

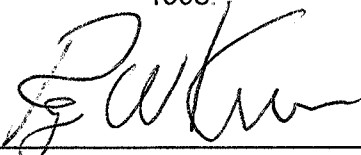
STATE OF WISCONSIN )  
 ) SS  
OFFICE OF THE COMMISSIONER OF RAILROADS )

I, Rodney W. Kreunen , Commissioner of the  
Office of the Commissioner of Railroads

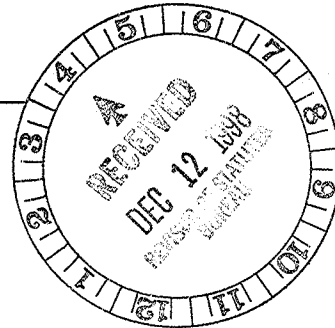
and custodian of the official records, certify that the annexed rules, affecting RR 1.001, 1.01, 1.02, 1.025, 1.03, 1.04, 1.07, 1.08, 1.11, 1.12, 1.13, 1.14 and 1.15, relating to procedures and practices of the office, were duly approved and adopted by this office on December 11, 1998.

I further certify that this copy has been compared by me with the original on file in this office and that it is a true copy of the original, and of the whole of the original.

IN TESTIMONY WHEREOF, I have hereunto  
set my hand at 610 North Whitney Way, Room 110,  
Madison, Wisconsin this 11th day of December,  
1998.

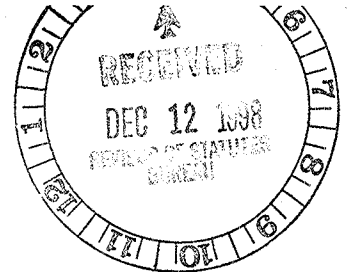


Rodney W. Kreunen  
Commissioner of Railroads



9000order1

ORDER OF THE  
OFFICE OF THE COMMISSIONER OF RAILROADS



The Wisconsin Office of the Commissioner of Railroads (office) adopts this order to renumber RR 1.02 (1) to (5); to amend RR 1.01 (1), (2) and (3), 1.04 (1) and (7), 1.07 (3), 1.08 (1) and (3), 1.11 (1), and 1.12 (3); to repeal and recreate RR 1.001 and 1.13 (2); and to create RR 1.02 (2), 1.025, 1.03 (3), 1.12 (4), 1.14 and 1.15, relating to procedures and practices of the office.

Clearinghouse No. 97-083

*Statutory authority:* ss. 189.02 (1), 195.03 (1), 195.39 and 227.11 (2) (a) and (b), Stats.

*Statutes interpreted:* ss. 19.35, 84.05, 86.12-86.13, 189.02, 190.16, 191.07, 191.09, 192.29, 192.31, 192.324, 192.34, 192.52, 192.53, 192.56, 195.03 to 195.04 to 195.041, 195.043, 195.05, 195.07 to 195.08, 195.19, 195.27 to 195.285, 195.29 to 195.32, 195.37, 195.60, 227.44, and 227.46 to 227.47 Stats.

**Analysis Prepared by the Office of the Commissioner of Railroads:**

The Wisconsin Office of the Commissioner of Railroads adopts these rules to renumber RR 1.02 (1) to (5); to amend RR 1.01 (1), (2) and (3), 1.04 (1) and (7), 1.07 (3), 1.08 (1) and (3), 1.11 (1), and 1.12 (3); to repeal and recreate RR 1.001 and 1.13 (2); and to create RR 1.02 (2), 1.025, 1.03 (3), 1.12 (4), 1.14 and 1.15, relating to procedures and practices of the office.

Chapter RR 1 sets forth the office's procedures and practices, primarily for hearings. The rules primarily codify current office practices and delete obsolete provisions. The rules establish a new procedure for issuance of final decisions by the hearing examiner in cases where the commissioner is unable to do so.

The rule repeals and recreates RR 1.001. The recreated rule adds definitions of "mail", "party", "crossing" and "highway". New RR 1.02 (2) provides for the certification of parties.

RR 1.01 (1) and (2) and RR 1.08 (3) are amended to allow filing documents with the office by facsimile. RR 1.08 (3) and RR 1.11 (1) are amended to reduce from 3 to one the number of copies that parties must submit to the office.

New RR 1.025 sets forth information that petitioners must submit to the office when requesting a change in a crossing, establishment of a new crossing or closure of an existing crossing. This section also allows the examiner to delay a hearing until the petitioner files the necessary documents.

New RR 1.03 (3) specifies the information which a notice of hearing issued by the office must contain.

