

RAILROAD RIGHT-OF-WAY STUDY - BACKGROUND MEMORANDUM

Senate Bill No. 2358, Section 5 (attached as an appendix), requires the Legislative Council to study the sale and lease of railroad rights of way. Sections 1 through 4 provide for limited indemnity provisions in contracts between railroads and grain and potato warehouses. The study appears to come from the contentious nature of Senate Bill No. 2358 and from House Bill No. 1291, which provides for a priority and procedure for the sale of railroad right of way on a line that has discontinued service.

RAILROAD RIGHT OF WAY

Because the resolution specifies that railroad right-of-way property is in question, it should be noted that not all property owned by railroads is included within the study. Railroad right of way is the land on which railroad track is located and varies in width but is generally of a width of 200 feet. As an example, some of the land owned by the Burlington Northern Railroad Company was originally granted by the United States to the Northern Pacific Railroad Company by Congress in the Northern Pacific Act (Act of July 1, 1864, ch. 216, 13 Stat. 365 et seq.). The Northern Pacific Act gave the Northern Pacific Railroad Company the power to construct a continuous railroad from Lake Superior to Puget Sound. The Northern Pacific Act granted the railroad two different kinds of property. The railroad was granted a 200-foot-wide right of way along the entire length of the railroad. In addition, the railroad was granted every alternate section of public land on each side of the railroad line. The alternate section land grants are not railroad right of way and are not part of this study, and much of this grant land is no longer owned by Burlington Northern.

In addition to the federal land grants to railroads, the state of North Dakota provided grants of land to railroads to encourage building of both main line and branch line railroads within the state. In 1893 North Dakota granted rights of way to railroads over state-owned land to build railroad lines. The rights of way granted were 100 feet wide, or 200 feet wide if necessary, for construction, and at places where railroad stations were located, the right of way was 300 feet wide and 1,600 feet long. The 1893 law provided that if any railway company appropriating public lands under the law abandoned the use of the lands for railway purposes, the lands abandoned would revert to the state.

In 2002 there were more than 3,700 miles of railway lines in North Dakota, a reduction from approximately 5,000 miles in 1979. Approximately two-thirds of the railway lines are branch line railroads. Railroads obtained most of the right of way for branch lines through purchase and condemnation.

One of the difficulties in discussing railroad right of way is the lack of uniformity and the usage of the term "right of way." The term in the legal context denotes an

easement. A right of way in the legal sense as it relates to railroads is a mere easement for railroad purposes in the land of others. The general meaning of the term in railroad parlance signifies a possessory interest in land in which track is constructed. In addition to the property right, right of way is used to describe the strip of land used by a railroad as the word highway is used to define the strip of land on which people operate motor vehicles. Under the previous example, sometimes right of way is the ditch or both the ditch and the road.

Right of way is not defined under the North Dakota Century Code (NDCC) for the purposes of railroad right of way, and the use of the term appears to take on different meanings as required by the subject matter. Whatever property right is in the right of way is defined by the instrument through which the railroad received the property. Whether this be by federal charter, state charter, condemnation, or purchase, that document or grant of authority determines the legal interest of the railroad which may range from a license to fee simple ownership.

To add to the confusion, there is a difference between abandonment of a right-of-way easement (abandoning the property) and abandonment of a railway line (abandoning service). The primary means of termination of a railroad right-of-way easement is through abandonment. Because an easement is merely a right to use and occupy someone else's land, an owner of an easement can relinquish the easement through a release or an abandonment, and the servient land becomes free and unburdened from the servitude. Railroads are commonly held to have abandoned an easement when they discontinue rail service and remove the tracks and ties. If the railroad holds a fee simple absolute interest in the right of way, the railroad's rights are unaffected by abandonment. A railroad that acquired a defeasible fee, either a fee simple subject to a condition subsequent or a fee simple determinable, may use the land subject to the condition of the deed, usually that the railroad use the land for railroad purposes. The railroad interest terminates when the railroad stops using the land for rail services, and the owner of the reversionary rights of the original grantor may be able to reenter and reclaim title to the land.

A prerequisite to abandoning the property is discontinuing and abandoning the line. To abandon a rail line a railroad must have permission from the Surface Transportation Board. Much of the authority over railroads is preempted by federal law. Generally, the jurisdiction over railway service belongs to the Surface Transportation Board. Once a carrier has been authorized by the Surface Transportation Board to abandon a line, the process as to dealing with property right-of-way property rights is a process governed by state property law subject to any conditions included in the federal abandonment process.

