THE RAILROAD WEEK IN REVIEW
MARCH 20, 2009

" This is still a market in which the return of capital is more important than the return on capital. -- Barron's *for March 16, 2009*

Wells Fargo President Richard Kovacevich said his bank never asked for the government funds but was forced to play along lest his refusal "stigmatize" those financial institutions that need the government dollars to shore up their balance sheets. In a recent speech at Stanford University he called the Obama administration's plan to stress test banks "asinine" and said the feds' costly retroactive provisions drove WFC's recent deep dividend cut.

According to a note on thestreet.com, "Kovacevich said that without the $25 billion Wells received from the government, it would have been able to raise private capital. If Wells had raised private capital, he added, the company would not have had to slash its dividend, or make other moves to preserve cash and keep up appearances -- like cutting executive bonuses and canceling promotional events.

One has to wonder whether the shortline tax credit and RRIF loan programs will be subject to such unsettling retroactive provisions. Or how far Congress is willing to push the re-reg buttons. They are clearly flailing about to protect the least productive voters' life, liberty and pursuit of happiness at the expense of same for the most productive elements of society.

UBS' Art Cashin writes in his March 17 letter: "Would the government start to take an activist roll in making operating decisions at places like AIG or Citi? Secondly, would the 'tear up the contracts' fever spread to other contracts in other places?" What's at stake here is "the full faith and credit of the US government," as the Chinese are demonstrating with their campaign to decrease exposure to the US dollar. The law of contracts is what makes our country work. Take that away and we quickly become another third-world mobocracy.

Schwab's "Market Perspective" for Wednesday asks "Depression or Recession - Does it Matter?" The short form is the market is "less than impressed" as the administration keeps trying different things to get the economy settled down and credit conditions improved. Though there are some signs the rate of decline in economic activity is slowing, the jump in the savings rate is "short-circuiting" the recovery in consumer spending so desperately needed for any turn-around.

Schwab says housing still faces "multiple headwinds" that will knock down the occasional modest signs of an uptick. As consumers batten down, consumer staples (think P&G, the Wal-Mart aisles along the edges) will under-perform though heath care and tech may outperform. [Neither of these are much good to the rails, however, -- rhb]

Iowa Pacific's Ed Ellis writes concerning my WIR screed about grants, "I started Wisconsin and Calumet, now part of WSOR, and we got the state to provide grants of close to $40 million, mostly federal money, to save a system that had no more than 3,000 annual carloads on 300 miles of track over the previous 10 years. Today WSOR moves more than 50,000 carloads a year. But if the state had defined a scalable system based on the historic volumes, or even projected volumes that were not prescient enough to look at changes in the dairy market and the effect on local grain farmers, they would have said that it was throwing good money after bad." Thanks, Ed.

The stimulus bill, AKA the *American Recovery & Reinvestment Act*, specifies that $27.5 billion is for highway and bridge construction, $8.4 billion for "mass transit," $1.3 billon for Amtrak and $8.0 billion for high-speed passenger rail projects. Writing in the Philadelphia NRHS Chapter newsletter, "Cinders," Frank Tatnall adds, "States will have the discretion to spend some of their highway funds for 'passenger and freight rail transportation.'"

Tatnall warns, however, that the ARRA "contains a complex formula for distributing finds to states," making the challenge particularly onerous in states that "are already faced with making painful cutbacks in personnel and services in order to balance their budgets. And even though Pennsylvania, to name one state, may be in line to receive $10 billion-plus over the next two years, capital shortfalls in capital funding for transit agencies could wipe out any chance of lower-priority projects - short lines, e.g. - for seeing any green.

Wanting to provide more detail on what the antitrust furor was all about, I asked the AAR's John Gray to give me a thumbnail picture of the matter. It turns out there are four distinct areas where the STB is the deciding authority, not the Department of Justice. Herewith the AAR language:

"*Mergers, consolidations, and pooling agreements* are exempted from the antitrust laws. However, the STB thoroughly examines the effects of the agreements on competition and the public interest, and only approves agreements that it deems are consistent with the public interest. As part of this examination, any interested party, including the Department of Justice, other government entities, shippers, and other railroads, can have their views considered by the STB."

[So when Obama's pick for the head of the Department of Justice's antitrust enforcement arm Christine Varney (WIR for Mar 13 erred in calling her Christine Barney) said she would support the pending railroad antitrust bill and that she questioned the rail mergers approved by the Bush administration she was wrong on two counts: mergers are already under the STB by law and there have been no rail mergers since Bill Clinton's years.]

"*Rate agreements* reviewed and approved by the STB are exempted from the antitrust laws, however this exemption does not give railroads a free hand to collude in ratemaking. Today, the main purpose of this exemption is to provide a framework for railroads to establish rules and regulations pertaining to the fees they pay each other when they use other railroads' equipment. This coordination enhances efficiency and is not controversial.

"Agreements arising from *conferences* on proposed unification or coordination projects are by law exempted from the antitrust laws. The invitees to these conferences may include railroads, rail labor, shippers, consumer representatives, state agencies, the STB, the Department of Justice, and the Federal Trade Commission. Shippers as well as railroads have supported the limited use of conferences under this provision. It remains a useful potential means of improving rail transportation with the opportunity for participation by all relevant parties.

"*Injunctive relief* may be obtained only by the federal government to have a court order a railroad to take some action in response to an alleged antitrust violation by a railroad that is subject to STB jurisdiction. The US Supreme Court has affirmed that the purpose of this exemption is to prevent private parties from interfering with the STB which has broad injunctive authority of its own over railroads."

