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RAILROAD ANTITRUST ENFORCEMENT ACT OF 2007

HEARING

BEFORE THE

TASK FORCE ON ANTITRUST AND COMPETITION POLICY

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

SECOND SESSION

ON

H.R. 1650

FEBRUARY 25, 2008

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RAILROAD ANTITRUST ENFORCEMENT ACT OF 2007

MONDAY, FEBRUARY 25, 2008

HOUSE OF REPRESENTATIVES,
TASK FORCE ON ANTITRUST
AND COMPETITION POLICY
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Task Force met, pursuant to notice, at 4:02 p.m., in room 2141, Rayburn House Office Building, the Honorable John Conyers, Jr. (Chairman of the Task Force) presiding.

Present: Representatives Conyers, Jackson Lee, Smith, Goodlatte, Cannon and Issa.

Mr. CONYERS. Good afternoon. The hearing on the Antitrust Task Force will come to order.

We are pleased to have everyone here. I would like to begin our discussion this afternoon by observing that under current law, the Department of Justice and the Federal Trade Commission have limited authority to enforce Federal antitrust laws in the railroad industry. This is a subject that has not been on the front of the minds of many Members of Congress, and we thank Congresswoman Baldwin, a Member of the Judiciary Committee, for putting a little focus on this today.

The Department of Justice and the Federal Trade Commission have limited authority to enforce Federal antitrust laws in the railroad industry. Why is this important? Well, certain transactions among rail carriers, if approved by the industry's regulatory body, the Surface Transportation Board or STB, are exempt from Federal antitrust enforcement. And so this hearing seeks to examine whether the roles of the Department of Justice and the FTC, Federal Trade Commission, in the railroad industry need to be expanded.

So the measure under scrutiny today would eliminate some of the antitrust immunities that specifically apply to railroads, providing the Department of Justice, the Trade Commission, and the STB, with concurrent jurisdiction over antitrust matters. In addition, it proposes to eliminate some of the restrictions on remedies available to private plaintiffs in antitrust actions against rail carriers. The bill removes the carve-out in the Clayton Act that prevents private plaintiffs from obtaining injunctive relief in railroad antitrust suits. The bill would enable private plaintiffs to be awarded treble damages. Judicial precedent currently limits damages to the rail carriers' filed rate.

So there are several issues I will be looking at carefully: Under current law, do shippers have an effective method of challenging rate increases? Would the industry benefit from having concurrent jurisdiction among DOJ, FTC, and the STB? And, is there any reason to continue preserving antitrust immunities for railroads?

So I come to the hearing to listen to a distinguished panel of witnesses, but I will be listening most carefully to see if the railroads are able to convince the Members of this Committee that eliminating antitrust immunities will somehow harm their industry, and ultimately the consumers.

So I look forward to all of our witnesses today, and I would turn now to my friend and colleague from California, Darrell Issa, who is the acting Ranking Member this afternoon. Welcome.

Mr. ISSA. Thank you, Mr. Chairman. Thank you for holding this hearing today. I, too, look forward to hearing my colleague's views on the bill that she has offered. Certainly, H.R. 1650, the "Railroad Antitrust Enforcement Act of 2007," gives us a starting point to have this discussion. It is rather familiar that the Antitrust Task Force hears not about small companies needing to be protected from large trusts, but rather, as today, we are going to hear more about large companies, the railroads, and whether or not they are using monopolistic power and some other way gaming the pricing structure against other large companies, such as chemical and other large bulk shippers.

That is not altogether different than it was in 1887, when Congress passed the Interstate Commerce Act. Although many small farmers and rural individuals found themselves with no market power, you also had the titans of the industry, some of them owners of rails, some not, who used the rail system to set prices arbitrarily and to the benefit of their companies and to the detriment of their competitors.

Whether it is the Sherman Antitrust Act or other regulatory acts, we in Congress have had an active role for more than 100 years, actually about 150 years, in dealing with antitrust and the railroads. Notwithstanding that, it is clear that the railroad today is not the railroad of yesterday. Since 1980, and, again, since 1995, when Congress abolished the Interstate Commerce Commission, we have seen an unusual shift in the role of the railroad. The railroad today competes without any monopolistic power against trucks and other surface transportation that operate on subsidized highways. It competes against air freight. Certainly the growth of DHL and UPS and others shows us that people are willing to pay an awful lot more than a regulatory rate of a rail in order to move their goods.

Notwithstanding that, though, there are and will always be items whose value is such that they can only be moved over the surface by rail, or in which the clear need of society is to have them moved over rail and not on our highways. To that end Congress will always have a role in making sure that rails are in existence and able to do those jobs for which there is no competition.

It is that balancing act that today we are going to look at of realizing that many, many people ship with rail only when they are the least expensive, while others ship with them not just because they are the least expensive, but, in fact, because they have no choice.

It is that latter situation that we will deal with from an antitrust standpoint. Would the abolishment of the limited antitrust exemptions in itself cure this problem, or, in fact, is more needing to be done? We in Congress have an oversight role over regulatory agencies, and perhaps what we will discover is that it is that oversight that is lacking. I look forward to the hearing because I believe it will give us a better understanding of which of these two paths, or perhaps both, have to be explored.

Last, but not least, it is very, very clear to me that what we have today is a rail structure which has now reached virtually 100 percent capacity. In a free-market system, without regulation, it is very, very clear that rail would choose, with no other intervention by the government, to move those items which have the greatest return for them, and that is likely not to be those that have no choice but to ship by rail.

So, in light of that, I hope that we not only will work on the antitrust, but I would hope that our other Committees of Congress, such as Energy and Commerce, and others, particularly T&I, would work on the fact that rail needs to expand. We cannot expect to have rail prices and rail delivery continue to improve if, in fact, we do not have enough rail lines and capacity.

Mr. Chairman, I very much look forward to this. I believe that this is a very timely hearing, and I yield back.

Mr. CONYERS. Thanks very much, Darrell.

I notice that Lamar Smith, our Ranking Member, is here. If he had an observation at this point, I would be happy to yield to him.

Mr. SMITH. Thank you, Mr. Chairman. I do not have an opening statement, other than to welcome my colleague, Tammy Baldwin. I look forward to her testimony, as well as the testimony of the panel. I have to say I won't be able to stay too long because of a conflict. I appreciate you having a hearing on this subject.

Mr. CONYERS. We will be working together on this, and Darrell and I will be happy to debrief you.

I notice that Chris Cannon is here. I wondered if he wanted to make any observations at this time.

Mr. CANNON. Thank you, Mr. Chairman.

I appreciate you holding this hearing. You may not know, but I actually owned, depending on how you count, between a quarter and a half of the largest shipper on the Union Pacific line, so I am familiar with the issues. I care about these issues a lot. I appreciate your opening statement, and Mr. Issa's, and look forward to a very pleasant hearing. Thank you.

Mr. CONYERS. I am glad you made that disclosure before these hearings went too far along the way.

Mr. CANNON. I suspect that means I am on your side on this one as well.

Mr. CONYERS. Sheila Jackson Lee, welcome all the way from Houston. Any opening comments?

Ms. JACKSON LEE. Mr. Chairman, I don't own any railroads, but I will say to you that the city of Houston has had for a very long time as a symbol of its existence a train or railroad in its city symbol. So I want to thank my colleague Congresswoman Baldwin for her legislation, which calls us to question the extent of government oversight and, therefore, whether or not it needs to be refixed.

I remain open. I am cautious, however, about treading on antitrust exemptions, and hope that as the legislation proceeds in this hearing, and as I listen to the testimony of Ms. Baldwin, we will find an opportunity to reach common ground or a response to what I think is a very vital issue, and that is the expansion of freight service in areas not hereto utilized or serviced. I think that is an important message.

I look forward, Mr. Chairman, to the witnesses and this hearing. Thank you very much. I yield back and ask that my entire statement may be submitted into the record, unanimous consent.

Mr. CONYERS. Thank you.

I will accept all Members' statements into the record at this time, including Sheila Jackson Lee's.

[The prepared statement of Ms. Jackson Lee follows:]

PREPARED STATEMENT OF THE HONORABLE SHEILA JACKSON LEE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS, AND MEMBER, TASK FORCE ON ANTITRUST AND COMPETITION POLICY

Thank you, Mr. Chairman, for your leadership in convening today's very important hearing on H.R. 1650, the Railroad Antitrust Enforcement Act of 2007. I would also like to thank the ranking member, the Honorable Ric Keller, and welcome our panelists. I look forward to their testimony.

This hearing could not be more timely, Mr. Chairman.

This legislation was introduced in 110th Congress and it eliminates the limited antitrust immunity that currently exists for the U.S. freight railroads. The basic premise of H.R. 1650 is that freight railroads enjoy wide-ranging immunity from out antitrust laws, giving them freedom from government oversight. This premise is not entirely correct. While I am a proponent of fair and equitable competition, I believe that we should tread cautiously in removing any antitrust exemptions and in allowing a right of private injunctive relief as a remedy.

RAILROADS ARE GENERALLY SUBJECT TO MOST ANTITRUST LAWS

Freight railroads are subject to most antitrust laws, including those that prohibit agreements among railroads to set rates, allocate markets, or unreasonably restrain trade. The few, limited antitrust exemptions applicable to railroad pertain only to conduct for which the Surface Transportation Board (STB), an independent agency within the U.S. Department of Transportation, has regulatory authority over railroads. The exemptions prevent dual and potentially conflicting oversight of railroads by the STB and the courts, while promoting safer, more efficient rail service.

Critics of U.S. freight railroads complain that railroads are "broadly exempt from the nation's antitrust laws." The implication is that railroads can engage in anticompetitive conduct free of government oversight. This is simply not true.

In fact, freight railroads are subject to antitrust laws that prohibit agreements among railroads to set rates, allocate markets, or otherwise unreasonably restrain trade. In addition, railroads are subject to extensive economic regulation by the STB. Among other things, the STB has jurisdiction over rail mergers and a range of rail service- and rate-related issues, including the level of rail rates in cases where railroads face no effective competition.

RAILROADS HAVE CERTAIN LIMITED ANTITRUST EXEMPTIONS

A few limited antitrust exemptions are available to railroads, but the exemptions are narrowly applied and only cover aspects of railroad conduct that are already subject to oversight by the STB. Because the railroads' conduct is subject to regulation by the STB, the limited antitrust exemptions exist to avoid dual (and potentially conflicting) oversight by the STB and the courts. The exemptions also allow railroads to work together in a limited way to increase efficiency and enhance safety.

Mr. Chairman, to further demonstrate we should tread cautiously with H.R. 1650, I will outline the narrow antitrust exemptions that currently apply to rail carriers and the STB's consideration of traditional antitrust principles in its administration of the Interstate Commerce Act. Next, I will discuss the portions of the proposed legislation that may make effective, integrated economic regulation of the rail industry more difficult.

As I stated earlier, railroads today are already subject to antitrust laws. They face civil and criminal liability for violations of the Sherman Act (*e.g.,* price-fixing, market allocation, bid rigging), and they have been successfully sued for violating that Act. *See, e.g., In re Burling N., Inc.,* 822 F.2d 518 (5th Cir. 1987); *see also, In re Lower Lake Erie Iron Ore Antitrust Litigation,* 998 F.2d 1144 (3rd Cit. 1993). Moreover, the survival of the judicially created *Keogh* doctrine, which had long immunized the railroads from certain antitrust civil suits involving rates that were filed with the Board's predecessor, the Interstate Commerce Commission (ICC), is in serious doubt. *Keogh v. Chicago & Nw. Ry,* 260 U.S. 156 (1922); *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.,* 476 U.S. 409 (1986). And, although rail carriers may argue that a court in a particular case should find implied antitrust immunity, courts do not favor implied immunities and require a showing of "clear repugnancy" between the regulatory regime and the imposition of the antitrust laws. *See Credit Suisse Securities, LLC v. Billing,* 127 S. Ct. 2383 (2007).

EXPRESS STATUTORY IMMUNITIES FROM THE ANTITRUST LAWS

The railroads have several express statutory immunities.

First, rail transactions reviewed and approved by the TSB under 49 U.S.C. Secs. 11321–11328 (which include consolidations, mergers, acquisitions, some leases, trackage rights, pooling arrangements, and agreements to divide traffic) cannot be separately challenged in federal court under the antitrust laws.

Second, the TSB may grant antitrust immunity to certain types of agreements related to rates or charges. *See* 49 U.S.C. Sec. 10706. It should be noted that this provision cannot be used to immunize something akin to a price-fixing agreement between competing railroads because the TSB cannot authorize rail carriers to discuss or participate in agreements related to single-line rates, or to inter-line rates of a particular movement unless the rail carrier can practicably participate in the movement. See 49 U.S.C. Sec. 1076(a)(3)(A)(i),(ii).

Additionally, there are two main categories of express immunities for railroads under the Clayton Act. Specifically, Section 16 provides that only the federal government may bring suit for injunctive relief against any common carrier subject to the TSB's jurisdiction. *See* 15 U.S.C. Sec. 26. Second, railroads, as common carriers subject to the TSB's jurisdiction, are expressly immune from the Federal Trade Commission (FTC) Act, which bans methods of unfair competition. *See* 15 U.S.C. Sec. 45(a)(2). However, the TSB prohibits the railroads from unreasonable competition within the rail industry. *See* 49 U.S.C. Sec. 10702.

PROBLEMS WITH THE PROPOSED LEGISLATION

Presently, only the United States Department of Justice (DOJ) or the STB may bring suit for injunctive relief against a common carrier subject to STB jurisdiction. 15 U.S.C. Sec. 26. The purpose behind this provision is to preclude any interference by injunction with any business or transaction of interstate carriers of sufficient public significance and importance to be within the jurisdiction of the STB, except when the suit is brought by the Government.

One area of concern that I have with this legislation is that H.R. 1650 would permit private parties to obtain injunctive relief against rail carriers in individual Sherman or Clayton Act challenges. This presents a serious risk to the centralized oversight of the TSB. Courts are not responsible for, nor do they possess the expertise to consider, how a decision revolving a discrete dispute between a single carrier and a single shipper will affect other carriers and shippers on that line or even in other parts of the country. Only the TSB is charged with examining the rail industry from both a national, regional, and local perspective.

Giving courts injunctive power in rail-related disputes would also create a great potential for conflicting decision from individual courts. Presently, the TSB has developed a consistent body of law that approaches competition issues with a viewpoint broadened by other rail transportation goals and provides the basis upon which both carriers and shippers shape their conduct and can assess their remedies. Courts would not the benefit of examining the broad public interest considerations that are at the disposal of the TSB. For example, the TSB has more experience in determining the adequacy of rail revenues to support capitol investment, health and public safety, fair wages, etc. In addition, some rail disputes might not lend themselves to one-time remedies and might need to be revisited often. In these instances, the court cannot be a substitute for regulators.

Many of the injunctive remedies that a court might order in an antitrust case may themselves require Board approval. This would simply add another layer of complexity and expense that would be added to the rail disputes.

Finally, because the STB already reviews rail mergers, H.R. 1650 would subject rail mergers and acquisitions to both the approval process and criteria of the TSB and traditional Clayton Act standards and procedures. Under the current scheme, the TSB must consult the DOJ before approving any merger. The TSB takes into consideration, and generally follows the recommendation of the DOJ because both are concerned with improper mergers. My concern, and the concern echoed by the TSB, is that dual merger review would frustrate the TSB's ability to fashion merger conditions based upon public interest concerns. These decisions are best left to the TSB and not to courts or federal antitrust agencies.

In sum, railroads are generally subject to antitrust laws. All aspects of railroad conduct that are exempt from antitrust laws are subject to the STB's regulatory jurisdiction. Therefore, ending railroad antitrust exemptions would not fill any void in the law. Instead, it would provide a dual remedy to shippers, reduce the efficiency of rail operations, and interfere with the STB's implementation of national rail transportation policies set by Congress. Limited antitrust exemptions for railroads exist because railroads are subject instead to economic regulation. We should think very hard about removing the railroads limited antitrust exemptions and we should look more closely at whether a right of private injunctive relief would benefit the railroads and the public at large.

Thank you, Mr. Chairman, I yield the remainder of my time.

Mr. CONYERS. We turn now to our only Member from Congress, the author of the measure, Tammy Baldwin, who is the first woman to serve in the House of Representatives from the great State of Wisconsin. She has been with us since 1998, and how she works on two major Committees, Judiciary and Energy and Commerce, is something I can't figure out. She is a forceful supporter of civil rights, an advocate for those in our society whose voices too often are not heard. She is a pragmatist that has brought together conservative as well as progressive thinkers, and she spent a great deal of time on health care, almost as much as me.

So I am happy to welcome her to begin her discussions. Of course, her statement will be in the record.

Welcome to your Committee, Tammy Baldwin.

STATEMENT OF THE HONORABLE TAMMY BALDWIN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WISCONSIN, AND MEMBER, COMMITTEE ON THE JUDICIARY

Ms. BALDWIN. Thank you, Mr. Chairman. I am delighted to have the opportunity today to address H.R. 1650, and delighted that you have chosen to have this hearing, and very interested in hearing our expert panel that will follow my presentation.

This important bipartisan legislation will restore competition to the rail industry by providing relief to thousands of shippers across the country dependent upon freight rail.

Let me begin with a little bit of history. Our Nation's railroad system was designed to serve our country, to transport goods and products from rural areas and cities to distribution points across the Nation. And over the years they have seen good times and bad times, but they have always provided an essential service to the Nation.

Back in 1980, the railroad industry was in poor financial health, overbuilt and failing. Seeking a remedy, Congress removed much of the regulatory oversight over the industry, and merger authority was placed under the industry's sole regulator, the Surface Transportation Board. Unfortunately, in 1980, Congress did not remove the antitrust exemptions that the industry had accumulated through various acts of Congress during the 1900's.

Free from government oversight by the DOJ or the FTC, the rail industry has undergone dramatic consolidation, shrinking from over 40 major Class 1 railroads to 4 major carriers today, carrying 90 percent of our Nation's freight. This level of concentration and the resulting lack of competition certainly were never envisioned by Congress back in 1980.

Over the years, while the railroads have profited, record profits, in fact, in recent years, the effects on shippers with little or no access to transportation competition along their route has been striking and largely ignored by the STB. Specifically, shippers report spiking rail rates and unreliable service.

Take one example in my home State of Wisconsin, Dairyland Power. This rural cooperative located in LaCrosse, Wisconsin, provides electricity for approximately 575,000 people in Wisconsin, Minnesota, Iowa and Illinois. Their three coal-fired power plants consume 3.2 million tons of coal per year, with 75 percent of that coal coming from the Powder River Basin located in Wyoming. All of this coal, all of it, is dependent upon rail for transportation, and Dairyland's power plants are served by only one railroad.

Over the years Dairyland has reported deteriorating service quality, at times forcing them to cut back on generation due to the insufficient coal inventories. But the real kicker came at the end of 2005 when the railroad that holds Dairyland captive raised their rates dramatically. The energy cooperative saw average rate increases of 93 percent as of January 2006 for 1 year of rail transportation service. It now costs Dairyland $75 million per year to ship by rail $30 million worth of coal; $75 million to ship $30 million worth of coal. The increase has translated into a 15 to 20 percent increase in electricity rates for the customers served by the cooperatives that depend on Dairyland for their power.

Let me be clear, utilities are not the only companies passing on these transportation rate hikes to their customers. Consumers also face increased rates from other captive shippers, including chemical companies, the manufacturing industry, the agricultural sector, forest and paper companies, among many others. Of course, consumers also pay the increased costs of the electricity consumed by restaurants, hospitals, dry cleaners, and other producers of good and services.

The trade associations representing many of these industry sectors, like the American Chemistry Council, the American Corn Growers, and the Steel Manufacturers Association, have endorsed the Railroad Antitrust Enforcement Act as a means of obtaining relief from the railroad monopoly power, and you will be hearing some of their stories later today.

To help ease the burden felt by consumers and shippers alike, Representatives Pomeroy, Alexander, Walz and I introduced H.R. 1650, the Railroad Antitrust Enforcement Act of 2007 in the House. Let me take a quick moment to explain what the bill does. First, it eliminates the antiquated railroad antitrust exemption that has no current public policy justification and is protecting anticompetitive conduct by the railroad industry.

A November 2007 letter from 21 State attorneys general to the House leadership and Senate leadership is asking Congress to remove the railroad antitrust exemption, and it reflects my belief that this provision is necessary, and I ask that this letter be made a part of the record.

Mr. CONYERS. Without objection.

[The information referred to follows:]

STATE ATTORNEYS GENERAL
A Communication From the Chief Legal Officers
Of the Following States:
Montana, South Dakota, Arizona, Arkansas, California, Connecticut, Delaware, the District of Columbia, Guam, Iowa, Louisiana, Minnesota, Mississippi, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma and Utah

November 19, 2007

Via Facsimile

Honorable Harry Reid
Majority Leader
United States Senate
Washington, DC 20510

Honorable Mitch McConnell
Minority Leader
United States Senate
Washington, DC 20510

Honorable Nancy Pelosi
Speaker of the House of Representatives
Washington, DC 20515

Honorable John Boehner
Minority Leader, House of Representatives
Washington, DC 20515

RE: Support for the Railroad Antitrust Enforcement Act of 2007 (H.R. 1650 and S. 772)

We, the undersigned Attorneys General, are writing to encourage Congress to remove the current railroad antitrust exemptions and subject the nation's major railroads to the basic law that ensures competition in our nation. Legislation that has been approved by the Senate Judiciary Committee and that is pending before the House Judiciary Committee (S. 772 and H.R. 1650), is essential to this goal. Similar legislation was introduced during the 109th Congress but it was not acted upon. This year, identical versions of both bills have been introduced in the House and Senate. We respectfully urge you and your colleagues to report and pass these important bills this year in your respective bodies. Rail customers in our states in a variety of industries are suffering from the classic symptoms of unrestrained monopoly power: unreasonably high and arbitrary rates and poor service, and this legislation is a part of the solution.

In 1980, the Congress deregulated most railroad activities through the Staggers Rail Act of 1980. The Interstate Commerce Commission, replaced in 1995 by the Surface Transportation Board (STB), was charged with the responsibility of restraining railroad monopoly power against those rail customers without access to competition. At the same time, the Congress did not remove the antitrust exemptions that had been granted to the railroad industry when they were extensively and tightly regulated.

Since 1980, the major freight railroad industry has consolidated from over 40 Class I providers to seven Class I's, four of which control over 90% of the nation's rail traffic. We understand from our citizens that the Surface Transportation Board has failed in its responsibility to restrain railroad monopoly power. In fact, a 2004 Department of Justice Antitrust Division letter to the Chairman of the House Judiciary Committee strongly suggests that some of the railroad practices allowed by the STB would be of questionable legality under the nation's antitrust laws.

Thus, today, the citizens of our states often find themselves subject to anticompetitive behavior on the part of the freight railroads, with significant adverse consequences:

- Coal is used to generate about 50% of the electricity in the nation. A number of coal-fired electricity generators in the west, midwest, southwest and southeastern portions of our nation are confronting rate increases that sometimes reach 100%+ and although coal supplies are better now then they have been, many utilities are still not receiving the amount of coal for which they have contracted with the coal producers and railroads for delivery. These utilities have to find supplemental coal, in some cases from foreign sources, including Indonesia, to maintain inventories. The result is increased electricity costs for consumers.

- Through pricing and service practices the railroads have forced consolidation of many grain elevators of all sizes into larger companies to build new facilities to load 100-110 car shuttle trains. This has shifted cost to the farming and grain-handling sector. It has also shifted cost to the public road sector as new and increased grain gathering patterns by truck develop to feed these facilities. Service is auctioned to the highest bidder where large companies can buy more. When transportation is tight this access to service is sold through a secondary market with premiums that can boost real transport cost 20-40% over the standard rate. The secondary marketer, not the railroad, gets the excess. This interrupts the market signal back to the railroad to add equipment to its fleet.

- Two-thirds of the chemical plants in the nation are served by a single railroad, with many of their customers also subject to single rail service. This railroad monopoly power is resulting in rates and service that is making American manufactured goods from chemical products uncompetitive with imported goods – which normally enjoy more competitive rail transportation rates because they have their choice of entry points into the nation.

- Multi-national companies that can site their plants in any number of countries are extremely reluctant to invest in a U.S. site that is served by a single railroad. One global forest products company is currently considering a major investment at the site of its current paper manufacturing facility in a midwestern state. The site is served by a single railroad. The transportation cost of moving finished product from this midwestern state to its market in the southeastern U. S., a distance of about 1,400 miles, is the same as the transportation cost of moving the finished product from Europe to the same southeastern U.S. market, a distance of almost 5,000 miles. This domestic transportation cost disadvantage presents a significant obstacle to increased foreign investment in our nation.

The anticompetitive practices employed by the freight railroads that are exempt from the antitrust laws of the nation allow for the situations described above.

In summary, the major railroads of our nation provide an essential service to our economy. They must be financially viable and efficient. Historically, our nation has found that the best way to ensure economic success and economic efficiency is through the discipline of competition.

We ask that you ensure a strong and viable rail system in the United States by ensuring that the railroads are subject to market competition through full application of the nation's antitrust laws.

Sincerely,

Mike McGrath
Attorney General of Montana

Larry Long
South Dakota

Terry Goddard
Attorney General of Arizona

Dustin McDaniel
Attorney General of Arkansas

Edmund G. Brown, Jr.
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Mark Shurtleff
Attorney General of Utah

cc: Honorable Patrick Leahy
Chairman,
Senate Committee on the Judiciary

Honorable Orrin Hatch
Ranking Member
Senate Committee on the Judiciary

Honorable John Conyers
Chairman
House Committee on the Judiciary

Honorable Lamar Smith
Chairman
House Committee on the Judiciary

Ms. BALDWIN. Second, the bill permits the Department of Justice and FTC to review railroad mergers under the antitrust law to ensure competitive markets.

Finally, the bill allows State attorneys general and other private parties to sue for damages to halt anticompetitive conduct, both of which are not currently allowable under Federal law.

I might add that the companion bill to H.R. 1650, which was introduced by Wisconsin senior Senator and Chairman of the Senate Antitrust Committee has already been reported out of the Senate Judiciary Committee by voice vote with no objection and is awaiting action on the floor.

Before I conclude, there is one big myth regarding the legislation that I would like to dispel. Opponents argue that by subjecting the railroads to our Nation's antitrust laws, we will somehow be re-regulating them. Our legislation does nothing of the sort. Subjecting the railroads to antitrust laws is about competition, not re-regulation. The bill simply places the rail industry under the same antitrust laws that every other industry, such as telecommunications, energy, or even other forms of freight transportation, including trucking and aviation, already face.

This bill will not fix all the problems with the railroad industry, but it will be a starting point for good-faith negotiation between rails and shippers, and it will restore some of the public interest responsibilities to our Nation's rail system.

Again, thank you, Mr. Chairman and Members of the Committee, for consideration of this important legislation. I look forward to working with you for its advancement in this Congress.

Mr. CONYERS. Thank you, Congresswoman Baldwin. We are appreciative that you brought our attention to this matter.

[The prepared statement of Ms. Baldwin follows:]

PREPARED STATEMENT OF THE HONORABLE TAMMY BALDWIN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WISCONSIN, AND MEMBER, COMMITTEE ON THE JUDICIARY

Thank you Mr. Chairman for the opportunity to testify today. I am very appreciative of the Committee's consideration of HR 1650, the Railroad Antitrust Enforcement Act of 2007. This important bipartisan legislation will restore competition to the rail industry and provide relief to thousands of shippers across the nation who are dependent on freight rail.

First, let me begin with a little history. Our nation's railroad system was designed to serve our country—to transport goods to rural areas and distribution points across the nation. And over the years, they have seen good and bad times. Back in 1980, the railroad industry was in poor financial health. Seeking a remedy, Congress granted them an exemption from U.S. antitrust statutes and merger authority was placed under the industry's sole regulator—the Surface Transportation Board.

But, free from government oversight by the DOJ or the FTC, the rail industry has undergone dramatic consolidation, shrinking from over 40 major Class 1 railroads to four major carriers today carrying 90% of our nation's freight. This level of concentration and resulting lack of competition certainly were never envisioned by Congress in 1980.

And, over the years while the railroads have profited—record profits, in fact—the effect on shippers with little or no competition along their route has been striking, and largely ignored by the STB.

Specifically, shippers report spiking rail rates and unreliable service. Take Dairyland Power in my home state of Wisconsin, for example. This rural cooperative located in La Crosse represents the power needs of approximately 575,000 people in Wisconsin, Minnesota, Iowa, and Illinois. Their three coal-fired power plants consume 3.2 million tons of coal per year, with 75% of that coal coming from the Powder River Basin located in Wyoming. All of this coal is dependent on rail for transportation.

Over the years, Dairyland has reported deteriorating service quality; at times forcing them to cut back generation due to insufficient coal inventories.

But the real kicker came in the last few years when the supply chain railroad raised Dairyland's rates dramatically. The energy cooperative saw average rates increase 93% as of January 2006 for one year of rail transportation service. It now costs about $75 million to ship by rail $30 million worth of coal.

With increases this high, Dairyland and other captive utilities have no choice but to raise their electric rates. So it is consumers—our constituents—who bear the burden of this unwarranted antitrust exemption manipulated by the rail system. And, let me be clear, the costs passed on to consumers are not solely by the utility companies. Consumers also face increased rates from other captive shippers—including chemical companies, the manufacturing industry, agricultural sector, forest and paper companies, among others. These sectors too can provide story after story of exorbitant rates, delayed service, and surcharge fees. I might mention that many of them (such as the American Chemistry Council, American Corn Growers, and the Steel Manufacturers Association) have endorsed the Railroad Antitrust Enforcement Act as a means for some future relief. And, you will be hearing some of their stories today.

To help ease the burden felt by consumers and shippers alike, Representatives Pomeroy, Alexander, Walz, and I introduced the Railroad Antitrust Enforcement Act in the House. Let me take a minute to explain what this bill does:

- First, it eliminates the antiquated railroad antitrust exemption that has no current public policy justification and is protecting anticompetitive conduct by the railroad industry. A November 2007 letter from 21 state Attorneys General to the House and Senate Leadership asking Congress to remove the railroad antitrust exemption reflects my belief that this provision is necessary—and I ask that this letter be made a part of the record.
- Second, the bill permits the Justice Department and FTC to review railroad mergers under antitrust law
- And finally, the bill allows state Attorneys General and other private parties to sue for damages and to halt anticompetitive conduct, both of which are not currently allowable under federal law.

I might add that the companion bill, introduced by Mr. Kohl in the Senate, already passed out of the Senate Judiciary Committee by voice vote and is awaiting a vote on the floor.

Before I conclude, there is one big myth regarding the legislation that I would like to dispel. Opponents argue that by subjecting the railroads to our nation's antitrust laws, we will somehow be "reregulating them." Our legislation does nothing of the sort. Subjecting the railroads to antitrust laws is about competition . . . not reregulation. This bill simply places the rail industry under the same antitrust laws that every other industry such as telecommunications, energy, or even other forms of freight transportation—including trucking and aviation—faces.

This bill will not fix all of the problems with the railroad industry. But, it will be a starting point for good faith negotiations between the rails and shippers. And, it will restore some of the public interest responsibilities to our nation's rail system.

Again, thank you Mr. Chairman for the committee's consideration of this important legislation. I look forward to working with you and other members of this committee to ensure that this bill is passed into law in the remaining months of the 110th Congress.

ATTACHMENT

I

110TH CONGRESS
1ST SESSION

H. R. 1650

To amend the Federal antitrust laws to provide expanded coverage and to eliminate exemptions from such laws that are contrary to the public interest with respect to railroads.

IN THE HOUSE OF REPRESENTATIVES

MARCH 22, 2007

Ms. BALDWIN (for herself, Mr. ALEXANDER, Mr. POMEROY, Mr. WALZ of Minnesota, and Mr. BAKER) introduced the following bill; which was referred to the Committee on the Judiciary, and in addition to the Committees on Transportation and Infrastructure and Energy and Commerce, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

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A BILL

To amend the Federal antitrust laws to provide expanded coverage and to eliminate exemptions from such laws that are contrary to the public interest with respect to railroads.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Railroad Antitrust Enforcement Act of 2007".

SEC. 2. INJUNCTIONS AGAINST RAILROAD COMMON CARRIERS.

The proviso in section 16 of the Clayton Act (15 U.S.C. 26) ending with "Code." is amended to read as follows: "*Provided,* That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit for injunctive relief against any common carrier that is not a railroad subject to the jurisdiction of the Surface Transportation Board under subtitle IV of title 49, United States Code.".

SEC. 3. MERGERS AND ACQUISITIONS OF RAILROADS.

The sixth undesignated paragraph of section 7 of the Clayton Act (15 U.S.C. 18) is amended to read as follows:

"Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Secretary of Transportation, Federal Power Commission, Surface Transportation Board (except for agreements described in section 10706 of title 49, United States Code, and transactions described in section 11321 of that title), the Securities and Exchange Commission in the exercise of its jurisdiction under section 10 (of the Public Utility Holding Company Act of 1935), the United States Maritime Commission, or the Secretary of Agriculture under any statutory provision vesting such power

SEC. 4. LIMITATION OF PRIMARY JURISDICTION.

The Clayton Act is amended by adding at the end thereof the following:

"SEC. 29. In any civil action against a common carrier railroad under section 4, 4C, 15, or 16 of this Act, the district court shall not be required to defer to the primary jurisdiction of the Surface Transportation Board.".

SEC. 5. FEDERAL TRADE COMMISSION ENFORCEMENT.

(a) CLAYTON ACT.—Section 11(a) of the Clayton Act (15 U.S.C. 21(a)) is amended by striking "subject to jurisdiction" and all that follows through the first semicolon and inserting "subject to jurisdiction under subtitle IV of title 49, United States Code (except for agreements described in section 10706 of that title and transactions described in section 11321 of that title);".

(b) FTC ACT.—Section 5(a)(2) of the Federal Trade Commission Act (15 U.S.C. 45(a)(2)) is amended by striking "common carriers subject" and inserting "common carriers, except for railroads, subject".

SEC. 6. EXPANSION OF TREBLE DAMAGES TO RAIL COMMON CARRIERS.

Section 4 of the Clayton Act (15 U.S.C. 15) is amended by—

(1) redesignating subsections (b) and (c) as subsections (c) and (d), respectively; and

"(b) Subsection (a) shall apply to common carriers by rail subject to the jurisdiction of the Surface Transportation Board under subtitle IV of title 49, United States Code, without regard to whether such railroads have filed rates or whether a complaint challenging a rate has been filed.".

SEC. 7. TERMINATION OF EXEMPTIONS IN TITLE 49.

(a) IN GENERAL.—Section 10706 of title 49, United States Code, is amended—

(1) in subsection (a)—

(A) in paragraph (2)(A), by striking ", and the Sherman Act (15 U.S.C. 1 et seq.)," and all that follows through "or carrying out the agreement" in the third sentence;

(B) in paragraph (4)—

(i) by striking the second sentence; and

(ii) by striking "However, the" in the third sentence and inserting "The"; and

(C) in paragraph (5)(A), by striking ", and the antitrust laws set forth in paragraph (2) of this subsection do not apply to parties and other persons with respect to making or carrying out the agreement"; and

(2) by striking subsection (e) and inserting the following:

"(e) APPLICATION OF ANTITRUST LAWS.—

"(1) IN GENERAL.—Nothing in this section exempts a proposed agreement described in subsection (a) from the application of the Sherman Act (15 U.S.C. 1 et seq.), the Clayton Act (15 U.S.C. 12, 14 et seq.), the Federal Trade Commission Act (15 U.S.C. 41 et seq.), section 73 or 74 of the Wilson Tariff Act (15 U.S.C. 8 and 9), or the Act of June 19, 1936 (15 U.S.C. 13, 13a, 13b, 21a).

"(2) ANTITRUST ANALYSIS TO CONSIDER IMPACT.—In reviewing any such proposed agreement for the purpose of any provision of law described in paragraph (1), the Board and any other reviewing agency shall take into account, among any other considerations, the impact of the proposed agreement on shippers, on consumers, and on affected communities.".

(b) COMBINATIONS.—Section 11321 of title 49, United States Code, is amended—

(1) in subsection (a)—

(A) by striking "The authority" in the first sentence and inserting "Except as provided in sections 4 (15 U.S.C. 15), 4C (15

U.S.C. 15c), section 15 (15 U.S.C. 25), and section 16 (15 U.S.C. 26) of the Clayton Act (15 U.S.C. 21(a)), the authority"; and

(B) by striking "is exempt from the antitrust laws and from all other law," in the third sentence and inserting "is exempt from all other law (except the antitrust laws referred to in subsection (c)),"; and

(2) by adding at the end the following:

"(c) APPLICATION OF ANTITRUST LAWS.—

"(1) IN GENERAL.—Nothing in this section exempts a transaction described in subsection (a) from the application of the Sherman Act (15 U.S.C. 1 et seq.), the Clayton Act (15 U.S.C. 12, 14 et seq.), the Federal Trade Commission Act (15 U.S.C. 41 et seq.), section 73 or 74 of the Wilson Tariff Act (15 U.S.C. 8–9), or the Act of June 19, 1936 (15 U.S.C. 13, 13a, 13b, 21a).

"(2) ANTITRUST ANALYSIS TO CONSIDER IMPACT.—In reviewing any such transaction for the purpose of any provision of law described in paragraph (1), the Board and any other reviewing agency shall take into account, among any other considerations, the impact of the transaction on shippers and on affected communities.".

(c) CONFORMING AMENDMENTS.—

(1) The heading for section 10706 of title 49, United States Code, is amended to read as follows: "**Rate agreements**".

(2) The item relating to such section in the chapter analysis at the beginning of chapter 107 of such title is amended to read as follows:

"10706. Rate agreements.".

SEC. 8. EFFECTIVE DATE.

(a) IN GENERAL.—Subject to the provisions of subsection (b), this Act shall take effect on the date of enactment of this Act.

(b) CONDITIONS.—

(1) PREVIOUS CONDUCT.—A civil action under section 4, 15, or 16 of the Clayton Act (15 U.S.C. 15, 25, 26) or complaint under section 5 of the Federal Trade Commission Act (15 U.S.C. 45) may not be filed with respect to any conduct or activity that occurred prior to the date of enactment of this Act that was previously exempted from the antitrust laws as defined in section 1 of the Clayton Act (15 U.S.C. 12) by orders of the Interstate Commerce Commission or the Surface Transportation Board issued pursuant to law.

(2) GRACE PERIOD.—A civil action or complaint

than 180 days after the date of enactment of this Act with respect to any previously exempted conduct or activity or previously exempted agreement that is continued subsequent to the date of enactment of this Act.

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Mr. CONYERS. As Darrell Issa has observed, the other body has for once gotten ahead of us. That is an unusual state of affairs.

I thank you very much. We will all be working with you, of course, after we hear from our very excellent witnesses today.

We now would like to invite to the witness table Susan Diehl, Terry Huval, G. Paul Moates, Dr. Darren Bush. Please join us.

