

THE RAILROAD WEEK IN REVIEW

MARCH 13, 2009

“Congress should be promoting policies that help jumpstart the economy and regain consumer confidence, not overburden an industry that stands ready to get America back on track.” AAR President Ed Hamberger on the railway anti-trust legislation

Now it begins. I’m reprinting this note from Wednesday’s Railway Age Newswire in its entirety because of the implications the railroad antitrust bill has for the entire railroad industry. Larry, Bill and I have all communicated on the topic and we’re going to hit it again in our Capacity conference in Chicago next week. Are you sitting down?

[RA starts here] Christine Barney, a former Federal Trade Commissioner who has been nominated by President Obama to be the chief antitrust enforcement officer at the Department of Justice, thinks legislation to take away the railroads’ remaining antitrust exemptions is “terrific.” Barney told Senator Herb Kohl (D-Wis.), “I will support your bill” at a Senate hearing on her nomination on Tuesday. Kohl is a sponsor of the legislation, which the Judiciary Committee approved March 5 and sent to the full Senate for consideration. Barney commended co-sponsor Sen. Russ Feingold (D-Wis.) on the antitrust legislation, and said that she will “enforce” it. She questioned why the DOJ had not fought any of the railroad mergers during the George W. Bush Administration years—failing to realize that none took place in that time period.

Comments *Railway Age* Contributing Editor Larry Kaufman: “That’s when she lost me once and for all. The last merger between Class Is was the joint purchase of Conrail by Norfolk Southern and CSX—in 1997. That was during the Clinton Administration. The CN/BNSF proposed combination was killed off by the STB in 2000—also during the Clinton presidency. Obviously, DOJ’s ‘good offices’ were not needed by STB.

“DOJ did *not* oppose the Santa Fe/Southern Pacific merger in 1986—during the Reagan presidency—but DOJ wasn’t needed. DOJ actually supported that merger, and the ICC killed it on antitrust grounds all by itself. All of the modern-era mergers were supported or accepted by DOJ except for the Union Pacific/Southern Pacific transaction, and DOJ filed a really shoddy, sophomoric brief at the STB on that one.”

In a later note on this topic, Larry wrote, “The pandering pols and I may use the English language differently. I am unaware of any collective ratemaking, and do recall that the AAR negotiated the end of collective ratemaking as a condition of the ‘service sensitive’ shipper support for Staggers in 1980. As I recall the law, and it has been many years since I read it, collective ratemaking is specifically barred to any railroad that achieves revenue adequacy. The railroads may actually have the right to engage in it at the moment, but have not done so for 29 years. Perhaps the panders consider having a western railroad discuss the division on an inter-regional movement to be collective ratemaking. If so, they are the only ones who do.”

The Association of American Railroads has said the legislation to repeal the industry’s limited antitrust exemptions “creates an unprecedented and confusing regulatory scheme that could alter the current economic oversight of the railroads.” The AAR noted that the Senate committee action came as the Senate Commerce committee was developing legislation “that could subject the railroads to still more economic regulation” by the Surface Transportation Board.

“We face two disparate schemes that spell nothing but confusion for the railroads and those charged with enforcing the regulations,” said AAR President and CEO Ed Hamberger. “Congress should be promoting policies that help jumpstart the economy and regain consumer confidence, not overburden an industry that stands ready to get America back on track.” [end]

Meanwhile, in the former financial capital of the US, reactions from Wall Street are mixed. Morgan Stanley’s Bill Greene writes, “We’ve noted that Washington is an increasingly less friendly place for rails under the new administration. Recent rate cases and proposed legislation support this suspicion. In its current form, the latest ‘antitrust’ bill likely has limited financial impact, but a potential challenge to rail ‘bottleneck’ [questions] could be a real threat...we expect some version of the anti-trust legislation could become law this year... There is a risk that bottleneck policies (see below) will be declared anti-competitive, which is a more material threat to rail efficiency and pricing, especially at eastern rails.... Even if these antitrust suits prove baseless, there is the risk rails could face higher legal fees if carriers are forced to fight more anti-trust cases.”

Tom Wadewitz at JP Morgan says, “This bill is much less of a threat to the railroad’s pricing story compared to the Railroad Competition bill which is likely a coming high-stakes battle for the railroads. In addition there remains meaningful uncertainty whether support will be broad enough on the Senate floor and in the House in order to pass either bill into law.

