission may adopt rules to carry out this section.

SECTION 4. AMENDMENT. Section 60-06-15 of the North Dakota Century Code is amended and reenacted as follows:

60-06-15. Application to existing leaseholds. The provisions of this chapter apply to the renewal or sale of existing leaseholds on railroad rights of way, and to existing leaseholds on lands that have ceased to be used for railroad rights of way after the leasehold was first created, and so long thereafter as the lease site remains under the ownership or control of the railroad or an entity that was or is under common ownership or control of the railroad. The value of a leaseholder's improvements may not be considered in determining annual rental or the gross sum for the right, privilege, and easement sought."

Page 3, line 22, remove "abandoned and surplus"

Page 3, line 25, remove "purchase agreement,"

REPORT OF STANDING COMMITTEE (410)
March 31, 2003 9:06 a.m.

Module No: HR-57-6144
Carrier: Welaz
Insert LC: 30771.0202 Title: .0300

Page 3, line 26, remove "deed, bill of sale," after "other" insert "real estate", and after "agreement" insert "for the use or occupancy of railroad right of way or other adjoining property"

Page 3, line 27, remove "oral or" and replace ", continuation, or extension" with "or amendment"

Renumber accordingly

(2) DESK, (3) COMM

Page No. 3

HR-57-6144

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10/22/03
Date

2003 SENATE TRANSPORTATION

CONFERENCE COMMITTEE

SB 2358

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Deanna Halliwell
Operator's Signature

10/22/03

Date

2003 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2358

Senate Transportation Committee

■ Conference Committee

Hearing Date 4-8-03

Tape Number	Side A	Side B	Meter #
1	X		0-4970
Committee Clerk Signature <i>Mary K. Monson</i>			

Minutes:

Senator Trenbeath opened the conference committee on SB 2358 with all members present.

Members included Senator Trenbeath, Senator Nething, Senator Taylor, Representative Hawken, Representative Weisz, and Representative Delmore.

Senator Trenbeath asked Representative Hawken to talk about how the House amended this bill.

Representative Hawken responded that the railroad and grain dealers worked out a good bit of this compromised bill. There are a couple of inadvertent errors that need to be cleaned up.

The study was left in.

Representative Weisz explained what the House did and what they didn't do. They limited the amount of indemnification to \$2 million. They added a pollution exclusion that would say that the railroad could require up to an additional million dollars over the \$2 million for pollution

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Operator's Signature

10/22/03

Date

Page 2
Senate Transportation Committee
Bill/Resolution Number SB 2358
Hearing Date 4-8-03

coverage or greater if the lessee agreed to it. They put in language that said for existing environmental conditions both parties have to insure for aggravating the existing conditions. They allowed the railroad to put on any endorsements they required in the lease. That is a point of contention. Construction and demolition was an issue. That House didn't allow for additional coverage but the railroad can put a rider on as part of the \$2 million. They clarified the language of the PSC stating that they do have the ability to get involved in both rate setting and sale price. They did not adopt proposed amendments by Senator Nething or Representative Weisz. They narrowed it down strictly to grain and potato warehouses.

Senator Trenbeath wondered, when they limit to grain warehouses and potato warehouses, if edible bean plants that ship by rail are included.

Representative Weisz replied that state and federal public warehouses have to have a state or federal license. Any plant that buys grain of any type or commodity has to have one of the two licenses. Potato warehouses don't have to be licensed. That's why potato warehouses were added. Everybody else is excluded. The public utilities asked to be excluded.

Senator Trenbeath said that representatives were present from both the Grain Dealers and the Railroad with suggestions as to how this bill could be made better from their perspective.

The Grain Dealers proposed amendments in letter form that Senator Nething had drafted to official amendment form. (See attached amendment .0203) That deals with the Senate Engrossed Bill. The railroads have submitted suggestions not in official form but set out quite well dealing with the House amendments.

Representative Weisz said one of the biggest issues that was still a point of contention dealt with FELA and who was insuring that risk. They left that because they didn't have a solution.

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Hearing Date 4-8-03

He didn't know if the amendments by Senator Nething meant to address this.

Senator Trenbeath asked Senator Nething or the Grain Dealers to go through the amendments.

Brian Bjella (Representing the Grain Dealers) (Meter 870) He distributed copies of two memos that were sent to both Chairmen with suggestions. (See attached Memorandums) These relate to the engrossed bill with House amendments. Item #1 on the memo dated 4-3-03 referred to a typo and was agreed to by both parties. Item #1 on the memo dated 4-8-03 was addressed.

(Meter 1120)

Senator Trenbeath asked if the word "claims" should also be taken out of line 23.

Brian Bjella said that would even be better.

Senator Trenbeath asked what the comments would be from both parties with respect to line 23 and inserting the word "death" between injury and property damage.

Brian Bjella didn't think there would be an objection.

Dan Kuntz said it was a suggestion only from the standpoint that the railroad wanted to make sure the language in subsection 1 matched the language in subsection 2.

Brian Bjella then addressed item #2 on memo dated 4-3-03.

Senator Trenbeath said it made sense. With respect to b and c, it seemed to him that the language should be entirely consistent.

Representative Weisz said on page 1 line 19 then "personal" should be changed to "bodily" so there is consistency across every section.

Brian Bjella continued with Subsection 4, page 3, line 4.

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Hearing Date 4-8-03

Senator Trenbeath stated that the railroad was also suggesting an amendment there. (Meter 1560) He suggested adopting Brian's language except, at the end of it, leave in the language "it's employees, agents, and invitees."

Brian Bjella moved on to #5 on the memo dated 4-3-03.

(Meter 1725) Discussion about leaving "real estate" out to be consistent. There seemed to be agreement that it should be left out.

Brian Bjella addressed item #2 on the memo dated 4-8-03.

Dan Kuntz (Meter 2090) explained that FELA is the Federal Employers Liability Act. It's like an equivalent to Worker's Comp for railroads except there isn't an insurance company or workers compensation company that pays the claims. The railroad has to pay the claims itself.

Right now there is an exemption in the insurance policy exempting coverage for employees.

Without FELA coverage that employees claim is not covered by the insurance. With the FELA endorsement the insurance takes care of the claim. Without the endorsement the railroad pays the claim and turns around and sues their lessee for indemnification or contribution to the extent it was caused by the lessee in maintaining the property.

Senator Trenbeath asked if it would be in the best interest of the grain warehouse if their suggested language was in, because it says that the railroad cannot require them to have insurance for things that are covered under the FELA. It doesn't take away the railroad's ability to claim against them if they bear the liability.

Dan Kuntz said he thought so because the railroad doesn't want to have to sue them with a separate lawsuit. The railroad would like to just turn it over to the insurance company.

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Operator's Signature

10/22/03
Date

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Bill/Resolution Number SB 2358
Hearing Date 4-8-03

Brian Bjella responded that this bill only deals with something they (the railroads) cause. They are asking the grain warehouses to pay for their fault. That is the objection. The railroad is trying to pass the insurance on to the grain warehouse. Asked why the railroad can't insure themselves.

Senator Trenbeath asked if that is what this is saying. Doesn't see where this provision provides the grain warehouses to be indemnifying the railroads against their own fault with respect to their employees.

Brian Bjella felt it would because Section 1 of the bill deals with their fault. Section 3 prompts out the exemption.

Senator Trenbeath agreed with him. (Meter 2585)

Senator Nething asked, by going to his suggested language and trying to piece it together with subsection 3b, would that be the protective language?

Brian Bjella answered that was correct.

Dan Kuntz said the railroad would like to see two changes from the House amendments.

(See attached suggested changes and requested amendments.) (Meter 2810) Currently the railroad leases provide that if construction or demolition is done on the property the railroads have the right to require railroad protective liability with them named as the named insured for the period of construction. The exposure to risk is so much higher during construction and demolition on that property that the normal limits aren't sufficient.

The railroad is very concerned about having to go through administrative proceedings before the PSC to establish sales prices on property. The likely result is that some of the properties might not be for sale if they have to go through administrative proceedings to set the sale prices or if

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Operator's Signature

10/22/03
Date

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Bill/Resolution Number SB 2358
Hearing Date 4-8-03

there were some suggestion that the railroad would be required to sell some piece of property at a price set by the PSC. They are more than happy to consider a private mediation process. They feel that would be much more productive, cheaper, and more satisfactory to both parties.

(Meter 3025) He moved on and explained the clarifications requested by the railroads.

Representative Weisz stated that the railroad is allowed to ask for the protective liability during construction and demolition, they just can't go over the \$2 million limit.

Dan Kuntz said that now the railroad has the basic policy for activities on the lease. If there is going to be construction or demolition of any substance on the lease, they require a separate policy just for the insurance of the railroad because of the concern that the \$2 million covering everybody's liability during construction on railroad property is not sufficient.

Senator Trenbeath tended to agree with Rep. Weisz. There might be some discussion whether the \$2 million limit is adequate but it seems that the event is covered under 3a.

Dan Kuntz said it was, as long as they get the right endorsement. There is another endorsement that plays into it and with that right endorsement there would be coverage up to the \$2 million.

The concern is during construction and demolition.

Senator Trenbeath asked what kind of premiums they are talking about.

Dan Kuntz wasn't sure for railroad protective liability. Would probably depend on the limit requested and it would be just for the period of construction.

Representative Weisz, looking at the language under 3a on page 2 passed by the House, felt that construction would fall under that if there was an endorsement or rider. That occurrence is still covered under \$2 million. That doesn't preempt any other occurrence from happening.

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10/22/03
Date

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Senator Trenbeath felt he was right but felt what they were really talking about was the amount of coverage.

Senator Nething said he thought Dan's point was that, in construction, that amount is not enough. The question is if there is a need to add a clause for construction of a different amount.

Brian Bjella preferred the language to stay as it is.

Senator Nething asked how the \$2 million was arrived at.

Brian Bjella replied that it is fairly common in the leases now. Felt that the \$2 million was fair.

Senator Nething asked if they saw a different liability potential when construction or demolition was going on.

Brian Bjella said yes. This seemed to be a compromise.

Senator Trenbeath asked if they would mind if there was language referencing the construction liability policy if there was a limit set on it at an additional \$2 million or something of that nature.

Brian Bjella felt it was something they could live with.

Senator Nething asked why the House brought it to the narrow perspective of just elevators and warehouses as opposed to the city exposures or other commercial exposures.

Representative Weisz responded that one issue they looked at was the idea that some businesses, located on leased property, don't need to be there. (Meter 4330) He had offered language saying that everyone is in the bill that originally went there for access. The railroads objected because they said they couldn't define the risk. They know where the grain elevators risk is.

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10/22/03
Date

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Bill/Resolution Number SB 2358
Hearing Date 4-8-03

(Meter 4530) Discussion on the proposed language in the House by Representative Weisz. It would have addressed those businesses that originally located there for access but it wouldn't cover the recent additions of such places as McDonalds and probably wouldn't cover some of the political subdivisions concerns. There wasn't support for the amendment in the committee. The House committee put the study on and felt it was a good starting point. The committee was recessed to be reconvened at the call of the chair.

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10/22/03
Date

2003 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2358

Senate Transportation Committee

■ Conference Committee

Hearing Date 4-11-03

Tape Number	Side A	Side B	Meter #
1	X		0-3900
Committee Clerk Signature <i>Mary K. Mowson</i>			

Minutes:

Senator Trenbeath reopened the conference committee on SB 2358 with all members present.

Senator Nething distributed a new packet of amendments in reference to the Engrossed Senate Bill. The memos from Brian Bjella sent on 4-3-03 and 4-7-03 were incorporated into these amendments but they do not reflect any conversations from this table. He also distributed a copy of the grain dealers responses to the BN and CP requested changes. (See attached memo dated 4-9-03 and Amendment .0205.)

Senator Trenbeath asked if they could safely say that the major sticking points now were with the FELA language and with respect to insurance caps, especially demolition insurance, and the PSC language.

Representative Weisz addressed Brian Bjella. He said he thought they had an agreement, more or less, that they didn't have a problem with the railroad requiring additional riders or

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endorsements as long as it didn't exceed the \$2 million coverage. (Excepting the FELA language which wasn't resolved.)

Brian Bjella said Rep. Weisz had understood that correctly. The Grain Dealers liked the language that came out of the House Committee. They didn't like the suggested amendments of the railroads page 2, line 16. (BNSF and CP Railroad Requested Amendments to SB 2358) Prefer that the bill stay as is with the engrossed House version rather than substituting this amendment.

Representative Weisz said, in respect to the aggregate limits, he thought the House Committee was under the understanding the agreement was a \$2 million limit.

Senator Trenbeath asked if he recalled if that was resolved by his committee as the result of at least a perceived agreement between the parties.

Representative Weisz said that was language presented by the parties involved. They thought the language was agreeable to the parties and he thought the understanding was that it would be the \$2 million total. The committee drafted the language for pollution and environmental condition.

(Meter 900) Discussion on premiums for construction/demolition policies and aggregate limits.

There is a problem with interpretation because the language is always per occurrence which indicates there is an unlimited aggregate. There was some indication that there should be an aggregate limit set, with a suggested limit of \$4 million. Opposition pointed out that this could result in \$6 million liability. In cases of construction or demolition there could be a \$2 million liability with a \$4 million aggregate plus a \$2 million limit for construction or demolition activity.

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Senator Nething referred to the clarification #1 on page 1 of ND Grain Dealers memo dated 4-9-03. He understood that the committee was putting a cap on the construction of \$2 million.

Asked if they were capping the pollution liability insurance.

(Meter 1830) Discussion and reading the bill clarified that the RR can require the grain dealer to provide the quality pollution legal liability insurance up to \$1 million. That is part of the bill.

Representative Hawken asked how many would be affected by everything at the same time.

Representative Weisz answered that a lot would be affected by the pollution because of anhydrous plants etc.

Senator Nething asked Brian Bjella (Grain Dealers) about their understanding of aggregate.

Brian Bjella said their understanding was \$2 million, and \$2 million additional allowed for construction and, if there was a pollution situation where there was hazardous materials, then they were able to ask for another \$1 million.

(Meter 2030) Discussion about lowering the limits per occurrence didn't get support. There also wasn't much support for \$2 million/occurrence \$2 million/aggregate.

Senator Trenbath directed a question to the railroad people about their feelings of \$2 million per occurrence, \$4 million aggregate, \$1 million pollution, and \$1 million on construction and demolition.

Dan Kuntz said it would clarify the aggregate question.

Brian Bjella felt the Grain Dealers understanding was that the total payoff on an accident would be \$2 million.

Representative Weisz wondered where the greater risk was. (Meter 2600)

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Dan Kuntz said the greater risk was the idea of the big accident, a catastrophe. The question is, in terms of writing a policy and putting it in a lease, what are they entitled to require for an aggregate. As it is written, there is no limit on the aggregate. Typically there is a per occurrence limit and an aggregate limit.

Senator Trenbeath reads it as saying the railroad may require the lessees to provide commercial liability insurance of not more than \$2 million per occurrence. Because there is no language on a cap he feels the railroad could require whatever aggregate cap they feel is fit.

Representative Weisz did not dispute the language problem. Again felt the problem was the understanding both parties had which obviously was different. (Meter 2775)

Senator Nething (Meter 2875) felt that if the per occurrence was \$2 million and the aggregate was open it would not be beneficial to the grain dealers. As it is, it is in the railroads benefit.

Representative Weisz wondered about a compromise of \$1 ½ million and \$3 million aggregate. (Meter 2975)

Dan Kuntz felt that \$2 million was low. (Meter 3015)

Brian Berg reminded the committee that this bill is geared towards mandating what the grain dealers must buy for the railroads, not for themselves. (Meter 3135)

Dan Kuntz pointed out that, as he understood it, the liability policies cover not only the railroad liability but also the grain dealers policy for \$2 million.

(Meter 3410) Discussion about going to \$2 million and \$4 million and take construction out, because they can add that back in with a rider as part of the \$4 million. The pollution would still be in as a separate additional.

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Senate Nothing asked to add to the list of important things to discuss that relating to the political subdivisions indemnity, and private leases. He asked to bring to the table the Weisz amendment.

Senator Trenbeath asked if it was the consensus of the committee that there wasn't any serious opposition to the suggestion from Representative Weisz with respect to the insurance of \$2 million and \$4 million aggregate inclusive of construction/demolition endorsement and \$1 million on pollution. (Meter 3840)

There were no comments.

The committee was recessed.

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2003 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2358

Senate Transportation Committee

■ Conference Committee

Hearing Date 4-14-03

Tape Number	Side A	Side B	Meter #
1	X		0-3700

Committee Clerk Signature *Mary K. Mouson*

Minutes:

Senator Trenbeath reopened the conference committee on SB 2358 with all members present. He reminded the committee they left off with talking about insurance liability levels and they were looking at the \$2 million per occurrence, \$4 million aggregate with a \$1 million on the pollution, and a \$2 million within the \$4 million cap on demolition/construction. He asked if it was the consensus of the group that it was acceptable. He did point out that they could come back to it.

Senator Taylor asked if anyone got estimates on costs of liability policies.

Nobody had that information.

Senator Trenbeath wanted to move on to the remaining large sticking points, such as FELA.

Representative Weisz said that on the House side the FELA language was probably the most controversial. It's hard to compromise.

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Senator Trenbeath asked if the sense in the House was in favor of the FELA language so the leaseholder would cover liability except for that which is covered by FELA.

Representative Welsz didn't believe there was a sense of that in committee because they could see both sides. The House committee had hoped the two sides would have worked something out that might be somewhat acceptable by the time the conference committee met. That didn't happen.

Senator Trenbeath understood that the grain company is saying the railroad may require the liability insurance except for liability that is covered under FELA.

Representative Welsz said the railroad says the FELA language has to be part of the overall liability.

Senator Nething asked to have someone refresh him as to why it has to be.

Dan Kuntz explained that FELA is the Federal Employees Liability Act which is like Workers Comp. (Meter 440) The standard commercial liability policy has an exception for employees. With that exception and without the FELA endorsement there is no way for the railroad to recover against the insurance company for damages to its employees. The only way for the railroad to recover against the elevator is by suing for the fault of the elevator in not maintaining the property that caused the damages to the employee. His understanding of the objections of the elevator is the insurance company would have to pay for that portion attributable to the fault of the railroad. The railroad responds to that by saying, once the FELA endorsement is there to cover the elevators negligence and fault, they don't think the premium gets any more because some of the fault may occasionally be the railroad. The endorsement covers both parties.

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The main reason the railroad wants this insurance for both parties is that they don't want to get into lawsuits. (Meter 650)

Senator Trenbeath said that in the final analysis that would be shifting that liability to the grain warehouses insurance. It will somehow be reflected in whatever the PSC says is a fair market value for that lease. Asked if the reason this is an issue is that the railroad self insures in those situations and, if they had a Workers Comp policy, this wouldn't be an issue.

Dan Kuntz agreed. He went on to say that if they had Workers Comp and a railroad employee got injured and was paid by Workers Comp, Workers Comp would then turn around and sue the elevator if they thought the elevator contributed to the fault. This is the same as if the railroad has to pay for its employees and they believe the elevator was at fault. If there is no FELA endorsement they will turn around and sue the elevator. This is what they are trying to avoid.

Senator Nething understood the railroads wants but said they also want it at the expense of the elevators. Asked why they could justify it. Why don't they split the expense if it is mutual benefit?

Dan Kuntz said it is the railroads opinion that most of the cases where an employee is injured on the lease is because of the condition of the lease. (Meter 835) It gets back to the additional cost for a leased operation. The lessor could get the insurance but then they turn around and bill the lessee.

Senator Trenbeath asked if they are requiring the FELA endorsement now in the leases.

Dan Kuntz said that the copy of the standard form lease used now requires a FELA endorsement.

Senator Trenbeath asked about the cost of the endorsement but nobody offered the information.

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Representative Delmore asked if someone would get that information by the next meeting. She had asked for it on the House side. That information could be significant to what the committee decides to do with the bill.

Senator Trenbeath asked **Brian Bjella** to get that information. He then moved on to page 3, line 4, with respect to the first engrossment with House amendments and asked the railroad about the language they wanted.

Dan Kuntz said the railroad needed an exception to allow them to require indemnification to the extent that it was caused by the lessee. He didn't think the lessee needed indemnification from the railroad. Thought either language by the railroad or the grain dealers would work. The language that came from the House was confusing and they were trying to find language that reflected what the House intended to do.

Brian Bjella said their language was included in their memo dated 4-3-03, item #4.

Senator Trenbeath said that the language suggested by Mr. Bjella would be inserted. There was no objection from the railroad or the committee.

Senator Trenbeath then moved on to Section 3 and Section 4. (Meter 1365) After some explanation from **Representative Weisz**, **Senator Trenbeath** said he was inclined to leave the language as it was in both sections. There was no objection.

(Meter 1690) Discussion relating to Section 6 and the question as to whether the words, real estate, should be in there. It was decided to take it out to be consistent.

Senator Nething addressed the situation with private leases. (Meter 1875) The way this bill is drafted it leaves them out and he was concerned about that. Asked if the House heard from any of these businesses.

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Representative Weisz said that they had heard from one political subdivision. They didn't hear from some of the other lessee groups. The public utilities did not want to get involved at this time.

Senator Nething felt they should include the private business owners, with railroad leases, so they would have the same rules for everyone.

Representative Delmore said she wasn't sure one size fit all in the case of these leases. She felt the study was the way to pursue it rather than trying to put all the players in at this point.

Representative Hawkin asked Senator Nething if he had any letters or e-mails they could look at from those people with concern.

Senator Nething talked about those who have contacted him with this problem. (Meter 2360)

He didn't feel they were dealing with the crux of the big problem.

Senator Taylor said, if there are threats to all the holders and not just the grain and potato warehouses, it is a bigger problem than what is being addressed.

Senator Trenbeath said they couldn't forget that the railroad owns the ground and if they don't want to write a lease they won't.

Representative Hawken felt there would be better ideas after a study. This was a good test group to see how the leases were set up and whether there were additional problems.

Senator Nething wants these other businesses to have the same opportunities to use the PSC with the same rules. The leases are separate but they need a place to go. They need an umpire.

Representative Weisz pointed out that he had addressed language that anybody who had located on railroad ground for access to the rails would come under these guidelines. There is a big difference between someone who built there to access rail versus someone who liked the

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location. (Meter 3090) Discussion followed with respect to adding to the definition of a party that can access the PSC and if it should go into 60-06.

Senator Trenbeath recessed the committee.

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BILL/RESOLUTION NO. SB 2358

Senate Transportation Committee

■ Conference Committee

Hearing Date 4-15-03

Tape Number	Side A	Side B	Meter #
1	X		0-2683

Committee Clerk Signature *Mary K. Morrison*

Minutes:

Senator Trenbeath reopened the conference committee on SB 2358 with all members present.

