

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Commission, on)	RULE AND REGULATION NO. 182
Its own motion, seeking to amend)	
Title 291, Chapter 3, Motor Carrier)	RESPONSE TO ORDER
)	RELEASING THIRD
Rules and Regulations, to rewrite)	SET OF PROPOSED RULES
the chapter in its entirety.)	FOR COMMENTS AND
)	SCHEDULING HEARING
)	
)	

COMMENTS OF BNSF RAILWAY

I. Introduction:

On January 7, 2014, the Nebraska Public Service Commission (Commission) published proposed rules that, in essence, rewrite Title 291, Chapter 3, Motor Carrier Rules and Regulations, in their entirety. After receiving written comments on January 31, 2014, and holding a public hearing on February 19, 2014, the Commission issued another draft of proposed rules for comment on August 5, 2014. BNSF’s January 31 filing articulates that most of the regulations do not apply to BNSF and we have no comments. In response to the most recent draft of proposed rules, we offer the following comments:

II. BNSF Railway appreciates the Commission’s revisions to Section 006.02A in the August 5, 2014, draft of the proposed rules. We stand by our January 31, 2014, comments, but fifty thousand (\$50,000) per person and one hundred thousand (\$100,000) aggregate coverage per accident is infinitely more reasonable and more consistent with the uninsured/underinsured motorist (UI/UIM) insurance coverage levels required in other states.

BNSF sincerely appreciates the Commission’s consideration of our previous comments regarding Section 006.02A. The Commission’s originally proposed regulation requiring carriers transporting rail crew employees to maintain at least one million dollars (\$1,000,000.00) worth of UI/UIM coverage per railroad passenger was impractical and unconscionable. The newly

proposed regulation sets a “minimum limit of fifty thousand (\$50,000) per person, one hundred thousand (\$100,000) aggregate per accident coverage.” While we still believe the Nebraska’s Uninsured & Underinsured Motorist Insurance Coverage Act establishes exclusive jurisdiction in the Department of Insurance, the rule as it is now drafted is infinitely more reasonable and consistent with the UI/UIM limits set in surrounding states, the Midwest and almost every other state in the nation.

III. BNSF Railway requires all persons driving BNSF employees to have criminal background checks. BNSF Railway contractually requires transportation service providers to maintain those records. BNSF supports criminal background checks. However, we are concerned that Section 005.03 (Background Checks) goes too far by requiring carriers to provide copies of every criminal background check to the Commission. This process raises privacy concerns for the employees and places an undue administrative burden on the carriers. As an alternative, it is suggested the Commission amend its rule to require carriers maintain the records and make them available for inspection by the Commission.

Virtually every one of the new provisions contained in Section 005 (Safety Regulations) related to transportation of railroad employees are duplicative in that they mirror existing contract provisions between the railroad and transportation service providers. It’s a Commission decision to promulgate regulations that duplicate those efforts. The one area of concern is in Section 005.03:

005.03 Background Check: Each operator of a motor vehicle subject to the Commission’s jurisdiction shall be subjected to a criminal background check **submitted to the Commission.** (Emphasis added)

The carriers already conduct background checks on all employees driving railroad personnel and are required to retain those records. The only question is whether or not those records should be “submitted to the Commission” or maintained by the carrier throughout the period of a driver’s employment and for a reasonable time thereafter.

This particular section is vague in the sense there is no prescribed method for submitting criminal background checks to the Commission and there is no limit as to how long the records

must be maintained. A number of important policy questions are raised: Can the carrier submit such records to the Commission electronically? Will the Commission maintain those records and how will those records be maintained? Even if we assume an individual's criminal background check is not subject to any sort of sunshine law, freedom of information request or open records request, the question is whether or not the carrier, and possibly even the railroad, would be financially liable in the event an individual's records somehow become public. The Commission's rulemaking authority cannot protect the carriers and others from being sued if the Commission were to somehow lose custody of an individual's criminal background check in its possession.

In an effort to be constructive and work with the Commission, BNSF Railway offers the following alternative language:

005.03 Background Check: Each operator of a motor vehicle subject to the Commission's jurisdiction shall be subjected to a criminal background check. **Such records shall be maintained by the carrier for a minimum of five years and available to the Commission for inspection during normal business hours.**

In short, this language would help the Commission achieve the desired objective of requiring background checks and being able to verify those background checks have actually been performed. At the same time, it places the burden of maintaining those records for inspection by the Commission on the carrier. They are already required to maintain these records and the records can be made available for inspection by the Commission during normal business hours. Hopefully, this suggested compromise will help the Commission achieve its desired goal in a way that satisfies privacy and liability concerns.

IV. Conclusion

BNSF Railway appreciates the Nebraska Public Service Commission's thoughtful, deliberative approach in crafting these regulations. BNSF's written comments filed

electronically on January 31, 2014, are still applicable to this proceeding. However, we recognize the changes to Section 006.02A are a vast improvement over what was originally proposed. We believe Section 005.03 can and should be modified so that individuals private records are protected and carriers do incur administrative costs or potential liability for transmitting driver records to the Commission.

One (1) original, five (5) paper copies and one (1) electronic copy in Word format were transmitted to the Nebraska Public Service Commission on this **5th day of September, 2014**.

Respectfully submitted,



Jeff Davis

Executive Director
Government Affairs
BNSF Railway
4515 Kansas Avenue
Kansas City, KS 66106
Phone: (913)-551-4202
Mobile: (913)-626-2545
Email: Jeffrey.Davis@BNSF.com