

MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION

SFN 2053 (2/85) 5M



ROLL NUMBER

DESCRIPTION

2405

2005 SENATE INDUSTRY, BUSINESS AND LABOR

SB 2405

2005 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2405

Senate Industry, Business and Labor Committee

Conference Committee

Hearing Date 1-31-05

Tape Number	Side A	Side B	Meter #
1		xxx	1050-3995
Committee Clerk Signature			

Minutes: **Chairman Mutch opened the hearing on SB 2405. All Senators were present.**

SB 2405 relates to insurance requirements in leases between railroads and grain and potato warehouses.

Senator O'Connell introduced the bill.

Senator O'Connell: There are a number of people in the room that will go through the bill with you. I am under the impression that you can not get this kind of insurance. With that, I will turn it over to these other people.

Steve Strege, Executive Vice President of the North Dakota Grain Dealers Association, spoke in support of the bill.

Steve: We are a ninety-four year old volunteer membership organization and over ninety percent of the grain elevators in North Dakota are our members. We are here in support of the bill. See attached FELA handout.

Senator Klein: The railroad is asking the elevators to cover their employees when they are switching cars at the elevator?

Steve: That's correct.

Senator Klein : So that would be similar to a trucker loading his truck with grain, pulling out and tarping it, getting injured, and then having that injury reported back to the elevator?

Steve: I think that is comparable. The problem here is that if the elevator is responsible or has some negligence, it's own insurance will cover it. But what FELA says and what railroad contract lease says is that when the railroad employees are on the leased property, house track, and there is an injury that is no fault of the elevator, the elevator still has to pay for that.

Larry Ash, commercial insurance agent, spoke in support of the bill. See written testimony.

There were no questions from the committee.

Dan DeRouchey, Manager of the Berthold Farmers Elevator, stated that they support the bill.

Brad Haugeberg, General Manager of Sunsbury Grain in Minot, stated his support for the bill.

Chairman Mutch allowed opposition at this time.

John Olson, Burlington Northern, spoke in opposition to the bill. Before the hearing I was interested in presenting the committee a list of the insurance companies the Burlington Northern said would provide the FELA coverage. Mr. Strege said they don't do that, so I told Burlington Northern they better do a recheck and find out if this coverage is available. But I will hand out the list any ways. See attached. I was not here with Burlington Northern, last session when this bill was worked on and I think there were a lot of discussions on legislation dealing with this subject matter and the current statute was the compromise. Now the proponents are back wanting the statute changed. My concern is that Mr. Strege says that it is because we can't get insurance,

but a lot of the testimony goes to the issue of negligence itself. The problem is that railroad employees are not covered by workers comp in North Dakota, they are subject to the federal employment liability act and therefore the railroad is at risk for those injuries that occur to employees, even on leased property. It's a good question why the railroad shouldn't be liable for it's own negligence, in case an employ gets hurt or killed on that leased property. The answer to that is because the laesae is in control of that property and must take care of that property.

Also we're compared to a negligent state, so we're going to be getting into those issues about whether the railroad is twenty percent liable or one percent or not at all and compare that with the liability with the laesae. So those are the two reasons why it is necessary for BN to have this endorsement on their leases. They have a responsibility under any circumstances to provide a safe work environment for their employees, even on the leased premises. So that will never change. The issue then becomes if the elevator is not carrying that FELA policy, then there may be injuries that are not covered and in that case the railroad has no where else to go except against the laesae directly.

Senator Nething : When we did this last session it was in the transportation committee. We were assured there was insurance carrier coverage available. During the interim, our transportation committee that studied this bill then found out that it wasn't. Your folks said these people were available for it and others say they weren't. It's not unavailable, it's just not available at a price the elevators can afford. That's the problem.

John: Leases continue to be written, either there are few endorsements, or the railroad is waiving those conditions.

Chairman Mutch : Probably in a lot of those elevators, the leases were consummated twenty or thirty years ago and they haven't done anything to upgrade them and then they find out there might be trouble.

Senator Heitkamp: The sole reason that you believe the local elevator should have to insure the railroad employee on railroad land is because they are better apt because they hold a lease to it.

John: That's one of the reasons.

Senator Klein : The elevator is saying "it's our fault, we understand that" but providing for the lease property compliments both entities. You are saying that even if the elevator keeps the area up and safe, the railroad still says they are responsible. It seems to be a stretch in who's covering them.

John: It's a good point. I'm not going to stand here and argue with you.

Senator Heitkamp : Why aren't they covered if it's on their land in the first place?

Senator Nething: It's an exchange of risk.

Larry Ash: This coverage is not available for the small country elevator. Without that, the country elevator is left out there with a huge exposure. The country elevator does have liability coverage.

Brad: My understanding is the railroad has to, by federal law, buy FELA coverage. They have the coverage on their track, but as soon as they get on the elevator leased track, they want us to pick up the liability. I don't believe there is a threat of increased premium.

Steve Streg: It has been brought up that maybe the railroads are waiving FELA and they are not, they are asking for more insurance.

The hearing was closed. No action was taken.

2005 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO SB 2405

Senate Industry, Business and Labor Committee

Conference Committee

Hearing Date 1-31-05

Tape Number	Side A	Side B	Meter #
2		xxx	16-630
Committee Clerk Signature <i>Lisallan Berkson</i>			

Minutes: **Chairman Mutch** opened the committee work on SB 2405. **Senators Espgaard and Heitkamp** were absent. SB 2405 relates to insurance requirements in leases between railroads and grain and potato warehouses.

