

**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 SECOND
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. BNSF does not have an opinion on most parts of the proposed rulemaking, but does wish to raise several issues regarding Section 006.02A - the newly proposed regulation that would require carriers transporting rail crew employees to maintain at least \$1,000,000.00 worth of uninsured and uninsured motorist (UI/UIM) coverage per railroad passenger. Assuming that the Commission intended Section 006.02A of the rule to read that 1 million (\$1,000,000.00) of UI/UIM coverage per railroad employee is required, BNSF raises the following three points:

- (1) The Commission does not have jurisdiction to promulgate rules regarding the Uninsured & Underinsured Motorist Coverage Act and Section 006.02A should be removed from the proposed rule. Sections 44-6413 and 44-6414 of the Nebraska Statutes expressly provide that only the Director of Insurance has authority to adopt and promulgate rules pursuant to the Uninsured & Underinsured Motorist Coverage Act.**
  
- (2) Section 006.02A requiring carriers to provide UI/UIM coverage for every railroad employee being transported is duplicative of the “Off-Track Vehicle Accident Benefits Agreement” contained in BNSF’s collective bargaining agreements, the railroad employee’s own automobile insurance policy and other remedies available to the employee.**

**(3) Section 006.02A should be void in that it attempts to require carriers transporting railroad employees to purchase UI/UIM coverage that Nebraska statutes state specifically the insurance companies don't have to provide. If enacted, the Commission's proposed rule could eventually put carriers providing rail crew transportation services out of business and affect interstate commerce because you would be forcing the carriers to buy insurance that no insurer in the state is required to sell.**

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 40,000 people who operate on more than 32,000 miles of track in 28 states and 2 Canadian Provinces. In Nebraska, we own more than 1,500 miles of railroad track and operate rail yards in Alliance, Lincoln, McCook and Omaha (2). BNSF also operates shops in Alliance, Lincoln and Havelock. BNSF moved more than 2.2 million railcars through the state of Nebraska in 2012. 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.

In 2012, BNSF employed more than 4,800 living in the state of Nebraska with a payroll of more than \$328.5 million. The average pay those employees received was more than \$68,000. 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.

Unique to the railroad industry, BNSF and other railroad collective bargaining agreements contain an "Off-Track Vehicle Accident Benefits Agreement" that provide injured railroaders with up to \$1,000.00 per week for up to 156 consecutive weeks or up. This amount is subject to any offset if they receive payments from the federal railroad

unemployment system, but either way the employee still gets up to \$1,000.00 per week for up to three years. In the case of death or dismemberment, injured railroad workers can receive up to \$300,000.00.

This does not any include any benefits that a railroad worker might have on their own or through their union. For instance, if an employee owns a car and has Nebraska insurance coverage, then that employee has UI/UIM insurance. Almost every railroader living in Nebraska owns an automobile and, assuming they have insurance coverage, on that automobile, they have UI/UIM. \$100,000 coverage per person and up to \$300,000 per accident is fairly standard. This coverage also applies and will be secondary or possibly third depending on what other insurance policies are out there. This is just one example of additional coverage available to railroad workers injured by an uninsured or underinsured motorist.

### **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 2013, when we averaged slightly more than one reportable injury to the Federal Railroad Administration (FRA) for every 200,000 hours worked. Since 1980, the rail industry as a whole 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 of 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 & bi-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

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 on a monthly basis and complete a monthly inspection report.

BNSF audits the performance of the drivers and managers to insure compliance.

BNSF also requires third-party transportation providers to adhere to a number of 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.

As a result of the safety measures taken by BNSF and its employees, we reduced the number of FRA-reportable third-party transportation accidents involving crew members from 55 in 2007 down to 20 FRA-reportable accidents in 2014, a reduction of approximately 64%, for more than 40,000 employees operating more than 32,000 miles of track and moving millions of railcars a year in 28 states and 2 Canadian provinces.

