Railroad Antitrust Immunity: A needed quid pro quo, or a solution to no problem?

by *Steven W. Block* November 2005

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Carrier antitrust immunity hasn't been in the news much lately. The topic was hyped after passage of the Ocean Shipping Reform Act (OSRA), which implemented a market-driven ocean shipping environment beginning in May 1999. In the months following OSRA's enactment, shipping circles, their lawyers, economists and the government began to wonder just what disadvantages carriers suffered that required Sherman Act immunity. Gone were the days of near mandatory tariff-driven common carriage and the economic burdens it imposed on steamship lines.

Moreover, only foreigners stood to gain from Uncle Sam's carrier antitrust immunity laws. The last major American carriers married foreign suitors and hauled down the Stars & Stripes in favor of colors more accommodating of shipping's economic particulars. Congress went so far as to consider ocean carrier antitrust reform legislation in 2000 (see August 2000 Legal Lookout article). But with OSRA's economic successes, guard changings in the federal government's legislative and executive branches, and a new focus in transportation issues imposed by 9/11, the legislation stalled in committee.

Another transportation mode that enjoys antitrust immunity, at least on a limited scale, is railroad. The historical concerns railroad antitrust immunity was designed to redress are similar to those on the wet side, and the two modes got the privilege around the same time (railroads by the Clayton Act in 1914; ocean carriers by the Shipping Act of 1916). But the differences have been highlighted by players voicing their views in a recent initiative to eradicate railroad immunity. Unlike international ocean carriage, the railroad industry remains highly regulated. The Staggers Act of 1980 loosened regulatory reins a great deal for routes and rate setting (so long as economic conditions justified it), but imposed safeguards that kick in where freight competition is absent or lax. Market-driven forces work just fine, but only where there's a market! Unlike the ocean carriage industry, where numerous lines are operated from every corner of the globe, the U.S. rail industry is rather finite and limited in its growth capacity by geography and the costs of track.

When Congress dismantled the Interstate Commerce Commission in 1995, it transferred railroad regulatory functions to the newly created Surface Transportation Board (STB). Part of STB's mission is to set maximum freight rates or otherwise cut railroads off at the pass when they gain too much market control or squeeze out the competish unfairly. It's a complex mesh of law, government, industry and economics that has been at the heart of railroad regulation for over a century.

So while some antitrust principles (or their equivalent as STB applies them) apply to railroads, train operators do enjoy specific antitrust immunity as regards the commercial

interaction and interrelationships inherent in the railroad industry's operations. A primary goal of this immunity is to avoid concurrent regulation of the railroad industry by STB and the courts, which could lead to inconsistency. Thus, "pooling arrangements," whereby railroads join forces in their traffic and services, are kosher if STB approves them. STB is statutorily mandated to bless only those pooling arrangements that would be for the better economic good. Collective rate setting is allowed with similar restrictions. STB also gets the final say on railroad mergers without Sherman Act scrutiny.

This summer, The Railroad Antitrust and Competition Enhancement Act of 2005 was introduced to Congress at the behest of railroad shippers who believe train operators have abused their antitrust immunity to the point they effectively enjoy monopolistic control. The bill's proponents, such as the National Association of Wheat Growers, feel immunity prevents rate-lowering competition for shippers who essentially are railroad "captives." Affected shippers charge that larger railroads operating in the West publicize their freight rates and wink-wink nudge-nudge at each other's numbers, thereby agreeing not to vie for business through pricing. They also complain of railroads taking advantage of "bottlenecks," wherein a railroad owns or controls a strip of track critical to a given route, and sells access to it at unreasonable rates.

Railroads, largely through the Association of American Railroads (AAR), counter by pointing to the significant degree of government regulation they're still subject to, as well as STB's supreme power to keep trains on an economically appropriate track. Nix railroad antitrust immunity, says AAR, and you'd better lighten up on some of the regs as well. Moreover, railroad freight charges have dropped over the past two decades, which shows the Staggers Act is working just fine.

The Congressionally created Antitrust Modernization Committee (AMC) will take up the issue as part of a sweeping antitrust overhaul. AMC's report is due in April 2007, but quite a bit of activity is expected in the interim. Industry players concerned about the impact antitrust liability might have on the rail industry should read up on AMC's agenda (see website below), and express their views sooner than later.

Ref: The Railroad Antitrust and Competition Enhancement Act of 2005, available at http://www.theorator.com/bills109/hr3318.html; and the Antitrust Modernization Committee's website at http://www.amc.gov/.