Ms. Diehl had a great deal of experience in her business career. She is senior vice president of logistics and supply chain management for Holcim, Incorporated, one of the Nation's largest producers of cement. We will put other items concerning her career into the record.

We will accept your statement into the record and invite you to begin the conversation among us this afternoon. Welcome, Ms. Diehl, to the Judiciary Committee.

TESTIMONY OF SUSAN M. DIEHL, SENIOR VICE PRESIDENT, LOGISTICS AND SUPPLY CHAIN MANAGEMENT, HOLCIM (US) INC.

Ms. DIEHL. Thank you, Mr. Chairman. Good afternoon. Thank you, Members of the Task Force.

My name is Susan Diehl, and I am the senior vice president of logistics and supply chain management at Holcim U.S., Incorporated. Mr. Chairman, as a life-long resident of the great State of Michigan, I tracked your distinguished career for so many years, and it really is a distinct pleasure for me to be here today to speak to your Committee about Holcim's experience as a captive shipper. I want to thank you for your service to our State over so many years, and also to our country.

Mr. CONYERS. Thank you.

Ms. DIEHL. As a Michiganian like you, I have seen too many jobs shipped overseas and Americans displaced because of regulations that defy law and logic and favor the few.

Mr. Chairman, I realize the rail lobby is powerful, but enough is enough. It is time Congress passes H.R. 1650 and levels the playing field between captive shippers and Class I railroads.

Holcim is a shipper of a strategic building material, namely cement. Cement is a critical component of concrete, which is an environmentally responsible building product used to build and repair our country's vital infrastructure. Concrete, as many of you may not know, is the second most consumed product on the planet. Water is the first. Holcim is one of the largest producers of cement in the world and in the United States, with operations in more than 70 countries, and across the U.S. in Michigan, Texas, Utah, and in Congresswoman Baldwin's State of Wisconsin. I am proud to say, Mr. Chairman, Holcim has been in Michigan for over 45 years and employs nearly 500 people in the State.

Reliable and cost-effective transportation options are critical to our industry. Average cement shipments range between 250 and 300 miles. Truck transportation increases our carbon footprint, clogs our already crowded highways, and is not economical much beyond 150 miles. Simply put, we are relying on railroads to deliver our product and to transport necessary fuels such as coal to our facilities.

More than 80 percent of U.S. cement-manufacturing plants are captive to a single railroad. Most cement plants are unable to secure competitive rail rates. To deal with the failings of the railroads and to remain competitive, we consistently make significant capital investments in our country and our own infrastructure to meet the demands of our customers. In the last decade, Holcim has invested over $1 billion in the U.S. to upgrade its capacity and better serve its customers while improving its environmental performance.

Holcim is investing an additional $1 billion in Ste. Genevieve, Missouri, on what will be the largest cement plant in the United States. A major reason for the location of this investment is the harbor on the Mississippi River that will allow us to ensure cost-effective, environmentally friendly, and reliable transport of cement by water. We are determined to protect these significant investments and the good jobs they create for many of your constituents. As much as anyone, we are committed to protecting these jobs; however, to do so, we need relief and removal of the antitrust exemptions for the railroads such as what is proposed in H.R. 1650.

The current system is broken, and the Surface Transportation Board is little more than a rubber stamp for the increasingly monopolistic practices of today's Class I railroads. Throughout the rail competition debate, Mr. Chairman, we have long sought to be part of the solution, and we have taken action. In 2003, we created our own railroad, Holrail, for the purpose of constructing and operating a 2.3-mile common carrier rail line to establish our own competition at our cement production facility in Holly Hill, South Carolina. Our captivity at Holly Hill allowed the railroads to provide us with poor and unresponsive service and charge unreasonably high rates.

Under the protections afforded in H.R. 1650, we believe Holcim would not have had to take such extreme measures as to construct a railroad at a significant cost. Our captivity leads to rates that we estimate to be 35 percent higher than our two largest competitors, who are only 3 miles away and have access to dual rail, while we are captive. This situation exists because the STB has failed its public responsibility to keep competition after the Staggers Act. They have done little to protect shippers or restrain the increasingly consolidated rail industry.

Given the track record of the STB issuing decisions in favor of the Class 1 railroads, it is not surprising that after several years, our petition and appeal were denied. It has cost us over $600,000 to pursue this case. While our company has the resources to take on this challenge, many companies do not.

If competition is to be restored, we believe that Congress must change the system to create a more level playing field. What is currently being proposed in H.R. 1650 under your leadership, Mr. Chairman, and that of your Committee and Congresswoman Baldwin, we seek many key proposals that will help to strike the right balance between growth and oversight. Indeed, we would not advocate for this bill if we believed it would deter growth of our critical rail infrastructure, it is so vital to our future.

We believe that Congress must promote rate competition by removing the railroad's antitrust exemptions and allowing normal protections afforded to all consumers to be in place. We think that they should be subject to the rule that it apply to shippers like Holcim and promote competition.

We deeply appreciate this opportunity to speak about issues that are not only vital to our industry, but to our national infrastructure and future growth as well. Thank you very much.

Mr. CONYERS. Thanks for starting us off in this discussion, Ms. Diehl. I appreciate your bringing the experience in real time of Holcim to the Committee.

[The prepared statement of Ms. Diehl follows:]

PREPARED STATEMENT OF SUSAN M. DIEHL

Good morning Chairman Conyers and Members of the Committee. My name is Susan Diehl and I am the Senior Vice President, Logistics and Supply Chain Management at Holcim (US) Inc., which I will refer to today as "Holcim". I am here to speak to the Committee about Holcim's experiences as a captive shipper. I commend you Mr. Chairman, and your Committee, for the leadership you are taking on this very important issue. As a person who was born and raised in Michigan, and whose company has a significant presence in Michigan, I see the devastating effects when companies cannot be cost competitive.

I sincerely appreciate the opportunity to express my deep concern over the fundamental flaws in the current rail system, which permits and indeed invites four major monopoly powers to dominate U.S. shippers, the vast majority of whom are unable to seek cost and eco-efficient competition. There exist impenetrable barriers to entry and an oversight system that is, at best, ineffective and undeniably available to only the privileged few who possess the ability to pay the high costs of access. Few, if any, industries can claim the benefit that the rail industry has of owning near-exclusive rights to its infrastructure, and to prevent the meaningful entry of new competitors.

Holcim is a shipper of a strategic building material, namely cement. In most of the markets it serves, Holcim faces unfair and non-competitive rates, on the heels of years of massive rail consolidation and utter lack of oversight by the STB and its predecessor. What is currently being proposed in H.R. 1650, under your leadership, Mr. Chairman and that of your Committee, has many key proposals that would help captive shippers like Holcim, for example: 1. removing the antitrust exemption under the Nation's antitrust laws; 2. allowing Federal Courts to assert jurisdiction in actions against common carriers and, 3. extending treble damages to carriers

Holcim submits this testimony fully recognizing that by doing so, it assumes certain risks: the rail lobby is effective and Holcim, as a captive shipper, has few alternatives if confronted with further erosion of service and cost competitiveness. Nevertheless, we hold a deep belief that the only way to continue to supply our country with its most fundamental building material and keep jobs in this country is to share our experience with you, Mr. Chairman, and your Task Force. The current system is unfair and needs change.

HOLCIM IS A LEADER IN THE MANUFACTURE OF CEMENT SERVING CUSTOMERS IN MORE THAN FORTY STATES, WITH A FOCUS ON SUSTAINABLE DEVELOPMENT

My Company, Holcim (US) Inc., is based in Waltham, MA and has its largest presence in Dundee, Michigan, where it contributes more than $85 million to the Michigan economy. It is a subsidiary of Holcim Ltd, a worldwide leader in the building materials sector, with over 150 million tons of cement and almost 200 million tons of aggregates supplied annually. Holcim Ltd is a leader in sustainable development and for the last three years, has been recognized as the "Leader of Industry" by the Dow Jones Sustainability Index for the building materials sector.

As a leader in the US cement industry, Holcim produces and supplies nearly 16 million tons of cement and cementitious products annually from its 16 manufacturing and 3 import facilities. We have more than 3000 employees, 475+ of whom are in Michigan and over $1.5 billion in annual revenue. We have invested nearly $1 billion to upgrade and expand our existing U.S. facilities over the last decade, and are investing another $1 billion in Ste. Genevieve County near St. Louis, Missouri, to build the world's largest single cement production line. Still, this massive investment in capacity and efficiency upgrades is not enough to serve the Nation's need for cement, as the industry must import approximately 20 million tons of additional cement to meet the domestic demand.

Holcim has four regions in the United States, including the Atlantic coast and southern US, the Great Lakes and Mississippi River system, Texas and Oklahoma, and the Rocky Mountains. We serve customers in over 40 states from our 16 plant facilities, and from over 55 additional remote distribution sites, or terminals. Roughly 7.5 million tons of cement moves from our manufacturing facilities to these remote company terminals, for final distribution to customers; 4.5 million tons or more (or 60%) of that volume moves by rail. In addition, Mr. Chairman, we bring critical raw materials such as coal and gypsum to our manufacturing facilities to feed their continuous operations.

How Cement is Made

The Committee may want to understand that cement is produced from various abundant raw materials including limestone, shale, clay and silica sand. These minerals are ground and heated in large rotary kilns to temperatures as high as 3,400 degrees Fahrenheit. The heat of the combustion fuses these materials into clumps of an intermediate material called clinker. When the clinker is discharged from the kiln, it is cooled and later ground with a small amount of gypsum to produce the gray powder known as portland cement. Different types of portland cement are manufactured to meet various physical and chemical requirements.

Portland cement manufacturing facilities use an enormous amount of energy. In fact, energy is the largest cost component in the manufacture of portland cement. The U.S. cement industry is largely coal fired with over 80% percent of all plants using coal, pet coke, or some combination of the two as primary kiln fuel in 2004. The domestic cement industry is one of the largest industrial consumers of coal. Much of the coal utilized to heat cement kilns is delivered by rail.

The cement industry is regional in nature, Mr. Chairman. Most cement manufacturing plants are located in rural areas near large limestone deposits, the principal ingredient in producing cement. However, at the same time plants also must be located near markets because the cost of shipping cement quickly exceeds its value. As such, customers traditionally purchase cement from local sources.

In 2007, we spent in excess of $60 million on rail freight and fuel surcharges (to move cement within our company, and even more when adding what is spent to bring raw materials into our facilities). What is interesting to note, Mr. Chairman, is that these costs cannot always be passed along to our customers, because sometimes our competitors have a local manufacturing presence and have no need to move cement by rail. In this type of situation, we need to be as cost competitive as possible.

As evidenced by the amount of product that moves by rail, and the remote areas served (e.g., Bliss, ID, Lehi, UT, Superior, NE), we recognize the railroads as an important component of our business. Unreliable service can force our operations to shut down due to lack of raw materials and fuels, and worse yet, leave customers stranded with no cement to complete their building work.

THE CEMENT INDUSTRY IS STRATEGICALLY IMPORTANT DOMESTICALLY AND HOLCIM IS COMMITTED TO CONTINUING INVESTMENTS TO IMPROVE ITS ENVIRONMENTAL EFFICIENCY AND INCREASE ITS CAPACITY

Considering the regional nature of the cement industry, it is critical that there are reliable and cost-effective transportation options available. Average cement shipments range between 250 to 300 miles. Truck transportation is not economical much beyond 150 miles; it is also not as environmentally friendly as rail. We are reliant on railroads to deliver our product. Only five of Holcim's sixteen cement plants have access to water transportation for domestic shipments and then only to select markets. The railroads have sometimes argued that these cement facilities are not captive since there are alternative modes of transportation available. This simply is not the case, Mr. Chairman. The US Cement Industry relies on rail transportation to move approximately 50 percent of all shipments between cement plants and distribution terminals, according to 2004 U.S. Geological Survey data, the most recent independent figures. It is highly important to our industry that the railroads provide reliable, efficient and cost-effective service to meet the widespread demand for our product. More than 80 percent of U.S. cement manufacturing plants are captive to a single railroad. Due to the absence of competition, these plants are unable to secure competitive rail rates and often receive poor service. On the other hand, dual rail-served facilities promote competition, leading to better rates and more reliable service.

The railroads also transport millions of tons of inbound coal shipments to fuel cement manufacturing plants each year. There are examples within the industry in which cement plants that are served by two railroads receive coal from a supplier that is captive to a single railroad. There are also instances where both the cement plant and the coal supplier are captive to a single railroad. These situations result in unnecessarily high rail rates that add to the cost of cement and, ultimately, to the cost of infrastructure.

INCREASING COMPETITION IS THE BEST WAY TO DRIVE EFFICIENCIES AND PROMOTE INVESTMENT IN RAIL INFRASTRUCTURE

Mr. Chairman, the railroads' argument that "re-regulation" will have a chilling effect on business growth is flawed and presents a false choice. H.R. 1650, currently before Congress, presents an opportunity to improve service, and increase rate competition, without impacting rail capacity.

The Staggers Act of 1980, which selectively removed regulations of the railroad industry in instances where transportation competition exists, has improved the industry's efficiency and financial stability. However, since deregulation, there has been a sharp decline from 63 Class I railroads in 1976 to just four major Class I railroads today handling 90% of the nation's rail traffic. This consolidation has contributed to diminished competition as well as ineffective and inconsistent rail service for the cement industry and many others.

Inconsistent and unreliable service from the Class I railroads is one of the most serious problems Holcim faces in its efforts to bring an affordable and essential product to market. Service encompasses many aspects of rail transportation, including picking up rail cars (covered hoppers), on-time delivery of rail cars and providing empty rail cars. The cars supplied by the railroads are typically old, poorly maintained and frequently a safety concern.

In recent years, Mr. Chairman, Holcim has been forced to purchase private rail cars because Class I railroads have refused to add cement rail cars to their fleets. Meanwhile the railroads have added tariff provisions charging for the storage (demurrage) of Holcim-owned (private) rail cars. This results in increased costs (in the form of capital investment, maintenance and service fees) to the cement shipper while providing no incentive to the rail carriers to improve their service.

We face uncertainty daily regarding the service reliability of the railroads. The Company is also disadvantaged competitively when competitors have dual service to serve markets where we are captive. Holcim has had to take extraordinary measures to try to remedy this disadvantage.

HOLRAIL IS CREATED TO CREATE COMPETITION WITH THE RAILROADS: 13 YEARS AND HUNDREDS OF THOUSANDS OF DOLLARS LATER, AND STILL NO COMPETITION

Holcim created HolRail LLC ("HolRail") in 2003 for the purpose of constructing and operating a 2.3 mile common carrier rail line, to establish competitive rail service at Holcim's cement production facility in Holly Hill, South Carolina ("Holly Hill Facility"). The Holly Hill Facility is heavily dependent upon both inbound and outbound rail service to produce and distribute up to 2 million tons of cement annually. However, the Holly Hill Facility is captive to a single railroad, the CSXT. This captivity has allowed CSXT to provide poor and unresponsive service while charging unreasonably high rates to Holcim (comparable to truck rates for similar distances), which has placed Holcim at a competitive disadvantage in the cement market. In order to improve its rail service and obtain competitive rates, Holcim concluded that it needed competitive rail service at Holly Hill.

Although the Holly Hill Facility is closed to the CSXT, the Norfolk Southern Railway ("NSR") comes within approximately two miles of the Holly Hill Facility, at Giant, South Carolina. Therefore, Holcim determined that it could obtain competitive rail service at Holly Hill by constructing its own railroad over that distance to connect with the NSR. Holcim separately incorporated HolRail for this purpose.

Holcim has two competitors located within 5 miles of the Holly Hill Facility, both of whom are dual served by the CSXT and the NSR. So, not only must Holcim try to compete without having a level playing field, Mr. Chairman, it must commit to invest in excess of $20+ million to level that playing field, incurring more costs due to the CSXT's failure to allow a shared right of way.

HolRail identified two potential routes to connect the Holly Hill Facility with the NSR, a "Preferred" and an "Alternate" route. Both routes would extend 2.3 miles, from north to south, across the Four Hole Swamp and parallel to CSXT's existing track. The Alternate Route, however, lies approximately 105 feet east of the Preferred Route over most of that distance. The key distinction between the two routes is that the Alternate Route can be constructed almost entirely on property owned by Holcim, whereas the Preferred Route must cross over CSXT's property for 1.7 miles and would be constructed within the existing CSXT right-of-way.

Despite having a clear path across Holcim-owned property via the Alternate Route, HolRail proposed the Preferred Route across CSXT's property to minimize the environmental consequences of constructing a railroad across the Four Hole Swamp, which is a unique and environmentally sensitive wetland. Since there is an existing transportation corridor, which includes the CSXT track, State Highway 453, above ground power lines, and a buried gas line, which already constricts the flow of water through the swamp, HolRail determined that simply widening that corridor, by constructing the Preferred Route immediately adjacent to the CSXT track, would cause the least environmental harm.

In contrast, the Alternate Route would exacerbate the harmful effects of the existing corridor by creating a second, entirely separate, transportation corridor approximately 130 feet further downstream, and deeper into the Four Hole Swamp. In addition to disturbing the portion of the swamp actually occupied by the railroad, the Alternate Route would disturb the entire area between the two corridors, which is referred to as an "island" effect. Consequently, the Alternate Route would more than double the acres of pristine wetlands that would be disturbed by the rail construction.

The Army Corps of Engineers, the South Carolina Department of Natural Resources, and The National Audubon Society submitted letters to the Surface Transportation Board independently confirming HolRail's observations and expressing their preference for the Preferred Route over the Alternate Route.

The Alternative Route, which the STB ordered HolRail to pursue without legal basis, would not only disturb these precious wetlands, but will also more than double the costs of construction and would force the Company to invest well over $20 million to construct. It took over 2 years to get the denial of HolRail's crossing petition from the STB, costing hundreds of thousands of dollars in legal fees and consulting fees. The DC Circuit Court of Appeals just denied our appeal, applying the Chevron doctrine to afford wide deference to the STB's decision. The Company may now be forced to pursue an environmentally damaging option to create much needed competition.

DAILY OPERATIONAL ISSUES CONTINUE TO ABOUND

- In May, 2007, the Canadian National Railroad utterly failed to service a distribution facility in Green Bay, WI. There was no option but to truck product from another facility in Duluth, MN. During this time, the Company paid 2.5 times more than the rail rate, a cost that cannot be passed on to customers. In addition, the truck haulage is less efficient from an environmental perspective than rail.
- In the fall of 2006, the Union Pacific Railroad threatened to stop serving a manufacturing facility for inbound coal. The Union Pacific Railroad stated that the Company did not unload cars quickly enough and insisted that Holcim share unit trains full of coal with our competitor in the area.
- Some basic analysis reveals that in 98% of all of the origins/destinations Holcim serves; either the origin or the destination is "closed" or captive on one railroad. In one instance where competition does exist in our system, the rates are over 60% less than a comparable captive haul.
- In 2007 alone, on selected hauls of less than 225 miles, trucking rates in Holcim are nearly $1.8 million more favorable than rail rates, despite the fact that it takes approximately 4 trucks to move the same amount of product as 1 rail car. Holcim wants to be able to leverage rail infrastructure to avoid the extra congestion and emissions occasioned by having more trucks on the road. Mr. Chairman, given that the Company moves more than 45,000 rail cars per year, converting this haulage to truck would put nearly 180,000 extra trucks on the road every year!

THE STB'S FAILURE TO PROTECT SHIPPERS AND PROVIDE LOW COST, UNBIASED ACCESS TO PURSUE CLAIMS IS A DETERRENT TO SHIPPERS AND FURTHER EMBOLDENS THE RAILROADS TO EXERT THEIR MONOPOLY POWER

As evidenced by the examples above, Holcim lives with the grim reality that there is little or no recourse when it can neither obtain favorable rates nor service from the Class I railroads. The STB has done little since it was formed to protect shippers from the increasingly consolidated rail industry, with almost impenetrable barriers to entry and few, if any options available.

The impediments to moving through the system created by the STB are evidenced by the fact that HolRail has been trying since 2004 to establish a short line; when a decision was finally issued earlier this year, the STB ordered HolRail to pursue an ecologically and environmentally inefficient option, at nearly twice the cost. In addition, to date, legal and consulting fees are in excess of $600,000.

Holcim has no recourse regarding rates since cement (officially "hydraulic cement") is classified as an exempt product from rate regulation by the STB. Since the STB has done little to address service issues, Holcim believes Congress should expand the STB's authority to promote transparency around rail service. Congress should also require the STB to submit an annual report regarding rail service complaints and describe the procedures the STB took to resolve them. Further, either party should be allowed to submit a dispute over rail service to the STB for "final offer" arbitration.

At present, the Surface Transportation Board does not fulfill its mandate "to respond to the demands of maintaining a healthy and competitive . . . national transportation infrastructure. . . . [T]he STB [is] charged with ensuring that the nation maintains a strong railroad infrastructure that serves passengers and shippers well."[1] The STB has not fostered competition and improved service during its tenure and has not responded well to the needs of shippers.

CONCLUSION

As a shipper of a strategic building material, Holcim needs a vibrant and profitable rail industry to support the nation's economic growth. Holcim must have access to a competitive rail transportation system, to ensure timely and efficient delivery of cement to those who build our nation's critical infrastructure. It simply requires the rail industry to re-invest to grow and stay competitive, like its customers. Congress must level the playing field following decades of consolidation and growth of monopoly power in the rail industry.

During the last decade, Holcim has invested over $1 billion to upgrade its capacity and better serve its customers while improving its environmental performance. Holcim is investing an additional $1 billion in Ste. Genevieve, Missouri, on the Mississippi River, to ensure cost effective, environmentally friendly and reliable transport of cement, in part based on concerns that the railroads will not have the capacity or service levels necessary to serve customer needs in the years to come. We believe that the railroads must also re-invest; however, that investment need not be conditioned on receiving a mandate to continue with monopolistic practices.

What is currently being proposed in H.R. 1650, under your leadership, Mr. Chairman and that of your Committee, has many key proposals that would help captive shippers like Holcim, for example: 1. removing the antitrust exemption under the Nation's antitrust laws; 2. allowing Federal Courts to assert jurisdiction in actions against common carriers and, 3. extending treble damages to carriers. Indeed, Mr. Chairman, we would not advocate for reform that would deter growth of our critical rail infrastructure. What we believe is that stronger competition creates incentives to become efficient operators with a strong customer focus—much like the incentives of the free market economy that drive efficiencies and competitive investment by Shippers. Competition, not monopoly power, is essential to fuel the railroads' and Shippers' growth. Continued monopoly power is by definition anti-competitive and will yield no growth. Every business must and does invest in renewing its infrastructure in order to remain competitive and railroads should be no exception.

I believe that Congress must especially consider provisions that promote rate competition and provide greater oversight on rail service related issues.

I sincerely thank you, Mr. Chairman, and Members of the Committee for your time and I again appreciate this opportunity to speak about issues vital to our national infrastructure and future growth.

Mr. CONYERS. We turn now to the director of utilities for the Lafayette Utility System in Louisiana and the chairman of the American Public Power Association. We have Mr. Huval, with a very important background, a little bit different from anyone else that is a witness. But Mr. Terry Huval, your experience and engineering background, your work over the years in Louisiana, and your particular experiences make us very pleased that you are before us today.

We are going to put your testimony in the record and invite you to talk with us at this time.

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[1] Statement of Congressman Wise, Ranking Member, Hearing on STB Reauthorization, March 12, 1998, U.S. House of Representatives, Subcommittee on Railroads, Committee on Transportation and Infrastructure.

TESTIMONY OF TERRY HUVAL, DIRECTOR OF UTILITIES, LAFAYETTE UTILITIES SYSTEM, LAFAYETTE, LA

Mr. HUVAL. Thank you, Mr. Chairman, and thank you to the Members of the Committee here this afternoon. My name is Terry Huval, I am from Lafayette, Louisiana, the heart of Cajun country. We speak more French than we speak English sometimes. In case I just jump into French, stop me and I will go ahead and get back to the English part of the story.

I am serving at the pleasure of the APPA as the chairman of the board this year. I have been in the utility business all my working career since I graduated in electrical engineering from college. I am also representing the Consumers United for Rail Equity, which is representing a large number of captive shippers not only in the utility business, but also in the grain, petrochemical, and many other areas.

My message to you today is to speak of the STB and how they have conducted their business, especially since I noted that the rail providers have indicated that the antitrust issues that we are trying to address by this bill 1650 are actually being overseen by the STB. I will share with you some stories about Lafayette.

We have a coal plant that we co-own that is located about 90 miles north of us. To get coal to that particular plant is a 1,500-mile trek from Wyoming to Louisiana. Of that 1,500 miles, we have a competitive rail solution for all but 20 miles. So only the last 20 miles is only served by one rail provider.

The STB, in their assessment of how they should be overseeing the railroads, takes the position that unless we have two rail providers, or these two rail providers, that come all the way from the beginning, from the source point, to the destination, that the company serving us cannot be forced to open up part of their line for competition. So what that means is of the 1,500 miles of train track coming to Lafayette, of which 1,480 miles we have a competitive option, we are forced under a monopoly rate structure for the entire 1,500 miles. That is, to us, not reasonable, and I think anyone who would be looking at these issues from an antitrust perspective would have to question why that takes place.

Unfortunately, as time has gone on in this business, we have noted even when there are alternate rail providers, that because to ship coal requires rail, unless you have a river close by, requires rail, you are not seeing much meaningful competition between the rail providers. That is unfortunate, and it has an impact on our customers. In our particular case, when we provide electric service to our customers, our total cost of providing service is what we charge the customers. If we are being overcharged by the rail companies, then 100 percent of that overcharge goes to our customers.

In the case of the city of Lafayette, based on experts that we have got, we have consulted with, they have indicated to us that we are probably spending about $15 million a year or more than we should to serve our 120,000 customers in Lafayette. Bringing that to something more manageable, if we look at the entire education system in Lafayette, whether it is the university or the technical college or the community college or public schools or private schools, that is almost 10 percent of our total electrical usage. So that means that those schools are paying about $1.5 million a year extra for electricity because of this circumstance.

It is my suggestion that I think those schools could find a better way to use that $1.5 million, and all the rest of our customers also. You know, $15 million each year comes up to a lot of money. Those are the dollars that our customers and the customers of most electric utility companies are being forced to pay.

The last point I wanted to bring up to you has to do with the whole notion that we should have a major industry like this that is not subject to all of the antitrust requirements that other companies are. I have read some of the testimony from the rail companies, and I don't understand how every other business in this country can operate and be under those types of antitrust requirements, but yet the rail companies feel that they should not be. I believe that if the jurisdiction of dealing with antitrust issues was moved away from the Surface Transportation Board, there would be a much more level playing field for the captive customers, and still at the same time recognizing the need of the railroads to continue to operate.

With that, I have reached the end of my comments. I thank you for your attention.

Mr. CONYERS. Thank you so much for your testimony.

[The prepared statement of Mr. Huval follows:]

PREPARED STATEMENT OF TERRY HUVAL

Testimony of Terry Huval
Director, Lafayette Utilities System
Lafayette, Louisiana

Before the
House Judiciary Committee Antitrust Task Force
On Antitrust and Competition Policy

Hearing on H.R. 1650,
the "Railroad Antitrust Enforcement Act of 2007"

Mr. Chairman and Members of the Committee, my name is Terry Huval, and I serve as the Director of the Lafayette Utilities System ("LUS") in Lafayette, Louisiana. I am also appearing here today on behalf of the American Public Power Association (APPA), an organization for which I currently serve as the Chairman of the Board of Directors. Thank you for the invitation to participate in this hearing in support of H.R. 1650, the Railroad Antitrust Enforcement Act of 2007.

LUS greatly appreciates the opportunity to appear today before the Committee to discuss a matter of considerable importance to consumer protection and the public interest. We seek the removal of antitrust law immunities and outdated policies that have contributed to the current competitive problems facing rail customers, including LUS, and that are producing significant marketplace harm. LUS and numerous other consumers across Louisiana and this Nation believe that H.R. 1650 offers an important step in helping to address some of the competitive problems facing railroad customers today. We respectfully urge the Judiciary Committee to favorably act upon and report H.R. 1650 to the full House.

We are pleased that the Senate Judiciary Committee has reported identical legislation, S. 772, and that legislation is now pending on the calendar of the Senate. We encourage the Committee and Congress to achieve the enactment of this legislation in 2008.

I. LUS AND ITS RELIANCE ON THE RAILROADS

LUS is publicly owned and operated, and is a part of the City of Lafayette, Louisiana, a community of 120,000 located approximately 135 miles west of New Orleans. LUS exists to serve the electric power and other utility service needs of its citizens and business owners in Lafayette. As a community-owned utility, LUS is committed to providing electricity to our customers at the lowest possible cost with the highest reliability of service.

While LUS owns a mix of coal-fired and gas-fired electric generation on which it relies to meet customer demand, the majority of its electrical energy is derived from the 523 Megawatt coal-fired Rodemacher Power Station Unit No. 2 located in Boyce, Louisiana. LUS is a 50 percent owner of the Rodemacher plant. The remainder of the facility is owned by an investor-owned utility in Louisiana and several other municipalities in Louisiana through their membership in a joint action agency. This Rodemacher coal unit has been in operation since 1982 and is an essential component of LUS' generation portfolio, as it provides over 65 percent of the electric energy used in the City.

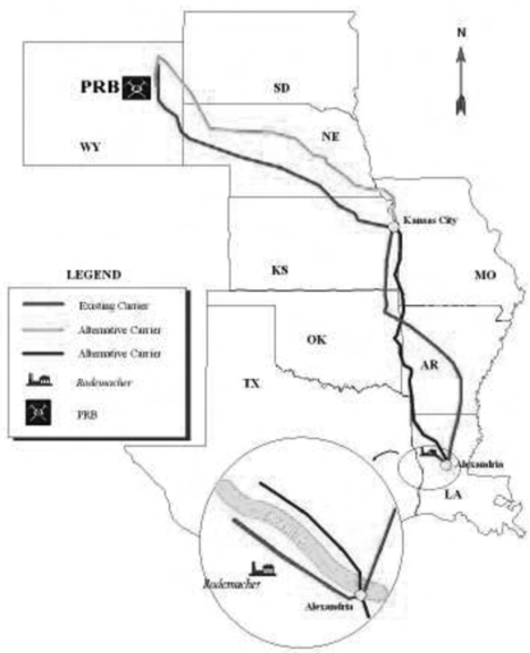
The Rodemacher plant's co-owners obtain the coal used at Rodemacher from mines in the Wyoming Powder River Basin (PRB) and collectively purchase approximately two (2) million tons of coal annually for use at Rodemacher. The only practical way to transport this coal from Wyoming to Rodemacher (a distance of over 1,500 miles) is by rail. To facilitate its rail deliveries, the Rodemacher co-owners have obtained and maintain, at the total expense of the co-owners, four (4) train sets of coal cars. Two (2) of those train sets are new aluminum car train sets (a total of 246 new railcars) that were very recently purchased by LUS for its service at considerable cost (approximately $16 million) in order to facilitate improved Rodemacher rail service and mitigate recent railroad service lapses, which I will describe later in this testimony.

II. <u>LUS' RAIL COMPETITION PROBLEM</u>

LUS is a classic captive rail customer. The Rodemacher station is served by only one railroad, the Union Pacific Railroad Company (UP). Theoretically, LUS has competition for much of its Rodemacher rail service. Two railroads originate coal in the PRB, the UP and the BNSF Railway Company (BNSF). BNSF and Kansas City Southern Railway Company have connecting rail lines in place covering approximately 99 percent of the 1,500 miles between the PRB coal mine origins and Rodemacher. However, Rodemacher is captive to UP at destination because only the UP serves the last 20 miles into the Rodemacher plant in Boyce.

The existing and possible alternative service routes to Rodemacher, are set forth in the schematic below:

Selected Routes For PRB Coal Moving to Rodemacher



A review of this schematic would suggest in a partially deregulated rail system that favors competition over government regulation that the Rodemacher plant would have two options: (1) a single rate on the UP from the Powder River Basin to the plant or (2) a competitive rate from either UP or BNSF/KCS to the junction point in Alexandria, then a rate from UP only from the junction to the plant. Unfortunately, under the Surface Transportation Board's (STB's) interpretation of the railroad deregulation law, the UP is not required today to provide a rate from the junction in Alexandria to the plant. Rather, the UP may only provide Rodemacher one rate from the PRB to the plant, making it captive – and paying high captive rail rates – from the PRB to our plant. Were we able to obtain a rate from the junction in Alexandria to our plant, then we would have a relatively short route where we have only one option and almost 1,500 miles where we would have the chance of competition between the UP and the BNSF/KCS. We believe our total rail bill would be lower if we were able to obtain a rate from the UP that allows us to access rail competition for 99% of the route to the Rodemacher plant.

LUS supports a strong national coal delivery network by rail, but it is in the Nation's interest to have a sound railroad system built on reasonable, not predatory pricing and service. Under the STB's interpretation of the railroad deregulation law, UP may use its monopoly "bottleneck" control over rail line facilities at plant destination to extend its 20 miles of monopoly power to the entire 1,500 miles of the route from the PRB to Rodemacher. In other words, UP's exclusive control of only 1 percent of the involved essential rail line to the Rodemacher plant enables UP to control 100 percent of the Rodemacher movement. This renders Rodemacher captive to UP for the entire origin-to-destination trip.

A. The Cost of Captivity

The cost of coal transportation is one of the single largest LUS electric generation expenses. Unfortunately, LUS pays substantially higher coal transportation prices than it would if we had access to effective origin-to-destination rail competition. For Lafayette, Louisiana, we believe this lack of railroad competition translates into approximately $15 million per year in "captivity payments" – the difference between what LUS pays its existing rail carrier compared to what LUS would pay if it had access to effective railroad competition. These higher payments are included in LUS customers' monthly electric bills and cause higher utility bills for all individuals and businesses in Lafayette.

Despite its lack of access to transportation competition, LUS has attempted to negotiate reasonable rate and service terms with its railroad service provider, but with no success. LUS's last contract with UP expired at the end of calendar year 2005. Attempts to negotiate reasonable rates and terms with UP for our Rodemacher service resulted in UP refusing to meaningfully negotiate new terms with us. Rather, UP presented LUS with its new "Circular 111" rates and terms for Rodemacher service. These rates and terms were not negotiable. LUS was left with little choice but to accede to UP's demands because of their monopoly control over LUS. Further, UP refused to provide us with any effective service guarantees, which we always had under our prior contractual arrangements with UP.

To add insult to injury, our rail service has been inconsistent, as UP has suffered well-known PRB coal delivery problems in 2005-2006. Thus, LUS is not only saddled with higher rail rates with no service guarantees, LUS also has virtually no ability to seek compensation for UP's service failures. In response to these UP delivery failures, LUS undertook extraordinary measures to help ensure an adequate coal supply. More specifically, LUS had to buy barge-delivered coal from Venezuela and truck lignite from Northwest Louisiana to help shore-up fuel inventory. In addition, LUS decided to prematurely replace (before the end of their useful life) its steel railcars with new aluminum railcars, which can carry more coal per train run, in an effort to help ensure that LUS is in the best position possible to meet the Rodemacher plant's annual coal requirements, even with UP service failures.

We hope this will assist UP to deliver more coal to Rodemacher in a timely manner and meet Rodemacher's annual coal volume requirements. But there are no guarantees and we are receiving little in return from UP for making these very expensive investments that produce considerable operating expense savings for UP. While our service has improved since 2005-2006, these are significant costs for a small utility that LUS would not need to incur if it was otherwise receiving reliable service and/or was able to obtain reasonable guaranteed service standards from UP.

1. **Consumer Impacts**

Very frankly, LUS customers must ultimately pay, in the form of higher electric rates, the $15 million extra payments LUS is required to pay annually in captivity payments. These overpayments are of critical importance to the City of Lafayette and its citizenry and businesses. Our customers care deeply about the cost of their electricity, and share LUS' concern about the need to ensure that our electric generation costs are kept as reasonable as possible.

For example, each year Lafayette educational institutions (e.g., the university, community colleges, trade schools, and all public and private schools) served by LUS consume approximately 10 percent of the total energy produced and purchased by LUS. Based on the aforementioned $15 million per year of captivity overpayments to LUS' rail provider, these schools are in turn paying approximately $1.5 million extra in electricity costs as their share of LUS' cost of rail captivity. This is $1.5 million from school budgets are funds that could obviously be more productively used in educational programs for students.

Besides the schools, I can also assure the Committee that fixed income families and retirees care deeply about these added monthly expenses, as do cost-conscious Lafayette businesses who are some of the largest consumers of LUS-produced electricity. The cost of captivity certainly matters and it has a substantial impact on Lafayette and our local economy. So contrary to some statements made by the rail companies, it is the electric residential and business consumer who pays 100 percent of all costs charged to us by the rail system, including premiums LUS is forced to pay due to rail captivity and those high costs have a direct impact on our community.

B. LUS Needs Effective Remedies to Protect Our Consumers

LUS needs meaningful remedies to protect its electricity consumers from this undue cost of captivity. Today, the railroads are exempt from many antitrust laws and the STB has already said it is fine for the UP to block LUS's access to competition through its ruling in the December, 1996 "bottleneck" decision. LUS could challenge our PRB rate from the UP at the STB, but these actions normally take up to three years and cost plaintiffs up to $6 million, and no shipper has received meaningful relief from the STB since 2001. For example, in the last rate case decided by the STB in September, 2007, the STB found that it was "reasonable" for a rail carrier to charge a rail rate that was 5 times greater than the cost the railroad incurred to make the coal deliveries in question.

III. THE REMAINING RAILROAD ANTITRUST IMMUNITIES SHOULD BE REMOVED

Mr. Chairman, it seems extremely ironic that the railroads, whose abuses of market power in the late 1800's led to the enactment of our Nation's antitrust laws are today exempt from many of those laws while their customers are subject to the Nation's antitrust laws. One must wonder why the railroads would oppose the removal of antitrust exemptions, unless they feel that the exemptions shield otherwise anticompetitive behavior as part of their conduct of business. Such a position by the railroads should by itself elevate sufficient suspicion to justify the passage of the H.R. 1650. This Task Force last year received a report from the Antitrust Modernization Commission that strongly argued against exemptions from the nation's antitrust laws. We think the railroad industry's exemptions from the antitrust laws are particularly unsupportable in light of the lack of competition that exists in many transportation markets and the very passive oversight of the rail industry by the STB.

We believe that the bottleneck decision of the STB would not stand if the antitrust laws of the nation applied to the railroad industry. Moreover, we believe that the application of the antitrust laws to the railroad industry would require the STB to implement the Staggers Rail Act of 1980 in harmony with the antitrust laws of the nation, just as the Federal Energy Regulatory Commission implements its regulatory authorities in harmony with the antitrust laws of the nation. We believe this requirement of law would lead the STB to re-examine its "bottleneck" decision in light of the nation's antitrust laws and, hopefully, reach a pro-competitive solution.

