

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF TRANSPORTATION

In the Matter of the Proposed
Permanent Rules Relating to
Standards for Mailbox
Installations and Supports

REPORT OF THE
ADMINISTRATIVE LAW JUDGE

A public hearing in the above-entitled matter was held on January 12, 1994, in St. Paul before Allan W. Klein, Administrative Law Judge.

Appearing on behalf of the staff of the Department of Transportation was Deborah Ledvina, Staff Attorney. Agency staff persons testifying included Jerry Miller and John Howard.

The only persons objecting to the proposed rules were affiliated with the United States Postal Service. They included Thomas L. Peterson, Manager, Operations Programs Support, Northland District. Also testifying on his own behalf was Thomas Gergen, Manager of Labor Relations for the USPS in Minneapolis.

The hearing continued until all persons had an opportunity to present their views, exhibits, and ask questions of others. The initial comment period closed on February 1, and the final response period closed on February 8.

This Report must be available for review to all affected individuals upon request for at least five working days before the agency takes any further action on the rules. The agency may then adopt a final rule or modify or withdraw its proposed rules. If the Department makes changes in the rules other than those recommended in this Report, it must submit the rules with the complete hearing record to the Chief Administrative Law Judge for a review of the changes prior to final adoption. Upon adoption of the final rules, the agency must submit them to the Revisor of Statutes for a review of the form of the rules. The agency must also give notice to all persons who requested to be informed when the rules are adopted and filed with the Secretary of State.

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

FINDINGS OF FACT

Procedural Requirements

1. On November 3, 1993, the Department filed the following documents with the Chief Administrative Law Judge:

- (a) A copy of the proposed rules certified by the Revisor of Statutes.
- (b) The Order for Hearing.
- (c) The Notice of Hearing proposed to be issued.
- (d) A Statement of the number of persons expected to attend the hearing and estimated length of the Agency's presentation.
- (e) The Statement of Need and Reasonableness.
- (f) A Statement of Additional Notice.

2. On November 9, 1993, a Notice of Hearing and a copy of the proposed rules were published at 18 State Register 1406.

3. On November 24, 1993, the Department mailed the Notice of Hearing to all persons and associations who had registered their names with the Department for the purpose of receiving such notice.

Shortly after the mailing of November 24, it was discovered that two errors had occurred. First, a photocopying error resulted in some portions of the rules not being mailed. Secondly, the notice, which was a dual notice, specified a comment period which closed on December 22, which was less than the 30 days required by statute. After consultation with the Administrative Law Judge, the Department did, on November 29, send out a correction sheet extending the comment period and a complete copy of the rules to its mailing list. No person objected to the error, it was corrected in a timely and appropriate manner, no prejudice resulted to any person, and it is deemed to be a harmless error within the meaning of Minn. Stat. § 14.15, subd. 6.

4. On January 4, 1994, the Department filed the following documents with the Administrative Law Judge:

- (a) The Notice of Hearing as mailed.
- (b) The Agency's certification that its mailing list was accurate and complete.
- (c) The Affidavit of Mailing the Notice to all persons on the Agency's list.
- (d) An Affidavit of Additional Notice.
- (e) The names of Department personnel who will represent the Agency at the hearing together with the names of any other witnesses solicited by the Agency to appear on its behalf.
- (f) A copy of the State Register containing the proposed rules.
- (g) All materials received following a Notice of Intent to Solicit Outside Opinion published at 16 State Register 1836 on February 3, 1992 and a copy of the Notice.

The filing date of January 4 did not meet the filing date specified in Minn. Rule pt. 1400.0600. The above-listed documents were available for inspection at the Office of Administrative Hearings from the date of filing to the date of the hearing. No person asked to inspect the documents. Therefore, the Department's failure to file them at least 25 days before the hearing did not deprive any person of an opportunity to participate meaningfully in the process. The failure to file on time constitutes a harmless error within the meaning of Minn. Stat. § 14.15, subd. 5.

5. The period for submission of written comment and statements remained open to February 1, 1994. The record for replies remained open to February 8, at which time the record closed for all purposes.

General Description of the Proposed Rules

6. The proposed rules regulate the placement of certain types of mailboxes and mailbox supports along a street or highway having a speed limit of 40 miles per hour or greater. They are proposed in response to a legislative directive to adopt "standards and permissible locations of mailbox installations and supports". They are substantially based upon "A Guide for Erecting Mailboxes on Highways" published by the American Association of State Highway and Transportation Officials (AASHTO). The proposed rules would prohibit the use of neighborhood delivery and collection box units (NDCBU) unless they could be documented to have passed an accredited crash test. The primary opposition to these rules, which came from the United States Postal Service, focused on this prohibition against NDCBUs.

