

**2013 HOUSE AGRICULTURE**

**HB 1445**

# 2013 HOUSE STANDING COMMITTEE MINUTES

House Agriculture Committee  
Peace Garden Room, State Capitol

HB 1445  
February 14, 2013  
Job #18962

Conference Committee

Committee Clerk Signature



## Explanation or reason for introduction of bill/resolution:

Relating to railroad crossings.

## Minutes:

Attachments #1-6

**Representative Weisz, Sponsor:** This issue showed up in transportation in a previous session. It came from railroad employees. They shouldn't have to blow the whistle at abandoned crossings.

We passed legislation that said if a crossing is not maintained on either side, the whistle wasn't to be blown. There was a procedure where someone could petition the PSC to have it blown if there was a safety issue. There are hundreds of crossings to blow for no reason. There are reprimands if an employee fails to blow the whistle. No one is responsible to determine if it is a private crossing. PSC says it is not their authority to define a private crossing.

For the amendment, the language Line 7 "Upon the request of a private property owner with property next to a railroad crossing" should be deleted. The bill should say is "A governing body of a political subdivision shall determine if the crossing is public or private as defined in 49-11." That defines what a private crossing is. If a dispute arises, disputes go to the PSC.

If the township or county says this is private and if someone does cross and there is an accident, is there liability? This legislature did say you are not to blow the whistle at private crossings. The issue seems to be nobody is responsible for actually saying which crossings are private. This is to have the political subdivisions say what is private or public.

**Vice Chair John Wall:** What determines if the road is maintained on either side?

**Representative Weisz:** If a blade runs or there is gravel, it is maintained. A trail to a field would not be maintained. Every county road would be public. This would fall upon the townships. Nearby farms get tired of having a whistle blow for no reason.

**Representative Weisz:** I will point out that nothing ever prohibits the crew from blowing the whistle. The tracks are there. It is the person crossing the tracks that needs to look.

I'm trying to come up with a method to know which crossings the railroad employees are not blowing the whistle.

**Jim Chase, United Transportation Union:** (11:05) (See attached #1 with pictures) The first and second picture are at Sandborn. This crossing doesn't have crossing planks in it. The other side of the tracks is under water and has been for 20 years. We are required to blow at that crossing. Most of the others end up in fields or gated pastures.

**Representative Rust:** The law says the governing body of a political subdivision "shall determine." Does this mean there will be additional work for those political subdivisions? If they are the ones that "shall" do it, are they held liable?

**Jim Chase:** The liability issue, we believe as long as the Political Subdivision acts within the existing law, there should be a minimum of liability. Either the crossing is maintained on both sides or it is not. It will require additional work for townships or the county. It would be the road superintendent because they know their territory.

If they are declared private, they are marked with a stop sign. Public crossing are marked with cross bucks and there is no requirement to stop. That should minimize the risk of collision. You can see these crossing are not being used very often.

Train crews are going to blow for any perceived danger. It is provided for in the Century Code 49-11-21, paragraph 4.

**Vice Chair John Wall:** Does the current practice of blowing the whistle at non-maintained areas save any lives?

**Jim Chase:** With the fact that we can still blow the whistle, it is going to mitigate that. I am an engineer with BNSF Railway and the last thing I want to do is hit anyone. Blowing at crossings that people can't even access? There are some crossings that farmers use to go field to field.

**Representative Rust:** The governing body "shall." Why isn't the bill written that (a) the railroad could ask the governing body to declare it or (b) a neighboring farmer could ask? Why isn't it a request to not blow rather than telling the township to go around and look at crossings?

**Jim Chase:** If you go back to 2009, the original bill says the railroads may petition if there is a dispute. We don't know where to go. Nobody is willing to take the responsibility. The railroad doesn't want to do it. The PSC says they don't have the authority. The ND Dept. of Transportation said it is not their responsibility. We thought this was the best solution.

**Representative Rust:** To put it on the township?

**Jim Chase:** The law is there now. There should be protections afforded.

**Representative M. Nelson:** What happens next? I would expect the PSC to get it on the national database. I don't expect my township officers to get it on the national database. Is there something needed to make sure when there are determinations made that they get on the national database.

**Jim Chase:** The determination would be made and given to the Dept. of Transportation. They have to update that database yearly by federal law.

**Representative M. Nelson:** (24:03) Are you saying they have to go on every crossing and make a determination or do they need to respond to your concerns?

**Jim Chase:** I think the engineers would have a good handle on which ones.

**Representative Trottier:** As an engineer, are you required the number of times to blow the whistle?

**Jim Chase:** We are required to blow four whistles at each crossing--two longs, a short, and a long.

**Representative Trottier:** Can you do it more if you want?

**Jim Chase:** We are limited. The BNSF is between 12 and 15 seconds through the crossing. The federal is slightly different.

**Representative Trottier:** In our town we have three crossings in a short area. At 3:00 in the morning there are about 8-10 at each crossing. Is that at the engineer's discretion?

**Jim Chase:** Depending on the speed. It sounds like that would be a good project for a quiet zone.

**Chairman Dennis Johnson:** You see an obstruction ahead, can you get stopped?

**Jim Chase:** It depends on the speed and the makeup of the train. I saw a vehicle at about a quarter mile from the crossing. I started to blow and put the train into emergency. We went by about 300 or 400 feet. Even at 35 miles/hour--that was a loaded coal train.

**Representative Kiefert:** You are not required to blow at private crossings?

**Jim Chase:** It is illegal to blow at a private crossing in North Dakota unless there is an emergency.

**Chairman Dennis Johnson:** Stop signs--whose responsibility at private crossings?

**Jim Chase:** I believe it is the railroads' responsibility because they have the cross bucks.

**Ron Huff, Brotherhood of Locomotive Engineers and Trainmen:** (28:50)  
(See attached #2)

Chapter 49-11 defines public crossings and private crossings.

The second page of attachment #2 refers to liability. 49-11-21, the last sentence of #2 says "A party may not be subject to any liability as a result of not making a request." According to the law, the townships cannot be held liable. We live in a day and age where people sue everybody for everything. Can the townships be sued? Yes. Are they going to prevail? It depends on judge and jury. This affords them some protection. If they have acted within the law and determined it to be a private crossing, the party cannot be held liable. We are not changing that with the bill.

This is a bill to make an addition so someone will make the determination. The liabilities are already covered.

The law says the warning device may not be sounded at a private crossing. We have to violate this law because there are private crossings out there. If there is a whistle post, you have to blow the whistle. If someone wants to petition to have the whistle still blown, they can do that.

When we are talking crossings, there are about 8,776 crossings in North Dakota. We know those are not all public. Who knows the county better? Someone from the county rather than the PSC.

Why should the Political Subdivisions be out there? The Political Subdivisions answer to higher authority. You can tell them to do this. When this bill originally came through, we thought there was some authority to make this determination.

If a dispute arises, (see attached #3) at bottom of 49-10.1-21, then the PSC will step in and go through their process.

If you leave the crossing as a public crossing, would the county or township be responsible for the maintenance of that road? If something happens approaching that railroad track, would they be responsible? The liability can go two ways.

**Representative Larson:** (37:06) The determination about whether this is public or private is the liability. This part is just because somebody doesn't make a request doesn't release liability. It would be the county that makes the determination.

**Ron Huff:** The determination has been made within the state law, could they be held liable? If they could, why are we making laws at all? As long as you are acting within the law, how can you be liable?

