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**U.S. Department of  
Transportation**  
Office of the Secretary  
of Transportation

**General Counsel**

1200 New Jersey Avenue, S.E.  
Washington, D.C. 20590

October 28, 2011

Ms. Cynthia Brown  
Chief of the Section of Administration  
Surface Transportation Board  
395 E Street, S.W.  
Washington, D.C. 20423

**ENTERED  
Office of Proceedings**

OCT 28 2011

**Part of  
Public Record**

**Re: Western Coal Traffic League – Petition for Declaratory Order  
FD No. 35506**

Dear Ms. Brown:

Please find enclosed for filing in the above-referenced matter the Opening Comments of the United States Department of Transportation. Please feel free to contact me if you have any questions.

Respectfully,

Christopher S. Perry

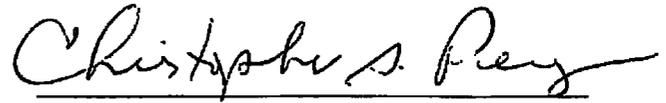
(202) 366-9282

christopher.perry@dot.gov

Enclosure

CERTIFICATE OF SERVICE

I hereby certify that on this 28<sup>th</sup> day of October, 2011, I caused this document to be served by first class mail, postage prepaid, upon all Parties of Record in this proceeding.

A handwritten signature in black ink, reading "Christopher S. Perry". The signature is written in a cursive style with a long horizontal flourish extending to the right. It is positioned above a solid horizontal line.

Christopher S. Perry

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

**WASHINGTON, D.C.**

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<b>Western Coal Traffic League</b>	)	<b>STB Finance Docket No. 35506</b>
<b>Petition For Declaratory Order</b>	)	
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**OPENING COMMENTS OF  
THE UNITED STATES DEPARTMENT OF TRANSPORTATION**

By its Decision of September 26, 2011 (the “Decision”), the Surface Transportation Board (“STB” or the “Board”) instituted this declaratory order proceeding and invited interested members of the public to participate. The Western Coal Traffic League (“WCTL”) filed this petition “asking the Board to issue an order declaring that the Board will adjust the Uniform Rail Costing System (URCS) costs of BNSF Railway Company (BNSF) for calendar year 2010 and subsequent years.” Decision at 1. WCTL argues that the “acquisition premium” that Berkshire Hathaway Inc. (“Berkshire”) paid to purchase BNSF in 2010 should be excluded from BNSF’s URCS calculation, and that the Board’s failure to grant such relief “will have significant detrimental effects on BNSF shippers.” *Id.* at 2. The Board requested comments to inform its analysis of the issues raised in WCTL’s petition.

The United States Department of Transportation (the “Department”) is pleased to have the opportunity to participate in this proceeding and to hear the views of other members of the industry and the public.

## **The Department's Interest In The Proceeding**

The Department is charged with the duty to establish “transportation policies and programs that contribute to providing fast, safe, efficient, and convenient transportation,” and to “provide general leadership in identifying and solving transportation problems.” 49 U.S.C. §§ 101(a), (b)(5). In carrying out these broad responsibilities, the Department seeks to ensure that railroad policy serves the following goals:

- **Safety.** Congress has expressed its “clear intent, encouragement, and dedication . . . to the furtherance of the highest degree of safety in railroad transportation.” 49 U.S.C. § 103(c). The Department remains committed to this goal. The railroad industry has improved significantly in its safety record over the past few decades, reducing casualties and other accidents, and making rail “one of the safest modes available” for transporting passengers and freight. Federal Railroad Administration, *Preliminary National Rail Plan* 12 (Oct. 2009), available at <http://www.fra.dot.gov/Downloads/RailPlanPrelim10-15.pdf> (“Preliminary National Rail Plan”). The Department wants to ensure that this trend continues.
- **Efficiency.** The Department strives to “promote an integrated, cohesive, efficient, and optimized national rail system for the movement of goods and people.” 49 U.S.C. § 103(j)(2). The rail system should work in tandem with other modes of transportation to serve the country’s needs. Furthermore, the Department seeks to foster the energy savings that rail transportation can provide. Due to “a mix of technical improvements in railroad infrastructure and improvement in equipment and operations,” railroad haulage “is one of the most fuel-efficient freight transportation modes in the Nation.” Preliminary National Rail Plan 14. Particularly at a time of global instability, economic uncertainty,

and pressure on government budgets, it is vitally important to conserve energy and to maximize the use of our natural resources.