Statutory Authority

7. Minn. Stat. § 169.072, enacted in 1991, directs the Commissioner of Transportation to adopt rules that provide for standards and permissible locations of mailbox installations and supports on a street or highway. Because the statutory language is crucial to arguments regarding the need for the proposed rules, pertinent parts are cited below:

Subdivision 1. Public Hazard. A mailbox installation or support on a public highway that does not meet the breakaway and location standards contained in rules adopted under subdivision 2 is declared to be a public nuisance, a road hazard, and a danger to the health and safety of the traveling public.

Subd. 2. Standards; Rulemaking. The commissioner shall by January 1, 1993, adopt rules that provide for standards and permissible locations of mailbox installations and supports on a street or highway. The commissioner shall base the rules substantially on federal highway administration regulations or recommendations, or other national standards or recommendations regarding the location and construction of safe, breakaway mailbox installations or supports. In adopting the rules, the commissioner shall consider the safety of the traveling public relative to the convenience and expense of owners of nonconforming mailbox installations or supports. The commissioner may provide for alternative standards to allow variances from the rules.

The balance of the statute provides a procedure whereby the Commissioner or a road authority may remove and replace a mailbox installation or support that does not conform to the rules.

8. The United States Postal Service has challenged the Agency's authority to adopt the proposed ban on NDCBUs as vulnerable to preemption under the supremacy clause of the United States Constitution. The same argument is made by Mr. Gergen individually.

9. NDCBUs are a cluster of several individual locked mailboxes which are packaged as a single unit. Typically, 8, 12 or 16 boxes are enclosed by a metal framework and supported by a single vertical post embedded in concrete. Crash tests, sponsored by the Federal Highway Administration, demonstrated that these installations caused unacceptable rollovers when struck by automobiles. Ex. 15.

10. Some NDCBUs are owned by the United States Postal Service, while others are owned by individuals or homeowners' groups.

11. The United States Postal Service encourages the use of NDCBUs to replace post offices in small hamlets or for new real estate developments that are in the process of building out. In some situations, USPS will only deliver to a NDCBU -- if a NDCBU cannot be used in those situations, postal patrons must travel to the nearest post office to collect their mail. The Postal Service pays its contract carriers substantially less per delivered box for deliveries made to an NDCBU as opposed to a delivery made to a separate freestanding mailbox. USPS estimates that there are currently over 2,000 NDCBUs in Minnesota that would be considered nonconforming under this rule, and that converting them to curbside boxes would cost the Postal Service at least \$260,000 annually in increased payments to contract carriers. Tr. 22-26.

12. The record does not contain any citation to an explicit statement from Congress of its intent to preempt state regulation of mailboxes, mailbox supports, or NDCBUs based upon highway safety. To the contrary, the Domestic Mail Manual, which is incorporated by reference into the Code of Federal Regulations (39 C.F.R. Minn. Stat. § 111.1) explicitly requires that rural boxes be placed "to conform with state laws and highway regulations."

13. The same language, quoted above, also supports a finding that preemption cannot be inferred from the existence of federal regulations which are so pervasive as to suggest that Congress intended to leave no room for states to supplement it. The federal government has not "occupied the field". The USPS regulations focus on the height and size of mailboxes, that they be grouped together wherever possible, and other matters directed to the efficiency of postal deliveries. Aside from a few isolated sentences, they do not address the concept of breakaway mailbox installations or supports. The closest rule is contained in section 156.531 of the DMM, which provides as follows:

Posts or other supports for rural boxes must be neat and of adequate strength and size. They may not be designed to represent effigies or caricatures which would tend to disparage or ridicule any person. The box may be attached to a fixed or movable arm.

As noted earlier, section 156.54 explicitly requires that boxes be placed to conform with state laws and highway regulations.

