Approved: 3-25-98
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY

The meeting was called to order by Chairperson Tim Emert at 10:10 a.m. on March 24, 1998 in Room 514S of the Capitol.

All members were present.

Committee staff present: Mike Heim, Legislative Research Department
Gordon Self, Revisor
Mary Blair, Committee Secretary

Conferees appearing before the committee: Gary Beachner, Owner/Manager, Beachner Grain, Inc.
Tom R. Tunnell, President, Kansas Grain & Feed Association
Kansas Fertilizer & Chemical Association
Dean Owens, KGFA Legal Counsel, Hampton & Royce, LC
Christine Shirber, Vice President, Co-Bank
Tony Dyer, President, Kansas Farmers Service Association
Jerry Boettcher, Owner, Boettcher Enterprises
Junior Strecker, General Manager, Scott Co-op Association
Jere White, Executive Director, Kansas corn Growers Association, Kansas Grain Sorghum Producers Association
Joe Lieber, Executive Vice President, Kansas Co-op Council

Others attending: see attached list

The minutes of the March 19 and March 23 meetings were approved on a motion by Senator Bond and a second by Senator Petty. Carried.

HB 2715 - Enacting railroad leasing act (proponents)

Conferee Beachner, reviewing the purpose of **HB 2715**, stated the bill was introduced to address the growing number of railroad leased property problems faced by agribusiness in Kansas. He listed the problems as: exorbitant lease rate increases, unreasonable lease contract provisions and threats of eviction when attempts are made to seek more reasonable rates or lease terms. He stated that this legislation provides for fair negotiations between railroad property tenants and their railroad landlords. He included a Kansas railroad map which identifies the grain elevator facilities in the Kansas Grain and Feed Association. (attachment 1) Brief discussion followed.

Conferee Tunnel presented a historical perspective on the relationship between the grain elevator association and the railroad and highlighted important points related to the impact of railroad deregulation and railroad mergers. He stated it is, at present, impossible to negotiate with the railroads and his association is asking, in **HB 2715**, for "fairness" in rail lease negotiations. (attachment 2) Discussion followed with the conferee stating that there is a need for "compromised" or "negotiated" legislation.

Conferee Owens testified as the principle draftsman of **HB 2715**. He discussed the legal setting of the bill, identified how the provisions parallel existing laws, and recommended several amendments to "clean up" the bill. He further discussed the bases which indicate a need for the bill, emphasizing the public purpose the bill serves. He stated there is no federal preemption problem with this bill; this is a local or state issue. (attachment 3) Discussion followed.

Conferee Schirber reviewed the structure and function of CoBank and stated that she works with loans to agricultural cooperatives in central and eastern Kansas. She explained that her bank is in favor of **HB 2715** because of its impact on their customers. She related how impossible it is to meet the needs of grain elevator owners who request long term loans for new facilities but whose collateral for the loan is attached to property governed by a one year lease. (attachment 4)

Conferee Dyer briefly reviewed the structure and function of the Kansas Farmers Service Association (KFSA). He discussed the unfairness of the hold harmless language contained in railroad lease agreements and related an incident which validates the use of his term, unfairness. He stated he supports **HB 2715**. (attachment 5)

Conferee Boettcher briefly reviewed his fertilizer business which "serves agriculture" in north central Kansas and southern Nebraska. He highlighted the history of railway leases and the conditions which influenced their current state. He cited examples which "illustrate the problems generated by the existing lease relationships." He reviewed five provisions in **HB 2715** and requested serious consideration of the bill. (attachment 6)

Conferee Stricker presented testimony regarding the rapid elevation of lease costs and the disparity between lease prices and value of land on property in Grigston, Kansas which is owned by Scott Cooperative Association. He discussed the events surrounding the railway's termination of this lease. (attachment 7) He requested support of **HB 2715**.

Conferee White reviewed **HB 2715** from a producer's point of view. He stated that the bill "would provide a mechanism to allow continued service in communities where, otherwise, elevators might close or relocate due to changes in railroad lease property ownership; it provides a mechanism of fair compensation". He further stated that the potential for taking of property rights is negated by the arbitration procedures in the bill. He urged passage of the bill. (attachment 8)

Conferee Lieber elaborated on four key words (which function as learning tools): portable; barrel; fairness; and constitutional. He requested the Committee remember them when considering **HB 2715**. He also discussed unfair lease rates and "hold harmless" clauses in the leases. He requested support of the bill. (attachment 9) Brief discussion followed.

Written testimony in support of **HB 2715** was submitted by: Kansas Agriculture Alliance; (attachment 10) Farmland Industries, Inc.; (attachment 11) Kansas Association of Wheat Growers; (attachment 12) Farmers Cooperative Association; (attachment 13) Walker Products Company, Inc.; (attachment 14) Farmers COOP; (attachment 15) Farmway Co-op, Inc.; (attachment 16) The Fowler Equity Exchange; (attachment 17) Farmers Co-operative Union; (attachment 18) Collingwood Grain Inc.; (attachment 19) The Lorraine Grain, Fuel & Stock Co.; (attachment 20) Beeler Cooperative Exchange; (attachment 21) Farmer's Co-op Mfg. & Merc. Assn.; (attachment 22) The Anthony Farmers Cooperative Elevator Company; (attachment 23) Kirk Grain Company. (attachment 24)

The meeting adjourned at 11:02 a.m. The next scheduled meeting is March 25.

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: March 24, 1998

NAME	REPRESENTING
Phil Wilson	Farmland
TOM PALACE	KOMA
Larry Sisson	Kearney Law office
Joe Lieber	KS Co-op Council
Gary Boschner	Boschner Grain / KGFA Chair
GINA BOWMAN-MORRILL	FARMLAND
Junior Strecker	Scott Coop - Scott City
BOB ANDERSON	CENTRAL KS. RAILWAY
Pat Hubbell	KS Railroads
Mark Kahrs	Bison Kansas
Bonnie Swoyer	FCE Farmers Coop Mut Insure
Dean Owens	Kansas Grain Assn attorney
JOHN C. BOTTENBERG	KS RAILROADS
Heather Randall	Whitney Damron, P.A.
Kim Gulley	League of KS Municipalities
Jon K Miles	KEC
James W Brotherton	Brotherton Enterprises, Beloit
Jerry Dyer	KANS. Farmers Service Assn
Mike Fraser	KEWEK/LOL Hutchinson, KS.

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: 3-24-98

NAME	REPRESENTING
Steve O'Brien	SEK Grain Inc
Ralph Holliday	"
Doug Trumble	Farmers Coop Greenleaf, KS
Whitney Damron	KS Auto Dealers Assn.
[illegible]	KS Auto. Dealers Assn.
Colleen Denton	KS Railroads
Jack Dutton	ID Information Services, Inc.
Kathy Olsen	KCBA
Ron Green	Governor's Office
Bill Fuller	Kansas Farm Bureau
Marty Vanier	KS Ag Alliance
Jere White	KS Corn Growers Assn; Grain Sorghum Producers Assn.
Doug Wareham	Ks. Grain & Feed Assn. Ks. Fertilizer & Chemical Assn.
Tom Tunnell	KS GRAIN & FEED ASSN KS FERT & CHEM ASSN.
Tom Stewart	Farmers Co-op Lucas, KS.
Kerry Tenhume	KS Grain & Feed Assn / KS Fert & Chem Assn

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: 3-24-98

NAME	REPRESENTING
Byron Ellery	Farmway Coop, Inc.
Steve Magette	Farmers Coop - Burdett, Ks
Christine Schirber	Co Bank - Wichita KS
R GRANT LORTSCHER	LORTSCHER AGRI SERVICE, INC.
Don Lauerman	Farmers Grain Cooperative, Walton
David Yenni	Mid Kansas Coop. Lindsborg
Ted Schultz	Mid Kansas Coop Moundridge
DOUGLAS L. WRIGHT	MID KS COOP, INMAN KS
Michael Wambold	Rep. Joann Flower
Mark E. Kieffer	Farmers Coop Co Haviland KS
Ed Lang	Valley Coop Inc, Winfield, Ks
Norbert Gerstenkorn	Farmers Co-op Grain Assn Conway Springs
Melvin J. Steinlage	NEMAHA Co Co-op ASSN SENECA
Warren R. Reavis	White Cloud Grain Hiawatha, KS
Tom Rehmert	RIGHT COOP ASSN, WRIGHT KS
Johnny Schaben	Farm Service Center, Ellinwood
Donald J. Mesta	LeRoy Coop Ass'n LeRoy KS
Tom Hanke	FARMERS COOP ASSN / [illegible]
John G. Severe	Western Grain Inc Wichita

KANSAS GRAIN & FEED ASSN

Statement of

Gary Beachner,
Chairman of the Board of the
Kansas Grain and Feed Association

to the

Senate Judiciary Committee

Regarding H.B. 2715

Senator Tim Emert, Chairman

March 24, 1998

KGFA, promoting a viable business climate through sound public policy for a century.

Senate Judiciary
3-24-98
Att 1

The Kansas Grain and Feed Association .....
..... a voluntary state organization founded in 1896 providing governmental representation, educational opportunities and a wide variety of professional services to the vast and indispensable grain and feed industry. The 1150 member firms of the KGFA include country elevators, terminal elevators, flour mills, feed manufacturers, grain merchandisers and allied industries.

816 S.W. Tyler ❐ Topeka, KS 66612 ❐ Telephone: 913-234-0461 ❐ Fax: 913-234-2930

Chairman Emert and members of the Senate Judiciary Committee, I am Gary Beachner, of Beachner Grain, Inc. which is headquartered in St. Paul, Kansas. Beachner Grain Inc. owns and operates 14 country grain elevators in southeast Kansas, and one terminal grain elevator in Wichita, Kansas. In addition to serving as the General Manager and Vice President of Beachner Grain, Inc., I am currently serving as the elected Chairman of the Board of the Kansas Grain and Feed Association. The Kansas Grain and Feed Association's membership includes over 1,250 Kansas business locations and represents 99% of the commercially licensed grain storage capacity in the state.

The Kansas Grain and Feed Association, along with the Kansas Fertilizer and Chemical Association and the Kansas Cooperative Council requested introduction of H.B. 2715, the Railroad Leasing Act to address the growing number of railroad leased property problems faced by agribusiness in Kansas. Problems encountered by businesses located on railroad leased property include exorbitant lease rate increases, unreasonable lease contract provisions and threats of eviction when attempts are made to seek more reasonable rates or lease terms.

The problems addressed by H.B. 2715 are not new to the Kansas grain industry, but the need to address the lack of fairness in negotiations between landlords and tenants of railroad property has reached a critical point. During the past year, three grain elevator firms received eviction notices from their respective railroad landlord(s) when they attempted to negotiate more reasonable property lease rates. Without intervention by this body to help level the playing field with regards to railroad property negotiations, this trend will assuredly continue.

Seldom does our organization face an issue which polarizes our membership as this one has. Attached with my testimony is a Kansas railroad map which identifies the grain elevator facilities which comprise our organizations membership. As you can see, the vast majority of our industry was built on railroad leased property. In Kansas today, there are over 550 grain elevator firms still located on railroad leased property. Unfortunately for many of these firms, the role of the railroad has become more of a landlord than a provider of rail transportation service.

During the past year in which I have served as Chairman of the Board, we have instructed our Association staff to conduct two surveys to identify examples of unreasonable lease rate increases and unreasonable contract liability clauses currently being imposed by railroad firms in Kansas. Those surveys identified numerous grain elevator firms located on railroad leased property who have struggled with the inability to negotiate fairly with their railroad landlord.

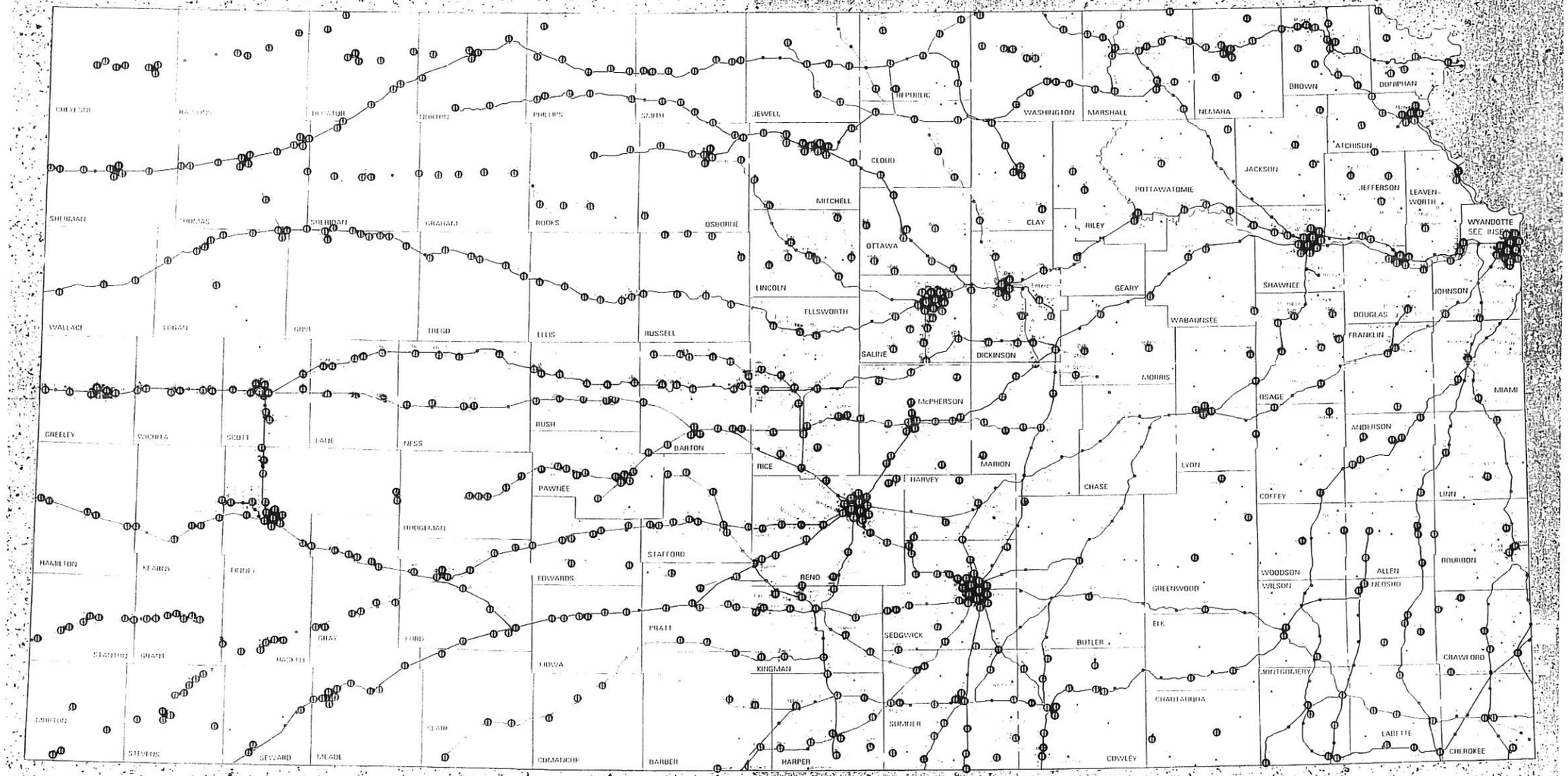
Following our research, we obtained the services of Hampton & Royce Law Firm located in Salina, Kansas to draft legislation which would provide for fair negotiations between railroad property tenants and their railroad landlords. We believe H.B. 2715 accomplishes that objective. Later you will hear from the primary draftsman of H.B. 2715, Mr. Dean Owens, our attorney.

In closing, I mentioned earlier that the problems addressed by H.B. 2715 are not necessarily new to our industry. While they are not new, the severity of the consequences if action is not taken to address these problems has reached a troubling new threshold. I hope you will take the time to review the stack of letters you have received from agribusinesses across Kansas which have experienced first-hand the difficulties associated with negotiating reasonable lease terms and rates. Our industry clearly has its back to the wall. We are here today to respectfully request positive action by this committee to ensure fair negotiations between grain elevator firms and railroads in Kansas.

Your next conferee, Mr. Tom Tunnell, our Chief Executive Officer, will provide a historical perspective of the relationship between grain elevator firms and their railroad landlords.

Thank you.

