

SECRETARY'S RECORD, PUBLIC SERVICE COMMISSION

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Nebraska)	Rule and Regulation No. 211
Public Service Commission, on)	
its own motion, seeking to)	
amend Title 291, Chapter 3,)	ORDER ADOPTING PROPOSED
Motor Carrier Rules and)	RULES AND ISSUING
Regulations, to adopt rules)	CERTIFICATE OF ADOPTION
modifying driver requirements)	
for licensees transporting)	
employees of railroad)	
carriers.)	Entered: October 8, 2024

BY THE COMMISSION:

On January 17, 2024, the Nebraska Public Service Commission ("Commission"), on its own motion, opened the above-captioned docket to amend provisions of the Commission's rule and regulations, Title 291, Chapter 3, to adopt rules modifying driver requirements for licensees transporting employees of railroad carriers. An initial draft of the regulations was attached to the January 17th Order.

A hearing was held on March 5, 2024. The January 17, 2024 order, four written comments, and notice of hearing were marked and accepted as exhibits 1-6.

On June 4, 2024, the Commission entered an order releasing a second set of proposed rules, seeking comment, and setting a hearing. The second draft of the regulations was attached to the June 4th Order.

A hearing was held on June 22, 2024. The June 4, 2024 order, notice of the hearing, and two written comments were marked and accepted as exhibits 7-10.¹

C O M M E N T S A N D H E A R I N G

1. Review of Written Comments

Written comments were provided to the Commission by Railcrew Xpress (RCX) and Union Pacific Railway (UP).

¹ See Transcript, at 5-6.

SECRETARY'S RECORD, PUBLIC SERVICE COMMISSION

Rule and Regulation No. 211

Page 2

RCX, in their written comments, stated that the proposed changes are unnecessary and would add to the cost of business. First, RCX noted that this would impose an unjust burden on only one segment of the transportation industry. RCX also pointed to the number of its drivers coming from out of state, claiming that the regulation would not achieve its stated goal because an estimated 30% of crew haulers from RCX performing services in Nebraska are from a bordering state. RCX further suggested modifications and clarifications to the proposed regulation. It suggested that the Commission remove the provision excluding applicants with a history of failing to stop and render aid, stating that it does not involve the driver performing an unsafe driving violation. It also noted that other criminal history requirements are redundant, as the eRailSafe program already filters out applicants with criminal histories addressed under the regulation. It further stated that under the eRailSafe program drivers are already provided identification badges and therefore that proposed regulation is redundant. RCX also requested clarification on intent of the proposed regulation requiring licensees to ensure that all drivers are operating vehicles in compliance with state law and stated that RCX already has a policy that states that "Drivers must adhere to all state and/or federal driving laws." Finally, RCX expressed that there needs to be a clear appeals process for applicants denied the opportunity to drive for RCX. RCX concluded by stating that the proposed regulation would unnecessarily increase costs and add to the Commission's workload.

Union Pacific ("UP"), which utilizes rail crew transportation companies in its operations, also provided written comments. UP raised concerns that the proposed rules would likely reduce the number of drivers, which could increase the likelihood of stopped trains and blocked crossings. It further stated that preexisting vetting practices under eRailSafe, as well as internal criteria imposed by Licensees, are already sufficient to ensure driver qualifications. It then expressed concern over the regulation's potential impact on the interstate operations of rail crew carriers. Next, it requested clarity on the proposed change's background check policy and whether it required periodic background checks beyond the initial application process. Finally, UP sought clarification on the vehicle registration requirements,

pointing out that most licensees serving railroads utilize fleet vehicles, which often have different registrations and rotate amongst drivers.