Senator Klein : Even the discussion from the Burlington Northern representative didn't really fix what is wrong. If the grain warehouse is negligent, then they should be responsible. They shouldn't be responsible just because the railroad is picking up grain. Then they can't even get the insurance affordably and if they did, I think, it would pretty much put them out of business.

Chairman Mutch : If I'm interpreting it right, it would exempt those who ship more than two hundred and fifty cars.

Senator Klein moved a DO PASS.

Senator Nething seconded.

Roll Call Vote: 5 yes. 0 no. 2 absent.

Carrier: **Senator Nething**

REPORT OF STANDING COMMITTEE (410)
January 31, 2005 4:57 p.m.

Module No: SR-20-1501
Carrier: Nothing
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

SB 2405: Industry, Business and Labor Committee (Sen. Mutch, Chairman) recommends DO PASS (5 YEAS, 0 NAYS, 2 ABSENT AND NOT VOTING). SB 2405 was placed on the Eleventh order on the calendar.

2005 HOUSE AGRICULTURE

SB 2405

2005 HOUSE STANDING COMMITTEE MINUTES

BILL SB 2405

House Agriculture

Conference

Hearing Date 3-04-05

Tape Number	Side A	Side B	Meter #
ONE	A		00.0 TO 22.9
Committee Clerk Signature <i>Edward D. Ellison</i>			

:Minute

CHAIR: NICHOLAS: Committee Members, we will open on SB 2405

.SEN. O'CONNEL: Relating to insurance requirements in leases between railroads and grain and potato warehouses. I am going to be real brief because there are experts to testify.

If you go to page one line nineteen of the bill that pretty much explains what we are trying to do here. That clause coming out of the bill. That pretty much explains it. If there are any questions I will answer them.

CHAIRMAN NICHOLS: Any questions?

SENATOR NETHING: Jamestown.

SB 2405 comes to you from the last legislative session in a sense. We had this bill on leases Between railroads and other. The out growth was a study. In that study during the interim I served on the committee. Sen. O'connell was the chairman of the committee. We learned that throughout that study that the question that Sen. O'Connell mentioned to you and the bill it

self indicated that there was actually no federal employee liability insurance available, the problem is no one can afford it. The railroads had said it was available. It is terribly expensive. There is no way for local elevators to really meet that obligation that we imposed upon them in state law. This bill is to repeal that section of the bill. Other people here will talk to you about the insurance question. We need to pass this bill and take this requirement out of law. The parties then will have to negotiate what ever way they can.

CHAIRMAN NICHOLAS: Any questions committee members.

REPRESENTATIVE BRANDENBURG: DIST 28. I stand in support of bill. It is an important bill dealing with the railroads and elevators. People actually have no instance because it is unaffordable. For elevators to buy. Yes you have cases where some gets hurt

A rail road Employee that actually works for the railroad may get hurt and they are not insured. Because according to the leases and the way it is written the elevators are responsible. Yet they can't afford the premiums. Some has to be responsible if someone who is a railroad employee. There is a black hole there.

TONY JOHANNESON: LOBBYIST REG. NO 9. [[PLEASE READ PRINTED

TESTIMONY]] I am General Manager of Dakota Prairie Ag. With headquarters in Edgley.

We are here in support of bill. This is a simple bill. I also have some testimony from Larry Ash from Jamestown. He had planned on being here today but there was a death in the family; I would just like to point out Larry Ash is an insurance agent with Security Instance Agency of Jamestown ND. He has been in the business since 1976. He has insured a lot of elevators.

In the state of ND The last line of his testimony. ""Insurance coverage's are written to protect individual businesses for their own negligence, not those of others, there for I am in support of SB 2405.

REPRESENTATIVE MUELLER: Did any elevators go out and get this insurance.

TONY: Not that I am aware of. I don't know anyone who offers it. Maybe an overseas Company will, I don't know.

REPRESENTATIVE BRANDENBURG: Who is really at risk.

TONY: I think a lot of elevators because they signed these leases or track agreements assume their liability policies. They assume they are covered for this insurance In fact this is a separate insurance and it is not available. If we had a state law they would have to abide by it.

The elevators are responsible and a claim could bankrupt them.

REPRESENTATIVE MUELLER: Are we going to see an increase in railroad rates if this bill is passed.

TONY: Could be retaliatory move. I hope not.

REPRESENTATIVE KREIDT: Money is of no object to them. Could it end up in criminal justice system.

TONY: Maybe it would be a good thing. Everyone is responsible for their own actions.

REPRESENTATIVE DAMSCHEN: Elevators still have to carry liability insurance??

TONY: Yes they do.

JOHN OLSON: Burlington Northern is of the impression you could get this insurance. They won't push it if the insurance is unavailable. The elevators still have to carry workmen compensation for these claims. Pass the bill.

Page 4

House Agriculture Committee

Bill/Resolution Number SB 2405

Hearing Date 3---04---05

BARB BIERBRAUER: I am a licensed Property/casualty insurance agent employed by Ag. States Agency in St. Paul, Minn.

[[please read Barb's PRINTER TESTIMONY]] Burlington Northern has withdrawn it's objection as far as passing this law. I do ask that you pass Senate Bill 2405.

CHAIRMAN NICHOLAS: Any questions committee members?

Any other testimony in support of this bill. Any opposition to bill.

CHAIRMAN NICHOLAS: I WILL ENTERTAIN A MOTION ON SB 2405.