**Representative M. Nelson:** Is this going to go out west where there are new crossings? Will this affect the process for new crossings?

**Ron Huff:** When they make the initial determination, they refer to this law. This law would not change that process.

**Charles Weick, State Board Chairman for the Brotherhood of Locomotive Engineers and Trainmen:** (41:00) (See attached #4) I represent about 300 members in North Dakota.

**Representative Larson:** The reason you would like to see this happen is so those posts where you have to blow the whistle can be removed?

**Charles Weick:** If there is a whistle post at a private crossing, we blow. I am not trying to reduce our responsibility. A lot of these crossings are in the middle of nowhere. We would like those removed. The railroads can assess a penalty for blowing or not blowing at crossings.

**Representative Larson:** At this point there is no way to get them removed. Can the railroad request that they be removed or a private property owner request it?

**Charles Weick:** We are not sure who is responsible for removing these posts.

**Representative Larson:** Now we have these posts where the whistles are blown. There is a way for the railroad to go in and say it is not needed. There is a way for a private property owner to request that it be removed. Is that correct?

**Charles Weick:** I believe so.

**Representative Larson:** There is a request for a quiet rail area. You want to go beyond that and have Political Subdivisions to look at every place where every whistle is blown and make a determination without someone requesting it.

### **Opposition:**

**John Olson, BNSF RailRay:** (50:18) (See attached #5)  
From 1980 to 2011, the train accident rate fell 76%. Rail employee injury rate fell 84%. Crossing collision rate fell 81%. The railroad is doing something right.

The situation out west--some of the section line roads are moving targets. Population changes may create some confusion to some of these railroad crossings.

Federal law and state law address the definitions. There is still some discretion and judgment. If there is an accident, the railroad will get sued. If the Political Subdivision gets involved in this, they are subjecting themselves to liability.

There are some private crossings where they should not have to blow the horn. There are requests being made.

The law now provides everything they want. They want the political subdivisions to be on the front line of responsibility. If a dispute arises, the railroad company or any government entity or private property owner can come to the PSC to make that request.

There are no private people here today. This is a dispute between the engineers and the railroad company. We should be allowed to work this out and let us err on the side of safety.

**Representative Fehr:** (56:20) In your testimony your second sentence says it would require local governments to take on extra cost and do what the state does now. The testimony we have heard said that the state isn't doing it now.

**John Olson:** My perspective differs from yours. If the local Political Subdivision wants to do this, they can. Under current law they can. They can go to the Public Service Commission and request that this should be a private crossing. This would require them to survey the entire county.

**Representative Fehr:** The entire county--most counties don't have a lot of railroad lines coming through. It would be simple for a township to determine. Is it adding a huge expense? They probably know where the crossings are without going out to look. Even though it is mandating it, there isn't a time deadline.

**John Olson:** If it was so important to have this statute, why aren't they here making the request? I don't think they want that responsibility.

**Representative Fehr:** In your testimony, the second sentence "apparently in a vain attempt." Can you define "vain attempt"?

**John Olson:** I consider it a vain attempt to get around federal rules. The railroad companies really try to honor federal requirements. Federal law does trump state law.

**Representative Fehr:** The warning device may not be sounded at a private crossing. That is in state law. Is there a federal law that trumps that?

**John Olson:** Federal law has a law which defines private crossings. They don't rely on the state law. Federal law for railroads takes precedence. When we are complying and determining what is a private crossing, we have to take that into consideration.

**Representative Fehr:** On the third page of your testimony, is that what you are referring to as the definition in federal law of private crossings as opposed to what is in our state law?

**John Olson:** That is correct. We threw in the definitions of how they both appear under state law and federal law.

**Representative M. Nelson:** If somebody has a disagreement with a public crossing that should be private, is there a federal agency to appeal to?

**John Olson:** I am not the one to ask. We did have a process with the Fraine Barracks issue here in Bismarck. It is now a private crossing and the horns are not blown.

**Representative M. Nelson:** The railroad knows where the train is. They know when the whistle blows and how many whistles. Is there a federal law that prevents automating that process? How come the train doesn't just blow when it gets to the right place?

**John Olson:** There are other safety mechanisms on a remote basis that can accomplish that. We don't want engineers to be fined.

**Chairman Dennis Johnson:** This can be worked out between the train companies and the engineers. Yet you are both here. Are there ongoing talks?

**John Olson:** When this bill came in, I made sure that my government affairs person in St. Paul had conversations with Ron and Jim. There is communication. I can't speak for the engineers and say they are satisfied with the process. I am fearful of creating a blanket solution because of a few instances that may have some unintended consequences.

**Representative Rust:** Would you have less angst if it said "upon request of a private property owner with property next to a railroad crossing, the PSC shall determine the crossing"?

**John Olson:** That is what current law provides. I don't know if there are requests pending before the PSC by private property owners.

Others in audience indicated there are no requests pending.

**Ken Yantes, Executive Secretary of North Dakota township officers:** I represent all 6,000 of them. The township officers don't feel they need this additional burden. "Shall" means there is some responsibility. They are not paid well and will not take the responsibility.

**Representative Fehr:** I am trying to picture townships officers not knowing which are public vs. private crossings.

**Ken Yantes:** They know what is out there but to do this it is going to take some effort at board meetings. There are 6,000 officers. It is difficult to inform them. It may not be on top of their list.

**Chairman Dennis Johnson:** Is it burdensome or more the liability issue?

**Ken Yantes:** The liability issue.

Aaron Birst gave testimony from Terry Traynor, North Dakota Association of Counties (Attached #6)

The liability is too much for the county to bear. We are suggesting an amendment on the bottom of the testimony.

In answer to the liability questions: my reading of the liability section doesn't provide immunity to the decision maker on railroad crossings.

I think the Rep. Weisz amendment makes it worse.

**Illona Jeffcoat-Sacco, Public Service Commission:** The PSC was not taking a position on this bill. Having heard an amendment to change PSC jurisdiction and responsibility, I ask for an opportunity to review the amendments and then take a position.

**Representative M. Nelson:** What would the PSC consider a dispute? Can anyone say, "I think the crossing is wrong"?

**Illona Jeffcoat-Sacco, PSC:** I can't answer that. I would like to review cases which were brought by the railroad. I can produce an answer in a letter later. The word "dispute" has to mean something.

**Representative Fehr:** We have heard testimony saying nobody is making a determination. In your opinion are things going well now. Is there a problem?

**Illona Jeffcoat-Sacco, PSC:** I am going from memory. We had another attorney handling those cases. This federal determination about public and private, the processes we had worked well. There was public notice to get public input. On Fraine Barracks there was a lot of back and forth to make sure it remained safe. Whether there are questions that have not come to the commission, I don't know. I will do research from our public contact.

**Representative Fehr:** This amendment would interject the local political subdivision. Would that be interference or welcomed input?

**Illona Jeffcoat-Sacco, PSC:** I can't say. I would answer after discussion with the commission. When we read the bill the first time, we thought we have no position.

**Representative Fehr:** I would want them to do that.

**Connie Sprynczynatyk, North Dakota League of Cities:** This mixes up a relationship. It inserts local government into a relationship that I am not certain we are ready to deal with. We have a concern about liability if you pass this bill.

