

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF TRANSPORTATION

In the Matter of Proposed
Permanent Rules Relating
to Railroad Grade Crossings

**REPORT OF THE
ADMINISTRATIVE LAW JUDGE**

The above-entitled matter came on for hearing before Administrative Law Judge Allan W. Klein on March 31, 1998, in St. Paul. The hearing recessed and then reconvened on April 29, 1998, in St. Paul, when it was completed.

This Report is part of a rulemaking proceeding held pursuant to Minn. Stat. §§ 14.131 to 14.20 (1997). The purpose of the Report is to gather and review public comments, to determine whether the Minnesota Department of Transportation (Mn/DOT) has fulfilled all relevant substantive and procedural requirements of law applicable to rulemaking, whether the proposed rules have been justified as needed and reasonable, and whether or not any modifications to the rules proposed by the Department after the initial publication constitute impermissible, substantial changes.

David L. Phillips, Assistant Attorney General, 525 Park Street, Suite 200, St. Paul, Minnesota 55103, appeared on behalf of the Department. Hope Jensen, the Department's rule coordinator, also appeared on behalf of the Department. The Department's hearing panel consisted of Al Vogel, Bob Swanson, Carla Helgeson, Bob Hohl, Ron Mattson and Joe Korcek.

Approximately six members of the public appeared for the March 31 hearing, only three of whom signed the hearing register. On April 29, approximately eight members of the public attended the hearing and five signed the hearing register. Both hearing sessions continued until all interested persons, groups and associations had an opportunity to be heard concerning the proposed amendments.

The record remained open until May 19, 1998, for the submission of written comments. During this initial comment period, the Agency filed a response to the issues raised during the rulemaking process, along with several proposals for changes in the proposed rules in response to those comments. No member of the public filed an initial comment. Thereafter, the record remained open for an additional five working days, to May 27, to allow for the filing of responsive comments. The only comment received was from Burlington Northern and Santa Fe Railway Company. The record closed for all purposes on May 27, 1998.

NOTICE

The Commissioner of the Department of Transportation must wait at least five working days before taking any final action on the rules; during that period, this Report must be made available to all interested persons upon request.

Pursuant to the provisions of Minn. Stat. § 14.15, subd. 3 and 4, this Report has been submitted to the Chief Administrative Law Judge for his approval. If the Chief Administrative Law Judge approves the adverse findings of this Report, he will advise the Commissioner of actions which will correct the defects and the Commissioner may not adopt the rule until the Chief Administrative Law Judge determines that the defects have been corrected. However, in those instances where the Chief Administrative Law Judge identifies defects which relate to the issues of need or reasonableness, the Commissioner may either adopt the Chief Administrative Law Judge's suggested actions to cure the defects or, in the alternative, if the Commissioner does not elect to adopt the suggested actions, he must submit the proposed rule to the Legislative Commission to Review Administrative Rules for the Commission's advice and comment.

If the Commissioner elects to adopt the actions suggested by the Chief Administrative Law Judge and makes no other changes and the Chief Administrative Law Judge determines that the defects have been corrected, then the Commissioner may proceed to adopt the rule and submit it to the Revisor of Statutes for a review of the form. If the Commissioner makes changes in the rule other than those suggested by the Administrative Law Judge and the Chief Administrative Law Judge, then he shall submit the rule, with the complete record, to the Chief Administrative Law Judge for a review of the changes before adopting it and submitting it to the Revisor of Statutes.

When the Commissioner files the rule with the Secretary of State, he shall give notice on the day of filing to all persons who requested that they be informed of the filing.

Based upon all the testimony, exhibits and written comments, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Procedural Findings

1. On December 4, 1995, the Department published a Notice of Solicitation of Outside Opinion on planned rules governing railroad operations. The Notice was published at 20 State Register 1314. Exhibit A.

2. On January 13, 1998, the Department filed a request for approval of its notice plan with the Office of Administrative Hearings. The notice plan was approved with additions on January 26, 1998. On January 13, 1998, the

Department requested the scheduling of a hearing date and filed the following documents with the Chief Administrative Law Judge:

- (a) the proposed rule certified by the Revisor of Statutes;
- (b) the Statement of Need and Reasonableness (SONAR); and
- (c) the dual Notice of Hearing proposed to be issued.

