BNSF RAILWAY

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Via Electronic Filing

Ms. Cynthia Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001

Re: STB Docket No. 35506: Western Coal Traffic League__ Declaratory Order.

Dear Ms. Brown:

Enclosed for filing in the above captioned docket are the Comments of BNSF Railway Company.

Sincerely,

Jill K. Mulligan

Enclosures

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35506

WESTERN COAL TRAFFIC LEAGUE—
PETITION FOR DECLARATORY ORDER

COMMENTS
OF BNSF RAILWAY COMPANY

Pursuant to the decisions of the Surface Transportation Board ("STB" or "Board") served on October 9 in the above-captioned proceeding, BNSF Railway Company ("BNSF") hereby files the following comments.

INTRODUCTION

In February of 2010, BNSF was acquired by Berkshire Hathaway Inc. ("Berkshire"). At the time of the acquisition, Berkshire and BNSF believed that the transaction was one that was not included among the specific types of control transactions that required review under the Board's regulations. However, Berkshire and BNSF subsequently became aware of the existence of two rail entities within the Berkshire organizational structure that qualify as rail common carriers subject to the STB's jurisdiction. As a result of Berkshire's ownership interest in these two small entities—the CBEC Railway Inc. ("CBEC") and the WCTU Railway LLC ("WCTU")—Berkshire's purchase of BNSF would have been subject to STB review pursuant to 49 U.S.C. § 11323(a). Berkshire and BNSF immediately notified the Board of the existence of these two entities, proposed a plan to remedy the issue by divestiture of both entities by the end of 2012, and have provided the Board with regular status updates. In addition to monitoring Berkshire's progress on divestiture, the Board also provided the opportunity for interested parties to comment in the context of this pending proceeding on the effect, if any, of Berkshire's ownership of CBEC and WCTU on the post-transaction valuation of BNSF assets and liabilities, which was the subject of multiple rounds of comments and a public hearing earlier in the year.

BNSF believes that Berkshire's ownership of these two entities that had previously been classified as rail common carriers at the time of the BNSF acquisition has no impact at all on the matters addressed by this proceeding. As explained below, both CBEC and WCTU are very small entities that have minimal operational scope and commercial impact. Even if these entities were more substantial in either respect, Berkshire's common control of BNSF, WCTU, and CBEC would have no impact at all on the core matter addressed in this proceeding—whether the Board should adhere to Generally Accepted Accounting Principles ("GAAP") purchase accounting standards, and its own long-standing precedent, to establish the cost basis to *BNSF's* assets and liabilities following the Berkshire acquisition. Neither of these entities has any relevance whatsoever to the accounting treatment of *BNSF's* assets and liabilities; neither entity has had or will have any impact on BNSF's financial reporting to the Board or the Board's other ongoing regulatory oversight of BNSF that incorporates aspects of that financial reporting. Finally, Berkshire has proposed, and the Board has accepted, a plan for the immediate divestiture of these entities. Following that divestiture, this completely technical noncompliance with the Board's control requirements, which has had no commercial or competitive impact, will be fully and completely remedied.

BACKGROUND

On February 12, 2010, Berkshire acquired BNSF for $35 billion, the equivalent of $100 per share for all outstanding shares. At the time, the transaction was submitted to the U.S. Federal Trade Commission and the U.S. Department of Justice for approval of the transaction under Federal antitrust laws, and such approval was granted. Prior to the transaction, Berkshire and BNSF conducted an extensive due diligence and compliance review process, engaging the assistance of major law firms. As part of that review, Berkshire took steps prior to the BNSF acquisition to divest itself of all holdings in the rail common carriers that it was aware of, namely shares in Union Pacific Railroad ("UP") and Norfolk Southern Corporation ("NS"). At the time of the transaction, all parties believed that Berkshire was not a rail carrier and did not own or control any rail carriers as defined by 49 U.S.C § 10102(5), and as a result the transaction was not submitted to the STB for review pursuant to 49 USC § 11323.

