

MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION

SFN 2053 (2/85) 5M



ROLL NUMBER

DESCRIPTION

1370

2005 HOUSE TRANSPORTATION

HB 1370

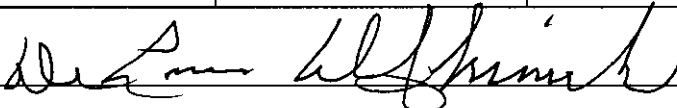
2005 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1370

House Transportation Committee

☐ Conference Committee

Hearing Date February 4, 2005

Tape Number	Side A	Side B	Meter #
1	X		28.7-52.1
2	X		0-13.0
Committee Clerk Signature 			

Minutes:

Chairman Weisz opened the hearing on HB 1370 A Bill for an Act to create and enact a new subsection to section 49-10.1-03 of the North Dakota Century Code, relating to regulation of railroad fuel surcharges by the public service commission.

Rep. Brandenburg Explained the amendment. If we are paying 30% more freight rates in ND we are getting charged 9% more freight rates because the fuel surcharges are going to be higher. A unit shipper in Berthold load unit trains and they load hundreds of cars on the same train. For a car load of wheat it is \$4100 going to the west coast. The corn on that same train, the same weight, 200,000 pounds is \$3300. There is an \$800 difference in cost for the same thing. The fuel surcharge of 9% is added onto that. It shows you that with the wheat and corn that was being shipped we are paying higher freight rates than we should be. What this bill says it is based on distance between where the shipment begins and terminates. They will say we are

breaking every law. Surface Transportation Board is not helping us on this. I can't figure out why. It is discrimination to be charging more in freight rates in ND than in other parts of the US.

Chairman Weisz Will this bill with its amendment address the issue you just brought out?

Rep. Brandenburg: The amendment addresses the weight and distance the car travels. Yes it does, but it doesn't separate the commodities. Put the weight on the car with all the same commodities on it. Does not matter if it is wheat or corn?

Chairman Weisz If I am reading this right it is not proportional to fuel surcharges in other state or provinces based on the distance between where the shipment begins and terminates. I am not sure this is addressing the problem of different commodities.

Rep. Brandenburg:(34.3) This language might not be the perfect language. It makes no sense for a truck to haul our grain 300 miles across our state on our roads to save rail rates from east to west costs so we are subsidizing the rail because our gas tax pays to fix those roads. It is unfair to have one commodity paying more or one state. The fuel surcharge in Nebraska should be the same as it is in ND. Everyone should be paying the full surcharge. Because of the way the freight rates are designed we are higher in ND.

Steve Strege: ND Grain Growers Assoc: (See attached testimony) We should put an emergency clause on this bill and get it to the governor to stop the bleeding.

Chairman Weisz The fuel surcharges do not have to be posted?

Steve Strege: (43.5) The fuel surcharges are announced on the railroad web sites.

Rep. Hawken(44.1) You made reference that the railroad was against the federal law. Why is this not before the federal government as opposed to the state?

Steve Strege: It has been brought before the federal regulators and they do nothing. We believe they are too much pro railroad. I don't believe there has ever been a bill before congress dealing with fuel surcharges.

Rep. Dosch(45.9) Would you have a history over the last couple of years what this fuel surcharge has been.

Steve Strege: Yes, I can get that for you.

Chairman Weisz Anyone else in support of HB 1370. Anyone in opposition of HB 1370.

John Herber:(46.8) The rail freight rates fall into two broad categories. Tariff rates we can change every day if we wanted to. Customers have told us they prefer the predictability of having a set rate. Most of our cost structure is barely predictable. Our fuel particularly can represent 50% or more of our cost. Especially when you have crude oil prices are \$50/barrel. We have to have the ability to share that risk. Our fuel surcharge does not factor in our hedging program. Hedging is a risk management plan and we do not pass those charges on to the consumer. The committee should consider the fuel surcharge and review applicable federal regulations and have to advise the committee on the limits the exist today and the state regulations in this area.

Rep. Hawken(50.4) I don't ship grain, but why is it not the same price if it is the same weight?

John Herber: Revenue in the rail industry is extremely complex world. We had as many as 80 people that do nothing but handle the accounting for freight rates. Particularly in our case we frequently interchange traffic with public railroads. Grain going to the West Coast will be interchanged with Union Pacific. Commonly we have more than one railroad handle the car. The customer will pay one freight rate.

Tape 2 Side A

Rep. Meyer When you are talking about your hedging policy. Do you per buy your fuel.

John Herber: We hedge our fuel program. Now we are going out to do our 2006 program.

We have an entire group of people that do this and are very knowledgeable. What you are really are doing is taking a risk and probably getting a locked in lower price. Sometimes we win and sometimes we loose so it averages out. But we are locking in 25%.

Chairman Weisz If you are hedging and locking in rates on fuel for 2006 now. People are getting contract rates a year ahead. Have any rates been retroactive?

Rep. Thorpe(3.1) What the price is in Minot (Berthold) for a car of wheat. Does Canadian Pacific use the same strategy for setting rates as they do in the US.

John Herber: The process in Canada is a little bit different. For 2004 we have had to rebate back to shippers \$700,000 because we exceeded the rate cap. I am not an expert on Canadian Wheat Board practices. There are different factors in Canada.

Rep. Thorpe Could you get me some figures on what freight weight from Estevan vs. Berthold. John said he would do this.

Chairman Weisz(4.9) Once freight has been ordered when can that fuel charge kick in. If I order freight that is 30 days behind and you have enacted a fuel surcharge, but I have ordered the freight an purchased the grain.

Brian Sweeney: (5.4) (See attached testimony) We do not make money on the fuel surcharge. We would have doubled the surcharge to even break even.

Chairman Weisz(9.3) Has BN used the surcharge in the past per car? Does fuel do a surcharge does it apply to those also or is it only for future orders?

Brian Sweeney:(9.7) I think ours has always been a percentage. When you enact a fuel surcharge we post it two months in advance you should be OK. I will check on this.

Rep. Meyer What is the composition of the Surface Transportation Board?

Brian Sweeney: In 1995 Congress got rid of the ICC and replaced it with the FCD. It is a three member board that is part of the US Dept. of Transportation. It was given exclusive jurisdiction over rail structures and the building and removal of track and all economic aspects of the rail industry. It was a very big change. One is a former congressional staff person. No they are not career railroad people. These are people who typically come out of public policy groups. They are political appointees of the president.

Chairman Weisz Anyone else in opposition to HB 1370?

Lowie Arnold, Edgely, ND: I am probably the only farmer that will testify on this committee today and you put 9% charge on the bushel of wheat. You know what that means to a farmer in ND. They say they hedge this and they hedge that. Fine, if they are going a good job they shouldn't have to put the surcharge on. On my operation as a farmer I have no way of getting that cost back. We have to pay for everything in and everything out. The rails know this and have for a long time. It is time that something like this has to be done.

Hearing closed (13.0)

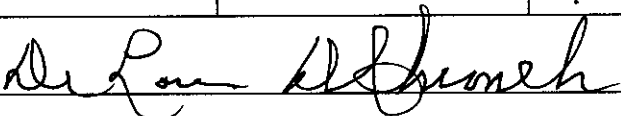
2005 HOUSE STANDING COMMITTEE MINUTES

BILL NO. HB 1370

House Transportation Committee

☐ Conference Committee

Hearing Date February 11, 2005

Tape Number	Side A	Side B	Meter #
2	X		2.5-31.0 13.0
Committee Clerk Signature 			

Minutes:

Chairman Weisz reopened hearing on HB 1370.

Rep. Owens Explained the amendment (See amendment). We also have another change on the second line where raw agricultural product is, change to commodities.

Chairman Weisz(4.5) Understand the amendment. As every one heard they are charging a percentage straight across in what their rate is. This attempts to say you have to establish a rate per car. It does not matter whether it is a single car shipment or a shuttle shipment. Fuel surcharge would be per car and it would be determined in the zone or area. For example west coast rate in North Dakota, there are three areas that those tariff rates determine east, central or west. So it would have to be per car based on the area. The rational is some what to equalize the charge because in some cases the fuel surcharge exceeds the total cost to get the train to where it is going. This would require them to base it on the area where it is going on a per car basis

instead of something else. Now there is a a great difference in fuel surcharge with no basis or rational. North Dakota is paying a huge chunk for railroad transportation.

Rep. Hawken How will this make it more legal. This particular wording.

Chairman Weisz It doesn't prohibit any type of fuel charge and it is not based on the rate that is established by them.

Rep. Ruby(7.7) The rate should include a percentage of the fuel cost within it to do the job that you are contracted to do? The surcharge is mainly when there is fluctuations in the rates that you estimated that the time you set the rate. If you have a surcharge that is more than what your total cost is going to get the freight, something is wrong.

Rep. Ruby made a motion that the amendments be approved. Seconded by Rep. Thorpe

Voice vote carried. No opposition

Chairman Weisz We have an amended bill in front of us.

Rep. Dosch Has the railroad had a change to look at this amendment?

Chairman Weisz I have no idea and they will oppose it anyway. They will argue that we should not get in the middle of anything having to do with fuel surcharges and how they would determine it. I do have a question for Brian. Do some coal contracts prohibit a surcharge.

Brian Sweeney:(10.0) That is right, some of the older coal contracts do have clauses that prohibit us from passing on the fuel surcharge. That is one thing we are insisting on all new contracts that there be language to allow you to do it.

Chairman Weisz (10.4) I sign a contract that specifically prohibits a fuel surcharge. Are all shippers paid fuel surcharges?

Page 3
House Transportation Committee
Bill Number HB 1370
Hearing Date February 11, 2005

Brian Sweeney: I can't say for sure. There are different time frames and fluctuations when the changes go into affect. It is right away with agricultural shippers there is a two month delay.

Rep. Ruby(11.1) I do see the abuse of fuel surcharges in my industry.

Motion Made by Rep. Ruby Seconded by Rep. Vegas

DO PASS AS Amended 10 Yes 4 No 1 Absent Carrier: Rep. Owens

FISCAL NOTE

Requested by Legislative Council
01/14/2005

Bill/Resolution No.: HB 1370

1A. State fiscal effect: *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	2003-2005 Biennium		2005-2007 Biennium		2007-2009 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues	\$0	\$0	\$0	\$0	\$0	\$0
Expenditures	\$0	\$0	\$0	\$0	\$0	\$0
Appropriations	\$0	\$0	\$0	\$0	\$0	\$0

1B. County, city, and school district fiscal effect: *Identify the fiscal effect on the appropriate political subdivision.*

2003-2005 Biennium			2005-2007 Biennium			2007-2009 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts
\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0

2. Narrative: *Identify the aspects of the measure which cause fiscal impact and include any comments relevant to your analysis.*

No fiscal impact is expected

3. State fiscal effect detail: *For information shown under state fiscal effect in 1A, please:*

A. Revenues: *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*

No revenues are expected

B. Expenditures: *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*

No expenditures are expected

C. Appropriations: *Explain the appropriation amounts. Provide detail, when appropriate, of the effect on the biennial appropriation for each agency and fund affected and any amounts included in the executive budget. Indicate the relationship between the amounts shown for expenditures and appropriations.*

No appropriation is necessary

Name:	Illona A. Jeffcoat-Sacco	Agency:	PSC
Phone Number:	701-328-2400	Date Prepared:	01/16/2005

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1370

Page 1, line 7, replace "higher than the average of fuel" with "not proportional to fuel surcharges in other states or provinces based on the distance between where the shipment begins and terminates."

Page 1, remove line 8

Renumber accordingly

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1370

Page 1, line 3, after "commission" insert "; and to declare an emergency"

Page 1, replace lines 7 and 8 with:

*change to
Commodities*

"Prohibit the assessment of a railroad fuel surcharge on a shipment of a ~~raw agricultural product~~ originating in this state if the surcharge is not assessed in a region, zone, or area on a per car basis or if the surcharge exceeds on a per car basis the surcharge on a carload shipment of the ~~raw agricultural product~~ originating in the same or similar region, zone, or area.

SECTION 2. EMERGENCY. This Act is declared to be an emergency measure."

Renumber accordingly

House Amendments to HB 1370 - Transportation Committee 02/11/2005

Page 1, line 3, after "commission" insert "; and to declare an emergency"

Page 1, replace lines 7 and 8 with:

"Prohibit the assessment of a railroad fuel surcharge on a shipment of commodities originating in this state if the surcharge is not assessed in a region, zone, or area on a per car basis or if the surcharge exceeds on a per car basis the surcharge on a carload shipment of the commodities originating in the same or similar region, zone, or area.