Relationship and process are the two key words. Do you have a process in place to handle disputes? What is the relationship among all of the parties? In regard to the 357 incorporated cities, many were established as service towns for the railroad. Today's relationship with the railroad typically in a city deals with quiet rail. We now have a length those horns have to be blown. Horns are now at 115 decibels. My office window is by the 5<sup>th</sup> street crossing. I can tell you how it affects life. You have a process in place. It took a year and Fraine Barracks was declared a private crossing.

**Chairman Dennis Johnson:** Closed the hearing.

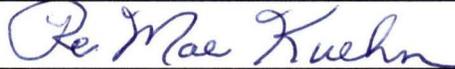
# 2013 HOUSE STANDING COMMITTEE MINUTES

House Agriculture Committee  
Peace Garden Room, State Capitol

HB 1445  
February 15, 2013  
Job #19062

Conference Committee

Committee Clerk Signature



## Explanation or reason for introduction of bill/resolution:

(Committee Work)

Relating to railroad crossings.

## Minutes:

Attachments #1-3

## Representative M. Nelson: (See attachment #1)

It seems the basic problem we have is the annual updating has not been taking place.

## Illona Jeffcoat-Sacco: (See attachment #2)

We go to a formal process. Someone has to petition in writing with sufficient information in it. Then we issue a formal notice. Then we schedule a hearing. We have the hearing in the location near the crossing. That petitioner is expected to come with evidence both testimony and documentary evidence. It is open to the public and anyone else with concerns.

In the Fraine Barracks situation, we had many landowners who were there providing information to the commission. The commission makes its determination only on the record evidence and it is subject to appeal.

There is a liability issue; but you have that entire process behind you. We also believe that it would be costly. We would need funds or FTEs. There would also be maintenance. Those crossing could change based on traffic.

Our consumer affairs person said, on page 2, he had nine complaints. He forwarded those to the railroad for resolution. Of those nine, there were none regarding public or private crossing issues. Seven were about blocked crossings. Two were about noise.

I attached the three orders issued on the public/private whistle blowing issue to the letter. We had a request from the railroad on seven crossings. That is case #09651. The commission ordered the whistle be blown at six of the seven.

We had another request at two crossings. The commission ordered it be blown at those two crossings after formal hearing.

The third one was the Fraine Barracks one that you have heard about.

We oppose the amendment of the counties.

**Representative M. Nelson:** The two complaints about train noise. How did you know that wasn't a private vs. public crossing issue?

**Illana Jeffcoat-Sacco:** I don't know the answer.

**Representative M. Nelson:** This morning I passed out the federal law. (See attachment #1) Does the Public Service Commission have a position as far as whether it is their responsibility to do the annual updating or is it the Dept. of Transportation's responsibility?

**Illana Jeffcoat-Sacco:** I believe the commission has a position. I believe the commission has not been doing the update. I have not heard any statements to that effect. We have waited until someone brings it to our attention.

**Representative M. Nelson:** Where the law says "railroad corporation, governmental entity, or private property owner may file with the commission a petition." How restrictive is the PSC in that. Could a railroad employee bring that action?

**Illana Jeffcoat-Sacco:** That issue has never come up. I hope we could get to the bottom if it is an employee.

**Representative M. Nelson:** If a dispute arises, does it have to rise to a certain level of disagreement?

**Illana Jeffcoat-Sacco:** It does not cause concern. If they just wrote us a letter and explained that there was an issue we would consider it a dispute. It is the formal process that brings out the best information.

(Attachment #3 handed out by Jim Chase)

**Representative Belter:** Moved Do Not Pass

**Representative Trottier:** Seconds the motion.

**Representative Belter:** I can understand the situation brought forward. It appears to me we have the proper mechanisms in law now.

**Representative Rust:** I will also support Do Not Pass. You are putting responsibility on Political Subdivisions that is pretty heavy.

**Representative Larson:** I agree. The PSC would have to add people to survey crossings. That responsibility with the Political Subdivisions would also have a fiscal impact. There haven't been any disputes regarding private/public. I will also vote against this.

**A Roll Call vote was taken: Yes 10, No 1, Absent 2. (Reps. Heilman & Haak)**

**Do Not Pass carries.**

**Representative Fehr will carry the bill.**

Date: 2/15/13

Roll Call Vote #: 1

**2013 HOUSE STANDING COMMITTEE  
ROLL CALL VOTES  
BILL/RESOLUTION NO. 1445**

House **Agriculture** Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken:     Do Pass     Do Not Pass     Amended     Consent Calendar  
                          Rerefer to Appropriations     Reconsider

Motion Made By Rep. Belter                      Seconded By Rep. Trottier

<b>Representatives</b>	<b>Yes</b>	<b>No</b>	<b>Representatives</b>	<b>Yes</b>	<b>No</b>
Chairman Dennis Johnson	X		Rep. Joshua Boschee	X	
Vice Chairman John Wall	X		Rep. Jessica Haak	AB	
Rep. Wesley Belter	X		Rep. Marvin Nelson		X
Rep. Alan Fehr	X				
Rep. Craig Headland	X				
Rep. Joe Heilman	AB				
Rep. Dwight Kiefert	X				
Rep. Diane Larson	X				
Rep. David Rust	X				
Rep. Wayne Trottier	X				

**Total**    Yes 10                      No 1

Absent 2

Floor Assignment Representative Fehr

If the vote is on an amendment, briefly indicate intent:

**REPORT OF STANDING COMMITTEE**

**HB 1445: Agriculture Committee (Rep. D. Johnson, Chairman) recommends DO NOT PASS (10 YEAS, 1 NAYS, 2 ABSENT AND NOT VOTING). HB 1445 was placed on the Eleventh order on the calendar.**

**2013 TESTIMONY**

**HB 1445**



# /

*Transportation Division*  
North Dakota State Legislative Board

**Testimony of Jim Chase  
Before the House Agriculture Committee  
In Support of HB 1445  
February 14, 2013**

Mr. Chairman and members of the House Agriculture Committee, my name is Jim Chase. I am North Dakota State Legislative Director for the United Transportation Union. The UTU is the largest rail labor union in North America. Our membership includes conductors, engineers, switchmen, trainmen, and yardmasters.

I rise today in support of House Bill 1445 and the amendment proposed by the bill's prime sponsor. This bill has been introduced in order to clarify who is initially responsible for determining if a rail crossing is public or private.

Back in 2009 we asked for a bill that would make it illegal for train horns to be sounded at private crossings in North Dakota; the bill also provided a definition of a public crossing. This definition was written to mirror federal law and states: "Public railroad crossing" means a location where a public highway, road, or street, including associated sidewalks or pathways, crosses one or more railroad tracks at grade. **The term includes a crossing if a public authority maintains the roadway on both sides of the crossing.** "Private railroad crossing" means any railroad at grade crossing of a roadway which is not a public railroad crossing. (See handout.)

The original bill's intent was to eliminate the need to blow train whistles at private crossings that met the new definition, such as section line roads and field-to-field crossings not maintained by a public authority on both sides. Following implementation, the railroads did stop requiring trains to blow the whistle at about 20 crossings statewide; however, we had identified many more (up to 200) that qualified as private crossings under the new definition.

Testimony of Jim Chase  
House Agriculture Committee  
HB 1445

I have done the research to determine why we are still being required to blow the whistle at these obviously private crossings. I have contacted the three entities involved, namely, the BNSF Railway Corporation, the North Dakota Department of Transportation and the Public Service Commission.