While the Board did not review the transaction pursuant to 49 U.S.C. § 11323, the Board has had the opportunity to seek public comment on and review of the regulatory impact of the purchase of BNSF by Berkshire. As described in BNSF's October 28, 2011 Opening Evidence in this docket, following the acquisition, BNSF's assets and liabilities were adjusted using GAAP-based purchase accounting, consistent with GAAP and Security and Exchange Commission ("SEC") requirements. The purchase price paid by Berkshire for BNSF, $35 billion, represented a $22 billion premium over the book value of BNSF and under GAAP purchase price accounting, $8 billion of the $22 billion was allocated to the assets and liabilities of BNSF that impact regulatory cost.[1] *See* Verified Statement of Thomas N. Hund, Opening Evidence and Argument of BNSF Railway, *Western Coal Traffic League—Petition for Declaratory Order*, STB Finance Docket No. 35506, at 7. The purchase accounting adjustments were recorded in Berkshire's and BNSF's 2010 10-K filings with the SEC, and in BNSF's 2010 R-1 Report to the STB. Western Coal Traffic League ("WCTL") petitioned the Board, asking that it exclude the impacts of the acquisition premium from BNSF's net investment base and

[1] As BNSF explained in its Opening Evidence, the remaining $14 billion was attributed to net assets that do not affect regulatory costs, primarily goodwill.

remove any impact from the Uniform Rail Costing System ("URCS") numbers for BNSF. On September 28, 2011, the STB instituted a proceeding to address the effect of the price that Berkshire paid to acquire BNSF on the Board's annual BNSF URCS and revenue adequacy determinations. In three rounds of evidentiary submissions, extensive comments were submitted by BNSF, WCTL and numerous other parties; the Board also held a public hearing on March 22^{nd}. The Board has not yet issued a decision in this proceeding.

On September 13, 2012, BNSF and Berkshire sent a letter to the Board in which they provided formal notice of Berkshire's ownership of two rail common carrier entities, CBEC and WCTU, at the time of Berkshire's acquisition of BNSF. At the time of the February 2010 purchase of BNSF, Berkshire owned a controlling interest in MidAmerican Energy Holdings Company, which in turn owns a subsidiary, a regulated public utility, MidAmerican Energy Company ("MidAmerican"), which owns a majority interest in CBEC, a six-mile shortline in Iowa. In addition, Berkshire also owned a controlling interest in the Marmon Holdings, Inc. ("Marmon"), an entity with about 150 manufacturing and service businesses. Within Marmon's portfolio at the time of the BNSF acquisition (through its subsidiary, Marmon Transportation Services LLC) was a 12-mile common carrier shortline, WCTU, which is located in Oregon and has limited operations serving a local industrial park.

In its September 13, 2012 letter, BNSF and Berkshire described Berkshire's ownership of entities classified as rail common carriers at the time of the BNSF acquisition and acknowledged that as a result of that ownership, Berkshire's purchase of BNSF would have been subject to STB jurisdiction under 49 U.S.C. § 11323(a)(5), which provides for Board review and approval prior to a transaction closing. Berkshire also acknowledged that when it purchased its initial 60 percent ownership interest in Marmon in 2008, Marmon's ownership at the time of WCTU would also likely have been a transaction subject to STB jurisdiction and review. In that letter, Berkshire and BNSF made it clear to the Board that it intended to fully comply with the requirements of Section 11323. In order to do so, Berkshire and BNSF committed to the Board to divest CBEC and WCTU by the end of 2012; the planned divestiture would involve the sale of the two entities to persons that are not rail carriers or owners of rail carriers, so that further proceedings before the Board would not be required. In subsequent correspondence with the Board, Berkshire provided additional information regarding the method and timing of its divestiture of CBEC and WCTU and the activities of Marmon and MidAmerican to value these two entities and identify and contact potential transferees. In its October 9, 2012 letter, the Board stated that the proposed divestiture was an appropriate remedy under STB precedent and instructed Berkshire to submit monthly progress reports. As reported in BNSF's November 1 update letter to the Board, both Marmon and MidAmerican have been working diligently to sell their interests in the shortlines and have engaged prospective buyers.

On October 9th, the Board reopened the record in this proceeding to allow interested parties to provide comments regarding the effect, if any, of Berkshire's temporary common ownership of BNSF, CBEC and WCTU without Board approval on the subject matter of this proceeding, post-acquisition valuation of BNSF's asset base.

BERKSHIRE'S OWNERSHIP OF CBEC AND WCTU HAS NO IMPACT ON PURCHASE ACCOUNTING IN THE BNSF ACQUISITION

Berkshire is made up of more than 75 decentralized business groups possessing nearly 2,000 subsidiaries. Prior to the acquisition, BNSF and Berkshire engaged in an extensive due diligence and compliance effort, aided by major law firms. As part of that review, Berkshire undertook to identify and divest itself of any ownership interests in other rail common carriers. Immediately prior to the BNSF purchase, Berkshire owned 8,120,385 shares of UP with a market value of $447.8 million, and 1,534,923 shares of NS with a market value of $71.6 million. Under 49 U.S.C. § 11323(5), acquisition of a rail carrier by a person that itself not a rail carrier but that controls any number of rail carriers requires the approval of the Board. In early November 2009, Berkshire sold all its shares in both companies—more than $500 million in stock—in order to ensure compliance with the STB's control requirements. If Berkshire had been aware that WCTU and CBEC qualified as "rail carriers" pursuant to 49 U.S.C. § 10102(5), it would have taken appropriate action to comply with 49 U.S.C. § 11323(a).