He felt the committee had two remaining issues of any consequence. (1) The insurance provision of the FELA endorsement, and (2) whether they limit the PSC review process to those already covered under 60-06 or expand it. He asked Brian Bjella if he had anything on the FELA endorsement cost.

Brian Bjella reported that he had information from one company who is the underwriter for most of the elevators in the state. He had two numbers. The extra \$2 million between the \$2 million and \$4 million would cost on the average \$7,000 per year per elevator. To get a FELA endorsement, \$2 million is \$4,000.

(Meter 160) Discussion on the rates that were provided. Mr. Bjella did not have the rates for the standard policies.

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Representative Weisz asked a representative from the railroad if they were looking at a specific number for the FELA endorsement.

Dan Kuntz said his understanding of the endorsements just removes an exception from the policy. It doesn't change the coverage limit. He talked about adding the railroad as an additional insured under the FELA endorsement. (Meter 400)

Senator Trenbeath said that a FELA endorsement on the elevators policy naming the railroad as an additional insured relieves the railroad of their self insurance obligation.

Dan Kuntz said yes up to the limits of the policy and it would allow them to turn the claim over to the insurance company.

Senator Trenbeath moved on to the PSC provisions. His feelings were that 60-06 represents, to him, a statutory public purpose statute. It infers that for purposes of access to rail services, grain and other warehouses are declared to be a public service. If the intent is to extend that to other entities not named under 60-06 there are problems. (Meter 760) He suggested that they leave the bill basically the way it is with respect to grain warehouses and other warehouses and allowing the PSC the right to review at least lease prices and sale prices, and that they insert a study provision.

(Meter 905) Discussion relating to the study resolution. It is pretty broad but could be expanded.

Senator Taylor asked about the opportunities for mediation between the bulk dealers and the railroad.

Senator Trenbeath said it comes down to the right of contract. (Meter 990)

Senator Trenbeath said they are conveying some serious concerns about the way the railroad and private entities have been operating with relations to each other over the course of time.

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(Meter 1150) Discussion about broadening the study and putting in language to mandate it.

Then Section 7 might not be needed.

(Meter 1395) Discussion with respect to the FELA issue and the exposure to risk. An idea would be to craft language to require the FELA endorsement when the lessee is making use of the railroad in its business. A lot of small elevators on leased property don't use the railroad to ship and struggle to stay in business.

Representative Hawken asked if there would be some consideration for how much insurance would cost if there is no activity or limited activity.

Representative Weisz responded that in his experience there is a base rate and, if there is a loss, the premium rises dramatically. He hasn't found it to be the case that the rates are dropped if there are no losses.

Senator Trenbeath was inclined to put together an amendment to make the distinction that the FELA could be required for a leaseholder who is an active participant with the railroad.

Senator Trenbeath reviewed the bill using his notes about changes. (Meter 1930) He dealt with the First Engrossment with House Amendments on SB 2358. There was some discussion and the committee agreed to have an amendment drafted with the changes.

The committee was recessed.

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2003 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2358

Senate Transportation Committee

■ Conference Committee

Hearing Date 4-16-03

Tape Number	Side A	Side B	Meter #
1	X		0-4520

Committee Clerk Signature *Mary K Mousen*

Minutes:

Senator Trenbeath reopened the conference committee on SB 2358 with all members present. He referred the committee to Amendments (30771.0206) to Engrossed Senate Bill 2358 which he had previously distributed. There were some additional language changes to be consistent and some minor changes. With respect to the insurance coverage paragraph "a", page 2 of the amendment, he said Dan Kuntz had suggested some clarification language so it would be talking about two endorsements, the FELA endorsement and a separate endorsement adding the railroad as an additional insured.

Representative Weisz was concerned whether the exception would apply to the naming of an additional insured.

(Meter 635) Discussion on the placement of the wording in paragraph "a" on page 2 of the amendment .0206. They felt a better placement of the wording would be to insert "including, but not limited to, an endorsement naming the railroad as an additional insured and an endorsement

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Hearing Date 4-16-03

under FELA if the warehouse engages in the business of transporting goods from the warehouse by means of the railroad" after contractors, on line 6 of paragraph "a".

Senator Trenbeath said there was suggested language for paragraph 4 on page 2 of the amendment changing "the environmental condition" to "the existing environmental damage" and after the word extent adding "the existing damage is". This language was based on a presumption of an agreement between the two parties He didn't feel it amended what the paragraph meant in the first place but did feel it was clearer language.

(Meter 890) Discussion centering around this change and whether "condition" should be changed to "damage".

Brian Bjella was concerned with the above changes. (Meter 1210) Wondered about their responsibility if the railroad causes an environmental problem after the lease.

Senator Trenbeath said that would be covered under paragraph (b).

(Meter 1380) Discussion with respect to using damage versus condition.

Representative Welz felt Brian Bjella had a valid point with the existing part of subsection 4.

The reason for this language is that either party is liable for their damage but the other party has to make sure they have protection if they aggravate that damage. (Meter 1460)

(Meter 1870) After much discussion on the language in subsection 4 the committee decided to remove the words "and status".

(Meter 3430) Discussion about the FELA language. What the committee is trying to say with the amendment is that the railroad, as part of the lease, will require FELA coverage if the grain warehouse is shipping by rail. They may not require the FELA coverage if the grain warehouse does not use it for that for that purpose. A lot of smaller elevators ship everything by truck.

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Brian Bjella (Meter 3950) asked if there would be coverage when there is an elevator that ships by rail but at the time the injury occurs on the elevator property they are not shipping grain.

Senator Trenbeath responded by saying that yes because the railroad will have required the FELA coverage at the time of the lease. The coverage not only extends when the railroad is shipping the wheat but extends at all times because the elevator does ship.

Brian Bjella objected on the grounds that they feel the railroad is asking the grain warehouses to pay the railroad worker comp premium and pay for the railroad employee's injury which the railroad has caused.

Senator Nothing asked if the railroad could subrogate the worker's comp against the grain warehouses if the warehouse is liable.

Brian Bjella said yes, if they are liable, but that is not what this bill deals with. This language is with the railroad fault only and who pays them.

Senator Trenbeath realized this was a sticking point but understood there was a consensus about what the language was going to be. He then moved on and said the major language was unchanged from the House bill with respect to the PSC's involvement.

The conference committee was recessed.

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2003 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2358

Senate Transportation Committee

■ Conference Committee

Hearing Date 4-17-03

Tape Number	Side A	Side B	Meter #
1	X		0-3915

Committee Clerk Signature *Mary K. Morrison*

Minutes:

Senator Trenbeath reopened the conference committee on SB 2358 with all members present. He distributed amendments .0207 and .0208 which differ from each other only with respect to paragraph 3.a.3 on page 2. The difference being that in .0207 there is a requirement that it could only be required for warehouses that ship an annual volume in excess of 500 loaded railroad cars. Representative Hawken thought they had decided that putting a number in would be extremely arbitrary so wondered why it's there.

Senator Trenbeath said it was an alternative suggestion brought by Senator Nething.

Brian Bjella said that Steve Strege told him that 500 cars or less was a small elevator and this would give them some protection, help them with their costs on these types of insurance requirements by exempting them from the FELA for the small shippers.

Representative Delmore asked how many elevators in the state would be required to carry the insurance for FELA.

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Brian Bjella said that Steve Strege thought it was a fairly small number, maybe 1/3.

Dan Kuntz said that putting a limit on it would not necessarily bear a direct relationship to exposure of the employees on the property. (Meter 380)

Senator Trenbeath said that what he was trying to look at was the cost to the smaller elevators. (Meter 580) Discussion with respect to the level of risks involved and if there are ratings for the insurance policies.

Senator Nething moved to adopt the amendments .0207. Seconded by **Representative Welsz**.
Roll call vote 3-3-0. Motion failed.

Representative Hawken moved to adopt the amendments .0208. Seconded by **Rep. Delmore**.
Roll call vote 3-3-0. Motion failed.

Senator Trenbeath asked if the requirement of FELA coverage has been part of the leases today.

Dan Kuntz said it was his understanding that it is.

Brian Bjella said that to his knowledge it is in the BN leases.

(Meter 1240) Discussion on the cost of getting coverage. This is not a new burden but the cost of obtaining the coverage is getting relatively expensive. There was some frustration on the part of the committee of not being able to get information on the actual costs of the insurance, size of shippers, the number of elevators, volumes shipped, etc. More talk on who benefits from the FELA coverage.

Brian Bjella felt the coverage was just for the railroads and not for the elevators. He explained that if the elevators are negligent and hurt the railroads employee it is covered under the basic CGL policy. The FELA is limited to railroad fault.

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Deanna Hall
Operator's Signature

10/22/03
Date

Page 3
Senate Transportation Committee
Bill/Resolution Number SB 2358
Hearing Date 4-17-03

Dan Kuntz said his understanding was that when the railroad has protection under the policy, their employees are not covered for injuries to them by that policy no matter whose fault it is. The exclusion limits protection to employees for any of the insured. Because the railroad is an additional insured under the policy, he understands the FELA endorsement is necessary to cover both the fault of the elevator and the railroad.

(Meter 2130) More discussion on the above.

Representative Hawken asked if other states have this type of requirement.

Dan Kuntz said the CGL policy is pretty much common throughout the United States and the lease language requiring the FELA endorsement is standard throughout the states the BNSF operates.

Senator Trenbeath asked if the exclusion on the policy is only because the railroad is an additional insured.

Dan Kuntz said that is probably true. The fact they have coverage under that policy is what creates the exception. To take that exception out is why the FELA endorsement is needed.

(Meter 2670) Discussion about FELA. It kicks in when an employee is injured. It's just a question of who is going to pay for the damages. Discussion continued on concerns with the small elevators dealing with this requirement.

Representative Hawken asked if there is any negotiation with leases.

Dan Kuntz said there is some negotiation but most leases are indefinite term leases. The railroad doesn't write that many new leases.

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Dennis Hall
Operator's Signature

10/22/03

Date

Page 4
Senate Transportation Committee
Bill/Resolution Number SB 2358
Hearing Date 4-17-03

Senator Nething moved the House Recede from the House Amendments and Adopt
Amendment .0207 with a revision from 500 to 250 loaded railroad cars. Seconded by
Representative Weisz.

Representative Delmore asked if elevators under 250 cars don't carry insurance or if that is part
of their contract that they have to carry that endorsement.

Brian Bjella answered that the BN lease probably mandates it but the elevators probably aren't
buying it because of the insurance costs.

Roll call vote 5-1-0. Passed.

The conference committee on SB 2358 was adjourned.

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Deanna Hall
Operator's Signature

10/22/03
Date

30771.0203
Title.

Prepared by the Legislative Council staff for
Senator Nothing
April 8, 2003

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2358

That the House recede from its amendments as printed on pages 1057-59 of the Senate Journal and pages 1148-1150 of the House Journal and that Engrossed Senate Bill No. 2358 be amended as follows:

Page 1, line 2, replace "transfer" with "use"

Page 1, line 3, replace "and" with a comma and after "60-06-06.1" insert ", and 60-06-15"

Page 1, line 9, replace "agreements" with "terms"

Page 1, line 10, replace "A purchase agreement, deed, bill of sale," with "Except as provided in this section, any provision of a"

Page 1, line 11, replace "pertaining to the sale, lease, license or other" with "for the", after "use" insert "or occupancy", and after the first "of" insert "railroad"

Page 1, line 12, replace "nonrailroad purchaser," with "state or federal licensed public grain warehouse or potato warehouse"

Page 1, line 13, remove "lessee, licensee, or other contracting party"

Page 1, line 20, replace "nonrailroad purchaser, lessee, licensee, or other contracting" with "state or federal licensed public grain warehouse or a potato warehouse"

Page 1, line 21, remove "party"

Page 1, line 24, replace "; or coverage or other" with an underscored period

Page 2, remove lines 1 through 4

Page 2, line 10, remove "purchase"

Page 2, line 11, remove "agreement, deed, bill of sale,"

Page 2, replace lines 13 through 15 with:

"3. Notwithstanding any other law, a railroad may require that a lessee, licensee, or other party contracting for the use or occupancy of right of way, or other adjoining property, provide the following:

a. Commercial general liability insurance of not more than two million dollars per occurrence coverage for bodily injury and property damage arising out of the use or occupancy of the property by the contracting party, including damage caused by the sole or concurrent fault of the railroad, its employees, agents, and contractors.

b. Indemnification and defense of the railroad, its employees and agents for all bodily injury and property damage claims and liability up to two million dollars per occurrence arising out of the use or occupancy of the property including claims and liability caused by the sole or

Page No. 1

30771.0203

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Deanna Walling
Operator's Signature

10/22/03
Date

concurrent fault of the railroad, its employees, agents, and contractors.

- c. Indemnification and defense of the railroad, its employees and agents for all bodily injury, property damage, and environmental damage claims and liability suffered by the lessee, licensee, or other contracting party, its employees, agents, and invitees, arising from the use or occupancy of the property, including claims and liability caused by the sole or concurrent fault of the railroad, its employees, agents, and contractors unless caused solely by the acts or omission of the railroad that are willful, wanton, or grossly negligent.
 - d. Pollution legal liability insurance up to one million dollars, unless the lessee agrees to a greater amount, to cover liabilities arising from hazardous substances or bulk storage of petroleum products brought on the property, or released on or near the property, or violations of environmental laws, by the lessee, licensee, or other contracting party, its employees, agents, and invitees.
4. Each party to the agreement is responsible for the liability resulting from the environmental condition and status of the property to the extent caused by, aggravated by, or contributed to by that party."

Page 2, line 30, remove "or to resolve disputes that arise"

Page 2, remove line 31

Page 3, line 1, remove "purchaser, lessee, or other user for any purpose, of a right of way"

Page 3, line 3, remove "If the commission finds that any term of a proposed right-of-way"

Page 3, remove lines 4 through 8

Page 3, line 9, remove "and reasonable to both parties." and overstrike "The commission shall conduct each hearing required under"

Page 3, overstrike lines 10 through 18

Page 3, line 19, overstrike "the general fund in the state treasury." and insert immediately thereafter "The value of a leaseholder's improvements may not be considered in determining a reasonable lease rate or selling price. The parties to such a proceeding shall pay the expenses of the proceeding, as determined by the commission, directly to the entities owed. The commission may adopt rules to carry out this section.

SECTION 4. AMENDMENT. Section 60-06-15 of the North Dakota Century Code is amended and reenacted as follows:

60-06-15. Application to existing leaseholds. The provisions of this chapter apply to the renewal or sale of existing leaseholds on railroad rights of way, and to existing leaseholds on lands that have ceased to be used for railroad rights of way after the leasehold was first created, and so long thereafter as the lease site remains under the ownership or control of the railroad or an entity that was or is under common ownership or control of the railroad. The value of a leaseholder's improvements may not be considered in determining annual rental or the gross sum for the right, privilege, and easement sought."

Page 3, line 22, remove "abandoned and surplus"

Page No. 2

30771.0203

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Deanna Waller
Operator's Signature

10/22/03
Date

Page 3, line 25, remove "purchase agreement,"

Page 3, line 26, remove "deed, bill of sale," and after "agreement" insert "for the use or occupancy of railroad right of way or other adjoining property"

Page 3, line 27, remove "oral or" and replace ", continuation, or extension" with "or amendment"

Renumber accordingly

Page No. 3

30771.0203

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Deanna Ballantyne
Operator's Signature

10/22/03
Date

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2358

That the House recede from its amendments as printed on pages 1057-1059 of the Senate Journal and pages 1148-1150 of the House Journal and that Engrossed Senate Bill No. 2358 be amended as follows:

Page 1, line 2, replace "transfer" with "use"

Page 1, line 3, replace "and" with a comma and after "60-06-06.1" insert ", and 60-06-15"

Page 1, line 9, replace "agreements" with "terms"

Page 1, line 10, replace "A purchase agreement, deed, bill of sale," with "Except as provided in this section, any provision of a"

Page 1, line 11, replace "pertaining to the sale, lease, license or other" with "for the", after "use" insert "or occupancy", and after the first "of" insert "railroad"

Page 1, line 12, replace "nonrailroad purchaser," with "state or federal licensed public grain warehouse or potato warehouse"

Page 1, line 13, remove "lessee, licensee, or other contracting party"

Page 1, line 20, replace "nonrailroad purchaser, lessee, licensee, or other contracting" with "state or federal licensed public grain warehouse or a potato warehouse"

Page 1, line 21, remove "party"

Page 1, line 24, replace "; or coverage or other" with an underscored period

Page 2, remove lines 1 through 4

Page 2, line 10, remove "purchase"

Page 2, line 11, remove "agreement, deed, bill of sale,"

Page 2, replace lines 13 through 15 with:

- "3. Except for liability a railroad is subject to under the Federal Employers Liability Act (45 U.S.C. 51 et seq.) and related federal employer liability acts, a railroad may require that a state or federal licensed public grain warehouse or potato warehouse provide the following:
- a. Commercial general liability insurance of not more than two million dollars per occurrence coverage for bodily injury and property damage arising out of the use or occupancy of the property by the contracting party, including damage caused by the sole or concurrent fault of the railroad, its employees, agents, and contractors.
- b. Indemnification and defense of the railroad, its employees and agents for all bodily injury and property damage claims and liability up to two million dollars per occurrence arising out of the use or occupancy of

the property including claims and liability caused by the sole or concurrent fault of the railroad, its employees, agents, and contractors.

c. Indemnification and defense of the railroad, its employees and agents for all bodily injury, property damage, and environmental damage claims suffered by the lessee, licensee, or other contracting party, its employees, agents, and invitees, arising from the use or occupancy of the property, including claims and liability caused by the sole or concurrent fault of the railroad, its employees, agents, and contractors unless caused solely by the acts or omission of the railroad that are willful, wanton, or grossly negligent.

d. Pollution legal liability insurance up to one million dollars, unless the lessee agrees to a greater amount, to cover liabilities arising from hazardous substances or bulk storage of petroleum products brought on the property, or released on or near the property, or violations of environmental laws, by the lessee, licensee, or other contracting party, its employees, agents, and invitees.

4. Each party to the agreement is responsible for the liability resulting from the environmental condition and status of the property to the extent caused by, aggravated by, or contributed to by that party.

Page 2, line 30, remove "or to resolve disputes that arise"

Page 2, remove line 31

Page 3, line 1, remove "purchaser, lessee, or other user for any purpose, of a right of way"

Page 3, line 3, remove "If the commission finds that any term of a proposed right-of-way"

Page 3, remove lines 4 through 8

Page 3, line 9, remove "and reasonable to both parties." and overstrike "The commission shall conduct each hearing required under"

Page 3, overstrike lines 10 through 18

Page 3, line 19, overstrike "the general fund in the state treasury." and insert immediately thereafter "The value of a leaseholder's improvements may not be considered in determining a reasonable lease rate or selling price. The parties to such a proceeding shall pay the expenses of the proceeding, as determined by the commission, directly to the entities owed. The commission may adopt rules to carry out this section.

SECTION 4. AMENDMENT. Section 60-06-15 of the North Dakota Century Code is amended and reenacted as follows:

60-06-15. Application to existing leaseholds. The provisions of this chapter apply to the renewal or sale of existing leaseholds on railroad rights of way, and to existing leaseholds on lands that have ceased to be used for railroad rights of way after the leasehold was first created, and so long thereafter as the lease site remains under the ownership or control of the railroad or an entity that was or is under common ownership or control of the railroad. The value of a leaseholder's improvements may not be considered in determining annual rental or the gross sum for the right, privilege, and easement sought."

Page 3, line 22, remove "abandoned and surplus"

Page No. 2

30771.0205

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Deanna Walker
Operator's Signature

10/22/03
Date

Page 3, line 25, remove "purchase agreement,"

Page 3, line 26, remove "deed, bill of sale," and after "agreement" insert "for the use or occupancy of railroad right of way or other adjoining property"

Page 3, line 27, remove "oral or" and replace ", continuation, or extension" with "or amendment"

Renumber accordingly

Page No. 3

30771.0205

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Deanna Stalinski
Operator's Signature

10/22/03
Date

30771.0206
Title.

Prepared by the Legislative Council staff for
Senator Trenbeath
April 16, 2003

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2358

That the House recede from its amendments as printed on pages 1057-1059 of the Senate Journal and pages 1148-1150 of the House Journal and that Engrossed Senate Bill No. 2358 be amended as follows:

Page 1, line 2, replace "transfer" with "use"

Page 1, line 3, replace "and" with a comma and after "60-06-06.1" insert ", and 60-06-15"

Page 1, line 4, after the second semicolon insert "and"

Page 1, line 5, remove "; and to provide an expiration date"

Page 1, line 9, replace "agreements" with "terms"

Page 1, line 10, replace "A purchase agreement, deed, bill of sale," with "Except as provided in this section, any provision of a"

Page 1, line 11, replace "pertaining to the sale, lease, license or other" with "for the", after "use" insert "or occupancy", and after the first "of" insert "railroad"

Page 1, line 12, replace "nonrailroad purchaser," with "state or federal licensed public grain warehouse or potato warehouse"

Page 1, line 13, remove "lessee, licensee, or other contracting party"

Page 1, line 17, replace "that is" with "to the extent"

Page 1, line 19, replace "personal" with "bodily"

Page 1, line 20, replace "nonrailroad purchaser, lessee, licensee, or other contracting" with "state or federal licensed public grain warehouse or a potato warehouse"

Page 1, line 21, remove "party"

Page 1, line 23, replace "that is" with "to the extent"

Page 1, line 24, replace "; or coverage or other" with an underscored period

Page 2, remove lines 1 through 4

Page 2, line 8, after "liability" insert "to the extent"

Page 2, line 10, remove "purchase"

Page 2, line 11, remove "agreement, deed, bill of sale,"

Page 2, replace lines 13 through 15 with:

"3. Notwithstanding any other provision of law, a railroad may require that a state or federal licensed public grain warehouse or potato warehouse

Page No. 1

30771.0206

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Deanna Dallen
Operator's Signature

10/22/03
Date

contracting for the use or occupancy of right of way, or other adjoining property, provide the following:

- a. Commercial general liability insurance of not more than two million dollars per occurrence and not more than four million dollars for multiple occurrences coverage for bodily injury and property damage arising out of the use or occupancy of the property by the contracting party, including damage caused by the sole or concurrent fault of the railroad, its employees, agents, and contractors, and an endorsement under the Federal Employers Liability Act [45 U.S.C. et seq.] naming the railroad as an additional insured if the warehouse engages in the business of transporting goods from the warehouse by means of the railroad.
 - b. Indemnification and defense of the railroad, its employees and agents for all bodily injury, death, environmental damage, and property damage claims and liability up to two million dollars per occurrence arising out of the use or occupancy of the property, including claims and liability caused by the sole or concurrent fault of the railroad, its employees, agents, and contractors.
 - c. Indemnification and defense of the railroad, its employees and agents for all bodily injury, death, property damage, and environmental damage suffered by the lessee, licensee, or other contracting party, its employees, agents, and invitees, arising from the use or occupancy of the property, including claims and liability caused by the sole or concurrent fault of the railroad, its employees, agents, and contractors unless caused solely by the acts or omission of the railroad that are willful, wanton, or grossly negligent.
 - d. Pollution legal liability insurance up to one million dollars, unless the lessee agrees to a greater amount, to cover liabilities arising from hazardous substances or bulk storage of petroleum products brought on the property, or released on or near the property, or violations of environmental laws, by the lessee, licensee, or other contracting party, its employees, agents, and invitees.
4. Each party to the agreement is responsible for all liability resulting from the environmental condition and status of the property to the extent caused, aggravated, or contributed to by that party, its employees, agents, and invitees."