BNSF Railway stated that it is relying on the federal Department of Transportation's crossing database, which has not been updated since the law went into effect. BNSF asserts that it does not have the authority to change the designation of a crossing to either public or private.

The North Dakota Department of Transportation stated that it is not its responsibility to determine the status of a crossing.

The Public Service Commission asserted that they do not have the authority to initially declare a crossing public or private; however, if the initial determination has been made and a dispute then arises, a petition could be filed by a railroad corporation, governmental entity, or private property owner. At that point, the commission would make a determination as to whether the crossing is public or private. It has become apparent that the entities involved are not willing or able to determine the crossings status.

During the course of my research into whose responsibility it is to determine a crossing's status, it has become evident that those most qualified to do so are the affected political subdivisions. A county engineer or road superintendent could easily determine if a road is maintained on either side of a crossing. The findings should then be reported to the North Dakota Department of Transportation for the purpose of updating both the state and federal crossing databases.

This follow-up piece of legislation is the key to moving forward and silencing unnecessary rail whistles across North Dakota. I ask that this committee recommends a "DO PASS" on House Bill 1445.



RAILROAD  
CROSSING  
ROAD

RAILROAD  
CROSSING

ROAD

ROAD





STOP

PRIVATE  
CROSSING  
NO TRESPASSING  
NEW TN









**CHAPTER 49-11**  
**RAILROAD BRIDGES, CROSSINGS, INTERSECTIONS, AND FENCES**

*H.R.*  
*2/14/13*  
*Ron Huff*

**49-11-00.1. Definitions.**

In this chapter, unless the context otherwise requires:



1. "Public railroad crossing" means a location where a public highway, road, or street, including associated sidewalks or pathways, crosses one or more railroad tracks at grade. The term includes a crossing if a public authority maintains the roadway on both sides of the crossing.
2. "Private railroad crossing" means any railroad at grade crossing of a roadway which is not a public railroad crossing.

**49-11-01. Obstruction of crossing by railroad - Provision for temporary way.**

Every railroad corporation while engaged in raising or lowering any railroad track or in making any other alterations, by means of which a railroad crossing may be obstructed, shall provide and keep in good order a suitable temporary way and crossing with adequate protection to enable travelers to avoid or pass such obstruction.

**49-11-02. Railroad bridges must be in good repair.**

Every railroad corporation shall maintain and keep in good repair all bridges and their abutments which the corporation shall construct for the purpose of enabling its road to pass over or under any public highway, watercourse, or other way. Railroad corporations which have transferred railway property to the public service commission in trust for the purposes of reorganization or reopening are not liable for failure to maintain railroad bridges in good repair during the period of trust.

**49-11-03. Railroad bridge must provide clear passage over highway.**

When it shall be necessary in the construction of a railroad to erect a bridge or culvert over any public highway or street, it shall be sufficient to construct the same so as to give a clear passageway of twenty feet [6.10 meters] or two passageways of fourteen feet [4.27 meters] each.

**49-11-04. Highways and watercourses to be restored to former state.**

Every corporation constructing, owning, or using a railroad shall restore every stream of water, watercourse, street, highway, or canal across, along, or upon which such railroad may be constructed to its former state or to such condition that its usefulness shall not be materially impaired and thereafter shall maintain the same in such condition against any effects in any manner produced by such railroad.

**49-11-05. Railroad to maintain sufficient highway crossings.**

Repealed by S.L. 1993, ch. 278, § 2.

**49-11-06. Railroad crossings - Construction and maintenance.**

1. A public highway-railroad crossing at grade shall be constructed of a grade of earth on one or both sides of the railroad track, as the location may require, for the entire width of the highway grade but in no case less than twenty feet [6.10 meters] in width, the middle point of which shall be as nearly as practicable at the middle point of the highway and such grade shall be of such slope as shall be necessary for the safety and convenience of the traveling public.
2. Firmly fastened planks, concrete, asphalt, or other suitable material for highway construction shall be used on and for the full length of the ties used in the roadbed of such railway where such crossing occurs. The highway material next inside of the rail shall not be more than two and one-half inches [6.35 centimeters] from the inside surface of such rail. The highway material used in the crossing shall not be less than

2. A person that violates this section is guilty of a class B misdemeanor. This section does not apply to a city that has an ordinance covering the same subject matter.

**49-11-19.1. Blocking or obstructing alternative crossings - Penalty.**

Any person operating a train who shall block or obstruct a public railroad crossing and who has the alternative of blocking or obstructing a crossing with active grade crossing traffic control devices or a crossing without such device shall, where feasible, and subject to the exception set forth in section 49-11-19, leave open the crossing with active grade crossing control devices. Any person who violates this section is guilty of an infraction.

**49-11-20. Installation of flagman at crossings.**

Whenever it shall appear that owing to any construction work or repair work, or for any other cause, an unusual number of trains are being operated in or through any city in this state, the commission, upon complaint by the governing body of such city through its chief executive officer, shall compel the installation of a flagman, without a hearing. Such order shall be complied with within five days. The railroad corporation may remove such flagman whenever the movement of trains through such city assumes a normal condition.

**49-11-21. Warning device sounded at crossing by locomotive - Exceptions.**

1. A warning device must be placed on each locomotive engine and the device on the lead locomotive must be sounded when approaching a public railroad crossing, and must continue to be sounded until the locomotive enters the public railroad crossing.
2. The warning device may not be sounded at a private railroad crossing. However, a party may petition the commission to request that a horn be sounded at a private railroad crossing. The commission shall review the request and issue an order approving or denying the request based on the safety concerns of the public. A party may not be subject to any liability as a result of not making a request.
3. The governing body of a city may adopt a quiet zone ordinance, as allowed by federal law and implemented under the federal railroad administration's supplemental safety measures for at-grade crossings, prohibiting a locomotive engine from sounding a warning device at crossings within the quiet zone under regular crossing conditions.
4. Notwithstanding any other provision of this section, a locomotive engineer may sound a locomotive horn at any crossing to provide a warning to animals, vehicle operators, pedestrians, trespassers, or crews on other trains in an emergency situation if in the locomotive engineer's judgment the action is appropriate to prevent imminent injury, death, or property damage.

**49-11-22. Liability for failure of locomotive to sound bell, horn, or whistle at crossing.**

1. A railroad that has operational control of a locomotive that fails to sound its warning device at any crossing as required by section 49-11-21 is guilty of an infraction.
2. If a crew member of a locomotive does not sound a warning device at a crossing for which the sounding of a warning device is not required, any crew member or railroad with operational control of the locomotive may not be liable for any damages sustained by a person by reason of the failure to sound a warning device.
3. This section does not exempt a railroad corporation from any liability created under chapter 49-16 or the Federal Employers' Liability Act [45 U.S.C. 51 et seq.] for injuries to its employees or agents.

**49-11-23. Liability of engineer for failure to sound bell, horn, or whistle of locomotive at crossing.**

Every locomotive engineer who does not cause a warning device to be sounded as required by section 49-11-21 shall be guilty of an infraction.

**49-10.1-14. Commission may adopt and enforce safety rules.**

The commission, for the protection of persons and property, may adopt and enforce railroad safety rules not inconsistent with any federal agency having jurisdiction over railroads. The commission may adopt rules more stringent than federal rules when necessary to eliminate an essentially state or local safety hazard if the rules are not incompatible with any federal law or rule and do not create an undue burden on interstate commerce.

