111TH CONGRESS
2d Session
HOUSE OF REPRESENTATIVES
REPT. 111–669
Part 1

RAILROAD ANTITRUST ENFORCEMENT ACT OF 2009

NOVEMBER 30, 2010.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. CONYERS, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

ADDITIONAL VIEWS

[To accompany H.R. 233]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 233) to amend the Federal antitrust laws to provide expanded coverage and to eliminate exemptions from such laws that are contrary to the public interest with respect to railroads, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

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99–006

THE AMENDMENT

The amendment is as follows:
Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Railroad Antitrust Enforcement Act of 2009".

SEC. 2. APPLICATION OF THE ANTITRUST LAWS TO RAIL CARRIERS.

(a) MERGERS AND ACQUISITIONS.—The last undesignated paragraph of section 7 of the Clayton Act (15 U.S.C. 18) is amended by inserting "(excluding transactions involving a rail carrier as defined in section 10102 of title 49 of the United States Code)" after "Surface Transportation Board".

(b) VESTING OF AUTHORITY IN ANTITRUST AGENCIES.—Section 11(a) of the Clayton Act (15 U.S.C. 21(a)) is amended by inserting "(excluding a rail carrier as defined in section 10102 of such title)" after "Code".

(c) INJUNCTIONS.—The proviso in section 16 of the Clayton Act (15 U.S.C. 26) is amended by inserting ", except against a rail carrier (as defined in section 10102 of such title)" after "Code".

(d) FEDERAL TRADE COMMISSION AUTHORITY.—Section 5(a)(2) of the Federal Trade Commission Act (15 U.S.C. 45(a)(2)) is amended by adding at the end the following: "For purposes of this paragraph with respect to unfair methods of competition, the term 'common carriers' excludes a rail carrier as defined in section 10102 of title 49 of the United States Code.".

SEC. 3. TERMINATION OF ANTITRUST EXEMPTIONS IN TITLE 49.

(a) IN GENERAL.—Section 10706 of title 49, United States Code, is amended—

(1) in subsection (a)—

(A) beginning in the 3d sentence of paragraph (2)(A) by striking ", and the Sherman Act (15 U.S.C. 1, et seq.)," and all that follows through "However, the" and inserting ". The",

(B) in paragraph (3)(B)—

(i) by striking "(i)", and

(ii) by striking clause (ii),

(C) in paragraph (4)—

(i) by striking the 2d sentence, and

(ii) in the 3d sentence by striking "However, the" and inserting "The", and

(D) in paragraph (5)(A) by striking ", and the antitrust laws set forth in paragraph (2) of this subsection do not apply to parties and other persons with respect to making or carrying out the agreement",

(2) in subsection (d) by striking the last sentence, and

(3) by striking subsection (e) and inserting the following:

"(e) Nothing in this section exempts an agreement approved, or submitted for approval, under subsection (a) from the application of the antitrust laws (as defined in subsection (a) of the 1st section of the Clayton Act, but including section 5 of the Federal Trade Commission Act to the extent such section 5 applies to unfair methods of competition).

"(f) In reviewing any agreement submitted for approval under subsection (a), the Board shall take into account, among any other considerations, the impact of such agreement on shippers, consumers, and affected communities. The Board shall make findings regarding such impact, which shall be—

"(1) made part of the administrative record;

"(2) submitted to any other reviewing agency for consideration in making its determination; and

"(3) available in any judicial review of the Board's decision regarding such agreement.".

(b) COMBINATIONS.—Section 11321 of title 49, United States Code, is amended—

(1) in subsection (a)—

(A) by striking "The authority" and inserting "Subject to subsection (c), the authority", and

(B) in the 3d sentence by striking "is exempt from the antitrust laws and from all other law," and inserting "is exempt from all other law (except the laws referred to in subsection (c)),", and

(2) by adding at the end the following:

"(c) Nothing in this subchapter exempts a transaction described in subsection (a) from the application of the antitrust laws (as defined in subsection (a) of the 1st section of the Clayton Act, but including section 5 of the Federal Trade Commission Act to the extent such section 5 applies to unfair methods of competition). The pre-

ceding sentence shall not apply to any transaction relating to the pooling of railroad cars approved by the Surface Transportation Board or its predecessor agency pursuant to section 11322.

