

# MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION

SFN 2053 (2/85) 5M



ROLL NUMBER

DESCRIPTION

23/5

2007 SENATE TRANSPORTATION

SB 2315

## 2007 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. 2315

Senate Transportation Committee

Check here for Conference Committee

Hearing Date: January 25, 2007

Recorder Job Number: 1915

Committee Clerk Signature

*Jody Klauze*

Minutes:

**Senator Gary Lee** opened the Senate Transportation Committee meeting at 9:00 AM. The clerk took the roll call. There were 5 committee members present and Senator Andrist was absent.

**Senator Lee** opened the hearing on SB 2315 a bill relating to damages for a railroad's failure to fence.

**Senator Christmann**, sponsor of SB 2315 appeared in support of the bill. He stated that he brought this bill forward because he has heard frequently that the railroad is not maintaining its fences. The law is clear that the railroad is responsible for maintaining the fences along the railroad. There have been problems with the railroad fulfilling those obligations. Senator Christmann also presented a proposed amendment to SB 2315 that would add damages to any person suffering bodily injury or property damage by the stock that has escaped by reason of the want of the fence. Senator Christman said that a gentleman would testify for the bill and explain why he feels this bill is necessary. He has been after the railroad to fix their fence or rebuild it on the property that joins his property since 2001. He has kept a written log of who he has talked to or contacted or tried to contact since 2001. The railroad has not maintained

the fence or even tried to work out the problem. This lack of concern is why Senator Christman introduced this bill. Senator Christman hand out a proposed amendment. **Senator Lee** requested the intern make copies of the century code 49-11-24 through 49-11-30.

**Matt Benz**, a livestock producer from Beulah, presented testimony in favor of SB 2315. His written testimony is enclosed.

**Senator Potter** said to Mr. Benz that he had no obligation to maintain the fence but what did he do.

**Mr. Benz** said he has had to do some maintenance so he could use the pasture next to the railroad.

**Senator Nething** asked why the property fence was built by the railroad along side of his property.

**Mr. Benz** said that his neighbor told the railroad that if they did not build or maintain the fence that separated his property from the railroad that he would deny the railroad access through his property and the railroad needed this. So the railroad built 2 miles of new fence for the adjoining property.

**Senator Bakke** asked if he had lost any livestock because of the poor fence.

**Mr. Benz** said he had not lost livestock. He added, that if the (livestock) do damage they are good neighbors and they make it right.

**Senator Lee** asked who would determine the price or amount of money for damages incurred if the amendment was in place.

**Mr. Benz** said he did not know how that would be determined.

**Senator Fiebiger** said that in section 2, lines 22-23 of SB 2315 it says notify and wondered if that should be "notify in writing".

**Senator Christman** said that in this bill he could see the Public Service Commission be the contact person who would have the point person's name for the landowner to contact. He also stated that he knew of a person who had lost cows and he doesn't know how they came up with the settlement but the landowner was happy with it.

**Senator Potter** asked if he had visited with the PSC.

**Senator Christman** said he had.

**Senator Lee** asked for any testimony in opposition to the bill.

**John Olson**, representing BNSF Railway Company spoke in opposition to this bill. He first apologized to Matt Benz in how his situation with the railroad had been handled and was sorry that he had to go through all this. He then proceeded with his testimony that is enclosed.

He also stated that the railroad is subject to a class a misdemeanor and this carries a \$15,000. fine, so he believes the laws are strong enough. The solution he stated is better communication between landowners and railroad. He added that this bill has gotten the attention of the railroad.

**Senator Nething** said that in Mr. Benz testimony he said he tried to start a dialog with the railroad.

**Senator Fiebiger** asked Mr. Olson why 30 days would not be a reasonable amount of time in the winter. What would be a fair number of days?

