

MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION

SFN 2053 (2/85) 5M



ROLL NUMBER

DESCRIPTION

23/5

2007 SENATE TRANSPORTATION

SB 2315

2007 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. 2315

Senate Transportation Committee

Check here for Conference Committee

Hearing Date: January 25, 2007

Recorder Job Number: 1915

Committee Clerk Signature

Jody Klauze

Minutes:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Senator Potter asked if he had visited with the PSC.

Senator Christman said he had.

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

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

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

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

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

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

Senator Lee asked for neutral testimony.

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

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

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

Mr. Bennet replied yes.

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

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

Senator Bakke asked how many complaints they get.

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

fencing complaints in one year.

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

2007 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. 2315

Senate Transportation Committee

Check here for Conference Committee

Hearing Date: February 1, 2007

Recorder Job Number 2545

Committee Clerk Signature

Jody Haeger

Minutes:

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

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

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

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

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

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

Senator Lee said he was favorable to the amendment.

Senator Nething moved a DO Pass on the amended.

Senator Bakke seconded.

The clerk called the roll. 5-0-1

Senator Nething moved a DO Pass as amended.

Senator Potter seconded.

Senator Lee will carry SB 2315.

PROPOSED AMENDMENTS TO SENATE BILL NO. 2315

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

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

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

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

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

Renumber accordingly

GLB
2-1-7

PROPOSED AMENDMENTS TO SENATE BILL NO. 2315

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

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

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

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

Page 2, remove line 3

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

Renumber accordingly

Date: 2-1-07
Roll Call Vote #: ^{1st} 50-0-1

2007 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 2315

Voice Vote

Senate Transportation Committee

Check here for Conference Committee

Legislative Council Amendment Number 70781.0102

Action Taken Do Pass

Motion Made By Senator Nething Seconded By Senator Bakke

Senators	Yes	No	Senators	Yes	No
Chairman Gary Lee	✓		Senator JoNell Bakke	✓	
V Ch John Andrist			Senator Tom Fiebiger	✓	
Senator Dave Nething	✓		Senator Tracy Potter	✓	

Total (Yes) 5 No 0

Absent 1

Floor Assignment _____

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

Date: 2-1-07
Roll Call Vote #: 5-0-1

2007 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 2315

Senate Transportation Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken do Pass as amended

Motion Made By Senator Nething Seconded By Senator Potter

Senators	Yes	No	Senators	Yes	No
Chairman Gary Lee	✓		Senator JoNeil Bakke	✓	
V Ch John Andrist			Senator Tom Fiebiger	✓	
Senator Dave Nething	✓		Senator Tracy Potter	✓	

Total (Yes) 5 No 0

Absent 1

Floor Assignment Senator Gary Lee

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

REPORT OF STANDING COMMITTEE

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

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

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

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

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

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

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

Page 2, remove line 3

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

Renumber accordingly

2007 HOUSE TRANSPORTATION

SB 2315

2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. SB 2315

House Transportation Committee

Check here for Conference Committee

Hearing Date: 03-08-2007

Recorder Job Number: 4670/4671

Committee Clerk Signature

Lisa M. Thomas

Minutes:

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

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

Christmann.

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

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

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

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

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

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

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

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

Opposition was heard at this time.

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

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

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

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

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

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

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

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

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

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

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

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

Olson continued..

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

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

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

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

Olson: Good thought. I have no idea.

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

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

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

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

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

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

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

Rep. Ruby: I believe that is clear.

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

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

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

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

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

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

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

There was no further testimony.

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

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

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

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

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

Rep. Weisz: That is probably correct.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Rep. Price: What is the duty of the landowner currently to report? Is it solely the RR's responsibility to inspect that fence, or is it the landowner's responsibility to inspect and report and then the RR to respond?

Olson: I think that our responsibilities are there whether or not it is reported or not. In other words, even if the farmer doesn't report a problem fence and the fence produces a cow that gets out and whatever happens, I think the RR is still liable for it. There is no responsibility I don't think that the landowner can make a report.