H.R. 1650 also would provide the prospect of additional oversight and involvement of the United States Department of Justice and the Federal Trade Commission, which has considerable experience in antitrust matters and which can provide presence and guidance in the area of railroad transportation that is sorely needed. In this respect, and in light of the massive concentration that has taken place in the railroad industry, LUS suggests that there is a need for Congress and this Committee to consider engaging in additional oversight of the operations and marketing practices of the railroads, including being alert to possible anticompetitive effects. This Committee could carry out this oversight responsibility by asking an appropriate independent entity other than the STB (whose policies have allowed the current competitive situation to be created and persist), such as through the Department of Justice's Antitrust Division, to oversee the competitive state of the railroad industry and regularly report to Congress on its oversight and on its recommendations for competitive and regulatory improvements.

We understand that the removal of existing antitrust immunities enjoyed by the railroads may not alone completely address or resolve the remaining competitive problems in the railroad industry or those being experienced by LUS. But subjecting the railroads to the antitrust laws will improve the dismal competitive climate that exists today and should send a strong statement that the Congress believes that promoting competition, and not fostering anti-competitive protectionism, is the right thing to do and is in the public interest.

On behalf of the APPA, I am also submitting a letter from them in support of H.R. 1650, which I respectfully request be included as part of the formal hearing record.

I am also attaching for your reference a letter dated September 27, 2004 and addressed to House Judiciary Committee Chairman F. James Sensenbrenner, Jr. This letter addresses the antitrust immunity granted to the railroad industry and how the STB has utilized this exemption to support its rulings against captive rail customers.

*   *   *

Mr. Chairman, thank you again for inviting me to testify. LUS commends H.R. 1650 to your favorable attention and respectfully requests that the full Judiciary Committee favorably report out the bill as soon as possible.

ATTACHMENTS

SEP-28-2004 12:07 JUDICIARY COMMITTEE 202 225 7682 P.02

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

September 27, 2004

The Honorable F. James Sensenbrenner, Jr.
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Sensenbrenner:

This responds to your letter of July 15, 2004, to the Department of Justice regarding the application of the antitrust laws in the railroad industry. You note that the various statutory antitrust exemptions for railroad industry activities were enacted many decades ago, and you question whether continuing this antitrust immunity serves the public interest. The Department appreciates having the benefit of your perspective on this important issue of competition policy.

The antitrust laws are the chief legal protector of the free-market principles on which the American economy is based. Experience has shown that competition among businesses, each attempting to be successful in selling its products and services, leads to better-quality products and services, lower prices, and higher levels of innovation. The antitrust laws ensure that businesses will not stifle this competition to the detriment of consumers. Accordingly, the Department has historically opposed efforts to create sector-specific exemptions to the antitrust laws. The Department believes such exemptions can be justified only in rare instances, when the fundamental free-market values underlying the antitrust laws are compellingly outweighed by a clearly paramount and clearly incompatible public policy objective.

In the first decades of the past century, for example, Congress enacted antitrust exemptions in industries in which it believed normal free-market competition to be unworkable. These industries included the railroad, airline, trucking, and telephone industries. In lieu of competition protected by the antitrust laws, Congress established comprehensive regulatory regimes that regulated prices, service offerings, and market entry as well as other aspects of these industries. These regulatory regimes often included statutory antitrust exemptions for conduct approved by the regulatory agency. And if the regulatory regime was sufficiently pervasive, the courts could hold that it had implicitly displaced private damages recovery under the antitrust laws. *See* Keogh v. Chicago Northwestern Railway, 260 U.S. 156 (1922); Square D Co. v. Niagara Frontier Tariff Bureau, 476 U.S. 409 (1986).

In the last decades of the past century, policymakers began to reconsider whether competition was truly unworkable in these industries, and efforts were undertaken to replace market regulation with competition where possible. As these industries became deregulated, antitrust exemptions no longer made sense. In the case of airlines, for example, the antitrust exemption for mergers approved by the Civil Aeronautics Board was repealed and, after a transition period, merger enforcement in the airline industry reverted to the Department of Justice under the antitrust laws.

In 1995, when Congress abolished the Interstate Commerce Commission and created the Surface Transportation Board to retain some of the ICC's old regulatory authority, the Department urged Congress to turn over review of railroad mergers to the antitrust enforcement agencies, as it had done with airlines. *See* Statement of Steven C. Sunshine, Deputy Assistant Attorney General, Antitrust Division, Before the House Transportation Subcommittee on Railroads, January 26, 1995 (attached). Congress opted instead to leave that responsibility with the Surface Transportation Board, with an accompanying antitrust exemption, with the Justice Department limited to an advisory role before the Surface Transportation Board. *See* 49 U.S.C. § 11321(a).

Your letter also describes three specific practices in the railroad industry about which concerns have been raised about possible anticompetitive effects.

The first practice is the refusal by a railroad that controls one segment of a freight movement to quote rates separately for that "bottleneck" segment, instead quoting rates only for the entire freight movement. You note that this practice denies shippers the benefits of competition on segments of the move where an alternative carrier might compete for the business. Because of the Surface Transportation Board's involvement in approving these rates, and its acceptance of this practice, relief may not be available under the antitrust laws. If this practice were subject to the antitrust laws, it could be evaluated as a refusal to deal in possible violation of section 2 of the Sherman Act, or as a tying arrangement in possible violation of section 1 of the Sherman Act. Whether it would constitute an antitrust violation would depend on the particular facts.

The second industry practice you describe is "paper barriers." Paper barriers are created when Class I railroads spin off segments of their trackage to short-line or low-density carriers with contractual terms that prohibit the acquiring carriers from competing with the Class I railroads for business. Since these contractual terms are part of an underlying sale transaction that is reviewed and approved by the Surface Transportation Board, they may be exempted from the reach of the antitrust laws, depending on the scope of the approval language in each of the Board's relevant orders. If paper barriers were subject to the antitrust laws, they would be evaluated under section 1 of the Sherman Act. The Department would examine whether the restraint is ancillary to the sale of the trackage – i.e., whether the restraint is reasonably necessary to achieve the pro-competitive benefits of the sale.

The third industry practice you describe is the practice by both of the major western Class I railroads of publicly disclosing tentative prospective shipping rate offerings. Under the antitrust laws, the public disclosure of pricing information among competitors can, under some circumstances, facilitate collusion and result in increased prices, in violation of section 1 of the Sherman Act. *See, e.g.*, United States v. Airline Tariff Publishing Co., 1994 Trade Cas. (CCH) ¶ 70,687 (D.D.C. 1994). Publicly announcing prospective rates outside the confines of a rate approval proceeding at the Surface Transportation Board is likely to be subject to review under the antitrust laws. If you know of anyone who has information that you believe might be useful for evaluating this practice under the antitrust laws, please encourage them to contact the Antitrust Division.

Thank you for bringing your interest in these issues to our attention, and for soliciting our views as you consider these issues. If we can be of further assistance, please do not hesitate to contact us.

Sincerely,

William E. Moschella

William E. Moschella
Assistant Attorney General

Enclosure

DEPARTMENT OF JUSTICE

STATEMENT OF

STEVEN C. SUNSHINE
DEPUTY ASSISTANT ATTORNEY GENERAL
ANTITRUST DIVISION
UNITED STATES DEPARTMENT OF JUSTICE

BEFORE THE
SUBCOMMITTEE ON RAILROADS
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
HOUSE OF REPRESENTATIVES

CONCERNING COMPETITIVE REVIEW OF RAILROAD MERGERS AFTER ICC SUNSET
ON
JANUARY 26, 1995

Madam Chairwoman and Members of the Subcommittee: I very much appreciate this opportunity to appear before you today to explain how the Department of Justice would review railroad mergers and acquisitions if the Interstate Commerce Commission's authority to review and approve those transactions is repealed. The Department of Justice believes that railroad mergers and acquisitions should be reviewed under the same legal standards that apply to virtually every other sector of our nation's economy. We believe that the antitrust approach would provide significant advantages, saving time and scarce federal resources and reducing burden and delay on the merging parties, while still protecting the public interest by preventing anticompetitive mergers.

For most of our economy, Congress has chosen to rely on market competition rather than government regulation to protect consumers and the public interest. Not only does competition best allocate scarce goods and services to those who value them most highly, it also forces firms to become as efficient as possible. Consumers benefit where competition is vibrant -- it provides the highest possible quality of goods and services at the lowest possible cost. The antitrust laws protect competition by prohibiting unreasonable restraints of trade, including mergers that threaten substantially to lessen competition.

A number of important industries have in recent years been largely freed from economic regulation, including trucking, airlines, and natural gas production. Building on earlier regulatory and legislative efforts, the

Staggers Rail Act of 1980 substantially deregulated the freight rail industry by placing more reliance on market forces. The Staggers Act is widely credited with revitalizing freight railroads, many of which were in precarious financial condition. The next logical step to deregulate further the rail industry would be to eliminate prior government review and approval of mergers under the "public interest" standard that is currently embodied in the Interstate Commerce Act.

Under the Interstate Commerce Act (ICA), rail carrier mergers must receive prior government approval under a broad "public interest" standard before they are permitted to occur. If a merger transaction involves two class I railroads, the ICC may not approve it unless and until the Commission determines that the transaction is, on balance, "consistent with the public interest."[1]

The ICA directs the Commission to consider competition, but only as one of five factors to balance in assessing the public interest: the effect of the proposed transaction on the adequacy of transportation to the public; the effect on the public interest of including, or failing to include, other rail carriers in the proposed transaction; the total fixed charges that would result from the proposed transaction; the interest of carrier employees affected by the proposed transaction; and whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region.[2]

The ICA contemplates intervention in the process by competitors and other interested parties, and provides for lengthy time periods for the Commission to conduct evidentiary hearings and issue its determinations. It can take the Commission up to two to three years to render its decisions on mergers having significant competition issues. Even a rail merger that raises few competitive concerns can be under review at the ICC for a year or more. For example, the ICC recently completed its review of the proposal by the Union Pacific for authority to take control of the Chicago & North Western. Union Pacific filed its application on January 29, 1993; the ICC approved the transaction in December 1994. There was extensive participation by competitors -- competitors who were perhaps more concerned with their own private interests than with the merger's likely impact on rail customers.

A more dramatic example of the time that ICC proceedings can take was the Santa Fe's proposal to take control of the Southern Pacific, which the Department opposed at the Commission. Those railroads first notified the ICC about their proposed combination on November 22, 1983. The ICC's ultimate decision, which disapproved the transaction, was not made until almost 3 years later, on October 10, 1986. Then, close to 2 more years passed before the ICC ordered Santa Fe to divest the Southern Pacific stock, which the ICC had allowed Santa Fe to hold in a voting trust.

The ICA's public interest standard as applied in ICC railroad merger proceedings has led to the negotiation of many protective and other conditions that caused the merged carrier to make concessions to protesting parties, which often include its principal competitors. Such conditions can limit the potential efficiencies of a merger and protect competitors from the enhanced competition that could otherwise result from a procompetitive combination.

In contrast, merger enforcement under the antitrust laws protects competition, not competitors. Section 7 of the Clayton Act, 15 U.S.C. 18, the primary provision of the antitrust laws governing mergers and acquisitions, prohibits those transactions that threaten "substantially to lessen competition in any line of commerce in any section of the country." The central issue under the Clayton Act is whether the merger will result in increased prices to consumers or reduced services.

Merger decisions are made far more quickly under the antitrust laws than under the ICA. Under the premerger notification provisions of the Hart-Scott-Rodino ("HSR") Act,[3] routine mergers that raise no antitrust issues can be consummated upon the expiration of a 30-day waiting period (15 days for cash tender offers). When requested, the antitrust enforcement agencies will in appropriate cases agree to "early termination" of the waiting period in less than 30 days.

Where a merger does raise antitrust concerns, we are able to obtain all of the information we need to resolve those concerns expeditiously. If we need additional information from the parties to complete our investigation, we can issue a "second request" that will extend the waiting period an additional 20 days after the parties supply the requested information.[4] The Department seeks information from competitors, suppliers, customers, employees, and other knowledgeable parties in order to analyze the effects of the merger. In addition, we can seek documents, deposition testimony, and interrogatory answers from the parties and other persons pursuant to the Antitrust Civil Process Act.

When the Department determines that a proposed merger raises significant competitive issues, several steps are available to speed resolution of the matter. Most such matters are resolved in 6 months to a year. The parties can "fix-it-first" by restructuring the transaction, which avoids a legal challenge by the Department. If the investigation runs its course and the Department decides to challenge the transaction, the parties and the Department frequently negotiate a consent judgment that corrects the competitive problem but otherwise allows the remainder of the transaction to go forward.

If the Department concludes that a merger transaction as structured would violate the antitrust laws, and the parties do not wish to restructure it, the Department must go to court to prevent the transaction. The Department can seek a preliminary injunction, which prohibits the merger pending a full trial for a permanent injunction. Even if the case goes through a full trial, it will likely be resolved less than a year after the complaint is filed, substantially less time than it usually takes the ICC to reach a final decision on a merger under the ICA. However, only a small percentage of the mergers reviewed by the Department are challenged in court.

The analytical framework we use in merger investigations is set forth in the 1992 Horizontal Merger Guidelines, issued jointly by the Department of Justice and the Federal Trade Commission. These Merger Guidelines have been cited and relied on by the courts in merger cases. Under the Merger Guidelines, we assess the merger's likely harm to competition, and consider any efficiencies that may outweigh potential harmful effects.

Our competitive analysis takes into account the position of each of the merging firms in each economically meaningful "relevant market", the relevant market's concentration, the extent to which that concentration would be increased, the competitive conditions likely to exist in the market after the transaction, and the likely ability of the resulting firm to raise prices or lower services to the detriment of consumers. We define relevant markets carefully, through an evaluation of any effective substitutes customers have for the services provided by the merging firms.

For railroad mergers, the analysis begins with identification of the affected routes. For two railroads with largely parallel routes, the logical starting point for defining a market is the carriage of a particular commodity from one point (called an origin) to a second point (called a destination) by the merging railroads.

Once the affected routes are identified, the analysis generally focuses on an evaluation of the other rail, intermodal, product, and source competition options available to shippers. Intermodal competition is the ability of a shipper to substitute another mode of transportation, usually truck or water carriage, for the shipment of a particular commodity between a particular origin and destination. If truck or water service is available and is a close substitute for rail carriage for certain commodities, these competitive alternatives would prevent a rail carrier from raising its rates for these commodities. For other commodities, however, trucks may be at a significant disadvantage to rail where, for example, the distance the commodity is shipped is great, the volume of the commodity shipped is large, or the value of the commodity as compared to its weight is small.

Other forms of competition considered include product and source competition. "Product competition" is the ability of a shipper to substitute another commodity that allows use of a transportation system other than the merged rail carrier. "Source competition" is the ability of shippers in the region of the merging railroads to avoid high rail rates by shipping a commodity to another destination or by obtaining it from another source, again using other than the merged rail carrier.

If one or more of these forms of competition is available, its existence will be reflected in the Department's definition of the markets affected by the merger. If such competition is significant, it may defeat or limit the ability of the merged carrier to raise prices. The degree to which any of these methods of competition will be effective will vary according to the nature of the commodities, routes, and perhaps other factors, including differences in demand and/or supply elasticity for different commodities.

The antitrust laws do not prohibit efficient railroad mergers that can benefit shippers. The Merger Guidelines expressly recognize that mergers can enhance efficiency. When necessary to an evaluation of the net competitive effects of a merger, we consider the prospect that real efficiencies will be achieved that could not be realized absent the merger. Thus, the Department of Justice will challenge a merger only when its likely harm to competition is not outweighed by its likely efficiencies.

The Department has not opposed rail mergers that did not significantly threaten competition. Over the past 10 years, the Department opposed only one rail merger in its entirety -- the proposed consolidation of the Santa Fe and Southern Pacific Railroads -- a transaction the ICC ultimately disapproved. The Department raised no objection to the two rail mergers most recently approved by the ICC: Kansas City Southern's acquisition of Mid-South, and the Union Pacific's control of the Chicago & North Western.

In sum, our analysis of proposed railroad mergers using the Merger Guidelines is the same general analysis we use in reviewing mergers subject to the antitrust laws. That analysis is sophisticated, thorough, and flexible -- it involves far more than simply computing market shares or concentration figures. It takes into account all the dynamics of the markets with which we are dealing.

Subjecting railroad mergers and acquisitions to the antitrust laws would expedite both the investigation and resolution of such transactions.

Madam Chairwoman, this concludes my prepared remarks. I would be happy to respond to any questions that you or other members of the Subcommittee may have.

FOOTNOTES:

1. 49 U.S.C. 11344(c). If a merger transaction does not involve two class I railroads, the ICA requires approval unless the ICC finds there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States and the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs. Id. 11344(d).

2. 49 U.S.C. 11344(b)(1).

3. 15 U.S.C. 18a.

4. 15 U.S.C. 18(b)(1), (e).

American Public Power Association

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February 21, 2008

The Honorable John Conyers
Chairman
Committee on the Judiciary
United States House of Representatives
2138 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Ric Keller
Ranking Member
Committee on the Judiciary, Antitrust Taskforce
United States House of Representatives
2142 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Lamar Smith
Ranking Member
Committee on the Judiciary
United States House of Representatives
2142 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Conyers and Ranking Members Smith and Keller:

On behalf of the American Public Power Association (APPA), I am writing in strong support of H.R. 1650, the Railroad Antitrust Enforcement Act of 2007, scheduled to be discussed by the Antitrust Task Force Subcommittee of the House Judiciary Committee on February 25, 2008. APPA is the national service organization for the more than 2,000 community-owned (public power) electric utilities that collectively serve over 44 million Americans.

Since 1980, the nation's railroad industry has consolidated to four major railroads that provide 90 percent of the railroad transportation for the nation. These four major railroads rarely compete and thereby exert a remarkable level of market power over their customers. This market power has resulted in record financial health for these railroads while at the same time leaving the majority of rail customers powerless to negotiate reasonable rail rates and levels of service. In October of 2006, the Government Accountability Office issued a report that found that a systemic lack of competition in the rail industry is resulting in a growing percentage of rail customers paying three times or more what it actually costs the railroads to move their freight. These high rates are reflected in higher electricity prices, higher costs of other consumer goods, reduced profit margins for American manufacturers, and lower operating margins for America's farmers.

Electric utilities rely on coal to generate approximately half of the nation's energy supply and the majority of that coal is shipped via the nation's rail system. Beginning in the spring of 2005 and continuing in some places today, some of our member utilities have experienced 15 to 20 percent shortfalls in the delivery of coal to our power plants. After curtailing the use of some of these power plants, importing foreign coal and some improved deliveries by the western railroads, the coal supply at most of our utilities is back to acceptable levels. We can easily foresee, however, future coal delivery problems if the monopoly practices of the current rail system are not corrected.

At the same time, the major railroads are exempt from most provisions of the nation's antitrust laws. We believe that removing these exemptions, as provided in H.R. 1650, will provide a number of benefits, including: increased transportation options for rail customers; the availability of another venue for rail customer complaints to be considered; assurance that any future rail mergers will comply with the nation's antitrust laws; and the potential for substantial fines for violation of antitrust law as a deterrent to the exercise of market power. The effectiveness of these laws was demonstrated recently when the Department of Justice imposed substantial penalties on two international air carriers that conspired to institute excessive fuel surcharges.

On behalf of the over 2,000 public power systems around the nation, we encourage your support for H.R.1650, and thank you in advance for your consideration and approval of this important legislation.

Sincerely,

Mark Crisson

Mark Crisson
President & CEO

MC/JWM/*GCM*

cc: Members of the House Judiciary Committee

Mr. CONYERS. We now move to Attorney Paul Moates, who has had an extensive career in the transportation law. As a matter of fact, he heads up that part of his firm's operation. He has been a representative on the National Arbitration Panel, which hears disputes between freight, railroads and Amtrak. He has served as a member in the United States Army, and was assigned to the White House Communications Agency, and has written extensively with the law symposiums. He is on the Public Utility Section of the American Bar Association.

So we think that your perspective will be very helpful. Welcome to the Committee. We have your prepared statement.

TESTIMONY OF G. PAUL MOATES, SIDLEY AUSTIN, LLP, ON BEHALF OF THE ASSOCIATION OF AMERICAN RAILROADS

Mr. MOATES. Thank you very much, Mr. Chairman, for those kind remarks. I appreciate it. It does put in mind of how many years I have been doing this, but I think I have a few more left, and I welcome the opportunity to appear here today.

I appreciate this opportunity to appear here today on behalf of the Association of American Railroads, which is, I am sure you are aware, the national trade association, really, the North America trade association, of railroads.

Just to clarify one thing that Congresswoman Baldwin mentioned before I get to my prepared remarks, she is correct, there are four major U.S. carriers we are all pretty much familiar with after the large consolidations, those, of course, being the Union Pacific, the Burlington Northern-Sante Fe, in the East Norfolk Southern, and CSX. However, there are several other important large railroads, and they are members of the AAR. In fact, two of them operate in Congresswoman Baldwin's State, referring to the Canadian Pacific system, which includes the former Soo Line Railroad, and in the East, the Delaware and Hudson, and the Canadian National system, which includes indeed the Illinois Central and the former Wisconsin Central Railroad. Of course, there is also the Kansas City Southern Railway that operates essentially in the middle of the country. So there are a few more than four large systems.

Mr. CONYERS. Do you want to put that in the record?

Mr. MOATES. I would be happy to do that.

With all due respect to my co-panelists, we believe this legislation is a solution looking for a problem. In developing what we think is a needless solution, it would subject railroads to an unwarranted dual system of regulation. We would submit that the longstanding statutory scheme should be altered only if there is an identified problem, and only if the proposed legislation would be effective remedying the perceived problem. Again, with respect, we do not believe either condition exists with respect to this legislation.

I think the two panelists to my left both who have spoken ahead of me had fairly critical things to say about the Surface Transportation Board. Obviously, the elimination or the major reform and the responsibilities and jurisdiction of that Board, as I understand it, is not part of this legislation, is really not before us here today.

I think the legislation that is before us is based on a number of faulty premises. The first is, and this gets repeated a lot, the railroads enjoy broad antitrust immunities. Mr. Chairman, that is simply not true. Railroads are generally subject to the antitrust laws, and the immunities that we do enjoy are limited in scope and also subject to regulatory oversight by the STB. Specifically, the antitrust laws prohibit anticompetitive agreements among railroads to collude in the setting of rates, to collude in allocation of markets, or in otherwise unreasonably restraining trade. We can't do that. If we do, we are subject to the Sherman Act and the Clayton Act and the other antitrust laws that you are very familiar with.

Railroads continue to be subject to the STB's regulatory jurisdiction with respect to certain rates and services, the terms of entry and exit from the industry, and mergers and other restructurings. That is all pursuant to, of course, the guidance of Congress as laid out in the Interstate Commerce Commission Termination Act of 1995. The few statutory antitrust exemptions that remain exist because of the need to avoid dual and potentially conflicting regulation by the courts and the STB. Moreover, and this is an important point, those limited exemptions do allow the railroads to work together in a very limited way to efficiently address some of the issues created because of our industry's network characteristics, and I will come back to that in a minute.

The second faulty premise is this legislation would benefit shippers by subjecting railroads to dual-merger jurisdiction. I might say the suggestion was made previously that all we are trying to do is level the playing field and make railroads subject to the same statutory scheme as other previously regulated industries and other freight providers. Again, with respect, that is not true. None of those other industries have dual-merger jurisdiction of an agency like the STB, which is charged with a very specific statute, 49 United States Code, sections 11321 to 323, in reviewing and approving, and approving with conditions, if it deems that appropriate, mergers and other consolidations in the railroad industry, and at the same time, as this legislation would do, have those kinds of transactions subject to the review of the Department of Justice and/or the Federal Trade Commission under the antitrust statutes.

Even more troubling to us in some sense is that this bill appears—and I hope I am reading it wrong—the bill appears to allow the Justice Department or the Federal Trade Commission retroactively after 180 days to look at and challenge mergers that have been previously approved by the ICC or the STB long ago. Hopefully, that isn't the intent. Hopefully that isn't what the drafters have in mind. But it does appear to be a possibility in the way the legislation is written.

Mr. Chairman, there is no reason to believe that this change in the law, that is the merger portion of this statute, this legislation, excuse me, will provide shippers with additional relief in any possible future merger cases. Indeed, the Clayton Act standard of preserving competition does not in any way give shippers any more protection, somewhat less perhaps, than the STB standard for major rail mergers, which now requires that merger applicants demonstrate that their transaction would result in enhancements to competition. There must be a demonstration of procompetitive benefits, not just neutral.

Moreover, dating back at least to the passage of the Staggers Act referred to by Congresswoman Baldwin, the STB and its predecessor, the Interstate Commerce Commission, have consistently used their conditioning authority to ensure that as a result of a merger, no customer has lost two-railroad service prior to the merger.

Ms. Diehl mentioned her concern about being exclusively served, or captive, in her terms, to a railroad in South Carolina, and competitors a short distance away having two-railroad competition. If those two railroads were to merge, the STB has the authority and typically would impose conditions to preserve that two-railroad competition.

Another of the solutions in H.R. 1650 looking for a problem is elimination of the limited exemption the railroads have under section 10706 establishing procedures for handling car hire payments. That exemption, although severely limited, nonetheless remains important since is fosters coordination on matters that enhance network efficiency that we don't believe are controversial. It is also important to recognize that even those rules do not provide for carriers collectively to discuss the setting of car hire rates. Those rates are established through bilateral negotiations between the owners and users of the equipment, and I want to emphasize again that under this exemption, competing railroads do not and have not for many years collectively set freight rates of any kind.

This legislation would not replace the existing STB regulatory regime with antitrust remedies where limited immunities exist. Rather, it would superimpose antitrust remedies on top of STB regulation. Moreover, it will not, I submit, provide rail customers with any new protections from allegedly high rates because high rates alone do not constitute an antitrust violation.

Finally, we have a major concern about section 2 of the bill, which permits private injunctions and introduces the very real possibility of dual but inconsistent regulation of railroads. So long as there remains a single regulatory body charged with oversight of the rail industry—and I realize some of my copanelists might prefer not to have that body, but as long as it is there, it is imperative that the antitrust laws and the national transportation policy be implemented in a harmonious fashion. In permitting courts to fashion equitable remedies in individual civil actions and also by discouraging from deferring to the STB's expertise, as section 4 of this bill does, the legislation threatens to disrupt that harmony.

In summary, we believe the legislation is flawed on several counts. It fails to recognize the railroads are subject to antitrust scrutiny today where there is no regulatory oversight, so that eliminating the industry's limited exemptions would not fill any void in the law. It also fails to recognize the public benefits from the existing limited railroad antitrust exceptions. Indeed, it would discourage activities that are in the public interest and subject railroads to dual and potentially inconsistent standards in areas that are being addressed as effectively, if not more effectively, through regulatory oversight.

Thank you, Mr. Chairman.

Mr. CONYERS. Thank you very, very much, Attorney Moates.

[The prepared statement of Mr. Moates follows:]

PREPARED STATEMENT OF G. PAUL MOATES

STATEMENT OF G. PAUL MOATES

ON BEHALF OF

THE ASSOCIATION OF AMERICAN RAILROADS

BEFORE THE U.S. HOUSE OF REPRESENTATIVES

COMMITTEE ON THE JUDICIARY

TASK FORCE ON ANTITRUST AND COMPETITION POLICY

HEARING ON H.R. 1650,
THE RAILROAD ANTITRUST ENFORCEMENT ACT OF 2007

FEBRUARY 25, 2008

Association of American Railroads
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The Association of American Railroads submits this testimony to express its opposition to H.R. 1650, the "Railroad Antitrust Enforcement Act of 2007."

In short, this legislation is a solution looking for a problem. It is premised on the incorrect assumption that a gap exists between the scope of economic regulation and the antitrust laws where rail competition and market conduct are subject to neither antitrust scrutiny nor government oversight. In fact, there is no such gap. All aspects of railroad conduct that are exempt from the antitrust laws are subject to the regulatory jurisdiction of the Surface Transportation Board (STB). Rather than filling any void in the law, this legislation would only provide a dual remedy to shippers and interfere with STB's implementation of national transportation policy.

H.R. 1650 would effect a number of changes to current law:

- It would remove the prohibition against private injunctions against railroad common carriers subject to the STB's jurisdiction, while retaining the prohibition with respect to other common carriers (amending 15 U.S.C. §26).
- It subjects certain STB-approved railroad transactions to section 7 of the Clayton Act relating to corporate acquisitions, while leaving intact an exemption from the reach of section 7 for several other industries (amending 15 U.S.C. §18).
- In certain types of antitrust actions against railroads, it curtails the judicial doctrine of primary jurisdiction, under which courts typically defer to the expertise of the regulatory agency, in this case the STB, questions within the agency's expertise.
- While retaining STB's jurisdiction over rail mergers, consolidations, acquisitions and rate agreements, it eliminates the STB's existing authority to enforce certain provisions of the antitrust laws with respect to STB-approved agreements in those areas, conferring that authority on the Federal Trade Commission (FTC) (or DOJ) (amending 15 U.S.C. §21(a)).
- It confers the FTC with authority over railroads, but not other types of common carriers (amending 15 U.S.C. §45(a)(2)).
- It eliminates the filed rate doctrine with respect to railroads only.
- It eliminates the current exemption from the antitrust laws that applies to certain STB-approved agreements under 49 U.S.C. §10706 and §11322, as well as STB-approved transactions under 49 U.S.C. §11321.

- Finally, by virtue of its effective date provision, the bill would subject to antitrust scrutiny railroad agreements approved by the STB (or its predecessor, the Interstate Commerce Commission (ICC)) before the bill was enacted that remain in effect more than 180 days afterwards.

In sum, while leaving intact the STB's regulatory regime, H.R. 1650 eliminates antitrust exemptions and carve-outs that apply to railroads, but retains those same exemptions to the extent they apply to other parties.

Long-standing statutory schemes should be altered only if there is an identified problem calling for remedial legislation, and only if the proposed legislation would be effective in remedying the perceived problem. Neither condition exists with respect to H.R. 1650. To the contrary, the legislation is built on several faulty premises. Railroads generally are subject to the antitrust laws and do not enjoy broad antitrust immunities; the existing immunities are limited and apply to conduct over which there remains close regulatory oversight. Moreover, while the bill's proponents argue otherwise, H.R. 1650 is unlikely to provide avenues of relief to shippers that are foreclosed today. Finally, H.R. 1650 does not simply "level the playing field" — it is built on top of, not as a replacement to, regulation by the STB. In short, the case for H.R. 1650 does not hold up under examination.

1. Background

Certainly, the antitrust immunities that apply to railroads were not created in a vacuum. In the years since passage of the Sherman Act, Congress has enacted a host of antitrust exemptions applying to a wide array of industries and conduct, typically in order to promote a public policy that might not be realized under full exposure to the antitrust laws. The exemptions that apply to railroads came about as a complement to the comprehensive regulatory regime that governs the railroad industry. And, as that regime has evolved over time, so too has the role of the antitrust laws in the railroad industry.

In 1887, before the first antitrust laws were enacted, Congress undertook comprehensively to regulate the economic, operational, and safety aspects of the railroad industry. This policy first was effected with enactment of the Interstate Commerce Act of 1887, c.104, 24 Stat. 379 (1887), under which the ICC, an independent federal agency, was given broad authority to regulate practically every aspect of railroad operations. The railroads were the first U.S. industry subject to such a comprehensive scheme of regulation. This regulatory scheme developed against the backdrop of a common law common carrier obligation, which required a common carrier to carry for all persons who applied, at reasonable charges. *See I.C.C. v. Baltimore & Ohio R.R.*, 145 U.S. 263 (1892). Today, that common carrier obligation is carried forward in the statutory requirement in the Interstate Commerce Act, as it has been amended, that railroads provide transportation or service on reasonable request. 49 U.S.C. §11101(a).

With the passage of the Interstate Commerce Act, the railroads became the first U.S. industry subject to regulatory oversight by an administrative agency. Over time, rigid and arcane regulation came to control nearly every aspect of railroad operations. By the 1970s, the cumulative effect of decades of stifling government control, combined with strong competition from other modes and changing shipping patterns, crippled the rail industry. Freight rates and accident levels were rising, rail infrastructure was deteriorating, much of the nation's rail mileage was in bankruptcy, and the industry's rate of return on investment averaged only 2.0 percent.

Because the status quo was untenable, Congress passed the Staggers Rail Act of 1980. Pub. L. 96-448, 94 Stat. 1895. In the Staggers Act, Congress recognized that railroads faced intense competition for most freight traffic, but prevailing regulation prevented railroads from earning adequate revenues and competing effectively. Accordingly, the Staggers Act allowed the railroads to establish their own routes, tailor rates and services to market conditions, and differentiate rates on the basis of demand. And, of course, rate regulation remains where effective competition is found to be absent.

The Staggers Act has been a tremendous success. Average inflation-adjusted rail rates have declined 55 percent since 1980. Rail safety has been improved as a direct result of approximately $420 billion being invested in infrastructure and equipment since 1980. And rail industry financial performance has also been improved, although it continues to lag behind Fortune 500 average return on equity.

The Staggers Act did not completely deregulate railroads. In addition to retaining authority over a variety of non-rate areas, the ICC (now the STB) retained the authority to set maximum rates or take other actions if a railroad was found to have market dominance or to have engaged in anti-competitive behavior.[1] The Staggers Act established a safety net, which still exists, to address the needs of rail customers for whose traffic there is no effective competition. In situations in which railroads have market dominance — *i.e.*, situations in which there is an absence of effective competition from other rail carriers or modes of transportation for the traffic at issue — railroads must establish rates that are reasonable. The STB will award reparations and prescribe appropriate rates if a railroad's rates are determined to be unreasonably high.

The end result is that today, railroads are subject to the antitrust laws as well as extensive economic regulation by the STB. The STB has jurisdiction over rail service, market

[1] The ICC Termination Act of 1995 eliminated certain regulatory provisions, abolished the ICC, and created, in its stead, the STB to maintain continued regulatory oversight of railroad rates and operations.

entry, and a wide range of rate-related conduct, including the level and structure of rates where there is no effective competition.

2. Railroads Are Subject to Both the Antitrust Laws and Regulatory Oversight: The Antitrust Exemptions That Still Apply Are Limited in Scope

There is a perception that railroads enjoy broad exemptions from the antitrust laws and that those exemptions result in an anticompetitive market that harms consumers. In fact, railroads <u>are</u> subject to federal antitrust laws. The antitrust laws prohibit anticompetitive agreements to set rates, allocate markets, or otherwise unreasonably restrain trade in the railroad industry. None of the extant antitrust exemptions that apply to railroads would immunize such conduct if it were to take place. *E.g.*, *In re Lower Lake Erie Iron Ore Antitrust Litigation*, 998 F.2d 1144 (3d Cir. 1993).

A few statutory antitrust exemptions apply to railroads, but they are very limited and narrowly applied. Moreover, railroad activities that are exempt from the antitrust laws are subject to regulation by the STB. When Congress has deregulated railroad activities, it has removed the corresponding antitrust exemptions. Railroads continue to be subject to the STB's regulatory jurisdiction with respect to certain rates and services, entry and exit, and mergers and other restructurings. The statutory antitrust exemptions that remain exist to avoid dual and potentially conflicting regulation by the courts and the STB. Moreover, they allow railroads to work together in a limited way to efficiently address some of the issues raised by the industry's network characteristics.

Section 10706 of Title 49, a target of H.R. 1650, provides that certain rate agreements that have been reviewed and approved by the STB are exempted from the antitrust laws. However, the scope of the exemption is severely limited (*e.g.*, the exemption does not apply to collective discussions of or agreements upon single-line rates, nor does it apply to any joint-line rate discussions between railroads unless they can practicably participate in the movement underlying the rate). More importantly, railroads' pricing for their transportation services is not covered by this exemption as a practical matter because the so-called rate bureaus that once addressed such rates no longer exist. The exemption remains important, however, to foster coordination on matters that enhance network efficiency (and are not controversial), such as rules governing administration of compensation for rail car use.

A history of this provision can be illustrative to show that changes to the antitrust laws should be considered only in the context of the regulatory environment. As noted above, this provision exempts railroads from the antitrust laws with respect to making and carrying out certain agreements which have been approved by the STB. Agreements which are to be submitted for STB approval under this provision include agreements between at least two rail carriers which relate to rates (including charges between rail carriers and compensation paid or received for the use of facilities and equipment), classifications, divisions, or rules related to them .

In its original form, 49 U.S.C. §10706 goes back to 1948, a period of far more active and comprehensive regulation of the railroad industry than exists today.[2] Initially, when enacted, this provision granted antitrust immunity for the railroads to meet together in rate bureaus and collectively set rates with antitrust immunity. However, when Congress passed the Staggers Act and provided a level of regulatory relief for the railroads, it also severely limited the scope of the statutory exemption under this provision. As noted above, the exemption does not apply to collective discussions or agreements upon single-line rates. Nor

[2] This provision was originally enacted as section 5b of the Interstate Commerce Act by the Reed-Bulwinkle Act of 1948, 62 Stat. 472.

does it apply to any joint-line rate discussions between railroads unless they can "practicably participate" in the movement underlying the rate. 49 U.S.C. §10706(a)(3)(A)(i) &(ii).

There is currently in effect an industry agreement approved under §10706 that permits joint consideration and establishment of rates of compensation for both railroad and shipper furnished freight cars and other transportation equipment, and rules and regulations pertaining thereto. This agreement, which is administered by the AAR, was first approved by the ICC in 1950 (Section 5a Application, *Association of American Railroads, per Diem, Mileage, Demurrage and Storage — Agreement*, 277 I.C.C. 413 (1950).[3] Any common carrier by railroad subject to the jurisdiction of the Interstate Commerce Act may become a party to the agreement.

Today, this Agreement provides a framework for the rail industry only to establish rules and regulations that pertain to the charges, known as car hire, that railroads pay each other when using the equipment of other railroads.[4] These rules, known as the AAR Code of Car Hire, establish procedures for the administration and accounting of car hire payments. Virtually all railroads, including many non-AAR members, subscribe to the Code. The Agreement sets forth the procedures to be utilized for consideration and establishment of the rules that make up the Code.

Again, it is important to note that under the Code, the railroads do not collectively establish the rates that users of freight cars pay to the car owners. These rates are established through bilateral negotiations between the owners and users of the equipment, or through binding arbitration if agreement cannot be reached, pursuant to the ICC's deprescription

[3] The Agreement initially covered demurrage and storage charges, rates paid by shippers for the detention of freight cars or for use of other transportation equipment or facilities. However, that authority was subsequently withdrawn by the ICC.