"(d) In reviewing any transaction described in subsection (a), the Board shall take into account, among any other considerations, the impact of the transaction on shippers and affected communities.".

(c) CONFORMING AMENDMENTS.—

(1) HEADING.—The heading for section 10706 of title 49, United States Code, is amended to read as follows: "**Rate agreements**".

(2) ANALYSIS OF SECTIONS.—The analysis of sections of chapter 107 of such title is amended by striking the item relating to section 10706 and insert the following:

"10706. Rate agreements.".

SEC. 4. CLARIFICATIONS REGARDING APPLICABILITY OF REGULATORY DOCTRINES.

(a) FILED RATE DOCTRINE.—The antitrust laws shall apply to a rail carrier (as defined in section 10102 of title 49 of the United States Code), without regard to whether such rail carrier filed a rate or whether a complaint challenging a rate is filed.

(b) DOCTRINE OF PRIMARY JURISDICTION.—In any civil action under the antitrust laws against a rail carrier (as defined in section 10102 of title 49 of the United States Code), the district court shall retain the discretion to defer to the jurisdiction of the Surface Transportation Board.

(c) DEFINITION.—For purposes of subsections (a) and (b), the term "antitrust laws" has the meaning given it in subsection (a) of the 1st section of the Clayton Act (15 U.S.C. 12(a)), but includes section 5 of the Federal Trade Commission Act to the extent such section 5 applies to unfair methods of competition.

SEC. 5. EFFECTIVE DATE.

(a) IN GENERAL.—Except as provided in subsections (b) and (c), this Act and the amendments made by this Act shall take effect on the date of enactment of this Act.

(b) LIMITATION.—No civil action under the antitrust laws may be filed with respect to any conduct or activity, including any agreement or provision thereof, that—

(1) concluded or terminated before the expiration of the 180-day period beginning on the date of the enactment of this Act, and

(2) was exempted by statute from the antitrust laws as the result of an order of the Interstate Commerce Commission or the Surface Transportation Board issued before the date of the enactment of this Act.

(c) EXCLUSION.—No civil action under the antitrust laws may be filed for the purpose of dissolving or otherwise undoing any merger, acquisition, or transfer of control consummated before the date of the enactment of this Act that was exempted by statute from the antitrust laws as the result of an order described in subsection (b)(2).

(d) DEFINITION.—For purposes of subsections (b) and (c), the term "antitrust laws" has the meaning given it in subsection (a) of the 1st section of the Clayton Act (15 U.S.C. 12(a)), but includes section 5 of the Federal Trade Commission Act (15 U.S.C. 45) to the extent such section 5 applies to unfair methods of competition.

PURPOSE AND SUMMARY

H.R. 233, the Railroad Antitrust Enforcement Act of 2009, will subject rail carrier industry practices to the pro-competitive influence of the antitrust laws by eliminating certain industry-specific statutory antitrust exemptions. These statutory exemptions are a holdover from a bygone period in which rail carriers were subject to extensive regulation. In the modern deregulated environment that commenced more than thirty years ago with the passage of the Railroad Revitalization and Regulatory Reform (4R) Act and the Staggers Rail Act, these holdover exemptions work primarily to subvert healthy free-market dynamics that would otherwise prevail in the industry.

H.R. 233 will apply to the rail carrier industry the remedies and enforcement mechanisms generally applicable to other industries under the Federal antitrust laws. Those harmed by antitrust violations committed by rail carriers will now be able to avail them-

selves of the rights and remedies available under the Federal antitrust laws. In addition, the Federal Trade Commission (FTC) and the Department of Justice (DOJ) (collectively, the Antitrust Agencies) and State attorneys general acting in *parens patriae* on behalf of their citizens will be able to enforce the Federal antitrust laws with respect to anticompetitive business practices and mergers and acquisitions in the rail carrier industry.

