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STATE OF FLORIDA
DEPARTMENT OF TRANSPORTATION
Haydon Burns Building
605 Suwannee Street
Tallahassee, Florida

AP

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DIVISION OF ADMINISTRATIVE HEARINGS

TREMRON JACKSONVILLE, L.L.C.;
CITY OF JACKSONVILLE; and
CENTURION AUTO TRANSPORT,

Petitioners,

v.

DEPARTMENT OF TRANSPORTATION,
and CSX TRANSPORTATION, INC.,

Respondents.
_____/

DOAH CASE NOS.: 01-1157
01-1158
01-1159

DOT CASE NOS.: 01-046
01-042
01-040

SFH-CLOS

FINAL ORDER

This proceeding was initiated by the filing of petitions for administrative hearing by **Petitioner, TREMRON JACKSONVILLE, L.L.C.** (hereinafter **TREMRON**); **Petitioner, CITY OF JACKSONVILLE** (hereinafter **JACKSONVILLE**); and **Petitioner, CENTURION AUTO TRANSPORT** (hereinafter **CENTURION**), pursuant to Section 120.57(1), Florida Statutes, in response to a Notice of Intent to Issue a Permit to close the at-grade railroad crossing located on Old Kings Road in Jacksonville, Florida, by the **Respondent, DEPARTMENT OF TRANSPORTATION** (hereinafter **DEPARTMENT**). The closing of the at-grade railroad crossing was requested by **Respondent, CSX TRANSPORTATION, INC.** (hereinafter **CSXT**). On March 23, 2001, the matter was referred to the Division of Administrative Hearings (hereinafter DOAH) for assignment of an Administrative Law Judge and a formal hearing.

A formal administrative hearing was held in this case in Jacksonville, Florida, on August 13-16, 2001, before Suzanne F. Hood, a duly appointed Administrative Law Judge.

Appearances on behalf of the parties were as follows:

For Petitioner, Tremron Jacksonville, L.L.C.:

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For Petitioner, City of Jacksonville:

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For Petitioner, Centurion Auto Transport:

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Centurion Auto Transport
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For Respondent, Department of Transportation:

Bruce R. Conroy, Esquire
Scott A. Matthews, Esquire
Office of the General Counsel
Department of Transportation
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For Respondent, CSX Transportation, Inc.:

Eric L. Leach, Esquire
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Jacksonville, Florida 32207

At the hearing, **TREMRON** presented the testimony of Hugh Caron and offered three exhibits (Tremron 1-3), which were admitted into evidence.

JACKSONVILLE presented the testimony of Harold Shafer; Thomas Miller; Faye Barham; Rebecca Jenkins; Lloyd Washington; Leonard Propper; Jimmy Holderfield; Richard Ball; Winfred Hazen, Jr.; Toufic Khayat; Reginald Fullwood; Talmadge Ford; and Kevin Carter. **JACKSONVILLE** presented Exhibits City 1-12, City 13A-13D, City 15-17, and City 21-25, which were admitted into evidence.

CENTURION did not present any witnesses, but offered one exhibit (Centurion 1), which was admitted into evidence.

The **DEPARTMENT** presented the testimony of Scott Albritton, and offered seven exhibits, all of which were admitted into evidence except for one composite exhibit, FDOT 3, and several isolated documents contained in two other composite exhibits, FDOT 1 and FDOT 2, as described in the hearing transcript, which the Administrative Law Judge reserved ruling on and which were later excluded.

Official recognition was taken of all relevant statutes and rules. The transcript of the hearing, including the post-hearing deposition of Geoff Pappas, was filed on September 11, 2001. **CSXT**, the **DEPARTMENT**, and **TREMRON** each filed a Proposed Recommended Order on November 30, 2001. **JACKSONVILLE** filed its Proposed Recommended Order on December 3, 2001. **CENTURION** did not file a Proposed Recommended Order. On February 11, 2002, Judge Hood issued her Recommended Order. On February 26, 2002, **JACKSONVILLE** filed its exceptions to the Recommended Order and on February 27, 2002, **TREMRON** filed its exceptions to the Recommended Order. The **DEPARTMENT** filed its

responses to **JACKSONVILLE'S** and **TREMRON'S** exceptions on March 6, 2002. In the **DEPARTMENT'S** response to **TREMRON'S** exceptions, the **DEPARTMENT** argued that because the exceptions had been submitted beyond the 15 day statutory limit for filing, the exceptions should be stricken as untimely. **CSXT** filed its responses to **JACKSONVILLE'S** and **TREMRON'S** exceptions on March 8, 2002. **TREMRON** filed a response to the **DEPARTMENT'S** motion to strike **TREMRON'S** exceptions on March 15, 2002. **JACKSONVILLE** served a response and what appears to be an amended response to the **DEPARTMENT'S** motion to strike **TREMRON'S** exceptions on March 15, 2002.

STATEMENT OF THE ISSUE

As stated by the Administrative Law Judge in her Recommended Order, the issue presented was: "[W]hether Respondent CSX Transportation, Inc.'s railroad crossing located on Old Kings Road in Jacksonville, Florida, meets the criteria for closure as set forth in Rule 14-46.003(2)(b), Florida Administrative Code."

BACKGROUND

On April 9, 1997, **CSXT** filed an application with the **DEPARTMENT** to close an at-grade railroad crossing located on Old Kings Road in Jacksonville, Florida (hereinafter the Crossing). On January 31, 2001, the **DEPARTMENT** sent a Notice of Intent to Issue a Permit to close the at-grade railroad crossing. On March 8, 2001, **CENTURION** filed its request for administrative hearing challenging the proposed crossing. On March 9, 2001, **JACKSONVILLE** filed its Petition for Administrative Hearing, and on March 13, 2001, **TREMRON** filed its Petition for Administrative Hearing. The matters were referred to DOAH on March 23, 2001, with a request for consolidation of the cases. On April 5, 2001,

an order was issued consolidating the three cases. The following DOAH case numbers were assigned: **TREMRON**, Case No. 01-1157; **JACKSONVILLE**, Case No. 01-1158; and **CENTURION**, Case No. 01-1159. The matter was set for hearing, assigned to Suzanne F. Hood, Administrative Law Judge, and discovery ensued.

The formal administrative hearing was held on August 13-16, 2001, before Judge Hood.

EXCEPTIONS TO RECOMMENDED ORDER

JACKSONVILLE'S first exception[1] is to the last three sentences in Finding of Fact No. 20 regarding the activation of warning devices and the resulting hazardous situation. **JACKSONVILLE** claims that the hazard caused by motorists seeing an open roadway and a stopped train is a hazard which can occur at many, if not all, crossings from time to time, making this a hazard that is not unique, but normal at any crossing that has more than one track. According to **JACKSONVILLE**, there was no competent or objective evidence concerning how signal activation occurred like this because the Crossing had been illegally closed for three years at the time the hearing was held, and thus it was unknown whether this happened once a day, once a month, or once a year, or that it happened often. The evidence presented showed that if a train causing activation of the signals without crossing the tracks was there for more than a short period, the signal keeping the arms down unnecessarily could

[1] **TREMRON** also filed exceptions or comments to the Recommended Order that both adopted **JACKSONVILLE'S** exceptions, and included additional exceptions and additional grounds for **JACKSONVILLE'S** exceptions. Without waiving its position that **TREMRON'S** exceptions/comments were not timely filed and should therefore be stricken, the **DEPARTMENT** will address **TREMRON'S** individual exceptions/comments and will include **TREMRON** in the **DEPARTMENT'S** disposition of the exceptions.

be deactivated. **JACKSONVILLE** argues that this is surely something the railroad would do in the normal course of its operations because it is required by Rule14-46.003(3)(f), Florida Administrative Code.

TREMRON'S second exception supports **JACKSONVILLE'S** first exception and states that Finding of Fact No. 20 misstates the actual evidence presented at trial which was that at times a train will trigger the closing mechanism at the subject crossing without actually blocking the Crossing, that this could occur at any crossing and is not unique to the subject crossing.

JACKSONVILLE'S [2] exception is grounded on the premise that Finding of Fact No. 20, which states "[o]ften a cut of railroad cars will pull close enough to the Crossing to activate the warning lights and gates without actually blocking the roadway," is not supported by "competent" or "objective" evidence. However, a showing of a lack of competent, substantial evidence is the standard by which an agency is to review a party's exception to an Administrative Law Judge's findings of fact. § 120.57(1)(l), Fla. Stat. (2001). In this instance, **JACKSONVILLE** has failed to establish the requisite lack of competent, substantial evidence. A review of the record in its entirety establishes the Crossing is unique because, inter alia, it is located within the yard limits of the **CSXT** Moncrief Yard, a large switching yard for **CSXT** trains; there are approximately 100 train movements, including switching movements across the Crossing on a daily basis; switching movements in the Moncrief Yard

[2] Because **TREMRON** has adopted all of **JACKSONVILLE'S** exceptions, each reference to **JACKSONVILLE** shall include **TREMRON**, unless otherwise stated, and without waiver of the **DEPARTMENT'S** position that **TREMRON'S** exceptions/comments were not timely filed and should be stricken.

involve the assembly and disassembly of trains through the movement of freight cars into designated yard tracks; switching movements take place in the Moncrief Yard 24 hours per day, 7 days per week, except for Thanksgiving, Christmas, and select holidays; and due to its proximity to the Moncrief Yard and Old Kings Road, it is regularly blocked by trains engaged in switching movements that travel back and forth across the Crossing, in addition to other train traffic. (T. 43-45, 51, 148, 58-62, 53-55, 89-90, 176-177, 137-138, 169, 788, 955-956, 958[3])

Competent, substantial record evidence also establishes that the Crossing is the only **CSXT** railroad crossing in the State of Florida that is regularly blocked by switching movements for extended periods of time; during switching movements it is common for trains to stop at distances that activate the signal lights and lower the crossing gates, even though there is no train physically blocking the Crossing; motorists frequently observe the signal lights activated and crossing gates in the down position when there is no train blocking the Crossing, due to the height and length of slow moving or stopped trains involved in switching operations on some or all of the four railroad tracks to the west of the **CSXT** main line; motorists approaching the Crossing from the west cannot see fast moving trains, including Amtrak passenger trains, approaching the Crossing on the **CSXT** main line; motorists and pedestrians, frustrated by long wait times at the Crossing, regularly drive around the crossing gates under the mistaken belief that the signal lights and gates are activated solely by trains stopped or moving slowly near the Crossing; and neighborhood witnesses admit that they either personally

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[3] Citations to the transcript of the hearing held on August 13-16, 2002, will be in the form of (T.) followed by the appropriate page number(s).

drive around the lowered crossing gates at the Crossing or observed other motorists driving around the gates in order to avoid extended train delays. (T. 189, 64-67, 151, 177-178, 151-152, 177-178, 540, 1376, 92-93, 154-155, 185-186, 538-539, 1362, 1376, 1148-1149, 1380, 831, 845-847, 959-960)

The **DEPARTMENT** cannot set aside findings of fact or revisit the Administrative Law Judge's resolution of evidentiary conflicts in the absence of a showing that the findings lack the requisite record support. Brown v. Criminal Justice Standards & Training Comm'n, 667 So. 2d 977, 979 (Fla. 4th DCA 1996); Heifetz v. Department of Business Reg., 475 So. 2d 1277, 1281-1282 (Fla. 1st DCA 1985). The competent, substantial evidence in this record establishes that this is not a hazard that is common to other rail crossings, it is a hazard unique to this Crossing.

JACKSONVILLE'S and **TREMRON'S** exceptions are rejected.

JACKSONVILLE'S second exception is to the first two sentences in Finding of Fact No. 26 regarding the average daily traffic counts from 1991 to 1997 being less than 2,000 vehicles per day. According to **JACKSONVILLE**, as evidenced by City Exhibit 12, the average from 1991 to 1997, if computed, was in fact 2,190. The last figure available before the Crossing was illegally closed in 1998 was 2,130, showing an increase from 1996 through 1998. **JACKSONVILLE** argues that had the Crossing not been illegally closed, it seems reasonable to conclude that the traffic counts would have increased in years 2000 and 2001 because of **TREMRON'S** initiating a business so close to the Crossing in June 2000.

In support of its exception, **JACKSONVILLE** points to dialogue (T. 710-711) between counsel and the Administrative Law Judge regarding the fact that the location of the traffic

count was not immediately adjacent to the Crossing, but rather 60 feet west of the "SCLRR" (**CSXT**) track crossing Old Kings Road just west of Melson Avenue to support its exception. **JACKSONVILLE** continues that the only traffic count taken right at the Crossing itself was taken by the **DEPARTMENT** in 1996, and resulted in a daily count of 1,845, and that the daily count on City Exhibit 12 for that year is 1,815, and suggests that the traffic count at Old Kings Road-Melson Avenue counting post is probably a fairly reliable one for the crossing itself, when the Crossing is open, "and if anything is slightly low." According to **JACKSONVILLE**, a daily traffic count of 2,000 or over is not considered a "low" count by **DEPARTMENT** standards. Indeed, the Railroad-Highway Grade Crossing Handbook, issued by the U.S. Department of Commerce, which is utilized as guidance by the **DEPARTMENT**, suggests that even branch lines or spur tracks should not be considered for closure unless ADT (average daily traffic) is less than 2,000. **JACKSONVILLE** asserts that according to **CSXT** expert witness, Rex Nichelson, if 2,000 or more cars a day use a crossing, whether a crossing is a candidate for closure becomes a judgment decision for the **DEPARTMENT**.

