

# MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION

SFN 2053 (2/85) 5M



ROLL NUMBER

DESCRIPTION

2368

2007 SENATE JUDICIARY

SB 2368

## 2007 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. **SB 2368**

### Senate Judiciary Committee

Check here for Conference Committee

Hearing Date: February 5, 2007

Recorder Job Number: 2800 & 2808

Committee Clerk Signature

*Maria L. Salberg*

**Minutes:** Relating to a choice of laws clause in a railroad right of way agreement.

**Senator David Nething**, Chairman called the Judiciary committee to order. All Senators were present. The hearing opened with the following testimony:

**Job Number: 2800**

#### **Testimony In Support of Bill:**

**Brian Bjella**, ND Grain Dealers Assoc. Introduced the bill – Att. #1.

Sen. Nething asked for a review of the history of the bill (meter 2:20) reviewed. The committee discussed what state a lease would apply to. Spoke of a law passed in '03. Currently with the railroad it states that they follow Texas law. This bill states that the law of ND would apply.

The way the bill is written it is confusing. The committee spoke of how to clarify it. **Sen.**

**Olafson** questioned the "void to the extent" can this be written into a lease? Yes.

**Sen. Fiebiger** stated what if the people chose to use another states law? What if they refuse to comply with this law? The Grain elevators have to be on the railroad track. They will have to comply to our law. What if they chose not to do business in ND.

#### **Testimony in Opposition of the Bill:**

**John Olson**, Representing BNSF (meter 10:58) Spoke in opposition – Att. #2. Leases are made and are uniform in 28 states

I am not sure what problem this will solve. **Mr. Olson** showed a couple of leases he had printed. He stated that there are so many transactions that go on between the railroad and other industries and spoke of some of them. To pass a law without seeing what the consequences may be, will be problematic. There is a law on Indemnification already on the books and this bill is poorly written. If this is the way the community wishes to go I am not sure I am not comfortable about this. I am not sure that this is currently being done. (meter 14:00)  
The intent is to stick to the indemnity provision.

If there is a problem and you want to know about it I will find out. The chairman requested **Mr. Olson** to research it. **Sen. Nething** asked **Mr. Bjella** if there was an actual problem or was this a potential problem? He responded of a personal situation. (meter 17:00) and the concern how the lease took the responsibility away from the railroad and gave it to the person. He was not aware on what railway it was.

**Sen. Nething** asked **Sen. Nelson** to research the carrier on the indemnity issue and bring her findings to the committee.

**Testimony Neutral to the Bill:**

None

**Senator David Nething**, Chairman closed the hearing.

**Job Number 2808**

**Senator David Nething**, Chairman reopened the hearing.

**Sen. O'Connell, Dist. #6** (meter 1:03) As carrier of the bill spoke. A lease was brought to my attention. In the lease it was stated that the lease was governed by the state of the "home office" for example if it is in Texas, then Texas law would govern, even if there is no law in

Texas. Spoke of the wordage of the bill being confusing. The committee discussed how ND law would not apply even though it is ND properties.

**Sen. Fiebiger** questioned if any events have happened that someone, had an event and had to go to Texas to pursue. **Sen .O'Connell** stated that there was an incident and the person is fearful of retaliation from the railroad and could not appear. They were told "good luck trying to file a case and find an attorney in Texas who would help you"

**Sen. Potter**, Dist. #35 (meter 4:36) Is here in support.

**Sen. Nething** stated why would a local co-op have to go down to Texas for a lease that governs here. He spoke of the indemnity clause. The committee discussed the wording was unclear and would like to word the bill more appropriately

**Sen. Fiebiger** volunteered to do this.

**Senator David Nething**, Chairman closed the hearing.

## 2007 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. **SB 2368**

### Senate Judiciary Committee

Check here for Conference Committee

Hearing Date: February 7, 2007

Recorder Job Number: 2368

Committee Clerk Signature *Maria L Solbey*

**Minutes:** Relating to a choice of laws clause in a railroad right of way agreement.

**Senator David Nething**, Chairman called the Judiciary committee to order. All Senators were present. The hearing opened with the following committee work:

**Senator David Nething**, Chairman closed the hearing.

**Sen. Fiebiger** spoke of trying to get in contact with John Walstad who was the drafter of the bill to discuss the intent of an amendment in reflection to the bill. Due to not being able to get in contact with him, he drew up a "rough draft" to present to the committee – Att. #1 He spoke of the indemnification procedure being lost to another state and his amendment for the committee to discuss. The amendment would "hog house" the bill.