**Mr. Olson** answered that he didn't know what would be fair.

**Senator Lee** asked for neutral testimony.

**William Bennet**, PSC stated that the PSC was neutral on the bill. The PSC does not have jurisdiction but they try to help the landowners. In past cases when he has to notify the railroad he contacts Sweeney or Olson. He stated that he had not had much success trying to

communicate with the Mandan office. In our dialogue with railroad I remind them of the laws in statute.

**Senator Nething** asked for clarification if he was referring to the criminal....

**Mr. Bennet** replied yes.

**Senator Nething** asked if the process now is to go to the States Attorney.

**Mr. Bennet** replied yes and also said he tries to explain to landowners that local has the authority.

**Senator Bakke** asked how many complaints they get.

**Mr. Bennet** said that they don't get a lot. He has been in his position for three years and he would say about 6-12 a year. He said he would be surprised if they got over half dozen

fencing complaints in one year.

Being no other testimony, Senator Lee closed the hearing on SB 2315.

## 2007 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. 2315

Senate Transportation Committee

Check here for Conference Committee

Hearing Date: February 1, 2007

Recorder Job Number 2545

Committee Clerk Signature

*Jody Haeger*

Minutes:

**Senator Gary Lee** opened discussion on SB 2315 relating to damages for a railroad's failure to fence.

Senator Lee brought a proposed amendment to the bill. The amendment adds damages not only to persons or livestock but also damages that livestock can make. It also adds that if the landowner can not get satisfaction through the railroad that they may notify the commission. The rest of the amendment is clean up.

**Senator Fiebiger** had a question on page 1, line 14.

**Senator Bakke** asked if the amendment modified Page 2, line 2

**Senator Lee** said that was correct and that was modified for the railroad. He said he gave a copy to the railroad representative and he had no comment after he saw them.

**Senator Potter** asked if Senator Christmann was aware of the amendment and if he approved.

**Senator Lee** said he was favorable to the amendment.

**Senator Nething** moved a DO Pass on the amended.

**Senator Bakke** seconded.

The clerk called the roll. 5-0-1

**Senator Nething** moved a DO Pass as amended.

**Senator Potter** seconded.

**Senator Lee** will carry SB 2315.

PROPOSED AMENDMENTS TO SENATE BILL NO. 2315

Page 1, line 10, after "owner" insert "and to any person suffering bodily injury or property damage by the stock that has escaped by reason of the want of the fence" and after "injury" insert "or damage"

Page 1, line 12, after "stock" insert "or other person"

Page 1, line 13, overstrike "owner's", after "property" insert "or bodily injury", overstrike "or" and insert immediately thereafter an underscored comma, and after "injury" insert ", or damage"

Page 1, line 14, replace "or" with an underscored comma and after "injury" insert ", or damage"

Page 1, line 16, overstrike "or" and insert immediately thereafter an underscored comma and after "injury" insert ", or damage"

Renumber accordingly



January 26, 2007

*GLB*  
2-1-7

PROPOSED AMENDMENTS TO SENATE BILL NO. 2315

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Page 1, line 16, overstrike "or" and insert immediately thereafter an underscored comma and after "injury" insert ", or damage"

Page 2, line 2, replace "is" with "may notify the commission"

Page 2, remove line 3

Page 2, line 4, remove "injured due to the unmaintained fence regardless of any fault of the owner"

Renumber accordingly





**REPORT OF STANDING COMMITTEE**

**SB 2315: Transportation Committee (Sen. G. Lee, Chairman) recommends AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (5 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). SB 2315 was placed on the Sixth order on the calendar.

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Renumber accordingly

2007 HOUSE TRANSPORTATION

SB 2315

## 2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. SB 2315

House Transportation Committee

Check here for Conference Committee

Hearing Date: 03-08-2007

Recorder Job Number: 4670/4671

Committee Clerk Signature

*Lisa M Thomas*

Minutes:

**Chairman Weisz continued the hearing on SB 2315. SB 2315 relates to damages for a railroad's failure to fence.**

**Senator Christmann** introduced the bill. See written testimony of Matt Benz submitted by Sen.

Christmann.