#3 2/14/13  
Ron Huff

**49-10.1-15. Semimonthly pay to railroad employees.**

All railroads doing business within this state are required to pay their employees, at least semimonthly, the wages earned by them within fifteen days of the date of such payment unless prevented by inevitable casualty. Whenever an employee shall be discharged, the employee's wages shall be paid to the employee at the time of the employee's discharge or whenever the employee shall demand the same thereafter.

**49-10.1-16. Intoxicated engineer or conductor - Penalty.**

Every person who is intoxicated while in charge as engineer of a locomotive engine or while acting as a conductor or driver upon any railroad train or car is guilty of a class A misdemeanor.

**49-10.1-17. Agreements to restore Amtrak service.**

The governor or the director of the department of transportation may make agreements in accordance with applicable federal law with the state of Montana and relevant federal agencies for the renewal of service on the Amtrak north coast Hiawatha route from Fargo to Spokane, Washington. The governor, the director of the department of transportation, or the commissioner of commerce may enter agreements with any political subdivision, state, and federal agency for the restoration of daily service on the Amtrak empire builder route.

**49-10.1-18. Determination of train speeds.**

If the governing body of a city proposes to establish a speed limit on trains passing through its corporate limits and an agreement cannot be reached with the railway company operating the railroad, the governing body of the city may file with the commission a petition that sets forth the facts and requests the commission's assistance in resolving the matter.

**49-10.1-19. Critical incident stress debriefing policy.**

Each railroad corporation shall develop a written critical incident stress debriefing policy. The railroad corporation shall keep a copy of the policy posted in a conspicuous place on an area of its premises commonly frequented by its employees. Penalties for a violation of this section are limited to those allowed in section 49-07-01.1.

**49-10.1-20. Accident report.**

A railroad corporation shall provide immediate notification to the department of emergency services of an accidental release of a hazardous material.

**\* 49-10.1-21. Railroad crossing determination.**

If a dispute arises as to whether a railroad grade crossing should be classified as public or private as defined in section 49-11-00.1, the railroad corporation, governmental entity, or private property owner may file with the commission a petition and the commission shall determine whether the crossing is public or private.

#4

**Brotherhood of Locomotive Engineers and Trainmen**

**North Dakota State Legislative Board**

Chairman: Charles Weick

February 14, 2013

RE: HB 1445

Mr. Chairman, Members of the Agriculture Committee

My name is Charles Weick and as State Chairman represent the Brotherhood of Locomotive Engineers and Trainmen here in North Dakota. I'm here today to speak in favor of HB 1445. As stated in the North Dakota century code 49-11-00.1 the term public crossing is defined as a location where a public highway road or street crosses one or more railroad tracks at grade. The term includes a crossing if a public authority maintains the roadway on both sides of the crossing. A private railroad crossing means any railroad at grade crossing of a roadway which is not a public railroad crossing.

**I would like to talk about how Locomotive Engineers and crews are disciplined for sounding or not sounding the whistle at crossings. North Dakota century code 49-11-21 states a warning device must be placed on the lead locomotive and sounded when approaching a public crossing and continues sounding until the locomotive enters the crossing. The warning device may not be sounded at a private crossing. Civil penalties can be assessed by the Federal Railroad Administration for violating this law and additional discipline can be assessed by the company.**

**Appendix H to Part 222—Schedule of Civil Penalties <sup>1</sup>**

Section	Violation	Willful violation
<b>Subpart B—Use of Locomotive Horns</b>		
§ 222.21 Use of locomotive horn		
(a) Failure to sound horn at grade crossing	\$5,000	\$7,500
Failure to sound horn in proper pattern	1,000	3,000
(b) Failure to sound horn at least 15 seconds and less than 1/4-mile before crossing	5,000	7,500

Sounding the locomotive horn more than 25 seconds before crossing	1,000	2,000
Sounding the locomotive horn more than 1/4-mile in advance of crossing	1,000	2,000
§ 222.33 Failure to sound horn when conditions of § 222.33 are not met	5,000	7,500
§ 222.45 Routine sounding of the locomotive horn at quiet zone crossing	5,000	7,500
§ 222.49 (b) Failure to provide Grade Crossing Inventory Form information	2,500	5,000
§ 222.59 (d) Routine sounding of the locomotive horn at a grade crossing equipped with wayside horn	5,000	7,500

Every locomotive has a black box on board similar to airlines. These can be downloaded from company headquarters after our run or at the end of our shift. A computer program allows the company to check our compliance with the whistle law at crossings. These downloads can be requested from the company by the Federal railroad Administration for further assessment. If I miss a whistle post or crossing in adverse weather this could be viewed as a serious infraction. Therefore I believe we need to determine the public and private crossings in our state and allow the railroad companies to remove the whistle posts at private crossings.

Mr. Chairman, members of the committee, for the reasons listed above I recommend a due pass on HB 1445. My personal information is listed below and I would be happy to answer any questions and e-mails.

Charles Weick, Chairman

701-693-5596 cell

701-693-2234 home

weick22@hotmail.com

## HB 1445

#5  
2/14/13  
John Olson

HB 1445 is a confusing bill that appears to duplicate what the state is already doing by creating another layer to an existing process. It would require local governments to take on extra costs and work to do what the state does now, apparently in a vain attempt to get around federal rules.

North Dakota's current law prohibiting sounding the horn at private crossings arose largely from employees of BNSF Railway objecting to being required to sound the horn at private crossings and facing the threat of discipline if they failed to do so. Railroads require sounding the horn at many private crossings for the same reason the federal government requires it at public crossings: safety.

In response, the legislature enacted a law that forbids sounding the horn at crossings that do not meet the federal definition of public, but allows appeals to the Public Service Commission for cases where there are safety concerns. BNSF filed appeals for a number of crossings where there are concerns about visibility, curvature, or the volume or type of traffic using the crossing.

We are not sure what this bill accomplishes. Current law says the Public Service Commission shall handle disputes and determine if a crossing is public or private. This bill would have the local road authority make an initial determination, which can be appealed to the Public Service Commission.

We don't understand the need for this bill. The fact is that state law clearly calls for the PSC to make the call, applying the state's public crossing definition, which is almost verbatim the federal definition of a public crossing. (Definitions attached) The PSC doesn't have the authority to overrule the federal definition of a public crossing, and claim a crossing is private when the federal definition makes it public, but no state legislation can fix that.

Under NDCC section 24-09-01.1 the North Dakota DOT already is required to maintain a survey of all railroad crossings in North Dakota in order to prioritize safety upgrades using federal funds. The law dictates minimum safety signage at public crossings, requires the DOT to "survey" these public railroad crossings and maintain an inventory. This subject is also covered in part by the Manual of Uniform Traffic Devices, which is a federal manual that has been incorporated as part of the North Dakota state law.

So the job of initially identifying public crossings is already being done. And the PSC has the charge to settle disputes under the current law.

And if the local jurisdiction decides a crossing is private, presumably it would then order us to stop sounding the horn. But we are bound by federal rules and definitions, so if we disagree we will have to keep sounding the horn, and wind up either at the PSC or in court. Are the local jurisdictions going to bear the cost of those appeals?