#### **VI. When railroad workers are injured on the job, they are covered by the Federal Employers Liability Act (FELA).**

In the unfortunate circumstance that a railroad employee is injured during the course of their employment, those railroad employees are covered by the Federal Employers Liability Act (FELA). **Since 1908, FELA has been an exclusive remedy available only to railroad workers that, unlike state worker's compensation law, allows the worker to sue the railroad and recover all of their losses.** Workers can recover damages for past and future wages, out-of-pocket medical expenses, any reduction in the employees' ability to earn wages as a result of the injury as well as non-economic damages like pain and suffering. Under FELA, the employee does have to prove the injury was in some way caused by the negligence of the railroad, its workers, contractors or agents. Jury verdicts for employees in FELA cases routinely exceed \$100,000.00 and can go into the millions.

## **VII. BNSF Comments Specific to the Nebraska PSC Rulemaking:**

**(1) The Commission does not have jurisdiction to promulgate rules regarding the Uninsured & Underinsured Motorist Coverage Act. Sections 44-6413 and 44-6414 of the Nebraska Statutes make clear that only the Director of Insurance has authority to adopt and promulgate rules pursuant to the Uninsured & Underinsured Motorist Coverage Act.**

Section 006.02 of the regulation requires carriers of passengers to carry UI/UIM coverage pursuant to the Uninsured & Underinsured Motorist Coverage Act. There is nothing wrong with this provision. However, Section 006.02A of the regulation goes on to further require carriers transporting railroad employees to carry \$1,000,000.00 worth of UI/UIM per railroad employee.

The Canons of Statutory Construction provide that when interpreting statutes, it's important to give them their plain and ordinary meaning. Section 44-6413(6) says the Director of Insurance "shall adopt and promulgate rules" to enact the Uninsured & Underinsured Motorist Coverage Act. Section 44-6414 says the Director of Insurance "may promulgate rules." A plain and ordinary reading of those sections show the Nebraska Unicameral Legislature gave exclusive jurisdiction to the Director of Insurance to adopt and promulgate rules consistent with Act, not the Commission.

It's also a well settled rule of statutory construction that the express mention of one thing excludes all others. So, unless the Commission can produce a statute specifically authorizing its adoption of UI/UIM regulations, it is highly unlikely the Commission has jurisdiction in this area and Section 006.02A should be removed.

**(2) Section 006.02A requiring carriers to provide UI/UIM coverage for every railroad employee being transported is duplicative of the "Off-Track Vehicle Accident Benefits Agreement" contained in BNSF's collective bargaining agreements, the railroad employee's own automobile insurance policy and other remedies available to the employee.**

BNSF and other railroads have national collective bargaining agreements. Since 1969, agreements with the Bureau of Locomotive Engineers and other unions have contained an “Off-Track Vehicle Accident Benefits Agreement” that provide injured railroaders with up to \$1,000.00 per week of monetary compensation for up to 156 consecutive weeks. In the case of death or dismemberment, injured railroad workers can now receive up to \$300,000.00 for their loss. While these benefits may not make an injured railroad employee whole, they provide immediate and substantial relief to those railroad workers who might be injured by an uninsured or underinsured motorist.

There is no prohibition against railroad employees carrying additional uninsured or underinsured motorist coverage. In fact, many railroad employees already carry such coverage as part of their standard automobile coverage. BNSF does not track whether or not its own employees own vehicles or carry insurance, but common sense would indicate that most railroad employees living in Nebraska own a vehicle. If a railroader living in Nebraska owns a vehicle and has insurance on that vehicle, he has some UI/UIM coverage. Most standard policies contain \$100,000 per person/\$300,000 per accident UI/UIM coverage. Such policies are available for their owners in the event they suffer a catastrophic injury at the hands of an uninsured motorist. The Nebraska Unicameral Legislature even contemplated the use of UI/UIM policies in combination with other UI/UIM policies and other insurance policies when it adopted Section 44-6411 of the Uninsured & Underinsured Motorist Coverage Act. That section specifically provides for priority of payment when there are multiple UI/UIM coverage policies applicable to a claim. Plus, there could be other policies and assistance from the Union that we are not aware of.

