

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

233401

ENTERED

WESTERN COAL TRAFFIC LEAGUE – PETITION FOR DECLARATORY ORDER)))))	Office of Proceeding November 28, 2012 Finance Docket No. 35506 Part of Public Record
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**JOINT REPLY COMMENTS OF THE
WESTERN COAL TRAFFIC LEAGUE
AMERICAN PUBLIC POWER ASSOCIATION
EDISON ELECTRIC INSTITUTE
NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS
NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION
WESTERN FUELS ASSOCIATION, INC.,
AND
BASIN ELECTRIC POWER COOPERATIVE, INC.**

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

WESTERN COAL TRAFFIC)	
LEAGUE – PETITION FOR)	
DECLARATORY ORDER)	Finance Docket No. 35506
)	

**JOINT REPLY COMMENTS OF THE
WESTERN COAL TRAFFIC LEAGUE, AMERICAN PUBLIC POWER
ASSOCIATION, EDISON ELECTRIC INSTITUTE, NATIONAL ASSOCIATION
OF REGULATORY UTILITY COMMISSIONERS, NATIONAL RURAL
ELECTRIC COOPERATIVE ASSOCIATION, WESTERN FUELS
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The Western Coal Traffic League, American Public Power Association, Edison Electric Institute, National Association of Regulatory Utility Commissioners (“NARUC”), National Rural Electric Cooperative Association, Western Fuels Association, Inc., and Basin Electric Power Cooperative, Inc. (collectively “Coal Shippers/NARUC”) present these Joint Reply Comments in response to the Surface Transportation Board’s (“STB” or “Board”) notice (“Notice”) served in this proceeding on October 9, 2012.¹

¹ Coal Shippers/NARUC filed their Opening Comments (“Op.”) on November 8, 2012. Other parties filing opening comments were BNSF Railway Company (“BNSF”), Alliance for Rail Competition *et al.* (“ARC”), Consumers United for Rail Equity (“CURE”), and Arkansas Electric Cooperative Corporation (“AECC”).

PREFACE AND SUMMARY

Berkshire Hathaway, Inc. (“Berkshire”) acquired control of BNSF illegally in 2010. BNSF asks the Board to ignore Berkshire’s unlawful control and issue no remedial relief in this proceeding. What BNSF is asking the Board to do is exactly what the Board cannot do: “sit idly by and wink at practices that lead to violations of [statutory] provisions”² and permit Berkshire to “retain the fruits of its unlawful conduct.”³

To remedy Berkshire’s unlawful actions, the Board should issue the remedial relief requested by Coal Shippers/NARUC in their opening comments: (1) find that Berkshire’s unlawful actions provide another supporting ground for removing the \$8.1 billion acquisition premium from BNSF’s Uniform Railroad Costing System (“URCS”) and revenue adequacy net investment bases; (2) utilize BNSF’s 2009 cost of capital in making URCS and revenue adequacy calculations during the unlawful control years; and (3) declare BNSF revenue adequate in 2010 and 2011.

² *Am. Trucking Ass ’ns., Inc. v. United States*, 344 U.S. 298, 311 (1953); *Zola v. ICC*, 889 F.2d 508, 516 (3d Cir. 1989).

³ *Cent. of Ga. Ry. Control*, 307 I.C.C. 39, 43 (1958) (“*Central of Georgia Ry.*”).

ARGUMENT

I.

BERKSHIRE UNLAWFULLY OBTAINED CONTROL OF BNSF IN 2010

49 U.S.C. § 11323(a)(5) provides that transactions involving the “[a]cquisition of control of a rail carrier by a person that is not a rail carrier but that controls any number of rail carriers” can “be carried out only with the approval and authorization of the Board.” *Id.* A non-carrier that controls a rail carrier must submit an application to the Board and obtain Board “approv[al] and authoriz[ation]” *before* it acquires another rail carrier.⁴

Berkshire was legally required to comply with § 11323 before it acquired BNSF in 2010. At that time, Berkshire should have either divested itself of its two common carrier subsidiaries before acquiring BNSF or sought regulatory approval for its acquisition of BNSF. Since Berkshire did neither, it should not have acquired BNSF in 2010. Nor should it have acquired BNSF at any later date unless and until it undertook one of these two actions.

BNSF claims that Berkshire’s failure to comply with § 11323 “was an unintentional oversight,”⁵ the two common carriers “are inconsequential,”⁶ the continuing

⁴ *See* 49 U.S.C. § 11324(a).

⁵ BNSF Op. at 7.

⁶ *Id.* at 6.

violation of the statute is only “temporary,”⁷ and its non-compliance is “completely technical.”⁸ Of course, none of these assertions – even if true – excuse Berkshire from its obligation to comply with § 11323.

Section 11323 very clearly states that when a non-carrier acquires a second common carrier, it must seek prior approval from the STB. Section 11323 does not say that the prior approval requirements are excused due to an “unintentional oversight,” or because some of the involved common carriers “are inconsequential,” or the unlawful control period is “temporary.” The statute also does not distinguish between asserted “technical” and “non-technical” violations.

Despite BNSF’s attempts to muddy the waters, it is clear that Berkshire violated § 11323 when it obtained control of BNSF in 2010, and will continue to be in violation of § 11323 until it divests itself of its two non-BNSF common carrier subsidiaries.⁹

⁷ *Id.* at 5.