14. Gergen has also argued that the proposed rules are preempted because they conflict with federal objectives and goals in that they create an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Essentially, this is based on the fact that a prohibition against NDCBUs on high speed roads will result in increased costs,

and Congress has required the Postal Service to provide adequate and efficient services "at fair and reasonable rates and fees." 39 U.S.C. § 403(a). Again, however, where it is possible to accommodate both the federal interest and the state interest such that the state interest does not stand as an obstacle to accomplishing the federal goal, then no preemption may be found. The mere fact that compliance with a state law may result in higher costs for a federal agency does not mean that the state law is preempted. Instead, the costs must be prohibitive. The Postal Service has failed to show that in this case. An additional \$260,000 in annual delivery costs is not prohibitive so as to invoke federal preemption.

15. In summary, it is concluded that the Agency has demonstrated its statutory authority to adopt the proposed rules, including the ban on NDCBUs on high speed roads, and that the proposed rules are not preempted by the federal constitution.

Fiscal Note

16. Minn. Stat. § 14.11, subd. 1 (1992) requires a fiscal note in the Notice of Hearing if the adoption of the rule will require local public bodies to spend more than \$100,000 in either of two years immediately following the adoption of the rule. The Department asserts that the threshold expenditure limit will not be met by these rules. Both USPS and Mr. Gergen assert that the Department's estimates may be low and that the threshold may, in fact, be met.

Minn. Stat. § 169.072, subd. 3 provides that the Commissioner or a road authority may remove and replace a nonconforming mailbox installation or support and may charge the owner or resident not more than \$75 for the cost of the removal and replacement. Since the first \$75 of any removal and replacement would not have to be paid by a local road authority, the question of whether or not the \$100,000 threshold would be exceeded depends upon whether or not the costs would exceed \$75 in enough cases that the aggregate cost would exceed \$100,000 in any one year. The best evidence in the record of such costs was provided by the Department at the hearing (Tr. 72-75) and in post-hearing comments dated February 1. The Administrative Law Judge concludes that while there may in fact be a small number of cases where the cost of removal and replacement would exceed \$75, in the vast majority of cases \$75 will cover the costs of removal and replacement. Moreover, the rate of removal is within the discretion of the road authority, so that it would not be forced to do more than it chose to in any one year. The Administrative Law Judge concludes that the \$100,000 limit of the statute will not be triggered.

Impacts on Agricultural Land

17. The adoption of the proposed rules will not have a direct or substantial adverse impact on agricultural land and, therefore, no further action is required by Minn. Stat. § 14.11, subd. 2.

Small Business Considerations

18. Minn. Stat. § 14.115 requires an agency to consider and adopt certain methods for reducing the impact of proposed rules on small businesses.

19. The only impact which the proposed rules would have on small businesses is removal and replacement where a small business has a nonconforming mailbox or support. Small businesses are required to have conforming structures to the same extent that any individual homeowner must have a conforming structure. There are no exceptions for small businesses, nor are there any special requirements. It is clear from the underlying statute that the Legislature's goal was protection of the safety of the traveling public. From the standpoint of enhancing public safety, there is no reason to exempt or otherwise provide special protection for nonconforming mailboxes owned by small businesses. While USPS suggested that its individual post offices and contractors ought to be viewed as separate small businesses, the Administrative Law Judge concludes that USPS must be viewed as a whole, and as such, USPS does not qualify as a "small business" within the meaning of Minn. Stat. § 14.115. The Administrative Law Judge concludes that the Department has complied with the small business statute.

Section-By-Section Analysis of Need and Reasonableness

20. Minn. Stat. § 14.50 (1992) requires the Administrative Law Judge to evaluate the degree to which the Agency has demonstrated the need for and reasonableness of its proposed action with an affirmative presentation of facts. The question of whether a rule is reasonable focuses on whether it has a rational basis. A rule is reasonable if it is rationally related to the end sought to be achieved by the statute. Broen Memorial Home v. Minnesota Department of Human Services, 364 N.W.2d 436, 440 (Minn. App. 1985); Blocher Outdoor Advertising Co. v. Minnesota Department of Transportation, 347 N.W.2d 88, 91 (Minn. App. 1984). The Agency's burden has been described as a requirement that it "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 v. Pettersen, 347 N.W.2d 238, 244 (Minn. 1984). An agency is entitled to make choices between possible standards, so long as the choice it makes is a rational one. When commentators, such as the USPS, suggest approaches other than that suggested by the Agency, it is not the appropriate role of the Administrative Law Judge to determine which alternative presents the "best" approach and require the Agency to adopt it. Instead, his role is to determine whether or not the alternative which the Agency has selected has been demonstrated to be a reasonable one.

