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SERVICE DATE – OCTOBER 9, 2012

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35506

WESTERN COAL TRAFFIC LEAGUE—PETITION FOR DECLARATORY ORDER

Decided: October 9, 2012

AGENCY: Surface Transportation Board.

ACTION: Notice of Request for Comments.

SUMMARY: The Surface Transportation Board seeks comments from the public addressing the recent discovery that Berkshire Hathaway Inc. (Berkshire), owned or controlled CBEC Railway (CBEC) and White City Terminal Union Railway (WCTU) when it acquired BNSF Railway Company (BNSF) in February 2010, thus subjecting Berkshire's acquisition of BNSF to the Board's jurisdiction pursuant to 49 U.S.C. § 11323. Specifically, the Board seeks comments addressing the effect, if any, of this discovery on the post-February 2010 valuation of BNSF's asset base.

DATES: Comments are due by November 8, 2012. Replies are due by November 28, 2012.

ADDRESSES: Comments and replies may be submitted either via the Board's e-filing format or in traditional paper format. Any person using e-filing should attach a document and otherwise comply with the instructions at the E-FILING link on the Board's website at <http://www.stb.dot.gov>. Any person submitting a filing in the traditional paper format should send an original and 10 copies referring to Docket No. FD 35506 to: Surface Transportation Board, 395 E Street, S.W., Washington, DC 20423-0001.

FOR FURTHER INFORMATION, CONTACT: Valerie Quinn, (202) 245-0382. Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at (800) 877-8339.

SUPPLEMENTARY INFORMATION: By a letter dated September 13, 2012, in response to an inquiry from the Board, Berkshire stated that it owned or controlled CBEC and WCTU at the time of Berkshire's acquisition of BNSF in February 2010,<sup>1</sup> thus subjecting this transaction to

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<sup>1</sup> On February 12, 2010, Berkshire purchased the common stock of BNSF's parent company that Berkshire did not already own in a transaction valued at \$34.5 million in cash and Berkshire stock (the Purchase Price). See Burlington Northern Santa Fe Corporation, Schedule

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the Board's jurisdiction pursuant to 49 U.S.C. § 11323. Berkshire also acknowledged that the 2008 purchase of its initial 60% ownership stake in the Marmon Group, which holds WCTU through one of its subsidiaries, was likely subject to Board jurisdiction. In its letter, Berkshire stated that it intends to fully comply with the requirements of § 11323 by divesting itself of CBEC and WCTU.

The Board responded to Berkshire in a letter dated September 18, 2012, stating that Berkshire is not permitted to own or control multiple carriers without Board authorization, and that according to the facts it disclosed, Berkshire failed to comply with the requirements of § 11323 when it acquired BNSF, and when it first obtained control over both the CBEC and WCTU.<sup>2</sup> The Board directed Berkshire to submit within 10 days a letter specifying the method and timing by which it proposed to remedy its failure to comply with § 11323, and further stated that the Board would, at that time, consider whether further action is warranted.

By letter dated September 25, 2012,<sup>3</sup> Berkshire responded to the Board, stating that it fully intends to complete the divestiture of both WCTU and CBEC to persons that are neither rail carriers, as defined by 49 U.S.C. § 10102(5), nor owners of other rail carriers, so that neither divestiture would be subject to Board jurisdiction, pursuant to § 11323, no later than December 31, 2012. Berkshire stated that it and its subsidiaries are currently in the process of valuing both rail carriers and contacting potential transferees. Berkshire proposed to update the Board on the progress of these divestitures on November 1, 2012 and December 1, 2012. The Board replied to Berkshire by letter on October 9, 2012, stating that prompt divestiture is an appropriate remedy under Board precedent, and directing Berkshire to submit written progress reports on November 1, 2012 and December 1, 2012, detailing the status of the divestitures. In the same letter, the Board also stated that should any developments or change in circumstances at any other time that affect the course of divestiture arise, Berkshire should bring them to the Board's attention immediately.

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13D (Amendment No. 4 to Schedule 13D), at 6 (Feb. 16, 2010), available at <http://www.sec.gov/Archives/edgar/data/934612/000119312510032484/dsc13da.htm>. The Purchase Price reflected a premium of approximately \$22 billion over the net book value of the pre-acquisition BNSF, which was approximately \$13 billion. Out of the \$22 billion, BNSF stated in its 2010 STB Form R-1 annual report that it increased the cost of its tangible assets by approximately \$8.1 billion to reflect their fair market value, and allocated \$14 billion to goodwill.

<sup>2</sup> An entity that is not a rail carrier must obtain prior Board approval to acquire a railroad line through an asset purchase. See 49 U.S.C. § 10901(a)(4). But the acquisition by a non-railroad of a controlling stock interest in a company that owns a railroad line does not trigger § 10901(a)(4). Prior Board approval of the acquisition of a controlling interest in the stock of a rail carrier is only required where the purchaser already controls a rail carrier. See 49 U.S.C. § 11323.

<sup>3</sup> The September 13, 2012 and September 25, 2012 Berkshire letters, as well as the Board's September 18, 2012 and October 9, 2012 responses, have been added to this docket.

On September 28, 2011, the Board opened this proceeding to address the May 2, 2011 petition of the Western Coal Traffic League (WCTL), where WCTL asked the Board to issue an order declaring that the Board will adjust the Uniform Railroad Costing System (URCS) costs of BNSF for calendar year 2010 and subsequent years. In particular, WCTL asked the Board to declare that it will exclude the write-up in BNSF's net investment base attributable to the difference between the BNSF's book value and the price that Berkshire paid to acquire BNSF in 2010, and to make corresponding changes in BNSF's annual URCS depreciation calculations. WCTL argued that the inclusion of the write-up could have an impact in rate cases, the determination of BNSF's revenue adequacy, and other matters. On March 22, 2012, the Board held a public hearing to explore the arguments raised by WCTL, BNSF, and other parties to the proceeding.

The Board now seeks comments from the public on the effect, if any, of Berkshire's non-compliance with § 11323 upon this proceeding. Berkshire's 2010 acquisition of BNSF was and remains subject to the Board's jurisdiction pursuant to § 11323, but Berkshire will not come into compliance until December 31, 2012 (by its estimates). The Board seeks comments on the effect, if any, of Berkshire's non-compliance with § 11323 on the legal and accounting principles that govern acquisition premiums within rail mergers, here the post-February 2010 valuation of BNSF's asset base.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Comments are due by November 8, 2012.
2. Replies are due by November 28, 2012.
3. This decision is effective on its service date.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.