

## United States Senate

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April 11, 2011

Daniel R. Elliot, III  
Chairman  
Surface Transportation Board  
395 E Street, S.W.  
Washington, DC 20423-0001

Dear Chairman Elliot:

I write to draw your attention to a specific concern related to the February, 2010 Berkshire Hathaway Incorporated (Berkshire) acquisition of the Burlington Northern Santa Fe Corporation (BNSF), which included its principal operating subsidiary, BNSF Railway Company. BNSF Railway is one of the largest railroads in the United States, with 32,000 miles of track in the western two-thirds of the country.

Before I outline these concerns, I wish to emphasize my belief that a revitalized freight rail network is very positive for the nation's transportation system. Railroads are the backbone of our nation's economy, and this year they are expected to reinvest over \$12 billion to upgrade and expand their network. I understand that much of the recent success of the railroads is due to renewed investor interest and the inflow of private capital, and Berkshire's acquisition of BNSF was a dramatic vote of confidence in the railroad industry model.

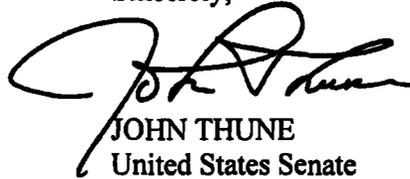
Despite my support for private investment in the nation's railroads, I have discrete concerns regarding the acquisition premium paid by Berkshire to BNSF shareholders, and the potential it could indirectly influence rail rates for a number of shippers. Presently, for Surface Transportation Board (STB) purposes, the acquisition premium refers to the difference between the depreciated book value of BNSF assets, and the price Berkshire paid to gain control of the railroad. Because Berkshire paid in excess of the book value, there is the potential that this difference could factor into BNSF's asset base and, in turn, impact STB calculations used to review and set certain rail rates.

While I am reviewing final figures from BNSF in their annual "R-1" report that was recently filed with the STB, there is the potential that BNSF could assign a higher value to certain assets based on the acquisition premium values. In theory, this could impact STB calculations on rate reasonableness. As you know, the STB has authority to determine whether a rate is unreasonably high only when a railroad has market dominance, and the rate exceeds 180% of the revenue to variable cost. Because the dollar amount represented by 180% of variable cost would be somewhat higher if an acquisition cost increases a railroad's investment base, there is a concern that some customers could be negatively impacted by creating a higher threshold for rate relief.

Additionally, one group of rail shippers who recently sought and received relief from the STB has a particular interest in the rate reasonableness calculation for BNSF. In 2009, Basin Electric and Western Fuels won an estimated \$345 million judgment against BNSF for rate relief on the over 8 million tons of coal hauled annually from the Powder River Basin in Wyoming. As part of the judgment, the shippers were awarded \$100 million in overcharges, and granted capped rates for the next 16 years. These capped rates are calculated using the same variable cost model that could be influenced by a write up in the value of BNSF assets due to the purchase premium. Given that there is well over \$200 million at stake in the form of future rate calculations, I believe this issue should be examined closely by the STB. Simply put, Western Fuels and Basin Electric should not be subject to higher rates than they would have been in the absence of the BNSF acquisition by Berkshire.

I understand that other U.S. Senators have raised related concerns with the STB, but I believe that this discrete issue warrants special attention. In order to ensure the continued success of America's freight rail network, the railroads and their customers must have complete confidence that the system is fairly regulated. I would encourage the Board to study this matter, and provide the appropriate remedy under existing authorities.

Sincerely,



JOHN THUNE  
United States Senate