

BEFORE THE
SURFACE TRANSPORTATION BOARD

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MAY 27 2008

PUBLIC SERVICE COMMISSION

STB EX PARTE NO. 677
COMMON CARRIER OBLIGATION OF RAILROADS

POST-HEARING COMMENTS OF STEVEN D. STREGE
FOR THE NORTH DAKOTA GRAIN DEALERS ASSOCIATION

At the April 24, 2008 hearing Chairman Nottingham asked me to elaborate on my comments about railroads requiring shippers to carry insurance to pay for railroad negligence. I did not have copies of the documents with me at the time. In answer to the question and to offer further explanation I'm filing this within the 30 days of post-hearing open record.

Attached are pages 8 and 9 of a 19-page lease a North Dakota grain elevator signed for its operation on BNSF property. Section 13 deals with Indemnity. Note at the top of page 9: "EVEN IF SUCH LIABILITIES ARISE FROM OR ARE ATTRIBUTED TO, IN WHOLE OR IN PART, ANY NEGLIGENCE OF ANY INDEMNITEE." Note in B on page 9: "...REGARDLESS OF THE NEGLIGENCE OF THE INDEMNITEES."

These leases and track agreements are presented on a take it or leave it basis. There is no opportunity for negotiation. Lessees and holders of track agreements have no objection to being responsible for damages they cause. But it is unreasonable for a railroad to require its customer to sign an agreement accepting liability for the railroad's negligent acts.

In the 2003 session of the North Dakota Legislature, the North Dakota Grain Dealers Association attempted to outlaw such provisions. This was met with stiff railroad opposition and implications that if the legislation passed, leases would be cancelled and the lessees would have to remove their improvements from the property. Little progress was made and even the limited relief enacted applies to only agreements entered into after July 31, 2003 and any written renewal or amendment to a prior agreement. Continuous renewals of the same lease are not covered.

The BNSF was requiring a specific endorsement for FELA liability (Federal Employers Liability Act). BNSF had produced a list of insurance carriers that purportedly offered such endorsements. A search of the insurance market revealed NO such endorsements available. We

asked the 2005 North Dakota Legislative Assembly to prohibit requiring FELA endorsements. We got the bill through the Senate and at the House hearing, to our surprise, the BNSF said it had no objection to passage of the bill because FELA endorsements are not available. However, this change too is effective for new leases only.

Also attached are pages 10-12 of that same BNSF lease. These show the numerous insurance requirements of the lease. Some insurance requirements aren't available. Signing a lease does not expand policy coverage and so the lessee/insured is not covered.

The common carrier obligation says a railroad is to provide service upon reasonable request. Without these leases and track agreements the railroad will not provide service. In effect the requirement for reasonable request has been expanded to include indemnification for negligent acts of the railroad, plus commercial general liability insurance up to of \$2,000,000 per occurrence and \$4,000,000 aggregate (best we could get in state law), plus business automobile insurance of at least \$1,000,000 (item C on page 11 of attachment), plus a Federal Employers Liability Act endorsement on existing leases and more. The STB should look into these matters for the benefit of rail shippers and receivers who are literally forced into such contracts.

Another property-related practice of railroads that shippers find objectionable, but are virtually powerless to change, are excess lease payments and sales prices. Land in small town North Dakota isn't worth much. But when the railroad owns it and a grain elevator sits on it the lease payments are set at multiples of true market value. If the rail customer wants to buy the property the BNSF has been asking 10X annual lease payment. In some cases rail customers have to pay thousands of dollars per acre while adjacent comparable property is selling for only a few hundred. In most cases the buyer must also accept environmental liability, including what was caused by the railroad.

Steven D. Strege, Executive Vice President
North Dakota Grain Dealers Association
118 Broadway, Ste 606,
Fargo, ND 58102

CERTIFICATE OF SERVICE

Steven D. Strege hereby certifies that on May 23, 2008 a copy of this document was sent by first class mail to all parties of record as of this date.

/s/Steven D. Strege

Section 11. Repairs; Maintenance.

