

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

BNSF Railway Company
Review of Private Railroad Crossings
Application

Case No. RR-09-651

AFFIDAVIT OF SERVICE BY CERTIFIED & REGULAR MAIL

STATE OF NORTH DAKOTA
COUNTY OF BURLEIGH

John Hamre deposes and says that:
he is over the age of 18 years and not a party to this action and on the **4th day of January, 2010** he deposited in the United States Mail, at Bismarck, North Dakota, **one** envelope with certified postage, return receipt requested, fully prepaid, securely sealed and containing a photocopy of:

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The envelope was addressed as follows:

Stephen W. Plambeck
Nilles Law Firm
201 N. 5th St.
P.O. Box 2626
Fargo, ND 58802-1525

Cert. No. 7009 1680 0001 2689 5761

John Hamre further deposes and says that on the **4th day of January, 2010** he deposited in the United States Mail, Bismarck, North Dakota, **two** envelopes by regular mail, with postage fully prepaid, securely sealed, containing a photocopy of the same:

Jim Styron
Transportation Project Manager
North Dakota Department of
Transportation
608 E. Blvd. Ave.
Bismarck, ND 58505

Tammy Wagner
U.S. Department of Transportation
Federal Railroad Administration
200 West Adams
Suite 310
Chicago, Illinois 60606

Subscribed and sworn to before me
this **4th day of January, 2010**

ESTHER JANGULA
Notary Public
State of North Dakota
My Commission Expires Dec. 21, 2012

John Hamre
Esther Jangula
Notary Public

RR-09-651 Filed: 1/4/2010 Pages: 7
Affidavit Certified and Regular - Finding of Fact,
Conclu. of Law and Order
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FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

December 31, 2009

Appearances

Commissioners Tony Clark and Brian P. Kalk.

Stephen W. Plambeck, Attorney, Nilles Law Firm, 201 North Fifth Street, PO Box 2626, Fargo ND 58802-1525, on behalf of BNSF Railway Company.

Annette Bendish, Legal Counsel, Public Service Commission, 600 E Boulevard Ave, Dept 408, Bismarck, North Dakota 58505, on behalf of the Public Service Commission.

Bonny M. Fetch, Administrative Law Judge, Office of Administrative Hearings, 1701 North Ninth Street, Bismarck, North Dakota 58501-1882, as Procedural Hearing Officer.

Preliminary Statement

On September 16, 2009, BNSF Railway Company (BNSF) submitted a letter petition requesting the Commission to review seven private railroad crossings and to issue an order determining whether or not audible devices warning of a train's approach should be sounded at these crossings.

On October 14, 2009, the Public Service Commission issued a Notice of Hearing scheduling a hearing for December 1, 2009 at 10:00 am in the Commission Hearing Room. The Notice of Hearing identified the following issues to be considered:

1. Whether the railroad should sound a warning device at private crossing, DOT # 086644R at Crary based on the safety concerns of the public.
2. Whether the railroad should sound a warning device at private crossing, DOT # 093009S at Erie based on the safety concerns of the public.
3. Whether the railroad should sound a warning device at private crossing, DOT # 093032L at Page based on the safety concerns of the public.

4. Whether the railroad should sound a warning device at private crossing, DOT # 093533R at Heimdahl based on the safety concerns of the public.
5. Whether the railroad should sound a warning device at private crossing, DOT # 081545B at Williston based on the safety concerns of the public.
6. Whether the railroad should sound a warning device at private crossing, DOT # 087697T at Mandan based on the safety concerns of the public.
7. Whether the railroad should sound a warning device at private crossing, DOT # 087513R at Hebron based on the safety concerns of the public.

On December 1, 2009, at 10:00 am, the public hearing was held in the Commission Hearing Room. BNSF presented one witness. Marc Halvorson, North Dakota State Legislative Director for Railroad Employees, James Chase, UTU, Ron Huff, Brotherhood of Locomotive Engineers, and James Olson from the North Dakota State Department of Transportation offered testimony.

Having allowed all interested persons an opportunity to be heard and having heard, reviewed, and considered all testimony and evidence presented, the Commission makes the following:

Findings of Fact

1. BNSF has approximately 517 private grade crossings in North Dakota.
2. In response to the amendments to North Dakota Century Code section 49-11-21 resulting from passage of 2009 House Bill 1342; BNSF has been removing whistle posts at private grade crossings in North Dakota.
3. In the process of reviewing 88 private grade crossings for purposes of removing whistle posts, BNSF identified seven railroad crossings the Commission may wish to review to determine whether, as a matter of public safety, the Commission in the exercise of its jurisdiction may direct that audible warnings of a train's approach be sounded.
4. The seven private grade crossings which BNSF brought to the Commission's attention as part of its letter petition are as follows:
 - a. A private grade crossing located at or near Crary, ND, identified as DOT # 086644R at milepost 69.83 on Line Segment 33;

- b. A private grade crossing located at or near Erie, ND, identified as DOT # 093009S at milepost 28.08 on Line Segment 34;
- c. A private grade crossing located at or near Page, ND, identified as DOT # 093032L at milepost 40.17 on Line Segment 34;
- d. A private grade crossing located at or near Heimdahl, ND, identified as DOT # 093533R at milepost 150.20 on Line Segment 34;
- e. A private grade crossing located at or near Williston, ND, identified as DOT # 081545B at milepost 126.87 on Line Segment 35;
- f. A private grade crossing located at or near Mandan, ND, identified as DOT # 087697T at milepost 4.38 on Line Segment 39; and
- g. A private grade crossing located at or near Hebron, ND, identified as DOT # 087513R at milepost 66.24 on Line Segment 39.