Page 2, line 30, remove "or to resolve disputes that arise"

Page 2, remove line 31

Page 3, line 1, remove "purchaser, lessee, or other user for any purpose, of a right of way"

Page 3, line 3, remove "if the commission finds that any term of a proposed right-of-way"

Page 3, remove lines 4 through 8

Page 3, line 9, remove "and reasonable to both parties." and overstrike "The commission shall conduct each hearing required under"

Page 3, overstrike lines 10 through 18

Page No. 2

30771.0206

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Deanna Walcott
Operator's Signature

10/22/03
Date

Page 3, line 19, overstrike "the general fund in the state treasury." and insert immediately thereafter "The value of a leaseholder's improvements may not be considered in determining a reasonable lease rate or selling price. The parties to such a proceeding shall pay the expenses of the proceeding, as determined by the commission, directly to the entities owed. The commission may adopt rules to carry out this section."

SECTION 4. AMENDMENT. Section 60-06-15 of the North Dakota Century Code is amended and reenacted as follows:

60-06-15. Application to existing leaseholds. The provisions of this chapter apply to the renewal or sale of existing leaseholds on railroad rights of way, and to existing leaseholds on lands that have ceased to be used for railroad rights of way after the leasehold was first created, and so long thereafter as the lease site remains under the ownership or control of the railroad or an entity that was or is under common ownership or control of the railroad. The value of a leaseholder's improvements may not be considered in determining annual rental or the gross sum for the right, privilege, and easement sought."

Page 3, line 21, replace "consider studying" with "study"

Page 3, line 22, remove "abandoned and surplus"

Page 3, line 25, remove "purchase agreement,"

Page 3, line 26, remove "deed, bill of sale," and after "agreement" insert "for the use or occupancy of railroad right of way or other adjoining property"

Page 3, line 27, remove "oral or" and replace ", continuation, or extension" with "or amendment"

Page 3, remove lines 29 and 30

Renumber accordingly

30771.0207
Title.

Prepared by the Legislative Council staff for
Senator Trenbeath
April 17, 2003

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2358

That the House recede from its amendments as printed on pages 1057-1059 of the Senate Journal and pages 1148-1150 of the House Journal and that Engrossed Senate Bill No. 2358 be amended as follows:

Page 1, line 2, replace "transfer" with "use"

Page 1, line 3, replace "and" with a comma and after "60-06-06.1" insert ", and 60-06-15"

Page 1, line 4, after the second semicolon insert "and"

Page 1, line 5, remove "; and to provide an expiration date"

Page 1, line 9, replace "agreements" with "terms"

Page 1, line 10, replace "A purchase agreement, deed, bill of sale," with "Except as provided in this section, any provision of a"

Page 1, line 11, replace "pertaining to the sale, lease, license or other" with "for the", after "use" insert "or occupancy", and after the first "of" insert "railroad"

Page 1, line 12, replace "nonrailroad purchaser," with "state or federal licensed public grain warehouse or potato warehouse"

Page 1, line 13, remove "lessee, licensee, or other contracting party"

Page 1, line 17, replace "that is" with "to the extent"

Page 1, line 19, replace "personal" with "bodily"

Page 1, line 20, replace "nonrailroad purchaser, lessee, licensee, or other contracting" with "state or federal licensed public grain warehouse or a potato warehouse"

Page 1, line 21, remove "party"

Page 1, line 23, replace "that is" with "to the extent"

Page 1, line 24, replace "; or coverage or other" with an underscored period

Page 2, remove lines 1 through 4

Page 2, line 6, replace "personal" with "bodily"

Page 2, line 8, after "liability" insert "to the extent"

Page 2, line 10, remove "purchase"

Page 2, line 11, remove "agreement, deed, bill of sale,"

Page 2, replace lines 13 through 15 with:

Page No. 1

30771.0207

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Deanna D. Hall
Operator's Signature

10/22/03
Date

- 3. Notwithstanding any other provision of law, a railroad may require that a state or federal licensed public grain warehouse or potato warehouse contracting for the use or occupancy of railroad right of way, or other adjoining property, provide the following:**
- a. Commercial general liability insurance of not more than two million dollars per occurrence and not more than four million dollars for multiple occurrences coverage for bodily injury, death, and property damage arising out of the use or occupancy of the property by the contracting party, including:**
 - (1) Damage caused by the sole or concurrent fault of the railroad, its employees, agents, and contractors;**
 - (2) An endorsement naming the railroad as an additional insured; and**
 - (3) An endorsement under the Federal Employers Liability Act [45 U.S.C. et seq.] if the warehouse engages in the business of transporting goods from the warehouse by means of the railroad in an annual volume in excess of five hundred loaded railroad cars.**
 - b. Indemnification and defense of the railroad, its employees and agents for all bodily injury, death, environmental damage, and property damage claims and liability up to two million dollars per occurrence arising out of the use or occupancy of the property, including claims and liability caused by the sole or concurrent fault of the railroad, its employees, agents, and contractors.**
 - c. Indemnification and defense of the railroad, its employees and agents for all bodily injury, death, property damage, and environmental damage suffered by the lessee, licensee, or other contracting party, its employees, agents, and invitees, arising from the use or occupancy of the property, including claims and liability caused by the sole or concurrent fault of the railroad, its employees, agents, and contractors unless caused solely by the acts or omission of the railroad that are willful, wanton, or grossly negligent.**
 - d. Pollution legal liability insurance up to one million dollars, unless the lessee agrees to a greater amount, to cover liabilities arising from hazardous substances or bulk storage of petroleum products brought on the property, or released on or near the property, or violations of environmental laws, by the lessee, licensee, or other contracting party, its employees, agents, and invitees.**
- 4. Each party to the agreement is responsible for all liability resulting from the environmental condition of the property to the extent caused, aggravated, or contributed to by that party, its employees, agents, and invitees.**

Page 2, line 30, remove "or to resolve disputes that arise"

Page 2, remove line 31

Page 3, line 1, remove "purchaser, lessee, or other user for any purpose, of a right of way"

Page 3, line 3, remove "If the commission finds that any term of a proposed right-of-way"

Page No. 2

30771.0207

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Deanna Hall
Operator's signature

10/22/03
Date

Page 3, remove lines 4 through 8

Page 3, line 9, remove "and reasonable to both parties," and overstrike "The commission shall conduct each hearing required under"

Page 3, overstrike lines 10 through 18

Page 3, line 19, overstrike "the general fund in the state treasury." and insert immediately thereafter "The value of a leaseholder's improvements may not be considered in determining a reasonable lease rate or selling price. The parties to such a proceeding shall pay the expenses of the proceeding, as determined by the commission, directly to the entities owed. The commission may adopt rules to carry out this section."

SECTION 4. AMENDMENT. Section 60-06-15 of the North Dakota Century Code is amended and reenacted as follows:

60-06-15. Application to existing leaseholds. The provisions of this chapter apply to the renewal or sale of existing leaseholds on railroad rights of way, and to existing leaseholds on lands that have ceased to be used for railroad rights of way after the leasehold was first created, and so long thereafter as the lease site remains under the ownership or control of the railroad or an entity that was or is under common ownership or control of the railroad. The value of a leaseholder's improvements may not be considered in determining annual rental or the gross sum for the right, privilege, and easement sought."

Page 3, line 21, replace "consider studying" with "study"

Page 3, line 22, remove "abandoned and surplus"

Page 3, line 25, remove "purchase agreement,"

Page 3, line 26, remove "deed, bill of sale," and after "agreement" insert "for the use or occupancy of railroad right of way or other adjoining property"

Page 3, line 27, remove "oral or" and replace ", continuation, or extension" with "or amendment"

Page 3, remove lines 29 and 30

Renumber accordingly

30771.0208
Title.

Prepared by the Legislative Council staff for
Senator Trenbeath
April 17, 2003

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2358

That the House recede from its amendments as printed on pages 1057-1059 of the Senate Journal and pages 1148-1150 of the House Journal and that Engrossed Senate Bill No. 2358 be amended as follows:

Page 1, line 2, replace "transfer" with "use"

Page 1, line 3, replace "and" with a comma and after "60-06-06.1" insert ", and 60-06-15"

Page 1, line 4, after the second semicolon insert "and"

Page 1, line 5, remove "; and to provide an expiration date"

Page 1, line 9, replace "agreements" with "terms"

Page 1, line 10, replace "A purchase agreement, deed, bill of sale," with "Except as provided in this section, any provision of a"

Page 1, line 11, replace "pertaining to the sale, lease, license or other" with "for the", after "use" insert "or occupancy", and after the first "of" insert "railroad"

Page 1, line 12, replace "nonrailroad purchaser," with "state or federal licensed public grain warehouse or potato warehouse"

Page 1, line 13, remove "lessee, licensee, or other contracting party"

Page 1, line 17, replace "that is" with "to the extent"

Page 1, line 19, replace "personal" with "bodily"

Page 1, line 20, replace "nonrailroad purchaser, lessee, licensee, or other contracting" with "state or federal licensed public grain warehouse or a potato warehouse"

Page 1, line 21, remove "party"

Page 1, line 23, replace "that is" with "to the extent"

Page 1, line 24, replace "; or coverage or other" with an underscored period

Page 2, remove lines 1 through 4

Page 2, line 6, replace "personal" with "bodily"

Page 2, line 8, after "liability" insert "to the extent"

Page 2, line 10, remove "purchase"

Page 2, line 11, remove "agreement, deed, bill of sale,"

Page 2, replace lines 13 through 15 with:

Page No. 1

30771.0208

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Deanna Dallen
Operator's Signature

10/22/03
Date

3. Notwithstanding any other provision of law, a railroad may require that a state or federal licensed public grain warehouse or potato warehouse contracting for the use or occupancy of railroad right of way, or other adjoining property, provide the following:
- a. Commercial general liability insurance of not more than two million dollars per occurrence and not more than four million dollars for multiple occurrences coverage for bodily injury, death, and property damage arising out of the use or occupancy of the property by the contracting party, including:
 - (1) Damage caused by the sole or concurrent fault of the railroad, its employees, agents, and contractors;
 - (2) An endorsement naming the railroad as an additional insured; and
 - (3) An endorsement under the Federal Employers Liability Act [45 U.S.C. et seq.] if the warehouse engages in the business of transporting goods from the warehouse by means of the railroad.
 - b. Indemnification and defense of the railroad, its employees and agents for all bodily injury, death, environmental damage, and property damage claims and liability up to two million dollars per occurrence, arising out of the use or occupancy of the property, including claims and liability caused by the sole or concurrent fault of the railroad, its employees, agents, and contractors.
 - c. Indemnification and defense of the railroad, its employees and agents for all bodily injury, death, property damage, and environmental damage suffered by the lessee, licensee, or other contracting party, its employees, agents, and invitees, arising from the use or occupancy of the property, including claims and liability caused by the sole or concurrent fault of the railroad, its employees, agents, and contractors unless caused solely by the acts or omission of the railroad that are willful, wanton, or grossly negligent.
 - d. Pollution legal liability insurance up to one million dollars, unless the lessee agrees to a greater amount, to cover liabilities arising from hazardous substances or bulk storage of petroleum products brought on the property, or released on or near the property, or violations of environmental laws, by the lessee, licensee, or other contracting party, its employees, agents, and invitees.
4. Each party to the agreement is responsible for all liability resulting from the environmental condition of the property to the extent caused, aggravated, or contributed to by that party, its employees, agents, and invitees."

Page 2, line 30, remove "or to resolve disputes that arise"

Page 2, remove line 31

Page 3, line 1, remove "purchaser, lessee, or other user for any purpose, of a right of way"

Page 3, line 3, remove "if the commission finds that any term of a proposed right-of-way"

Page 3, remove lines 4 through 8

Page No. 2

30771.0208

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Deanna D. Hall
Operator's Signature

10/22/03
Date

Page 3, line 9, remove "and reasonable to both parties," and overstrike "The commission shall conduct each hearing required under"

Page 3, overstrike lines 10 through 18

Page 3, line 19, overstrike "the general fund in the state treasury." and insert immediately thereafter "The value of a leaseholder's improvements may not be considered in determining a reasonable lease rate or selling price. The parties to such a proceeding shall pay the expenses of the proceeding, as determined by the commission, directly to the entities owed. The commission may adopt rules to carry out this section."

SECTION 4. AMENDMENT. Section 60-06-15 of the North Dakota Century Code is amended and reenacted as follows:

60-06-15. Application to existing leaseholds. The provisions of this chapter apply to the renewal or sale of existing leaseholds on railroad rights of way, and to existing leaseholds on lands that have ceased to be used for railroad rights of way after the leasehold was first created, and so long thereafter as the lease site remains under the ownership or control of the railroad or an entity that was or is under common ownership or control of the railroad. The value of a leaseholder's improvements may not be considered in determining annual rental or the gross sum for the right, privilege, and easement sought."

Page 3, line 21, replace "consider studying" with "study"

Page 3, line 22, remove "abandoned and surplus"

Page 3, line 25, remove "purchase agreement,"

Page 3, line 26, remove "deed, bill of sale," and after "agreement" insert "for the use or occupancy of railroad right of way or other adjoining property"

Page 3, line 27, remove "oral or" and replace ", continuation, or extension" with "or amendment"

Page 3, remove lines 29 and 30

Renumber accordingly

903
4-17-03
1 of 3

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2358

That the House recede from its amendments as printed on pages 1057-1059 of the Senate Journal and pages 1148-1150 of the House Journal and that Engrossed Senate Bill No. 2358 be amended as follows:

Page 1, line 2, replace "transfer" with "use"

Page 1, line 3, replace "and" with a comma and after "60-06-06.1" insert ", and 60-06-15"

Page 1, line 4, after the second semicolon insert "and"

Page 1, line 5, remove "; and to provide an expiration date"

Page 1, line 9, replace "~~agreements~~" with "terms"

Page 1, line 10, replace "A purchase agreement, deed, bill of sale," with "Except as provided in this section, any provision of a"

Page 1, line 11, replace "pertaining to the sale, lease, license or other" with "for the", after "use" insert "or occupancy", and after the first "of" insert "railroad"

Page 1, line 12, replace "nonrailroad purchaser," with "state or federal licensed public grain warehouse or potato warehouse"

Page 1, line 13, remove "lessee, licensee, or other contracting party"

Page 1, line 17, replace "that is" with "to the extent"

Page 1, line 19, replace "personal" with "bodily"

Page 1, line 20, replace "nonrailroad purchaser, lessee, licensee, or other contracting" with "state or federal licensed public grain warehouse or potato warehouse"

Page 1, line 21, remove "party"

Page 1, line 23, replace "that is" with "to the extent"

Page 1, line 24, replace "; or coverage or other" with an underscored period

Page 2, remove lines 1 through 4

Page 2, line 6, replace "personal" with "bodily"

Page 2, line 8, after "liability" insert "to the extent"

Page 2, line 10, remove "purchase"

Page 2, line 11, remove "agreement, deed, bill of sale,"

Page 2, replace lines 13 through 15 with:

- 2 of 3
- "3. Notwithstanding any other provision of law, a railroad may require that a state or federal licensed public grain warehouse or potato warehouse contracting for the use or occupancy of railroad right of way, or other adjoining property, provide the following:
- a. Commercial general liability insurance of not more than two million dollars per occurrence and not more than four million dollars for multiple occurrences coverage for bodily injury, death, and property damage arising out of the use or occupancy of the property by the contracting party, including:
 - (1) Damage caused by the sole or concurrent fault of the railroad, its employees, agents, and contractors;
 - (2) An endorsement naming the railroad as an additional insured; and
 - (3) An endorsement under the Federal Employers Liability Act [45 U.S.C. et seq.] if the warehouse engages in the business of transporting goods from the warehouse by means of the railroad in an annual volume in excess of two hundred fifty loaded railroad cars.
 - b. Indemnification and defense of the railroad, its employees and agents for all bodily injury, death, environmental damage, and property damage claims and liability up to two million dollars per occurrence arising out of the use or occupancy of the property, including claims and liability caused by the sole or concurrent fault of the railroad, its employees, agents, and contractors.
 - c. Indemnification and defense of the railroad, its employees and agents for all bodily injury, death, property damage, and environmental damage suffered by the lessee, licensee, or other contracting party, its employees, agents, and invitees, arising from the use or occupancy of the property, including claims and liability caused by the sole or concurrent fault of the railroad, its employees, agents, and contractors unless caused solely by the acts or omission of the railroad that are willful, wanton, or grossly negligent.
 - d. Pollution legal liability insurance up to one million dollars, unless the lessee agrees to a greater amount, to cover liabilities arising from hazardous substances or bulk storage of petroleum products brought on the property, or released on or near the property, or violations of environmental laws, by the lessee, licensee, or other contracting party, its employees, agents, and invitees.
4. Each party to the agreement is responsible for all liability resulting from the environmental condition of the property to the extent caused, aggravated, or contributed to by that party, its employees, agents, and invitees."

Page 2, line 30, remove "or to resolve disputes that arise"

Page 2, remove line 31

Page 3, line 1, remove "purchaser, lessee, or other user for any purpose, of a right of way"

Page 3, line 3, remove "If the commission finds that any term of a proposed right-of-way"

Page No. 2

30771.0209

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Deanna Hall
Operator's Signature

10/22/03
Date

3 of 3

Page 3, remove lines 4 through 8

Page 3, line 9, remove "and reasonable to both parties." and overstrike "The commission shall conduct each hearing required under"

Page 3, overstrike lines 10 through 18

Page 3, line 19, overstrike "the general fund in the state treasury." and insert immediately thereafter "The value of a leaseholder's improvements may not be considered in determining a reasonable lease rate or selling price. The parties to such a proceeding shall pay the expenses of the proceeding, as determined by the commission, directly to the entities owed. The commission may adopt rules to carry out this section."

SECTION 4. AMENDMENT. Section 60-06-15 of the North Dakota Century Code is amended and reenacted as follows:

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Page 3, line 21, replace "consider studying" with "study"

Page 3, line 22, remove "abandoned and surplus"

Page 3, line 25, remove "purchase agreement,"

Page 3, line 26, remove "deed, bill of sale," and after "agreement" insert "for the use or occupancy of railroad right of way or other adjoining property"

Page 3, line 27, remove "oral or" and replace ", continuation, or extension" with "or amendment"

Page 3, remove lines 29 and 30

Renumber accordingly

Deanna Stalder
Operator's Signature

10/22/03
Date

REPORT OF CONFERENCE COMMITTEE (420)
April 17, 2003 4:16 p.m.

Module No: SR-70-7886

Insert LC: 30771.0209

REPORT OF CONFERENCE COMMITTEE

SB 2358, as engrossed: Your conference committee (Sens. Trenbeath, Nething, Taylor and Reps. Hawken, Weisz, Delmore) recommends that the **HOUSE RECEDE** from the House amendments on SJ pages 1057-1059, adopt amendments as follows, and place SB 2358 on the Seventh order:

That the House recede from its amendments as printed on pages 1057-1059 of the Senate Journal and pages 1148-1150 of the House Journal and that Engrossed Senate Bill No. 2358 be amended as follows:

Page 1, line 2, replace "transfer" with "use"

Page 1, line 3, replace "and" with a comma and after "60-06-06.1" insert ", and 60-06-15"

Page 1, line 4, after the second semicolon insert "and"

Page 1, line 5, remove "; and to provide an expiration date"

Page 1, line 9, replace "agreements" with "terms"

Page 1, line 10, replace "A purchase agreement, deed, bill of sale," with "Except as provided in this section, any provision of a"

Page 1, line 11, replace "pertaining to the sale, lease, license or other" with "for the", after "use" insert "or occupancy", and after the first "of" insert "railroad"

Page 1, line 12, replace "nonrailroad purchaser," with "state or federal licensed public grain warehouse or potato warehouse"

Page 1, line 13, remove "lessee, licensee, or other contracting party"

Page 1, line 17, replace "that is" with "to the extent"

Page 1, line 19, replace "personal" with "bodily"

Page 1, line 20, replace "nonrailroad purchaser, lessee, licensee, or other contracting" with "state or federal licensed public grain warehouse or potato warehouse"

Page 1, line 21, remove "party"

Page 1, line 23, replace "that is" with "to the extent"

Page 1, line 24, replace "; or coverage or other" with an underscored period

Page 2, remove lines 1 through 4

Page 2, line 6, replace "personal" with "bodily"

Page 2, line 8, after "liability" insert "to the extent"

Page 2, line 10, remove "purchase"

Page 2, line 11, remove "agreement, deed, bill of sale,"

Page 2, replace lines 13 through 15 with:

3. Notwithstanding any other provision of law, a railroad may require that a state or federal licensed public grain warehouse or potato warehouse contracting for the use or occupancy of railroad right of way, or other adjoining property, provide the following:
- a. Commercial general liability insurance of not more than two million dollars per occurrence and not more than four million dollars for multiple occurrences coverage for bodily injury, death, and property damage arising out of the use or occupancy of the property by the contracting party, including:
 - (1) Damage caused by the sole or concurrent fault of the railroad, its employees, agents, and contractors;
 - (2) An endorsement naming the railroad as an additional insured; and
 - (3) An endorsement under the Federal Employers Liability Act [45 U.S.C. et seq.] if the warehouse engages in the business of transporting goods from the warehouse by means of the railroad in an annual volume in excess of two hundred fifty loaded railroad cars.
 - b. Indemnification and defense of the railroad, its employees and agents for all bodily injury, death, environmental damage, and property damage claims and liability up to two million dollars per occurrence arising out of the use or occupancy of the property, including claims and liability caused by the sole or concurrent fault of the railroad, its employees, agents, and contractors.
 - c. Indemnification and defense of the railroad, its employees and agents for all bodily injury, death, property damage, and environmental damage suffered by the lessee, licensee, or other contracting party, its employees, agents, and invitees, arising from the use or occupancy of the property, including claims and liability caused by the sole or concurrent fault of the railroad, its employees, agents, and contractors unless caused solely by the acts or omission of the railroad that are willful, wanton, or grossly negligent.
 - d. Pollution legal liability insurance up to one million dollars, unless the lessee agrees to a greater amount, to cover liabilities arising from hazardous substances or bulk storage of petroleum products brought on the property, or released on or near the property, or violations of environmental laws, by the lessee, licensee, or other contracting party, its employees, agents, and invitees.
4. Each party to the agreement is responsible for all liability resulting from the environmental condition of the property to the extent caused, aggravated, or contributed to by that party, its employees, agents, and invitees.