KANSAS GRAIN AND FEED ASSOCIATION MEMBERSHIP
ESTABLISHED IN 1896



HEADQUARTER STATION

1-5

Statement of

Tom R. Tunnell, President
Kansas Grain and Feed Association

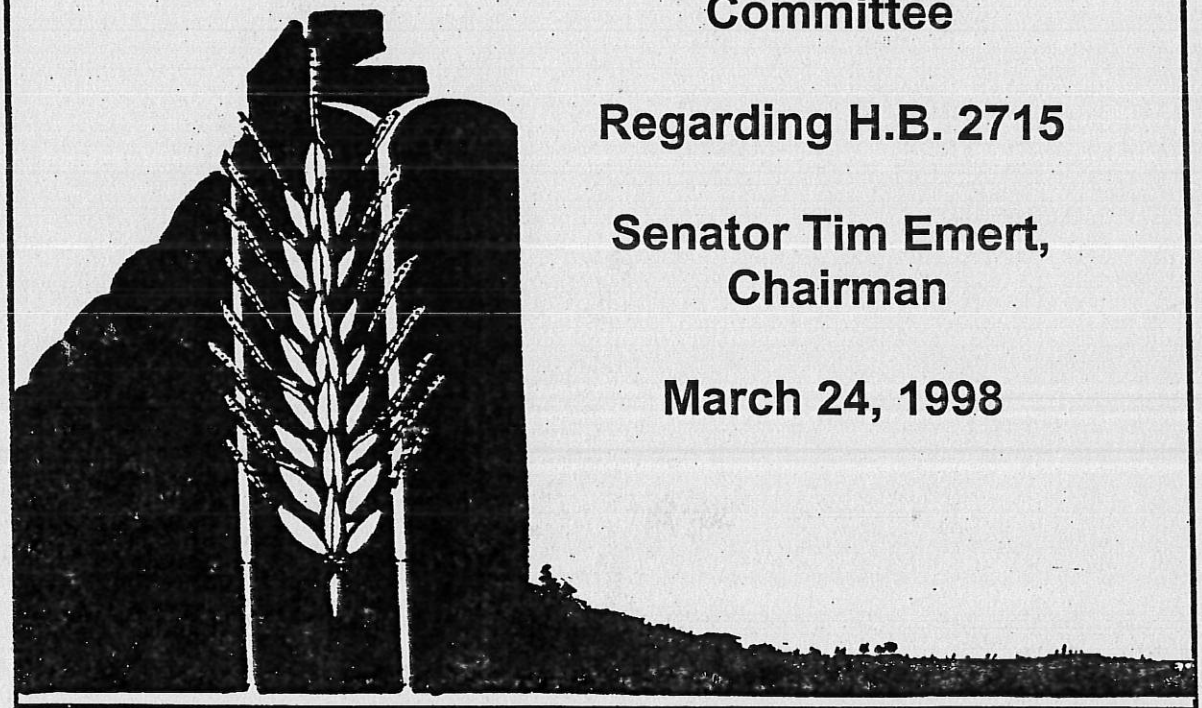
to the

Senate Judiciary Committee

Regarding H.B. 2715

Senator Tim Emert, Chairman

March 24, 1998



Country Elevators stand tall on Kansas prairies – proud symbols of quality and service to agriculture. Ready markets for grain, providers of services and supplies, country elevators are pillars of your community, strengthening the economy and providing jobs. If you need us tomorrow, support us today!

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Chairman Emert and Members of the Senate Judiciary Committee, I am Tom R. Tunnell President of the Kansas Grain and Feed Association (KGFA). As Chairman Beachner stated our Association represents the entire spectrum of grain receiving, storage, processing and shipping facilities in the state of Kansas. I also appear on behalf of the Kansas Fertilizer and Chemical Association and its over 500 agribusiness firms which provide service and crop inputs to Kansas farmers.

In my brief time today, I would like to give you an historical perspective of the special relationship grain elevators have with railroads and how that relationship has evolved over the past 100+ years. Additionally, I will highlight a few important points related to the impact of railroad deregulation and railroad mergers.

Beginning in the second half of the last century, as railroads were being built across our state, one important thing necessary to their success was the need for something to ship. Grain of course was the obvious answer. To establish grain loading points along their lines, railroads identified early-day entrepreneurs who were willing to invest and construct facilities on railroad-owned property to receive farmer-delivered grain and load it on railcars. These facilities were built on the various railroad lines from five to twelve miles apart which was about the distance grain could be hauled by horse and wagon from a farmer's field. At that time, long-term rail leases between elevators and railroads were signed which were acceptable to both parties. A business partnership between railroads and grain elevators was thus established and quite frankly was mutually beneficial for the most part of the next 100 years.

However the passage of the Federal Rail Deregulation Act by Congress in 1980 had tremendous impact on our industry. Twenty years ago there were over 800 rail shipping elevators in our state. Today there are less than 200 viable rail shipping elevators and only 67 unit train loading facilities--the remaining elevators are forced to ship by truck. The map attached to my testimony shows the location of the train loading elevators.

Besides this drastic reduction of rail service to the grain industry due to federal deregulation and the resulting railroad mergers (which was certainly demonstrated last harvest

when over 32 million bushels of grain had to be stored on the ground), some railroads seem to have decided that annual lease charges to elevators could become an added source of increased annual cash flow income. Additionally, passing all leasehold legal liabilities on to the elevator has become common practice. You will hear actual examples of these abuses in subsequent testimony.

Opponents to this bill will say the state Legislature has no authority to pass legislation which would impact a railroad's ability to negotiate leases. And further, that this authority lies exclusively with the United States Department of Transportation's Surface Transportation Board. Dean Owens, a respected member of the Kansas Bar will testify in a moment and explain why we disagree with this.

Further, we believe the Kansas Legislature not only has the authority to pass and enforce this legislation, but has the responsibility to do so. But let me make one central position clear—all we are asking for is FAIRNESS in rail lease negotiations. Now, we must either take or leave what railroads offer in terms of price and lease provisions, it is the LEAVE part that greatly disturbs us. Our industry has hundreds of millions of dollars invested in facilities located on railroad-owned property and to not expect us to attempt to preserve and protect these assets would be ludicrous. Currently, our negotiation posture is one of having a "gun to our head". We are willing to pay fair--in fact perhaps more than fair--charges. We ask only for just treatment.

I recently served on a National Grain and Feed Association task force which studied areas where federal law needs to be amended by Congress to alleviate the impact of rail mergers on the nation's grain shipping and handling industry. The task force has finalized its study and I will present its recommendations in testimony at a field hearing of the U.S. Senate, Commerce, Science and Transportation Committee Subcommittee on April 9 in Hays, Kansas.

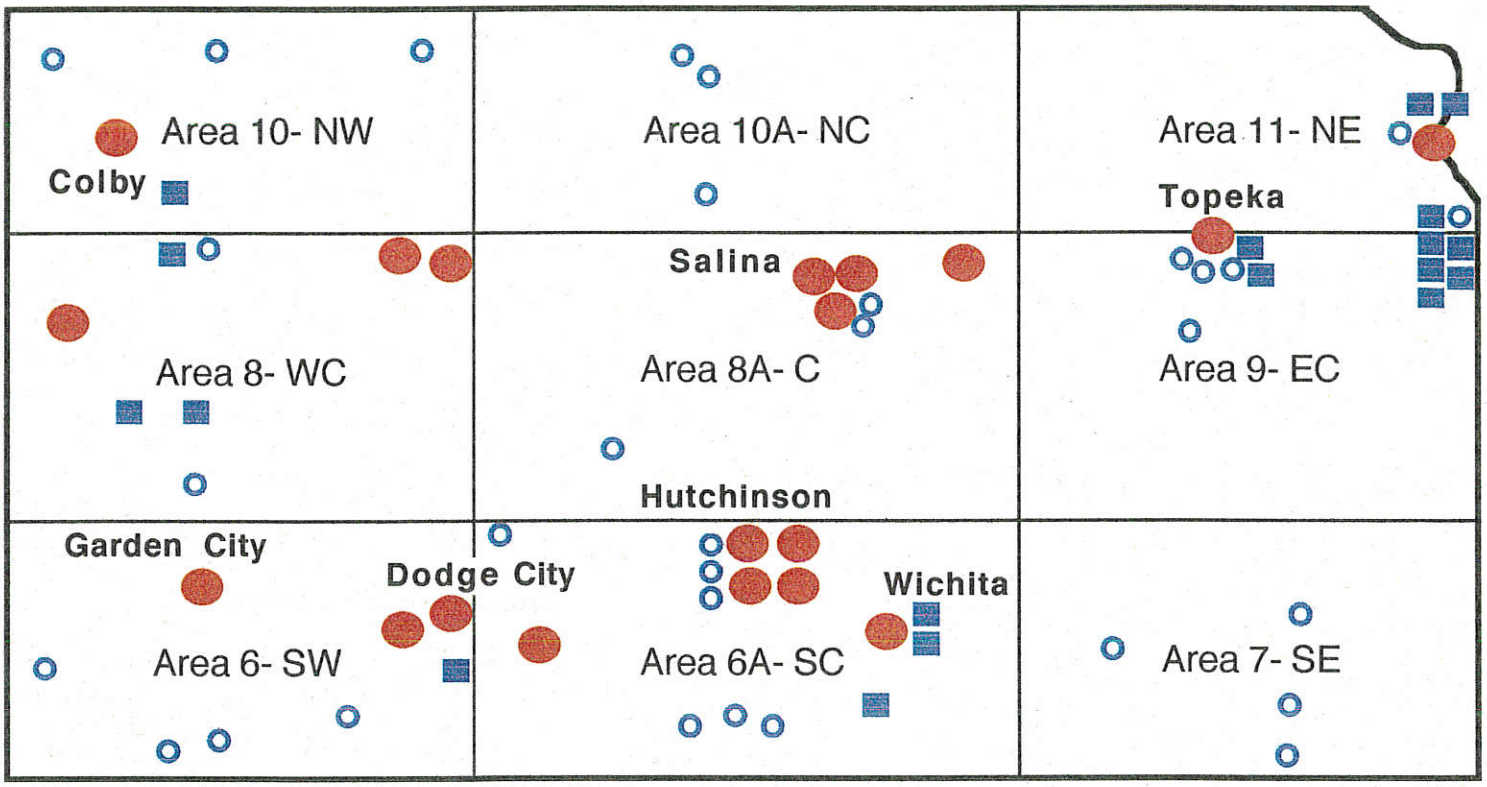
Senator Sam Brownback scheduled this hearing in an effort to determine what, if anything, can be done to ameliorate the rail service problem in our state.

Representatives of our Association also met with Governor Graves in January and discussed the impact of the rail merger situation on Kansas agriculture. He voiced his support during that meeting to do whatever necessary at the state level to help. Passing this legislation will go along way to help our industry in this regard.

In closing let me say state government oversight of railroads may seem distasteful to some of you, but I believe a fair lease negotiation process can be adopted without having a negative impact on either party. Certainly, government oversight is already a way of life for those of us in agribusiness. All Kansas elevators must be licensed and bonded by either the state or federal government. We must submit to unannounced audits, maintain a prescribed financial net worth, and our storage and "in and out" charges to farmers must be annually authorized by the respective government agency that licenses our facilities. We accept this regulatory oversight as government's effort to protect our farmer customers. Certainly, allowing our elevator owners and farm cooperatives some protection from unjustified lease costs and terms is also consistent with the role of state government.

Thank you for this opportunity to testify before your committee.

KANSAS UNIT TRAIN LOADING FACILITIES



Kansas is divided into 9 crop reporting districts.
The districts are used for U.S. wheat crop quality & Kansas Agricultural Statistics reports.

100-car+ unit train loading facilities

50-80 car loading facilities

20-49 car loading facilities

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HOWARD ENGLEMAN
JACK N. STEWART

SPECIAL COUNSEL:
CLARENCE L. KING, JR.

E. S. HAMPTON (1905-1982)
TOM W. HAMPTON (1935-1984)
JOHN Q. ROYCE (1918-1991)

Statement of W. Dean Owens
in Support of House Bill No. 2715,
Before The Senate Judiciary Committee

March 24, 1998

I am Dean Owens, a Salina attorney and principal draftsman of this bill. During 30 years of practice, I have represented many grain companies and have worked closely with the Kansas Grain and Feed Association and its members on many projects.

Last fall, my firm was hired by KGFA to draft legislation which would address **two critical problems** faced by grain elevators and other agri-businesses located on land leased from railroads:

> **Imposition of unjust** and oppressive **lease terms** and rents by railroads on their tenants; and
>
> **Uncertainties as to** the rights and **title** of tenants when railroad rights-of-way are abandoned or other leased land is sold or transferred by railroads.

It is very important to understand that the need for this bill is based on:

> **Public Purpose:** Agriculture is the leading industry in this state. Grain elevators and other ag related businesses provide **essential goods and services for the agricultural economy of Kansas**. As such, they **serve the public** need and the state has a **legitimate public interest** in protecting them from unjust lease terms and from loss of their businesses and property without compensation. **This bill serves a public purpose.**
>
> **Applies Only to Tenant Owners:** The bill applies only to **leases of land** by railroads to **tenants who own** buildings or other **permanent structures** located **on the railroad land**;
>
> **Unequal Bargaining Power:** There are **no present** standards or **limits on the railroads' absolute power** to dictate unfair or unreasonable lease terms and rents **under the threat of "take it or move your elevator"**;

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Rights-of-Way Only Easements: Kansas courts have consistently held that **railroads hold only an easement for rights-of-way** and adjoining land, **which will terminate when** the land is **no longer used for railroad purposes**; and

Sixteen grain company owners and managers testified before the House Transportation Committee about the severity of these problems and their urgent need for this legislation. The testimony on behalf of farm organizations and their members further demonstrates this need.

I will briefly discuss how the **provisions of this bill parallel existing laws**, and why the provisions of this bill are reasonable and should be upheld by the courts. I will then recommend a few **needed amendments** to the bill.

Section 1 is self-explanatory.

Section 2 contains important definitions used throughout the bill. The definitions of "**railroad land**" and "**tenant**" are particularly significant. They restrict application of the bill to agri-businesses located on land leased from railroads.

Sections 3 and 8 are adapted from provisions of the Kansas Landlord and Tenant Act, which were referred to with approval by the Kansas Supreme Court in upholding another section of that act as follows:

> While the act allows a landlord and tenant to negotiate an individualized lease, it prohibits the enforcement of unconscionable provisions (**K.S.A. 58-2544**), . . . and prohibits the inclusion of certain per se unreasonable terms (**K.S.A. 58-2547**). *See* 225 Kan. 359 at 364.

Similarly, this bill **leaves the parties free to negotiate any lease terms which are not unconscionable or per se unreasonable**. There is no reason to believe that any court will find that unfair or unconstitutional. *See also* **K.S.A. 58-2501a.**

Sections 4 and 5 are borrowed from **Iowa statutes** which provide an **independent forum for resolution** of railroad lease **disputes** and **protect tenants from losing their valuable improvements** to speculators or profiteers. These statutes have been upheld by both federal and state courts in cases challenging them on constitutional grounds, including:

> Constitutional guarantees of equal protection, due process, and sanctity of private contract;
>
> Preemption of state law by federal law; and
>
> A "taking" for a private use without adequate compensation.

See CMC Real Estate v. Dept. of Transp., 475 N.W. 2d 166 (Iowa 1991) and the cases cited in that opinion. A copy of this decision is attached on pages 5 through 9.

The Iowa experience and well-reasoned court decisions provide exceptionally fine precedent and authority for the value and constitutionality of these laws. In addition, similar laws have been enacted and are working well in Minnesota, North Dakota, and Wisconsin. It is our understanding that similar bills have been introduced in Oklahoma and other states this year, for the same reasons that H.B. 2715 has been introduced in Kansas.

Section 6 was added by the House to substitute an arbitration panel for the KCC to resolve railroad lease disputes. This raises a question under the Uniform Arbitration Act which is addressed in the requested amendments.

Section 7 requires that litigation concerning railroad leases be conducted in the county where the land is located, consistent with **K.S.A. 60-601**. The second sentence affords any party the right to have the court resolve any uncertainties or differences, in advance of suffering damage or making the wrong decision on some necessary course of action. This is consistent with the Kansas Declaratory Judgment Act (**K.S.A. 60-1701 through 1716**).

Section 8 provides a safeguard against any unconscionable lease term. The Bill does not define the term "unconscionable". This omission was intentional. The doctrine of unconscionability is included in at least four present Kansas statutes: Uniform Commercial Code at K.S.A. 84-2-302; Uniform Consumer Credit Code at K.S.A. 16a-5-108; Consumer Protection Act at K.S.A. 50-627; and Residential Landlord and Tenant Act at K.S.A. 58-2544. Sec. 8 of House Bill 2715 was adapted from **K.S.A. 58-2544.**

In discussing the doctrine of unconscionability, the Kansas Supreme Court stated in *Wille v. Southwestern Bell Tel. Co.*, 219 Kan. 755 (1976), that:

> The UCC neither defines the concept of unconscionability nor provides the elements or parameters of the doctrine. Perhaps this was the real intent of the drafters of the Code. To define the doctrine is to limit its application, and to limit its application is to defeat its purpose. (219 Kan. at 758)

In its opinion in the *Wille* case, the **Court identified ten factors** or elements as **aids for determining** the applicability of the doctrine of **unconscionability** to a given set of facts. (219 Kan. at 758, 759) One of the important factors identified by the Court is the concept of inequity of bargaining power.

Section 9 is adapted from **K.S.A. 60-1004**, which protects any person who has made improvements to land occupied "under color of title in good faith" from being ejected by someone else establishing a superior title to the land, unless full compensation is paid for such improvements. **K.S.A. 58-2501a** now protects tenant farmers from loss of their improvements without compensation.

Section 10 provides that the Act will apply only to new leases and leases which are renewed or modified after its effective date.

Sections 11 and 12 are self-explanatory.

Requested Amendments to the bill are on attached pages 10 through 12. These "clean up" amendments are needed to correct typographical errors and to address the House amendments, as explained in the note to each change.

