

NORTH DAKOTA LEGISLATIVE COUNCIL

Minutes of the

TRANSPORTATION COMMITTEE

Monday, September 29, 2003
Roughrider Room, State Capitol
Bismarck, 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, Dan J. Ruby, Dorvan Solberg, Robin Weisz, Ray H. Wikenheiser

Member absent: Representative Elwood Thorpe

Others present: See attached appendix

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

RAILROAD RIGHT-OF-WAY STUDY

Railroads

Mr. David Drach, Manager, Real Estate Sales and Leasing, Canadian Pacific Railway, Minneapolis, Minnesota, provided written testimony on the sale and lease of railroad right of way. He said the Soo Line Railroad Company is a wholly owned subsidiary of the Canadian Pacific Railway. He said the Canadian Pacific obtained most of its property in fee title and through negotiation, not condemnation or grant. He said railroads require a lot of land because of safety concerns and the need for car sidings. He said although the management of railroad property is similar to any other real estate enterprise, the management of railroad property is dissimilar in that the leasing of property is secondary to the business of operating a railroad, railroads have inherent dangers, most leases involve land and not buildings, and the Soo Line does not require damage deposits but requires the tenant to cover all liability and insurance needs. He said land leases are generally not marketed to the public and occur upon a lessee's initiation. He said rental rates are the same for different uses if all factors are the same and lease provisions do not distinguish between rail and nonrail shipping tenants. He said there are many costs associated with leasing property. He said sometimes lessees abandon property and the railroad must expend substantial sums in demolition. He said an environmental investigation and cleanup for a site abandoned by a lessee can result in a sizable cost to the railroad. He said in the sale of noncorridor property, lessees are usually given the first opportunity to

buy property to which they hold the lease. He said the sale price is based upon the market value of the land, subject to a minimum. He said generally the railroad's preference is not to sell corridor property. A copy of his testimony is on file in the Legislative Council office.

In response to a question from Senator Nething, Mr. Drach said although the railroad is a local monopoly, the railroad has competition statewide with other railroads and short lines. He said the railroad does not have a monopoly on real estate. He said most leases have nothing to do with the provision of shipping services by the railroad.

In response to a question from Senator Nething, Mr. Drach said the last time land was acquired by the railroad was approximately four years ago for a siding expansion.

In response to a question from Senator Nething, Mr. Drach said the railroad allocates the responsibility for liability and insurance on the leased property to the tenant. He said the railroad would have a difficult time purchasing insurance because of the different types of lessees. He said the tenant must accept liability from reasonable railroad operations. He said this is not malicious, but a sound business practice.

In response to a question from Senator Nething, Mr. Drach said sale and lease rates vary based upon the fair market value; however, there is a minimum. He said it is cheaper to lease property in a small town than in a large town if the minimum is met in both instances. He said most sales in rural areas are at the minimum.

In response to a question from Senator Nething, Mr. Drach said a railroad's operating property is centrally assessed and when service ends property taxes are locally assessed.

In response to a question from Senator Mutch, Mr. Drach said lease provisions have not changed until the last 15 years and there have not been retroactive changes. He said changes are the result of a more litigious society and environmental concerns. He said some leases have had the same terms for over 100 years. He said 100 years is a substantial amount of time to pass without a rental increase. He said the minimum lease amount is \$720 per year.

In response to a question from Representative Headland, Mr. Drach said the railroad is dealing with two elevators that have been abandoned.

In response to a question from Representative Headland, Mr. Drach said although the railroad could get a judgment against an elevator that has abandoned property, the judgment would not be valuable because the elevator likely has no available assets. He said the reason the elevator abandons the property is because the elevator is insolvent.

In response to a question from Representative Weisz, Mr. Drach said it would be extremely unlikely for a railroad to require an elevator to remove any improvements on the property within 30 days unless they accept sale terms of 10 to 20 times the lease rate. He said this scenario has not happened with the Soo Line. He said if someone else will pay the amount, the amount asked is not unfair.

In response to a question from Representative Weisz, Mr. Drach said although under some circumstances a shipper could be held hostage by the railroad to pay an excessive sale price, the Soo Line policy is that if there is a disagreement about price, the buyer may obtain an appraisal and the price determined by the appraisal is the sale price, subject to a minimum.

In response to a question from Representative Ruby, Mr. Drach said \$10,000 is the minimum for the sale of property, subject to a recommendation for a lower amount by an area manager.

In response to a question from Senator Nething, Mr. Drach said the minimum is based on administrative and opportunity costs. He said the administrative costs include legal and environmental costs. He said the opportunity costs include the loss of income from the sale of other properties that are worth more money which could have been made instead.

