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SERVICE DATE – LATE RELEASE FEBRUARY 16, 2012

SURFACE TRANSPORTATION BOARD

NOTICE

Docket No. FD 35506

WESTERN COAL TRAFFIC LEAGUE—PETITION FOR DECLARATORY ORDER

Decided: February 15, 2012

AGENCY: Surface Transportation Board.

ACTION: Notice of public hearing.

SUMMARY: The Surface Transportation Board (Board) instituted a declaratory order proceeding on September 28, 2011, Western Coal Traffic League—Petition for Declaratory Order, FD 35506 (STB served Sept. 28, 2011), and will hold a public hearing to explore the effect of the price that Berkshire Hathaway, Inc. (Berkshire) paid to acquire BNSF Railway Company (BNSF) in 2010 on the Board's annual Uniform Rail Costing System (URCS) and revenue adequacy determinations, with respect to BNSF.

DATES: The hearing will begin at 9:30 a.m., on Thursday, March 22, 2012, in the Board's hearing room at the Board's headquarters located at 395 E Street, S.W., Washington, DC. The hearing will be open for public observation. Anyone wishing to participate at the hearing shall file with the Board a notice of intent to participate (identifying the party, the proposed speaker, and the time requested), and a summary of the intended testimony (not to exceed 3 pages), no later than **Tuesday, March 6, 2012**. All witnesses are encouraged to use their hearing time to call attention to the points they believe are particularly important. Witnesses should present a short oral statement of their comments and be prepared to answer questions from the Board.

ADDRESSES: All filings may be submitted either via the Board's e-filing format or in the 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 "www.stb.dot.gov" website. Any person submitting a filing in the traditional paper format should send an original and 10 copies of the filing to: Surface Transportation Board, Attn: Docket No. FD 35506, 395 E Street, S.W., Washington, DC 20423-0001.

Copies of written submissions will be posted to the Board's website and will be available for viewing and self-copying in the Board's public docket room, Suite 131. Copies of the submissions will also be available (for a fee) by contacting the Board's Chief Records Officer at (202) 245-0238 or 395 E Street, S.W., Washington, DC 20423-0001.

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

**SUPPLEMENTARY INFORMATION:** In this proceeding, the Western Coal Traffic League (WCTL), and other parties,<sup>1</sup> argue that the Class I Railroad Annual Report submitted by BNSF to the Board for the year ending December 31, 2010 (2010 R-1), produces a write-up in BNSF's net investment base for URCS costing purposes equal to \$8.1 billion<sup>2</sup> and a decrease in BNSF's 2010 annual depreciation calculations by \$128 million, both based on the \$43 billion that Berkshire paid to acquire BNSF. WCTL also argues that the \$8.1 billion write-up increases BNSF's variable costs, and raises the quantitative jurisdictional threshold for rate reasonableness proceedings, thus decreasing the number of shippers that could pursue rate cases before the Board, as well as decreasing the maximum rate relief that shippers could be awarded. In addition, WCTL claims that the inclusion of the acquisition premium in the calculation of BNSF's rate of return on its 2010 net investment moves BNSF further away from a Board determination that the carrier is revenue adequate, thus making it less likely for captive shippers to obtain relief in BNSF rate cases. WCTL further argues that the Board's financial accounting rules and Generally Accepted Accounting Principles (GAAP) do not govern regulatory rulemaking, and that the Board is not required to follow GAAP in determining the scope of its regulatory jurisdiction. WCTL therefore suggests that the Board should exercise its authority under 49 U.S.C. § 10707(d)(1)(B) to adjust BNSF's URCS costs starting in 2010, by removing the \$8.1 billion write-up from BNSF's 2010 R-1, and by making the appropriate corresponding adjustments to annual depreciation.

BNSF counters WCTL's claims by arguing that the Board's precedent on this subject is well-settled, as the Board, the Interstate Commerce Commission (the Board's predecessor agency), the Railroad Accounting Principles Board, and the courts have determined that acquisition cost is an economically accurate measure of current market value. BNSF argues that the issue of the acquisition premium raised by WCTL has been litigated and resolved in favor of GAAP accounting. BNSF further claims that WCTL has presented no evidence or argument that merits revisiting the use of the Berkshire acquisition cost for URCS costing or any other regulatory purpose.

**BOARD RELEASES AND LIVE VIDEO STREAMING AVAILABLE VIA THE INTERNET:** Decisions and notices of the Board, including this notice, are available on the Board's website at [www.stb.dot.gov](http://www.stb.dot.gov). This hearing will be available on the Board's website by live video streaming. To access the hearing, click on the "Live Video" link under "Information Center" at the left side of the home page beginning at 9:00 a.m. on March 22, 2012.

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<sup>1</sup> For convenience, in this decision we will refer to the arguments made by WCTL, and other supporting parties, largely within the context of WCTL's pleadings.

<sup>2</sup> In its opening evidence filed on October 28, 2011, WCTL states that it initially calculated the acquisition premium as \$7.625 billion, but based on new information received from BNSF, WCTL has revised this figure to \$8.1 billion. See WCTL Opening 2 n.1.

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

It is ordered:

1. A public hearing in this proceeding will be held on Thursday, March 22, 2012, at 9:30 a.m., in the Surface Transportation Board Hearing Room, at 395 E Street, S.W., Washington, DC, as described above.

2. By **Tuesday, March 6, 2012**, anyone wishing to participate at the hearing shall file with the Board a notice of intent to participate (identifying the party, the proposed speaker, and the time requested), and a summary of the intended testimony (not to exceed 3 pages).

3. This decision is effective on the date of service.

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