TREMRON'S third exception is also to Finding of Fact No. 26, agreeing with **JACKSONVILLE** that the Administrative Law Judge's "finding" (Finding of Fact No. 26) concerning the average daily traffic count was fundamentally flawed in that there was no accurate traffic count available because **CSXT** illegally closed the Crossing for a two year period prior to the notice being issued in this case by the **DEPARTMENT**. Further, **TREMRON** asserts, this "finding" completely ignores the uncontradicted testimony as to the value of this Crossing to the residents in both the Paxon and Grand Park neighborhoods, virtually all of whom testified that using this Crossing to connect the two areas was an

important way of life. The Administrative Law Judge, according to **TREMRON** simply ignored this testimony and, instead, misstated the actual evidence as to the traffic count, which is erroneous.

JACKSONVILLE'S exception to the Administrative Law Judge's Finding of Fact No. 26, that the average daily traffic volumes for the Crossing was less than 2,000 vehicles per day, and that such volumes are low, must be asserted on the basis that it is not supported by competent, substantial evidence, although **JACKSONVILLE** never directly makes this assertion or acknowledges this standard. § 120.57(1)(l), Fla. Stat. (2001) However, it is against this standard that the **DEPARTMENT** must consider all of **JACKSONVILLE'S** exceptions to findings of fact.

The record reflects that depending upon which years are analyzed, the average daily traffic volumes for the Crossing for the seven years preceding its closing was less than 2,000 vehicles per day. (T. 435-437)(CSXT Ex. 27) The record also establishes that the Crossing is not justified from a traffic utilization standpoint. Regardless of whether it might be slightly more or less than 2,000 vehicles per day, the record is undisputed that the Crossing does not have the 10,000 to 15,000 vehicles per day necessary to justify a cost analysis of whether the Crossing should remain open, or the 60,000 to 65,000 average daily traffic counts for urban settings necessary to justify further cost benefit analysis to determine whether the Crossing should be kept open. **JACKSONVILLE'S** exception is based, in part, on its position that the traffic counts it conducted for the years 1991 through 1997 were performed approximately 60 feet west of the Crossing. **JACKSONVILLE** then concludes that based upon the traffic counts performed by the **DEPARTMENT** at the Crossing, **JACKSONVILLE'S** traffic counts were

reliable. As set forth in **JACKSONVILLE'S** exceptions, the traffic count performed by the **DEPARTMENT** at the Crossing in 1996 resulted in an average daily traffic count of 1,845 vehicles. However, the record establishes that the motor vehicle traffic volume at Old Kings Road is considered a low traffic count by **DEPARTMENT** standards, and that even **JACKSONVILLE'S** traffic operations superintendent, Richard Ball, testified that he would consider 10,000 vehicles per day a significant traffic volume. (T. 437-438, 474- 476, 640, 40) Rex Nichelson testified he considers 2,000 vehicles per day to be "generally a low volume of traffic." (T. 437, 473) Thus even if it is arguable whether 2,000 vehicles per day may or may not be "low," 2,000 clearly is not a significant average daily traffic count.

Nevertheless, **JACKSONVILLE** has, at best, established that there may have been conflicting testimony regarding daily traffic counts. The Administrative Law Judge heard the testimony, reviewed the evidence, and made her findings. The resolution of evidentiary conflicts by an Administrative Law Judge cannot properly be revisited by the **DEPARTMENT**. Brown, 667 So. 2d at 979; Heifetz, 475 So. 2d at 1281-1282.

JACKSONVILLE'S and **TREMRON'S** exceptions are rejected.

JACKSONVILLE'S third exception is to Finding of Fact No. 28 regarding the height and length of slow-moving or stopped trains, the resulting inability of motorists to see fast or moving trains, and the 20 degree skew of the intersection. **JACKSONVILLE** claims there is good visibility in both directions up and down the tracks from both sides of the Crossing, with the 20 degree angle presenting no impediment to the view. (See City Ex. 11(g), 11) **JACKSONVILLE** asserts that the main line track of the Crossing, and the one on which Amtrak and other through trains operate, is the easternmost track. (T. 170) The only visual

difficulty with the Crossing, for those who choose to disregard the signals and run the crossing gates, occurs for drivers crossing from the west, if a through train comes from the south on the easternmost track at a time when train cars engaged in switching occupy the tracks between and are blocking the Crossing. (T. 100, 114) If this occurred, the driver on the west side would likely not see the through train approaching from the south on the easternmost track (although he might hear it), but could see a train coming on that same easternmost track coming from the north (because the Crossing is at the neck of the yard and trains being switched do not extend significantly north of the Crossing). (Id.)(City Ex. 11(a))

JACKSONVILLE'S third exception is to the Administrative Law Judge's Finding of Fact No. 28, pertaining to the difficulty of visibility involved with the Crossing, because it is contrary to the record. **JACKSONVILLE** cites to City Exhibit 11 as evidence that there is "good visibility" in both directions up and down the tracks. However, a review of the record in its entirety establishes the frequent and recurring visibility obstructions and difficulties at the Crossing. (T. 69, 92, 113-114, 185-188, 466-473) The Administrative Law Judge's findings in this regard are supported by competent, substantial evidence in the record.

JACKSONVILLE'S exception is rejected.

JACKSONVILLE'S fourth exception is to the following portions of Finding of Fact No. 29:

> Motorists frustrated by the long wait times at the Crossing **regularly** drive around the crossing gates . . . . **At times** vehicles fall off the roadway as drivers attempt to go around trains partially blocking the roadway. **Drivers also become distracted by the beveled and rough roadway surface** between the numerous tracks. These circumstances, together with the regular and extended blockages, give motorists **a high**

> **probability** of interacting with train traffic **while simultaneously almost inviting them to run the gates**. (emphasis added by **JACKSONVILLE**)

JACKSONVILLE asserts that while there is anecdotal evidence that sometimes motorists have driven around the gates, there is no basis in evidence for saying they **regularly** do so. While there is anecdotal evidence that a few times over the last 25 years motorists have driven off the road surface while crossing with the gates down, there is no evidence which suggests this is an ongoing or periodic activity as implied by the phrase **at times**. There is no evidence that **drivers become distracted** by the **roadway surface**. The proposition that motorists have **a high probability** of interacting with train traffic at the Crossing is simply false and not supported by the evidence, given the fact that only eight vehicular accidents have been documented at the Crossing in twenty-three and one half (23.5) years (1975-July 1998), and only two of the six involved injuries. (T. 1145-1149)(City Ex. 11) **JACKSONVILLE** claims that the suggestion that the Crossing, with gates down, warning lights flashing, and trains on the tracks blocking the Crossing "almost invites" motorists to run the gates sounds like a closing argument, is not supported by evidence, and is not worthy of being a finding. According to **JACKSONVILLE**, the evidence showed that motorists frustrated by the prospect of a long wait at the Crossing would use another route. (T. 770, 788, 948, 1268, 1297-1305)

TREMRON'S fourth exception/comment is also to Finding of Fact No. 29, claiming the statement concerning the regularity of drivers going around the Crossing gates is "without evidentiary support." **TREMRON** admits that there was some evidence that this occurred on occasion but asserts that there was virtually no evidence that the roadway surface of the Crossing had any negative impact on motorists becoming "distracted." **TREMRON** also

argues that the Administrative Law Judge's finding in Paragraph 29, that when the Crossing has its gates down and warning lights flashing and there are trains on the tracks blocking the Crossing, that this "almost invites" motorists to run the gates is preposterous and is based on no evidence or any reasonable inference from any evidence presented at the hearing below: The only testimony as to motorists going around the crossing arms were those who were extremely familiar with the Crossing and exactly what happened there. Further, according to **TREMRON**, all of the witnesses who had regularly used the Crossing for years verified that their familiarity with what was going on at the Crossing would let them know when they needed to use an alternative route.

While **JACKSONVILLE** asserts that findings that motorists regularly drove around the Crossing's gates, which, along with the rough surface of the roadway at the Crossing, created a hazard of likelihood of interaction with train traffic, are not supported by the record, **JACKSONVILLE** admits that some evidence exists. In fact, the finding that motorists regularly drive around the crossing gates and the reasonable inference that the Crossing has a high probability of train versus motor vehicle interaction is amply supported by record evidence. There is competent, substantial evidence of residents who admitted to having gone around the gates at the Crossing, and one admitted to having gone around the gates once or twice a week for the 26 years that she had lived there. (T. 846- 851) It is disingenuous and insufficient to argue that this evidence should be ignored or otherwise not considered because those who regularly drive around the crossing gates are those who are familiar with the Crossing.

The record also establishes that on occasion several vehicles at a time would go around

the gates together. Virtually every witness from the area admitted to crossing at this or another rail location in the area by going around the gates. The Administrative Law Judge's findings and reasonable inferences that long waits at the Crossing, along with the closure being activated by standing trains resulting from switching movements, give motorists a high probability of interacting with train traffic while "almost" inviting motorists to cross illegally is supported by the record. The record also supports a finding that drivers are distracted by the rough nature of the Crossing due to the uneven nature of construction where there are a number of tracks to maneuver. (T. 525-527)

The **DEPARTMENT** cannot set aside findings of fact or revisit the Administrative Law Judge's resolution of evidentiary conflicts in the absence of a showing that the findings lack the requisite record support. Brown, 667 So. 2d at 979; Heifetz, 475 So. 2d at 1281-1282. Moreover, the **DEPARTMENT** cannot properly revisit the Administrative Law Judge's weight and credibility determinations. Neither an agency nor a reviewing court has the authority to substitute its view of the evidence for that of the Administrative Law Judge. Boyd v. Dep't of Revenue, 682 So. 2d 1117, 1118 (Fla. 4th DCA 1996); Heifetz, 475 So. 2d at 1281-1281.

JACKSONVILLE'S and **TREMRON'S** exceptions are rejected.

JACKSONVILLE'S fifth exception is to the first sentence of Finding of Fact No. 32 regarding the unique safety hazards present and a "general misapprehension by the motoring public of the nature of yard switching movements." The safety hazards present, according to **JACKSONVILLE**, are not unique, but rather are similar to those found at other crossings located in or about switching yards. **JACKSONVILLE** claims that this is demonstrated by the

fact that specific regulations are in effect to govern crossings having passing tracks, multiple tracks which obscure other trains, and trains having high speeds. See Rule 14.003(d)2-14.003(d)4, Fla. Admin. Code. There is no evidence of **a general misapprehension by the motoring public of the nature of yard switching movements**. Rather, **JACKSONVILLE** claims, those motorists testifying had substantial familiarity with the Crossing and what happened there. (T. 760, 786, 824, 937, 946, 997, 1262,1296, 1351)

JACKSONVILLE again takes exception to the Administrative Law Judge's finding that a number of safety hazards present at the Crossing are not unique to this Crossing. Thus, **JACKSONVILLE** disputes the uniqueness of the safety hazards, not that they exist. As detailed above, the record supports a finding that the varied and unique combination of hazards make the Crossing unique. In addition, the competent, substantial evidence of the presence of a substantial number of train-switching movements over the Crossing, multiple tracks with trains of varying speeds, motorist frustration over train delays, obstructions to visibility, and a general misapprehension by the motoring public of yard switching movements supports a reasonable inference that these facts foster "a general misapprehension by the motoring public of the nature of yard switching movements."

JACKSONVILLE'S exception is rejected.

JACKSONVILLE'S sixth exception is to the portion of Finding of Fact No. 33 regarding the distances to traverse the Crossing in the present condition and if the signals were relocated closer to the tracks. According to **JACKSONVILLE**, two tracks were removed in 1998, leaving five, rather than the seven that were there before. Thus, the distance across the Crossing now is 276 feet (the distance across the tracks would be 50 feet less). (T. 591-593)

JACKSONVILLE argues that **CSXT's** work at the Crossing in the summer of 1998 which included moving the two western tracks necessitated moving the western gate closer to the track, was not done because **CSXT** illegally left the Crossing closed. (T. 1028, 1031)(City Ex. 25)

The point of Finding of Fact No. 33 is not to describe the precise distance to traverse the Crossing, but that regardless of whether it is 397 feet, or 276 feet, the Crossing presents the same problem of long travel within a rail crossing that has numerous tracks, numerous switching movements, a high speed main line, and a skewed angle. The record supports this finding. The **DEPARTMENT** cannot set aside findings of fact or revisit the Administrative Law Judge's resolution of evidentiary conflicts in the absence of a showing that the findings lack the requisite record support. Brown, 667 So. 2d at 979; Heifetz, 475 So. 2d at 1281-1282.