21. With regard to the ban on NDCBUs on high speed roads, the Agency relied upon a crash test performed at the Texas Transportation Institute under the sponsorship of the Federal Highway Administration. This test is documented in Ex. 15, which is a videotape of a number of tests on a variety of mailbox installations. The test is also documented in an article entitled "Neighborhood Mailbox for Roadside is Crash-Tested with Auto", which is attached to a May 17, 1985 letter from the Federal Highway Administration to the Postmaster General. Based upon the crash tests and complaints from state highway agencies, the American Association of State Highway and Transportation Officials Manual, published in 1984, recommends a model regulation for adoption by the states which includes the following:

No more than two mailboxes may be mounted on a support structure unless the support structure and mailbox arrangement have been shown to be safe by crash testing. . . . Mailbox supports shall not be set in concrete unless the support design has been shown to be safe by crash tests when so installed.

A draft revision of the AASHTO guide labeled "Draft 1994" was attached to the Department's February 1 comment letter. It also contains a model regulation for adoption by the states which continues to use the language quoted above. Both the 1984 and 1994 documents contain a discussion of NDCBUs which comment on their weight (between 100 and 200 pounds) and their performance in the crash test.

22. The record does not contain any evidence of fatalities or other injuries actually occurring as a result of a collision between an automobile and an NDCBU. However, concerns about NDCBUs go back into the early 1980s, if not before. In the May 1985, correspondence from the Federal Highway Administrator to the Postmaster General, there are assertions that some state highway officials were having difficulty obtaining cooperation from the Postal Service regarding the location of NDCBUs. Such concerns had caused the Postal Service, in 1983, to issue a memorandum directing postal service personnel to consult with appropriate local government authorities, including highway officials, regarding locations of NDCBUs. That memorandum, however, was not entirely successful, and in 1985 the Federal Highway Administrator commented that: "We have a situation where one federal agency is spending public funds to remove highway hazards while another federal agency is installing devices along the highways which are hazardous." This conflict has yet to be resolved.

23. The proposed rule, like the AASHTO proposal, would allow the placement of NDCBUs along high-speed highways if they were installed so that they would pass an accredited crash test. A NDCBU could pass a test so long as it used breakaway couplings or a slipbase. A Federal Highway Administration project manager who has been involved in managing numerous crash test contracts over the last 17 years opined that a NDCBU with a breakaway coupling or slipbase could pass the test, and that similar design modifications had resulted in a 1,000 pound wooden utility pole being found acceptable. Memo dated February 1, 1994 from Charles F. McDevitt attached to Department Comments of February 1. The Postal Service is concerned that a breakaway NDCBU could pose a hazard to children who might try to climb or play on it (Tr. 50), and has resisted requiring such a modification for NDCBU.

24. The Administrative Law Judge concludes that the Department has demonstrated that NDCBUs do pose a hazard to the traveling public. The proposed rule which would prohibit their placement along high-speed routes has been demonstrated to be a rational response to that problem in light of the history of attempts to resolve it and the existence of alternative mountings which would allow NDCBUs to be used without creating a hazard to the public.

25. After USPS concerns about NDCBUs surfaced during the hearing process, the Department and USPS engaged in a number of conversations. They agreed to work on a memorandum of understanding covering three specific issues. One of them would be a commitment on the part of the Department to replace unlawful multi-mailbox supports with crash-tested designs, so as to perpetuate aggregation of mailboxes to the greatest extent possible.

Aggregation is desired by USPS as a cost-saving matter. This agreement, if implemented, should eliminate some of the economic impact feared by USPS while still achieving the Department's goal of eliminating hazardous structures on the roadway.

26. The Agency has proposed a number of situations in which a mailbox or its support would be nonconforming. These are taken, generally, from the AASHTO Manual described earlier. One of the ways in which a mailbox would be nonconforming under the rule is that it is "not United States Postal Service approved". Part 8818.0300, subp. 1(E). In a comment from the chief counsel for state and local policies, the Postal Service noted that such a requirement goes beyond postal regulations and may reflect a misunderstanding of them. The commentator explained:

The USPS reviews and approves the design and construction of rural mailbox receptacles for manufacturers who find such approval provides a marketing edge. Approval is based upon the strength and durability of submitted boxes.

