

train's approach would no longer need to be sounded unless an exception applied under Section 49-11-21 of the North Dakota Century Code.

5. By letter dated May 5, 2010, W.C. Wocken, City Administrator for the City of Bismarck, (hereafter "City" or "Bismarck"), had responded to the Commission's April 8, 2010 inquiry, as to how the City intended to restrict access to the Fraine Barracks Railroad Crossing. He stated that the Board of City Commissioners had adopted a plan that would significantly lessen the traffic at the railroad crossing and make it easier to monitor compliance with the safety procedures for that railroad crossing. He further stated that the North Dakota National Guard, (hereafter "Guard" or "National Guard"), considered the access over the railroad tracks to be essential to their operation from a logistics, security and practical point of view, and that their proposal would ensure that the only persons using the Fraine Barracks Railroad Crossing would be National Guard personnel who had an established safety protocol for the railroad crossing and an electronic surveillance system to monitor violations of that protocol. His letter concluded by outlining the specific details of the City's proposal. A true and correct copy of the City's 5/5/10 letter proposal is attached hereto as part of Exhibit 1.

6. In an e-mail sent on August 25, 2010, Colonel Steven A. Tabor notified BNSF, the City, the PSC, the FRA and others that he had located a private crossing agreement for the Fraine Barracks Railroad Crossing that dated back to 1944. He produced a copy of a Private Road Crossing Permit, No. 63248, which the Northern Pacific Railway Company had granted to the North Dakota National Guard back on January 15, 1944, to be effective February 1, 1944. The Northern Pacific Railway Company is one of the railroads that subsequently became part of what is now known

as BNSF Railway Company. Both before the prior PSC hearing and after Colonel Tabor's e-mail, BNSF checked its records but was unable to locate a copy of this private crossing agreement. BNSF nonetheless agrees that what Colonel Tabor located is a private crossing agreement for the Fraine Barracks Railroad Crossing that continues in effect up to the present day. A true and correct copy of the 1/15/44 Private Road Crossing Agreement is attached and included as part of Exhibit 1.

7. To implement the Commission's 5/18/10 Order and provide for the additional safety measures the PSC ordered, the Guard and BNSF agreed to amend the 1/15/44 Private Road Crossing Agreement. Attached hereto as Exhibit 1 is a true and correct copy of the September 6, 2010 Letter Agreement between the Guard and BNSF. The 9/6/10 Letter Agreement, by its terms, amends the existing 1/15/44 Private Road Crossing Agreement. A copy of the 1/15/44 Private Road Crossing Agreement is attached to the 9/6/10 Letter Agreement. Exhibit A to the 9/6/10 Letter Agreement is the safety improvement plan that the Guard and the City developed. That safety improvement plan is what was detailed in the City's 5/5/10 letter to the PSC and Exhibit A to the 9/6/10 Letter Agreement is a copy of that 5/5/10 letter to the PSC from the City. Exhibit B to the 9/6/10 Letter Agreement are copies of the plan sheets and fence detail for modifications made to the Fraine Barracks Railroad Crossing.

8. The City reports that it has trimmed the trees it proposed to trim and that it has installed all the signs it agreed to install and provided BNSF with upgraded size "stop" signs for installation by BNSF. BNSF has installed the two over-sized "stop" signs the City provided on a cross-buck on each side of the tracks for vehicles approaching the crossing from either direction. The City originally intended that both of the over-sized

"stop" signs be installed on the north side of the tracks, with one sign on the east side of the road and the other sign on the west side of the road. However, having two oversized "stop" signs on the north side of the tracks, coupled with the fencing that was being installed, created a problem for standard railroad operations which also introduced a safety concern for railroad work. BNSF brought these concerns to the City's attention and the City decided to omit the installation of an oversized "stop" sign on the east side of the road on the north side of the tracks. Attached hereto as Exhibit 2 are true and correct color photocopies of six photographs of modifications made to the Fraine Barracks Railroad Crossing, including the photograph of the sign the City installed on Schafer Street at the south edge of the Bismarck State College campus, which states: **"ROAD CLOSED/0.5 MILES AHEAD/NO THRU TRAFFIC"**; the photograph of the standard **ADVANCED RAILROAD WARNING SIGN**, including an **"ALL VEHICLES MUST STOP"** sign, the City installed nearer the railroad tracks; and the photograph of the sign the City installed to prohibit traffic from stopping on the railroad tracks, which states: **"CAUTION/RAILROAD CROSSING/DO NOT STOP/ON TRACKS."** The fencing and gates to which the Guard and BNSF agreed have been constructed and are depicted in the other three photographs included as part of Exhibit 2. The upgraded sized **"STOP"** and **"PRIVATE CROSSING"** signs for the Fraine Barracks Railroad Crossing that BNSF installed are not depicted in the photocopies of the photographs attached as Exhibit 2, but can be viewed upon inspection of the crossing..

9. Because the modifications to the Fraine Barracks Railroad Crossing may vary in some of the details from what was contemplated in the Commission's 5/18/10 Order,

both the Guard and BNSF have asked the PSC to review the Fraine Barracks Railroad Crossing, as modified, to determine whether or not the modifications satisfy the Commission's 5/18/10 Order and, if so, whether or not audible devices warning of a train's approach will be sounded routinely at the Fraine Barracks Railroad Crossing.

10. If the PSC determines that in light of the modifications that have been made to the Fraine Barracks Railroad Crossing, the interest in public safety no longer requires that audible devices of a train's approach to the crossing be sounded and orders BNSF to stop the routine sounding of train whistles there, then BNSF will remove the whistle posts for the Fraine Barracks Railroad Crossing.

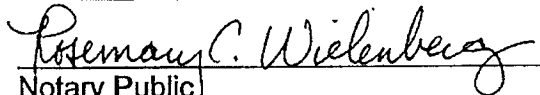
FURTHER YOUR AFFIANT SAYETH NOT.

Dated this 23rd day of November, 2010.



Lynn Leibfried

Subscribed and sworn to before me this
23rd day of November, 2010.



Notary Public
My Commission Expires: 1-31-2012