JACKSONVILLE'S sixth exception is rejected.

JACKSONVILLE'S seventh exception is to Finding of Fact No. 34 that "[t]he use of commercial trucks over the crossing on a regular basis would **substantially** increase the danger of an accident." (emphasis added by **JACKSONVILLE**) **JACKSONVILLE** argues that there is no evidence that use of commercial trucks over the Crossing would **substantially** increase the danger of an accident simply because of the distance across the Crossing and because commercial trucks are longer than cars. Indeed, evidence was presented that commercial trucks are required to stop at crossings and that their drivers are disciplined if they cross illegally. (T. 1377) In fact, **JACKSONVILLE** claims, this is apt to make commercial truck drivers more careful, and hence safer at crossings than the ordinary car might be.

TREMRON specifically emphasizes that the finding that there is some alleged additional danger by commercial trucks is without any foundation in this record whatsoever. According to **TREMRON**, the only evidence presented was that a driver who failed to stop at the Crossing and ensure that it was safe to proceed would be "disciplined by their [sic] employer." (T. 1377)

There is competent, substantial evidence in the record to support the Administrative Law Judge's finding that due to their weight, length, and load potential, commercial trucks increase danger at the Crossing because such factors necessitate they take longer to traverse the Crossing than automobiles. (T. 101-103, 124-126) The **DEPARTMENT** cannot set aside findings of fact in the absence of a showing that the findings lack the requisite record support. Brown, 667 So. 2d at 979; Heifetz, 475 So. 2d at 1281-1282.

JACKSONVILLE'S and **TREMRON'S** exceptions are rejected.

JACKSONVILLE'S eighth exception is to those portions of Finding of Fact No. 35 regarding the number of railroad crossing accidents from 1975 until 1988 and the number being the highest number in the City of Jacksonville during that period. **JACKSONVILLE** argues that there was a total of twelve documented accidents, no more. (T. 1145-1149)(CSXT Ex. 22) According to **JACKSONVILLE**, the one occurring on January 5, 1986, was insufficiently supported to be documented as an accident at the Crossing, leaving eleven. (T. 1146-1147, 365-367) To this **JACKSONVILLE** adds CSXT Exhibit 23, a claim report first furnished to **JACKSONVILLE** at the administrative hearing, making twelve. (T. 375-382) This total, **JACKSONVILLE** claims, includes pedestrian accidents. According to **JACKSONVILLE**, because it is undisputed that pedestrians continued to use the Crossing

even after it was illegally closed, the relevant time frame for analyzing these accidents is January 1975 through July 2001, a period of 25 years, 7 months, not the 23 years used in the findings. (T. 161, 358-359, 514, 991-993, 1275, 1382)

By its exception, **JACKSONVILLE** argues that it was erroneous for the Administrative Law Judge to conclude that the Crossing had at least 12 documented accidents, because the record indicated exactly 12. The Administrative Law Judge found that "at least 12 railroad-crossing accidents from 1975 through 1998 . . . the highest number of crossing accidents of any crossing located in Jacksonville, Florida." The record contains evidence of twelve documented accidents. However, it cannot be said that it is error to state that in light of these documented accidents and the other incidents testified to by several witnesses, that it was error to describe the number of accidents as "at least 12." This finding is supported by competent, substantial evidence, particularly in light of the low volume of motor vehicle traffic. (T. 364-371)(CSXT Ex. 22)

JACKSONVILLE'S exception is rejected.

JACKSONVILLE'S ninth exception is to Finding of Fact No. 37 regarding "numerous near-miss incidents," obstructions to visibility, and Amtrak trains on the **CSXT** main lines. **JACKSONVILLE** admits that there is at best evidence of only a few or several near misses, not numerous near misses over the 70 year period of time from prior to 1930 through July 1998, that witnesses observed traffic at the Crossing. (T. 784-786) **JACKSONVILLE** argues that evidence of a small number of near misses over a length of time has little, if any, probative value, unless composed against near misses at other crossings, and no such comparative evidence or data was placed in evidence. An Amtrak train traveling 40 miles per

hour would not have enough time to stop to avoid a collision for any vehicle that commences crossing the tracks after rail gates are down for its approach. This Crossing is no different in this respect than other crossings.

JACKSONVILLE'S exception to Finding of Fact No. 37, appears to be to the Administrative Law Judge's use of the word "numerous" to describe the number of near misses at the Crossing, rather than the word "several" as **JACKSONVILLE** would have chosen. The record reflects that due to visibility obstructions, the number of tracks, the skewed angle of the Crossing, and Amtrak trains traveling on the **CSXT** main line, this Crossing is like no other and collisions cannot be avoided. **JACKSONVILLE** would have the **DEPARTMENT** change the word "numerous" to "several" to emphasize what it considers to be an inconsequential number of near miss incidents. However, there is competent, substantial evidence in the record that the number was not inconsequential and that there may have been "hundreds of close calls - near misses, people taking chances." (T. 88) Neither an agency nor a reviewing court has the authority to substitute its view of the evidence for that of the Administrative Law Judge. Boyd, 682 So. 2d at 1118; Heifetz, 475 So. 2d at 1281-1281.

JACKSONVILLE'S exception is rejected.

JACKSONVILLE'S tenth exception is to that part of Finding of Fact No. 40 that states "Mr. Carter . . . was aware of other trucks going around the lowered gates." **JACKSONVILLE** claims this is incorrect; there was no such testimony by Kevin Carter.

Contrary to **JACKSONVILLE'S** assertion, Mr. Carter admitted that he has personally seen trucks being driven around the crossing gates, and that he is aware that truck drivers go around the gates "pretty regularly." (T. 1379-1380) The Administrative Law Judge's finding

in this regard is supported by competent, substantial evidence.

JACKSONVILLE'S exception is rejected.

JACKSONVILLE'S eleventh exception is to Finding of Fact No. 42 regarding the existence of a serious safety hazard to pedestrians and pedestrians regularly climbing between freight cars and their regularly placing bicycles over or under railroad cars' couplings. **JACKSONVILLE** claims that there were only four pedestrian accidents at the Crossing from 1975 through July 2001, 25 years, 7 months, none of which resulted in a fatality. (T. 1145-1149)(CSXT Ex. 22)(City Ex. 11) According to **JACKSONVILLE**, there is no evidence that pedestrians **regularly** climb between freight cars or **regularly** place bicycles over or under coupling mechanisms; there is only evidence that this has happened on a few occasions, including those involving the four pedestrian accidents in the last 25 years, 7 months.

TREMRON takes specific exception to Finding of Fact No. 42, claiming that it is again a misapprehension of the actual evidence presented and is not based on any reasonable inference therefrom. In fact, according to **TREMRON**, the testimony concerning pedestrian use at this Crossing is that for a number of people in this low income area, walking across the Crossing was their only realistic route. It is **TREMRON'S** position that the Administrative Law Judge's completely ignoring the lack of alternative routes for these pedestrians constitutes a failure to apply the proper criteria in her Recommended Order.

There is competent, substantial evidence in the record that there is a serious safety hazard involving pedestrians at the Crossing; that prior to its closing in 1998, pedestrians would regularly climb between freight cars stopped at the Crossing in order to avoid extended train blockages; and pedestrians would regularly place their bicycles over or under the

coupling mechanism that connects railroad cars while attempting to climb between railroad cars. (T. 136, 1208, 1307-1308, 1312)

On the other hand, there is no record evidence that "for a number of people in this low income area, walking across the crossing was their only realistic route," or that the Administrative Law Judge ignored any such evidence or ignored the alleged lack of alternative routes for pedestrians in examining the issues of pedestrian convenience and pedestrian safety. By these exceptions, it would appear that the **DEPARTMENT** is being asked to make additional findings to support **JACKSONVILLE'S** interpretation of the evidence. Such additional findings are beyond the authority of the **DEPARTMENT** to make. Florida Power & Light Co. v. State of Florida Siting Board, 693 So. 2d 1025, 1026-1027 (Fla. 1st DCA 1997).

JACKSONVILLE'S and **TREMRON'S** exceptions are rejected.

JACKSONVILLE'S twelfth exception is to the last two sentences in Finding of Fact No. 45 that:

> FDOT does not utilize the safety index for its closure analysis. The FDOT safety index for prioritizing crossing-warning devices upgrades does not determine the dangerousness of a railroad crossing.

JACKSONVILLE claims that in the Notice of Intent issued in this case by the **DEPARTMENT** (FDOT Ex. 5), the Safety Hazard Index of the Crossing was considered and discussed; thus the proposition that the **DEPARTMENT** does not consider the Safety Hazard Index is incorrect. According to **JACKSONVILLE,** contrary to this finding, the Safety Hazard Index attempts precisely to quantify for comparative purposes how hazardous

(dangerous) a crossing is. (City Ex. 11)

The record reflects that the **DEPARTMENT'S** Safety Index is used by the **DEPARTMENT** to prioritize the upgrade of traffic control devices at railroad crossings and not to rank the dangerousness of crossings. (T. 438- 440, 1199) The record also establishes that the **DEPARTMENT** does not utilize the Safety Index for its closure analysis, but uses it to prioritize the spending of funds for crossing safety improvements such as flashing lights or gates. (T. 1230-1232) Even if it can be said that the reference to the Safety Index in the **DEPARTMENT'S** notice of intent creates a conflict in the evidence, the **DEPARTMENT** cannot set aside findings of fact or revisit the Administrative Law Judge's resolution of evidentiary conflicts in the absence of a showing that the findings lack the requisite record support. Brown, 667 So. 2d at 979; Heifetz, 475 So. 2d at 1281-1282. In addition, neither an agency nor a reviewing court has the authority to substitute its view of the evidence for that of the Administrative Law Judge. Boyd, 682 So. 2d at 1118; Heifetz, 475 So. 2d at 1281-1282.

JACKSONVILLE'S exception is rejected.

JACKSONVILLE'S thirteenth exception is to the last sentence of Finding of Fact No. 47: "Because the safety index report continues to assign a high rank to the Crossing, which already has lights and gates, the only way FDOT can make the Crossing safer is to close it." **JACKSONVILLE** argues that nowhere is it written that the only way the **DEPARTMENT** can make the Crossing safer is to close it. According to **JACKSONVILLE**, as noted in the "Proposed [sic] Order, at Finding of Fact No. 44," protective measures can be taken, if the Crossing is closed, to make the Crossing safer, such as road barriers and fencing. Similar protective measures, **JACKSONVILLE** argues, can be taken to make the Crossing safer if it

remains open. Indeed, **JACKSONVILLE** claims its expert, Toufic Khayat, recommended such measures. To deter vehicles from crossing when the gates are down, he recommended a raised median separator and curbs. (City Ex. 11, 11(f)) **JACKSONVILLE** also points to Mr. Khayat's testimony that moving the gate closer to the tracks on the west side was recommended to improve visibility and to encourage pedestrians to cross legally, and he recommended sidewalks at the site of the Crossing and fencing to prevent crossing at other locations in the rail yard other than the roadway. (T. 1151-1155) There is no reason, according to **JACKSONVILLE**, why the **DEPARTMENT** cannot require an agreement to make one or more of these improvements a condition of permitting the Crossing to remain open.

In Finding of Fact No. 47, the Administrative Law Judge elaborated on her findings regarding the **DEPARTMENT'S** Safety Index contained in Findings of Fact No. 45 and 46. The Administrative Law Judge previously found that the **DEPARTMENT'S** Safety Index was utilized by the **DEPARTMENT** to prioritize the upgrade of crossings and that the **DEPARTMENT** had a limited budget for upgrade of crossings in the State of Florida. The record supports the Administrative Law Judge's findings that the Crossing had the highest level of crossing protection, i.e., automatic gates and lights. The objected to findings in this regard are related to the relationship between the existence of automatic gates and lights and the **DEPARTMENT'S** Safety Index. The Administrative Law Judge includes in her findings methods of making the Crossing safer with barrier medians, sidewalks, and fencing, as suggested by **JACKSONVILLE'S** expert, Toufic Khayat, while recognizing the fact that the issue in this case is whether the Crossing meets the **DEPARTMENT'S** criteria for closure.

The Administrative Law Judge's findings in this regard are supported by competent, substantial evidence in the record.

JACKSONVILLE'S exception is rejected.

JACKSONVILLE'S fourteenth exception is to the second and last sentences of Finding of Fact No. 50:

> Petitioners have proposed that four-quadrant gates and a median be constructed in order to deter motorists from going around the gates. . . . However, people at times run four-quadrant gates and would be likely to do so at the Crossing.