SECTION 2. EMERGENCY. This Act is declared to be an emergency measure."

Renumber accordingly

Date: 2-11-05
Roll Call Vote #:

2005 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1370

House Transportation Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken

As Pass As Amend.

Motion Made By

Rep. Ruby

Seconded By

Rep. Vigasaa

Representatives	Yes	No	Representatives	Yes	No
Rep. Weisz - Chairman	✓		Rep. Delmore		✓
Rep. Hawken - Vice Chair.		✓	Rep. Meyer	✓	
Rep. Bernstein	✓		Rep. Schmidt	✓	
Rep. Dosch	✓		Rep. Thorpe	✓	
Rep. Iverson		✓			
Rep. Kelsch	<u>Abst</u>				
Rep. Owens	✓				
Rep. Price	✓				
Rep. Ruby	✓				
Rep. Vigasaa	✓				
Rep. Weiler		✓			

Total (Yes)

10

No

4

Absent

1

Floor Assignment

Rep Owens

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1370: Transportation Committee (Rep. Weisz, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (10 YEAS, 4 NAYS, 1 ABSENT AND NOT VOTING). HB 1370 was placed on the Sixth order on the calendar.

Page 1, line 3, after "commission" insert "; and to declare an emergency"

Page 1, replace lines 7 and 8 with:

"Prohibit the assessment of a railroad fuel surcharge on a shipment of commodities originating in this state if the surcharge is not assessed in a region, zone, or area on a per car basis or if the surcharge exceeds on a per car basis the surcharge on a carload shipment of the commodities originating in the same or similar region, zone, or area.

SECTION 2. EMERGENCY. This Act is declared to be an emergency measure."

Renumber accordingly

2005 SENATE TRANSPORTATION

HB 1370

2005 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1370

Senate Transportation Committee

☐ Conference Committee

Hearing Date 3-04-05

Tape Number	Side A	Side B	Meter #
1	x		1260-3970
Committee Clerk Signature <i>Mary K. Morrison</i>			

Minutes:

Chairman Trenbeath opened the hearing on HB 1370 relating to regulation of railroad fuel surcharges by the public service commission; and to declare an emergency.

Representative Mike Brandenburg (District 28) He introduced HB 1370 and explained the rail situation in ND and said we are considered captive shippers. It's proven that in ND the freight rates are 30% higher than they are in the central part of the United States. The fuel surcharges are also 30% higher. The BN is charging 8% over freight rates. Canadian Pacific is 5% over freight rates. The problem is, if you are paying 30% more already on the freight rates, the fuel surcharges are also higher because of the 30% increase they are based on. This bill deals with the fuel surcharges and that they should be based upon the zones or area. This addresses the zones and area that railroads work with. He offered a proposed amendment. (See attached.) It talks about zones and mileage blocks, the language railroads work with.

Senator Trenbeath pointed out that the amendment was basically a hog house amendment.

He asked Rep. Brandenburg to explain the meaning of the phrase, "equalized from or within zones or mileage blocks".

Rep. Brandenburg responded that, as the railroads deal with zones and mileage blocks, there is the same consistency with freight that is shipped. The surcharge does change on the commodity.

Senator Trenbeath was not concerned with the concept as he was with the grammar. He asked if the draftsman was present.

Rep. Brandenburg said he would let the grain dealers address that question.

Senator Warner asked if it was important if the word "commodities" be considered and if there were other things that might originate in the state, such as coal.

Rep. Brandenburg said they were trying to find the language that deals with railroad issues. He said it was important but he should ask the grain dealers.

Steve Strege (ND Grain Dealers Association) See attached testimony in support of HB 1370. He also provided copies of a letter from BNSF to Public Service Commission Chairman Tony Clark.

(See attached letter.) In answer to a previous question, he pointed out that the author of the amendment, Brian Bjella, was present. He said they were trying to get the language perfected.

One of the concerns on the House side was that it not be on a mileage specific basis from one origin to one destination.

Senator Trenbeath referred to the last paragraph of Mr. Strege's testimony. He said it appears they are urging the committee to pass this law not to enforce it but rather to send a message.

He asked if they are convinced it is enforceable if it is passed.

Steve Strege said they are trying to write the amendment so it is enforceable.

Senator Trenbeath then asked if he thought it was enforceable with the amendment.

Steve Strege said he thought so.

(Meter 2866) **Steve Strege** added that the BN web site already has mileages between two locations. He thought it would be easy for them to convert that over to a "per car" "per mile" surcharge rather than basing it on the rate which, he said, is the problem.

Opposition:

John Huber (Director of Government Affairs, Canadian Pacific Railway) See attached testimony opposing HB 1370.

John Olson (Burlington Northern) Presented written testimony, prepared by Brian Sweeney with Government Affairs and Legislative Council for Burlington Northern, opposing HB 1370 and the proposed amendments. (See attached testimony. Also, see attached letter from Kevin Kaufman, BN, dated Jan. 7, 2005, to Public Service Commissioner, Tony Clark.)

Senator Trenbeath asked how they address the allegations Mr. Strege made on the differences between hauling a load of soybeans and hauling a load of wheat.

John Olson said he would have to admit that there are some inequities with that. That is an issue that should be addressed. The railroad should be compelled to look at that and it has gone on record as committing to looking at some alternatives. But, in their testimony, they have pointed out that commodities may be of different weights.

Senator Trenbeath asked why there isn't somebody from BN or CP coming in to tell why the apparent indefensible disparity somehow makes sense.

John Olson replied that was a fair question. He said he couldn't explain why there are different rates but was sure they could.

Senator Trenbeath said that, by the evidence before them, there seemed to be a problem.

John Olson said he thought the problem was that no one can devise a true, equitable, fair system for all shippers across the national system of transportation for railroads. The fuel surcharge, based upon shipping costs, was the way they implemented to address that problem with the additional fuel costs. The letters from Kevin Kaufman to the Public Service Commissioner indicate that they are committed to looking at different processes at imposing these fuel surcharges. They recognize the problem and are looking at it.

The hearing on HB 1370 was closed.

2005 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1370

Senate Transportation Committee

☐ Conference Committee

Hearing Date 3-17-05

Tape Number	Side A	Side B	Meter #
1	x		480-540
1	x		805-925
1	x		2100-2557
Committee Clerk Signature <i>Mary K. Monson</i>			

Minutes:

Chairman Trenbeath opened HB 1370 for discussion.

Discussion indicated concern with whether or not the State has any jurisdiction in this matter.

There was a request to get some input from the PSC.

(Meter 2520)

Senator Trenbeath reported that the Grain Handlers requested the committee postpone action on this bill so they could meet with the Attorney General.

The meeting was adjourned.

Additional information from Steve Strege, ND Grain Dealers, was submitted for the information of the committee and for the record. (See attached BNSF Rules Book 6100 - Carload Fuel Surcharge)

2005 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1370

Senate Transportation Committee

☐ Conference Committee

Hearing Date 3-24-05

Tape Number	Side A	Side B	Meter #
1	x		30-1090
Committee Clerk Signature <i>Mary K Monson</i>			

Minutes:

Chairman Trenbeath opened HB 1370 for discussion. He introduced a proposed amendment from the Grain Dealers. It was a hog house amendment that would create a new section to 49-02 of the Century Code. It still deals with fuel surcharges on railroads but does it in a different fashion.

Senator Nething said he would like someone to explain what the amendment does differently than the bill.

Chairman Trenbeath asked Brian Bjella, (Grain Dealers) to address that.

Brian Bjella (ND Grain Dealers Assoc.) The amendment has two purposes. First, it moves the bill to a new chapter in the Code to better isolate the bill from a preemption claim that the railroads might bring. The second, is a total rewording of it. This was to get away from the usage of the word "rates" or any reference to "rates" that was in the original house bill. Again, this was to help to try to protect the bill from a preemption claim and, also, to zero in on the

actual cost. The idea is to say that whatever the cost the railroad has in additional fuel that is all that can be passed on. They cannot pass on that cost plus, which is what they have been doing.

Senator Espegard asked if they couldn't surcharge any more than 50% if zero was \$1 a gallon and fuel was \$1.50 a gallon.

Brian Bjella said that was right. If it was an actual dollar for dollar, penny for penny, increase, they can't complain. Their whole complaint is the premium that has been tacked on over and above that.

Senator Trenbeath asked Mr. Bjella about the content of their conversation with the Attorney General and whether or not he had access to their amendment.

Brian Bjella said he reviewed the engrossed bill. They were quite skeptical of the constitutionality of the Engrossed House Bill but they have not seen the amendment.

Senator Trenbeath asked Mr. Bjella if he thought the amendment was at least closer to being acceptable.

Brian Bjella said they still felt it would be a tough fight but it gets closer to the goal.

Senator Mutch said that in order to make this work they would have to know what the price of fuel was to start with and how the surcharge reflects into the present prices.

Brian Bjella said those charges, at least with BNSF, are available on their web site.

(Meter 530) There was discussion that the reason this might stand the test is that they are only relating to that amount over cost. It still isn't a clear question but there was agreement that it was closer to being legitimate.

Senator Espegard said the hook might be the percentage would be a percentage of the freight rate and not a percentage of the fuel cost.

Brian Bjella said it was his understanding that it was an add on to the rate, not the rate itself.

Senator Trenbeath said this tries to separate it from the rate and base it on the approximate cost of the fuel.

Senator Espegard motioned to accept the amendment to HB 1370.

Senator Warner seconded the motion.

The motion carried on a voice vote. The amendment was adopted.

Senator Espegard motioned a **Do Pass as Amended** on HB 1370.

Seconded by **Senator Bercier**. Roll call vote 6-0-0. **Passed.**

Floor carrier is **Senator Espegard**.

Roll Call Vote #: 1

2005 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1370

Senate **TRANSPORTATION** Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken Adopt Amendment (Grain Growers 3-24-05)

Motion Made By Sen. Espgaard Seconded By Sen. Warner

[illegible]

Total (Yes) _____ No _____

Absent _____

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:

Brian Bjella
(Grain Dealers)
Submitted 3-24-05

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1370

Page 1, line 1, replace "subsection to section 49-10.1-03," with "section to chapter 49-02"

Page 1, line 5, replace "subsection to section 49-10.1-03," with "section to chapter 49-02"

Page 1, replace lines 7 through 11 with:

"A railroad is prohibited from assessing a fuel surcharge on a shipment of commodities originating in this state if the surcharge exceeds the approximate increased cost of the fuel above what the fuel cost when zero surcharge was last assessed."

Renumber accordingly.

JPB
3-24-05

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1370

Page 1, line 1, remove "subsection to" and replace "49-10.1-03" with "to chapter 49-02"

Page 1, line 5, remove "subsection to" and replace "49-10.1-03" with "to chapter 49-02"

Page 1, replace lines 7 through 11 with:

"Railroad fuel surcharge - Restricted. A railroad may not assess a fuel surcharge on a shipment of commodities originating in this state if the surcharge exceeds the approximate increased cost of the fuel above what the fuel cost when zero surcharge was last assessed."

Renumber accordingly

Date: 3-24-05
Roll Call Vote #: 2

2005 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1370

Senate TRANSPORTATION Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number 50534.0201 Title .0300

Action Taken Do Pass as Amended

Motion Made By Sen. Espegard Seconded By Sen. Bercier

Senators	Yes	No	Senators	Yes	No
Senator Espegard	✓		Senator Bercier	✓	
Senator Mutch	✓		Senator Warner	✓	
Senator Nething	✓				
Senator Trenbeath, Chairman	✓				

Total (Yes) 6 No 0

Absent 0

Floor Assignment Senator Espegard

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1370, as engrossed: Transportation Committee (Sen. Trenbeath, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). Engrossed HB 1370 was placed on the Sixth order on the calendar.

Page 1, line 1, remove "subsection to" and replace "49-10.1-03" with "to chapter 49-02"

Page 1, line 5, remove "subsection to" and replace "49-10.1-03" with "to chapter 49-02"

Page 1, replace lines 7 through 11 with:

"Railroad fuel surcharge - Restricted. A railroad may not assess a fuel surcharge on a shipment of commodities originating in this state if the surcharge exceeds the approximate increased cost of the fuel above what the fuel cost when zero surcharge was last assessed."

