



Legislative Fiscal Bureau

One East Main, Suite 301 • Madison, WI 53703 • (608) 266-3847 • Fax: (608) 267-6873

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Joint Committee on Finance

Paper #640

Elimination of the Office of the Commissioner of Railroads (PSC -- Office of the Commissioner of Railroads)

[LFB 2003-05 Budget Summary: Page 33, #6, Page 178, #8; Page 362, #1; and Page 418, #3]

CURRENT LAW

The Office of the Commissioner of Railroads (OCR) regulates railroads and monitors the safety of railroad crossings. The Railroad Commissioner may order the closing of a railroad crossing or the installation of a safety improvement, such as crossing gates or lights. OCR conducts formal hearings on certain matters before issuing a decision, including any proposal to change the alignment of a crossing, create a new crossing, or close an existing crossing. Hearings are not required to order the installation of a railroad crossing protection device, unless an interested party objects to the Commissioner's order.

The office has 7.0 FTE positions, including 1.0 program assistant, 4.0 railroad safety analysts, 2.0 attorneys, who serve as hearing examiners for the Office, and the Railroad Commissioner, who is appointed by the Governor for a six-year term. The operations of the Office are funded through assessments on railroads. The assessment is capped at 1.85% of railroads' prior-year, intrastate revenues. Base funding for the agency is \$558,700 PR. OCR is attached, for limited administrative purposes, to the Public Service Commission.

GOVERNOR

Eliminate the Office of the Commissioner of Railroads (OCR) and delete \$588,800 PR (base plus standard budget adjustments) annually on the effective date of the bill. In addition, delete the position of the Commissioner of Railroads and two other PR positions. Eliminate certain functions of OCR and transfer other functions, funding, and the 4.0 PR remaining positions to other state agencies, as follows:

Abolish OCR. Repeal all statutory provisions creating OCR, attaching OCR administratively to the PSC, describing the powers and duties of OCR, providing for a Commissioner of Railroads, setting the term and manner of appointment of the Commissioner, and assigning the Commissioner to an executive salary group.

Transfer Railroad Regulatory Functions to the Department of Transportation (DOT). Provide that DOT shall be responsible for railroad regulatory matters with respect to the following general statutory provisions: Chapter 191 (railroad construction activity); Chapter 192 (railroad regulations and liabilities); Chapter 195 (railroad regulation); and other statutory provisions relating to harbor railroads (Chapter 30), railroad grade crossing improvements (Chapters 84 and 86), authority of turnpike corporations to relocate railroads (Chapter 182), the allocation of costs of railroad industrial spur tracks (Chapter 190), sole, rather than joint, involvement in certain determinations related to discharge into nonfederal wetlands (Chapter 281), and snowmobile rail crossings (Chapter 350). In general, these changes would be accomplished by replacing all references to OCR's duties and responsibilities with corresponding references to DOT.

Transfer Resolution of Contested Railroad Cases to the Division of Hearings and Appeals. For the purpose of resolving contested matters relating to railroad regulation, transfer this authority to the Division of Hearings and Appeals (Division) in DOA. Specify that administrative hearing procedures under Chapter 227 of the statutes would generally apply to these proceedings. Require the Administrator of the Division to assign a hearing examiner to preside over any hearing or review relating to the regulation of any of the following matters: adequacy of railroad fire protection devices; allocation of costs of railroad crossing improvements; adequacy of bridges, culverts, and drainage facilities near railroad rights-of-way; allocation of costs when two railroads intersect and the appropriate type of grade separation, if any, at proposed intersections; allocation of costs of railroad industrial spur tracks; safety and adequacy of railroad bridges, drawbridges, and fences; removal or transfer of railroad terminals, shops, stations, and agency service; adequacy and cost allocations of grade and highway crossing protections; exemption for vehicles otherwise required to stop at railroad crossings from stopping at a specified crossing; views, trees, and brush near crossings; and the determination of direct and remainder assessments for the costs of railroad regulation. Specify that existing penalties for failure to provide necessary documents or information to OCR or for violating OCR orders would now apply with respect to the Division.

