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BEFORE THE

SURFACE TRANSPORTATION BOARD

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FINANCE DOCKET NO. 35506

WESTERN COAL TRAFFIC LEAGUE – PETITION FOR
DECLARATORY ORDER

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COMMENTS OF
ALLIANCE FOR RAIL COMPETITION
MONTANA WHEAT & BARLEY COMMITTEE
COLORADO WHEAT ADMINISTRATIVE COMMITTEE
IDAHO BARLEY COMMISSION
IDAHO WHEAT COMMISSION
MONTANA FARMERS UNION
NEBRASKA WHEAT BOARD
OKLAHOMA WHEAT COMMISSION
SOUTH DAKOTA WHEAT COMMISSION
TEXAS WHEAT PRODUCER BOARD
WASHINGTON GRAIN COMMISSION
NATIONAL ASSOCIATION OF WHEAT GROWERS

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Dated: November 8, 2012

Alliance for Rail Competition and the other shipper interests identified on the cover (hereafter "ARC, et al.") file these comments in response to the Board's Notice and Request for Comments served October 9, 2012 in this proceeding.

ARC, et al. filed comments on three prior occasions in this proceeding,[1] and participated in the Board's hearing on March 22, 2012. As is clear from prior statements by ARC, et al., it is bad law and bad policy to favor BNSF and disfavor BNSF's captive shippers with regard to the premium above market capitalization paid by Berkshire Hathaway when it acquired BNSF.

The specific impetus for this latest round of comments is the disclosure, long after the fact, that Berkshire Hathaway erred in failing to seek STB approval of its acquisition of BNSF, due to its (indirect) ownership of other rail carriers. BNSF, which presumably advised Berkshire Hathaway with respect to STB requirements, characterizes the error as a regrettable oversight, which can be taken care of through a prompt divestiture of the other rail carriers, no harm, no foul. Notably, one of the smaller railroads, CBEC Railway, Inc., is a rail carrier with which BNSF regularly interchanges coal trains.

To ARC, et al., further indulgence for BNSF is unwarranted. BNSF is a major railroad and this was a transaction of unprecedented scale, at least in recent decades.[2] The way the Board deals with the Berkshire Hathaway acquisition of BNSF is certain to be seen on Wall Street as a precedent for future acquisitions of other railroads. Even if the errors made in connection with this transaction were honest mistakes, the public interest and the Board's own interest in the integrity of its procedures would be damaged, possibly irreparably, if other entities

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[1] See the opening, reply and rebuttal comments filed October 28, 2011, November 28, 2011 and December 20, 2011, respectively.

[2] We are aware of attempts to analogize this acquisition to the acquisition by Blackstone of C&NW in 1989, but the size of this transaction, the passage of 20 years, and the absence of any similar acquisition premium challenges before the ICC make the two cases dissimilar.

with billions of dollars to spend were to conclude, with respect to STB approval, that it is better to seek forgiveness than permission.

In making this point, ARC, et al. are not ascribing underhanded motives to BNSF. We have no basis for believing that Mr. Buffett was dissembling when he expressed his interest in acquiring BNSF as a long-term investment rather than a short-term "play." ARC, et al. regard it as more significant than the Board has heretofore acknowledged that Berkshire Hathaway, which paid the premium in question, has never sought to influence the Board's treatment of the premium. So far as we are aware, Berkshire Hathaway itself has filed no comments in this proceeding. It is BNSF, which did not pay any premium, which argues for various premium-related benefits.

We do not know whether the BNSF acquisition would have been handled differently if STB approval had been considered potentially necessary. Maybe the terms would have differed, or greater care would have been exercised in light of expectations of shipper calls for conditions, including protections for BNSF's captive customers. The amount of the premium, which has been taken on faith, and as to which we cannot rule out correction if other mistakes turn up, might have been clarified in the evidentiary record.[3]

These considerations, however, are outweighed by others, specifically, adverse impacts on captive shippers, and concerns about implications for other acquisitions in the future.

From the perspective of captive shippers, "business as usual" treatment of the acquisition premium, when this transaction bears so little resemblance to the precedents on which BNSF relies, has at least three severe and obvious adverse impacts, precedential impacts aside.

First, BNSF would be able to recover $8.1 billion directly from captive shippers through rate increases. Whether it would recover any of the $8.1 billion from non-captive shippers is an

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[3] At the Board's March 22 hearing, CURE counsel Michael McBride accurately characterized the calculation of the amount of the premium as a "black box."

open question, and one not before the Board, but there would be no legal impediment to BNSF recovering the entire amount from its own captive shippers. In addition, BNSF would have a free hand to decide which shippers, or which categories of shippers, would be hit with the largest rate increases. There is no legitimate reason in the law or policy for the Board to permit this.