Renumber accordingly

2005 HOUSE TRANSPORTATION

CONFERENCE COMMITTEE

HB 1370

2005 HOUSE STANDING COMMITTEE MINUTES

BILL NO. HB 1370

House Transportation Committee

☒ Conference Committee

Hearing Date April 7, 2005

Tape Number	Side A	Side B	Meter #
1	X		0-6.8
Committee Clerk Signature <i>DeLour Althimeh</i>			

Minutes:

Roll Call: Senator Trenbeath, Senator Espegard, Senator Warner; Rep. Owens-chairman, Rep. Weisz, Rep. Schmidt. All Present.

Chairman Owens opened the conference committee hearing on HB 1370. Just a quick reminder, because of what we are trying to do with this bill, because of the 4 R Stegger Act there are a number of situations where we can't do anything regulatory dealing with rates at the state level. But fuel surcharge is not a rate associated with a shipment per say. It is an additional charge based on an external event ie fuel costs. 1. The problem being the current magnesium for determining that is based on the original shipment rates, which in our case in ND are based on something under the 4 R's Act and the Stegger Act referencing constrained market prices which allows them, in a acaptive traffic situation, to charge more to make up for losses in higher competitive markets and thus we have situations where we are charging for shipping 30% more,

it appears, for shipment of communities than in other locations with similar mileage is my understanding. Now because of that since the fuel surcharge is based on that rate and it is a percentage that makes our fuel surcharge higher compared to everyone else as well. The original bill that came to the house; quite frankly as I recall in the house committee, we felt like it had a 10 minute life expectancy in court because it literally prohibited certain things dealing with that that could have been interrupted as having something to do with rates. So we amended to focus more on the fuel surcharge and excess to setting up zones or areas and regions on a per car basis in an effort to get rid of the association with the rate itself. Then we received from the senate a change. I have been trying to understand it and understand the thinking behind it, but at this point I will ask the Chairman of the Transportation Committee to explain what he understood the senate version to be and why we did not concur with it.

Rep. Weisz:(2.4) Yes, the reason I did not want to concur was I needed an explanation of why the senate thought this version was better than ours. Every version and the original bill has been trying to do the same thing. If the senate thinks this bill is more defensible that the house passed or what.

Senator Trenbeath:(3.0) We went to this in furtherance of exactly the situation you were talking about to try to get this thing as far away from a rate related situation as possible and relate it specifically to the actual cost of fuel consumed for the transfer of our grain. To be honest with you I am not sure this does that. The relative federal law not only claims exclusive jurisdiction on rate. In that regard the North Dakota Supreme Court just came out with that decision. Matter of fact the Home of Economy vs. Burlington Northern and it recited some of the federal language according to USCS 10501(b), quotes, the jurisdiction of the surface transportation

board over transportation by rail carriers, and remedies provided in this part in respect to rates, rules and practices, routes, services and facilities of such carriers is exclusive. I think that is exactly the type of language we have been trying to get around and I am not so sure we have done it yet.

Rep. Weisz: (4.1) I would like copies of that ruling.

Senator Trenbeath: The supreme court did rule against Burlington Northern.

Chairman Owens: My immediate concern was when you said an practices. That is a pretty open word and it could easily include fuel surcharges.

Senator Trenbeath: I think it might make sense at this time to make copies of the letter to the members of the committee and give you a little time to digest it. I think we are all in the like mind that we want to do the best we can for both the shippers and the grain growers. If we are convinced that an actual statute does have 10 minutes or less of a change of surviving; then maybe we ought to think of something in the nature of a resolution so we can provide some support to our citizens.

Rep. Weisz:(5.4) I would like to have more time to study the letter and consider more options.

Senator Trenbeath: This is how new this case is. It was filed yesterday.

Chairman Owens: Then it is timely as far as giving us some additional information. I will get copies made and we will get that to every body real quick. I did discover today that the US House and US Senate has already approved deleting the 4.3 cent tax on railroads diesel fuel too so they are already getting a break there as well. It is just waiting for the President's signature. If there is no other action to take now and I will set up another meeting and we will adjourn our meeting.(6.8)


2005 HOUSE STANDING COMMITTEE MINUTES

BILL NO. HB 1370

House Transportation Committee

☒ Conference Committee

Hearing Date April 12, 2005

Tape Number	Side A	Side B	Meter #
1	X		9.2-29.6
Committee Clerk Signature 			

Minutes:

Committee Members: Senator Trenbeath, Senator Espegard, Senator Warner, Chairman Owens, Rep. Weisz, Rep. Schmidt. All Present

Chairman Owens:(9.5) In the beginning we had a resolution, an amendment and two different possible amendments. One being a study and another one changing it to an amendment. What is your desire, committee?

Rep. Weisz: (10.1) I have looked at this amendment and the reality is it doesn't have any real teeth. Just trying to keep the railroad honest. They basically said you can charge what you want, it won't change how they can do them, but at least they can't come out and say we are just covering our costs. If indeed they are charging more for their increased costs they will have to admit to that. If they don't they would be in trouble and I don't think you are going to see that happening. I guess I could support that. I think the study, whether we do it or not, I don't think

it is necessarily a bad deal to study this thing. It is an important issue for the Ag Industry. This affects every farmer and grain dealers. Railroads are putting on a 9% surcharge without notice. The railroad tax is not just a minor issue the railroad tax and fuel surcharge can be major. If we are going to continue to see these fuel surcharges I don't have a problem doing a study on this. Rep. Weisz Made a Motion to move this amendment 0203. Rep. Schmidt seconded it.

Senator Trenbeath: (12.0) I don't want to come across here as facilitating this practice of the railroads because I don't think it is being done correctly or fairly for the farmers and elevators in the state of ND. However, when I look at the railroad fuel surcharge portion of this amendment 0203 it not only brings to mind the preemption of the federal government, but it also brings to my mind what about common carriers; truck lines, airlines etc. Those two things coupled together. The other common carriers questions and the other question regarding the lawfulness of enacting a section such as that made me not to favor it. The portion of it that deals with the legislative counsel study does have merit and that would be willing to support. That of course is contained in the previously submitted amendment 0202 so I would have to vote against this amendment for the reasons I have stated.

Rep. Weisz: (13.3) Because we are not telling them how they can establish the rates or what the rate even has to be. We don't say it can exceed the increased cost. Explain to me where you think we run into the federal preemption that could cause us a problem.

Senator Trenbeath:(13.6) I think the exceptions that are recognized in the Home of Economy case present themselves with respect to the proposed amendment and therefore I believe as recited in the Home of Economy case; the 49 U.S.C.S. 10501(b) would make this statute challenge able in the jurisdiction of the Surface Transportation Board (b) (1) (reads that portion).

Rep. Weisz: (14.3) Your argument would be that under the rules area is where the appearances would come in would be under practices.

Senator Trenbeath: (14.7) We are saying if they do it other than based on the actual increase in the cost of the fuel it's illegal. It is an unlawful practice if a railroad operating in this state represents directly or indirectly the fuel surcharges imposed by the railroad upon services for the shipment of grain and other commodities are accessed to cover the increased cost of the fuel to the railroad, when the fuel surcharge exceed the increased cost of fuel or shipping.

Rep. Weisz: (15.1) Maybe I am completely missing what you are saying. The way I looked at it. The key word was represent. That they can charge any surcharge they want. They cannot represent that it is only covering their costs when it exceeds the cost of shipping. That is the way I read it; no way to we prohibit them from charging more. We are just argumenting that they can't represent that they aren't.

Senator Trenbeath: (15.4) I don't disagree with you. Under that interpretation that law would never be enforced.

Rep Weisz: I agree with you. All it says is if you are going to do it you can't represent that your doing something else. That is the only thing the way I read this law. You can't come out here and say we are covering our increased cost of fuel.

Senator Trenbeath: It is one of two things; either it is illegal or unenforceable. In either event, that is not something the legislature should be doing, passing laws that are one or the other, let along possibly both.

Rep. Wiesz: (16.2) I am not sure it is unenforceable. Whether we would enforce it, it would be up to the AG, but if indeed the railroad represented themselves. Obviously I would assume AG

could do an action. My assumption would be that the railroad would not make any comments that would not make any comments that would make them fall under this statute. I don't suppose this would change fuel surcharge or how they treat it.

Senator Trenbeath:(16.8) I do agree that the legislative counsel should study this. If they were to do that and came back and said yea, we think this would be an appropriate corrective action that would be another matter.

Rep. Schmidt If they took the wording out of there, it is unlawful because what the railroad is doing is ripping our wheat farmers up. Is there a word we can put in there that says stop this that would pass the test? A study, no action will be taken in the meantime this is costing farmers thousands of dollars.

Senator Trenbeath: I don't think there is a way we have the authority to correct that. I think the Surface Transportation Board has the authority to correct that. Don't want to pass laws that are unenforceable or unlawful or both.

Senator Warner: This rate case that is being considered by the Public Service Commission. Is this an issue that can be addressed in the content of that case?

Rep. Weisz: No, I don't believe it can directly. Because it is a surcharge it is not a rate. I guess in an indirect way so then we would win the rate case obviously, there would be relief to the shippers of ND and the farmers, but surcharges aren't rates. If there was a 30% reduction in rates; obviously with the percentage. I don't think anyone feels the railroad shouldn't recoup for their increased costs. They are in it to make money. So if fuel doubles and stays there there has to be increased rates at some point. The point always has been the inequity of the fuel surcharge. Surcharges come and go so you lose your ability to argue rates because it is a floating think.

The surcharge would go away and we would just have a new rate structure. And that will happen if indeed, we settle out on our fuel rates. So the contract rates will reflect the new fuel charges when the contracts come up for renewal.

Senator Espegard: (21.5) Can you sign a contract that doesn't involve surcharging?

Rep. Weisz: Yes, you can sign contracts that do not include fuel surcharges and I cannot tell you what the life of the contracts are. So when the 5 or 9% fuel charges kicked in these contracts were protected. They are not getting the increase surcharges. Now when those contracts expire they will reflect that higher fuel charge. There are contracts throughout the country that did not reflect any fuel surcharges. Coal or whatever that did not reflect any fuel surcharges. Now rates have gone sky high. Renegotiating contracts being a relative term with the railroad.

Senator Espegard:(23.2) I feel sorry for the farmers. I don't think it is far the way it is being done, but I do hesitate putting in law something that is probably illegal and not enforceable. I will have to vote against this amendment as well.

Vote 3 Yes 3 No Tied Failed

Discussion:

Rep. Weisz:(25.0) Sorry we could not do more than the study. Hope we can encourage the legislative counsel that this should be a priority. We are talking hundreds of millions of dollars here.

Chairman Owens:(25.8) Personally I do believe that fuel charges because it is across a number of industries, that the surcharge would fall under practices as defined in the supreme court judgment. I do believe it would be a simple matter to include it under practices because they have it in airlines; they have it in a number of different places and we all pay whether we want to

or not. It is governed under fuel surcharges. That is what they do. So it is not just the railroad industry that does that. At least with a study there may be an opportunity to seek alternative means for determining it because it is so rate based right now and with ND and other states around us that the argument in the rate case whether or not we are a captive market and that doesn't protect us because the Stager and Four R's allow them the higher costs for a captive market. But still the identification of captive market would warrant that because the rates are naturally higher because the captive market why should the fuel surcharges be based on that versus anything else. I will admit that in the previous bill the way it was written I was hoping to not only help the rate case, viewing it as a consumer protection and marketing issue rather than, but Senator Trenbeath brought up some issues as to the way it could be viewed from the other side and that is what the law is all about is arguing both sides of it and see which one comes out on top.

Senator Trenbeath: For clarification I make a motion would be with respect to 0202 be accepted. Senator Espegard seconded.

Vote 5 Yes 1 No 0 Absent Carrier: Rep. Owens

(29.6)

:

JJB
3-24-05

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1370

Page 1, line 1, remove "subsection to" and replace "49-10.1-03" with "to chapter 49-02"

Page 1, line 5, remove "subsection to" and replace "49-10.1-03" with "to chapter 49-02"

Page 1, replace lines 7 through 11 with:

"Railroad fuel surcharge - Restricted. A railroad may not assess a fuel surcharge on a shipment of commodities originating in this state if the surcharge exceeds the approximate increased cost of the fuel above what the fuel cost when zero surcharge was last assessed."

Renumber accordingly

Conference Committee Amendments to Engrossed HB 1370 (50534.0202) - 04/12/2005

That the Senate recede from its amendments as printed on pages 1468 and 1469 of the House Journal and page 1059 of the Senate Journal and that Engrossed House Bill No. 1370 be amended as follows:

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to provide for a legislative council study of railroad fuel surcharges."

