United States Senate
WASHINGTON, DC 20510

March 22, 2011

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

Dear Chairman Elliott:

We write to express our concerns with the Surface Transportation Board's treatment of acquisition premiums when assessing the asset base of a Class I rail carrier. As you likely know, Berkshire Hathaway recently acquired BNSF Railway for approximately $7.3 billion over the company's book value. Allowing this and future acquisition premiums to be included in a railroad's regulatory rate base raises a serious concern for captive rail customers. Put simply, Berkshire Hathaway could pay an inflated price for BNSF, and then pass that cost on to its captive customers in the form of higher rates. We urge you to reexamine STB accounting policies to protect shippers against such practices.

More generally, we are troubled by the STB's practice of permitting the inclusion of acquisition premiums in its evaluation of a railroad's revenue adequacy. Over the last fifteen years, the STB's accounting method has never once found the railroad industry as a whole to have adequate revenues, and only a very small number of individual Class I railroads have been found to be revenue adequate in a given year. Prior to 1990, the STB's predecessor agency, the Interstate Commerce Commission (ICC), relied on book value, rather than acquisition cost, when determining revenue adequacy. The STB started using acquisition costs in 1990, in part because some railroads were acquired by other railroads for substantially *less* than their book value. The ICC noted at the time that this policy could change on a case-by-case basis and should depend on what is the most accurate and reasonable valuation in each particular case. We urge you to consider returning to this model.

Additionally, by including an acquisition premium in the capital asset base, a railroad is able to inflate artificially the revenue-to-variable cost ratio of 180 percent that is required by statute for a shipper to bring a rate dispute before the STB. The Board is necessarily limited in its ability to determine when a rail rate is unreasonably high, but we are concerned that the inflation of this congressionally established threshold will ultimately mean only a very small number of shippers are able to challenge rates before the STB. If the purchase of a railroad includes an acquisition premium over book value and the railroad is allowed to revalue its property and equipment costs upward to reflect that premium, then the variable cost calculation will increase and the likelihood that shippers will be able to show that rates exceed 180 percent of variable costs will decrease. We do not think this is what Congress intended when it established this threshold.

Unlike other railroad mergers, the Berkshire/BNSF transaction did not involve the merger of two railroads, and hence there can be no hope that this transaction will increase rail efficiencies that might justify the premium paid. In this case, if BNSF is able to include the acquisition premium in its investment base, it will decrease BNSF's return on investment, which may provide the appearance of a justification for a rate increase that the STB would be powerless to halt. Furthermore, Berkshire Hathaway's acquisition of BNSF was not subject to pre-approval by the STB, and thus the possible impact of the acquisition premium on the railroad industry, shippers, and the economy has not yet been subject to any prior Board review proceedings.

We understand that the STB is required to adhere to generally accepted accounting principles to the maximum extent practicable. But Congress has also required that the STB "shall periodically review its cost accounting rules and shall make such changes in those rules as are required to achieve the regulatory purposes of this part." See 49 U.S.C. § 11161. We urge the Board to examine this accounting issue, and at a minimum, initiate a proceeding to investigate the impact of including acquisition premiums when assessing the asset base of a carrier. We also understand that no other federal regulatory agency allows this practice, and we urge the Board to consider this when examining its current accounting practices.

Thank you for your prompt attention to this matter. We look forward to your response.

Sincerely,

Al Franken
United States Senator

David Vitter
United States Senator

Tom Harkin
United States Senator

Herb Kohl
United States Senator

Tim Johnson
United States Senator

Mary L. Landrieu
United States Senator

Mark L. Pryor
United States Senator

Michael B. Enzi
United States Senator

Amy Klobuchar
United States Senator

Jon Tester
United States Senator