

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Commission, on)	RULE AND REGULATION NO. 211
Its own motion, seeking to amend)	
Title 291, Chapter 3, Motor Carrier)	RESPONSE TO ORDER
)	OPENING DOCKET, RELEASING
Rules and Regulations, to rewrite)	PROPOSED RULES,
the chapter in its entirety.)	SEEKING COMMENT AND
)	SCHEDULING HEARING
)	
)	

COMMENTS OF BNSF RAILWAY

I. Introduction:

On January 17, 2024, the Nebraska Public Service Commission (Commission) published proposed rules to amend Title 291, Chapter 3, Motor Carrier Rules and Regulations, to adopt modified driver requirements for licensees transporting employees of railroad carriers. BNSF supports the Commission's efforts to protect rail employees from harm and is supportive of the concept of what the Commission is trying to accomplish but does wish to echo the concerns raised by Railcrew Xpress (RCX) regarding § 013.08D2 and § 013.08D3. Specifically, BNSF urges the Commission to do the following:

- (1) Thoroughly investigate RCX's allegation that disqualifying all registered sex offenders, without analyzing the actual crime the offender was placed on the registry for or how long ago the crime was committed, as well as anyone and everyone convicted of, who pled guilty or nolo contendere to "a crime involving property damage, theft, acts of violence" will cause the instantaneous termination of approximately 10% of RCX's Nebraska workforce and could disrupt commerce because they will have too few crew van drivers to safely transport employees to and from crew change points. BNSF would urge the Commission to take notice of RCX's driver safety record, the presence or lack of employee complaints to the Commission about RCX drivers and all other relevant factors, before implementing this policy and to implement the policy in such a way so that it does not affect commerce;**

- (2) Specifically define the following terms in Section 013.08D3 located on page 39 of the proposed rule so there is no confusion about what crimes result in automatic driver disqualification:
 - a. “a crime involving property damage”;
 - b. “theft”; and
 - c. “acts of violence”.
- (3) Create a new section similar to Section 005.08C (carrier appeals for “out of service vehicles) and Section 010.01C3 (seventy-year-old drivers can appeal age restriction) whereby a carrier, existing driver or someone seeking to become a driver can appeal the denial of their ability to be a driver.

To fully appreciate BNSF’s position in this matter, the Commission needs to understand the context in which Section 006.02A is being raised.

II. Background: BNSF Railway is one of Nebraska’s Leading Employers:

BNSF Railway employs more than 33,000 people who operate on more than 32,000 miles of track in 28 states and 2 Canadian Provinces. In Nebraska, we own approximately 1,500 miles of railroad track and operate rail yards in Alliance, Lincoln, McCook, and Omaha. BNSF also operates shops in Alliance, Lincoln, and Havelock. BNSF moved approximately two million railcars in, out or through Nebraska in 2022. For more than a century, BNSF and its predecessor railroads have been one of Nebraska’s largest employers. In some communities, we are the largest employer as well as the largest payer of property taxes.

BNSF employs more than 3,500 people in Nebraska with a payroll of more than \$315 million. The average pay and benefits those employees received was more than \$129,000 last year. BNSF’s union employees, through either BNSF or their union, receive a wide range of benefits including, but not limited to health insurance, life insurance, accident and disability insurance, railroad retirement, a 401(K) plan, tuition reimbursement and paid holidays.

III. BNSF Railway is committed to the safety of the public and our employees.

BNSF is committed to safety – the safety of the public and the safety of our employees. Together, with the help of our employees, BNSF achieved the safest year in the history of

the railroad in 2023, when – according to Federal Railroad Administration (FRA) data - we averaged less than one reportable injury for every 200,000 hours worked. Since 1980, the rail industry has reduced employee injury rates, train accident rates, and grade crossing collision rates by 80 percent or more. BNSF believes that every accident and injury is preventable. Operating free of accidents and injuries has long been part of BNSF’s vision and our focus has been on preventing accidents in the first place. Nothing is more important than returning home safely in all the communities in which we live and operate.

IV. Railroads depend on third party providers to transport crews.

There is a limited amount of freight rail infrastructure in this country. High demand for rail services means that crew members – mainly engineers and conductors – are not able to get rail transportation back to their originating location because of previously scheduled track usage. Plus, FRA regulations require that, when a rail crews’ allowable working hours are up, they are required to get off the train and go back to their home rail depots. This presents a logistical challenge to railroads in how they manage their crews. Railroads depend on third party providers to transport crews from train to train and from trains back to their home rail depots. These “carriers” are now an indispensable part of the rail business.