However, use of an approved box is not required by postal regulations. A customer may erect a box, and so long as it meets standards for flag, size, strength and quality of construction, local postmasters may approve delivery to it. Indeed, postal regulations permit the withdrawal of delivery to rural boxes not meeting these latter standards, but do not permit withdrawal for failure to comply with external regulations, such as the [Mn/DOT] rules. Thus, the [Mn/DOT] rules are overbroad by going beyond mailbox supports and adding requirements for rural mailbox receptacles that the USPS does not itself require.

27. In response, the Department indicated that it did not intend the reading suggested by USPS. The Department intended to prohibit mailboxes that the USPS (including their local postmasters) were unwilling to deliver to, not just those boxes which had been labeled "approved" after having been actually submitted to USPS. The Department's interpretation is consistent with the model regulation contained in the AASHTO guide, but the AASHTO language is clearer in that it requires mailboxes to "be of light sheetmetal or plastic construction conforming to the requirements of the U.S. Postal Service." The AASHTO language avoids using the word "approved" which caused the confusion suggested by the USPS's comment. The Administrative Law Judge recommends, but will not require, that the Agency eliminate any possible confusion on this point by changing its proposed language to only prohibit mailboxes that are not "acceptable for delivery of mail" by the United States Postal Service.

28. USPS and Mr. Gergen both expressed concerns that local postal officials would become involved in interpreting and enforcing the proposed rules. They were concerned that this could take time away from USPS work and damage relations between USPS and its customers. The Department responded that there was nothing in the rules to suggest that USPS personnel would have to enforce them, and it was not the Department's intent that they do so. In post-hearing comments, the Department noted that after the concerns of USPS surfaced during the hearing process, there had been a series of conversations between Department personnel and USPS personnel which resulted in the agreement to attempt to prepare a memorandum of understanding regarding

enforcement of the rules. The memorandum would cover three points, one of which would be:

Mn/DOT would itself and would encourage other road authorities to work closely with local postmasters regarding what these rules say and how they plan to implement an enforcement policy. In this way the postmasters would be able to direct postal patrons to the best information.

Such a resolution of the enforcement issue is appropriate. The Department does not want to be in the business of interpreting or enforcing USPS rules, nor does USPS want to be in the business of interpreting and enforcing Department rules. The fact that such an agreement is contained in a memorandum of understanding, rather than in the rules themselves, does not invalidate the rules. The rules are not unreasonable because they do not contain such a provision as a rule.

29. USPS and Mr. Gergen made a number of other comments with regard to specific rules, but the Administrative Law Judge finds that they do not raise substantial issues regarding the need for or reasonableness of the Department's proposals. The Department has justified both the need for and reasonableness of all of its proposed rules.

Post-Hearing Amendment Proposed By the Department

30. The Department has proposed to make one change to the rules. The change would clarify that the list of nonconforming structures only applies to structures located on streets or highways having a speed limit of 40 miles per hour or greater. A structure located on a street or highway having a lower speed limit would not be covered by these rules. The Administrative Law Judge finds that this is not a change in the meaning of the rule from its original form. The change does avoid misunderstandings that could arise from a casual reading of the rules. The application to 40-mile-per-hour or greater roadways was already present in Part 8818.0200, subp. 2, and already did limit the application of Part 8818.0300. However, by repeating the limitation again in the latter rule, the Department will avoid potential confusion. The Administrative Law Judge finds that the proposed change is not a substantial one.

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

CONCLUSIONS

1. That the Department gave proper notice of the hearing in this matter.
2. That the Department has fulfilled the procedural requirements of Minn. Stat. §§ 14.14, and all other procedural requirements of law or rule.
3. That the Department has documented 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 (i) and (ii). None of the rules are preempted by federal law.

4. That 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. 2 and 14.50 (iii).

5. That the addition to the proposed rules which was suggested by the Department after publication of the proposed rules in the State Register does not result in rules which are substantially different from the proposed rules as published in the State Register within the meaning of Minn. Stat. § 14.15, subd. 3, Minn. Rule 1400.1000, subp. 1 and 1400.1100.

6. That any Findings which might properly be termed Conclusions and any Conclusions which might properly be termed Findings are hereby adopted as such.

7. That a finding or conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the Department from further modification of the rules based upon an examination of the public comments, provided that no substantial change is made from the proposed rules as originally published, and provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

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

RECOMMENDATION

IT IS HEREBY RECOMMENDED: that the proposed rules be adopted consistent with the Findings and Conclusions made above.

Dated this 10th day of March, 1994.



ALLAN W. KLEIN
Administrative Law Judge

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