

**BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION**

In the Matter of the Nebraska	)	Docket No. PI-230
Public Service Commission, on	)	
Its own motion, to investigate	)	RESPONSE TO ORDER
insurance requirements for motor	)	OPENING DOCKET, SEEKING
carriers providing intrastate	)	COMMENT AND
transportation services within	)	SCHEDULING HEARING
the state of Nebraska.	)	
	)	
	)	
	)	

**COMMENTS OF BNSF RAILWAY**

**I. Introduction:**

On March 10, 2020, the Nebraska Public Service Commission (Commission) published an order opening a docket, seeking comment and scheduling a hearing regarding insurance requirements for motor carriers providing intrastate transportation of passengers and household goods within the state of Nebraska. The Commission asked four questions:

1. Are the liability insurance minimums listed in Rules 003.03A-D sufficient minimum amounts?
  - a. If not, why are the minimums insufficient?
  - b. Should the minimums be changed? Please state the recommended amount.
2. Is the cargo insurance minimum listed in Rule 003.03A a sufficient minimum amount?
  - a. If not, why is the minimum insufficient?
  - b. Should the minimum be changed? Please state the recommended amount.
3. Is the uninsured/ underinsured motorist coverage minimum listed in Rule 006.02 a sufficient minimum amount?
  - a. If not, why is the minimum insufficient?
  - b. Should the minimum be changed? Please state the recommended amount,
4. Should the Commission adopt differing uninsured/underinsured motorist coverage minimums? For example, based on carrier type (common v. contract carrier), service class, vehicle type, vehicle seating capacity, etc.?

BNSF appreciates the Commission’s willingness to seek counsel. We have no opinion on Questions #1 or #2. In response to Questions #3 and #4, BNSF offers the following two points that apply solely to the sufficiency of uninsured/underinsured motorist (UI/UIM) coverage for crew vans transporting our crews intrastate in Nebraska:

- I. **In response to Question #3, BNSF believes the \$100,000 per person/\$300,000 aggregate per accident minimums are sufficient for the purpose of crew vans transporting rail employees in Nebraska.**
- II. **In response to Question #4, the Commission should not adopt UI/UIM coverage limits for contract carriers (crew vans) transporting railroad employees in excess of the existing \$100,000 per person/\$300,000 aggregate per accident limits.**

In support of our response that the Commission should not adopt UI/UIM coverage limits for contract carriers (crew vans) transporting railroad employees in excess of the existing \$100,000 per person/\$300,000 aggregate per accident limits, BNSF offers two points:

- (1) Rail workers transported by contract carriers (crew vans) already receive special insurance benefits better than UI/UIM coverage and they already have the opportunity to recover more money than the sum total of all their damages. Further increasing the UI/UIM insurance limits in Section 006.02A creates an even greater likelihood those rail employees will receive a windfall payment at the ultimate expense of railroads because they are the only customers of the state's sole contract carrier.**
- (2) Increasing Section 006.02A beyond the statutory maximums required in Section 44-6408(2) of the Nebraska Statutes threatens rail transportation and interstate commerce because it forces the state's only contract carrier for rail employees in Nebraska to purchase UI/UIM coverage no insurance company is required to sell.**

Before discussing these points, here is some context to help the Commission better appreciate BNSF's position on increasing UI/UIM limits.

## **II. Background: BNSF Railway is one of Nebraska's Leading Employers:**

BNSF Railway employs approximately 40,000 people operating on more than 32,500 miles of track in 28 states and 3 Canadian Provinces. In Nebraska, BNSF owns 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 Nebraska in 2018. For more than a century, BNSF and its predecessor railroads have been one of Nebraska's largest employers. We are one of the state's largest property taxpayers and the largest employer in some communities.

In 2018, BNSF employed more than 4,600 people living in Nebraska with a payroll of almost \$370 million. In addition to receiving compensation that averaged \$79,850 per employee, BNSF's union employees enjoy a wide range of benefits, through either BNSF or their union, 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. When railroad workers are injured on the job, they are covered by the Federal Employers Liability Act (FELA).**

BNSF Railway believes every accident or injury is preventable and our vision is for BNSF to operate free of both accidents and injuries. In the unfortunate circumstance where a railroad employee is injured during the course of their employment, railroad workers 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 workers to sue the railroad for negligence and recover all of their losses.** Workers can recover damages for lost past and future wages, lost past and future out-of-pocket medical expenses, loss of earning capacity as a result of the injury, loss of household services as well as non-economic damages like pain and suffering. Under FELA, the employee has only to prove that the negligence of the railroad, its workers, contractors or agents contributed in whole or in part to their injury. Proximate cause does not apply in the FELA setting. While the employee's damages can be reduced in some circumstances for their contributory negligence, the employee's own contributory negligence does not bar recovery.