Page 2, line 30, remove "or to resolve disputes that arise"

Page 2, remove line 31

Page 3, line 1, remove "purchaser, lessee, or other user for any purpose, of a right of way"

Page 3, line 3, remove "If the commission finds that any term of a proposed right-of-way"

REPORT OF CONFERENCE COMMITTEE (420)
April 17, 2003 4:16 p.m.

Module No: SR-70-7886

Insert LC: 30771.0209

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Page 3, line 9, remove "and reasonable to both parties." and overstrike "The commission shall conduct each hearing required under"

Page 3, overstrike lines 10 through 18

Page 3, line 19, overstrike "the general fund in the state treasury." and insert immediately thereafter "The value of a leaseholder's improvements may not be considered in determining a reasonable lease rate or selling price. The parties to such a proceeding shall pay the expenses of the proceeding, as determined by the commission, directly to the entities owed. The commission may adopt rules to carry out this section."

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Page 3, line 27, remove "oral or" and replace ", continuation, or extension" with "or amendment"

Page 3, remove lines 29 and 30

Renumber accordingly

Engrossed SB 2358 was placed on the Seventh order of business on the calendar.

2003 TESTIMONY
SB 2358

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Deanna Hall
Operator's Signature

10/22/03

Date



"Welhalla Bean
Company"
<wbc@utma.com>

To: "Thomas I. Trenbeath" <ttrenbea@state.nd.us>
cc:
Subject: Fw: trenbeath2

02/12/2003 09:25 AM

----- Original Message -----

From: Billie Rauser

To: Darryl

Sent: Tuesday, February 11, 2003 3:34 PM

Subject: trenbeath2

-->



Attention: Senator Tom Trenbeath

Senate Transportation Committee

As the authorized legislative representative of the North Central Bean Dealers Association, I would like to confirm the association's support of Senate Bill Number 2358.

Requiring the railroad to be held accountable for its negligent actions and the resulting liability is in the best interest of our organization.

Reason for indemnity agreement void & unenforceable:

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Deanna Hallmark
Operator's Signature

10/22/03
Date

Following is an actual example:

In 1998 the employees of Walhalla Bean Company were loading a Burlington Northern box car at the company's loading dock. An employee walking between cars heard a clicking noise and observed the Burlington Northern engine pushing the unit train in his direction. He jumped back or would have been crushed and hollered at the employees loading the box car to evacuate the car. The unit train collided with the box car being loaded. This car had not been released to the railroad and was shown as being on spot at Walhalla Bean Company. Fortunately, the employee operating the forklift was able to get himself and the forklift out of the way of danger before the collision. When the unit train collided with the spotted car the loading ramp cut off warehouse walls, sheering through the sheets of steel. By the time the train was able to stop close to twenty feet of the wall had been destroyed. The fault was found to be with the Burlington Northern brakeman employee. He failed to check if the industry (Walhalla Bean Company) was loading the equipment. Burlington Northern did pay for the damages in this incident. However, under current lease agreements and the associated indemnity clauses with Burlington Northern, they would not be required to.

Also at stake here is the future of railroad service to businesses forced to buy railroad owned land at elevated prices. A business operating on a branch line that is forced to purchase railroad property is risking the possibility of the railroad exercising its right to discontinue service. This leaves the business with property that has a greatly diminished value and no rail service for future business endeavors.

The North Central Bean Dealers Association is greatly in support of Senate Bill Number 2358. The association feels that this bill being passed into law is inherent to the future of the bean industry in North Dakota as a whole.

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Deanna Walhalla
Operator's Signature

10/22/03
Date

Sincerely,

Darryl Berg

Legislative Representative



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Darryl Berg
Operator's Signature

10/22/03
Date



NORTH DAKOTA GRAIN DEALERS ASSOCIATION

STEVEN D. STREGE, Executive Vice President
CHERYL WELLE, Executive Assistant
CONNIE LEIER, Administrative Assistant
Ph: 701-235-4184, Fax: 701-235-1028
118 Broadway, 808 Black Bldg., Fargo, ND 58102
Website: www.ndgda.org

LARRY PHILLIPS, Safety & Health Director
Ph: 701-251-9112, Fax: 701-251-1758
P.O. Box 5055, Jamestown, ND 58402-5055

STU LETCHER, Safety Specialist
Ph: 701-543-3110, Fax: 701-543-4183
P.O. Box 72, Hatton, ND 58240

SB 2358 SENATE TESTIMONY Senate Transportation Committee -- February 13, 2003

Good morning Mr. Chairman and members of the Senate Transportation Committee. My name is Keith Brandt. I am President of the North Dakota Grain Dealers Association and the General Manager of Plains Grain and Agronomy at Enderlin, ND and three other nearby locations. Right now I am on the Canadian Pacific Railway. But most of my 25 years in the grain elevator business was spent at locations on the Burlington Northern Railroad at Galesburg, Mayville and Hunter.

Thank you Senator Mutch for being the prime sponsor on this bill. Thank you Chairman Trenbeath for also sponsoring. We asked for this bill so as to curb the railroads' abuse of its lessees and others it serves through high lease and site sale costs, and unconscionable liability shifting provisions in these agreements.

Our legal counsel, Brian Bjella, who wrote this bill, is here this morning to explain more about what we are trying to get at and how this bill would accomplish that. This may not be a perfect bill as is. In fact Mr. Bjella already has some amendments to propose.

This bill involves three somewhat separate, but also somewhat related issues - lease costs, site sale costs, and the liability-shifting indemnification clauses in leases and/or other agreements that the railroad and the rail customer have even on customer-owned.

Our Association and its members are generally free market thinking people. The railroad will no doubt say today that the market should determine lease rates, site costs and indemnity provisions. But what we have here is NOT a free market of several willing buyers and sellers. It is instead a railroad holding life or death powers over a business that, in many cases, located on the railroad's property to give the railroad business. The business entity made improvements to the property in the form of its own structures. But the location of those structures can now be used against the business by railroad demands that must be met, or it becomes a matter of getting off the railroad property.

The Burlington Northern has been in and out of the site sale business over the past dozen years or so. At one point they were attempting to sell a certain number of sites each year. Then the emphasis shifted to raising the lease prices. The minimum was arbitrarily set at \$1,200 per year. Most elevators were paying more than that. Then when it came to selling the property, BNSF multiplied the annual lease cost by an arbitrary factor of 10. So if you were paying \$2,500 per year on a lease of two acres the sales price was automatically \$25,000. There didn't seem to be any relationship with surrounding property values. This leads to situations such as:

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Keith Brandt
Operator's Signature

10/22/03
Date

In a western North Dakota town a grain elevator is quoted a price of nearly \$50,000 for between three and four acres of property on which its facilities sit.

A different western North Dakota elevator, in an even smaller town along the BNSF, was quoted \$12,000 plus \$1,000 processing fee for less than two acres. He ended up buying the property for \$10,000 total. During this process he asked the railroad if he could pay for a third party appraiser. The railroad said no, it would put the value on the property. The elevator manager feels the property could possibly sell for a third of the value the railroad first put on it. The buyer receives a quitclaim deed and is responsible for having the property platted to have the legal description suitable for taxation.

A grain elevator in a small northeastern North Dakota town was quoted \$43,000 for the 2.5 acres its facilities sit on. This fellow actually did better than most, he got them down to \$21,000. This is yet another example of the railroad taking advantage of the shipper because they have him over the barrel.

Another eastern North Dakota elevator was asked \$31,000 for little over three acres. They got their quitclaim deed for a little under \$20,000. These quitclaim deeds release the selling railroad from any liability for latent defects, including the environmental condition of the property. But the railroad maintains mineral rights and the full right and privilege to remove them at anytime.

An oil company in northern North Dakota paid nearly \$300,000 in damages and attorneys' fees because of an accident caused by a sticky brake on the railroad's grain car.

The Canadian Pacific Railway has announced that repair to its main line switches leading into an industry will be that industry's responsibility, notwithstanding the fact that some of the wear on the switch is due to through traffic, not industry traffic. In addition, some or all track agreements allow the railroad to use the industry's track at will, thus creating more wear that the industry is expected to pay for. This can run into the hundreds of thousands of dollars.

You may have heard that there is an arbitration system under the National Grain and Feed Association to supposedly resolve these problems. But less than 1/3 of North Dakota grain elevators are members of that Association. And there are some inherent flaws in the arbitration process. For instance, arbitrators cannot change lease terms that have been unilaterally imposed by the railroad. So the only thing arbitable about these ridiculous indemnity clauses is whether they have been applied correctly. Secondly, depending on an arbitration system means going to that system time after time after time. We have told the BNSF it should remove these ridiculous clauses from their leases. They refuse. So that is why we come to you to try to remedy the situation in state law.

I will try to respond to any questions you may have. I would appreciate you allowing our legal counsel Mr. Bjella to be the next speaker here in favor of SB 2358. Thank you.

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Deanna Walcott
Operator's signature

10/22/03
Date

NCBDA

North Central Bean Dealers Association

Attention: Senator Tom Trenbeath
Senate Transportation Committee

As the authorized legislative representative of the North Central Bean Dealers Association, I would like to confirm the association's support of Senate Bill Number 2358.

Requiring the railroad to be held accountable for its negligent actions and the resulting liability is in the best interest of our organization.

Reason for indemnity agreement void & unenforceable:

Following is an actual example:

In 1998 the employees of Walhalla Bean Company were loading a Burlington Northern box car at the company's loading dock. An employee walking between cars heard a clicking noise and observed the Burlington Northern engine pushing the unit train in his direction. He jumped back or would have been crushed and hollered at the employees loading the box car to evacuate the car. The unit train collided with the box car being loaded. This car had not been released to the railroad and was shown as being on spot at Walhalla Bean Company. Fortunately, the employee operating the forklift was able to get himself and the forklift out of the way of danger before the collision. When the unit train collided with the spotted car the loading ramp cut off warehouse walls, sheering through the sheets of steel. By the time the train was able to stop close to twenty feet of the wall had been destroyed. The fault was found to be with the Burlington Northern brakeman employee. He failed to check if the industry (Walhalla Bean Company) was loading the equipment. Burlington Northern did pay for the damages in this incident. However, under current lease agreements and the associated indemnity clauses with Burlington Northern, they would not be required to.

Also at stake here is the future of railroad service to businesses forced to buy railroad owned land at elevated prices. A business operating on a branch line that is forced to purchase railroad property is risking the possibility of the railroad exercising its right to discontinue service. This leaves the business with property that has a greatly diminished value and no rail service for future business endeavors.

The North Central Bean Dealers Association is greatly in support of Senate Bill Number 2358. The association feels that this bill being passed into law is inherent to the future of the bean industry in North Dakota as a whole.

Sincerely,


Darryl Berg
Legislative Representative

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Operator's signature

10/22/03
Date

SENATE BILL 2358

Introduction

- Brian R. Bjella
- Fleck, Mather & Strutz, Ltd.
- representing North Dakota Grain Dealers Association

Section 1 of bill

Prohibits railroad in a lease or other agreement from:

1. requiring the lessee to indemnify or defend the railroad for any loss or damage caused by the railroad
2. requiring the lessee to purchase insurance to provide coverage to the railroad for any loss or damage caused by the railroad
3. exempting or excusing the railroad from any loss or damage caused by the railroad

The sole purpose of this part of the bill is to make the railroad responsible for injuries or environmental damage that it has caused.

Why should an elevator or other right-of-way lessee be responsible for and have to pay for injuries or environmental damage caused by the railroad. But this is what the railroads mandate in their right-of-way agreements.

Sample indemnity provision in railroad lease:

"To the fullest extent permitted by law, lessee shall release, indemnify, defend and hold harmless lessor and lessor's affiliated companies, partners, successors, assigns, legal representatives, officers, directors, shareholders, employees and agents (collectively, "Indemnitees") for, from and against any and all claims, liabilities, fines, penalties, costs, damages, losses, liens, causes of action, suits, demands, judgments and expenses (including, without limitation, court costs, attorneys' fees and costs of investigation, removal and remediation and governmental oversight costs) environmental or otherwise (collectively "Liabilities") of any nature, kind or description of any person or entity directly or indirectly arising out of, resulting from or related to (in whole or in part):

- (i) This lease, including, without limitation, its environmental provisions;

- (ii) Any rights or interests granted pursuant to this lease;
- (iii) Lessee's occupation and use of the premises;
- (iv) The environmental condition and status of the premises caused by, aggravated by, or contributed in whole or in part, by lessee; or
- (v) Any act or omission of lessee or lessee's officers, agents, invitees, employees, or contractors, or anyone directly or indirectly employed by any of them, or anyone they control or exercise control over,

Even if such Liabilities arise from or are attributed to, in whole or in part, any negligence of any Indemnitee. The only Liabilities with respect to which lessee's obligation to indemnify the Indemnitees does not apply are Liabilities to the extent proximately caused by the gross negligence or willful misconduct of an Indemnitee."

What this means is that if there is an accident on leased property, even if the railroad is wholly responsible, the lessee must pay all damages.

Colorado has a statute prohibiting a railroad from seeking indemnification for damages due to a fire caused by the railroad. North Dakota used to have a similar statute.

Other states have laws prohibiting railroads in their contracts from requiring indemnification for their own negligence: the courts of Montana, Iowa, California and Maryland have upheld statutes prohibiting indemnification when the railroad was seeking to escape liability for its own negligence by virtue of the terms of a contract.

Section 1 of this bill would prohibit a railroad from passing its liability on to others. It does not make the railroad liable for the negligence of the lessee, but only for its own actions.

Section 3 of bill

Purpose is to give the Public Service Commission the authority to resolve disputes between lessees and railroads in right-of-way agreements. This would give lessees a place to go to try to resolve disputes when the railroad refuses to negotiate contract terms.

Since the bill was drafted we have learned of other right-of-way users impacted by the insurance/indemnification provisions and other non-negotiable terms of right-of-way agreements. Attached are proposed amendments to expand the bill to cover anyone who has a right-of-way dispute with a railroad.

Once again, this bill is similar to laws in several other states. In recent years Iowa, Minnesota and Wisconsin have amended their statutes to give telephone and power cooperatives and utilities,

and pipeline companies, a grievance procedure before their public utilities commissions when unable to obtain crossing permits from railroads on reasonable terms and prices.

Iowa's law also requires the railroad to bear responsibility for its own acts and omissions in crossing agreements (prohibits indemnification).

Just last year Nebraska passed a comprehensive statute empowering its Department of Agriculture to resolve disputes between railroads and their lessees over renewal terms, lease termination or sale of the leased property.

The Grain Dealers are requesting similar protection, by providing this grievance procedure before the Public Service Commission.

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Deanna Stalder
Operator's signature

10/22/03
Date

ASA

Ag States Agency.

P.O. Box 64089 • St. Paul, MN 55164-0089 • (651) 306-3700

February 12, 2003

Steve Stregg, Executive Vice President
North Dakota Grain Dealers Association
118 Broadway, 606 Black Building
Fargo, ND 58102

RE: Railroad Property Lease Agreements

Dear Steve:

We appreciate the opportunity to respond to the issue involving the indemnification our clients have to provide most railroads to lease the railroad's property.

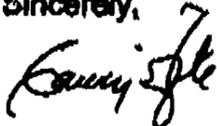
We represent several Property/Casualty Insurance Companies including Farmland Mutual Insurance Company. Our response will be a general composite of our interpretation of the insurance companies policy language that our agency represents.

Entering into a Railroad Property Lease Agreement doesn't expand coverage. To the extent that most insurance policies generally consider Railroad Property Lease Agreements covered under the definition of an "Insured Contract", their stance is that their liability insurance policies only covers bodily injury and property damage for which the insured not the railroad is legally liable. Therefore, it is an incorrect assumption that the insurance contract will cover the indemnification of the railroad for their negligent acts. Also, insurance policies contain conditions and limitations that can modify coverage.

Therefore, we support a Legislative Bill that would limit the indemnification that businesses are required to give railroads without regard for any negligence on the railroad's part. This bill would be a major step toward providing financial security to businesses that are located in North Dakota and encouraging entry of new businesses into North Dakota.

If you have any additional questions please contact me at (800) 548-1494 extension 6845.

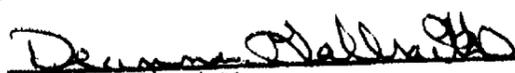
Sincerely,



Corwin Tufts, President

Your Partners in Protection

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NORTH DAKOTA GRAIN DEALERS ASSOCIATION

PROPOSED AMENDMENTS TO SENATE BILL NO. 2358

Page 1, line 11, after the second "a" insert "non-railroad"

Page 1, line 18, after "the" insert "non-railroad"

Page 2, line 4, after "damage" insert "other than property damage subject to the provisions of 49 U.S.C. 11706"

Page 2, line 24, replace "or to resolve lease disputes that arise pursuant to right-of-way leases for any purpose between railroad right-of-way owners and lessors" with "or to resolve disputes that arise pursuant to proposed agreements between railroad right-of-way owners and a non-railroad purchaser, lessee, or other user for any purpose, of right of way"

Page 2, line 27, replace "If the commission finds that any right-of-way lease term or lease extension and renewal term is onerous, unduly burdensome, unfair to the lessee, the commission shall provide in its order that the terms be removed from the lease or modified to the extent necessary to be fair and reasonable to both parties" with "if the commission finds that any term of a proposed right of way purchase agreement, crossing agreement, lease or lease extension and renewal agreement, or other agreement for use of right-of-way, including the purchase price, fee, or rent to be paid, are onerous, unduly burdensome or unfair to the non-railroad purchaser, lessee, or other user, or do not equate to fair market value in the vicinity, the commission shall provide in its order that the term be removed from the agreement or prescribe modifications to such term so as to be fair and reasonable to both parties"

Renumber accordingly.

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Deanna Hall
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10/22/03
Date

Senate Transportation Committee
S.B. 2358

Testimony of Jim Neubauer, City Administrator, City of Mandan
Thursday, February 13, 2003

Mr. Chairman, members of the Committee, my name is Jim Neubauer, I am the City Administrator of Mandan. I am here on behalf of Mayor Ken LaMont, who was unable to attend the hearing this morning and also representing the interests of its business community, as well as the City of Mandan.

As many of you may be aware, the City of Mandan has been dealing with a multi-million gallon diesel fuel spill which is resting on top of the groundwater 10 - 20 feet beneath approximately 40 acres of our main downtown business district. One of the adverse impacts of the diesel fuel spill has been a "leaching" of diesel fuel fumes and benzene into the basements and lower levels of several downtown businesses and one apartment complex. Several city employees and other private individuals have made adverse health claims. The BNSF signed a consent order in 1985 accepting responsibility for the presence of the fuel and for any costs and work associated with the clean up and remediation of the environmental disaster.

Currently the issue of the railroad's responsibility is the subject of two separate legal proceedings: an administrative action in the health department and a state district court action. Needless to say the legal process will be lengthy and costly. In the meantime, remediation efforts by the BNSF have ceased north of an imaginary line down the middle of our Main Street, for which BNSF now claims it has no responsibility.

The City of Mandan and many new independent businesses lease property on the south side of our Main Street from the BNSF. Early in 2002, BNSF sought to renegotiate the leases with the City. Our city attorney balked at many of the lease provisions, namely those requiring the city to indemnify the railroad against environmental damage or liability and those requiring the city to purchase insurance

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Jim Neubauer
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extending coverage to the railroad and its employees, or agents for any personal injury or property damage that may occur on the railroad's right-of-way or the lease premises. We were able to convince the railroad to allow us to renew the existing leases, without the new "draconian" language.

However, the independent businesses have not been as successful in their attempts to negotiate out these onerous provisions, which attempt to pass the railroad's liability onto innocent lessees. The first two sections of SB 2358 directly address the language that we found so objectionable in the railroad's leases. I have to believe that other cities along the main lines have encountered similar problems with the lease language. We need your help to avert the forced assumption of liability for another's wrongdoing.

I understand that this bill was prepared at the request of the ND Grain Dealers Association, but I wanted you to know that its protection would benefit, not just the grain dealers, but cities, and small businesses. The protections provided by this bill, will assist Mandan in furthering its economic development. Our future growth depends on the small independent businesses. Your help would be greatly appreciated.

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Deanna Stalder
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Testimony Opposing SB 2358
Senate Transportation Committee
February 13, 2003

Mr. Chairman & Members of the Committee:

My name is Dan Crothers, and I am an attorney in private practice in Fargo.

I appear in opposition to Senate Bill 2358, which unfairly singles out one type of business, and would deprive them of contractual options that are available to literally every other contracting party in the state of North Dakota.

I have been an attorney for more than 20 years, having been admitted to practice law in both North Dakota and New Mexico. The bulk of my experience has been in real estate law, and commercial and business litigation. I have taught real estate law at the University of Minnesota-Moorhead and have given numerous continuing legal education seminars to North Dakota and Minnesota lawyers on a variety of real estate law topics.

From my experience with both real estate and commercial law, I have observed that indemnification clauses—including clauses where a party is indemnified for their own negligence—are routinely used in a variety of contracts, including commercial real estate leases, equipment leases, as well as service and construction contracts.

The North Dakota Supreme Court has been called upon to interpret and apply many indemnification clauses. In each case it has found the clauses to be consistent with public policy, and enforceable according to their terms. Those cases include:

Praus v. Mack, 2001 ND 80, 626 N.W.2d 239 (express indemnification clause holding prime contractor harmless by sub-contractor, including for prime contractor's own negligence)

Olander Contracting Co. v. Gail Wachter Investments, 2002 ND 65, 643 N.W.2d 29 (express indemnification holding municipality harmless by contractor, including municipality's own negligence)

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Dennis Olander
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St. Paul Fire & Marine Ins. Co. v. Amerada Hess Corp., 275 N.W.2d 304 (N.D. 1979) (express indemnification clause in well service contract where owner held harmless by contractor and required to pay for damage to owner's derrick)

Barsness v. General Diesel v. First Assembly of God Church, 422 N.W.2d 819 (N.D. 1988) (express indemnification clause in heavy equipment lease where owner-lessor indemnified for own negligence by church-lessee of equipment)

These cases are but a few that have been appealed to North Dakota's highest court that have enforced indemnification clauses. Countless others have been handled at the trial court level and do not appear in the case books. All of them hold that properly drafted indemnification clauses are enforceable and not contrary to public policy.