REPRESENTATIVE FROELICH MADE A MOTION FOR A DO PASS.

REPRESENTATIVE HEADLAND SECONDED THE MOTION.

THERE WERE 9 YES 0 NO 4 ABSENT

VICE CHAIR WOMAN KINGSBURY WILL CARRY THE BILL.

CHAIRMAN NICHOLAS CLOSED ON SB 2405

3-4-05

2405

Date:
Roll Call Vote #:

2005 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO.

House HOUSE AGRICULTURE COMMITTEE Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken DO PASS

Motion Made By FROELICH Seconded By HEADLAND

Representatives	Yes	No	Representatives	Yes	No
REP. EUGENE NICHOLAS CHAIRMAN	✓		REP. TRACY BOE		
REP. JOYCE KINGSBURY VICE CHAIRMAN	✓		REP. ROD FROELICH	✓	
REP. WESLEY BELTER			REP. PHILLIP MUELLER	✓	
REP. M. BRANDENBURG			REP. KENTON ONSTAD		
REP. CHUCK DAMSCHEN	✓				
REP. CHAIG HEADLAND	✓				
REP. GARY KREIDT	✓				
REP. GERALD UGLEM	✓				
REP. JOHN WALL	✓				

Total (Yes) 9 No 0

Absent 4

Floor Assignment Kingsbury

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

REPORT OF STANDING COMMITTEE (410)
March 4, 2005 1:01 p.m.

Module No: HR-40-4192
Carrier: Kingsbury
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

SB 2405: Agriculture Committee (Rep. Nicholas, Chairman) recommends DO PASS
(9 YEAS, 0 NAYS, 4 ABSENT AND NOT VOTING). SB 2405 was placed on the
Fourteenth order on the calendar.

2005 TESTIMONY

SB 2405

FELA ENDORSEMENT PROVIDERS

BNSF's Risk Management Department asked insurance brokers for the names of some companies that provide the FELA endorsement noted in BNSF lease agreements. The following companies, we were told, are among those through which such coverage has been obtained. To our knowledge, these companies do business in all states.

Domestic Companies

Zurich - Steadfast Insurance Company
Lexington - Lexington Insurance Company
Arch- Arch Specialty Insurance Company

Lloyd's of London Syndicates

Wellington
Atrium
Catlin
Beazley
Millennium

London - Based Companies

Zurich
XL Europe
MaxRe
AIG (Lexington)

Contact for further information:

John M. Olson
Lobbyist # 376
BNSF
115 N. 4th Street
Bismarck, ND 58501
(701) 223-4524

Testimony of Larry Ash
SENATE BILL NO. 2405 – FELA Liability
Senate Industry Business & Labor Committee
Senator Duane Mutch Chaiman
January 31, 2005

Good morning Mr. Chairman and members of the Industry Business & Labor Committee. My name is Larry Ash. I am a commercial insurance agent with Security Insurance Agency in Jamestown, ND. I have been in the Agri-business insurance since 1976.

Federal Employers Liability Act (FELA) was made a federal law by Congress in 1908. FELA is a law that provides special protection to employees of railroads.

If the injured worker can prove that his employer was negligent (that is, provided an unsafe place to work) then he can recover for pain and suffering and disability and can recover full compensation. Such a case is usually worth much more than a Workers Compensation loss since Workers' Compensation has a strict statutory limits. The injured worker with FELA can have his case decided by a jury, which is always preferable since they have more in common with the injured worker.

The lease contracts states that the grain elevator shall indemnify and hold the railroad harmless from any liability or claim related to FELA regards of negligence or strict liability of the railroad. The problem with these contracts is that Insurance contracts excluded coverage for FELA and they are unable to endorse the coverage onto their insurance contracts. It is my understanding that a signed lease contract will hold up in court of law and insurance companies are not required to pay if there is no negligence on the part of the grain elevator. So, if the grain elevator signs this lease and has a FELA claim, they will probably be put out of business if the claim is large.

Since, the grain elevators Worker Compensation, General Liability or Employers Liability will not endorse coverage for the FELA exposure, the only remedy is the Excess & Surplus market. I have inquired with some of the large Broker Firms that deal with the E & S lines that write this type coverage and they have stated they don't have a market that would provide coverage for the FELA coverage for a small country

elevator. One broker stated that some of the large companies that purchase the FELA endorsement usually have very large deductibles ranging from \$250,000 to \$500,000 and the cost are very expense.

It appears the railroad is trying to contract their liability away to the grain elevators. The grain elevators do not have any control over the railroad employees and there for can not control the work environment of the railroad employees. Insurance coverage's are written to protect individual businesses for their own negligence, not those of others, there for I am in support of Senate Bill 2405.

Thank you,



NORTH DAKOTA GRAIN DEALERS ASSOCIATION

STEVEN D. STREGE, Executive Vice President
CHERYAL WELLE, Executive Assistant
CONNIE LEIER, Administrative Assistant
Ph: 701-235-4184, Fax: 701-235-1026
118 Broadway, 606 Black Bldg., Fargo, ND 58102
Website: www.ndgda.org

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

HAL GRIEVE, Safety Specialist
Ph: 701-633-5256, Fax: 701-633-5258
204 4th Avenue S., Buffalo, ND 58011

TESTIMONY OF NORTH DAKOTA GRAIN DEALERS ASSOCIATION
SENATE BILL 2405 – FELA LIABILITY
SENATE INDUSTRY BUSINESS & LABOR COMMITTEE
SENATOR DUANE MUTCH CHAIRMAN
JANUARY 31, 2005

Good morning Mr. Chairman and members of the IBL Committee. My name is Steve Strege. I serve as Executive Vice President of the North Dakota Grain Dealers Association. We are a 94-year-old voluntary membership trade association and over 90% of our state's grain elevators are members. We are here in support of SB 2405.