JACKSONVILLE argues that it nowhere proposed four-quadrant gates; and that the finding is simply incorrect in this respect. Rather, **JACKSONVILLE** claims, its expert witness only acknowledged familiarity with four gate installations in cross examination. (T. 1240) According to **JACKSONVILLE,** Rex Nichelson, the expert for **CSXT**, discussed four-quadrant gates at some length and then concluded they would not solve the problem. (T. 481-485) **JACKSONVILLE** asserts that the "The Proposed [sic] Order" (like Nichelson, on behalf of **CSXT**) sets up a straw man (the four-quadrant gate system) in Findings of Fact No. 50, 51, and 52, and proceeds to knock him (it) down. Because no party, let alone **JACKSONVILLE**, has proposed this system, these paragraphs, according to **JACKSONVILLE**, are unnecessary and not to the point.

A review of the record reveals that portions of Finding of Fact No. 50 may not be relevant to the issue presented in this case. However, it is not within the **DEPARTMENT'S** authority to make relevancy determinations of an Administrative Law Judge's findings of fact. However, review of the record in its entirety establishes that there is no competent, substantial

evidence in the record to support the portion of the second sentence of finding in Finding of Fact No. 50, that the "Petitioners" have proposed that "four-quadrant gates" be constructed. An "agency may not reject or modify the findings of fact [of an Administrative Law Judge] unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence . . . ." § 120.57(1)(l), Fla. Stat. (2001).

JACKSONVILLE'S exception is accepted in part and Finding of Fact No. 50 is modified by deleting the words "four-quadrant gates and" from the second sentence. The remainder of **JACKSONVILLE'S** exception is rejected.

TREMRON alone takes exception to Finding of Fact No. 60, which **TREMRON** claims implies that the existence of "alternative" routes supports the closure of the subject Crossing. **TREMRON** argues that this "finding" fundamentally ignores an inescapable and uncontradicted fact which the Administrative Law Judge[4] has simply disregarded, and treated as some unimportant irrelevance (see Findings of Fact No. 74 and 75).

According to **TREMRON**, what the Administrative Law Judge has fundamentally ignored, and which the **DEPARTMENT** did not even know existed prior to the petitions being filed in this case, is that the illegal closure of the subject Crossing and its continued closure, has resulted in the homes and businesses, including **TREMRON**, located within the Triangle Area being trapped for at times of up to an hour (and sometimes longer) per day as testified to by **TREMRON'S** Hugh Caron, Resources Logistics' Kevin Carter, and the residents.

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[4] In reiterating **TREMRON'S** exceptions, its references to "hearing officer" and "DOAH judge" have been changed to the proper title of "Administrative Law Judge."

Further, **TREMRON** argues, the Administrative Law Judge fundamentally ignored the fact that for those residents and businesses within the triangle, having the Crossing open provided an option, important because when the Norfolk Southern line was blocked at St. Clair Street, it always also blocked Old Kings Road and that the illegal closure of the subject Crossing by **CSXT** has eliminated a significant option for those homes and businesses.

TREMRON does not argue that the Administrative Law Judge's findings regarding alternate routes are not supported by competent, substantial evidence. Rather, **TREMRON** argues that the Administrative Law Judge misjudged the viability of alternate routes and ignored relevant evidence. The **DEPARTMENT** cannot set aside findings of fact or revisit the Administrative Law Judge's resolution of evidentiary conflicts in the absence of a showing that the findings lack the requisite record support and cannot make additional findings of fact. Brown, 667 So. 2d at 979; Heifetz, 475 So. 2d at 1281-1282. There is competent, substantial evidence in the record to support the Administrative Law Judge's findings regarding the availability and viability of other routes for pedestrians, motor vehicle traffic, and emergency vehicles. These findings cannot be disturbed by the **DEPARTMENT**.

TREMRON'S exception is rejected.

JACKSONVILLE'S fifteenth exception is to the second and third sentences of Finding of Fact No. 65 regarding a decrease in the total blockage of the Crossing and the blockage of the "through area." According to **JACKSONVILLE**, keeping the Crossing open would not just **somewhat** decrease total blockage time within the triangle – it would decrease it by at least 50 per cent. As noted in the "Proposed [sic] Order," Finding of Fact No. 64, "CSXT trains block the Crossing on an average of at least nine or more hours a day and as much as 12 hours

a day." With the Crossing open, traffic could pass through at least 50 per cent of the time, or more on days it was blocked less. This would mean that the time the area is sealed would be cut in half. **JACKSONVILLE** argues that the 2.25 hours of daily locked in time referenced in Finding of Fact No. 64 would be reduced by at least half, and all the individual blockages would be reduced in half by the opportunity to use the additional escape route. Residents and business operators and managers in the triangle area (depicted in City Ex. 11(b)) testified that this difference in locked-in time made the difference between making it acceptable or not acceptable to be located in the triangle. (T. 767, 827, 835)(City Ex. 16)

JACKSONVILLE claims that the last sentence in Finding of Fact No. 65, that even with the Crossing open, the triangle area will be sealed 40 per cent of a 24 hour day is simply incorrect in light of the foregoing. Two and one-quarter hours decreased by a minimum of 50 per cent or more would be slightly over an hour or less. This is certainly not 40 per cent of a 24 hour day.

While **JACKSONVILLE** asserts that leaving the Crossing open would cut in half the amount of time that the triangle area is "sealed," the record does not contain testimony or other evidence that the times that the Crossing would be open would correlate with the times that the other crossings are closed. Based upon a review of the entire record, it appears that the import of these findings is that even if the Crossing was open, the triangle residents would not be able to use the Crossing for a minimum of 40 percent of the time due to train blockages, not that the triangle area is blocked by train traffic 40 percent of the time. (T. 62-64, 969-987, 1172-1175) (CSXT Ex. 5, 32)(City Ex. 13A, 13B, and 13C)

JACKSONVILLE'S exception is rejected.

JACKSONVILLE'S sixteenth exception is to the second sentence of Finding of Fact No. 66 that "Trains block the New Kings Road crossing for up to 30 minutes at a time, less than one hour of total blockage during an average 12-hour period from 7:00 a.m. to 7:00 p.m." The "Proposed [sic] Order," according to **JACKSONVILLE**, leaves unstated the consequences of having the Crossing closed when busy, four-lane New Kings Road is blocked for 30 minutes at a time. **JACKSONVILLE** argues that it deprives motorists of an alternative route which, though it may sometimes also be blocked, makes this long delay on U.S. 1/23 more acceptable because there is a choice that can reduce the inconvenience.

JACKSONVILLE does not allege that Finding of Fact No. 66, or any portion thereof, is not supported by competent, substantial evidence. Rather, **JACKSONVILLE** asserts that the consequences of the blockage of the New Kings Road crossing are not addressed by the Administrative Law Judge in Finding of Fact No. 66. However, a review of the Recommended Order reflects that some of the consequences of the closing are addressed in Findings of Fact No. 67 through 71, and the Administrative Law Judge finds the new route more convenient. It appears that by its exception, **JACKSONVILLE** requests that the **DEPARTMENT** make additional findings regarding the consequences of the Crossing's closing when New Kings Road is blocked. Such additional findings are not only unnecessary, but beyond the authority of the **DEPARTMENT** to make. Florida Power & Light Co., 693 So. 2d at 1026-1027

JACKSONVILLE'S exception is rejected.

JACKSONVILLE'S seventeenth exception is to the second sentence of Finding of Fact No. 68:

> However, the Edgewood Avenue overpass on the alternate route provides the Paxon and Grand Park residents access to either side of the Crossing without crossing any of railroad tracks along Old Kings Road.

JACKSONVILLE argues that the proposed alternate route around the Crossing, a distance of 3.26 miles, is not reasonable for pedestrians as it would take over an hour for even a brisk walker to walk this distance. (T. 246)(City Ex. 11) **JACKSONVILLE** argues that the proposed alternate route around the Crossing, apart from being too long a distance for pedestrians to walk, is also very dangerous for pedestrians. Apart from an absence of sidewalks along both Edgewood Avenue and U.S. 1/23, which are both four lane highways, the Edgewood Avenue Viaduct has cement barriers which block off and reduce the size of the sidewalks on the Viaduct so they are impassible. (T. 1158-1159)(City Ex. 11, 11(b)) Thus, according to **JACKSONVILLE**, a pedestrian must walk right next to the auto lanes on the Viaduct. (Id.)

Review of the record in its entirety reveals that the Administrative Law Judge's findings regarding the ability of residents of the Paxon and Grand Park neighborhoods to use the Edgewood Avenue/New Kings Road alternate route to access either side of the Crossing without having to deal with the Old Kings Road train blockages are supported by competent, substantial evidence. In fact, **JACKSONVILLE** does not take exception to the Administrative Law Judge's findings on the basis that they are not supported by competent, substantial evidence, but rather, that based upon its interpretation of the evidence, alternate routes are not reasonable for pedestrians. However, based upon the Administrative Law Judge's reference to "these people," which appears to be a reference to the persons identified in Finding of Fact

No. 67 who use the Crossing to attend community activities, school, and shopping, the findings in Finding of Fact No. 68 appear to address motorists rather than pedestrians. This conclusion is also supported by the fact that pedestrian issues are addressed in Findings of Fact No. 99 through 103.

JACKSONVILLE'S exception is not supported by the record, while the Administrative Law Judge's findings in this regard are supported by competent, substantial evidence. However, even if **JACKSONVILLE'S** exception could be said to be supported by competent, substantial evidence, it is the province of the Administrative Law Judge to weigh and interpret the evidence. The **DEPARTMENT** cannot properly revisit the Administrative Law Judge's weight and credibility determinations. Neither an agency nor a reviewing court has the authority to substitute its view of the evidence for that of the Administrative Law Judge. Boyd, 682 So. 2d at 1118; Heifetz, 475 So. 2d at 1281-1281.

JACKSONVILLE'S exception is rejected.

JACKSONVILLE'S eighteenth exception is to the second and third sentences of Finding of Fact No. 74:

> However, the triangle existed before these homes were constructed and before the businesses were established. Anyone locating a home or business in the triangle area between two railroad yards and two railroad tracks knew or should have known that train blockages were going to be a problem.

JACKSONVILLE contends that no resident or business had any reason to know that the Crossing would be permanently closed after having been open at least since the 1930's, thus transforming a tolerable problem into an intolerable one. (See discussion, at exception to Finding of Fact No. 15, supra)(T. 784-786, 812-813)

In Finding of Fact No. 74, the Administrative Law Judge heard the testimony, examined the evidence presented, and made findings that train blockages were necessarily going to be a problem for the residents and businesses of the triangle area who elected to locate their homes and businesses between two major rail yards and the **CSXT** and Norfolk Southern Railroad main lines, regardless of the closure of the Crossing. (T. 841, 1373-1374, 1378-1379)(CSXT Ex. 15) Once again, **JACKSONVILLE** does not argue that the findings in this regard are not supported by competent, substantial evidence, but that **JACKSONVILLE** views it as unreasonable to conclude that residents would know or should have known train blockages would be a problem under such circumstances. The **DEPARTMENT** cannot reweigh or reinterpret the evidence to support **JACKSONVILLE'S** view of the evidence. Boyd, 682 So. 2d at 1118; Heifetz, 475 So. 2d at 1281-1281.

JACKSONVILLE'S exception is rejected.

JACKSONVILLE'S nineteenth exception is to the second sentence of Finding of Fact No. 75 that: "They used the Crossing mainly when the St. Clair Street crossing was blocked." **JACKSONVILLE** claims this sentence is incomplete and the following should be added to the end of the sentence: "when they needed medical attention, and when they went downtown." (T. 760)(City Ex. 16)

TREMRON adds to this exception to Finding of Fact No. 75, by stating that there is no evidence to support the "finding" that the subject Crossing was a secondary route: all of the witnesses within the triangle testified that they would use both the St. Clair Street crossing and the subject crossing depending on where they were going or whether one of them was blocked.

There is competent, substantial evidence in the record to support a finding that triangle residents used St. Clair Street as their primary route of access prior to the Crossing's closing. (T. 769, 840) This evidence is not limited by the language **JACKSONVILLE** asks the **DEPARTMENT** to add to the Administrative Law Judge's finding. It is the function of the Administrative Law Judge to make weight and credibility determinations; the **DEPARTMENT** cannot properly revisit those determinations. Neither an agency nor a reviewing court has the authority to substitute its view of the evidence for that of the Administrative Law Judge or make additional findings. Boyd, 682 So. 2d at 1118; Heifetz, 475 So. 2d at 1281-1281; Florida Power & Light Co., 690 So. 2d at 1026-1027.

JACKSONVILLE'S and **TREMRON'S** exceptions are rejected.

JACKSONVILLE'S twentieth exception is to the second sentence of Finding of Fact No. 76:

> Prior to the purchase of the business premises, Tremron represented to the Jacksonville Economic Development Commission that it had performed an initial feasibility study and concluded that the current roadways and public utilities were adequate to meet the demands for the new facility.

