

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of
Amending and Adopting Rules in

WAC 480-62

Relating to Contract Railroad Crew
Transportation

DOCKET TR-170780

GENERAL ORDER R-591

ORDER AMENDING AND
ADOPTING RULES
PERMANENTLY

- 1 **STATUTORY OR OTHER AUTHORITY:** The Washington Utilities and Transportation Commission (Commission) takes this action under Notice WSR #18-06-010, filed with the Code Reviser on February 23, 2018. The Commission brings this proceeding pursuant to RCW 80.01.040, RCW 81.04.160, and RCW 81.61.050.
- 2 **STATEMENT OF COMPLIANCE:** This proceeding complies with the Administrative Procedure Act (RCW 34.05), the State Register Act (RCW 34.08), the State Environmental Policy Act of 1971 (RCW 43.21C), and the Regulatory Fairness Act (RCW 19.85).
- 3 **DATE OF ADOPTION:** The Commission adopts this rule on the date this Order is entered.
- 4 **CONCISE STATEMENT OF PURPOSE AND EFFECT OF THE RULE:** RCW 34.05.325(6) requires the Commission to prepare and publish a concise explanatory statement about an adopted rule. The statement must identify the Commission's reasons for adopting the rule, describe the differences between the version of the proposed rules published in the register and the rules adopted (other than editing changes), summarize the comments received regarding the proposed rule changes, and state the Commission's responses to the comments reflecting the Commission's consideration of them.

OFFICE OF THE CODE REVISER
STATE OF WASHINGTON
FILED

DATE: April 18, 2018

TIME: 12:41 PM

WSR 18-10-001

5 To avoid unnecessary duplication in the record of this docket, the Commission designates the discussion in this Order, including appendices, as its concise explanatory statement, supplemented where not inconsistent by the staff memoranda preceding the filing of the CR-102 proposal and the adoption hearing. Together, these documents provide a complete but concise explanation of the agency's actions and its reasons for taking those actions.

6 **REFERENCE TO AFFECTED RULES:** This Order adopts or amends the following sections of the Washington Administrative Code:

Amend	WAC 480-62-125	Definitions
Amend	WAC 480-62-240	Passenger Carrying Vehicles—Equipment
Amend	WAC 480-62-245	Passenger Carrying Vehicles—Operation
Adopt	WAC 480-62-275	Contract Crew Transportation Registration and Permit Requirements
Adopt	WAC 480-62-278	Contract Crew Transportation Vehicle and Driver Safety Requirements
Adopt	WAC 480-62-281	Contract Crew Transportation Intrastate Medical Waivers
Adopt	WAC 480-62-284	Contract Crew Transportation Insurance Requirements
Adopt	WAC 480-62-287	Contract Crew Transportation Passenger Notice Requirements
Adopt	WAC 480-62-290	Contract Crew Transportation Safety Training
Adopt	WAC 480-62-293	Contract Crew Transportation Enforcement
Adopt	WAC 480-62-296	Contract Crew Transportation Reporting Requirements
Adopt	WAC 480-62-299	Contract Crew Transportation Record Retention Requirements
Amend	WAC 480-62-999	Adoption by Reference

7 **PREPROPOSAL STATEMENT OF INQUIRY AND ACTIONS THEREUNDER:**
In the 2017 session, the legislature passed Engrossed Substitute House Bill (ESHB) 1105, which amends RCW 81.61 to include Commission regulation of contract railroad crew transportation. The bill required the Commission to adopt rules under RCW 34.05 as necessary to regulate persons providing contract railroad crew transportation and every contract crew transportation vehicle.

8 The Commission filed a Preproposal Statement of Inquiry (CR-101) on July 20, 2017, at WSR # 17-16-007. The statement advised interested persons that the Commission filed

with the Code Reviser a Preproposal Statement of Inquiry to implement ESHB 1105. The Commission also informed persons of this inquiry by providing notice of the subject and the CR-101 to everyone on the Commission's list of persons requesting such information pursuant to RCW 34.05.320(3), and by sending notice to all transportation companies holding certificates and the Commission's list of transportation attorneys. Pursuant to the notice, the Commission received comments on August 28, 2017, and held a stakeholder workshop on October 5, 2017.