The 2003 North Dakota Legislative Assembly dealt with insurance liabilities imposed on grain elevators by railroads. FELA was a sticking point. FELA is the Federal Employers Liability Act. It is most easily described as work comp coverage for railroad employees, although it is said to be more favorable to the employee than something like ND work comp. A settlement was reached in that 2003 Session by allowing railroads to require the FELA endorsement, providing coverage for railroad employees, of only those grain elevators handling more than 250 loaded railcars annually.

We asked that this bill be introduced for a couple of reasons. One is that the FELA endorsements called for in present law are simply not available from insurance companies that currently write North Dakota grain elevators, and we're quite sure not from anyone else either at reasonable cost. This is already in the legislative record through testimony provided by Jamestown insurance agent Larry Ash to the Interim Transportation Committee meeting in Minot last March 15, and

also in an analysis by a different insurance underwriter provided to that same committee back in September. I have copies of those with me for anyone who wants them, but the testimony to be presented here by insurance representatives will duplicate that.

Last summer the BNSF gave me a list of FELA providers. Insurance professionals who checked out the domestic companies said none would write it for us. Foreign sources were questionable or very expensive or both.

We are not trying to escape any liability for our own negligent acts by offering this bill. If the grain elevator is at fault in the event of a railroad employee injury, its comprehensive general liability insurance will respond. But that insurance will not respond when the insured bears no fault. Grain elevators have been unknowingly signing railroad leases and track agreements with FELA requirements in them and have thus exposed themselves to huge uninsured liabilities. The consequences of an incident could be huge, and life-threatening to a small business.

In addition to the practicality of no one writing FELA endorsements, there is the philosophical view that one party should not be held responsible for the negligence of another. If the railroad can transfer its liabilities for such incidents to its customers, then there is less incentive for it to correct situations that might bring about such incidents.

Testimony being submitted by others goes into more detail, but it is enough for us to say that this is an unreasonable and impractical situation that state law should not allow to go on. This is a simple bill; it eliminates that one item we cannot comply with. Let's keep it simple. Thank you and I'll try to answer any questions.

TESTIMONY OF BARBARA J. BIERBRAUER
SENATE BILL 2405 – FELA LIABILITY
SENATE INDUSTRY BUSINESS & LABOR COMMITTEE
SENATOR DUANE MUTCH CHAIRMAN
JANUARY 31, 2005

Steve Strage -
FELA (Federal Employers' Liability Act)

The Federal Employers' Liability Act is a federal law passed by Congress in 1908. It was designed to protect and compensate railroad employees injured on the job. The law makes every common carrier by railroad engaging in commerce between any of the States or territories liable in damages to any person employed by the carrier (or under the direction of the railroad) for injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of the carrier or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works or other equipment. The railroad has lobbied unsuccessfully for years to get the act repealed. Is that an indicator?

The BNSF contract states the industry (grain elevator) shall indemnify and hold the indemnitee (railroad) harmless from any liabilities arising out of or related to any claim related to FELA regardless of any negligence or strict liability of the railroad. The railroad also wants to be indemnified for FELA claims based on actual or alleged violations of any federal, state or local laws or regulations including FELA, The Safety Appliance Act, The Boiler Inspection Act, The Occupational Health & Safety Act, The Resource Conservation Act. A railroad employee cannot bring an action under the latter four acts but must bring it under FELA alleging a violation of the acts in the complaint. Violation of the Safety Appliance Act, for example, may result in absolute liability without comparative negligence (See attached addendum for an explanation of these acts). These federal acts are designed to ensure worker and workplace safety. The Safety Appliance Act and Boiler Inspection Act pertains specifically to safe railroad cars and locomotives.

1. FELA, a federal law, was passed by Congress to "put on the railroad industry some of the costs of the legs, arms, eyes and lives which it consumed in its operation". Grain elevators have no control over railroad operations. They cannot control the safe operations of the cars and locomotives or workplace safety of its employees. To ask a grain elevator to be liable for an injury to a railroad employee due to contractual obligations is ludicrous. Contractually, that is what BNSF is asking of the grain elevator. This is the only contract I have read in 30 years of insurance experience that requires the indemnitor to be responsible for work related injuries to the indemnitee employees.
2. Insurance does not cover violations of law – If the indemnification agreement in the railroad contract holds up in a court of law, any serious injury as a result of a violation of law could put the average grain elevator out of business or force that elevator into bankruptcy.

Neither Nationwide Agribusiness Insurance Company/Farmland Mutual Insurance Company or Michigan Millers Mutual Insurance Company will endorse their policy to provide FELA coverage in order to comply with BNSF's contract. Since FELA is a liability of negligence, the compensation granted to the injured railroad employee is usually many times greater than that provided by State Workers' Compensation law for non-railroad workers.

