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E. Thomas Conmy, III Retired

November 14, 2008

RECEIVED

NOV 14 2008

Annette Bendish  
Legal Counsel  
Public Service Commission  
600 E. Boulevard Ave., Dept. 408  
Bismarck, ND 58505-0480

PUBLIC SERVICE COMMISSION

Re: Application for Rail Clearance Variance at Farmers Union Elevator, Ray, ND

Dear Ms. Bendish:

Thank you for the 10/28/08 letter you addressed to Brian J. Sweeney at BNSF Railway Company in St. Paul, MN. BNSF has reviewed the materials you forwarded to Mr. Sweeney, and also the materials you e-mailed to me. Based upon the information provided, BNSF must **oppose** the application.

The proposed infringement upon rail clearance will create a safety hazard in violation of North Dakota law. Railroad employees who are engaged in providing service to railroad customers must frequently ride the side of railcars as part of their normal and routine duties. Riding the side of railcars may occur when placing railcars to a track for loading or unloading by the customer, when pulling railcars from a track after they have been loaded or unloaded by the customer, or when switching railcars from one track to another track. Close clearance situations created by adjacent buildings, building appurtenances, structures or other fixed or movable objects may pose a risk of injury, including death, or property damage, when the adjacent building, building appurtenance, structure or object infringes upon the space that would normally be occupied by a person riding on the side of a railcar. Injury or death can occur as a result of blunt force from collision with the infringing structure or object, or as a result of being knocked from the railcar to the ground or track, or as a result of snagging an article of clothing on the infringing structure or object and becoming entangled between the structure or object and the railcar. In addition, from the materials provided to date, BNSF cannot determine if there may be

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RR-08-833 Filed: 11/14/2008 Pages: 6  
Response to Variance Request - Opposing the  
Application

BNSF Railway Company

Nilles Law Firm, Stephen W. Plambeck

Annette Bendish  
Legal Counsel  
Public Service Commission  
November 14, 2008  
Page 2

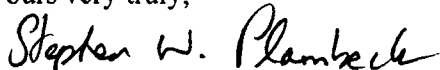
some risk to railcars or freight from what is being constructed by J-Sons, Inc., for Farmers Union Elevator.

Beyond what North Dakota law may require or permit, BNSF is unwilling to waive or release Farmers Union Elevator's contractual obligations to maintain the clearances required by their contract with BNSF. Moreover, from the available information, we are unable to determine if J-Sons, Inc., could complete its construction without infringing upon the required clearance. We do not know what alternative designs were or could be considered or why the construction cannot be completed without this infringement. We are also unable to determine the full extent to which the proposed infringement would interfere with routine train operations.

If the Public Service Commission decides to grant the application for the variance over BNSF's opposition, then BNSF respectfully urges the Commission to attach two conditions to the variance: (1) an indemnification provision in favor of BNSF; and (2) certain insurance requirements. Attached to this letter is the language BNSF proposes the Commission adopt as part of any order granting any variance from the clearance requirements. If the construction for which a variance is requested contributes to an accident or incident that results in a personal injury, death, or any property damage, including environmental and pollution concerns from some railcar or some freight being transported by rail, then the responsibility for any resulting damages should rest with Farmers Union Elevator at Ray, ND; and not with BNSF.

Thank you for your consideration.

Yours very truly,



Stephen W. Plambeck  
[splambeck@nilleslaw.com](mailto:splambeck@nilleslaw.com)

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Enc

## INDEMNIFICATION PROVISIONS

To the fullest extent permitted by law, Industry shall indemnify, defend and hold harmless Railroad and Railroad's affiliated companies, partners, successors, assigns, legal representatives, officers, directors, shareholders, employees and agents (collectively, the "Indemnitees") for, from and against any and all claims, liabilities, fines, penalties, costs, damages, losses, liens, causes of action, suits, demands, judgments and expenses (including, without limitation, court costs, attorneys' fees and costs of investigation, removal, remediation and governmental oversight, environmental or otherwise) (collectively, "Liabilities") of any nature, kind or description of any person or entity, including, but not limited to, Railroad, Railroad employees, Industry, Industry employees, independent contractors and any other person or entity alleging injury, including death, or property damage, including financial loss of any kind, directly or indirectly arising out of, resulting from or related to (in whole or in part) this variance, the construction by J-Sons, Inc., for Industry, the changed condition at Industry resulting from the construction by J-Sons, Inc., for Industry, Industry's occupation and use of the premises, the environmental condition and status of the premises, the impingement upon rail clearance or any act or omission of Industry or Industry's officers, agents, invitees, licensees, contractors, subcontractors, employees or any other person or entity directly or indirectly employed by any of them, even if such Liabilities arise from or are attributed to, in whole or in part, any negligence or other fault of any Indemnitee. The only Liabilities with respect to which Industry's obligation to indemnify the Indemnitees does not apply are Liabilities to the extent proximately caused by the willful misconduct of an Indemnitee.

