

Jeffcoat-Sacco, Illona

From: Plambeck, Stephen W. [SPlambeck@nilleslaw.com]
Sent: Friday, December 03, 2010 2:42 PM
To: Jeffcoat-Sacco, Illona
Subject: FW: Fraine Barracks Crossing, , Case No. RR-10-26
Attachments: Amended Findings of Fact FINAL.pdf

As directed by the Administrative Law Judge, attached is a draft of Amended Findings of Fact, Conclusions of Law and Order for the Commission's consideration. There has been no ruling, and by submitting the attached draft, I do not want to be perceived as advocating any particular outcome one way or the other. It remains BNSF's position that it will sound the train whistles or not sound the train whistles at the Fraine Barracks Crossing, whichever way the Commission decides to rule from its review of the crossing. The attached draft is based on my sense of where I thought the Commissioners were headed based on the prior Order and their remarks at the hearing. Obviously, they are free to add to, delete from or otherwise change the attached draft, depending upon what they decide to do.

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STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

BNSF Railway Company
Review of Private Railroad Crossing
Application

Case No. RR-10-26

AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

December __ , 2010

Appearances

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

Stephen W. Plambeck, Attorney, Nilles Law Firm, 201 North Fifth Street, P.O. Box 2626, Fargo, ND 58108-2626, 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. (March 1, 2010 hearing only).

Ilona A. Jeffcoat-Sacco, Legal Counsel, Public Service Commission, 600 E. Boulevard Ave. Dept 408, Bismarck, ND 58505, on behalf of the Public Service Commission. (November 29, 2010 hearing only).

Colonel Steve Tabor, AIA, Director of Facilities Engineering, North Dakota National Guard, Fraine Barracks, P.O. Box 5511, Bismarck, ND 58506, on behalf of the North Dakota National Guard (November 29, 2010 hearing).

William C. Wocken, City Administrator, City of Bismarck, on behalf of the City of Bismarck. (November 29, 2010 hearing).

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, North Dakota, 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, North Dakota. 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. Members of the public also offered testimony.

On April 8, 2010, the Commissioners sent a letter to the City of Bismarck requesting additional information regarding the Fraine Barracks crossing area and asking whether the City of Bismarck had any intent to restrict access to that area.

On May 5, 2010, the Commission received a letter from the City of Bismarck outlining a proposal to restrict access to the Fraine Barracks crossing area.

On May 18, 2010, the Commission issued Findings of Fact, Conclusions of Law and an Order determining that the Fraine Barracks crossing would be a private crossing after certain modifications were made to the crossing and that audible devices warning of a train's approach should not be sounded at this crossing after the specified modifications to the crossing have been made, unless an exception under North Dakota Century Code Section 49-11-21 applies.

On October 20, 2010, the North Dakota Public Service Commission issued a Notice reopening the record to incorporate additional relevant evidence and scheduling a hearing for November 29, 2010, at 1:30 p.m. in the Public Service Commission Hearing Room, 12th Floor, State Capitol, 600 E Boulevard Ave, Bismarck, North Dakota. The Notice of Hearing identified the following issues to be considered:

1. What modifications have been made to the Fraine Barracks crossing?
2. Whether modifications made to the Fraine Barracks crossing are sufficient to comply with the Commission's May 18, 2010 Order supporting a determination that the Fraine Barracks crossing is a private crossing?
3. Whether the railroad should discontinue sounding a warning device at the Fraine Barracks crossing, unless an exception under N.D.C.C. Section 49-11-21 applies?

On November 29, 2010, at 1:30 p.m., the public hearing was held in the Public Service Commission Hearing Room. Lynn Leibfried, P.E., Manager Public Projects, BNSF, presented evidence by affidavit and in response to questions. Colonel Steve Tabor, North Dakota National Guard, also presented evidence and answered questions put to him.

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:

Amended 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 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. On January 15, 1944, the Northern Pacific Railway Company, (one of the railroads that subsequently became part of what is now known as BNSF Railway Company), granted to the North Dakota National Guard a Private Road Crossing Permit, No. 63248, establishing the Fraine Barracks crossing. That 1/15/44 Private Railroad Crossing Agreement went into effect on February 1, 1944.

9. On September 6, 2010, the North Dakota National Guard and BNSF entered into a Letter Agreement amending the existing 1/15/44 Private Railroad Crossing Agreement in order to implement in part the Commission's 5/18/10 Order, including the safety improvement plan developed by the City of Bismarck and the North Dakota National Guard as detailed in the City of Bismarck's 5/5/10 letter to the Commission.