Rep. Price: If we are moving down this road then, it raises more concerns for me. If a train is going by at fifty-five, they are not going to notice an immediate problem with the fence. It shouldn't really be solely on the RR to send a crew out every day to check fence. If we are going to go further on the RR, then there should be a little more on the landowner to report the fence. But, to have a better place to report.

Rep. Kelsch moved a DO NOT PASS.

Rep. Thorpe seconded.

Rep. Thorpe: I guess I do feel that the bill was here primarily for one instance and I understand there is probably others but mainly it has come to one instance. I think the RR knows about it now and unless somebody would rather somehow keep this alive until the next session. I would just as well move a DO NOT PASS.

Rep. Kelsch: The reason I moved a DO NOT PASS is you know, I guess I have a bit of an issue, Rep. Price brought up part of it, but I truly believe that if this would have been a major issue, if a constituent of mine would have come to me and said you know we are having difficulty getting to the RR, you know, we are having some problems with it. I would have immediately gone to John and said you know what; you had better help me and you better help my constituent! But there is some definite issues with the way that the bill is written and I'll take

it a step further, what I said to Mr. Benek when I was talking about under other entities that they have you know don't feel as though they have the jurisdiction over them and you know one 'em is the wireless industry. I could tell you on there website, I know who is listed if there are complaints and I know that when the commission has a complaint, receives a complaint against MY company, I receive it immediately from the commission and you know what, it's taken care of. Now, it may not be exactly resolved the way that the customer wants it but by gosh it's done, so that is why I don't think it's necessary to have this if it persists and we come back next session you know what it hasn't gotten any better you know then yeah maybe we should take a look at this but I strongly recommend that the commission put something out on the website and if there is information because if you click on to the commission website you know you can go into RR or the commission has updated information. I don't think that we need to put this into law and I just think that there are too many unanswered questions in here and I don't like that the burden of proof being put should be on one entity.

Rep. Ruby: I think Rep. Price made a pretty good point because it ties the notification and the liability together. If I am a landowner and I see that the fence is down and my pasture is eaten down, and my neighbor's is pretty plush and I don't notify the RR they can go over and eat down their pasture and that land owner may not notify that there is a problem with it because he knows the RR is responsible for it so I think it deals with a little bit of liability of the notification as well as the liability.

Rep. Owens: I was going to oppose the DO NOT PASS because I believe the timing issue is relevant to have in here and we could make the little changes. I was going to. The Vice Chairman flipped me about the liability because we would have to adjust that too and I think it has to be based if you are liable from the time of receipt of the notice you are fine, and then everything is based on timing. The example of well I know that's fixed and I'll notify them next

week and life gets busy but time goes on and three weeks later you finally get around and there was damage done during those three weeks and the RR is liable.

Roll Call Vote: 12 yes. 0 no. 1 absent.

Rep. Dosch was absent.

Carrier: Rep. Kelsch

2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. SB 2315

House Transportation Committee

Check here for Conference Committee

Hearing Date: 03-15-2007

Recorder Job Number: 5134

Committee Clerk Signature

Juan M Thomas

Minutes:

Chairman Weisz called the committee together to discuss the committee's actions on SB 2315.

Chairman Weisz: The Senate was less than pleased. If the committee wants, I said I would attempt to have a committee reconsider our actions, possibly amend it and if the committee decides that it's as bad as it was the first time, but I will at least give it a second chance. I tried to explain that it was unanimous.

Rep. Kelsch: There you know, the House is a different body. And I'll tell you what, I'm kind of getting, you know every time I go in on a bill that we have made changes to a Senate bill and listen to what the Senate has to say about it. I don't know where all of these paternal feelings have started.

Rep. Price: We as House members have to be very careful that we don't respond in the same way. I move that we reconsider our actions.