- ***Economic Growth.*** “Moving freight quickly and economically enables our Nation’s industries and markets to meet the demands of domestic consumers and helps U.S. products to compete in the global marketplace.” *Id.* at 17. Thus, the rail system should aid in the nation’s economic growth by providing an effective means of transporting passengers and material between markets nationwide, and to points of connection with other markets across the world.
- ***Livability.*** The Department has stressed the importance of “livable communities—places where transportation, housing, and commercial development investments have been coordinated so that people have access to adequate, affordable, and environmentally sustainable travel options.” Federal Railroad Administration, *National Rail Plan: Moving Forward: A Progress Report 25* (Sept. 2010), available at [http://www.fra.dot.gov/downloads/NRP\\_Sept2010\\_WEB.pdf](http://www.fra.dot.gov/downloads/NRP_Sept2010_WEB.pdf) (“National Rail Plan Progress Report”). Freight rail plays an important role in enhancing the livability of America’s communities, since “[m]ost passenger service . . . occurs on rail infrastructure that is owned and operated by freight railroads.” Preliminary National Rail Plan 6. Increased passenger rail travel, in turn, helps to relieve traffic congestion, revitalize cities, and encourage economic development. National Rail Plan Progress Report 25.
- ***Continued Railroad Investment.*** The railroad industry requires large capital investments for the maintenance and repair of track, stations, and equipment, as well as the construction of new facilities to meet future demand. Such investments are particularly important in light of the expected increases in the nation’s freight volume over the

coming decades. Indeed, “[b]etween 2010 and 2035, the transportation system will experience a 22 percent increase in the total amount of tonnage it moves.” National Rail Plan Progress Report 6. Thus, the rail industry should be given adequate incentives not only to meet current capacity, but also to ensure that the rail system is properly enhanced to meet increasing demands.

### **Acquisition Premiums In The Railroad Industry**

As the Department understands it, the Board’s precedent on acquisition premiums has been settled for many years. The Board has declined in several instances to adopt the position that WCTL takes in this proceeding, and has ruled that acquisition price, rather than book value or the predecessor’s stock value, is the appropriate measure of the value of rail assets. The courts of appeals have upheld this determination. *See Major Rail Consolidation Procedures*, STB Ex Parte No. 582 (Sub-No. 1), 2001 WL 648944, at \*18 (June 11, 2001) (“*Rail Consolidation Procedures*”); *CSX Corp. et al. – Control And Operating Leases/Agreements – Conrail Inc. and Consolidated Rail Corp.*, 3 S.T.B. 196, 1998 WL 456510, at \*37-38 (July 20, 1998), *aff’d sub nom. Erie-Niagara Rail Steering Comm. v. S.T.B.*, 247 F.3d 437 (2d Cir. 2001) (“*Conrail*”); *Railroad Revenue Adequacy – 1988 Determination*, 6 I.C.C. 2d 933, 935-42 (1990), *aff’d sub nom. Ass’n of Am. R.R. v. I.C.C.*, 978 F.2d 737 (D.C. Cir. 1992) (“*1988 Railroad Revenue Adequacy Determination*”).