[4] This Agreement also is occasionally used to take up matters related to allowances provided when non-railroad cars are used.

orders. Ex Parte No. 334 (Sub-No. 8) *Joint Petition for Rulemaking on Railroad Car Hire Compensation*, 9 I.C.C.2d 80 (1992); 9 I.C.C.2d 582 (1993); 9 I.C.C.2d 1090 (1993). The car hire rules are promulgated, amended, and enforced through the actions of committees, designated by the approved Agreement, which are composed of representatives of AAR member railroads and small railroads (which generally are not AAR members). Committee meetings where substantive discussions occur are open to all interested parties, typically are attended by representatives of several non-railroad car owners and lessors, and serve as a forum for all parties to express their views and concerns on matters related to the rules.

This process works effectively to assure that there is a uniform set of rules — not rates — pertaining to the payment of car hire. Given the large number of railroads and car owners, the rules, and the process under which they are promulgated, administered, and enforced, provide an orderly and accepted system for (1) apportioning financial responsibility for making payment in various situations; (2) governing collection; (3) adjustment of accounts; and (4) handling of claims. While not all parties always favor all proposed rule changes, the process is well-accepted, not controversial, and is seen as beneficial by all participants.

AAR believes the conduct undertaken today pursuant to the industry §10706 agreement would pass muster under a rule of reason analysis. Nonetheless, the statutory immunity is beneficial because it enables railroads collectively to address matters that arguably relate to rates without fear that they will be subject to antitrust lawsuits aimed at disrupting that conduct. STB oversight pursuant to the statute, 49 U.S.C. §10706(a)(3)(C), as well as the fact that all meetings are sound recorded or transcribed and are available to the STB, assures that the conduct under §10706 remains within the confines of the Agreement and is consistent with transportation policy. Eliminating the exemption that immunizes the making and implementing of car hire rules from antitrust challenge would discourage the railroads' efficiency-enhancing coordination activities without providing any conceivable relief with respect to any alleged deficiencies in the rail transportation market.

Similarly, the elimination of antitrust immunity for STB-approved pooling agreements would also discourage efficiency-enhancing coordination. The antitrust exemption provided by 49 U.S.C. §11321 permits railroads to pool equipment when undertaken in strict compliance with agreements approved by the STB (or, formerly, by the ICC) pursuant to prescribed statutory standards. 49 U.S.C. §11322. Examples include national pools of flat cars and multilevels (autoracks). These pooling arrangements are used to share assets in a manner that enhances the utilization of those assets, leading to greater efficiencies that could not be achieved in the absence of the pools. Such pools benefit both the railroads and the customers whose products are shipped in the pooled railcars, and the limited antitrust immunity permits railroads to undertake this efficiency-enhancing conduct without being subject to the threat of antitrust claims. Moreover, the STB maintains jurisdiction over the pooling agreements and is free to modify or revoke its approval if a pool is used for anticompetitive purposes. Eliminating the antitrust immunity would serve no beneficial purpose.

3. The Purported Benefits of the System of Dual Regulation That H.R. 1650 Would Bring About Are Dubious and Illusory

A. Railroad Consolidations

In amending both section 7 of the Clayton Act and The Federal Trade Commission Act, H.R. 1650 does not so much eliminate an antitrust exemption as establish a system of dual regulation. Though the STB's authority over rail mergers is not eliminated by H.R. 1650, the bill would also make applicable the Clayton Act standards and permit antitrust enforcement agencies to challenge rail mergers — even, it appears, those that were approved by the STB (or ICC) long ago. There is little reason to believe that this change in the law will provide the relief some shippers insist they need. In fact, we fail to understand how subjecting a major rail merger to the less stringent DOJ standard to only preserve competition gives shippers more protection than the STB standard of enhancing competition.

Under existing law, the STB closely regulates railroad consolidations and cannot approve them without considering any potential adverse effect on competition and ensuring that they are consistent with the public interest. Since Staggers, the STB and its predecessor, the ICC, have consistently used their statutory authority to impose conditions on railroad consolidations to ensure that no customer has lost two-railroad service due to a consolidation. The STB regulatory process for assessing mergers, consolidations, and pooling agreements provides for the development of a detailed record, with affected parties (including DOJ) having the opportunity to participate. Where rail customers are served by only one railroad today, it is not the result of consolidations permitted since 1980, it is because the market cannot support the presence of more than one carrier.

When the STB considers a proposed merger of two or more Class I railroads, it must consider, among other things, (1) the effect of the proposed transaction on the adequacy of transportation to the public; (2) the effect on the public interest, and (3) whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region or in the national rail system. In that regard, the STB is guided by traditional Clayton Act Section 7 analysis. *See Santa Fe Southern Pac. - Control – Southern Pac. Transp. Co.*, 2 I.C.C. 2d 709, 727 (1986). In fact, since 1980, the ICC/STB has approved only one rail merger that the Justice Department opposed. In an order approving a transaction, the STB may impose conditions on the applicants, including divestiture of tracks, the granting of trackage rights,[5] or access to other facilities.

The STB having exclusive jurisdiction over approval of consolidations is an outgrowth of Congress' decision to have rail consolidations considered in the context of the national transportation policy which, while most certainly including the interest of promoting competition, also includes other important considerations. The railroad consolidation provisions originated in the Transportation Act of 1920, 41 Stat. 456. Under that law, Congress sought to balance the policies embodied in the antitrust laws with those embodied in the national transportation policy. Given the context in which railroad consolidations are to be considered, Congress determined that the regulatory agency with substantive expertise and responsibility for implementing national transportation policy is in the best position to evaluate proposed consolidations in the railroad industry.

In recent years, with the competitive environment in which the railroads operate, the focus of the national transportation policy has reflected a greater reliance on competition and market forces. See 49 U.S.C. §10101(1) & (2). As a result, STB oversight of the railroad industry permits railroads far greater flexibility with respect to their rates and services than was the case in the past. This change has also been recognized by the STB with respect to its consolidation policy.

In 2001, the STB revised its regulations pertaining to railroad mergers to elevate the importance of preserving competition as a condition for approval of a transaction. *See generally* 49 C.F.R. Part 1180. The STB's stated policy is to ensure "balanced and sustainable competition in the railroad industry." 49 C.F.R. §1180.1(a). The regulations further state that the STB does not favor consolidations that reduce the transportation

[5] Trackage rights are the rights of one carrier to use the track of another carrier.

alternatives available to shippers unless there are substantial and demonstrable public benefits to the transaction that cannot otherwise be achieved. *Id.* The STB requires that major merger applications include provisions for enhanced competition. §1180.1(c). Moreover, the STB is prepared to use its authority to "preserve and/or enhance competition." *Id.* Applicants seeking approval of a transaction are required to explain how they would, at a minimum, preserve competition and market options and to propose remedies to mitigate and offset competitive harms. §1180.1(c)(2)(I). Thus, while the STB retains exclusive jurisdiction to approve rail mergers, the agency continues to take into account — indeed, now emphasizes — policies embodied in the antitrust laws along with other public interest factors.

The STB has authority, which it has frequently exercised in the past and maintains today, to impose conditions on merging railroads and to exercise significant oversight when it approved rail consolidations. See 49 U.S.C. §11324(c). The Board may impose conditions governing the transaction, including the divestiture of parallel tracks or requiring the granting of trackage rights and access to other facilities. At least since 1980, the Board has consistently imposed merger conditions to preserve two-railroad service where it existed. *E.g., Union Pac. Corp., Union Pac. R.R. Co., and Missouri Pac. R.R. Co. Control and Merger Southern Pac. Rail Corp., Southern Pac. Transp. Co., St. Louis Southwestern Ry. Co., SPCSL Corp., and Denver and Rio Grande Western R.R. Co.* [General Oversight], STB Finance Docket No. 32760 (Sub-No. 21), Decision 13 (1998).

In addition, the Board has exercised its authority by maintaining oversight of transactions for a period of time after approval. For example, a five-year oversight period was made a condition of approval of the acquisition of Conrail by CSX and Norfolk Southern. *See CSX Corp. And CSX Transp., Inc., Norfolk Southern Corp. and Norfolk Southern Ry. Co.*

Control and Operating Leases/Agreements Conrail, Inc., and Consolidated Rail Corp., Decision No. 89, Finance Docket No. 33388 (3 S.T.B. 196) (1998). *aff'd., Erie-Niagara Rail Steering Comm. v. Surface Transp. Bd.*, 247 F.3d 437 (2nd Cir. 2001).

Because of STB's imposition of conditions on mergers and its emphasis on preserving competition, there is probably more effective price competition today than there was in the "idyllic" days of long ago. The greater number of Class I railroads that existed then were subject to heavy-handed ICC rate regulation which made it difficult for railroads to respond to changed market conditions and tended to leave rates at a level designed to protect the most inefficient carriers. In addition, as described above, rates were often made by immunized rate bureaus, legalized price-fixing cartels that no longer exist today. The assigning of jurisdiction over railroad consolidations to the STB is an outgrowth of the longstanding regime of economic regulation. As a result, the agency that is charged with carrying out the national transportation policy, and which, along with its predecessor, possesses well over 100 years of accumulated expertise, continues to have the final say over rail consolidations. It is not clear what benefits introducing dual merger authority would bring, or that such dual authority, in the few industries where it now applies, has resulted in a more competitive market than would otherwise exist.

B. Primary Jurisdiction and Injunctive Relief

Also of questionable benefit is the provision in H.R. 1650 that reverses judicial precedent under which federal courts have referred matters to the STB involving its "primary jurisdiction" in four types of antitrust challenges. Not technically an antitrust exemption, the doctrine of primary jurisdiction is concerned with promoting proper relationships between courts and administrative agencies charged with particular regulatory duties. Under longstanding precedent, courts may defer to the regulatory agency on otherwise antitrust-related contentions. Primary jurisdiction, which by no means is limited to application in the railroad industry, applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of a claim requires resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body. *See U.S. v. Western Pac. R.R.*, 352 U.S. 59, 64 (1956). The purpose of this court-developed doctrine is to avoid potential conflicts between that oversight and the outcome of private litigation. *Id.*

Similarly, in order to avoid inconsistent results as between courts and the STB, private parties are prohibited from seeking to enjoin alleged antitrust violations by common carriers related to matters that are within the STB's jurisdiction. 15 U.S.C. §26; *See e.g., Central Transfer Co. v. Terminal R.R. Ass'n,* 288 U.S. 469, 475 (1933). H.R. 1650 would open the door to private injunctions against railroads, but not other common carriers. This immunity which is being eliminated does not prevent a private party from seeking antitrust damages against a railroad; nor does it prohibit the federal government from seeking injunctive relief. It simply prevents a civil court, which does not posses the expertise to consider how a decision involving a discrete dispute between a single railroad and single plaintiff might affect other railroads and shippers on other parts of the rail network. The STB, on the other hand, is charged with the responsibility for looking at the railroad network as a whole, taking into account the national, regional, and local aspects of the system. Thus, the STB is in a much better position to ensure that remedies to resolve individual disputes comport with national rail policy objectives.

Permitting private injunctions introduces dual regulation which will often be at cross purposes. So long as there remains a single regulatory body that is charged with oversight of the rail industry, it is imperative that the antitrust laws and national transportation policy be implemented in a harmonious fashion. In permitting courts to fashion equitable remedies in individual civil actions (Section 2), and by discouraging courts from deferring to the STB's expertise (Section 4), H.R. 1650 threatens to disrupt that harmony. While individual plaintiffs might find satisfaction in pursuing injunctions, or in having courts ignore (to the plaintiff's benefit) STB resolution of relevant issues, such outcomes could well have ripple effects to the detriment of other shippers and the rail network as a whole.

It is fair to say that part of the motivation behind H.R. 1650 (and in particular elimination of the primary jurisdiction doctrine and allowance of private injunctions) is dissatisfaction on the part of some rail shippers with decisions of the STB on certain market practices. One example is concern over the STB's refusal to require railroads to quote "bottleneck" rates, a term that refers to rates that would apply to segments of a railroad's network used to reach individual shippers or receivers that are served by only one railroad. Even in the absence of any antitrust exemptions, it is dubious whether this, and other unilateral railroad conduct, would be subject to antitrust relief. *See Verizon Comm. v. Trinko*, 540 U.S. 398 (2004).[6]

Similarly, repeal of the filed rate, or *Keogh*, doctrine,[7] which H.R. 1650 would accomplish, is unlikely to offer any real benefits to rail shippers. The continued viability of that doctrine as it related to railroads is dubious, as most rail rates are no longer subject to filing requirements. AAR is unaware of the filed rate doctrine being used in recent times to

6 In *Verizon*, despite the antitrust savings clause in the Telecommunications Act, the Court explained that "[a]ntitrust analysis must always be attuned to the particular structure and circumstances of the industry at issue. Part of that attention to economic context is an awareness of the significance of regulation." The Court further explained that "[o]ne factor of particular importance is the existence of a regulatory structure designed to deter and remedy anticompetitive harm."

7 *See Keogh v. Chicago & NW Ry.*, 260 U.S. 152 (1922).

absolve railroads of conduct that otherwise would have constituted an antitrust violation. Interestingly, H.R. 1650 would eliminate this "immunity" only with respect to railroads. It apparently would remain intact for other regulated industries, which, in recent times, have utilized it to defend antitrust actions. *E.g., Utilimax.com, Inc. v. PPL Energy Plus, LLC*, 273 F.Supp.2d 573 (E.D. Pa. 2003)(rates filed with the Federal Energy Regulatory Commission) AAR would recommend that rather than repealing the Keogh doctrine in a piecemeal fashion, the Committee consider a comprehensive review of Keogh for all affected industries.

4. The Premise That H.R. 1650 Only Levels the Playing Field and Treats Railroads Like All Other Industries is False

The notion that H.R. 1650 merely seeks to level the playing field and treat railroads like all other industries is belied by the very language of the bill. In several instances, H.R. 1650 addresses specific antitrust exemptions that currently apply beyond just railroads, but eliminates them only with respect to railroads.

For example, STB-regulated common carriers other than railroads remain immune to private injunctions, 15 U.S.C. §26; and, only STB-approved railroad transactions, but not transactions consummated pursuant to the authority of other named federal regulatory agencies, are made subject to section 7 of the Clayton Act. 15 U.S.C. §18. Motor carrier agreements that are approved by the STB retain antitrust immunity. 49 U.S.C. §13703.

Beyond the obvious question of why these antitrust exemptions remain sound policy for other industries, is the continued reality of STB economic regulation to which railroads remain subject. H.R. 1650 would not replace the STB's regulatory regime with application of the antitrust laws in the areas where limited immunities currently exist. Rather, H.R. 1650 would superimpose antitrust remedied on top of STB regulation. As described above, the STB has full authority to review proposed railroad mergers and similar transactions and gives full consideration to competitive issues. Moreover, the STB retains jurisdiction over rail service, market entry, and a wide range of rate-related conduct, including the level and structure of rates where there is no effective competition. As a result, rail customers continue to enjoy protection against unreasonably-high rates. In the limited circumstances in which a railroad's service is not subject to competition from other railroads or other modes of transportation, rail customers are protected by regulatory constraints on their rates. Moreover, the elimination of the antitrust immunities that are proposed will not provide rail customers with any protection from high rates, because high prices alone do not constitute an antitrust violation. So long as the regime of economic regulation remains in effect, H.R. 1650 cannot be justified as simply treating railroads like all other industries.

In sum, H.R. 1650 is flawed on several counts. It fails to recognize the public benefits from the limited antitrust exemptions that allow the railroad industry to undertake certain activities subject to expert oversight using a public-interest standard rather than solely the antitrust laws. It also fails to recognize that railroads are subject to antitrust scrutiny where there is no regulatory oversight. Consequently, eliminating the limited antitrust exemptions that apply to the railroad industry would not fill any void in the law. More likely, it would discourage activities that are in the public interest and subject railroads to dual, and potentially inconsistent, standards in areas that are being addressed as effectively, if not more effectively, through regulatory oversight. The AAR urges Congress not to embrace such an ill-advised result.

Mr. CONYERS. We now turn to Professor Darren Bush, California State University, and the University of Utah. He has written extensively and lectured about antitrust laws and economics, and received many awards. I am going to include in your introduction a list of selected publications which you have contributed over the years.

We welcome you to the hearing.

TESTIMONY OF DARREN BUSH, PROFESSOR, UNIVERSITY OF HOUSTON LAW CENTER

Mr. BUSH. Thank you, Mr. Chairman and other distinguished Members of this Antitrust Task Force. I want to thank you today for giving me the opportunity to speak about competition policy in the context of a deregulated railroad industry. My remarks today are my own, as I, quite sadly, do not represent anyone in this matter. This makes me feel free to discuss the nature and effect of the proposed legislation with a certain degree of specificity.

As an antitrust professor and as an economist, there are certain things in the legislation that give me pause, there are certain things in this legislation that I think are very productive, and I think it is very important to discuss all of those things.

The first thing I want to start out by asking is: Is there ever a reason to keep an antitrust immunity? As I and others have set forth in a recent report to the Antitrust Modernization Commission, we believe the burden of establishing the case for any immunity should fall upon the proponents of the immunity who at a minimum should, one, clearly explain why the conduct in the scope of the immunity is both prohibited or unduly limited by antitrust liability and is in the public interest; make some estimation as to the effects the proposed immunity will have in addition to its intended effect; and, three, demonstrate that the proposed immunity is necessary to achieve the desired policy outcome.

In the case of railroads, I find no clear benefit to the immunity, except perhaps to the railroads and to the Surface Transportation Board in the form of exclusive jurisdiction. The benefits of such a regulatory scheme are dubious at best, and the conduct sought for continued immunization has characteristics that could lead, and has certainly led, to serious consumer injury.

For example, it is fair to say that the Surface Transportation Board and its predecessor, the ICC, have rarely met a merger they did not like. This isn't due to incompetence; as stated in my written testimony, it is by design. While the goal of a promerger stance is increased investor returns and system stability, it is not clear the policy has accomplished either. Some recent mergers have created service disruptions and spawned shipper complaints, and while the STB has revamped its merger policy to some degree, it has yet to be tested by any railroad merger.

The question arises as to whether the STB will be able to resist its past practices of allowing mergers to come to fruition with Acela-like speed, nor can we conclude much about what appears to an be agreement between the DOJ and the STB with respect to many of the mergers approved by the STB. The DOJ, in absence of an ability to join a merger, will not dedicate resources to a thorough examination of the transaction. Thus, the DOJ is unlikely to have the same type of information available in the context of a railroad merger as it possesses in virtually every other industry, including but not limited to the ability to issue a second request for documentary materials, the ability to submit investigative demands to third parties for documentary materials, conducting of interviews with relevant third parties, conducting of civil investigative demands for oral testimony, and other methods necessary to paint a full and complete picture of the nature of competition in the marketplace.

More troubling than STB's merger policy is the STB's view with respect to other transactions with clear anticompetitive effect and perhaps no procompetitive benefit. This is the case with paper barriers. In many sales of secondary trackage to small regional players who wish to interconnect with the seller's, a major trunk line operator's, main lines, the seller, in exchange for interconnection, often demanded that the regional player only interchange its traffic from the divested line to the seller, foreclosing any opportunity for the buyer to interchange with operators. These paper barrier restraints were often permanent. The ICC and the STB historically approved such restraints. Those would certainly change if they were subject to antitrust review by the DOJ, as they would typically be somewhat per se illegal since they have no terminating time period.

There are some issues with respect to rates, however. There was mention earlier that much of what the railroads do is subject to antitrust attack. However, it is not the nature of what is addressed in the statute as sort of the umbrella that goes beyond the statute. In other words, where there is not a statutory exception, there is still pause in the courts to address any sort of antitrust issue when there is some realm of perhaps immunity.

This is certainly the case where the STB has sought to move certain rates or other activities away from regulation and into the marketplace, because the STB often has the option of reregulating that conduct. And courts, where potentially challenged conduct could be rendered moot upon reregulation, are not likely to render any judgment. In other words, the fact that the STB could, in fact, render the issue moot would not cause judges to allow antitrust suits to continue. The only remedy for this potentially judicial hesitation for this conduct is to clearly define what is within the STB's realm and what is not.

One other point I want to make, I know I am testing your time limitations, is there are certain other aspects of immunity that the legislation does not address. There is a notion of what is called immunity by proxy. If you read the Supreme Court's recent *Verizon Communication v. Trinko* decision, Justice Scalia laments in part for the decision that where a regulatory body exists, the benefits of the antitrust enforcement will tend to be small. This sentiment was also carried forth in the Supreme Court's recent *Credit Suisse Securities v. Billing* decision.

Now, the question becomes if there is a repeal of the express antitrust immunity, will the courts find an implied immunity merely because there is regulatory conduct at issue? In other words, merely removing the antitrust immunity will not necessarily remove all immunity. This is also true of primary jurisdiction. The legislation in it has a provision that dictates that the courts do not have to defer to the primary jurisdiction of the agency, but the primary jurisdiction issue is one of discretion for the courts, and there is a question as to whether the primary jurisdiction provision will actually eliminate primary jurisdiction.

The third thing that I have that is an issue with the legislation is the filed rate doctrine. Now, if you followed the electricity cases that have come out of the ninth circuit and now the tenth circuit, even where the regulatory agency has not expressly authorized a rate, but merely where the rates are subject to just submission ex post, market prices submitted ex post to a regulatory agency, the courts have found those to be filed rates, and therefore they are immune from private plaintiff antitrust attack. So merely having a repeal of the express antitrust immunity, I think, is insufficient to deal with some of those issues that are still plaguing us within the courts with respect to deregulated industries.

I look forward to entertaining questions as to these issues. Thank you very much for your time.

[The prepared statement of Mr. Bush follows:]

PREPARED STATEMENT OF DARREN BUSH

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"The Intersection of Competition Policy and Surface Transportation Regulatory Policy: An Examination of H.R. 1650, the "Railroad Antitrust Enforcement Act of 2007"

BEFORE
THE HOUSE JUDICIARY COMMITTEE ANTITRUST TASK FORCE
UNITED STATES CONGRESS

ON

FEBRUARY 25, 2008

Introduction

Mr. Chairman, Ranking Member Keller and other distinguished members of the Judiciary Committee Antitrust Task Force, I want to thank you for giving me the opportunity today to speak about regulation and competition policy in the context of the railroad industry. But more importantly, I would like to thank you for asking the hard questions about the direction of railroad policy in light of the United States' experiences with the railroad industry over the past several decades. My remarks here today are my own, as I do not represent anyone. I speak today based upon my experience as an Antitrust Division trial attorney focused on deregulated industries, as an economist, and as a law professor whose research and writing has focused on antitrust issues arising in the context of regulated/deregulated industries.[1]

Antitrust Immunities and Exemptions in General

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[1] The term "deregulation" is a bit of a misnomer. See Harry First, *Regulated Deregulation: The New York Experience in Electric Utility Deregulation*, 33 LOY. U. CHI. L. J. 911 (2002)(noting that New York's electricity market was not deregulated, but in fact replaced "one regulatory system with another.").

In consideration of the repeal of any statutory immunity from the antitrust laws, it is important to consider the realm of possible other immunities and exemptions that may give rise to unforeseen antitrust immunity.

To review some basics, an express antitrust immunity may be justified when a regulatory agency has been expressly empowered by Congress to displace competition in an industry. Congress may expressly confer upon the regulator the exclusive power to control competitive issues within that industry by providing the industry with antitrust immunity.

Traditionally, such grants of authority were for the purpose of displacing competition with rate and entry regulation while providing the firm with a monopoly, albeit a regulated one.[2] The agency would confer upon the industry the right to some reasonable rate of return and an exclusive right to provide service within its territory in exchange for the provision of service to all comers, agency review of rates and costs associated with providing that service, and other hurdles that limited the ability of the firms within that industry to expand into other realms or charge higher rates.

In this realm, the common notion was that antitrust had little to say. Indeed, notions of competition were antithetical to this arrangement.[3] After all, there was little

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[2] *See generally* Darren Bush, *Mission Creep: Antitrust Exemptions and Immunities as Applied to (De)regulated Industries,* 2006 UTAH L. REV. 613.
[3] Darren Bush & Carrie Mayne, *In (Reluctant) Defense of Enron: Why Bad Regulation Is to Blame for California's Power Woes (or Why Antitrust Law Fails to Protect against Market Power when the Market Rates Encourage Its Use),* 83 OR. L. REV. 207, 207 (2004)(noting the historical perspective that regulation and antitrust are substitutes); see Richard D. Cudahy, *The Wearing Away of Regulation: What Remains,* PUB. UTIL. FORT., Oct. 12, 1989, at 9, 9–12; *Consolidation in Telecommunications Industry Senator Metzenbaum's Views,* 7 TRADE REG. REP. (CCH) ¶ 50,126 ("[F]ederal and state regulation of the telecommunications industry has been and will continue to be a poor substitute for aggressive antitrust review."); Leslie W. Jacobs et al., *Panel Discussion, Deregulation and Expanding Antitrust Liability: A New Battleground for Private Antitrust Litigants,* 53 ANTITRUST L. J. 221, 222 (1984) ("When I was

ability to compete between franchises as entry was highly restricted.[4] Moreover, the terms, conditions, and prices of the services offered in such industries were actively overseen by administrative agencies. Thus, with few exceptions, antitrust was required to remain silent.

However, current notions of regulation focus on market mechanisms that are not necessarily antithetical to the antitrust laws.[5] "Regulated" industries today are typically regulated only in the parameters under which competition takes place. Agencies do not to the same degree restrict entry—they encourage it. They no longer to the same degree review rate schedules and tariffs—they allow the market constructed by administrative rules and statutes to determine the rates and prices charged. They also do not to the same degree guarantee a rate of return, instead allowing the market to winnow out losers and reward winners.

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involved with getting the airline industry deregulated, we were quite hopeful that competition would substitute for regulation and that much of the antitrust enforcement would be done by private litigation." (statement of Marvin S. Cohen, Member, D.C. Bar)); Alfred E. Kahn, *Deregulatory Schizophrenia*, 75 CAL. L. REV. 1059, 1059 (1987) ("I agree thoroughly with Judge Breyer that the antitrust laws are not just another form of regulation but an alternative to it—indeed, its very opposite." (footnote omitted)); cf. Peter C. Carstensen, *Evaluating "Deregulation" of Commercial Air Travel: False Dichotomization, Untenable Theories, and Unimplemented Premises*, 46 WASH. & LEE L. REV. 109, 116 (1989) (noting dichotomy of regulation/deregulation "is false with respect to analysis of regulation and deregulation of any industry, and is extremely so with respect to commercial air travel").

[4] One notable exception was competition for larger industrial and commercial customers in the electricity industry.

[5] *See* Herbert Hovenkamp, *Antitrust and the Regulatory Enterprise*, 2004 COLUM. BUS. L. REV. 335, 341 (2003). Professor Hovenkamp states:

> One consequence of regulation is a reduced role for the antitrust laws. When the government makes rules about price or output, market forces no longer govern. To that extent antitrust is shoved aside. A corollary is that as an industry undergoes deregulation, or removal from the regulatory process, antitrust re-enters as the residual regulator. Since our fundamental criterion for determining antitrust immunity in regulated industries is the extent of unsupervised private discretionary conduct, the natural result of deregulation is an increased role for the antitrust laws. In general, the more extreme the deregulation--that is, the more that the market is opened to ordinary competitive forces--the greater the role for antitrust.

Id.

Thus, antitrust law and regulation may serve complementary purposes[6] in industries subject to what my colleague Harry First and others have called "regulated deregulation."[7] Under these "new" regulatory schemes common today, express exemptions from the antitrust laws generally will be inappropriate and, therefore, should be rare. In other words, the "default" rule should always be that competition and its enforcement agent, the antitrust laws, prevail.[8]

Linked closely with the notion of express immunity is the doctrine of implied immunities, or claims that Congress "intended" to exempt regulatory conduct from antitrust even though it did not do so by express statutory language. Historically, courts have viewed implied immunities with extreme skepticism. As one group of commentators has stated:

> [T]wo grounds--and only two grounds--will support an implied repeal: the first is irreconcilability and the second is an affirmative showing of legislative intent to repeal by implication. The latter criterion has only been satisfied in cases in which the repealing act contains a directive to the regulatory agency to police the interplay of competitive forces. The irreconcilability criterion requires, at a minimum, that the statutes [antitrust and regulatory] produce differing results. This finding alone is not sufficient however. Rather, to find 'irreconcilability' there must be a determination that

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[6] For a discussion of the complementary nature of regulation and antitrust, *see* Darren Bush & Carrie Mayne, *In (Reluctant) Defense of Enron: Why Bad Regulation Is to Blame for California's Power Woes (or Why Antitrust Law Fails to Protect Us Against Market Power When the Market Rules Encourage Its Use),* 83 OR. L. REV. 207 (2004).

[7] *See* Harry First, *Regulated Deregulation: The New York Experience in Electric Utility Deregulation*, 33 LOY. U. CHI. L. J. 911, 924 (2002)(discussing "regulated deregulation" as the replacement of cost of service regulation with state and federal regulation of "the mechanism put into place to manage competitive markets.")

[8] It follows that antitrust "savings clauses" should not be required. A savings clause, in contrast to establishing competition as the default rule, places the burden upon Congress to actively declare (and redeclare) that the antitrust laws apply. *See, e.g.,* Telecommunications Act of 1996, sec. 601(b)(1), (c)(1), § 152 note, 110 Stat. 56, 143 (1996)(" SAVINGS CLAUSE ... nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws. NO IMPLIED EFFECT ... This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State or local laws unless expressly so provided in such Act or amendments.").

> repeal of the antitrust laws is necessary to make the regulatory act work. This requires an appreciation of the nature of the various regulatory acts.[9]

Broad delegations of power to a regulatory agency may lead to instances where agency directives are in tension with antitrust law. As Judge Greene's opinion in an early phase of the Antitrust Division's suit against AT&T seeking dissolution of the company on the ground of unlawful monopolization points out, however, such instances are relatively narrow. In response to AT&T's motion to dismiss the suit claiming that Congress had committed regulation of the activity in question to the F.C.C. under the Communications Act of 1934, Judge Greene wrote:

> Regulated conduct is . . .deemed to be immune by implication from the antitrust laws in two relatively *narrow* instances: (1) when a regulatory agency has, with congressional approval, exercised explicit authority over the challenged practice itself (as distinguished from the general subject matter) in such a way that antitrust enforcement would interfere with regulation . . . and (2) when regulation by an agency over an industry or some of its components or practices is so pervasive that Congress is assumed to have determined competition to be an inadequate means of vindicating the public interest.[10]

Particularly in light of the current trend towards "regulated deregulation," it is increasingly unlikely that the roles of regulation and antitrust serve antithetical purposes. Rather, the creation and fostering of competition might indeed be best served by the complementary potential of regulation and antitrust.[11]

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[9] Robert Balter and Christian Day, Implied Antitrust Repeals: Principles for Analysis, 86 DICK. L. REV. 447 (1982). *See also* United States v. National Association of Security Dealers, 422 U.S. 694, 719 (1975)("Implied antitrust immunity is not favored, and can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system"); Gordon v. New York Stock Exchange, Inc., 422 U.S. 659 (1975).

[10] U.S. v. Amer. Tel. & Tel. Co., 461 F.Supp. 1314, 1322 (D.C.D.C. 1978)(emphasis supplied).

[11] Similar arguments might be made in favor of a limited state action doctrine and the filed rate doctrine. The original state action doctrine arose out of principles of federalism and a concern that the federal government not intrude upon state created and sanctioned regulation. Again, the most common type of industry regulation was rate and entry regulation. However, "regulated deregulation" has come onto the state scene in many instances. In such instances, it is unlikely that the clearly articulated state policy seeks to displace competition with regulation. Rather the purpose of the policy would be that regulation creates competition. The creation of competition cannot be said to be in contradiction with the purposes of

However, the caselaw is going in the opposite direction.[12] Even where there is no *direct* regulatory oversight, courts have found implied immunity merely due to *potential* regulatory oversight. What remains is a gap between regulation and antitrust, where neither serve to provide essential oversight to an industry.

One reason for the gap is that express immunities tend to "creep." That is, they not only protect the world they were designed to protect, but their shield extends to conduct which the express immunity was not seeking to protect. In other words, the existence of an express immunity providing protection from the antitrust laws for some particular conduct may actually provide immunity for other types of antitrust conduct.[13]

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antitrust. *See* Darren Bush, *Mission Creep, supra* note 2. For examples of state policies creating competition in the context of traditionally regulated industries, *see* United States v. City of Stillwell, Oklahoma, Case No. CIV 96-196 B, government filings available at http://www.usdoj.gov/atr/cases/stilwc0.htm (Oklahoma statute allowed municipal electric cooperatives to compete with one another for new customers); United States v. Rochester Gas & Elec. Corp., 4 F.Supp.2d 172 (W.D. N.Y. 1998)(New York statute allowing retail sales of electricity by cogeneration plants).

Similarly, the *Keogh* doctrine or filed rate doctrine was originally designed to preclude the bypassing of statutory damages granted under the Interstate Commerce Act. The Interstate Commerce Act provided for single damages as a remedy. The plaintiffs in *Keogh* sought to use antitrust to bypass statutorily conferred remedies. This approach was rejected by the Court. The case was not about the justness or reasonableness of rates, as has been increasingly the case with application of the *Keogh* doctrine. Keogh v. Chicago & Northwestern Railway Co., 260 U.S. 156, 162-163 (1922).

As has increasingly been the case, *Keogh* has been applied in the context of "regulated deregulation." However, the market clearing prices typically found in such industries bear no relation to the types of rates originally addressed by the *Keogh* progeny, namely, traditional cost of service rates set via tariff after review by an administrative agency. In contrast, market rates are only reviewed (in rare instances) and even then they are reviewed *ex post*. Courts nonetheless continue to hold that the filed rate doctrine applies to market based rates. *See, e.g.,* Public Utility Dist. No. 1 of Grays Harbor County Wash. v. IDACORP Inc., 370 F.3d 641, 651 (9th Cir. 2004)("[W]hile market-based rates may not have historically been the type of rate envisioned by the filed rate doctrine, we conclude that they do not fall outside of the purview of the doctrine."); Public Utility District No. 1 v. Dynegy Power Marketing, Inc., 384 F.3d 756 (9th Cir. 2004); Town of Norwood v. New England Power Co., 202 F.3d 408 (1st Cir. 2000).

[12] Credit Suisse Securities (USA) LLC v. Billing, 127 S. Ct. 2383 (2007).

[13] See ABA, FEDERAL STATUTORY EXEMPTIONS FROM ANTITRUST LAW 17 (2007)(noting that courts have sometimes adopted "expansive interpretations as to the scope of an exemption")(hereafter ABA Monograph).

The doctrine of primary jurisdiction also may play a crucial role where there is any regulatory oversight at all even in the absence of express or implied immunity.[14] While primary jurisdiction is *not* a methodology by which to grant immunity or exemption, but rather a method by which courts might rely on an agency's expertise in order to resolve a dispute before them, the doctrine has been misused as a grant of immunity in the past.[15]

The doctrine of "primary jurisdiction" is not, as is sometimes thought, an implied immunity. "Primary jurisdiction" addresses the question of whether the antitrust court should *suspend* the resolution of some questions of fact or law over which it possesses antitrust jurisdiction, until passed upon by the regulatory authority whose jurisdiction encompasses the activity involved. Although infrequent, such initial deference can be the practice when (1) resolution of the case involves complex factual inquiries particularly within the province of the regulatory body's expertise; (2) interpretation of administrative rules is required; and (3) interpretation of the regulatory statute involves broad policy determination within the special ken of the regulatory agency. This deference to statutory interpretation extends even to questions of jurisdiction.[16]

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[14] For a discussion of historical misuse of the doctrine, *see* Louis B. Schwartz, *Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility*, 67 HARV. L. REV. 436 (1954). *See also* Louis Jaffe, *Primary Jurisdiction Reconsidered*, 102 U. PA. L. REV. 577 (1954); JUDICIAL DOCTRINE OF PRIMARY JURISDICTION AS APPLIED IN ANTITRUST SUITS, STAFF REPORT TO THE ANTITRUST SUBCOMMITTEE OF THE HOUSE COMMITTEE ON THE JUDICIARY, 84TH CONG., 2D SESS. (1956).
[15] Schwartz, *supra* note 11 at 470-471 ("The lesson taught by [the expansion of primary jurisdiction doctrine from a procedural rule to a judicial exemption] is this: if a primary jurisdiction does not already exist, it may be advisable for an industry to create one as a means of avoiding the compulsion to compete which is embodied in the antitrust laws as administered by the federal courts.")
[16] *See Sourthern Railway Co. v. Combs*, 484 F.2d. 145 (6th Cir. 1973). *See also* Alpharma, Inc. v. Pennfield Oil Co., 411 F.3d 934, 938 (8th Cir. 2005)("The contours of primary jurisdiction are not fixed by a precise formula. Rather, the applicability of the doctrine in any given case depends on "whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application. . . .

The effect of judicial reference of a question to an administrative agency should be agency action on the question referred and then further court action in the antitrust case, although agency action might be dispositive. Unlike a finding of express or implied immunity, however, where primary jurisdiction doctrine is applied, the trial court's action is reviewed and that review is on antitrust standards. However, primary jurisdiction is a doctrine that is typically applied at the *discretion* of the court. Thus, statutory language that suggests that a court shall "not be required to defer to the primary jurisdiction of the Surface Transportation Board" does nothing to prevent a court from doing so.

On the other hand, in instances in which the doctrines of express or implied immunity are applied, the agency's action is reviewed on the standards set forth in the regulatory statute, and usually with the judicial deference to the agency's fact finding. As a practical matter, the initial determination of which doctrine applies in a particular case is of great significance in deciding what law applies, the degree to which antitrust considerations may or may not be accorded weight, and whether the antitrust remedies of criminal sanctions or treble damages are available in a particular case. An express or implied exemption finding precludes the application of antirust standards and remedies; while an application of the primary jurisdiction doctrine does not necessarily preclude use of antitrust standards and remedies to adjudicate the dispute but may only defer the adjudication pending an initial decision by the agency.

Among the reasons and purposes served are the promotion of consistency and uniformity within the areas of regulation and the use of agency expertise in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion.")(internal quotations and citations omitted).

A court may find none of these doctrines apply in a case involving activity by a regulated industry—even where the agency has some jurisdiction over the activity in question. As Judge Greene pointed out in the AT&T case, in such cases antitrust policy and regulatory policy are seen as compatible and not antagonistic.

I raise these issues to point out that repeal of express antitrust immunity is insufficient to eliminate the potential for judicially created immunities through the doctrines of implied immunity, primary jurisdiction, or limitations of antitrust law's applicability through the filed rate doctrine or other such exemptions.[17] Careful consideration ought to be given to the potential exemptions and immunities that may exist even after repeal of express immunity. Such immunities and exemptions typically are a result of the statutory authority conferred upon the regulatory agency and the execution of that authority by the agency.

[17] See *supra* note 12.

The Railroad Antitrust Immunities

I now turn more specifically to the substance of today's hearing. To discuss the impact of repealing express antitrust immunity upon surface transportation policy, it is necessary to bifurcate my discussion into impacts of repealing the transactional immunity and repealing immunities related to rates.