Rep. Owens seconded the motion.

Voice Vote: Motion carried.

Rep. Weisz: I understand there are some amendments, do we have any?

Rep. Owens: I think we voted against the bill because it is bad. I don't care how in love the Senate is with it. It was a bad bill. What I noticed, was one, they added all of these injuries and claims that could go against the railroad. Thirty days from receipt of notice they had to fix the fence, and if it was December 29th that they received the notice, you know as well as I do that is a wonderful time to be out there working on a fence and not a very reasonable time frame, and two, the way it's written somebody could notice that it's damaged, wait four weeks and let whatever run wild and do whatever it wants to and then come back and give them notice and say by the way, you owe for all of this damage for the past four weeks. It was a bad bill and it got what it deserved.

Rep. Weisz: If you just required that they gave an address to the DOT.

Rep. Kelsch: They are going to do that. They already said that they would and said that they would post it on the website. As we sit here, why are we adding more burdens onto businesses? It is pure and simple and on the tape we said can this be done and Bill Benek said that it can be done. After the hearing, John Olson said I will work with the PSC and we will get that posted on the website.

Rep. Weisz: Well, maybe we can have John write a letter saying he will.

Rep. Kelsch: I truly don't believe that we need to impose regulations that are undue and unreasonable. Rep. Price even made a comment saying the way that it's written, pretty much that the railroad is going to have to have somebody out checking the fences 24-7-365.

Rep. Weisz: I agree with that.

Rep. Price: If we were to change the bill I think number one, the landowner should notify in writing. The phone numbers they are getting sent around all the time, there needs to be some accountability because it's not like there is one office, unless they truly get it set up. And then it should be within a certain amount of time, it could be within thirty days, weather permitting. I

mean it's not going to be January 30th, if we are going to change it. But also in the mean time, landowners have a responsibility to remove livestock from that pasture and make other arrangements because if you know the fence is down and you don't, you have got some responsibility.

Rep. Kelsch: I just find that it's absolutely amazing that we are a totally different chamber we are a totally different Transportation Committee and now we are trying to fix something because one individual is upset. How do you think that they would respond to us if we went over and did the same thing in the Senate? It would not be taken well at all.

Rep. Weisz: I am not asking you to save face. You did what I asked. I brought the bill back, I gave it a chance and further discussion. I am not asking, because I don't agree that, I think it's unfortunate that we even have this you kill mine I kill yours or whatever, I don't agree with that. But I did agree that I would ask to bring it back and have a discussion. I told them to offer amendments and they have had a week to do it. That's what I promised them and that is all I am asking. I am not saying we should pass this.

Rep. Schmidt: Do you think that John Olson kind of made a promise to us that the railroad has got the message and we will correct it. Do you suppose he could get that in writing and give it to the Senate?

Rep. Weisz: I may ask John Olson to write a letter saying that he is going to work with the DOT. I am not asking you to vote for a bad bill. I did my part. He felt we didn't give it adequate discussion or anything and I said fine, I will ask the committee to bring it back, if they allow it, we will have the discussion. I am not telling anyone to change their vote. If you think it's bad, it's bad.

Rep. Ruby moved a DO NOT PASS. Rep. Kelsch seconded.

Roll Call Vote: 9 yes. 3 no. 1 absent.

Carrier: Rep. Kelsch

Rep. Thorpe was absent and not voting.