Berkshire and BNSF simply did not realize that these two minor entities had been classified as rail common carriers subject to the Board's jurisdiction. CBEC is a six-mile railroad located in Council Bluffs, Iowa, and its principal function is to facilitate transportation in and out of the coal-fired power plants of MidAmerican Energy Company, which owns a majority interest in the railroad. CBEC is essentially a non-operating owner of an industrial spur primarily to MidAmerican's plant that connects to both the UP and BNSF and has no employees or rolling stock. WCTU operates over twelve miles of track using two employees and two locomotives; WCTU's principal function is providing services to a local industrial park (it transported around 550 carloads in 2011). WCTU does not physically connect to BNSF. Both shortlines serve a very small customer base in a very limited geographical area and possess minimal operational scope and commercial impact. WCTU's annual revenues were approximately $200,000 in 2011, while CBEC's were approximately $3.8 million. When the entities' 2011 revenues are combined, that equates to 0.021% of BNSF's annual revenues in that same year. When considered in the context of BNSF or other Class I rail carriers, WCTU and CBEC are inconsequential. When considered under the standards of 49 U.S.C. § 11324, WCTU and CBEC are simply not vehicles for a substantial lessening of competition or restraint of trade.[2] Clearly, Berkshire's failure to understand the nature of its ownership interest in these two entities and take appropriate action to comply with 49 U.S.C. § 11323(a) was an unintentional oversight.

Even if WCTU and CBEC were more significant in terms of their operational or competitive reach, Berkshire's temporary joint ownership of BNSF, WCTU and CBEC would have no bearing on the issues raised in this docket. As described above, this proceeding was initiated by the Board in response to a petition from WCTL asking that the Board exclude the write-up in BNSF's asset in BNSF's net investment base attributable to GAAP purchase accounting and make corresponding changes to BNSF's annual URCS calculations. A full record has been developed in that proceeding, and it demonstrates that the Board should not abandon its longstanding precedent of applying GAAP purchase accounting to railroad acquisitions and that WCTL's petition should be dismissed. BNSF will not repeat those arguments here. The Board has narrowly tailored the scope of this reopening of the record to allow parties to comment on the impact of this ownership on the BNSF/Berkshire acquisition premium.

The simple answer is that there is no impact. Whether Berkshire has an ownership interest in CBEC and WCTU has no bearing on the treatment of *BNSF* assets and liabilities following the Berkshire transaction. As described above, parties to the proceeding have taken

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[2] Under 49 U.S.C. §11324(d), the Board is directed to approve an application for a transaction which does not involve two or more Class I rail carriers, 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." Such a review is not within the scope of this proceeding and is unnecessary given the steps being taken to divest Berkshire's interest and come into compliance with the Board's control requirements.

issue with the purchase premium being reflected in BNSF's assets and liabilities. That impact is reflected in BNSF's R-1 annual report beginning in 2010, and those figures are incorporated into certain regulatory mechanisms used by the Board, most notably URCS and the annual revenue adequacy calculations. CBEC and WCTU are not and have never been a part of BNSF's operating system or corporate structure; the revenues and costs of these two minor shortlines have never been attributed to BNSF and their assets have never been treated as BNSF assets. CBEC and WCTU are in no way reflected or incorporated into BNSF's financial reporting to the STB (like the R-1 report) and, accordingly, have no impact whatsoever on the regulatory functions of the Board that draw on those financials reports, such as URCS. The Board recognized this in responding to an inquiry from Senator Rockefeller regarding the effect, if any, that the revenues of CBEC and WCTU would have in determining whether BNSF is revenue adequate. As Chairman Elliott explained: "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." Letter dated October 9, 2012, from STB Chairman Daniel R. Elliott III to Senator John D. Rockefeller IV, at 4.

CONCLUSION

Berkshire's joint ownership of three rail common carriers BNSF, WCTU and CBEC was not intentional, and was ultimately without any real world impact, including on purchase accounting. This issue is a temporary one, and the solution that Berkshire and BNSF are pursuing here—immediate divestiture—is reasonable, effective and consistent with the Board's precedent and policies.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Comments of BNSF Railway Company were served on November 8, 2012, on all parties of record by U.S. first-class mail, postage prepaid.

Jill K. Mulligan