

NORTH DAKOTA LEGISLATIVE COUNCIL

Minutes of the

TRANSPORTATION COMMITTEE

Tuesday, March 16, 2004
Board Room, Sleep Inn and Suites
Minot, North Dakota

Senator David P. O'Connell, Chairman, called the meeting to order at 9:00 a.m.

Members present: Senators David P. O'Connell, Duane Mutch, Dave Nething, Tom Seymour; Representatives Craig Headland, Joyce Kingsbury, William E. Kretschmar, Dan J. Ruby, Dorvan Solberg, Elwood Thorpe, Robin Weisz, Ray H. Wikenheiser

Others present: See attached appendix

It was moved by Senator Nething, seconded by Representative Solberg, and carried on a voice vote that the minutes of the previous meeting be approved as distributed.

RAILROAD RAILCAR SUPPLY

Mr. Tony Clark, Commissioner, Public Service Commission, provided written testimony on the railcar shortage in this state. A copy of his testimony is on file in the Legislative Council office.

In response to a question from Representative Thorpe, Mr. Clark said almost all state regulation of railroads is preempted by federal law. He said the state may be an advocate in a rate case before the Surface Transportation Board. He said in the past the Legislative Assembly has appropriated money for a rate case and has passed resolutions urging Congress to make changes in the law.

Mr. Tim Bryan, Chairman of the Producer Board, SunPrairie Grain, Bowbells, presented written testimony to the committee on the impacts of the railcar shortage on a grain company. He said the financial impacts include penalties assessed by Pacific Northwest buyers and interests costs. A copy of his testimony is on file in the Legislative Council office.

Mr. Brad Haugeberg, Manager, SunPrairie Grain, Fargo, responded to questions on the railcar shortage. In response to a question from Representative Kretschmar, Mr. Haugeberg said farmers in this state produce so much grain that if it was moved by truck it would destroy the roads. He said 20 percent of the crops in this state are moved by truck.

In response to a question from Representative Ruby, Mr. Haugeberg said cars purchased at auction must arrive within a 15-day window. He said there is a \$50 per day late penalty for up to four days. He said if a grain elevator accepts the penalty, then the elevator loses priority.

In response to a question from Senator O'Connell, Mr. Haugeberg said the Canadian Pacific Railway is 45 to 60 days behind on all trains. He said the Burlington Northern Santa Fe Railway Company is timely on shuttle trains, but 45 to 60 days behind on other trains.

Mr. Brian Sweeney, Legal Counsel and Executive Director of Government Affairs, Burlington Northern Santa Fe Railway Company, St. Paul, Minnesota, provided testimony on why there has been a shortage of railcars and efforts made by Burlington Northern to address the concerns of grain elevators.

Mr. John Huber, Director of Government Affairs, Canadian Pacific Railway, Minneapolis, Minnesota, provided testimony on the reasons for a shortage of railcars and the Canadian Pacific response to the shortage.

SALE OF LEASE AND RAILROAD RIGHT-OF-WAY STUDY Switches

Mr. Haugeberg provided testimony on the cost of rail switches being billed to grain elevators. He said rail switches cost approximately \$100,000 each. He said an elevator requires at least two switches. He said Canadian Pacific has begun to charge for these switches. He said Burlington Northern does not charge for switches. He said North Dakota Century Code (NDCC) Section 60-06-05 requires railroads to pay for the switches. He said every time a train on the main line goes over a switch it wears on the switch. He said railroads reserve the right to use the sidetrack for storage and do not allow the elevator any control over the switch. He provided a handout of resolutions passed at the annual convention of the North Dakota Grain Dealers Association. The resolutions related to rail switches and sidetracks being the responsibility of the railroad and the reasonable and equitable division of railcars by railroads. A copy of the handout is on file in the Legislative Council office.

