

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

Donald Zillig, County Board Member,)	
)	
Complainant,)	
)	No. T13-103
vs.)	
)	
BNSF Railway Company, a Delaware Corporation,)	
)	
Respondent.)	
)	

Complaint as to crossing closure (306 921H) located in East Dubuque, Jo Daviess County, Illinois.

**BNSF’S MOTION TO DISMISS AND TO
CANCEL THE HEARING OF NOVEMBER 21, 2013**

NOW COMES Respondent, BNSF Railway Company (BNSF), and respectfully moves pursuant to 735 ILCS 5/2-615 to dismiss the Complaint of Donald Zillig, County Board Member, with prejudice based upon a failure to state a claim and for want of jurisdiction, and to cancel the hearing of November 21, 2013 until Motion to Dismiss is resolved. In support hereof, your Respondent states:

1. Complainant filed the instant complaint about the closing of a private crossing inventoried as DOT # 306 921H on October 15, 2013.
2. The Complaint is presumably filed pursuant to the formal Complaint process under Section 200.170 of Part 200 of Subchapter b of Chapter I of Title 83 of the Illinois Administrative Code.
3. A formal complaint must state “the acts or things done or omitted to be done in violation, or claimed to be in violation, of any statute, or of any order or rule of the Commission”.

4. All governmental agencies have considered both the crossing subject of the complaint as a private crossing. This includes the Illinois Commerce Commission (“ICC”) and the United States Department of Transportation (“USDOT”). See Exhibits 1 and 2 attached hereto and by this reference made a part hereof.

5. There are no known orders of the ICC concerning what has always been considered a private crossing, nor are any alleged to exist in the Complaint.

6. There are no regulations, statutes or rules of the ICC that are alleged to have been violated.

7. The Complaint is deficient on its face, and with no reasonable expectation of any curing of these defects, should be dismissed with prejudice.

8. BNSF believes that the jurisdiction of the Interstate Commerce Commission with regard to the private crossing is also at issue. As expressly set forth in subchapter 7 of the Illinois Commercial Transportation law, 625 ILCS 5/18c-7101, et. seq.

The jurisdiction of the Commission under this Sub-chapter shall be exclusive and shall extend to all intrastate and interstate rail carrier operations within this State, except to the extent that is jurisdiction is pre-empted by valid provisions of the Staggers Rail Act of 1980 or other valid federal statute, regulation, or order.

9. In Subchapter 7, the ICC’s expressed jurisdiction applies to public highways and crossings. A crossing that has not been approved by the ICC, upon petition and hearing, as a public crossing, is considered a private crossing. *Wehde v. RTA*, 237 Ill.App.3d 664, 604 N.E.2d 446 (2nd Dist. 1992), (additional citations omitted); citing *Martin v. ICGRR*, 237 Ill.App.3d 910, 917, 606 N.E.2d 9 (1st Dist. 1991). It is beyond dispute that there has been no petition, no hearing, and no approval a public crossing at DOT # 306 921H.

10. As the *Wehde* court noted:

This section (18c-7401) confers jurisdiction concerning *public* crossings to the ICC and sets forth a rail carrier's duties with respect public crossings in the interest of public safety. 237 Ill.App.3d at p. 673-674.

11. BNSF closed the old farm access crossing due to the safety issues that the underpass presented to its and the Illinois Central's train operations over the mainline tracks that BNSF is obligated to maintain by private agreement with the Illinois Central Railroad.

12. It was clearly the closure of a private crossing, and not in violation of any ICC order or rule. The complaint concerns what is represented as an old farm crossing that the ICC has no jurisdictional or regulatory basis under Section 200.170 to rule upon the instant complaint.