V. BNSF Railway is committed to employee safety when using third party transportation providers to transport crews.

BNSF Railway is committed to the safety of its crews when using third party transportation providers. BNSF requires that its transportation suppliers’ drivers be 18 years of age or older, possess a valid driver’s license and meet the following driver requirements:

- **eRailsafe Background Check** – all drivers prior to serving BNSF
- **TWIC Background Check** – as required for port access
- **MVR Check** - Pre-employment & semi-annual review

- Disqualified if any of the following in the last 3 years
 - More than 2 Moving Violations
 - Any Careless/Reckless Driving Violations
 - DUI/DWI Infractions
- **Drug Testing** (Pre-employment, Random, Post Accident, and Probable Cause)
- **Training Requirements** (pre-service, annual refresher, and post-accident):
 - Defensive Driver Training
 - Operation Lifesaver (OLI)
 - Supervisor Ride-Along
 - Fatigue Training
 - Intermodal/Automotive Facility Training
 - Site specific training
- **Crew Member Empowerment** – crew members are empowered to report any and all safety issues at any time, any day.

In addition, drivers are required to perform daily inspections of their vehicle and complete daily inspection reports. Managers for third-party transportation companies are required to inspect all vehicles monthly and complete a monthly inspection report. BNSF audits the performance of the drivers and managers to ensure compliance.

BNSF also requires third-party transportation providers to adhere to numerous safe operating practices including, but not limited to, the following:

- **Driver Hours of Service** – based on US DOT standards
 - Drive-Time not to exceed 10 hours without 8 hours rest
 - On-duty Time + Drive-Time not to exceed 15 hours without 8 hours rest
 - On-duty Time + Drive-time not to exceed 60 hours in 7-day period

- **Cell Phone Policy**– Use of cell phones, including hands free device, is prohibited while driving.
- **Driver Safety Briefing** – Driver will perform a Pre-Trip and End of Trip Safety Briefing whenever passengers are on-board.
- **Vehicle Backing Policy**
 - Avoid backing with passengers on-board whenever possible
 - Position vehicle to avoid backing situations
 - Complete backing maneuver before passengers enter the vehicle at the pick-up location or after passengers have exited the vehicle at the drop-off location.
 - When necessary to back with passengers on-board, driver will request one passenger exit the vehicle to guide the movement.
 - Driver and all passengers will perform a safety briefing before commencing any movement.

VI. BNSF Comments Specific to the Nebraska PSC Rulemaking:

- (1) Thoroughly investigate RCX’s allegation that disqualifying all registered sex offenders, without analyzing the actual crime the offender was placed on the registry for or how long ago the crime was committed, as well as anyone and everyone convicted of, who pled guilty or nolo contendere to “a crime involving property damage, theft, acts of violence” will cause the instantaneous termination of approximately 10% of RCX’s Nebraska workforce and could disrupt commerce because they will have too few crew van drivers to safely transport employees to and from crew change points. BNSF would urge the Commission to take notice of RCX’s driver safety record, the presence or lack of employee complaints to the Commission about RCX drivers and all other relevant factors, before implementing this policy and to implement the policy in such a way so that it does not affect commerce;**

Employing approximately 250 drivers, RCX is the largest transporter of railroad workers in Nebraska. All these drivers passed extensive background checks going back at least seven years. It has been alleged that this particular combination of disqualifying criteria – anyone

who was ever placed on the sex offender registry, anyone ever found guilty or pleaded to an offense involving property damage, theft or violence could force RCX to immediately dismiss approximately twenty-five (25) drivers or more when the rule becomes effective. Losing 10% of their drivers would not only impact RCX, but it could also impact rail operations and rail commerce throughout the state. It will also impact RCX's ability to hire new drivers. The Commission should thoroughly investigate the impact this rule is going to have on the existing corps of drivers when the rule goes into effect as well as its effect on the pool of future drivers before implementing a final rule.