Provide that in hearing these matters, the Division must give due weight to the experience, technical competence, and specialized knowledge of DOT as well as to the discretionary authority conferred upon DOT. Require the Division to give great weight to DOT's interpretation of the statutes and the rules that it administers. Provide that if there is a conflict between this new provision and any other statute relating to a hearing or review conducted by the Division, these new procedures take precedence.

Require that DOT pay the costs of the hearing examiner in accordance with a schedule of fees developed by the Division. Specify that any appeals arising from examiners' decisions be heard by the Administrator of the Division, and that the determination of the Administrator is the final decision of DOA. Allow appeal of the Administrator's decision for judicial review.

Transfer Railroad Corporate Registration Functions to the Department of Financial Institutions (DFI). Require railroad corporations to file the following types of documents with DFI, rather than with OCR, as is currently required: all books of account or stock books as may be required by DFI; designation of a principal office within the state; the annual report to the railroad's stockholders; and certificates issued by DOT for railroad construction or route alteration. Re-assign the approval of route maps for proposed railroads from DFI to DOT.

Modify Railroad Regulatory Authority. In transferring railroad regulatory functions to other agencies, make the following changes to the current level of railroad regulation:

Repeal the requirement that, before any railroad track construction may proceed in the state, the railroad must have a certificate that is issued only after a public hearing and upon a finding of "public convenience and necessity." Under the bill, a certificate authorizing construction would be issued by DOT, but a hearing would be discretionary, and there would be no public convenience and necessity standard required. Also, repeal that standard for issuance of certificates of authority for ferry operations.

Eliminate the current OCR role in authorizing the issuance and disposition of railroad corporation securities, including stock and debt instruments, and instead, allow all such activities authorized by DFI or, in the case of railroads engaged in or proposing interstate commerce, the Federal Surface Transportation Board. [The reference to the Federal Surface Transportation Board replaces an outdated reference under current law to the former Interstate Commerce Commission. The bill would also update a second reference to the Interstate Commerce Commission under provisions regarding forms for the state to use in obtaining information from railroad companies.]

Additionally, repeal:

- The authority and the procedures to investigate and remedy complaints of unreasonable or unjustly discriminatory rates, including interstate rates, and of inadequate service within the state;
- The requirement that railroads furnish reasonably adequate service and facilities and that the charges made be reasonable and just;

- The prohibitions against discriminatory rates, undue or unreasonable carrier preferences, and rebates and concessions received in the furtherance of discriminatory rates;
- The standards with respect to providing free transportation, reduced rates, and passes;
- The authority to prescribe the time and form of rate schedule filings, use of free passes by shippers, rates and charges at elevators and warehouses upon railroad ground, and the manner of providing railroad car service to shippers, including weighing and testing railroad cars and freight;
- The authority to collect information on railroad income and expenditures, construction costs, and debt level;
- The authority to investigate complaints about freight charges and the correctness of freight bills;
- The requirements that railroads maintain transportation contracts and pass lists for certain periods of time and make them available for inspection, as required; and
- Penalties for failure to meet time requirements for erecting overhead warning devices ("telltals") to alert workers of low clearances.

Repeal current law specifications with respect to railroad grade crossing and safety signage. Provide, instead, that such signs would have to be consistent with DOT's required uniform system of signs manual. Allow the use of existing signs until they are replaced or relocated.

Provide that DOT may issue orders on the following matters without holding a public hearing: (a) the installation of protective devices, signs, or safety improvements at railroad crossings; (b) the determination of the type of grade crossing to be used where a railroad intersects a street or another railroad; (c) the granting of an exemption for vehicles otherwise required to stop at railroad crossings from stopping at a specified crossing; (d) the elimination of existing highway grade crossings associated with highway relocation, improvement, or new construction; and (e) the safety and adequacy of railroad bridges and drawbridges. Provide that DOT shall issue orders based on its investigation and criteria promulgated by rule with respect to such issues (however, specific rule authority is not provided with respect to "(c)"), and that the Division shall hear related appeals. Under current law, a public hearing must be held on all of these matters. Specify that the rule related to the installment of protective devices at railroad crossings may include programming criteria relating to prioritizing those crossings needing

protection. Specify that the rule related to highway grade crossings shall include criteria to apportion expenses.