In response to a question from Representative Weisz, Mr. Haugeberg said SunPrairie paid for the sidetrack and in the past Canadian Pacific has paid for the switches, including the moving and repairing of the switches. He said it is unfair for the railroad to bill the elevator for costs relating to the switches. He said Canadian Pacific has made other unfair billings. He

said SunPrairie has approximately 30 unpaid invoices from Canadian Pacific, which include bills for bridge repair when there is no bridge near the elevator and for snow removal in May. He said the railroad charged \$942 for the use of orange cones.

In response to a question from Senator O'Connell, Mr. Huber said Canadian Pacific has developed a new program to bill for switches over a period of years instead of in a lump sum. He said under the contract with the elevators, Canadian Pacific may bill for the switches. He said the Canadian Pacific position is that the customer is contractually responsible for the switches.

Representative Weisz said the entity that provides the wear and tear on the switches should pay for the switch. He said it will be impossible for small shippers to pay for switches.

SHORT LINE RAILROADS

Mr. Daniel L. Zink, Director of Administration, Red River Valley and Western Railroad, Wahpeton, provided testimony on short line railroads. He said there are three short line railroads in this state. He said there are seven large railroads and 550 short line railroads in the United States. He said short line railroads are part of the feeder system to the large Class 1 railroads. He said short line railroads have one-third of the track in this state and are an alternative to the abandonment of branch lines. He said short line railroads have saved railroad service to some rural areas. He said the Red River Valley and Western Railroad handles twice the carloads it had in 1987 and has 70 customers. He said the fastest area of growth is local service. He said local service is hauling freight solely on the short lines track. He said the railroad owns 100 cars for local service. He said the railroad is purchasing the track the railroad uses from Burlington Northern on a long-term contract for deed. He said the railroad has a long-term easement from Burlington Northern for the right of way. He said for the lease of the railroads right of way, the railroad uses Burlington Northern forms because of the property interest retained by Burlington Northern.

In response to a question from Representative Solberg, Mr. Zink said the other two short line railroads in this state lease the track from the main line carrier.

In response to a question from Representative Kretschmar, Mr. Zink said the railroad is always looking at reestablishing an abandoned line, but when the track is removed it is cost-prohibitive.

In response to a question from Senator Seymour, Mr. Zink said the Red River Valley and Western Railroad is privately owned.

In response to a question from Representative Weisz, Mr. Zink said the rates for long, off-system hauls are set by Burlington Northern. He said the Red River Valley and Western Railroad sets rates for local shipments if they have no effect on the long-haul

rates. He said the 100 cars owned by the railroad are used solely for local service and some of the cars are prohibited from being used as Class 1 railroads because of the condition of the car.

In response to a question from Representative Thorpe, Mr. Zink said the biggest issue for short line railroads is the change by Class 1 railroads to larger capacity cars. He said the track of most short lines cannot handle large capacity cars. He said laying new track is a substantial cost issue for a short line railroad.

In response to a question from Senator Nething, Mr. Zink said the railroad has 35 to 40 personnel and equipment to conduct most of the maintenance for the railroad. He said the railroad uses some contractors.

INDEMNITY PROVISIONS AND INSURANCE

Mr. Larry Ash, Security Insurance Agency, Jamestown, provided testimony on insuring of grain elevators. He said insurance rates have increased 50 to 100 percent in the last few years. He said underwriting requirements have gotten tighter and tighter. He said there are only three companies that sell insurance to a grain elevator. He said track leases are weighted heavily in favor of the railroad and indemnify the railroad for everything except gross negligence or willful misconduct. He said the track lease requires the lessee to take on the negligence of the railroad. He said insurance companies are not willing to provide coverage for what is being asked for in track leases. He said commercial general liability policies have an absolute exclusion for pollution. He said track agreements require the lessee to indemnify the railroad for pollution. He said some companies provide limited premises pollutant cleanup, but the coverage is limited and very expensive. He said private companies do not provide an endorsement for Federal Employers' Liability Act (FELA) claims. He said the insurance industry has been issuing policies based on old leases and has not reviewed the new leases to see if there have been changes. He said once the industry reviews the new leases, the industry probably will not provide coverage. He said presently there is no one in the market to provide a FELA endorsement. He provided a handout comparing railroad indemnity provisions with commercial general liability insurance provisions. In addition, he provided a handout of a presentation made by Ms. Barb Bierbrauer at the North Dakota Grain Dealers Association annual convention in January. The handout compares lease agreement language with insurance contract coverages and exclusions for general liability policies. A copy of each handout is on file in the Legislative Council office.