In response to a question from Senator Nething, Mr. Drach said a lessee does not have a right to purchase railroad property. He said if the railroad does not want to sell, the railroad has no obligation to sell.

Mr. Brian Sweeney, Burlington Northern Santa Fe Railway, St. Paul, Minnesota, provided testimony on the sale and lease of railway property. He said there are approximately 4,000 acres of property leased through 960 leases in this state. He said \$1,709 per year is the average lease rate. He said the lowest lease rate is \$25 and the highest lease rate is \$17,000. He said the average lease rate for 168 elevators is \$2,337 per year. He said Staubach Global Services manages railroad property. He said the railroad does not actively pursue tenants. He said it is a fallacy that tenants need to be on railroad property because they are railroad customers. He said a lessee in Belfield left the railroad with \$150,000 in demolition costs after the lessee paid \$3,000 per year in rent. He said some states have regulated railroad lease rates. He said these states have required

higher rents so that rates do not subsidize rents. Mr. Sweeney said a sale price of 10 times the annual lease rate is a rule of thumb for the sale of railroad property. He said the normal variance is from 8 to 12 times. He said if the buyer wants a lower rate, the buyer can negotiate a lower amount. He said when the railroad sells property, generally, the primary purpose is to get rid of the property. He said in these situations the railroad usually only wants an amount that will cover the railroad's costs.

Mr. Sweeney said the typical rate for a licensee to use railroad right of way for utility purposes is a one-time fee of \$2,500. He said this amount has recently been reduced to \$750 for not-for-profit companies and governmental entities. He said the permit process occurs 50 to 60 times per year.

Mr. Sweeney said the railroad keeps agreements standardized and infrequently includes new or unique terms. He said the indemnity terms used by the railroad are the same as used by the state and other real property lessors. He said the indemnity terms protect the lessor from the liability that would not be there but for the lessee. He said the indemnity terms also protect the lessee. He said the railroad requires injured employee coverage. He said under the federal Employers Liability Act, employees of the railroad sue the railroad if they are injured on a lessee's property. He said the railroad asks for railroad protection insurance if there is going to be demolition or construction conducted by the lessee close to the track. A copy of his testimony is on file in the Legislative Council office.

Mr. Dave Schneider, General Director of Real Estate, Burlington Northern Santa Fe Railway, Fort Worth, Texas, provided testimony on the sale and lease of railroad property. He said nationwide, the railroad has approximately 8,600 land leases, 125,000 permits, and 10,000 track agreements. He said there are approximately 300 new leases, 300 tract agreements, and 1,600 new permits each year. He said the railroad sells approximately 400 parcels and provides 100 easements per year. He said the railroad outsources map updates that are required approximately 2,700 times per year. He said the management of abandoned property is outsourced and management covers approximately 125 transactions per year. He said the railroad pays approximately \$10 million per year for property management. He said the railroad paid approximately \$500,000 for the demolition of abandoned property and has been informed of approximately \$10 million more in liability for future abandoned property.

Mr. Roger Schwinghammer, Regional Account Manager, Staubach Global Services, Arden Hills, Minnesota, presented testimony on the management of railroad right of way. He said Staubach handles all leases in five states, including North Dakota. He said the process for a lease begins with a response to a

request. He said Staubach sends the potential lessee an application. He said the most important information on the application is the purpose of the lease. He said if the application is for a new lease, the application is sent to the load and trainmaster for approval. He said if the application is approved by the load and trainmaster, the application is sent to engineering. He said upon approval by engineering, the application is approved and sent back to the applicant. He said the rental rate is set by looking at other leases in the area and keeping the lease rate comparable for lessees in that area. He said the price is based upon appraisals. He said lessees can negotiate the price. He said after the lease is signed, the lease is sent to the Tax Department. He said the total processing time for a lease is approximately six weeks.

In response to a question from Representative Weisz, Mr. Sweeney said the system created under the federal Employers Liability Act is a tort-based system. He said the railroad is liable for the amount proved in court. He said a federal Employers Liability Act endorsement is required to protect the railroad and the lessee from a claim.

In response to a question from Representative Weisz, Mr. Sweeney said under the federal Employers Liability Act if an employee is 100 percent at fault, the railroad would have an excellent defense to the employee's claim. He said under the federal Employers Liability Act a jury decides liability based on the facts. He said if an employee is injured on a lessee's property, the employee will most likely sue the railroad and the railroad would most likely bring the lessee into the action if the lessee were negligent. He said the federal Employers Liability Act endorsement protects the lessee. He said if the lessee and the railroad are both at fault, the federal Employers Liability Act endorsement pays for their negligence and prevents the lessee and railroad from fighting each other as well as fighting the employee.