A. Lessee shall, at its sole expense, take good care of the Premises (including all Lessee Improvements) and shall not do or suffer any waste with respect thereto and Lessee shall promptly make all necessary or desirable Repairs to the Premises. The term "Repairs" means all reasonable repair and maintenance necessary to keep the Premises (including all Lessee Improvements) in good condition and includes, without limitation, replacements, restoration and renewals when necessary. Lessee shall keep and maintain any paved areas, sidewalks, curbs, landscaping, and lawn areas in a clean and orderly condition, and free of accumulation of dirt and rubbish.

B. Lessor shall not have any liability or obligation to furnish or pay for any services or facilities of whatsoever nature or to make any Repairs or alterations of whatsoever nature in or to the Premises, including but not limited to structural repairs, or to maintain the Premises in any manner. Lessee acknowledges that Lessor shall have no responsibility for management of the Premises.

Section 12. Safety; Dangerous and Hazardous Conditions.

It is understood by Lessee that the Premises may be in dangerous proximity to railroad tracks, including Lessor's Tracks, and that persons and property, whether real or personal, on the Premises will be in danger of injury, death or destruction incident to the operation of the railroad, including, without limitation, the risk of derailment, fire, or inadequate clearance (including sight clearance or vision obstruction problems at grade crossings on or adjacent to the Premises), and Lessee accepts this Lease subject to such dangers, and acknowledges that its indemnification obligations hereunder extend to and include all such risks.

Section 13. Indemnity.

A. TO THE FULLEST EXTENT PERMITTED BY LAW, LESSEE SHALL RELEASE, INDEMNIFY, DEFEND AND HOLD HARMLESS LESSOR AND LESSOR'S AFFILIATED COMPANIES, PARTNERS, SUCCESSORS, ASSIGNS, LEGAL REPRESENTATIVES, OFFICERS, DIRECTORS, SHAREHOLDERS, EMPLOYEES AND AGENTS (COLLECTIVELY, "INDEMNITEES") FOR, FROM AND AGAINST ANY AND ALL CLAIMS, LIABILITIES, FINES, PENALTIES, COSTS, DAMAGES, LOSSES, LIENS, CAUSES OF ACTION, SUITS, DEMANDS, JUDGMENTS AND EXPENSES (INCLUDING, WITHOUT LIMITATION, COURT COSTS, ATTORNEYS' FEES AND COSTS OF INVESTIGATION, REMOVAL AND REMEDIATION AND GOVERNMENTAL OVERSIGHT COSTS) ENVIRONMENTAL OR OTHERWISE (COLLECTIVELY "LIABILITIES") OF ANY NATURE, KIND OR DESCRIPTION OF ANY PERSON OR ENTITY DIRECTLY OR INDIRECTLY ARISING OUT OF, RESULTING FROM OR RELATED TO (IN WHOLE OR IN PART):

- (i) THIS LEASE, INCLUDING, WITHOUT LIMITATION, ITS ENVIRONMENTAL PROVISIONS;
- (ii) ANY RIGHTS OR INTERESTS GRANTED PURSUANT TO THIS LEASE;
- (iii) LESSEE'S OCCUPATION AND USE OF THE PREMISES;
- (iv) THE ENVIRONMENTAL CONDITION AND STATUS OF THE PREMISES CAUSED BY, AGGRAVATED BY, OR CONTRIBUTED IN WHOLE OR IN PART, BY LESSEE; OR
- (v) ANY ACT OR OMISSION OF LESSEE OR LESSEE'S OFFICERS, AGENTS, INVITEES, EMPLOYEES, OR CONTRACTORS, OR ANYONE DIRECTLY OR INDIRECTLY EMPLOYED BY ANY OF THEM, OR ANYONE THEY CONTROL OR EXERCISE CONTROL OVER,

EVEN IF SUCH LIABILITIES ARISE FROM OR ARE ATTRIBUTED TO, IN WHOLE OR IN PART, ANY NEGLIGENCE OF ANY INDEMNITEE. THE ONLY LIABILITIES WITH RESPECT TO WHICH LESSEE'S OBLIGATION TO INDEMNIFY THE INDEMNITEES DOES NOT APPLY ARE LIABILITIES TO THE EXTENT PROXIMATELY CAUSED BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF AN INDEMNITEE.