The Effect of Repeal of Transaction Immunity

A little history is in order to more fully understand how the railroad industry got where it is today. Transactional immunity (immunity for mergers, acquisitions, and related agreements) arose during the 1920s due to increasing concern over the financial health of the railroads and government experience at managing the railroads during World War I.[18] Such experiences led Congress to believe that in order to enhance the financial returns of investors and to promote better service, it was necessary to promote consolidation within the industry with the help of the Interstate Commerce Commission (ICC), the predecessor to the Surface Transportation Board (STB). The ICC adopted a plan that balanced competition against other concerns that were sometimes inconsistent with competition policy.

Congress required that the ICC approve any agreement between railroads, including mergers and acquisitions. Law required that any merger application be in harmony with the policy of consolidating the industry. ICC approval of these transactions immunized the transactions from antitrust scrutiny.

[18] ABA Monograph, *supra* note 13 at 196. *See also* THEODORE E. KEELER, RAILROADS, FREIGHT, AND PUBLIC POLICY 25 (1983)

There appears to have been little or no Congressional debate about the antitrust immunity at the time of its passage. Courts have thus taken the position of simply accepting the language as it stands without inquiring as to its purpose.[19] The immunity itself has remained virtually unchanged, despite reforms in railroad legislation and the disbanding of the ICC.[20]

Current merger review by the STB, by statutory design and by regulatory obedience to that design, has favored consolidation. The STB is required to determine whether a transaction is in the public interest. While competitive considerations are central to the analysis, they are only one of five factors which the STB is statutorily required to consider.[21] The overall balancing of these factors means that a merger that is grossly anticompetitive should be permitted if the transaction on net yields greater benefits to the stakeholders in the merger (labor, the companies involved, etc.) than are lost by the public.

It is no surprise, therefore, that the STB has only rarely encountered a merger that it did not like.[22] While the STB has imposed conditions upon many mergers, those conditions are not consistently about competitive effects arising from the transaction.

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[19] *See, e.g.*, Denver & Rio Grande W. R.R. Co. v. United States, 387 U.S. 485 (1967); *In Re* REA Express Private Treble Damage Antitrust Litig., 412 F. Supp. 1239, 1261-63 (E.D. Pa. 1976).
[20] *See ICC Termination Act of 1995*, H.R. REP. NO. 104-311, at 83 (1995).
[21] *See* 49 U.S.C. § 11324.
[22] *See* Salvatore Massa, *Injecting Competition in the Railroad Industry Through Access*, 27 TRANSP. L.J. 1, 2 n. 5 (2000). Mr. Massa points out:

> Furthermore, federal policy has favored railroad mergers for quite some time. As Surface Transportation Board Commissioner Gus Owen has observed "[s]ince 1920 it has been the public policy, as enunciated by Congress, to reduce the number of competing railroad systems." See Central Power & Light Co. v. Southern Pac. Transp. Co., Fin. Docket No. 31242 at 19 (Surface Transp. Bd. Dec. 27, 1996) (Comm'r Owen commenting) [hereinafter CP&L], aff'd sub. nom., No. 97-1081, 1999 WL 60501 (8th Cir. Feb. 10, 1999). During the period 1956 to 1971, regulatory authorities approved ten of fourteen

It is not at all clear that the move toward consolidation has yielded stability in service and the higher investor returns sought by Congress in the 1920s. Some recent mergers have created service disruptions and spawned shipper complaints.[23] As a result, the STB created a 15 month moratorium on mergers and promulgated a detailed statement concerning its merger review policy that in part created a much higher hurdle for merging parties in demonstrating efficiencies from the transaction. In it, the STB requires that "substantial and demonstrable gains in important public benefit" outweigh any "anticompetitive effects, potential service disruptions, or other merger-related harms."[24] It is unclear what this new standard will yield, if anything, as it has yet to be tested by a major railroad consolidation. And while the STB has declared that it will "consider the policies embodied in the antitrust laws,"[25] it is not clear what weight such policies will be afforded in the overall public interest calculus.

However, mergers are not the only transactional issues that arise in the context of railroads. One major issue is that of "paper barriers."[26] In many sales of secondary trackage to smaller regional players who wished to interconnect with the seller's (a major

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> merger applications. . . . Since 1980, regulatory agencies have approved twelve of thirteen merger applications. See Salvatore Massa, *Are All Railroad Mergers in the Public Interest? An Analysis of the Union Pacific Merger with Southern Pacific*, 24 TRANSP. L.J. 413, 431 n.96 (1997) (listing ten of eleven); CSX Corp.-- Control--Conrail Inc., Fin. Docket No. 33388, 1998 WL 456510 (Surface Transp. Bd. July 23, 1998) (approving the eleventh merger); Rip Watson, *Deal Creates First Large Cross-Border Rail System*, J. COM., Mar. 26, 1999, at A1 (announcing approval of twelfth merger).

Id.

[23] *See* Massa, *supra* note 22 at 12 (detailing service issues arising from the Union Pacific-Southern Pacific merger and the Union Pacific-Chicago & Northwestern Railway merger); Daniel Machalaba, *CSX, Norfolk Southern Find Breaking Up is Hard to Do*, WALL ST. J., June 28, 1999 at B4 (discussing issues with CSX and Norfolk Southern's acquisition and division of Conrail).

[24] 49 C.F.R. § 1180.1(c).

[25] 49 C.F.R. § 1180.1(c)(2).

[26] My former colleague and coauthor Salvatore Massa has excellently described the paper barriers issue. See Salvatore Massa, *A Tale of Two Monopolies: Why Removing Paper Barriers Is A Good Idea*, TRANSP. J. Winter/Spring 2001, at 47.

trunk line operator) main lines, the seller, in exchange for interconnection, often demanded that the regional player only interchange its traffic from the divested line to the seller, foreclosing any opportunity for the buyer to interchange with other operators. These "paper barrier" restrains were often permanent.

The ICC historically approved such restraints, finding that they had no anticompetitive effect. And, despite complaints from smaller railroad firms, shippers, and labor organizations, the STB has not changed course with respect to these restraints.[27]

Finally, I should point out that both the ICC and STB could authorize railroad interlocking directorates. Nothing has changed in this realm since the 1920s. The STB's rules establish a procedure for applying for such interlocking directorates, although smaller carriers are exempt from the application process.

To summarize: Under the STB, the railroad industry has been largely consolidated. Only four major domestic carriers existed after 2000, while two Canadian carriers operate subsidiaries in the U.S. that interconnect to their Canadian lines. In this realm of extreme consolidation, it can hardly be said that the railroads' financial stability has improved. It is unclear whether the mergers and the antitrust immunity have indeed improved the health of the merging parties. And the STB has continued to bless what are traditionally anticompetitive agreements without any clear justification for their existence.

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[27] ABA Monograph, *supra* note 13 at 208.

Given this history, I wonder what would be lost if the antitrust laws would be able to come into play in the context of transactions. There appear three identifiable areas in which antitrust law might conflict with railroad regulation by the STB.

First, Section 7 of the Clayton Act does not have a statute of limitations. Thus, any repeal of antitrust immunity should be on a prospective basis only. Otherwise, private plaintiffs may sue to undo mergers long since passed. In most instances, operations have already been consolidated, and unscrambling the eggs would be next to impossible. In this instance alone does it make sense to defer to the prior findings of the STB and only make merger review prospective.[28]

Second, the STB's position on paper barriers runs in contrast to the antitrust laws. There appears to be no justification for these restraints. Under antitrust law rule of reason analysis, permanent barriers associated with the sale of a business which are without a specific and reasonably short duration run afoul of Section 1 of the Sherman Act, and may be subject to Section 2 scrutiny as well. The position of the Sherman Act case law is reasonable here, as no company should have a permanent interest in assets it has sold.[29]

Third, there is no justification for interlocking directorates which run afoul of the antitrust laws yet are approved by the STB. Coordination to the extent necessary to ensure reliability may take place in the railroad industry as it does in other industries, namely through arms length agreements. There is no demonstration that railroads are

[28] ABA Monograph, *supra* note 13 at 215.
[29] Id. at 216.

uniquely in need of interlocking directorates when compared to other industries such as electricity or natural gas.[30]

To my knowledge, the repeal of the antitrust immunity raises no other transactional concerns.

The Effect of Repeal of Immunity Related to Rates

While deregulation has expanded the application of the antitrust laws in the context of the railroads, there is much room for debate as to the effect of deregulation on the willingness of courts to impose antitrust remedies. For example, the STB continues to have authority over the setting of maximum rates, which could preempt a shipper's monopolization claim for treble damages and force the shipper to seek remedies exclusively before the STB.[31]

In contrast, much has already been opened to antitrust scrutiny. In 1995 Congress repealed the provisions that gave the ICC authority to review and remedy predatory rates, effectively opening such rates to antitrust attack.[32] Congress also deregulated traffic moving between shippers and rail carriers under private contract.[33] The ICC and STB have also moved to exempt many rates or other activities from regulation under the Staggers Rail Act of 1980.[34] The effect of an order from the STB stating that certain conduct is no longer subject to regulation is to open that conduct to antitrust attack.

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[30] Id.
[31] ABA Monograph, *supra* note 13 at 198. *See also supra* note 12 discussing the filed rate doctrine.
[32] *See* 49 U.S.C. § 10701(c); H.R. REP. NO. 104-311, at 82-83 (1995).
[33] *See* 49 U.S.C. §§10709 (c), (g).
[34] *See* Staggers Rail Act § 213, 94 Stat. at 1912-13 (codified at 49 U.S.C. § 10502).

However, because the STB has the option of re-regulating the conduct, courts have appeared reluctant to allow plaintiffs to challenge exempted conduct.[35]

Moreover, while regulators still may immunize rate bureaus from antitrust scrutiny, statutory provisions have curtailed much of the rate bureaus' activities.[36] Other provisions have foisted upon these bureaus other impediments, including substantial reporting requirements. Still, the Department of Justice is on record as being opposed to any antitrust immunity in this realm.[37]

Thus, while regulation has drastically eliminated what is subject to antitrust immunity, several issues arise. If it is the case that much of railroad policy has moved away from regulation to market forces, then it is imperative that antitrust fill the gap left by regulators. Otherwise, we are left with the worst of all possible worlds—a business subject to neither competition policy nor regulation. As one of my coauthors on the ABA Monograph so firmly put it:

> [R]egulatory policies regarding exemptions from regulation are fundamentally troublesome. They allow regulators to effectively walk away from reviewing the competitive effect of certain conduct, but leave uncertainty as to whether the exempted activity remains shield from the reach of antitrust law. If anything, activities exempted from regulation should become subject to antitrust scrutiny even if it is potentially subject to re-regulation by the agency. Finally in this late stage of deregulation, perhaps Congress should no longer delegate authority to the STB to decide what should and should not be regulated in the first place.[38]

[35] *See, e.g.*, G. & T. Terminal Packaging Co. v. Consolidated Rail Corp., 830 F. 2d 1230 (3d Cir. 1987).
[36] ABA Monograph, *supra* note 13 at 202.
[37] See H.R. Rep. No. 96-145 at 431 (1979)(statement of Donald L. Flexner, Deputy Assistant Attorney General)("[A]ntitrust immunity is not needed for those rate bureau activities that might benefit the public interest.")
[38] ABA Monograph, *supra* note 13 at 210.

The Effect of Repeal on National Railroad Policy

It could be argued that the imposition of antitrust laws upon the railroad industry would create serious issues with respect to regulatory policy. For example, the potential for a private plaintiff challenge in federal court could expose the defendant to the full panoply of powers possessed by the court under Section 4 of the Sherman Act.[39] The potential for such relief might have ripple effects throughout the national railroad system. In addition to these private civil suit concerns, concern might be expressed about the potential for concurrent jurisdiction in the realm of merger review. I shall address the latter issue first.

As a threshold matter, I am on record that those proposing an immunity should have the burden to demonstrate its need.[40] In the context of today's discussion, I find no reason to conclude that there is something so special in railroad regulation that should isolate it from other industries that exhibit similar issues, including potential natural monopoly conditions in some component of the industry, high coordination needs for purposes of providing service and protecting public safety, and where exists some

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[39] 15 U.S.C. § 4 states in part, "The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1 to 7 of this title; and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations."

[40] *See* Darren Bush, Gregory K. Leonard and Stephen Ross, A FRAMEWORK FOR POLICYMAKERS TO ANALYZE PROPOSED AND EXISTING ANTITRUST IMMUNITIES AND EXEMPTIONS: REPORT PREPARED BY CONSULTANTS TO THE ANTITRUST MODERNIZATION COMMISSION, *available* at http://www.amc.gov/commission_hearings/pdf/IE_Framework_Overview_Report.pdf. *See also* Darren Bush, *Supplemental Written Testimony submitted to the Antitrust Modernization Commission*, *available* at http://www.amc.gov/commission_hearings/pdf/Bush_Supplemental_Statement.pdf.

modicum of competition. Absent such a showing, there appears little argument against concurrent jurisdiction.

Indeed, the STB argues that the Department of Justice and the STB have only been in disagreement on one particular case in the past. One wonders, then, why the STB would not think that past is prologue.[41]

A more serious argument in favor of concurrent jurisdiction is that because the world of railroads is one of extreme levels of market concentration, the anticompetitive stakes are high. Any future merger could potentially yield strong and persistent anticompetitive effects. The consideration of these effects might be lost in the STB's calculus of total benefits to consumers, the railroads, labor, or other stakeholders to the transaction. The antitrust laws, in contrast, do not necessarily consider transfers from consumers to stakeholders to be a good thing. Moreover, the antitrust agencies more readily consider the full spectrum of competitive harms.

I find it similarly disingenuous to argue that courts will likely cause disruption of national railroad policy in the wake of an antitrust suit brought by a private plaintiff or by a state attorney general as *parens patriae*.[42] Many agencies live with the potential of court action against a company subject to the agency's regulation. As before, unless

[41] I do not, for purposes of this discussion, however, conclude that any agreement among the agencies related to merger policy is meaningful. The DOJ, in commenting on railroad mergers, is at a distinct disadvantage relative to its knowledge of other mergers. It will not allocate resources to seriously investigate railroad transactions. In the context of mergers in the railroad industry, it will not and cannot engage in the types of investigatory tools typically at its disposal, such as issuance of "second requests", submission of civil investigative demands to third parties (customers and competitors) for documentary materials, conducting of interviews with relevant third parties, conducting of civil investigative demands for oral testimony, and other methods necessary to paint a full and complete picture of the nature of competition in the marketplace.

[42] *See* 15 U.S.C. § 15c.

there is something unique about railroads, there is little justification for granting immunity here while embracing competition policy elsewhere. In most instances, historically such choices between immunity and antitrust law application were not made due to industry idiosyncrasies, but rather due to industry lobbying and political pressure.[43]

Finally, where regulatory action is in place, there are a plethora of potential antitrust exemptions at the defendant's disposal. As mentioned previously, the doctrines of implied immunity and primary jurisdiction might still come into play. And plaintiffs challenging any rates subject to STB authority would likely find that the filed rate doctrine is alive, well, and growing.[44]

For these reasons, there appears to be little justification for the notion that courts handling antitrust litigation will somehow turn national railroad regulatory policy on its head.

Conclusion

The realm of railroad regulation does not generally appear to be at loggerheads with the realm of antitrust laws. Because the STB's role in the railroad industry has waned due to efforts to deregulate the industry, antitrust should step in to fill the void.

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[43] *See generally* ABA Monograph, *supra* note 13. Moreover, courts should be credited for innovative actions that have brought revolutionary changes to regulated industries. As an example, the compulsion of wheeling in *U.S. v. Otter Tail* gave rise to a whole regulatory wave of open access, particularly in but not limited to the electricity industry. See Otter Tail Power Co. v. United States, 410 U.S. 366 (1973). Judge Greene's breakup of AT&T yielded remarkable changes in the telecomm industry as well. United States v. American Tel. & Tel. Co., 552 F. Supp. 131 (D.D.C. 1982), *aff'd mem. sub nom.* Maryland v. United States, 460 U.S. 1001 (1983).

[44] *See supra* note 12.

The difficulty is that the role the STB plays in the realm of railroads may send mixed signals to courts faced with railroad antitrust cases. Repeal of the express immunity addresses only part of the problem. Issues arise as to the scope of the repeal in a realm where the STB retains some regulatory jurisdiction. And, in a world with expanding judicially created antitrust exemptions, it is worthwhile for us to consider what a potential antitrust plaintiff, who the proposed legislation would purportedly seek to encourage in order to help foster and police competition policy, might gain in a post-express immunity world.

Rather than the dire predictions that the STB might have about such a world, I suggest that the bill might not change much if the courts continue on their current path of embracing broad and bold interpretations of judicially created exemptions such as implied immunity and the filed rate doctrine. On the other hand, I would welcome a full and true repeal of the antitrust immunity here, if carefully done. It is imperative that the gap created via deregulation of the railroads be filled. Where regulation gives way to markets, regulation must also give way to antitrust and competition policy. And where the old policies of regulation such as fostering of consolidation through merger are at odds with more recent policies seeking to foster competition via deregulation, it is the old policies that should yield. Otherwise, we are truly left with the worst of all possible worlds.

Mr. CONYERS. Thank you, Professor Bush.

There's been a point rasied about whether we have an answer that is in search of a problem. I'm going to ask anyone to respond to any parts of these questions. Do railroads really have that much immunity in the first place? Is there any reason to keep antitrust immunity?

Opponents of this bill claim concurrent jurisdiction is unnecessary; that not only is insufficient oversight provided by STB, but STB uses a tougher standard than DOJ. And then there was the last question that you raised about the imperfection of the legislation, Professor Bush.

What have you been thinking about all of this, Ms. Diehl, since you started it off?

Ms. DIEHL. Thank you, Mr. Chairman. What I've been thinking is, my goodness, of course, they don't want their antitrust exemption lifted. Why would they? Because they're able to maintain two duopolies in this country. So really there is no question about fixing prices when you are a monopoly by the very nature of what you do in business. You have the power to set prices. And so what we find to be very challenging as a private shipper is that we have to be super competitive. And when we go in for merger analysis, the DOJ is looking at, are you going from six to five. Here we're going from two to one, and there is no recourse. And the railroads own their own highways. So even when people like us go to try and be part of the solution and build our own rail, we are thwarted, and it costs us hundreds of thousands of dollars and potentially leads us to having to go and build across a wetland because we haven't gotten anyone to concur with our position that we should be able to co-exist on the railroad's property.

So, for me, I look at it, and I think absolutely the right thing to do is to make sure that all of us are playing by the same set of rules that are going to promote true efficiency and competition that help the consumers.

Mr. CONYERS. Thank you very much. Director of utilities for Lafayette, what are your impressions? How have you been moved by what you've heard here today?

Mr. HUVAL. I don't think it takes too much digging into it to see that there is some anti-competitive behavior being taken by the railroads. And that is—that is the kind of issues we need to deal with. To suggest that the Surface Transportation Board is really overseeing that, when you look at the various examples on how railroads can take advantage of captive customers, there is no regulator that I'm aware of that would allow that sort of thing to take place without putting some limits on that. The comment raised about the railroads have a network, and so, therefore, they need to have this exemption from antitrust in order to be able to incorporate with each other, to build—to work out their networks, we in the electrical utility industry have networks that are subject to regulation by the Federal Interregulatory Commission, by State public service commissions. We have to engage in those kinds of discussions also. It doesn't require us to have some type of exemption from antitrust. I think just the concept of a solution looking for a problem is just a spin job, and it really has no merit in what the issue is here. And the issue is clearly that the STB has taken its role as being the overseer of antitrust in a way—to protect antitrust in a way that is favorable to the railroads and not favorable to the people of this country.

Mr. CONYERS. Thank you very much. Professor Darren Bush.

Mr. BUSH. I was thinking, while listening to my colleagues on the panel, that there are certain types of conduct that the antitrust laws can prevent, and there are certain types of conduct that regulators can prevent. And those two are often compliments to—substitutes for one another. Mr. Moates had mentioned, for example, in the anti-trust laws, as currently applied to the railroad, industry suggest that they cannot collude in prices or rates, which is perfectly fine except that the antitrust exemption has allowed them to gain monopoly power. And if I have monopoly power, I don't have to collude with anyone because in fact I am a monopoly. Certain other types of regulation can run at loggerheads with antitrust as well. For example, the fact that I'm subject—that railroads are subject to STB regulation can certainly create problems for antitrust plaintiffs both in the sense of judges who are unwilling to step upon an agency's turf where that turf is not clearly defined in terms of filed rate doctrine, in terms of primary jurisdiction, in terms of implied immunity. So there are clearly some inabilities for any sort of remedy apart from going to the STB. And it doesn't seem clear to me that the STB has been effective in promoting competition, nor was it designed to. The STB was not designed to promote competition. The STB was designed—and ICC prior to that to consolidate the railroads. In fact, that was its legislative, essentially, mandate, was to consolidate the railroads in the wake of shortages during World War II. So when you have a mandate that suggests to you consolidation, that runs antithetical to the antitrust laws certainly. In other industries, you do not have this type of—this need for consolidation. In the electric utility industry, we certainly have some degree of competition, as you pointed out. There is no need for interlocutory directorates, there is no need for an antitrust exemption. In fact, the electric utilities are subject to concurrent jurisdiction with FERC and the Department of Justice, and State and public utility commissions. It may drive them a little crazy, but in fact, it has proven to be an effective check on the competitive process. So if you ask me whether or not there is a problem, it seems to me that just by looking at the legislative mandate of the Surface Transportation Board, there is a problem. Certainly the testimony here today suggested there is a problem, and the antitrust laws can help resolve some of those problems.

Mr. CONYERS. Thank you very much.

Counselor, Mr. Moates.

Mr. MOATES. Thank you, Mr. Chairman. I think my colleagues here and friends have given me one or two things I need to respond to. The first thing I'd like to do is ask us all to take three or four or five metaphorical steps back and pause and think about where we are and how we got to where we are with the actually very efficient and pared down large rail systems that we have today that we've talked about. The Congressman in his opening remarks made reference to the fact that it wasn't that many years ago that we had a real problem with the railroad industry in this country. It was overbuilt. It was underfunded, and it was undercapitalized, and there were a lot of bankruptcies.

Congress did indeed—I agree with Professor Bush on this—very clearly first in the Railroad Revitalization and Regulatory Reform Act of 1976, the 4R Act, and then in the Staggers Rail Act of 1980 address a lot of the ills that the railroad industry had faced, including over-regulation by the Interstate Commerce Commission and its rates, including the fact that it had way too much capacity, and it took way too long to rationalize the plant by abandoning and selling lies.

We've come a long way, I'm very happy to say, and most of this has been during my career. And it has been an interesting thing to be part of and to observe. But where we are today is with a very large efficient railroad system. What we do lose sight of is, this country's freight rail system is frankly the unparalleled best freight-rail system in the world. We hear that all the time from people around the world. And it's a system that the taxpayers don't pay for. It is a system that the railroads pay for. And they have to pay a lot for it. And another reference is made by the Congressman in his opening remarks to the capacity and the infrastructure concerns that we all share about all this Nation's infrastructure. But from our perspective, the railroad industry infrastructure, which indeed is at unparalleled strains because of the capacity and the very near-capacity situation it faces in most major corridors; railroading is an expensive business. We have to earn a lot of capital to be able to reinvest in our business and to attract scarce investment dollars to the industry. We are regulated to a significant degree in how we do that. The STB does regulate rates. I represent railroads in rate cases right now. The STB has in the last couple of years reformed the way that it calculates the industry's cost of capital. I work with the AAR on that matter. The STB has issued a decision, that has not been mentioned here and was not mentioned in your staff's paper, just in the last few months about this paper barriers issue, which again is one that on its face appears easy to target; look what the railroads did, they sold their branch lines to startup railroads, to regional railroads, and they put these gimmicks in there to make sure that they got all the traffic. Well, of course they did, Mr. Chairman. Because of the gimmick, that is the requirement that the new short line railroads, formerly part of the big railroad, didn't funnel the traffic that did come off of that line to the big railroad, it wouldn't make any sense for the big railroad to have done the transaction. It would have been better off, all things being equal, to have just abandoned the line or done something else with it. We're all glad it didn't happen. We're glad that there aren't a lot more rights of way in this country with 40-foot trees in the middle of them as opposed to a very robust regional and short line railroad industry that partners with the big railroads.

I don't mean to get on my high horse here, but there are one or two other things that I just wanted to address that were mentioned by the other witnesses. Ms. Diehl has mentioned several times this proceeding that she and her company went through at Holly Hills, South Carolina—to serve their Holly Hills, South Carolina, facility to build, she says, their own railroad. What they wanted to build was a 2.3 mile line coming out of their property that is presently served by the CSX Transportation, a very large class one railroad to build to a line 2 miles away from the Norfolk Southern Railroad so they would get access to a second railroad. But their proposal was to build on the right of way of CSX. You guys are there. Sure it is your property. But there is enough room for all of us. And they filed an application with the STB to do that and at the same time an application for authority to cross CSX's line. And there is a provision in the commerce act that allows for that crossing under very specified, carefully controlled circumstances, not the least of which is you're not going to unduly burden the operation of the other railroad.

After a full proceeding, full adjudication, the STB ruled against them and said that their application did not meet the standards of such a crossing. I think she said—and we can check the record—she referred to that as the STB rubber stamping of what the railroad wanted.

Last Friday, a nondivided, unanimous panel of the United States Circuit Court of Appeals for the District of Columbia Circuit affirmed the STB decision, and I don't think anybody—and I'm sure not even Ms. Diehl—would suggest the D.C. Circuit was rubber stamping anything. They took a hard look at it and concluded that the agency's decision was absolutely appropriate and consistent with the statute.

One last point if I may. Professor Bush said that—and he has a point here, but I fear he overstates it a bit. He said the Department of Justice will not devote resources to railroad mergers while the STB has exclusive jurisdiction. It is another way of saying, you know, we're the Justice Department; if we can't control things and play them by our rules, we're not going to play. Again, with all due respect, I know from personal experience it isn't true. The Department of Justice, again, pursuant to the Commerce Act, is a statutory—let me be more clear. The Attorney General of the United States and the Secretary of Transportation are statutory parties to all railroad merger cases. Their Departments participate. And in my experience, the Justice Department usually participates in a vigorous and very meaningful way.

I told this story—we had a hearing on this bill on the Senate side, and I'm embarrassed to have to do it again. But one of the not so great moments of my legal career was in the 1980's when I was one of the lawyers representing the proposal, the proponents of the merger of the Santa Fe Railway with the Southern Pacific Railway. And the Interstate Commerce Commission, at the urging of the Department of Justice and after 2 years of hearings, turned that merger down. It didn't happen. It was rejected as being anti-competitive. It would violate the antitrust laws. I think we all know that subsequently the Santa Fe Railway merged with the Burlington Northern Railroad, and the Southern Pacific Railroad later merged with the Union Pacific Railroad. So those railroads are somewhere else today if you will. They are part of a bigger system, but not the system that was proposed. And——

Mr. CONYERS. Darrell Issa, can you throw a little light on this discussion, please?

Mr. ISSA. I think that the Chairman just said that your time is up. He will do the same to me in due course. Look, I want to take a line of questioning because I think we have two things before us. We have Ms. Baldwin's legislation, which I have no doubt will depart this Committee after many, many opportunities to amend and to view it in light of the details you've brought up. So I'm not going to go back down that same line, although it was an interesting line. Let me go through just a couple of sort of businessmen questions.

Ms. Diehl, I'll start with you. You make cement. You know, after unbottled water, I don't know of anything that is more of a commodity than cement. I said unbottled, because clearly bottled water you could afford to airfreight. Why aren't you operating at a seaport? Why is it you depend on rail, which is four times more expensive than water since you're in Michigan, and there is a body of water there?

Ms. DIEHL. That is a great question because—I mean—and some of our competitors, in fact, in Michigan, do operate on the water. Well, what we have to do, though, is—we are burning millions and millions of tons of raw materials every year. And so we locate our plants right at the site of our quarries, which make us very driven to places where we have good limestone quarries and reserves. Our parent company happened to find Dundee, Michigan, as the place in the U.S., but we have three or four of our facilities—I think maybe even five now that are on the water. But most of them—if we're going to get to people in Utah or the State of Colorado, unfortunately, there is not a lot of water there. And so we do have to move by rail. And not only Holcim, but over 50 percent of our industry moves their product by rail.

Mr. ISSA. And my reason for my question was, if you had water, a deep body of water at your front door, you wouldn't even be asking rail to bid on the job, would you?

Ms. DIEHL. Well, we believe that the water facet of the business certainly makes us more environmentally responsible. It is lower cost. It doesn't have the congestion. And our recent billion dollar plus investment is on the Mississippi River and——

Mr. ISSA. And I bring that point up because whether it is trucks or trains or other forms of transportation, ultimately this Committee should not be making those business decisions for you. And I ask that I think because that is one of my concerns, is that rail is cheaper than truck, and ships are cheaper per ton mile than rail. And some of those decisions we can't change even from the dais of this great Committee, although the Chairman I'm sure will try some day.

Mr. Huval, you oversee a regulated utility; is that right?

Mr. BUSH. That's correct.

Mr. ISSA. And what are the profits of that regulated utility, and how does it compare in the delivery of electricity based on its cost base and return to its stockholders versus the average rail company?

Mr. HUVAL. Well, we are a regulated utility by our city council. We are owned by the citizens of the City of Lafayette. So whatever dollars we make on providing electric service goes back to reinvesting into the system.

Mr. ISSA. So if you're inefficient, the taxpayers just pay more?

Mr. HUVAL. If we're inefficient, the taxpayers either pay more or they would decide they don't want us to provide the service to them and decide for some other company to provide the service.

Mr. ISSA. Have you bid against private utilities and other utilities to just shut down your operation the way the City of Cleveland did and just run the power in through your power lines and not produce it? In other words——

Mr. HUVAL. Yes, we have looked at the cost of trying to buy power from others and have found that generally we could provide more reliable power at a lower cost by generating it ourselves.

Mr. ISSA. Okay. Because again, you know, the rail company can't make you more competitive than your production facilities are. Mr. Bush, Professor Bush, a hypothetical question. If we modify this act to eliminate the rate system and make rail completely antitrust eligible and just got rid of surface transportation, would that meet your requirement or do you want the Surface Transportation Board to do a better job, and oh, by the way, you want these other entities to have access to a piece of the backside of rail? I'm not trying to lead you, but I am trying to ask if we're going to make rail, and maybe we will, less exempt or not exempt, why should we regulate them if, in fact, sans antitrust, they're entitled to whatever the market will bear?

Mr. BUSH. I'm thankful you raised that point, and I was going to object to the question as being leading.

Mr. ISSA. I would, too.

Mr. BUSH. I'm not in a position intellectually to determine whether or not the STB should exist. I am in a position intellectually to determine what are the effects of STB's existence on antitrust cases. And if you, in your hypothetical, remove the STB from existence, I would say that the initial effect is you already have monopoly power in existence because of the STB's actions. But for a challenge under the merger laws that have no statute of limitations really to undo those mergers which you can't really practically undo anyway, they are already a monopoly in many areas, and you can't—and the antitrust laws do not bring—take offense at monopolies. They take offense at monopolization. So I can charge as high a price if I want to if I'm a monopoly. So the removal of STB does not actually counteract a monopoly. It does however counteract three basic issues. If you remove the STB to three issues that would immediately be challengeable are the paper barriers, interlocking directorates and, as we've just talked about, the mergers that have taken place. Those are the three issues where you see the greatest tension there. And as Mr. Moates has discussed earlier, while—while the DOJ is certainly involved in the merger review before the STB, let's not make any mistake about this—this is an agency I used to work for, and in fact, I used to work for the Transportation, Energy and Agriculture section which used to do all the merger stuff for the Antitrust Division. And I will assure you that when you have a whole bunch of active mergers where we can actually bring a case, you would certainly not see a lot of resources wasted of trying to plea with the STB about challenging a merger, particularly when we don't have all——

Mr. ISSA. I got that point. Mr. Moates, lest you think that I'm just going to pick on the three of them and give you a pass, I've given you a lot of fodder here, and I'll give you a fair chance to maybe disagree with some of the positions. But let me look at it another way. I've done a little bit of the research, and regulated public utilities are doing pretty well, like electric companies, for example, relative to the rail. The rail is not competing effectively for, if you will, the first dollar of venture capital. So I have one question which is, if it is a monopoly, where is the money going? But I have a second one, and I'm going to—this is the only question exclusively for you in addition to responding. Ms. Diehl had an interesting point when trying to create a competition, even if it was on CSX's lines. And that was for 2½ miles, why am I a single source, why is it I can't essentially get some sort of relief on a deminutus cost; 2½ miles is not what rail—you know, you take the highest rail rate you can think of for 2½ miles. It is not going to make the difference of having real competition beyond. So I can understand what their company tried to achieve. I can understand why any rail company would try to not give away their right of way for purposes of being in a competitive situation and perhaps making less money. I've been in that position in consumer electronics. It is a little different than Mr. Cannon. But very clearly I have a sensitivity to it. But this committee has this piece of legislation in front of it—or this Task Force has this piece of legislation, and the full committee will have legislation in front of it. But it also has the bigger issue of, in fact, is there a better way to deregulate rail. And my question to you is, if the CSX-type situation, if the Congress were to say that the right of ways belong to the American people because of their historic right and like the airways—airwaves and the airways that the radio frequency people operate in and the airlines operate in, we'll recognize that you have certain preferred rights but not exclusive right to landing rights or a particular frequency and so on. If Congress in order to see that there not be excess or windfall profits, if we can't do it through a regulatory scheme, what would you say to the fact that that 2½ miles from the dais appeared to be an unreasonable barrier to what would otherwise be ordinary competition? Not on behalf of a company that didn't want to have it happen, but from the dais, why shouldn't we have modified the law to say that the short distance—and I think it was Congresswoman Baldwin that also talked about—oh, no. Actually, it was you, Mr. Huval. They talked about 1,500 miles versus 20 miles. Why shouldn't we look at those short distances, relative to the whole amount, and make sure that they not dictate the overall price in opposition to what would otherwise be a competitive environment that would provide a lower price? So that is the question for you. The others you can answer, but that one does from the dais look like it flies in the face of fair competition.

Mr. MOATES. I'll settle for just that one.

Mr. ISSA. Wise move.

Mr. MOATES. That's a very good question and a difficult one in many ways. But I would start by saying—and I don't want to be argumentative—but unlike the airwaves, this is our property. We built those railroads. We have deeds. That is our track. That is our ballast. It is our billions of dollars of investment. I'm not sure what you mean, Congressman. If you mean——

Mr. ISSA. No, the history of right of ways and how they were gleaned by your forefathers' forefathers is one in which we're not granting such deals again, that many, many, many right of ways—and for that matter, it is true of all public utilities, not that you're a public utility. But I can't get two transmission lines to my house. I can't get two cables to my house. I can't get two telephone lines to my house because, although I have these three wires and they might be able to compete, the truth is each of them was granted a monopoly. And so this Committee and the Congress for years in other areas, such as telecommunications and so on, has tended to say that the access to these roads, these access—should not be unreasonably the exclusive right of somebody who has been given an exclusive right meaning it is understandable—nobody should get a right to your right of way without a fair return. But at the other end, we didn't grant an exclusive right to that. You don't have the right to exclude, if you will. And part of it is how you got the right of ways, no different than other utilities did in various communities. That's what I was getting to.

Mr. MOATES. Well, with all due respect, I think in many cases it was and is different. The—we're all thinking probably about the Pacific Railroad Act of Abraham Lincoln and how the Union Pacific and the Central Pacific were built and the land grants out west. And that has all been looked at very caefully by the way. In fact, I believe—I could stand to be corrected on this. I think the General Accounting Office did an analysis of rail rates within the last 10 years that included a look at the issue of how much of the return that the railroads are getting were attributable to land grants and how they got their right of ways. And my recollection is, they concluded at this point in time it was gone, whatever had been there is gone. The railroads, if you will, have rebuilt their systems many times, over, just—and in some parts of this country, we rebuild them every 3 or 4 or 5 years, like out of the Powder River Basin in Wyoming where there is such heavy, dense traffic. So my first concern would be—I would have to take a little issue with your premise, that it is not in my view analogous to the airwaves. It is our private property. If we're talking about a public taking for some public purpose, I recognize there are legal doctrines for that. But I would urge you not to think about going down that way. I would come back to Ms. Diehl's concerns and ask about a couple of things. Number one, surely when Holcim built that facility in Holly Hill—and I don't know the facts at all—but it had to be aware that it was building it on one railroad. It made a business decision for whatever reason. Number two, if it later concluded the business decision was a bad one and the railroad raised the rates—as far as I know, it has never filed a rate case at the STB to complain about those rates. And if—and to get a finding that they are unreasonably and unlawfully high under the Commerce Act, it has the legal ability to do that. Number three, this 2.3 miles here, 20 miles in the gentleman's case from Louisiana, part of what they refer to is this bottleneck. The STB has promulgated regulations for challenging bottleneck rates. The regulations are laid out in 49 CFR. There is a decision back in the mid '90's that says what the standards are. They haven't been invoked. So I really would urge the Committee to take a hard look at those kind of issues before it concludes that there is no effective possible relief today.

One answer might be, but we don't like the way the STB regulates rates. It defines all rates to be reasonable. Well, in a sense, I wish that were true because I try rate case, but it isn't true, number one. And number two, the standards by which the STB judges these cases have been to the court of appeals numerous times and have been affirmed and have been found to be lawful. So I think what we're hearing here is a much greater broader concern about the STB and the way it administers the Commerce Act as opposed to specific concerns about the antitrust exemptions.

Mr. CONYERS. Thank you very much. I'd like to ask the distinguished and thoughtful lady from Texas, Sheila Jackson Lee, to ask her questions of the witnesses and also sit in the Chair.

Ms. JACKSON LEE [presiding]. I yield to myself. Thank you very much, Mr. Issa. Let me thank the witnesses very much, and I thank Ms. Baldwin for her thoughtful legislation as well. And let me try to query some of the persons present and acknowledge Professor Bush from the University of Houston Law Center in my congressional district, one of the Nation's outstanding law schools. And we certainly thank you for your thoughtful presentation. I'm going to start with Ms. Diehl and see if I can understand your story from the perspective of the role that railroads play in impacting your bottom line. You are poised or in a posture where you're not near water, so you are using rail lines. And I imagine that these rail lines come right up to your property and right—connected to your product and you use these rail lines to get your product to market. Start me there. What happens that is the result of an unregulated or an antitrust exempt railroad system, what happens to your business?

Ms. DIEHL. Well, let me step back one step and say that we, in fact, to Mr. Moates' point, have had to actually construct our networks around where the railroads exist because we ship 5 million or so tons of product just between our plants and our distribution facilities around this country.

Ms. JACKSON LEE. And you ship them by rail?