**IV. In addition to the rail employee's right to pursue a FELA claim, rail employees transported by contract carriers (crew vans) are covered by an "Off-Track Vehicle Accident Benefits Agreement" that provides ample coverage in the event they are riding in a crew van that is struck by a UI/UIM motorist.**

Unique to the railroad industry, railroad collective bargaining agreements contain an “Off-Track Vehicle Accident Benefits Agreement” that provides railroaders injured while traveling “off-track” with guaranteed payments of up to \$1,000.00 per week for up to 156 consecutive weeks (3 years). This amount is subject to an offset they receive from the federal railroad unemployment system, if any. Regardless, the employee still receives as much as \$1,000.00 per week for up to three years. The railroad covers 100% of the employee’s medical care (including the deductible) and, in the case of death or dismemberment, injured railroad workers can receive up to \$300,000.00 in off-track vehicle accident benefits.

**V. BNSF requires all of its contractors, especially contract carriers, to maintain appropriate levels of insurance.**

Railroad workers riding in contract carriers are covered by their employer-sponsored health insurance policy and the railroad will reimburse the employee any out-of-pocket expenses. BNSF is self-insured and contractually requires its carriers transporting railroad employees to indemnify BNSF for any lawsuits.

BNSF requires all its suppliers to carry commercial general liability (CGL) 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 for bodily injury and property damage.

**V. BNSF Comments Specific to the Nebraska PSC Rulemaking:**

- (1) Rail workers transported by contract carriers (crew vans) already receive special insurance benefits better than UI/UIM coverage and they already have the opportunity to recover more money than the sum total of all their damages. Further increasing the UI/UIM insurance limits in Section 006.02A creates an even greater likelihood those rail employees will receive a windfall payment at the ultimate expense of railroads because they are the only customers of the state’s sole contract carrier.**

When a rail employee is injured in a crew van accident, the employee's medical bills (including deductibles) are paid for by the railroad, the employee receives \$1,000.00 a week for up to three years, and if the railroad was negligent in any way, the rail employee has a FELA claim against it for economic and non-economic damages.

In addition to these benefits, the rail employee injured in a crew van by a UI/UIM motorist can possibly recover from multiple UI/UIM policies. At a minimum, they can receive an additional \$100,000 from the contract carrier's UI/UIM coverage pursuant to Section 006.02.

In Nebraska, the collateral source rule prevents the jury in the rail employee's FELA case from hearing that the employee has already received \$100,000 from the contract carrier's UI/UIM policy. So, the rail employee can collect the \$100,000 insurance payment from the contract carrier, then recover from the railroad under FELA and the jury never knows about the double recovery. The contract carrier and, ultimately, the railroads pay both bills because there is only one contract carrier for intrastate transportation, the contract carrier's UI/UIM insurance pays the rail worker, the contract carrier indemnifies BNSF for jury verdicts, and those costs get passed back to BNSF when we renegotiate our contract with the contract carrier.

**(2) Increasing Section 006.02A beyond the statutory maximums required in Section 44-6408(2) of the Nebraska Statutes threatens rail transportation and interstate commerce because it forces the state's only contract carrier for rail employees in Nebraska to purchase UI/UIM coverage no insurance company is required to sell.**

Section 44-6408(2) of the Nebraska Statutes (the Uninsured and Underinsured Motorist Insurance Coverage Act) 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.** (Emphasis added)

Neither the Nebraska Department of Insurance, who has authority over enforcing the Uninsured & Underinsured Motorist Insurance Coverage Act, or the Commission has the authority 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 the Commission decides to require higher UI/UIM coverage limits, contract carriers will be at the mercy of insurance companies who have no obligation to provide the coverage and who can charge whatever they want to charge for UI/UIM coverage without any state oversight. Ultimately, this lack of competition could threaten the very existence of the contract carriers deemed essential to railroads engaged in interstate commerce when there is a major claim or if all the carriers decide to exit the market.

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.

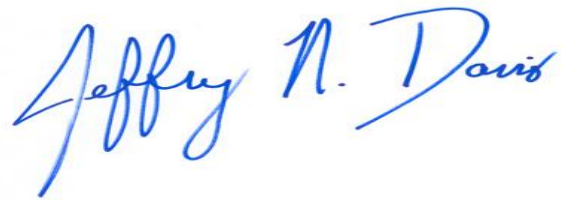
#### **CONCLUSION:**

In conclusion, BNSF appreciates the Commission's willingness to listen why rail employees are already being made whole through all of the current avenues of compensation available and that increasing UI/UIM limits for contract carriers transporting rail employees ultimately results in a windfall for the employee at the railroad's expense. BNSF encourages the Commission to base its decision on competent and substantial evidence, not hypotheticals. To do otherwise is to allow the proponents of the rule to turn the tragedy of someone being injured on the job into a financial windfall for the workers and their attorney.

For all of these reasons, BNSF Railway respectfully requests the Commission maintain UI/UIM limits at current levels.

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 **3rd day of April, 2020**.

Respectfully submitted,



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