JACKSONVILLE argues that the second sentence of Finding of Fact No. 76 is incomplete and that **TREMRON** had no reason to assume the Crossing would be closed permanently in June 2000, when it bought the premises. (T. 868, 874)

TREMRON adds that it vehemently objects to and takes exception to the Administrative Law Judge's "findings," in Finding of Fact No. 76 which imply that somehow **TREMRON** has been satisfied with the status of the illegal closure of the subject Crossing by **CSXT**. **TREMRON** claims that all of the testimony from **TREMRON'S** witness, Hugh

Caron, and the other fact witnesses in this case, was unequivocal that **CSXT** illegally closed the Crossing in July 1998 under a ruse of needing to perform track repairs and that the community was led to believe, until shortly before the **DEPARTMENT'S** notice was issued in this case, that this closing was temporary. According to **TREMRON**, Mr. Caron's testimony was unequivocal that everyone he spoke with at the time **TREMRON** located and built its facility on St. Clair Street, understood that the closure was temporary.

There is competent, substantial evidence in the record to support findings that **TREMRON** purchased its business premises in June 2000, after the Crossing had been closed and barricaded for almost two years, and that its first visit to the site had been only a few months prior to purchase. (T. 869, 919) The record also establishes that **TREMRON** represented to **JACKSONVILLE** in its Industrial Development Revenue Bond Application that **TREMRON** had "conducted its initial feasibility study and concluded that the current roadways and public utilities serving the area should be adequate to meet the demands of their [sic] new facility." (T. 909-913)(CSXT Ex. 31) While neither the testimony nor CSXT Exhibit 31 establishes the date the application was prepared or submitted, the record does establish that the Crossing was closed in July 1998 and **TREMRON** first visited its existing site in either February or March 2000. (T. 919) The Administrative Law Judge makes no finding in Finding of Fact No. 76, that **TREMRON** knew or had reason to know that the Crossing would be permanently closed. Whether or not it is reasonable to conclude that **TREMRON** should have known or should have discovered that the Crossing would be permanently closed because it had been closed for almost two years by the time it purchased the property is beyond the authority of the **DEPARTMENT** to decide. It is not proper for an

agency to make supplemental findings of fact on an issue about which the Administrative Law Judge made no findings. Florida Power & Light Co., 693 So. 2d at 1026-1027 (citing Friends of Children v. Florida Dep't of Health & Rehabilitative Services, 504 So. 2d 1345, 1348 (Fla. 1st DCA 1987)).

JACKSONVILLE'S and **TREMRON'S** exceptions are rejected.

JACKSONVILLE'S twenty-first exception is to the second sentence of Finding of Fact No. 80: "The results of the CSXT surveys provide persuasive evidence that no significant train delays exist at St. Claire [sic] Street.[5]" **JACKSONVILLE** argues that this conclusion conflicts with the conclusions in Finding of Fact No. 64, and is incorrect. **JACKSONVILLE** claims that two and one-quarter hours of locked in time during a 24 hour time frame is not insignificant.

TREMRON also takes exception to that portion of Finding of Fact No. 80, that "no significant train delays exist at St. Claire [sic] Street." **TREMRON** argues that such a finding is preposterous and is totally unsupported in this record. According to **TREMRON**, Mr. Caron testified that he, his employees, and trucks wishing to ingress and egress **TREMRON'S** facility must wait an hour or sometimes longer for the St. Clair Street and Old Kings Road crossings to be cleared, and Resource Logistics' Kevin Carter verified this fact.

There is competent, substantial evidence in the record that the train blockages at St. Clair Street were not significant and that no significant train delays existed at St. Clair Street. (T. 218-222, 258-259, 452, 1313-1314)(CSXT Ex. 14, 16)(Tremron Ex. 1)(City Ex. 16)

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[5] The correct spelling is St. Clair Street.

While there is also speculative testimony that train blockage for the St. Clair Street crossing may be as long as 2.25 hours during a 24 hour time period and some persons may at times have a longer wait than others, the resolution of these conflicts and the determination of weight to be given to testimony are within the province of the Administrative Law Judge, not the **DEPARTMENT**.

JACKSONVILLE'S and **TREMRON'S** exceptions are rejected.

JACKSONVILLE'S twenty-second exception is to the last sentence of Finding of Fact No. 81:

> Mr. Caron and local triangle residents, Thomas Miller, Milton Holland and Rebecca Jenkins, testified that the cooperative arrangement was working in a satisfactory manner at the time of the final hearing.

According to **JACKSONVILLE**, Norfolk Southern's attempt to cooperate has somewhat reduced the waiting time for the residents and **TREMRON**, but not to the point that it is satisfactory, acceptable, or the same as if the Crossing were open. (T. 762, 830)(City Ex. 16)

TREMRON also takes exception to Finding of Fact No. 81, claiming that the Administrative Law Judge fundamentally misperceived the import of that testimony which simply recognized that the situation had improved somewhat on St. Clair Street at the time of the hearing but that this could not be counted on. Mr. Caron's testimony was clear that Norfolk Southern had made no promises of any kind as to either reducing the amount of blockage or providing a reliable time table of when blockage would occur. In short, **TREMRON** argues, the Administrative Law Judge fundamentally ignored the uncontradicted evidence that the residents and businesses located within the triangle suffered major, regular,

and unabated inconvenience by **CSXT's** illegal closure of this Crossing and the **DEPARTMENT'S** attempt to allow the closure to become permanent will only ensure that this unacceptable inability to ingress and egress their property will now be permanent.

TREMRON also felt "compelled" to point out that the entire litany of "findings" engaged in by the Administrative Law Judge as to the economic analysis testified to by Mr. Pappas, regardless of the details, fundamentally ignores the inescapable fact (based on the testimony from the residents and the businesses located within the triangle, including **TREMRON**) that the closure of the subject Crossing has, is, and will cost the residents and businesses significant amounts of time and money. According to **TREMRON**, the Recommended Order's entire discussion under Section G concerning pedestrian convenience fundamentally ignores the fact that pedestrians have always used this Crossing and have no realistic alternative.

The record reflects that after the date of the **TREMRON** train delay studies at St. Clair Street, **TREMRON'S** President, Hugh Caron, testified that he reached a cooperative arrangement with Norfolk Southern whereby the railroad agreed to reduce train blockages at St. Clair Street. Mr. Caron and local triangle residents, testified that the cooperative arrangement was working in a satisfactory manner at the time of the final hearing. (T. 762-842, 881, 885, 914)(City Ex. 16) In light of this evidence, it cannot be said that it was unreasonable for the Administrative Law Judge to conclude that these cooperative arrangements with the railroad were satisfactory. Factual inferences, like weight and credibility determination, are to be drawn by the Administrative Law Judge as trier of fact. Heifetz, 475 So. 2d at 1283 (citing Golden Dolphin No. 2, Inc. v. Division of Alcoholic

Beverages & Tobacco, 403 So. 2d 1372 (Fla. 5th DCA 1981)). Neither an agency nor a reviewing court has the authority to substitute its view of the evidence for that of the Administrative Law Judge. Boyd, 682 So. 2d at 1118.

JACKSONVILLE'S and **TREMRON'S** exceptions are rejected.

JACKSONVILLE'S twenty-third exception is to Finding of Fact No. 83, regarding emergency use of an alternate route through the Norfolk Southern Simpson Yard. **JACKSONVILLE** argues that the Norfolk Southern Simpson Yard is private property in which industrial activity is ongoing through which it is dangerous to drive. (City Ex. 16) **JACKSONVILLE** contends that Kevin Carter and Mr. Holland had obtained passage for emergencies, and sending commercial trucks through the Simpson Yard is not the sort of emergency for which Carter gets access. (T. 1374) According to **JACKSONVILLE**, going through the Yard cannot be properly classified as an "alternate route."

Review of the record establishes that Resource Logistics' manager, Mr. Carter, testified that in the event of a train blockage, his trucks can use an alternate route through the Norfolk Southern Simpson Yard to circumvent the blocked crossing "on extreme cases." (T. 1374-1375) Mr. Milton Holland, one of the three homeowners who resides in the triangle area, testified that in the event of a train blockage, he can use the alternate route through the Norfolk Southern Simpson Yard "anytime I want to," thus circumventing the blocked crossing. (City Ex. 16, p. 20) Finding of Fact No. 83 makes findings directly supported by competent, substantial evidence; it makes no finding or suggestion that this alternate route is a normal route, only that it is available on an emergency basis.

JACKSONVILLE'S and **TREMRON'S** exceptions are rejected.

JACKSONVILLE'S twenty-fourth exception is to the second sentence of Finding of Fact No. 86 that "Mr. Carter testified that, at this point in time it did not make a difference to him whether the Old Kings Road Crossing remained closed." According to **JACKSONVILLE**, Mr. Carter's remarks were: "Well at this point, it being closed for so long, it doesn't really make a difference now. . . . Basically we just got used to it. [It would be better] to a point [if it were opened]. . . ." (T. 1367). In addition, Carter gave the following additional answers to questions on this issue:

Q. Well, if it were opened, would you use it again?

A. Yes.

Q. And would that assist your operations?

A. Yes, it would.

Q. Would it save you any money?

A. It would save us on time.

Q. Can time be translated into money?

A. Yes. Cuts back overtime. (T. 1368)

JACKSONVILLE claims that in the above quoted portions of his testimony Mr. Carter rescinded the answer quoted in the "Proposed [sic] Order," which does not fairly represent his view.

A review of the record substantiates Mr. Carter's testimony and that he also responded to the following questions:

Q. Mr. Carter, do you have a point of view or position with respect to whether or not you believe that the CSX crossing ought to be reopened?

A. Well, at this point, it being closed for so long, it doesn't really make a difference now.

Q. Is that right?

A. Uh-huh.

Q. And why do you say that?

A. Basically we got used to it.

Q. If it were opened, would it be better?

A. To a point, it would be. It would cut down on a lot of illegal dumping. A couple of–if would keep the–actually, the police don't like to patrol that particular area, because they don't like getting caught by the train. And we had more police coming through that area, but since that particular track is blocked, they rarely come through there.

Based upon the totality of the evidence it cannot be said that there is no competent, substantial evidence to support Finding of Fact No. 86, or the reasonable conclusion that although Mr. Carter indicated it might be a bit better with the Crossing open, it was not of any major significance to him or his business operations. (T. 1367, 1368) Factual inferences, like weight and credibility determinations, are to be drawn by the Administrative Law Judge as trier of fact. Heifetz, 475 So. 2d at 1283 (citing Golden Dolphin No. 2, Inc., 403 So. 2d 1372). Neither an agency nor a reviewing court has the authority to substitute its view of the evidence for that of the Administrative Law Judge. Boyd, 682 So. 2d at 1118.

JACKSONVILLE'S exception is rejected.

JACKSONVILLE'S twenty-fifth exception is to the first sentence of Finding of Fact No. 99:

> It is undisputed that the Crossing was not designed for pedestrian or bicycle use. Nevertheless, persuasive evidence indicates that pedestrian and bicyclists used the Crossing before it was closed. They have continued to cross the tracks since CSXT removed the crossing roadway in July 1998.

JACKSONVILLE argues that the Crossing was designed and intended for pedestrian and bicycle use to the same extent that any other public highway (except interstates and comparable limited access roads) in the State of Florida is designed and intended. No evidence was presented that this is not the case. This is particularly true in light of the fact that the roadway across the Crossing has been there since 1837, long before motor vehicles were invented. (T. 1060-1063)

TREMRON, in a generalized exception to Findings of Fact No. 99-113 states, without explanation or elaboration, that it takes exception to the findings contained in the Recommended Order Section 5 (pages 20-32), Section G "Pedestrian Convenience" (pages 33-34), and Section H "Excessive Restriction to Emergency Type Vehicles Resulting from Closing" (pages 35-37).

The record reflects that Old Kings Road does not have sidewalks, bicycle paths, or pedestrian lanes and that Old Kings Road was not designed for pedestrian or bicycle use. (T. 1211) There is also competent, substantial evidence to support the finding that even after the Crossing was closed, it, nevertheless, continued to be used by pedestrians and bicyclists. **JACKSONVILLE** does not contend that there is no competent, substantial evidence to support the Administrative Law Judge's findings in this regard, but notes that Old Kings Road is no less designed for pedestrian or bicycle use than any other roadway in the state. Findings of fact can be rejected by an agency only when there is no competent, substantial evidence to

support them. § 120.57(1)(l), Fla. Stat. (2001).

JACKSONVILLE'S and **TREMRON'S** exceptions are rejected.

JACKSONVILLE'S twenty-sixth exception is to the second sentence of Finding of Fact No. 100, regarding pedestrian use of the Crossing. **JACKSONVILLE** claims the finding is incomplete because there is evidence in the record that during the eight hour period of observation in question more pedestrians turned away, deterred by the observer, a police officer. (T. 991)

Review of the record establishes that the Administrative Law Judge noted that in a survey of ten railroad crossings performed by Waitz & Moye at the request of **JACKSONVILLE**, there were six adult pedestrians who used the Crossing during a 24 hour period. (T. 1194-1195)(CSXT Ex. 28) **JACKSONVILLE'S** police witness, Leonard Propper, testified that he personally observed approximately six pedestrians during an eight hour shift at the Crossing. (T. 991) While the presence of a police officer may have deterred some pedestrian use of the Crossing, there were no police officers present during the Waitz & Moye study. **JACKSONVILLE** elected to use police officers to assess train blockages at the Crossing and made no attempt to replicate the Waitz & Moye study.