B. FURTHER, TO THE FULLEST EXTENT PERMITTED BY LAW, NOTWITHSTANDING THE LIMITATION IN SECTION 13(A), LESSEE SHALL NOW AND FOREVER WAIVE ANY AND ALL CLAIMS, REGARDLESS OF WHETHER SUCH CLAIMS ARE BASED ON STRICT LIABILITY, NEGLIGENCE OR OTHERWISE, THAT RAILROAD IS AN "OWNER", "OPERATOR", "ARRANGER", OR "TRANSPORTER" WITH RESPECT TO THE PREMISES FOR THE PURPOSES OF CERCLA OR OTHER ENVIRONMENTAL LAWS. LESSEE WILL INDEMNIFY, DEFEND AND HOLD THE INDEMNITEES HARMLESS FROM ANY AND ALL SUCH CLAIMS REGARDLESS OF THE NEGLIGENCE OF THE INDEMNITEES. LESSEE FURTHER AGREES THAT THE USE OF THE PREMISES AS CONTEMPLATED BY THIS LEASE SHALL NOT IN ANY WAY SUBJECT LESSOR TO CLAIMS THAT LESSOR IS OTHER THAN A COMMON CARRIER FOR PURPOSES OF ENVIRONMENTAL LAWS AND EXPRESSLY AGREES TO INDEMNIFY, DEFEND, AND HOLD THE INDEMNITEES HARMLESS FOR ANY AND ALL SUCH CLAIMS. IN NO EVENT SHALL LESSOR BE RESPONSIBLE FOR THE ENVIRONMENTAL CONDITION OF THE PREMISES.

C. TO THE FULLEST EXTENT PERMITTED BY LAW, LESSEE FURTHER AGREES, REGARDLESS OF ANY NEGLIGENCE OR ALLEGED NEGLIGENCE OF ANY INDEMNITEE, TO INDEMNIFY, AND HOLD HARMLESS THE INDEMNITEES AGAINST AND ASSUME THE DEFENSE OF ANY LIABILITIES ASSERTED AGAINST OR SUFFERED BY ANY INDEMNITEE UNDER OR RELATED TO THE FEDERAL EMPLOYERS' LIABILITY ACT ("FELA") WHENEVER EMPLOYEES OF LESSEE OR ANY OF ITS AGENTS, INVITEES, OR CONTRACTORS CLAIM OR ALLEGE THAT THEY ARE EMPLOYEES OF ANY INDEMNITEE OR OTHERWISE. THIS INDEMNITY SHALL ALSO EXTEND, ON THE SAME BASIS, TO FELA CLAIMS BASED ON ACTUAL OR ALLEGED VIOLATIONS OF ANY FEDERAL, STATE OR LOCAL LAWS OR REGULATIONS, INCLUDING BUT NOT LIMITED TO THE SAFETY APPLIANCE ACT, THE BOILER INSPECTION ACT, THE OCCUPATIONAL HEALTH AND SAFETY ACT, THE RESOURCE CONSERVATION AND RECOVERY ACT, AND ANY SIMILAR STATE OR FEDERAL STATUTE.

D. Upon written notice from Lessor, Lessee agrees to assume the defense of any lawsuit or other proceeding brought against any Indemnitee by any entity, relating to any matter covered by this Lease for which Lessee has an obligation to assume liability for and/or save and hold harmless any Indemnitee. Lessee shall pay all costs incident to such defense, including, but not limited to, attorneys' fees, investigators' fees, litigation and appeal expenses, settlement payments, and amounts paid in satisfaction of judgments.

Section 14. Equal Protection.

It is agreed that the provisions of Sections 10, 12, and 13 are for the equal protection of other railroad companies, including, without limitation, the National Railroad Passenger Corporation (Amtrak), permitted to use Lessor's property, and such railroad companies shall be deemed to be included as Indemnitees under Sections 10, 12, and 13.

Section 15. Assignment and Sublease.

