

**FIRST ENGROSSMENT
with Conference Committee Amendments****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 and to provide for application.

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 to the extent caused by the sole or concurrent fault of the railroad or its
18 employees, agents, or independent contractors arising out of any claims or
19 actions for bodily injury, death, property damage, or environmental damage or
20 liability.

21 b. Requires the state or federal licensed public grain warehouse or potato
22 warehouse to purchase insurance providing coverage for the railroad or its
23 employees, agents, or independent contractors against any loss, liability, or

1 other damage to the extent caused by the sole or concurrent fault of the
2 railroad or its employees, agents, or independent contractors.

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

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

11 3. Notwithstanding any other provision of law, a railroad may require that a state or
12 federal licensed public grain warehouse or potato warehouse contracting for the
13 use or occupancy of railroad right of way, or other adjoining property, provide the
14 following:

15 a. Commercial general liability insurance of not more than two million dollars per
16 occurrence and not more than four million dollars for multiple occurrences
17 coverage for bodily injury, death, and property damage arising out of the use
18 or occupancy of the property by the contracting party, including:

19 (1) Damage caused by the sole or concurrent fault of the railroad, its
20 employees, agents, and contractors;

21 (2) An endorsement naming the railroad as an additional insured; and

22 (3) An endorsement under the Federal Employers Liability Act [45 U.S.C.
23 et seq.] if the warehouse engages in the business of transporting goods
24 from the warehouse by means of the railroad in an annual volume in
25 excess of two hundred fifty loaded railroad cars.

26 b. Indemnification and defense of the railroad, its employees and agents for all
27 bodily injury, death, environmental damage, and property damage claims and
28 liability up to two million dollars per occurrence arising out of the use or
29 occupancy of the property, including claims and liability caused by the sole or
30 concurrent fault of the railroad, its employees, agents, and contractors.

- 1 c. Indemnification and defense of the railroad, its employees and agents for all
2 bodily injury, death, property damage, and environmental damage suffered by
3 the lessee, licensee, or other contracting party, its employees, agents, and
4 invitees, arising from the use or occupancy of the property, including claims
5 and liability caused by the sole or concurrent fault of the railroad, its
6 employees, agents, and contractors unless caused solely by the acts or
7 omission of the railroad that are willful, wanton, or grossly negligent.
- 8 d. Pollution legal liability insurance up to one million dollars, unless the lessee
9 agrees to a greater amount, to cover liabilities arising from hazardous
10 substances or bulk storage of petroleum products brought on the property, or
11 released on or near the property, or violations of environmental laws, by the
12 lessee, licensee, or other contracting party, its employees, agents, and
13 invitees.
- 14 4. Each party to the agreement is responsible for all liability resulting from the
15 environmental condition of the property to the extent caused, aggravated, or
16 contributed to by that party, its employees, agents, and invitees.

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

19 **49-16-05. Contracts exempting railroad from liability void.** Any contract, rule,
20 regulation, or device ~~whatsoever~~ with the purpose or intent of ~~which shall be to enable~~ enabling
21 any railroad ~~corporation~~ to exempt itself that railroad from any liability created by sections
22 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
23 void. In any action brought against the railroad ~~corporation~~, under or by virtue of any of the
24 provisions of this chapter, the ~~corporation~~ railroad may set off ~~therein~~ in that action any sum it
25 has contributed or paid to any insurance relief benefit or indemnity that may have been paid to
26 the injured employee or to the person entitled ~~thereto~~ to the payment on account of the injury or
27 death for which ~~said~~ the action was brought.

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

30 **60-06-06.1. Determination - Appropriation.** Any party may petition the public service
31 commission to determine rights governed under this chapter. The commission shall determine

1 the matter in accordance with chapter 28-32 and the parties' rights of appeal are as limited by
2 chapter 28-32. ~~The commission shall conduct each hearing required under this section in the~~
3 ~~county where the right of way at issue is located. The parties to the determination proceeding~~
4 ~~shall pay the expense of the proceeding, the compensation of any experts, and actual~~
5 ~~expenses of any employees of the commission while engaged in the proceeding. The~~
6 ~~commission shall ascertain these costs and expenditures and, after giving the parties notice~~
7 ~~and opportunity to be heard, and after a hearing to determine the amount of cost and~~
8 ~~expenditures if a hearing is demanded by either of the parties, shall render a bill and make and~~
9 ~~transmit to the parties an order for payment by registered mail. Within ten days after receipt of~~
10 ~~the order, the parties shall pay to the commission the amount of the costs and expenses. The~~
11 ~~commission shall deposit all costs and expenses collected under this section in the general~~
12 ~~fund in the state treasury. The value of a leaseholder's improvements may not be considered~~
13 ~~in determining a reasonable lease rate or selling price. The parties to such a proceeding shall~~
14 ~~pay the expenses of the proceeding, as determined by the commission, directly to the entities~~
15 ~~owed. The commission may adopt rules to carry out this section.~~

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

18 **60-06-15. Application to existing leaseholds.** The provisions of this chapter apply to
19 the renewal or sale of existing leaseholds on railroad rights of way, and to existing leaseholds
20 on lands that have ceased to be used for railroad rights of way after the leasehold was first
21 created, and so long thereafter as the lease site remains under the ownership or control of the
22 railroad or an entity that was or is under common ownership or control of the railroad. The
23 value of a leaseholder's improvements may not be considered in determining annual rental or
24 the gross sum for the right, privilege, and easement sought.

25 **SECTION 5. LEGISLATIVE COUNCIL STUDY - ABANDONED AND SURPLUS**
26 **RAILROAD RIGHTS OF WAY.** The legislative council shall study, during the 2003-04 interim,
27 the sale and lease of railroad rights of way. The legislative council shall report its findings and
28 recommendations, together with any legislation required to implement the recommendations, to
29 the fifty-ninth legislative assembly.

30 **SECTION 6. APPLICATION.** Section 49-16-01.1 applies to any lease, license, or
31 other agreement for the use or occupancy of railroad right of way or other adjoining property

Fifty-eighth
Legislative Assembly

- 1 entered after the effective date of this Act, and to any written renewal or amendment of any
- 2 prior agreement occurring after the effective date of this Act.