Further, Industry shall now and forever waive any and all claims, regardless whether based on strict liability, negligence, fault or otherwise, that Railroad is an "owner", "operator", "arranger", or "transporter" of the premises for purposes of CERCLA or other environmental laws. Industry will indemnify, defend and hold the Indemnitees harmless from any and all such claims regardless of the negligence or other fault of the Indemnitees. Industry further agrees that the use of the premises as contemplated by this variance shall not in any way subject Railroad to claims that Railroad is other than a common carrier for purposes of environmental laws and expressly agrees to indemnify, defend, and hold the Indemnitees harmless for any and all such claims. In no event shall Railroad be responsible for the environmental condition of the premises.

Industry further agrees, and shall cause its contractor to agree, regardless of any negligence or other fault or alleged negligence or other fault of any Indemnitee, to indemnify and hold harmless the Indemnitees against and assume the defense of any liabilities asserted against or suffered by any Indemnitee under or related to the Federal Employers' Liability Act ("FELA") whenever employees of Railroad or employees of Industry or any of its agents, invitees or contractors claim or allege that they are employees of any Indemnitee or otherwise. This indemnity shall also extend, on the same basis, to FELA claims based on actual or alleged violations of any federal, state or local laws or regulations, including but not limited to, the Safety Appliance Act, the Boiler Inspection Act, the Occupational Safety and Health Act, the Resource Conservation and Recovery Act, and any similar state or federal statute.

## INSURANCE REQUIREMENTS

1. Industry must, at its sole cost and expense, procure and maintain the following insurance coverages with Railroad named as an additional insured:

A. Commercial General Liability Insurance. This insurance must contain broad form contractual liability with a combined single limit of a minimum of \$5,000,000 each occurrence and an aggregate limit of at least \$10,000,000. Coverage must be purchased on a post 1998 ISO occurrence form or equivalent and include coverage for, but not limited to, the following:

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

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

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

No other endorsements limiting coverage may be included on the policy with respect to any obligations under this Variance..

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

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

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

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

D. Railroad Protective Liability insurance naming only the Railroad as the Insured with coverage of at least \$5,000,000 per occurrence and \$10,000,000 in the aggregate. The policy must be issued on a standard ISO form CG 00 35 10 93 and include the following:

- ◆ Endorsed to include the Pollution Exclusion Amendment (ISO form CG 28 31 10 93)

- ◆ Endorsed to include the Limited Seepage and Pollution Endorsement
- ◆ Endorsed to include Evacuation Expense Coverage Endorsement
- ◆ No other endorsements restricting coverage may be added
- ◆ The original policy must be provided to the Railroad prior to performing any work or services under this Variance.

In lieu of providing a Railroad Protective Liability Policy, Industry or its contractor(s) may participate in Railroad's Blanket Railroad Protective Liability Insurance Policy available to Industry or its contractor(s). The limits of coverage are the same as above. The cost is \$ \_\_\_\_\_.

- I elect to participate in Railroad's Blanket Policy for activities commencing as of the Effective Date (if any);
- I elect not to participate in Railroad's Blanket Policy for activities commencing as of the Effective Date (if any).

2. In addition to the foregoing, the following other requirements shall apply:

Where allowable by law, all policies (applying to coverage listed above) must not contain an exclusion for punitive damages and certificates of insurance must reflect that no exclusion exists.

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

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

All policy(ies) required above (excluding Workers Compensation and if applicable, Railroad Protective) must include a severability of interest endorsement and must name Railroad an additional insured. Severability of interest and naming Railroad as an additional insured must be indicated on the certificate of insurance.

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

Industry must furnish to Railroad an acceptable certificate(s) of insurance including an original signature of the authorized representative evidencing the required coverage, endorsements, and amendments and referencing the contract audit/folder

number if available. The policy(ies) must contain a provision that obligates the insurance company(ies) issuing such policy(ies) to notify Railroad in writing at least 30 days prior to any cancellation, non-renewal, substitution or material alteration. This cancellation provision must be indicated on the certificate of insurance. In the event of a claim or lawsuit involving Railroad, Industry will make available any required policy covering such claim or lawsuit.

Any insurance policy must be written by a reputable insurance company acceptable to Railroad or with a current Best's Guide Rating of A- and Class VII or better, and authorized to do business in the state(s) in which the service is to be provided.

Industry represents that this Variance has been thoroughly reviewed by Industry's insurance agent(s)/broker(s), who have been instructed by Industry to procure the insurance coverage. Allocated Loss Expense must be in addition to all policy limits for coverages referenced above.

Not more frequently than once every five years, Railroad may reasonably modify the required insurance coverage to reflect then-current risk management practices in the railroad industry and underwriting practices in the insurance industry.

If any portion of the operation is to be subcontracted by Industry, Industry must require that the subcontractor provide and maintain the insurance coverages set forth herein, naming Railroad as an additional insured, and requiring that the subcontractor release, defend and indemnify Railroad to the same extent and under the same terms and conditions as Industry is required to release, defend and indemnify Railroad herein.

Failure to provide evidence as required herein will entitle, but not require, Railroad to terminate the Variance immediately. Acceptance of a non-compliant certificate will not operate as a waiver of Industry's obligations hereunder.

The fact that insurance (including, without limitation, self-insurance) is obtained by Industry will not be deemed to release or diminish the liability of Industry including, without limitation, liability under the indemnity provisions of this Variance. Damages recoverable by Railroad will not be limited by the amount of the required insurance coverage.