The AAR then offers four reasons not to upset this apple cart. First, "All aspects of railroad conduct that are exempt from antitrust laws are subject to STB jurisdiction, so stripping railroads' exemptions would not fill any void in the law. Second, doing so would create a scenario where multiple agencies have overlapping authority over railroads - a recipe for trouble. Third, removing the exemptions would make it more difficult for railroads and shippers to work together to enhance the [innate railroad] efficiencies that benefit rail shippers and American consumers. Fourth and last, there are those who say they want to level the playing field by treating railroads like other industries. But their proposals do not eliminate similar exemptions for other industries. If exemptions are acceptable for other industries, why not for railroads?"

Please, Ms. Varney, take a look at the AAR's paper and read up on the US Code citations before you try to make Justice do what the STB already does quite well, and under existing law at that. Supporting Congressional action to change these laws is an ill wind that does the fragile economy no good. And, while you're at it, take a look at the NS video (http://www.nscorp.com/nscportal/nscorp/Community/Regs%20That%20Work/) to review the effects of the heavy hand of Congress on railroad operations.

Dagny Taggart, Call Wick Moorman! Laura Blanchard, WIR's resident snark, says it's something right out of *Atlas Shrugged*: a small number of big shippers may hamstring the railroad industry by creating another layer of regulatory red-tape and by kneecapping the railroads' ability to raise freight rates and fund capital improvements.

Two bills wending their way through Congress, S. 146 and HR 233, will unbalance the regulatory regime for rail rates and practices that has worked so well since 1980. Behind the effort to pass "The Railroad Antitrust Enforcement Act of 2009" is CURE, "Consumers United for Rail Equity," whose sad tales of horrendous rate increases are unconscionably misleading.

For example, take CURE Executive Director Robert Szabo's example of a utility that saw rates increase by a significant multiple when the contract came up for renewal. Left out of Szabo's touching good story was the fact that over the 20 year life of the contract the effective rate had dropped to 1/3 of the original rate and the huge increase, in constant dollars, amounted to a whopping $2.00/ton. (To put this in perspective...that would be an increase of ten cents per ton for every year of the original contract.)

There's plenty more to be said about the evils of these acts. You can find the AAR's position on it here, and there's a comprehensive review of the issues in the February *Railway Age* (which alas is not on line). For more on the gravity of the situation, see the memo from Norfolk Southern Chairman and CEO Wick Moorman attached below -- and take the time to write your Congresscritters right now. You can locate their names and addresses, if you don't know them already, from the link in Moorman's message.

TO: ALL NORFOLK SOUTHERN EMPLOYEES
FROM: WICK MOORMAN

Every Norfolk Southern employee needs to speak up against anti-railroad legislation that's being considered right now in the U.S. Congress. Activity in Washington that threatens the health of NS and the rail industry is a threat to each of us.

We all know that rail is important to the future of our country. NS and the other railroads are private companies creating jobs and investing in infrastructure to make the U.S. more competitive. But a concerted effort is under way by well-funded special interest groups to change the economic rules under which we operate. Their motives are simple and cynical. They want lower rail rates now, even if it undermines the financial well-being of our industry and damages the nation's long-term competitiveness. If successful, this effort would have a devastating effect -- destroying the financial foundation needed for a vibrant, healthy, expanding freight rail industry.

The first salvo in this Congress is a harmful bill to eliminate the limited exemptions applicable to railroads from the antitrust laws. This bill is based on the fictional premise that railroads are somehow given a free pass on antitrust issues. The real facts are that:

- The railroad industry already is subject to antitrust laws.
- The bill would create a regime of many agencies with overlapping and confusing roles, rather than relying on the oversight of the specialized, expert federal Surface Transportation Board.
- Many provisions of the bill would result in railroads being treated worse than other industries with exemptions.

More legislation to unbalance the regulatory regime for rail rates and practices that has worked so well since 1980 is close behind the antitrust bills. If the current regulatory equation becomes "unbalanced," the results will be extraordinarily damaging to NS, the industry, and the country. It will mean a smaller industry with fewer jobs and little prospect for growth. You might think that this sounds irrational in a world where the energy and environmental advantages of rail transportation become clearer every day. It is, in fact, totally irrational, but the people who are lined up against us are very determined, and they think that they will be successful. We cannot underestimate the seriousness of this threat.

I urge you to contact your Congress members. Have your family, your coworkers, your union leaders, and others from around the country do the same thing. Send a one- or two-sentence email asking them to kill S. 146 and HR 233, the "Railroad Antitrust Enforcement Act of 2009," and to oppose efforts to impose unbalanced regulation on railroads. Tell them this legislation is bad for Norfolk Southern, bad for its employees, bad for the rail industry, and bad for America. Tell them you support our existing, effective system of "balanced regulation." Let them know that the railroad industry isn't broken, and it doesn't need to be "fixed" through government intrusion and special interests.

It's easy to contact your particular Representatives and Senators. Visit www.congress.org and enter your Zip Code under "My Elected Officials." Click here to see information on the opposition to this harmful legislation from one of the rail industry's largest unions, the Transportation Communications International Union. If appropriate, you should also encourage your union legislative leadership to follow the strong example of the TCU and get actively behind this effort to protect our company and our industry.

Learn more about the issue with our five-minute video, “Regs That Work,” on the NS Web site under the “Community” tab. Or, to receive a DVD, write regsthatwork@nscorp.com.

Your colleagues at Norfolk Southern and the other railroads are working on all fronts to protect the industry’s interests. Your efforts are critical to success. Thank you for your fast action.

To see the bills:

- http://www.opencongress.org/bill/111-h233/show
- http://www.washingtonwatch.com/bills/show/111_SN_146.html

(For those of you familiar with *Atlas Shrugged*, take heart: sales in the past couple months have tripled over the same period last year, and it is also outselling certain presidential memoirs on Amazon right now.)