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. LEGISLATIVE COUNCIL STUDY - RAILROAD FUEL SURCHARGES. The legislative council shall consider studying railroad fuel surcharges during the 2005-06 interim. The legislative council shall report its findings and recommendations, together with any legislation required to implement the recommendations, to the sixtieth legislative assembly."

Renumber accordingly

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1370

That the Senate recede from its amendments as printed on pages 1468 and 1469 of the House Journal and page 1059 of the Senate Journal and that Engrossed House Bill No. 1370 be amended as follows:

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to create and enact a new section to chapter 51-15 of the North Dakota Century Code, relating to railroad fuel surcharges; to provide for a legislative council study of railroad fuel surcharges; and to declare an emergency.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. A new section to chapter 51-15 of the North Dakota Century Code is created and enacted as follows:

Railroad fuel surcharge. It is an unlawful practice if a railroad operating in this state represents, directly or indirectly, that fuel surcharges imposed by the railroad upon services for the shipment of grain or other commodities are assessed to cover the increased cost of the fuel to the railroad, when the fuel surcharges exceed the increased cost of the fuel for shipments from this state.

SECTION 2. LEGISLATIVE COUNCIL STUDY - RAILROAD FUEL SURCHARGES. The legislative council shall consider studying railroad fuel surcharges during the 2005-06 interim. The legislative council shall report its findings and recommendations, together with any legislation required to implement the recommendations, to the sixtieth legislative assembly.

SECTION 3. EMERGENCY. This Act is declared to be an emergency measure."

Renumber accordingly

**REPORT OF CONFERENCE COMMITTEE
(ACCEDE/RECEDE)**

Bill Number HB 1370 (, as (re)engrossed):

Your Conference Committee House Transportation

For the Senate:

For the House:

	Yes	No		Yes	No
Senator Trenbeath	X		Rep. Owens	X	
Senator Espegard	X		Rep. Weisz	X	
Senator Warner		X	Rep. Schmidt	X	

recommends that the SENATE RECEDE from
the Senate amendments on HJ pages 1468 - 1469 and
place HB1370 on the Seventh order.

XXX , adopt amendments as follows, and place HB 1370 on
the Seventh order:

_____, having been unable to agree, recommends that the committee be
discharged and a new committee be appointed.

**Engrossed HB 1370 was placed on the Seventh order of business on the
calendar.**

DATE: April 12, 2005
CARRIER: Rep. Owens

LC NO.	50534.0202	of amendment
LC NO.		of engrossment
Emergency clause added or deleted		
Statement of purpose of amendment		

Motion Made By : Senator Trenbeath

Seconded By: Senator Espegard

Vote Count 5 **Yes** 1 **No** 0 **Absent**

REPORT OF CONFERENCE COMMITTEE

HB 1370, as engrossed: Your conference committee (Sens. Trenbeath, Espegard, Warner and Reps. Owens, Weisz, Schmidt) recommends that the **SENATE RECEDE** from the Senate amendments on HJ pages 1468-1469, adopt amendments as follows, and place HB 1370 on the Seventh order:

That the Senate recede from its amendments as printed on pages 1468 and 1469 of the House Journal and page 1059 of the Senate Journal and that Engrossed House Bill No. 1370 be amended as follows:

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to provide for a legislative council study of railroad fuel surcharges.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. LEGISLATIVE COUNCIL STUDY - RAILROAD FUEL SURCHARGES. The legislative council shall consider studying railroad fuel surcharges during the 2005-06 interim. The legislative council shall report its findings and recommendations, together with any legislation required to implement the recommendations, to the sixtieth legislative assembly."

Renumber accordingly

Engrossed HB 1370 was placed on the Seventh order of business on the calendar.

2005 TESTIMONY

HB 1370

2-4-05

**Testimony of BNSF Railway Company Opposing HB 1370
(Fuel Surcharges)
House Transportation Committee February 2, 2005**

Good Morning Mr. Chairman and members of the Committee. I am Brian Sweeney, legislative counsel for BNSF Railway Company. BNSF opposes HB 1370, which deals with fuel surcharges.

First, I want to emphasize that the fuel surcharge is not a money-maker for the railroad. The surcharge does not even cover our entire fuel cost increase. In 2004, we would have charged almost double the surcharge that we had in place if we wanted to just break even. Last year our incremental fuel expense was almost \$700 million, and the surcharge recovered about \$360 million. We do not make money on the surcharge, we do not break even.

BNSF is one of the largest users of diesel fuel in the country. We use more than 1.4 billion gallons of fuel each year. When the price of fuel began to rise dramatically, every major railroad was forced to institute a fuel surcharge. All of them do this in pretty much the same way, which is to assess a surcharge that is a percentage increase of the shipping rate.

BNSF calculates the surcharge based on the price of highway diesel fuel three months prior. The base for the calculation is \$1.25 per gallon. Each five cent price rise or fall in the price of fuel in January means a one-half percent rise or fall in the surcharge in April.

For ease of doing business, the railroads all base the surcharge on a percentage of the shipping rate. This is the easiest, simplest way in which to do this. It is not a perfect system, in that some pay a greater dollar amount than others because their base rate is higher, or pay more for less distance than others, or pay more for less cargo weight than others, or pay more to ship over the plains than over the mountains.

For example, fuel consumption increases with weight. So if a system using straight mileage is adopted, it would not be completely fair, either. An intermodal container holds about 20 tons of cargo, compared with about 100 tons in a grain car and 120 tons in a coal car. Should the intermodal shipper pay the same surcharge as the grain or coal shipper to go the same distance when he ships only one fifth the weight?

One of the problems with this bill is that it is very, very vague. Assuming such a restriction is even legal, the bill is not even clear about how the fuel surcharge should be calculated. How is this average computed? Is it based upon miles, weight, terrain, absolute dollar amount? Is it across the board or is it just for similar commodities?

The bill is also of very questionable legality. It would appear to conflict with federal law that gives all economic regulation of the rail industry to the Surface Transportation Board. We do not believe that the State can even impose such a restriction, even if it were clearly articulated.

BNSF has been in discussions with the National Industrial Transportation League, or NIT League, which is an organization that represents manufacturers and other transportation customers. We are working with them on the possibility of shifting to a mileage-based system. However, it will take some time -- at least several months -- to devise a system that can be applied not just across our 33,000-mile network, but on other railroads, as well. This involves setting up a system in which not just the railroad, but all of our customers can calculate the distances and resulting costs in an identical manner. This is a very complex job, which is why the rate-based system was used, to begin with.

It will also require the rest of the rail industry adopting the same systems, because of the large volume of traffic that is interchanged with other railroads.

In conclusion, we recognize the problem this bill refers to, and are trying to work with a major shipping group and other railroads to address it. But the solution proposed in this bill is too vague to be workable and is probably a violation of federal law.



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HOUSE TRANSPORTATION COMMITTEE - REP. ROBIN WEISZ CHMN. TESTIMONY OF NORTH DAKOTA GRAIN DEALERS ASSOCIATION RE: HOUSE BILL 1370 - FEBRUARY 4, 2005

Good morning Mr. Chairman and members of the Transportation Committee. I am Steve Strege, Executive Vice President of the North Dakota Grain Dealers Association. We are a 94-year-old voluntary membership trade association and over 90% of our state's grain elevators are members. We are here in support of HB 1370.

North Dakota is being taken to the cleaners by railroad fuel surcharges and this bill with amendments is intended to bring that situation under some control.

North Dakota is at the center of the North American continent, landlocked. We are captive shippers for railroads to exploit. Our rates and railroad profitability on those rates are higher than nearly anywhere else. The current railroad practice of assessing a fuel charge based on a percentage of the rate expands this inequity geometrically.

The 110-car shuttle train rate on wheat from Berthold, ND to Pacific Northwest ports like Seattle and Portland is \$4,174 per car for 1,300 miles (\$3.21 per car-mile) (\$1.13 per bushel). The 110-car shuttle rate on soybeans from Clarkfield, MN to the PNW, same weight for 1,750 miles is \$3,300 per car, \$1.89 per car-mile. The cars and locomotives are interchangeable, moving over much of the same track to the same place. The 9% fuel surcharge assessed in December and January on that wheat train is \$41,322. On the identical weight train of soybeans pulled 1750 miles from the Minnesota origin the fuel surcharge is \$32,670. A third more distance, but a fourth ~~more~~^{less} surcharge. The 9% dropped to 8% for February.

It gets even more odd. The soybean rate from Berthold to the PNW is \$3,400 per car vs. that wheat rate of \$4,174. The fuel surcharge on wheat is the \$41,322 cited above. On an identical weight train from the same origin to the same destination the fuel

surcharge on the soybeans is \$33,660. One of the Grain Dealers Directors asked BNSF Ag Products VP Kevin Kaufman at our recent convention: "Does wheat pull harder than soybeans?" He didn't answer the question.

There is nothing cost-based or mileage-based about the way railroads currently figure their fuel surcharges. That doesn't make any sense, except to railroads trying to further exploit their captive shippers. If the rate doesn't have anything to do with the mileage then the fuel surcharge assessed against the rate doesn't have any validity either. The fuel surcharge ought to be mileage-based, and that's what this bill says.

On Saturday January 22 the Grain Dealers Association Board of Directors met with BNSF Ag Products Vice President Kevin Kaufman. We expressed to him in the strongest gentlemanly terms possible our dissatisfaction with the way these fuel surcharges are being assessed. He admits it isn't right. But it is the easiest for the railroad. Fuel surcharges are "a complex issue" he says. For the elevator at Berthold paying that \$41,000 this is more than complex; it is a rip off.

BNSF says their fuel surcharges are merely a "cost recovery mechanism". A fuel surcharges study of major railroads done by the National Grain & Feed Association reveals excess revenue (surcharge plus hedging gains) over actual fuel costs for the BNSF for 2nd qtr 2003-1st qtr 2004, inclusive, is \$157 million. Mr. Kaufman told us that this situation MIGHT be resolved in six to twelve months. We should put an emergency clause on this bill and get it to the governor as soon as possible, to stop the bleeding as soon as possible.

If past is prologue, the railroads will tell you you can't do this; that you can't put a common sense restriction on their fuel surcharges because that is pre-empted by federal law. Fuel surcharges assessed in this manner appear more lawless than lawful. Let's pass this; let's enact this; and then if a railroad wants to ignore a law in a state that contributes so handsomely to its bottom line, that's THEIR public policy and public relations problem. I suggest that as soon as this bill is enacted a copy be sent to all three members of the Surface Transportation Board and all relevant Congressional committees with an appropriate letter of explanation. I will be more than happy to assist.

Thank you. I will attempt to answer any questions.

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1370

Page 1, line 1, replace "subsection to section 49-10.1-03," with "section to chapter 49-02"

Page 1, line 5, replace "subsection to section 49-10.1-03," with "section to chapter 49-02"

Page 1, replace lines 7 through 11 with:

"A railroad is prohibited from assessing a fuel surcharge on a shipment of commodities originating in this state if the surcharge applies to the freight rate or is not mileage based per car, provided, however, that if a railroad publishes common carrier rates that are equalized from or within zones or mileage blocks, fuel surcharges shall also be equalized from or within those zones or mileage blocks."

Renumber accordingly.



NORTH DAKOTA GRAIN DEALERS ASSOCIATION

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SENATE TRANSPORTATION COMMITTEE - SEN TOM TRENBEATH, CHMN. TESTIMONY OF NORTH DAKOTA GRAIN DEALERS ASSOCIATION RE: HOUSE BILL 1370 - MARCH 4, 2005

Good morning Mr. Chairman and members of the Transportation Committee. I am Steve Strege, Executive Vice President of the North Dakota Grain Dealers Association. We are a 94-year-old voluntary membership trade association and over 90% of our state's grain elevators are members. We are here in support of HB 1370.

We need North Dakota state government to help its grain elevators and farmers bring an end to the abuse and extraction of what might add up to be millions of dollars from our state in excessive railroad fuel surcharges. I should point out here at the beginning that the Burlington Northern Santa Fe is significantly worse in terms of the level of surcharge assessed. In December and January when the BNSF was at 9% of the freight rate, the CP was at 5.5%. Today those numbers are 7.5% BNSF and 4% CP. BNSF has announced it will go back up to 8% in April, and with petroleum prices jumping again, who knows where we might be a few months from now.

Fuel surcharges supposedly cover the increased cost of fuel due to the price run-up in the past year or two. But BNSF is recovering much more than that from North Dakota grain, in some cases more than the total cost of the fuel consumed. I've done some calculations where the surcharge comes out to over twice the total cost of fuel. I don't know any way to describe this other than to say it is a rip off.