In response to a question from Representative Weisz, Mr. Ash said there is no insurance company that will provide a FELA endorsement. He said

Ms. Bierbrauer and he looked at the market and could not find anyone who offered a FELA endorsement.

Mr. Sweeney provided written testimony on insurance requirements of Burlington Northern. He said there is a misinterpretation of the hold harmless clause. He said if an anhydrous ammonia spill happened on a lessee's sidetrack and the spill was not related to the lease, the lessee would not be liable. He said commercial general liability insurance excludes worker injury. He said the worker will sue the railroad and the railroad will sue the lessee if contributorily negligent. He said a FELA endorsement protects the lessee and maintains the relationship between the lessee and the lessor. He said Burlington Northern's risk management department contends FELA endorsements are available in the marketplace. He provided a handout on required insurance. He provided a handout of a letter in response to previous questions from the committee on annual revenues attributed to North Dakota and shippers not on Burlington Northern property. A copy of his testimony and each handout is on file in the Legislative Council office.

In response to a question from Representative Weisz, Mr. Sweeney said it is not a double standard for a railroad employee, injured on a sidetrack, being able to go after the insurance company of the lessee instead of only being able to go after the railroad, as when injured on the main line. He said the lessee has exposure to liability because there is a relationship between the injury and the person injured on a sidetrack. He said because the lessee has exposure to this liability, the railroad requires insurance to address the liability.

In response to a question from Representative Weisz, Mr. Sweeney said it is typical in landlord-tenant relationships for the lessee to assume the liability. He said the State of North Dakota requires lessees to assume liability. He said the lessee is in control of the property and is in the best position to keep it in safe condition.

In response to a question from Representative Weisz, Mr. Sweeney said a lessee would be liable if the lessee had an anhydrous ammonia facility next to the track and a train went off the track and hit the anhydrous ammonia tank. He said the lessee brought the tank onto the property and the tank was filled with a dangerous chemical and, therefore, the lessee should indemnify the railroad. He said the tank creates an increased risk for the railroad and the railroad needs to be indemnified for that risk. He said the other ways of addressing the risk would be to charge a higher rent or prohibit the placement of anything on the right of way.

In response to a question from Representative Weisz, Mr. Sweeney said a railroad employee injured on a lessee's property would not pursue the lessee's general liability insurance because the claim would be

rejected by the commercial general liability insurance carrier.

In response to a question from Representative Thorpe, Mr. Sweeney said if a train derailed and killed people in an elevator, the lessee would have to indemnify the railroad. He said but for the placement of the elevator next to the railroad there would not have been a death.

ALTERNATIVE METHODS FOR RECORDING AND DISCHARGING MOTOR VEHICLE LIEN STUDY

At the request of Chairman O'Connell, committee counsel reviewed a bill draft [50003.0100] to allow for an electronic lien notification procedure.

Mr. Keith Kiser, Director, Motor Vehicle Division, Department of Transportation, provided testimony on the bill draft. He said the study came at the request of Senator Thomas L. Trenbeath. He said there is no specific procedure in the bill draft for electronic liens. He said the department envisions that the procedure will be carried out by a third party that provides these services as in other states. He said large lenders want this service. He said the department will work with lenders to provide the most cost-effective and desirable procedure. He said the procedure will not be created through administrative rules.

In response to a question from Representative Weisz, Mr. Kiser said the largest lenders are the auto dealer lenders. He said after these lenders, the next largest lenders are U S Bank, Capital Credit Union, and the military credit union.