3. The Department mailed a copy of the SONAR to the Legislative Reference Librarian on January 12, 1998. Exhibit A. On February 12, 1998, the Department mailed the Dual Notice of Hearing to all persons and associations who had registered their names with the agency for the purpose of receiving such notice. Exhibit F.

4. On February 17, 1998, the Dual Notice of Hearing was published at 22 State Register 1399. Exhibit E. The Department did not publish the proposed rules in the State Register pursuant to authority to omit publication which was granted by the Administrative Law Judge and the Chief Administrative Law Judge under Minn. Stat. §§14.14 and 14.22.

5. On the day of the hearing, the Department placed the following additional documents into the record:

- (a) the Notice of Solicitation published at 20 State Register 1314 (Exhibit A);
- (b) the proposed rule, certified by the Revisor of Statutes (Exhibit B);
- (c) the SONAR (Exhibit C);
- (d) a copy of the letter transmitting the SONAR the Legislative Reference Librarian (Exhibit D);
- (e) the Notice of Hearing as mailed (Exhibit F);
- (f) the Notice of Hearing as published in the State Register and a copy of the Department's web page containing the Dual Notice (Exhibit E);
- (g) the Administrative Law Judge's letter approving the notice plan (Exhibit I);
- (h) the Department's Certificate of Mailing, provision of additional notice, and certification of the mailing list as accurate and complete (Exhibits F and G);

Nature of the Proposed Rules

6. In this rulemaking proceeding the Department seeks to update its (and predecessor agencies') existing rules regarding railroad operations. The proposed changes affect public and private grade crossings, as well as clearances, accounting, tariffs, agency closings, the Rail Service Improvement Program, the Rail Bank Program, and the Loan Guarantee Program.

Statutory Authority

7. The Department cites Minn. Stat. § 218.071, subd. 1 and a variety of other statutes in Chapters 218, 219 and 222, as the source of its authority to adopt these rules. SONAR, at 2-3. The Administrative Law Judge finds that the Department has the statutory authority to adopt the proposed rule.

Rulemaking Legal Standards

8. Under Minn. Stat. § 14.14, subd, 2, and Minn. Rule 1400.2100, one of the determinations which must be made in a rulemaking proceeding is whether the agency has established the need for and reasonableness of the proposed rule by an affirmative presentation of facts. In support of a rule, the Department may rely on legislative facts, namely general facts concerning questions of law, policy and discretion, or it may simply rely on interpretation of a statute, or articulated policy preferences. ***Manufactured Housing Institute v. Pettersen***, 347 N.W.2d 238, 244 (Minn. 1984); ***Mammenga v. Department of Human Services***, 442 N.W.2d 786 (Minn. 1989). The Department prepared a Statement of Need and Reasonableness ("SONAR") in support of the amendments. At the hearing, the Department primarily relied upon the SONAR as its affirmative presentation of need and reasonableness for the proposed amendments. The SONAR was supplemented by comments made by Department staff at the public hearing and in its written posthearing comments.

The question of whether a rule has been shown to be reasonable focuses on whether it has been shown to have a rational basis, or whether it is arbitrary, based upon the rulemaking record. Minnesota case law has equated an unreasonable rule with an arbitrary rule. ***In re Hanson***, 275 N.W.2d 790 (Minn. 1978); ***Hurley v. Chaffee***, 231 Minn. 362, 367, 43 N.W.2d 281. 284 (1950). Arbitrary or unreasonable agency action is action without consideration and in disregard of the facts and circumstances of the case. ***Greenhill v. Bailey***, 519 F.2d 5, 19 (8th Cir. 1975). A rule is generally found to be reasonable if it is rationally related to the end sought to be achieved by the governing statute. ***Mammenga***, 442 N.W.2d at 789-90; ***Broen Memorial Home v. Minnesota Department of Human Services***, 364 N.W.2d 436, 444 (Minn. Ct. App. 1985). The Minnesota Supreme Court has further defined the Department's burden in adopting rules by requiring it to "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken." ***Manufactured Housing Institute***, 347 N.W.2d at 244. The Department is entitled to make choices between possible approaches as long as the choice it makes is rational. Generally, it is not the proper role of the Administrative Law Judge to determine which policy alternative presents the "best" approach since this would invade the policy- making discretion of the Department. The question

is rather whether the choice made by the Department is one that a rational person could have made. ***Federal Security Administrator v. Quaker Oats Company***, 318 U.S. 218, 233 (1943).