**Sen. Fiebiger** made the motion to Do Pass the amendment – Att. #1 and **Sen. Olafson** seconded the motion. All members were in favor and the motion passes.

**Sen. Fiebiger** made the motion to Do Pass SB 2368 as amended and **Sen. Lyson** seconded the motion. All members were in favor and the motion passes.

Carrier: **Sen. Fiebiger**

**Senator David Nething**, Chairman closed the hearing.

Att #,  
2-7-07

Senate Bill 2368

Choice of laws indemnification clause – void. To the extent a provision of any lease, license or other agreement relating to the use or occupancy of railroad right of way or other adjoining property provides the indemnification provisions of North Dakota Century Code section 49-16-01.1 do not apply or another provision applies, said provision is void.

Date: 2-7-07

Roll Call Vote # 1

2007 SENATE STANDING COMMITTEE ROLL CALL VOTES

BILL/RESOLUTION NO. 2368

Senate \_\_\_\_\_ Judiciary \_\_\_\_\_ Committee \_\_\_\_\_

Check here for Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken Do Pass Amend- AH #1 2/7

Motion Made By Sen. Fiebriger Seconded By Sen. Olafson

Senators	Yes	No	Senators	Yes	No
Sen. Nething	/		Sen. Fiebriger	/	
Sen. Lyson			Sen. Marcellais		
Sen. Olafson			Sen. Nelson		

Total Yes 6 No 0

Absent 0

Floor Assignment \_\_\_\_\_

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



Date: 2-7-07  
Roll Call Vote # 2

2007 SENATE STANDING COMMITTEE ROLL CALL VOTES

BILL/RESOLUTION NO. 2368

Senate \_\_\_\_\_ Judiciary \_\_\_\_\_ Committee \_\_\_\_\_

Check here for Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken Do Pass As Amended

Motion Made By Sen. Fiebiger Seconded By Sen. Lyson

Senators	Yes	No	Senators	Yes	No
Sen. Nething	✓		Sen. Fiebiger	✓	
Sen. Lyson	✓		Sen. Marcellais	✓	
Sen. Olafson	✓		Sen. Nelson	✓	

Total Yes 6 No 0

Absent 0

Floor Assignment Sen. Fiebiger

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

**REPORT OF STANDING COMMITTEE**

**SB 2368: Judiciary Committee (Sen. Nething, Chairman) recommends AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2368 was placed on the Sixth order on the calendar.

Page 1, line 2, after "in" insert "an indemnification provision of"

Page 1, line 6, replace "A" with "To the extent a" and replace "for" with "relating to"

Page 1, line 7, remove "is void to the extent the"

Page 1, line 8, remove the first "provision", replace "that any provision" with "the indemnification provisions", replace "does" with "do", and remove ", that the laws of"

Page 1, line 9, remove "another state are to apply", remove "that", remove "law, rule, or", and replace "is to apply. With respect to a" with "applies, the provision is void"

Page 1, remove line 10

Page 1, line 11, remove "apply"

Renumber accordingly

2007 HOUSE JUDICIARY

SB 2368

## 2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. SB 2368

House Judiciary Committee

Check here for Conference Committee

Hearing Date: 3/13/07

Recorder Job Number: 4943

Committee Clerk Signature

*A. Penrose*

Minutes:

**Vice Chair Klemin:** We will open the hearing on SB 2368.

**Sen. Tracy Potter:** This time I am introducing this bill on behalf of the Senate minority leader.

**Rep. Klemin:** Thank you. Further testimony in support.

**Brian Bjella, ND Grain Dealers Association:** (see attached testimony).

**Rep. Kretschmar:** In the statute, it says, railroad right of way or other adjoining property. What does that mean, the other adjoining property.