(2) Specifically define the following terms in Section 013.08D3 located on page 39 of the proposed rule so there is no confusion about what crimes result in automatic driver disqualification:

- a. "a crime involving property damage";**
- b. "theft"; and**
- c. "acts of violence".**

Section 013.08D3 of the regulation appears to bar anyone from transporting railroad employees if they were every guilty of any crime involving property damage, theft, or an act of violence - even a misdemeanor. At a minimum, these terms should be defined so RCX and other providers know exactly what crimes disqualify a driver. In addition to defining "acts of violence," the Commission should clarify whether one act is sufficient to disqualify a driver or whether it requires two or more "acts" because the vaguely worded language could be interpreted to require two acts.

(3) Create a new section similar to Section 005.08C (carrier appeals for "out of service vehicles) and Section 010.01C3 (seventy-year-old drivers can appeal age restriction) whereby a carrier, existing driver or someone seeking to become a driver can appeal the denial of their ability to be a driver.

It seems reasonable that if a carrier can appeal a vehicle being taken out of service by the commission and a seventy year old driver can appeal a regulation barring that worker from

working past age seventy, then there ought to be some process whereby the Commission allows either the carrier or the driver to appeal a regulation prohibiting their future employment, especially if they have already been employed by a carrier for years and, in some cases, decades. Will you force existing drivers to ask the Governor for a pardon? Under the regulation, could someone who has been pardoned even still be considered for employment? The Commission needs to resolve this issue and create a mechanism where either the carrier or the driver can ask for the right to keep their job or, at a minimum, an eligibility determination.

VII. Conclusion:

In conclusion, BNSF supports the Commission's efforts to have uniform policies and enhance safety. The proposed rule as drafted raises questions and those questions need to be answered before the Commission issues a final order of rulemaking so there is no harm to interstate commerce, and no one has their employment adversely affected without just cause.

One (1) electronic copy in Word format was transmitted to the Nebraska Public Service Commission on this **20th day of February 2024**.

Respectfully submitted,

Jeff Davis

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February 20, 2024

Nebraska Public Service Commission
PSC.motorfilings@nebraska.gov
Brittany.roos@nebraska.gov
1200 N Street #300
Lincoln, NE 68508

Re: Title 291, Chapter 3, Motor Carrier Rules and Regulations seeking comments on modifying driver requirements for licensees transporting employees of railroad carriers.

Commission,

RailCrew Xpress (RCX) is a transportation company that provides service to railroad crews, based on awarded contracts for their customers at their various service units. RCX is contracted to transport work crews to and from locations on an on-demand and in some circumstances as a scheduled shift basis.

Railcrew Xpress, LLC employees approximately 250 employees in Nebraska providing transportation services to Union Pacific (UP) and Burlington Northern (BNSF) railroads.

The proposed regulations in 013.08D only being applied to carriers of railroad passengers creates an unjust duty for only one segment of the transportation industry. It places stricter background regulations than other companies who transport the public, kids, etc.

The proposed regulations would in fact place greater background restrictions for carriers of railroad personnel than people who access secure ports or transport hazardous waste, etc.

The proposed regulations in 013.08D would not accomplish the stated goal, as based on the railroad needs, many trips cross over state lines. Specifically RCX employees from Iowa, Kansas, Missouri, Illinois, Wyoming, and Colorado would not be subject to these new restrictions and thus crews in Nebraska maybe transported by someone from another state that was certified by e-railsafe but not these additional requirements.

The additional requirements in 013.08D places more restrictive hiring requirements related to criminal background checks than the railroad company personnel being transported. In fact, Union Pacific has a second chance program and BNSF has modified their background requirements over the last several years. If these regulations are designed to keep everyone safe in the vehicles, should RCX require background reports for any crew getting into a vehicle with them?

The proposed additional requirement in 013.08D will eliminate applicants that are qualified and can perform all the required job duties. The applicants have paid their debt to society and have conformed to all requirements for their release. The applicants should be allowed to work in a driving position for RCX.

RCX has specific policies and practices to identify and eliminate applicants that have **job related** convictions within legal timeframes.

- a. More than one moving violation within a three year period will disqualify applicants from the driving position.
- b. A careless/reckless/failure to control a vehicle conviction within a three year period will disqualify applicants from the driving position.
- c. An auto theft conviction in a three year period will also disqualify the driver.
- d. A drug or alcohol conviction within a three year period will disqualify applicants from the driving position.
- e. A felony conviction in the last 7 years is reviewed by e-railsafe and the railroad and a determination is made if the driver is eligible.
- f. A release from incarceration/parole/probation in the last five (5) years is reviewed by e-railsafe and the railroad and a determination is made if the driver is eligible.
- g. Additionally, all background reports are reviewed for crimes of concern by RCX, e-railsafe, and the railroad to determine if disqualified.