In my practice I also draft contracts for business clients. Simply stated, written contracts represent an agreed upon allocation of risk between two or more parties. Many of the business contracts I have prepared or reviewed include clauses requiring one party to indemnify the other party on any variety of issues that are agreed to between the parties to the contracts. Indemnification is a regular and proper part of many business transactions, without which a great number of the transactions would not occur.

I appear here today to ask that you not single out railroads, and that you not take away from railroads the ability and opportunity to enter into contracts which both parties—the railroad and the party contracting with the railroad—agree and believe to be beneficial. For these reasons, and the reasons stated by others appearing here today in opposition to this bill, I ask that the Committee take Senate Bill 2358 to the floor with a "do not pass" recommendation.

Thank you.

Daniel J. Crothers
Attorney at Law
Nilles, Hansen & Davies, Ltd.
P.O. Box 2626
Fargo, ND 58108
701-237-5544

February 13, 2003

Before the North Dakota Senate Transportation Committee.

Testimony of David S. Drach, Canadian Pacific Railway in opposition to proposed Senate Bill number 2358.

Mr. Chairman and committee members:

1. Introduction

My name is David Drach. I am the Manager of Real Estate Sales and Leasing and also an attorney for Soo Line Railroad Company, in Minneapolis. Soo Line Railroad Company is a wholly-owned subsidiary of Canadian Pacific Railway and we do business under our parent company's name. I have been employed by CP Rail for over 18 years, the last 17 in the Real Estate Department. For past 15 years North Dakota has been one of the regions within my area of responsibility for various real estate matters, such as leasing and sales. Currently CP Rail has 1,180 miles of right of way and track in North Dakota. On its North Dakota right of way and station grounds, CP Rail has 682 active land leases and 1,749 utility encroachments (not including those within public rights of way).

2. Summary

CP Rail is opposed to SB 2358 for the following reasons:

- a. Railroads have unique requirements and the bill places unreasonable restrictions on railroad practices that are fundamental to the safe and profitable operation of railroads.
- b. The bill is overly broad in the parties it benefits. Its passage would be a severe detriment to not only the leasing or sale of railroad property, but also railroad operations.
- c. The bill unfairly singles out railroads and places restrictions on them for practices that are common in business and government.
- d. The harm that that it is assumed that the bill is intended to cure has been miscalculated.
- e. The bill will have unintended results and it will likely harm lessees more than it will help them.

3. Railroads have unique requirements and the bill places unreasonable restrictions on railroad practices that are fundamental to the safe and profitable operation of railroads.

Railroads are an inherently dangerous environment. Even when everything is done as can be reasonably expected, there are dangers. A wheel bearing can go bad, a rail can crack, or a motorist can drive in front of a train. We do our best to improve the safety of railroad operations, but even with our best efforts it is not a completely safe business. One method of dealing with this inherent danger is to maintain a right of way to protect

David S. Drach
Canadian Pacific Railway

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Feb. 13, 2003 testimony re SB 2358
ND Senate Transportation Committee

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the railroad and the public. If the nature of railroads were different, we could run trains with only minimal clearance room. But that is not the case. By its very nature, Railroading is a land-intensive business.

Railroads are subject to different liability rules than other businesses, such as Federal Employees Liability Act, FELA and the Railroad Labor Act.

4. The bill is overly broad in the parties it benefits.

- a. The proposed law isn't limited to local lessees, the ma & pa operators of the local feed & seed. Any lessee or purchaser of railroad property is benefited by the law. Utility companies, Fortune 500 companies, governments, other railroads, all are within the benefited class.
- b. Besides leases for feed mills and parking lots, railroads lease property to municipalities for parks and trails and to utilities for electric, telephone, gas and fiber optic cables on the right of way. The utilities benefit from an uninterrupted longitudinal corridor to construct the improvements of their trade. All of these agreements require that the utilities indemnify and defend the railroad from and against damage or injury resulting from or in any way connected with railroad operations. The reason is that it is not a matter of IF a train operation will impact these improvements, but where and when. It is a certainty. These companies weigh the benefit and risk associated with the terms and they build on the railroad property. They voluntarily agree to these terms and also to move their improvements (at their cost) if the railroad requests. Again, the utilities voluntarily agree to these terms. In addition to indemnification, certain types of utilities are required to maintain insurance. Electrical transmission lines and petroleum pipelines are two examples. The reason, although probably obvious, is that downed electrical transmission lines have the tendency to electrocute people and things and pipelines tend to blow up. Without the protection of the indemnification and insurance provisions in these agreements, the railroad simply could not allow them on the property.
- c. Railroads also lease property to other railroads. Of CP Rail's 1,180 miles of track in North Dakota, 730 miles is operated by lessees. Northern Plains Railroad operates over CP Rail track in northeastern North Dakota and Dakota, Missouri Valley and Western in western North Dakota, including Bismarck. The leasing of lines to lessee-operators allows rail service to be preserved on marginally-profitable lines. Without indemnification and insurance provisions, the only alternative would be to abandon service on these lines.

5. The bill's passage would be a severe detriment to not only the leasing or sale of railroad property, but also railroad operations.

- a. The apportionment of liability is not easily divided into categories of "fair", "unfair," "sole," or "concurrent." Railroad practice of requiring indemnification of the railroad

David S. Drach
Canadian Pacific Railway

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for its own negligence isn't a case of the railroads expecting to run a locomotive through someone's building and walking away.

- b. Under the proposed law, the railroad would be exposed to liability for arguably everything that occurs on a lease site because one can almost always craft an argument that a railroad has concurrent liability. In many situations the railroad has liability simply because it owns the property as is the case is with environmental issues. In other situations, arguments can, and have, been made that a landowner is negligent not by way of an overt act or omission, but because they negligently selected or hired the parties who did cause harm.
- c. People are litigious. There is a common saying that if someone is harmed, someone else is negligent because people just plain don't get hurt unless someone was negligent. There is an incentive for a complaining party to include as many possible responsible defendants as possible—and the deeper the pockets, the better. Frequently plaintiffs injured on lease sites will attempt to claim that the matter is governed by FELA or the Railway Labor Act because it is believed that the plaintiff's will have a better chance for a larger recovery.
- f. Because certain lessee activities do not meet the current criteria for new leases, as an alternative to terminating the lease, these lessees have been permitted to remain on the property provided that they obtain insurance coverage to cover the risks inherent with their businesses. In CP Rail's portfolio, by far the most common type of lease that falls into this category is bulk oil stations. These sites are small, low rent (often at our minimum) and invariably have caused impacts to the soil and water. Although bulk stations typically have above-ground tanks, the piping and loading/unloading areas are renown for leaks and although leaks are typically small, problems accumulate because it is not uncommon for these types of facilities to have been in existence for 50 or 75 years. Add to this scenario the fact that most bulk oil operators are smaller business, often a family-run operation, you can imagine the size of liability issue they pose for the railroad. Small revenue, big environmental impacts plus small proprietor equals big problem. The proposed law would essentially impose the responsibility for these sites to the railroad. Cumulative rents for such a site for 50 years might only be \$15,000. I've seen clean up projects for the same type of site exceeding \$100,000. CP Rail's current minimum rent is \$720 per year. We would have to rent the site for over 138 years to recover the cleanup costs. (This presumes that rent and cleanup costs would increase at the same rate). Even a modest cleanup effort can cost \$15,000, or 20 years worth of rent.

5. The bill unfairly singles out railroads and places restrictions on them for practices that are common in business and government.

- a. Indemnification of one party by another party isn't unique to railroad matters. I would venture to say that whenever a contract is drawn between two parties, liability is one of the topics covered and that there will be some sort of indemnification or release provision.

David S. Drach
Canadian Pacific Railway

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b. Indemnification of a Seller by a Buyer, or of a Landlord by a Tenant, is not the exception, it is the rule. Even government contracts require indemnification. The Railroad indemnifies landlords where the roles are reversed. It is a fact of business.

c. Where indemnification alone will not adequately address a particular issue, or indemnifying party has inadequate resources to fulfill the needed indemnification requirements, the common business practice is to obtain insurance to cover the risks. Virtually all business transactions of any significant size that I deal with require insurance – even if the parties are financially capable of absorbing any potential loss. The proposed bill would prohibit the use of insurance in most sales and leases.

d. Fundamental to our way of business is the notion that where sophisticated parties are involved and there is not a perceived harm to the general public, then government should loathe to interfere with the contracts between willing contractors. This law would be a significant departure from that commonly held belief in that it would significantly favor one set of parties without providing benefit to the public in general.

6. The harm that that it is assumed that the bill will cure has been miscalculated.

- a. Railroad property's primary purpose is to facilitate railroad operations. If a railroad can accommodate a third party and still preserve the needs of the railroad operations, then, and only then, a secondary use, such as a sale or lease, is possible.
- b. When a party wants to purchase or lease property from a railroad, they are of aware of the dangers and the railroads' requirements and they make a decision to agree to those terms. It is not a case of imposing onerous terms on a party without options (although there certainly may be cases where a party wants to change the terms after-the-fact).
- c. Contrary to a commonly held opinion, right of way property is not, without anything more, more prone to environmental problems than other commercial or industrial property. It is true that railroads have had environmental issues where there have been railroad activities that have impacted the environment, such as fueling depots. But property isn't necessarily more apt to have environmental problems simply because it is, or was, owned by a railroad.

When contemplating a sale of property, CP Rail's practice is to allow the prospective buyer the opportunity to assess the environmental condition of the property. This includes a historical review of the site plus often sampling. The buyer and the railroad may back out of the deal up to the very moment the sale closes if they believe it would be imprudent to conclude the transaction because of environmental concerns. In that event, the buyer gets their deposit returned. But, if the buyer closes upon the sale, then our standard terms provide that they take the property "as-is" and with "all

David S. Drach
Canadian Pacific Railway

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faults." Or, in other terms, they indemnify the railroad for environmental conditions on the property. It's not a situation that they don't know what they're getting into.

- d. It has been my experience that environmental impacts on sale property are more often the result of lessee activities or impacts from surrounding properties than railroad operations. Our current practices in respect to lessee activities are more rigorous than in years' past. We no longer will permit new leases for certain types of activities such as scrap metal storage, gasoline stations and bulk oil. Existing leases for these activities are scrutinized more than other types because they tend to cause more environmental impacts. Whenever impacts become known, CP Rail's practice is to ensure that the lessee is addressing it, or CP Rail will. It is preferable that the lessee address the concerns. Lessees can perform these efforts at a lower cost than the railroad can. Besides, the lessee can continue their business while the needed efforts are made.
- e. When possible, sometimes it is prudent for a lessee to purchase the railroad land to that has been environmentally impacted by their activities. As an owner of the land they can manage remediation efforts at a pace that is more economic to them, plus ownership makes it easier to justify investment in the property and their improvements and to obtain financing.
- f. Because the railroad has owner liability for the environmental conditions on the property, the proposed law would allow a lessee to contaminate a lease site and the railroad would be unable to hold contractually obligated to clean up their contamination.

7. The bill will have unintended results and it will likely harm lessees more than it will help them.

- a. Railroads, like other business, make rational and logical business decisions. Although there are synergies between operating a railroad and locating third parties on our property, our primary business is moving freight. Leasing and selling land is a secondary business to that primary purpose and everything that is associated with it. If a third party wants to locate upon railroad land, an admittedly dangerous environment, then the railroad has permitted them to do so, provided that they are accepting of those dangers. This notion is no different than being a spectator to a baseball game. There's a chance a spectator could get hit by a fly ball. The ballplayers don't try to hit fouls backward into the stands any more than railroads try to derail trains, but we all know that both happen.
- b. Clearly, if an endeavor doesn't make money, you can't afford to do it. Besides hard costs, such as out of pocket expenses or development costs, the risks involved must also be taken into consideration when evaluating the cost of an endeavor. Risk is a cost.

David S. Drach
Canadian Pacific Railway

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- c. The railroad could not afford to allow third parties onto our property without the existing liability and defense provisions.
- d. Because the railroad could not obtain indemnification from the lessee for the contamination that they caused, it would be unlikely that the purchase of the property would be option for the lessee to manage their environmental impacts to the property.

8. Conclusion:

Railroads aren't the big evil entities that sometimes it is tempting to paint them as. Like other businesses, railroads evaluate the benefits, costs and risks of business opportunities and make rational decisions based upon that appraisal. Like any other business, railroads can't afford to pursue opportunities where the costs exceed the benefits.

Railroads' primary business is to move trains. Third parties can be accommodated on railroad property if it can be done profitable without interfering with railroads' primary business. If sales or leasing of railroad property can't be accomplished without interfering with the railroads' primary business or upon terms that don't satisfy a risk vs. benefit analysis, then the rational decision would be to stop leasing or selling railroad property.

Contrary to what could be the presumed objective of the bill, the bill would actually have the harshest effect upon smaller businesses because these are parties who have small rentals, large risks and are financially unable to absorb the costs associated with those risks. If the railroad were to carry those costs, a measure of the value of doing so would be the premium charged by an insurance company. A business analysis of the proposal would dictate that the railroad increase rentals by the amount approximating the insurance premiums to offset the risk. If the tenants were unable to afford the increased rent, then the only option would be to terminate their leases and remove their improvements from the property because the railroad would be prohibited by this bill from obtaining the contractual indemnity that is necessary to allow a third party onto the railroad property or from requiring the third party to obtain insurance to cover the risks.

David S. Drach
Canadian Pacific Railway

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Subject: SB 2358 - Rail leases and indemnity provisions

From: Steve Strege <sstrege@ndgda.org>

Date: Fri, 14 Feb 2003 06:15:03 -0600

To: ttrenbea@state.nd.us, dmutch@state.nd.us, despegar@state.nd.us, rtaylor@state.nd.us, dbercier@state.nd.us

CC: Brian Bjella <bbjella@flecklaw.com>, Keith Brandt <efend@mlgc.com>

Gentlemen,

Thank you for your attention to the problems of railroad site lessees and others who have cost and liability problems with railroads. These North Dakota interests need relief, and SB 2358 provides that. Please contact our attorney Brian Bjella (223-6585), or me (800-342-4778), or our Association President Keith Brandt who testified (701-437-2400), if you have any questions or concerns. I can't be at the Capitol today, but Brian can be of assistance if needed.

SB 2358 boils down to two things - 1) the old 800 lb gorilla vs the 100 lb weakling story - there should be a referee (PSC) when the dominant railroad is dealing with the vulnerable site lessee, and 2) Railroads should be held accountable for their own negligent acts instead of shifting liability onto lessees or others.

I heard that one of the railroad lawyers testified they are seeking only a reasonable profit. Demanding \$50,000 for 3-4 land grant acres in small town North Dakota seems more than a little excessive. Requiring a local business to pay \$300,000 in damages and attorney's fees for a problem caused by a railroad's faulty equipment doesn't pass the fairness test.

Thank you.

Steve Strege, Exec VP
ND Grain Dealers Association
Fargo, ND
1-800-342-4778
fax: 701-235-1026

2-14-03

NORTH DAKOTA GRAIN DEALERS ASSOCIATION
PROPOSED AMENDMENTS TO SENATE BILL NO. 2358

Page 2, after line 9, insert:

3. Notwithstanding anything contained herein to the contrary, a railroad may require indemnification of and any shall not be liable for any loss, liability or damage to any purchaser, lessee, licensee or other contracting party, their employees, agents or invitees.

Renumber accordingly.

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Deanna Ballantyne
Operator's Signature

10/22/03
Date



**CANADIAN
PACIFIC
RAILWAY**

Real Estate

Suite 804
501 Marquette Avenue South
(55402)
PO Box 530 (55440)
Minneapolis Minnesota

Fax (612) 904-6147

February 20, 2003

Mr. Richard McDonald
3540 35th Street N.E.
Inkter, ND 58244

101-248-3654

Re: Senate Bill 2358 – Lease and Sale of Railroad Property in North Dakota

Dear Mr. McDonald:

Due to pending North Dakota Senate Bill No. 2358, Canadian Pacific Railway is suspending all negotiations involving leases and sales of property in the state. The proposed law, in essence, would void the indemnification language and insurance requirements that the railroad has deemed necessary to lease or sell its land.

If Senate Bill No. 2358 becomes law, we anticipate that negotiations for these types of transactions will be abandoned. Existing leases will be reviewed to determine whether it is prudent for the railroad to continue the leases and, if so, at what increased rental rates. For many lessees, the passage of the law will likely mean their leases must be terminated, and tenants will be asked to demolish and remove their improvements. It is unlikely that any future sales will be concluded.

Without attempting to argue the merits of the bill, Canadian Pacific Railway believes that the effects of the bill becoming law will be harsh for the railroad and its tenants, buyers, and customers. The railroads are recommending a study be conducted during the 2003-04 interim to identify any issues regarding indemnification, with findings being reported to the session scheduled for 2005. This study would be done without further restrictions. We urge you to review the proposed bill for yourself and, if you believe as we do that the bill should not be made law, to contact your state senator and representative to voice your opinion.

Sincerely,

John P. Nail
Director, Real Estate Marketing, U.S.

Enclosure

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60-06-06.1. Determination - Appropriation. Any party may petition the public service commission to determine rights governed under this chapter. The commission shall determine the matter in accordance with chapter 28-32 and the parties' rights of appeal are as limited by chapter 28-32. The commission shall conduct each hearing required under this section in the county where the right of way at issue is located. The parties to the determination proceeding shall pay the expense of the proceeding, the compensation of any experts, and actual expenses of any employees of the commission while engaged in the proceeding. The commission shall ascertain those costs and expenditures and, after giving the parties notice and opportunity to be heard, and after a hearing to determine the amount of cost and expenditures if a hearing is demanded by either of the parties, shall render a bill and make and transmit to the parties an order for payment by registered mail. Within ten days after receipt of the order, the parties shall pay to the commission the amount of the costs and expenses. The commission shall deposit all costs and expenses collected under this section in the general fund in the state treasury.

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NORTH DAKOTA GRAIN DEALERS ASSOCIATION

STEVEN D. STREGE, Executive Vice President
CHERYL WELLE, Executive Assistant
CONNIE LEIER, Administrative Assistant
Ph: 701-236-4184, Fax: 701-236-1038
118 Broadway, 808 Black Bldg., Fargo, ND 58102
Website: www.ndgda.org

LARRY PHILLIPS, Safety & Health Director
Ph: 701-251-9112, Fax: 701-251-1758
P.O. Box 8066, Jamestown, ND 58402-8066

STU LETCHER, Safety Specialist
Ph: 701-843-3110, Fax: 701-843-4183
P.O. Box 72, Hetton, ND 58240

February 28, 2003

TO: Members of the House Transportation Committee
FROM: Steve Strege, North Dakota Grain Dealers Association
RE: SB 2358 - railroad lease and indemnification

It has come to our attention that some legislators are hearing from railroads and/or constituents who've been contacted by their railroad, that if this bill is enacted some ominous consequences will follow. While acknowledging concern about what's being said, we ask that you reserve judgment until hearing the rest of the story. In a nutshell, this bill provides for PSC adjudication of disputes over railroad site leases, and places some of the liability for a railroad's at-fault acts on the railroad, where we believe it belongs. Nothing in this bill requires railroads to assume liability for acts other than their own.

SB 2358 received a unanimous Do Pass from the Senate Transportation Committee and passed the Senate 46-0 on February 20. On that very day a major railroad overnighted a letter to some of its lessees, saying it was "suspending all negotiations involving leases and sales of property in the state." The letter went on to say, "For many lessees, the passage of this law will likely mean their leases must be terminated, and tenants will be asked to demolish and remove their improvements." At least one grain elevator manager responded by telling that railroad he did not appreciate their "scare tactics," and reminding them that he is their customer.

This elevator, like many on any railroad in North Dakota, has spent hundreds of thousands or millions of dollars gearing-up to load larger trains more quickly to give the railroad more efficiency. This elevator, like many in North Dakota, provides millions of dollars of freight revenue each year to the railroad. These customers deserve better than an implication they may have to knock down their structures and get off the property.

We submit to you that this kind of railroad reaction is further testimony FOR SB 2358, that attempts to inject some balance into the railroad-lessee/property owner relationship. Our testimony on SB 2358 over on the Senate side can be found at www.ndgda.org. The Rural Electric Co-ops, League of Cities, ND Insurance Reserve Fund, and City of Mandan are also supporting this bill.

Copy: Senate Transportation Committee

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House Transportation Committee
S.B. 2358
Testimony of Jim Neubauer, City Administrator, City of Mandan
Thursday, March 13, 2003

Mr. Chairman, members of the Committee, my name is Jim Neubauer, I am the City Administrator of Mandan. I am here on behalf of Mayor Ken LaMont, who was unable to attend the hearing this morning and also representing the interests of its business community, as well as the City of Mandan.

As many of you may be aware, the City of Mandan has been dealing with a multi-million gallon diesel fuel spill which is resting on top of the groundwater 10 - 20 feet beneath approximately 40 acres of our main downtown business district. One of the adverse impacts of the diesel fuel spill has been a "leaching" of diesel fuel fumes and benzene into the basements and lower levels of several downtown businesses and one apartment complex. Several city employees and other private individuals have made adverse health claims. The BNSF signed a consent order in 1985 accepting responsibility for the presence of the fuel and for any costs and work associated with the clean up and remediation of the environmental disaster.

Currently the issue of the railroad's responsibility is the subject of two separate legal proceedings: an administrative action in the health department and a state district court action. Needless to say the legal process will be lengthy and costly. In the meantime, remediation efforts by the BNSF have ceased north of an imaginary line down the middle of our Main Street, for which BNSF now claims it has no responsibility.

The City of Mandan and many new independent businesses lease property on the south side of our Main Street from the BNSF. Early in 2002, BNSF sought to renegotiate the leases with the City. Our city attorney balked at many of the lease provisions, namely those requiring the city to indemnify the railroad against environmental damage or liability and those requiring the city to purchase insurance

Page 1 of 2

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extending coverage to the railroad and its employees, or agents for any personal injury or property damage that may occur on the railroad's right-of-way or the lease premises. We were able to convince the railroad to allow us to renew the existing leases, without the new "draconian" language.

However, the independent businesses have not been as successful in their attempts to negotiate out these onerous provisions, which attempt to pass the railroad's liability onto innocent lessees. The first two sections of SB 2358 directly address the language that we found so objectionable in the railroad's leases. I have to believe that other cities along the main lines have encountered similar problems with the lease language. We need your help to avert the forced assumption of liability for another's wrongdoing.