It was moved by Senator Nething, seconded by Senator Mutch, and carried on a roll call vote that the committee approve and recommend to the Legislative Council the bill draft creating an electronic lien notification procedure for motor vehicles. Senators O'Connell, Mutch, Nething, and Seymour and Representatives Headland, Kingsbury, Kretschmar, Ruby, Solberg, Thorpe, Weisz, and Wikenheiser voted "aye." No negative votes were cast.

UNINSURED AND UNDERINSURED MOTORIST COVERAGE

At the request of Chairman O'Connell, committee counsel presented a memorandum entitled *Uninsured and Underinsured Motorist Coverage - History*. He said the memorandum includes information on this state's law, legislative history, and case law, including *Rask v. Nodak Mutual Insurance Company*, relating to uninsured and underinsured motorist coverage.

Mr. Rob Hovland, North Dakota Domestic Insurers Association, provided testimony on uninsured and underinsured motorist coverage in this state. He said there are five coverages required by law:

1. No-fault/personal injury protection;

2. Liability;
3. Property damage (sometimes considered part of liability);
4. Underinsured motorist; and
5. Uninsured motorist coverage.

Mr. Hovland said uninsured and underinsured motorist coverage is for bodily injury to yourself. He said under the current statute, uninsured and underinsured motorist coverage extends to a person on a motorcycle they do not own. He said motorcycle owners should have to purchase insurance separately for the motorcycle.

Mr. Hovland said the *Rask* case allows a person to sue an insurance company directly instead of the other person in the accident, thereby increasing the amount of damages. He said all liability insurance should first be taken into account before underinsured benefits are available.

In response to a question from Representative Weisz, Mr. Hovland said no-fault does not apply to motorcycles. He said under state law when an individual buys an automobile policy that individual is covered while riding on an underinsured motorcycle not owned by that individual.

Mr. Larry Maslowski, Insurance Department, answered questions for the committee. In response to a question from Senator O'Connell, Mr. Maslowski said of the five types of insurance required for an automobile, only no-fault does not apply to motorcycles. He said the Legislative Assembly intended to include the situation in which an individual with uninsured and underinsured motorist coverage was injured while riding on an uninsured or underinsured motorcycle because of the high probability of great injury.

In response to a question from Representative Ruby, Mr. Hovland said premiums are higher on motorcycles because any accident on a motorcycle has a high probability of great injury. He said no vehicle is as dangerous as a motorcycle.

In response to a question from Representative Weisz, Mr. Hovland said in the example given, the parents did not want the child rated on their vehicles for uninsured and underinsured motorist coverage.

In response to a question from Representative Ruby, Mr. Hovland said the law requires that members of the household are included under the policy.

Representative Weisz said insurance companies know that this situation may arise and can adjust premiums accordingly. He said it is a different issue if a child is a part of a household from whether the person should or should not be covered because the situation is unfair to an insurance company.

In response to a question from Representative Weisz, Mr. Hovland said it is unfair for the operation of motorcycles to increase the rates for motor vehicle policies.

Ms. Crystal Hovland, student, Rugby, presented testimony on uninsured and underinsured motorist coverage. She said she was in favor of the changes in the law proposed by Mr. Hovland.

Mr. Pat Ward, North Dakota Domestic Insurers Association, presented written testimony on underinsured motorist coverage. A copy of his testimony is on file in the Legislative Council office. He said the issues relating to underinsured motorist coverage are:

1. Whether to use the modified difference in limits approach or the excess approach.
2. Whether to include motorcycles under the definition of motor vehicles.
3. Whether to make the coverage mandatory or optional.
4. Whether to reverse the *Rask* case through legislation.

Mr. Ward said motorcycles are more likely not to be insured than other vehicles. He said this is because a high proportion of youth ride motorcycles and motorcycles are a seasonal vehicle for which a person may forget to reinstate insurance.