In response to a question from Representative Weisz, Mr. Schneider said if a lessee purchases railroad property, federal Employers Liability Act endorsement is not required. He said the railroad asks to be indemnified and released from liability as part of a sale, but does not require insurance.

In response to a question from Senator Mutch, Mr. Sweeney said he is not aware of any means of transferring liability to the purchaser of railroad right of way.

In response to a question from Representative Weisz, Mr. Sweeney said once the railroad sells land, it is difficult to require insurance. He said after a sale the owner would be negligent on the owner's property, not the railroad's property. He said the owner would be brought into a lawsuit involving an injury to a railroad worker on the owner's property. To the contrary, if the owner were a lessee, the lessee would not be brought into a lawsuit because the lessee would have insurance.

In response to a question from Representative Weisz, Mr. Schneider said federal Employers Liability Act endorsement is required in a track agreement.

In response to a question from Senator O'Connell, Mr. Schneider said indemnity and insurance provisions are considered on a case-by-case basis when property donations are made to cities.

In response to a question from Senator Mutch, Mr. Sweeney said an injury and the location at which the injury occurs affects who is liable.

In response to a question from Senator Mutch, Mr. Sweeney said if a railroad worker is injured on private land, the railroad worker will most likely file a federal Employers Liability Act claim against the railroad.

In response to a question from Senator Nething, Mr. Sweeney said an elevator does not have to be located on railroad property. He said an elevator can be located on a spur track or siding owned by the elevator. He said at some point the elevator property will have to connect with the railroad property.

In response to a question from Representative Weisz, Mr. Schneider said there is no policy on selling leased property. He said a few years ago 1,580 leases were sold as a package sale. He said the sale of leased property is lessee-driven.

In response to a question from Representative Weisz, Mr. Sweeney said approximately three years ago a letter was sent out saying it was possible for lessees to buy railroad property.

In response to a question from Representative Weisz, Mr. Schneider said the operating corridor of the railroad is 50 feet on each side of the track. He said if the right of way is sold, it does not include the operating corridor which is covered by an easement.

LESSEES

Mr. Ross F. Warner, Risk Services Manager, North Dakota Insurance Reserve Fund, Bismarck, provided written testimony on indemnity and insurance clauses found in license agreements between railroads and cities and water users. A copy of his testimony is on file in the Legislative Council office.

In response to a question from Representative Weisz, Mr. Warner said the indemnity provision language in railroad leases is similar to language used by other lessors; however, the railroad does an exceptionally good job of drafting these provisions.

Ms. Connie Sprynczynatyk, North Dakota League of Cities, provided testimony on the study. She said after discussing railroad issues with representatives of various cities, most of the representatives thought that any issues the cities might have can be worked out with the railroad.

In response to a question from Senator Nething, Ms. Sprynczynatyk said the cities have been able to resolve any issues they have had with the railroads.

Mr. Russ Staiger, President, Bismarck Development Association, presented testimony on the study.

He said railroad leases impair economic development because they are for a short term and have a 30-day cancellation clause. He said most banks will not loan money for improvements on property that is leased with a 30-day cancellation clause. He said lessees have been allowed to purchase land from the Canadian Pacific Railway in the fee simple. He said until recently, lessees were unable to purchase land from the Burlington Northern Santa Fe Railway because the railroad claimed there was a reversionary clause that stated if the railroad sold any of the railroad's land all the land would revert to the federal government. He said since the railroad's change in policy in 1998, 55 parcels in the Bismarck-Mandan area, most in Bismarck, have been sold to lessees. He said the railroad suspended sales in Mandan because of environmental issues. He said it is imperative that lessees are able to purchase land from the railroad, otherwise the property will become dilapidated. He said the sale of property increases the property value and hence taxes, and provides for new jobs. He said indemnity provisions place an impediment to the purchase of railroad property.

In response to a question from Representative Weisz, Mr. Staiger said the railroad will not provide an easement within 50 feet of the track without certain indemnity provisions.

In response to a question from Representative Ruby, Mr. Sweeney said the railroad does not sell property within 50 feet of the track. He said the transferee obtains an easement for this property which requires insurance and indemnification.

In response to a question from Representative Weisz, Mr. Sweeney said if there is a derailment and a railroad car collides with a building, the lessee would be liable for any additional damage caused to the car by the car colliding with the building.