In addition to need and reasonableness, the Administrative Law Judge must also assess whether the rule adoption procedure was complied with, whether the rule grants undue discretion, whether the Department has statutory authority to adopt the rule, whether the rule is unconstitutional or illegal or vague, whether the rule constitutes an undue delegation of authority to another entity, or whether the proposed language is not a rule. Minn. Rule 1400.2100.

In its post-hearing submission, the Department proposed several changes. The Administrative Law Judge must determine if new language is substantially different from that which was originally proposed. Minn. Stat. § 14.15, subd. 3 (1996). The standards to determine if the new language is substantially different are found in Minn. Stat. § 14.05, subd. 2 (1996).

Impact on Farming Operations

9. Minn. Stat. § 14.111 imposes an additional notice requirement when rules are proposed that affect farming operations. Similarly, Minn. Stat. § 14.14, subd. 1b. requires that a public hearing be conducted in an agricultural area when the proposed rule affects farming operations. The Department indicated that the proposed rule would not affect farming operations. BNSF suggested the contrary: that the rules require private landowners to clear land of obstructions that might affect sight lines near private crossings, and that occurs more often than not in rural areas, so therefore farming operations are affected. Tr. II at 18. The statute states:

Before an agency adopts or repeals rules that affect farming operations, the agency must provide a copy of the proposed rule change to the commissioner of agriculture, no later than 30 days prior to publication of the proposed rule in the State Register.

A rule may not be invalidated for failure to comply with this section if an agency has made a good faith effort to comply.

The Department responded that the proposed rule does not place any new burdens on farm operations and, in fact, farm crossings that connect a field on one side of the rail trackage to a field on the other side are specifically exempted from the provisions of the rules. The farm crossings that are included in the rules are the ones that are on a private roadway that leads from a public road to a farm residence, other farm buildings, or a field. Those crossings are no different in usage than any other private crossings that are considered accesses

for residences, businesses, or recreational facilities. The proposed rule was not designed to affect farming operations and any impact that does occur would be no more than the impact to the community in general. Post-Hearing Comments at 2.

The Administrative Law Judge finds that the proposed rule does not impose restrictions or impact on farming operations, and thus no notice to the Commissioner of Agriculture is required.

Classes of Persons Affected by the Proposed Rules

10. Minn. Stat. § 14.131 requires an agency adopting rules to include in its SONAR:

(1) a description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule;

(2) the probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues;

(3) a determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule;

(4) a description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule;

(5) the probable costs of complying with the proposed rule; and

(6) an assessment of any differences between the proposed rule and existing federal regulations and a specific analysis of the need for and reasonableness of each difference.

In its SONAR, at pages 7-17, the Department included its analysis to meet the requirements of this statute.

11. The Department analyzed the methods for achieving the goals of the rule and considered alternatives. The analysis was thorough and complete.

The Department has met the statutory requirements for assessing the impact of the proposed rules.

Analysis of the Proposed Rules

General

12. Prior to the first hearing on March 31, five railroads requested additional time to prepare for the hearing, to have their technical people meet with the Department staff one more time, and to assure that their technical people would be present at the hearing. At the March 31, hearing, the Department reluctantly agreed to grant them additional time, and a mutually convenient date of April 29 was set to reconvene the hearing. In the interim, a meeting was held between attorneys and operating personnel from three railroads and the Department staff. At this meeting, the railroads presented a lengthy (64-page) list of criticisms of the proposed rule and suggestions for change. The meeting lasted for several hours, and resulted in the Agency agreeing to make some changes, and the railroads accepting the Agency's position on other matters. However, there were still a number of matters where the two could not come to a resolution. This Report is going to focus on those unresolved matters, as well as any other issues which the Administrative Law Judge believes need to be addressed. The Report will not discuss each and every rule, nor will it discuss all of those situations where problems have been resolved, even if that resolution involved a change of language. Instead, it will focus on the more serious unresolved issues and any other issues which the Administrative Law Judge believes need attention. Any matters not specifically addressed herein are found to have been justified as needed and reasonable and, if there was a change in language, the change does not constitute a "substantial change".

Analysis of Selected Rule Provisions

13. Part 8330.0220 is an important rule, sought by the industry, explicitly providing that the rules relating to crossings, visibility standards and engineering functions are not retroactive. The proposed rule provides as follows:

Subpart 1. Not Retroactive. Parts 8830.0300 to 8830.3400 are not retroactive but are intended to apply to replacements and installations erected on and after the effective date of these changes to this chapter, and to existing installations that are substantially changed, modified, or reconstructed. Installations already lawfully in place before the effective date of this part are not to be considered in violation of Parts 8830.0300 to 8830.3400.