The bottom line is that train horns MUST be sounded at public crossings as defined by the federal government. The North Dakota law uses the federal government's definition, because the federal rule trumps any state action. We understand there is some belief that the list of public crossings needs to be cleaned up. But leaving that up to each city, township or county to do it on its own would only cause confusion. The bill doesn't even require that the railroad or DOT be notified that the issue is being considered.

Some of the problem may result from misunderstandings. There are a number of public crossings that at first glance appear to little-used private crossings. But they are in fact section-line roads on public easements every mile. Some of these look like little more than dirt tracks, but they meet the federal definition. Another example is in Sanborn, where the road leading to the crossing has been underwater for some time, yet we continue to sound the horn. That's because the road hasn't been vacated, so it continues to meet the federal definition of a public crossing. We agree that it seems odd to sound the horn where vehicles can't even get to the track, but the rule requires it.

We're willing to research some of these crossings. Last month the unions provided BNSF with a list of about 35 crossings where they question the need for sounding the horn. (One of those, by the way, was the flooded Sanborn crossing.) BNSF has committed to reviewing the list to see if any of those crossings can be reclassified.

This bill will saddle the local governing body with the job of making a determination that is already being made and presumably, having to bear the trouble and cost of defending that decision on appeal to the Public Service Commission or the courts.

John Olson  
[olsonpc@midco.net](mailto:olsonpc@midco.net)  
(701) 426-9393

On behalf of BNSF Railway

## **Federal Government Grade Crossing Definitions Used in the Locomotive Horn Rule:**

*Public highway-rail grade crossing* means, for purposes of this part, a location where a public highway, road, or street, including associated sidewalks or pathways, crosses one or more railroad tracks at grade. If a public authority maintains the roadway on both sides of the crossing, the crossing is considered a public crossing for purposes of this part.

*Private highway-rail grade crossing* means, for purposes of this part, a highway-rail grade crossing which is not a public highway-rail crossing.

49 CFR 222.9 Definitions

## **North Dakota Definitions:**

1. “Public railroad crossing means a location where a public highway, road, or street, including associated sidewalks or pathways, crosses one or more railroad tracks at grade. The term includes a crossing if a public authority maintains the roadway on both sides of the crossing.
2. “Private railroad crossing” means any railroad at grade crossing of a roadway which is not a public railroad crossing.

NDCC 49-11-00.1 - Definitions

Testimony to the  
**House Agriculture Committee**  
Prepared February 14, 2013 by  
Terry Traynor, Assistant Director  
North Dakota Association of Counties

### **Regarding: HB1445 – Railroad Crossing Determination**

Mr. Chairman and committee members, county officials across the state recognize the concern this bill is attempting to address, but have asked that I express their opposition to the solution proposed in House Bill 1445.

The existing statute that this bill amends, already establishes the PSC as the ultimate authority for the determination of public and private railroad crossings. Adding the county, township and city authorities into this process will only increase the complications and shift liability to local government. The bill doesn't identify who should be responsible or who is qualified to make the required determinations. It doesn't establish the standards that should apply for such a determination. It doesn't address the burden of monitoring for, and notification of, possible changes in the character of any of the tens of thousands of potential crossings.

We believe the bill can be amended, as indicated below, to broaden the role of the PSC, and leave the political subdivisions out of the process. Without such amendments, we urge a Do Not Pass recommendation.

#### **PROPOSED AMENDMENTS TO HOUSE BILL No. 1445**

Page 1, line 7, remove "private" and the second "the"

Page 1, remove lines 8 and 9

Page 1, line 10, remove "subdivision, if" and overstrike "a dispute arises"

Renumber accordingly

HB 1445

Rep. Neilson  
#1  
2/15/13

The purpose of the U.S. DOT National Highway-Rail Crossing Inventory Program is to provide a uniform national inventory database that can be applied to the improvement of safety at highway-rail intersections.

The information can be used for planning and implementation of crossing improvement programs by public and private agencies responsible for highway-rail crossing safety.

For Crossing Inventory purposes, a crossing is defined as those tracks that exist between a pair of the same type of warning devices.

The Highway-Rail Crossing Inventory Program is a required process by law whereby every crossing in the nation is assigned a Crossing Inventory Number (a six digit number followed by an alphabetical character) which coincides with inventory information on the location, classification, physical characteristics, traffic control and warning devices, railroad data, and highway data that is obtained and recorded in the US DOT National Highway-Rail Crossing Inventory File, as well as in individual State and Railroad files. All crossings in the United States, public, private and pedestrian, both at-grade and grade-separated (underpasses and overpasses) must have a DOT Crossing Inventory Number assigned. The Act requires States and Railroads to update annually by September 30th of each year after October 16, 2010.

## **U.S. DOT**

### **NATIONAL HIGHWAY-RAIL CROSSING INVENTORY**

#### **Policy, Procedures and Instructions for updating the database.**

##### **For States and Railroads**

There is often a conflict in the National File with these fields when updates are submitted. When such conflicts exist, FRA may request the submitting agency to confirm that the updated information is correct. This confirmation can be provided by submitting a simple letter (or email) directing the FRA (or its Contractor) to effect the changes and that the data is correct. The submitting agency is taking responsibility for the accuracy of the information provided. For such cases, the submitting agency should check with the opposing agency to confirm and resolve any conflicts before directing FRA to make the change.

Crossing Type (public or private) is usually obvious. However, in certain situations where it is not clear, resolution of the conflict will require discussions and agreement by both the Railroad and the State. The State needs to implement procedures to determine and designate which crossings are public in their State and so notify the affected Railroad.

### **Why Do Locomotives Need to Sound Their Horns?**

In accordance with a statutory mandate, FRA issued regulations which took effect in 2005 that require locomotive horns be sounded in advance of all public highway-rail crossings, and provide local communities the option of silencing them by establishing quiet zones. Under the Federal regulation, locomotive engineers must sound train horns for a minimum of 15 seconds, and a maximum of 20 seconds, in advance of all public grade crossings, except:

- If a train is traveling faster than 45mph, engineers do not have to sound the horn until it is within ¼ mile of the crossing, even if the advance warning is less than 15 seconds.

- If a train stops in close proximity to a crossing, the horn does not have to be sounded when the train begins to move again.
- A “good faith” exception at locations where engineers can’t precisely estimate their arrival at a crossing.

Wherever feasible, train horns must be sounded in a standardized pattern of 2 long, 1 short and 1 long and the horn must continue to sound until the lead locomotive or train car occupies the grade crossing. The minimum volume level for locomotive horns is 96 decibels and the maximum volume level is 110 decibels.

## **CODE OF FEDERAL REGULATIONS Subpart B—Use of Locomotive Horns**

### **§ 222.21**

When must a locomotive horn be used?

(a) Except as provided in this part, the locomotive horn on the lead locomotive of a train, lite locomotive consist, individual locomotive or lead cab car shall be sounded when such locomotive or lead cab car is approaching a public highway-rail grade crossing. Sounding of the locomotive horn with two long blasts, one short blast and one long blast shall be initiated at a location so as to be in accordance with paragraph (b) of this section and shall be repeated or prolonged until the locomotive occupies the crossing. This pattern may be varied as necessary where crossings are spaced closely together.

### **§ 222.25 How does this rule affect private highway-rail grade crossings?**

This rule does not require the routine sounding of locomotive horns at private highway-rail grade crossings. However, where State law requires the sounding of a locomotive horn at private highway-rail grade crossings, the locomotive horn shall be sounded in accordance with § 222.21 of this part. Where State law requires the sounding of a locomotive audible warning device other than the locomotive horn at private highway-rail grade crossings, that locomotive audible warning device shall be sounded in accordance with §§ 222.21(b) and (d) of this part.