The proposed regulations in 013.08D can cause concerns, claims and lawsuits related to discriminatory treatment. Specifically, one eight year employee was recently denied access to railroad property specifically because someone found him on a sex offender registry - there was no complaint of inappropriate behavior. This ex-employee has now filed an EEOC charge against RCX claiming discrimination for being removed from railroad property.

Employers may consider an applicant's criminal history when making an employment decision. However, under Equal Employment Commission (EEOC) guidelines, employers must first make an individual, case-by-case inquiry and consider: (1) the nature and gravity of the offense or offenses, (2) the nature of the job, and (3) the time that has passed since the conviction and/or completion of the sentence.

Per the Equal Employment Opportunity Commission (EEOC), the employer cannot conduct background checks or use the information obtained in a manner that denies equal employment opportunity to anyone on a protected basis, by intent or by unlawful disparate impact. Anytime an employer an applicant's or employee's background information is used to make an employment decision, they must comply with federal laws that protect applicants and employees from discrimination. That includes discrimination based on race, color, national origin, sex, or religion; disability; genetic information (including family medical history); and age (40 or older).

It is required to exercise special care when basing employment decisions on background problems that may be more common among people of a certain race, color, national origin, sex, or religion; among people who have a disability; or among people age 40 or older. For example, employers should not use a policy or practice that excludes people with certain criminal records if the policy or practice significantly disadvantages individuals of a particular race, national origin, or another protected characteristic, and does not accurately predict who will be a responsible, reliable, or safe employee. In legal terms, the policy or practice has a "disparate impact" and is not "job related and consistent with business necessity."

The proposed additional requirement in 013.08D3 also does not comply with FCRA requirements as specifically 013.08D3 does not have any timeframe to review past convictions.

When an employer runs background checks through a company in the business of compiling background information, they must comply with the Fair Credit Reporting Act (FCRA). The Federal Trade Commission (FTC) enforces the FCRA. The FCRA includes a seven-year rule that prohibits background check companies from reporting certain types of adverse information that is older than seven years when the position the applicant has applied for pays a salary of less than \$75,000 per year.

The proposed regulations in 013.08D appear that it would eliminate approximately 25 employees or 10% of the workforce. This would lead directly to train/crew delays , fines, and related customer issues. Thus causing increased costs for RCX and the railroads.

Additionally RCX would need to replace those employees who consist of employees who have been providing services to the railroad and crews for over 15 years. Their knowledge and experience of the routes, yards, and crews would be lost upon their termination.

Proposed requirement 013.08D3 seems to list any crime ever without regard to job related, felony versus misdemeanor and actual crime. What crime would not be related to fraud, damage to property, theft, and acts of violence? This regulation appears to be a blanket denial of anyone who ever has been convicted of any crime at anytime in their life.

Employees with crimes such as violate hunting/fishing, cat running at large, allow or permit animal to bit human, littering/illegal dumping, maintain a nuisance, shoplifting \$0-\$500, bad checks, child abuse, etc. would be denied.

The proposed additional requirement in 013.08D is not needed as there has not been an incident of involving a RCX employee, who would now be ineligible in Nebraska related to sexual misconduct or violent misconduct complaint.

Further under Neb. Rev. Stat. § 48-202, public employers cannot ask about criminal history information during the early phases of the hiring process. Employers cannot include questions about criminal history on their applications and are not allowed to inquire about it until they have determined that an applicant meets the minimum qualifications for the job. The “ban the box” laws continue to be passed throughout the country and for both private and public employees. Due to these regulations, it takes longer to hire and employers have to interview more applicants to get qualified candidates.

Further as documented to the Committee on Homeland Security, subcommittee on transportation security and infrastructure in 2010, applicants and employees need a mechanism to appeal the decision if denied employment due to background report. As documented in the e-railsafe program and TWIC requirements, an appeal process must be available for inaccurate reports and being disqualified. Who would hear these appeals and what process would be in place to handle them?