Because standard insurance carriers will not provide coverage for FELA, the grain elevator is forced to go to an outside market to purchase a "stand alone liability policy providing FELA coverage". Research into domestic outside markets (markets provided by BNSF Risk Management Department) revealed:

1. Zurich (Steadfast Insurance Company) – will not write **country grain elevator** operations. The company, owned by Zurich Financial Services Group, will not write stand along FELA coverage.
2. Lexington – owned by American International (AIG) – will not write **country grain elevator** operations. They may be a market for very large accounts such as ADM/Cargill but not local grain elevators. They will not write stand alone FELA coverage
3. Arch – Arch Specialty Insurance Company – owned by Arch Capital Group – will not write **country grain elevator** operations. Arch is not a market for stand alone FELA coverage.

Other markets include the Lloyd's Syndicates or London-Based Companies. Some of these carriers are located in Bermuda, the Virgin Islands or Ireland. These markets would have to be accessed through large brokerage houses. There would be a starting minimum premium on anything written – starting between \$5,000 and \$10,000 to provide stand alone FELA and probably on the high side if an underwriter understands what is provided to railroad workers under FELA. This premium is not affordable to the country grain elevator which is already paying larger premiums than the average business for insurance.

BNSF's contract also contains a disclaimer. That disclaimer states "acceptance of a certificate that does not comply with this section (insurance requirements) shall not operate as a waiver of industry's (grain elevator's) obligations hereunder". What does this and the insurance requirements mean to the average grain elevator?

1. The grain elevator's insurance carrier will not provide FELA coverage which forces the elevator to the outside insurance market seeking coverage that is not available at an affordable premium.
2. The grain elevator is held liable for the negligence of the railroad (except for claims caused by the intentional misconduct or gross negligence of the railroad) for injury to its employees and, conversely for injury to the elevator's employee who was under the direction of the railroad when injured, due to contractual obligation which is totally slanted in favor of the railroad. One claim would seriously impact the elevator's profitability or force the elevator out of business because the elevator a) did not understand the insurance requirements in the contract or b) could not afford to purchase stand alone FELA coverage or c) signed the contract knowing insurance requirements were not met but had to move grain.

Why should local grain elevators be forced contractually to take on the liabilities of the railroad, some of which are mandated through federal law? Why should local elevators be forced to pay for the injury of a railroad employee if negligence clearly rests with the railroad? If the tables were turned, what would the railroad do?

Federal Employers' Liability Act (FELA)

Steve Strege

The Federal Employers' Liability Act is a federal law passed by Congress in 1908. It was designed to protect and compensate railroaders injured on the job. It governs the liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence. Every common carrier by railroad while engaging in commerce between any of the several States or territories shall be liable in damages to any person suffering injury while employed by such carrier, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works or other equipment.

FELA was never intended to be awarded automatically. FELA requires the injured railroader to prove the railroad was legally negligent, at least in part, in causing the injury. The law is based on "comparative negligence". After proving negligence, the injured railroader is entitled to full compensation or full compensation based on the comparative negligence of the railroad. Justice William Douglas, United States Supreme Court, stated: "The Federal Employers Liability Act was designed to put on the railroad industry some of the costs of the legs, arms, eyes and lives which it consumed in its operation. Not all these costs were imposed, for **the Act did not make the employer an insurer. The liability which it imposed was the liability of negligence**". Such compensation is usually many times greater than that provided by State Workers' Compensation for non-railroaders.

The railroads, under the law, have a duty to provide safe places of work for their employees. They must also provide safe equipment, tools and proper working conditions for them. If any railroad fails to take these safety measures, or if the employee is injured through the carelessness of any other employee, the railroad is held responsible. It is liable to the worker for any injuries or damages he/she may suffer as a result.

The injured railroad worker is entitled to more than compensation. FELA allows railroad employees to recover the following types of damages:

- ◆ Lost earnings, both past and future
- ◆ Medical expenses, if not paid by railroad or by insurance provided at the railroad's expense
- ◆ Compensation for decreased earning power such as may be involved due to the necessity of taking a lower paying job because of the injuries sustained
- ◆ Compensation for pain and suffering, past and future. Such damages may include "humiliation and embarrassment" in cases of scarring, mutilation, disfigurement or the loss of the ability to enjoy a normal life or engage in the usual pre-accident activities
- ◆ If an employee held another job outside the railroad, the railroad may also be liable for the amount potentially earned from both jobs during the period of disability produced by the injury

Even if the injured railroad employee cannot prove negligence, the railroad still has to pay "maintenance and care" (medical bills and a percentage of lost wage) to the injured employee. FELA is a liability law but the "maintenance and care" basically throws it back to Workers' Compensation even though the "maintenance and care" is not statutory and medical care does not continue for an indefinite period of time as it does under most WC laws.

Under the Federal Employers' Liability Act the railroad worker's claim may be brought in a State Court or U.S. Federal Court whichever better suits the workers convenience or purpose. The injured worker is entitled to have a trial by a jury. The employee may bring the claim in these courts in any city into which

the railroad runs or has branch lines or even where the railroad has no tracks but does have any kind of an office for the doing of any business.

Right of a worker to choose the place and court where he/she may bring the claim is an important right. It gives workers the chance to sue in courts located in the larger cities where usually court and jury awards are more adequate and reasonable than in rural communities. In addition, injured workers who are members of minority groups are more likely to receive a fairer hearing in the bigger cities.

Sometimes a worker is considered "employed" by the railroad even if he/she is a non-railroad employer. If you can demonstrate the injured person was 1) borrowed by the railroad or 2) working for two employers simultaneously, the railroad and his/her own employer, or 3) the injured's employer is subservient to the railroad (under the railroad's control).