In summary:

> Constitutionality. Every law is subject to constitutional scrutiny by the courts. When those in need of this law are ready and willing to defend it in the courts, they should be allowed to do so. Constitutionality is not a valid reason to vote against this bill.
>
> Preemption. This bill relates only to Kansas land and Kansas real property law. It does not affect railroad operations, service, or rates which are subject to federal jurisdiction.
>
> Public Purpose. The state has a legitimate public interest in protecting businesses which have in good faith located their operations on railroad property, to assure that they are not forced to submit to unjust lease terms due to the parties' unequal bargaining power.

Enactment of this bill is vitally needed by those who provide goods and services which are essential to the agricultural economy of Kansas. We ask you to do what is right, fair, and proper. These problems simply will not go away without your help. We urge your vote and active support to work this bill in your Committee and to pass House Bill 2715 this year.

CMC REAL ESTATE CORPORATION, Appellant,

v.

IOWA DEPARTMENT OF TRANSPORTATION, RAIL AND WATER DIVISION; and Iowa Department of Inspections and Appeals, Appeals and Fair Hearings Division, Appellees.

Dickens Cooperative Elevator Company, Intervenor-Appellee.

No. 90-802.

Supreme Court of Iowa.

Sept. 18, 1991.

Railroad's successor in interest brought judicial review action challenging decision of Department of Transportation (DOT), fixing lease terms on property owned by successor and occupied by grain elevator. The District Court, Polk County, Robert A. Hutchison, J., upheld terms of lease agreement ordered by DOT, and appeal was taken. The Supreme Court, McGiverin, C.J., held that: (1) successor received just compensation for alleged taking; (2) statute authorizing DOT to set lease terms did not violate equal protection; (3) statute did not unconstitutionally impair contractual obligations; and (4) statute gave DOT authority to modify lease's termination provision and add other lease terms.

Affirmed.

1. Eminent Domain ⇐17

Even if taking occurred when Department of Transportation set maximum rate that railroad's successor could charge grain elevator for land originally leased from railroad, taking was for valid public purpose of protecting businesses already located on property owned by railroads from potentially unequal bargaining position. U.S.C.A. Const.Amend. 5; I.C.A. Const. Art. 1, § 18; I.C.A. § 327G.62.

2. Eminent Domain ⇐67

It is initially for legislature to determine whether private property is being taken for public use; courts should not substitute their judgment for legislature's judgment as to what constitutes public use unless use is palpably without reasonable foundation. U.S.C.A. Const.Amend. 5; I.C.A. Const. Art. 1, § 18.

3. Eminent Domain ⇐126(1)

Even if taking occurred when Department of Transportation (DOT) limited amount railroad's successor could charge grain elevator for lease of railroad property, successor was afforded just compensation; DOT valued lease by using unimproved value of property in question and rate of return within range of returns suggested by parties. U.S.C.A. Const.Amend. 5; I.C.A. Const. Art. 1, § 18; I.C.A. § 327G.62.

4. Eminent Domain ⇐122

Under United States and Iowa Constitutions, private property may not be taken for public use without just compensation; in determining what constitutes just compensation, courts must look to individual facts of each case. U.S.C.A. Const.Amend. 5; I.C.A. Const. Art. 1, § 18.

5. Constitutional Law ⇐241
Railroads ⇐119

Statute permitting Department of Transportation (DOT) to determine rental rates for property leased from railroad was rationally related to legitimate state interest in assuring businesses that locate their operations on railroad property and invest in permanent physical structures on that land are not forced to submit to unjust lease terms due to parties' unequal bargaining power, and did not violate equal protection. U.S.C.A. Const.Amend. 14; I.C.A. Const. Art. 1, § 6; I.C.A. § 327G.62.

6. Constitutional Law ⇐213.1(2)

Under rational basis standard, statute challenged on equal protection grounds is constitutional unless challenged classification is patently arbitrary and bears no rational relationship to legitimate state purpose. U.S.C.A. Const.Amend. 14; I.C.A. Const. Art. 1, § 6.

7. Constitutional Law ⇐48(1, 4)

Statutes are presumed constitutional and burden rests on challenger to demonstrate that statute violates equal protection; to sustain that burden, petitioner must negate every reasonable basis which may support statute. U.S.C.A. Const. Amend. 14; I.C.A. Const. Art. 1, § 6.

8. Constitutional Law ⇐148
Railroads ⇐119

Statute permitting Department of Transportation (DOT) to limit rental rates for property leased from railroad did not unconstitutionally impair contractual obligations; statute imposed minor impairment on railroad's ability to lease its land, and that impairment was reasonable condition justified by legitimate state purpose of preventing railroads from charging unjust rent. I.C.A. § 327G.62; U.S.C.A. Const. Art. 1, § 10, cl. 1.

9. Constitutional Law ⇐117

Although language of contract clause is facially absolute, its prohibition must be accommodated to inherent police power of state to safeguard vital interests of the people. U.S.C.A. Const. Art. 1, § 10, cl. 1.

10. Constitutional Law ⇐115

Threshold inquiry under contract clause is whether state law has, in fact, operated as substantial impairment of contractual relationship; severity of impairment increases level of scrutiny to which legislation is subjected. U.S.C.A. Const. Art. 1, § 10, cl. 1.

11. Constitutional Law ⇐115

In determining extent of impairment for purposes of contract clause analysis, Supreme Court considers whether industry complaining party has entered has been heavily regulated in the past. U.S.C.A. Const. Art. 1, § 10, cl. 1.

12. Constitutional Law ⇐117

If state regulation challenged under contract clause constitutes substantial impairment of private parties' ability to contract, state, in justification, must have significant and legitimate public purpose behind regulation, such as remedying of broad and general social or economic problem; once legitimate public purpose has been identified, final inquiry is whether impairment is based upon reasonable conditions and is of character appropriate to public purpose justifying legislation's adoption. U.S.C.A. Const. Art. 1, § 10, cl. 1.

13. Railroads ⇐119

Statute permitting Department of Transportation (DOT) to regulate rental rates for property leased by railroads was not unconstitutionally vague as applied to dispute between railroad's successor and lessee over rental rates. I.C.A. § 327G.62; I.C.A. Const. Art. 1, § 9.

14. Constitutional Law ⇐251.4

Civil statute is unconstitutionally vague under due process clause when its language does not convey sufficiently definite warning of proscribed conduct, as measured by common understanding or practice. U.S.C.A. Const.Amend. 14; I.C.A. Const. Art. 1, § 9.

15. Statutes ⇐47

When persons must necessarily guess at meaning of statute and its applicability, statute is unconstitutionally vague; however, where economic regulation is involved, statutes are subject to less strict vagueness test because their subject matter is often more narrow, and because businesses, which face economic demands to plan business carefully, can be expected to consult relevant legislation in advance of action.

16. Constitutional Law ⇐48(4)

If vagueness can be avoided by reasonable construction, consistent with statute's purpose, statute must be interpreted in that way. U.S.C.A. Const.Amend. 14; I.C.A. Const. Art. 1, § 9.

17. Railroads ⇐133(4)

Statute permitting Department of Transportation (DOT) to limit rental rates charged for railroad property authorized DOT to modify termination provision of lease between railroad's successor and grain elevator and to add other lease terms. I.C.A. § 327G.62.

Bennett A. Webster and James L. Pray of Gamble, Riepe, Webster, Davis & Green, Des Moines, for appellant.

Bonnie J. Campbell, Atty. Gen., Merrell M. Peters, Acting Gen. Counsel, and David Ferree and Mark Hunacek, Asst. Attys. Gen., for appellees.

Harold W. White of the Fitzgibbons Brothers Law Office, Estherville, for intervenor-appellee.

Considered by McGIVERIN, C.J., and LARSON, CARTER, SNELL and ANDREASEN, JJ.

McGIVERIN, Chief Justice.

Petitioner CMC Real Estate Corporation (CMC), a successor in interest to the Chicago, Milwaukee, St. Paul and Pacific Railroad Company (Milwaukee Railroad), filed this judicial review action challenging the respondent Iowa Department of Transportation's (DOT) fixing of lease terms on property owned by CMC and occupied by intervenor Dickens Cooperative Elevator Company (Coop). The district court reviewed the DOT's decision and upheld the terms of the lease agreement ordered by the DOT. We agree and affirm.

I. *Background facts and proceedings.* Coop has, since 1938, leased land located in Dickens, Iowa, from the Milwaukee Railroad or CMC, its successor in interest. Coop built grain storage facilities, including several permanent structures, on the leased land, which is located adjacent to the railroad tracks. Coop uses its convenient access to railway transportation to receive farming supplies, including fertilizer, and to transport corn and soybeans from the grain storage facility to purchasers.

In 1976, the Milwaukee Railroad and Coop entered into a five-year lease of the property located in Dickens at an annual rental rate of $1,300. In 1981, after the Milwaukee Railroad had entered into bankruptcy, the trustee of the Milwaukee Railroad agreed to a five-year extension of the lease with Coop at an annual rental rate of $1,450. On November 25, 1985, CMC became the successor in interest to the Milwaukee Railroad.

The 1981 extension of the 1976 lease expired in 1986. CMC sought to re-lease the property to Coop for 3 years at an annual rate of $11,200. Coop, dissatisfied with CMC's proposed lease rate, filed an application with the DOT pursuant to Iowa Code section 327G.62 (1985), seeking an order fixing just and equitable lease terms on the property leased to it by CMC.

DOT transferred the matter to the department of inspections and appeals for a contested case administrative hearing before a hearing officer. *See* Iowa Code § 327G.62 (1987); 761 Iowa Admin.Code 13.20. After conducting an evidentiary hearing, the hearing officer ordered the parties to execute a five-year extension to the parties' current lease with three modifications. Those modifications were an adjustment of the annual rental rate to $4,993.65, a yearly adjustment of the rent as reflected by the consumer price index, and elimination of all unilateral termination provisions. Both parties to the lease appealed to the DOT. *See* Iowa Code § 10A.202(1)(d); Iowa Code § 17A.15(5).

The DOT, after reviewing the administrative file and the transcript of the administrative hearing, affirmed all terms of the hearing officer's decision, except that it reduced the annual rent to $3,121.

CMC then filed a petition for judicial review in district court. *See* Iowa Code § 17A.19. The district court affirmed the DOT's final order.

CMC appealed. *See* Iowa Code § 17A.20. We now consider CMC's challenges attacking the constitutionality of section 327G.62 and the propriety of the DOT's decision fixing the lease terms.

II. *CMC's "taking" argument.* CMC contends that section 327G.62 violates both United States and Iowa constitutional requirements that private property shall not be taken for public use without just compensation. U.S. Const. amend. V; Iowa Const. art. I, § 18. Relying on *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982), CMC also argues that the DOT's actions constituted a taking because the DOT's fixing of the lease terms took away CMC's property rights in the land leased to Coop, including its right to possess, use and dispose of its property. *See id.* at 435, 102 S.Ct. at 3176, 73 L.Ed.2d at 882. CMC asserts that Coop's occupation of its property is factually similar to the situation found in *Loretto* and, thus, we should hold that a taking occurred.

In fixing the lease terms between CMC and Coop, the DOT relied on section 327G.62, which provides:

> When a disagreement arises between a railroad corporation, its grantee, or its successor in interest, and the owner, lessee, or licensee of a building or other improvement, including trackage, used for receiving, storing, transporting, or manufacturing an article of commerce transported or to be transported, situated on a present or former railroad right-of-way or any land owned or controlled by the railroad corporation, its grantee, or its successor in interest, as to the terms and conditions on which the article is to be continued or removed, the railway corporation, its grantee, or its successor in interest, or the owner, lessee, or licensee may make written application to the department and the department shall notify the department of inspections and appeals which shall hear and determine the controversy and make an order as is just and equitable between the parties, which order shall be enforced in the same manner as other orders of the department.

For purposes of this appeal we will assume, without deciding, that the DOT's actions in fixing the lease terms in accordance with section 327G.62 constituted a taking.[1] We make this assumption because even if a taking did occur, that taking was for a public use and just compensation was paid. Thus, no constitutional error occurred. *See Easter Lakes Estates, Inc. v. Polk County*, 444 N.W.2d 72, 75 (Iowa 1989) ("takings" doctrine is premised on the notion that private property cannot be taken for public use without paying adequate compensation).

[1] A. *The public use issue.* CMC contends that section 327G.62 does not satisfy the constitutional requirement that a person's property may not be taken for the benefit of another without a justifying public purpose even though compensation is paid. *See Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 239, 104 S.Ct. 2321, 2328, 81 L.Ed.2d 186, 196 (1984).

[2] It is initially for the legislature to determine whether private property is being taken for a public use. *Simpson v. Low-Rent Hous. Agency of Mount Ayr*, 224 N.W.2d 624, 627 (Iowa 1974); *see also Hawaii Hous. Auth.*, 467 U.S. at 239, 104 S.Ct. at 2329, 81 L.Ed.2d at 196. Courts should not substitute their judgment for the legislature's judgment as to what constitutes a public use unless the use is palpably without reasonable foundation. *Id.* at 241, 104 S.Ct. at 2329, 81 L.Ed.2d at 197. The Iowa legislature enacted section 327G.62 to promote the valid public purpose of protecting businesses located on property owned by railroads, or their successors in interest, from the unequal bargaining position that results when such companies, which invest in permanent physical structures on that land and rely on access to the railroad in operation of their businesses, are forced to submit to later unjust lease terms demanded by railroads or their successors in interest. *See generally In re Chicago, Rock Island & Pac. R.R.*, 794 F.2d 1182 (7th Cir.1986); *In re Chicago, Rock Island & Pac. R.R.*, 772 F.2d 299 (7th Cir.1985), *cert. denied*, 475 U.S. 1047, 106 S.Ct. 1265, 89 L.Ed.2d 574 (1986); *In re Chicago, Rock Island & Pac. R.R.*, 753 F.2d 56 (7th Cir.1985). Protection of these businesses, the legislature feels, furthers the public interest of maintaining a healthy Iowa economy. *Accord In re Chicago, Rock Island & Pac. R.R.*,

1. In support of its argument that there has been a permanent physical taking of its property, CMC asserts, *inter alia*, that it cannot dispose of the property and that it cannot terminate the lease. We note, however, that CMC may effectively terminate this lease and dispose of the property by selling it pursuant to the procedures outlined in Iowa Code sections 327G.78 and 327G.79.

772 F.2d at 302 ("The propriety of State regulation of grain elevators as a business 'affected with a public interest' has been settled law ever since *Munn v. Illinois*, 4 Otto 113, 125–32, 94 U.S. 113, 125–32, 24 L.Ed. 77 (1876)."). We cannot say that this public purpose is without foundation. Therefore, we must conclude that if any taking occurred in this case, pursuant to section 327G.62, that taking was for a public use.

CMC argues that *Missouri Pacific Railway v. Nebraska*, 164 U.S. 403, 17 S.Ct. 130, 41 L.Ed. 489 (1896), compels a contrary conclusion. However, we believe it is distinguishable.

In *Missouri Pacific*, the state board of transportation ordered a railroad company to grant an association of farmers the right to erect and maintain a grain elevator on the land of the railroad company. The Court held that the state's action constituted a taking of private property for private use in violation of due process. *Id.* at 417, 17 S.Ct. at 135, 41 L.Ed. at 495. The Court's determination that the property was not taken for public use rested on the fact that the state lacked a justifying public purpose. *See Hawaii Hous. Auth.*, 467 U.S. at 241, 104 S.Ct. at 2329, 81 L.Ed.2d at 197. The present case is distinguishable because we have identified a public purpose justifying the state's alleged taking: the protection of businesses already located on property owned by railroads, or their successors in interest, from potentially unequal bargaining positions.

Finally, we note that the case before us is distinguishable from *Ferguson v. Illinois Central Railroad*, 202 Iowa 508, 210 N.W. 604 (1926). *Ferguson* held, under the predecessor to section 327G.62, that the board of railroad commissioners could not constitutionally order a railroad company to furnish a private party with a site on its property, and to fix the rental for such site, in order to enable the party to erect on such site a private coal shed from which to sell coal for gain. As in *Missouri Pacific*, this court's determination that the railroad's property was not taken for a public use rested on the fact that there was no justifying public purpose for ordering the erection and maintenance of a private coal shed on the railroad's property.

[3] B. *The just compensation issue.* CMC contends that it was not afforded just compensation in return for the alleged taking. In support of its position, CMC argues that it was not compensated for the highest and best use of the property.

[4] Under the United States and Iowa constitutions, private property may not be taken for a public use without just compensation. *See Easter Lakes Estates*, 444 N.W.2d at 75 ("takings" doctrine is premised on the notion that private property cannot be taken for public use without paying adequate compensation). In determining what constitutes "just compensation," courts must look to the individual facts of each case. *Des Moines Wet Wash Laundry v. City of Des Moines*, 197 Iowa 1082, 1086, 198 N.W. 486, 488 (1924) (the words "just compensation" have no technical or purely legal significance) (proceeding in eminent domain); *Azul Pacifico, Inc. v. City of Los Angeles*, 740 F.Supp. 772, 777 (C.D.Cal.1990). Courts generally look to the property owner's loss rather than the gain of the entity causing the taking to measure the amount of compensation. *Id.* (citing *Kimball Laundry Co. v. United States*, 338 U.S. 1, 69 S.Ct. 1434, 93 L.Ed. 1765 (1949)). The owner's loss is usually measured by the extent to which the taking deprived it of an interest in its property. *Id.* (citing *United States v. General Motors Corp.*, 323 U.S. 373, 65 S.Ct. 357, 89 L.Ed. 311 (1945)).