We and others have told the BNSF to back off. But it is quite a cash cow for them to milk. North Dakota Public Service Commission Chairman Tony Clark had contacted BNSF Ag Products Vice President Kevin Kaufman in January about this situation. Mr. Kaufman responded right away, and then on February 14 sent a follow-up report letter. I'd like to focus on the point #2 on 50% coverage and #1 on earnings.

Here are some specific numbers. The 110-car shuttle train rate on wheat from Berthold, ND to Portland, Oregon is \$4,174 per car for 1,300 miles (\$3.21 per car-mile) (\$1.13 per bushel). The 110-car shuttle rate on soybeans from Clarkfield, MN to Portland, same weight for 1,750 miles is \$3,300 per car, \$1.89 per car-mile. The cars and locomotives are interchangeable, moving over much of the same track to the same place. Let's set aside for a moment the absurdity of that rate difference and look at only the fuel

surcharge. The 9% fuel surcharge assessed in December and January on that wheat train was \$41,322. On the identical weight train of soybeans pulled a third more miles the fuel surcharge was \$32,670. That is 70% more for North Dakota wheat on a per mile basis. If Berthold paid the same per-mile its surcharge would be \$24,271, not the \$41,322. This is a \$17,051 over the soybean charge. And we don't know that the charge on the soybean train is justified.

It gets even more odd. The soybean rate from Berthold to the PNW is \$3,400 per car vs. that wheat rate of \$4,174. The fuel surcharge on wheat is the \$41,322 cited above. On an identical weight train from the same origin to the same destination the fuel surcharge on the soybeans is \$33,660. My Board of Directors met with Mr. Kaufman in January and one of the Directors asked: "Does wheat pull harder than soybeans?" There was no answer given to that question. We were told then and still are told that fuel surcharges are "a complex issue", that this method of assessment is easiest for the railroad, and that they are working to resolve the matter. If this was not working in the railroads' favor it would be corrected quickly.

BNSF says their fuel surcharges are merely a "cost recovery mechanism", and that it does not collect more in fuel surcharges than its incremental fuel expense. A study undertaken by the National Grain and Feed Association, the National Industrial Transportation League and others, regarding fuel surcharges of five major railroads states: "...with limited exceptions, the surcharge programs of the five carriers consistently result in over-recovery of fuel cost increases on an individual movement basis."

Let me personalize this a bit more for a couple of you with examples from Osnabrock and Reynolds. To protect the innocent I'd better say that none of the managers, owners or directors of any of the elevators I've mentioned asked me to use them as examples. I picked them out.

The railroads have already said that you as legislators can't do anything about this; that you can't put a common sense restriction on their fuel surcharges because that is preempted by federal law. Fuel surcharges assessed in this manner appear more lawless than lawful. Let's pass this; let's enact this; and then if a railroad wants to ignore a law in a state that contributes so handsomely to its bottom line, that's THEIR public policy and public relations problem. I suggest that as soon as this bill is enacted a copy be sent to all three members of the Surface Transportation Board and all relevant Congressional committees with an appropriate letter of explanation. I will be more than happy to assist.

Thank you. I will attempt to answer any questions.



Kevin D. Kaufman
Group Vice President
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February 14, 2005

Honorable Tony Clark, President
North Dakota Public Service Commission
600 E. Boulevard Ave. Dept 408
Bismarck, North Dakota 58505-0480

Re: Fuel Surcharge

Dear Mr. Clark:

In response to your original letter, dated January 20, 2005, I told you that following John Lanigan's meeting with the National Industrial Transportation League ("NITL") I would report back to you.

On Thursday, January 27, John Lanigan met with John Ficker, NITL, Kendall Keith, NGFA, and David Church, Forest Products Association of Canada for ninety minutes in Washington. During this positive meeting, John expressed our willingness to continue to explore options to our current revenue percentage system to determine if we can construct a proxy or modifier for distance to adjust the impact on higher (and lower) revenue per shipment customers. He further conveyed to the meeting participants that while BNSF Railway has no disagreement with the principle and general concept of a mileage-based program, it is important that NITL review their study and make corrections where the study is inaccurate so that misunderstanding does not impede the success of further dialogue. Permit me to point out just four of the most obvious inaccuracies.

- 1) Fuel price increases have been and continue to negatively impact earnings. BNSF does not collect more in fuel surcharge ("FSC") than what it incurs in incremental fuel expense. The fact is that BNSF recovers only about 50 percent of its incremental fuel expense, based on a \$1.25 per gallon, using EIA's On-Highway Diesel Fuel price as the floor as suggested in the NITL study. The cost of fuel increased dramatically throughout 2004. This dynamic has caused BNSF to insist that FSC provisions be included in all price authorities for all commodities shipped on the railroad.
- 2) Most railroads do not have 100% of their revenue base participating in FSC programs. For example, BNSF's fuel coverage from surcharges is approximately 50% of our fuel expense at the strike price of \$1.25 HDF. This coverage is currently coming from only about 50% of our revenue base. This indicates that contrary to the NITL study, our fuel surcharge revenue does not exceed the cost of fuel and thus FSC programs have not become a method for enhancing revenue.
- 3) Fuel hedge results are included in the NITL calculations despite their conclusion that, "hedging is an internal business choice that assists in stabilizing the predictability of corporate revenue....and that hedging gains should accrue to the railroad". This inconsistency results in a significant understatement of the calculated fuel costs per carload because they offset the actual costs with the hedge affect. BNSF agrees with the authors of the study that hedging is an internal choice and that an equitable FSC formula should not take into account hedging gains and losses.
- 4) The program uses specific miles per gallon ("MPG") consumed by each of our major train types to determine fuel intensity. The NITL study determines fuel intensity on a fuel expense per car basis. It then determines an average surcharge per loaded car mile by dividing fuel surcharge per car by loaded car miles. However, in

estimating the applicable surcharge per shipment, it uses the total actual miles, thus effectively charging for the empties twice.

I hope that the foregoing is helpful for your continued, unbiased review of the fuel surcharge issue. I think that you will agree that it is in our mutual interest to reduce misunderstanding by making sure that our discussions are based upon the facts and not distorted by misleading statements such as those made in a recent trade organization fax to its members. Their implication was that BNSF made 5 percent off of fuel surcharge in our recently reported fourth quarter. But revenues are not earnings and proper analysis requires that revenues be offset by their applicable expenses.

Thank you for the opportunity to report to you on our meeting. We continue to explore options to our current program that would correctly address the true, underlying economics of fuel surcharge and are practical to implement. I will keep you informed of our progress.

Sincerely,

Kevin Kaufman
Group Vice President, Ag Products

cc: Roger Nober
NDGDA Members
Kendall Keith
John Ficker
David Church

Testimony before North Dakota State Senate Transportation Committee

March 4, 2005

Testimony regarding ~~HF~~ ^{HB} 1370

#068

Mr. Chairman and members of the committee, my name is John Huber, Director of Government Affairs for Canadian Pacific Railway. I am here before regarding ~~HF~~ ^{HB} 1370 the regulation of railroad fuel surcharges.

Mr. Chairman, my company is well aware of the actions taken on this bill in the North Dakota House and that those actions reflect a strong sense of frustration with the manner in which fuel surcharges are applied.

Please note that I specifically stated "the manner" in which the fuel surcharge is calculated. I note specifically that the bill as drafted does not try to ban fuel surcharges, but in my opinion, appears to address what is being perceived as a lack of fairness on how they are calculated. I interpret that as recognition by the state that the industry needs some flexibility due to the volatility of this key expense item. The issue of fuel surcharges, and alternate approaches for fair recovery of this cost factor, is being reviewed within Canadian Pacific Railway. I cannot tell you, nor would I try to speculate, on where that review may lead.

Furthermore Mr. Chairman, may I respectfully add that you and members of this committee are aware that regulation of rail rates, and therefore fuel surcharges, currently resides at the federal, not the state level. I realize that fact only adds to the frustration in certain quarters.

With that in mind, I would respectfully suggest a different course of action on this matter. In my opinion, I believe a significant portion of the motivation for this measure, keeping in mind the documented legal ground you are considering entering, is to send a strong message to my company and the rail industry in North Dakota. Unfortunately with this proposed bill comes with it an immediate court challenge that at the end of the day will simply spend the tax dollars of the citizens of North Dakota for a legal defense whose outcome is clear. I respect the fact that it is the responsibility of the legislature, and not I, on how to spend your tax dollars. That said, as you are being encouraged to make this expenditure, I hope those same people are being candid with you about the likelihood of success.

Therefore I believe an equally effective, and frankly much more cost effective approach, would be for this committee to draft a resolution that embodies the thoughts and concerns you want to express on this topic. A resolution would offer the advantage of detailing specific findings of this committee and the legislature that is more difficult to recite in the law as crafted.

Mr. Chairman and members of the committee I believe a resolution passed by the North Dakota legislature is ultimately a more prudent use of the tax dollars in your state while accomplishing the goal of expressing your concerns on this manner.

Thank you for your time this morning and I would be happy to respond to any questions.

**Testimony of BNSF Railway Company Opposing HB 1370
(Fuel Surcharges) March 4th, 2005**

Good Morning Chairman Trenbeath and members of the Senate Transportation Committee. I am Brian Sweeney, legislative counsel for BNSF Railway Company. BNSF opposes HB 1370, which deals with fuel surcharges.

First, I want to emphasize that the fuel surcharge is not a money-maker for the railroad. The surcharge does not even cover our entire fuel cost increase. In 2004, BNSF would have charged almost double the surcharge that was in place for BNSF to just break even. Last year BNSF's incremental fuel expense was almost \$700 million, and the surcharge recovered about \$360 million. BNSF does not make money on the surcharge, it does not break even.

BNSF is one of the largest users of diesel fuel in the country. It consumes more than 1.4 billion gallons of fuel each year. When the price of fuel began to rise dramatically, every major railroad was forced to institute a fuel surcharge. All of them do this in pretty much the same way, which is to assess a surcharge that is a percentage increase of the shipping rate.

BNSF calculates the surcharge based on the price of highway diesel fuel two months prior. The base for the calculation is \$1.25 per gallon. Each five cent price rise or fall in the price of fuel in March means a one-half percent rise or fall in the surcharge in May.

For ease of doing business, the railroads all base the surcharge on a percentage of the shipping rate. This is the easiest, simplest way in which to do this. It is not a perfect system, in that some pay a greater dollar amount than others because their base rate is higher, or pay more for less distance than others, or pay more for less cargo weight than others, or pay more to ship over the plains than over the mountains.

For example, fuel consumption increases with weight. So if a system using straight mileage is adopted, it would not be completely fair, either. An intermodal container holds about 20 tons of cargo, compared with about 100 tons in a grain car and 120 tons in a coal car. Should the intermodal shipper pay the same surcharge as the grain or coal shipper to go the same distance when he ships only one fifth the weight?

One of the problems with this bill is that it is very, very vague. Assuming such a restriction is even legal, the bill is not even clear about how the fuel surcharge should be calculated. How is this average computed? Is it based upon miles, weight, terrain, absolute dollar amount? Is it across the board or is it just for similar commodities?

As amended in the House, the bill is also very, very confusing. It says in part, that a railroad cannot have a higher surcharge more for a commodity than it does for that same commodity in that same region, zone or area. In addition, region, zone and area are not even defined. So the bill says a railroad cannot charge more than it charges in an undefined area.

The bill is also of very questionable legality. It would appear to conflict with federal law that gives all economic regulation of the rail industry to the Surface Transportation Board. BNSF does not believe that the State can even impose such a restriction, even if it were clearly articulated.

BNSF has been in discussions with the National Industrial Transportation League, or NIT League, which is an organization that represents manufacturers and other transportation customers. We are working with them on the possibility of shifting to a mileage-based system. Attached to the testimony is a copy of January 21 correspondence from BNSF to PSC Commissioner Tony Clark. However, stating that the railroad is making this effort.

It will take some time -- at least several months -- to devise a system that can be applied not just across our 33,000-mile network, but on other railroads, as well. This involves setting up a system in which not just the railroad, but all of our customers can calculate the distances and resulting costs in an identical manner. This is a very complex job, which is why the rate-based system was used, to begin with.

It may also require the rest of the rail industry adopting the same systems, because of the large volume of traffic that is interchanged with other railroads.

But BNSF recognizes the importance the State places on this issue. BNSF is currently evaluating alternative methodologies and will determine within the next two months if it will be able to change the system by the end of this year.

