

"All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

—THE CONSTITUTION
Article I, Section 1

Vested Interests

ROLL CALL

The lobbying and legislation that drives Capitol Hill

WEDNESDAY, SEPTEMBER 26, 2007

PAGE 11



Douglas Graham/Roll Call

Railroad giants like CSX are engaged in a furious battle with their own customers, who are pushing a bill that would end railroad's antitrust exemptions.

The Railroading of America

Customers Say Freight Railroads Monopolize and Overcharge

By Daniel Jackson
ROLL CALL STAFF

The nation's railroads are squaring off against their own shipping customers over two bills that would remove several long-standing antitrust exemptions enjoyed by the rail companies and restructure the federal oversight body that regulates them.

Supporters of the two bills — the Railroad Antitrust Enforcement Act and the Railroad Competition and Service Improvement Act — say the four largest U.S. railroads have essentially divided the country geographically, creating regional monopolies that charge their customers exorbitant rates. And they say that the Surface Transportation Board, the federal body tasked with regulating anticompetitive behavior by the railroads, rubber-stamps the railroads' behavior to the detriment of their customers.

See RAILROAD, page 15

Wednesday, September 26, 2007 ROLL CALL VESTED INTERESTS Page 15

A Fight Over Antitrust Exemptions

RAILROAD, from page 11

"There's a lot of anticompetitive behavior among railroads," said Bob Szabo, the executive director of Customers United for Rail Equity and a partner at Van Ness Feldman. "Specifically, the STB allows railroads to block [customers'] access to competing railroads," he added.

The group, known as CURE, has about 60 members, including utilities, paper, steel, cement and chemical companies. And it has launched a media campaign to push for passage of the legislation.

The rail carriers' antitrust exemptions make a wide range of business arrangements — including mergers, some lease agreements and "agreements to divide traffic" — immune to challenge in federal court, so long as the arrangements are approved by the STB.

One of the biggest problems according to Szabo, is a practice known as a "paper barrier," comparable to a "tie-in agreement" in other industries. Under these agreements, major rail carriers lease sections of track to short-line carriers at inexpensive rates while prohibiting or heavily penalizing them if they do business with the major carrier's competitors.

To address these grievances, the antitrust enforcement bill would strip rail carriers of their immunity from litigation and allow the FTC to police the industry for the first time.

The competition and service improvement bill would bar the STB from approving certain railroad mergers, force it to submit some rate disputes to arbitration and authorize the STB to investigate alleged antitrust violations even if it has not received a complaint.

Support for the railroad antitrust bill has been more geographic than partisan. Two Republican Representatives and Sen. David Vitter (R) from Louisiana — home to many petrochemical companies — have signed on as co-sponsors of the antitrust enforcement bill. The bill's author, Sen. Herb Kohl (D), and House co-sponsor Rep. Tammy Baldwin (D) both represent Wisconsin, home to farming and logging industries that rely heavily on rail shipping, with the major carrier's competitors.

To address these grievances, the antitrust enforcement bill would strip rail carriers of their immunity from litigation and allow the FTC to police the industry for the first time.

The competition and service improvement bill would bar the STB from approving certain railroad mergers, force it to submit some rate disputes to arbitration and authorize the STB to investigate alleged antitrust violations even if it has not received a complaint.

Support for the railroad antitrust bill has been more geographic than partisan. Two Republican Representatives and Sen. David Vitter (R) from Louisiana — home to many petrochemical companies — have signed on as co-sponsors of the antitrust enforcement bill. The bill's author, Sen. Herb Kohl (D), and House co-sponsor Rep. Tammy Baldwin (D) both represent Wisconsin, home to farming and logging industries that rely heavily on rail shipping.

The northeastern Minnesota district of Rep. James Oberstar (D) — the chief House sponsor of the competition and service improvement bill — is home to numerous logging and mining operations.

The dispute over antitrust exemptions is partly the result of history. In the late 1970s railroads were entirely federally regulated and in bad shape. In the early 1980s the Staggers Act partially deregulated the industry while allowing it to remain exempt from some U.S. antitrust laws.

Since then, the industry has shrunk and consolidated; currently there are fewer than 10 major railroad companies operating in the United States, which for now, at least, are in relatively good shape financially.

Peggy Nasir, a spokeswoman for the Association of American Railroads, acknowledged that the railroads' financial stability is in part due to the industry's partial deregulation. But she said the regulations still in place would put them at a serious disadvantage if antitrust exemptions were removed. "If you want to take away our [antitrust] exemptions, then take away our regulation, too," she said.

Nasir pointed out that the railroads already are subject to most U.S. antitrust law and said the STB is thorough in its oversight.

"They do a very good job of balancing the needs of the various consumer groups and the railroads," she said.

That's news to Rep. Richard Baker (R-La.), a House co-sponsor of the antitrust enforcement bill. "The Surface Transportation Board has failed to use its authority to ensure competition in the rail industry," Baker wrote in an e-mail statement.

The American Chemistry Council, a coalition of chemical companies including some of the railroad's larger customers, also faults the STB for not protecting consumers.

The STB and industry deregulation have been "wildly successful in restoring railroads' financial health," said Marty Durbin, ACC's managing director for federal affairs. "That's good. But in protecting customers, [the STB] is failing miserably. There have been consistently one-sided rulings by the STB over the years."

At a standing-room-only markup on Sept. 20, the Senate railroad antitrust bill was reported out of the Judiciary Committee — "the first time," Szabo said, "that the Judiciary Committee had ever reported a railroad antitrust bill."

A few Senators, however, expressed concerns. Judiciary ranking member Arlen Specter (R-Pa.) said he supported the bill but worried that it hadn't received a hearing. Sen. John Cornyn (R-Texas) questioned the wisdom of opening up federal courts to more antitrust lawsuits against the railroads.

"I'm always a little skeptical of regulation by legislation," Cornyn said. "I wonder whether the STB can handle these changes without exposing railroads to more litigation."

The rail carriers have characterized the pending legislation as "re-regulation," a return to the days when the rail carriers were fully regulated by the government and in a financial shambles. An article on AAR's Web site said the legislation would create a regulatory system similar to what existed prior to industry deregulation and warns that rail company investors would bail out if the two bills pass.

"Wall Street is emphatic," the article reads. "Investment capital for capacity expansion will dry up if re-regulation passes."

AAR spokeswoman Nasir said fighting attempts to re-regulate the railroads is nothing new to her organization.

"We've been doing this for 23 years," she said.