Date: 3-8-07
 Roll Call Vote #: 1

2007 HOUSE STANDING COMMITTEE ROLL CALL VOTES 2315
 BILL/RESOLUTION NO. _____

House Transportation Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Not Pass

Motion Made By Rep Kelsch Seconded By Thorpe

Representatives	Yes	No	Representatives	Yes	No
Chairman Weisz	✓		Rep. Delmore	✓	
Vice Chairman Ruby	✓		Rep. Gruchalla	✓	
Rep. Dosch	A		Rep. Myxter	✓	
Rep. Kelsch	✓		Rep. Schmidt	✓	
Rep. Owens	✓		Rep. Thorpe	✓	
Rep. Price	✓				
Rep. Sukut	✓				
Rep. Vigesaa	✓				

Total Yes 12 No 0

Absent 1

Floor Assignment Kelsch

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

Date: 3-15-07
Roll Call Vote #: 1

2007 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 2315

House Transportation Committee

Check here for Conference Committee

Legislative Council Amendment Number voice (voice vote)

Action Taken reconsider Actions

Motion Made By Price Seconded By Owens

Representatives	Yes	No	Representatives	Yes	No
Chairman Weisz			Rep. Delmore		
Vice Chairman Ruby			Rep. Gruchalla		
Rep. Dosch			Rep. Myxter		
Rep. Kelsch			Rep. Schmidt		
Rep. Owens			Rep. Thorpe		
Rep. Price					
Rep. Sukut					
Rep. Vigesaa					

Total Yes _____ No _____

Absent Motion Carried

Floor Assignment _____

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

Date: 3-15-07
 Roll Call Vote #: 2

2007 HOUSE STANDING COMMITTEE ROLL CALL VOTES
 BILL/RESOLUTION NO. 2315

House Transportation Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Not Pass (again)

Motion Made By Ruby Seconded By Kelsch

Representatives	Yes	No	Representatives	Yes	No
Chairman Weisz		X	Rep. Delmore	X	
Vice Chairman Ruby	X		Rep. Gruchalla	X	
Rep. Dosch	X		Rep. Myxter	X	
Rep. Kelsch	X		Rep. Schmidt		X
Rep. Owens	X		Rep. Thorpe	Absent	
Rep. Price	X				
Rep. Sukut	X				
Rep. Vigesaa		X			

Total Yes 9 No 3

Absent 1

Floor Assignment Kelsch

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

REPORT OF STANDING COMMITTEE (410)
March 16, 2007 8:03 a.m.

Module No: HR-50-5507
Carrier: R. Kelsch
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

SB 2315, as engrossed: Transportation Committee (Rep. Weisz, Chairman) recommends
DO NOT PASS (9 YEAS, 3 NAYS, 1 ABSENT AND NOT VOTING). Engrossed
SB 2315 was placed on the Fourteenth order on the calendar.

2007 TESTIMONY

SB 2315

SB2315
Matt Benz
2108 7th St. NE
Beulah, ND

*Same
Submitted by
Sen. Christmann
to
House*

Mr. Chairman and members of the Transportation committee: I am Matt Benz from Beulah where my family and I have a small livestock operation on the breaks of the Knife River adjacent to a stretch of railroad owned by BNSF. I am here in support of SB2315.

Under N.D.C.C. § 49-11-24, the railroad is obligated to maintain its fence "so long as the owner or lessee maintains a fence around the other sides of the enclosure. Under N.D.C.C. § 49-11-29, failure of the railroad to maintain the fence is a class A misdemeanor.

We have lived at our current residence for ~20 years. As part of our normal spring duties we fix the fence around our pasture, all of the fence. In April of 2001, we found the fence along the railroad right of way to be in terrible shape. Much of the wire was gone and many of the posts were broken off. It needed a lot of work. I then tried to start a dialog with BNSF. Eventually I was told they did not have money in the budget to erect a new fence. We bought wire and posts and proceeded to repair the worst part of the fence so our livestock would stay in. The next summer, 2002, BNSF rebuilt ~2 miles of fence on the property adjacent to ours. They did not fix or rebuild our fence, or contact us.

In the fall of 2005, I again attempted to start a dialog with BNSF in order to get BNSF to repair the fence along their right of way. They sent me an email with the phone numbers of a few people to contact, unfortunately they forgot to include an area code. I tried ND and MN area

codes, none of them worked. After relating this to them in a email I got emails from four different people in BNSF, they all told me to get in contact with someone else, usually failing to include email addresses and\or phone numbers. I decided I was getting the runaround.