Create a requirement that the Department, notwithstanding its other duties related to grade crossings, must monitor and investigate all such crossings and determine, for each crossing, whether any warning devices, advance warning signs, or other warning measures are required to protect and promote public safety. Specify that DOT may make this determination without a hearing, but also provide that any order may be appealed to the Division. Provide that any device, sign, or other measure at a crossing that conforms to a DOT determination, or, if DOT has not made a determination, that was approved by OCR or the Office of the Commissioner of Transportation, is considered adequate and appropriate warning for the crossing.

Railroad Assessments. On the effective date of the transfer, delete the existing PR appropriation for state funds for OCR and create a new, PR appropriation under DOT to support the transferred railroad regulation activities. Also, authorize the use of the existing segregated appropriation for railroad crossing improvement and protection maintenance, funded from the transportation fund, for purposes of the transferred railroad regulation activities.

Authorize DOT, rather than OCR, to collect direct and remainder assessments from railroads sufficient to support railroad regulatory activities. Specify that 10% of the total amounts collected be deposited in the general fund for the costs of state government operations and the remaining 90% be deposited in the general fund and credited to the new, PR appropriation described above. Clarify that, although collected by DOT, the funds collected from direct and remainder assessments to support railroad regulatory activities would not be deposited in the transportation fund. Delete the provision that specifies that federal funds received for the regulation of railroads are credited to OCR's FED appropriation, rather than being part of the transportation fund.

Transition Provisions. On the effective date of the bill:

Transfer from OCR 4.0 PR positions and the incumbent employees, as identified by the Secretary of DOT, to DOT. These positions include one program assistant position and three regulation compliance investigator positions.

Delete the remaining 3.0 PR positions of OCR not transferred, including the positions of the Commissioner of Railroads and the two attorneys.

Specify that: (a) all persons transferred would retain the same rights and employee status they held prior to the transfer; and (b) no employee who had attained permanent status in his or her classified position would be required to serve a new probationary period. Finally, include transitional provisions transferring all assets and liabilities, tangible personal property, contracts,

rules and orders, and all pending matters from OCR to DOT. Provide that in the event of any disagreements between the Commissioner and the Secretary of DOT with respect to tangible personal property, contracts, rules and orders, and pending matters, the Secretary of DOA would be required to determine the matter and develop a plan for an orderly transfer.

The net effect of the funding and position transfers and deletions associated with this item is as follows:

<u>Agency</u>	<u>Annual Funding Change</u>	<u>Annual Position Change</u>
PSC	-\$588,800	-7.00
DOT	588,800	4.00
DOA	<u>200,000</u>	<u>0.00</u>
Total	\$200,000	-3.00

Additional Provisions. In addition, make the followings changes: (a) when referring to signs and instruments for safety purposes, generally replace the word "protection" with the word "warning;" (b) delete language authorizing OCR to sue and be sued in that name, as there are no provisions preventing such actions with respect to the state agencies to which the responsibilities of OCR would be transferred under the bill; and (c) delete other statutory references to sections that would be deleted under these provisions.

DISCUSSION POINTS

1. The Department of Transportation proposed eliminating the Office of the Commissioner of Railroads and transferring its functions to DOT and DOA in its agency budget request. In submitting this proposal, the Department argued that the regulation of railroad crossing issues, which is the primary responsibility of OCR, could be done more effectively and efficiently by DOT since it would allow for better coordination of highway and railroad crossing decisions. In addition, DOT indicates that Department staff are currently involved with OCR staff in many of the same crossing investigations, particularly if they involve state highways.