RR 1.07 (3) is amended to remove a stated purchase price for a copy of a hearing tape. The current cost is stated in an attached note. RR 1.12 (3) is similarly amended to remove the cost of record copies. The current cost for various records and record searches is stated in a note. RR 1.12 (3) is also amended to remove the record fee exemption currently granted to government agencies. The amended rule would treat record requests from government agencies the same as requests from private citizens. New RR 1.12 (4) authorizes the use of private copying services, with the agreement of the requester, for record requests.

Section RR 1.13 governs environmental review of office actions. Recreated RR 1.13 (2) deletes reference to agency actions that are preempted by federal law. The ICC Termination Act extended exclusive federal jurisdiction over all aspects of economic regulation of railroads and expressly preempts state regulation in this area. Because the office can no longer undertake these actions, reference to them is obsolete.

New sections RR 1.14 and 1.15 set forth items that proposed and final decisions must contain. These sections codify current office practice. RR 1.15 (3) (a) allows the commissioner to designate the examiner, rather than the commissioner, to issue a final decision. This paragraph requires the commissioner to so designate the examiner in any instance that the commissioner recuses from a case. RR 1.15 (3) (b) grants the examiner authority to issue a final decision in uncontested cases during a prolonged absence or disability of the commissioner or the vacancy of the commissioner position. Current law makes no provision for decision-making in the event of recusal, disability or vacancy. RR 1.15 (3) (a) and (b) fills this void.

On July 7, 1997, the office received the Legislative Council Staff's (LCS) Clearinghouse Report on the proposed rule. The LCS suggested a number of changes that have been incorporated in the rule. The rule corrects the note to RR 1.12 (3) which previously stated incorrect record fees. The rule lists specific statutory sections being interpreted rather than entire chapters. The LCS suggested that the phrase "transmitted facsimile" be added to RR 1.11 (1) for consistency with amended RR 1.01 and 1.08 (3). The LCS questioned the use of the phrase "findings of ultimate fact" in new RR 1.14 and 1.15. The rule changes this phrase to "ultimate conclusion on each material issue", which is the wording used in s. 227.47 (1). The remaining changes suggested by the LCS related to form and grammar.

Pursuant to due notice, the office held a public hearing on March 27, 1998. The office also took written comments through March 27, 1998.

The Wisconsin Department of Transportation (DOT) and the Wisconsin Central Ltd. (WCL) appeared at the hearing. The Burlington Northern Santa Fe Railroad Co. (BNSF), by its attorneys Spence, Ricke & Thurmer, P.A. and the City of Milwaukee, by Mariano Schifalacqua, City Engineer, submitted written comments.

The WCL, BNSF and City of Milwaukee all raised concerns about the requirement in new RR 1.025 (2) (a) that the petitioner seeking changes in existing rail/highway crossings or establishment of new crossings must submit "engineering design plans". The comments suggested that "concept plans" or "preliminary plans" be substituted for "engineering design plans". Requiring preparation of engineering design plans before the approval of the project was seen as excessive. The office has amended the language to allow the submission of concept plans or preliminary engineering plans. The purpose of the requirement is twofold: to ensure that petitioners are prepared to present their case at a hearing and to share information with the other party. The amended language fulfills these 2 goals.

The WCL also questioned whether "closure" of crossings should be included within the content requirements of 1.025 (2) (a). The office has amended the rule to drop closures from the filing content requirement. When a roadway is closed at railroad tracks a vehicle turnaround of some type is usually needed. However, the type of turnaround needed depends on the type and number of vehicles using the roadway, which may not be fully known until the time of the hearing.

The WCL objected to the phrase "including the area affecting or affected by the intersection" in the definition of "crossing" in RR 1.001 (1). The WCL believes this phrase could cause extraneous matters to be included within the term. The rule inserts the word "directly" to limit the scope of the definition.

The BNSF objected to RR 1.13 (2) (b)'s reference to spur tracks. The BNSF argues that the Interstate Commerce Commission Termination Act of 1995 preempts state jurisdiction over spur track removals. The office concurs that states are largely preempted in this area. Once a spur track has been abandoned, however, then the spur track is no longer under the exclusive jurisdiction of the federal Surface Transportation Board. States do retain jurisdiction to order the removal of an abandoned spur track. In many instances spur tracks are abandoned by disuse over a long period of time, but remain physically within the roadway. The office can then exercise its jurisdiction to order the removal of the spur track from the roadway.

At the hearing it was suggested that granting exemptions from minimum vertical and horizontal clearance requirements should be added to the list of minor actions in RR 1.13 (2) that do not require an environmental impact statement. This change is included in the rule.