2. Hearing on July 22, 2024

First, Dillon Keiffer-Johnson testified on behalf of the Department. Keiffer-Johnson provided an overview of the docket and discussed some of the comments received from various groups.²

In response to comments that the internal policies of carriers are already stricter than the proposed rules, Keiffer-Johnson stated that this does not preclude the Commission from adopting general minimum requirements and that the rules would also apply if new carriers enter the market at a later date.³ He noted that the Commission has not developed driver standards such as those in these proposed regulations for contract carriers or common carriers.⁴

Keiffer-Johnson contended that the proposed rules would not impact a driver making an interstate trip.⁵ However, where an out-of-state driver enters Nebraska to provide intrastate transportation, the driver would be subject to the proposed regulation since that would be operating under the licensee's intrastate license.⁶

Sandy Walker, VP of HR and Risk for RCX, testified that there appears to be no triggering event or customer concerns on the matters of the proposed regulations.⁷ She further stated that RCX has a well-established record and that the proposed regulations are not needed because the industry already imposes stricter requirements than those proposed.⁸ Ms. Walker stated that not a single Nebraska employee would be eliminated with these new regulations.⁹

² Transcript, at 8-19.

³ Transcript, at 13.

⁴ Transcript, at 15, 33-34.

⁵ Transcript, at 16-17.

⁶ *Id.*

⁷ Transcript, at 37.

⁸ Transcript, at 39.

⁹ Transcript, at 39-40.

SECRETARY'S RECORD, PUBLIC SERVICE COMMISSION

Rule and Regulation No. 211

Page 4

Ms. Walker stated that the requirement of a PSC identification card would be redundant and increase costs.¹⁰ Walker later clarified that while a driver's eRailSafe badge is not always displayed the same way, those with badges can always make them available when requested.¹¹

Walker requested greater clarification on the process of appeals if a driver was denied due to their criminal background.¹²

Brian O'Hara, president and CEO of RCX, also testified. O'Hara stated that he had not heard any facts or examples to justify raising requirements.¹³ O'Hara stated that RCX is one of the safest providers in the industry, noting that, regarding BNSF crews, RCX received only ten crew complaints and no crew injuries out of over 26,000 trips over the span of a year.¹⁴

O'Hara then testified that the eRailSafe program has an appeals process that works well for RCX and that program has not let an unqualified person slip through the background process, adding that RCX regularly disqualifies applicants that were approved by eRailSafe based on RCX's own hiring standards.¹⁵ Mr. O'Hara stated that many of their drivers are not dispatched by RCX and are instead dispatched by BNSF or UP directly.¹⁶

O'Hara also testified that a requirement of a separate ID could cause confusion, as rail crews may turn away a driver in Nebraska if that driver did not have a PSC-specific ID.¹⁷ O'Hara further explained that RCX is unsure of the cost of ID badges and that any the additional costs would have to be passed on to rail customers.¹⁸ Following Commissioner questions, Mr. O'Hara noted that the eRailSafe badge has the driver's picture and name on it, so if those cards were sufficient to comply with the proposed regulations that would create no additional cost.¹⁹

¹⁰ Transcript, at 42.

¹¹ Transcript, at 42.

¹² Transcript, at 41, 47.

¹³ Transcript, at 49.

¹⁴ Transcript, at 50.

¹⁵ Transcript, at 51.

¹⁶ Transcript, at 53.

¹⁷ Transcript, at 53.

¹⁸ Transcript, at 54, 61.

¹⁹ Transcript, at 61-64.

SECRETARY'S RECORD, PUBLIC SERVICE COMMISSION

Rule and Regulation No. 211

Page 5

Chad Deasy, Deputy Chief of Police and Director of Homeland Security for Union Pacific Railroad, testified next. Mr. Deasy said that he is the rail industry chair for eRailSafe and he manages the day-to-day eRailSafe Program for UP.²⁰ He also testified that the frequency required for background checks was unclear.²¹ When asked if every Class I rail provider currently operating in Nebraska utilized the eRailSafe system in their hiring process, Deasy answered in the affirmative.²²

When asked how Union Pacific would handle employees who did not comply with the sex offender registry requirements, Deasy stated that such individuals would not be allowed on Union Pacific property.²³ He further explained that if an individual were charged with failure to register, Union Pacific would take a look at the charges and place the individual under review, with the possibility of appeal remaining available to the applicant.²⁴ If it were to become an ongoing issue, Deasy stated that Union Pacific would, at that point, notify law enforcement.²⁵

