



Office of the Chairman

Surface Transportation Board
Washington, D.C. 20423-0001

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FD 35506

October 9, 2012

The Honorable John D. Rockefeller IV
Chairman
Committee on Commerce, Science,
and Transportation
United States Senate
Washington, DC 20510

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Dear Chairman Rockefeller:

I write in response to your letter regarding the acquisition by Berkshire Hathaway Inc. (Berkshire) of BNSF Railway Company (BNSF). As you are aware, Berkshire acknowledged in a letter, dated September 13, 2012, that it owned or controlled White City Terminal Union Railway (WCTU) and CBEC Railway, Inc. (CBEC) when it acquired BNSF in February, 2010. Berkshire is not permitted to own or control multiple carriers without authorization from the Surface Transportation Board (Board), and, by not obtaining authorization, Berkshire failed to comply with the requirements of 49 U.S.C. § 11323. In your letter, you indicate that this situation raises questions regarding the lawfulness of the acquisition, and you inquire about the actions and steps the Board might undertake in this matter.

The Board is soliciting public input regarding the effect, if any, of Berkshire's non-compliance with § 11323 on the acquisition premium. With respect to remedying the non-compliance with § 11323, Berkshire has indicated that it will divest WCTU and CBEC no later than December 31, 2012. Under agency precedent, prompt divestiture of the railroad holdings that caused the violation can cure non-compliance with the statute. The Board will continue to monitor this activity to ensure that the divestitures are completed in a timely fashion.

You have asked several related questions, which I will respond to in turn below.

- 1. Given that no application was filed with the STB and the fact that the STB did not conduct its statutorily-required review, was the approval of Berkshire's acquisition of BNSF lawful?**

Because no party brought this transaction before the Board, our approval process was not engaged. As stated in our letter to Berkshire of September 18, 2012, Berkshire should have

obtained Board authorization to own or control multiple carriers, and, by failing to do so, it did not comply with the requirements of 49 U.S.C. § 11323.

2. If, as should have occurred, the STB had reviewed the acquisition, specifically how would the STB's review have differed from the review conducted by the DOJ and FTC given the differing missions and review requirements among these agencies?

Because the transaction did not involve more than one Class I railroad, the governing statute provides that “the Board shall approve such an application unless it finds that . . . (1) as a result of the transaction, there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States; and (2) the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs.” 49 U.S.C. § 11324(d). The transaction would have been reviewed under this standard. While the Board was not involved in the review by the antitrust authorities, both processes evaluate the likely competitive impact of a transaction.

3. In light of last week's discoveries, will the STB now conduct its own review of the merger?

Unless Berkshire does not divest promptly, the Board will not conduct its own review of the transaction under 49 U.S.C. § 11324(d). Under our precedent, non-compliant entities in this situation can remedy their non-compliance through divestiture or by seeking Board approval of the transaction. See Ass'n of P & C Dock Longshoremen v. Pittsburgh & Conneaut Dock Co., 8 I.C.C.2d 280, 295 (1992); Stagecoach Group PLC—Acquis. of Control—Twin America, LLC, MCF 21035, slip op. at 18 (STB served Feb. 8, 2011). Berkshire informed us, in its letter of September 25, 2012, that it intends to divest WCTU and CBEC to persons who are not rail carriers (as defined by 49 U.S.C. § 10102(5)) and do not own other rail carriers, no later than December 31, 2012. Therefore, it does not appear that a proceeding will take place regarding approval of the transaction. However, the Board is seeking public comment in Western Coal Traffic League—Petition for Declaratory Order, Docket No. FD 35506, regarding the effect, if any, on the acquisition premium.

4. What specific steps does the STB intend to take in order to provide a full, thorough review of and remedy to this situation? What is the STB's timeline for making these determinations?