Section 327G.62 requires that the DOT order Coop to pay compensation that is just and equitable. The DOT ordered compensation that it concluded was just and equitable. Upon review of the record, we do not believe that the DOT abused its discretion in fixing compensation, nor can we say that CMC was not afforded just compensation. More specifically, the record does not show that the DOT failed to justly compensate CMC in calculating an annual rental based upon the unimproved value of the Dickens, Iowa, property. *Accord In re Chicago, Rock Island & Pac. R.R.*, 753 F.2d at 60 ("[W]e hold that the unimproved value of the ... property provides the better basis for an equity court to determine the fair rent...."); *In re Chicago, Rock Island & Pac. R.R.*, 794 F.2d at 1185. Indeed, for the purposes of this lease, the unimproved value of the Dickens, Iowa, property was the extent of CMC's compensable interest therein. *See Azul Pacifico*, 740 F.Supp. at 777.

In further support of its argument, CMC cites, *inter alia*, *Hall v. City of Santa Barbara*, 833 F.2d 1270 (9th Cir.1986), *cert. denied*, 485 U.S. 940, 108 S.Ct. 1120, 99 L.Ed.2d 281 (1988), which states that rental payments to landlords which assure them of a fair return on their investment may not in fact adequately compensate them for a taking of their property. The DOT in this case based its calculation of annual rent on an average return on investment of 11.25%, a return within a range of returns suggested by the parties. Although *Hall* may have stated that rent that assures a landlord a fair return on investment is not the test of adequate compensation in cases involving a claim of taking by physical invasion, the appellate court conceded, in remanding the matter to the district court, that "[i]t may well be that the rental payments ... adequately compensate [landlords] for the taking of their property. However, this cannot be assumed; it must be proven." *Id.* at 1281. *See also Loretto*, 458 U.S. at 441, 102 S.Ct. at 3179–80, 73 L.Ed.2d at 886 (the issue of the amount of compensation that is due is a matter for the state courts to consider on remand). The DOT in this case was not specifically considering the facts before it as elements in a calculation of "just compensation" as such. Our review of the record, however, leads us to conclude that when the DOT ordered rental terms that it concluded were "just and equitable," those terms also amounted to "just compensation."

Having determined that, if CMC's property was taken, it was taken for public use and just compensation was paid, we believe no constitutional violations occurred as claimed.

[5] III. *Equal protection.* CMC next contends section 327G.62 violates the equal protection guarantees of the United States and Iowa constitutions by creating a statutory classification that treats railroad corporations and their successors in interest differently from other property owners. CMC contends the two classes receive disparate treatment in that other property owners are always allowed to set the lease terms for their property, while railroads and their successors in interest are required to have their lease terms determined by the DOT in instances when the railroad or its successor in interest and its lessee cannot agree on lease terms. CMC argues that there is no rational basis for the statute's disparity in treatment.

The United States Constitution provides, in part, that, "[n]o state shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Article I section 6 of the Iowa Constitution places substantially the same limitations upon the state as does the equal protection clause of the United States Constitution. *Ruden v. Parker*, 462 N.W.2d 674, 675 (Iowa 1990).

[6, 7] All parties agree that we should apply a rational basis analysis in determining whether section 327G.62 violates equal protection. Under that standard, a statute is constitutional unless the challenged classification is patently arbitrary and bears no rational relationship to a legitimate state purpose. *See Bennett v. City of Redfield*, 446 N.W.2d 467, 474 (Iowa 1989). Statutes are presumed constitutional and the burden rests on the challenger to demonstrate that a statute violates equal protection. *Id.* To sustain that burden, petitioner must negative every reasonable basis which may support the statute. *City of Waterloo v. Selden*, 251 N.W.2d 506, 508 (Iowa 1977).

Our first task is to determine if section 327G.62 promotes a legitimate state purpose. The state has a legitimate interest in protecting and preserving companies located within its borders from influences beyond their control that threaten their continued economic vitality. Section 327G.62 forwards that legitimate purpose by assur-

ing that businesses which locate their operations on railroad property, invest in permanent physical structures on that land, and rely on access to the railroad in operation of their businesses, are not forced to submit to later unjust lease terms demanded by railroads or their successors in interest due to the parties' unequal bargaining power.

The statute's underlying theme is highlighted by the present case, where removal of the substantial physical improvements placed on the land by Coop is not economically feasible. Coop's inability to relocate its improvements left it without any bargaining power in the negotiation of lease terms and gave CMC unfettered power to attempt to impose unjust lease terms.

Having identified the state's legitimate purpose justifying section 327G.62, we must further determine if the classification of railroads and their successors in interest created by the statute bears a rational relationship to the legitimate state purpose we have identified. We believe that it does because railroads and their successors in interest generally constitute the class of parties controlling access to railway transportation.

We agree with the district court that the classification of railroads and their successors in interest, created by section 327G.62, bears a rational relationship to the legitimate purpose of section 327G.62. Therefore, we conclude that section 327G.62 does not violate the equal protection provisions of the United States and Iowa constitutions.

[8] IV. *Impairment of contracts.* CMC contends that section 327G.62 constitutes a law impairing contracts in violation of United States constitutional safeguards. *See* U.S. Const. art. I, § 10. Article I section 10 provides that no state shall pass any law impairing the obligation of contracts.

[9–11] Although the language of the contract clause is facially absolute, its prohibition must be accommodated to the inherent police power of the state to safeguard the vital interests of the people. *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 410, 103 S.Ct. 697, 704, 74 L.Ed.2d 569, 580 (1983). The threshold inquiry is whether the state law has, in fact, operated as a substantial impairment of a contractual relationship. *Id.* at 411, 103 S.Ct. at 704, 74 L.Ed.2d at 580. The severity of impairment increases the level of scrutiny to which the legislation is subjected. *Id.* However, in determining the extent of impairment, we consider whether the industry the complaining party has entered has been heavily regulated in the past. *Id.*

[12] If the state regulation constitutes a substantial impairment on private parties' ability to contract, the state, in justification, must have a significant and legitimate public purpose behind the regulation, such as the remedying of a broad and general social or economic problem. *Id.* at 411–12, 103 S.Ct. at 704, 74 L.Ed.2d at 581. Once a legitimate public purpose has been identified, the final inquiry is whether the impairment is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption. *Id.* at 412, 103 S.Ct. at 705, 74 L.Ed.2d at 581.

We believe section 327G.62 does not impose a substantial impairment on CMC's ability to contract. We reach this conclusion for three reasons. First, CMC has entered into the heavily regulated railway industry. The fact that the railway industry is heavily regulated lowers the level of impairment of CMC's ability to contract, regardless of the fact that CMC does not presently operate a railroad, because CMC was or should have been aware of the extensive regulation of railways prior to purchasing the railway property that was the subject of Coop's lease. Secondly, section 327G.62's impairment of CMC's ability to contract in this case is not substantial because the statute only operates to prevent CMC from charging an unjust rent. Section 327G.62 does not impair CMC from entering into a lease with Coop containing just and equitable terms.

Finally, section 327G.62 is supported by the legitimate public purpose of assuring

the economic vitality of companies which locate their operations on railroad property, invest in permanent physical structures on that land, and rely on access to the railroad in operation of their businesses.

Section 327G.62 thus imposes a minor impairment on CMC's ability to lease its land, and that impairment is nonetheless an appropriate and reasonable condition justified by a legitimate state purpose. Therefore, we conclude that section 327G.62 does not violate article I section 10 of the United States Constitution.

[13] V. *Due process.* CMC's final constitutional challenge is that section 327G.62 is unconstitutionally vague and does not provide meaningful standards or guidelines for its application or interpretation. *See* U.S. Const. amend. XIV, § 1; Iowa Const. art. 1, § 9.

[14–16] A civil statute is unconstitutionally vague under the due process clause when its language does not convey a sufficiently definite warning of proscribed conduct, as measured by common understanding or practice. *Knepper v. Monticello State Bank*, 450 N.W.2d 833, 838 (Iowa 1990). When persons must necessarily guess at the meaning of a statute and its applicability, the statute is unconstitutionally vague. *Id.* However, where economic regulation is involved, statutes are subject to a less strict vagueness test because their subject matter is often more narrow, and because businesses, which face economic demands to plan businesses carefully, can be expected to consult relevant legislation in advance of action. *Id.* Finally, if vagueness can be avoided by a reasonable construction, consistent with the statute's purpose, the statute must be interpreted in that way. *Id.*

We agree with the district court that, as applied in this case, section 327G.62 is not unconstitutionally vague. Section 327G.62 clearly states the manner of operation of the statute and the parties affected thereby in specifying that the DOT is to resolve in a just and equitable manner any disagreements or controversies between a railroad successor and the owner of improvements situated on land owned by the railroad successor. Case law applying section 327G.62 has also outlined general aims of the statute, and has otherwise stated the general rule of equity that the unimproved value of property in the present situation should provide the basis for a fair rental determination between a landlord and its tenant. *See generally In re Chicago, Rock Island & Pac. R.R.*, 772 F.2d 299 (7th Cir.1985), *cert. denied*, 475 U.S. 1047, 106 S.Ct. 1265, 89 L.Ed.2d 574 (1986); *In re Chicago, Rock Island & Pac. R.R.*, 753 F.2d 56 (7th Cir. 1985).

We hold that the statute complies with constitutional due process requirements.

VI. *Factual findings.* CMC next challenges the DOT's factual findings, contending that substantial evidence does not support the agency's decision. *See* Iowa Code § 17A.19(8)(f). Specifically, CMC contends that substantial evidence does not exist because the DOT erred in relying on the testimony of Coop's expert appraiser, erred in its determination of the highest and best use of the property, erred in determining that the railroad spur did not increase the property's value and erred in not giving greater weight to CMC's expert appraiser's testimony. Thus, CMC says DOT's decision was arbitrary and capricious and in violation of Iowa Code section 17A.19(8)(f).

A recent court of appeals case, *Morgan v. Iowa Dep't of Transp.*, 428 N.W.2d 675, 677–78 (Iowa App.1988), relying on our statements in *Norland v. Iowa Dept. of Job Serv.*, 412 N.W.2d 904 (Iowa 1987), concisely states our scope of review:

> On purely factual matters such as this, both the district court and [appellate courts] exercise a limited scope of review. Fact findings of an agency are binding on the courts when they are supported by substantial evidence. Evidence is not insubstantial merely because it would have supported contrary inferences. It is substantial when a reasonable mind would accept it as adequate to reach the same findings. When there is a conflict in the evidence or when reasonable minds might disagree about the inferences to be drawn from the evidence,

the decision of the agency should be affirmed. In short, the findings of an agency are binding on appeal unless a contrary result is demanded as a matter of law. This limited scope of factual review is warranted by the presumably greater expertise an agency has over matters within its purview. We must ask "not whether the evidence might support a different finding but whether the evidence supports the findings actually made."

(Citations to *Norland* omitted.)

Without unduly extending this opinion by discussion of the factual issues raised, our review of CMC's challenges to the agency's decision discloses that the agency's findings and decision were all supported by substantial evidence in the record. We therefore conclude that the district court did not err in affirming the DOT's decision on these issues.

[17] VII. *Scope of DOT's powers.* CMC's final argument is that section 327G.62 did not give the DOT authority to modify the termination provision of the lease or to add other lease terms. More specifically, the lease proposed by CMC provided, *inter alia*, that either party could cancel the lease upon giving thirty days notice to the other party. DOT struck that provision in its decision. Our reading of the statute compels us to uphold the DOT decision. Allowance of a thirty-day cancellation provision to either party could not only make the other lease terms inoperative, but could also lead to the very situations which section 327G.62 was designed to prevent: those in which a railroad successor threatens unilateral termination of the lease in order to force a captive tenant to pay an unjust rent.

Additionally, section 327G.62 grants the DOT authority to hear and determine controversies and make an order as is just and equitable when disagreements arise between a railroad corporation or its successor in interest and its lessee. In this case, a dispute arose between CMC and Coop over the lease terms of property owned by CMC and leased by Coop. DOT reviewed the controversy and issued an order establishing just and equitable terms for the lease between CMC and Coop. The DOT's actions complied with the authority granted to it under section 327G.62; it did not exceed its authority.

VIII. *Disposition.* All other issues raised have been considered and we find them without merit or unnecessary to discuss.

We conclude section 327G.62 is constitutional as applied in this case and that the DOT acted properly in establishing the lease terms between CMC and Coop. The district court judgment is affirmed.

AFFIRMED.

Requested Amendments

House Bill 2715 - Am. by HCW

March 24, 1998

Sec. 2

- Amend Sec. 2(i) definition of "tenant" to read:

> (i) "tenant" means any public grain warehouse or other person primarily engaged in the sale or distribution of fertilizer or other goods or services used or useful in the production of agricultural crops, occupying railroad land in good faith pursuant to any lease, license or permit granted by a railroad;

- Delete the word "and" at the end of line 30, page 2; and add a new Sec. 2(j) as follows:

> (j) "public grain warehouse" means any public warehouse or public grain warehouse as defined in K.S.A. 34-223 and amendments thereto.

[NOTE: These changes restrict application of the act to only those tenants which provide goods and services used in agriculture, as originally provided in portions of the bill deleted by the House.]

Sec. 4

- On page 3 at lines 22 and 24, change the word "person" to "railroad".

- Delete all of Sec. 4 following the word "equitable." in line 36 on page 3, and add new subsections (b) and (c), as follows:

> (b) To assist the arbitration panel in its determination of the fair lease rental under subsection (a), the arbitration panel may order that the fair lease rental of the railroad's interest in the railroad land be appraised by three disinterested appraisers. The railroad and tenant shall each designate an appraiser and those two shall designate a third appraiser. The railroad and tenant shall each pay one-half of the reasonable costs and expenses of such appraisal.
>
> (c) In any determination of fair lease rental of the railroad's interest in the railroad land, only the value of the railroad's interest therein shall be considered and the value of any interest or improvement which is not owned by the railroad shall not be considered.

[NOTE: The first change is recommended by the Revisor. The second corresponds to Sec. 5(b) and (c) for consistency and corrects a typographical error on page 3, line 37.]

3-11

Sec. 6

- At the end of line 8 on page 5, change the word "person's" to "persons".

[NOTE: To correct a grammatical error.]

- Add a new Subsection (c) as follows:

> (c) Every lease of railroad land by a railroad to a tenant shall be deemed by any court to include a written agreement to submit to arbitration any controversy arising at any time between the parties, within the meaning and intent of K.S.A. 5-401 and amendments thereto.

[NOTE: This is intended to answer a legal question regarding the use of arbitration rather than KCC to resolve railroad lease disputes.]

Sec. 8

- On page 5 at line 33, insert a **comma** between the words "setting" and "purpose".

[NOTE: To correct a typographical error.]

3-12

Testimony on HB 2715

Senate Judiciary Committee

March 24, 1998

Prepared by Christine Schirber

CoBank, Wichita, KS

Mr. Chairman and members of the committee, my name is Christine Schirber. I am a Vice President of CoBank. I work with loans to agricultural cooperatives in central and eastern Kansas.

Approximately 2,300 stockholders own CoBank. With $18 billion in assets, CoBank specializes in cooperative, agribusiness, rural utility, Farm Credit association and agricultural export lending. CoBank has banking centers across the nation, representative offices in Mexico City and Singapore and a national office in Denver, Colorado.

We are in support of this bill because of its impact on our customers. As the volume of grain production increases through improved yields, many grain companies are facing the need to build more storage and grain handling facilities to meet the needs of the farmers. The additional bins and equipment will be built adjacent to or attached to their facilities. In many instances, these elevators are attached to real estate that is leased from the railroad. The terms of the leases are written for periods of one year.

Our concern in addressing requests for term loans to build elevators on leased properties is the discrepancy between the typical tenor of the loan and the term of the lease.

Senate Judiciary
3-24-98
Att 4

Prudent lenders cannot make long term loans for new facilities when the collateral for the loan is attached to property governed by a one-year lease. Loans for these types of facilities would typically have an amortization schedule of ten years or more. The facilities themselves would have a life of approximately forty years. In addition to the uncertain nature of renewals each year, the lessee faces the risk of having to remove their buildings from the leased property when the lease is terminated. Removal of a concrete elevator is virtually impossible; therefore, the asset would have to be destroyed.

At this time, CoBank has a loan request for $2.5 million to build an elevator on leased property. The need for a lease that is structured for a term in excess of the proposed amortization of the loan is one of the pending issues for the approval of the loan today.

These issues are of concern to any lender and have a significant negative impact on all grain companies who are struggling to meet the needs of the farmers who depend upon their facilities for handling and storage of their grains.

Thank you for your time. If you have any questions, I will be glad to address them at this time.