In the spring of 2006, someone called and visited with my wife about the fence. He did not leave a name or phone number but indicated BNSF was going to take care of the fence. Throughout the spring, summer, and fall of 2006 our livestock continued periodically to get out along the right of way. We repaired spots on a weekly basis until finally in September we gave up and confined our livestock and started to feed them. We are still waiting for the BNSF to do something about the fence.

Mr. Chairman and members of the committee, BNSF continually fails to obey the law. Landowners who run livestock are bound by state law to maintain a fence that will keep our livestock contained, we are responsible for damages to other people's property when our livestock get out. I try to keep up my end of the deal, maybe this bill will prod BNSF to keep their end of the deal.

Thank for you for your time and I ask for you support of this bill.

2763
2315**49-11-24. Railroad right of way — Fences.**

1. Every owner or lessee of land abutting any operating railroad's right of way who has a legal fence, as defined in section 47-26-01, along all sides of the land except the side abutting the right of way may make a written request of the owners or operators of the railroad to construct a fence along the right of way. Upon receipt of the request, the owners or operators shall erect, within a reasonable time, a legal fence along the right of way to confine livestock as required by section 36-11-01. The owners or operators shall maintain the fence so long as the owner or lessee maintains the fence around the other sides of the enclosure.
2. Where the railroad has a fence along its right of way, the owners or operators of the railroad shall maintain the fence without necessity of a request by the owner or lessee so long as the owner or lessee maintains a fence around the other sides of the enclosure.
3. Except for the penalty and liability imposed by sections 49-11-29 and 49-11-30, the failure to comply with the requirements of this section is not, in itself, evidence of negligence and the fact that this section has been violated is not admissible in any other action.

Source: S.L. 1883, ch. 57, § 1; R.C. 1895, § 2980; R.C. 1899, § 2980; R.C. 1905, § 4299; C.L. 1913, § 4646; S.L. 1915, ch. 202, § 1; 1919, ch. 193, § 1; 1925 Supp., § 4646; R.C. 1943, § 17-0401; S.L. 1989, ch. 570, § 1.

65 Am. Jur. 2d, Railroads, §§ 125-148.
74 C.J.S. Railroads, §§ 94, 176-184, 558-581.
Children, duty of railroad to fence track as against, 31 A.L.R.2d 808.

Collateral References.
Railroads ⇐ 72(4), 103, 104, 411, 412.

49-11-25. How fence on railroad right of way to be constructed.

A fence required under the provisions of section 49-11-24 shall be constructed as follows:

1. Good posts shall be set in the ground firmly, and such posts shall be not more than twenty feet [6.10 meters] apart.
2. There shall be securely fastened to such posts not less than four strands of barbed wire. The top wire shall be not less than fifty-four inches [137.16 centimeters] above the ground, the bottom wire shall be approximately sixteen inches [40.64 centimeters] above the ground, and the two center wires shall equally divide the distance between the top and bottom wires.
3. Instead of the barbed wire described in subsection 2, woven wire which is not less than forty-eight inches [121.92 centimeters] wide may be used.

Source: S.L. 1883, ch. 57, § 1; R.C. 1895, § 2980; R.C. 1899, § 2980; R.C. 1905, § 4299; C.L. 1913, § 4646; S.L. 1915, ch. 202, § 1; 1919, ch. 193, § 1; 1925 Supp., § 4646; R.C. 1943, § 17-0402.

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Source: S.L. 1883, § 2980; R.C. 1899, § 2980; C.L. 1913, § 4646; S.L.