**Rep. Ruby:** It mentions the responsibility of the railroad to fence. So if they put a fence up and it's not adequate, but they fenced it, are they relieved of the liability at that point? There is a fence there but most cattle producers wouldn't have put that fence up.

**Sen. Christmann:** I only have the original version in front of me and it was quite a lot different. I don't know if the adequacy is really addressed. In my own experience, when the railroad does build a fence, it is very good. I have never known them to come out and build a one or two wire fence on the post there. What they put up is really really good. It might only last a year if it gets buried under ten or fifteen feet of snow. I didn't really think of adjusting that.

**Rep. Ruby:** In subsection two, it is all new language dealing with the duty of or notification that the landowner can notify and if that doesn't work then they go to the commission and the commission notifies the railroad. What are the penalties, other than increased liability?

**Sen. Christmann:** I don't think we are going to have a problem with that. There is not a penalty on it. I really think the railroad wants to address these things but they are a big company and some things get lost. I think it just needs to be clarified who the contact person is for the railroad. I think we can work through that.

**Rep. Delmore:** We talk to the Public Service Commission here? It doesn't say in the bill who we should talk to if we have a complaint.

**Sen. Christmann:** It is the PSC that oversees railroads. They are aware of this and feel comfortable with it.

**Rep. Thorpe:** I am not real familiar with who is responsible but this must be relating to pasture and I guess I have never took notice along the railroad, what's the owner's fence, apparently from what I understand they must fence three sides and the railroad has the one part of it. Can they do that, go and use a railroad fence for one section of the fence. If I was to fence livestock in, I guess I would want it to be all my fence so I could be responsible for it.

**Sen. Christmann:** I grew up living along the railroad so I guess it seemed obvious to me. The duty of the railroad is to maintain the fence, and there may be an exception to this, they have to maintain a fence going along the railroad if you maintain a fence around your property. In the case of Red River Valley crop land where there is not a fence for miles, railroads don't have to fence, but if you fence yours they need to keep up theirs. Whether that is a good way of going into it one hundred years ago or not, doesn't matter at this point. That is the way these agreements were made. In my own case, the railroad that goes through my property has been abandoned for some time and it's not a factor. When they made the deal with my grandfather and cut a pasture in half and put a big berm in front of it that got wrecked on a lot of snowy years. That was the deal the was made, that they would forever maintain that fence.

**Opposition was heard at this time.**

**John Olson, BNSF**, spoke in opposition to the bill.

**Olson:** One of my less lovable clients, with that, I know that I should not appeal to your sense of compassion. We opposed this in the Senate. They made some changes that were good changes. The bill has improved somewhat. The railroad BNSF and many, Sen. Christmann is correct. When a farmer fences a pasture on three sides butting the railroad right of way. The railroad then has the duty to fence and maintain that fence. The situation that Sen. Christmann referred to, that one was lost in the system and I think that the owner of that property was not treated very well by the railroad, that is absolutely correct. The railroad has the responsibility to act a little bit in a better professional manner then they did in that case. So I am not defending them. I have turned in that name and number and as far as I know, the railroad is going to be making contact with that farmer to take care of this problem. When you fence the railroad, they do bare a lot of responsibility. Also, under the current law for failure to do anything in the code relating to fencing, there is not only civil liability but it's a Class A misdemeanor which is a criminal offense. I can't remember but for a corporation I think that the fine for a Class B misdemeanor is ten thousand dollars. I think for corporate fine for an A misdemeanor is twenty thousand, way up there. The point is there is plenty of law available now that citizens can use to prosecute or get civil liability recovery from the railroads. There is over thirty five hundred miles of railroad track owned and maintained by BNSF in North Dakota right now. Times two for each side, that is seven thousand miles that potentially they would maintain. That is the extent of their responsibility. The point of all of this is that the railroad responsibility is to prevent someone else's property that is going on to the right of way and it puts tremendous pressure on the railroad based on the way the bill is currently in law to do that compensation in the matter that Sen. Christmann referred. He said that once there cow got injured or killed as a