The industry raised concern about the phrase “substantially changed, modified, or reconstructed”. They found it ambiguous, and urged that it be further clarified “to more clearly identify when and what type of [action] triggers the applicability of the new rules”. Public Ex. 2, p. 3 and Public Ex. 3, p. 4.

The agency responded as follows:

The words “substantially changed, modified, or reconstructed” were selected to apply to existing installations to distinguish between routine maintenance where parts are replaced by like or similar parts and work on the installation that changes the way it operates, or changes the way it appears. Another way to state the intent of the rule would be – if the action taken at the signal installation would require a change in the signal plan, the proposed rule would apply.

Agency Post-Hearing Comments, at p. 5.

During the hearing, this matter was discussed in more detail, where the following exchange occurred [substantially edited for clarity]:

Mr. Cocchiarella: There are occasions when the crossings are changed because plankings are changed, new rubber surfaces are put down, just as examples, the rubberized surfaces are put down, the rails or the ties are changed themselves. When does something like that amount to a substantial change which would then bring that crossing into the ambit of these rules and require compliance with these rules?

Mr. Swanson: Certainly . . . change one plank for another; you put the same rail signs back where you had before, then change the light bulb to a new light bulb because the first one burned out; those are not substantial changes. You’re making repairs and doing maintenance. What we intend here is when you change something, change the height of a crossing, the crossing gets widened, you change the appearance of the signal system, you make it do something different, those are all substantial changes. . . . Not that you’ve fixed the plank in the road and put a new plank in.

(Tr. II, pp. 47-48).

14. The Administrative Law Judge believes that it would be very difficult to catalog all of the possible changes that could occur to a crossing and its

associated signaling systems, warning devices, etc., and then specify, in detail, what specific quantity of each type of change constitutes a “substantial change”. The Agency has attempted, both in the oral testimony cited above and in its post-hearing comments, to give examples to assist in interpreting the phrase. The Administrative Law Judge believes that under the circumstances, no greater detail is required. See *Can Manufacturers Institute v. State*, 289 N.W.2d 416 (Minn. 1979).

15. Part 8830.2500 relates to flaggers, who are people who physically go out onto a roadway to direct traffic or “flag” traffic to avoid accidents. According to the SONAR, flaggers (historically known as watchmen) were needed at railroad crossings because warning devices used to be operated manually. When a train approached, the watchman would manually turn on the lights of the warning device in order to warn traffic of the approach of a train. Or, if there were no lights, the watchman would walk out into the roadway with flags or signs. Now, however, the use of flaggers is no longer the current practice in the rail industry. They have been replaced, for the most part, by automatic electronic warning devices. There are no longer any permanently-stationed flaggers in Minnesota.

On occasion, however, due to some temporary or emergency situations, such as when an active warning device is malfunctioning, or when there is an accident at a crossing, or a train is operating at an “exempt” crossing (where there are no active devices because there are five or less train movements per year), flaggers are still required to warn and direct traffic.

The existing rule (which everyone agrees is outdated) applied only to permanently stationed flaggers. It specified the clothing they must wear, the signs they had to use, and in what situations they were required to warn or direct traffic.

The new rule deletes most of the old rule, and replaces it with a simplified version. The new rule applies to rail carrier employees who, as a part of normal duties, could be expected to direct roadway traffic. It acknowledges the possibility of temporarily stationing flaggers at crossings. It goes on to specify that flaggers must wear garments and be equipped as required by 49 C.F.R. § 234.5, and specifies that they shall direct roadway traffic only when there is potential danger at the crossing, such as when an active warning device is malfunctioning, a train is approaching the grade crossing, or the grade crossing is occupied by railroad equipment. The purpose of the rule is to assure that flagging operations are safe, both for the flagger and for the traveling public.

16. The proposed changes to this rule were the most strenuously contested changes in this entire proceeding. The industry is concerned that the requirements for clothing and equipment would be applied to train crews who happened to be “just passing through” an area where traffic direction is

unexpectedly required, and thus every train would be required to carry the required clothing and equipment in order to be sure the rule would not be violated. Both BNSF and Canadian Pacific (CPRR) state they would have to equip virtually every locomotive with the flagging gear in order to assure compliance. Testimony of Spencer Arndt at p. 11 and Gary Mentjes at p. 4. The current federal requirements, which are referenced in the proposed Minnesota rule, specifically exclude train crew members from the requirements for specified clothing and equipment. The industry would like to see a similar exclusion written into the Minnesota rule.