I understand that this bill was prepared at the request of the ND Grain Dealers Association, but I wanted you to know that its protection would benefit, not just the grain dealers, but cities, and small businesses. The protections provided by this bill, will assist Mandan in furthering its economic development. Our future growth depends on the small independent businesses. Your help would be greatly appreciated.

Page 2 of 2

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Railway rips land lease bill

Canadian Pacific freezes real estate transactions, encourages protest

By Steven P. Wagner
swagner@forumcomm.com

A letter sent to North Dakota grain dealers has Steve Struge worried about the industry's future.

Struge, the North Dakota Grain Dealers Association executive vice president, said a letter is a threat by the Canadian Pacific Railway.

The railroad suspended all real estate transactions, including the renewal of leases with elevators and other businesses along its tracks.

Canadian Pacific sent letters to about 25 businesses and encouraged managers to resist legislation regulating railroad leases. Last month, the senators passed the bill and referred it to the House, which has yet to take it.

The legislation would make the railroad responsible for their



Tony Clark
Public Service
Commissioner

letters sent to elevator managers.

"The railroad does appear to be overreacting to a fairly limited bill," Clark said. "It (the bill) makes sense. These negotiations are one-sided."

Canadian Pacific operates 473 miles of track in North Dakota and leases another 866 miles to short line railroads. About 800 entities lease land from the railroad.

The company says the legislation is unacceptable.

"The best description I can give you is terrible," Bergens said. "It has some huge ramifications for us and the people who do business with us, both to buy and lease our property."

The bill gives the PSC unlimited authority to change contract terms and the letters to elevator managers inform them how the bill could affect

they have to intimidate people."

With Canadian Pacific's letter, elevator managers appear divided on the bill after the Senate passed it, a reaction which Trembeath expects will spark new debates in the House.

"I don't think there's any question the House is going to make some revisions and it's heading to a conference committee," Trembeath said.

"There isn't anybody on our committee that feels this thing is in its final form."

their contracts, he said.

Burlington Northern Santa Fe owns and operates about 2,100 miles of track in the state. The railroad won't disclose its number of lessees or comment on the bill, BNSF spokesman Gus Maloukas said.

The Senate Transportation Committee heard testimony on the bill and gave it a "do pass" recommendation.

Those looking to lease or buy land from the railroad have a disadvantage when negotiating contracts, said committee chairman Sen. Thomas Trembeath, R-Cavalier.

"They're not able to walk away from it and therefore are forced to pay a higher price," he said. "You have very little chance to negotiate the lease."

EASE: Farmers could bear brunt of any extra costs

From Page A14

When those leasing railroad land, like elevators, have built gear or improved facilities. In some cases, lessees have put hundreds of thousands of dollars and can't walk away from the land, Trembeath said.

If the cost of storing grain increased by the price you pay for the lease on which the elevator sits, then that's going to be less for the farmer to take home," he said.

But it's not just farm-related

"It is a decreasing number of grain handlers and elevators that are affected by this and an increasing number of non-traditional businesses for the purposes of railroad right of way," Trembeath said.

In the bill's current form, railroad companies like Canadian Pacific will weigh risks with new contracts before working with North Dakota businesses, Bergens said.

Some lessees would have to indemnify Canadian Pacific before any new sales or lease

"If you're going to be there, you're going to have to assume full risk for being there," he said. "We run long, heavy trains, and it's possible there's a risk out there that there could be a derailment."

It's that possibility that prompted grain dealers to seek legislative support for contract negotiations.

"We're hearing from insurance companies," Struge said. "The types of risks the lessees are assuming aren't covered. They (railroad officials) are

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ENGROSSED SENATE BILL 2358

I. Introduction

- Brian Bjella
- representing North Dakota Grain Dealers Association

II. Sample indemnity provision in railroad lease:

"To the fullest extent permitted by law, lessee shall release, indemnify, defend and hold harmless lessor and lessor's affiliated companies, partners, successors, assigns, legal representatives, officers, directors, shareholders, employees and agents (collectively, "Indemnitees") for, from and against any and all claims, liabilities, fines, penalties, costs, damages, losses, liens, causes of action, suits, demands, judgments and expenses (including, without limitation, court costs, attorneys' fees and costs of investigation, removal and remediation and governmental oversight costs) environmental or otherwise (collectively "Liabilities") of any nature, kind or description of any person or entity directly or indirectly arising out of, resulting from or related to (in whole or in part):

- (i) This lease, including, without limitation, its environmental provisions;
- (ii) Any rights or interests granted pursuant to this lease;
- (iii) Lessee's occupation and use of the premises;
- (iv) The environmental condition and status of the premises caused by, aggravated by, or contributed in whole or in part, by lessee; or
- (v) Any act or omission of lessee or lessee's officers, agents, invitees, employees, or contractors, or anyone directly or indirectly employed by any of them, or anyone they control or exercise control over,

Even if such Liabilities arise from or are attributed to, in whole or in part, any negligence of any Indemnitee. The only Liabilities with respect to which lessee's obligation to indemnify the Indemnitees does not apply are Liabilities to the extent proximately caused by the gross negligence or willful misconduct of an Indemnitee."

What this means is that if there is an accident on leased property, even if the railroad is wholly responsible, the lessee must pay all damages.

III. Section 1 of bill

Prohibits railroad in a lease or other agreement from:

1. requiring the lessee to indemnify or defend the railroad for any loss or damage caused to third parties by the railroad
2. requiring the lessee to purchase insurance to provide coverage to the railroad for any loss or damage caused by the railroad
3. exempting or excusing the railroad from any loss or damage caused by the railroad

The sole purpose of this part of the bill is to make the railroad responsible for some of the damages and environmental harm that it causes.

To give an example, should an accident like the very serious anhydrous spill which occurred in Minot just over a year ago have occurred on property leased by an elevator, through the sole fault of the railroad; the elevator owner under the above indemnity provisions would be responsible for all property and environmental damages, including damage to railroad property, even though it was not at fault. This is how far-reaching these indemnity provisions are.

However, the Grain Dealers were still willing to make a significant concession by an amendment that was placed in the bill. We call your attention to page 2, line 13. In the testimony before the Senate Transportation Committee, the railroads argued that a person coming unto their property must accept some risk for being there. What this section says is that a person contracting with a railroad to use a right-of-way must accept the risk of damage to its property or injury to its employees; even when caused by the sole negligence of the railroad. Thus, what is left in the bill is that if the accident caused damages to the property of the railroad or to third parties (such as neighbors) the lessee would not be liable for those damages. This was a significant concession by the Grain Dealers, and should satisfy the concerns of the railroad about the lessee having to assume the risk of coming unto railroad property.

Colorado has a statute prohibiting a railroad from seeking indemnification for damages due to a fire caused by the railroad. North Dakota used to have a similar statute.

Other states have laws prohibiting railroads in certain contracts from requiring indemnification for their own negligence: the courts of Montana, Iowa, California and Maryland have upheld statutes prohibiting indemnification when the railroad was seeking to escape liability for its own negligence by virtue of the terms of a contract.

At the hearing before the Senate Transportation Committee, railroads also asserted that right-of-way users could obtain insurance to cover all of these liabilities. However, attached are two letters from insurance underwriters of right-of-way properties, indicating that the lessee cannot obtain insurance to cover all of the mandated liabilities.

The first letter is from an underwriter for grain elevators stating in part that "it is an incorrect assumption that the insurance contract will cover the indemnification of the railroad for their negligent acts." Also attached is a letter from the North Dakota Insurance Reserve Fund which provides insurance to political subdivisions in this state, some of which lease right-of-way from railroads. The letter states in part that "it has been NDIRF's observation that the insurance obligations imposed by railroad corporations drafting these agreements are duplicative and the indemnity provisions likely result in significant uncovered liability exposures for NDIRF members."

These letters are ample proof that lessees of railroad right-of-way, even when they obtain as much insurance as they can, retain significant uninsured liability exposure under these railroad indemnity provisions.

Section 1 of this bill would prohibit a railroad from passing some of its liability on to the lessee. It does not make the railroad liable for the negligence of the lessee, but only for some of its own actions.

IV. Section 3 of bill

Purpose is to give the Public Service Commission the authority to resolve disputes between right-of-way users and railroads in agreements. This would give the users a place to go to try to resolve disputes when the railroad refuses to negotiate contract terms. The bill covers anyone who has a right-of-way dispute with a railroad.

Once again, this bill is similar to laws in several other states. In recent years Iowa, Minnesota and Wisconsin have amended their statutes to give telephone and power cooperatives, utilities, and pipeline companies, a grievance procedure before their public utilities commissions when unable to obtain crossing permits from railroads on reasonable terms and prices.

Iowa's law also requires the railroad to bear responsibility for its own acts and omissions in crossing agreements (prohibits indemnification).

Just last year Nebraska passed a comprehensive statute empowering its Department of Agriculture to resolve disputes between railroads and their lessees over lease renewal terms, lease termination or sale of the leased property.

The Grain Dealers are requesting similar protection, by providing this grievance procedure before the Public Service Commission.

V. Conclusion

By now you have probably seen or heard about the letter one of the railroads wrote to many of its lessees stating that if the bill is passed, negotiations for the lease and sale of property will be abandoned. This is so typical of the way elevator operators have been treated by the railroad-conduct business on our terms or do not conduct business at all. This is a perfect example of why this legislation is needed, it's an attempt to try to level the playing field when dealing with railroads. The Grain Dealers urge your passage of Senate Bill 2358.

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Deanna Waller
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P.O. Box 2250 • Bismarck, North Dakota 58502 • N.D. Write: 1-800-421-1900 • Fax: 1-701-234-0800 • Local: 234-1900

February 18, 2003

Mr. Steve Stregg
Executive Vice President
ND Grain Dealers Association
118 Broadway, 606 Black Bldg.
Fargo, ND 58102

RE: SB 2358

Dear Mr. Stregg:

The NDIRF appreciates an invitation to provide our general views and express support regarding SB 2358 and railroad indemnity issues addressed in the bill.

NDIRF provides liability coverage to most political subdivisions in North Dakota. In that context, staff underwriters have reviewed a number of agreements between NDIRF members (usually cities or water districts) and railroad corporations. These agreements typically involve a license to cross railroad right of way for various projects.

In a nutshell, it has been the NDIRF's observation that the insurance obligations imposed by railroad corporations drafting these agreements are duplicative and the indemnity provisions likely result in significant uncovered liability exposures for NDIRF members. This situation is coupled with substantial initial and ongoing costs in obtaining the additional coverage and limits of liability required beyond what the NDIRF offers, to the extent they may even be available.

In our view, the limitations on railroad liability transfer contained in SB 2358 represent a significant positive step toward fairness and reduction of the costs and risks involved for local governments in North Dakota who need to complete civil projects across a railroad right of way.

Sincerely,

Steven L. Spilde
Chief Executive Officer
North Dakota Insurance Reserve Fund

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NORTH DAKOTA GRAIN DEALERS ASSOCIATION

STEVEN D. STREGE, Executive Vice President
CHERYL WELLE, Executive Assistant
CONNIE LEIER, Administrative Assistant
Ph: 701-238-4184, Fax: 701-238-1028
118 Broadway, 608 Black Bldg., Fargo, ND 58102
Website: www.ndgda.org

LARRY PHILLIPS, Safety & Health Director
Ph: 701-251-8112, Fax: 701-251-1758
P.O. Box 5055, Jamestown, ND 58402-5055

STU LETCHER, Safety Specialist
Ph: 701-843-3110, Fax: 701-843-4183
P.O. Box 72, Hatton, ND 58240.

SB 2358 HOUSE TESTIMONY House Transportation Committee -- March 13, 2003

Good morning Mr. Chairman and members of the House Transportation Committee. My name is Keith Brandt. I am President of the North Dakota Grain Dealers Association and the General Manager of Plains Grain and Agronomy at Enderlin, ND and three other nearby locations. Right now I am on the Canadian Pacific Railway. But most of my 25 years in the grain elevator business was spent at locations on the Burlington Northern Railroad at Galesburg, Mayville and Hunter.

Thank you Chairman Weisz for cosponsoring this bill. We asked for this bill so as to curb the railroads' abuse of its lessees and others it serves through high lease and site sale costs, and unconscionable liability shifting provisions in these agreements.

Our legal counsel, Brian Bjella, who wrote this bill, is here this morning to explain more about what we are trying to get at and how this bill would accomplish that.

Our Association and its members are generally free market thinking people. The railroad will no doubt say today that the market should determine lease rates, site costs and indemnity provisions. But what we have here is NOT a free market of several willing buyers and sellers. It is instead a railroad holding life or death powers over a business that, in many cases, located on the railroad's property to give the railroad business. The business entity made improvements to the property in the form of its own structures. But the location of those structures can now be used against the business by railroad demands that must be met, or it becomes a matter of getting off the railroad property.

This power over lessees and purchasers of railroad property has been displayed since this bill passed the Senate 46-0 on February 20. Immediately that very day the Canadian Pacific Railway sent some letters out saying negotiations on leases and sales were suspended and that some lessees might have to demolish their improvements and remove them from railroad property. Those we know of who received such letters thought it was pretty strong-armed tactics.

The Burlington Northern has been in and out of the site sale business over the past dozen years or so. At one point they were attempting to sell a certain number of sites each year. Then the emphasis shifted to raising the lease prices. The minimum was arbitrarily set at \$1,200 per year. Most elevators were paying more than that. Then when it came to selling the property, BNSF multiplied the annual lease cost by an arbitrary factor of 10. So if you were paying \$2,500 per year on a lease of two

-OVER-

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acres the sales price was automatically \$25,000. There didn't seem to be any relationship with surrounding property values. This leads to situations such as:

In a western North Dakota town a grain elevator is quoted a price of nearly \$50,000 for between three and four acres of property on which its facilities sit.

A different western North Dakota elevator, in an even smaller town along the BNSF, was quoted \$12,000 plus \$1,000 processing fee for less than two acres. He ended up buying the property for \$10,000 total. During this process he asked the railroad if he could pay for a third party appraiser. The railroad said no, it would put the value on the property. The elevator manager feels the property could possibly sell for a third of the value the railroad first put on it. The buyer receives a quitclaim deed and is responsible for having the property platted to have the legal description suitable for taxation.

A grain elevator in a small northeastern North Dakota town was quoted \$43,000 for the 2.5 acres its facilities sit on. This fellow actually did better than most, he got them down to \$21,000. This is yet another example of the railroad taking advantage of the shipper because they have him over the barrel.

Another eastern North Dakota elevator was asked \$31,000 for little over three acres. They got their quitclaim deed for a little under \$20,000. These quitclaim deeds release the selling railroad from any liability for latent defects, including the environmental condition of the property. But the railroad maintains mineral rights and the full right and privilege to remove them at anytime.

An oil company in northern North Dakota paid nearly \$300,000 in damages and attorneys' fees because of an accident caused by a sticky brake on the railroad's grain car.

The Canadian Pacific Railway has announced that repair to its main line switches leading into an industry will be that industry's responsibility, notwithstanding the fact that some of the wear on the switch is due to through traffic, not industry traffic. In addition, some or all track agreements allow the railroad to use the industry's track at will, thus creating more wear that the industry is expected to pay for. This can run into the hundreds of thousands of dollars.

You may have heard that there is an arbitration system under the National Grain and Feed Association to supposedly resolve these problems. But less than 1/3 of North Dakota grain elevators are members of that Association. And there are some inherent flaws in the arbitration process. For instance, arbitrators cannot change lease terms that have been unilaterally imposed by the railroad. So the only thing arbitable about these ridiculous indemnity clauses is whether they have been applied correctly. Secondly, depending on an arbitration system means going to that system time after time after time. We have told the BNSF it should remove these ridiculous clauses from their leases. They refuse. So that is why we come to you to try to remedy the situation in state law.

I will try to respond to any questions you may have. I would appreciate you allowing our legal counsel Mr. Bjella to be the next speaker here in favor of SB 2358. Thank you.

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10/22/03
Date

Lease No. >

THIS AGREEMENT, made and entered into as of the > day of >, 20>, by and between SOO LINE RAILROAD COMPANY, doing business as Canadian Pacific Railway, hereinafter called "Lessor," and >, of >, State of >, hereinafter called "Lessee,"

WITNESSETH:

1. The Lessor, in consideration of the payments, covenants and conditions hereinafter set forth, to be made, performed and complied with by the Lessee, hereby leases to the Lessee those certain premises situated at or near >, County of >, State of >, described as follows:

>

excepting and reserving all driveways now or hereafter laid out across said premises to provide access to other industries located on the Lessor's property;

TO HAVE AND TO HOLD, for the term of > (>) months from the date hereof, hereinafter referred to as the "Basic Term," and thereafter from month to month. Except as provided in paragraph 11 below, this lease shall be subject to termination at any time after the Basic Term by either party hereto upon thirty (30) days' written notice to the other. Upon such termination, the Lessor shall make proportionate refund to the Lessee of rental that shall have been paid in advance, after deduction of any amounts payable by the Lessee hereunder. *<If no automatic expiration after five years, delete the following sentence:* Notwithstanding the foregoing, this lease shall expire without any further action by either party on the fifth anniversary of the date hereof.

2. Any and all buildings and improvements, including all necessary machinery and appliances, shall be constructed, installed and maintained at the Lessee's sole expense, upon the leased premises in a manner satisfactory to the Lessor. The premises shall be continuously and exclusively occupied and used by the Lessee during the term of this lease as a site for such buildings and improvements and for the conduct upon the premises in an active and substantial way of >, or such other kind of activities as may be approved by the Lessor.

3. The Lessee shall pay the Lessor > and No/100 Dollars (\$>.00) per month,

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payable > in advance, as rental for the leased premises, <If CPI Inflater is not desired, delete the following clause: subject to increase as provided in subparagraph 4(C) hereof,> hereinafter referred to as the "Base Rent".

4. (A) The Lessee, in addition to the Base Rent, shall pay all taxes, assessments, license fees or other charges (except for special assessments for public improvements) which, during the term of this lease, shall be levied or assessed by, or which are payable to any state, municipal, county or federal authority for or against the whole or any part of the leased premises, including all improvements located thereon, or against the business conducted upon the premises. With respect to special assessments for public improvements which are levied or assessed or which are payable during the term of this lease, the annual rental hereunder as the same shall have been modified pursuant to reappraisal, if any, shall be increased by an amount equal to ten percent (10%) of the proportionate share of the total gross amount of such special assessments that is properly chargeable to the leased premises.

(B) The Lessee, in addition to the Base Rent, shall assume and pay the entire cost of installation, maintenance, repair and renewal of any crosswalks which have been or may be installed to provide exclusive driveway entrance to or exit from the leased premises. The Lessee shall at all times keep clean and free from snow, ice, refuse and obstructions, any such crosswalk and any sidewalk now located or to be located adjacent to the leased premises, and shall fully indemnify, hold harmless, and defend the Lessor from and against all Claims in any manner arising from or growing out of Lessee's failure to do so. Any maintenance or snow removal by Lessee shall be carried out in a manner that will not interfere with railroad operations on trackage adjacent to the leased premises.

<If CPI Inflater is not desired, delete the following Subparagraph (C).>

(C) The Base Rent shall hereafter be increased or decreased each billing date of this lease to an amount equal to the product of the Base Rent multiplied by the fraction of the "index" for the "comparison month" over the "index" for the "base month"; provided however, that in no event shall the Base Rent be less than the sum provided in paragraph 3 above. As used herein, the term "index" shall mean the "all items" group of the United States city average consumer price index (1982-84 = 100) issued monthly by the Bureau of Labor Statistics of the United States Department of Labor, or its successor. The term "comparison month" shall mean the month most recently preceding the billing date of this lease for which the "index" is available. The term "base month" shall mean >. The "index" for the "base month" will appear on the rental bill.

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5. The Lessee shall not place or permit any material, structure, equipment, pole, beam, cable, wire or other obstruction nearer than eight (8) feet six (6) inches horizontally (measured at right angles) from the center line of any railway track now or hereafter located upon or adjacent to the leased premises, or nearer than twenty-seven (27) feet vertically measured from the top of the rail; nor permit any excavation to be made or remain nearer than eight (8) feet six (6) inches horizontally from the center line of any such track; nor permit any pipes or facilities to be installed underneath the same without securing the advance written consent of the Lessor.

6. The Lessee shall, during the term of this lease, fully protect the leased premises from all mechanics' and materialmen's liens accruing by reason of the construction, maintenance, repair, replacement or renewal of any buildings or improvements of the Lessee located upon the leased premises, or the use or occupancy thereof by the Lessee.

7. The Lessee shall not permit any advertisements or signs upon the leased premises other than advertisements or signs relating strictly to the business which is being conducted thereon.

8. (A) The Lessee shall not permit the existence of any nuisance upon the leased premises and shall at all times keep the leased premises in a proper, clean, safe and sanitary condition, and free from brush, vegetation and accumulations of waste materials which may create a fire hazard.

(B) The Lessee shall not cause or allow the leased premises to be used for any purposes other than as herein authorized, or in any manner cause or allow the leased premises or any of the Lessor's adjacent property to become a hazardous waste treatment, storage or disposal facility within the meaning of, or to otherwise bring any such property within the ambit of the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 et seq. or any similar state statute or local ordinance.

(C) The Lessee shall be familiar with the requirements of, comply with, and secure at the Lessee's own expense any permits or licenses required by, all applicable laws, regulations, ordinances, and standards, including without limitation all Environmental Laws and the orders of any duly constituted public authority now or hereafter in effect which in any way govern or regulate the Lessee's occupancy or use

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of the leased premises, and shall at the Lessee's sole expense, make all improvements, alterations, repairs or additions, and install all appliances required by any such laws, regulations, ordinances or standards.

(D) The Lessee shall, upon written request by the Lessor, provide the Lessor with copies of transportation and disposal contracts and manifests for Hazardous Waste, any permits issued under any Environmental Laws, and any other documents demonstrating that the Lessee has complied with all Environmental Laws relating to the leased premises. Upon reasonable notice to the Lessee, Lessor and Lessor's beneficiaries, agents and employees shall have the right to enter the leased premises at any time and to conduct any inspections and tests deemed advisable by Lessor in order to determine Lessee's compliance with Environmental Laws.

(E) The Lessee shall not, without prior written disclosure to and approval by the Lessor, Use or authorize the Use of any Hazardous Substance on the leased premises, including installation of any above or underground storage tanks; subject thereto, the Lessee shall arrange at its own cost for the lawful transportation and off-site disposal of any and all Hazardous Substances that it shall Use or generate.

(F) The Lessee shall not cause or allow the Release or threat of Release of any Hazardous Substance on, to, or from the leased premises.