10. There are approximately 300 motor vehicle movements over the railroad tracks at the Fraine Barracks crossing each day, and about 22 trains each day.

11. 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.

12. Ron Huff of the Brotherhood of Locomotive Engineers and Trainmen testified at the 3/1/10 hearing that the speed of trains at the Fraine Barracks crossing is approximately 16 mph and not more than 35 mph.

13. 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, both prior to restrictions at the crossing subsequently implemented by the North Dakota National Guard.

14. In its May 5, 2010 letter to the Commission, the City of Bismarck proposed modifications to the Fraine Barracks crossing area to restrict access and add additional layers of safety. Specifically, the city proposes:

1. Posting a sign on Schafer Street at the south entrance to the NECE building stating that no public access is allowed south of that point. The actual wording will be provided by the city Traffic Engineer.
2. Posting a sign north of the crossing on this trail that says: 'Railroad Crossing; All traffic must stop.' The number of tracks is also normally listed. The wording will be provided by the city Traffic Engineer.
3. Upgrading the size of stop signs on the north approach to the crossing and post on both sides of the trail.
4. Focusing a security camera in Fraine Barracks on the crossing to record drivers who do not stop at the crossing.
5. The Adjutant General will discipline non-compliant drivers by eliminating their gate privileges.
6. Fencing the area between the railroad and the existing National Guard fence to insure no access south of the tracks except into

Fraine Barracks. A gate will be installed in these new fences north and south of the access road to allow railroad maintenance of the right-of-way.

7. The National Guard will continue to perform sanding and snow maintenance on the road north and south of the crossing to promote driver safety.
8. The brush and trees that presently exist near the Fraine Barracks fence line will be removed or pruned in such a way as to not constitute a sight distance impairment for drivers.
9. If the trees and brush on the north side of the railroad track west of the crossing are determined to be a sight distance impediment they should be ordered removed or pruned. If assistance with the removal or pruning is needed the City of Bismarck will attempt to assist.

15. Since the Commission issued its 5/18/10 Order, the following modifications have been made to improve safety at the Fraine Barracks crossing:

1. The City of Bismarck posted a sign on Schafer Street at the south entrance to the NECE building to restrict access beyond that point. The wording for the sign was provided by the City's Traffic Engineer. The sign states in bold black letters on a white background: "ROAD CLOSED/0.5 MILES AHEAD/NO THRU TRAFFIC." (Photo Exhibit 1 to Exhibit 4).
2. Nearer the Fraine Barracks crossing, the City of Bismarck posted a standard advance warning sign for the crossing consisting of a circular yellow sign with a large black "X" separating the black letters "R" and "R." (Photo Exhibit 2 to Exhibit 4).
3. Directly below the advance warning sign, the City of Bismarck also posted a square yellow sign stating in black letters: "ALL/VEHICLES/MUST STOP." (Photo Exhibit 2 to Exhibit 4). The wording for that sign was provided by the City's Traffic Engineer. The sign does not indicate the number of railroad tracks because there is only a single set of railroad tracks at the Fraine Barracks crossing.
4. Even nearer the Fraine Barracks crossing, the City of Bismarck posted a square yellow sign with black lettering that states: "CAUTION/ RAILROAD CROSSING/DO NOT STOP/ ON TRACKS." (Photo Exhibits 2 and 4 to Exhibit 4; Third Photo Exhibit in Exhibit 2 to Exhibit 3).