2. Opponents of the Governor's proposal to eliminate OCR argue that having a railroad regulatory authority independent of DOT is necessary to ensure that issues involving railroad-highway crossings are resolved fairly. They argue that since OCR is often in a position of issuing orders in which DOT is an interested party, the Department could not be expected to assume this role and remain objective in such cases. For instance, OCR is responsible for allocating the cost of improvements at a crossing, such as the improvements required when the highway is widened, between the various parties. In such cases where DOT is the highway authority, there is concern that the Department would ask the railroad to pay a disproportionate share of the costs. In calendar

years 2001 and 2002, slightly over 20% of OCR petitions originated with DOT, indicating that the Department could have an interest in the outcome of these cases.

3. The functions of OCR would be transferred to DOT under the bill, but the mechanism for funding the functions would remain the same. DOT, like OCR currently, would assess railroads directly for administrative costs that can be attributed to a single railroad, such as the investigation and associated hearings on a particular crossing. For administrative costs that can not be attributed directly to a single railroad, DOT (as OCR does currently) would assess a remainder assessment on all railroads' intrastate revenues. The bill would create a program revenue appropriation in DOT, similar to OCR's current appropriation, to collect assessments and account for expenditures. In his testimony before the Joint Committee on Finance, the Railroad Commissioner noted that since OCR does not expend GPR funds, the elimination of the Office would not result in general fund savings.

4. When public hearings on railroad matters are required under current law, one of OCR's two attorneys conducts the hearing. (One of the attorneys is a project position that expires in 2005-06, while the other is a permanent position.) Under the bill, hearings would be conducted by a hearing examiner at the Division of Hearings and Appeals in DOA. DOT would be billed for DOA's costs of conducting the hearing, which would be paid out of the Department's newly-created PR appropriation for railroad regulatory costs. The bill would increase PR expenditure authority in the Division of Hearings and Appeals by \$200,000 to reflect the additional workload associated with railroad hearings. DOA indicates that the \$200,000 figure was estimated by adding the salary and fringe benefit costs of one of OCR's attorneys and one-half of the salary and fringe benefit costs of the Commissioner, which together total \$156,700, plus an additional \$43,300 in supplies and services costs.

5. Although the bill includes an estimate of \$200,000 for hearing-related costs, OCR indicates that the Office's total costs associated with hearings is lower than \$200,000. The Office does not account for the costs associated with hearings independent of other costs, but based on OCR's estimates and the rates charged by DOA for hearing examiner's time, it is estimated that the actual amount that would be charged if DOA did OCR's hearings would be \$75,000 to \$100,000. Furthermore, the bill would modify the procedures for issuing orders and conducting hearings in a way that may reduce the number of hearings held. First, the bill would allow DOT to issue orders on physical changes to crossings (including the creation of a new crossing or the closing of an existing crossing) without holding a public hearing, whereas OCR is currently required to hold a hearing in these cases. These cases, which constitute the majority of OCR's hearings, would only require a hearing if an interested party files an objection to the order within 20 days of the order. Second, in any hearing proceeding, the hearing examiner would be required to give "due weight" to the experience, technical competence, and specialized knowledge of DOT and give "great weight" to the Department's interpretation of statutes and rules that it administers. The fact that the bill would place these requirements on the examiner may discourage interested parties from filing objections to the Department's orders, since they may reduce the chance that a DOT order can be successfully challenged.

6. Although DOT would not be required to hold hearings on many issues where OCR is currently required to hold a hearing, DOT indicates that the Department's intention is to seek public input on decisions. If a decision is made to adopt the Governor's recommendation to eliminate OCR and transfer its duties to DOT and DOA, the Committee could modify the provision to continue to require a public hearing in cases where hearings are currently required. In addition, since DOA hearing examiners are not required to give "due weight" to other agencies' technical expertise or "great weight" to other agencies' statutory and rule interpretations, the Committee could decide to eliminate the preferential treatment provided for DOT in this regard.