The bill is prospective in effect. Any merger or acquisition consummated prior to the date of the bill's enactment, or conduct occurring prior to that date and immunized at that time under an order by the Surface Transportation Board (STB) or its predecessor, the Interstate Commerce Commission, will not become subject to antitrust action as a result of the bill. Any merger or acquisition or conduct taking place after the bill's enactment will be subject to the bill's provisions.

There is an additional 180-day grace period for conduct that began pursuant to immunity under the previous law and that is continuing at the date of enactment. After the expiration of that 180-day period, that conduct, should it continue, will also become subject to the new law.

Except with respect to conferring antitrust immunity, H.R. 233 fully preserves the STB's regulatory authority. With respect to reviewing rail carrier mergers and acquisitions, the STB will retain its public interest authority, alongside the Antitrust Agencies' antitrust authority. The two reviews will be conducted concurrently yet separately.

H.R. 233 is not intended to create any inference that the railroads have been, or currently are, engaged in conduct that would violate the antitrust laws. No provision of the bill or other statement in this Report should be interpreted to suggest a contrary legislative intent. Those are legal determinations that the Committee intends to be made by the courts and the Antitrust Agencies.

BACKGROUND AND NEED FOR THE LEGISLATION

H.R. 233 would subject rail carrier industry practices to appropriate antitrust enforcement by removing the special Federal antitrust exemptions that currently apply in that industry. This completes a process begun nearly three decades ago, with the pro-competitive deregulation of the rail carrier industry. Absent the bill's corrective measures, the rail carrier industry can only partially achieve the pro-competitive benefits of deregulation.

BACKGROUND

In the 1920's, when the rail carrier industry was heavily regulated under the Interstate Commerce Act, Congress enacted a number of antitrust exemptions for activities in the industry that were regulated. Thirty years ago, following the enactment of the 4R Act and the Staggers Act, the industry was largely deregulated, giving rail carriers greater flexibility in setting their own rates. However, the industry's antitrust exemptions were left in place. As a result, the Antitrust Agencies remain severely restricted in their ability to enforce the antitrust laws in the rail carrier industry to protect competition and consumers.

The STB has exclusive authority to approve, and immunize, rail carrier mergers and acquisitions, as well as other joint conduct that alters the competitive landscape.[1] The Board evaluates mergers and acquisitions under a broad "public interest" standard, which differs markedly from the standard used by the Antitrust Agencies in performing an antitrust review. Because mergers subject to the STB's jurisdiction are expressly exempt from the FTC Act, the FTC has no authority to conduct antitrust review. The role of the Department of Justice is limited to submitting advisory comments to the STB for its consideration, which the STB is free to reject.

Private parties are likewise denied recourse to the antitrust laws for protection and redress. In addition to the remaining exemptions from the Interstate Commerce Act, a corollary provision inserted in Section 16 of the Clayton Act[2] when it was enacted in 1914 denies them the right to seek injunctive relief against rail carriers subject to the STB's jurisdiction, and the Keogh Doctrine[3] precludes them from recovering monetary damages.

Businesses that ship by rail believe that the antitrust exemptions have enabled rail carriers to engage in a number of anticompetitive practices. Some shippers believe that when they have no competing rail options—i.e., when they are "captive shippers"—the rail carriers charge unfairly inflated rates, which the shippers are left to recover from their customers in the form of higher prices. Shippers also complain that the rate appeal process at the STB favors the rail carriers.

Other rail carrier practices that shippers believe are anticompetitive and result in inflated rates include (1) entering into "paper barrier" contracts that unduly punish operators of connecting short-line tracks for doing business with competing carriers, and (2) using "bottleneck" segments of track, where one rail carrier has a monopoly, to eliminate competition on other portions of long-haul transportation routes passing through the bottleneck, by refusing to break long-haul quotes into separate segments. The Department of Justice indicated in a September 2004 letter that these practices could very well violate Federal antitrust laws.[4]

ANTITRUST ANALYSIS

H.R. 233 will enhance competition by enabling the Antitrust Agencies to enforce the antitrust laws in the rail carrier industry, and by enabling private parties to seek the relief and remedies ordinarily available under the antitrust laws.