In conclusion, we recognize the problem this bill refers to, and are trying to work with a major shipping group and other railroads to address it. But the solution proposed in this bill is too vague and confusing to be workable and is probably a violation of federal law.

BNSF

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January 21, 2005

Honorable Tony Clark, President
North Dakota Public Service Commission
600 E. Boulevard Ave. Dept 408
Bismarck, North Dakota 58505-0480

Dear Mr. Clark:

I was very pleased to receive your letter dated January 20, 2005, because, as you are aware, the National Industrial Transportation League ("NITL") has recently produced a study that analyzes rail industry fuel surcharge. Further, because BNSF is recognized as having the most transparent, simple and consistent fuel surcharge program, NITL has invited our Chief Marketing Officer, John Lanigan, to Washington next week to discuss this issue. John has a trucking background with Schneider International and so he is very familiar with fuel surcharge and the complexity of the issue.

For BNSF, fuel surcharge is a pure pass through. The fact is that, at this time, fuel surcharge is only offsetting approximately 50 percent of our increased fuel costs. Our current program was designed to be simple and easy for our customers to calculate and use. No one anticipated the recent volatility or sustained high prices. And we recognize that this has not only financially burdened us but is also burdening our customers.

Unfortunately, the issue is complex not only for the rail industry, but also for each railroad because they operate in different geographies and have different operating structures. Trains are not uniform like trucks. Different commodities and different modes run with different train and locomotive consists that significantly impact the fuel consumed over the same mileage. In addition, railroads have complex interline and interchange contracts that cannot be unilaterally changed.

My point is that we recognize this is a complex and important issue for our customers and the transportation industry. As a result, we are working with NITL and the AAR to analyze this issue and develop an equitable solution that will not burden our customers with additional costs.

Following John's meeting with NITL, I will get back to you on our progress and the timing of when recommendations will be available.

Sincerely,

Kevin Kaufman
Group Vice President, Ag Products

c. Roger Nober, Chairman, STB

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BNSF Rules Book 6100 - Carload Fuel Surcharge

A fuel surcharge may be applied to price authorities subject to BNSF Rules Book 6100. The surcharge for the following month will be determined on the first of the prior month based on the U.S. average price of Retail On-Highway Diesel Fuel for the second prior month. The Fuel Surcharge Rate (FSR) is determined from the table found in item 3375 of BNSF Rules Book 6100 Series. The BNSF Rules Book 6100 can be found online at: [Miscellaneous Pricing Publications](#).

Quick Links

[Carload West Texas Intermediate Crude](#)

[Carload Fuel Surcharge](#)

[Coal Fuel Surcharge](#)

[Intermodal Fuel Surcharge](#)

[Highway Diesel Prices](#)

Carload Fuel Surcharge Rate Based on Retail On-Highway Diesel Fuel (HDF).

HDF = Prior Period's monthly average of the US average price of Retail On-Highway Diesel Fuel as reported on the U. S. Department of Energy's web pages at:

[Click here for EIA Retail On-Highway Diesel Prices](#)

To receive updates to the Carload Fuel Surcharge as well as other Carload Pricing updates by email, [log in to your BNSF iPower account](#), select Customer Subscription Service, and subscribe to Pricing Updates.

Carload Fuel Surcharge Rate

For the Month of:	Prior HDF Average:
May 2005 (NA until 3/28/05)	Mar 2005 (NA until 3/28/05)
Apr 2005 8.0%	Feb 2005 \$2.027
Mar 2005 7.5%	Jan 2005 \$1.959
Feb 2005 8.0%	Dec 2004 \$2.009
Jan 2005 9.0%	Nov 2004 \$2.147
Dec 2004 9.0%	Oct 2004 \$2.134
Nov 2004 7.0%	Sept 2004 \$1.917
Oct 2004 6.0%	Aug 2004 \$1.833
Sep 2004 5.0%	July 2004 \$1.739
Aug 2004 5.0%	June 2004 \$1.711
July 2004 5.0%	May 2004 \$1.746
June 2004 4.5%	Apr 2004 \$1.692
May 2004 4.0%	Mar 2004 \$1.629
Apr 2004 3.5%	Feb 2004 \$1.582
Mar 2004 3.5%	Jan 2004 \$1.551
Feb 2004 2.5%	Dec 2003 \$1.490
Jan 2004 2.5%	Nov 2003 \$1.482
Dec 2003 2.5%	Oct 2003 \$1.481
Nov 2003 2.5%	Sept 2003 \$1.467
Oct 2003 2.5%	Aug 2003 \$1.487

Sept 2003 2.0%	July 2003 \$1.435
Aug 2003 2.0%	June 2003 \$1.424
July 2003 2.5%	May 2003 \$1.451
June 2003 3.0%	Apr 2003 \$1.533
May 2003 2.0% *	Mar 2003 \$1.708
APR 2003 4.5%	Feb 2003 \$1.654
Mar 2003 2.5%	Jan 2003 \$1.488
Feb 2003 2.0%	Dec 2002 \$1.429
Jan 2003 2.0%	Nov 2002 \$1.420
DEC 2002 2.5%	Oct 2002 \$1.462
Nov 2002 2.0%	Sep 2002 \$1.411
Oct 2002 1.0%	Aug 2002 \$1.328
Sep 2002 0.0%	July 2002 \$1.299
Aug 2002 0.0%	June 2002 \$1.286
July 2002 1.0%	May 2002 \$1.305
June 2002 1.0%	APR 2002 \$1.309
May 2002 0.0%	Mar 2002 \$1.230
APR 2002 0.0%	Feb 2002 \$1.152
Mar 2002 0.0%	Jan 2002 \$1.153

Carload Fuel Surcharge Table

Prior Period's Avg. Price of HDF between:	Applicable Fuel Surcharge:
\$1.25 to \$1.299	0.5%
\$1.30 to \$1.349	1.0%
\$1.35 to \$1.399	1.5%
\$1.40 to \$1.449	2.0%
\$1.45 to \$1.499	2.5%
\$1.50 to \$1.549	3.0%
\$1.55 to \$1.599	3.5%
\$1.60 to \$1.649	4.0%
\$1.65 to \$1.699	4.5%
\$1.70 to \$1.749	5.0%
\$1.75 to \$1.799	5.5%
\$1.80 to \$1.849	6.0%
\$1.85 to \$1.899	6.5%
\$1.90 to \$1.949	7.0%
\$1.95 to \$1.999	7.5%
\$2.00 to \$2.049	8.0%

Each \$0.05 per gallon increase there after apply an additional .5%

*** BNSF elected to amend item 3375 of BNSF Rules book BNSF-6100-A, effective May 1, 2003 to reduce the carload Fuel Surcharge to 2% for the month of May 2003.**

For surcharge comments or questions, email auxpricing@bnsf.com



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AG-LINE: Canadian Pacific Railway Announces April Fuel Surcharge

March 2, 2005

April's Fuel Surcharge applicable to CPRS Grain Tariff's 0009, 4050, 4444 and 4450

Canadian Pacific Railway's Fuel Surcharge for the month of **April** has been set at **4.5%**. The fuel surcharge is based on the US Average Price of Retail

On-Highway Diesel Fuel, originally published June 1st, 2004, applicable to **CPRS Grain Tariffs 0009, 4050, 4444 and 4450**. The following chart provides a history of monthly fuel surcharge amounts:

Fuel Surcharge Rates			
Column 1	Column 2	Column 3	Column 4
For the Month of:	Applicable Fuel Surcharge is:	Based on the Average Price of Retail On-Highway Diesel Fuel During the Month of:	At an Average Rate of (From the Month listed in Column 3):
Jun 2004	1.0%	April 2004	\$1.692/gallon
Jul 2004	1.5%	May 2004	\$1.746/gallon
Aug 2004	1.5%	June 2004	\$1.711/gallon
Sept 2004	1.5%	July 2004	\$1.739/gallon
Oct 2004	2.5%	August 2004	\$1.833/gallon
Nov 2004	3.5%	September 2004	\$1.917/gallon
Dec 2004	5.5%	October 2004	\$2.134/gallon
Jan 2005	5.5%	November 2004	\$2.147/gallon
Feb 2005	4.5%	December 2004	\$2.009/gallon
Mar 2005	4.0%	January 2005	\$1.959/gallon
Apr 2005	4.5%	February 2005	\$2.027/gallon

For additional information on CPR's Fuel Surcharge Program, including applicable fuel trigger prices and a detailed list of exemptions, please refer to our website at www.cpr.ca (Customers>Existing Customers>Tariffs & Bulletins>Grain Fuel Surcharge).

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ND Grain Growers



Retail On-Highway Diesel Prices Sign Up for Email Updates
 EIA Home > Petroleum > Weekly Retail
 On-Highway Diesel Prices > Diesel Prices
 Details - Last 53 Weeks

Prices in Dollars Per Gallon

Date	U.S. Average	East Coast	New England	Central Atlantic	Lower Atlantic	Midwest	Gulf Coast	Rocky Mtn	West Coast	California
02/28/05	2.118	2.117	2.241	2.233	2.056	2.064	2.035	2.174	2.412	2.376
02/21/05	2.020	2.027	2.198	2.154	1.957	1.953	1.943	2.087	2.321	2.259
02/14/05	1.986	2.013	2.197	2.150	1.938	1.935	1.915	2.011	2.190	2.196
02/07/05	1.983	2.025	2.222	2.159	1.950	1.938	1.938	1.967	2.113	2.144
01/31/05	1.992	2.048	2.225	2.172	1.979	1.954	1.940	1.946	2.085	2.126
01/24/05	1.959	2.014	2.180	2.140	1.945	1.928	1.919	1.884	2.027	2.068
01/17/05	1.952	2.009	2.168	2.127	1.944	1.928	1.908	1.877	2.001	2.023
01/10/05	1.934	1.999	2.163	2.133	1.926	1.911	1.876	1.877	1.973	2.014
01/03/05	1.957	2.025	2.180	2.163	1.952	1.929	1.887	1.934	2.011	2.063
12/27/04	1.987	2.045	2.196	2.161	1.982	1.959	1.928	1.961	2.040	2.097
12/20/04	1.984	2.052	2.199	2.171	1.988	1.944	1.922	1.988	2.047	2.087
12/13/04	1.997	2.063	2.206	2.184	1.998	1.953	1.910	2.049	2.097	2.138
12/06/04	2.069	2.111	2.234	2.220	2.053	2.033	1.995	2.124	2.181	2.225
11/29/04	2.116	2.141	2.258	2.252	2.082	2.086	2.053	2.171	2.233	2.287
11/22/04	2.116	2.143	2.258	2.251	2.086	2.083	2.048	2.170	2.242	2.299
11/15/04	2.132	2.159	2.268	2.262	2.105	2.096	2.056	2.215	2.274	2.336
11/08/04	2.163	2.182	2.296	2.278	2.130	2.123	2.096	2.248	2.324	2.386
11/01/04	2.206	2.212	2.330	2.307	2.161	2.172	2.147	2.276	2.370	2.431
10/25/04	2.212	2.213	2.329	2.309	2.161	2.185	2.144	2.278	2.380	2.437
10/18/04	2.180	2.179	2.290	2.267	2.131	2.161	2.115	2.219	2.337	2.394
10/11/04	2.092	2.100	2.212	2.200	2.047	2.055	2.033	2.132	2.276	2.322
10/04/04	2.053	2.058	2.155	2.144	2.013	2.019	2.000	2.065	2.238	2.290
09/27/04	2.012	2.019	2.102	2.092	1.981	1.982	1.971	1.999	2.169	2.236
09/20/04	1.912	1.905	1.988	1.973	1.868	1.882	1.868	1.937	2.088	2.152
09/13/04	1.874	1.867	1.954	1.938	1.829	1.847	1.826	1.919	2.040	2.131
09/06/04	1.869	1.858	1.949	1.933	1.818	1.845	1.819	1.918	2.038	2.136
08/30/04	1.871	1.858	1.956	1.937	1.815	1.844	1.824	1.915	2.051	2.148
08/23/04	1.874	1.861	1.944	1.944	1.818	1.846	1.833	1.896	2.061	2.153
08/16/04	1.825	1.811	1.910	1.903	1.763	1.797	1.765	1.862	2.029	2.113
08/09/04	1.814	1.803	1.889	1.891	1.758	1.781	1.756	1.849	2.030	2.113
08/02/04	1.780	1.765	1.857	1.856	1.717	1.738	1.722	1.823	2.036	2.115
07/26/04	1.754	1.737	1.836	1.828	1.689	1.709	1.691	1.809	2.031	2.107

