

HOUSE BILL REPORT

HB 2591

As Reported By House Committee On:
Technology, Telecommunications & Energy

Title: An act relating to compensation and conditions for utility facilities within a railroad right-of-way.

Brief Description: Compensating railroads for utility use of rights of way.

Sponsors: Representatives Morris, Crouse, DeBolt, Cooper, Pennington, Scott, Mielke, Ericksen, Doumit, Reardon, Schoesler and Haigh.

Brief History:

Committee Activity:

Technology, Telecommunications & Energy: 1/26/00, 2/4/00 [DPS].

Brief Summary of Substitute Bill

- New process is created for disputes over compensation for use of railroad rights of way.
- Process defines default conditions for utilities' use of railroad rights of way.
- Private party's reversionary rights are considered.
- Railroads may not charge for cattle and farm implement crossings.

HOUSE COMMITTEE ON TECHNOLOGY, TELECOMMUNICATIONS & ENERGY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 10 members: Representatives Crouse, Republican Co-Chair; DeBolt, Republican Vice Chair; Ruderman, Democratic Vice Chair; Bush; Delvin; McDonald; Morris; Reardon; Thomas and Wolfe.

Minority Report: Do not pass. Signed by 2 members: Representatives Poulsen, Democratic Co-Chair and Kastama.

Staff: Scott MacColl (786-7106)

Background:

There are currently nearly 3,300 route miles of railroads in Washington, owned by two Class I railroads, and 11 short line railroads. Utility companies compensate the railroads for facilities located within the railroad right of way based on permit fee requirements, negotiated fees, master agreements, or condemnation proceedings.

Engrossed Substitute Senate Bill 5180, 1999 legislative session, required the Utilities and Transportation Commission to prepare a report concerning information regarding specific costs associated with the location of utility facilities within railroad rights of way in Washington.

The study indicated that both utilities and railroads assert they incur various "extraordinary" expenses as a result of utilities being located within the railroad rights of way.

Summary of Substitute Bill:

A new process for resolution is codified within the attorney general's statutes regarding disputes between railroads and utilities over compensation to be paid for the construction or maintenance of facilities in the railroads' right of way. The rules dictating this process apply to all future facilities and where agreements concerning existing facilities do not exist, expire, or are terminated, and on public or private property.

These resolutions provisions only apply if the utility and the railroad cannot reach an agreement regarding compensation. Municipal owned railroads are exempted from these provisions, and a private property owner's interests and reversionary rights may not be impaired. The bill also includes a null and void clause.

Compensation for Use

No railroad shall be able to charge a fee for facilities which cross a railroad right of way at a public right of way. Railroads must own title or have control over a right of way to charge a fee for the easement to the right of way. There are two expenses that utilities using the railroad right of way are required to pay:

- a utility must compensate for reasonable direct expenses incurred by the railroad for a facility that is located within a railroad right of way; and

- utilities must also pay a one time easement fee, in lieu of any license fee, sufficient to compensate the railroad for the loss in property value due to a utility locating the facility in the right of way. The property value must be based on fair market value as a railroad right of way. This particular one-time fee applies to all utility facilities located prior to this bill that are covered under an expired contract, and all future facilities.

Property owners that need access to their property will pay \$300 every 10 years for that access. Cattle and farm implement crossings are not required to pay a license fee.

In a dispute between parties over compensation, the parties shall attempt to reach a compromise through mediation.

Direct expense is defined for the purposes of this act to mean: a) the cost of inspecting the crossing site before, during or after construction; b) administrative costs; c) the cost of flagging during construction; and d) other costs incurred due to actual construction. Contributions to profit are specifically not included in the definition of direct expense.

Insurance Coverage

Railroads and utilities shall determine individually the amount and scope of insurance to carry to cover associated risks. The railroad and utility shall indemnify each other for damages resulting from its own negligence.

Notification between Utilities and Railroads

The railroad and utility must notify each other at its own expense for emergencies, planned repairs or any operation in the right of way that affects the other entity. Notification of intent to construct must be made 21 days prior to construction, and notification of actual construction three days prior.

The two parties must establish a mechanism for receiving notification of emergencies 24 hours a day, including an emergency contact and telephone number, and specific emergency procedures.

Reimbursement and Relocation

Railroads and utilities must reimburse each other for:

- expenses reasonably incurred resulting from emergencies caused by the property or facilities; and
- reasonable miscellaneous expenses incurred.

Utilities must relocate their facilities if the relocation is reasonably necessary for railroad operations. Grade crossings markings or signs damaged by either entity must be paid for by the damaging entity. Railroads and utilities must repair and maintain their own facilities.