There is no testimony in this record from anyone who used the Crossing as a pedestrian. **JACKSONVILLE'S** neighborhood witness, Faye Barham, testified she had not personally observed any pedestrians at the Crossing in the 1990's, and Lloyd Washington, testified that he never observed pedestrians on the Crossing. (T. 791, 966) Speculation by **JACKSONVILLE** as to pedestrian use of the Crossing, based upon those who did not cross, is not evidence and cannot be considered. The record does not support rejection of Finding of

Fact No. 100. § 120.57(1)(l), Fla. Stat. (2001).

JACKSONVILLE'S twenty-sixth exception is rejected.

JACKSONVILLE'S twenty-seventh exception is to the first and last sentences of Finding of Fact No. 102:

> Public bus service provided by the Jacksonville Transportation Authority (JA) connects the neighborhoods on both sides of the Crossing. Additionally, CSXT and C.J. provided exhibits which clearly show that pedestrians on both sides of the Crossing have reasonable access to bus transportation over the alternate route, on weekdays and weekends, without having to walk an unreasonable distance.

JACKSONVILLE claims there was insufficient evidence presented to justify any conclusion that there is adequate bus service from one side of the Crossing to the other, or vice versa. Robert Grear, an investigator hired by **CSXT**, followed two buses for the purpose of ascertaining whether bus travel was available for people (pedestrians) to travel from the west side of the Crossing to the east side. (T. 247-248) One of the two buses Grear followed, the WS 10, comes from downtown Jacksonville on Beaver Street, after some turns and cut backs goes to Detroit Street, up Detroit Street to West 12th Street, from there to Edgewood Avenue to and over the Viaduct, and "turns north from New Kings Road, goes one block, makes a circle here and - - I think its Shenandoah or something - - and it comes to here, and then it will come back." (T. 225-226, 247-248)(CSXT Ex. 18) The other bus, NS 4, originates downtown, makes a loop somewhere on the east side of the Crossing, goes to the Amtrak Station on New Kings Road, and then goes east on West 45th Street to Moncrief Road. (Id.) According to Grear the two buses intersect routes at a point on the eastern side of the Crossing and it is possible to make a connection between them. (T. 249)

JACKSONVILLE claims that the foregoing exhibits and testimony do not serve to establish that viable or reasonably practical bus transportation around the Crossing for pedestrians exists, for several reasons:

(1.) The time it would take to get one of these buses, ride it, get off it, and make a connection with the second bus, and ride it to a point in the neighborhood desired were not established. (See T. 249)

(2.) The NS 4, after arriving at the junction point with WS 10, proceeds east on West 45th Street to Moncrief Road. (T. 225, 248-249) There was no testimony which indicated that the NS 4 traveled back along the route whence it had come, permitting someone connecting with it from the WS 10 to ride the NS 4 back to the neighborhood near the east side of the Crossing, rather than riding it to Moncrief, and then downtown, before ultimately coming back on the same bus from downtown. (Id.) Indeed, Grear indicated that the NS 4 in fact heads south after reaching Moncrief, suggesting precisely the latter scenario. (T. 250) This would leave a pedestrian coming from the west side of the Crossing the choice of likely taking a couple of hours via the bus connection, or having to walk the remainder of the way after getting off the WS 10. Between the getting to the bus, waiting for it, riding it, and then walking the other half of the trip, this again would take unduly long.

(3.) The fact that the buses have reasonable schedules and are reasonably available was not adequately established. The only testimony on this point was that the two buses ran only every 30 minutes, according to schedules which were not

produced or offered. (T. 247-248) CSXT Exhibit 28, Section 2, Figure 1, is a diagram that shows JA bus routes in the northwest quadrant. It does not contain enough detail, however, to permit a conclusion that adequate or reasonable bus service is available from one side of the Crossing to the other.

The foregoing, **JACKSONVILLE** argues, constitutes the totality of the evidence presented on bus transportation. This evidence is insufficient to carry the burden of persuasion on the issues of adequacy or reasonableness, which lies on **CSXT's** shoulders.

TREMRON also takes exception to Finding of Fact No. 102, claiming that the "finding" is a complete misperception of the evidence which recognized that there was no realistic public transportation alternative and the characterization in Finding of Fact No. 103 that the closure causes only "limited" pedestrian inconvenience is unsupported by the record.

The record establishes that evidence was presented that public bus service provided by the Jacksonville Transportation Authority connects the neighborhoods on both sides of the Crossing, and that buses run regularly every 30 minutes throughout the day. (T. 113, 229, 247, 250, 816, 1193)(CSXT Ex. 17, 18) **JACKSONVILLE** studied the bus service available in the area of the Crossing as part of the Waitz & Moye analysis, and prepared a diagram identifying the bus routes that connect the neighborhoods on both sides of the Crossing. (T. 1193)(CSXT Ex. 17, 18) Despite the fact that **JACKSONVILLE** operates the public bus service in the area of the Crossing, there is no other evidence on this issue. **TREMRON** essentially argues that the Administrative Law Judge misjudged the viability of alternate access. The Administrative Law Judge had substantial evidence of the viability of other routes for pedestrians, traffic, and emergency vehicles before her and made findings accordingly.

The **DEPARTMENT** cannot set aside findings of fact or revisit the Administrative Law Judge's resolution of evidentiary conflicts in the absence of a showing that the findings lack the requisite record support. Brown, 667 So. 2d at 979; Heifetz, 475 So. 2d at 1281-1282. In addition, neither an agency nor a reviewing court has the authority to substitute its view of the evidence for that of the Administrative Law Judge. Boyd, 682 So. 2d at 1118; Heifetz, 475 So. 2d at 1281-1282.

JACKSONVILLE'S twenty-seventh exception is rejected.

JACKSONVILLE'S twenty-eighth exception is to Finding of Fact No. 103 that "The pedestrian safety hazards at the Crossing substantially outweigh any limited pedestrian inconvenience that would result from the closing of the Crossing." **JACKSONVILLE** argues that the proposed alternate route around the Crossing, a distance of 3.26 miles, is not reasonable for pedestrians (City Ex. 11) and that it would take over an hour for even a brisk walker to walk this distance. (T. 246) The proposed alternate route around the Crossing, apart from being too long a distance for pedestrians to walk, is also very dangerous for pedestrians. Apart from an absence of sidewalks along both Edgewood Avenue and U.S. 1/23, which are both four lane highways, the Edgewood Avenue Viaduct has cement barriers which block off and reduce the size of the sidewalks on the Viaduct so they are impassible. (T. 1158-1159)(City Ex. 11, 11(b)) Thus, a pedestrian must walk right next to the auto lanes on the Viaduct. (Id.) According to **JACKSONVILLE**, the reality is that the hazard of walking the alternative route is greater than using the Crossing, and that the inconvenience is beyond reason, requiring more than an hour of walking.

There is competent, substantial record evidence of the pedestrian hazards at the

Crossing, given the long times that trains block the Crossing, and the measures pedestrians took to cross. The Administrative Law Judge analyzed the issues of pedestrian convenience and safety and concluded that pedestrian safety hazards outweighed the limited pedestrian inconvenience resulting from the closure. The record also documents the serious safety hazard of pedestrians climbing between freight cars at the Crossing. There is, however, no testimony of a single witness who regularly walked or biked over the Crossing and who objected to the closure. The Administrative Law Judge's findings are supported by substantial, competent evidence, and the **DEPARTMENT** is without authority to reweigh or reinterpret that evidence. Boyd, 682 So. 2d at 1118; Heifetz, 475 So. 2d at 1281-1282.

JACKSONVILLE'S twenty-eighth exception is rejected.

TREMRON'S fourteenth exception is to Findings of Fact No. 104 through 113, regarding the excessive restriction to emergency type vehicles resulting from the closing of the Crossing. **TREMRON** claims that the most egregious misperception of the evidence contained in Findings of Fact No. 104 through 113 concerns the alleged lack of any excessive restriction to emergency type vehicles resulting from closing. According to **TREMRON**, the Recommended Order's inference is utterly amazing in that a reading of it without knowledge of the actual facts (at pages 35 to 38) could lead an uninitiated reader to believe that somehow **CSXT's** illegal closing of the Crossing, and the **DEPARTMENT'S** attempt to permit this closure, has actually led to even better access for emergency vehicles. The record of this proceeding is unequivocal that this is absolutely not the case and that for those residents and businesses trapped within the triangle for six hours every day, the closure has created a deathtrap.

The testimony of Chief Loren Mock, **TREMRON** notes, pointed out that although the emergency response times have decreased over the years because of his department's increased efficiency, that even a single minute can make the difference between life and death. (T. 281, 287-289) There is absolutely no question from any reasonable interpretation of the evidence, that the closure of the subject Crossing has created a situation wherein an emergency, no rescue vehicle access is possible: death for someone injured within the triangle at some point is inevitable. The Administrative Law Judge's flippant assertion that cutting trains is an alternative that somehow ameliorates this dangerously unacceptable restriction of access is, to put it charitably, cruel and outrageous.

The record establishes, inter alia, that prior to its closing, emergency vehicles were dispatched from the east side of the Crossing to cover emergency calls on the west side of the Crossing, and that even when the Crossing was open, Old Kings Road was an area of limited access for fire and rescue crews due to the amount of train blockages at the Crossing. (T. 268) There is also competent, substantial evidence that since the closure of the Crossing, the Jacksonville Fire Department has modified its response procedures to handle fire and rescue calls for the west side of the Crossing with a station located on Huron Street, to meet increasing demand for service on the west side of the Crossing, not due to the Crossing's closure. (T. 268, 299-300) On the other hand, there is no evidence presented that even one fire and rescue call has been delayed since 1998. (Cf. T. 270-277)

TREMRON'S exception is rejected.

JACKSONVILLE'S twenty-ninth exception is to the last sentence of Finding of Fact No. 112: "While fire and rescue personnel prefer that the Crossing be open, any restriction to

fire and rescue vehicles as a result of the closure of the Crossing has not been and will not be excessive."

JACKSONVILLE contends that it is clear that when the triangle area is locked in by trains, 2.25 hours a day, there will be emergency response by fire and rescue that are far outside the bounds of reasonableness. (See Findings of Fact No. 109 and 110) The times when this might occur will be reduced 50 per cent or more if the Crossing is open. (See par. 15, supra.)

The record establishes, inter alia, that prior to its closing, emergency vehicles were dispatched from the east side of the Crossing to cover emergency calls on the west side of the Crossing, and that even when the Crossing was open, Old Kings Road was an area of limited access for fire and rescue crews due to the amount of train blockages at the Crossing. (T. 268) There is also competent, substantial evidence that since the closure of the Crossing, the Jacksonville Fire Department has modified its response procedures to handle fire and rescue calls for the west side of the Crossing with a station located on Huron Street, to meet increasing demand for service on the west side of the Crossing, not due to the Crossing's closure. (T. 268, 299-300) On the other hand, there is no evidence presented that even one fire and rescue call has been delayed since 1998. (Cf. T. 270-277)

JACKSONVILLE'S twenty-ninth exception is rejected.

JACKSONVILLE'S thirtieth exception is to Finding of Fact No. 114 regarding the impact of Crossing accidents on **CSXT's** operation. **JACKSONVILLE** argues that there was evidence of only a single instance in 25 years, 7 months, in which an individual was relieved from work because of psychological trauma caused by witnessing an accident (T. 71-72) and

that this is not sufficient to carry any weight on the issue of "business necessity." The sums paid in claims by **CSXT** and Amtrak, according to **JACKSONVILLE**, are not excessive for a period of time of 25 years, 7 months, particularly if the injuries were occasioned in part by the negligence of **CSXT**, presumably part of the basis for settling.

Review of the record establishes the impact that railroad crossing accidents can have on railroad operations, including the psychological impact on train crews, and that, exclusive of attorney's fees and costs, **CSXT** and Amtrak had paid approximately $600,000 to settle claims arising out of accidents at the Crossing. (T. 73, 372) The Administrative Law Judge found that the high number of accidents and the cost of claims at the Crossing, and the significant liability exposure for crossing accidents at the Crossing, including physical and emotional injury claims brought by motorists, passengers, train crews, and pedestrians based upon the proximity of the Crossing to the Moncrief Yard negatively impact **CSXT's** operations. (T. 372-374) **JACKSONVILLE** would have the **DEPARTMENT** find that **CSXT's** losses are not "excessive." A finding that **CSXT's** losses are not "excessive" is not only unnecessary, but beyond the authority of the **DEPARTMENT** to make. Florida Power & Light Co., 693 So. 2d at 1026-1027.

JACKSONVILLE'S thirtieth exception is rejected.