The rights under FELA certainly make it more attractive than any States Workers' Compensation law which has strict statutory limits

Safety Appliance Act

The Safety Appliance Act requires that railroad cars be equipped with:

1. Train brakes that enable an engineer to control the speed of a train without the necessity of a brakeman using hand brakes for that purpose.
2. Efficient hand brakes.
3. Couplers that couple automatically upon impact and can be uncoupled without employees going between the ends of cars for that purpose.
4. Secure grabirons, handholds, sill steps, ladders and running boards.

Any defect in the braking system of a train, including air hoses, air reservoirs and connecting pipes, or any other part of the braking system, constitutes a violation of the act.

The Boiler Inspection Act

The Boiler Inspection Act, which pertains specifically to locomotives:

1. Requires that all parts and appurtenances be in proper condition and safe to all who use them, at all times.
2. Prohibits the presence of grease or oil on running boards or catwalks, defective seats or armrests and any other unsafe condition.

Occupational Safety and Health Act

Congress passed the Occupational and Safety Health Act to ensure worker and workplace safety. Their goal was to make sure employers provide their workers a place of employment free from recognized hazards to safety and health.

Resource Conservation and Recovery Act

Congress enacted the Resource Conservation and Recovery Act in 1976 to establish a system for managing non-hazardous and hazardous solid wastes in an environmentally sound manner. Specifically, it provides for the management of hazardous wastes from the point of origin to the point of final disposal i.e. cradle to the grave.

TESTIMONY OF BARBARA J. BIERBRAUER
SENATE BILL 2405 – FELA LIABILITY
HOUSE AGRICULTURE COMMITTEE
REPRESENTATIVE EUGENE NICHOLAS CHAIRMAN
MARCH 4, 2005

FELA (Federal Employers' Liability Act)

Good morning Mr. Chairman and members of the Agriculture Committee. My name is Barb Bierbrauer. I am a licensed Property/Casualty Insurance Agent employed by Ag States Agency in St. Paul, Minnesota. I have approximately 30 years experience in the insurance industry, 21 of which has been in commercial or business insurance. The last 7 years has been spent exclusively in agricultural business insurance.

When Congress passed the Federal Employers' Liability Act in 1908, it was designed to protect and compensate railroad employees injured on the job. This federal law is based on the liability of negligence. The railroad became liable for injury or death to any person employed by the railroad (or under the direction of the railroad) due to the negligence of any of the officers, agents or employees of the railroad or due to any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works or other equipment. **The railroad has lobbied unsuccessfully for years to get the act repealed but it remains in force.**

When Congress passed the Federal Employers' Liability Act, the legislators probably did not surmise the railroad would contractually transfer its' liabilities to a third party. The BNSF contract states the industry (grain elevator) shall indemnify and hold the indemnitee (railroad) harmless from an liabilities arising out of or related to any claim related to FELA regardless of any negligence or strict liability of the railroad. **Grain elevators have no control over railroad operations. They cannot control the safe operations of the cars and locomotives or workplace safety of its employees. To ask a grain elevator to be liable for injury to a railroad employee due to a contractual obligation is unfair. Contractually, that is what BNSF is asking of the grain elevator. This is the only contract I have read in 30 years of insurance experience that requires the indemnitor to be responsible for the work related injuries to the indemnitee's employees. The contract is one sided.**

The indemnification clause in the contract goes on further to state the railroad wants to be indemnified for FELA claims based on actual or alleged violations of any federal, state or local laws or regulations including FELA and various other acts (see attachment). Insurance does not cover violations of law. If the indemnification agreement in the railroad contract holds up in a court of law, any serious injury as a result of a violation of law could force the average grain elevator into bankruptcy or out of business..

Is FELA coverage available? Neither Nationwide Agribusiness Insurance Company/Farmland Mutual Insurance Company or Michigan Millers Mutual Insurance Company will endorse their policy to provide FELA coverage in order to comply with BNSF's contract. Research into other domestic outside insurance markets, markets provided to Mr. Strege from BNSF's Risk Management Department, revealed these insurers will not write country grain elevator operations or write stand alone FELA coverage. They may be markets for very large accounts such as ADM/Cargill but not local grain elevators.

If FELA is available at all, non-standard markets have to be utilized. These markets include the Lloyd's Syndicates or London Based Companies. Some of these carriers are located in Bermuda, The Virgin Islands or Ireland. These markets would have to be accessed through large brokerage houses. There would be a starting minimum premium – any where between \$5,000 and \$10,000 to provide stand along FELA and, more than likely, on the high side if an underwriter understands the exposure presented by FELA. This premium is not affordable to the country grain elevator which is already paying larger premiums than the average business for insurance.

Are BNSF employees already protected under the General Liability and/or Automobile Liability Policies carried by the grain elevators? The answer is yes. If a railroad employee is injured due to the negligent actions of a grain elevator employee, that railroad employee has a third party liability claim against the grain elevator. The injury to the railroad employee is not considered a Workers' Compensation claim or FELA claim but rather a bodily injury claim by the grain elevator's insurance company and, therefore, not excluded by the insurance contract. If the BNSF employee is already protected, why is the FELA endorsement necessary?

What does the contractual obligation to provide FELA mean to the average grain elevator?