### Text of Rule

SECTION 1. RR 1.001 is repealed and recreated to read:

RR 1.001 Definitions.

(1) "Crossing" means the intersection of a highway with a track or tracks of a railroad, including the area directly affecting or affected by said intersection.

(2) "Highway" includes all public ways and thoroughfares and all bridges on the same, whether used by motorized vehicles or not, but does not include snowmobile trails.

(3) "Mail" means first class, certified or regular mail, or inter-departmental mail.

(4) "Office" means the office of the commissioner of railroads.

(5) "Party" means any person who requests admission as a party and whose substantial interest may be affected by a decision. "Party" includes the railroad and maintaining highway authority and the department of transportation when a highway project which encompasses a crossing involves the expenditure of federal funds, whether on a state highway or not.

SECTION 2. RR 1.01 (1), (2), and (3) are amended to read:

RR 1.01 Communications and documents addressed to office. (1) All written communications and documents ~~should~~ shall be filed with the office by deposit in the mail, by facsimile transmission, or in person.

(2) Documents shall be served upon the office by deposit in the ~~first-class mail~~, by facsimile transmission, or by delivery in person. When service is made upon the office, the date of service shall be the day when the document is received by the office receives the document.

(3) Office hours are 7.45 a.m. to 4.30 p.m., Monday through Friday. Offices are closed on Saturdays and Sundays, ~~Martin Luther King Jr.'s Birthday, Independence Day, Labor Day, Thanksgiving Day, Christmas Eve day, Christmas, New Year's Eve day, New Years, Good Friday afternoon, Memorial Day, and other days as designated by the governor~~ and on holidays listed in s. 230.35 (4) (a), Stats.

SECTION 3. RR 1.02 (1), (2), (3), (4) and (5) are renumbered RR 1.02 (1) (a), (b), (c), (d) and (e).

SECTION 4. RR 1.02 (2) is created to read:

RR 1.02 Parties. (2) Certification. The commissioner or hearing examiner shall certify parties. The certified parties shall be listed in the proposed decision and the final decision. For purposes of certifying parties, the commissioner or hearing examiner shall consider the nature, duration and degree of the effect of the final decision upon a person's interest.

SECTION 5. RR 1.025 is created to read:

RR 1.025. Petitions, complaints and applications. (1) Form. Each petition, complaint or application filed with the office shall be in writing and signed by the petitioner, complainant, or applicant, or a person authorized to file the petition, complaint or application.

(2) Content. Each petition filed with the office for the alteration, establishment, or relocation of a crossing shall include all of the following:

(a) Concept plans or preliminary engineering design plans showing the proposed changes.

(b) The proposed construction completion date

(c) The proposed apportionment of cost for the construction.

(3) Copies. At the time of filing, a petitioning highway authority shall provide a copy of the petition to the affected railroad or a petitioning railroad shall provide a copy of the petition to the affected highway authority.

(4) Sanctions. Failure to comply with sub. 2 or sub. 3 may result in an order by the examiner that the matter not be heard until those requirements are met.

Note: Addresses for railroads and highway authorities may be obtained by contacting the office at Office of the Commissioner of Railroads, 610 N. Whitney Way, Room 110, PO Box 8968, Madison, WI 53708-8968, Voice (608) 266-7607, Fax (608) 261-8220 or TTY (608) 267-1479.

SECTION 6. RR 1.03 (3) is created to read:

RR 1.03 (3). The notice of hearing shall be in writing, with a title identifying the matter and the docket number and contain all of the following information:

- (a) The date, time and location of the hearing.
- (b) The statutory authority for the hearing.
- (c) A short summary of the matter to be considered.
- (d) A statement of the issues.
- (e) A notice of assessment of costs against the railroad under s. 195.60 Stats., where applicable.
- (f) Such other information as the commissioner or hearing examiner may deem appropriate.

SECTION 7. RR 1.04 (1) and (7) (intro.) are amended to read:

RR 1.04 Hearings. (1) At any hearing an examiner may preside. ~~An examiner shall disqualify himself or herself if by reason of personal~~ Personal interest in or knowledge of the matter to be heard ~~he or she is unable to act~~ disqualifies the examiner if it prevents the examiner from acting fairly or impartially. No person who has directly participated in the investigation of the matter to be heard shall be designated or serve as examiner.

(7) (intro.) Failure to comply with any order issued under sub. (2) or s. RR 1.09 by any of the parties without good cause shown for the failure to comply shall result in sanctions being imposed by the examiner. Sanctions which ~~shall~~ may be imposed include any of the following:

SECTION 8. RR 1.07 (3) is amended to read:

RR 1.07 (3) If a proceeding has been recorded, the office may substitute a copy of the tapes for a transcript request if no petition for judicial review has been filed. The cost per tape shall be ~~\$11.00~~ an amount set by the office based on the actual total cost and paid in advance, unless otherwise provided by statute.