13. Finally, there is no standing for a County Board member to bring a Complaint of this nature. He asserts no enforceable property interest in the former underpass. The old farm access is alleged to be subject of a private conveyance by deed in 1885, and if an easement was created, it would be an easement appurtenant that cannot be conveyed separate or apart from the land. *Heritage Standard Bank v. Trustees of Schools*, 84 Ill.App.3d 653, 405 N.E.2d 1196 (1st Dist. 1980). The owner of an easement cannot materially increase the burden on the subservient estate (here the railroad), nor can he impose a new or additional burden. *Heritage Standard Bank*, 84 Ill.App.3d at p. 684; *Elser v. Village of Gross Point*, 223 Ill. 230 (1906). Mr. Zillig certainly cannot do what the owner of the former easement could not do.

WHEREFORE BNSF Railway Company respectfully requests for all of the foregoing reasons that the Illinois Commerce Commission (1) cancel the hearing on the complaint until after the motion to dismiss is decided (2) dismiss the Complaint with prejudice, (3) if the motion

to dismiss is denied, permit reasonable discovery prior to any hearing and (4) for other just and appropriate relief.

Respectfully submitted,

BNSF RAILWAY COMPANY,

By:

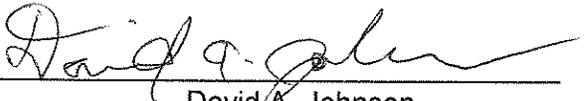
A handwritten signature in black ink that reads "Robert J. Prendergast". The signature is written in a cursive style with a horizontal line underneath it.

Robert J. Prendergast

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VERIFICATION

I, David A. Johnson, Manager Public Projects for the Respondent, BNSF Railway Company, hereby certify pursuant to 735 ILCS 5/1-109 that I have read the foregoing Motion to Dismiss, and the factual matters and exhibits contained therein are believed true and correct, to the best of my knowledge, information and belief.



David A. Johnson

CERTIFICATE OF SERVICE

I, Robert J. Prendergast, an attorney, hereby certify that on the 6th day of November, 2013, I caused the foregoing **BNSF'S MOTION TO DISMISS AND TO CANCEL THE HEARING OF NOVEMBER 21, 2013** to be served on attorneys/parties of record by e-filing the same with the Illinois Commerce Commission and by forwarding the same to the following at the email or street addresses listed below, before 5:00 p.m.:

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Robert J. Prendergast

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ICC » Transportation » Railroad Safety »

Grade Crossing Inventory

[Crossing Number Search](#) | [County Search](#) | [Advanced Search](#)
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[Collision History](#)
[Docket History](#)

Crossing Information

DOT/AAR Number:	306921H
Status:	Open
Railroad:	BNSF Railway Company
Milepost:	179.45
ICC Line Code:	W
Crossing Type:	Private (RR Over) Crossing (Industrial)
Type of Private Crossing:	Industrial
County Name:	Jo Daviess
City Name:	EAST DUBUQUE
In Or Near:	Near
Street Name:	
Highway Number:	
Railroad Division:	EASTERN
Railroad Subdivision:	DUBUQUE
Number of Main Tracks:	0
Number of Other Tracks:	0
Description of Other Tracks:	
Crossing Surface Type:	Unknown
Average Number of Daily Trains:	0
Train Speed - Timetable:	0
Train Speed - Minimum Likely:	0
Train Speed - Maximum Likely:	0
Maximum Warning Devices:	
Highway - Railroad Interconnect:	Unknown
Channelization:	Unknown
Signs Other Quantity 1:	0
Signs Other Description 1:	
Signs Other Quantity 2:	0
Signs Other Description 2:	
AADT:	0
Traffic Lanes:	0
Truck Percent:	0
Land Use:	Unknown
Angle of Intersection - Road to Rail:	Unknown
Highway Type:	Unknown
FHWA Road Class:	Unknown
On State Highway:	
Roadway Paved:	
Pavement Markings:	Unknown
Advanced Warning Signs:	
Track Within Street:	
Road Intersection Near:	Unknown
DOT Structure ID 1:	
DOT Remarks 1:	
FRA Quiet Zone:	(old)
Passenger Train Type:	Unknown
Average Passenger Trains Per Day:	0
Latitude:	42.47419920

Pictures

There are no pictures for this crossing.

