

**STATEMENT OF SENATOR HERB KOHL
ON INTRODUCTION OF THE RAILROAD ANTITRUST ENFORCEMENT ACT
JANUARY 6, 2009**

MR. KOHL: Mr. President, I rise today to introduce legislation essential to restoring competition to the nation's crucial freight railroad sector. Freight railroads are essential to shipping a myriad of vital goods, everything from coal used to generate electricity to grain used for basic foodstuffs. But for decades the freight railroads have been insulated from the normal rules of competition followed by almost all other parts of our economy by an outmoded and unwarranted antitrust exemption. So today I am introducing along with my colleagues, Senators Vitter, Leahy, Feingold, Schumer, Rockefeller, Dorgan and Klobuchar, the Railroad Antitrust Enforcement Act of 2009. This legislation will eliminate the obsolete antitrust exemptions that protect freight railroads from competition. This legislation is identical to the legislation that was reported out of the Judiciary Committee in the last Congress without dissent.

Our legislation will eliminate obsolete antitrust exemptions that protect freight railroads from competition and result in higher prices to millions of consumers every day. Consolidation in the railroad industry in recent years has resulted in only four Class I railroads providing over 90 percent of the nation's freight rail transportation. The lack of competition was documented in an October 2006 Government Accountability Office report. That report found that, shippers in many geographic areas [QUOTE] "may be paying excessive rates due to a lack of competition in these markets." These unjustified cost increases cause consumers to suffer higher electricity bills because a utility must pay for the high cost of transporting coal, result in higher prices for goods produced by manufacturers who rely on railroads to transport raw materials, and reduce earnings for American farmers who ship their products by rail and raise food prices paid by consumers.

The ill-effects of this consolidation are exemplified in the case of "captive shippers" – industries served by only one railroad. Over the past several years, these captive shippers have faced spiking rail rates. They are the victims of the monopolistic practices and price gouging by the single railroad that serves them, price increases which they are forced to pass along into the price of their products, and ultimately, to consumers. And in many cases, the ordinary protections of antitrust law are unavailable to these captive shippers – instead, the railroads are protected by a series of outmoded exemptions from the normal rules of antitrust law to which all other industries must abide. In August 2006, the Attorneys General of 17 states and the District of Columbia sent a letter to Congress citing problems due to a lack of competition and asked that the antitrust exemptions be removed.

These unwarranted antitrust exemptions have put the American consumer at risk, and in Wisconsin, victims of a lack of railroad competition abound. A coalition has formed, consisting of about 40 affected organizations – Badger CURE. From Dairyland Power Cooperative in La Crosse to Wolf River Lumber in New London, companies in my state are feeling the crunch of years of railroad consolidation. To help offset a 93 percent increase in shipping rates in 2006, Dairyland Power Cooperative had to raise electricity rates by 20 percent. The reliability, efficiency, and affordability of freight rail have all declined, and Wisconsin consumers feel the pinch.

And similar stories exist across the country. We held a hearing at the Antitrust Subcommittee in September 2007 which detailed numerous instances of anti-competitive conduct by the dominant freight

railroads and at which railroad shippers testified as to the need to repeal the outmoded and unwarranted antitrust exemptions which left them without remedies. Dozens of organizations, unions and trade groups – including the American Public Power Association, the American Chemistry Council, American Corn Growers Associations and many more affected by monopolistic railroad conduct endorsed the Railroad Antitrust Enforcement Act in the last Congress.

The current antitrust exemptions protect a wide range of railroad industry conduct from scrutiny by governmental antitrust enforcers. Railroad mergers and acquisitions are exempt from antitrust law and are reviewed solely by the Surface Transportation Board. Railroads that engage in collective ratemaking are also exempt from antitrust law. Railroads subject to the regulation of the Surface Transportation Board are also exempt from private antitrust lawsuits seeking the termination of anti-competitive practices via injunctive relief. Our bill will eliminate these exemptions.

No good reason exists for them. While railroad legislation in recent decades – including most notably the Staggers Rail Act of 1980 – deregulated much railroad rate setting from the oversight of the Surface Transportation Board, these obsolete antitrust exemptions remained in place, insulating a consolidating industry from obeying the rules of fair competition. And there is no reason to treat railroads any differently from dozens of other regulated industries in our economy that are fully subject to antitrust law – whether the telecommunications sector regulated by the FCC, or the aviation industry regulation by the Department of Transportation, just name just two examples.

Our bill will bring railroad mergers and acquisitions under the purview of the Clayton Act, allowing the federal government, state attorneys general and private parties to file suit to enjoin anti-competitive mergers and acquisitions. It will restore the review of these mergers to the agencies where they belong – the Justice Department’s Antitrust Division and the Federal Trade Commission. It will eliminate the exemption that prevents FTC’s scrutiny of railroad common carriers. It will eliminate the antitrust exemption for railroad collective ratemaking. It will allow state attorneys general and other private parties to sue railroads for treble damages and injunctive relief for violations of the antitrust laws, including collusion that leads to excessive and unreasonable rates. This legislation will force railroads to play by the rules of free competition like all other businesses.

In sum, by clearing out this thicket of outmoded antitrust exemptions, railroads will be subject to the same laws as the rest of the economy. Government antitrust enforcers will finally have the tools to prevent anti-competitive transactions and practices by railroads. Likewise, private parties will be able to utilize the antitrust laws to deter anti-competitive conduct and to seek redress for their injuries.

It is time to put an end to the abusive practices of the nation’s freight railroads. On the Antitrust Subcommittee, we have seen that in industry after industry, vigorous application of our nation’s antitrust laws is the best way to eliminate barriers to competition, to end monopolistic behavior, to keep prices low and quality of service high. The railroad industry is no different. All those who rely on railroads to ship their products – whether it is an electric utility for its coal, a farmer to ship grain, or a factory to acquire its raw materials or ship out its finished product – deserve the full application of the antitrust laws to end the anti-competitive abuses all too prevalent in this industry today. I urge my colleagues support the Railroad Antitrust Enforcement Act of 2009.

I ask unanimous consent that my statement be printed at an appropriate place in the record next to the text of the bill.