Ms. DIEHL. And we ship them by rail. We ship about 10 million total but 5 million of that goes by rail. And so when we actually make our decision, we cannot really say, awe, we are going to go to some new facility and expand. We have to serve our customers and our consumers, and we have to make these decisions even when we understand that we are captive. And, in fact, we are captive, if you were to look at our origin and destination pairs, in nearly 98 percent of our facilities, so it is a false choice that Mr. Moates presents that somehow we can go somewhere else. We're bound by the raw materials that we utilize in our process which is primarily limestone and——

Ms. JACKSON LEE. So you've chosen to be near that product, to build your factory near that product?

Ms. DIEHL. That's correct.

Ms. JACKSON LEE. And therefore, the rail lines connect—do they connect to you, or were the rail lines there first?

Ms. DIEHL. Some of our facilities go back over 100 years. And so we have chosen facilities that are not only by our product, but we have had to, to connect——

Ms. JACKSON LEE. The rail lines would obviously draw to a place that would provide them with business?

Ms. DIEHL. That's correct.

Ms. JACKSON LEE. All right. So take me forward.

Ms. DIEHL. So in the case that Mr. Moates refers to, the Holly Hill case we were talking about in South Carolina——

Ms. JACKSON LEE. One of your business——

Ms. DIEHL. One of our business entities, a major plant. We just underwent a $250 million expansion of that facility to be able to serve the markets in the Carolinas and also in the south. When we did that, of course, we did it based on business decisions. But we knew from the beginning that there was this secret document that we are not aware of called the Carolinas plan that somehow prevented us from being able to access the Norfolk Southern. And hydraulic cement is actually an exempt product, and so we are, you know, not under the rate regulation scheme. And when we have done this, what we have chosen to do is to really be part of the solution. We've chosen to be part of the solution. And in the case—yes, Mr. Moates is right, the D.C. Circuit did deny our appeal. But in doing so, they didn't even get to the question of what fair compensation we——

Ms. JACKSON LEE. Let me—what I really want to get at—you're captive. You have a rail line that passes by the—98 percent of your businesses. What actions are the rail lines taking that interfere with your business bottom line?

Ms. DIEHL. Well, there are a couple of things. First of all, we don't have the access to an alternative. We are really stuck. So in normal business dealings, if we don't like one coal supplier, we can go and talk to another one. In normal business dealings, we can go and shop to find the best possible rates and service, and we can have that leverage. The only leverage that we have relative to the railroads is only when there is another mode available. So, for example, in the southern corridor, we do have truck rates, but it is not really economical beyond 150 miles.

Ms. JACKSON LEE. So you can't negotiate a lower rate with the sole provider of the service? That is one.

Ms. DIEHL. Correct.

Ms. JACKSON LEE. That one railroad. What else?

Ms. DIEHL. The second thing is, in terms of getting the bottleneck issue taken care of where they won't quote the small part of the line, where they actually refuse to quote the small part of the entire route, that is another area where we could get competition where we can't actually go ahead and do it because of this bottleneck issue. One of the issues that——

Ms. JACKSON LEE. Jammed up on the rails, just trains just sitting there?

Ms. DIEHL. The bottleneck meaning when you have a really long route and a very small part of it can't be served by another railroad competitively, the main carrier won't even quote the rate separately for that small part saying, you know, we'll only quote for the whole rate. And that is an issue where Chairman Nottingham of the Surface Transportation Board said it was the most talked about issue.

Ms. JACKSON LEE. So another line cannot interject itself in the open area because the rail bids on the whole—the whole line?

Ms. DIEHL. We can't get a breakout rate for that small portion where we could actually get competition. That's correct.

Ms. JACKSON LEE. Anything else?

Ms. DIEHL. In terms of getting service, generally, we have been asked by the railroads to actually invest in their capital. So we at Holcim actually own 2,100 railcars where we have taken the burden of investing in capital equipment so that we can be served by the railroads. We have to invest in rail cars, and it costs us millions and millions of dollars to do that.

Ms. JACKSON LEE. With the bill that is before us, what relief would you get directly? The same rail line is there, meaning a certain track rather is there. How would you get relief?

Ms. DIEHL. I would say that it is a good place to start because the argument has been made, and I think it is a good one, that the railroads own their own highways. So, right now, we're in this situation where we only have these four class-one railroads moving 90 percent of the business in this country. So we have to get to a point where we can actually allow competition in any way possible through debottlenecking, and this bottleneck issue I talked about, looking at issues where if there is this agreement that prevents someone from, you know—or has these track agreements, that somehow we can challenge them in district court and have it be open and transparent for the shippers.

Ms. JACKSON LEE. So the idea of removing the exemption would put you in a better posture? Just the idea, just the concept of removing the exemption helps you?

Ms. DIEHL. I believe that the concept of having that exemption lifted puts us all on the field where we have to behave by a certain set of rules that are common to us. You can't be a monopoly and unregulated. I mean, they have both. They are both a monopoly, and they're unregulated. And so, because of that, there is no power that is really holding them accountable to making sure they are as competitive as they can be relative to rates and service.

Ms. JACKSON LEE. And again, I'm asking—so the removal of the exemption would help you?

Ms. DIEHL. Yes.

Ms. JACKSON LEE. Mr. Moates, tell me why a provision that allows private plaintiff actions is so detrimental. Two, I noticed there are 21 attorneys general that have joined in support of this legislation. I noticed that the State of Texas has not. If you understand the landscape there, explain to me why our attorney general, you think, is not involved. I do have an experience with the cement issue, and to Ms. Diehl, it may be very different from what you are speaking of, but my contractors, my builders, a year or two ago were incensed about their inability to get cement and the trains stuck on the tracks and not moving, and maybe you'll comment on that as to what my dilemma was, and we were just frustrated.

But I ask Mr. Moates, one, about the private plaintiff action that is allowed by this legislation and why that would be, if you will, a posture that you'd not like to have us put the railroads in. And if you know any more details about the railroad structure in Texas, why would you think that the attorney general in Texas has not joined or made mention of their support for this particular legislation? Answer the first question first, please.

Mr. MOATES. I'll address but I can't answer it because I don't know the answer to that. I know that Professor Bush is from Texas. Possibly he may have insights that I don't have.

Ms. JACKSON LEE. He is going to get his chance.

Mr. MOATES. Yeah. I would answer if I knew. I honestly have no idea.

Ms. JACKSON LEE. That—the plaintiff provision, I assume you have some comment on that.

Mr. MOATES. Yes, and it was part of my prepared remarks. What it comes down to——

Ms. JACKSON LEE. It is always better to get it in the question.

Mr. MOATES. Yes, it is. Thank you very much. What it comes down to fundamentally is our very grave concern that the reason that Congress in its wisdom had prohibited private plaintiff actions when it drafted these acts initially still obtains, and that is that there is a very real possibility out here that if private injunctive actions were permitted as this legislation would allow, that we could see a real patchwork, a set of regulations and outcomes. The district court judge here decides one thing. The State court judge here decides something else. The STB decides a third thing, and it is the same railroad running through various judicial districts, maybe even different States, and it would have different kinds of, if you will, injunctive behavioral mandates applicable to it. You know, I'm not going to try to build a giant house of cards, but it doesn't take a lot of imagination, I would submit, to think that a judge here or a judge there may conclude that something about the local situation—well, I'll make up a hypothetical. What if a shipper brought an injunctive action and convinced a judge somewhere that its plant should be served twice a day by that railroad because the cement wasn't getting to people who wanted the cement. I'm just—I'm literally making this up. But suppose further that one of the reasons for their not serving the plant twice a day was there hadn't been sufficient volume for that, and the railroad had a limited number of crews, and it had other shippers that were also demanding service. At the end of the day, railroads are businesses, and they make decisions like all businessmen do about the best way to serve their customers. They're not there to anger their customers. They are there to provide the best service they can. If sometimes that results in someone not getting the service as promptly or in the manner that they would immediately like to see, do we want judges in private injunctive actions sort of telling the railroad that is the way it must be? If you have to go switch my plant twice a day, maybe you can only go to that plant down the line or in the next county or in the next State once a week. Again, I'm making this up. I don't know of anything——

Ms. JACKSON LEE. You're putting your best argument forward for the railroads, and you should be commended, and they should be grateful. Let me—as I go to Professor Bush, let me just make this one point. The point is that—of course, Mr. Issa made the comment that this bill will probably see a number of amending processes going forward. I understand there will be a hearing or a markup or it is moving toward Committee in the Senate. And I would argue that there are probably opportunities to put provisions in the bill that provide some guidance to the courts, some consistency through policies or language from the SBT because most Federal judges have the sense, if you will, of the catastrophic impact of their decisions, particularly as it relates to Congress. And so we might help them along with language that gives them structure to their decisions. We wouldn't want an injunction so deeply embedded and so long lasting that the entire commerce as handled by railroads would be shut down. That wouldn't be advantageous to us as well. So I would offer to say that we have some work on that. You raise a valid point, that we have some work to do on it. But I would counter and say that the Federal courts might be responsive to the fact that they couldn't shut down commerce either. Let me just go to Professor Bush to comment again on how interfering the bill would be to commerce. I believe you support the bill. And coming out of Texas, have you studied why our attorney general is not engaged or advocating or aware of this bill because we certainly have sort of the same situation that Ms. Diehl is talking about, where railroads come right up to businesses, tracks come right up to businesses, and they also come right up to neighborhoods. Maybe you might comment on the impact this bill would have on people living in neighborhoods where railroads are coming right up to their window. In the old days, they appreciated it because they had a house; they had no place else to live. Today, I think in my community, they are certainly raising concerns as to whether they continuously have to be subjected to railroads right outside their backyard. Speak to this bill in particular as it relates to Texas, if you have any knowledge of that and the last point about the antitrust, the provision of plaintiff lawsuits that this bill will provide.

Mr. BUSH. Thank you. They are both excellent questions. And also thank you for plugging the University of Houston Law Center, which I concur is an excellent law center.

Ms. JACKSON LEE. Any time.

Mr. BUSH. With respect to why Texas is not a signatory to this letter, I haven't the foggiest idea.

Ms. JACKSON LEE. And you'll go and look for me if you would.

Ms. DIEHL. I will.

Ms. JACKSON LEE. Investigate for me. Thank you.

Mr. BUSH. My notion is that there are certain States—and I can think of them off the top of my head—that are more active in legislative processes at the Federal level than others and also active in antitrust enforcement at higher levels than others. Many Sates, because of budget considerations, are—their antitrust laws are only enforced with respect to what is called naked price-fixing agreements to restrain trade, and that is the extent of their antitrust enforcement. But I will go, and I'll actually find out what the nature of Texas's antitrust enforcement is.

Ms. JACKSON LEE. Thank you.

Mr. BUSH. With respect to the private plaintiffs issue, there's a couple of points that need to be made. First of all, when we talk about private plaintiff actions in Federal antitrust law, we think in terms of this notion of treble damages, which is provided for in the

Clayton Act. In reality, however—and this is something that was there for a reason—treble damages were thought to deter anti-competitive conduct because, of course single damages is just disgorgement. If I steal a computer, you know, I have a chance of getting caught, right, but if my only penalty is giving it back, then it is really not much of a deterrent. So we have treble damages in Federal antitrust law for that reason.

However, studies have kind of shown—I'm thinking of Bob Lande's study out of—from the University of Baltimore with John Connor, that treble damages are rarely effectuated in Federal antitrust law. So what we're talking about is really not a threat of treble damages to the railroads but single damages. With respect to injunctive relief and this notion that, gee, one—one district court might actually have us paint our railcars red and the other district court will have us paint our railcars green, Federal courts are much more sensitive to regulatory agencies and regulated entities than that. And I've already mentioned two Supreme Court cases that—as evidence of that. For example, in part four of Trinko—of the Trinko case, Justice Scalia is very cautious about the use of antitrust law where there is regulation. I'm not as cautious as he is. But courts are much more savvy than that. And, in fact, there is a history in every other industry apart from railroads where there is a substantial degree of coordination across circuits, electric utilities, natural gas transportation, airlines, a whole host of other industries that were once regulated that are now—that have been subject to the antitrust laws. So we've not seen that kind of effect. So I think, unless—we can come up with hypothetical after hypothetical, but it has just not been the practice that we've seen that kind of effect.

Ms. JACKSON LEE. Let me thank you, Professor Bush. You might contemplate some more questions along those lines. As I have an opportunity, I want to pose that line of questioning again. Because Mr. Moates makes a point, and I want to be clear that we've looked at every aspect that would give us comfort that that would not be the result of the private lawsuits that would be allowed. So I thank you very much.

And at this time, I'd like to recognize the distinguished gentleman from Virginia, Mr. Goodlatte for 5 minutes.

Mr. GOODLATTE. Thank you, Madam Chairman.

And I find both the difficulty that the complainants have disturbing, but I'm also concerned about the solution that is proposed with this legislation.

Mr. Moates, is it correct that as I've heard, that captive shippers are charged considerably more? I've heard 20 percent or more than those shippers who are not captive.

Mr. MOATES. Congressman, there is no single lever to apply to a captive shipper. Captive shippers is a group. And of course, that is sort of a pejorative sounding term. We all understand what we're talking about.

Mr. GOODLATTE. They only have one choice.

Mr. MOATES. If it is a shipper that only has one railroad serving its facility. As a group, they are definitely charged more, and they should be. And the STB and the ICC before it and the reviewing courts of appeals have all agreed they should be. Why? Because in the words of the economists, they are the most demand in elastic customers of the railroad. I don't mean to lecture, but a railroad is a very large system, has very large fixed and common costs that must be paid for by all of the users. Some of the users of the system don't need the railroad as much. The paradigm is the—you know, the UPS trailer going down on the flatcar. It doesn't take a whole lot to get that thing off the flatcar and onto the road. So, therefore, that kind of service is typically priced at a lower profit margin, if you will, than coal to an electric utility that absolutely has to have the railroad provide the service because economic theory and experience teaches and the STB's regulatory philosophy about these rates, which has been again affirmed by several courts of appeal, say you have to charge the so-called captive shipper more if the railroad is ever going to have a reasonable opportunity to earn what in the words of the statute are adequate revenues defined as sufficient capital to pay for its whole system.

Mr. GOODLATTE. Mr. Huval, is that how you pronounce your name? I'm sorry.

Mr. HUVAL. That's correct, yes.

Mr. GOODLATTE. Would you want to respond to that since he just identified you as somebody who should pay more because of the inelasticity of your demand?

Mr. HUVAL. I was glad to hear him admit it that that is indeed the case, and that's what we've known for some time on our end. You know, I guess our concern is that we may agree that perhaps that maybe there should be some additional costs applied to captive shippers. It is a matter of degree. If you take a look at how the Surface Transportation Board handles these sorts of rate cases, compare it to what happened in other regulated areas—for example, electric utility companies. The electric utility company that serves people who are served by monopoly, the electrical utilities, cannot decrease your rates without getting prior authority from their public service commission or from the city council In the case of the City of Lafayette or from some entity that oversees them, and it is supposed to be based on some type of cost base plus a rate of return for doing so. In the case of the Surface Transportation Board, the way it works is that the railroad company decides one morning they want to change the rate and charge the different rate, a much higher rate, that is up to the customers to have to appeal that to the Surface Transportation Board. And our burden of proof is to show that we could build our own railroad and provide service to ourselves cheaper than the railroad company can and that shows how lopsided——

Mr. GOODLATTE. Let me interrupt you there and just say I understand that. But quite frankly, when you go and appeal, you're basically asking for one or it might be one consumer rate or one business rate, but for the entire State of Virginia, in the case of utility companies serving most or all of that State, there are only a few questions to be raised there. But the railroad has to set a different fee for a whole array of different types of products that it hauls for a wide array of different types of equipment that it has to provide to haul those products for literally thousands of different customers. And to each time they have to do that, go to a commission and ask for them to meet and to consider a change would be—

I hope you would agree—a very inflexible way to do that. It takes—your utility—I don't know about your utility. But in Virginia, it takes many months, sometimes a year or more, to get a rate change and go through the process of presenting that evidence. When you're talking about a—one change meaning a multimillion dollar change in revenue to the utility, I understand that. But when you're talking about one change meaning one of thousands of decisions that have to be made by the railroad each time, I'm not sure that type of system would work. And it would seem to me that the cure would be worse than the disease here.

Mr. HUVAL. Well, I guess—then I'm not sure how—I don't know how the railroad company comes up with their rates. But obviously, they have some structure to decide what they're going to charge captive customers. I mean, they actually have a circular that indicates what the rate charges are going to be. So if there is more transparency in that process so people can understand how it works and what is in there, I think that would certainly be a lot of benefit. But right now——

Mr. GOODLATTE. I would be interested in knowing of a mechanism that worked efficiently to give a captive shipper some way of utilizing the antitrust laws to be able to do that. But having to go through a rate review process like that for each change, it sounded like where we came from, not where we ought to be headed to.

Professor Bush, what do you believe is the relevant market for antitrust purposes here? Should we look at just railroads alone, or should we look at the competition that they face in some markets but don't face in others from trucking, from shipping—from water shipping and so on, pipelines.

Mr. BUSH. This will sound facetious, but the answer is yes. The answer is, it depends upon which consumer we're talking about and the types of alternatives available to that consumer. When we talk about relevant markets in antitrust, we talk about what used to be called a hypothetical monopolist test. And in that test, which is under the 1992 U.S. Department of Justice Federal Trade Commission of Horizontal Merger Guidelines, the question is, could a hypothetical monopolist raise the price by a small and significant nontransitory amount profitably? And this is to gauge whether or not consumers could actually seek alternatives. It is harder to do that in the railroad industry because I believe in many instances we are already at a monopoly price, if not a duopolistic price. So you have to think about what would be a competitive price. And if you raised the competitive price by a certain amount, would consumers switch? In many instances, it would not be that consumers would switch from railroads to other modes of transportation. For example, take Ms. Diehl's problem. She has an input that is located at a certain location, and she needs to transport that after it is processed to other locations. Where should I put my facility? If I put it near a seaport so that I can have alternative modes of transportation for the output market, I may still only have a monopoly on the input market. If I locate my plant where the input is, I will have—I may have a monopoly on the output market, but I won't have any issues on the input market. So it really depends on the consumer. Now, one other thing I was thinking about when listening to my colleagues on the panel——

Mr. GOODLATTE. Let me interrupt you and ask you, as you consider what Mr. Moates said to me, do you agree or disagree that in order for railroads to be profitable—and these are private, you know, stock corporations that have to report a profit and so on if they are going to stay in business—do you agree with him that they have to charge captive shippers more than they charge shippers who are in a competitive situation, or they will never make a profit because it will drive—the competition will drive them below what they can operate profitably at?

Mr. BUSH. I would be hesitant to buy that argument mostly because I don't see a lot of situations where we're talking about some sort of vibrant competition. A competitive market of two—for example, two railroad lines is not competitive, it is a duopoly. And therefore, any price that will be charged in that market will still be substantially above cost, and I don't necessarily buy the argument that we need to charge the captive shippers more. We can charge the captive shippers more because we have monopoly power over them. If you want to do something about that—which the antitrust laws, by the way, will not do anything about. If you remove the exemption, then the captive shippers will still be charged monopoly prices. Absent some other conduct, the antitrust laws can't get at that. The only way you can do something about that is to have some sort of requirement of an open access provision which is done in every single network industry. With electricity, with gas pipelines, we have this open access provision which does put some degree of regulation on top of a competitive framework.

Mr. GOODLATTE. Thank you.

Madam Chairman, might I ask if Mr. Moates could—I know my time has expired—if he might be able to respond to the observations of Professor Bush?

Ms. JACKSON LEE. Mr. Moates, please respond.

Mr. MOATES. Thank you. And I'll be brief.

But thank you, Congressman. With all due respect to Professor Bush, He is an antitrust professor. He is not a regulatory economist. It may be his view that what I described, which is called differential pricing or Ramsey pricing, has been adopted by the STB and the ICC before it as the regulatory standard for determining maximum reasonable coal rates, which is what we were talking about. The Third Circuit and the D.C. Circuit and other courts of appeals have affirmed that reasoning. So it isn't a matter of my making it an argument here today to see if anybody agrees with me. I'm telling you that is the law, and it is sound regulatory policy. And again, with all due respect, removing antitrust exemptions that deal with things like railroad mergers and whether district courts should defer to the doctrine of primary jurisdiction of the STB and the like has nothing to do with any of that. What we're talking about here is the way the STB administers its regulation of the maximum reasonable rail rates under the Commerce Act, not the antitrust laws. Thank you.

Mr. GOODLATTE. Thank you, Madam Chairman.

Ms. JACKSON LEE. I'm going to yield to Mr. Cannon, but I do want Professor Bush to clarify his background.

Mr. BUSH. I do have a Ph.D. In economics that is based upon antitrust law and regulation. Thank you.

Ms. JACKSON LEE. I yield now to the gentleman from Utah, Mr. Cannon, for 5 minutes.

Mr. CANNON. Thank you. Professor Bush, do you also have a law degree, or do you teach at the law school with——

Mr. BUSH. I also have a law degree, sir.

Mr. CANNON. Great. Thank you. So—and you have worked in the area of antitrust for a long time; is that not true?

Mr. BUSH. I've worked in—my mike keeps going on and off. I worked in the Department of Justice for 3 years. I've also done substantial consulting on antitrust matters for quite longer than that.

Mr. CANNON. Thank you. I began earlier by suggesting a similar interest of Ms. Diehl and my personal background. But let me just say, this is a very complex area, and I haven't jumped to my conclusions on this bill yet. But, Mr. Moates, Mr. Huval recently—or just a little while ago—stated that what he thought the burden of proof was and that was essentially you could show that you could build your own railroad for less. Do you want to respond to what the burden of proof is on the shipper?

Mr. MOATES. Thank you, Congressman.

Yes. I think what the gentleman was referring to is what is known as the stand-alone cost test, which is how the STB implements this differential pricing standard I was just talking about.

As a somewhat oversimplified but a not wholly inaccurate way of describing the test, what the STB has developed in this rate standard—again, I keep seeing this multiple times in reviewing United States Courts of Appeals—is a determination that if you can show that to replicate the rail facilities needed to serve you at a cost that is less than that generated or incurred by the railroad, the real railroad in the real world to provide you the services that are supported by the rate that is being challenged, if you can call it that, then you win. You prevail under what is called the stand-alone cost test.

It is really sort of a surrogate for, and the rubric is what is the least cost, most efficient alternative method of transportation to the railroad you are complaining about, their rate, that could conceivably be invented? It is pretty conceivable. I mean, in doing these analyses, the STB has declared that we are not going to consider barriers to entry.

Something we talked about earlier, the land grants, take them out. You can't consider that. A railroad spent a lot of money to put a grade crossing in on this line. It can't be considered. This is a barrier to entry, because the railroad didn't have that cost when it was first built. Environmental mitigation. Take the cost out.

It is a complicated test. It is controversial. The Congress has had multiple hearings with the STB to talk about it. The Board has refined its test over the years; and, in fact, as we speak, there is yet another appeal to the D.C. Circuit pending, dealing with the most recent change by the Board on those rules. The shippers appealed, and the railroads appealed. So everybody has concerns.

May I have just one moment of privilege? I misspoke earlier, and Ms. Diehl corrected me, and she is right, and I want the record to be clear. I gave an answer about the things she could do to deal with her rate other than to build on to the CSX right-of-way in Holly Hill. I said one thing she could do is file a rate case. She absolutely correctly reminded me, because I had forgotten, hydraulic cement is a commodity that the ICC a long time ago exempted from rate regulation. Now there is a procedure where they can move to have that exemption revoked as to them on a demonstration of need, essentially, and then file a rate case. But she is correct, and I don't like to misspeak.

Mr. CANNON. You have cleansed your conscience, cleansed the record, even though we are getting awfully technical on some of these issues.

Ms. Diehl or Mr. Huval or Professor Bush, would you like to respond to the statement by Mr. Moates about what the standard is? I think Mr. Moates has laid out the illegal standard. Do you want to respond either to whether or not this was a correct statement of the law or whether that makes sense in today's world?

Mr. HUVAL. I am not going to dispute whether it is a correct interpretation of the law. But I will say that, from the standpoint of how typical regulation of monopolies take place, it is 180 degrees out of synch with that. If you look at every type of oversight of an entity that has a monopoly, whether it is a real monopoly or de facto monopoly, that it is done based on some process that starts from the bottom up versus having a customer have to stand up and react to it.

And can you imagine if a person wasn't happy with their electric rates, if the electric company just said, look, build your own generator if you can do it cheaper than we can? It is really an observed concept, from our perspective; and all it does is it results in very few appeals being filed because the burden of proof is so heavily upon the entity that is suffering the rate impact.

Mr. CANNON. Thank you. I think the fact that we have so few rate appeals makes your statement self-evident.

I would like to make a few comments. Seems to me the suggestion by Mr. Moates—and if you would like to respond, you may—but I would like to comment that the private litigation as a function of different courts coming to different conclusions, I think Mr. Bush answered that well. I don't think that is a significant problem to this legislation.

I was intrigued by Mr. Issa's questioning about creating—I am not sure how to characterize it—but having some kind of, I think he said, people of the United States owning the rights-of-way. I suppose that would come with some kind of compensation or property rights.

But we have learned a lot in America. In 1977, we had a large power plant in Utah that entered in 30-year contracts for coal. Those contracts were for $85-a-ton coal. I have a ball asking my constituents what the price of coal was in 2007, and they think maybe $300, because that would have been inflation, but the price is down in the range, I think, based on Ms. Baldwin's testimony, about $15 a ton. So $30 million for her local utility and $75 million for transportation.

It is not the same, but a telephone, mobile phone or an Internet access uses a common line much more effectively, much more efficiently than our current railroads do. It would seem to me if we had more competitive pressure we might find that there are better ways to make money. And not to suggest that we ought to nationalize our railroads, but it seems to me that in this debate we need to be thinking about efficiencies.

It does cost a lot of money, Mr. Moates, a lot to build and maintain a railroad. That is, I don't think, a matter at issue. The question is, can we do the system much more efficiently? Because we are suffering for want of cement worldwide. The rest of the world is growing so rapidly. Maybe with the housing problem, we will drop a little bit off on that. But commercial building is still very strong here and worldwide, and cement is in short supply.

And for a company like Ms. Diehl's to decide to invest a large amount of money in a new plant, her investors have to decide whether or not it is worth living with the high cost of real transportation; and, in fact, that marginal increment to your business represented by a new cement plant ought to be something you should want to induce instead of be the barrier for. Recognizing also, at the same time, there is a huge increase in demand from rail service, it is going to take a lot more capital in the future.

It occurs to my mind that we need to be thinking about how we can be more efficient, how we make the market more efficient, how, regardless of the intransigence and the determination and the historical precedent on how we do rail fees, that we may want to take a different look at that.

So I don't think I have co-sponsored this bill yet, but I certainly think we need to pursue the consideration of this. This is one of the really great, perhaps, opportunities in our economy for transformation change and maybe we could even say improvement, since change doesn't always equal improvement.

So I want to thank you.

Thank you, Madam Chairman, for indulging me; and I yield back

Ms. JACKSON LEE. I thank the gentleman from Utah.

I have a few more questions that I would like to offer, sort of the probative practical questions.

Let me first go to Mr. Huval, who I did not include in my earlier round of questions, and just get your take on your presence here today as a regulated industry—is that my understanding—and, therefore, speak to the unfairness.

You are a utility and—electricity?

Mr. HUVAL. That is correct.

Ms. JACKSON LEE. So you are not engaged in the business of railroad, but you are here today to talk about this concept. Tell me why—other than being invited, and we thank you for being here.

Mr. HUVAL. Thank you. Thank you for the opportunity.

Certainly our issue is pretty simple. We have 1,500 miles of railroad to get to our plant. Only 20 miles is owned by one company. We could have competition on 1,480 miles, but the Surface Transportation Board's rule and the railroad companies don't want to let that happen.

So our perspective is that, where there is competition, we should be able to enjoy the benefits of competition. When there is no competition, then there should be some kind of regulated price, some set price for where there is no competition. It is as simple as that.

Our customers are paying more because of that. This is not an issue where we are taking it on the chin. Our customers, every one of them, whether residential or commercial customers, are having to pay that extra cost.

Ms. JACKSON LEE. Educate me in what you are shipping on the railroads.

Mr. HUVAL. We are shipping coal from Wyoming to Louisiana.

Ms. JACKSON LEE. To provide the utility through coal.

Mr. HUVAL. Providing for our coal-fired power plant, that is correct.

Ms. JACKSON LEE. You have the ability to utilize physically a wide array of railroads, wide array of different railroad companies.

Mr. HUVAL. We have an opportunity to have two railroad companies. There are two railroads that will start in Wyoming. They will come down to the center of Louisiana. Our plant is located 20 miles away from that second railroad, and that is where our issue is.

Ms. JACKSON LEE. The STB blocks you from utilizing that second railroad?

Mr. HUVAL. That is correct.

Ms. JACKSON LEE. So this is a plain and simple bottom line for you, which is—say, for example, STB issued a regulation that would cure your problem. That would satisfy your economic question.

Mr. HUVAL. I think generally that would be the case, yes. The bottom line is, where we have competition, we ought to enjoy the benefit of competition. When there is not competition, there ought to be some rate set based on some reasonable circumstance.

Ms. JACKSON LEE. And STB has not given you that relief.

Mr. HUVAL. That's correct.

Mr. CANNON. Would the Chair yield to follow up on that question?

Ms. JACKSON LEE. I'd be happy to yield.

Mr. CANNON. Are you saying the STB won't let you use the second line, or that the cost you would be charge by the second line plus the 20 miles of truck transportation are prohibitive?

Mr. HUVAL. What the STB is telling us is they will not force the company that owns the entire line to give us a quote only for the 20 miles. So without a quote for the 20 miles, that puts us—we have to have that 20 miles to get to our plant. So it forces us to have to buy service all the way back to the Wyoming plant, the Wyoming site for the coal.

The second thing the STB does is it won't force a second company. Not only not force a second company, the second company won't even make an offer to provide service, assuming that we would build an alternate line. If you want to say, suppose we build the last 20 miles to connect up to the second rail company, the second rail company's position is that we won't even give you a price until you build. So you can't make a business decision, if it makes sense to do that or not.

Mr. CANNON. Thank you, Madam Chair. Yield back.

Ms. JACKSON LEE. Mr. Huval, is that a staff answer that you have gotten, or you have actually been before the Board and gotten a decision?

Mr. HUVAL. No, it has not been before the Board. It is taking the Board's previous decisions and making requests as we have to the rail companies to consider either of those options and not getting a response.

Ms. JACKSON LEE. But did you get an oral response from the staff saying, because of these previous decisions, we are not giving you any latitude?

Mr. HUVAL. To appeal one of these things takes—I forget what the number is—like $188,000 to make an appeal. It doesn't make sense for us to do that when we know what the track record has been.

Ms. JACKSON LEE. So you have accepted previous interpretations to suggest to you that you wouldn't find relief, and you are just going on. And you have tried to sort of make way on your own negotiations, and you have not been successful.

Mr. HUVAL. That is correct. There is really no more negotiations anymore in that regime.

Mr. GOODLATTE. Madam Chairman, I wonder if I might follow up on that.

Ms. JACKSON LEE. I would be happy to yield to the gentleman from Virginia.

Mr. GOODLATTE. I thank the Chairwoman.

I would like to ask Mr. Moates, the gentleman makes a point regarding the fact that they are a captive shipper, and they have only one alternative to choose from, and they are getting charged what they think is a very excessive rate. What is their alternative? What do they do? Do you think that the STB is evenhanded in these decisions, or do you think they are biased in favor of the railroad? What is your take?

I can kind of guess at your answer, but what is your response to him? Is it just go to the STB and lump it?

Mr. CANNON. Would the gentleman yield so I can sort of clarify the question?

Ms. JACKSON LEE. I would be happy to yield to the gentleman, reclaiming my time. And I assume Mr. Goodlatte is not finished. So let me yield to you and then back to Mr. Goodlatte.

Mr. CANNON. Suppose Mr. Huval invests $100 million to build 20 miles of line. Now he has access. But he is now no longer a captive user. Does that mean that we should change the STB standard? In other words, does he have to buy $100 million—or whatever it would take him to build that 20 miles—so he can now not be a captive user and escape from your paradigm of return that is most heavily—the burden put on the captive user?

Mr. GOODLATTE. It is a little different question, but maybe he can answer both.

Mr. MOATES. I will try.

First, let's make sure we have the actual facts in mind. There are these two large western railroads, as Mr. Huval said, that serve the Powder River Basin. It is going to his plant in Lafayette, Louisiana. What he is saying is one of those big railroads has tracks that go all the way, they are the ones that serve him, and they charge him a rate that he doesn't like.

Point number one, he is not hydraulic cement. His rates are regulated. He can file a rate complaint with the STB and complain about that. He talked about the filing fee of being $185,000 or whatever. The STB in the last month, pursuant to a mandate from this Congress, you passed legislation that required the Board to reduce those filing fees dramatically. They are now only a couple hundred dollars.

Back to the economic situation. The other railroad, I will take his word for it, is about 20 miles away in Alexandria, Louisiana. You asked could he truck it. I don't know that that was explored. Maybe that is too expensive. Maybe there is too much volume.

Mr. GOODLATTE. I didn't ask that. What I asked was, leaving aside this specific example, he spoke in general terms at the outset of his comments about how, when you are a captive shipper, you don't have any recourse other than to a board that he thinks the weight of evidence is overwhelmingly siding with the railroads. Is that your understanding or do you have a rebuttal to that?

Mr. MOATES. There are two things that are available. The first is, file the maximum rate case against the railroad that goes all the way. If the rate is actually unreasonably high under the Act, and they can demonstrate that, the STB can and will order a prescription of a rate, new rate, and can and will order rate reparations damages.

Mr. GOODLATTE. How often is that done, and how often does that result in a lower rate?

Mr. MOATES. I am not going to remember the number. There are a not insignificant number of coal rate cases, but they are not filed every week. Maybe a couple a year, and they are mainly against the western railroads. I have defended a couple against the eastern railroads filed by a couple of eastern utilities a few years ago. Those are the cases I can speak to.

I have been involved in one or two western cases, and in the eastern cases we prevailed. The rates were held to be not unreasonably high. So no relief to the eastern utilities.

Some of the western utilities have gotten rate relief. They have had rate prescriptions, and they have had reparations ordered, not in all cases. I am not going to speak for the shippers. But, generally, the shipper community is unhappy with the amount of relief it has gotten from these STB rate cases.

I am a railroad lawyer, and I represent the railroad industry. I think the Board has done, all things considered, a reasonable job of administering the statute. I disagree with the Board ardently sometimes on some of these cases, and I think it has made some determinations of this stand-alone cost test that I think are wrong, and in some cases we have appealed those to the courts of appeals. It is an evolving area, to a degree.

But the other question, he says, can I make the other railroad—can I make the railroad that serves me give the other railroad a rate so we can connect that 20 miles? What he means is the second railroad would bring it all the way to Alexandria and then it would turn it over to the railroad that brings him the coal today for that last 20 miles.

This procedure there is to invoke the so-called bottleneck rate standards that I referred to a couple of times that have not been used since their implementation. Shippers take the position that the standard to get relief is too high. What is the standard? A demonstration that the railroad that is bringing the coal all the way today is either engaging in anti-competitive conduct or is abusing its market power.

Those are the concepts we have been grappling with. That is available to them. They can file such a cause.

I hope that is responsive.

Ms. JACKSON LEE. I thank the gentleman.

Let me pursue the line of questioning that I started pursuing, and I appreciate Mr. Goodlatte and Mr. Cannon expanding on it.

Let me emphasize, without polling all the Members of this Committee, that you believe there are some individuals who remain open-minded or remain quizzical, and ultimately this will be before the full Committee. The bill will.

So, Mr. Moates, you have partly made the statement about the STB. In fact, you mentioned successes in your western cases and eastern cases. I might make note of the point that you seem to be able to work that system. I would argue or ask the question why you couldn't work the western district and the eastern district in a variety of Federal courts, because you work with different decisions through the STB.

Though I know it is regulatory, I just wanted to raise the question, not necessarily asking for an answer on that. Let me move to the question I want. But I do want to note that you get different decisions in different regions. So we could probably resolve whether or not courts would be disruptive, because courts usually are very sensitive in being disruptive in commerce.

But I want to go to the point of the STB saying—and I perceive your point is that the railroads—and you are doing a great job for them—should not be subject to regulation by both the STB and be subject to the antitrust laws as provided for by the Sherman and Clayton Acts. You state that the STBs provide that there should be balance and sustainable competition, but two of our witnesses have spoken about this concept of captive railway situation.

I have mentioned the plight of those needing cement in Texas and being held captive because they have not been able to get the product in. In fact, I have had contractors, builders standing in line on rail cars to move for their cement to get there. So what then is the relief? The STB does not seem to be adequate. What then is the relief to this concept of a captive railway situation?

Mr. MOATES. I will see if I can do the best I can with that. I am not an expert on moving cement.

Ms. JACKSON LEE. I don't want you to talk about cement. It could be coal. I just want you to speak to the captive railway situation. We are, in essence, blocked in getting our product to market.

Mr. MOATES. That sounds to me as though there is a service issue. I am not sure what time frame we are talking about or what the real problem is. The western railroads in the mid to late 1990's had some very well-publicized problems with service, some of them resulting in the wake of two very large mergers. Those issues have been resolved.

Actually, as full as the system is today in the sense of the capacity being heavily used, I think the service metrics—and I think the shippers agree with this—the service metrics across the rail industry are really quite good now. The railroads, most of them are running what they call scheduled railroads. That isn't exactly like

United Airlines landing within 2 minutes of what it claims it will, although it doesn't do that all the time either, but at least has a schedule like that.

The railroads aren't, of course, quite that scheduled but much more than they used to be. So, in this case, the Texas cement shippers should have a much better idea.

Ms. JACKSON LEE. But if the STB is a regulatory authority and they don't do anything to enhance competition, what relief do the shippers have?

Mr. MOATES. I am trying to respond to the cement movement in the context of competition. I am not sure it is a competitive problem. I think it may be more of an issue of service issues and capacity issues and how many trains can we get through the choke point at a given point in time and whose train goes first and are the cement cars on there or are the coal cars on there. I am not sure that is a competitive problem.

If we are talking about expanding the capacity, that is something the industry and its customers want to do, the industry is doing it, but it is expensive, and it is going to take time, and we have to be able to earn our cost to capital, or something close to it, to be able to do that. So I bring my point back.

If I may make one comment on your initial observation. I said—and perhaps I misled you, and I apologize if I did. I said there have been coal rate cases in the east, generally in the west, generally more in the west, but they have all been decided by one decision maker, the STB, under the same standards. That is these coal rate standards to stand-alone cost tests.

So I don't think that would be quite the same as the possibility of judges in different parts of the country perhaps approaching issues using different standards and different lenses, if you will, in terms of how they look at a problem.

Ms. JACKSON LEE. Thank you for clarifying that.

I guess, as a lawyer, I would argue in Federal courts they would certainly have the STB decisions to be guided by. We do know that Federal courts most often try not to be catastrophic in their interference with commerce, or I think there would be some balance, but I respect your interpretation.

