

NILLES LAW FIRM
ATTORNEYS AND COUNSELORS AT LAW

Duane H. Ilvedson
Stephen W. Plambeck
Gregory B. Selbo
William P. Harrie*
Mark R. Hanson* •
H. Malcolm Pippin+
Douglas W. Gigler*
Andrew L.B. Noah

1800 RADISSON TOWER
201 NORTH FIFTH STREET
POST OFFICE BOX 2626
BISMARCK, NORTH DAKOTA 58108-2626
(701) 237-5544
Fax: (701) 280-0762
www.nilleslaw.com

*Jacqueline S. Anderson
*Shanon M. Gregor
+Gregory W. Liebl
• *Kristi L. Haugen
*Mark R. Western
*Adam D. Wogsland
*Megan E. Kummer
Ryan C. McCamy

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PUBLIC SERVICE COMMISSION

*Also Licensed in Minnesota
Also Licensed in South Dakota
Also Licensed in Montana

E. Thomas Conmy, III Retired

March 8, 2010

Annette Marie Bendish
Attorney at Law
North Dakota Public Service Commission
600 E Boulevard Ave., Dept 408
Bismarck, ND 58505

Re: BNSF Railway Company - Case No. RR-10-26
BNSF Railway Company - Case No. RR-10-27
Our File No. 96220.001

Dear Ms. Bendish:

Enclosed herewith is the original and seven copies of BNSF's Waiver of its right to cross-examine and present further evidence with respect to the letter received from Col. Steven A. Tabor after the March 1, 2010 hearing.

Also enclosed are the proposed Findings of Fact, Conclusions of Law and Orders I was directed to draft and submit to the Commission. For your convenience, I am also enclosing seven copies of each draft.

If you have any questions, or there is anything further that I need to submit, please let me know.

Thank you for your consideration.

Sincerely,


Stephen W. Plambeck

SWP/bjb
Enc.

38 RR-10-26 Filed: 3/9/2010 Pages: 5
Proposed Findings of Fact, Conclusions of Law and Order

BNSF Railway Company

Stephen Plambeck - Nilles Law Firm

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

BNSF Railway Company
Review of Private Railroad Crossing
Application

Case No. RR-10-26

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

_____, 2010

Appearances

Commissioners Tony Clark, Brian P. Kalk, Kevin Cramer, Chairman.

Stephen W. Plambeck, Attorney, Nilles Law Firm, 201 North Fifth Street, P.O. 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, ND 58505, on behalf of the Public Service Commission.

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

Preliminary Statement

On January 8, 2010, BNSF Railway Company (BNSF) filed an application requesting the Commission review the Fraine Barracks railroad crossing in Bismarck, ND and asked the Commission to issue an order under North Dakota Century Code section 49-10.1-21 determining whether this crossing is a public or private railroad crossing, and if private, if audible devices warning of a train's approach should be sounded at this crossing under North Dakota Century Code section 49-11-21.

On January 27, 2010, the Public Service Commission issued a Notice of Hearing scheduling a hearing for March 1, 2010, at 1:30 p.m. in the Brynhild Haugland Room, Ground Floor, State Capitol, 600 E Boulevard Ave, Bismarck, ND. The Notice of Hearing identified the following issues to be considered:

1. Whether the Fraine Barracks railroad crossing (DOT #087680P) is a public or private railroad crossing as defined by Section 49-10.1-21.

2. If the Fraine Barracks railroad crossing (DOT #087680P) is a private crossing, whether the railroad should sound a warning device based on the safety concerns of the public.

On March 1, 2010, at 1:30 p.m., the public hearing was held in the Brynhild Haugland Room. Lynn Leibfried, P.E., Manager Public Projects, BNSF, presented evidence by affidavit and in response to questions from the Commission. Seventeen other persons also 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. 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.
2. In the process of removing those whistle posts, BNSF was unable to determine whether or not the Fraine Barracks crossing (DOT #087680P) was public or private and, if private, identified the Fraine Barracks crossing as one which 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.
3. The City of Bismarck identified the road that intersects with the railroad tracks as an unnamed, two-lane asphalt trail which constitutes an extension of Shafer Street north across the railroad tracks to the gated fence that controls access onto Fraine Barracks and from which the road continues through Fraine Barracks and extends out on the other side.
4. The City of Bismarck and the National Guard plow snow and otherwise maintain the road that intersects with the railroad tracks.
5. The City of Bismarck is a public authority.
6. The National Guard, as a state agency, is also a public authority.
7. Both sides of the road at the Fraine Barracks crossing are maintained by public authorities.
8. There is no barrier to prohibit the general public from traveling on the road that intersects with the railroad tracks except for a gated fence at Fraine Barracks located to the south of the Fraine Barracks crossing.

9. There are approximately 300 motor vehicle movements over the railroad tracks at the Fraine Barracks crossing each day, and about 22 trains each day.
10. The road that extends Shafer Street to the railroad tracks has a downward slope and can become slippery with snow or ice.
11. Children also play in the area, and in the winter sled downhill towards the railroad tracks.
12. Some area residents drive in the area of the Fraine Barracks crossing for purposes of obtaining access to their properties.
13. Photographs for the Fraine Barracks crossing show a curve in the tracks, some trees and other vegetation that may restrict the view of motorists and train crews as they approach the crossing.
14. There have been two incidents involving a collision between a train and a motor vehicle at the Fraine Barracks crossing; one in 1998 and the other in 1986.
15. According to the FRA, there is a 66.8% increase in the risk of train-motor vehicle collisions when train whistles are silenced.

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

Conclusions of Law

1. The Commission has jurisdiction under North Dakota Century Code sections 49-10.1-21 and 49-11-21 to determine if the Fraine Barracks crossing is public or private and if private, to order railroads to sound audible warning devices based on the safety concerns of the public.
2. Because the road that intersects with the Fraine Barracks crossing is maintained by a public authority on both sides, the Fraine Barracks Crossing is a public railroad crossing as defined in North Dakota Century Code section 49-10.1-21.
3. Even if the Fraine Barracks Crossing was a private railroad crossing, the public safety concerns at that crossing necessitate the sounding of audible warnings of a train's approach.

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

Order

The Commission orders:

1. Fraine Barracks crossing (DOT #087680P) is a public railroad crossing, and as such, federal whistle regulations apply.

PUBLIC SERVICE COMMISSION

Tony Clark
Commissioner

Kevin Cramer
Commissioner

Brian P. Kalk
Commissioner