⁸ *Id.* at 2.

⁹ Berkshire informed the Board in a letter filed on November 16, 2012 that it had divested one of the two non-BNSF common carrier subsidiaries and it “anticipate[d]” divestiture of the second non-BNSF common carrier subsidiary “before December 31, 2012.” *See* Letter from Roger Nober, Executive Vice President, Law & Secretary, BNSF, to Lucille L. Marvin, Director, STB Office of Public Assistance, Government Affairs and Compliance, at 1 (Nov. 16, 2012).

II.

BERKSHIRE SHOULD NOT BE PERMITTED TO RETAIN THE FRUITS OF ITS UNLAWFUL ACTIONS

BNSF argues that its unlawful acquisition by Berkshire in 2010 has “no impact”¹⁰ on the issues raised in this proceeding because the “revenues and costs”¹¹ of the two non-BNSF common carrier subsidiaries are not “reflected or incorporated into BNSF’s financial reporting to the STB.”¹²

BNSF’s statement of the “impact” of Berkshire’s unlawful actions is both self-serving and wrong. Berkshire has been, and continues to be, in unlawful control of BNSF. As a matter of law, Berkshire could not lawfully acquire BNSF without first either filing an application and obtaining prior Board approval to acquire BNSF or properly divesting its two non-BNSF common carrier subsidiaries. Berkshire has chosen the latter path, and the Board has directed that Berkshire complete the two divestitures before the end of this year (2012).¹³

As pertinent here, Berkshire should not have acquired BNSF in 2010, should not have paid any acquisition premium in 2010, and should not have been excluded from the Board’s cost of capital computations starting in 2010. The earliest date that Berkshire should have acquired BNSF, paid the premium, and been excluded

¹⁰ BNSF Op. at 7.

¹¹ *Id.* at 8.

¹² *Id.*

¹³ See Letter from Lucille L. Marvin, Director, STB Office of Public Assistance, to Roger Nober, Executive Vice President, Law & Secretary, BNSF, at 1 (Oct. 9, 2012).

from the cost of capital computations is the date Berkshire completes its divestiture of its two non-BNSF common carrier subsidiaries – a date that remains in the future.

BNSF wants to retain the fruits of its unlawful actions: retaining the benefits of the premium in the unlawful control years (2010 to date); retaining the benefits of its exclusion from the cost of capital computations in the unlawful control years (2010 to date); and retaining the benefits of being found revenue inadequate in the first two unlawful control years (2010 and 2011); and possibly being found revenue inadequate in the third unlawful control year (2012).

The law is clear that BNSF cannot “retain the fruits of its unlawful conduct.”¹⁴ The unlawful benefits to Berkshire for regulatory purposes are not tied to the “costs and revenues” of its two non-BNSF common carrier subsidiaries. Instead, they are tied directly to the impact that Berkshire’s unlawful actions had on the Board’s calculation of *BNSF’s* URCS variable costs, *BNSF’s* cost of capital, and *BNSF’s* revenue adequacy.

III.

THE BOARD SHOULD GRANT THE REMEDIAL RELIEF REQUESTED BY COAL SHIPPERS/NARUC

The Board has broad “equitable powers to expunge” a violation of § 11323.¹⁵ The Board should exercise these powers in this case by: (1) finding that Berkshire’s unlawful acquisition of BNSF provides another ground supporting exclusion

¹⁴ *Cent. of Ga. Ry. Control*, 307 I.C.C. at 43.

¹⁵ *See Gilbertville Trucking Co. v. United States*, 371 U.S. 115, 130 (1962).

of the \$8.1 billion premium from BNSF's net investment base for URCS and revenue adequacy purposes; (2) utilizing BNSF's last known regulatory cost of capital – which is the 2009 figure of 10.01% – to make BNSF URCS and revenue adequacy calculations in each unlawful control year; and (3) declaring BNSF revenue adequate in 2010 and 2011 because BNSF earned a return on its net investment in each year greater than 10.01%.

The relief sought by Coal Shippers/NARUC is supported by other shippers participating in this proceeding. *See* ARC Op. at 7 (“ARC, et al. urge the Board to adjust BNSF costs under URCS to exclude the contested acquisition premium, to exclude the premium in assessing whether BNSF has achieved revenue adequacy, and to avoid an unwarranted increase in the cost of capital.”); CURE Op. at 19 (“the Board should . . . grant the relief sought by WCTL”); AECC Op., Exhibit A, Verified Statement of Michael A. Nelson at 3 (“the public interest considerations arising in this proceeding call for the Board to reject incorporation of the acquisition premium”).

CONCLUSION

Coal Shippers/NARUC respectfully request that the Board issue a declaratory order granting the relief requested in their Opening, Reply and Rebuttal submissions, as supplemented by the relief requested in their Comments and Reply Comments.

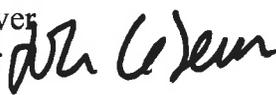
Respectfully submitted,

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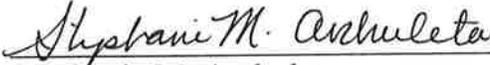
Dated: November 28, 2012

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CERTIFICATE OF SERVICE

I hereby certify that this 28th day of November, 2012, I have caused copies of the forgoing Joint Reply Comments to be served via first-class mail, postage prepaid upon all parties of record to this case.


Stephanie M. Archuleta