Deasy was later asked about the eRailSafe process and ID cards. Deasy testified that eRailSafe IDs should be ready to be displayed on Union Pacific property and that all their contractors use eRailSafe.²⁶ When asked how eRailSafe detects criminal history on an applicant's record, Deasy testified that they do federal, state, and county/municipal background checks, and then a member of Union Pacific reviews the history.²⁷

Next to testify for the railroads was Jeffrey Davis, Regional Director of Public Affairs for Burlington Northern Santa Fe Railroad, or BNSF. Davis testified that the proposed regulation by the Commission was based on "questionable anecdotal stories and hypothetical scenarios that have not occurred."²⁸ He asked the Commission to harmonize requirements for identification cards and

²⁰ Transcript, at 66.

²¹ Transcript, at 69.

²² Transcript, at 90-1.

²³ Transcript, at 72.

²⁴ Transcript, at 73.

²⁵ Transcript, at 72-4.

²⁶ Transcript, at 77.

²⁷ Transcript, at 79.

²⁸ Transcript, at 93.

SECRETARY'S RECORD, PUBLIC SERVICE COMMISSION

Rule and Regulation No. 211

Page 6

background checks between the regulations and eRailSafe program.²⁹ He also pointed out the lack of an appeal process for applicants or drivers who would be denied the opportunity to transport employees of railroad carriers.³⁰ Mr. Davis wanted clarification that the proposed regulations only apply to intrastate transportation.³¹ When asked about BNSF's use of the eRailSafe program, Davis testified that the program already excludes individuals that would be excluded under the proposed regulation.³²

Amanda Snide, Assistant State Director of the Nebraska Legislative Board for SMART TD, testified next. She testified that SMART TD agrees with the changes.³³ Ms. Snide stated that there is a disconnect between RCX's statements that no drivers would be impacted by these changes and UP's statements that they are worried about the potential staffing impact.³⁴ Snide stated that she would like to prevent individuals from being sexually assaulted or having someone put in a place where they are in jeopardy.³⁵ Ms. Snide claimed that, based on past hearings, RCX has had employees on the sex offender registry that were not following that registry.³⁶

Snide also stated that the employer's burden under the proposed regulation would be minimal, as it would be the employee's responsibility to register with the sex offender registry.³⁷ She further stated that rail crew employers should include a clause dismissing an employee who is not compliant.³⁸

Last to testify was Jasmine Harris, Director of Public Policy and Advocacy for RISE. Harris discussed the ability for an appeals process if there is an error and an opportunity for allowing the individual to show rehabilitation.³⁹ Finally, Harris said that just

²⁹ Transcript, at 94.

³⁰ Transcript, at 94.

³¹ Transcript, at 95-97.

³² Transcript, at 94-6.

³³ Transcript, at 105.

³⁴ Transcript, at 105.

³⁵ Transcript, at 106.

³⁶ Transcript, at 106-7.

³⁷ Transcript, at 109.

³⁸ Transcript, at 109.

³⁹ Transcript, at 114.

SECRETARY'S RECORD, PUBLIC SERVICE COMMISSION

Rule and Regulation No. 211

Page 7

because a driver is on the sex offender registry does not mean they are in violation of the registry requirements.⁴⁰

O P I N I O N A N D F I N D I N G S

The final proposed rules, attached as Appendix C match the second set of proposed regulations considered at the June 4, 2024 hearing with the addition of the word "intrastate" in Rule 013.08(D) to make clear that these regulations only apply to intrastate transportation. If a driver is providing intrastate transportation, whether that driver is from Nebraska or another state, the regulations would apply. If a driver is providing interstate transportation, then that would not fall within the regulations. This change is not substantive in nature because under statute the Commission only has jurisdiction over intrastate transportation.⁴¹

Interested parties in written comments and at the hearing raised concerns that the regulations could impose an additional burden on the regulated entities. However, RCX testified that their current screening process is stricter than the standards proposed and that not a single driver would be eliminated by the driver disqualifying offenses.⁴² Additionally, BNSF testified that the eRailSafe program currently utilized already excludes individuals that would be excluded under the proposed regulation.⁴³ Based on the comments and testimony received the Commission finds that the regulations would promote safety by setting minimum standards for drivers without imposing a significant burden on licensees. Further, if a new licensee enters the market it will ensure that their drivers meet certain minimum standards as well.

