

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Application)	APPLICATION NO. R-185
of Adams Building Contractors,)	
Jackson, Michigan, seeking a)	
clearance waiver from the side)	EXEMPTION GRANTED
clearance restrictions at a rail)	
loop system at a grain elevator)	
siding in Anselmo, Nebraska.)	ENTERED: NOVEMBER 27, 2012

APPEARANCES

For the Commission Staff:

Mark Breiner
300 The Atrium
1200 N Street
PO Box 94927
Lincoln, Nebraska 68509

BY THE COMMISSION:

BACKGROUND

By application filed June 27, 2012, an application was filed by Adams Building Contractors, Jackson, Michigan Applicant, seeking a clearance waiver from the side clearance restrictions at a rail loop system at a grain elevator siding in Anselmo, Nebraska. Notice of the application was published in The Daily Record, Omaha, Nebraska, on August 21, 2012. Notice of the waiver request was also conveyed to the United Transportation Union and Burlington Northern Santa Fe Railroad. No objection, Petition for Intervention, or protest was received from any party.

On November 7, 2012, the Commission sent notice of this hearing to all parties. The hearing in this matter was held on November 19, 2012, in the Commission Hearing Room in Lincoln, Nebraska.

EVIDENCE

Thomas Miller testified first for the Applicant. Mr. Miller stated that his company entered into a construction management agreement with the Anderson Group last year. The design of the structure that was to be placed in Anselmo

originally had 12 inch columns for support of the structure. Eight augur cast borings roughly 12 inches in diameter and 76 feet deep were put in place to support the structure. These were put in place early in the process and before the final engineering was finished as the company that did the boring was only available at that time and the entire project would have been delayed for many months due to their unavailability. The structure was built to be 18 foot on center.

When the final design of the building was made, the Applicant found that it had to go a little taller with the lower structure to accommodate clearance for the telescoping spout that goes into the rail cars. The increased height of the building created a need to go with 21 inch columns and not 12 inch columns. Mr. Miller asked if they still had an eight foot six inch side clearance and was informed that they did have that clearance. The next day, Mr. Miller was informed that the math had been done incorrectly and that the side clearance was only eight foot one-half inch. Mr. Miller contacted Gene Elliason from the Burlington Northern Santa Fe Railroad and asked his opinion regarding the side clearance. Mr. Elliason said that he needed to contact the Nebraska Public Service Commission.

Mr. Miller looked at the Commission's Railroad Rules and Regulations and saw that railroad structure needed only an eight foot clearance. He then contacted Commission staff, who indicated that the tower was not a railroad structure under Commission rules and an eight foot six inch side clearance was required, but that an exemption to the rule could be requested. Mr. Miller was advised to discuss with the railroad their position on the possibility of granting of the exemption. The Applicant then applied for the exemption.

Mr. Miller noted that the railroad appeared to have agreed to the granting of the waiver, but that the United Transportation Union (UTU) had not agreed with said granting of the exemption. Mr. Miller stated that the eighteen foot length of the building is supported by four columns on each side, and that the remainder of the stretch is open area. Most workers in the area will be working above the passageway with support harnesses to help keep them from falling. The site of the building is on a tangent section of the rail and is 300 feet from any curve on the rail loop in the system. The Applicant has agreed to place warning signs in specific locations and with language approved by the railroad.

On examination by Commissioner Jerry Vap, Mr. Miller noted that the Anderson Group's employees were to be trained to operate the locomotives while on the loop system. The turnouts are all automatic, so no switches need to be operated. He said there should not be any railroad employees as the locomotive will be parked and the operation of the locomotives switched from the railroad to the Anderson Group.

Mr. Miller also noted that the facility will be governed by, and is in full compliance with, OSHA regulations. There have also been safety evaluations done by both the Applicant and the Andersons on the facility.

On examination by Commissioner Frank Landis, Mr. Miller stated that the Applicant will place three warning signs to identify the area as a restricted clearance area. Representations of the signs will be supplied to the Commission as late filed Exhibit number 8.

On examination by Commissioner Tim Schram, it was noted that the railroad's clearance requirement is eight foot six inches for side clearance, but that the railroad has also indicated they do not oppose granting the waiver for this particular location.

On further examination by Commissioner Landis, Mr. Miller noted that most people working in this facility will be working on the second level and that it would be very rare for a worker to be in this particular restricted area. The workers on the second level will be trained to use a fall protection system, all under OSHA rules and regulations.

Commissioner Schram noted that there is a pit on the rail line. Mr. Miller said that the pit is for the unloading of a bad car. If the car does not meet transportation requirements, then the car is unloaded into this pit and the grain is recycled back into the system. The pit is located outside of the structure and is not involved with the restricted area.