KANSAS FARMERS SERVICE ASSOCIATION

★ ★ ★ ★ ★ KF AGRI INSURANCE ★ ★ ★ ★ ★

100 EAST FIRST • P.O. BOX 1747 • HUTCHINSON, KS 67504-1747
316-662-5406 • (KS/CO) 1-800-362-2104 • FAX 316-662-0662

Testimony on H.B. 2715
Senate Judiciary Committee
March 24, 1998
Prepared by Tony Dyer
Kansas Farmers Service Association

Mr. Chairman and Committee Members:

I am Tony Dyer, President of Kansas Farmers Service Association, Hutchinson, Kansas. I'm here today in support of H.B. 2715.

KFSA is owned by 139 local cooperatives in Kansas. We provide cooperative services and insurance to our members. Kansas cooperatives are engaged in every aspect of agribusiness plus many other business ventures. Many of them need economical, dependable rail service offered on a fair and equitable basis.

One of their, and our, major concerns is the basic unfairness of the hold harmless language contained in Railroad Lease Agreements.

An accident that occurred in Russell, Kansas, on November 23, 1983 is a prime case in point. This involved Agco, Inc. of Russell, Kansas, Union Pacific Railroad Company, and Randall Miller, an employee of Agco, Inc.

The U.P. was switching cars at the cooperative when an accident occurred resulting in Mr. Miller having his lower leg crushed resulting in the loss of a foot.

The case was tried in U.S. District Court and on August 27, 1986, Mr. Miller was awarded $1,678,700. Negligence was determined by the jury as follows: Union Pacific Railroad Company - 47%; Randall J. Miller - 20%; and Agco, Inc. - 33%. U.P.'s portion of this award was $788,989 as of August 27, 1986.

The Union Pacific Railroad Company appealed this verdict in the U.S. Court of Appeals Tenth Circuit on April 5, 1990. The Court denied the appeal on May 29, 1990.

The original judgment against the railroad entered on August 27, 1986 had now grown to $1,113,432.71 when interest was added to the original award. After appeals failed, the Union Pacific Railroad Company then came to Agco, Inc. and demanded that they pay 50% of the railroad's judgment and interest for the railroad's negligence. Why should Agco, Inc. have to pay 50% of the judgment for the railroad's negligence? The railroad's negligence was determined by a district court jury and upheld by the U.S. Court of Appeals?

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We feel the hold harmless language in these leases should be against public policy. An individual or company should be willing to hold someone else harmless for their wrongful acts, but there is something inherently unfair about being forced to sign a contract that holds you liable for someone else's negligence.

Thank you for your time and consideration.

Enclosures

FORM 2209 DUPLICATE ORIGINAL - LESSEE'S COPY CS 1-79-3M

No. Audit No. OMA-5610 No.

LEASE

Date. THIS AGREEMENT, made and entered into this 12th day of March, 1981,

Parties. by and between UNION PACIFIC RAILROAD COMPANY

a corporation of the State of Utah (hereinafter called "Lessor"), party of the first part, and AGCO, INC., a corporation of the State of Kansas, having a place of business at Russell, Russell County, Kansas 67665 (hereinafter called "Lessee"), party of the second part, WITNESSETH:

Lease. Section 1. The Lessor, for and in consideration of the covenants and payments hereinafter mentioned to be performed and made by the Lessee, hereby agrees to lease and let and does hereby lease and let unto the Lessee for a term begin-

Term. ning on the 1st day of December, 1978, and extending to and including the 30th day of November, 1983, unless sooner terminated as herein provided,

Location. the portion of the premises of the Lessor at Russell Russell County, Kansas, shown outlined by yellow lines on the plat, or described in the description, or both, hereto attached and hereby made a part hereof; RESERVING, however, to the Lessor the right to place and maintain at prominent places on the leased premises signs advertising Union Pacific Railroad.

Improvements. It is agreed that no improvements placed upon the leased premises by the Lessee shall become a part of the realty.

Rental. Section 2. The Lessee agrees to pay to the Lessor for the use of said premises rental at the rate of THREE THOUSAND ONE HUNDRED EIGHT NINE Dollars ($ 3,189.00) per annum, payable annually in advance. Acceptance of said rental in advance by the Lessor shall not act as a waiver of its right to terminate this lease as hereinafter provided.

Taxes. The Lessee further agrees to pay, before the same shall become delinquent, all taxes levied during the life of this lease upon the leased premises and upon any buildings and improvements thereon, or to reimburse the Lessor for sums paid by the Lessor for such taxes, except taxes levied upon the leased premises as a component part of the railroad property of the Lessor in the state as a whole.

Assessments. If, during the life of this lease, any street or other improvement, whether consisting of new construction, maintenance, repairs, renewals, or reconstruction, shall be made, the whole or any portion of the cost of which is assessed against or is fairly assignable to the leased premises, the Lessee agrees to pay in addition to the other payments herein provided for —

(a) ten and one-half percent (10½%) per annum on the amount so assessed against or assignable to the said premises when expenditures by the Lessor for such improvements are properly chargeable to capital account under the accounting rules of the Interstate Commerce Commission current at the time;

(b) the entire amount so assessed against or assignable to the said premises when expenditures for such improvements are not properly chargeable to capital account under said accounting rules.

Use of Leased Premises. Section 3. The Lessee covenants that the leased premises shall not be used for any other purpose than for storage and handling of grain, warehouse and tank storage facilities for unloading, storing and distributing petroleum products, (wholesale purposes only) and liquid fertilizer, including anhydrous ammonia and agrees that if

Abandonment. the Lessee abandons the leased premises, the Lessor may enter upon and take possession of the same, and that a non-user for the purpose mentioned continuing for thirty days shall be sufficient and conclusive evidence of such abandonment.

Lessee Not to Sublet or Assign. Section 4. The Lessee agrees not to let or sublet the leased premises, in whole or in part, or to assign this lease without the consent in writing of the Lessor, and it is agreed that any transfer or assignment of this lease, whether voluntary, by operation of law or otherwise, without such consent in writing, shall be absolutely void and, at the option of the Lessor, shall terminate this lease.

Use for Unlawful Purposes Prohibited. Indemnity. Section 5. It is especially covenanted and agreed that the use of the leased premises or any part thereof for any unlawful or immoral purposes whatsoever is expressly prohibited; that the Lessee shall hold harmless the Lessor and the leased premises from any and all liens, fines, damages, penalties, forfeitures or judgments in any manner accruing by reason of the use or occupation of said premises by the Lessee; and that the Lessee shall at all times protect the Lessor and the leased premises from all injury, damage or loss by reason of the occupation of the leased premises by the Lessee or from any cause whatsoever growing out of said Lessee's use thereof.

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Lease, Section 5:

> "**It is especially** covenanted and **agreed that** the use of the leased premises or any part thereof for any unlawful or immoral purposes whatsoever is expressly prohibited; that the **Lessee shall hold harmless the Lessor** and the leased premises **from any** and all liens, fines, **damages**, penalties, forfeitures, **or judgments in any manner accruing by reason of the use or occupation of said premises by the Lessee; and that the Lessee shall** at all times **protect the Lessor** and the leased premises **from all** injury, **damages**, or loss **by reason of the occupation of the leased premises by the Lessee from any cause whatsoever growing out of said Lessee's use** thereof."

Industry Tract Contract, Section 9, Paragraph 2:

> "**The Industry also agrees to indemnify** and hold harmless the **Railroad** Company, its officers, agents and employees, **for loss, damage, or injury from any act or omission of the Industry**, its employees or agents, to the person or property of the parties hereto and their employees and agents, and to the person or property of any other person or corporation, while on or about the Track; **and if any claim or liability** other than from fire **shall arise from the joint or concurring negligence of the parties hereto** (or of any two or more of them if there be more than two), **it shall be borne equally by the parties at fault**, except as provided in Section 8 hereof."

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF KANSAS

RANDALL J. MILLER, Plaintiff,	)	
v.	)	CIVIL ACTION
	)	NO. 84-2174-S
UNION PACIFIC RAILROAD COMPANY, Defendant.	)	

VERDICT

We, the jury, duly empanelled and sworn, upon our oaths, present the following answers to the questions submitted by the court.

1. . Do you find any of the following entities to be at fault: Union Pacific Railroad Company, Randall Jay Miller, Agco, Inc.?

YES ✓ NO ___

NOTE: If you answered Question No. 1 "YES", proceed to Question No. 2. If you answered Question No. 1 "NO", you have completed your deliberations and judgment will be rendered in favor of the defendant.

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2. Considering all of the fault at one hundred percent (100%), what percentage of the total fault is attributable to each of the following entities?

UNION PACIFIC RAILROAD CO.	(0% to 100%)	47 %
RANDALL J. MILLER	(0% to 100%)	20 %
AGCO, INC.	(0% to 100%)	33 %
		100%

3. Without considering the percentage of fault found in Question No. 2, what total amount of damages do you find was sustained by the plaintiff, Randall J. Miller?

$ 1,678,700.00

August 7, 1986
DATE

FOREPERSON

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RANDALL JAY MILLER,	)	
	)	
Plaintiff - Appellee/Cross-Appellant,	)	
	)	
	)	Nos. 87-1005
v.	)	87-1012
	)	
UNION PACIFIC RAILROAD COMPANY,	)	
	)	
Defendant - Appellant/Cross-Appellee.	)	

ORDER

Filed May 29, 1990

Before HOLLOWAY, Chief Judge, McKAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY and EBEL, Circuit Judges.

This matter comes on for consideration of appellant's petition for rehearing with suggestion for rehearing en banc, filed in the captioned cases.

Upon consideration of the petition for rehearing, the petition is denied by the panel to whom the case was argued and submitted.

In accordance with Rule 35(b) of the Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to all the judges of the court in regular active service. No member of the hearing panel and no judge in regular active service on the court having requested

EXHIBIT "E"

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at the rt be polled on rehearing en banc, Rule 35, Federal Rules of pellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court

ROBERT L. HOECKER, Clerk

By _____
Patrick Fisher
Chief Deputy Clerk

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AMOUNT DUE AS OF 8/27/91

Refer to Tab 9 for actual jury verdict and judgment form.

Refer to Tab 12 for Union Pacific's settlement after appeal denied.

Date		Judgement Amount
8/27/86		$788,989.00
8/27/87	Interest for one year at 6.18% compounded annually:	48,759.52
8/27/88	Interest for one year at 6.18% compounded annually:	51,772.86
8/27/89	Interest for one year at 6.18% compounded annually:	54,972.42
8/27/90	Interest for one year at 6.18% compounded annually:	58,369.71
	Subtotal as of 8/27/90:	$1,002,863.52
	Court Costs as of 8/27/90:	9,348.03
	Subtotal:	$1,012,211.55
8/21/91	Amount of interest at 10% contract rate (under 10% contractual rate for indemnification claim after settlement, not at 6.18% post-judgment interest rate claim), for past year since payment by Union Pacific:	$ 101,221.16
	TOTAL AMOUNT:	$1,113,432.71
	50% of $1,113,432.71 =	$ 556,716.36
	Interest per day at 10% interest rate ($101,221.16 x 50% ÷ 365 days) =	$ 138.66

10419764

TESTIMONY OF JAROLD BOETTCHER

PRESIDENT, BOETTCHER ENTERPRISES, INC., BELOIT, KANSAS

BEFORE THE SENATE JUDICIARY COMMITTEE

SENATOR TIM EMERT, CHAIRPERSON

TUESDAY, MARCH 24, 1998

IN FAVOR OF HB2715, RAILROAD LEASING ACT

Thank you, Mr. Chairman, and members of the Committee for the opportunity to present my comments in favor of HB2715, Railroad Leasing Act.

My name is Jarold Boettcher. I am President of Boettcher Enterprises, Inc., with headquarters in Beloit, Kansas. We are a family and employee owned business serving agriculture in Northcentral Kansas and Southern Nebraska. We have 35 retail fertilizer plants located in twelve counties in Kansas and two in Nebraska, serving over 4000 farmer customers.

Ten of these locations are currently served by rail. Eleven of these locations used to have rail service. The balance of fourteen are located on off-rail sites. We have lease agreements in place with the Union Pacific, the Santa Fe (now B.N.), the Burlington Northern, and the MidStates Port Authority in sixteen locations. Several involve multiple leases. Most lease agreements date back 20 or 30 years or more. No new lease for a new location has been signed for over ten years.

The Railroad Leasing Act will significantly impact relationships with the railroads and bring about much needed reform. The fundamental problem is that the leases are one sided. All the power for change or status quo rests with the railroads. The lessees have no rights, have no protection against unreasonable seizure and cancellation, are exposed to unilateral changes in the leases to suit the environmental and other interests of the railroads, and have significant economic exposure to rising lease rates.

Many years ago, the railroads were anxious to have anyone build structures on their property, in the hopes that freight would be generated. Lease rates were low. Restrictions were few. Terms were flexible. Fixed facilities such as elevators, fertilizer plants and warehouses were put in place with expectations that current lease terms would continue, that service would be provided, and that freight would be generated, both inbound and outbound.

Times change. The railroads discovered the development potential of their

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real estate in the 1960's and 1970's, at or about the same time that the their fortunes as railroads began to falter with increased competition from the trucking industry. Real estate subsidiaries were formed. Development proceeded. The railroads, for the first time began to look at their leased property as assets, rather than as sites for freight generation. Along the way, concrete and buildings were put in place. We lessees generally took the situation at the time for granted. So did the railroads.

It is true that historical lease rates were low. It is also true that the railroads, of their own free will, set these lease rates. It is difficult to understand the logic of raising rates now to somehow "make up" for these low rates in the past. The only analogy I can think of for this argument is that since I thought about buying Microsoft 10 years ago, but didn't do it, I should be able to buy the stock today at 1988 prices. Lease rates should be set to reflect real values in the market place today, not at some premium to somehow redress bad decisions made by the railroads years ago, now so obvious with hindsight.

With the bust in real estate values in the mid 1980's, there was some re-consideration of the non-rail operations but another trend emerged - concern over the environment and identification of responsible parties. The railroads have moved aggressively to minimize their exposure to any past, current, or future environmental problems by unilaterally inserting broad, hold-harmless agreements in virtually all leases. These hold-harmless clauses are now generally in place and not only make us responsible for our actions on the properties (and properly so), the leases make us responsible for the actions of the railroads on the leased property. We are stuck either way, responsible or not.

Specifics:

1) Leases are for one year, cancelable on 30 day notice by either party.

2) Exposure on the upside to lease rates is unlimited.

3) Hold harmless clauses make the lessee responsible not only for his actions but also those of the lessor.

4) Eviction is not only possible. It has happened to us.

5) The railroads can unilaterally make material changes in the leases, and the lessee must sign or move.

6) The presence of fixed facilities makes the negotiating position of the lessee weak or ineffective.

7) The railroads have refused to negotiate the terms of the leases. At a recent meeting, the respective positions of the lessees and the railroads were discussed. We were told by representatives of the railroads that they would negotiate terms. Negotiation has happened twice in my dealings with four different railroads over the past 15 years and only where our moving was a

real option. The one-sided nature of the leases makes us dependent upon the good will of the railroads to even listen to us, let alone consider making any changes. I don't think that is realistic. Common sense tells us the railroads have no reason to voluntarily give up their monopoly position.

We have two examples which illustrate the problems generated by the existing lease relationships.

For many years, we held a lease from the UP, at Republic, Kansas. The rail line was abandoned in the mid-1980's. The UP sold the property to a third party who made a demand of us to "pay or move". However, the railroad had billed us, twice, for the lease, after they had sold the property. This action is equivalent to fraudulent conveyance of property - i.e., representing that you own something when you don't. Our county attorney thought this might be criminal fraud. I contacted the UP, and they apparently agreed. The UP hastily arranged a meeting whereby we purchased our formerly leased property for a reasonable price. I have no idea what settlement the UP made with the third party. This situation illustrates the ability of the railroad to totally ignore the circumstances of the lessee and any improvements he might have and act solely in their interest.

In 1995, one of our leases at Courtland, Kansas, was canceled. The alleged reason for cancellation was that the Santa Fe needed the land for a track expansion for a unit train load-out. We were given 30 days to tear down our structure, a dry fertilizer storage building which had been on this site for nearly 30 years. The terms of the lease provide that if we failed to remove our building, ownership reverts to the railroad, or alternatively, the railroad can hire a contractor, tear down the building, and send us the bill. We were forced to purchase land and rebuild our facility at an out of pocket cost in excess of $70,000. Our former leased property exists today as a flat concrete slab. No track has been laid on the site. The entire transaction was a waste.

Railroads have minimum lease rates which sometimes lead to large numbers. Raising minimums is the newly discovered mechanism to increase lease rates. In one move, minimums are going from $300 or $400 to $1200 per lease, using the U.P. as an example. We have two locations where we lease a small piece of ground which have existing buildings on them. Using the railroads minimum lease rates and applying them to an equivalent acre base yields a lease rate well in excess of $5000 per year per acre. This is a very high price to pay for ground that would otherwise lay empty in rural Kansas. There is unlimited upside exposure to even higher numbers in the future.