(G) The Lessee shall promptly notify the Lessor of any actual or suspected Release of any Hazardous Substance on, to, or from the leased premises, regardless of the cause of the Release.

(H) The Lessee shall promptly provide the Lessor with copies of all summons, citations, directives, information inquiries or requests, notices of potential responsibility, notices of violation or deficiency, orders or decrees, claims, causes of action, complaints, investigations, judgments, letters, notices of environmental liens or Response actions in progress, and other communications, written or oral, actual or threatened, from the United States Environmental Protection Agency, the United States Occupational Safety and Health Administration, or other federal, state or local agency or authority, or any other entity or individual, concerning (i) any Release of a Hazardous Substance on, to or from the leased premises, (ii) the imposition of any lien on the leased premises, or (iii) any alleged violation of or responsibility under any Environmental Law relating to the leased premises.

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(I) The Lessee shall promptly take all necessary action in Response to any Release or Use of a Hazardous Substance at the leased premises caused by, or attributable to, any act or omission of the Lessee (or the Lessee's employees, agents, representatives or invitees) that (i) gives rise to any Claim under any Environmental Law, (ii) causes a significant public health or workplace effect, or (iii) creates a nuisance.

(J) Following receipt of any notice, order, claim, investigation, information request, letter, summons, citation, or directive pursuant to subparagraph H of this paragraph 8 or in connection with any action taken pursuant to subparagraph I of this paragraph 8, Lessee shall notify Lessor of and permit Lessor to participate in any and all investigations, telephone conferences, settlement discussions, remediation plans and all other interactions, direct or indirect, with governmental or regulatory officials, and Lessee shall take all action necessary to ensure that any indemnification, release, or hold harmless agreement benefiting Lessee and arising out of such activities, whether from a governmental or regulatory entity or from a private entity, also benefits Lessor to at least the same extent as Lessee. Lessee acknowledges and agrees that a Release of any Hazardous Substance may impair the value of the leased premises and restrict future use of the leased premises notwithstanding the completion of any cleanup or remediation to the satisfaction of governmental or regulatory officials. Lessee agrees to compensate Lessor fully for any such diminution in value or restriction in use of the leased premises regardless of whether a cleanup or remediation action was performed to the satisfaction of governmental or regulatory officials. No provision of this subparagraph J shall be construed to limit or impair the indemnification provisions of paragraph 9, below.

9. (A) The Lessee acknowledges and agrees that the movement of railroad locomotives, trains or cars and the work incident to the maintenance of the right of way and track in close proximity to the leased premises involves some risk of injury to persons and damage to structures and property thereon by fire, vibration or smoke. As one of the material considerations of this lease, without which it would not be granted, the Lessee expressly assumes said risk and hereby releases and agrees to indemnify, hold harmless and defend the Lessor and its directors, officers, stockholders, divisions, agents, affiliates, subsidiaries, predecessors, successors and assigns, or anyone acting on its behalf or their behalf, from and against any and all Claims of every kind, past, present and future, existing and contingent, known and unknown, arising from any injury

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to persons, firms or corporations whomsoever (including the parties hereto and their employees, agents and invitees), including injuries resulting in death, and damage to property whatsoever (including property of the parties hereto), including structures and their appurtenances, equipment and appliances, except Claims arising under Environmental Laws, while such persons or property are on, about, or in the vicinity of the leased premises, and when such injury or damage has been caused by or is attributable to, in whole or in part, fire, vibration or smoke in connection with the Lessor's operation of locomotives, trains or cars, the Lessor's performance of railroad maintenance in the vicinity of the leased premises, or any other activity of the Lessee or the Lessor, except that Lessee's assumption of liability and its obligations hereunder shall not extend to damages to the premises of the Lessor, to rolling stock belonging to the Lessor or to others, or to shipments in course of transportation. The Lessee's obligations hereunder shall survive the termination or expiration of this lease.

(B) As one of the material considerations of this lease, without which it would not be granted, the Lessee hereby releases and agrees to indemnify, hold harmless and defend the Lessor and its directors, officers, stockholders, divisions, agents, affiliates, subsidiaries, predecessors, successors and assigns, or anyone acting on its behalf or their behalf, from and against any and all Claims arising under any Environmental Law, of every kind, past, present and future, existing and contingent, known and unknown, arising from any injury to persons, firms or corporations whomsoever (including the parties hereto and their employees, agents and invitees), including injuries resulting in death, and damage to property whatsoever (including property of the parties hereto), wherever such persons or property are located, caused by or attributable to, in whole or in part, any act or omission of the Lessee (or the Lessee's employees, agents, contractors, representatives, or invitees), including without limitation the Use or Release of Hazardous Substances by the Lessee and the breach by the Lessee of any of its warranties, representations or covenants. The Lessee's obligations hereunder shall survive the termination or expiration of this lease.

<If Lessee will not be required to maintain general liability insurance, delete the following Subparagraph (C).>

(C) The Lessee shall, at its sole expense, maintain comprehensive general liability insurance coverage which shall insure the Lessee against loss, with limits of liability of not less than \$1,500,000 combined single limit with respect to injuries to or death of one or more persons and damage to property in any one occurrence. Lessee shall require the companies insuring Lessee to waive all rights of subrogation which it may have as a result of any loss against Lessor or any other railway company. Lessee

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shall require the company issuing comprehensive general liability coverage to provide coverage for the risks covered by the indemnity provisions herein, or which Lessee contractually assumes in this agreement, for the benefit of Lessor. Lessee shall also name Lessor as an additional insured and provide a certificate of insurance to Lessor evidencing the coverages required above and further providing that such insurance shall not be canceled by the insured or the insurer on less than ten (10) days' advance written notice to Lessor.

10. (A) The Lessee shall not dispose of or remove any buildings or improvements located upon the leased premises without first obtaining the written consent of the Lessor and paying all rent, taxes, assessments, license fees or other charges which may be due hereunder.

(B) When any rent, taxes, assessments, license fees or other charges payable hereunder are past due, the Lessor shall have and is hereby granted a lien therefore upon the buildings and improvements of the Lessee located upon the leased premises, including appliances, and upon thirty (30) days' written notice to the Lessee may take possession of and sell the same and apply the proceeds against such past due indebtedness.

11. If the Lessee shall at any time fail to perform or comply with any of the terms, covenants or conditions of this lease, and such default continues for a period of ten (10) days after written notice thereof by the Lessor to the Lessee, then the Lessor may declare this lease at an end and forthwith re-enter and take absolute possession of the leased premises. Notwithstanding the foregoing, if the Lessee shall default on its obligation to make any payment required under this lease, the Lessor may immediately declare this lease at an end and forthwith re-enter and take absolute possession of the leased premises without advance notice to the Lessee.

12. If required by the Lessor to do so upon termination of this lease for any reason, the Lessee shall promptly remove all of Lessee's buildings, improvements and property then located upon the leased premises, fill up all excavations that may have been made, and surrender complete possession of the premises to the Lessor, in a condition satisfactory to the Lessor. Should the Lessee fail to make such removal or restoration, the Lessor, at its election, may either remove the Lessee's buildings, improvements and property and restore the leased premises to substantially their former state at the sole expense of the Lessee, or may retain the Lessee's buildings, improvements and property as the Lessor's sole property.

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13. Any notice of termination or other notice given by the Lessor hereunder, shall be good if served upon the Lessee, or if deposited in a United States post office, certified mail, addressed to the Lessee at the last known address of the Lessee.

14. This lease shall not be assigned or in any manner transferred by the Lessee, voluntarily or involuntarily, by operation of law or otherwise, or the leased premises or buildings thereon sublet, used or occupied for the conduct of any business by any third person or corporation, or for any purpose other than herein authorized, without the advance written consent of the Lessor. Any attempted or purported assignment, transfer, or sublease by the Lessee without such consent shall be void. Subject thereto, this lease shall inure to the benefit of, and be binding upon the heirs, executors, administrators, successors and assigns of the respective parties.

15. This lease and all provisions thereof shall be subject to revision at any time if made necessary by any order or finding of the Surface Transportation Board, state authorities, or other authorities having jurisdiction.

16. The Lessee agrees that after termination of the lease by either party for breach of any provision of said lease by the Lessee or for any other reason, Lessee shall continue to pay to the Lessor, at the rate in effect on the date of termination, rental for any period of time after said termination during which Lessee remains in possession of the leased premises or during which any buildings or personal property of Lessee remain on said leased premises unless Lessor has notified Lessee that Lessor has exercised the option granted pursuant to paragraph 12 above to retain such buildings and/or personal property as Lessor's sole property.

17. The Lessee covenants and agrees that it will pay and discharge and indemnify the Lessor for and against any and all losses, costs, damages and expenses (including reasonable attorneys' fees and legal expenses of the Lessor) incurred by the Lessor by reason of any breach by the Lessee of any of the terms, conditions or provisions contained in this lease. The Lessee's obligations hereunder shall survive the termination or expiration of this lease.

18. The Lessor does not warrant title to the leased premises, and makes no representations or warranties, express or implied, as to the habitability of the leased premises or the fitness of the leased premises for Lessee's purpose or any other

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particular purpose.

19. Each provision, paragraph, sentence, clause, phrase, and word of this lease shall apply to the extent permitted by applicable law and is intended to be severable. If any provision, paragraph, sentence, clause, phrase or word of this lease is illegal or invalid for any reason whatsoever, such illegality or invalidity shall not affect the legality or validity of the remainder of the lease.

20. This agreement completely outlines all of the rights, responsibilities, and obligations of the parties hereto and said lease agreement may not be amended or altered except by an instrument in writing signed by both parties. Furthermore, this lease agreement merges all prior oral representations and negotiations of the parties hereto.

21. (A) "Claim" or "Claims" means any and all liabilities, suits, claims, counterclaims, causes of action, demands, penalties, debts, obligations, promises, acts, fines, judgments, damages, consequential damages, losses, costs, and expenses of every kind (including without limitation any attorney's fees, consultants' fees, response costs, remedial action costs, cleanup costs and expenses which may be related to any Claims);

(B) "Environmental Law" or "Environmental Laws" means the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9601 et seq., the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 et seq., the Federal Water Pollution Control Act, 33 U.S.C. § 1251 et seq., the Clean Water Act, 33 U.S.C. § 1321 et seq., the Clean Air Act, 42 U.S.C. § 7401 et seq., the Toxic Substances Control Act, 15 U.S.C. § 2601 et seq., all as amended from time to time, and any other federal, state, local or other governmental statute, regulation, rule, law or ordinance dealing with the protection of human health, safety, natural resources or the environment now existing or hereafter enacted;

(C) "Hazardous Substance" or "Hazardous Substances" means any pollutant, contaminant, hazardous substance or waste, solid waste, petroleum product, distillate, or fraction, radioactive material, chemical known to cause cancer or reproductive toxicity, polychlorinated biphenyl or any other chemical, substance or material listed or identified in or regulated by any Environmental Law;

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(D) "Release" or "Released" means any actual or threatened spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, disposing or spreading of any Hazardous Substance into the environment, as "environment" is defined in CERCLA;

(E) "Response" or "Respond" means action taken in compliance with Environmental Laws to correct, remove, remediate, cleanup, prevent, mitigate, monitor, evaluate, investigate, assess or abate the Release of a Hazardous Substance;

(F) "Use" means to manage, generate, manufacture, process, treat, store, use, re-use, refine, recycle, reclaim, blend or burn for energy recovery, incinerate, accumulate speculatively, transport, transfer, dispose of, or abandon a Hazardous Substance.

IN WITNESS WHEREOF, the parties hereto have caused this lease to be duly executed, as of the day and year first above written.

SOO LINE RAILROAD COMPANY

By

Director, Real Estate Marketing,

U.S.

>

By

Its

Not Assignable Without Consent

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NOT TO BE RECORDED IN PUBLIC RECORDS

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HB 2358
House Transportation

Section 5: Contracts and Agreements

This section includes:

Quick Tips

5.1 Introduction

- Screening Contractors
- Safety Requirements for Bid Specifications and Contracts
- Spoliation – Notice of Potential Claim Clause
- Indemnification/Hold Harmless Clauses
- Additional Insureds
- Insurance Clauses

5.2 Special Use Agreements

- Facilities Use Agreements
- Waivers of Liability

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Contractual Risk Transfer Through Indemnification/Hold Harmless Clauses

Contractual risk is generally transferred with an indemnification/hold harmless clause. The purpose of the clause is to define who pays when a third party makes a claim for damages arising out of the work performed under the contract. The party that exercises the most control over the activities governed by the contract is in the best position to enforce safety and loss control practices and should, therefore, be responsible for any injuries or damages arising from those activities.

Future agency contributions to the Risk Management Fund are based on actual losses incurred as well as costs incurred to defend any losses. This, of course, includes losses and costs related to claims arising from services provided by contractual agreements. By not implementing an in-depth analysis of the cost and benefit ratio of all agency agreements and incorporating the appropriate indemnification language into the agreement, the agency may adversely impact its required contributions.

The analysis should also address the fact that the Risk Management Fund cannot, by law, defend or pay settlements or judgments on behalf of any parties other than the State, a State entity, or a State employee. Therefore, when determining the appropriate indemnification language, agencies must remember that if the agency were to sign a contract agreeing to indemnify a private third party, or a political subdivision, the Risk Management Fund would not be able to defend or pay any settlement or judgment on behalf of that third party. Any such cost would be the sole expense of the contracting agency.

Indemnification/hold harmless clauses will assist agencies in addressing potential exposures and should be used in conjunction with insurance clauses (see pages 5.1-13 through 5.1-23 of this Manual). With rare exceptions, the State should require all contractors to indemnify the State and hold it harmless for losses arising out of the contractor's work for the State.

For our purposes, there are four basic forms of indemnification/hold harmless language:

1. *Limited:* Each party agrees to assume liability and expenses (e.g., defense and investigation costs) for their own acts. This is essentially the same as the liability that would exist under common law, but it is specified in the agreement.

2. *Intermediate*: Requires Contractor to be responsible for its own liability and the joint liability of the Contractor and the State. This is probably the most commonly used form of an indemnification clause.

3. *Broad*: Requires Contractor to be responsible for all liability arising out of the project (including the sole liability of the State.) The broad form language has been declared against public policy in some jurisdictions and is not commonly used.

4. *Inter-governmental* form for "unique" circumstances: This fourth form is a variation of the basic forms that may also be appropriate in certain circumstances. As discussed below, for certain "unique" agreements between a state agency and a political subdivision, we recommend use of an indemnification/hold harmless clause that requires each party to assume liability for its own acts but requires one party to be responsible for the expenses, including defense and investigation costs, for the joint liability of the parties. This is a combination of the limited and intermediate clauses and may be appropriate for the limited circumstances discussed below. We will refer to this form as the *inter-governmental* form.

▪ **Indemnity Provisions for Professional Services Agreements.** Page 5.1-16 explains the Risk Management Division recommendation that professional liability coverage (errors and omissions) should be an additional insurance requirement in a service agreement when special intellectual ability is needed rather than strict physical activity. *The question may arise that, if professional liability coverage is required under a contract, does the intermediate indemnity provision require revision.* No, it does not. If a claim covered by the commercial general liability (CGL) policy occurs due to the contractor's activities, its CGL policy will respond. If the claim is covered by its errors and omissions coverage, the professional liability policy will respond.

Recommended Indemnification Wording for Contracts

In general, the *limited* indemnification form is recommended for inter-agency and routine political subdivision agreements; the *inter-governmental* indemnification form for the "unique" (defined below) political subdivision agreements; and the *intermediate* indemnification form for contracts with private persons or entities.

those requirements must be attached as an addendum to the contract. The addendum must be signed by all parties to the agreement.)

The examples include two different versions of the *inter-governmental* indemnification clause to be used in "unique" agreements with political subdivisions. One version is to be used when there is no subcontractor involved in the agreement. The second version is to be used when a subcontractor will perform most of the activities under the contract. (Note: These clauses may need modification of the names of the parties used to be consistent with the names used in the lease or other contract in question.)

Leases

Inter-agency and routine political subdivision lease agreements (limited form): Lessor and Lessee each agrees to assume its own liability for any and all claims of any nature including all costs, expenses and attorneys' fees which may in any manner result from or arise out of this agreement.

***Leases involving political subdivisions when unique circumstances arise (inter-governmental form):** Landlord (or Tenant) agrees to defend, indemnify, and hold harmless the state of North Dakota, its agencies, officers and employees (State), from any and all claims of any nature, including all costs, expenses and attorneys' fees which may in any manner arise out of or result from this agreement, except claims resulting from or arising out of the State's sole negligence. The legal defense provided by Landlord (or Tenant) to the State under this provision must be free of any conflicts of interest, even if retention of separate legal counsel for the State is necessary. Landlord (or Tenant) also agrees to defend, indemnify, and hold the State harmless for all costs, expenses and attorneys' fees incurred in establishing and litigating the indemnification coverage provided herein. This obligation shall continue after the termination of this agreement.

Leases involving private firms or individuals (intermediate form): Landlord (or Tenant) agrees to defend, indemnify, and hold harmless the State of North Dakota, its agencies, officers and employees (State), from any and all claims of any nature, including all costs, expenses, and attorneys' fees, which may in any manner result from or arise out of this agreement, except for claims resulting from or arising out of the State's sole negligence. The legal defense provided by Landlord (or Tenant) to the State under this provision must be free of any conflicts of interest, even if retention of separate legal counsel for the State is necessary. Landlord (or Tenant) also agrees to defend, indemnify, and hold the State harmless for all costs, expenses and attorneys' fees incurred in establishing and litigating the indemnification coverage provided herein. This obligation shall continue after the termination of this agreement.

Contractor to the State under this provision must be free of any conflicts of interest, even if retention of separate legal counsel for the State is necessary. Contractor also agrees to defend, indemnify, and hold the State harmless for all costs, expenses and attorneys' fees incurred in establishing and litigating the indemnification coverage provided herein. This obligation shall continue after the termination of this agreement.

Insurance Requirements for Contractors

While the indemnification/hold harmless clause is very important, it should not be the only protection required in contracts. Some courts have declared indemnification clauses invalid for a variety of reasons.

Even when the clause is valid, the State still faces the risk of the contractor being insolvent, uninsured, or otherwise unable to pay claims. Therefore, all contractors, with certain limited exceptions, should be required to maintain reasonable insurance coverage and provide written proof of this protection.

The Fund strongly recommends that the State make sure the Contractor has provided all the appropriate written proof of insurance coverage and additional insured documentation. "Written proof" consists of certificates of insurance and endorsements to policies. These items will be discussed in further detail later in this Chapter. Obtaining and reviewing such paperwork is a very important step in ensuring that all the required coverages are in place. Contact the Risk Management Division at (701) 328-6514 if you have questions regarding the written proof of coverage.

The insurance clauses found in many contracts may use outdated language with no defined meaning in the insurance industry. The terms "public liability insurance" and "comprehensive liability insurance" are two common examples. In addition, policy limits generally are no longer split separately for the number of persons involved in an occurrence, for bodily injury versus property damage liability, and so on. Most policies now have a combined single limit per occurrence and, in the case of general liability, an annual aggregate limit. To prevent disputes, insurance requirements in contracts should be as specific as reasonably possible or should be defined. Common definitions of many insurance terms are found in Section 10 of this Manual.

The specific coverages and limits required will vary, depending on the nature of the contract. When possible, the State should require limits of coverage of its contractors that are higher than the State's own \$250,000 per person and \$1,000,000 per occurrence exposure. A higher requirement

provides additional protection for both the State and the contractor in the event of a loss, since the coverage is shared by both parties when the State is an additional insured. Also, aggregate limits can be impaired by *other* operations of the contractor, so the higher the limits, the better.

The term "insurance" as used throughout this section is a short hand reference that includes coverage provided through government self-insurance pools and government self-retention funds. Similarly, "certificates of insurance" requirements can be provided by memorandum of coverage documentation.

Additional Insureds

Some of the recommended insurance provisions found in this Chapter, starting at page 5.1-13, require the state of North Dakota and its agencies, officers, and employees be included as "additional insureds" under the policies of others. There is probably more confusion and misunderstanding about this contractual risk transfer method than any other. Entire books have been written about this topic, but here are the key points to keep in mind when drafting insurance clauses in contracts:

- "Additional insured" status means the State is considered an "insured" party on the insurance policy (usually the general liability or umbrella/excess liability policy) of another person or entity who is the "named insured."
- It generally is not possible — or desirable — to be an "additional named insured" because named insureds have duties to pay premiums, report claims, and so on.
- The purpose of the additional insured status is to obtain rights to defense and indemnity coverage from the insurance company of the other party to the contract without having to look to the State's own funding sources. When combined with a specific insurance requirement clause, it serves to strengthen the financial responsibility of the other party.
- The other party's insurance policy must be specifically endorsed to add the State as an "additional insured." Merely obtaining a certificate of insurance to this effect does not guarantee that the endorsement has been issued, so it is best to obtain a copy of the actual policy endorsement whenever possible. Examples of the certificate of

insurance form and the endorsement form are found on pages 5.1-24 and 5.1-25 of this Manual for your reference.

- The "additional insured" endorsement *should* (but often, in insurance industry practice, does not) specify:

1. The full legal name of the additional insured; i.e., the state of North Dakota, its agencies, officers and employees;
2. The specific location or operations for which the coverage applies;
3. The time frame of when the coverage begins and ends — in some cases, coverage should continue beyond the life of the contract;
4. That a 30-day (or whatever number of days is agreed to) notice of modification or cancellation will be provided to the additional insured at a specified name and address;
5. That the insurance company waives any right of recovery it may have against the State. This is necessary since an additional insured is a third party to the policy contract; it provides no consideration to the insurer and, therefore, may be subject to subrogation;
6. That the coverage required under this agreement shall be primary for the State and shall not be affected by any other insurance or coverage obtained by the State on its own behalf;
7. That cross liability/severability of interest coverage is provided; and
8. The legal defense provided to the State under the policy must be free of any conflicts of interest, even if retention of separate legal counsel for the State is necessary.

Ideally, these items should be included in the insurance requirements of State contracts. Policy limits and scope of coverage applicable to the additional insured can be modified in the policy endorsement, as long as it is consistent with the terms of the contract. Many of the problems that arise in this area would be prevented if insurance companies would include these elements on all of the additional insured endorsements they issue and if contracting parties would require them in their contracts.

- Some insurers issue a "blanket additional insured" endorsement intended to include any person or organization that the named insured contractually agrees to add. The State will have to evaluate such endorsements on a case-by-case basis to ensure compliance with the contract.

Recommended Insurance Clauses for use in Common Types of Contracts

The insurance required in the contract varies, depending on the nature of the work being performed. For example, agreements for work involving the use of vehicles by contractors should require the contractor to carry automobile liability insurance in addition to general liability and workers' compensation. When the contractor's primary duties under the contract requires the use of a commercial vehicle, the State should be named as an additional insured under the contractor's automobile liability coverage.