result of a railroad fencing issue, they pay. There is a lot of blue ribbon cows that they pay for and they haven't quivveled with it. We have already created the torque system specifically addressed at the railroad that nobody else has, any other industry in current law. The only way the farmer is liable is if he is grossly negligent. The railroad can be negligent, but it takes gross negligence for the farmer to have any responsibility at all. The other thing is that I don't know what the highway department responsibility is for their public right of ways, but it is a big job for anybody including the railroads and to give a thirty day notice to the railroads right now isn't going to work very well. Weather conditions and other conditions that apply here, so basically that is our position. I think that the railroad can do a better job should obviously. It is not in the fencing business. I think some sort of long term solution should be sought out. I just know that we do the best we can.

**Rep. Thorpe:** I don't know if you have the information or not, I am wondering where this is located, it must be a secondary line I am guessing.

**Sen. Christmann:** It is a line that runs from the coal mine over to a power plant, so there is several trains a day.

**Rep. Delmore:** I realize your frustration but is there recourse for the citizens to contact the railroad?

**Olson:** It is in the works. I have addressed creating a 1-800 number or something like that. Right now, Dan Kuntz, who you probably know is a past lobbyist for the RR. I get these calls. The call come to Bill at the PSC and then Bill gives me and Brian Sweeney an email. Brian is in St. Paul and then it goes to the next level. It is supposed to go to the road master who is Jahne in Mandan. That is where the responsibility really lies. So we need to create an understanding and a duty on behalf of the RR to designate that the road master that is

responsible for everything west of Bismarck, he needs to get on that situation and address the issue. Yes, that is being done.

**Rep. Owens:** I have to admit that I was concerned about the requirement to repair within thirty days. If the notice came January 2<sup>nd</sup>, we have a little thing called weather that can interfere. What is your opinion that if it was changed to something that they had to provide written recognition of the notice, receipt of the notice within twenty days and a certain length of time to fix it? If they don't fix it, all of the damage comes into play.

**Olson:** It is unreasonable for thirty days. My point is that there is enough law out there right now. Particularly under criminal prosecutions with damages provisions that should compel the RR to get on the job and repair fences that they are required to repair. Certainly you make a good point. It is impossible for us to repair things within thirty days in the winter time. It is just unreasonable. If you want to put in a longer period of time that is more reasonable, certainly that improves the bill. The RR has not considered fence repair a priority. I think what we are all trying to do here is make this a priority and that is to maintain the safety of the tracks. They don't want to compromise that and that is why I think some of the delays get here. Perhaps some fences are in more need of repair than others or maybe there are situations where quite frankly, the landowner himself can attempt it.

**Rep. Gruchalla:** The fences alongside, just the normal, cow gets out, gets hit by a car, the farmer is responsible. If the fence is down next to the RR, the RR is responsible. I have checked some cow/car crashes and I would think that if the fence is down and this bill will help keep the cows and the horses off the highways I think this is a good bill. I am not sure if that language is in there to get somebody else out there to fix it.

**Olson:** I think that is the responsibility there now and Sen. Christmann said he is not here to make it a felony. Its there, in criminal prosecution can be held. What more do you need?

*Olson continued..*

Rep. Owens makes a good point on the amount of time that would be an improvement to recognize the conditions here. I certainly am opposed to going any further than the law currently goes right now.

**Rep. Thorpe:** I didn't get a lot of comfort from this. I understand where you are going with it, but the 1-800 number, the experience I have with them is anything but comforting. You hit all those little buttons and the last button you push, it says to dial over and I hope there is a better system than that.

**Olson:** Point well taken. My point is there shouldn't be a dozen people that are channeling things through. If that number will at least get you to the eleventh or twelfth is my point.

**Rep. Price:** Past experience, my father always wanted every bit of pasture you could get and so we fixed that one fence every spring and when he died, we moved the fence a little bit. Has there been any discussion that the RR and landowners, I don't know how many feet it would take to move the fence, but maybe rent the pasture land from the owner on a long term basis and put the fence where it is not going to get knocked down every winter?