RCX is not opposed though to a tightening of the requirements for who can be an employee for us in the state of NE. We do everything in our power to hire safe people that abide by the laws of the state. We don't want bad or unsafe people working for our company. However, the regulations proposed are overreaching. RCX is willing to engage in a process to make changes to the driver hiring requirements. Changes suggested would include, timelines for a look back period, listing of specific violations, felony vs misdemeanor, appeal process, compliance with EEOC and FRCA guidance, and grandfather of current employees as the employees in question for RCX have been productive employees in most cases for many years and have abided by all rules and laws currently on the books in the state of Nebraska. We have received no direct or specific complaints of any kind regarding these employees that would be impacted by this rule change from BNSF or UP who both have a process for crew members to report unsafe or strange behavior.

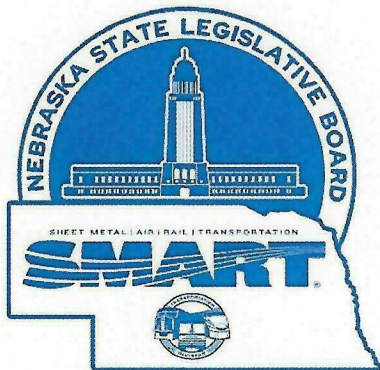
Based on all these reasons, RCX is requesting the Commission to not make these modifications and to engage RCX, BNSF, and UP to come up with hiring requirements that everyone can agree on.

Sincerely,

Sandy Walker

Sandy Walker
Vice President

January 26, 2024



Dear Commissioners,

This letter is in reference to the Nebraska Public Service Commission on its own motion, hereby opens docket No. 211 to amend provisions of the Commission's rules and regulations, Title 291, Chapter 3, to adopt rules modifying driver requirements for licensees transporting employees of railroad carriers. The SMART-

TD Legislative Board requests stronger requirements for the Rail Crew Carriers and the individuals employed by the carrier.

As written;

005.03 BACKGROUND CHECK. Each operator of a motor vehicle subject to the Commission's jurisdiction will be subject to a criminal background check submitted to the Commission.

Accordingly, the current language of that section allows the rail crew carriers to hire drivers with backgrounds of registered as a sex offender or who has been convicted of or pled guilty, any offense involving fraud, use of a motor vehicle to commit a felony, a crime involving property damage, theft, acts of violence, or acts of terror.

Our organization requests the PublicService Commission to void section 005.03 in its entirety and adopt the following sections of 012 TRANSPORTATION NETWORK COMPANIES.

012.11 DRUGS AND ALCOHOL POLICY. Every transportation network company will implement, enforce, and maintain a zero-tolerance policy on the use of drugs or alcohol applicable to any driver providing service for the transportation network company that prohibits a driver from using any amount of drugs or alcohol while the driver is providing service.

012.12A. Prior to permitting a person to act as a driver, the transportation network company will obtain and review a national criminal history record information check.

012.12A1. The criminal disposition information retrieved by the transportation network company's national criminal history record information check will be at least as comprehensive as the criminal disposition information retrieved by a national criminal history record information check performed by the Federal Bureau of Investigation pursuant to Neb. Rev. Stat. § 81-6120.

012.12A2. Fingerprinting is not required as part of the national criminal history record information check.

012.12B. A person who has four or more moving traffic violations or one or more major traffic violations in the three (3) years prior to the date of the criminal background check will not serve as a driver. The following offenses will constitute major traffic violations: 012.12B1. Failure to stop and report or render aid as required under Neb. Rev. Stat. §§ 60-696 or 60-697.

012.12B2. Reckless driving in violation of any city or village ordinance or of §§ 60-6213, 60-6214, or 60-6217.

012.12B3. Speeding of more than thirty-five (35) miles per hour over the speed limit.

012.12C. A person who has been convicted of or pled guilty or nolo contendere to driving under the influence of drugs or alcohol in the previous seven (7) years in this state or any other state or territory prior to the date of the criminal background check will not serve as a driver.

012.12D. A person who is required to register as a sex offender or who has been convicted of or pled guilty or nolo contendere to any offense involving fraud, use of a motor vehicle to commit a felony, a crime involving property damage, theft, acts of violence, or acts of terror will not serve as a driver.

-005.07 INSPECTION OF VEHICLES. The Commission may at any time, but at least annually, inspect or cause to be inspected any vehicle subject to its jurisdiction. The inspections may be conducted at any place except that inspections of passenger carrying vehicles will not impede or delay the schedule upon which the vehicle is operating. The Commission may at any time enter the operating premises of the carrier or into such vehicles as may be operated by the carrier to ascertain whether any statute, rule, or regulation has been violated.