In response to a question from Representative Weisz, Mr. Ward said approximately 10 states mandate uninsured and underinsured motorist coverage.

In response to a question from Representative Thorpe, Mr. Ward said changing the definition of motor vehicle from two or more load-bearing wheels to three or more load-bearing wheels may not exclude all motorcycles.

Mr. Rod St. Aubyn, Blue Cross Blue Shield of North Dakota, Fargo, presented testimony on uninsured and underinsured motorist coverage. He said Blue Cross Blue Shield is concerned when coverage once mandated is not mandated because of cost-shifting to health care insurance. He provided written testimony on the change in Colorado's no-fault law and on fraud reports to the insurance company of suspected insurance fraud relating to no-fault insurance. A copy of his testimony is on file in the Legislative Council office.

Mr. Hovland said uninsured motorist and underinsured motorist coverage has nothing to do with health insurance. He said health insurance does not have a claim against uninsured or underinsured motorist coverage.

Mr. Maslowski provided a copy of a report entitled *Automobile No-Fault Independent Medical Examinations* presented to the Budget Committee on Health Care on September 24, 2002. He said the recommendation of the report was to have an alternative dispute mechanism for small claims. A copy of the report is on file in the Legislative Council office.

DEALER LICENSING STUDY

Low-Speed Vehicle Dealers

At the request of Chairman O'Connell, committee counsel presented a bill draft [50041.0100] on the

licensing of low-speed vehicle dealers. He said the bill draft imposes the requirements for trailer dealers on low-speed vehicles.

Mr. Kiser provided testimony on the bill draft. He said the department issued licenses for low-speed vehicle dealers for three years until an Attorney General's opinion said the department did not have authority over low-speed vehicle dealers. He said the dates of licensure in the bill draft need to be adjusted to correspond with present licensing practices.

In response to a question from Representative Thorpe, Mr. Kiser said the bill draft allows a person with a motor vehicle dealer's license and insurance not to have duplicative coverage for a low-speed vehicle dealer's license.

In response to a question from Representative Ruby, Mr. Kiser said there are low-speed vehicle dealers that are not motor vehicle dealers. He said there are cases when people may sell low-speed vehicles but not any other kind of vehicles.

In response to a question from Representative Weisz, Mr. Kiser said the reason for regulation is to have consistency in the market and provide consumer protection.

Mr. John Kennelly provided written testimony on the bill draft. He said that imposing no additional requirements on already licensed auto dealers that sell low-speed vehicles is appropriate. A copy of his testimony is on file in the Legislative Council office.

Senator O'Connell said the funds generated by the licensing should go into the highway fund.

Motorcycle Dealers

At the request of Chairman O'Connell, committee counsel presented a bill draft [50042.0100] on the licensing of motorcycle dealers. He said the bill draft

imposes most of the requirements of new and used motor vehicle dealers on motorcycle dealers.

In response to a question from Representative Thorpe, committee counsel said under present law a motorcycle dealership may not be in a residence.

In response to a question from Representative Thorpe, Mr. Kiser said there would be a separate license for new and used motorcycle dealers under the bill draft.

In response to a question from Representative Thorpe, Mr. Kiser said a vehicle dealer that takes a vehicle in on trade for which the dealer does not have a license does not need to have a license because the dealer is not in the business of selling the vehicle that was traded in. However, he said if a car dealer is in the business of selling motorcycles, then the car dealer needs a separate license.

In response to a question from Representative Weisz, Mr. Kiser said the study was in response to a Minot dealer that went out of business and left 85 customers without proper registration.

Senator Nething said the purpose of the bill draft is consumer protection.

Representative Weisz said the purpose of the bill draft is turf protection. He said the motorcycle market is smaller than the motor vehicle market and should not have the same regulations.

No further business appearing, Chairman O'Connell adjourned the meeting at 4:00 p.m.

Timothy J. Dawson
Committee Counsel

ATTACH:1