1. The grain elevator's insurance carrier will not provide FELA coverage which forces the elevator to the outside insurance market seeking coverage that is not available or not available at an affordable premium.
2. The grain elevator is held liable for the negligence of the railroad (except for the claims caused by the intentional misconduct or gross negligence of the railroad) for injury to its employees and, conversely for injury to the elevator's employee who was under the direction of the railroad when injured, due to a contractual obligation which is totally slanted in favor of the railroad. One claim could seriously impact the elevator's profitability or force the elevator out of business because the elevator a) did not understand the insurance requirements in the contract or b) could not afford to purchase stand alone FELA coverage or c) signed the contract knowing insurance requirements were not met but had to move grain.

Should local grain elevators be contractually forced to take on the liabilities of the railroad some of which are mandated through federal law? Should local elevators be forced to pay for the injury of a railroad employee if negligence clearly rests with the railroad?

Please pass Senate Bill 2405.

Federal Employers' Liability Act (FELA)

The Federal Employers' Liability Act is a federal law passed by Congress in 1908. It was designed to protect and compensate railroaders injured on the job. It governs the liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence. Every common carrier by railroad while engaging in commerce between any of the several States or territories shall be liable in damages to any person suffering injury while employed by such carrier, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works or other equipment.

FELA was never intended to be awarded automatically. FELA requires the injured railroader to prove the railroad was legally negligent, at least in part, in causing the injury. The law is based on "comparative negligence". After proving negligence, the injured railroader is entitled to full compensation or full compensation based on the comparative negligence of the railroad. Justice William Douglas, United States Supreme Court, stated: "The Federal Employers Liability Act was designed to put on the railroad industry some of the costs of the legs, arms, eyes and lives which it consumed in its operation. Not all these costs were imposed, for **the Act did not make the employer an insurer. The liability which it imposed was the liability of negligence**". Such compensation is usually many times greater than that provided by State Workers' Compensation for non-railroaders.

The railroads, under the law, have a duty to provide safe places of work for their employees. They must also provide safe equipment, tools and proper working conditions for them. If any railroad fails to take these safety measures, or if the employee is injured through the carelessness of any other employee, the railroad is held responsible. It is liable to the worker for any injuries or damages he/she may suffer as a result.

The injured railroad worker is entitled to more than compensation. FELA allows railroad employees to recover the following types of damages:

- ◆ Lost earnings, both past and future
- ◆ Medical expenses, if not paid by railroad or by insurance provided at the railroad's expense
- ◆ Compensation for decreased earning power such as may be involved due to the necessity of taking a lower paying job because of the injuries sustained
- ◆ Compensation for pain and suffering, past and future. Such damages may include "humiliation and embarrassment" in cases of scarring, mutilation, disfigurement or the loss of the ability to enjoy a normal life or engage in the usual pre-accident activities
- ◆ If an employee held another job outside the railroad, the railroad may also be liable for the amount potentially earned from both jobs during the period of disability produced by the injury

Even if the injured railroad employee cannot prove negligence, the railroad still has to pay "maintenance and care" (medical bills and a percentage of lost wage) to the injured employee. FELA is a liability law but the "maintenance and care" basically throws it back to Workers' Compensation even though the "maintenance and care" is not statutory and medical care does not continue for an indefinite period of time as it does under most WC laws.

Under the Federal Employers' Liability Act the railroad worker's claim may be brought in a State Court or in a U.S. Federal Court whichever better suits the workers convenience or purpose. The injured worker is entitled to have a trial by a jury. The employee may bring the claim in these courts in any city into which the railroad runs or has branch lines or even where the railroad has no tracks but does have any kind of an office for the doing of any business.

The right of a worker to choose the place and court where he/she may bring the claim is an important right. It gives workers the chance to sue in courts located in the larger cities where usually court and jury awards are more adequate and reasonable than in rural communities. In addition, injured workers who are members of minority groups are more likely to receive a fairer hearing in the bigger cities.

Sometimes a worker is considered "employed" by the railroad even if he/she is a non-railroad employer. If you can demonstrate the injured person was 1) borrowed by the railroad or 2) working for two employers simultaneously, the railroad and his/her own employer, or 3) the injured's employer is subservient to the railroad (under the railroad's control).

The rights under FELA certainly make it more attractive than any States Workers' Compensation law which has strict statutory limits

Safety Appliance Act

The Safety Appliance Act requires that railroad cars be equipped with:

1. Train brakes that enable an engineer to control the speed of a train without the necessity of a brakeman using hand brakes for that purpose.
2. Efficient hand brakes.
3. Couplers that couple automatically upon impact and can be uncoupled without employees going between the ends of cars for that purpose.
4. Secure grabirons, handholds, sill steps, ladders and running boards.

Any defect in the braking system of a train, including air hoses, air reservoirs and connecting pipes, or any other part of the braking system, constitutes a violation of the act.

The Boiler Inspection Act

The Boiler Inspection Act, which pertains specifically to locomotives:

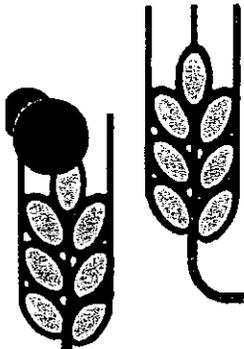
1. Requires that all parts and appurtenances be in proper condition and safe to all who use them, at all times.
2. Prohibits the presence of grease or oil on running boards or catwalks, defective seats or armrests and any other unsafe condition.

Occupational Safety and Health Act

Congress passed the Occupational and Safety Health Act to ensure worker and workplace safety. Their goal was to make sure employers provide their workers a place of employment free from recognized hazards to safety and health.