### **§ 222.9 Definitions.**

*Private highway-rail grade crossing* means, for purposes of this part, a highway-rail grade crossing which is not a public highway-rail grade crossing.

*Public highway-rail grade crossing* means, for purposes of this part, a location where a public highway, road, or street, including associated sidewalks or pathways, crosses one or more railroad tracks at grade. If a public authority maintains the roadway on both sides of the crossing, the crossing is considered a public crossing for purposes of this part.



# Public Service Commission

## State of North Dakota

#2

COMMISSIONERS

Brian P. Kalk  
Randy Christmann  
Julie Fedorchak

Executive Secretary  
Darrell Nitschke

600 East Boulevard, Dept. 408  
Bismarck, North Dakota 58505-0480  
Web: [www.psc.nd.gov](http://www.psc.nd.gov)  
E-mail: [ndpsc@nd.gov](mailto:ndpsc@nd.gov)  
Phone: 701-328-2400  
ND Toll Free: 1-877-245-6685  
Fax: 701-328-2410  
TDD: 800-366-6888 or 711

15 February 2013

Honorable Dennis Johnson, Chairman  
Agriculture Committee  
North Dakota House of Representatives  
600 East Boulevard Avenue  
Bismarck, ND 58505

Re: House Bill 1445

Dear Chairman Johnson:

Thank you for the opportunity to provide the Public Service Commission's position on proposed amendments to HB 1445, and to respond to some of the committee's discussion at yesterday's hearing on the bill

As I mentioned at the hearing yesterday, the Commission had no position on House Bill 1445 as introduced because the Commission did not see any impact from the bill on the Commission's responsibilities under existing law. The Commission would have the same position regarding the amendment offered by Representative Weisz, for the same reasons.

The commission opposes the amendment offered by the Association of Counties. The Commission believes the current process is adequate and works well.

If the Commission is asked to determine that a crossing is public or private, or whether a whistle should be blown at a private crossing, the Commission conducts a formal process before making a determination. The Commission schedules a hearing in the vicinity of the crossing at issue, and serves and publishes a Notice of Hearing inviting public testimony. At the hearing, the entity petitioning for the determination produces sworn testimony and evidence to justify what is requested and why, and any other interested person can similarly testify. Testimony is under oath and subject to cross examination. The Commission's decision must be based on the record evidence, and is subject to appeal under N.D.C.C. Chapter 28-32.

The Association of Counties amendment raises two concerns. As expressed by others who testified yesterday, the Commission is very much concerned with shifting potential liability that more appropriately lies with the railroad to the Commission. We see a significant difference between simply classifying crossings as public or private (the survey approached discussed yesterday) and making a similar determination after a

formal proceeding with full procedural due process, including public notice, sworn testimony, and the opportunity for cross-examination.

The Commission is also concerned with the amount of resources that would be necessary if the Commission is assigned such duties. If assigned the survey duties, the Commission would need to add FTEs to conduct the survey of crossings or be appropriated a significant amount to outsource the work.

In response to questions about whether the Commission has seen a lot of problems in this area, the person who handles Consumer Affairs for the Commission informed me that over the last nine months the Commission received nine complaints that were forwarded on to the railroad for resolution. Of those nine complaints there were none regarding concerns over private or public crossings. Most (seven) were about blocking crossings and the other two were about train noise.

Also, I have attached to this testimony copies of three orders issued by the Commission related to public/private crossings and the issue of whether the railroad should blow a whistle at a private crossing. These are the only cases the commission has heard on these issues.

The first order, Case No. RR-09-651, was issued 31 December 2009. It began with a petition from BNSF Railway Company asking for a determination of whether a whistle should be blown at seven private crossings. After hearing, the Commission ordered the whistle to be blown at six of the seven crossings.

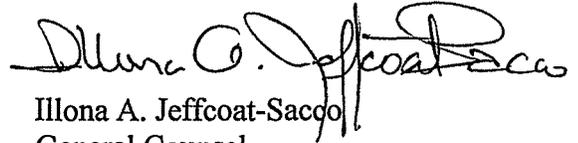
The second order, Case No. RR-10-27, relates a petition of BNSF Railway Company asking the Commission to review two private crossings to determine if a whistle should be blown. The Commission determined yes, a whistle should be blown at those two crossings.

The third order, Case No. RR-10-26, relates to the Fraine Barracks issue you heard about yesterday. BNSF Railway Company also brought this petition, asking the Commission to first determine if the crossing was private, and if yes, to determine if a whistle should be blown at that crossing. After two hearings and significant safety improvements were made by the city and the National Guard, the Commission determined that the crossing was private and that a whistle need not be blown.

Honorable Dennis Johnson  
15 February 2013  
Page 3

Thank you again for an opportunity to present this information.

Best regards,

  
Ilona A. Jeffcoat-Sacco  
General Counsel

c: Rep. John Wall, Vice Chairman  
Rep. Wesley R. Belter  
Rep. Joshua A. Boschee  
Rep. Alan Fehr  
Rep. Jessica Haak  
Rep. Craig Headland  
Rep. Joe Heilman  
Rep. Dwight Kiefert  
Rep. Diane Larson  
Rep. Marvin E. Nelson  
Rep. David S. Rust  
Rep. Wayne Trottier

**STATE OF NORTH DAKOTA  
PUBLIC SERVICE COMMISSION**

**BNSF Railway Company  
Review of Private Railroad Crossings  
Application**

**Case No. RR-09-651**

**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.

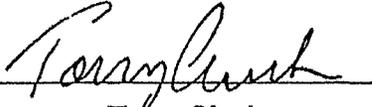
3. An audible warning of a train's approach be sounded at the private grade crossing located at or near Page, ND, identified as DOT # 093032L at milepost 40.17 on Line Segment 34.

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**

**STATE OF NORTH DAKOTA**  
**PUBLIC SERVICE COMMISSION**

**BNSF Railway Company**  
**Review of Private Railroad Crossings**  
**Application**

**Case No. RR-10-27**

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**

**April 8, 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 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 12, 2010, BNSF Railway Company (BNSF) submitted a letter petition requesting the Commission review two private railroad crossings near Manvel, North Dakota, and to issue an order determining whether or not audible devices warning of a train's approach should be sounded at these crossings 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 10:00 a.m. 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 #062517W near Manvel, ND, based on the safety concerns of the public.
2. Whether the railroad should sound a warning device at private crossing DOT #062518D near Manvel, ND, based on the safety concerns of the public.