“Under the current law, State Attorneys General do not have the opportunity to sue the railroads regarding antitrust issues and the Rail Competition Bill would create the opportunity for State AGs to sue the railroads for violation of antitrust laws. Suing the railroads for collusion is not a new idea as there are already shipper lawsuits in the courts regarding rail behavior on fuel surcharges. Nevertheless the Antitrust Bill could cause an increase in efforts to take the railroads to court on accusation of antitrust violations.”

On the other hand, Tony Hatch sees the matter as “hardly devastating” because (a) he does not see any Class I mergers on the horizon and (b) it is “unlikely there will be significant class one shortline sales.” However, he continues, the legislation could put added pressure on the paper barrier issue. “Paper barriers are the legal (paper) contracts that enforce short line alliances with their former parent connecting major rail. There is some talk that this bill could open up so-called ‘bottlenecks’ whereby rails into a plant would be forced to quote rates not just to the destination but to the next interchange with another rail - which could be complicated.”

As for short lines, the ASLRRRA’s White Paper on the subject makes no bones about the impact on Class II and III carriers: “The Railroad Antitrust Enforcement Act would have a chilling effect on the opportunities small railroads would receive to fill the gaps in underserved parts of our national rail transportation infrastructure....The potential for a diverse federal court system to create conflicting standards would unnecessarily complicate the creation of new short lines and the expansion or merger of existing short lines. Moreover, to the extent the costs of large railroads are increased to defend against unpredictable private antitrust actions and injunctive orders, those costs will be passed through to their shortline connections putting further pressure on already tight shortline operating margins.”

Where it ends I do not know. What is becoming increasingly evident is the fact that Washington is in over its head. Last night at Philadelphia’s historic Union League William & Mary’s Mason School of Business hosted an alumni event with two of its professors holding forth on the economy. John Boschen (Economics and Finance) talked about the housing bubble in relation to household income and John Merrick (Business Economics and Finance, himself an ex-Lehman trader) graded

the performance of the Team Obama and the Congress in handling the present situation (Geithner gets an “incomplete,” Congress gets an “F”).

I’m hearing a lot of talk about how this administration will be good for the railroads but I don’t see it. Jillions of dollars for high-speed rail and not a *sou* for Class I infra tax credits? The best railroad infrastructure in the country is owned by the freight rails and without them Amtrak has few places to go. The rails win the green argument hands down. So why do the Members insist on making being in the railroad business even more difficult? Perhaps because, as today’s WSJ notes, “Over two-thirds of voters believe members of Congress are more interested in helping their own careers than in helping the American People.”

My biggest regret for the week is missing the Annual CSX Shortline Workshop. Normally held in Feb, dates got shuffled around this year creating some scheduling conflicts for me. Len Kellermann, who heads up the CSX shortline program, writes that more than 200 people representing some 160 of their 225 shortline connections made the trip. (That’s an accomplishment in itself: to have more than two-thirds of the short line names represented has to be some sort of a record.)

Len continues, “The theme of the program was *A Clear Vision for the Future* and highlighted CSXT’s long-term focus on being prepared to move more freight by rail, as fluidly as possible, when the economy rebounds. For example, our capital spend for 2009 remains at \$1.6 BB. Our need to promote the advantages of rail versus competing modes, and stave off re-regulation, is as acute as ever. And our need to be as close as possible to our mutual customers is as valid as ever.

“The entire executive team from CSX presented to our audience, including Michael Ward (CEO), Clarence Gooden (Commercial), Tony Ingram (Operations), Ellen Fitzsimmons (Law and Public Affairs), and Oscar Munoz (CFO). Beyond the E-Team, as it’s called, we also had Alan Blumenfeld (VP-Service Design and Advanced Technology), Frank Lonergo (President-CSX Technology), Steve Potter (AVP-Car Management), and Paul Hitchcock (Associate General Counsel) give presentations. Monday morning was filled with Market-based and E-Commerce presentations, and on Monday afternoon we had our Trade Show, where 34 CSX booths were displayed in our Trade Show hall.”

I have to add that CSX has long been a leader in the area of support for and involvement with its short lines. This is the longest-running Class I annual shortline workshop; CSX not only pioneered the trade show concept but also has, to my mind, the widest variety of trade show presenters, including not only the usual commodity groups but also the many short line support functions from service design to industrial development and service start-up.

Furthermore, CSX was, as far as I can recall, the first Class I to set up a “shortline caucus group” to ferret out shortline worries about everything from new business development to interchange details to getting paid on time. Look for the presentation material on the CSX short line page in the near future. And please drop me a note if there were any particular take-aways you’d like to pass on.

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