7. If the changes outlined in the previous point are adopted, it may be reasonable to expect that the volume of railroad hearings conducted by DOA would be similar to the number currently conducted by OCR. Given that the \$200,000 may be too high for the amount of railroad hearings that DOA would conduct, this amount could be reduced to \$75,000 if the Committee adopts the Governor's recommendation with the modifications to the hearing procedures. If DOA determines that changes in hearing volume or complexity result in this amount being too low, the Department could submit a request to the Joint Committee on Finance under s. 16.515 of the statutes to increase the expenditure authority of the Hearings and Appeals PR appropriation.

8. The bill would fund railroad regulation in DOT at the same level at which OCR would be funded if the Office were to be retained, which is \$588,000 PR annually. However, given that the bill would eliminate some positions, it may be expected that total expenditures would be lower. The bill would eliminate the Railroad Commissioner as well as two attorney positions. These savings would be offset to some extent by the fact that DOT would be charged by DOA for services that are currently performed by the eliminated positions. A reasonable assumption may be that the savings would equal the total cost for the eliminated positions, net of the estimated \$75,000 charge for hearings. Using these assumptions, it is estimated that the savings would be \$247,600 PR annually.

9. It should be noted that while these would be the savings relative to the base, OCR's actual expenditures have been lower than the appropriation base, primarily because the Office has had one or two vacant positions for the past several years. In 2001-02, actual office expenditures were \$453,800, or \$134,200 below the \$588,000 that the bill would provide to DOT for the functions. It should also be noted that any savings associated with the elimination of OCR positions would not result in "unused" program revenue funds. Instead, lower expenditures would result in a lower assessment on railroads.

10. The railroad assessment mechanism that OCR uses to fund office expenses, which is the same mechanism that DOT would use under the bill, requires the Office to collect an amount that exceeds the Office's direct expenditures. The increment above the direct expenditures, which, according to state statute, is for "state government operations," is deposited in the general fund as GPR-Earned. Of the total assessment, 90% is for the Office's direct expenditures and the other 10% is GPR-Earned. (Therefore, the GPR-Earned amount is equal to 11.1% of direct expenditures.) So, for instance, if OCR's expenditures are \$588,000, the Office would actually collect \$653,300 and the GPR-Earned amount would be \$65,300.

11. The bill includes GPR-Earned amounts of \$70,600 in 2003-04 and \$71,800 in 2004-05 from railroad assessments. However, the maximum amount of GPR-Earned that would be generated if DOT had annual, direct expenditures of \$588,000 is \$65,300, which, relative to the bill, would be a reduction of \$5,300 in 2003-04 and \$6,500 in 2004-05. If the DOT railroad regulation appropriation is reduced by \$247,600 annually (as outlined in Point #8), the maximum amount of GPR-Earned that would be generated is \$37,800, which is lower than the amount reflected in the bill by \$32,800 in 2003-04 and \$34,000 in 2004-05.

12. The bill reflects the receipts as GPR-Earned by the PSC. However, the administration has indicated that the estimated receipts should be reflected under DOT, rather than the PSC. If the Governor's recommendation to eliminate OCR is adopted, with or without the modification to reduce DOT's appropriation, this technical adjustment should also be made.

13. In submitting its budget request, DOT recommended that OCR's permanent attorney position be transferred to DOA in order to conduct railroad hearings. The Department indicates that since this person has been in the position for over 15 years and has experience in the area of federal and state railroad law, including conducting railroad hearings, transferring the attorney to DOA would help facilitate the transition to a system in which DOA conducts hearings. The bill, however, would eliminate the attorney position, which would require DOA to conduct the hearings with existing staff. If the Committee adopts the Governor's recommendation to eliminate OCR, the Committee could decide to modify the bill to transfer the attorney position. However, if the volume of railroad hearings remains at current levels, it is possible that the hearing workload would not be enough to support the entire position, in which case DOA would have to absorb the other costs associated with the position.