Resource Conservation and Recovery Act

Congress enacted the Resource Conservation and Recovery Act in 1976 to establish a system for managing non-hazardous and hazardous solid wastes in an environmentally sound manner. Specifically, it provides for the management of hazardous wastes from the point of origin to the point of final disposal i.e. cradle to the grave.



NORTH DAKOTA GRAIN DEALERS ASSOCIATION

STEVEN D. STREGE, Executive Vice President
CHERYL WELLE, Executive Assistant
CONNIE LEIER, Administrative Assistant
Ph: 701-235-4184, Fax: 701-235-1026
118 Broadway, 606 Black Bldg., Fargo, ND 58102
Website: www.ndgda.org

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

HAL GRIEVE, Safety Specialist
Ph: 701-633-5256, Fax: 701-633-5258
204 4th Avenue S., Buffalo, ND 58011

TESTIMONY OF NORTH DAKOTA GRAIN DEALERS ASSOCIATION
SENATE BILL 2405 – FELA LIABILITY
ND HOUSE AGRICULTURE COMMITTEE
REPRESENTATIVE GENE NICHOLAS, CHAIRMAN
MARCH 4, 2005

Good morning Mr. Chairman and members of the House Ag Committee. My name is Tony Johannesen. I'm General Manager of Dakota Prairie Ag with headquarters in Edgeley. I'm also a Director on the North Dakota Grain Dealers Association Board and a past president of the organization. As you all likely know, NDGDA is a 94-year-old voluntary membership trade association and over 90% of our state's grain elevators are members. We are here in support of SB 2405.

The 2003 North Dakota Legislative Assembly dealt with insurance liabilities imposed on grain elevators by railroads. FELA was a sticking point. FELA is the Federal Employers Liability Act. It is most easily described as work comp coverage for railroad employees, although it is said to be more favorable to the employee than something like ND work comp. The 2003 Session ended with the law allowing railroads to require the FELA endorsement from only those grain elevators handling more than 250 loaded railcars annually. The endorsement was supposed to go on elevator commercial general liability policies, thus providing coverage for railroad employees even though the elevator was not at fault.

We asked that this bill be introduced for a couple of reasons. One is that the FELA endorsements called for in present law are simply not available from insurance companies that currently write North Dakota grain elevators, and we're quite sure not from anyone else either at reasonable cost. Last summer the BNSF gave Grain Dealers a list of supposed FELA providers. Grain elevator insurance professionals who checked out the domestic companies said none would write it for us. Foreign sources were questionable or very expensive or both. This will be verified today by testimony from those insurance professionals.

We are not trying to escape any liability for our own negligent acts by offering this bill. If the grain elevator is at fault in the event of a railroad employee injury, its comprehensive general liability insurance will respond. But that insurance will not respond when the insured bears no fault. Grain elevators have been unknowingly signing railroad leases and track agreements with FELA requirements in them and have thus exposed themselves to huge uninsured liabilities. The consequences of an incident could be huge, and life-threatening to a small business.

In addition to the practicality of no one writing FELA endorsements, there is the philosophical view that one party should not be held responsible for the negligence of another. If the railroad can transfer its liabilities for such incidents to its customers, then there is less incentive for it to correct situations that might bring about such incidents.

Testimony being submitted by others goes into more detail, but it is enough for us to say that this is an unreasonable and impractical situation that state law should not allow to go on. This is a simple bill; it eliminates that one item we cannot comply with. Let's keep it simple. Thank you and I'll try to answer any questions.

Testimony of Larry Ash

SENATE BILL NO. 2405 – FELA Liability

House Agriculture Committee

Representative Gene Nicholas, Chairman

March 4, 2005

Good morning Mr. Chairman and members of the Agriculture Committee. My name is Larry Ash. I am a commercial insurance agent with Security Insurance Agency in Jamestown, ND. I have been in the Agri-business insurance since 1976.

Federal Employers Liability Act (FELA) was made a federal law by Congress in 1908. FELA is a law that provides special protection to employees of railroads.

If the injured worker can prove that his employer was negligent (that is, provided an unsafe place to work) then he can recover for pain and suffering and disability and can recover full compensation. Such a case is usually worth much more than a Workers Compensation loss since Workers' Compensation has a strict statutory limits. The injured worker with FELA can have his case decided by a jury, which is always preferable since they have more in common with the injured worker.

The lease contracts states that the grain elevator shall indemnify and hold the railroad harmless from any liability or claim related to FELA regards of negligence or strict liability of the railroad. The problem with these contracts is that Insurance contracts excluded coverage for FELA and they are unable to endorse the coverage onto their insurance contracts. It is my understanding that a signed lease contract will hold up in court of law and insurance companies are not required to pay if there is no negligence on the part of the grain elevator. So, if the grain elevator signs this lease and has a FELA claim, they will probably be put out of business if the claim is large.

Since, the grain elevators Worker Compensation, General Liability or Employers Liability will not endorse coverage for the FELA exposure, the only remedy is the Excess & Surplus market. I have inquired with some of the large Broker Firms that deal with the E & S lines that write this type coverage and they have stated they don't have a market that would provide coverage for the FELA coverage for a small country elevator. One broker stated that some of the large companies that purchase the FELA endorsement usually have very large deductibles ranging from \$250,000 to \$500,000 and the cost are very expense.

It appears the railroad is trying to contract their liability away to the grain elevators. The grain elevators do not have any control over the railroad employees and there for can not control the work environment of the railroad employees. Insurance coverage's are written to protect individual businesses for their own negligence, not those of others, there for I am in support of Senate Bill 2405.

Thank you.