Further, railroad employees still have the right to bring a FELA claim against the railroad to recover all of their damages, both economic (past and future wages) and non-economic (pain

and suffering). FELA cases often settle. In those cases that go to trial, jury verdicts for plaintiffs routinely exceed \$100,000.00 and can go into the millions.

BNSF Railway is self-insured and contractually requires its carriers transporting railroad employees to indemnify BNSF for any lawsuits. BNSF requires its suppliers to carry commercial general liability insurance in the amount of \$1,000,000.00 per occurrence and \$2,000,000.00 in aggregate coverage. Primary suppliers of business automobiles are required to provide \$5,000,000.00 worth of coverage.

In conclusion, Section 006.02A is duplicative of the "Off-Track Vehicle Accident Benefits Agreement" contained in BNSF's collective bargaining agreements and likely in addition to the railroad employee's own UI/UIM coverage found in their automobile policies as well as other benefits. Plus, the employee still has the opportunity to bring a cause of action against the railroad under FELA. Thus, there is ample financial aid available to railroad workers hurt while riding in a passenger van at the request of their employer and requiring carriers to carry more UI/UIM coverage would be duplicative and very expensive on top of all the resources already available.

**(3) Section 006.02A should be void as a matter of public policy in that it attempts to require carriers transporting railroad employees to purchase UI/UIM coverage that Nebraska statutes specifically state the insurance companies don't have to provide. If enacted, the Commission's proposed rule could eventually put carriers providing rail crew transportation services out of business and affect interstate commerce because you would be forcing the carriers to buy insurance that no insurer in the state is required to sell...**

Section 006.02A of the Commission's proposed rule requires carriers providing rail crew transportation to carry \$1,000,000.00 worth of UI/UIM insurance. Section 44-6408(2) of the Nebraska Statutes (the Uninsured and Underinsured Motorist Insurance Coverage Act cited in Section 006.02A of the rule) states as follows:

At the written request of the named insured, the insurer shall provide higher limits of uninsured and underinsured motorist coverages in accordance with its rating plan and rules, except that **in no event shall the insurer be required to provide limits higher than one hundred thousand dollars per person and three hundred thousand dollars per accident.**

Thus, neither the Nebraska Department of Insurance who has authority over enforcing the Uninsured & Underinsured Motorist Insurance Coverage Act or the Commission will be able to compel any insurance company to provide more than \$100,000.00 per person or \$300,000.00 per accident worth of UI/UIM coverage.

If left in its current form, Section 006.02A would require the carriers to purchase more coverage – coverage that Nebraska insurers are not obligated to provide. If this is allowed to happen, insurance companies will be able to charge carriers transporting railroad employees whatever they want to charge for UI/UIM coverage, there would be no state oversight and that could threaten the very existence of the carriers providing transportation to railroad employees in Nebraska and interstate commerce.

At a minimum, the Commission should recognize the \$100,000.00 per person and \$300,000.00 per accident caps established for UI/UIM coverage by the Nebraska Unicameral Legislature in Section 44-6408(2) as persuasive authority that the Nebraska Unicameral Legislature did not intend for any branch of government to enact a regulation requiring anyone to carry insurance above those limits.

#### **VIII. Conclusion:**

In conclusion, the Commission lacks jurisdiction to promulgate Section 006.02A. Even if the Commission did have jurisdiction, those efforts are duplicative of the coverage and remedies already available to those scheduled, union employees. Finally, Section 006.02A would be setting carriers up for failure in the sense that it would require significantly more UI/UIM coverage than Nebraska requires insurance carriers to offer. As a result, insurance

coverage might become unaffordable or impossible to attain, forcing the carriers to go out of business and thereby damaging interstate commerce. For all of these reasons, BNSF Railway respectfully requests the Commission strike Section 006.02A from the final order of rulemaking in this case.

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 **31st day of January, 2014**.

Respectfully submitted,



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