EXHIBIT

1

exhibitsticker.com

Longitude:	90.61774680
LAT LONG Source:	Actual
ENS Sign:	No
EMERGENCY Phone Number:	
Posted Highway Speed:	0
Narrative Railroad:	
Narrative State 1:	
Data Last Updated:	10/16/1990

**U.S. DOT - CROSSING INVENTORY INFORMATION
AS OF 11/1/2013**

Crossing No.: **306921H** Update Reason: **Changed Crossing** Effective Begin-Date of Record: **01/01/11**
 Railroad: **BNSF BNSF Rwy Co. [BNSF]** End-Date of Record:
 Initiating Agency **Railroad** Type and Position: **Private RR Over**

Part I Location and Classification of Crossing

Division:	CHICAGO	State:	IL
Subdivision:	AURORA	County:	JO DAVIESS
Branch or Line Name:	AURORA-N LACROS	City:	Near EAST DUBUQUE
Railroad Milepost:	0182.79	Street or Road Name:	PRIVATE
RailRoad I.D. No.:	0003	Highway Type & No.:	
Nearest RR Timetable Stn:	EAST DUBUQUE	HSR Corridor ID:	
Parent Railroad:		County Map Ref. No.:	
Crossing Owner:		Latitude:	42.4741992
ENS Sign Installed:		Longitude:	-90.6177468
Passenger Service:	None	Lat/Long Source:	Actual
Avg Passenger Train Count:	0	Quiet Zone:	No
Adjacent Crossing with Separate Number:			

Private Crossing Information:

Category:	Farm	Public Access:	
No signs or signals	Specify Signs:	Specify Signals:	

	ST/RR A	ST/RR B	ST/RR C	ST/RR D
Railroad Use:				
State Use:				
Narrative:				

Emergency Contact: **(800)832-5452** Railroad Contact: **(817)352-1549** State Contact: **(217)782-0378**

Part II Railroad Information

Number of Daily Train Movements:		Less Than One Movement Per Day:	No
Total Trains:	50	Total Switching:	0
Typical Speed Range Over Crossing: From	0 to 60 mph	Day Thru:	25
Type and Number of Tracks:	Main: 2 Other: 0	Maximum Time Table Speed:	60
		Specify:	
Does Another RR Operate a Separate Track at Crossing?			No
Does Another RR Operate Over Your Track at Crossing?			No



U.S. DOT - CROSSING INVENTORY INFORMATION

Crossing **306921H**

Continued

Effective Begin-Date of Record: **01/01/11**

End-Date of Record:

Part III: Traffic Control Device Information

Signs:

Crossbucks: 0	Highway Stop Signs: 0
Advanced Warning:	Hump Crossing Sign:
Pavement Markings:	Other Signs: 0 Specify:
	0

Train Activated Devices:

Gates: 0	4 Quad or Full Barrier:
Mast Mounted FL: 0	Total Number FL Pairs: 0
Cantilevered FL (Over): 0	Cantilevered FL (Not over): 0
Other Flashing Lights: 0	Specify Other Flashing Lights:
Highway Traffic Signals: 0	Wigwags: 0 Bells: 0
Other Train Activated Warning Devices:	Special Warning Devices Not Train Activated:
Channelization:	Type of Train Detection: None
Track Equipped with Train Signals?	Traffic Light Interconnection/Preemption:

Part IV: Physical Characteristics

Type of Development:	Smallest Crossing Angle:
Number of Traffic Lanes Crossing Railroad:	Are Truck Pullout Lanes Present?
Is Highway Paved?	
Crossing Surface:	If Other:
Nearby Intersecting Highway?	Is it Signalized?
Does Track Run Down a Street?	Is Crossing Illuminated?
Is Commercial Power Available?	

Part V: Highway Information

Highway System:	Functional Classification of Road at Crossing:
Is Crossing on State Highway System:	
Annual Average Daily Traffic (AADT):	AADT Year: 1982
Estimated Percent Trucks:	Avg. No of School Buses per Day: 0
Posted Highway Speed: 0	