**Brian Bjella:** How is that defined?

**Rep. Kretschmar:** Yes, what does it apply to.

**Brian Bjella:** I'm not certain of the intent of that language. I wasn't the drafter of this bill. But I assume that sometimes the railroad has additional properties, other than just the 200 or 100 ft right of way that the elevator might be situated on. I'm just assuming that it is put in there, that as long as the elevator is leasing from the railroad, the right of way or other property that they are trying to purchase, that this bill will apply.

**Rep. Klemin:** This provision in 49-16-01.1, and I haven't read through that. But you said here, that it provides that in new leases each party is responsible for its own negligence. By

that do you mean that there was a provision in leases that made the tenant liable for the negligence of the railroad.

**Brian Bjella:** That is correct.

**Rep. Klemin:** That change in the statute did not apply to existing leases, just to new leases.

**Brian Bjella:** That is my understanding, yes.

**Rep. Klemin:** What you're saying now is that the new leases are attempting to negate what the statute says.

**Brian Bjella:** We have heard of that happening, yes. They are putting choice of laws provisions in the leases, saying that in the event of a dispute that the terms and provisions in the law, rarely apply and appear to be an attempt to end run around SB 49-16-01.1. So that is why this bill was brought forward.

**Rep. Klemin:** In the case of an existing grain elevator, where would be getting a new lease. Is this like a substitute lease for an existing lease, or what circumstances.

**Brian Bjella:** They come up for renewal, typically they are 10 year leases. This would apply when a new lease is undertaken or a lease is renewed.

**Rep. Griffin:** Do you know of any other areas, or any other industries where we grant this type of protection.

**Brian Bjella:** I think this is done as a matter of fairness, because the railroad are presenting this as a take it or leave it proposition from the railroads. If you want to continue to operate your elevator properly on their property, you must sign the lease. I'm also aware of the discussion that there was a bill, for instance as I understand, when you sign a DOT contract, there was somewhat similar language and they got rid of that, but I'm not sure if it passed or not. That would be an analogy. Each party is responsible for their own negligence.

**Rep. Klemin:** Of course, we do have other provisions in the statute which say certain contract provisions are void against public policy and one that comes immediately to mind is provisions in mortgages and other types of contracts which say that provisions for attorney fees are void. Do you recall that.

**Brian Bjella:** Yes.

**Rep. Klemin:** So this is not completely unique, I guess.

**Brian Bjella:** That would be correct.

**Rep. Kingsbury:** Didn't some of this come about when we talked about this in the Ag Interim committee, that it would happen that when elevator leases and if the railroad did not prepare or keep up the certain part of the switches or things like that, and the elevators would end up paying the repairs, and they were responsible for some of that. It was always a matter of who was responsible when they were leasing from the railroad, but in fact they were taking care of repairs and maintaining it and then they would be responsible for the injuries that may have occurred. That seemed to be a problem.

**Brian Bjella:** I know that has been a major issue where they are not responsible for the switches and maintenance of the switches, and if they were to break down or cause harm, they aren't responsible. This was being included in some of the new leases.

**Rep. Klemin:** Thank you. Further testimony in support. Testimony in opposition.

**John Olson, BNSF Railroad:** I don't necessarily take a lot of opposition with this bill. We did over in the Senate when it first came in, because the bill as written over there would have voided all provisions for any contracts or leases. The Senate put on an amendment, so now I think it is consistent with the law. I think we can live with this bill the way it is. I just want you to know, that I pulled a number of real estate agreements and there is a mixture of what law applies, whether it is the law of where the real property is located, whether it's the law of TX,

we tried to standardize a lot of the contracts. It's not just an easy problem. I will give the materials to the chairman, if needed. I have had no information from Mr. Strege or Mr. Bjella for any specific problems. I have no information for any problems. If there are some problems out there, I would like to know about them. If the railroad is trying to write leases that circumvents the ND law, we should find out about that. I don't know of any. There are provisions in some of these leases, where a couple of these came from New Mexico, where they had standardized forms, and there is recognition of the indemnification for these types of lease provisions. I think Rep. Kingsbury pointed out an issue, which I recall, was a matter of who was going to be liable for injury, negligence of employees and so on. The big issue was the insurance requirement that the railroad wanted elevators to cover employees. That was changed a session or two ago. The railroad backed off that. We rewrote statute mainly for the indemnification provisions that were changed and addressed.