17. The Department's response is that this rule will be used only at a limited number of crossings, and that train crews (other than those who can be routinely expected to use the crossings) can be exempted by specific orders for each crossing. The Department notes as follows (in its post-hearing comments):

The main problem appears to be the "commissioner-designated" crossings . . . in which train crew members may be called on to flag rather than a designated flagger. . . . The commissioner-designated crossings are currently only the "exempt" crossings where there are five or less train movements per year. The "exempt" status is given to these crossings so that school buses and other selected vehicles that are required to stop at all railroad crossings are relieved of that responsibility for these seldom-used locations. There are presently only 52 "exempt" crossings and most of them are in the process of being abandoned. While in theory, any of the many train crew members could be asked to flag at an exempt crossing, it is our opinion that the seldom-used crossings are only used by local switching units that can be easily identified. It would be better to address special situations with respect to flagging by train crews in the order that establishes the exempt crossing rather than making the rule over-complex. Orders for present exempt crossings could be modified to allow a train crew member to perform flagging if need be.

The Administrative Law Judge concludes that the Department has justified the need for requiring flaggers to be properly clothed and equipped as a matter of safety, both for the flagger and for the public on the roadway. The Administrative Law Judge, however, cannot find that it is reasonable to require every engine to carry this material which, all parties agree, will be used very rarely. There are currently 52 exempt crossings, which by definition have five or fewer train movements per year each. Most of them are in the process of being abandoned. The Department is correct in suggesting that the orders for those could be modified to avoid violations. But that would not cure the problem with the unforeseen need for flagging at a non-exempt crossing. The railroads would be

required to equip every engine with appropriate clothing and equipment for that very isolated and rare event. The Administrative Law Judge finds that the Agency has failed to demonstrate the reasonableness of its proposed rule. The logical way to cure this defect is, as the railroads suggest, to exempt train crew members from the proposed rule. That would make the state rule parallel with the federal rule.

18. The resolution proposed above avoids a difficult preemption issue raised by the railroads. They point out that based upon 49 U.S.C. § 20106 (entitled “National Uniformity of Regulation”), and 49 C.F.R. § 234.4 (entitled “Preemptive Effect”), there may be a problem with the Department’s original proposal, in that it varies from federal rules in ways that could constitute undue burdens on interstate commerce. The Administrative Law Judge has not researched or analyzed this issue to the degree needed to express an opinion regarding whether or not the Department’s original proposal would run afoul of the federal requirements or not. The conclusion regarding reasonableness avoids the need of addressing the constitutional issue. It is noted here solely to alert the Commissioner of its existence.

19. Part 8830.2650 relates to maintaining grade crossing surfaces, and, in part, provides that a rail carrier shall not “close a roadway to perform maintenance at a grade crossing” without giving advance notice to the road authority.

In the SONAR, the Agency indicated that problems between rail carriers and road authorities have occurred because the public is not notified of a closure. This can lead to congestion, accidents, unsafe conditions and disorderly public conduct. It argued that the proposed rule was needed to protect the safety of the traveling public and ensure the traffic flow is maintained.

At the hearing, the industry stated that the rule was ambiguous because it did not define any period of time that the roadway would be closed in order to trigger the notification requirement. The industry urged that there be a specific amount of time set forth in the rule whereby the railroad could close the intersection for minor maintenance without having to give notice to the road authority. Ex. 3, p. 12 and Tr. II at pp. 42-46. In a dialog during the hearing, the railroad attorney mentioned that there was a state statute (Minn. Stat. § 219.383, subd. 3) which prohibits a railroad from closing a public road or street crossing by a standing car, train, engine or other railroad equipment for longer than ten minutes. The Agency responded to the railroad’s concern about the lack of specificity in the rule indicating that the Agency did not have a particular number in mind, and inviting the railroads to submit a suggestion. There was discussion about the impact of a closure on emergency services, and then the Judge urged the railroads to propose a specific number that they had found reasonable from experience in other jurisdictions. In post-hearing comments, the Agency noted that an earlier railroad joint comment suggested that a number of states do not

require notification unless the crossing would be closed for a specified period of time such as 15 minutes. The Department went on to indicate that if the railroads wanted the Agency to adopt their example of 15 minutes, the Department would be willing to consider that. The railroads never responded to this offer, and that is the extent of the record on the matter.