Our organization requests the Public Service Commission to void section 005.07 in its entirety and adopt the following sections of 012 TRANSPORTATION NETWORK COMPANIES.

012.15 INSPECTIONS;

012.15B. A driver will annually obtain such an inspection and approval of the driver's personal vehicle in order to continue its use as a personal vehicle. A driver will maintain proof of the current inspection.

012.15A. The inspection will include inspection of at least the following components and as such components will be in good working order:

012.15A1. Foot brakes;

012.15A2. Parking or emergency brakes;

012.15A3. Steering mechanism;

012.15A4. Windshield;

012.15A5. Rear window and other glass;

012.15A6. Windshield wipers;

012.15A7. Headlights;

012.15A8. Taillights;

012.15A9. Turn indicator lights;

012.15A10. Stop lights;

012.15A11. Front seat adjustment mechanism;

012.15A12. The opening, closing, and locking capability of doors;

012.15A13 Horn;

012.15A14. Speedometer;

012.15A15. Bumpers;

012.15A16. Brake Lights;

012.15A17. Muffler and exhaust system;

012.15A18. Tire conditions, including tread depth;

012.15A19. Interior and exterior rear-view mirrors;

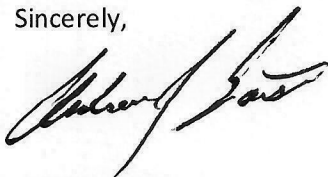
and 012.15A20. Safety belts for drivers and passengers.

012.15B. A driver will annually obtain such an inspection and approval of the driver's personal vehicle in order to continue its use as a personal vehicle. A driver will maintain proof of the current inspection.

012.15C. A transportation network company will make the initial and annual inspection reports available to the Commission upon request.

The Public Service Commission's revision of these sections is vital to the safety of all our members who are required to travel in these vehicles and with these drivers. SMART-TD appreciates the Public Service Commission's time and energy to make this Rule and Regulation change.

Sincerely,

A handwritten signature in black ink, appearing to read "Andrew Foust", written in a cursive style.

Andrew Foust

SMART Transportation Division

Nebraska Legislative Director

From: bill@viplimo.com
To: [Seabrooks, Brittany](#); [PSC Motorfilings](#)
Subject: R&R 211
Date: Tuesday, February 13, 2024 11:37:16 AM

I would appreciate being able to submit comments concerning requiring background checks and any proposed changes to hiring processes for motor carries as I missed the notice for the previous hearing and will be at the national limousine convention on March 5.

First, I applaud the commission's stated purpose of protecting public safety and adequate vetting of all drivers (and vehicles) is a large part of that. I have been very disappointed in the commissions previous apparent lack of interest and certainly action involving the many illegal operators that have sprung up in this state, some operating for 6-7 years without authority. I have personally submitted numerous companies that have been operating illegally and have yet to get any response from the commission as to what if anything is being done to put a stop to them. I am not alone in this frustration as others have testified to illegals operating in throughout the state without any apparent action taken by the commission. At that same hearing, Lori Hieber, owner of Leisure Limousine in Lincoln, testified you even have Luxury Limousine still operating even though I understand you have fined them and removed their authority, though no apparent enforcement action has been taken and the fine remains unpaid.

I personally am so discouraged by the commission's lack of involvement in protecting the public that I feel this issue needs to be brought to the attention of the governor and the transportation committee of the legislature.

Now as to what measures we take, we are regulated by the D.O.T. Our Commercial Motor Vehicles (9 passenger or more) are required to be inspected by us quarterly and by a licensed DOT repair facility yearly and have a valid inspection tag displayed on the windshield at all times. All CMV vehicles and drivers have oversight exclusively from the DOT. Drivers are required to have

federal background checks and pre-employment drug screens as well as random screens. We update MVR's and background checks yearly. We also employ 2 full time mechanics and use several repair facilities as well.

Even though we are not mandated to do so for our non-cmv drivers, we still do drug screens and background checks on all driving employees and would encourage the commission to require that for all professionally drivers, whether TNC's or taxi's or sedan/ limousine companies.

Obviously this only applies to legal and registered companies so it will have little effect if the commission continues its policy of turning a blind eye to all the illegal operators out there. Perhaps when some tragic event happens this will all come out and the commission will deem it important enough to address but my hope is that this can be dealt with now so that needless injury or perhaps death can be avoided.

Thank you in advance for your consideration,

Bill

Bill Alford, Owner
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