The following are examples of insurance clauses that can be used in leases and other routine or low-risk contracts. (Note: In accordance with N.D.C.C. 32-12.2-13, when an agency chooses to use those clauses marked with an asterisk, the clauses and an explanation of the consideration for the use of those requirements must be attached as an addendum to the contract signed by all parties to the contract. See pages 5.1-6, 5.1-7, and 5.1-8 of this Section for discussion on this requirement in accordance with the revision to the State Tort Claims Act.) (Also note: These clauses may need modification of the names of the parties to be consistent with the remainder of the contract in question.)

Leases

Inter-agency lease agreements: Lessor and Lessee each shall secure and keep in force during the term of this agreement, from an insurance company, government self-insurance pool or government self-retention fund authorized to do business in North Dakota, commercial general liability insurance with minimum limits of \$250,000 per person and \$1,000,000 per occurrence.

Routine political subdivision lease agreements: Landlord (or Tenant) shall secure and keep in force during the term of this agreement, from insurance companies or a government self-insurance pool authorized to do business in the state of North Dakota, the following insurance coverages covering Landlord (or Tenant) for any and all claims of any nature arising out of this agreement:

- 1) commercial general liability with the minimum liability limits of \$250,000 per person and \$500,000 per occurrence.
- 2) Workers' compensation coverage meeting all statutory requirements.
- 3) Property insurance insuring the full and true value of all Landlord's (or Tenant's) real and personal property located on or in the building in which the leased premises are located for all losses.

The insurance coverages listed above must meet the following additional requirements:

- 1) Any deductible or self insured retention amount or other similar obligation under the policies shall be the sole responsibility of the Landlord (or Tenant). The amount of any deductible or self retention is subject to approval by the State.
- 2) This insurance may be in policy or policies of insurance, primary and excess, including the so-called umbrella or catastrophe form and must be placed with insurers rated "A" or better by A.M. Best Company, Inc., provided any excess policy follows form for coverage. The policies shall be in form and terms approved by the State. "Follows form" means the excess policy must be written with the same terms and conditions as the policy to which it is excess.
- 3) Landlord (or Tenant) shall furnish to State a certificate of insurance evidencing the required coverages are in effect and providing that the coverages may not be canceled or modified without thirty (30) days prior written notice to State.
- 4) Failure to provide insurance as required in this agreement is a material breach of contract entitling State to terminate this agreement immediately.

Leases involving private firms or individuals and *Leases involving political subdivisions when unique circumstances arise (Inter-governmental form): Landlord (or Tenant) shall secure and keep in force during the term of this agreement, from insurance companies or a government self-insurance pool authorized to do business in the state of North Dakota, the following insurance coverages covering Landlord (or Tenant) for any and all claims of any nature arising out of this agreement:

- 1) commercial general liability, including contractual coverage, with minimum liability limits of \$250,000 per person and \$1,000,000 per occurrence.
- 2) Workers' compensation coverage meeting all statutory requirements.
- 3) Property insurance insuring the full and true value of all Landlord's (or Tenant's) real and personal property located on or in the building in which the leased premises are located for all losses.

The insurance coverages listed above must meet the following additional requirements:

- 1) Any deductible or self insured retention amount or other similar obligation under the policies shall be the sole responsibility of the Landlord (or Tenant). The amount of any deductible or self retention is subject to approval by the State.
- 2) This insurance may be in policy or policies of insurance, primary and excess, including the so-called umbrella or catastrophe form and must be placed with insurers rated "A" or better by A.M. Best Company, Inc., provided any excess policy follows form for coverage. The policies shall be in form and terms approved by the State. "Follows form" means the excess policy must be written with the same terms and conditions as the policy to which it is excess.

- 3) The State will be defended, indemnified, and held harmless to the full extent of any coverage actually secured by the Landlord in excess of the minimum requirements set forth above. The duty to indemnify the State under this agreement shall not be limited by the insurance required in this agreement.
- 4) The State of North Dakota, its agencies, officers and employees (State) shall be endorsed on the commercial general liability policy, including any excess policies (to the extent applicable), as additional insureds. The State shall have all the rights and coverages as Landlord under said policies. The additional insured endorsement for the commercial general liability policy shall be written on terms equivalent to the ISO 1985 CG 20 10 form, or other form as approved by the State, and shall not limit or delete State's coverage in any way based upon State's acts or omissions.
- 5) The insurance required in this agreement, through a policy or endorsement shall include:
 - a. a "Waiver of Subrogation" waiving any right of recovery the insurance company may have against the State;
 - b. a provision that the policy and endorsements may not be canceled or modified without thirty (30) days' prior written notice to the undersigned State representative;
 - c. a provision that any attorney who represents the State under this policy must first qualify as and be appointed by the North Dakota Attorney General as a Special Assistant Attorney General as required by N.D.C.C. § 54-12-08;
 - d. a provision that Landlord's (or Tenant's) insurance coverage shall be primary (i.e., pay first) as respects any insurance, self-insurance or self-retention maintained by the State and that any insurance, self-insurance or self-retention maintained by the State shall be excess of the Landlord's (or Tenant's) insurance and shall not contribute to it;
 - e. cross liability/severability of interest coverage for all policies and endorsements.
- 6) The legal defense provided to the State under the policy, and any endorsements, must be free of any conflicts of interest, even if retention of separate legal counsel for the State is necessary.
- 7) Landlord (or Tenant) shall furnish a certificate of insurance and all endorsements, including the additional insured endorsement, to the undersigned State representative prior to the commencement of this agreement.
- 8) Failure to provide insurance as required in this agreement is a material breach of contract entitling State to terminate this agreement immediately.

In cases where the Landlord or Tenant or its insurance company refuses to include the State as an additional insured, and the agency still intends to contract with the Landlord or Tenant, the following coverage should be required:

Landlord (or Tenant) shall secure and keep in force during the term of this agreement, from insurance companies or a government self-insurance pool authorized to do business in the state of North Dakota, the following insurance coverages covering Landlord (or Tenant) for any and all claims of any nature arising out of this agreement:

- 1) commercial general liability, including contractual coverage, with the minimum liability limits of \$250,000 per person and \$1,000,000 per occurrence.
- 2) Workers' compensation coverage meeting all statutory requirements;
- 3) Property insurance insuring the full and true value of all Landlord's (or Tenant's) real and personal property located on or in the building in which the leased premises are located for all losses.

The insurance coverages listed above must meet the following additional requirements:

- 1) Any deductible or self insured retention amount or other similar obligation under the policies shall be the sole responsibility of the Landlord (or Tenant). The amount of any deductible or self retention is subject to approval by the State.
- 2) This insurance may be in policy or policies of insurance, primary and excess, including the so-called umbrella or catastrophe form and must be placed with insurers rated "A" or better by A.M. Best Company, Inc., provided any excess policy follows form for coverage. The policies shall be in form and terms approved by the State. "Follows form" means the excess policy must be written with the same terms and conditions as the policy to which it is excess.
- 3) Landlord (or Tenant) shall furnish to State a certificate of insurance evidencing the required coverages are in effect and providing that the coverages may not be canceled or modified without thirty (30) days prior written notice to State.
- 4) Failure to provide insurance as required in this agreement is a material breach of contract entitling State to terminate this agreement immediately.

Service/Professional Agreements

The question often arises whether or not professional liability coverage (errors and omissions) should be required when drafting a service agreement. The general rule is when special intellectual ability is needed rather than strict physical activity, professional errors and omissions coverage is required. *If it is determined that professional errors and omissions is not required for the contract you are drafting, omit the second paragraph referencing Professional errors and omissions coverage in the Required Coverages portion listed below.*

In the case of professional liability insurance, it is usually not possible or desirable for the State to be an additional insured on the policy, nor will the policy cover liability assumed in a contract. However, general and automobile liability coverage should be required in most contracts involving professional services.

Inter-agency Service agreements: Grantor and Grantee each shall secure and keep in force during the term of this agreement, from an insurance company,

MEMORANDUM

**TO: Senator Tom Trenbath, Chair, Senate Transportation Committee
Representative Robin Weisz, Chair, House Transportation Committee**
FROM: North Dakota Grain Dealers Association
DATE: April 3, 2003
IN RE: Engrossed Senate Bill 2358 with House Amendments

The North Dakota Grain Dealers Association is most appreciative of your efforts in the passage of SB 2358 in both the Senate and the House. As you are aware, the House made substantial amendments to the Bill. The North Dakota Grain Dealers Association respectfully requests that a conference committee be appointed for the following reasons:

1. On page 2, line 9, the word "not" appears. This word was not found in the House amendments and changes the whole tenor of this section from saying what the railroad can require to what it cannot require.
2. To be consistent with language on page 2, line 13; on page 2 lines 18 and 23, change "personal" to "bodily." The word "bodily" is correct insurance language, as "personal injury" means things such as false arrest and invasion of privacy.
3. We believe a small, but substantive change is needed on page 2, line 24, by deleting the word "to" and inserting "suffered by." The purpose for this is to make clear that it is damages suffered by the lessee that the railroad is being indemnified for. In addition, on line 25, there should be a comma after the word "property."
4. See subsection 4 of Section 1 as found beginning on page 3, line 4. As we understood the conversation of House Transportation Committee members, this section was suppose to state that with regard to environmental liability, each party was to take responsibility for any environmental harm it caused. However, we do not believe the language states this and seems ambiguous. We would suggest the following wording:
Each party to the agreement shall be responsible for all liability resulting from the environmental condition and status of the property to the extent caused by, aggravated by, or contributed to by that party.
5. On page 4, line 22, the words "real estate" should be stricken in order to be consistent with the language in Section 1 (page 1, lines 10 and 11).

Thank you for your consideration of the foregoing matters.

Page 1

Deanna Stalder
Operator's Signature

10/22/03
Date

MEMORANDUM

**TO: Senator Tom Trenbeath, Chair, Senate Transportation Committee
Representative Robin Weisz, Chair, House Transportation Committee**
FROM: North Dakota Grain Dealers Association
DATE: April 8, 2003
IN RE: Engrossed Senate Bill 2358 with House Amendments

At the hearing before the House Transportation Committee, Representative Weisz suggested that the parties should have the bill reviewed by insurance specialists. The North Dakota Grain Dealers Association has had the bill reviewed by the underwriter for most of the insurance written for elevators in North Dakota. While several comments were made, the following highlight the two most important provisions:

1. As detailed in our April 3, 2002, Memorandum, a small but substantive change is needed in page 2, lines 23 and 24 for the purpose of making clear that it is damage suffered by the lessee that the railroad is being indemnified for. A few more words need to be deleted. On page 2, line 23, the last "and" should be deleted, and on line 24, the words "liability to" should be deleted and the words "suffered by" inserted.
2. The bill as currently written would require elevators to pay for injury to railroad employees caused by the railroad. While the elevators certainly agree that they should pay for any harm they cause to railroad employees, they strenuously object to paying for harm caused to railroad employees by the railroad. It is the railroad's duty under federal law to provide a safe workplace for their employees. The elevators should not be forced to pay for a railroad's violation of that duty. As a result, we suggest that on page 2, that lines 9 through 11 be deleted and the following inserted:

"Except for liability under the Federal Employers Liability Act, 45 U.S.C. 51 et seq., and related federal employer liability acts which a railroad is subject to, a railroad may require that a state or federal licensed public grain warehouse or potato warehouse, provide the following:

Page 1

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Deanna Halls
Operator's Signature

10/22/03
Date

BNSF AND CP RAILROAD REQUESTED CHANGES TO SB 2358

Substantive Changes:

- **Allow the railroads to require railroad protective liability insurance during construction and demolition**
- **Remove PSC involvement in setting sales price of railroad property.**

Clarifications:

- **Clarify that railroads will be allowed to require insurance and indemnification within specified limits.**
- **Clarify that railroads are not prohibited from requiring indemnification and insurance for lessee's fault.**
- **Provide aggregate limit for insurance policies.**
- **Clarify railroads' right to require insurance and indemnification for existing environmental conditions to the extent created or aggravated by the lessee.**
- **Clarify that railroads are entitled to require endorsements and be listed as an additional insured on liability policy.**
- **Clarify that insurance and indemnification provisions apply only to grain and potato warehouses.**
- **Clarify that Bill applies only to lease renewals and amendments expressly modifying insurance and indemnification terms.**
- **Make the insurance and indemnification language consistent between subsection 1 and subsection 3 of 49-16-01.1.**

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Dennis D. Ballantyne
Operator's Signature

10/22/03
Date

BNSF and CP Railroad Requested AMENDMENTS to SB 2358

Page 1, line 17, replace "that is" with "to the extent"

- Clarify that railroads are not prohibited from requiring indemnification and insurance for portion of loss caused by the lessee's fault.

Page 1, line 23, replace "that is" with "to the extent"

Page 2, line 4, after "liability" insert "to the extent"

Page 2, line 9, remove "not"

Page 2, line 10, replace "lessee, licensee, or other party" with "state or federal licensed public grain warehouse or potato warehouse"

- Railroads are concerned that section can be interpreted to limit insurance and indemnification requirements for other lessees.

Page 2, line 13, after "occurrence" insert "and six million dollars aggregate"

- Currently there is no limit on the aggregate coverage limit.
- Insurance companies may argue coverage extends to only one occurrence during a policy period.

Page 2, line 16, after "contractors" insert "and naming the railroad as an additional insured with endorsement CG2010 (ed. 10-93), and with policy language and endorsements to protect the railroad's interests"

- Railroads are concerned that without the specific authorization for endorsements and without the railroad being included as additional named insured, insurance companies will argue that coverage for the railroad is limited to general policy terms only – contrary to the intent of the House Subcommittee.

Page 2, line 18, after "injury" insert "death, environmental damage,"

- Make language consistent with subsection 1(a)

Page 2, line 23, after "injury" insert "death"

Page 2, line 29, after "dollars" insert "per occurrence and three million dollars aggregate"

Page 3, after line 3, insert:

e. Railroad protective liability insurance naming only the railroad as the insured with coverage of not more than two million dollars per occurrence if construction or demolition is to be performed on the property by the lessee, licensee, or contracting party, or its employees, agents, contractors and subcontractors.

- Construction and demolition activities near railroad operations substantially raises the risk of exposure to the railroad and requires additional coverage beyond the two million dollar limit for all parties that applies to normal operating activity on the property.

Page 3, line 4, replace "Each party to the agreement shall indemnify and insure the other party" with "The railroad may require indemnification, defense of the railroad, and insurance

- Language is necessary to address prohibition in subsection 1(c) in the event the lessee aggravates an existing environmental condition.
- Railroad would lose benefit of insurance protection if required to indemnify lessee for environmental conditions created by lessee.
- Pursuant to subsection 1(c), lessee would not be liable for environmental damage caused by the railroad beyond the indemnification and insurance provisions in subsection 3; therefore indemnification and insurance by the railroad to the lessee in paragraph is unnecessary.

Page 4, line 4, remove "or selling price"

- The PSC has no expertise in setting real estate sales prices.
- Railroads have no comfort in the ability of PSC to render objective decision in setting sales prices.
- Administrative proceedings are costly and time consuming in relation to the value of the properties.
- Involvement of PSC in setting sales prices will likely result in properties not being offered for sale to grain warehouses.
- Railroads will consider arrangements with grain warehouses for private mediation of sales prices.

Page 4, line 5, after "pay" insert "an equal share of", and remove "as determined by the commission,"

- Costs of PSC proceedings to set rents should be split equally or borne by the lessee rather than allocated at the discretion of the PSC – the cost of these proceedings will likely exceed an annual rental.

Page 4, line 6, remove "The commission may adopt rules to carry out this section."

- Statute already provides adequate guidance for setting lease prices – additional rules are unnecessary.
- Railroads are concerned that PSC will use rulemaking to adopt substantive provisions for setting lease prices not permitted under the statute or the North Dakota and United States Constitutions.

Page 4, line 10, remove "or sale"

- PSC has no expertise in setting sales prices.
- Railroads will be unwilling to offer properties for sale to grain warehouses if there is a possibility of PSC involvement in setting sales prices.

Page 4, line 24, after "act" insert "expressly modifying the insurance and indemnification provisions of the prior agreement"

- Written renewals or amendments need to expressly modify insurance and indemnification provisions to prevent confusion regarding which provisions apply and possible loss of insurance coverage.
- Automatic application of statute to every written renewal or amendment could result in unnecessary changes in existing insurance and indemnification provisions to detriment of grain warehouses.

MEMORANDUM

TO: Senator David Nething
FROM: North Dakota Grain Dealers Association
DATE: April 9, 2003
IN RE: BNSF and CP Railroad Requested Changes to Senate Bill 2358 with House Amendments

The North Dakota Grain Dealers Association responds to the changes requested by the railroads to Senate Bill 2358:

SUBSTANTIVE CHANGES:

1. Allow the railroads to require railroad protective liability insurance during construction and demolition.

RESPONSE: The Grain Dealers agree to language proposed by the railroads with the \$2 million cap. Now we would like the railroads to cease their resistance to Grain Dealer's language on FELA. On page 2, lines 9-11, should be deleted and the following inserted:

"Except for liability under the Federal Employers Liability Act, 45 U.S.C. 51, et seq., and related federal employer liability acts which a railroad is subject to, a railroad may require that a state or federal licensed public grain or potato warehouse provide the following:"

2. Remove PSC involvement in setting sales price of railroad property.

RESPONSE: Do not agree, PSC needed as place to go as last resort if unable to get railroad to agree to set price at fair market value.

CLARIFICATIONS:

1. Clarify that railroads will be allowed to require insurance and indemnification within specified limits.

RESPONSE: Cannot agree, railroad requesting in several instances to increase the \$2 million agreed upon limit to \$3 million and even \$6 million. Grain Dealers have already agreed to amendments whereby railroads can mandate additional pollution liability insurance and construction and demolition insurance. Cannot agree to any additional amendments.

2. Clarify that railroads are not prohibited from requiring indemnification of insurance for lessee's fault.

RESPONSE: Bill already does this, but okay to replace or add "to the extent" where railroads have requested.

3. Provide aggregate limit for insurance policies.

RESPONSE: Do not agree, railroad seeks to increase \$2 million agreed limit to \$3 million to \$6 million.

4. Clarify railroad's right to require insurance and indemnification for existing environmental conditions to the extent created or aggravated by the lessee herein.

RESPONSE: This item was covered in conference committee by agreement to use Grain Dealers language for subsection 4 of Section 1 along with language suggested by Senator Trenbeath.

5. Clarify that railroads are entitled to acquire endorsements and can be listed as an additional insured on liability policy.

RESPONSE: Other than for construction endorsement as agreed to above, cannot agree to any additional language as this would allow railroads to include all additional endorsements. This constant piling on of additional liabilities and insurance requirements is one of the main reasons why the Grain Dealers sought this bill in the first place.

6. Clarify that insurance indemnification and provisions apply only to grain and potato warehouses.

RESPONSE: Agree.

7. Clarify that bill applies only to lease renewals and amendments expressly modifying insurance and indemnification terms.

RESPONSE: Emphatically cannot agree. Again, one of the main purposes of the bill was that it applies to renewals of leases and new leases. Suggested railroad language (last railroad amendment) would allow them to write renewals or new leases which would not be subject to the bill as long as they didn't change the onerous insurance or indemnification requirements.

8. Make the insurance and indemnification language consistent between subsection 1 and subsection 3 of 49-16-01.1.

RESPONSE: This is acceptable, assuming they were talking about making consistent the words "bodily" and inserting the word "death."

Possible Amendments to SB 2358

New Code Sect.

- S. 2 49-16-01.1 Section 1 - Indemnity agreements - revise as per discussions regarding application to non-grain and potato warehouses, non-applicability to 60-02, etc.
- S. 1 New Section - Applicability of 49-02-01.1 to coops, municipalities, etc.
- S. 3 49-16-05 Section 2 - Void contract provisions - okay as in engrossed version of bill?

Section 3 - Grain & potato warehouses & eligible rail lessees - revise as follows:

- S. 4. 60-06-01 **60-06-01. Who may make application for warehouse or elevator on railroad right of way.** Any person, firm, corporation, or limited liability company desirous of erecting and operating at or contiguous to any railroad station or siding a warehouse or elevator for the purchase, sale, shipment, or storage of grain or potatoes for the public for hire, may make application in writing to the person, firm, corporation, or limited liability company owning, leasing, or operating the railway at such station or siding for the right, privilege, and easement of erecting and maintaining a public warehouse. For the purposes of this chapter, an eligible rail lessee is defined as a grain or potato warehouse or any other entity that is leasing land from a railroad or an entity that was or is under common ownership or control of the railroad and whose facilities were originally constructed on railroad property in order to obtain access to rail service to ship or receive commodities by rail.

- S. 5. 60-06-06.1 **60-06-06.1 Determination - Appropriation.** Any party may petition the public service commission to determine rights governed under this chapter. The commission shall determine the matter in accordance with chapter 28-32 and the parties' rights of appeal are as limited by chapter 28-32. ~~The commission shall conduct each hearing required under this section in the county where the right of way at issue is located. The parties to the determination proceeding shall pay the expense of the proceeding, the compensation of any experts, and actual expenses of any employees of the commission while engaged in the proceeding. The commission shall ascertain these costs and expenditure and, after giving parties notice and opportunity to be heard, and after a hearing to determine the amount of cost and expenditures if a hearing is demanded by either of the parties, shall render a bill and make and transmit to the parties any order for payment by registered mail. Within ten days after receipt of the order, the parties shall pay to the commission the amount of the costs and expenses. The commission shall deposit all costs and~~

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~~expenses collected under this section in the general fund in the state treasury. The parties to such a proceeding shall pay the expenses of the proceeding, as determined by the commission, directly to the entities owed. The commission may promulgate rules to carry out the provisions of this section.~~

S. 6
New Section
of Code
(60-06-16)

→ 60-06-xx. Arbitration and mediation. An eligible rail lessee may petition the commission to arbitrate or mediate lease or site sale disagreements involving, but not limited to, terms, conditions, lease rates, sale prices, bad faith negotiations, and eviction notices not governed by (insert # of section governing indemnity agreements). The value of a leaseholder's improvements may not be considered in determining a reasonable lease rate selling price. The parties to such a proceeding shall pay the expenses of the proceeding, as determined by the commission, directly to the entities owed. The commission may promulgate rules to carry out the provisions of this section.

S. 7 Section 4 - Study - Okay as in engrossed version of bill?

S. 8 Section 5 - Application - Okay as in engrossed version of bill?

S. 9 Section 6 - Expiration Date - Strike?

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Deanna Waller
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