The railroads have said they will sit down and negotiate some of these issues. They tell us that this bill is not needed. The historical record is that they have refused to negotiate in the past. Common sense tells us that they will not do so in the future, other than to tell us they will. In a few situations where our business on leased property was movable, the railroads have been remarkably responsive and flexible. If we truly had the option of moving and indicated we would do so, the railroads have recognized the real situation and we have been successful in re-negotiating leases. This dichotomy in

behavior by the railroads indicates they are very much aware of their preferred position if their lessee has permanent fixtures in place which would be impossible to move.

Current railroad leases are a historical accident. They arose out of circumstances and conditions not present today. Absent the existence of permanent structures, no person exercising sound business judgment would sign a new lease today and entertain the notion of placing a permanent structure on a piece of ground with a one-year term, with a 30 day cancellation clause, with broad hold-harmless clauses, with no provision for compensation for improvements. Yet those circumstances exist today. In commercial transactions where both parties are free to negotiate, very long term leases are not only common, they are nearly universal. One party is not made responsible for everything. Lease rates are defined in the original document. The railroads tell us we signed these leases years ago; they are commercial contracts; and that we should trust them to have good will and to treat us as customers. Common sense tells us no change will occur unless it is forced.

THE RAILROAD LEASING ACT WOULD:

1) Provide protection against unreasonable contract provisions;

2) Provide a mechanism where disagreements regarding railroad property lease values can be resolved through binding arbitration;

3) Provide first-right-of-refusal clauses in the event of sale of property to prevent the situation that we experienced at first hand;

4) Provide for disputes to be resolved in the local County Court and defines any such action as one concerning real property; and

5) Provides for the local County Court to determine just compensation for improvements made to real property.

Please give HBO 2715 your serious consideration. Thank you.

SCOTT COOPERATIVE ASSOCIATION
P. O. Box 350
SCOTT CITY, KANSAS 67871
Phone: (316) 872-5823
Fax: (316) 872-5417

Presentation To Senate Judiciary Committee

(Regarding House Bill #2715)
By Junior Strecker

Mr. Chairman and Members of the Senate Judiciary Committee:

My name is Junior Strecker, General Manager of the Scott Cooperative Association in Scott City, Kansas. We serve six locations totaling seven elevators on railroad lease property. Scott Coop is comprised of over 1270 stockholders with the majority residing in Scott and Wichita counties.

In 1993, we purchased a 460,000 bushel elevator in Grigston, Kansas, from Bunge Corporation. At that time, rail service was provided by the Santa Fe Railroad and the total lease cost was $600.00 per year. The railroad was then purchased by the Central Kansas Railway and in 1994 the lease was $1500.00. In 1995 the same lease increased to $2800.00. The trend continued in 1996 as the lease cost climbed to $4100.00. I attempted to negotiate with the CKRY and was informed by their employee that "if you don't like the lease, move your damn elevator". Those were exactly his words, "if you don't like the lease, move your damn elevator." Not given any option, we paid the lease only to receive bills for 1997 totaling $5,200.00. At this time our board of directors said "enough is enough" and instructed our attorney to attempt to negotiate. The CKRY would only agree to reduce the lease by $200.00 leaving a new balance of $5000.00.

The Scott Coop directors instructed our attorney to continue negotiations with the CKRY until October 15, 1997, when we received "Notice of Lease Termination" instructing us to vacate the premises and restore the site to its original condition. As you all know, to comply with this directive is impossible. So, once again, we paid against our better judgment. A copy of the Notice of Lease Termination is attached to my presentation.

As I mentioned earlier, this elevator is located in Grigston, Kansas, where there are a total of three houses. One house is a small trailer house; one is a house with goats and chickens all around, and the third house is one we acquired when we purchased the elevator. The area is basically growing in weeds, except where we mow. Real estate in that immediate area is selling for $550.00 to $600.00 per acre, and we lease approximately one acre from the CKRY.

Members of the committee, these comments are the reason I ask you to support House Bill #2715. I assure you, there are many, many more horror stories just like ours in the country today.

Thank you very much for your concern!!

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OmniTRAX, Inc.

252 Clayton Street, 4th Floor
Denver, Colorado 80206
Telephone (303) 393-0033
Fax (303) 393-0041

October 15, 1997

NOTICE OF LEASE TERMINATION

Via 1ST Class &
U.S. Certified Mail-RRR

Scott County Cooperative
C/o Keen Brantley, Esq.
P.O. Box 605
325 Main Street
Scott City, KS 67871

RE: Leased Premises Located in the City of Grigston and the County of Scott, State of Kansas, and Further Identified as CKR REALTY, L.L.C. Lease Audit Number 95817.

NOTICE IS HEREBY GIVEN that, pursuant to the lease dated May 4, 1949, as subsequently amended, between Scott County Cooperative, as Lessee, and CKR Realty, a Colorado Limited Liability Corporation, as Lessor, as provided under the Basic Lease Terms, under which you hold possession of the premises described in the Lease, and further described on Drawing No. 13204, dated February 25, 1949, attached hereto, you are hereby given 30 days' notice that Lessor does hereby terminate said lease effective November 30, 1997.

YOU ARE FURTHER NOTIFIED that, pursuant to Paragraph 16 of said Lease, your Landlord, CKR Realty, L.L.C., requires that you remove all Lessee-owned alterations and improvements of whatever nature and restore the leased premises, and that all persons holding or claiming interest or possession under Lessee's authority or pursuant to Lessee's tenancy must vacate the premises and, if you fail to deliver up the premises on or before November 30, 1997, the undersigned will institute legal proceedings against you to recover possession of the premises, and to recover TREBLE RENTS AND DAMAGES for the malicious, unlawful detention of the premises, along with attorneys' fees and costs.

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Scott County Cooperative
C/o Keen Brantley, Esq.
P.O. Box 605
325 Main Street
Scott City, KS 67871

YOU ARE FURTHER NOTIFIED that nothing contained in this notice shall be construed as a waiver of any preceding breach by Lessee of any provision or obligation of said Lease and Lessor's acceptance of any rental amount which is or was a tender of any rental payments for any period after the termination provided in this extension of the Notice and that CKR Realty, L.L.C. will refund payments for any period beyond termination of the tenancy. To avoid any confusion or delay with regard to the possible refund of rental payments, it is suggested that you pay only that amount of rent accrued through the expiration date of November 30, 1997, which is $2,946.24.

CKR REALTY, L.L.C.

By: _____

Clark A. Robertson, Vice President-Real Estate
Authorized Agent

CKR Realty, L.L.C.
252 Clayton Street, 4th Floor
Denver, CO 80206
(303) 393-0033

EXHIBIT 'A'

ATTACHED TO LEASE FROM

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY

WESTERN DIVISION — GREAT BEND DISTRICT

TO

GANO GRAIN CORPORATION

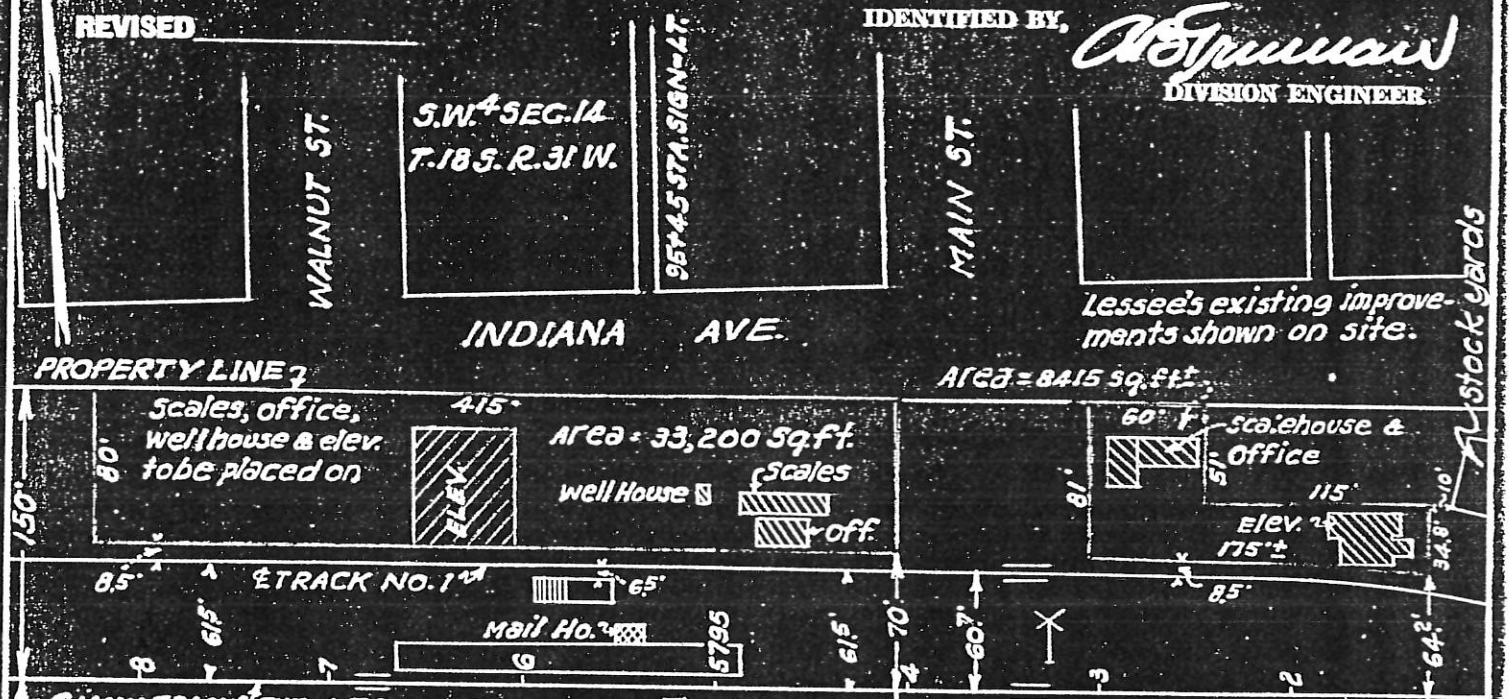
AT

GRIGSTON, SCOTT COUNTY, KANSAS

Scale 1"=100' DODGE CITY, KANSAS D.E.O. No. 13204 DATED Feb. 25, 1949

REVISED

IDENTIFIED BY, A. G. Truman DIVISION ENGINEER



Sheet No. S-L-32, V-34

Parcel No. 2 ~ W.D. 5995

" No. 7 ~ W.D. 5995 & Cond. 4905

" No. 11 ~ W.D. 5995 & cond. 4905

" No. 12 ~ W.D. 5123, W.D. 5995 & Cond. 4905

" No. 16 ~ W.D. 5995 & Cond. 4905

" No. 17 ~ W.D. 5310, W.D. 5995 & Cond. 4905

" No. 18 ~ W.D. 5633, W.D. 5995 & Cond. 4905

" No. 25 ~ W.D. 5995 & Cond. 4905

" No. 29 ~ W.D. 5995 & Cond. 4905

" No. 30 ~ W.D. 5122, W.D. 5995 & Cond. 4905.

NOTE:

Two sites as shown above in red to be used for elevators, offices, scales, scalehouse and wellhouse.

25377-B

95817

7-4

Kansas
Grain Sorghum Producers
Association

Kansas
Corn Growers
ASSOCIATION

TESTIMONY

TO: Kansas Senate Judiciary Committee
FROM: Jere White, Executive Director
DATE: 24 March 1998
SUBJECT: H.B. 2715

The Kansas Corn Growers Association and Kansas Grain Sorghum Producers wish to submit this testimony in support of H.B. 2715, commonly known as the Railroad Leasing Act. If there has ever been a year that the importance of an adequate grain handling infrastructure for Kansas was apparent, 1997 was one of those years. With changes in our rail systems that continue to occur, new challenges emerge. H.B. 2715 would provide a mechanism to allow continued service in communities where, otherwise, elevators might close or relocate due to changes in railroad lease property ownership. It provides a mechanism of fair compensation.

The railroad lobby will suggest that they are concerned with some of your constituents being subject to a potential "taking" of property rights. Absent the arbitration procedures contained in this bill providing for fair negotiations as well as fair compensation, we would also be concerned. Failure by the legislature to act in providing fairness on this issue could result in a "taking" of important markets from Kansas agriculture.

Most grain elevators in Kansas serve as official public warehouses, licensed by the state or federal government. Public grain warehouses function much the same as banks. At any given time, Kansas farmers, not grain elevators, own the majority of grain stored at these facilities. If negotiations are not successful and eviction notices are served to elevators, they are de-facto eviction notices to hundreds of local farmers on thousands of bushels of their grain. This could easily occur to grain that is enrolled in long-term commodity loan programs. The current situation is not good for any party. Kansas will have to deal with these issues soon. Not anticipated by our predecessors, they are real and here to stay until addressed.

We urge this committee to move H.B. 2715 favorably. Had all changes that were to occur been known decades ago, surely property leases and construction of grain facilities would have evolved differently. We must now do what is in the public good. Allowing Kansas grain elevators the opportunity to remain in operation while fairly compensating landowners of leased railroad property makes sense for all Kansans.

P.O. BOX 446, GARNETT, KS 66032-0446•PHONE (913) 448-6922•FAX: (913) 448-6932

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Testimony on HB2715
Senate Judiciary Committee
March 24, 1998
Prepared by Joe Lieber
Kansas Cooperative Council

Mr. Chairman and members of the committee, for the record, I'm Joe Lieber, Executive Vice President of the Kansas Cooperative Council. The Council has a membership of nearly 200 cooperative businesses, which have a combined membership of 200,000 Kansans. Approximately 130 of our members handle grain for their member/owners.

You have just heard a few examples of how railroad leases and their rates have affected local cooperatives and their member producers. From the stack of written testimony and some possible telephone calls from your constituents, you know there are many more problems.

As you consider HB2715, I would ask you to remember the following words: portable, barrel, fairness, and constitutional.

The reason we are here today asking for the legislature to help is that many elevators are paying exorbitant lease rates to the railroads. Plus, many of those leases contain a "Hold Harmless" clause. The railroads have been able to do this because our elevators are not portable, we can't move them. So you can see the railroads have us over a barrel.

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The elevators are not asking for a free ride, they are just asking for fairness. We are asking for a procedure that will determine a fair price that we will pay. We are also asking for a fair contract that does not make us libel for the railroad's actions.

Is what we are asking constitutional? I think after hearing our attorney's testimony and the results of the Iowa case you will agree that it is.

I can assure you that the railroads will tell you that they are willing to set down and discuss rates with the elevators, but as you have heard from previous testimony, this is not always the case.

The passage of HB2715 will insure that they do set down and negotiate a fair rate.

The Kansas Cooperative Council supports the passage of HB2715 and we ask for your support.

Thank you, Mr. Chairman and members of the committee.

SS 3-24 Att #10

KANSAS AGRICULTURAL ALLIANCE

STATEMENT OF THE

KANSAS AGRICULTURAL ALLIANCE

BEFORE THE

SENATE JUDICIARY COMMITTEE

TIM EMERT, CHAIRMAN

REGARDING H.B. 2715

The Kansas Agricultural Alliance (KAA) is a coalition of 20 agribusiness organizations that spans the entire spectrum of Kansas agriculture, including crop, livestock, and horticultural production, suppliers, allied industries and professions.

The Alliance appreciates the opportunity to submit a statement today in support of H.B. 2715.

As you well know, agriculture is vital to the strength of the Kansas economy. As previous conferees have explained the ability to keep agricultural production in the state of Kansas competitive requires that producers have an economically viable way of moving their product to market. The current trend of consolidating and merging railroads, and abandonment of short lines has created a situation in which country elevators are cut off from rail lines, leaving producers with few, if any, local options for transporting grain. Additionally, the increase in lease rates for grain facilities located on railroad property has proven a burden to these businesses in a time of reduction or elimination of service. The effect of this combination of factors is forcing grain producers to move their grain to market by less efficient and more expensive methods.

The members of the Kansas Agricultural Alliance hope you will consider H.B. 2715 favorably and we thank you for your attention to this issue.

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att 10

Marty Vanier, DVM ◆ Executive Director
1728 Thomas Circle ◆ Manhattan, Kansas 66502 ◆ (913) 539-9506

SJud 3-24 Att #11

Written Comments

by

Farmland Industries, Inc.

on

H.B. 2715

"The Railroad Leasing Act"

before the

Senate Judiciary Committee

March 24, 1998

Senate Judiciary
3-24-98
Att 11

On behalf of the farmer-owned Farmland System, thank you for the opportunity to express our support for H.B. 2715, the Railroad Leasing Act, being considered before this Committee today.

This bill is timely considering the frustrations that the agricultural community specifically has faced during the last several months due to the poor rail service experience of carrying Kansas grain to domestic and export markets.

Farmland will soon make these concerns well known again during a hearing before the National Surface Transportation Board.

Two key issues which will be stated during this national hearing include:

1) To provide shippers with the right to seek redress for railroad service failures in all circumstances in the courts or at the Surface Transportation Board.

2) To eliminate the current outrageous filing fees which range from $27,000 to $200,000 to file a complaint regarding rail service. It is very difficult for a farmer-cooperative to afford to file such a complaint when the fees are so astronomical.

How does this relate to the legislation before you today?

It is important for you to understand the dilemma that the entire agricultural industry faces in order to ensure that it receives guaranteed rail service and is able to move Kansas agricultural products to export.