A. Lessee shall not (i) assign or otherwise transfer this Lease or any interest herein, or (ii) sublet the Premises or any part thereof, without, in each instance, obtaining the prior written consent of Lessor, which consent may be withheld in Lessor's sole and absolute discretion. For purposes of this Section 15, in the event that there are aggregate transfers or other changes in the ownership interests of Lessee resulting in a change of more than 20% of the ownership interests as held on the date hereof, a transfer shall be deemed to have occurred hereunder. Any person or legal representative of Lessee, to whom Lessee's interest under this Lease passes by operation of law, or otherwise, will be bound by the provisions of this Lease.

Notwithstanding anything herein to the contrary, and without limitation to Lessor's right to approve or disapprove any transfer of this Lease, in no event shall this Lease or any interest herein be assigned unless the Lessee's entire interest under the Railroad Track Agreement is assigned at the same time to the same assignee, and any approval by Lessor to such assignment shall be deemed withdrawn if such interests are not simultaneously assigned.

B. Any assignment, lease, sublease or transfer made pursuant to Section 15(A) may be made only if, and shall not be effective until, the assignee cures all outstanding defaults of Lessee hereunder and executes, acknowledges and delivers to Lessor an agreement, in form and substance satisfactory to Lessor, whereby the assignee assumes the obligations and performance of this Lease and agrees to be personally bound by and upon all of the covenants, agreements, terms, provisions and conditions hereof on the part of Lessee to be performed or observed. Lessee covenants that, notwithstanding any assignment or transfer, whether or not in violation of the provisions of this Lease, and notwithstanding the acceptance of rent by Lessor from an assignee or transferee or any other party, Lessee will remain fully and primarily liable along with the assignee for the payment of the rent due and to become due under this Lease and for the performance of all of the covenants, agreements, terms, provisions, and conditions of this Lease on the part of Lessee to be performed or observed.

Section 16. Liens.

Lessee shall promptly pay, discharge and release of record any and all liens, charges and orders arising out of any construction, alterations or repairs, suffered or permitted to be done by Lessee on the Premises. Lessor is hereby authorized to post any notices or take any other action upon or with respect to the Premises that is or may be permitted by law to prevent the attachment of any such liens to the Premises; provided, however, that failure of Lessor to take any such action shall not relieve Lessee of any obligation or liability under this Section 16 or any other Section of this Lease.

Section 17. Insurance.

Lessee shall, at its sole cost and expense, procure and maintain during the life of this Lease the following insurance coverage:

A. All risks property insurance covering all of Lessee's property including property in the care, custody or control of Lessee. Coverage shall include the following:

- ◆ Issued on a replacement cost basis.
- ◆ Shall provide that in respect of the interest of Lessor the insurance shall not be invalidated by any action or inaction of Lessee or any other person and shall insure the respective interests of Lessor as they appear, regardless of any breach or violation of any warranty, declaration or condition contained in such policies by Lessee or any other person.
- ◆ Include a standard loss payable endorsement naming Lessor as the loss payee as its interests may appear.

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- ◆ Include a waiver of subrogation in favor of Lessor.

B. Commercial General Liability Insurance. This insurance shall contain broad form contractual liability with a combined single limit of a minimum of \$1,000,000 each occurrence and an aggregate limit of at least \$ 2,000,000. Coverage must be purchased on a post 1998 ISO occurrence form or equivalent and include coverage for, but not limited to, the following:

- ◆ Bodily Injury and Property Damage
- ◆ Personal Injury and Advertising Injury
- ◆ Fire legal liability
- ◆ Products and completed operations

This policy shall also contain the following endorsements, which shall be indicated on the certificate of insurance:

- ◆ The employee and workers compensation related exclusions in the above policy shall not apply with respect to claims related to railroad employees.
- ◆ The definition of insured contract shall be amended to remove any exclusion or other limitation for any work being done within 50 feet of railroad property.
- ◆ Any exclusions related to the explosion, collapse and underground hazards shall be removed.

No other endorsements limiting coverage may be included on the policy.

