

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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November 28, 2012  
Part of Public  
Record

WESTERN COAL TRAFFIC LEAGUE – PETITION FOR DECLARATORY ORDER

SUPPLEMENTAL REPLY COMMENTS OF  
CONSUMERS UNITED FOR RAIL EQUITY

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Equity

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CONSUMERS UNITED FOR RAIL EQUITY

Consumers United for Rail Equity (“CURE”) hereby submits its Supplemental Reply Comments in this proceeding.

In view of the number of rounds of Comments previously filed, and the extensive oral argument conducted herein on March 22, 2012, as well as the Supplemental Comments CURE filed on November 8, 2012, we will be brief, and reply primarily to BNSF Railway Company (“BNSF”), which also filed Comments on November 8, 2012.

Although BNSF filed Comments herein on November 8, 2012, neither Berkshire Hathaway (“Berkshire”) nor any other railroad interests filed comments at that time, including the Association of American Railroads (“AAR”), which in 2011 had filed extensive Comments herein.

In its November 8, 2012 Comments (at 4-5), BNSF states that there were not one, but two prior instances wherein Berkshire was required, but failed, to seek STB approval prior to its acquisition of interests in railroads. The first transaction for which Berkshire did not seek the Board’s approval was in 2008 when Berkshire, which already owned

MidAmerican Energy Holdings Company (“MidAmerican”), which in turn owned<sup>1</sup> CBEC, a shortline railroad in Iowa<sup>2</sup> which serves MidAmerican’s coal-fired power plants, acquired a 60-percent interest in Marmon Holdings. BNSF acknowledges that Marmon owned then and owns now a shortline railroad in Oregon: the WCTU. The second transaction subject to the Board’s prior approval was the acquisition of BNSF, which was announced in November 2009 and which closed in February 2010.

BNSF attempts to convince the Board that these matters have no “real-world impact,” and that its proposed divestiture of the WCTU and CBEC would resolve the issues raised by Berkshire’s failure to comply with the statutory requirement that it seek the STB’s approval before actually acquiring these additional railroads.

Of course, the fact that BNSF acknowledges that it interchanges traffic with the CBEC is itself evidence that the acquisition of BNSF by Berkshire could have “real-world impact.” As the Board well knows, such combined ownership interests may prevent one railroad, previously independent, from interchanging traffic with any railroad other than its new owner, thereby reducing competition in the national rail system.

Arkansas Electric Power Cooperative Corporation also raised a second issue concerning potential foreclosure of rail-to-rail competition as a result of Berkshire’s acquisition of BNSF.

CURE is not in possession of the facts necessary to determine if these potential impacts in fact have “real world impacts,” but CURE does not believe they can be

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<sup>1</sup> BNSF now asserts by letter to the Board dated November 16, 2012 that the Berkshire-owned MidAmerican Energy Company divested itself of the CBEC.

<sup>2</sup>It is important under the statute to note that BNSF admits CBEC interchanges with BNSF.

summarily dismissed, as BNSF would have it, without the opportunity for investigation in an appropriate proceeding.

Beyond these matters, however, several key issues presented by Berkshire's acquisition of BNSF were discussed at length in CURE's November 8, 2012 Supplemental Comments, in CURE's three rounds of Comments filed in 2011, and in CURE's oral argument on March 22, 2012. Suffice to say that the acquisition of BNSF by Berkshire (including payment of a premium of \$22-23 billion to acquire BNSF's remaining stock), even assuming *arguendo* that the Board would have approved the transaction had Berkshire sought such authority before closing, will, if BNSF has its way, have "real world impacts".

First, due to the purchase of BNSF by Berkshire Hathaway and with no alterations or improvements to the BNSF system, the BNSF URCS costs, which are the basis for determining BNSF costs in STB proceedings challenging BNSF's rates, will increase by the amount of \$8.1 billion if the Board approves BNSF's actions with regard to this "acquisition premium".

Second, if the BNSF URCS costs are allowed to be inflated as proposed – an action that would not have happened had Berkshire Hathaway not purchased BNSF - the "jurisdictional threshold" applicable to movements on BNSF would apply to higher rates due to the an allocation of part of this "acquisition premium" to BNSF's "variable costs". Thus, more BNSF traffic would be under the 180-percent jurisdictional threshold than would be the case without the "acquisition premium", thereby denying some rail customers of BNSF the opportunity to challenge their rates at the Board.

Third, the Board's cost-of-capital determination for the railroad industry, unless the Board requires Berkshire and BNSF to provide BNSF's cost of capital, will be affected due to the absence of "numbers" for BNSF.

Fourth, due to the inclusion of the "acquisition premium", BNSF could be required to achieve a higher rate of return to be viewed as "revenue adequacy" under the Board's current test.

Fifth, the "RSAM" ("Revenue-Shortfall Allocation Methodology") figure attributable to BNSF for purposes of rate challenges under the Board's "Three-Benchmark" guideline would be increased artificially to the detriment of "captive rail customers" of the BNSF. CURE continues to rely on the Comments and argument it has made previously in this proceeding on these issues.

So, much as BNSF would prefer that Berkshire's acquisition of BNSF be treated as if it has no "real world impact" on anyone, the reality is far different. The key point is that the public, including especially potentially adversely impacted BNSF shippers and BNSF shipper interests, should have had the opportunity before the acquisition was completed to seek either to prevent the acquisition or to have conditions addressing these concerns included with the Board's approval of the transaction. At that time, Berkshire and BNSF, as proponents of an order authorizing the transaction, would have had the burden of proof regarding the acquisition premium – at a time when the acquisition premium now at issue would not yet have been paid.

By now acknowledging that such a proceeding was required in 2009-10, when shippers and shipper interests would not have had the burden of proof and could

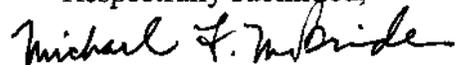
challenge a substantial premium before it was paid, BNSF's Comments demonstrate that the Board now must act to conduct the appropriate proceeding that will permit all interested parties to raise issues they have with the BNSF acquisition by Berkshire in a posture where Berkshire and the BNSF bear the burden of proof with the Board.

By not having such a proceeding now that Berkshire and the BNSF have admitted that the Board then had and has now jurisdiction of the transaction, the Board is allowing Berkshire and the BNSF to improve their legal position on these issues through their earlier illegal actions. Needless to say, such a result is not good public policy.

#### Conclusion

The Board should grant the relief sought by CURE in its November 8, 2012 Supplemental Comments and consider whether to grant the relief sought by the other shippers and shipper interests who filed Comments in this proceeding.

Respectfully submitted,



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Certificate of Service

I hereby certify that I have served, this 28<sup>th</sup> day of November, 2012, a copy of the foregoing Supplemental Reply Comments of CURE on all persons on the Board's official service list for this proceeding.

Michael F. McBride

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