5. The accompanying photographs for the private grade crossing located at or near Hebron, ND, showed a sight restriction from a tree located in the area of the crossing; however, since the photograph was taken, that tree has been removed and at BNSF's request and without any objection from anyone, that crossing has been removed from the list being reviewed by the Commission.

6. The photographs which accompanied BNSF's request with respect to the private grade crossing located at or near Crary, ND, show a grain bin and multiple sets of tracks that may restrict the view of oncoming trains for motorists approaching the crossing and may restrict the train crew's view of oncoming motor vehicles or other obstacles on the crossing.

7. The photographs which accompanied BNSF's request with respect to the private grade crossing located at or near Erie, ND, show a line of trees that appear to be part of a shelterbelt that appears to be located off the railroad's right-of-way and may restrict the view that operators of motor vehicles approaching the crossing have of oncoming trains or the view that train crews have of motor vehicles or other obstacles on or near the crossing.

8. The photographs which accompanied BNSF's request with respect to the private grade crossing located at or near Page, ND, show trees and other shrubbery and a change in elevation as the intersecting road approaches the tracks which may restrict the view of motorists or others as they approach the crossing, as well as the train crew's view of motor vehicles or other obstacles on or near the crossing.

9. The photographs which accompanied BNSF's request with respect to the private grade crossing located at or near Heimdahl, ND, show multiple sets of tracks and a change in elevation as the road intersects with the railroad tracks which may restrict the view of oncoming trains for operators of motor vehicles approaching the crossing and may restrict the view that train crews have of motor vehicles or other objects on or near the crossing.

10. The photographs which accompanied BNSF's request with respect to the private grade crossing located at or near Williston, ND, show a hill, a bridge abutment, vegetation and other conditions which may restrict the view that operators of motor vehicles have of oncoming trains, as well as the view that train crews may have of motor vehicles and other objects on or near the crossing.

11. The photographs which accompanied BNSF's request with respect to the private grade crossing located at or near Mandan, ND, show a curve, a change in elevation between the tracks and the road that intersects with the track and other conditions which may restrict the view that operators of motor vehicles approaching the crossing have of oncoming trains and the view that train crews have of motor vehicles or other objects on or near the crossing.

12. The N.D. DOT, because of cost considerations, has not done a traffic count in recent years at any of the six private grade crossings that are the subject of BNSF's petition.

13. The Commission received no evidence in response to the notice of this hearing directly from any of the adjacent landowners or other persons who may use any of the six private grade crossings that are the subject of BNSF's petition.

From the foregoing Findings of Fact, the Commission now makes its:

Conclusions of Law

1. The Commission has jurisdiction under North Dakota Century Code section 49-11-21, as amended by 2009 House Bill No. 1342, to order railroads to sound audible warning devices at private grade crossings based on the safety concerns of the public.

2. The public safety concerns at the private grade crossing located at or near Crary, ND, identified as DOT # 086644R at milepost 69.83 on Line Segment 33 necessitate the sounding of audible warnings of a train's approach.

3. The public safety concerns at the private grade crossing located at or near Erie, ND, DOT # 093009S at milepost 28.08 on Line Segment 34 necessitate the sounding of audible warnings of a train's approach.

4. The public safety concerns at the private grade crossing located at or near Page, ND, identified as DOT # 093032L at milepost 40.17 on Line Segment 34 necessitate the sounding of audible warnings of a train's approach.

5. The public safety concerns at the private grade crossing located at or near Heimdahl, ND, identified as DOT # 093533R at milepost 150.20 on Line Segment 34 necessitate the sounding of audible warnings of a train's approach.

6. The public safety concerns at the private grade crossing located at or near Williston, ND, identified as DOT # 081545B at milepost 126.87 on Line Segment 35 necessitate the sounding of audible warnings of a train's approach.

7. The public safety concerns at the private grade crossing located at or near Mandan, ND, identified as DOT # 087697T at milepost 4.38 on Line Segment 39 necessitate the sounding of audible warnings of a train's approach.

From the foregoing Findings of Fact and Conclusions of Law, the Commission now make its:

Order

The Commission orders:

1. An audible warning of a train's approach be sounded at the private grade crossing located at or near Crary, ND, identified as DOT # 086644R at milepost 69.83 on Line Segment 33.

2. An audible warning of a train's approach be sounded at the private grade crossing located at or near Erie, ND, identified as DOT # 093009S at milepost 28.08 on Line Segment 34.

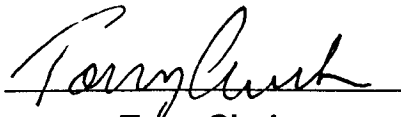
3. An audible warning of a train's approach be sounded at the private grade crossing located at or near Page, ND, identified as DOT # 093032L at milepost 40.17 on Line Segment 34.

4. An audible warning of a train's approach be sounded at the private grade crossing located at or near Heimdahl, ND, identified as DOT # 093533R at milepost 150.20 on Line Segment 34.

5. An audible warning of a train's approach be sounded at the private grade crossing located at or near Williston, ND, identified as DOT # 081545B at milepost 126.87 on Line Segment 35.

6. An audible warning of a train's approach be sounded at the private grade crossing located at or near Mandan, ND, identified as DOT # 087697T at milepost 4.38 on Line Segment 39.

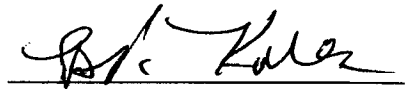
PUBLIC SERVICE COMMISSION



**Tony Clark
Commissioner**



**Kevin Cramer
Chairman**



**Brian P. Kalk
Commissioner**