On examination by Commission staff, Mr. Miller said that the eighteen foot length of the structure is supported by four columns. The columns are each one foot wide. The remainder of the distance is open space where employees are able to enter and exit the area.

Robert Borgeson testified in opposition to the granting of the exemption. Mr. Borgeson is the State Director for the UTU. He stated that safety standards should be adhered to and that the Commission should not grant the waiver. Mr. Borgeson noted that, while the current situation is that UTU operators will not be working in this area, the situation could change in the future. Mr. Borgeson also noted that his concerns were broader than just UTU members but that all workers should be considered in this situation.

Mr. Borgeson did not know if the railroads had different standards for clearances in different states. He also did not believe that the plan for the facility required UTU members to be present while the train is operated on the loop system.

Michael Bacon testified in support of the Application. Mr. Bacon said that he has been working on the project for over one year. He said that no employees, either of the UTU or of the Anderson Group, should be present in the area where the train passes to be loaded. If the car has to be unloaded, it is unloaded in an area outside of the building. He stated that the Anderson Group is very safety conscious, citing an expensive routing for trucks so that they could avoid a dangerous curve. He further noted that this facility is a significant investment for the area and will benefit the local farmers.

Mr. Bacon again detailed the operations of the facility regarding grain load-out, and that workers at the building are working on the second level and not on the ground. He also said that warning signs acceptable to the railroad and the Commission will be placed pursuant to direction from the Commission and the railroad.

OPINION AND FINDINGS

The applicant seeks the following waiver from the Commission's side clearance requirements:

1. A waiver of the Commission's Railroad Rules and Regulations, Section 002.06A, which requires a general clearance of 8 feet 6 inches for side clearances.

The Applicant testified as to specifics of the building that is involved and the conditions the workers will experience. The evidence shows that the building is eighteen feet in length, but that the only areas that do not meet the regular clearance

requirements are four, one foot wide support columns, with the rest being open space. There are many avenues of exit from the building as only four feet of the area is affected by the support posts.

It is further in evidence that the workers are expected to perform the vast majority of their work from the second level of the building, which is not directly involved with the clearance area or in the operation of the train through the facility.

The Commission further notes that this facility is and will be governed by federal OSHA rules and regulations. This regulation should keep the facility safe for the employees.

Michael Ray of Burlington Northern Railroad Santa Fe Railroad (BNSF) sent a document to the Commission as Late Filed Exhibit 9. In that document it states that the BNSF's contract that covers this facility states that the Minimal Clearances is eight feet six inches, but that "clearances which are less than the Minimal Clearances but are in compliance with applicable Legal Requirements will not be a violation of this Section 2.8, so long as the Industry strictly complies with the terms of any such Legal Requirement and posts a sign in a location approved by the railroad clearly noting the existence of such reduced clearance." It is the position of the BNSF that the granting of an exemption to this building will place the building "in compliance with applicable Legal Requirements" and therefore the BNSF does not object to the granting of the exemption.

Drafts of the proposed signs were sent by the Applicant to BNSF and the Commission. Michael Ray from BNSF said the railroad requests that the proposed language of "Closed Clearance" on one of the signs be changed to "No Clearance". The Applicant has said they will comply with the language and placement of the signs pursuant to BNSF specifications.

The Commission is cognizant of the issues as addressed by Mr. Borgeson. However, the structure does have numerous routes for workers to leave the area, it is governed and regulated by OSHA, and it appears that significant safety measures have been taken for the facility.

After due consideration of the evidence and being fully advised in the premises, the Commission is of the opinion and finds that the Application should be granted. The building in issue has four support columns over an eighteen foot long

throughway that offers numerous escape routes for any person that may be in the area. The BNSF contract acknowledges there will be situations such as this one wherein the side clearance requirements may be different than standard. No apparent reason has been shown why a clearance exemption should not be granted as requested by the Applicant. It does not appear that granting of the exemption as requested would endanger the railroad crews or the public.

This exemption as granted is limited to this particular case location and is not to be applied to any other facility of the Applicant or other entity involved in this matter.

The Commission further finds that signs as detailed in Exhibit 8 shall be posted as set out and with the changes requested by BNSF.

The Commission finds that the Application should be granted as set forth above.

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that Application No. R-185 be, and it is hereby, granted; that the side clearances for the building subject to this Application are waived and the location is exempt pursuant to Rule 002.01B; that this Order applies only to this particular case and particular location and does not apply to any other facility; and that warning signs will be posted as set forth in Exhibit 8 with the changes as set for herein

MADE AND ENTERED at Lincoln, Nebraska, this 27th day of November, 2012.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

Chairman

ATTEST:

Executive Director

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NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

Tim Schram
Aune Boyer
Gerald L. Var

Chairman *Rod Johnson*

ATTEST:

Michelle H. D.
Executive Director

//s//Rod Johnson
//s//Frank E. Landis