20. The Administrative Law Judge finds that the rule is impermissibly vague without some specified time period in it. The joint comment (part of Ex. H) at p. 11 does indicate that a number of states use a 15-minute standard. The Minnesota statute which contains a ten-minute standard relates to closing a road “by a standing car, train, engine or other railroad equipment, or by a switching movement”. Many maintenance operations would not fall into that category. Moreover, the statute merely prohibits blocking a road or street, it does not require notification to the road authority. Therefore, it would appear that the only number in the record which is directly on point is the 15-minute standard used by other states.

The defect can be cured by adopting some standard which has support in the record, such as the 15-minute standard. So long as the proposed standard were reasonable, it would not constitute a substantial change.

21. Part 8830.2000 deals with gate operation and control and, in particular, subpart 3 deals with what to do when a gate arm malfunctions. The proposed rule provides that where gates are involved, means must be provided to enable personnel designated by the rail carrier to raise the gates when a malfunction in the control system causes the gates to obstruct traffic under conditions other than the approach and movement of a train over the grade crossing.

In the SONAR, the Department explained that the historical growth in the use of gates makes it necessary to assure that when a malfunction occurs, traffic will not be interrupted for longer than necessary. The railroad must have some way to raise the malfunctioning gate and allow traffic to flow. The rule does not specify precisely what kinds of mechanisms are required. It only requires that some “means” must be provided to allow personnel to raise the gates.

The lack of specificity as to what “means” must be provided did raise concerns from the railroads. Tr. II, at p. 65. The Agency responded to this concern by indicating that it intentionally left the choice of methods open, allowing the railroads to pick whatever methods they believed were most appropriate. *Id.*

22. The Administrative Law Judge believes that this kind of a rule is entirely appropriate, and is not impermissibly vague. The test for vagueness is whether or not a person of ordinary intelligence can ascertain what is required. This rule meets that test. There are no doubt a number of “means” which could

be selected to achieve the goal, and there is nothing wrong with giving the railroad the discretion to select whatever means it believes is most suitable. So long as the railroad selects some means that will accomplish the goal, it is in compliance. Greater specificity in the rule is not required.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Minnesota Department of Transportation gave proper notice in this matter. The notice plan was properly approved.

2. The Department has fulfilled the procedural requirements of Minn. Stat. § 14.14, and all other procedural requirements of law or rule.

3. The Department has demonstrated its statutory authority to adopt the proposed rules, and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. § §14.05, subd. 1, 14.15, subd. 3, and 14.50(l) and (ii), except that proposed rule 8830.2650 is impermissibly vague, as discussed at Finding 20.

4. The Department has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the meaning of Minn. Stat. § §14.14, subd. 4 and 14.50(iii), except that the Department has failed to demonstrate the reasonableness of its proposed requirements for flaggers contained in part 8830.2500, as discussed at Finding 17.

5. The Department has made numerous proposed changes to its rules in response to suggestions in the record. None of those proposed changes results in a rule which is substantially different from the proposals as published in the State Register within the meaning of Minn. Stat. § § 14.05, subd. 2 and 14.15, subd. 3.

6. The finding or conclusion of need and reasonableness with regard to any particular rule subsection does not preclude and should not discourage the Department from further modification of the proposed rule based upon an examination of the record, so long as the rule finally adopted is based upon facts as appearing in the rule hearing record.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the proposed amended rules be adopted, except as provided in the Findings and Conclusions above.

Dated this _____ day of June _____ 1998.

ALLAN W. KLEIN
Administrative Law Judge

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MEMORANDUM

Readers should understand that the railroads initially had many many concerns with the details of these rules, but through meetings and correspondence, most of the disputed matters were resolved. The railroad's initial set of joint comments raised 73 issues, and in the course of a lengthy meeting, six additional issues were raised. Tr. II, p. 9. In response, the Agency prepared a 24-page post-hearing submission proposing numerous minor changes to resolve the railroad's concerns. There were really only a handful of issues that were unresolved at the end of the proceeding, and those are the issues which are discussed in the report. The Administrative Law Judge mentions this because he would not want readers to overlook the tremendous amount of work that was invested into these rules in order to reduce the disputes down to a very small number.

AWK