

**FIRST ENGROSSMENT
with House Amendments**

Fifty-eighth
Legislative Assembly
of North Dakota

ENGROSSED SENATE BILL NO. 2358

Introduced by

Senators Mutch, Tallackson, Thane, Trenbeath

Representative Weisz

1 A BILL for an Act to create and enact section 49-16-01.1 of the North Dakota Century Code,
2 relating to indemnity provisions on use of railroad rights of way; to amend and reenact sections
3 49-16-05, 60-06-06.1, and 60-06-15 of the North Dakota Century Code, relating to prohibition of
4 railroad indemnity agreements in right-of-way leases; to provide for a legislative council study;
5 to provide for application; and to provide an expiration date.

6 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

7 **SECTION 1.** Section 49-16-01.1 of the North Dakota Century Code is created and
8 enacted as follows:

9 **49-16-01.1. Indemnity terms void and unenforceable.**

10 1. Except as provided in this section, any provision of a lease, license, or other
11 agreement for the use or occupancy of railroad right of way, or other adjoining
12 property, between a railroad or its representative and a state or federal licensed
13 public grain warehouse or potato warehouse is void to the extent it does any of the
14 following:

- 15 a. Purports to indemnify or require the defense of the railroad, or its employees,
16 agents, or independent contractors against any loss, liability, or other damage
17 that is caused by the sole or concurrent fault of the railroad or its employees,
18 agents, or independent contractors arising out of any claims or actions for
19 personal injury, death, property damage, or environmental damage or liability.
20 b. Requires the state or federal licensed public grain warehouse or a potato
21 warehouse to purchase insurance providing coverage for the railroad or its
22 employees, agents, or independent contractors against any loss, liability, or
23 other damage that is caused by the sole or concurrent fault of the railroad or
24 its employees, agents, or independent contractors.

1 c. Purports to exempt, or otherwise excuse, the railroad from any fault or other
2 responsibility for personal injury, death, property damage other than property
3 damage subject to Public Law No. 104-88 [109 Stat. 847; 49 U.S.C. 11706],
4 or environmental damage or liability caused by sole or concurrent acts of the
5 railroad or its employees, agents, or independent contractors, or for any
6 environmental damage or condition which exists at the time the lease,
7 license, or other agreement is entered.

8 2. As used in this section, "fault" is defined under section 32-03.2-01.

9 3. Notwithstanding any other provision of law, a railroad may not require that a
10 lessee, licensee, or other party contracting for the use or occupancy of right of
11 way, or other adjoining property, provide the following:

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

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

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

29 d. Pollution legal liability insurance up to one million dollars, unless the lessee
30 agrees to a greater amount, to cover liabilities arising from hazardous
31 substances or bulk storage of petroleum products brought on the property, or

1 released on or near the property, or violations of environmental laws, by the
2 lessee, licensee, or other contracting party, its employees, agents, and
3 invitees.

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

8 **SECTION 2. AMENDMENT.** Section 49-16-05 of the North Dakota Century Code is
9 amended and reenacted as follows:

10 **49-16-05. Contracts exempting railroad from liability void.** Any contract, rule,
11 regulation, or device ~~whatsoever~~ with the purpose or intent of ~~which shall be to enable~~ enabling
12 any railroad ~~corporation~~ to exempt ~~itself~~ that railroad from any liability created by sections
13 49-16-01.1, 49-16-02, 49-16-03, 49-16-04, 49-16-05, and 49-16-08 to that extent ~~shall be~~ is
14 void. In any action brought against the railroad ~~corporation~~, under or by virtue of any of the
15 provisions of this chapter, the ~~corporation~~ railroad may set off ~~therein~~ in that action any sum it
16 has contributed or paid to any insurance relief benefit or indemnity that may have been paid to
17 the injured employee or to the person entitled ~~thereto~~ to the payment on account of the injury or
18 death for which ~~said~~ the action was brought.

19 **SECTION 3. AMENDMENT.** Section 60-06-06.1 of the North Dakota Century Code is
20 amended and reenacted as follows:

21 **60-06-06.1. Determination - Appropriation.** Any party may petition the public service
22 commission to determine rights governed under this chapter. The commission shall determine
23 the matter in accordance with chapter 28-32 and the parties' rights of appeal are as limited by
24 chapter 28-32. ~~The commission shall conduct each hearing required under this section in the~~
25 ~~county where the right of way at issue is located. The parties to the determination proceeding~~
26 ~~shall pay the expense of the proceeding, the compensation of any experts, and actual~~
27 ~~expenses of any employees of the commission while engaged in the proceeding. The~~
28 ~~commission shall ascertain those costs and expenditures and, after giving the parties notice~~
29 ~~and opportunity to be heard, and after a hearing to determine the amount of cost and~~
30 ~~expenditures if a hearing is demanded by either of the parties, shall render a bill and make and~~
31 ~~transmit to the parties an order for payment by registered mail. Within ten days after receipt of~~

1 ~~the order, the parties shall pay to the commission the amount of the costs and expenses. The~~
2 ~~commission shall deposit all costs and expenses collected under this section in the general~~
3 ~~fund in the state treasury. The value of a leaseholder's improvements may not be considered~~
4 ~~in determining a reasonable lease rate or selling price. The parties to such a proceeding shall~~
5 ~~pay the expenses of the proceeding, as determined by the commission, directly to the entities~~
6 ~~owed. The commission may adopt rules to carry out this section.~~

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

9 **60-06-15. Application to existing leaseholds.** The provisions of this chapter apply to
10 the renewal or sale of existing leaseholds on railroad rights of way, and to existing leaseholds
11 on lands that have ceased to be used for railroad rights of way after the leasehold was first
12 created, and so long thereafter as the lease site remains under the ownership or control of the
13 railroad or an entity that was or is under common ownership or control of the railroad. The
14 value of a leaseholder's improvements may not be considered in determining annual rental or
15 the gross sum for the right, privilege, and easement sought.

16 **SECTION 5. LEGISLATIVE COUNCIL STUDY - ABANDONED AND SURPLUS**
17 **RAILROAD RIGHTS OF WAY.** The legislative council shall consider studying, during the
18 2003-04 interim, the sale and lease of railroad rights of way. The legislative council shall report
19 its findings and recommendations, together with any legislation required to implement the
20 recommendations, to the fifty-ninth legislative assembly.

21 **SECTION 6. APPLICATION.** Section 49-16-01.1 applies to any lease, license, or
22 other real estate agreement for the use or occupancy of railroad right of way or other adjoining
23 property entered after the effective date of this Act, and to any written renewal or amendment of
24 any prior agreement occurring after the effective date of this Act.

25 **SECTION 7. EXPIRATION DATE.** This Act is effective through July 31, 2005, and
26 after that date is ineffective.