The Board has thoroughly reviewed what actions Berkshire must take to come into compliance. In our letter to Berkshire of September 18, 2012, we directed Berkshire to submit within 10 days a letter specifying the method and timing by which it proposes to remedy its failure to comply with § 11323. Berkshire responded, in its letter of September 25, 2012, that it

intends to remedy its non-compliance by divesting WCTU and CBEC no later than December 31, 2012. The Board will monitor Berkshire's compliance measures and will receive status reports regarding its divestitures on November 1 and December 1, 2012. If Berkshire fails to remedy its non-compliance by January 1, 2013, the Board will take appropriate action, which could include, for example, the requirement of an application for control.

- 5. Given the unique circumstances of this matter, it is prudent that the Board allow for public comment so that stakeholders can provide input and thoughts concerning the acquisition of BNSF by Berkshire Hathaway. Doing so would provide a sense of transparency into the Board's process for dealing with this issue. Does the STB intend to open a docket for public comment?**

In these circumstances, it would be helpful to solicit public input on whether these new revelations impact the pending controversy around whether BNSF should be permitted to mark up its assets to reflect its acquisition by Berkshire. Indeed, to promote the interests of full transparency, I previously directed staff to prominently post Berkshire's letter and our response on our website. The Board is also seeking public comment in Docket No. FD 35506 regarding the effect, if any, of Berkshire's non-compliance on the acquisition premium, as discussed below.

- 6. In an acquisition, the acquiring entity is charged with determining whether it is a carrier or non-carrier. As an institutional practice, does the STB conduct its own independent review to confirm whether an entity is a carrier or not? If the acquiring entity determines it is not a carrier, does the STB require any certification to this fact?**

In this instance, the Board discovered that Berkshire controlled an additional railroad, WCTU, and asked Berkshire to confirm this fact, which it did. The applicable statute provides that specified transactions, including acquisition of control of a rail carrier by a person that is not a rail carrier but that controls any number of rail carriers, may be carried out only with the approval and authorization of the Board. 49 U.S.C. § 11323(a)(5). This approval and authorization takes place through a proceeding initiated "on application of the person seeking that authority." 49 U.S.C. § 11324(a). Under the statute, entities are not required to inform us or otherwise certify that a transaction has taken place that they believe is not subject to the Board's jurisdiction. Occasionally, where the Board's jurisdiction over a particular transaction is unclear, parties to the transaction (or non-parties) will seek a determination from the Board as to whether approval is required. Given Berkshire's non-compliance in this instance, I am directing Board staff to monitor carefully press reports of any rail transactions by holding companies and contact those companies to make sure they are aware of their obligations under § 11323.

7. What, if any, effect will this development have on the pending case at the STB concerning the \$8 billion acquisition premium paid by Berkshire Hathaway in its acquisition of BNSF and whether or not that premium should be applied to BNSF's asset base?

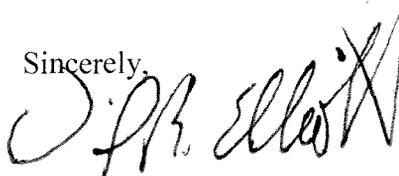
As noted, the Board is opening a comment period in Docket No. FD 35506 to solicit public input regarding the effect, if any, of Berkshire's non-compliance on the acquisition premium. The Board seeks comment regarding the effects, if any, that Berkshire's failure to comply with the statutory merger provisions should have on the legal and accounting principles that govern acquisition premiums within rail mergers.

8. What effect, if any, will the revenues from the newly identified railroads that are owned by Berkshire Hathaway have in determining whether BNSF is revenue adequate?

Under agency precedent, these revenues will have no impact in determining whether BNSF is revenue adequate. The revenues and return on investment of WCTU and CBEC would not be attributable to BNSF, because these entities are not operated as part of a single, integrated BNSF system, and therefore they would not be included in BNSF's assets. See Proposal to Require Consol. Reporting by Commonly Controlled Railroads, EP 634 (STB served Nov. 7, 2001).

I appreciate your interest in this important matter. Your letter and this response will be posted on the Board's website in Docket No. FD 35506. Lucille Marvin, Director of the Office of Public Assistance, Governmental Affairs, and Compliance, will keep you and your staff informed as this matter develops. If I may be of further assistance, please do not hesitate to contact me.

Sincerely,



Daniel R. Elliott III
Chairman