In response to a question from Senator O'Connell, Mr. Sweeney said if the building were full of people, the railroad would be indemnified and insured by the lessee for any injury to those people.

Mr. Drach said the Canadian Pacific Railway does not require a federal Employers Liability Act or railroad protective policy unless either is needed. He said the testimony by Mr. Warner was that the insurance reserve fund does not provide insurance under certain circumstances. He said Mr. Warner's testimony did not say that railroad requirements were unreasonable.

Mr. Robert Krava, Manager, Asset Management Support, Otter Tail Power Company, Fergus Falls, Minnesota, provided testimony on permits to cross railroad right of way. A copy of his testimony is on file in the Legislative Council office. He said Otter Tail Power Company has four areas of concern which include:

1. The length of time it takes to acquire a permit.
2. The fees charged for a permit.
3. Insurance requirements.

4. Arbitrary placement of new conditions without notice.

In response to a question from Representative Headland, Mr. Krava said each permit, which costs \$2,500, must be accompanied by a railroad protective liability insurance policy that costs between \$2,000 and \$2,500.

In response to a question from Representative Weisz, Mr. Krava said there is a one-time payment for a crossing permit. He said previously there were short-term permits. He said these older permits keep increasing in cost for renewal. He said the railroad protective liability insurance is just for construction and may cover one day's work.

In response to a question from Representative Weisz, Mr. Sweeney said Burlington Northern Santa Fe Railway provides an umbrella policy that could be purchased for much less than the \$2,000 for a railroad protective policy. He said the \$2,500 fee for a permit is needed for engineering reviews and other administrative costs. He said there is wide availability of railroad protective policies in the open market.

Mr. Stu Carlson, Executive Director, North Dakota Rural Water Systems Association, Bismarck, presented testimony on the permits to cross railroad right of way. He said the association represents groups that lay pipe for a water system. He said there are two concerns when crossing railroad right of way--time and cost. He said he recently received a new agreement in which the cost had been lowered from \$2,500 to \$750 and the insurance requirements for a commercial liability policy had decreased from \$5 million per occurrence/\$10 million aggregate to \$2 million per occurrence/\$4 million aggregate. He said the general liability insurance had been reduced \$5 million per occurrence/\$10 million aggregate to \$6 million. He said a blanket policy could be purchased from the railroad for \$1,000. He said the timeframe for receiving a permit is approximately five weeks. He said this length of time can be a problem with this state's shortened construction season.

Mr. Steven D. Strege, Executive Vice President, North Dakota Grain Dealers Association, provided testimony on elevators on railroad right of way. He said it is against public policy for a railroad to be able to contract away a liability because it reduces the incentive for a railroad to be safe. He said if a railroad can contract away liability, it removes the ability of the insurer to take risk reduction efforts in cooperation with the insured. He said the landlord/tenant relationship between elevators and the railroad is not a free market. He said the elevator locates on railroad property to give the railroad business. He said North Dakota Century Code Section 49-16-01.1(3)(a)(1) sets limits for commercial general liability insurance that a railroad can require of a grain elevator at \$2 million per occurrence and \$4 million for multiple occurrences. He said this coverage is for damage caused by the sole or concurrent fault of the

railroad, its employees, agents, and contractors. He said the association supports the removal of the word "sole" and sharing of damages in relation to responsibility. A copy of his testimony is on file in the Legislative Council office. In addition he provided a handout of a letter from Mr. Corwin Tufte, President, Ag States Agency, LLC, that states in reference to insurance purchased for property under a railroad property lease agreement "it is an incorrect assumption that the insurance contract will cover the indemnification of railroads for their negligent acts."

In response to a question from Representative Weisz, Mr. Strege said a federal Employers Liability Act endorsement is an unreasonable liability imposed upon a grain elevator.

Mr. Dan DeRouche, Berthold Farmers Elevator Company, Berthold, presented testimony on switching costs. He said the railroad has been requiring the shipper to pay for maintenance of the switches. He said these bills are between \$500 to \$1,000 per month. He said recently the railroad has stated that the shipper will have to pay for the entire switch. He said the cost of the switch is approximately \$90,000. He said most elevators require two switches for accessing the main track. He said the switch is on the main line and suffers wear and tear from trains operating on the main line.

In a response to question from Senator Mutch, Mr. DeRouche said the elevator uses the railroad to ship in excess of 90 percent of all product shipped by the elevator. He said the elevator does ship some product in state by truck.