Placement of New Facilities

Utilities are required to provide physical descriptions of new facilities, and any alterations or additions to property or facilities at their own expense. Utility facilities located within railroad rights of way must be constructed and maintained under applicable federal and state laws and standards.

Dispute Resolution

A railroad may not refuse to permit a utility to construct, replace, maintain, or repair facilities within a right of way based solely on a dispute over compensation.

In the event of a dispute, and upon petition by a railroad to superior court for expedited review, the superior court may require the utility to move or modify the facility at the utility's expense.

Substitute Bill Compared to Original Bill:

A private party's property interests and reversionary rights will not be impaired. Railroads owned by municipal railroads are expressly excluded. Railroads must own title or have control over a rights of way to charge a fee for the easement to the rights of way. A property owner may make a payment in the amount of \$300 for 10 years for access to their property across a railroad. Railroads are restricted from charging a license fee for cattle or farm implement crossings.

In the event of a dispute over compensation for use of the right of way, the railroad and the utility will attempt to reach a compromise through mediation.

A drafting error is deleted.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date of Substitute Bill: Ninety days after adjournment of session in which bill is passed.

Testimony For: Over the last 15 years, railroad fees for access to rights of way have been escalating. The insurance requirements are onerous. The increase on fees also has an impact on ratepayers. Some states have legislation that addresses this situation, such as Wisconsin and Minnesota. This is important to ratepayers and investors. It is important to be able to predict the costs of access to the rights of way. Negotiation has been attempted. Safety, before during and after construction in the rights of way is very important. The railroad has a need to know about construction.

Utilities have substantial responsibilities to provide service to customers in the most cost-effective way. This process would give some consistency through predictable and reasonable rates, since much of the short lines have been sold off to out-of-state owners/managers. The issue of insurance is that utilities hold \$50 million in liability, and the railroad requires that their insurance be purchased through the railroad as well. This adds another \$500 to each permit.

It is not the intention to further condition safety features, or to include municipal railroads.

Testimony Against: The Burlington Northern Sante Fe Railroad has approximately 90,000 rights of way permits, with about 11,000 in Washington, with 200 new facilities installed annually. The railroad met in 1997 in Seattle with the utilities about permits and compensation, and last year took part in the WUTC study with the offer to negotiate. Why does the railroad need permits? Safety before, during, and after. It is imperative that the railroad look at designs prior to construction. This bill would allow construction before any type of review takes place. Railroad lines are filling up, and the railroad is investing over 2 billion in infrastructure across the U.S.

There are concerns about communication during construction between third parties and railroads for train movements through an area. Concerns have been raised about inductive interference in electrostatic fields which causes interference between railroad fields and utility fields.

These permits have very strong provisions. The railroads have been researching where all third party facilities are located. They found that agreements and rates are not uniform, but that railroad rates reflect value of property.

Fees structures have been offered in the last five years of a one-time payment, annual payments, and easement fees. They are currently set at \$1,000 for 10 years or \$2,500 in perpetuity. This bill treats railroad rights of way as public rights of way, even though some are privately owned by the railroad.

There are also constitutional concerns about eminent domain, due process, and takings without just compensation. This will be a costly and cumbersome process. There is also a concern with the underlying property owners for abandoned rights of way. The railroads hold only an easement, and that cannot give them more than limited usage. Courts are necessary to determine who the actual owner is.

Both Burlington Northern and Union Pacific are active community partners. Washington is the most trade-dependent state in the nation. Rail is growing, and is trying to partner with the community.

An amendment is needed for individual users of the railroad right of way for power lines to homes and irrigation districts to farms and ranches. Individuals have no recourse with the railroad's exorbitant fees.

(Neutral with concerns) Concerned that short line railroads don't have deep pockets, and this will cause financial shortages to short lines. Eminent domain process puts the short line on its head - due to the notion of a quick take. Also, the definition of right of way is a problem in that railroad rights of way are not static, but they move around. They are generally wider than they need to be, so that there are adjacent patches of land, but that land couldn't be used in this definition of railroad. The compensation justification is a problem as well; the land should be valued at its highest and best usage.

Testified: (Support) Rosemary Williamson and Mark Simonson, GTE; Brian White, Snohomish County Public Utility District; Kristen Sawin, Washington Public Utility Districts Association; Don Malisani, Avista Corporation; Howard Strong, Puget Sound Energy; Ron Fox, PacifiCorp; and Charlie Brown, Washington Rural Electric Cooperatives.

(Opposed) Ethel Steele, Burlington Northern and Santa Fe Railway; Vicki Beres; and Tom Parker, Union Pacific Railroad.

(Neutral) Steve Tate, Washington State Shortline Association.

(Concerns) Dewayne Conley.