**Olson:** Good thought. I have no idea.

**Rep. Price:** There are going to be areas that is always going to be a problem. I know pasture is precious.

**Olson:** That is part of the problem here is the solution sounds easy but it is probably talks like we just raised here. No matter what the fence is, if a big snow fall comes, what are we supposed to do? Get out there and in thirty days move the snow and repair the fence. Those are judgment and common sense kind of dictating.

**Rep. Ruby:** I think the original bill deals with the damage to the cow and I think it was brought up about how this expands to liability. If you think about it, there is some damage that can be

done to another property owner's property whether they have hay, do you believe under the existing law that the RR would be responsible for the damage that the cow would do even though the train and the cow didn't meet?

**Olson:** I think that is a good question. I kind of think that the court system itself would provide for that. Roman law taught us that if you have your boat tied up to the dock on the river and the rope is cut and the boat comes lose and damages things on your property downstream you could only recover against the owner the cost of the rope. Our system carries it all the way. If your negligence causes one, and one causes two and three, then you liable all the way down. I think that the current court system, if there is negligence involved in maintaining the fence.

**Rep. Ruby:** I was wondering if there would be a little bit of ambiguity on that because you would have the one land owner who says it was your cow and you did the damage and this doesn't say that the RR has to oblige to that. It just says if the RR does damage to the cow because of the fence, then they are going to compensate for that. It doesn't say what that cow would do with another property. You say that you think you are liable for it now, but the way this is written, it is possible that the one landowner would sue the other landowner and then he would blame the RR and you have all of these suits.

**Olson:** Let's take the RR out of it and you need a law specifically to address that. We want the cow that got out of the neighbors fence that damaged the property to put it there too, don't just single out the RR. That was my point.

**Rep. Ruby:** I believe that is clear.

**Olson:** Here we are even covering the negligence. He's not liable for anything unless he is grossly negligent.

**Sen. Christmann:** Most of the discussion has been about trying to correct the problem with 1-800 numbers and criminal prosecution whether it's thirty days or longer and the quality of the

fence and that sort of thing, but Mr. Chairman, you hit the point very well. The biggest part of this whole issue is that liability for the damages that the livestock do. Just like we have the misdemeanor charges that can go out, but we all know that if the RR doesn't do a good job, there is not a State's Attorney in the state that is going to go after the RR, over a field of wheat that gets destroyed. Just like it has worked in the past for paying damages on livestock that are killed by the train, I think it remains clear that we are to prevent these arguments between neighbors over whose fault it is.

**Rep. Kelsch:** When did you find out about this?

**Sen. Christmann:** I have heard of RR problems since I was a kid. I have known about this one for a couple of years. This is certainly not the only individual.

**Rep. Kelsch:** We all know who the lobbyist for the RR is. Did you contact Mr. Olson at all to try to have him help?

**Sen. Christmann:** No I didn't. I got this list of who this person had been through and also the fact that if you just talk them into fixing one guy's fence, that doesn't solve the problem. There is hundreds of miles of it and it tends to let things go that are causing the problem and most of the problem here is the damages that the livestock do and that is not addressed.

**There was no further testimony.**

**The hearing was closed. No action was taken at this time.**

**Later that day, the committee took up discussion on the bill.**

**Rep. Ruby:** If this bill is going to be passed on, maybe something could be looked at as far as notification.

**Rep. Thorpe:** I am wondering if this fence that is in controversy is over there in some really rough country areas where fencing can be an ongoing thing and very costly to somebody,

whether it be the landowner or the RR, but I have a hunch that it is one of those areas that is tough to maintain.

**Rep. Weisz:** That is probably correct.

**Rep. Schmidt:** I really do believe that the thirty days is a tough deal. I think we may have to amend that to a longer time.