The state can address more of the serious issues that the industry is currently facing, such as:

- Concerns regarding Rail lease contracts
- Rail property lease rate increases
- No opportunity for first right of refusal to purchase leased rail property.
- No compensation for improvements upon "eviction."
- No property rights in case of rail abandonment.

H.B. 2715 addresses these issues providing for enhanced rights of locally owned grain elevator operations.

Farmland System Background

Farmland is owned by over 500,000 farm families through almost 1,400 local cooperatives in 22 Midwestern states. In Kansas, specifically, over 50,000 farm families own and are served by over 140 local cooperatives which in turn own Farmland.

Most of these local cooperatives have grain elevators. Farmland serves these cooperatives with additional grain elevator service in Hutchinson, Topeka, Wichita and Kansas City, Kansas. These elevators are on rail lines.

Farmland spends over $400 million on transportation costs annually. This is the second largest annual expenditure for the Farmland System. Due to

Farmland's size and bidding power, we have been able to purchase sidings and/or yards for these elevators.

Unfortunately, the majority of our local cooperatives do not have that option or that influence. That is why several Kansas-based local cooperatives have joined forces with Farmland in joint ventures to develop together grain unit train loaders. Otherwise the railroads will not service them.

HB 2715, if passed, will provide the opportunity for local cooperatives with grain facilities to have greater ability to serve their farmer owners by being granted first right to purchase leased land from the railroads.

It will provide for fairness in treatment by the railroads in handling disputes and contract provisions.

Although deregulation of the rail industry was to bring anticipated competition to shippers, in many areas where the railroads decreased in number, competition has been lost. Kansas is experiencing this adverse situation. As captive shippers, locally-owned grain elevators in these small communities, currently do not have the clout to request the respect and the service from the rail industry necessary to serve these communities.

Will the state of Kansas address the needs of these small communities, which serve as the state's economic lifeline, by passing H.B. 2715? Or will the rail industry monopoly win again?

Therefore, we strongly urge your vote of support of H.B. 2715. Please report this bill out of committee.

KANSAS ASSOCIATION of WHEAT GROWERS

P.O. Box 1266 • Manhattan, KS 66505-1266 • (785) 587-0007 • FAX (785) 587-0003

DATE: March 24, 1998

TO: Kansas Senate Judiciary Committee

FROM: Ray E. Crumbaker, President
Kansas Association of Wheat Growers

RE: Railroad Leasing Act - H.B. 2715

As the President of the Kansas Association of Wheat Growers (KAWG), I am submitting the following written testimony in representation of our membership. My family and I farm near Brewster, Kansas in the northwestern part of Kansas. I am also president of a local, privately owned grain elevator. Since 1952, the KAWG has worked to enhance the profitability of our wheat producer-members. We support the Railroad Leasing Act (H.B. 2715) because we believe this legislation *will affect* the bottom line of our wheat-producer members.

As the federal government relaxes direct support of producers, we must in turn hold down our costs and increase the value of our crops to stay in business. The direct cost we are addressing today is the cost of transportation.

Transportation costs to our members show up as the "basis," or difference between cash bids in rural areas and bids at market centers, or consumption areas. For example, the basis between my local elevator and Kansas City for wheat is currently 53.3 cents/bushel. To put real numbers to this, by the end of the 1998 wheat crop year, we will pay over $50,000 to transport our wheat to a demand market. Transportation costs are real. They affect our bottom line.

As we approach each legislative session, we carefully choose issues we believe the KAWG should focus on. This year, our Legislative Affairs Committee chose to focus our support on the Railroad Leasing Act for at least the following reasons:

- We believe grain elevators serve the rural public's best interests when they are allowed to enter reasonable leases with those who hold the rights to the property their facilities occupy. That is to say, we believe the Railroad Leasing Act would provide public benefits.

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- Our producer members directly pay for unreasonable lease rates and terms. Lack of service and an overall increase in the cost of storage and transportation results when railroads are allowed to enforce leases that tend to "gouge" grain elevators.
- While we are sensitive to the private property issues surrounding the Railroad Leasing Act, we believe the legislation addresses the concerns our KAWG membership would have. The legislation provides for fair compensation and property ownership that is in the public good. Rural Kansas will benefit from continued grain storage and transportation service.

Producers and grain elevators enjoy a good working relationship that is vital to the success of rural Kansas. The Railroad Leasing Act provides for the continuation of this relationship. We ask this committee to favorably recommend H.B. 2715 to the full Senate. Thank you for your consideration and attention on this important issue.

FARMERS COOPERATIVE ASSOCIATION

Partners in Progress
P.O. Box 868
Talmage, Kansas 67482

Following are comments submitted in support of H.B. 2715 by Mr. Dean Sparks .

I am the General Manager of the Farmers Cooperative Association which is headquartered in Talmage, Kansas. This company was founded in 1908 to serve the farming community. We have Branch locations in Abilene, Solomon, New Cambria, Salina, Bennington, Niles and Wells. We are served by the Union Pacific, Burlington Northern/ Sante Fe and Kyle Railroads. The majority of our grain assets are located on leased railroad property.

We serve approximately 1100 producers / customers with our facilities. We handle grain, fertilizer , feed , fuel , propane and other farm supplies. We are a full service Cooperative. We have 42 full time employees as well as a number of seasonal employees.
We ship all of our grain out by truck to area terminals. We receive most of our farm supplies by truck.

We are very concerned about the lease rate structure the railroads are using. The property in Talmage, Kansas is leased from the Burlington Northern/ Sante Fe Railway Company. We have a 700,000 bushels concrete elevator located on a 6 acre tract of land. Our annual lease rate has gone from $2,574.00 in 1996 to $ 4,990.00 in 1997 and will be $7,100 effective July 1, 1998 . That is a 176% increase in two years. It also equates to a lease rate of $1183.00 per acre per year. Our options are to pay the increase or vacate the property.

We have two locations in Abilene located on Burlington Northern / Sante Fe Railroad leased property. One site will see a 50% increase in 1998 and the other a 23% increase in 1998.

Fair Market values have not risen in the areas we are located in the past two years. The railroads contend they are adjusting rates on a fair market basis. The rate we will be paying annually in reality is close to the total value of the land.
The Railroad will not acknowledge our complaints nor will the Catellus Management Corporation which manages their leased properties.

This is happening throughout our industry. We are asking for your help in an effort to establish an arbitration process that will establish a fair lease rate for railroad property. We support House Bill 2715 and ask this committee to support it also.

Thank you for the opportunity to submit comments in support of H.B. 2715. Questions should be referred to Mr. Dean Sparks at (785) 388 - 2714 .

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att 13

ST&B 3-24 Written #14

Walker Products Company, Inc.

414 South 6th
Lincoln, Kansas 67455

Mr. Chairman and members of the committee, My name is Craig Walker; President of Walker Products Co., Inc. I appreciate this opportunity to submit comments.

Walker Products is a family corporation that was founded in 1954 by my father and his two brothers as a grain elevator. We have six full time employees serving 200 farmers. Some of our services are handling grain, seed, fertilizer, chemical application and some merchandise. Walker Products operated solely from this location until 1986 when we purchased another elevator in town to use for extra storage in years of excess production. This facility originally resided on Santa Fe Railroad leased property but is now leased from the Central Kansas Railroad (CKR).

Since November of 1996 our primary problem with the CKR realty company has been skyrocketing lease rates. Since 1994 yearly lease rates have increased from $1895.00 to the present day rate of $6,174.00. The following list shows the lease rates for each of these years.

YEAR	LEASE PERIOD	LEASE RATE	% INCREASE
1994	11/1/93 - 10/31/94	$1,895.00	
1995	11/1/94 - 10/31/95	$1,940.00	2.4%
1996	11/1/95 - 10/31/96	$1,998.00	3.0%
1997	11/1/96 - 10/31/97	$5,250.00	262.8%
1998	11/1/97 - 10/31/98	$6,174.00	17.6%

The 1997 year lease increased by 263 percent over the 1996 lease rate. In 1998 the percentage increase for the two year period from 1996 to 1998 was 309%.

The CKR has been very difficult to negotiate with. Originally the 1997 proposed rate was $5,994.00 or 300 percent higher than the 1996 rate. We were only able to negotiate this down to the final 263 percent rate increase. Although we experienced what could questionably be called a success by negotiating a lower rate for 1997, in the 1998 rate increase to $6,174.00 we lost what little we had gained in negotiation and more. That's $6,174.00 to lease ground for one year that should be valued according to the local real estate market at a maximum $950.00 to own the 1.27 acres in question.

When we started to try to negotiate for purchase of the property in November of 1996 the price was in excess of $20,000. CKR's price as of October 1997 is $17,500. Again for land that has a local value of $950.00.

Property & Lease Description:

- The property in question is not prime developable property. The property lies in a flood plain. The buildings and bins constructed in 1911 and the 1950's are on top of 3 foot tall foundations to keep out of the flood water. It has been flooded numerous times 2 to 3 feet deep over all the property and up to just below floor level of the bins and office.
- The area of land in this lease constitutes 1.27 acres. At $6,174.00 = $4861/acre lease rate

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- The highest value of the property as determined by the two people who appraise and sell real estate in the Lincoln area is as farm land at a value of $500-$750 per acre. In their opinion to sell and use it for new business or residential construction would be extremely undesirable due to flooding.
- The facility on this property is no longer served by the railroad. When Walker Products requested CKR in 1995-96 to repair the rail spur serving this facility, since it had become unusable, they refused citing that it would not be economically desirable for them. Whereupon we requested to not pay the lease rate for this track. In July of 1996 they submitted a form letter to us for our signature to be released from the track lease.
- Lease contract contains a 30 day eviction notice. At any time they can evict us from the premises without compensation for the improvements (buildings and bins).
- Lease contract contains a hold harmless clause that states that Walker Products will be liable for all costs and legal fees associated with the use of the premises "whether such claim arises in whole or in part from the negligence or alleged negligence of the Licensor (CKR)".

In negotiating with CKR to lease or purchase this property 2 representatives that I have dealt with have stated that if we could not come to terms and instead chose to abandon said property that they would force us to remove all the improvements under terms of the contract and that this would be economically undesirable for Walker Products to do. We are at the unreasonable mercy of the railroad to purchase or lease land at prices that are beyond comprehension or face forced removal of the office and buildings at costs far in excess of any gain that Walker Products receives through the operation of this facility.

I believe that we need your help to ensure that our local Kansas communities and businesses are not forced to compete or even survive under such an oppressive business environment where rural land and properties are being treated as urban gold mines. We support House Bill 2715 and ask that this committee help us by looking favorably upon this legislation. Thank you for the opportunity to submit comments if you have any questions I may be reached at 785-424-4107 at my office or at 785-524-4722 at home.

Craig Walker - President

ners COOP®

P.O. Box 6
Nickerson, Kansas 67501

NICKERSON
422-3207
1-800-861-3207

HUTCHINSON
665-5575
1-800-794-7558

ADAMS CORNER
422-3221
1-800-491-3221

PARTRIDGE
567-2345

WHITESIDE
662-1550

Stuff 24 with #15

March 23, 1998

Tim Emert, Chairman
Judiciary Committee; Kansas Senate
State Capital Building; Room 356 E
Topeka, Kansas 66612

Thank you for taking the time to read about the problems our Cooperative is experiencing with the Railroad contracts. My name is Herb Stange and I am the General Manager of The Farmers Cooperative Elevator Company of Nickerson, Kansas. Our Cooperative has been in business since 1911 and we have 5 locations to serve over 2000 patrons, of which most are farmers. We provide services for grain handling, fertilizer, feed and petroleum products to our patrons.

This past year we were provided bills to lease property from the Central Kansas Railroad from a company that they had hired called Omnitrax. We have two properties that are within one block of each other in the city of Nickerson. Below is the lease time and amounts that we were charged during the 96-97 and 97-98 years.

Contract 168717	Dates: 8-1-97 to 7-31-98	Amount Due: $6090.00
Contract 168717	Dates: 8-2-96 to 7-31-97	Amount Due: $3170.00
Contract 172504	Dates: 6-1-96 to 5-31-97	Amount Due: $620.00
Contract 172504	Dates: 6-1-97 to 5-31-98	Amount Due: $639.00

As you can see contract #168717 went up 92% whereas contract #172504 increased 3%. These properties are only one block apart. We pay all property taxes and also pay all insurance on buildings and contents on both of these properties. We had no negotiating power on the raises and we had no notification of the increase in the leases until we received the bills. How they determined one should increase 92% and the other 3% seems unexplainable.

These increases are unfair to the 2,000 patrons that we serve. The money to pay these bills eventually comes out of their pockets. We are asking for you and your committee's help and support of House Bill 2715.

Thank you again for taking the time to be concerned about our problems with the railroads.

Sincerely,

Herb Stange, General Manager
The Farmers Cooperative Elevator Co.
Nickerson, KS 67561

Senate Judiciary
3-24-98
att 15

FARMWAY CO-OP INC.

(913) 738-2241

204 EAST COURT, BOX 568, BELOIT, KANSAS 67420

March 17, 1998

Senator Tim Emert
Chairman, Senate Judiciary Committee
Kansas Senate
Topeka, Kansas 66612

Dear Senator Emert:

I am writing this letter to address railroad property lease agreement issues our company is currently dealing with. My name is Jeff Bechard and I am the Grain Division Manager for Farmway Co-op, Inc. of Beloit, Kansas. The Farmway organization has served the North Central Kansas area for 87 years. Currently there are nearly 6000 farmers who are served by Farmway's facilities which employee 155 people. Services provided to these farmers center around grain, feed, fertilizer, petroleum and miscellaneous agriculture inputs.

Farmway is served by the Kyle/UP, Central Kansas and BNSF Railroads. These railroads are essential in keeping us competitive in the market place. We believe our presence in the market directly effects the survival of communities we serve. We strongly support the railroads so their service will always be available. However, the inflexible attitude the railroads have taken on property lease agreements is cause for concern.

Recently we received new lease agreements for elevators on the Kyle/UP railroad and the agreements have a built in 3% annual increase. The UP has also written into their contracts the ability to reevaluate these rates every three years. When Farmway asked the UP for buyout offers on the leases, the UP would not respond. The BNSF lease agreements have also included significant annual rate increases.

Farmway Co-op is asking the Senate Judiciary Committee for help and support of House Bill 2715. As shippers on Kansas rail lines we strongly support the issues in this bill. Thank you for your consideration on this matter.

Sincerely,

Jeffery L Bechard

Jeffery L. Bechard
Grain Division Manager
Farmway Co-op, Inc.

Senate Judiciary
3-24
att 16

THE FOWLER EQUITY EXCHANGE

P. O. Box 350
FOWLER, KANSAS 67844
PHONE 646-5262

March 23, 1998
Senator Tim Emert
Chairman, Senate Judiciary Committee
Kansas Senate
State Capitol Room 356-E
Topeka, Kansas 66612

Dear Senator Emert,

Please allow me to introduce myself. My name is Brent Marshall and I am President and General Manager of the Fowler Equity Exchange, Fowler, Kansas, which is a farmer cooperative. This cooperative has been in business since 1914 and is located in southwest Kansas. We represent about three hundred farmers and land owners in our area. We supply our patrons with livestock feed, fertilizer, petroleum products, farm supplies and have 1,963,000 bushels of grain storage.

Fowler, Kansas is on the main line U. P. Railroad. We have facilities located on four different leases. Since 1987 the lease payment on these four leases has more than doubled. In 1994 the cooeprative offered to buy these leases from the railroad but were told that the railroad didn't have adequate resources to process small-dollar sales and that the rental income being generated by the leases was sufficient to forego the sale of these parcels. Finding anyone with any authority to talk to is nearly impossible and those people who you do get a hold of don't have the answers.

I would like very sincerely to ask for the committee's help and support of House Bill #2715. Senator Emert, I appreciate very much your time and attention given to this matter.

Sincerely,

FOWLER EQUITY EXCHANGE

Brent Marshall

Brent Marshall
President and General Manager

Senate Judiciary
3-24-98
Att. 11

"There is No Substitute for a Farmers Elevator"

Farmers Co-operative Union

RICHARD P. FISHER - *Manager*
A Locally Owned, Tax-paying, Community-building Enterprise
P.O. Box 159 - Phone 316-278-2141
STERLING, KANSAS 67579

March 23, 1998

Senator Tim Emert
Chairman, Senate Judiciary Committee
Kansas Senate
State Capitol, Room 356E
Topeka, Kansas 66612

Dear Senator Emert

I am the General Manager of the Farmers Co-operative Union at Sterling, Ks. We have been in business since 1917 and have 9 locations in Rice and Barton county. We have 57 employees and serve over 1500 members of our co-operative. The services we provide are grain warehousing, feed, fuel, and fertilizer.

Presently we are served by the Central Kansas Railway at 7 of our locations. In the last 18 months, our lease rates have increased 80 to 110%. Here in Sterling our rate went from $1,580.00 in 1996, to $3,285.00 in 1997. Other local land values have not increased at this pace.

Other rail issues of concern to our organization are contract provisions that force us to assume all liabilities on leased property and our lack of recourse on any of these issues.

In closing, I ask for you and your committee to support House Bill 2715.

Thank you for your consideration in this matter.