The Board has determined that acquisition price tends to represent the result of “an arms-length transaction, freely negotiated between the parties.” *1988 Railroad Revenue Adequacy Determination*, 6 I.C.C. 2d at 939; *see Conrail*, 247 F.3d at 442 (“The STB argues that the price paid [for Conrail] was not excessive because the actual purchase price of a rail asset, negotiated at arm’s length, best reflects the asset’s actual value.”). Furthermore, the Board concluded that

the use of acquisition price is consistent with Generally Accepted Accounting Principles (“GAAP”) and with the conclusions reached by the Railroad Accounting Principles Board (“RAPB”) about measuring railroad value. *1988 Railroad Revenue Adequacy Determination*, 6 I.C.C. 2d at 938-40; 978 F.2d at 741-42. This GAAP determination is important to the approach that the Board adopts, because the Board “is statutorily required to conform its accounting rules to [GAAP] ‘to the maximum extent practicable.’” *Conrail*, 247 F.3d at 442 (quoting 49 U.S.C. §§ 11142, 11161, 11164) (brackets omitted).

WCTL argues that “[o]ther regulatory bodies [apart from STB] do not permit” the use of “acquisition premiums.” *Petition of the Western Coal Traffic League For A Declaratory Order at 7-8 (“WCTL Petition”).* WCTL, like parties in earlier proceedings before the Board, relies primarily upon the example of heavily regulated utilities, like power. *Id.* However, the Board has determined that heavily regulated utilities involve fundamentally different economic conditions. For utilities, market value “is determined predominately through regulatory policy.” *1988 Railroad Revenue Adequacy*, 6 I.C.C. 2d at 938. Thus, “market value,” or acquisition price, “would be inherently inaccurate as an independent valuation of the company[,] because an essential component of the company’s value, future earnings, was dependent on the level of the very same regulated rates.” *Conrail*, 247 F.3d at 442-43. By contrast, in the railroad context, “a large share of revenues is determined by competitive markets and not by regulation.” *1988 Revenue Adequacy Determination*, 6 I.C.C. 2d at 938-39.<sup>1</sup>

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<sup>1</sup> The Board is subject to Congress’s directive to exempt railroad transportation activities except in certain instances specified by statute. 49 U.S.C. § 10502(a). Thus, the Board’s predecessor, the Interstate Commerce Commission, “exempted numerous commodities, services, and types of transactions from regulation,” based upon a “finding that traffic for [certain] individual commodities was sufficiently competitive and that railroads lacked sufficient market power such that abuse of shippers was not a substantial threat.” *Review of Commodity, Boxcar, and TOFC/COFC Exemptions*, S.T.B. Docket No. EP 704, Corrected Notice 2-3 (Oct. 25, 2010).

Nonetheless, in establishing its precedent on acquisition premiums, the Board has continually stated its intention to be vigilant toward changes in the industry, and to ensure that it retains the authority to grant relief where it is necessary to avoid unfair results. Thus, the Board has explained that its “decision will be driven by what is the most accurate and reasonable valuation in each particular case.” *Id.* at 941. The Board has said that it “will take appropriate action” where a railroad’s cost figures “do[] not comport with GAAP, or [where] the acquisition price has been inflated and does not accurately reflect the fair market value of the[] assets.”

Letter from Chairman Daniel R. Elliott, III, to Hon. Al Franken 1 (Mar. 28, 2011).

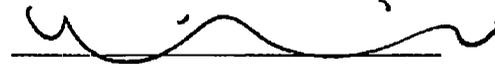
### **The WCTL Proceeding**

The Department has an interest in STB actions and policies that may affect the achievement of the Department’s goals for the rail industry. In recognizing STB’s precedent on acquisition premiums, the Department also understands the Board’s desire to remain apprised of the concerns facing shippers, railroads, other members of the industry, and the public. Indeed, the Department realizes that an effective system of rail transportation depends upon a concerted effort among public and private entities nationwide.

Thus, the Department looks upon this proceeding as an opportunity to continue the dialogue among stakeholders about the challenges facing the rail industry. The Department looks forward to hearing the views of other parties and to gaining further insights into the issues raised by the Petition. After considering the other parties’ opening remarks, the Department may offer additional views at a later stage in the proceeding.

October 28, 2011

Respectfully submitted,

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ROBERT S. RIVKIN

General Counsel  
United States Department of Transportation