FEDERAL REGULATION

Under the Interstate Commerce Act of 1887, freight railroads became the first United States industry to become subject to comprehensive federal economic regulation. Railroads were regulated by the federal government through the Interstate Commerce Commission for the next 93 years. In 1980 Congress passed the Staggers Rail Act. The Staggers Rail Act deregulated the railroad industry but not completely. The Interstate Commerce Commission retained authority to set maximum rates or take certain other actions if railroads were found to have abused market power or engaged in anticompetitive behavior. In addition, the Interstate Commerce Commission has jurisdiction over railroad line abandonments. With the passage of the Interstate Commerce Commission Termination Act of 1995, the Surface Transportation Board succeeded the Interstate Commerce Commission as the federal agency with jurisdiction over railroads. Under 49 U.S.C. 10501(b), the Surface Transportation Board has exclusive jurisdiction over transportation by rail carriers and remedies with respect to rates, classifications, rules, practices, routes, services, and facilities of carriers; and the construction, acquisition, operation, abandonment, discontinuance of a spur or side track, or a facility that may be entirely in one state.

There are certain procedures for alternative uses for railroad right of way in abandonment proceedings. Although the end result may be the right of way being used for public use or as a trail and being "rail banked," these uses arise by the Surface Transportation Board giving opportunities to interested parties to negotiate voluntary agreements. The Surface Transportation Board does not require a railroad to sell its property for public use and does not even require the railroad to consider using the right of way for a trail. In short, the Surface Transportation Board has limited jurisdiction over the property during the abandonment process. Once the Surface Transportation Board has allowed an abandonment of a railroad line, the state has jurisdiction over the property.

STATE REGULATION

The state may not regulate railroads inconsistent with federal law and only to the extent in which railroad activities constitute intrastate commerce. Power of state regulation over railroads is given to the Public Service Commission under NDCC Chapter 49-10.1. In particular, under Section 49-10.1-03, the commission may regulate railroads in matters affecting the relations between railroads and the public.

There are many instances in which the state through direct legislation or through the power of the Public Service Commission regulates the railroad industry. In particular, this state has provided the criminal penalties associated with a Class C felony for an individual who unlawfully tampers with railroad property, including signs. This state exercises jurisdiction over the property that is railroad right of way. Under NDCC Section 49-10.1-13, the commission has specific authority over the placement of fixed or permanent structures at a

distance of less than eight feet from the railroad track. A person is required to be authorized by the commission to place any fixed or permanent structure or obstruction at a distance of less than eight feet from a railroad track.

Grain and Potato Warehouses on Right of Way

North Dakota Century Code Chapter 60-06, originally enacted in 1890, provides that any person may erect and operate a grain or potato warehouse or elevator on railroad right of way upon compliance with the chapter. Upon application and payment of what the applicant deems reasonable compensation, the applicant is immediately entitled to erect the warehouse or elevator. In case the amount tendered in payment is not accepted, provisions exist for district courts to determine the proper payment. In addition, under Section 60-06-06.1 any party may petition the Public Service Commission to determine rights governed under Chapter 60-06. The right to elect to use the right of way under Chapter 60-06 also applies to renewal of leases. Chapter 60-06 has never been the subject of a North Dakota Supreme Court decision, so the constitutionality of that chapter is not assured.

During the 1987-88 interim the Legislative Council's Business Committee studied railway right-of-way tenants. The committee received testimony from railroads. Representatives of the Soo Line Railroad and the Burlington Northern Railroad opposed any expansion of NDCC Chapter 60-06 beyond coverage of businesses handling grain or potatoes. They said grain and potato businesses require railroad access, but in other commercial ventures the need for railroad access does not exist. It was pointed out that legal considerations involving the freedom to make contracts, prohibition of laws impairing the obligation of contracts, the right to equal protection of the laws, prohibition of unreasonable restrictions on the use of private property, the exercise of the police power in regulation of business, prohibition of impairment of vested rights of corporate stockholders, the right to due process, and the right to compensation under eminent domain laws are all potential legal arguments that could be made against granting increased rights to tenants on railroad right-of-way property. They said they have not pressed these claims against existing law, but further intrusion of state law into the railroad and tenant relationship may force them to make a legal challenge against Chapter 60-06.

In 2003 the Legislative Assembly adopted Senate Bill No. 2358. Senate Bill No. 2358 relates to lease provisions between railroads and grain and potato warehouses, which is mainly governed by NDCC Chapter 60-06. The bill makes most of these changes in Chapter 49-16, which governs liability of railroads for negligence as to the railroad's employees.

