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All Aboard

By Brian Wingfield
October 23, 2007

Washington, D.C. - One of the major lobbying wars of 2008 is shaping up on Capitol Hill. The issue: whether railroads should enjoy partial exemption from anti-trust legislation. The opponents: powerful freight rail companies and an unusual alliance of electric utilities and chemical companies.

Tuesday the Senate Committee on Commerce, Science and Transportation will haul in, among others, the chairman of the agency that oversees railroad mergers, the head of the Norfolk Southern railroad and a top official from the Government Accountability to discuss the state of competition in the freight rail industry. The oversight hearing is the first since the Senate Judiciary Committee last month passed a bill that could subject freight railroads to a bevy of anti-trust lawsuits. Another bill, designed to promote competition among railroads and provide shippers with lower rates, is also in the works.

Will either measure go anywhere this year? Not a chance. But that's why they're important. The deep-pocketed adversaries squaring off in this battle now have ample time to build their cases--and war chests--in an effort to sway lawmakers.

In one corner is a group called Consumers for United Rail Equity (CURE), which includes electric utilities like Entergy and Xcel Energy, and chemical companies like Dow and DuPont. They're unhappy with several antitrust exemptions that railroads receive by law, including the inability of mergers to be challenged by a federal court. CURE says the agency that oversees railroad rates and mergers, the Surface Transportation Board (STB) has allowed industry consolidation to the point that regional monopolies have formed, holding shippers "captive" to rates set by the railroads.

CURE wants the laws to be adjusted so that shippers can have access to competing railroads without having to pay higher rates.

But this "re-regulation" is not the way to stoke competition, says the American Association of Railroads, whose members include Amtrak and the four major freight lines, CSX, BNSF Railway, Norfolk Southern and Union Pacific. They say railroads are in fact subject to most anti-trust laws and that the STB's oversight is rigorous. Moreover, the railroads argue, lifting anti-trust exemption would cause the courts to unnecessarily interfere with national rail policies.

The controversy began in earnest a year ago, when the GAO issued a report expressing "concerns about competition and captivity" in the freight rail industry. When Congress partially deregulated the industry in 1980, there were about 30 freight railroad companies operating in the United States. An avalanche of mergers and acquisition activity has cut that number to seven, with the four majors controlling most of the rail lines. All of them have benefited financially from deregulation. For example, BNSF saw a 102% increase in its net income from 1996 to 2006, according to AAR; during the same time, CSX income increased by 81%.

GAO has noted that rail rates actually declined between 1985 and 2000, but it also says that rates have increased slightly since about 2001, which could either be due to "reasonable economic practices" or a "possible abuse of market power." And because of GAO's findings, the coalition of shippers seems to have been able to curry favor with Democrats in Congress, even with the Bush administration backing the railroads.

So who's right? It will take months to find out. Last month, the STB commissioned a study of competition in the freight rail industry by a third-party research firm, Wisconsin-based Christensen Associates. With a price tag of $1 million, the study is expected to be released a year from now.

In the meantime, neither side has to worry much about running out of cash to influence lawmakers. Two of CURE's brawniest members are the Edison Electric Institute and the American Chemistry Council, which have each spent about $1.1 million on lobbying this year, according to the Center for Responsive Politics (CRP), a campaign finance watchdog. (However, it should be noted that this money has paid for lobbying on other issues as well.)

During the same time, the American Association of Railroads has spent about $3.3 million, and CSX and Norfolk Southern have shelled out more than $1.5 million each, CRP says.

Bob Szabo, CURE's executive director and counsel, says he expects a "very pitched" fight, but his group is pushing for the legislation before Christensen wraps up its analysis for STB.

"We don't see any reason to wait for a study," he says. "We already know the answer: There's a lack of competition."