ND Grain Growers

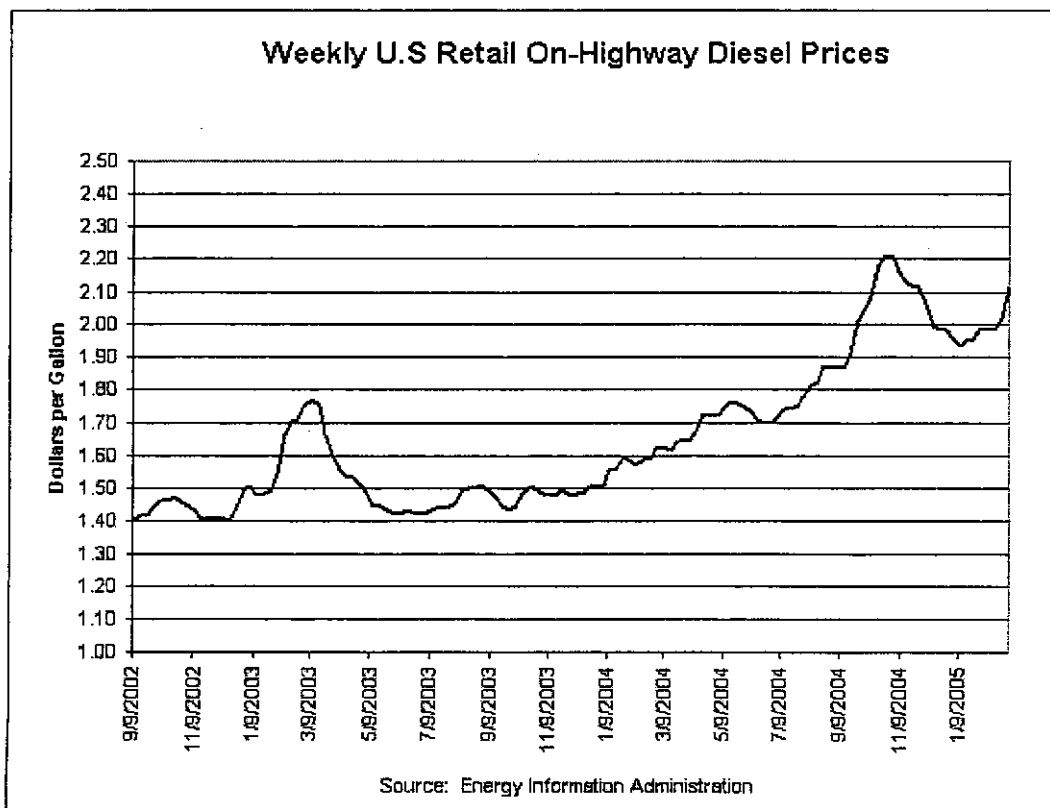
07/19/04	1.744	1.727	1.822	1.820	1.678	1.699	1.674	1.797	2.033	2.096
07/12/04	1.740	1.718	1.812	1.810	1.670	1.694	1.671	1.794	2.040	2.113
07/05/04	1.716	1.698	1.802	1.790	1.649	1.670	1.641	1.788	2.010	2.076

06/28/04	1.700	1.688	1.804	1.776	1.639	1.650	1.624	1.815	1.969	2.034
06/21/04	1.700	1.685	1.807	1.776	1.636	1.652	1.623	1.835	1.959	2.019
06/14/04	1.711	1.687	1.810	1.780	1.636	1.657	1.635	1.879	1.998	2.051
06/07/04	1.734	1.700	1.816	1.792	1.649	1.675	1.655	1.921	2.063	2.121

05/31/04	1.746	1.705	1.815	1.800	1.655	1.684	1.661	1.940	2.105	2.186
05/24/04	1.761	1.707	1.806	1.799	1.658	1.687	1.671	1.955	2.198	2.266
05/17/04	1.763	1.700	1.804	1.791	1.652	1.688	1.664	1.951	2.250	2.340
05/10/04	1.745	1.678	1.768	1.765	1.633	1.667	1.645	1.928	2.255	2.356
05/03/04	1.717	1.653	1.754	1.742	1.605	1.657	1.627	1.892	2.146	2.274

04/26/04	1.718	1.655	1.755	1.736	1.611	1.670	1.634	1.876	2.103	2.247
04/19/04	1.724	1.665	1.757	1.742	1.624	1.679	1.639	1.835	2.112	2.260
04/12/04	1.679	1.640	1.748	1.721	1.596	1.631	1.605	1.748	2.026	2.162
04/05/04	1.648	1.636	1.755	1.720	1.589	1.610	1.586	1.697	1.885	2.014

03/29/04	1.642	1.638	1.757	1.729	1.588	1.616	1.583	1.680	1.817	1.889
03/22/04	1.641	1.643	1.760	1.736	1.593	1.615	1.587	1.670	1.795	1.854
03/15/04	1.617	1.624	1.756	1.731	1.566	1.582	1.557	1.636	1.801	1.874
03/08/04	1.628	1.639	1.762	1.740	1.584	1.588	1.566	1.623	1.845	1.927
03/01/04	1.619	1.629	1.767	1.736	1.571	1.579	1.549	1.599	1.851	1.939





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Home of Economy v. Burlington Northern, 2005 ND 74

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

2005 ND 74

Home of Economy, a North Dakota Corporation, Plaintiff and
Appellant

v.

Burlington Northern Santa Fe Railroad, a National Railroad
Corporation, Defendant and Appellee

No. 20040267

Appeal from the District Court of Grand Forks County, Northeast
Central Judicial District, the Honorable Joel D. Medd, Judge.

REVERSED AND REMANDED.

Opinion of the Court by Maring, Justice.

Garry A. Pearson, Pearson Christensen, P.O. Box 5758, Grand
Forks, N.D. 58206-5758, for plaintiff and appellant.

Daniel J. Crothers, Nilles, Ilvedson, Stroup, Plambeck & Selbo, Ltd.,
P.O. Box 2626, Fargo, N.D. 58108-2626, for defendant and
appellee.

Home of Economy v. Burlington Northern

No. 20040267

Maring, Justice.

[¶1] Home of Economy appealed from a judgment dismissing for
lack of subject matter jurisdiction its action for damages and for an
injunction to require Burlington Northern Santa Fe Railroad
("BNSF") to reopen a grade crossing in Grand Forks. We conclude
the Interstate Commerce Commission Termination Act of 1995
("ICCTA") does not preempt state jurisdiction over grade crossings.
We reverse and remand.

I

[¶2] In 2003, BNSF closed a grade crossing on a spur line
connecting BNSF's main line with the State Mill and Elevator in

Brandenburg
Boe
Headland
Nichols
Erbele
Warner

Rolus
Weiss
Schmitt

Jeff Nelson

Grand Forks. The grade crossing provided access from State Mill Road across BNSF's spur line to property now owned by Home of Economy, and there was evidence BNSF ran forty to seventy cars per day on the spur line to the State Mill and Elevator. According to Cliff Olson, the previous owner of Home of Economy's property, the grade crossing had existed on BNSF's spur line since 1925. According to Olson, until the early 1950s, the grade crossing provided the only access from State Mill Road to his property, but in the early 1950s, Highway 81 was routed to also provide access to his property, and each access road had been used equally by his customers. According to Olson, there were no signs at the crossing when he owned the property, and BNSF placed a stop sign at the grade crossing after Home of Economy acquired the property from him in 1994. According to Wade Pearson, a vice president of Home of Economy, BNSF informed him in 1994 that it intended to close the grade crossing, but Pearson objected and BNSF placed a stop sign at the crossing.

[¶3] In June 2003, without notice to Home of Economy or any other entity, BNSF removed the wooden planks between the tracks, excavated the soil, and bulldozed a barrier on both sides of the spur line, making it impossible for vehicular traffic to cross the spur line from State Mill Road to Home of Economy's property. Home of Economy sued BNSF in a North Dakota state court for damages and to reopen the crossing, claiming an easement for access to its land had existed from the State Mill Road across the spur line since the 1920s. Home of Economy alleged an easement by prescription, easement by necessity, and easement by estoppel. The trial court dismissed Home of Economy's action, concluding the state court lacked subject matter jurisdiction, because the ICCTA vested jurisdiction over the regulation of railroad operations in the federal Surface Transportation Board. The court concluded the closing of the grade crossing constituted regulation of rail transportation under the ICCTA, because the grade crossing affected rail cars going from BNSF's rail yard to the State Mill and Elevator and could also affect liability for accidents at the crossing. The court concluded the ICCTA granted the Surface Transportation Board exclusive jurisdiction over the grade crossing and preempted state jurisdiction over Home of Economy's action.

II

[¶4] Home of Economy argues the ICCTA does not preempt all state court jurisdiction over railroads, but grants exclusive federal jurisdiction to the Surface Transportation Board only in those cases involving substantial economic impact on a railroad's operations. Home of Economy argues the ICCTA does not preclude states from enforcing the public's right of passage across the spur line and claims that, by using the grade crossing for at least 78 years, the public has acquired an easement across the spur line. BNSF

responds the ICCTA relegates the dispute over the crossing to the exclusive jurisdiction of the Surface Transportation Board, and a North Dakota state court does not have jurisdiction to grant Home of Economy's requested relief. BNSF alternatively argues it was entitled to summary judgment because Home of Economy's claim for an easement is precluded under North Dakota law.

[¶5] The issue in this case is whether the ICCTA preempts state law regarding grade crossings. The Supremacy Clause of the United States Constitution, U.S. Const. art. VI, cl. 2, provides that "the laws of the United States . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." Under the Supremacy Clause, state law that conflicts with federal law is "without effect." Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992) (quoting Maryland v. Louisiana, 451 U.S. 725, 746 (1981)). See Billey v. North Dakota Stockmen's Ass'n, 1998 ND 120, ¶¶ 28-29, 579 N.W.2d 171; NoDak Bancorporation v. Clarkson, 471 N.W.2d 140, 142 (N.D. 1991); State v. Liberty Nat'l Bank and Trust Co., 427 N.W.2d 307, 309-10 (N.D. 1988); Federal Land Bank v. Lillehaugen, 404 N.W.2d 452, 455 (N.D. 1987). In English v. General Elec. Co., 496 U.S. 72, 78-79 (1990) (citations omitted), the United States Supreme Court described when federal law preempts state law under the Supremacy Clause:

First, Congress can define explicitly the extent to which its enactments pre-empt state law. Pre-emption fundamentally is a question of congressional intent, and when Congress has made its intent known through explicit statutory language, the courts' task is an easy one.

Second, in the absence of explicit statutory language, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively. Such an intent may be inferred from a "scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," or where an Act of Congress "touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." Although this Court has not hesitated to draw an inference of field pre-emption where it is supported by the federal statutory and regulatory schemes, it has emphasized: "Where . . . the field which Congress is said to have pre-empted" includes areas that have "been traditionally occupied by the States," congressional intent to supersede state laws must be "clear and manifest."

Finally, state law is pre-empted to the extent that it actually conflicts with federal law. Thus, the Court has found pre-

emption where it is impossible for a private party to comply with both state and federal requirements, or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

[¶6] The United States Supreme Court's framework for analyzing preemption claims starts with the assumption that Congress does not intend to displace state law. Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996); New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 654 (1995); Cipollone, 505 U.S. at 516. See Billey, 1998 ND 120, ¶ 28, 579 N.W.2d 171; Lillehaugen, 404 N.W.2d at 455. The assumption that Congress did not intend to displace state law is not triggered when a state regulates in an area where there has been a history of significant federal presence. United States v. Locke, 529 U.S. 89, 108 (2000) (state regulation of maritime commerce). However, where a state acts in a field that states have traditionally occupied, the assumption that the historic police powers of a state are not superseded by federal law applies, unless Congress clearly and manifestly indicates a contrary intent. Medtronic, at 485. In Cipollone, at 517, the United States Supreme Court explained that when Congress has considered the issue of preemption and has included in the enacted legislation a provision explicitly addressing preemption, matters beyond the reach of the statute are not preempted. See Medtronic, at 484. Thus, when Congress has explicitly addressed the preemption issue, courts must identify the domain expressly preempted by the statute, and whether federal law preempts state law is largely a matter of statutory construction. Cipollone, at 517; Medtronic, at 484-86.