**Rep. Onstad:** Typically, how long are the leases between the railroad and the elevator, are they 10 year or 20 years?

**John Olson:** They are long term leases.

**Rep. Kretschmar:** How do you interpret the phrase, other adjoining property, that's in the bill.

**John Olson:** I don't know. I suspect that there is property outside of the regular right of way, over which the railroad has to control. Maybe that is in the situation of grain elevators.

**Rep. Kretschmar:** Could it be interpreted to apply to land that the railroad doesn't own but that is adjacent or touching to their right of way.

**John Olson:** That certainly could be a possibility.

**Rep. Klemin:** In that context, the parties wouldn't be making a lease that covered adjoining property that neither had an interest in, would they. The lease wouldn't cover adjoining property that the railroad didn't have an interest in, would it.

**John Olson:** One would think not, but I don't know. The statute doesn't seem to distinguish that.

**Rep. Klemin:** What exactly was the Senate amendment that you are referring to, or is this a complete rewrite.

**John Olson:** It is kind of a rewrite. I can read the initial bill.

**Rep. Klemin:** As I understood your testimony, the railroad can live with this bill now.

**John Olson:** Yes, we worked with the Senate committee to refine the legislation as it applies specifically to those indemnification provisions.

**Rep. Klemin:** Thank you. Further testimony in opposition, or neutral. We will close the hearing.



## 2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. SB 2368

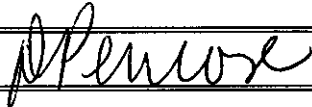
House Judiciary Committee

Check here for Conference Committee

Hearing Date: 3/14/07

Recorder Job Number: 5026

Committee Clerk Signature



Minutes:

**Chairman DeKrey:** We will take a look at SB 2368. What are the committee's wishes.

**Rep. Klemin:** I move a Do Pass.

**Rep. Koppelman:** Second.

**Rep. Kretschmar:** My concern is on line 8, of the phrase other adjoining property, because I don't really know what that means. It might mean Farmer Jones' property that's adjacent, I don't know. I would like to propose an amendment to take, other adjoining property out.

**Rep. Kingsbury:** That was one of the points that we talked about, in the interim committee, when it is a railroad issue, they're requiring the elevators to maintain this. Then there gets to be a question if there's some accident or something, who's liable, and some of that land between the railroad and the elevator building is probably a gray line, he admitted that.

**Rep. Koppelman:** I think as I read it, it looks like what it is referring to is the lease. I think the point is, it could be a driveway or something.

**Rep. Klemin:** I have examined the title to a lot of railroad property, especially when they sold off a lot of it. What had happened a lot of times is that the railroad would have the right of way, and then for some reason, usually they wanted to have a depot there. They acquired land right next to the right-of-way, which then became part of the railroad owned property so that's

usually where it came up. So that would be the only context in which they would be talking about a railroad right of way and plus this other adjoining property. It would have to be under the same railroad lease. They wouldn't be leasing out anything that they didn't own.