- 9 **SMALL BUSINESS ECONOMIC IMPACT ANALYSIS:** Chapter 19.85 RCW requires that an agency prepare a Small Business Economic Impact Statement (SBEIS) if the agency's proposed rules will impose more than minor costs on businesses in an industry. On November 20, 2017, the Commission mailed a notice to all stakeholders interested in the Commission's rulemaking, providing both a copy of the draft rules and an opportunity to respond to an SBEIS Questionnaire. The notice requested that regulated companies provide information about possible cost impacts of the draft rules with specific information for each rule that the company identified as causing an impact. No stakeholder responded to the survey or identified any cost impacts.
- 10 In addition, Commission Staff's analysis shows that the draft rules will impose no costs beyond those already imposed by statute. Because the proposed rules will not impose more than minor costs on passenger transportation or railroad companies, the Commission concludes that no SBEIS is required.
- 11 **NOTICE OF PROPOSED RULEMAKING:** The Commission filed a notice of Proposed Rulemaking (CR-102) on February 23, 2018, at WSR #18-06-010. The Commission scheduled this matter for oral comment and adoption under Notice WSR #18-06-010 at 1:00 p.m., Thursday, April 12, 2018, in the Commission's Hearing Room, Second Floor, Richard Hemstad Building, 1300 S. Evergreen Park Drive S.W., Olympia, Washington. The Notice provided interested persons the opportunity to submit written comments to the Commission.
- 12 **WRITTEN COMMENTS:** The Commission received written comments on the proposed rules on March 7, 2018, March 26, 2018, and March 29, 2018. Summaries of those written comments and Commission Staff's responses and recommendations are contained in Appendix A, attached to, and made part of, this Order.
- 13 **RULEMAKING HEARING:** The Commission considered the proposed rules for adoption at a rulemaking hearing on April 12, 2018, before Commissioner Ann E. Rendahl, and Commissioner Jay M. Balasbas. The Commission heard a presentation and comments from Mathew Perkinson, Motor Carrier Safety Manager, Transportation Safety Division, representing Commission Staff, and oral comments from representatives from

the Brotherhood of Locomotive Engineers & Trainmen (BLET), BNSF Railway Company (BNSF), and the Sheet Metal, Air, Rail, and Transportation Union (SMART). Chairman David W. Danner listened to a recording of the April 12, 2018, hearing and participated fully in this rulemaking.

14 **SUGGESTIONS FOR CHANGES THAT ARE REJECTED/ACCEPTED:** Written and oral comments suggested changes to the proposed rules. The Commission adopts Staff's recommendations and reasons to accept or reject those suggestions contained in the summary matrix in Appendix A. The Commission expands on its explanation for its actions in three areas, discussed below.

1. Driver Training

15 SMART and BNSF recommend changes to the proposed driver training requirements set out in WAC 480-62-290. Specifically, SMART suggests that contract railroad crew transportation drivers should be certified by independent driver training firms, and that prospective drivers should be required to pass a qualifying exam focusing on the unique and inherent risks associated with driving within railroad facilities, adjacent to railroad tracks, and frequently traversing railroad crossings.

16 We decline to adopt SMART's recommendations. RCW 81.61.050 provides that the Commission must regulate the driver qualifications of persons providing contract railroad crew transportation consistent with the manner in which the Commission regulates driver qualifications under chapter RCW 81.70 and Title 49 of the Code of Federal Regulations (C.F.R.). While commercial driver licenses are required to operate certain vehicles and all drivers are required to pass a road test,¹ neither RCW 81.70 nor Title 49 C.F.R. require or permit the Commission to impose unique certification or exam requirements on some carriers but not others. Moreover, RCW 81.61.050 requires only that all contract transportation crew drivers complete eight hours of Commission-approved safety training. Nothing in the statute authorizes or requires independent certification or testing upon completion of that training.