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49-11-26 shall be

1. The fence [15.2 meters] high.
2. The woven wire therein shall be not less than one-half in more than shall be no wide; the centimeters inches [15.2 centimeters].
3. The bottom wire shall be not less than five (5.08 centimeters) wide.
4. The bottom wire shall be not less than five (5.08 centimeters) wide.
5. Not less than four (4) strands of wire shall be placed four (4) inches above the first strand.
6. The posts used for such purposes, shall be not less than four (4) meters], and

Source: S.L. 1883, ch. 57, § 1; R.C. 1895, § 2980; R.C. 1899, § 2980; C.L. 1913, § 4646; S.L.

2185

49-11-26. Landowner may require railroad to build hog-tight fence. Every owner or lessee of a tract of land abutting upon any railroad or railway, or through which any railroad or railway has been or may be constructed, who has built a hog-tight fence along all sides of such land, except the side abutting against the railroad right of way, may demand of the owners or operators of such railroad or railway that the right of way adjacent to such tract of land be enclosed with a hog-tight fence. Upon such demand, such owners or operators shall erect the hog-tight fence and maintain the same in good repair so long as the owner of such tract of land shall continue to maintain a hog-tight fence around the other sides of the enclosure.

Source: S.L. 1883, ch. 57, § 1; R.C. 1895, § 2980; R.C. 1899, § 2980; R.C. 1905, § 4299; C.L. 1913, § 4646; S.L. 1915, ch. 202, § 1; 1919, ch. 193, § 1; 1925 Supp., § 4646; R.C. 1943, § 17-0403.

49-11-27. Requirements of hog-tight fence built by railroad on right of way. A fence built pursuant to a demand made under section 49-11-26 shall be constructed as follows:

1. The fence shall be not less than twenty-six inches [66.04 centimeters] high.
2. The woven wire shall have not less than seven cables and the meshes therein shall not exceed six inches [15.24 centimeters] in length.
3. The bottom mesh shall be not more than three inches [7.62 centimeters] wide; the second mesh shall be not more than three and one-half inches [8.89 centimeters] wide; the third mesh shall be not more than four inches [10.16 centimeters] wide; the fourth mesh shall be not more than four and one-half inches [11.43 centimeters] wide; the fifth mesh shall be not more than five inches [12.7 centimeters] wide; and the sixth mesh shall be not more than six inches [15.24 centimeters] wide.
4. The bottom wire of the fence shall be placed not to exceed two inches [5.08 centimeters] from the surface of the ground.
5. Not less than three barbed wires of not less than no. 13 standard gauge with barbs not exceeding six inches [15.24 centimeters] apart shall be placed above the woven wires. The first barbed wire shall be placed four inches [10.16 centimeters] above the woven wire; the second barbed wire shall be placed eight inches [20.32 centimeters] above the first barbed wire; and the third barbed wire shall be placed eight inches [20.32 centimeters] above the second barbed wire.
6. The posts used in such fence shall be of ordinary size for fence purposes, shall be set in the ground to a depth of at least two feet [.61 meters], and shall be not to exceed sixteen feet [4.88 meters] apart.

Source: S.L. 1883, ch. 57, § 1; R.C. 1895, § 2980; R.C. 1899, § 2980; R.C. 1905, § 4299; C.L. 1913, § 4646; S.L. 1915, ch. 202, § 1; 1919, ch. 193, § 1; 1925 Supp., § 4646; R.C. 1943, § 17-0404.

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49-11-28. Swinging gates — When railroad required to maintain. Upon the written request of the owner or lessee of land abutting the railroad's right of way, the owners or operators of a railroad shall construct and maintain suitable and safe swinging gates on any side of a private crossing enclosed by the railroad under section 49-11-24. The request must be made at the same time a request is made under subsection 1 of section 49-11-24.

Source: S.L. 1919, ch. 193, § 2; 1925 Supp., § 4646a1; R.C. 1943, § 17-0405; S.L. 1989, ch. 570, § 2.

Cross-References.

Cattle guards and crossings where land on both sides of railroad owned by one person, see § 49-11-17.

Highway cattle guards, see ch. 24-10.

Collateral References.