JACKSONVILLE'S thirty-first exception is to Conclusion of Law No. 124 that "Closing the Crossing would enhance its safety. The benefit of the enhanced safety outweighs any possible inconvenience to motorist[s] and pedestrians that may result from closure." **JACKSONVILLE** argues that this conclusion is in error because closing **any** crossing enhances its safety, and because the "Proposed [sic] Order" does not take cognizance of or

follow the applicable case law in determining that, **ipso facto**, this **outweighs any possible inconvenience to motorists and pedestrians**. **JACKSONVILLE** claims City of Holly Hill v. Department of Transp., 621 So. 2d 741 (Fla. 5th DCA 1993), is instructive in this respect. There, the court stated: "[t]he opening of a vehicular/pedestrian railroad crossing necessarily increases the probability of [a car-train] accident." Id. at 742-743. In Holly Hill, the court determined that the probability of one additional car-train crash every four years, although tragic, was an acceptable risk. As a result, the opening of the new crossing at issue in that case was acceptable. Id.

By comparison with Holly Hill, at the Crossing in question there is a history of eight car-train crashes in 25 years, 7 months. This represents not quite as low a figure as one car-train accident every four years, but is close to that in that it amounts to one car-train accident every 3.2 years. **JACKSONVILLE** contends that this is a rate so near to that approved in Holly Hill when it reversed the **DEPARTMENT'S** decision, that the Holly Hill result governs in this case as a matter of law. According to **JACKSONVILLE**, the conclusion to the contrary in the "Proposed [sic] Order" must be set aside.

TREMRON appears to take exception to every Conclusion of Law in the Recommended Order when it states:

> The foregoing demonstrates that the misperception and erroneous interpretation of certain of the facts have led to the Recommended Order being worthy of no deference by the DOT. The preponderance of the evidence clearly shows that at least as to those residents and businesses within the triangle, there is no realistic alternative route and that the closure constitutes a totally unreasonable restriction of emergency vehicles. Conclusion of Law 129 is completely contrary to the facts and, on its own accord, justifies denial of the permit.

> Finally, the Recommended Order's total ignoring of the devastating impact the closure has had and will continue to have on pedestrians renders the Recommended Order erroneous as a matter of law. *See* City of Holly Hill v. Department of Transportation, 621 So. 2d 741 (Fla. 5th DCA 1993).

A review of the record and the law reveals that Holly Hill is not dispositive of the issue in this case and fails to establish that the Administrative Law Judge erred as a matter of law in her conclusions. In Holly Hill, the City of Holly Hill submitted an application to the **DEPARTMENT** to open an at-grade railroad crossing for vehicles and pedestrians. Id. at 742. The hearing officer considered the necessity, convenience, and safety effects upon vehicle traffic at the proposed crossing, but did **not** consider the impact of pedestrian use of the proposed crossing as a vehicular/pedestrian crossing. Id. The hearing officer recommended that the city's application for a vehicular/pedestrian crossing be denied and that the **DEPARTMENT** approve a pedestrians only crossing. Id. at 742. The **DEPARTMENT** adopted the hearing officer's recommendation and denied the application, but also declined to approve a pedestrians only crossing, claiming it was without jurisdiction to approve such a crossing. Id. On appeal, the court held that the hearing officer erred in considering only vehicular traffic in determining the necessity, convenience, and safety of a vehicular/pedestrian crossing. Id. The rail crossing was granted because the data used to support an increase in car-train crash probabilities was not demonstrated to be significant and insufficient as an evidentiary basis to deny the crossing application. Id. at 743. In the instant case, there is a significant demonstrated history of accidents at the Crossing, data supporting that the Crossing is, perhaps, Jacksonville's most dangerous crossing, and evidence regarding the extremely unique safety hazard characteristics of the Crossing.

Moreover, in the present case, the Administrative Law Judge specifically considered and evaluated the evidence, and made findings of fact regarding pedestrian use of the Crossing. The Administrative Law Judge did not limit the introduction of evidence regarding the issues of pedestrian convenience and safety in any manner. The standard by which an agency may review an Administrative Law Judge's conclusions of law is set forth in Section 120.57(1)(l), Florida Statutes, and states that an agency "may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction." Although **JACKSONVILLE** and **TREMRON** do not agree with the Administrative Law Judge's ultimate conclusions regarding pedestrian issues, her findings are supported by substantial, competent evidence and her conclusions are supported in the law.

JACKSONVILLE also argues that this conclusion of law is erroneous because Holly Hill stands for the proposition that if there was less than one accident every four years at a railroad crossing, then the **DEPARTMENT** must deny the petition to close the Crossing.[6] **JACKSONVILLE** misinterpreted the holding in the Holly Hill case. In Holly Hill, the central issue was whether an at-grade crossing should be opened at a location where no crossing had previously existed. Evidence was presented that the opening of the new crossing would create a slight increase in the risk of a crossing accident. Id. at 742. The appellate court found that the opening of any new railroad crossing necessarily will result in an increase in the

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[6] At the Old Kings Road crossing, there were a minimum of 12 crossing accidents from 1975 to 1998 or one every 2.33 years. Although this calculation is not germane to the outcome of this case, **JACKSONVILLE** incorrectly calculated that there was on average one accident every four years at the Old Kings Road crossing.

probability of a crossing accident, but that the slight increase in the probability of a crossing accident "by itself" was insufficient to justify disapproving an additional crossing. Id. at 742-743.

In the instant case, there is competent, substantial evidence regarding the numerous safety hazards present at the Crossing. (T. 43-45, 51, 148, 58-62, 53-55, 89-90, 176-177, 137-138, 169, 780, 845-847, 955-956, 958-960, 1148-1149) In addition to the 12 or 13 documented accidents at the Crossing from 1975 to 1998, the testimony was undisputed that there were numerous near miss incidents. (T. 88) There is also competent, substantial evidence regarding the significant safety hazards existing at the Crossing, including: it has the highest number of railroad crossing accidents in Jacksonville, Florida, including several involving serious personal injury; motorists regularly driving around the crossing gates because of extended train blockages and a general lack of appreciation of the nature of the switching movements at the Crossing, as well as the potential danger of obstructed trains traveling at high speeds on the **CSXT** main line; visibility obstructions for motorists who cannot observe fast-moving freight or Amtrak passenger trains on the **CSXT** main line; a substantial number of daily train movements over the Crossing; five railroad tracks that cross Old Kings Road at a skewed angle; the extended length of the Crossing resulting from the number of tracks and skewed angle; motorist frustration over extended train delays; the proximity of the Crossing to the Moncrief Yard switching activities; and pedestrians climbing between freight cars on a regular basis due to extended train delays. (T. 43-51, 148, 58-62, 53-55, 89-90, 176-178, 137-138, 788, 955-958, 64-67, 151-155, 185-186, 538-539, 1148-1149, 845-847, 959-960) **JACKSONVILLE'S** suggestion that the safety hazards existing at

the Old Kings Road crossing are analogous to the Holly Hill finding of a slight increase in accident probability for a new yet to be constructed crossing is without basis in fact or in the law.

JACKSONVILLE'S and **TREMRON'S** exceptions are rejected.

JACKSONVILLE'S thirty-second exception is to the last two sentences of Conclusion of Law No. 125:

> The alternate route is practical given its minimal additional distance and time requirements. Public buses provide pedestrians with reasonable transportation to both sides of the Crossing over the alternate route.

JACKSONVILLE claims that the alternate route is thoroughly impractical for pedestrians, and that there is insufficient evidence to permit the conclusion that available bus transportation provides a reasonable alternative for pedestrians.

The Administrative Law Judge made sufficient findings of fact, supported by competent, substantial evidence, that the Crossing is unsafe for vehicles and pedestrians. It cannot be said that it is erroneous as a matter of law to conclude that the alternate route is practical.

JACKSONVILLE'S thirty-second exception is rejected.

JACKSONVILLE'S thirty-third exception is to the last sentence of Conclusion of Law No. 126:

> However, the additional inconvenience is not significant when balanced against the problems of substantial train delays at the Crossing and the overwhelming public safety benefits associated with eliminating the crossing.

JACKSONVILLE claims that the businesses and residences within the triangle area are locked

in for as along as an hour at a time and for over two hours a day. This cruel result, in **JACKSONVILLE'S** opinion, is not justified based on the only slightly higher accident rate than the one approved in Holly Hill.

The Administrative Law Judge made findings of fact regarding how minimal delays are experienced by a few people in an area where train delays are inevitable. Further, if relevant to the analysis, the significant accident history at the Crossing constitutes an accident almost every two years, nearly double the accident rate set out in Holly Hill, 621 So. 2d at 742. In light of the totality of the evidence, it cannot be said that the Administrative Law Judge's conclusion in this regard is erroneous as a matter of law.

JACKSONVILLE'S thirty-third exception is rejected.

JACKSONVILLE'S thirty-fourth exception is to Conclusion of Law No. 128:

> CSXT does not have a business necessity to close the Crossing. On the other hand, closure of the Crossing would have a beneficial effect on rail operations and expenses based upon the railroad's potential liability exposure for accidents. This exposure is especially significant based on the regular presence of motorists and pedestrians crossing around lowered gates in front of trains or between freight cars.

JACKSONVILLE claims the liability demonstrated over the 25 year, 7 month time period at issue is not sufficient to weigh significantly in favor of closing the Crossing.

There is competent, substantial evidence in the record that **CSXT** has significant liability in maintaining this Crossing, based upon the accident history of the Crossing and the continual disregard of the closed gates and flashing lights by motorists and pedestrians alike. In light of this evidence, the conclusion of the Administrative Law Judge in this regard is not erroneous as a matter of law.

JACKSONVILLE'S thirty-fourth exception is rejected.

JACKSONVILLE'S thirty-fifth exception is to Conclusion of Law No. 129:

> Finally, the evidence proved that the closure of the Old Kings Road crossing would not cause an "excessive" restriction to emergency type vehicles. To the contrary, response times for emergency vehicles have improved since the closure in 1998.

JACKSONVILLE contends that when the triangle area is locked in, which occurs daily for long periods of time, emergency response times are and will be unreasonable, excessive, and inevitably result in the future in serious injury or death to one of the employees or residents in the area. This will continue, according to **JACKSONVILLE**, notwithstanding improvements in emergency response time and is exacerbated and made at least doubly more dangerous by the closing of the Crossing.

JACKSONVILLE'S opinion that any period of time that the triangle area is closed off is unreasonable does not constitute competent, substantial evidence, nor does it refute the competent, substantial evidence in the record that there has been improvement in response time since the closure. There is nothing in the record or the law to support **JACKSONVILLE'S** conclusion that serious injury or death will "inevitably result" due to the Crossing's closure or to establish the Administrative Law Judge's conclusions in this regard are erroneous as a matter of law.

JACKSONVILLE'S thirty-fifth exception is rejected.

JACKSONVILLE'S thirty-sixth exception is to Conclusion of Law No. 130 that:

> In tacit recognition of the safety hazards that exist at the Crossing, Petitioners argued that FDOT should consider upgrades to the traffic control devices as an alternative to closure. Under Rule 14-46.003, Florida Administrative Code, FDOT is not

> required to consider the relative merits of allocating funds to upgrade the traffic control devices at a railroad crossing as part of its crossing closure determination.

JACKSONVILLE claims that neither it, **TREMRON**, nor the third petitioner, **CENTURION**, made any such argument, and that the paragraph is irrelevant.

A review of the record in its entirety supports a finding that **JACKSONVILLE'S** experts recommended a raised median separator and curbs, as well as fencing around the entire rail yard and moving the gate closer to the tracks on the west side to make it safer. (T. 1151-1155)(City Ex. 11, 11(f)) In fact, in prior exceptions, **JACKSONVILLE** argued that the **DEPARTMENT** should condition reopening of the Crossing based upon the requirement that such measures be implemented. Conclusion of Law No. 130 concludes that those matters are beyond the scope of the rule. A reading of Rule 14-46.003, Florida Administrative Code, reveals that this conclusion is not erroneous as a matter of law. Moreover, in response to a prior exception the **DEPARTMENT** acknowledged that **JACKSONVILLE** did not recommend four-quadrant gates be installed. (p. 25-26, supra.) However, raised medians are also traffic control devices and there is no indication that the Administrative Law Judge is referring to four-quadrant gates. As such, no error in the Administrative Law Judge's conclusion has been established.

JACKSONVILLE'S thirty-sixth exception is rejected.

JACKSONVILLE'S thirty-seventh exception is to Conclusion of Law No. 131 that

> FDOT would not consider upgrades to the traffic control devices based upon the existence of signal lights and gates at the Crossing. Moreover, installation of a four-quadrant gate system would enhance the danger at the Crossing because vehicles could be trapped in the path of a train.

JACKSONVILLE argues that no party proposed that this be considered. According to **JACKSONVILLE**, sentence two is wildly speculative and not justified by any evidence presented.

As noted above, **JACKSONVILLE'S** expert made recommendations as to certain upgrades at the Crossing. (T. 1151-1155)(City Ex. 11, 11(f))(p.25-26, supra.) In addition, there is testimony that upgrades to a four-quadrant gate system is not a viable alternative to closure. The Administrative Law Judge's conclusion in this regard, and any findings therein, are not speculative, but supported by the record and the law.