5. The City of Bismarck provided BNSF with two upgraded, reflectorized “stop” signs to install on the railroad right of way at the Fraine Barracks crossing. It was agreed that the two upgraded “stop” signs would be installed atop the posts with the crossbucks and “no trespassing” sign for a private railroad crossing that are located on each side of the railroad tracks, instead of posting both of the upgraded “stop” signs on the north side of the railroad tracks. (Photo Exhibits 3A and 3B to Exhibit 4). The installation of an upgraded “stop” sign on the east side of the road to the north of the railroad tracks would have interfered with standard railroad operations by, among other things, limiting clearance for some of the larger equipment used on the tracks and right of way, and would have introduced a safety concern for such railroad work.
6. On the same post, but below both the upgraded “stop” sign and the private railroad crossing crossbucks is a square sign with a white background stating in bold black lettering: “ALL VEHICLES/MUST STOP.” (Photo Exhibits 3A and 3B to Exhibit 4).
7. The North Dakota National Guard has focused a security camera on the Fraine Barracks crossing to monitor its use and to record drivers who fail to stop at the crossing. (Photo Exhibit 3A to Exhibit 4). Upon the Commission’s issuance of an Order from the public hearing held on November 29, 2010, the Adjutant General for the North Dakota National Guard has agreed to publish guidance informing all employees that they will lose North Gate access privileges for seven (7) days for a first violation, thirty (30) days for the second violation, one (1) year for the third violation and permanently if there is a fourth violation.
8. Gated fencing has been installed in the area between the railroad right of way and the existing National Guard fence on the south side of the railroad tracks, both to the east and to the west, to prevent non-railroad motor vehicle traffic from travelling along the south side of the railroad tracks. (Photo Exhibits 5A, 5A, 5B, 5B, 6A, 6B to Exhibit 4). Under the 9/6/10 Letter Agreement amending the 1/15/44 Private Railroad Crossing Agreement, the locked gates and fencing was installed and is owned and to be maintained by the North Dakota National Guard. The North Dakota National Guard has provided keys for the locks on the gates to BNSF to permit railroad maintenance of its right of way.
9. The North Dakota National Guard will continue to perform sanding and snow maintenance on the road north and south of the railroad tracks at the Fraine Barracks crossing to promote driver safety.

10. The North Dakota National Guard, with assistance from the City of Bismarck, will remove or prune brush, trees and other vegetation along the Fraine Barracks fence line and on the north side of the railroad tracks to the west of the Fraine Barracks crossing that constitute a sight distance impairment for motorists using the Fraine Barracks crossing. The 1/15/44 Private Railroad Crossing Agreement further provides that the North Dakota National Guard will remove and keep removed any vegetation that will interfere with approaching trains being seen for a distance of not less than 500 feet in each direction from any point on the road crossing from a distance of not less than 50 feet from the rail on both sides of the track.

16. The plan adopted by the Board of City Commissioners for the City of Bismarck as outlined in their 5/5/10 letter to the Commission is expected to lessen motor vehicle traffic significantly at the Fraine Barracks crossing by restricting southbound traffic approaching the railroad tracks and to make it easier to monitor compliance with the safety procedures for that railroad crossing.

17. From a logistics, security and practical point of view, access for motor vehicle traffic over the railroad tracks at the Fraine Barracks crossing is essential to the operation of the North Dakota National Guard.

18. The North Dakota National Guard and the City of Bismarck have taken steps to ensure that the only non-railroad persons using the Fraine Barracks crossing are National Guard personnel who have an established safety protocol for the use of the crossing and an electronic surveillance system to monitor violations of that protocol.

19. In light of the modifications that have been made to the Fraine Barracks crossing, the interest in public safety no longer requires that audible devices warning of a train's approach to the crossing be sounded routinely.

20. The modifications made to the Fraine Barracks crossing fully satisfy the requirements of the Commission's 5/18/10 Order as amended by the Findings of Fact Conclusions of Law and Order herein.

21. In response to questions from the Commission, both Colonel Tabor and Mr. Wocken testified that the safety of the employees of the North Dakota National Guard and the citizens of the City of Bismarck will not be compromised if audible warnings of a train's approach are discontinued at the Fraine Barracks crossing.

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

Amended 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. Under the 1/15/44 Private Railroad Crossing Agreement as amended by the 9/6/10 Letter Agreement and in light of the modifications that have been made to the Fraine Barracks crossing area which restrict access and provide an additional layer of safety, the Fraine Barracks crossing is a private railroad crossing as defined in North Dakota Century Code Section 49-11-00.1.

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

Amended Order

The Commission orders:

1. Fraine Barracks crossing (DOT #087680P) is now a private railroad crossing, and as such, federal whistle regulations do not apply.

2. The Adjutant General of the North Dakota National Guard, as proposed and agreed, is to publish guidance as to the discipline, including loss of North Gate access privileges, that employees will face if they fail to comply with the laws, rules and regulations governing travel over the Fraine Barracks crossing.

3. BNSF is to remove the whistle posts for the Fraine Barracks crossing and to stop the routine sounding of audible warnings of a train's approach to the crossing.

PUBLIC SERVICE COMMISSION

**Tony Clark
Commissioner**

**Kevin Cramer
Commissioner**

**Brian P. Kalk
Commissioner**