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# United States Senate

COMMITTEE ON COMMERCE, SCIENCE,  
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September 27, 2012

The Honorable Daniel R. Elliott, III  
Chairman  
Surface Transportation Board  
395 E Street, SW  
Washington, DC 20423

ENTERED  
Office of Proceedings  
September 27, 2012  
Part of  
Public Record

Dear Chairman Elliott:

I am concerned about critical information recently brought to light regarding the regulatory review and approval of Berkshire Hathaway's acquisition of the BNSF Railroad. As you know, letters exchanged last week between BNSF and the Surface Transportation Board (STB), confirmed that, contrary to what it believed at the time of its acquisition of BNSF in February 2010, Berkshire Hathaway owns or controls two small shortline railroads – the CBEC Railway and the White City Terminal Union Railway. As the exchange of letters points out, the fact that Berkshire owned these two lines at the time of acquisition means that its acquisition of BNSF fell within the jurisdiction of the Board pursuant to 49 U.S.C. §11323, and that Berkshire should have submitted an application to the STB for approval of the transaction. As such, the STB was statutorily required to review the transaction to determine whether it was consistent with the public interest. The transaction should have only been allowed to proceed after approval and authorization by the Board. Clearly, this did not occur. Instead, the transaction was filed only with the Securities and Exchange Commission, the Department of Justice (DOJ) and Federal Trade Commission (FTC). The DOJ and FTC subsequently granted "early termination" of the mandatory waiting period under the Hart-Scott-Rodino Act, thus effectively approving the transaction under Federal anti-trust laws.

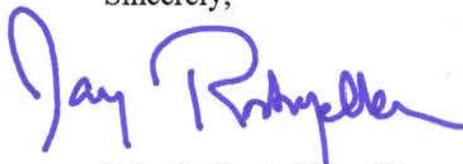
This unusual case brings to light a number of questions, the most critical of which is whether or not Berkshire's acquisition of BNSF should be deemed lawful. In the Board's response to BNSF's letter on this matter, the Board directed BNSF to provide a letter within 10 days that specifically states how BNSF proposes to remedy this situation. This action by the Board is clearly a first step in what will be a complex situation. I understand that this is a highly unique case, but it has left me with a number of questions about the actions and steps that the Board intends to undertake. Specifically:

1. Given that no application was filed with the STB and the fact that the STB did not conduct its statutorily-required review, was the approval of Berkshire's acquisition of BNSF lawful?

2. If, as should have occurred, the STB had reviewed the acquisition, specifically how would the STB's review have differed from the review conducted by the DOJ and FTC given the differing missions and review requirements among these agencies?
3. In light of last week's discoveries, will the STB now conduct its own review of the merger?
4. What specific steps does the STB intend to take in order to provide a full, thorough review of and remedy to this situation? What is the STB's timeline for making these determinations?
5. Given the unique circumstances of this matter, it is prudent that the Board allow for public comment so that stakeholders can provide input and thoughts concerning the acquisition of BNSF by Berkshire Hathaway. Doing so would provide a sense of transparency into the Board's process for dealing with this issue. Does the STB intend to open a docket for public comment?
6. In an acquisition, the acquiring entity is charged with determining whether it is a carrier or non-carrier. As an institutional practice, does the STB conduct its own independent review to confirm whether an entity is a carrier or not? If the acquiring entity determines it is not a carrier, does the STB require any certification to this fact?
7. What, if any, effect will this development have on the pending case at that STB concerning the \$8 billion acquisition premium paid by Berkshire Hathaway in its acquisition of BNSF and whether or not that premium should be applied to BNSF's asset base?
8. What effect, if any, will the revenues from the newly identified railroads that are owned by Berkshire Hathaway have in determining whether BNSF is revenue adequate?

These are just some of the many questions that this unique instance has brought forth. Given the high level of interest in Berkshire's acquisition of BNSF, and the potential impact these recent discoveries could have, I expect the STB to fully use the statutory authority it has been granted by Congress to judiciously and transparently review this issue and come to a sensible and equitable solution. I request that you provide responses to my questions by Monday, October 8<sup>th</sup>. As you move forward with this process, please keep my staff regularly and thoroughly informed of any developments that occur.

Sincerely,



John D. Rockefeller IV  
Chairman