JACKSONVILLE'S thirty-seventh exception is rejected.

JACKSONVILLE'S thirty-eighth exception is to Conclusion of Law No. 132:

> In this case, Respondents have shown that the closing of the Crossing effectuates FDOT's policy of improved safety at railroad crossings by eliminating, where reasonable convenient, the interaction of motor vehicle traffic with rail traffic.

JACKSONVILLE claims that based on all the errors in the Findings of Fact it set forth in its prior exceptions and the error of law cited in the preceding paragraphs, this conclusion is not supported by the preponderance of the evidence, is legally in error, and is manifestly unjust.

As previously detailed above, with one minor exception, the Administrative Law Judge's findings of fact are supported by competent, substantial evidence. As such, they fully support Conclusion of Law No. 132 and no error as a matter of law has been shown.

JACKSONVILLE'S thirty-eighth exception is rejected.

JACKSONVILLE'S thirty-ninth exception is to the fact that closing the Crossing would leave a 3.4 mile stretch of rail in an urban area with no railroad crossing, a fact

essentially ignored in the "Proposed [sic] Order," which is contrary to both legal precedent and regulatory guidance. (See T. 677-678) In Holly Hill, **JACKSONVILLE** argues, the opening of a fifth crossing within a mile was ordered over the **DEPARTMENT'S** objection, based in part on pedestrian need. Holly Hill, 621 So. 2d at 742-743. This case, according to **JACKSONVILLE**, is similar, because there is a long history of pedestrian use of the Crossing. **JACKSONVILLE** contends that it is agreed that the amount of pedestrian traffic in the last three years has been very low because of the fact that the Crossing has been illegally barricaded and the roadbed removed. Likewise, it is agreed, according to **JACKSONVILLE**, that the volume will increase when the Crossing reopens. Given these facts, the Holly Hill case mandates the reopening of the Crossing and denial of the permit to close the Crossing.

JACKSONVILLE continues that in addition to the Holly Hill decision, the "Proposed [sic] Order" ignores the Federal Highway Administration's Railroad-Highway Grade Crossing Handbook which indicates that one of the criteria for closing a crossing on a main line is that there be more than five crossings within the one mile segment of track affects. (City Ex. 11, App. B) It is **JACKSONVILLE'S** position that it is obvious that this criterion was not met here and was not even discussed in the lengthy "Proposed [sic] Order."

The basis of **JACKSONVILLE'S** exception is that there will not be a "legal" road crossing of the tracks for pedestrians for quite some distance. However, the record in this case establishes that there is competent, substantial evidence in the record to support the Administrative Law Judge's findings of pedestrian inconvenience, and the findings and conclusions that pedestrian inconvenience is outweighed by the substantial risks to the Crossing being open. Moreover, there is competent, substantial evidence that despite removal of the

flashing lights and gated vehicular access to the Crossing, the same train activity is taking place and pedestrians continue to use the Crossing, notwithstanding its closure to vehicular traffic. (T. 140, 145, 152, 161-162, 791, 991, 996, 1194-1195) For pedestrians, the reality of the situation is that there is little difference in terms of their ability to cross, and their actual use of the Crossing. (T. 140, 145, 152, 161-162, 791, 991, 996, 1994-1195) However, the unsafe movements of vehicles that took place at this uniquely dangerous crossing will be avoided by closure of this Crossing. The Administrative Law Judge's conclusions in this regard have not been shown to be erroneous as a matter of law.

JACKSONVILLE argues that the rule being applied in this case, Rule 14-46.003, Florida Administrative Code, does not incorporate the FHWA Railroad-Highway Grade Crossing Handbook (Handbook). Thus, under **JACKSONVILLE'S** interpretation, it is not within the purview of the Administrative Law Judge to apply such criteria, other than as guidance and not as binding. What was and should be examined by the **DEPARTMENT** were those characteristics published by the Federal Railroad Administration (FRA), the American Association of State Highway and Transportation Officials (AASHTO), and the Association of American Railroads (AAR), as listed in the **DEPARTMENT'S** Notice of Intent:

- Crossings where vehicular traffic can be safely and efficiently redirected to an adjacent crossing;
- Crossings where the road crosses railroad tracks diagonally, or any crossing with reduced sight distance;
- Adjacent crossings where one is being updated or grade-separated; and
- Complex crossings where it is difficult to provide adequate warning devices or which have severe operating problems, e.g., multiple tracks, extensive switching operations, long periods of blocked crossings, etc.

When those factors are examined, the **DEPARTMENT** concluded this Crossing is a ready candidate for closure. When the Administrative Law Judge reviewed the evidence supporting these factors, the Administrative Law Judge also found the Crossing met the criteria for closure. The **DEPARTMENT** is statutorily charged with responsibility for closure of unsafe rail crossings, including ones related to city streets, and so long as there is competent, substantial evidence to support the **DEPARTMENT'S** determination, such determination will be upheld. City of Plant City v. Department of Transp., 399 So. 2d 1075 (Fla. 2d DCA 1981). There is competent, substantial evidence to support the Administrative Law Judge's finding and the conclusions of law in her Recommended Order have not been shown to be erroneous.

JACKSONVILLE'S thirty-ninth exception is rejected.

DEPARTMENT'S MOTION TO STRIKE

In its response to **TREMRON'S** exceptions, the **DEPARTMENT** argues that **TREMRON** submitted its exceptions beyond the 15 day statutory limit for exceptions and, therefore, its exceptions should be stricken.

Section 120.57(1)(k), Florida Statutes, provides, in part, that an agency charged with issuing a final order "shall allow each party 15 days in which to submit written exceptions to the recommended order." The details of this requirement and other "filing" requirements for Chapter 120, Florida Statutes, proceedings are provided by Rule 28-106.104, Florida Administrative Code. In pertinent part, the rule provides that:

> (1) In construing these rules or any order of a presiding officer, filing shall mean received **by the office of the agency clerk during normal business hours** or by the presiding officer

during the course of a hearing.

* * *

(3) Any document **received by the office of the agency clerk after 5:00 p.m. shall be filed as of 8:00 on the next regular business day**. (emphasis added)

These uniform rules apply to all agencies in accordance with the authority provided by Section 120.54(5), Florida Statutes. As such, they apply to the **DEPARTMENT** and all parties initiating or participating in proceedings afforded by Chapter 120, Florida Statutes.

There is ample precedent for the **DEPARTMENT'S** motion. In fact, Vasquez is squarely on point and requires the **DEPARTMENT'S** motion be granted. Metropolitan Dade County v. Vasquez, 659 So. 2d 255 (Fla. 1st DCA 1995). There, the court addressed the untimely filing of a notice of appeal with the Judge of Compensation Claims (JCC). Mr. Vasquez, aware of his filing deadline, hired a courier service with specific instructions to deliver the notice on March 17 (a Friday). Id. at 355. However, the courier did not arrive at the building housing the JCC's office until 5:05 p.m. on March 17, and the security guard would not permit entry or allow the delivery to be left. Id. The courier returned on Monday, March 20, and filed the notice of appeal. In concluding the notice of appeal was not timely filed, the court noted:

> A party who waits until the last available day to file its notice of appeal, and who fails to assure that the notice is delivered prior to the close of the business day bears the risk that it will be denied access to file the notice 'after hours.'

Id. at 356. Such is the case here; **TREMRON** knew the deadline, waited until the last moments of the last available day to file its exceptions, and miscalculated. **TREMRON** argues

that its exceptions were timely placed in its fax machine for transmittal and that it is somehow the **DEPARTMENT'S** fault that they were received seven minutes late. Putting a document in a fax machine is no more timely than putting it in a mailbox or in the hands of a courier if it is not delivered and filed on or before the date due. **TREMRON'S** exceptions were filed a day late, not seven minutes late. Under the rule and Vasquez, it is the filing date that determines timeliness, not the beginning of attempt to file.

In another case, a rule of the Agency for Health Care Administration similarly required that certain documents must be received in the local health council and by the agency by 5 p.m. on the day of the deadline. Vantage Healthcare Corp. v. Agency for Health Care Admin., 687 So. 2d 306 (Fla. 1st DCA 1997). As in Vasquez, a prospective applicant had a deadline to file a letter of intent and mistakenly relied on a courier to timely meet that deadline. Although the letter of intent was not filed on time, the agency considered it and awarded the applicant a certificate of need. Id. at 307 Another entity that did not receive a certificate of need challenged the final order, claiming that the agency had departed from the clear and express requirements of its own rule by granting a certificate to an applicant whose letter of intent was untimely. Id. The First District Court of Appeal agreed and reversed, holding that the "agency is obligated to follow its own rules." Id. (citations omitted).

Most recently, the Second District Court of Appeal addressed the issue of timely filings in administrative proceedings in Cann v. Department of Children & Family Services, 27 Fla. L. Weekly D780 (Fla. 2d DCA April 5, 2002). There, the court reluctantly affirmed the agency's denial of the Canns' request for an administrative hearing as untimely. The Canns' attorney relied on the postal service to deliver the request for an administrative hearing in one

day, but the postal service took two days, rendering the request untimely filed. Id. While the court addressed the doctrine of equitable tolling, it concluded that its requirements had not been met because there was nothing in the record to support a conclusion that the Canns had been "misled or lulled into inaction, has in some extraordinary way been prevented from asserting his rights, or has timely asserted his rights mistakenly in the wrong forum." Id. (quoting Machules v. Department of Admin., 523 So. 2d 1132, 1134 (Fla. 1988)). However, the court specifically wrote to say that it was sympathetic to the Canns' argument and that perhaps an excusable neglect standard would be appropriate for administrative proceedings or that a service requirement rather than a filing requirement would be more appropriate for actions that are not jurisdictional. The court noted that notwithstanding its strong beliefs on the issue, it was without authority to create such rules and that such arguments must be directed to the legislature or the relevant agencies. Id. at 779-780.

Pursuant to Rule 28-106.104, Florida Administrative Code, Vasquez, Vantage Healthcare, and Cann, **TREMRON'S** exceptions were not timely filed, and the **DEPARTMENT'S** motion to strike is granted. In consideration of the potential for administrative and judicial efficiency and economy, the **DEPARTMENT'S** consideration of and response to **TREMRON'S** exceptions herein, notwithstanding the fact that the motion to strike has been granted, cannot be deemed a waiver of its right to object to and strike the late filed exceptions as a matter of law.

FINDINGS OF FACT

1. After review of the record in its entirety, it is determined that the Administrative Law Judge's Findings of Fact in paragraphs 1 through 49 and 51 through 114 are supported by

competent, substantial evidence and, therefore, are adopted and incorporated as if fully set forth herein.

2. A Finding of Fact in paragraph 50 is hereby modified as set forth above, and as modified is supported by competent, substantial evidence, and adopted and incorporated herein.

CONCLUSIONS OF LAW

1. The **DEPARTMENT** has jurisdiction over the subject matter of and the parties to this proceeding pursuant to Chapter 120, Florida Statutes.

2. The Conclusions of Law in paragraphs 115 through 132 of the Recommended Order are fully supported in law. As such, they are adopted and incorporated as if fully set forth herein.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is

ORDERED that as herein above modified, the Administrative Law Judge's Recommended Order is fully supported by the record and the law and is adopted herein. It is further

ORDERED that the exceptions filed by **Petitioner, TREMRON JACKSONVILLE, L.L.C.**, are hereby stricken. It is further

ORDERED that the notice of the intent of the **Respondent, DEPARTMENT OF TRANSPORTATION**, to grant the Petition of **Petitioner, CSX TRANSPORTATION, INC.**, a permit to permanently close the at-grade crossing at Old Kings Road in Jacksonville, Florida, is hereby affirmed.

DONE AND ORDERED this 25th day of ~~May~~ April, 2002.

THOMAS F. BARRY, JR., P.E.
Secretary
Department of Transportation
Haydon Burns Building
605 Suwannee Street
Tallahassee, Florida 32399

FILED D.O.T. CLERK
2002 APR 25 AM 11:00

NOTICE OF RIGHT TO APPEAL

THIS ORDER CONSTITUTES FINAL AGENCY ACTION AND MAY BE APPEALED PURSUANT TO SECTION 120.68, FLORIDA STATUTES, AND RULES 9.110 AND 9.190, FLORIDA RULES OF APPELLATE PROCEDURE, BY FILING A NOTICE OF APPEAL CONFORMING TO THE REQUIREMENTS OF RULE 9.110(d), FLORIDA RULES OF APPELLATE PROCEDURE, BOTH WITH THE APPROPRIATE DISTRICT COURT OF APPEAL, ACCOMPANIED BY THE APPROPRIATE FILING FEE, AND WITH THE DEPARTMENT'S CLERK OF AGENCY PROCEEDINGS, HAYDON BURNS BUILDING, 605 SUWANNEE STREET, M.S. 58, TALLAHASSEE, FLORIDA 32399-0458, WITHIN THIRTY (30) DAYS OF RENDITION OF THIS ORDER.

Copies furnished to:

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