C. Business Automobile Insurance. This insurance shall contain a combined single limit of at least \$1,000,000 per occurrence, and include coverage for, but not limited to the following:

- ◆ Bodily injury and property damage
- ◆ Any and all vehicles owned, used or hired

D. Workers Compensation and Employers Liability insurance including coverage for, but not limited to:

- ◆ Lessee's statutory liability under the worker's compensation laws of the state(s) in which the work is to be performed. If optional under State law, the insurance must cover all employees anyway.
- ◆ Employers' Liability (Part B) with limits of at least \$500,000 each accident, \$500,000 by disease policy limit, \$500,000 by disease each employee.

E. If construction is to be performed on the Premises by Lessee, Lessee or Lessee's contractor shall procure Railroad Protective Liability insurance naming only the Lessor as the Insured with coverage of at least \$2,000,000 per occurrence and \$6,000,000 in the aggregate. The policy shall be issued on a standard ISO form CG 00 35 10 93 and include the following:

- ◆ Endorsed to include the Pollution Exclusion Amendment (ISO form CG 28 31 10 93)
- ◆ Endorsed to include the Limited Seepage and Pollution Endorsement.
- ◆ Endorsed to include Evacuation Expense Coverage Endorsement.
- ◆ Endorsed to remove any exclusion for punitive damages.
- ◆ No other endorsements restricting coverage may be added.
- ◆ The original policy must be provided to the Lessor prior to performing any work or services under this Lease

F. Contractor's Pollution Legal Liability (CPL) Insurance. This insurance shall be in an amount of at least FIVE MILLION DOLLARS (\$5,000,000) per occurrence and TEN MILLION DOLLARS (\$10,000,000) in the aggregate including but not limited to coverage for the following:

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- ◆ bodily injury, sickness, disease, mental anguish, or shock sustained by any person, including death;
- ◆ property damage including physical injury to or destruction of tangible property including the resulting loss of use thereof, cleanup costs, and the loss of use of tangible property that has not been physically injured or destroyed;
- ◆ defense costs including costs, charges and expenses incurred in the investigation, adjustment or defense of claims for such compensatory damages.
- ◆ Coverage shall apply to sudden and non-sudden pollution conditions including the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water, which results in BODILY INJURY, PROPERTY DAMAGE, or Remediation Expense.
- ◆ If coverage is purchased on a "claims made" basis, lessee hereby agrees to maintain coverage in force for a minimum of three years after expiration, cancellation, or termination of this contract. Annually contractor agrees to provide evidence of such coverage as required hereunder.
- ◆ Delete any bodily injury exclusions resulting from lead or asbestos.
- ◆ Amend the Contractual Liability exclusions and employers' liability exclusion to provide coverage for liability assumed under contract.
- ◆ Amend the definition of Property Damage to provide coverage for natural resource damage.

Other Requirements:

All policies (applying to coverage listed above) shall contain no exclusion for punitive damages and certificates of insurance shall reflect that no exclusion exists.

Lessee agrees to waive its right of recovery against Railroad for all claims and suits against Railroad. In addition, its insurers, through the terms of the policy or through policy endorsement, waive their right of subrogation against Railroad for all claims and suits. The certificate of insurance must reflect the waiver of subrogation endorsement. Lessee further waives its right of recovery, and its insurers also waive their right of subrogation against Railroad for loss of its owned or leased property or property under Lessee's care, custody, or control.

Lessee's insurance policies through policy endorsement must include wording which states that the policy shall be primary and non-contributing with respect to any insurance carried by Railroad. The certificate of insurance must reflect that the above wording is included in evidenced policies.

All policy(ies) required above (excluding Workers Compensation and if applicable, Railroad Protective) shall include a severability of interest endorsement and shall name Railroad and Staubach Global Services - RR, Inc. as additional insureds with respect to work performed under this Lease. Severability of interest and naming Railroad and Staubach Global Services - RR, Inc. as additional insureds shall be indicated on the certificate of insurance.

Lessee is not allowed to self-insure without the prior written consent of Railroad. If granted by Railroad, any deductible, self-insured retention or other financial responsibility for claims shall be covered directly by Lessee in lieu of insurance. Any and all Railroad liabilities that would otherwise, in accordance with the provisions of this Lease, be covered by Lessee's insurance will be covered as if Lessee elected not to include a deductible, self-insured retention or other financial responsibility for claims.