Senate Bill No. 2358 creates NDCC Section 49-16-01.1, which as a general rule prohibits a railroad from including within an agreement with a public grain or potato warehouse provisions for indemnification, reimbursement, of the railroad for damages caused by the railroad or for insurance to answer for damages caused

by the railroad. The bill as introduced did not have any exceptions to the rule and required the Public Service Commission to modify a lease that was onerous, unduly burdensome, or unfair to the lessee to make the lease fair and reasonable. The bill as passed creates an exception to the general rule by allowing the railroad to require commercial general liability insurance of not more than \$2 million per occurrence and not more than \$4 million for multiple occurrence for damages. The railroad may require the commercial general liability insurance to include an endorsement naming the railroad as an additional insured and an endorsement under the Federal Employers Liability Act if the warehouse engages in the business of transporting goods from the warehouse by means of the railroad in an annual volume in excess of 250 loaded railroad cars. The railroad may require indemnification in defense of the railroad or damages up to \$2 million per occurrence arising out of the use or occupancy of the property. The railroad may require indemnification in defense of the railroad for damage suffered by the lessee, licensee, or contracting party arising from the use or occupancy of the property unless caused solely by the acts or omission by the railroad that are willful, wanton, or grossly negligent. The railroad may require pollution legal liability insurance up to \$1 million to cover liabilities arising from hazardous substance or bulk storage of petroleum products brought on the property or for violation of environmental laws by the lessee. The bill provides that each party to the agreement is responsible for all liability resulting from the environmental condition of the property to the extent caused by that party. Under Section 49-16-05 any contract that violates this section is void, not voidable.

The bill also amends NDCC Section 60-06-06.1 to prohibit the Public Service Commission from considering the value of leaseholders' improvements in determining a reasonable lease rate or selling price. The bill also amends Section 60-06-15 by providing that the chapter applies to the sale of existing leaseholders on railroad rights of way.

The legislative history illuminates some of the arguments by the railroads against the bill as introduced. In summary, the railroad's argument was that railroads are engaged in an inherently dangerous activity. There are going to be accidents and derailments during this activity. Railroads have a right of way as a barrier between the railroad and other people so as not to injure other people when there are accidents. If a person wants to locate a business on the right of way, that business should indemnify the railroad for the bad things that happen around an inherently dangerous activity. If the business does not like the indemnity conditions in a contract, the business does not have to agree and can locate in a safer area.

The legislative history illuminates some of the arguments of warehouses against indemnity provisions. In summary, the main argument of the warehouses was that the provisions were unfair because the provisions were suddenly imposed in renewals and were not negotiable. Because warehouses have invested large amounts of money in buildings and infrastructure,

warehouses cannot reject the provisions and move without incurring a great financial loss. In addition, if a warehouse did move, it would most likely want to move next to the railroad for the transportation services. This places warehouses in a very weak bargaining position.

Sale of Abandoned Right of Way

Under NDCC Chapter 49-09 the state regulates the acquisition and transferring of railroad property. Under Section 49-09-04.2, before August 1, 2003, when service is discontinued and the property is offered for sale, the property must first be offered for public purposes. Along abandoned rail lines, the lessee operators of grain and potato warehouses located on the right of way must be given the next option to acquire the property. Next, adjoining agricultural landowners are given the option to acquire the property adjoining the landowner's land.

Two bills were introduced during the 2003 legislative session that affected NDCC Section 49-09-04.2. House Bill No. 1403 would have required surplus right-of-way property parallel to a rail line that is offered for sale by a railroad to have the same priorities apply as are otherwise applicable to abandoned rail lines under the section. This bill failed to pass the Senate.

House Bill No. 1291 makes major changes to NDCC Section 49-09-04.2 effective August 1, 2003. When service is discontinued and offered, the property must be offered to the present owner or operator-lessee of fixed assets located on the property followed by a person owning land contiguous to the right of way on opposite sides of the right of way. Next, the property must be offered to a person representing a reasonable plan for public recreational use of the abandoned property followed by the adjoining landowner if the land is assessed for tax purposes as agricultural land. The bill requires the railroad to provide notice to owners and operator-lessees of fixed assets of the railroad's intent to dispose of railroad right of way. The sale price of abandoned railroad property is required to be equitable. If a railroad complies with the priorities and notice requirements and five years have passed since abandonment or since service was discontinued, the railroad may deed the right of way to the county if the property is accepted by the county.

Under NDCC Section 49-09-04.3 a railway abandoning a rail line shall remove and clear railroad property and shall control noxious weeds on the right of way. Under Section 49-09-10.2 each carrier or other entity intending to acquire an operating railroad's right of way is required to file notice with the commission.

SUGGESTED STUDY APPROACH

The issues addressed by this study involve interested parties that are important to major industries in this state--agriculture and transportation. Interested parties include the grain dealers and railroads. In addition, railroad rights of way located within cities are generally desirable locations for commercial and industrial ventures. Because North Dakota cities developed and grew along rail lines and the railroad is often in or near the downtown area, railroad right of way in cities has

developed a commercial value apart from its location near the railroad. Much of "Main Street" North Dakota's commercial and industrial property is on land that is, or was, railroad right of way. Although state law does not address sales and leases of railroad right of way to these parties, the study may address these situations.

The committee may want to receive testimony from interested parties to determine which issues are most relevant and which solutions are most cogent.

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