In response to a question from Senator O'Connell, Mr. DeRouche said the shipper pays for a derailment that occurs at the switch.

In response to a question from Representative Ruby, Mr. DeRouche said the elevator owns the land upon which the sidetrack is located.

In response to a question from Senator Seymour, Mr. DeRouche said the \$180,000 for two switches will be passed on to the agricultural producers or the elevator will have to go out of business.

In response to a question from Representative Solberg, Mr. DeRouche said the Canadian Pacific said they would remove the switch if the shipper did not pay for the switch. He said shippers presently pay for maintenance costs and do not argue over that payment because the shipper is reliant on the railroad.

In response to a question from Senator O'Connell, Mr. DeRouche said the elevator pays the railroad approximately \$1 per bushel for freight. He said this results in the elevator in Berthold paying approximately \$10 million per year in shipping fees.

In response to a question from Representative Weisz, Mr. DeRouche said the elevator owns the siding; however, the switch is on the railroad's property. He said the railroad wants the shippers to pay for an upgrade to a switch on the main line rail.

Mr. John Huber, Canadian Pacific Railway, Minneapolis, Minnesota, provided testimony on the study. He said the track agreement governs the maintenance of switches. He said if the railroad is billing a shipper for maintenance and the shipper is not liable for under the track agreement, the billing is in error.

Mr. Gene Gorseth, Ag States Agency, Bismarck, provided testimony on the study. He said insurance companies will not insure an unnamed third party for that party's negligent acts. He said insurance insures the insured for negligent acts. He said the railroads have a social responsibility to pay for and protect the public from the railroad's negligence. He said the courts should decide who is negligent and the negligent should pay; railroads should not make this determination.

ALTERNATIVE METHODS FOR RECORDING AND DISCHARGING MOTOR VEHICLE LIEN STUDY

At the request of Chairman O'Connell, committee counsel presented 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 in support of the bill draft. He said under the electronic lien procedure the Department of Transportation envisions, lockbox companies would handle lien transactions for financial institutions. He said the financial institution would not need to possess the certificate of title. He said on removal of the lien the lender would send notice to the lockbox company and the lockbox company would notify the Department of Transportation. He said the Department of Transportation would send the title to the owner. He said there is great potential for lockbox companies to market this service to large financial institutions. He said when there were floods in Grand Forks, one bank lost over 5,000 titles and had to have duplicates issued to the bank. He said under an electronic lien procedure the bank would have had nothing to lose. He said there would be small savings to the department in postage and handling. He said the costs would be borne by the lockbox company and lender. He said there would be no cost to the department.

In response to a question from Representative Weisz, Mr. Kiser said the reason for a lockbox company and for not having the department provide this service to every lienholder is that there would be a great cost to the department. He said the department looked at what was being done in other states and other states are using lockbox companies.

In response to a question from Senator Nething, Mr. Kiser said most liens are held by GMAC and Chrysler Financial which are out-of-state lenders. He said an electronic lien notification procedure would not affect automobile dealers.

Mr. Keith Magnusson, Director, Driver and Vehicle Services, Department of Transportation, provided testimony on the bill draft. He said he has had contact with a large lender that would use the electronic lien procedure if this state allowed for that procedure.

LICENSING OF SNOWMOBILE AND ALL-TERRAIN VEHICLE DEALERS

Mr. Magnusson said a performance audit of the department made the department consider licensing low-speed vehicles, snowmobiles, and all-terrain vehicle dealers. He said a recent Attorney General's opinion grouped these three types of vehicles together in not allowing the department any regulatory authority over the dealers of these vehicles. He said if one of these dealers goes out of business, there is no bond and the department may have to absorb any loss in fees. He said the committee may want to request expansion of the study to include low-speed vehicle dealers.

In response to a question from Representative Solberg, Mr. Kiser said a low-speed vehicle is an electrically powered, glorified golf cart that can operate on golf courses and public highways with certain low speed limits.

Mr. Magnusson said he had spoken with motorcycle dealers who are licensed and they have requested more regulation similar to the regulations over new and used motor vehicle dealers. He said he was requested by some motorcycle dealers to request the study to be broadened to include the study of motorcycle dealers.

It was moved by Senator Nething, seconded by Representative Solberg, and carried on a voice vote to request the Legislative Council chairman to authorize expansion of the study on the licensing of snowmobile and all-terrain vehicle dealers to include the licensing of motorcycle and low-speed vehicle dealers.

No further business appearing, Chairman O'Connell adjourned the meeting at 2:20 p.m.

Timothy J. Dawson
Committee Counsel

ATTACH:1