Sincerely
Richard P. Fisher
Richard P. Fisher
General Manager

Senate Judiciary
3-24-98
att. 18

.NTRY ELEVATORS

1600 N. Lorraine Suite 200
P.O. Box 2150
Hutchinson, KS 67504-2150

Collingwood GRAIN INC.

A Subsidiary of ADM

TERMINAL STOR.

Phone (316) 663-7121
FAX (316) 669-5880

March 19, 1998

Senator Tim Emert
Chairman of the Senate Judiciary Committee
356 East
State House
Topeka, KS 66612

Dear Senator Emert:

This letter is to request your support for the passing of House Bill 2715.

Collingwood Grain, Inc. operates 70 grain elevators in Kansas, Oklahoma, Texas and Colorado, with the majority of these being in central and western Kansas. We have facilities that were built on leased property from the railroad companies. Originally the railroads made attractive lease arrangements in order to position rail shippers on their lines. In many cases land was not available to purchase originally because the railroad companies owned the land for 50 to 100 feet on both sides of the railroad line and would only lease. Today, every railroad company that we deal with has a real estate department separate from the rail traffic department and in many cases contract the management of the leases to third parties. We have seen lease fees double in a year for both tract leases and land leases with grain handling and storage facilities on them.

I feel it is extremely important for the grain industry and any other industry that has been located on railroad property, to have the security that is provided in House Bill 2715.

I have mentioned the lease rates but lease provision, first right of refusal to purchase, compensation in the event of eviction and property rights in case of abandonment are equally and extremely important for long term operation of our industry.

Please give this urgent matter your support by voting for the passage of House Bill 2715.

Thank you.

Sincerely,

G. L. Downey

G. L. Downey
President

Senate Judiciary
3-24-98
att. 19

THE LORRAINE GRAIN, FUEL & STOCK CO.

GRAIN FEEDS SEEDS PROPANE/BUTANE PETROLEUM PRODUCTS

P.O. BOX 20 LORRAINE, KANSAS 67459 (913) 472-5271

March 18, 1998

Senator Tim Emert
Chairman, Senate Judiciary Committee
Kansas House of Senate
State Capitol, Room 356-E

Dear Senator Emert:

I'm Duane Kelley, General Manager, Lorraine Grain, Fuel & Stock, Company, Lorraine, Kansas. Our organization was formed in 1904. At present we have two (2) locations (Geneseo & Lorraine), 14 employees and serve over 500 patrons in southern Ellsworth and northern Rice Counties. We are a full service cooperative handling grains, feeds, fuels, fertilizer and chemicals.
At present we ship grain primarily by truck. With rail service only available at Geneseo,on a line leased by CKR from the UP. Geneseo can only load four (4) cars at a time and with rail service not feasible because of availability of cars and cost. Compared to truck, rail is eight cents per bushel higher so we have to rely on trucks to move grain in a timely manner. Rail service at Lorraine was abandoned may 30,1997 by CKR. Rails and ties picked up and yet CKR feels we should pay them a lease amount of $1,300/year. I feel this is wrong because CKR no longer serves the community with service which was the entent in which it was given the rail line. The current amount is $500 higher then when we did have rail service!
The one thing that really upsets me was when their agent stopped in and DEMANDED payment. In our previous payment we had stated we would pay for one year and renegotiate for the next year. We had not heard from them other then a billing that had arrived a couple of weeks ahead of this arrogant employee. His demeanor was rude and he implied that we where receiving rail service, to which I replied, that he had better check, because at that time they had pulled the rail lose from the ties. I so informed him of this which really ticked him off. He became increasingly rude in his remarks and stated that he was giving us a 30 day eviction notice. He promptly went to his car, filled out the order and returned to the office laid it on my desk informing me I was duly noted and rudly left.

"There Is No Substitute For A Farmer's Elevator"

Senate Judiciary
3-24-98
Att. 20

THE LORRAINE GRAIN, FUEL & STOCK CO.

GRAIN FEEDS SEEDS PROPANE/BUTANE PETROLEUM PRODUCTS

P.O. BOX 20 LORRAINE, KANSAS 67459 (913) 472-5271

Their was no negotiating and no alternative suggested by this person. I listened last Friday 2-6-98 to a CKR employee say they wanted to negotiate. My response to that is we proposed an offer back on September 1997 that we have heard nothing on. It just reemphasis our position with the bill before you. It also makes a point that Railroads don't feel they need to negotiate, which I totally disagree. If I treated my customers the way this person treated his customer I would not have a job for one second!

I have illustrated an example of lease problems and abandonment which are part of the bill before you. Their are other examples on land values, contract provisions and assumed liability for which I will not dwell on at this time. These are also included in the bill and need our attention. I ask for you and your committee to support House Bill 2715 because it is fair to all parties involved. It is important because the State Economy hangs in the balance. If we become puppets of an entity only interested in lining their pockets then we will no longer control our own progress and direction of our State Economy. Thank you for your time and attention to this very serious matter before us!

Sincerely,

Duane Kelley

Duane Kelley
General Manager
Lorraine Grain, Fuel & Stock, Co.

BEELER COOPERATIVE EXCHANGE

Phone 913-848-2224
FAX 913-848-2223

COOP

P.O. Box 96
Beeler, Kansas 67518

March 19, 1998

Senator Tim Emert
Chairman, Senate Judiciary Committee
Kansas Senate
State Capitol
Topeka, Kansas

Senator Emert:

My name is Dale klenke, General Manager of Beeler Co-op, a small country grain elevator in Ness County, Kansas. We have a single location and serve 446 stockholder farmers. We have been in business over 50 years and employ 5 people. We have 935,000 bushels of grain storage, sell fuels, feed, fertlizer, and farm supplies.

Beeler is located on the CKRY shortline railroad. We have both a track lease and a land lease with CKRY. In 1993 we agreed to lease rates on both leases that would not increase for a 5 year period except for a "Consumer Price Index" increase. This "CPI" has been about 2.5% to 3.0% each year. CKRY increased our land lease by 75% in 1996 (2 years before the 5 yr agreement would expire). We caught this in 1997 and notified them and asked for a a refund for the overcharge in 1996 and 1997 that we had already paid. In early January 1998 I received a phone call from CKR Realty of Denver. Colorado and they admitted the increase should not of happened. They proposed by phone that if no refund were given they would agree to an additional 3 year lease at the $3,050 (75% increase) rate or if we wanted a refund they may increase our land lease to approximately $5,000 or $6,000 a year when up for renewell in December of 1998. The proposed $6,000 rate would double the rate again after the 75% increase of 1996.

Local Ness County land sells for approx. $250 per acre. Our rail land lease occupies less than 2 acres of land. I asked CKY Realty to give me a selling price so I could consider purchase of the land but was told I needed to talk with someone else but purchase price would be about 15 times the current lease rate or more (over $45,000) We are paying $3,050 now for land that sells for $250 an acre or approx. $500 value.

This railroad is in bad need of repair and we wonder how long we'll continue to have service.

Senate Judiciary
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Att 21

BEELER COOPERATIVE EXCHANGE

Phone 913-848-2224
FAX 913-848-2223

COOP

P.O. Box 96
Beeler, Kansas 67518

Recently I learned that the Sante-Fe---BN railroad may no longer place any cars on this shortline as they are needed for the 100 car load out locations. This means we can no longer ship to the Gulf or Kansas City markets. With this loss of markets we definitely feel no further increases in leases are justified. We will only be able to ship to Hutchinson and Wichita markets period.

We are one of a few small grain elevators that have not merged. We are having difficulty making ends meet, losing money 2 of last 5 years. High rail leases do not help.

Please support House Bill 2715. Our railroad is acting like a Dictator. We are not able to negotiate. I have checked with other grain elevators on both this line and others and find lease rates from $500 to $1,500 and some at over $3,000. I can not understand how we are paying twice what the elevator next door is. There is no equity or reasons for the rates.

Thank you for your support. Please call me if you have any questions.

Sincerely,

Dale Klenke
General Manger

RAtes Paid on Leases

Land Lease #169778	Track Lease #169777
1993---$1,595	1993---$781
1994--- 1,642	1994--- 798
1995--- 1,692	1995--- 822
1996--- 2,961	1996--- 847
1997--- 3,050	1997--- 873

Farmer's Co-op Mfg. & Merc. Assn.

300 S. Harvest
P.O. Box 307
Lucas, Kansas 67648

800-366-1781 or 785-525-6455
Fax 785-525-6456

March 23, 1998

Senator Tim Emert
Chairman Senate Judiciary Committee
Kansas Senate
State Capitol, Room 356 East
Topeka, Kansas 66612

Dear Senator Emert:

The city of Lucas is in northeast corner of Russell county in central Kansas. Farmer's Co-op serves 150 customers with 230 stockholders in a city of 500 people. Our Co-op was formed in 1912 and has served the area with markets for their products, feed, seed, fertilizer, and farm supplies for 86 years.

In June 1993 Union Pacific Railroad Company filed an application to abandon 102 miles of track known as the Plainville Branch. This line had served Farmer's Co-op. A flood in the spring of 1993 did sever damage to this line, which added to UPRR claim. The Interstate Commerce Commission in December of 1993 approved the abandonment. Since that time the tracks have been removed. Our business has been forced to rely on trucks to move all of our products in and out.

Since this time an even more unusual problem has arisen for our business. In May 1995 a tornado damaged or destroyed 50% of our storage. Due to the need to service our customers we entered an expensive rebuilding project. Our problem is who has title to the land we are building on? We do not have title and neither does Union Pacific Railroad. Outside the city limits the rights are reversionary to adjacent landowners. In the city limits UPRR did not have title but a sort of easement. This is not an easement of record. We have spent many hours and lots of money to determine how to get title. No answers have been found. The rebuilding project proceeded as planed, and is complete.

House Bill 2715 will help address the issue of ownership due to abandonment and will allow an equitable settlement for businesses that are on leased property. We also hope to put an end to the stranglehold the railroads have on leaseholders, one of which is not being held responsible for environmental problems the railroad may have created. The businesses that sit on railroad lease property are the ones that made the railroad successful over the years, but now are treated as being unimportant.

Senate Judiciary
3/24/98
Att. 22

I am asking for your help and the Senate Judiciary Committee's help and support of House bill 2715 to give businesses negotiation power with railroads. Our businesses serve not only large cities but also many small communities that make up this great state. I want to thank you for the consideration that you and your committee have given this bill.

Yours truly,

Thomas K. Stewart
General Manager
Farmer's Co-op Mfg. & Merc. Assn.

22-2

The Anthony Farmers
Cooperative Elevator Company

Box 111 • Anthony, Kansas 67003 • 316-842-5181

5,264,000 Bushel Bonded Storage

GRAIN • FEED • SEED • FERTILIZER • PETROLEUM PRODUCTS • CHEMICALS

- Anthony Elevator Office 842-5181
- Service Station 842-3703
- Propane 842-5036
- Shook Elevator 842-5412
- Duquoin Elevator 896-2977
- Spring Elevator 842-5093
- Harper Elevator 896-7511
- Service Station 896-7376
- Attica Elevator 254-7245
- Sharon Elevator 294-5530

March 23, 1998

Senator Tim Emert
Chairman, Senate Judiciary Committee
Kansas Senate
State Capitol, Room 356-E
Topeka, KS 66612

Dear Senator Tim Emert;

My name is Dan Cashier, General Manager of the Anthony Farmers Cooperative. We are a full service cooperative located in Southcentral Kansas with a trading area in Harper, Barber, and Kingman counties. We serve over 1,100 farmers and have 30 employees working in seven branches.

The intent of this letter is to bring to your attention some unfair business ventures by the OmniTrax Railroad Company. The OmniTrax tries to serve four of our branches. The following information can describe the point I am making.

Case #1: In December of 1996, the Anthony Farmers Co-op purchased an elevator in Sharon, Kansas, from Garvey Grain, with a track and land site leased by OmniTrax. In 1996, Garvey had leased the land for $933.00. In 1997, we received a bill from OmniTrax for a sum of $3,500.00. There were no improvements done to this site by OmniTrax to warrant this large increase.

Case #2: 2.9 acres of land in Anthony, Kansas. From 3/96 to 2/97 Anthony Farmers Co-op leased this land for $3,915.00. On June 4, 1996, we held a meeting with two representatives of the Central Kansas Railway AKA OmniTrax. The purpose for the meeting was to buy the leased 2.9 acres. Two other separate businesses had just purchased ground joining the 2.9 acres. These two businesses purchased parcels that sold for $5,000.00 and $5,747.00. The lowest OmniTrax would sell the 2.9 acres for was $59,000.00. We did not purchase the land at that price. The only thing that resulted from the meeting was an increase in the land lease for a sum of $5,500.00 per year.

Senate Judiciary
3-24-98
att 23

The Anthony Farmers Co-op does not use the railroad track, which sets on the 2.9 acres, 11 months out of the year. Service is poor and rates are too high. Our main concern is the fact our elevator facilities are on this railroad property. We feel OmniTrax has no intentions of being a railroad facility, but a real estate company, to get whatever they can. They have made no improvements to this land or the railroad track, which is in very poor shape.

It is my understanding that we are not the only organization experiencing trouble with this company. Until the railroad reasonably sells or abandons the track and land, we are met with forever increasing leases with no tangible return. We ask for you to keep this in mind. Any help would be appreciated.

Sincerely,

Daniel W. Cashier
General Manager
Anthony Farmers Cooperative Elevator Co.

STUB 3-24 att 24

KIRK GRAIN COMPANY

P. O. Box 36

Scott City, Kansas 67871

316-872-2855

March 20, 1998

Senator Tim Emert
Chairman of Senate Judiciary Committee
Kansas Senate
State Capitol
Room 356 East
Topeka, Kansas 66612

Dear Senator Emert:

My name is Kathy Lawrence. My brother, Chuck Kirk and I manage our family owned grain elevator located in Scott City, Kansas. Our family has been in the grain business since 1921, when our grandfather, J. E. Kirk moved his family of nine children here from Protection, Kansas. Presently, our mother, Eleanor Kirk is the owner. For the past seventy-seven years we have provided a continuous and necessary service for area ranchers and farmers. This has meant a market and storage facility for their grains and a place to purchase feed, salt and hay. Wheat, milo and corn make up the majority of the grains handled in our 443,669.00 bushel capacity house.

J. E. Kirk signed a land and track lease with the Santa Fe Railroad in 1946, which was to begin January 1, 1947. His rent for this was $33.28. For the next 47 years this amount increased approximately $22.00 a year. Our last payment in 1993 to ATSF was for $1,034.00. That same year, Central Kansas Railroad acquired our Santa Fe lease and instituted a new charge. They sent us an additional lease for 392' of track at $1.25 a foot. Previously this track had been leased to us from ATSF in accordance with maintenance and operation agreements for trackage adjacent to site leases at no rental charge.

However, the Omni Trax office in Denver, which handles the Central Kansas Railroad leases, informed us this trackage fee was to help defray their insurance costs. When I asked about the possibility of purchasing this ground, they said it wasn't for sale.

A summary of their charges from 1993 to 1997 follows:

	Elevator Lease	Track Lease	Total to CKRY
1993		$490.00	$ 490.00
1994	$1060.57	$500.00	$1560.57
1995	$1087.00	$515.00	$1602.00
1996	$1120.00	$530.00	$1650.00
1997	$2240.00	$686.00	$2926.00

Senate Judiciary
3-24-98
att. 24

KIRK GRAIN COMPANY
P. O. Box 36
Scott City, Kansas 67871
316-872-2855

Upon receipt of the 1997 elevator lease we contacted the Omni Trax office immediately to protest this 100% increase. I spoke with a Mr. Anthony Pranno. He informed us that due to rising administrative and insurance expenses our leases had to be upwardly adjusted (doubled). He also indicated that our track lease, due at a later date, would also increase significantly. After a rather lengthly discussion he said "if you don't want to pay - you can vacate the premises". I went on to ask again about purchasing this property. He said they really did not want to sell an asset that would guarantee them long term rent. However, their lowest price would be our average rent times 15 years or approximately $24,000.00. The trackage would be a separate entity and would cost an additional $7,500.00.

At this point we were very frustrated with an unexpected and to us, unjustified large increase in rent. Further, Mr. Pranno's "give no quarter" attitude left us in a dilemma as to what options were left to us. We feared that if we didn't pursue purchasing the property, the rents would continue to double making it prohibitive to purchase the land we has used for 77 years. At this point we contacted our lawyer and asked him to negotiate for us. We did eventually purchase the elevator lease much to our relief. We are still paying yearly rent for the track.

Once again I would like to express my concern over our treatment by this company. Their callous "take it or get off" attitude didn't go very far in generating a working atmosphere. Being a small business we didn't have a lot of outside resources that we could call on for assistance. Moving our concrete elevator was not an option that we wanted to consider. That left paying the increasing rents until they were sky high or trying to purchase at a very high price.

Let me also say that although we continue to pay track lease, we have yet to see them provide any type of maintenance.

I would ask this committee for your help and support of House Bill 2715. A special thank you to Senator Emert for his time and attention to this problem.

Sincerely,

Kathy Lawrence + Chuck Kirk

Kathy Lawrence
Chuck Kirk

Kirk Grain Co.

24-2