Let me just conclude with Professor Bush and take the questions that I have just posed to Mr. Moates, who took a very healthy stab at it on behalf of his position. But what are the checks and balances in the system if the STB fails to preserve or enhance competition? I am putting it to someone who I think favors the bill. Are there any checks and balances on the STB? If not, where does that take us? Is it a service problem that Mr. Moates has spoken to?

Mr. BUSH. I will state that I am generally in favor of the bill, with caveats, because there are certainly some issues that the bill does not address, particularly the implied immunity, primary jurisdiction issues that I raised before.

Right now, what we have is I think the worst of all possible worlds. We have a business that is subject neither to competition policy nor regulation. And keep in mind that——

Ms. JACKSON LEE. Does STB foster competition? Do you think so?

Mr. BUSH. Nor was it designed to foster competition. It was designed originally to foster consolidation. And it has done that superbly.

The antitrust immunities in general—and I have studied all of them, actually—are usually not with some economic rationale or justification. In most instances, it is some sort of special interest legislation that transfers wealth from consumers such as shippers to others, for example, railroads. So we should not take the position that the antitrust immunity that, just because it is there, should always remain there.

Is there a service problem? Yes, there is a service problem. The question is, what is the origin of the service problem? Recall, those of you who are old enough, AT&T prior to its deregulation. You could have any phone you wanted so long as it was black. It could be tossed from a 20-story building, cheap phone cord that tangled, and you had to lease it. It was only after the destruction or divestiture of AT&T that you started getting some sort of competition and innovation in the industry. You kind of see the same things in a different way in the electric utility industry where you started implementing competition in electric generation under the auspices of energy conservation in 1978.

If we did something similar to the railroads, one wonders what kinds of service problems we would have, if any. Because competition is the impetus for the creation of service. You do not have any sort of incentive to provide service if you are a monopoly it. It only exists if there is some level of competition.

Ms. JACKSON LEE. Let me thank the witnesses for a very thoughtful presentation and discussion. In fact, I know that my colleagues and myself would be eager for this to continue into the evening. We, unfortunately, will be called soon to the floor of the House. But it has been an important, broad discussion and potential roadmap as we move forward.

Professor Bush, I would appreciate on behalf of the Committee if you would expand on your statement, where you talk maybe more expansively about your thoughts about the legislation before us, particularly those elements that maybe you shortened in your remark. Maybe you would have a document that you have case law to provide in writing.

Mr. Moates, if there are some additional thoughts after thinking about it, we welcome you having some submissions, as we do the other witnesses in clarifying your market. That might be very helpful to us. I know the Committee would welcome this thoughtful analysis.

This will continue to pose a series of questions. This is an antitrust task force. I want to thank Chairman Conyers for his leadership on this issue and Ranking Member Smith. We take our jurisdiction very seriously; and we welcome, again, your additional thoughts.

This hearing is now adjourned.

[Whereupon, at 6:30 p.m., the Task Force was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

Defending Liberty
Pursuing Justice

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VIA OVERNIGHT MAIL

December 10, 2008

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Re: Comments Regarding the Railroad Antitrust Enforcement Act, H.R. 1650

Madam Speaker and Gentlemen:

On behalf of the Section of Antitrust Law of the American Bar Association, I am pleased to submit the enclosed comments regarding H.R. 1650.

Please note that these views are being presented on behalf of the Section of Antitrust Law. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and should not be construed as representing the position of the American Bar Association.

If you have any questions regarding these comments, please contact me.

Sincerely,

James A. Wilson
Chair, Section of Antitrust Law

Enclosure

ABA SECTION OF ANTITRUST LAW
COMMENTS ON THE RAILROAD ANTITRUST ENFORCEMENT ACT

The Section of Antitrust Law of the American Bar Association (the "Antitrust Section" or "Section") is pleased to submit these views regarding the Railroad Antitrust Enforcement Act, S. 772 reported favorably by the Senate Judiciary Committee on December 19, 2007, and H.R. 1650, reported favorably by the House Judiciary Committee on September 18, 2008 (the "Act").

The views expressed in these comments have been approved by the Antitrust Section's Council. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and should not be construed as representing the policy of the American Bar Association.

Summary

The Antitrust Section submits that any decision to allow an immunity or exemption from the antitrust laws should be made reluctantly and only after thorough consideration of each particular situation. The inquiry with respect to immunities and exemptions should focus narrowly on the fundamental principles and objectives of antitrust law, namely promoting competition and consumer welfare. Exemptions and immunities should be recognized as decisions to sacrifice competition and consumer welfare, and should accordingly be authorized only when some countervailing value – such as free speech or federalism – outweighs the general presumption in favor of competitive markets.

The Antitrust Section has frequently noted its opposition to industry-specific exemptions from the antitrust laws based on claims that such immunity is necessary given unique market conditions, believing that the antitrust laws are sufficiently flexible to account for particular market circumstances. The Section's general opposition to exemptions and immunities was endorsed by the 2007 report of the Congressionally-mandated Antitrust Modernization Commission ("AMC"), which concluded that "statutory immunities from the antitrust laws should be disfavored," "[t]hey should be granted rarely" and "only where, and for so long as . . . is necessary to satisfy a specific societal goal that trumps the benefit of a free market to consumers and the U.S. economy in general."

The Railroad Antitrust Enforcement Act would remove railroads from the protection of the judicially-created "filed-rate" or *Keogh* Doctrine, which insulates firms from antitrust damages actions, and allow private parties to seek injunctive relief against railroads under the antitrust laws. The Act would also place review of railroad industry mergers, like those in other industries, in the hands of the Federal antitrust agencies – the Department of Justice and the Federal Trade Commission – removing the Surface Transportation Board's exclusive authority.

The Section supports these steps and encourages Congress to move forward quickly to dismantle the antitrust exemption for the railroad industry, through the Railroad Antitrust Enforcement Act, and to consider additional legislation to eliminate antitrust exemptions applicable to other industries.

Comments

I. The Antitrust Section Discourages Statutory Exemptions and Immunities

The Antitrust Section believes that the economy is best served by promoting competition in the marketplace, and statutory immunities and exemptions from the antitrust laws should be strongly disfavored. The Antitrust Section has frequently noted its opposition to antitrust exemptions and immunities, whether created judicially or by statute, finding them to be rarely justified. The Section recently expressed this view in comments to the Federal Trade Commission:

> The Section has long and consistently resisted the creation or expansion of exemptions that shield whole areas of market activity or sectors of commerce from rigorous antitrust enforcement. The antitrust laws are designed to provide general standards of conduct for the operation of our free enterprise system, and in the Section's considered view, special exemptions from these standards rarely are justified. Whatever their expressed purposes, antitrust exemptions often impair consumer welfare.

Comments of ABA Section of Antitrust Law on FTC Report on the State Action Doctrine, at 2-3 (May 6, 2005).[1]

The Section believes that the common law process through which the antitrust laws promote both allocative efficiency and consumer welfare is flexible and evolutionary. It adapts to the unique circumstances of markets and industries, to changing technologies and circumstances, and to the development and growth of legal and economic theory.[2] The antitrust laws today do not prohibit the vast bulk of business conduct, including competitor collaborations that generate pro-competitive efficiencies or that have not harmed or are not likely to harm the competitive process and consumer welfare. They do prohibit, however, mergers that are likely to raise price or reduce quality, service or innovation, naked collusion among competitors to fix prices or allocate territories, and conduct that excludes rivals to the detriment of consumers.

Exemptions and immunities shelter industries or forms of behavior from the procompetitive reach of the antitrust laws, and thus are likely to harm the economy by reducing competitiveness and efficiency. They also often freeze in place the development of economic theory. Claims that an exemption or immunity is necessary for competition to flourish or because

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[1] The Antitrust Section has supported repeal of antitrust exemptions in testimony before the Antitrust Modernization Commission, and has opposed other exemptions. *See* Comments to the Antitrust Modernization Commission on General Immunities and Exemptions, the Shipping Act Antitrust Exemption and the McCarran-Ferguson Act and Reports of the Antitrust Section on the Free Market Antitrust Immunity Reform Act of 1999, the Quality Health-Care Coalition Act of 1999, Antitrust Health Care Advancement Act of 1997, the Television Improvement Act of 1977, the Major League Baseball Antitrust Reform Act of 1997, the Curt Flood Act of 1996, and the Major League Baseball Antitrust Reform Act of 1995 (all available at www.abanet.org/antitrust).

[2] *See, e.g., Nat'l Soc'y of Prof'l Eng'rs* v. *United States,* 435 U.S. 679, 687-88 (1978) ("Congress, however, did not intend the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations. The legislative history makes it perfectly clear that it expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition.").

competition is itself harmful or undesirable, or does not work in some particular industry should not prevail. Over a century of development has shown that the antitrust laws are the best guardian of competition, and are capable of growing to accommodate the unique characteristics of particular industries. The antitrust laws have been described as "the Magna Carta of free enterprise . . . as important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms."[3]

The Antitrust Section recognizes that exemptions and immunities are occasionally warranted – but only where an important value unrelated to competition, such as free speech or federalism, trumps the need for competition. As the Section noted to the AMC, "[a]ntitrust, while vigilant regarding every nuance of competition, deliberately turns a blind eye to concerns outside that scope."[4] Thus, the *Noerr-Pennington* doctrine, developed to protect free speech and the right to petition the government, and the state action doctrine, based on the values of federalism and state sovereignty, epitomize exemptions founded upon important interests unrelated to competition. Certainly, the legislature may determine that, in a particular case, competition and the free-market system may be limited to advance some other purpose.

Antitrust exemptions for the railroad industry – and other long-standing exemptions and immunities – do not appear to be justified by any non-competition related value. Instead, they appear to be no more than "naked economic protectionism," adopted in a legal era that considered economic protectionism in certain industries to be socially beneficial – before the consensus antitrust policy that has largely governed antitrust enforcement in recent decades. It is now appropriate to re-evaluate whether statutory immunities and exemptions are consistent with promoting efficiency and consumer welfare.[5]

The Section believes that these exemptions have survived as long as they have because their benefits apply to small, concentrated interest groups that receive substantial benefits – such as railroads, ocean shipping carriers and agricultural cooperatives. On the other hand, the costs from such statutory exemptions are generally passed on to individual consumers. Thus, statutory exemptions from the antitrust laws create an asymmetry of costs and benefits. It is consumers that suffer the most from higher prices, lower output, reduced quality and reduced innovation.[6] While some shippers may complain about railroad industry practices that they allege violate the antitrust laws, consumers are the biggest losers.

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[3] *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972).

[4] Comments of the ABA Section of Antitrust Law on General Immunities and Exemptions to the Antitrust Modernization Commission at 3 (Nov. 30, 2005). *See also Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 695 (1978) ("The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services. 'The heart of our national economic policy long has been faith in the value of competition.'") (quoting *Standard Oil Co. v. FTC*, 340 U.S. 231, 248).

[5] Comments of the ABA Section of Antitrust Law on General Immunities and Exemptions to the Antitrust Modernization Commission at 6-7 (Nov. 30, 2005).

[6] *Id.* at 4-6.

Courts have generally construed exemptions to the antitrust laws narrowly, respecting Congress's desire "to strike as broadly as [possible] in § 1 of the Sherman Act."[7] While Congress of course remains free to exempt behavior from the reach of the antitrust laws, the Antitrust Section believes the onus of an exemption's ongoing justification ought to be on those favoring its preservation and the Section has supported including a sunset provision in any new exemption.[8]

That there should be a presumption against antitrust exemptions is particularly true where an industry is being deregulated, and there is uncertainty as to whether activity is exempted from regulation and is shielded from the antitrust laws. If anything, activities exempted from regulation should become subject to antitrust scrutiny even if potentially subject to re-regulation. Thus, the Antitrust Section supports repeal of remaining antitrust exemptions for the railroad industry, completing the industry's transition to competition.

II. The Antitrust Modernization Commission Recommends Dismantling Exemptions

The Antitrust Modernization Commission Act of 2002[9] mandated the formation of a blue-ribbon Commission appointed by the President and majority and minority leadership of the House of Representatives and the Senate. The AMC was tasked with reviewing the country's antitrust laws to determine whether and how they should be modernized.

The AMC recently reported that the economic principles that guide antitrust law remain relevant to and appropriate for the antitrust analysis of industries in which innovation, intellectual property and technological change are central features. Properly interpreted, the antitrust laws promote innovation and dynamic efficiency as well as price competition, serving consumer welfare in the global, high-technology economy that exists today.[10]

Nonetheless, there are numerous industry-specific areas where Congress has explicitly stated that the antitrust laws do not apply. Statutory exemptions exist for everything from anti-hog-cholera serum to sports broadcasting. The Antitrust Section has chronicled these exemptions in a recently-published monograph entitled *Federal Statutory Exemptions from Antitrust Law* (2007).

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[7] *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787 (1975). One leading judge has argued: "[An antitrust exemption is] special interest legislation, a single-industry exception to a law designed for the protection of the public. When special interests claim that they have obtained favors from Congress, a court should ask to see the bill of sale. . . . [Because] special interest legislation enshrines results rather than principles . . . courts read exceptions to the antitrust laws narrowly, with beady eyes and green eyeshades." *Chicago Prof'l Sports v. Nat'l Basketball Ass'n*, 961 F.2d 667, 671-72 (7th Cir. 1992).

[8] *See* ABA Antitrust Section Amended Comments on the Shipping Act Antitrust Exemption at 3 (Mar. 17, 2006); Comments of the ABA Section of Antitrust Law on General Immunities and Exemptions to the Antitrust Modernization Commission at 11-17 (Nov. 30, 2005).

[9] Pub. L. No. 107-273, § 11054(h), 116 Stat. 1856, 1857 (2002).

[10] AMC, *Report and Recommendations* (2007) (hereafter *AMC Report*).

During the course of the AMC study, the Commission invited comment and held several days of hearings addressing exemptions. The AMC report issued last year advised:

> Statutory immunities from the antitrust laws should be disfavored. They should be granted rarely, and only where, and for so long as, a clear case has been made that the conduct in question would subject the actors to antitrust liability and is necessary to satisfy a specific societal goal that trumps the benefit of a free market to consumers and the U.S. economy in general.[11]

The AMC urged that even "[w]hen the government decides to adopt economic regulation, antitrust law should continue to apply to the maximum extent possible, consistent with that regulatory scheme [and] antitrust should apply whenever regulation relies on the presence of competition or the operation of market forces to achieve competitive goals."[12]

The AMC specifically concluded that no immunity should be granted to stabilize prices in order to provide an industry with certainty and predictability for purposes of investment or solvency – one of the arguments sometimes made in the railroad industry based on its need for capital investment. The AMC noted that the costs of price stability typically fall on consumers, resulting in inflexibility that undermines economic growth. Arguments that carriers need an antitrust exemption to adopt practices such as sharing equipment given the costs of investments was also specifically rejected by the AMC.[13]

III. Antitrust Exemptions in the Railroad Industry

A. Deregulation and the Role of the Surface Transportation Board

Railroads today benefit from several antitrust exemptions and immunities which are legacies of a bygone era. The AMC advised that "[d]uring the early part of the twentieth century, a belief that certain industries [such as railroads] were either 'natural' monopolies . . . or were at risk for 'excessive competition' led to government regulation of prices, costs, and entry into those industries."[14] Thus, instead of relying on antitrust laws to prevent unfair competition, regulatory agencies were given responsibility for monitoring competition. For more than a hundred years, under the Interstate Commerce Act of 1887, the Interstate Commerce Commission ("ICC") and later the Surface Transportation Board ("STB") regulated the railroad industry. Technological changes and recognition of the costs and market distortion of economic regulation, however, have led to changes over time.[15]

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[11] *Id.* at 335, Recommendation 57.

[12] *Id.* at 338, Recommendation 63.

[13] *Id.* at 351-52.

[14] *Id.* at 333.

[15] *Id.*

The antitrust exemptions in the railroad industry derive from the Transportation Act of 1920 under which the ICC developed a plan for consolidation,[16] and the Reed-Bulwinkle Act of 1948 (passed over President Truman's veto), under which the ICC approved rate bureaus.[17] Even if, in a regulated environment where all rates were subject to oversight, antitrust exemptions may have made some sense, deregulation has eroded the basis for continuing exemptions. Pervasive regulation of the railroad industry has been eliminated over the last 30 years. In 1976, Congress passed the Railroad Revitalization and Regulatory Reform Act (the "4R Act"), which reduced rate regulation and provided carriers with some flexibility in setting rates.[18] The 1980 Staggers Rail Act further limited the authority of the ICC, to regulate rates only for traffic where insufficient competition existed to protect shippers.[19] The 1995 Interstate Commerce Commission Termination Act replaced the ICC with the STB and further deregulated the industry.[20]

The STB today has limited statutory authority, *inter alia*, to resolve railroad rate and service disputes involving traffic that is subject to the agency's jurisdiction and to review railroad restructuring transactions, including line sales, line constructions and line abandonment. In addition, the agency oversees mergers between railroads.[21] Under the ICC's and the STB's administration and approval, however, the number of large (or Class I) U.S. railroads has dropped from sixty-three to seven, through a series of mergers over the past four decades and the agency's stewardship of competition has been challenged.[22]

B. Statutory and Judicially-Created Exemptions and Immunities for Railroads

While the railroad industry today is not immune from all antitrust actions, the industry does benefit from several express statutory and judicially-created immunities from antitrust law, which would be eliminated by the Railroad Antitrust Enforcement Act. Specifically, the industry today benefits from the following antitrust exemptions:

- Mergers and acquisitions are exclusively within the purview of the STB. If approved by the STB, they are exempt from challenge under Section 7 of the Clayton Act.[23]

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[16] Ch. 91 § 407, 41 Stat. 456, 482 (1920).

[17] Ch. 491, 62 Stat. 472 (1948).

[18] Pub. L. No. 94-210, 90 Stat. 31 (1976).

[19] Pub. L. No. 96-448, 94 Stat. 1895 (1980).

[20] Pub. L. No. 104-88, 109 Stat. 803 (1995).

[21] 49 U.S.C. § 11324.

[22] Testimony of Charles D. Nottingham, Chairman, Surface Transportation Board, before the Senate Judiciary Committee, Subcommittee on Antitrust, Competition Policy and Consumer Rights (Oct. 3, 2007).

[23] 49 U.S.C. § 11321(a).

- The STB is also authorized to review line sales, and its approval immunizes the transaction from the antitrust laws.[24]

- Certain STB-approved agreements relating to leases, trackage rights, pooling arrangements, and agreements to divide traffic, are exempted from the antitrust laws to the extent necessary to carry out the approved agreement.[25]

- Railroads are also immune for certain rate-related agreements approved by the STB, such as agreements establishing rules governing charges that one railroad must pay to use another's equipment.[26]

- Private parties may not obtain injunctive relief under the antitrust laws against a common carrier subject to STB jurisdiction.[27]

- Conferences among railroads, shippers, labor, consumer representatives and government agencies may be convened by the Secretary of Transportation, and discussions or agreements entered into with the Secretary's approval through these conferences are exempted from antitrust laws.[28]

- The STB and not the FTC has authority to enforce compliance with the Federal Trade Commission Act against railroads and other common carriers subject to STB jurisdiction.[29]

- Under the judicially-created *Keogh* doctrine,[30] railroads are immune from treble damages for filed rates.

The Railroad Antitrust Enforcement Act would eliminate these exemptions and place railroads on an equal footing with most other industries.

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[24] 49 U.S.C. § 10901(c).

[25] 49 U.S.C. § 10706; 15 U.S.C. § 18.

[26] 49 U.S.C. § 10706.

[27] 15 U.S.C. § 26.

[28] 49 U.S.C. § 333.

[29] 15 U.S.C. § 21(a).

[30] *Keogh v. Chicago & N.W. Ry. Co.*, 260 U.S. 156 (1922). *See also AMC Report, supra* note 10, at 340 ("At the time this doctrine was created, members of a regulated industry were typically required to file their proposed rates with regulators who reviewed the rates to ensure they were 'fair and reasonable.' In creating the doctrine in *Keogh*, the Supreme Court explained that only the relevant regulatory authority could change these rates, even if the rate was higher than it otherwise would be due to a price fixing conspiracy.").

IV. The Railroad Antitrust Enforcement Act

The Railroad Antitrust Enforcement Act would make a number of specific changes to current law to limit existing antitrust immunities applicable to the freight railroad industry. It would amend the Clayton and Federal Trade Commission Acts, as well as various sections of the federal transportation code (Title 49), to eliminate most of the antitrust exemptions and immunities that now apply to the freight railroad industry. The House and Senate bills would:

- Make railroad mergers and acquisitions subject to Section 7 of the Clayton Act;
- Amend Section 16 of the Clayton Act to allow private parties to seek injunctive relief against railroads in federal courts under the antitrust laws;
- Add a new section to the Clayton Act providing that district courts would no longer be required to defer to the primary jurisdiction of the STB in civil actions against a common carrier railroad;
- Amend Section 11(a) of the Clayton Act to remove the STB's exclusive jurisdiction over rate agreements and mergers involving railroads;
- Amend Section 5 of the FTC Act to make railroads subject to its provisions;
- Amend the Clayton Act to overturn the "filed-rate" or *Keogh* Doctrine, and allow treble damages actions against railroads for antitrust violations; and
- Make conforming amendments to the STB statute to remove antitrust exemptions for rate agreements and exclusive jurisdiction for the STB over railroad mergers and acquisitions.

Thus, while some rail shipments are already subject to the antitrust laws – because they are either under private contracts or exempted from regulation – the proposed legislation would extend antitrust coverage to the remaining freight rail traffic.

A. Jurisdiction over Mergers and Acquisitions

Importantly, the Railroad Antitrust Enforcement Act would bring railroad mergers within the ambit of Section 7 of the Clayton Act and empower the Federal antitrust enforcement agencies to sue to block acquisitions the effect of which may be substantially to lessen competition.[31] That change would be consistent with the AMC's recommendation that "even in industries subject to economic regulation, the antitrust agencies generally should have full merger enforcement authority under the Clayton Act."[32] The AMC recognized that the Department of Justice and Federal Trade Commission regularly examine mergers and acquisitions noti-

[31] S. 772, Sec. 3; H.R. 1650, Sec. 3.

[32] *AMC Report, supra* note 10, at 341, 363-66.

fied pursuant to the Hart-Scott-Rodino Act to determine whether such proposed transactions may substantially lessen competition, and the agencies apply the same standards to all industries.

The STB would, however, continue to approve mergers and acquisitions under its "public interest" test. Thus, transactions would be subject to dual review, as they are in certain other industries, including transactions in the telecommunications industry subject to Federal Communications Commission ("FCC") review and oil and gas industries subject to Federal Energy Regulatory Commission ("FERC") review. The House Report on the Act suggests: "[p]assage of the bill would subject railroads to the same kind of concurrent oversight by both a Federal enforcement agency and a regulatory body found in other partially-regulated industries."[33]

The AMC identified only four industries in which regulatory agencies still review proposed transactions under a statutory "public interest" standard, and where the agency can allow transactions to proceed if it concludes "public interest" benefits outweigh likely anticompetitive effects. These industries include (1) certain aspects of electricity and natural gas regulated by FERC, (2) telecommunications/media regulated by the FCC, (3) banking entities regulated by various banking agencies, and (4) railroads regulated by the STB. In the first two industries – electricity and telecommunications – the DOJ has full enforcement authority to investigate and challenge mergers, regardless of the agency's public interest review. In banking, the DOJ provides its analysis to the banking agency, and in practice the DOJ and the banking agencies work closely together. While the banking agency has authority to depart from the DOJ's recommendation, the DOJ can challenge the banking agency's decision in court.[34]

Only in the railroad industry does the regulatory agency have complete discretion to ignore the DOJ. While the STB by statute must give "substantial weight" to the DOJ's views, the STB makes the final decision on whether to allow a merger.[35] Indeed, in 1996, the STB approved the merger of Union Pacific and Southern Pacific, despite the DOJ's objections that the merger was anticompetitive.[36]

The AMC recognized that concurrent merger review by the antitrust agencies and a regulatory agency can impose "significant and duplicative" costs on both the merging parties and the agencies, and can lead to conflicts between the agencies. The AMC suggested that Congress therefore periodically consider whether regulatory agency review under the "public interest" standard is necessary, or whether the antitrust agency's review under the Clayton Act will adequately protect consumers' interests.[37] We, too, are concerned about the costs of dual

[33] H.R. Rep. No. 110-860, at 6 (2008).

[34] *AMC Report*, *supra* note 10, at 341-42, 363-64.

[35] 49 U.S.C. § 11324(d).

[36] *Union Pac. Corp., et al. – Control and Merger – Southern Pac. Rail Corp., et al.*, 1 S.T.B. 233 (1996), *aff'd sub nom. Western Coal Traffic League v. Surface Trans. Bd.*, 169 F.3d 775 (D.C. Cir. 1999).

[37] *AMC Report*, *supra* note 10, at 342, 365-66, Recommendation 74. Other organizations studying the interrelationships between regulatory and antitrust review of mergers have also recommended that antitrust agencies

enforcement, but recognizing the federal antitrust agencies' expertise in reviewing the competitive effects of mergers and acquisitions, the Antitrust Section endorses federal antitrust agency review of future railroad mergers and at least removing the STB's exclusive merger review authority.

B. The Filed-Rate Doctrine

The Railroad Antitrust Enforcement Act would specifically abolish the judicially-created "filed-rate" or *Keogh* Doctrine with respect to railroads.[38] Derived from the Supreme Court's 1922 decision in *Keogh v. Chicago & Northwestern Railway*, the doctrine prohibits private plaintiffs from pursuing an antitrust action seeking treble damages where the plaintiff is claiming that a rate submitted to, and approved by, a regulator resulted from an antitrust violation, such as collusion among carriers. The Court reasoned that only the regulatory authority could change the rates, even if those rates were higher than they might be due to a price-fixing conspiracy.[39]

The *Keogh* Doctrine was created at a time when members of regulated industries were required to file their proposed rates with the appropriate regulatory agency.[40] The agency would then review the rates to make sure they were fair and reasonable. In *Keogh*, the Court held that an award of treble damages was not available to a private plaintiff who claimed that rates approved by the regulatory agency violated antitrust principles. While technically neither an exemption nor an immunity, this doctrine effectively protects railroads that file their rates with the STB. Courts have applied the doctrine to preclude antitrust claims where a tariff has been filed with a regulatory agency regardless of whether the agency has actually reviewed and approved the rate.[41] The Supreme Court, in 1986, suggested that a variety of factors "seem[ed] to undermine" the doctrine's continuing validity, but nonetheless concluded it was for Congress to determine whether to abolish it.[42]

The AMC concluded that the time has come for Congress to address the issue. It advised: "Congress should evaluate whether the filed-rate doctrine should continue to apply in regulated industries and consider whether to overturn it legislatively where the regulatory agency no longer specifically reviews proposed rates."[43] The Antitrust Section agrees that deregulation within the rail industry, eliminating STB review of most rates, has undermined the *Keogh*

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have exclusive jurisdiction. *See generally id.* at 365 (discussing recommendations of the International Competition Policy Advisory Committee and the Organization for Economic Cooperation and Development).

[38] S. 772, Sec. 6; H.R. 1650, Sec. 2.

[39] 260 U.S. 156, 162-64 (1922).

[40] *AMC Report*, *supra* note 10, at 340.

[41] *See*, e.g., *California ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 852-53 (9th Cir. 2003); *Utilimax.com, Inc. v. PPL Engergy Plus, LLC*, 378 F.3d 303, 306 (3d Cir. 2004).

[42] *Square D Co. v. Niagra-Frontier Tariff Bureau, Inc.* 476 U.S. 409, 423 (1986).

[43] *AMC Report*, *supra* note 10, at 340-41, 362-63, Recommendation 68.

Doctrine. The proposed legislation overruling the *Keogh* Doctrine in the railroad industry is therefore consistent with the AMC's recommendation. While the Antitrust Section believes Congress should consider similar legislation in other industries, that is a step in the right direction, toward curtailing the exemption.

C. *Primary Jurisdiction*

The Act would also remove any requirement that federal district courts defer to the primary jurisdiction of the STB in any civil antitrust action against a railroad.[44] The doctrine of "primary jurisdiction" is not an immunity. Rather, it addresses the question of whether a court should *suspend* resolution of some questions of fact or law over which the court has jurisdiction, until passed upon by the regulatory authority whose jurisdiction encompasses the activity involved. Such deference may occur when (1) resolution of the case involves complex factual inquiries within the province of the regulatory body's expertise; (2) interpretation of administrative rules is required; or (3) interpretation of the regulatory statute involves a broad policy determination within the special expertise of the regulatory agency.[45] The effect of a court invoking the primary jurisdiction doctrine is referral to the administrative agency and then further court action. While the agency action might be dispositive it will be reviewed by the court applying antitrust standards. Such action is distinct from a court making a finding of express or implied immunity, in which case the agency action would be reviewed on the standards set forth in the regulatory statute, with deference to the agency's fact finding.

The Antitrust Section supports the proposed legislation, which would allow but not require courts to defer to the primary jurisdiction of the STB. District courts currently must defer to the primary jurisdiction of the STB in civil actions against railroads arising under the antitrust laws, and private parties are not permitted to seek redress for their injuries through injunctive relief. The Act would remove these limitations, and would allow successful plaintiffs to recover treble damages in appropriate circumstances.

D. *Other Exemptions; Other Provisions of the Legislation*

The Railroad Antitrust Enforcement Act would remove other exemptions as well. For instance, the Act would allow private parties to sue railroads under the antitrust laws for injunctive relief by amending Section 16 of the Clayton Act, which currently exempts common carriers subject to STB regulation from injunctive relief in private antitrust actions.[46] The Antitrust Section supports this change, and would urge Congress to consider legislation, in addition to this bill, to eliminate the exemption for other common carriers subject to STB regulation.

The Senate bill would also remove any exemption from FTC jurisdiction, so that the FTC may enforce the Clayton Act and FTC Act against railroads. The House bill is limited to FTC

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[44] S. 772, Sec. 4; H.R. 1650, Sec. 6.

[45] *See Ricci v. Chicago Mercantile Exch.*, 409 U.S. 289 (1973).

[46] S. 772, Sec. 2; H.R. 1650, Sec. 5.

jurisdiction under its "unfair method of competition" authority, so that the agency could not exercise consumer protection authority over railroads.[47]

The Act would also eliminate exemptions from the antitrust laws for leases, trackage rights agreements and ratemaking agreements approved by the STB.[48] The legislation would thereby give authority to the DOJ, FTC and State Attorneys General to enforce the antitrust laws with respect to such transactions notwithstanding any action taken by the STB.

The Section notes that both the Senate and House bills contain provisions to protect conduct that was previously exempted by the STB from antitrust actions. The Senate bill, however, would allow suits after 180 days, if such conduct continued after enactment of the legislation. The House bill would make clear that mergers and acquisitions consummated before the bill's enactment remain exempt and firms that engaged in conduct previously exempted by STB approval would have 180 days to discontinue such conduct, and would only be liable thereafter to the extent such conduct were to continue.[49] The House bill would appear to take a more sound approach, to avoid re-opening long-consummated mergers.

The Section also notes that supporters of the Act plead for a more competitive landscape in the railroad industry, claiming that "the absence of competition and apparent allocation of markets have allowed railroads to preserve market share even while eliminating performance guarantees and dramatically raising prices."[50] They assert that current conditions often hold participants "captive" – i.e., they are forced to rely on a single rail provider for their needs and are unable to protect themselves "through normal business negotiations."[51] The STB has been criticized for allowing railroads to adopt so-called "paper barriers" – when major railroads sell or lease segments of their tracks to short line carriers under contractual terms that indefinitely restrict the ability of the short line to do business with any other major connecting rail carrier – and to refuse to provide their "captive" customers with rates to points where the customer can gain access to a competing railroad. Whether such agreements and pricing practices have legitimate business justifications or will be found to violate the Sherman Act remains to be seen, but they will be subject to scrutiny under the antitrust laws as they would be in any other industry, under the proposed legislation.

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[47] S. 772, Sec. 5; H.R. 1650, Secs. 4, 7.

[48] S. 772, Sec. 7; H.R. 1650, Sec. 8. Pursuant to an amendment adopted during the Senate Judiciary Committee's consideration, the reported bills would continue to exempt railroad car pooling arrangements from antitrust scrutiny.

[49] S. 772, Sec. 8; H.R. 1650, Sec. 9.

[50] Testimony of William L. Berg, President & CEO, Dairyland Power Cooperative, before the Senate Judiciary Committee, Subcommittee on Antitrust, Competition Policy and Consumer Rights (Oct. 3, 2007).

[51] Testimony of Ken Vander Schaaf, Director, Supply Chain Mgmt., Alliant Techsystems Ammunition & Energetics Systems, before the Senate Judiciary Committee, Subcommittee on Antitrust, Competition Policy and Consumer Rights (Oct. 3, 2007).

Conclusion

The Antitrust Section believes that the changing nature of the rail industry justifies a corresponding change in the way allegedly anticompetitive activity among railroads is addressed. The Section therefore supports Congress's decision to take a closer look at railroad operations in light of the deregulation of the industry.

The Antitrust Section maintains its longstanding disapproval of statutory exemptions and immunities from antitrust laws and supports the legislature's consideration to reevaluate the *Keogh* Doctrine and the role of antitrust agencies in enforcing healthy competition within the rail industry. The Antitrust Section appreciates the opportunity to provide these comments.

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Supporters of the Railroad Antitrust Enforcement Act of 2007 (S. 772/H.R. 1650)

National Trade Associations and Coalitions

Alliance for Rail Competition
Alliance for Rural America
American Agriculture Movement
American Chemistry Council
American Coalition for Ethanol
American Corn Growers Association
American Forest and Paper Association
American Public Power Association
Consumer Federation of America
Consumers United for Rail Equity
Edison Electric Institute
Federation of Southern Cooperatives
Large Public Power Council
National Association of Farmer Elected Committees
National Association of State Utility Consumer Advocates
National Association of Regulatory Utility Commissioners
National Farmers Organization
The National Grange
National Rural Electric Cooperative Association
Portland Cement Association
Steel Manufacturers Association
United Transportation Union
Western Coal Traffic League
Women Involved in Farm Economics

Supporters by State

Alabama:

3M
A.B.H. Enterprises, Inc.
A.C. Legg, Inc.
Agrium Advanced Technologies
Akzo Nobel Functional Chemicals LLC
Alabama Metal Industries Corporation
American Apparel, Inc.
American Foam Cast, Inc.
Arkema Inc.
Atlantic Marine Holding Company
Austal USA
Avanti Polar Lipids
Bag Supply, Inc.
BASF Catalyst LLC
BASF Corporation
Bender Shipbuilding
Bennett Lumber Company L.L.C.
Boise
Boozer Laminated Beam Company
Bostrom Seating, Inc.
Bowater Newsprint
BP
Bush Hog, L.L.C.
Carmeuse Lime & Stone
Central Machine & Fabrication
Chemtura Corporation
Ciba Specialty Chemicals Corporation
CMC Steel Alabama
Coca Cola Bottling
Daikin America, Inc.
Degussa Corporation
DeSoto Mills, Inc.
Doncasters Southern Tool
DuPont
DuPont Ag Products
Dynea USA Inc.
EFP Corporation
Elk Corporation
ExxonMobil
Federal Mogul
Frontier Yarns, LLC
Fruit of the Loom
GE Plastics
Georgia-Pacific LLC
GKN Westland Aerospace
Globe Motors
Harrigan Lumber Company, Inc.
Harvest Select Catfish
Hawk Plastics Corporation
Hexcel Chemical Corporation
Holcim (US) Inc.
Hunt Refining Company
Imerys-Pigments for Paper, North America
Industrial Plating Company, Inc.
INEOS Phenol, Inc.
International Paper

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Alabama Continued:

IPSCO Steel (Alabama) Inc.
ISP Chemicals LLC
ITW Sexton Can Company, Inc.
Johnston Textiles, Inc.
Kemira Water Solutions, Inc.
KG Woodring Manufacturing and Technical Services, LLC
Knauf Insulation
M & B Metal Products Company, Inc.
Madix, Inc.
Marshall Biscuit Company
Mason Corporation
Matthews Industries
McAbee Construction, Inc.
MeadWestvaco, Inc.
Merichem Company, Inc.
Merryweather Foam
Miller Wire Works, Inc.
Mitsubishi Polysilicon
Mohawk Industries
Mueller Company
National Packaging Company, Inc.
Nemak
Neptune Technology Group, Inc.
New Era Cap Company
New Gas Concepts
NOVA Chemicals
Nucor Steel Birmingham, Inc.
Occidental Chemical Corporation
OCI Chemical Corporation
Olin Chlor Alkali
Omya Alabama Inc.
O'Neal Steel, Inc.
Paragon Decors, Inc.
Pitts Trailers
Praxair, Inc.
Pridecraft
Priesters Pecans
RadiciSpandex
Reno Refractories Inc.
Russell Corporation
Sabel Steel Service, Inc.
Shaw Industries Group, Inc.
Shell Chemical LP
Simcala, Inc.
Sloss Industries
Smurfit-Stone Container Corporation
Soft Touch Hosiery
Solutia, Inc.
Southern Alloy Corporation
Southern Ionics, Inc.
Springs Global US, Inc.
Standard/Taylor, Inc.
Superior Metal Products Company
Syngenta Corporation
Tate & Lyle Sucralose, Inc.
The Westervelt Company
Toray Carbon Fibers America, Inc.
Toray Fluorofibers (America), Inc.
TORP Technology
Tubular Products Company
Twitchell Corporation
Tyson Foods, Inc.
U.S. Steel
UOP LLC, A Honeywell Company
Vanity Fair Brands, LP
VF Jeanswear
W.Y. Shugart & Sons, Inc.
Walter Industries/Mueller Water Products
Warrior Asphalt Refining Corporation
Wehadkee Yarn Mills
WestPoint Home, Inc.
Weyerhaeuser
Wiltew, Inc.
Worthington Steel

Arkansas:

Carroll-Boone Water District
City of Pocahontas, Arkansas
City Water & Light, Jonesboro
Cooper Communities, Inc.
Electric Cooperatives of Arkansas
Entergy Arkansas, Inc.
Holcim (US) Inc.
Holiday Island Suburban Improvement District
Magnolia Economic Development Corporation
Municipal Utilities of Jonesboro, Conway, West Memphis and Osceola, Arkansas
Nucor Corporation
Randolph County Chamber of Commerce
Rohm and Haas Company
Smurfit-Stone Container Corporation
Stribling Packaging and Display
Tyson Foods, Inc.

California:

BASF Corporation
Cytec Industries
DuPont
Rohm and Haas Company
Sierra Pacific Resources
Smurfit-Stone Container Corporation
Tyson Foods, Inc.

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Colorado:

Basin Electric Power Cooperative
Holcim (US) Inc.
Rocky Mountain Farmers Union
Smurfit-Stone Container Corporation
Tri-State Generation & Transmission Association
Xcel Energy, Inc.