**Rep. Kelsch:** First of all, the commission does not have the authority to regulate the RR so and they don't have authority or jurisdiction over fences so first of all what we are doing is now we are giving the commission authority to do this form and that sort of thing and they don't have jurisdiction. Second of all, you know if we want I mean if this is something that is important my recommendation would be that we say that the commission you know we prefer that the commission put on their website these you know these numbers which is you know the numbers and addresses. So that it's available on the website but you know I can't support this because I don't feel the commission has the jurisdiction at this point, we don't have the jurisdiction at this point you know so what authority do they even have to enforce the laws because we are happy.

**Rep. Weisz:** I disagree to some point. They do have some jurisdiction over the RR.

**Rep. Kelsch:** But they don't have jurisdiction over the fences.

**Rep. Weisz:** That is correct. To answer that question is to present it to them.

Does the commission currently have jurisdiction or regulatory power over the RR that would cover this area of requiring notification?

**Bill Benek, Council for the PSC:** At the present time, we don't have jurisdiction over fencing matters. We do get calls concerning fences and when we get a call and I am normally the one that handles this, I contact the railroad and also John Olson. I advise them of the problem and tell them that the law does require them to maintain the fences and I advise them of the

penalty provisions under the law and that the local law enforcement officials, state's attorney and local law enforcement officials have the jurisdictions enforced. That's what we do at this point. I will say that I think that the RR has been fairly responsive on the calls that we do get. I base that on the fact that normally I don't hear a second call and we don't get that many calls. I would say, I have been dealing with this over the last approximately three years and prior to that, it was John Muhlke, I doubt that I know that I don't get more than probably three or four calls a year. I don't know if there isn't a big problem or the people just aren't calling but that has been our experience. But right now we don't have the jurisdiction over them.

**Rep. Kelsch:** How difficult would it be to post on your website under RR or whatever the addresses for people to contact if they have an issue with the RR?

**Bill:** It wouldn't be difficult to post information on our website like the way the bill reads right now, the RR can provide the contact person and that would be posted on the website. Or if the legislature wants us to do that, that's not a problem.

**Rep. Kelsch:** Do you currently do that for other entities or other utilities in this state that you don't have jurisdiction over?

**Bill:** We, the commission, even where they don't have jurisdiction has tried to help people who may call with a problem. We have situations with communications where we will try to help people get their problem resolved but providing them contact information with the entity that they are complaining about we let them know that we have received a complaint. Besides fencing calls, we get calls like blocked RR crossing. Again it's a local law enforcement that has jurisdiction but we try to get the RR to advise them of the problem if it is a recurring problem. We ask them to address that.

**Rep. Gruchalla:** So the RR is responsible to keep the fence in repair?

**Bill:** That is correct, under the law, the RR has the responsibility to keep the fence in repair. If the landowner is fencing the other three sides.

**Rep. Gruchalla:** So then the calls are coming in to the PSC so apparently there is a problem with communication, do calls come in to the DOT?

**Bill:** I can't tell you, I don't know if calls come into the DOT.

**Rep. Gruchalla:** I guess I thought that the DOT was responsible for that also. They are obviously the crossings from the roadways, but I didn't know that local law enforcement was responsible for that.

**Bill:** Local law enforcement has the jurisdiction over the enforcement, that is what I was referring to. DOT does not have the responsibility for that.

**Rep. Weisz:** Just addressing the language regarding the injury part. Is that a problem?

**John Olson:** I think that whatever negligence that and the responsibility of duty that the railroad has, that is violated, any damages that occur should be the responsibility of the RR. Why single out the RR in the court system? Already you single out the RR having to overcome the responsibility of the farmers who assume gross negligence and we even have a farmer who is somewhat responsible. My preference is not to change the court system for the RR, but I think that the court system will provide that if the RR is negligent, they pay.

**Rep. Ruby:** You mentioned before about the negligence and gross negligence, what is the real difference?

**Olson:** Basically like this. Negligence is defined as a lack of ordinary care of all of us are required to conduct. Gross negligence is defined as the absence of any care at all. We use that term in other areas of court practice.