On March 1, 2010, at 10:00 a.m., the public hearing was held in the Commission Hearing Room. Lynn Leibfried, P.E., Manager Public Projects, BNSF, presented evidence by affidavit and in response to questions from the Commission. Marc Halvorson, North Dakota State Legislative Director for Railroad Employees and Ron Huff, Brotherhood of Locomotive Engineers, 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 whistle posts from private grade crossings, BNSF identified two 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.
3. The two 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 near Manvel, ND, identified as DOT #062517W at milepost 13.02 on Line Segment 250; and
  - b. A private grade crossing located near Manvel, ND, identified as DOT #062518D at milepost 13.19 on Line Segment 250.
4. The photographs which accompanied BNSF's request with respect to private grade crossing DOT #062517W show a tree, a tree line, a change in elevation between the railroad tracks and the road with which it intersects and a curve in the railroad tracks that may restrict the view of motorists and train crews as they approach the crossing.
5. The photographs which accompanied BNSF's request with respect to private grade crossing DOT #062518D, show trees, vegetation, a change in elevation between the railroad tracks and the road with which it intersects and a curve in the railroad tracks that may restrict the view of motorists and train crews as they approach the crossing.
6. Marc Halvorson and Ron Huff provided information to the Commission, including a letter from an adjacent landowner requesting removal of the whistle post, but also acknowledged there was a safety concern due to the trees that may restrict the view that operators of motor vehicles and trains may have of one another as they approach the crossing.

7. The Commission received no evidence in response to the notice of this hearing directly from any adjacent landowner or person who may use either crossing that the safety concerns of the public would not warrant audible warnings of a train's approach to either crossing.

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 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 near Manvel, ND, identified as DOT #062517W at milepost 13.02 on Line Segment 250 necessitate the sounding of audible warnings of a train's approach.

3. The public safety concerns at the private grade crossing located near Manvel, ND, identified as DOT #062518D at milepost 13.19 on Line Segment 250, 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:

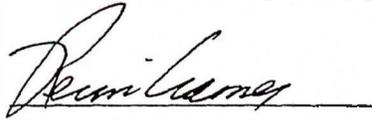
1. An audible warning of a train's approach be sounded at the private grade crossing located near Manvel, ND, identified as DOT #062517W at milepost 13.02 on Line Segment 250.

2. An audible warning of a train's approach be sounded at the private grade crossing located near Manvel, ND, identified as DOT #062518D at milepost 13.19 on Line Segment 250.

### PUBLIC SERVICE COMMISSION



**Tony Clark**  
Commissioner



**Kevin Cramer**  
Chairman



**Brian P. Kalk**  
Commissioner

**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 15, 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 49-11-00.1.
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 its Findings of Fact, Conclusions of Law and Order determining that the Fraine Barracks crossing would be a private crossing after certain modifications were made to the crossing, and that further 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 Commission issued a Notice of Hearing reopening the record to incorporate additional relevant evidence and scheduling a hearing for November 29, 2010, at 1:30 p.m. in the Commission Hearing Room, 12<sup>th</sup> 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 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 .

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 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 North Dakota 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. The January 15, 1944 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 January 15, 1944 Private Railroad Crossing Agreement in order to implement in part the Commission's May 18, 2010 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 May 5, 2010 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 March 1, 2010 hearing that the speed of trains at the Fraine Barracks crossing is approximately 16 miles per hour and not more than 35 miles per hour.

13. There have been two incidents involving a collision between a train and a motor vehicle at the Fraine Barracks crossing: one in 1986 and the other in 1998, both prior to the subsequent implementation of restrictions at the crossing 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 stated:

1. Post 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. Post 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. Upgrade the size of stop signs on the north approach to the crossing and post on both sides of the trail.
  4. Focus a security camera in Fraine Barracks on the crossing to record drivers who do not stop at the crossing.
  5. Adjutant General will discipline non-compliant drivers by eliminating their gate privileges.
  6. Fence 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. 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 fenceline 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. Subsequent to the Commission's May 18, 2010 Order, the following modifications have been made to improve safety at the Fraine Barracks crossing:
- a. The City of Bismarck posted a sign on Schafer Street at the south entrance to the National Energy Center of Excellence 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."
  - b. 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."
  - c. Directly below the advance warning sign, the City of Bismarck also posted a square yellow sign stating in black letters: "ALL/VEHICLES/MUST STOP." 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.

- d. Close to 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."
- e. 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. The North Dakota National Guard and the City of Bismarck agreed that rather than posting both upgraded stop signs on the north side of the railroad tracks, 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. 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.
- f. 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."
- g. 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. Upon the issuance of a Commission decision after 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 days for a first violation, thirty days for the second violation, one year for the third violation and permanently if there is a fourth violation.
- h. Gated fencing has been installed in the area between the railroad right of way and the existing North Dakota 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. Under the September 6, 2010 Letter Agreement between BNSF and the North Dakota National Guard amending the January 15, 1944 Private Railroad Crossing Agreement, the locked gates and fencing was installed, and is owned and will 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.

- i. 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.
- j. The North Dakota National Guard, with assistance from the City of Bismarck, has committed to removing or pruning any 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 January 15, 1944 Private Railroad Crossing Agreement further provides that the North Dakota National Guard will remove and keep removed any vegetation that will interfere with the ability to see approaching trains 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 its May 5, 2010 letter to the Commission and September 6, 2010 letter agreement 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. 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.

18. The modifications made to the Fraine Barracks crossing satisfy the requirements of the Commission's May 18, 2010 Order as amended and supplemented by these Findings of Fact, Conclusions of Law and Order .

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. Under the January 15, 1944 Private Railroad Crossing Agreement as amended by the September 6, 2010 Letter Agreement between BNSF Railway and the North Dakota National Guard 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 Findings of Fact and Conclusions of Law, the Commission now makes its:

**Order**

The Commission orders:

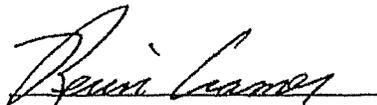
1. Fraine Barracks crossing (DOT #087680P) is a private railroad crossing, and as such, federal whistle regulations do not apply.

2. Audible devices warning of a train's approach may not be sounded at the Fraine Barracks railroad crossing (DOT # 087680P) unless an exception stated in North Dakota Century Code section 49-11-21 applies, and BNSF Railway Company shall remove the whistle posts.

**PUBLIC SERVICE COMMISSION**



**Tony Clark**  
Commissioner



**Kevin Cramer**  
Chairman



**Brian P. Kalk**  
Commissioner



# 3  
2/15/13

**Transportation Division**  
North Dakota State Legislative Board

**From, Jim Chase**

**Members of the House Agriculture Committee,**

**As a result of testimony that has been presented, we feel compelled to address several issues.**

**If liability is a deciding factor in supporting this legislation then we would submit to you that a hold harmless amendment would likely reduce concerns. E.g. "A political subdivision may not be held liable for any damages sustained as a result of determining a rail crossing status as being public or private.**

**Any action that a political subdivision takes or does not take has the potential to expose that entity to liability. This proposal neither creates nor diminishes any previously existing exposure.**

**The suggestion was made that communication with the railroad companies are open, ongoing, and could resolve this issue. This communication, while ongoing since 2010, has not resolved any issues.**

**We believe that there has been only nominal compliance with the law passed in 2009. Completing this process in a timely manner is appropriate but not urgent.**

**The possibility of the database ever being updated in terms of which crossings are public or private (as per the 2009 law) is highly unlikely under the present system of "dispute" resolution only. The PSC would have to hear hundreds of cases before we could even get close to the number crossings that need to be addressed. Abandoned rail crossings will continue to be just that...abandoned and whistled.**

**There needs to be an incentive, a mandate, or some punitive process for there to be resolution of this crossing status issue whether it is a political subdivision, the railroad, the PSC, or the NDDOT.**

**The state and federal laws are clear that the determination must be made and maintained by some entity. This proposal is our way of suggesting how this can be done with the least cost and effort over time.**

**Thank you for your consideration of this bill it is an important issue we are trying to resolve.**