Railroads ⇐ 72(4), 100-104, 411, 412.
65 Am. Jur. 2d, Railroads, §§ 125-148.
74 C.J.S. Railroads, §§ 94, 168-184, 558-581.

49-11-29. Failure to construct fence or swinging gate — Penalty. Any person owning or operating any line of railroad within this state and refusing or neglecting to comply with sections 49-11-24 through 49-11-28 is guilty of a class A misdemeanor. A prosecution or conviction under sections 49-11-24 through 49-11-28 does not relieve such person from liability for the maiming or killing of livestock on the right of way by reason of that person's negligence.

Source: S.L. 1919, ch. 193, § 4; 1925 Supp., § 4646a3; R.C. 1943, § 17-0406; S.L. 1975, ch. 106, § 530; 1989, ch. 570, § 3.

49-11-30. Failure of railroad to fence — Damage to owner of stock — How collected. Any corporation operating a railroad and failing to fence the same against livestock running at large where the duty to fence exists is liable to the owner of any stock killed or injured by reason of the want of such fence for the full amount of the damages sustained by the owner, unless the injury was occasioned by the grossly negligent act of the owner of the stock or the owner's agent. To recover, the owner of the stock must prove only the loss of or injury to the owner's property. Notice in writing that a loss or injury has occurred, accompanied by an affidavit thereof, must be served upon an officer of the corporation or upon a station or ticket agent employed by the corporation in the county where the loss or injury occurred. If the corporation fails or neglects to pay the damages within ninety days after the notice is served on it, the owner is entitled to recover from the corporation double the amount of damages actually sustained by the owner, and a reasonable attorney's fee when it is adjudged by a court of competent jurisdiction that the claimant is entitled to the amount claimed.

Source: S.L. 1907, ch. 209, § 1; C.L. 1913, § 4655; R.C. 1943, § 17-0407; S.L. 1989, ch. 570, § 4.

Collateral References.

Liability of railroad or other private landowner for vegetation obscuring view at railroad crossing, 66 A.L.R.4th 885.

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Testimony of BNSF Railway In Opposition to SB 2315

Good morning Chairman and members of the Committee. I am John Olson, representing BNSF Railway Company in opposition to this bill. Railroads already are burdened with greater responsibility and cost for building and maintaining fences than any other industry. Adding to that burden is not necessary.

State law currently requires railroads to fence their right of way or bear the liability for harm to livestock on that land. There is more than 3,500 miles of railroad right of way in North Dakota. That means railroads could potentially have to build and maintain about 7,000 miles of fence. And that fence isn't to prevent railroad property from encroaching on the land of others. It is to keep someone else's property off of railroad property. And current law already puts tremendous pressure on the railroads to settle livestock claims promptly, by assessing double damages for failure to pay promptly.

The railroads have built fences. The question is can they maintain them as promptly as people would like. There is a great deal of fence to monitor and maintain. It is a big challenge to do the job. Even the State of North Dakota cannot maintain all of its fences on a monthly basis. Yet we are going to hold the railroad strictly liable and assess treble damages if they don't meet that standard.

This bill is not reasonable. Is it practical to have an absolute 30-day limit in winter? Winter weather can hinder doing repairs. Remember, the people who would have to repair the fences are the same people whose job it is to make sure the tracks are safe and repair problems. There are certain times of the year when their workload sharply increases and delays the ability to work on fences. Severe weather can damage track as well as fences. Does the state think they should drop everything and repair a fence, rather than repair a track?

The bill is also lacking in fundamental fairness. Why should these claims be treated differently than other tort claims governed by North Dakota law? This bill throws out the state's comparative fault law and disregards any fault of the livestock owner if 30 days has elapsed. Railroads already have to bear the cost of repairing the fence without any regard to who or what damaged it. Now they are faced with strict liability and treble damages if they don't do it right away.

The State already expects more of railroads than other industries in this area and already has penalties in place. This bill is unnecessary and unfair.

Thankyou for your consideration.