Note: The cost per tape is \$12.00. This amount is subject to change.

SECTION 9. RR 1.08 (1) and (3) are amended to read:

RR 1.08 (1) The examiner may require briefs in any matter before the office and answers to complaints.

(3) Briefs shall be no more than 10 pages, typed in double space on 8½ x 11 inch paper, unless the examiner provides otherwise. ~~Three copies~~ An original and one copy of the brief shall be filed with the office and one copy mailed, transmitted by facsimile or delivered in person to each of the other parties.

SECTION 10. RR 1.11 (1) is amended to read:

RR 1.11 Comments on proposed decisions. (1) Where a proposed decision is prepared and circulated, comments shall be filed within 15 days of ~~deposit in the first class mail or delivery in person~~ the date of the proposed decision unless a different date is specified by the examiner or commissioner. An original and one copy of the comments shall be filed with the office and one copy mailed, transmitted by facsimile, or delivered in person to each of the other parties listed in the proposed decision.

SECTION 11. RR 1.12 (3) is amended to read:

RR 1.12 (3) The fee shall be ~~15 cents per page. No fee shall be assessed against government bodies.~~ for reproduction, photocopying, photographing, transcription or other duplication of a public record in the custody of the office may not exceed the actual, direct and necessary cost.

Note: The office charges the following fees: simple photocopying - 15 cents per page, cassette tape of hearing \$12.00. When the cost of locating a record exceeds \$50, the office charges the actual, necessary and direct costs of location. These amounts are subject to change.

SECTION 12. RR 1.12 (4) is created to read:

RR 1.12 (4) With the agreement of the record requester, the custodian of records may elect to use a private company to produce copies of records in any form. The fee for such copies shall be the actual cost charged by the private company plus the cost of any office staff labor.

SECTION 13. RR 1.13 (2) (a) to (d), (f) and (g) are repealed.

SECTION 14. RR 1.13 (2) is repealed and recreated to read:

RR 1.13 (2) The following types of office actions shall do not require an environmental impact statement:

- (a) Orders relating to crossings.
- (b) Approval of spur track removal.
- (c) Granting of applications by water carriers.
- (d) Granting exemptions for vertical and horizontal clearances.

SECTION 15. RR 1.14 is created to read:

RR 1.14. Proposed decision. (1) Form. Each proposed decision issued by a hearing examiner shall be in writing, with a title identifying the matter and the docket number.

(2) Content. Each proposed decision shall include all of the following:

(a) Specific proposed findings of fact.

(b) Proposed ultimate conclusion on each material issue.

(c) Proposed conclusions of law.

(d) A proposed order setting out the duties of each party, including deadlines for work or installations required, and an apportionment of costs.

SECTION 16. RR 1.15 is created to read:

RR 1.15. Final decision. (1) Form. Each final decision issued by a hearing examiner shall be in writing, with a title identifying the matter and the docket number.

(2) Content. Each final decision shall include all of the following:

(a) Specific findings of fact.

(b) Ultimate conclusion on each material issue.

(c) Conclusions of law.

(d) An order setting out the duties of each party, including deadlines for work or installations required, and an apportionment of costs. The order is not limited simply to granting or denying a petition, but may order any reasonable method for the improvement of public safety or convenience.

(3) Final decision by examiner. (a) The commissioner may, at any stage of the proceedings, designate the examiner to render the final decision. The commissioner shall designate the examiner to render the final decision when the commissioner has recused himself or herself from participation in a proceeding. The designation shall be in writing and provided to all parties.

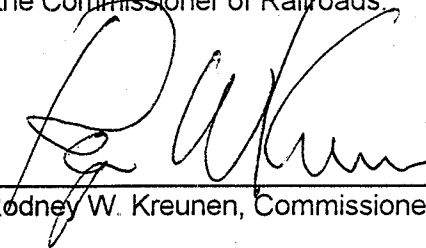
(b) During any prolonged disability or absence of the commissioner, the examiner shall render the final decision in any uncontested matter. During any period in which the position of commissioner is vacant, the examiner shall render the final decision in any uncontested matter.



This rule shall take effect on the first day of the month commencing after the date of publication as provided in s. 227.22 (2) (intro.), Stats.

Dated at Madison, Wisconsin, December 11, 1998.

By the Office of the Commissioner of Railroads.



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Rodney W. Kreunen, Commissioner of Railroads

9000RR1 Order