**Chairman DeKrey:** Clerk will call the roll.

**13 YES 0 NO 1 ABSENT**

**DO PASS**

**CARRIER: Rep. Wolf**

Date: 3/14/07  
Roll Call Vote #: 1

2007 HOUSE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. 2368

House JUDICIARY Committee

Check here for Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken Do Pass

Motion Made By Rep. Klemin Seconded By Rep. Koppelman

Representatives	Yes	No	Representatives	Yes	No
Chairman DeKrey	✓		Rep. Delmore	✓	
Rep. Klemin	✓		Rep. Griffin	✓	
Rep. Boehning	✓		Rep. Meyer	✓	
Rep. Charging			Rep. Onstad	✓	
Rep. Dahl	✓		Rep. Wolf	✓	
Rep. Heller	✓				
Rep. Kingsbury	✓				
Rep. Koppelman	✓				
Rep. Kretschmar	✓				

Total (Yes) 13 No 0

Absent 1

Floor Assignment Rep. Wolf

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

**REPORT OF STANDING COMMITTEE**

SB 2368, as engrossed: Judiciary Committee (Rep. DeKrey, Chairman) recommends **DO PASS** (13 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). Engrossed SB 2368 was placed on the Fourteenth order on the calendar.

2007 TESTIMONY

SB 2368

AH #1  
2-5-07

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# NORTH DAKOTA GRAIN DEALERS ASSOCIATION

In re: SB2368  
Senate Judiciary Committee

Brian Bjella  
Representing the North Dakota Grain Dealers Association

The North Dakota Grain Dealers Association supports SB 2368. In 2003 the legislature passed Section 49-16-01.1, which this bill would amend, to give grain elevators some protection from onerous leases they are forced to sign to continue in business.

For example, some railroad leases made elevators liable for injury caused solely by the railroad's negligence. Elevators would have to pay damages for harm they did not cause. Section 49-16-01.1 helped to level the playing field somewhat by directing that in new leases each party is responsible for its own negligence.

We support this bill as railroads appear to be trying to avoid the protections provided by North Dakota law, by mandating in leases that the law of a state more favorable to the railroad would apply.

North Dakota law should apply to leases of land in North Dakota. The Grain Dealers urge passage of this bill to insure the protections passed in 2003 are not taken away by another onerous lease provision.

AH #2  
2-5-07

**Testimony of BNSF Railway  
In Opposition to SB 2368  
February 5, 2007**

Good Morning Chairman and members of the Committee. I am John Olson, representing BNSF Railway in opposition to Senate Bill 2368.

This bill unfairly singles out a single class of property and landlords. It fails to take into account the complexity of administering real estate transactions on a national basis and would void provisions of existing agreements to which parties have already agreed.

BNSF railway operates and owns property in 28 states, including North Dakota. It has about 8,600 property leases, 125,000 permits and about 14,000 track leases across its system. Clearly, the railroad needs some sort of standardization if it is to administer those agreements. Having to use 28 different bodies of state law would make that job far more complex.

The bill would change one provision of existing agreements, without any regard as to what effect that change might have on the rest of the contract. When contract terms are drafted, the law that will apply influences how they are written. Arbitrarily changing the applicable law may have unforeseen consequences.

We also object to a single type of property owner being singled out. If this is good public policy, why is it only good public policy if the land is owned by a railroad? Why not have it apply across the board and say that choice of law provisions in all real estate agreements and in all contracts are voided? If such clauses are bad, they are bad for everyone. If they are allowed for some, they should be allowed for all.

I urge you to vote against this bill. Thankyou for your consideration.



# NORTH DAKOTA GRAIN DEALERS ASSOCIATION

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In re: SB 2368  
House Judiciary Committee

Brian Bjella  
Representing the North Dakota Grain Dealers Association

The North Dakota Grain Dealers Association supports SB 2368. In 2003 the legislature passed Section 49-16-01.1 to give grain elevators some protection from onerous leases drafted by a railroad, which elevators are forced to sign to continue in business.

For example, some railroad leases made elevators liable for injury caused solely by the railroad's negligence. Elevators would have to pay damages for harm they did not cause. Section 49-16-01.1 was passed to help level the playing field somewhat, by mandating that in new leases each party is responsible for its own negligence.

We support this bill as railroads appear to be trying to avoid the protections provided to elevators by North Dakota law, by inserting provisions in new leases mandating that the law of a state more favorable to the railroad would apply.

North Dakota law should apply to leases of land in North Dakota. The Grain Dealers urge passage of this bill to insure the protections passed in 2003 are not taken away by a new onerous lease provision.