Second, BNSF could recover more than $8.1 billion from its captive shippers, because a write-up of its URCS costs would delay BNSF's achievement of long-term revenue adequacy. This consideration adds insult to injury, because there could be no more compelling proof of a railroad's ability to attract capital in the financial markets than Berkshire Hathaway's decision to pay billions of dollars more than market capitalization for BNSF. ARC, et al. have been informed that, if BNSF URCS costs had been corrected to eliminate the effects of the acquisition premium, BNSF would have been found revenue adequate for 2011. BNSF now has access to virtually unlimited capital from Berkshire Hathaway to meet its future growth needs. How can the STB continue to categorize BNSF as revenue inadequate?

Assuming the Board really does intend to limit or cap further differential pricing once a railroad achieves long-term revenue adequacy, an artificial delay of several years in reaching that milestone could easily be worth hundreds of millions of dollars to BNSF. There is no legitimate reason in law or policy for the Board to permit this. BNSF has experienced no increase in its costs of service as a result of the Berkshire Hathaway acquisition. Certainly, shippers received no operational benefits from the transaction.[4]

Third, failing to correct BNSF costs under URCS to adjust for the acquisition premium could permit all railroads to impose otherwise challengeable rate increases with immunity, inas-

[4] Berkshire Hathaway has done very well. USA Today reported on November 3, 2012 that BNSF contributed $937 million to third quarter 2012 profits compared with $766 million in the third quarter of 2011.

much as the write-up would affect the railroad industry cost of capital, which in turn affects revenue adequacy generally, not just for BNSF. Here again, the result could magnify the adverse impact on captive shippers beyond the $8.1 billion nominally at issue in this proceeding. Captive shippers via all railroads would be exposed to unjustified rate increases, and the railroads would enjoy a windfall that Berkshire Hathaway never requested. The equities here, and the public interest, heavily favor adjusting BNSF URCS costs to avoid victimizing captive shippers.

Indeed, under the Board's recent proposal in M&G Polymers USA, LLC v. CSX Transportation, Inc., Docket No. NOR 42123, decision served September 27, 2012, there could be a fourth form of adverse impact on captive shippers. BNSF has already conceded that, if relief sought by shippers in this proceeding is denied, its RSAM level would rise. See BNSF's Opening Evidence filed October 31, 2011 in this proceeding, at page 22, n. 15. The "refined approach" proposed in M&G Polymers could make it harder for shippers to establish BNSF market dominance due to these artificially increased RSAM levels. And higher URCS costs for BNSF will increase its variable costs and lower R/VC percentages for BNSF rates, artificially making fewer rates jurisdictional.

Finally, none of these impacts would escape the notice of Wall Street, or sovereign wealth funds, or anyone else, which may include visionaries but may also include corporate raiders whose interest might be to acquire a railroad for short-term gain, with major financing to come from rate increases on captive traffic.

Let us assume that Warren Buffet and the rest of Berkshire Hathaway's management are visionaries, with high-minded motives and a long-term perspective. If that is the case, an URCS-cost write-up played no part in the decision to acquire BNSF, and a decision by the Board to take reasonable measures to protect the interests of captive shippers would represent no penalty to Berkshire Hathaway, BNSF's sole stockholder.

However, such a decision would do a great deal to deter future Class I railroad acquisitions of the kind that should be deterred, i.e., transactions driven by the ability of the acquired railroad, post-acquisition, to recover any acquisition premium, even if larger than $8 billion, from captive shippers.

If the Board declines to adjust URCS costs, or revenue adequacy determinations, or cost of capital calculations, in this proceeding, in the erroneous belief that this acquisition is indistinguishable from UP's acquisition of SP or the acquisition of Conrail by NS and CSX, that willful misreading of "precedent" will severely limit the ability of the agency to do otherwise in the future.

The fact that BNSF erroneously failed to identify the interests in small rail carriers that would otherwise have delayed the acquisition or necessitated a request for Board approval, as occurred here, doesn't help BNSF's cause. On the contrary, the concern becomes even more acute that, in a future case involving a corporate raider, this precedent would force the Board to approve a similar or larger windfall for the railroad. It could also force the Board to approve similar or worse harm to captive shippers, and a similar tolerance of procedural irregularities or misrepresentations facilitating a deal that hurts the public but enriches the dealmaker.

For these reasons, 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.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Comments has, this 8th day of November, 2012, been served on all parties of record by first-class mail, postage prepaid.

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John M. Cutler, Jr.

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