Connecticut:

Arkema Inc.
Cytec Industries
DuPont
Nucor Corporation
Smurfit-Stone Container Corporation

Delaware:

Cytec Industries
DuPont
Rohm and Haas Company

District of Columbia:

DuPont

Florida:

BASF Corporation
DuPont
Florida Municipal Power Agency
Holcim (US) Inc.
Progress Energy
Rohm and Haas Company
Smurfit-Stone Container Corporation

Georgia:

BASF Corporation
Cytec Industries
Holcim (US) Inc.
Municipal Electric Authority of Georgia
Oglethorpe Power Corporation
Olin Chlor Alkali
Smurfit-Stone Container Corporation
Tyson Foods, Inc.

Idaho:

Holcim (US) Inc.
Tyson Foods, Inc.

Illinois:

Dairlyand Power Cooperative
DuPont
Exelon Corporation
Holcim (US) Inc.
Nucor Corporation
Rohm and Haas Company
Smurfit-Stone Container Corporation
Tyson Foods, Inc.
Velsicol Chemical Corporation

Iowa:

Algona Municipal Utilities
Basin Electric Power Cooperative
Corn Belt Power Cooperative
Dairyland Power Cooperative
DuPont
Holcim (US) Inc.
Iowa Association of Electric Cooperatives
Iowa Rural Electric Association
Missouri River Energy Services
Smurfit-Stone Container Corporation
Tyson Foods, Inc.

Kansas:

Kansas Farmers Union
Rohm and Haas Company
Smurfit-Stone Container Corporation
Sunflower Electric Power Corporation
Tyson Foods, Inc.

Kentucky:

American Electric Power Service Corporation
Arkema Inc.
DuPont
Rohm and Haas Company
Smurfit-Stone Container Corporation
Tyson Foods, Inc.

Louisiana:

American Electric Power Service Corporation
Basell USA Inc.
BASF Corporation
Cytec Industries
DuPont
Entergy Louisiana, Inc.
Holcim (US) Inc.
Lafayette Utilities System
Rohm and Haas Company
Smurfit-Stone Container Corporation

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Maryland:

Basell USA Inc
Cytec Industries
DuPont
Smurfit-Stone Container Corporation

Massachusetts:

Cytec Industries
NOVA Chemicals
Rohm and Haas Company

Michigan:

American Electric Power Service Corporation
Basell USA Inc.
BASF Corporation
Cytec Industries
DuPont
Holcim (US) Inc.
Rohm and Haas Company
Smurfit-Stone Container Corporation
Xcel Energy, Inc.

Minnesota:

Alliant Energy
Arkema Inc.
Basin Electric Power Cooperative
Cytec Industries
Dairyland Power Cooperative
DuPont
Chippewa Valley Bean Co., Inc.
East River Electric Power Cooperative
Freeborn-Mower Cooperative Services
Grand Rapids Area Chamber of Commerce
Great River Energy
Hibbing Area Chamber of Commerce
Holcim (US) Inc.
Lyon-Lincoln Electric Co-op
McNeilus Steel
Minnesota Association of Cooperatives
Minnesota Farmers Union
Minnesota Grain and Feed Association
Minnesota Forest Industries
Minnesota Power
Minnesota Rural Electric Association
Minnesota Soybean Growers Association
Minnesota Valley REC
Minnesota Municipal Utilities Association
Missouri River Energy Services
Ottertail Power Company
People's Cooperative Services
Renville-Sibley Co-op
Rohm and Haas Company
Smurfit-Stone Container Corporation
Tri-County Electric Cooperative
Xcel Energy, Inc.

Mississippi:

BASF Corporation
DuPont
Entergy Mississippi, Inc.
Holcim (US) Inc.
Nucor Corporation
South Mississippi Electric Power Association
Tyson Foods, Inc.

Missouri:

BASF Corporation
Holcim (US) Inc.
Smurfit-Stone Container Corporation
Tyson Foods, Inc.

Montana:

Basin Electric Power Cooperative
Holcim (US) Inc.
Montana-Dakota Utilities
Northwestern Corporation
Smurfit-Stone Container Corporation

Nebraska:

Basin Electric Power Cooperative
Holcim (US) Inc.
DuPont
Lincoln Electric System
Northwestern Corporation
Nucor Corporation
Tyson Foods, Inc.

Nevada:

Sierra Pacific Resources
Smurfit-Stone Container Corporation

New Jersey:

BASF Corporation
Cytec Industries
DuPont
Rohm and Haas Company
Smurfit-Stone Container Corporation

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New Mexico:

Basin Electric Power Cooperative
Rocky Mountain Farmers Union
Tyson Foods, Inc.
Xcel Energy, Inc.

New York:

Arkema Inc.
CEMEX, INC.
CH Energy Group
Cytec Industries
DuPont
Empire District Electric Company
Nucor Corporation
Olin Chlor Alkali
Smurfit-Stone Container Corporation
Rohm and Haas Company
Smurfit-Stone Container Corporation
Tyson Foods, Inc.

North Carolina:

BASF Corporation
Cytec Industries
DuPont
Holcim (US) Inc.
Nucor Corporation
Progress Energy
Rohm and Haas Company
Smurfit-Stone Container Corporation
Tyson Foods, Inc.

North Dakota:

Basin Electric Power Cooperative
McNeilus Steel
Montana-Dakota Utilities
Missouri River Energy Services
Smurfit-Stone Container Corporation
Xcel Energy, Inc.

Ohio:

American Electric Power Service Corporation
BASF Corporation
DuPont
Holcim (US) Inc.
NOVA Chemicals
Nucor Corporation
Ohio Farmers Union
Ohio Municipal Electric Association
Rohm and Haas Company
Smurfit-Stone Container Corporation

Oklahoma:

American Electric Power Service Corporation
DuPont
Holcim (US) Inc.
Oklahoma Farmers Union
Smurfit-Stone Container Corporation
Tyson Foods, Inc.

Pennsylvania:

Arkema Inc.
BASF Corporation
DuPont
Exelon Corporation
NOVA Chemicals
Pennsylvania Farmers Union
Rohm and Haas Company
Smurfit-Stone Container Corporation
Tyson Foods, Inc.

South Carolina:

BASF Corporation
Cytec Industries
DuPont
Holcim (US) Inc.
Nucor Corporation
Progress Energy
Smurfit-Stone Container Corporation
Tyson Foods, Inc.

South Dakota:

Basin Electric Power Cooperative
Missouri River Energy Services
Montana-Dakota Utilities
Northwestern Corporation
Smurfit-Stone Container Corporation
South Dakota Rural Electric Association
Tyson Foods, Inc.
Xcel Energy, Inc.

Tennessee:

American Electric Power Service Corporation
Arkema Inc.
Basell USA Inc.
BASF Corporation
Cytec Industries
DuPont
NOVA Chemicals
Holcim (US) Inc.
Nucor Corporation
Olin Chlor Alkali
Rohm and Haas Company

Tennessee Continued:

Smurfit-Stone Container Corporation
Tyson Foods, Inc.

Texas:

American Electric Power Service Corporation
Arkema Inc.
Association of Electric Companies of Texas
Basell USA Inc.
BASF Corporation
CEMEX INC.
City of Austin/Austin Energy
Cytec Industries
DuPont
East Texas Cooperatives
Entergy Services, Inc.
Holcim (US) Inc.
Lower Colorado River Authority
Lyondell Chemical Company
NOVA Chemicals
Nucor Corporation
Rohm and Haas Company
Smurfit-Stone Container Corporation
Temple – Inland
Texas Brine Company, LLC
Texas Farmers Union
Texas Municipal Power Agency
Texas Petrochemicals LP
TOTAL Petrochemicals USA, Inc.
Tyson Foods, Inc.
Xcel Energy, Inc.

Utah:

DuPont
Holcim (US) Inc.
Nucor Corporation
Rohm and Haas Company

Virginia:

Alliant Techsystems, Inc. (ATK)
American Electric Power Service Corporation
BASF Corporation
DuPont
Rohm and Haas Company
Smurfit-Stone Container Corporation
Tyson Foods, Inc.

Washington:

Cytec Industries
Holcim (US) Inc.
Nucor Corporation
Rohm and Haas Company
Smurfit-Stone Container Corporation
Tyson Foods, Inc.
Washington State Potato Commission

West Virginia:

American Electric Power Service Corporation
Cytec Industries
DuPont
Holcim (US) Inc.
Smurfit-Stone Container Corporation

Wisconsin:

Alliant Energy Corporation
BASF Corporation
Checker Logistics, Inc.
Chippewa Valley Bean Co., Inc.
Citizens Utility Board
Customers First! Coalition
Dairyland Power Cooperative
Domtar Industries
Georgia Pacific
Green Bay Area Chamber of Commerce
Green Bay Packaging
IBEW Local 2150
Leicht Transfer & Storage
Louisiana-Pacific
Madison Gas & Electric
Manitowoc Grey Iron Foundry
Manitowoc Public Utilities
Menasha Utilities
Midwest Food Processors Association
Municipal Electric Utilities of Wisconsin
Neenah Foundry
Ort Lumber
Packaging Corporation of America
Procter & Gamble
Sadoff Iron & Metal Company
Stora Enso
Timber Producers Association of
Wisconsin & Michigan
Tomahawk Region Chamber of Commerce
Tyson Foods, Inc.
We Energies
Wisconsin Agri-Service Association
Wisconsin Cast Metals Association
Wisconsin Corn Growers Association
Wisconsin Energy Corporation
Wisconsin Farm Bureau Federation
Wisconsin Farmers Union
Wisconsin Federation of Cooperatives
Wisconsin Crop Production Association

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Wisconsin Continued:

Wisconsin Industrial Energy Group
Wisconsin Manufacturers & Commerce
Wisconsin Merchants Federation
Wisconsin Paper Council
Wisconsin Professional Loggers Association
Wisconsin Public Power Inc.
Wisconsin Public Service Corp.
Wisconsin Utilities Association
Wolf River Lumber, Inc.
Xcel Energy, Inc.

Wyoming:

Wyoming Rural Electric Association

September 20, 2007

Responses of

Terry Huval
Director, Lafayette Utilities System
Lafayette, Louisiana

To the Follow-up Questions for the Record Submitted on Behalf of Members of the House Committee on the Judiciary (dated April 7, 2008)

Related to the

Hearing on H.R. 1650,
the "Railroad Antitrust Enforcement Act of 2007"

Before the
House Judiciary Committee Antitrust Task Force
on Antitrust and Competition Policy (February 25, 2008)

Lafayette Utilities System ("LUS") respectfully submits these responses to the House Judiciary Committee's follow-up questions dated April 7, 2008.

Question 1. ***What percentage of rail rate increases filter down to the utility bills of the citizens of Lafayette?***

Response. As a community-owned and operated utility, 100% of rail rate increases and, in fact, all costs incurred by LUS to produce electricity flow through directly to our customers. We have no other source of revenue to pay for these expenditures. The railroad captivity payments LUS incurs essentially serve as an added charge on the end-consumer. As I stated in my written testimony: "it is the electric residential and business consumer who pays 100 percent of all costs charged to us by the rail system, including premiums LUS is forced to pay due to rail captivity and those high costs have a direct impact on our community." (Testimony at 8-9).

Question 2. ***Recently, the STB implemented some changes designed to streamline their rate review procedures. Some argue that we should wait and see how these new procedures work***

before we rush to, in Mr. Moates' words, pass a "solution looking for a problem." Why shouldn't we wait another year or so to see whether the new procedures improve conditions for rail shippers?

Response. The rate challenge process changes that are relevant to the City of Lafayette are those applicable to "large rate cases." These changes were applied to a rate challenge brought by Western Fuels Association and Basin Electric. Last September, the STB ruled against Western Fuels and Basin finding that a rail rate that is five times what it cost the railroad to move their coal was "reasonable". This case involves $1 BILLION in total rate increases to one customer! The customer would have won the case under the old rules, but it lost its case under the new rules (although it has been provided an opportunity to submit supplemental evidence). The customer has now spent over 3 years and as much as $6 million litigating its case. This is the first case decided by the STB under its new rules. We don't need to wait any longer to know that the large rate challenge process will not work.

Additionally, even if the STB's large rate case remedies were effective, those possible remedies do not address all the practices of a highly concentrated railroad industry, including the use of public pricing and refusals to provide competitive bottleneck rates. The STB also has no specific expertise in the application of the antitrust laws. H.R. 1650 would provide the prospect of additional oversight and involvement of the United States Department of Justice and the Federal Trade Commission, both of which have considerable experience in antitrust matters and can provide helpful guidance to the area of railroad transportation which is sorely needed.

Question 3. You are the Chairman of the Board of the American Public Power Association. Are other municipal power agencies encountering the same problems with rail-based shipping that you have described?

<u>Response</u>. Yes, rail pricing and service is a problem for coal-based municipal power plants across the nation. In fact, the rail issue is one of the top priorities for the American Public Power Association as reflected in the letter that I submitted at the Hearing on behalf of them in support of H.R. 1650.

<u>Question 4</u>. Do you believe that this law would have any effect on shippers in bottleneck situations such as yourself? How?

<u>Response</u>. Yes, absolutely.

As I stated in my written testimony:

> We believe that the bottleneck decision of the STB would not stand if the antitrust laws of the nation applied to the railroad industry. Moreover, we believe that the application of the antitrust laws to the railroad industry would require the STB to implement the Staggers Rail Act of 1980 in harmony with the antitrust laws of the nation, just as the Federal Energy Regulatory Commission implements its regulatory authorities in harmony with the antitrust laws of the nation. We believe this requirement of law would lead the STB to re-examine its "bottleneck" decision in light of the nation's antitrust laws and, hopefully, reach a pro-competitive solution.

(Testimony at 10).

As I further stated in my testimony, LUS customers must ultimately pay, in the form of higher electric rates, $15 million annually in railroad captivity payments. These overpayments are of critical importance to the City of Lafayette and its citizenry and businesses. The market power that has been used to bring about "bottlenecks" is also a matter of vital importance to consumer welfare and the competitiveness and efficiency of the U.S. economy. As the Antitrust Modernization Commission aptly put it:

> To the extent that the antitrust laws do not apply, firms may take anticompetitive actions with impunity. As a practical matter, an exemption from all or part of the antitrust laws means firms can avoid the tough discipline of competition, at least to some extent. While the

> beneficiaries of an exemption likely appreciate reduced market pressures, consumers (as well as non-exempted firms) and the U.S. economy generally bear the harm from the loss of competitive forces.[1]

H.R. 1650 would not be an outright ban on anticompetitive railroad practices or solve all of the remaining railroad competitive problems by itself. However, preventing the application of the Nation's competition laws to the railroad industry clearly imposes undue costs on railroad customers and the electric consuming public. Much more needs to be done and H.R. 1650 is a very important step in the right direction.

[1] Antitrust Modernization Commission, Report and Recommendations to Congress (Apr. 2007) at 334-35.

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May 21, 2008

House Committee on the Judiciary
2138 Rayburn House Office Building
Washington, DC 20515
Attn: Matthew Morgan

Re: April 7, 2008 Letter from Chairman Conyers to Susan Diehl

Dear Mr. Morgan:

I am in receipt of the above referenced letter, asking for the answers to certain follow up information. The information requested by the Chairman is set forth below.

"Question 1: The railroad industry points to a 2006 GAO study suggesting that, overall, rail rates were lower in 2005 than they were in 1985. Does this paint an accurate picture of the costs being paid by captive shippers?

Answer:

Since captive rail customers, like Holcim, represent at most about 25% of the freight moved by the railroads, the high prices paid by Holcim and other captive rail customers tends to be "averaged out" by looking at the entire universe of rail rates. In addition, as the GAO Report also states, the rates charged by railroads does not tell the entire story regarding the costs incurred by rail customers because so many traditional railroad capital costs have been shifted to the rail customers outside their rates - for example, over 60% of the rail cars today are supplied by rail customers rather than the railroads - and the railroads are also imposing "supplemental charges" to their rates, like significant fuel surcharges.

Mr. Chairman, the GAO figures you reference is not a fair reflection of rail rates for captive rail customers. In fact, we believe that the Committee should investigate how captive rail rates today compare to captive rail rates in 1985 - a number possessed only by the railroads and a number that the railroads will not reveal.

Question 2: Regarding the Holly Hill facility you described in your testimony, how much more were you paying in rail rates than your two competitors, located less than five miles away, who had access to two railroads?

a. How did this affect your ability to compete with those companies?

Holcim

Pg. 2 Mr. Morgan

Answer:

Most rail rates are pursuant to contract and are confidential. The majority of rail customers, especially large volume shippers, is constrained from revealing contract rates and must keep their rates confidential for competitive reasons or for future negotiations with the railroads. The only data bank of historical railroad rates exists at the STB which contains information on both contract and tariff rail rates.

Escalation Consultants, Inc of Gaithersburg, Maryland recently used this data from the STB and conducted a study on the Average 2007 Cost of Captivity by Commodity per Ton. What it showed was a compelling case that captive rates are considerably higher than competitive rates. In most instances, non competitive or captive rates were more than 100% higher than rates that were non-captive. Mr. Chairman, I believe you and your committee have a copy of this report from Escalation Consultants. If you do not, we would be more than happy to provide you with a copy."

Please let me know if you need any further information.

Best regards,

Susan M. Diehl

Susan M. Diehl
Sr. Vice President, Logistics and Supply Chain

Respoonse to Conyers Questions from G. Paul Moates

1. ***You testified that because of the STB, there is "probably more effective price competition today that there was in the 'idyllic' days of long ago. (p. 13) Today, shippers experience bottlenecks and paper barriers. Do you consider bottlenecks and paper barriers part of or an exception to effective price competition?***

   A. AAR stands by its statement, made in the context of merger policy, that effective price competition is greater today than in the past, notwithstanding shipper complaints about so-called paper barriers and bottlenecks. Generally, paper barriers—agreements between Class I railroads and shortlines they have spun off--promote competition in that in the absence of those agreements, the line in question likely would have been abandoned. Any restrictions that are part of these agreements are likely to have been integral to the agreement's consummation. The alternative would most likely be no rail transportation option available to local shippers, leaving the shippers with only a truck option.

   What is referred to as a "bottleneck" is simply the structure of the rail system that has developed over time as railroads have invested in a way that results in the concentration of traffic in most efficient routes. While individual shippers may believe that the current structure of the network denies them specific rail options they would like to have, forcing those options on the railroads would, in the long run, destroy the ability of railroads to earn sufficient returns to reinvest in their plant, which, ultimately, would undermine the efficiency of the network and reduce competition.

2. ***In your testimony, you mention that "[a]verage inflation-adjusted rail rates have declined 55 percent since 1980." (p.4) Does this statistic take into account the increased shifting of capital costs to shippers over the past twenty years?***

   a. ***Also, the figure that you quote is an average; have rates for captive shippers gone down over the same period of time?***
   b. ***Have they gone up?***

   A. Rail rates have come down substantially since 1980 even if the shifting of capital costs, primarily car ownership, to shippers is considered. For a variety of good reasons, an increasing percentage of rail cars are owned by leasing companies and shippers, rather than by railroads, though railroads still own a large percentage of rail cars. When a shipment moves in non-railroad owned equipment, the rate for that shipment (everything else equal) typically will be lower than the rate would be if the shipment were carried in railroad-owned equipment, to reflect the lower costs to railroads of that movement. Moreover, for some shippers rates may have come down even more than the data suggests, as specific arrangements, such as rebates or discounts that are not reflected in the reported rates, may apply.

As to the rate trends with respect to so-called "captive shippers," AAR does not have access to data regarding the rail rates of particular shippers so is not in a position to respond to this part of the question, other than to point out that rail rate decreases have occurred in every commodity category over the period referenced.

3 ***You've stated that only the STB has the expertise necessary to properly evaluate mergers in the context of overall rail policy. But hasn't DOJ been conducting rail merger analyses for decades?***

A. DOJ has had a role in rail merger review over the years and its input has been valuable. In fact, in most recent instances the ICC/STB has acted consistent with DOJ's recommendation. However, as an agency with general antitrust expertise DOJ is not in a position to evaluate the impact of a proposed merger on national rail transportation policy, nor is it charged with reviewing merger on the basis of that policy. On the other hand, national rail transportation policy is a matter on which STB has expertise. So while DOJ reviews are fine within their sphere, they would not be adequate for rail mergers so long as Congress continues to place importance on national rail transportation policy.

4 ***In your testimony, you stated that the STB review process emphasizes policies embodied in the antitrust law. Aren't the DOJ and FTC in as good, if not better, position to interpret federal antitrust policy?***

A. DOJ and FTC are certainly in a good position to interpret federal antitrust policy, but, as stated above, they are not the agencies that possess expertise in national rail transportation policy. STB can consider antitrust policy in the context of national transportation policy and the impact of a proposed merger on that policy. As mentioned in the AAR's testimony, STB's revised regulations governing mergers place a strong emphasis on preserving and enhancing competition, so it has both bases covered.

5 ***In 2006, the Government Accountability Office released an extensive study of competition in the freight railroad industry. In August 2007, the GAO updated its 2006 report with data that had become available since the publication of its initial report. In that update, the GAO found that in 2005, industry rail rates increased 7 percent over their 2004 levels, the largest annual rate increase over the past twenty years. Do you believe that this trend of price increases will continue in the foreseeable future?***

A. Rail rates are established independently by individual railroads based on a host of factors. AAR has no information regarding future trends in rail rates.

6 ***You testified that civil courts do not "possess the expertise to consider how a decision involving a discrete dispute between a single railroad and single***

plaintiff might affect other railroads and shippers on other parts of the rail network." (p.14) How are railroads situated any differently from interstate pipelines transporting oil and natural gas that are subject to actions by civil courts in multiple jurisdictions?

A. The quoted statement is made in the context of the proposal to eliminate the prohibition on private injunctive relief against alleged antitrust violations—a proposal strongly opposed by the STB. AAR believes the current law reflects sound policy for the reasons stated in its testimony and that there are unique aspects of the rail industry that support maintaining this provision. The issue goes well beyond the interstate nature of rail operations. The railroad industry is highly integrated. Freight and cars are interchanged between different railroads throughout the network on a daily basis. About one-third of rail traffic moves over two or more rail lines. As a result, injunctive relief directed at one carrier or one line can certainly impact other parts of the network in ways that might not be obvious to a general court. It's not clear that the pipeline industry or other interstate industries—many of which move highly fungible products--are integrated to the same degree as the railroad industry to the extent that a court order directed at one company could impact the service offered by another.

On the point of treating railroads like other industries are treated, it should be noted that while H.R. 1650 would eliminate the prohibition on private injunctions against railroads, it would not disturb that prohibition with respect to certain non-rail common carriers.

7 ***In your testimony you stated that in situations "in which the railroads have market dominance ... railroads must establish rates that are reasonable." (p.4) Isn't the burden of proof on shippers to prove that rates are unreasonable when challenging them before the STB?***

a. Aren't the rates presumed reasonable when challenged?

A. Railroads do have a legal obligation to establish reasonable rates in cases of market dominance. However, a shipper challenging a rail rate on reasonableness grounds has the burden of proof, as in all cases of a party alleging a violation of the law. This allocation is appropriate, as it is consistent with general legal doctrine. When a party challenges the lawfulness or propriety of another party's conduct, the party bringing the claim has the burden of proving the violation or other improper conduct alleged. For example, if a party alleges an antitrust violation, it would have the burden of proving all the elements of its case. This is in accord with longstanding notions of fairness and due process, fundamental tenets of our legal system. There is no reason the burden in rate reasonableness cases should be otherwise.

The nature of many of these questions underscores AAR's point that H.R. 1650 is a solution looking for a problem. A number of the questions imply that rail rates are too high. Even if that premise is accepted, high rates in themselves do not constitute an antitrust violation. Moreover, if rail rates were the result of collusion among the railroads, that conduct would be subject to the antitrust laws today, as would other anticompetitive collusive activity. As further support for this point, as far as AAR is aware, the shippers who support H.R. 1650 have not been able to identify how enactment of this legislation will offer them a remedy for their alleged problems with railroads.

Follow-Up Questions for Hearing on
An Examination of H.R. 1650, the Railroad Antitrust Enforcement Act
Professor Darren Bush

1. *Opponents of the bill state that if it were passed, the railroads would become subject to injunctions brought by private plaintiffs, leading to nightmare scenarios in which interstate railroads are enjoined from parts of their routes but not others. Is this a likely scenario?*

Response: The likely scenario, with all due respect to the drafters of this legislation, is that it will not disturb the regulatory framework at all. This is because courts will likely apply judicially created immunities and exemptions to shield the industry from application of the antitrust laws.

It is simply disingenuous to argue that courts will likely cause disruption of national railroad policy in the wake of an antitrust suit brought by a private plaintiff or by a state attorney general as *parens patriae*.[1] Many agencies live with the potential of court action against a company subject to the agency's regulation. Unless there is something unique about railroads, there is little justification for granting immunity here while embracing competition policy elsewhere.

Historically such choices between immunity and antitrust law application were not made due to industry idiosyncrasies, but rather due to industry lobbying and political pressure.[2] Express immunities in the context of specific industries were not typically conferred due to any meaningful fear of conflict between antitrust and regulation, or for any fear of economic ripple effects throughout the economy from antitrust litigation.

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[1] *See* 15 U.S.C. § 15c.

[2] *See generally* ABA Monograph, *supra* note 5. Moreover, courts should be credited for innovative actions that have brought revolutionary changes to regulated industries. As an example, the compulsion of wheeling in *U.S. v. Otter Tail* gave rise to a whole regulatory wave of open access, particularly in but not limited to the electricity industry. *See* Otter Tail Power Co. v. United States, 410 U.S. 366 (1973). Judge Greene's breakup of AT&T yielded remarkable changes in the telecomm industry as well. United States v. American Tel. & Tel. Co., 552 F. Supp. 131 (D.D.C. 1982), *aff'd mem. sub nom.* Maryland v. United States, 460 U.S. 1001 (1983).

Finally, where regulatory action is in place, there are a plethora of potential antitrust exemptions at the defendant's disposal. As mentioned in my original testimony, the doctrines of implied immunity and primary jurisdiction might still come into play. And plaintiffs challenging any rates subject to STB authority would likely find that the filed rate doctrine is alive, well, and growing.[3]

For these reasons, there appears to be little justification for the notion that courts handling antitrust litigation will somehow turn national railroad regulatory policy on its head. There is also no justification for the notion that there is something peculiar about the railroad industry that separates it from other regulated industries subject to the antitrust laws.

However, I do fear that the doctrines of implied immunity and primary jurisdiction will yield a result antithetical to the purpose of the proposed legislation.[4] Even where there is no *direct* regulatory oversight, courts have found implied immunity merely due to *potential* regulatory oversight. What remains is a gap between regulation and antitrust, where neither serve to provide essential oversight to an industry.

One reason for the gap is that express immunities tend to "creep." That is, they not only protect the world they were designed to protect, but their shield extends to conduct which the express immunity was not seeking to protect. In other words, the existence of an express immunity providing protection from the antitrust laws for some particular conduct may actually provide immunity for other types of antitrust conduct.[5]

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[3] *See supra* note 4.
[4] Credit Suisse Securities (USA) LLC v. Billing, 127 S. Ct. 2383 (2007).
[5] See ABA, FEDERAL STATUTORY EXEMPTIONS FROM ANTITRUST LAW 17 (2007)(noting that courts have sometimes adopted "expansive interpretations as to the scope of an exemption")(hereafter ABA Monograph).

The doctrine of primary jurisdiction also may play a crucial role where there is any regulatory oversight at all even in the absence of express or implied immunity.[6] While primary jurisdiction is *not* a methodology by which to grant immunity or exemption, but rather a method by which courts might rely on an agency's expertise in order to resolve a dispute before them, the doctrine has been misused as a grant of immunity in the past.[7]

The doctrine of "primary jurisdiction" is not, as is sometimes thought, an implied immunity. "Primary jurisdiction" addresses the question of whether the antitrust court should *suspend* the resolution of some questions of fact or law over which it possesses antitrust jurisdiction, until passed upon by the regulatory authority whose jurisdiction encompasses the activity involved. Although infrequent, such initial deference can be the practice when (1) resolution of the case involves complex factual inquiries particularly within the province of the regulatory body's expertise; (2) interpretation of administrative rules is required; and (3) interpretation of the regulatory statute involves broad policy determination within the special ken of the regulatory agency. This deference to statutory interpretation extends even to questions of jurisdiction.[8]

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[6] For a discussion of historical misuse of the doctrine, *see* Louis B. Schwartz, *Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility*, 67 HARV. L. REV. 436 (1954). *See also* Louis Jaffe, *Primary Jurisdiction Reconsidered*, 102 U. PA. L. REV. 577 (1954); JUDICIAL DOCTRINE OF PRIMARY JURISDICTION AS APPLIED IN ANTITRUST SUITS, STAFF REPORT TO THE ANTITRUST SUBCOMMITTEE OF THE HOUSE COMMITTEE ON THE JUDICIARY, 84TH CONG., 2D SESS. (1956).

[7] Schwartz, *supra* note 11 at 470-471 ("The lesson taught by [the expansion of primary jurisdiction doctrine from a procedural rule to a judicial exemption] is this: if a primary jurisdiction does not already exist, it may be advisable for an industry to create one as a means of avoiding the compulsion to compete which is embodied in the antitrust laws as administered by the federal courts.")

[8] *See Sourthern Railway Co. v. Combs*, 484 F.2d. 145 (6th Cir. 1973). *See also* Alpharma, Inc. v. Pennfield Oil Co., 411 F.3d 934, 938 (8th Cir. 2005)("The contours of primary jurisdiction are not fixed by a precise formula. Rather, the applicability of the doctrine in any given case depends on "whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application. . . . Among the reasons and purposes served are the promotion of consistency and uniformity within the areas of regulation and the use of agency expertise in cases raising issues of fact not within the conventional

The effect of judicial reference of a question to an administrative agency should be agency action on the question referred and then further court action in the antitrust case, although agency action might be dispositive. Unlike a finding of express or implied immunity, however, where primary jurisdiction doctrine is applied, the trial court's action is reviewed and that review is on antitrust standards. However, primary jurisdiction is a doctrine that is typically applied at the *discretion* of the court. Thus, statutory language that suggests that a court shall "not be required to defer to the primary jurisdiction of the Surface Transportation Board" does nothing to prevent a court from doing so.

On the other hand, in instances in which the doctrines of express or implied immunity are applied, the agency's action is reviewed on the standards set forth in the regulatory statute, and usually with the judicial deference to the agency's fact finding. As a practical matter, the initial determination of which doctrine applies in a particular case is of great significance in deciding what law applies, the degree to which antitrust considerations may or may not be accorded weight, and whether the antitrust remedies of criminal sanctions or treble damages are available in a particular case. An express or implied exemption finding precludes the application of antirust standards and remedies; while an application of the primary jurisdiction doctrine does not necessarily preclude use of antitrust standards and remedies to adjudicate the dispute but may only defer the adjudication pending an initial decision by the agency.

A court may find none of these doctrines apply in a case involving activity by a regulated industry—even where the agency has some jurisdiction over the activity in

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experience of judges or cases requiring the exercise of administrative discretion.")(internal quotations and citations omitted).

question. As Judge Greene pointed out in the AT&T case, in such cases antitrust policy and regulatory policy are seen as compatible and not antagonistic.

I raise these issues to point out that *repeal of express antitrust immunity is insufficient to eliminate the potential for judicially created immunities through the doctrines of implied immunity, primary jurisdiction, or limitations of antitrust law's applicability through the filed rate doctrine or other such exemptions.*[9] Careful consideration ought to be given to the potential exemptions and immunities that may exist even after repeal of express immunity. Such immunities and exemptions typically are a result of the statutory authority conferred upon the regulatory agency and the execution of that authority by the agency.

2. *Opponents of the bill claim that concurrent jurisdiction by the federal agencies is unnecessary, that not only is sufficient oversight provided by the STB, but also that the STB uses a tougher standard than the DOJ. Is this accurate?*

Response: The foundation of this question is a bit unclear. I assume the opponents would claim that the STB, when placed side by side the DOJ, would be a stronger enforcer of competition policy.

The proposition is laughable. It is hard to conceive of an industry regulator anywhere in the United States that has fostered more consolidation than the STB. In every instance but one, the agency has cleared mergers. It may be the case that the STB going forward would preclude further consolidation in the industry, but such a rejection of a proposed transaction would certainly be validation that the industry is already excessively concentrated thanks in large part due to the blessing of the STB of virtually ever railroad

[9] See *supra* note 12.

merger. Moreover, the STB's position on many issues runs directly contrary to the antitrust laws.

To begin, current merger review by the STB, by statutory design and by regulatory obedience to that design, has favored consolidation. The STB is required to determine whether a transaction is in the public interest. While competitive considerations are central to the analysis, they are only one of five factors which the STB is statutorily required to consider.[10] The overall balancing of these factors means that a merger that is grossly anticompetitive should be permitted if the transaction on net yields greater benefits to the stakeholders in the merger (labor, the companies involved, etc.) than are lost by the public.

It is no surprise, therefore, that the STB has only rarely encountered a merger that it did not like.[11] While the STB has imposed conditions upon many mergers, those conditions are not consistently about competitive effects arising from the transaction.

It is not at all clear that the move toward consolidation has yielded stability in service and the higher investor returns sought by Congress in the 1920s. Some recent

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[10] *See* 49 U.S.C. § 11324.

[11] *See* Salvatore Massa, *Injecting Competition in the Railroad Industry Through Access,* 27 TRANSP. L.J. 1, 2 n. 5 (2000). Mr. Massa points out:

> Furthermore, federal policy has favored railroad mergers for quite some time. As Surface Transportation Board Commissioner Gus Owen has observed "[s]ince 1920 it has been the public policy, as enunciated by Congress, to reduce the number of competing railroad systems." See Central Power & Light Co. v. Southern Pac. Transp. Co., Fin. Docket No. 31242 at 19 (Surface Transp. Bd. Dec. 27, 1996) (Comm'r Owen commenting) [hereinafter CP&L], aff'd sub. nom., No. 97-1081, 1999 WL 60501 (8th Cir. Feb. 10, 1999). During the period 1956 to 1971, regulatory authorities approved ten of fourteen merger applications. . . . Since 1980, regulatory agencies have approved twelve of thirteen merger applications. See Salvatore Massa, *Are All Railroad Mergers in the Public Interest? An Analysis of the Union Pacific Merger with Southern Pacific*, 24 TRANSP. L.J. 413, 431 n.96 (1997) (listing ten of eleven); CSX Corp.-- Control--Conrail Inc., Fin. Docket No. 33388, 1998 WL 456510 (Surface Transp. Bd. July 23, 1998) (approving the eleventh merger); Rip Watson, *Deal Creates First Large Cross-Border Rail System*, J. COM., Mar. 26, 1999, at A1 (announcing approval of twelfth merger).

Id.

mergers have created service disruptions and spawned shipper complaints.[12] As a result, the STB created a 15 month moratorium on mergers and promulgated a detailed statement concerning its merger review policy that in part created a much higher hurdle for merging parties in demonstrating efficiencies from the transaction. In it, the STB requires that "substantial and demonstrable gains in important public benefit" outweigh any "anticompetitive effects, potential service disruptions, or other merger-related harms."[13] It is unclear what this new standard will yield, if anything, as it has yet to be tested by a major railroad consolidation. And while the STB has declared that it will "consider the policies embodied in the antitrust laws,"[14] it is not clear what weight such policies will be afforded in the overall public interest calculus.

Thus, STB is neither a strong regulator favoring competition policy, nor is it likely to be in the future. In most "deregulated industries," mergers are subject to, at the very least, review by the agency regulators and the Department of Justice (e.g., electric utility mergers are subject to DOJ and Federal Energy Regulatory Commission review). There is nothing special about the railroad industry that should preclude such antitrust review.

The STB's view on "paper barriers" is discussed *infra* in my response to question 3. However, I wish to make clear that upholding anticompetitive restraints does not position the STB as an outstanding enforcer of competition policy.

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[12] *See* Massa, *supra* note 22 at 12 (detailing service issues arising from the Union Pacific-Southern Pacific merger and the Union Pacific-Chicago & Northwestern Railway merger); Daniel Machalaba, *CSX, Norfolk Southern Find Breaking Up is Hard to Do*, WALL ST. J., June 28, 1999 at B4 (discussing issues with CSX and Norfolk Southern's acquisition and division of Conrail).
[13] 49 C.F.R. § 1180.1(c).
[14] 49 C.F.R. § 1180.1(c)(2).

Finally, I should point out that both the ICC and STB could authorize railroad interlocking directorates. Nothing has changed in this realm since the 1920s. The STB's rules establish a procedure for applying for such interlocking directorates, although smaller carriers are exempt from the application process.

There is no procompetitive justification for interlocking directorates which run afoul of the antitrust laws yet are approved by the STB. Coordination to the extent necessary to ensure reliability may take place in the railroad industry as it does in other industries, namely through arms length agreements. There is no demonstration that railroads are uniquely in need of interlocking directorates when compared to other industries such as electricity or natural gas.[15]

Thus, the notion that the STB is somehow the better antitrust enforcer runs flatly against any and all evidence of how the STB has operated. It frequently has approved of transactions and conduct that fly directly in the face of the antitrust laws.

3. *Opponents of the bill claim that HR 1650 won't alleviate some of the concerns raised by shippers, e.g., "paper barriers." Do you think there may be some form of relief against paper barriers under federal antitrust laws?*

Response: In my opinion, shippers and smaller regional players will be able to challenge "paper barriers." With a caveat that such a challenge may be subject to a judicially created immunity or exemption, these paper barriers clearly violate the antitrust laws.

To review, "paper barriers"[16] are common anticompetitive restraints contained in agreements for the sale of secondary trackage to smaller regional players who wished to

[15] Id.
[16] My former colleague and coauthor Salvatore Massa has excellently described the paper barriers issue. See Salvatore Massa, *A Tale of Two Monopolies: Why Removing Paper Barriers Is A Good Idea*, TRANSP. J. Winter/Spring 2001, at 47.

interconnect with the seller's (a major trunk line operator) main lines. The seller, in exchange for interconnection, often demanded that the regional player only interchange its traffic from the divested line to the seller, foreclosing any opportunity for the buyer to interchange with other operators. These "paper barrier" restraints were often permanent.

The ICC historically approved such restraints, finding that they had no anticompetitive effect. And, despite complaints from smaller railroad firms, shippers, and labor organizations, the STB has not changed course with respect to these restraints.[17]

The STB's position on paper barriers runs in contrast to the antitrust laws. There appears to be no justification for these restraints. Under antitrust law rule of reason analysis, permanent barriers associated with the sale of a business which are without a specific and reasonably short duration run afoul of Section 1 of the Sherman Act, and may be subject to Section 2 scrutiny as well. The position of the Sherman Act case law is reasonable here, as no company should have a permanent interest in assets it has sold.[18]

The remedy in such circumstances would be an injunction against the enforcement of that contract provision.

[17] ABA Monograph, *supra* note 13 at 208.
[18] Id. at 216.