14. The bill would delete current law authority to investigate and remedy complaints of unreasonable or unjustly discriminatory rates and inadequate service within the state. OCR has not engaged in this type of regulation with respect to railroads due to issues of federal preemption. However, since the statutes define "water carriers" (such as the passenger ferries serving Washington Island and Madeline Island) as railroads, the elimination of the authority to regulate rates and service of railroads would have the effect of eliminating the regulatory authority over water carriers. Water carriers currently operate as regulated monopolies without any comparable competing alternative. If the Committee decides to continue the regulation of water carriers and decides to adopt the Governor's proposal to eliminate OCR, the provision would have to be modified in order to create the authority to regulate water carriers within DOT.

ALTERNATIVES

1. Adopt the Governor's recommendation to eliminate OCR, transfer its duties and responsibilities to DOT, DOA, and DFI, and transfer the funding mechanism for railroad regulatory activities from OCR to DOT. Delete \$588,800 PR annually in OCR and provide \$588,800 PR annually in DOT to reflect these changes. Provide \$200,000 PR annually in DOA's Division of Hearings and Appeals appropriation to reflect charges paid by DOT for railroad hearings. Modify

the Governor's provision to: (a) reduce GPR-Earned amounts by \$5,300 in 2003-04 and \$6,500 in 2004-05 to reflect a reestimate of these amounts; and (b) reflect the receipt of GPR-Earned amounts in DOT rather than in PSC.

<u>Alternative 1</u>	<u>GPR</u>
2003-05 REVENUE (Change to Bill)	- \$11,800

2. Adopt the Governor's recommendation (as modified to reflect the reestimated GPR-Earned amounts and to reflect the receipts in DOT instead of PSC) with one or more of the following modifications:

<u>Alternative 2</u>	<u>GPR</u>
2003-05 REVENUE (Change to Bill)	- \$11,800

a. Require DOA and DOT to conduct hearings on railroad issues in cases where OCR is required to conduct hearings under current law. Delete provisions that require DOA hearing examiners to give due weight to DOT's technical expertise and great weight to DOT's statutory and rule interpretations. Reduce funding provided in DOA's Division and Hearings and Appeals appropriation by \$125,000 PR annually to establish funding for railroad hearings at \$75,000 PR annually.

<u>Alternative 2a</u>	<u>PR</u>
2003-05 FUNDING (Change to Bill)	- \$250,000

b. Reduce the amount of expenditure authority in the DOT railroad regulation appropriation by \$247,600 PR annually to reflect a reestimate of the amount required for railroad regulation. Reduce GPR-Earned by an additional \$27,500 annually to reflect this reduction.

<u>Alternative 2b</u>	<u>GPR</u>	<u>PR</u>
2003-05 FUNDING (Change to Bill)	\$0	- \$495,200
2002-03 REVENUES (Change to Bill)	- \$55,000	\$0

c. Transfer 1.0 PR position annually, on the effective date of the bill, from OCR to DOA's Division of Hearings and Appeals to reflect the transfer of the permanent OCR attorney to DOA. Specify that the incumbent employee in the OCR's attorney position would retain the position and that the employee would have all the rights and the same status under state employment relations provisions that the employee had in OCR immediately prior to the transfer.

Since the bill would eliminate this position, this alternative has the effect, relative to the bill, of creating 1.0 PR position in DOA.

<u>Alternative 2c</u>	<u>PR</u>
2003-05 POSITIONS (Change to Bill)	1.00

d. Authorize DOT to investigate and remedy unreasonable or unjustly discriminatory rates and inadequate service for the purpose of retaining jurisdiction over water carriers.

3. Delete provision. Reduce GPR-Earned by \$5,300 in 2003-04 and \$6,500 in 2004-05 to reflect a reestimate of the amount generated on OCR's railroad assessments.

<u>Alternative 3</u>	<u>GPR</u>	<u>PR</u>
2003-05 REVENUES (change to Bill)	- \$11,800	\$0
2003-05 FUNDING (Change to Bill)	\$0	- \$200,000
2004-05 POSITIONS (Change to Bill)	0.00	3.00

Prepared by: Jon Dyck