RCX requested that the Commission remove the provision excluding applicants with a history of failing to stop and render aid, stating that it does not involve the driver performing an unsafe driving violation.⁴⁴ However, the statutes referenced in Rule 013.08D(i)(a) relate to a driver's duties when they are involved in an accident resulting in property damage or injury to

⁴⁰ Transcript, at 113.

⁴¹ Neb. Rev. Stat. §75-304.04.

⁴² Transcript, at 39-40.

⁴³ Transcript, at 94-6.

⁴⁴ Exhibit 9.

SECRETARY'S RECORD, PUBLIC SERVICE COMMISSION

Rule and Regulation No. 211

Page 8

another person.⁴⁵ Therefore, Rule 013.08D(i)(a) is related to whether a driver has a history of unsafe driving.

Regarding Rule 013.08(E), the regulations do not require that the identification be a Commission specific card. Any form of identification that includes a photograph and driver name would be sufficient. RCX noted that an eRailSafe card includes a driver's name and photograph and that if an eRailSafe card was sufficient then there would be no additional cost.⁴⁶ Chad Deasy, Deputy Chief of Police and Director of Homeland Security for Union Pacific Railroad, testified that every Class I rail provider currently operating in Nebraska utilizes the eRailSafe system in their hiring process.⁴⁷ Therefore, regulated entities could meet this requirement without any significant cost.

Comments and testimony were made regarding whether periodic background checks were required and whether there was a formal appeals process. Similar to the screening requirements for Transportation Network Companies under Neb. Rev. Stat. §75-326 and 291 N.A.C. §3-012.12(B), these regulations do not require a specific regularity of background check. Nothing in the proposed regulations provide for a specific regularity of background checks beyond the initial screening currently completed by licensees. However, if a licensee becomes aware that a current driver receives a new disqualifying conviction, then the licensee should determine whether the driver no longer meets the regulation's requirements.

Additionally, if a licensee or driver believes that the Commission is seeking to disqualify a driver in error, the licensee or driver may submit information to the Commission to correct that error. Further, if the Commission were to enter an order regarding a driver's qualifications that the licensee disagrees with, then the licensee may make a motion for reconsideration with the Commission or may appeal a Commission order under 291 NAC 1-002.16.

The proposed regulations retain the language regarding the need for licensees to ensure that drivers comply with state laws. Currently, under 291 NAC 3-013.08(A)(i) licensees must operate their vehicles in compliance with state law. This additional proposed language extends this to require that licensees also ensure that the licensee's drivers comply with state laws. The

⁴⁵ See Neb. Rev. Stat. §§60-697 to 60-698.

⁴⁶ Transcript, at 61-64.

⁴⁷ Transcript, at 90-1.

SECRETARY'S RECORD, PUBLIC SERVICE COMMISSION

Rule and Regulation No. 211

Page 9

Commission finds that driver compliance with state laws is important in ensuring that vehicles under Commission jurisdiction do not put the public at risk.

Based on the above, the Commission finds that the proposed rules set forth in Appendix C should be adopted and a Certificate of Adoption issued.

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that a Certificate of Adoption for the proposed rules set forth in Appendix C be, and is hereby, issued.

ENTERED AND MADE EFFECTIVE at Lincoln, Nebraska, this 8th day of October, 2024.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

Eric M. Hamler
[Signature]
Tim Schram
Kevin Stocker

[Signature]

Chair

ATTEST:

Thomas W. Golden
Executive Director