[¶7] The relevant part of the ICCTA, 49 U.S.C.S. § 10501(b), includes specific preemptive language, which provides:

(b) The jurisdiction of the [Surface Transportation] Board over--

(1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and

(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,

is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

[¶8] The remedies in the ICCTA explicitly preempt state remedies "with respect to regulation of rail transportation." The ICCTA defines "transportation" to include "a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use" and "services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property." 49 U.S.C.S. § 10102(9). The ICCTA defines "railroad" to include "a bridge, car float, lighter, ferry, and intermodal equipment used by or in connection with a railroad, . . . the road used by a rail carrier and owned by it or operated under an agreement, and . . . a switch, spur, track, terminal, terminal facility, and a freight depot, yard, and ground, used or necessary for transportation." 49 U.S.C.S. § 10102(6).

[¶9] The structure of the ICCTA includes provisions dealing with standards for establishing rates, classifications, through routes, rules, and practices, see 49 U.S.C.S. §§ 10701-10747; licensing, see 49 U.S.C.S. §§ 10901-10907; operations regarding transportation, service, and rates, see 49 U.S.C.S. §§ 11101-11164; finance, see 49 U.S.C.S. §§ 11301-11328; federal-state relations regarding taxes, see 49 U.S.C.S. §§ 11501-11502; enforcement in the form of investigations, rights, and remedies, see 49 U.S.C.S. §§ 11701-11707; and civil and criminal penalties, see U.S.C.S. §§ 11901-11908. However, none of those provisions explicitly deal with grade crossings. Moreover, the legislative history for the ICCTA reflects Congress intended to effectuate "the direct and complete preemption of State economic regulation of railroads." H.R.Rep. No. 104-311, 104 Cong., First Sess., at 95-96 (1995), reprinted in 1995 U.S.C.C.A.N. 793, 807-08. The legislative history for the ICCTA explicitly effectuates the federal policy of occupying the entire field of economic regulation of the interstate rail transportation system and recognizes that states retain police powers reserved by the constitution. Id. at 807-08.

[¶10] The ICCTA does not explicitly grant the Surface Transportation Board exclusive jurisdiction over grade crossings, and the parties have not cited any cases about whether the ICCTA has preempted state law regarding grade crossings. In different factual situations, some courts have broadly construed Congress's preemption language in the ICCTA and have concluded that language preempted state or local laws. Friberg v. Kansas City S. Ry., 267 F.3d 439, 443-44 (5th Cir. 2001) (holding plain language of ICCTA preempted Texas Anti-Blocking Statute that prohibited railroad from allowing standing train to block crossing for more than five minutes); City of Auburn v. United States, 154 F.3d 1025, 1029-31 (9th Cir. 1998) (holding plain language of ICCTA preempted state and local environmental land use laws); Rushing v.

Kansas City S. Ry., 194 F. Supp. 2d 493, 499-501 (S.D. Miss. 2001) (holding ICCTA preempted state nuisance and negligence action to enjoin railroad from operation of switch yard); Wisconsin Cent. Ltd. v. City of Marshfield, 160 F. Supp. 2d 1009, 1012-15 (W.D. Wis. 2000) (holding broad language of ICCTA preempted city's use of eminent domain law to condemn railroad's passing track); Soo Line R.R. v. City of Minneapolis, 38 F. Supp. 2d 1096, 1099-1101 (D. Minn. 1998) (holding ICCTA preempted local law requiring demolition permits for railroad's buildings in rail yard); Burlington N. Santa Fe Corp. v. Anderson, 959 F. Supp. 1288, 1294-96 (D. Mont. 1997) (holding ICCTA preempted state law authorizing state public service commission to exercise regulatory authority over railroad agency closing); CSX Transp., Inc. v. Georgia Pub. Serv. Comm'n, 944 F. Supp. 1573, 1580-85 (N.D. Ga. 1996) (holding ICCTA preempted state regulatory authority over railroad agency closings); Application of Burlington N. R.R., 545 N.W.2d 749, 751 (Neb. 1996) (holding ICCTA preempted state court's jurisdiction to consider practices, routes, services, and facilities of interstate rail carriers); City of Seattle v. Burlington N. R.R., 41 P.3d 1169, 1172-74 (Wash. 2002) (holding ICCTA and Federal Rail Safety Act of 1970 preempted city's railroad switching and blocking ordinances). See Maureen E. Eldredge, Comment: Who's Driving the Train? Railroad Regulation and Local Control, 75 U. Colo. L. Rev. 549, 562-79 (2004).

[¶11] Some courts, however, have narrowly construed Congress's preemption language in the ICCTA and have concluded that language has not preempted state or local laws. Iowa, Chicago & E. R.R. v. Washington County, 384 F.3d 557, 561-62 (8th Cir. 2004) (holding railroad failed to establish ICCTA preempted state administrative proceedings for railroad to replace four railroad-highway bridges); Florida E. Coast Ry. v. City of West Palm Beach, 266 F.3d 1324, 1329-39 (11th Cir. 2001) (holding ICCTA did not preempt application of city zoning and licensing ordinances to a railroad's lessee's aggregate distribution operation located on railroad property because that activity did not constitute regulation of rail transportation); Rushing, 194 F. Supp. 2d at 501 (holding ICCTA did not preempt state action to require railroad to remedy pooling of water on plaintiffs' property); State v. Burlington N. Ry. Co., 2001 Ok. Civ. App. 55, ¶ 16, 24 P.3d 368 (holding ICCTA did not preempt state's authority to require railroad to repair or replace right-of-way fences); Wheeling & Lake Erie Ry. Co. v. Pennsylvania Pub. Util. Comm'n, 778 A.2d 785, 790-92 (Pa. Commw. Ct. 2001) (holding ICCTA did not preempt state authority to regulate rail-highway crossing bridge and allocate costs of maintenance and reconstruction); In re Vermont Ry., 769 A.2d 648, 652-55 (Vt. 2000) (holding ICCTA did not preempt city's zoning ordinance for permit for salt shed on railroad property). See Eldredge, 75 U. Colo. L. Rev. at 579-84.

[¶12] In Florida E. Coast Ry., 266 F.3d at 1331, the Eleventh Circuit Court of Appeals stated the ICCTA did not preclude the application of all other law, but preempted state law "only . . . 'with respect to regulation of rail transportation,'" which the court concluded necessarily meant "something qualitatively different from laws 'with respect to rail transportation.'" The court said Congress narrowly tailored the preemption provision to "displace only 'regulation,' i.e., those state laws that may reasonably be said to have the effect of 'manag[ing]' or 'govern[ing]' rail transportation . . . while permitting the continued application of laws having a more remote or incidental effect on rail transportation." Id. The court concluded zoning ordinances of general applicability, which were enforced against a private entity leasing property from a railroad for non-rail transportation purposes, were not sufficiently linked to rules governing the operation of the railroad so as to constitute laws "with respect to regulation of rail transportation." Id. The court also examined the history and purpose of the ICCTA and said the ICCTA removed direct economic regulation by states, as opposed to the incidental effects that were in the exercise of traditionally local police powers. Id. at 1337.

[¶13] In Wheeling, 778 A.2d at 791-92, the Pennsylvania court recognized that states have the traditional police power to regulate the public safety of grade crossings and to allocate the costs of constructing, maintaining, and improving grade crossings. See Atchison, Topeka & Sante Fe Ry. v. Public Utils. Comm'n, 346 U.S. 346, 352 (1953); Lehigh Valley R.R. v. Board of Pub. Util. Comm'rs, 278 U.S. 24, 34-35 (1928). See generally 65 Am. Jur. 2d Railroads §§ 181, 186 (2001). The court recognized the ICCTA did not expressly preempt states' traditional police power over public safety of rail-highway crossings. Wheeling, 778 A.2d at 792. The court concluded Congress clearly intended to preempt only the states' previous authority to economically regulate rail transportation within states' borders with respect to such matters as the operation, rates, rules, routes, services, drops, facilities, and equipment, and to reserve the states' police power to regulate the safety of rail-highway crossings. Id. The court concluded there was no conflict between the exclusive jurisdiction of the Surface Transportation Board to economically regulate rail carriers under the ICCTA and the states' authority to regulate the public safety of rail-highway crossings, which are part of the public highways. Id.

[¶14] In Iowa, Chicago & E. R.R., 384 F.3d at 561-62, the Eighth Circuit Court of Appeals concluded the railroad had failed to establish the ICCTA preempted state law requiring a railroad to replace four bridges at its own expense. The court said its holding was narrow because state proceedings were incomplete and states do not operate in this arena free of federal involvement, and if federal funding was used for one or more of the four bridge projects, federal law would apportion the cost. Id. at 562.

[¶15] Our law recognizes public roads by prescription. N.D.C.C. § 24-07-01. See Hartlieb v. Sawyer Township Bd., 366 N.W.2d 486, 488 (N.D. 1985); Mohr v. Tescher, 313 N.W.2d 737, 739 (N.D. 1981); Backhaus v. Renschler, 304 N.W.2d 87, 89 (N.D. 1981); Berger v. Berger, 88 N.W.2d 98, 100 (N.D. 1958). Our statutes also recognize the traditional state police power over grade crossings. See N.D.C.C. chs. 24-09; 49-10.1; 49-11. Our statutes distinguish between public grade crossings and private crossings. See N.D.C.C. §§ 24-09-01.1 (public highway-railroad crossing); 24-09-02 (public grade crossings); 24-09-04 (public grade crossings); 24-09-05 (each grade crossing); 24-09-08 (any railroad grade crossing); 24-09-10 (changing or closing railroad crossing of a public highway and a railroad); 49-10.1-10 (private crossings over any line or railroad in the state); 49-11-06 (railroad crossings at public highway railroad crossing); 49-11-17 (railroad crossing over land owned on both sides by one person). Our statutes authorize the North Dakota Department of Transportation to conduct and systematically maintain a survey of all streets and highways as required by the Federal Highway Safety Act of 1973 to identify railroad crossings which may need additional warning systems beyond the standard crosswalks and advance warning signs. N.D.C.C. § 24-09-01.1.

[¶16] A body of federal statutory law and case law also deals with the interrelationship between state and federal authorities over grade crossings. See Norfolk S. Ry. v. Shanklin, 529 U.S. 344 (2000) (holding, under 49 U.S.C.S. § 20101 et seq., the Federal Railroad Safety Act of 1970, once federal highway administration approved project and installed sign at grade crossing using federal funds, federal law preempted state tort law for wrongful death action against railroad). The Federal Rail Safety Act specifically addresses "the railroad grade crossing problem." See 49 U.S.C.S. § 20134(a). In Iowa, Chicago & E. R.R. Corp., 384 F.3d at 561, the Eighth Circuit Court of Appeals discussed the interplay between the ICCTA and the Federal Rail Safety Act of 1970 and recognized Congress for many decades had forged a federal-state regulatory partnership to deal with problems of rail and highway safety and highway improvement, which the ICCTA did not address. The court said Congress's silence did not reflect a clear and manifest purpose for the ICCTA to preempt traditional state regulation of public roads and bridges that Congress had encouraged in other statutes. Id. The court concluded the railroad had failed to establish the ICCTA preempted state proceedings to replace bridges at four railroad crossings. Id.

[¶17] The foregoing authorities indicate the ICCTA has not preempted all state authority over issues regarding railroads and grade crossings. The preemption language in the ICCTA explicitly preempts many issues "with respect to regulation of rail transportation," but does not specifically refer to states' traditional police power regarding grade crossings. We conclude the ICCTA

does not explicitly preempt state law regarding grade crossings, and we discern no actual conflict between the Surface Transportation Board's exclusive jurisdiction with respect to regulation of rail transportation under the ICCTA and states' traditional authority regarding grade crossings. We therefore conclude the trial court erred in determining the ICCTA preempted state law regarding grade crossings.

III

[¶18] Relying on Nowling v. BNSF Ry., 2002 ND 104, 646 N.W.2d 719, BNSF alternatively argues it was entitled to summary judgment because Home of Economy's claim for an easement is precluded under North Dakota law. In Nowling, at ¶ 14, we held a right of way for an operating railroad was a public highway under N.D. Const. art. XII, § 13, which was not subject to adverse possession. Here, however, the trial court did not address that issue, and we therefore decline to address it.

IV

[¶19] We reverse the judgment and remand for proceedings consistent with this opinion.

[¶20]

Mary Muehlen Maring
Carol Ronning Kapsner
Dale V. Sandstrom
Gerald W. VandeWalle, C.J.

[¶21] The Honorable William A. Neumann, a member of the Court when this case was heard, resigned effective March 14, 2005, and did not participate in this decision.

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