¹ Under 49 C.F.R. Part 383, commercial driver licenses are required prior to operating the following vehicles: single vehicles with a manufacturer's weight rating of 26,001 pounds or more; trailers with a manufacturer's weight rating of 10,001 pounds or more, and a combined vehicles' gross weight rating of 26,001 pounds or more; vehicles designed to transport 16 or more persons (including the driver), including private and church buses; school buses, regardless of size; and vehicles used to transport any material that requires hazardous material placarding or any quantity of a material listed as a select agent or toxin in 42 C.F.R. 73. Pursuant to 49 C.F.R. Part 391.21, all persons who drive commercial motor vehicles must successfully complete a road test and be issued a certificate of driver's road test.

17 BNSF suggests that the rules be amended to allow each company providing contract railroad crew transportation to develop driver training based on written safety and operational rules provided by the railroad in lieu of requiring railroads to provide training. We decline to adopt this recommendation. RCW 81.61.050 mandates that the Commission both require and approve safety training for contract railroad crew transportation providers. As such, the statute expressly grants the Commission discretion to determine who is fit to provide the required training. As Staff notes in its response, the railroad is uniquely qualified to provide training related to railroad yards and property, pick-up and drop-off points, and grade crossing safety. Accordingly, we conclude that a railroad or its designee is best suited to develop and provide safety training to contract railroad crew transportation drivers. We note that a railroad may designate its contract carrier to provide training on its behalf. Doing so, however, neither transfers the responsibility for providing the training nor the liability for failing to do so from the railroad to the carrier.

2. Vehicle Safety Requirements

18 BNSF requests that the Commission clarify by this Order that the vehicle equipment safety requirements set out in WAC 480-62-278(2) apply only to those features with which the vehicle was equipped at the time of manufacture. Currently, Staff applies the standards set out in the 2017 North American Standard Out-of-Service Criteria Handbook to assess whether vehicles subject to inspection violate Commission safety rules. When Staff conducts a safety review of vehicles that hold eight or fewer passengers, it inspects only those features originally installed by the manufacturer. For example, vehicles that were not originally manufactured with emergency exits, such as SUVs or minivans, will not be placed out of service for failing to have an emergency exit. Consistent with the manner in which the Commission regulates all passenger transportation carriers, we confirm that Staff will assess compliance based on the manufacturer's specifications.

19 We decline to adopt SMART's and BLET's recommendation to require studded tires on contract crew transportation vehicles that cross mountain passes in winter months. Prescribing the use of studded tires would be inconsistent with the manner in which the Commission regulates passenger carriers under chapter RCW 81.70 and Title 49 C.F.R. because no similar requirement exists for other transportation companies, many of whom traverse mountain passes in inclement weather. In addition, the Washington State Patrol mandates the use of tire chains or other traction devices in inclement weather according to vehicle size.² As Staff notes in its response, WAC 480-62-278(1) requires drivers to "operate vehicles with due regard to circumstances or conditions at the time of

² See WAC 204-24-050.

operation.” This necessarily includes following state laws and rules that govern the use of traction devices.

3. Notice Requirements

- 20 BNSF recommends the Commission modify the language in WAC 480-62-287(2) to provide a general telephone number and email address for passengers wishing to file a complaint against a contract crew transportation carrier rather than directing those complaints to a specific Staff member. We agree. Complaints against carriers should be received and routed by the Commission’s consumer protection division, which is responsible for handling complaints filed against any company the Commission regulates. Consumers may file complaints with the Commission by calling a toll free number, which is fully staffed during business hours, or filling out a form on the Commission’s website. Separately assigning complaint handling duties to various areas of the Commission could impede the public’s ability to file a complaint, create duplicative or redundant work, or result in inefficient and inconsistent processes. As such, complaints against contract crew transportation carriers will be received through the central complaint system then subsequently routed to the appropriate staff member in motor carrier safety for investigation and resolution. Accordingly, we adopt BNSF’s recommendation as set out in Appendix A and paragraph 24, below.
- 21 At the adoption hearing, SMART expressed concerns about the Commission’s online complaint form, which contains a disclaimer stating that complaints become public records subject to disclosure under the Public Records Act (PRA). The PRA, however, specifically exempts from disclosure any personally identifying information included in safety complaints submitted under RCW 81.61.³ To address this issue, the Commission will modify its online complaint form to include language explaining the relevant exemption and to add a field that allows users to indicate that their complaint qualifies for the exemption. We expect this change to be implemented on or around May 1, 2018.
- 22 **COMMISSION ACTION:** After considering all of the information regarding this proposal, the Commission finds and concludes that it should adopt the rules as proposed in the CR-102 at WSR # 18-06-010 with the changes described below and in Appendix A.
- 23 **CHANGES FROM PROPOSAL:** The Commission adopts the proposal with the following changes from the text noticed at WSR # 18-06-011:

WAC 480-62-240(1)(d) First sentence – replace “insure” with “ensure.”

³See RCW 42.56.330(9).

- WAC 480-62-240(1)(g) First sentence – delete “The.”
 First sentence – insert “Prior to operating a vehicle, the” before “driver.”
 First sentence – replace “ensure that” with “determine whether.”
- WAC 480-62-245(5)(a) First sentence – replace first bullet point with (i).
 First sentence – replace second bullet point with (ii).
 First sentence – replace third bullet point with (iii).
 First sentence – insert “or” following “Where traffic is controlled by crossing gate arms or an alternately flashing light signal intended to give warning of the approach of a train;”
 First sentence – replace fourth bullet point with (iv).
- WAC 480-62-278(6) First sentence – replace “that” with “who.”
- WAC 480-62-278(7) First sentence – replace “that” with “who.”
- WAC 480-62-281(1) Second sentence – replace “passenger” with “contract crew.”
- WAC 480-62-281(2) Second sentence – replace “passenger” with “contract crew.”
- WAC 480-62-281(3) Second sentence – replace “passenger” with “contract crew.”
- WAC 480-62-287(2) Delete first sentence.
 Second sentence – delete “contact” before “information.”
 Second sentence – insert “necessary” after “information.”
 Second sentence – replace “the motor carrier safety manager” with “filing complaints, which.”
 Second sentence – replace “web site” with “website.”
- WAC 480-62-999 Second sentence – delete “branch of the Washington state.”

Chapter 480-62 listed in paragraph 6 above should be amended or adopted as applicable to read as set forth in Appendix B, as rules of the Washington Utilities and Transportation Commission, to take effect pursuant to RCW 34.05.380(2) on the thirty-first day after filing with the Code Reviser.

ORDER**THE COMMISSION ORDERS:**

- 25 (1) The Commission adopts and amends WAC 480-62 to read as set forth in Appendix B, as rules of the Washington Utilities and Transportation Commission, to take effect on the thirty-first day after the date of filing with the Code Reviser pursuant to RCW 34.05.380(2).
- 26 (2) This Order and the rule set out below, after being recorded in the register of the Washington Utilities and Transportation Commission, shall be forwarded to the Code Reviser for filing pursuant to RCW 80.01 and RCW 34.05 and WAC 1-21.

DATED at Olympia, Washington, April 18, 2018.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION



DAVID W. DANNER, Chairman



ANN E. RENDAHL, Commissioner



JAY M. BALASBAS, Commissioner

Note: The following is added at Code Reviser request for statistical purposes:

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, amended 0, repealed 0; Federal Rules or Standards: New 0, amended 0, repealed 0; or Recently Enacted State Statutes: New 9, amended 4, repealed 0.

Number of Sections Adopted at Request of a Nongovernmental Entity: New 0, amended 0, repealed 0.

Number of Sections Adopted on the Agency's own Initiative: New 0, amended 0, repealed 0.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, amended 0, repealed 0.

Number of Sections Adopted using Negotiated Rule Making: New 0, amended 0, repealed 0; Pilot Rule Making: New 0, amended 0, repealed 0; or Other Alternative Rule Making: New 0, amended 0, repealed 0.