Empowering Federal Agencies to Enforce Antitrust Laws

Enactment of this legislation would enable the Antitrust Agencies to enforce the antitrust laws in the rail carrier industry. Under current law, the STB evaluates rail carrier mergers and acquisitions under a broad public interest standard, outlined in 49 U.S.C.

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[1] STB-approved transactions under 49 U.S.C. § 11321–11328 (consolidations, mergers, acquisitions, some leases, trackage rights, pooling arrangements, and agreements to divide traffic) are exempt from antitrust enforcement. Certain rate- and charge-related agreements approved by the STB under 49 U.S.C. § 10706 are similarly exempt.

[2] 15 U.S.C. § 26.

[3] Keogh v. Chicago & Northwestern Railway, 260 U.S. 156 (1922); see Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409 (1986).

[4] Letter from Assistant Attorney General William E. Moschella to Rep. F. James Sensenbrenner, Jr. (September 27, 2004).

§ 11324. Unlike the antitrust standard, which is focused on preventing mergers and acquisitions that substantially lessen competition and result in restrictions on output or increases in price, the STB's public interest standard is more diffuse; competition concerns can be disregarded or overruled. 49 U.S.C. § 11321 provides that a rail carrier merger or acquisition approved or exempted by the STB is exempt from the antitrust laws. The FTC has no role whatsoever in rail mergers, and the Department of Justice can do no more than offer the STB a non-binding advisory evaluation.

Although section 11324(d)(2) requires the STB to "accord substantial weight to any recommendations of the Attorney General" when making its determination regarding a proposed rail carrier merger or acquisition, the STB remains free to ultimately disregard them. The STB's 1996 decision approving the Union Pacific/Southern Pacific merger over DOJ's vigorous objections, subsequently affirmed on appeal by the Eighth Circuit,[5] starkly demonstrates the limits of DOJ's current role under the antitrust laws. The STB ruled that its statutory mandate "sharply contrasts with the approach to mergers taken by the DOJ and the Federal Trade Commission. The policies embodied in the antitrust laws provide guidance, but are not determinative. . . . Thus the [STB] can . . . approve transactions even if they otherwise would violate the antitrust laws."

Enactment of this legislation would subject rail carriers to the same kind of concurrent oversight by both a Federal enforcement agency and a regulatory body found in other modern industries subject to regulation, including electricity transmission, the operation of liquid natural gas import terminals, and the transportation of oil and natural gas by interstate pipeline. The STB would maintain its public interest supervision, with antitrust oversight by the Antitrust Agencies operating alongside the regulatory authority.

Enhanced Ability of Shippers to Challenge Anticompetitive Rail Rates

H.R. 233 would also allow shippers to challenge other anticompetitive rail practices under the antitrust laws. Currently, so-called "captive" shippers who have only one rail carrier option are frequently charged higher rates, due to a lack of competition among rail carriers, and the ability of carriers to charge differential pricing under the Staggers Act. Although some of these rating practices might ordinarily violate the antitrust laws, neither shippers nor the Antitrust Agencies have any effective recourse to challenge them under existing law.

According to an October 2006 U.S. Government Accountability Office report, the volume of traffic traveling at significantly noncompetitive rates (defined as above 300% of variable cost) has increased since 1985.[6] The rates paid by these captive shippers are,

[5] Union Pac. Corp., S.T.B. 233, 1996 WL 467636 (August 12, 1996), petition for review denied, Western Coal Traffic League v. STB, 169 F. 3d 775 (1999), opinion clarified, Union Pac. Corp., 2002 WL 335181 (February 28, 2002).

[6] October 2006 United States Government Accountability Office Report to Congressional Requesters, "Freight Railroads: Industry Health Has Improved, but Concerns about Competition and Capacity Should Be Addressed," available at http://www.gao.gov/new.items/d0794.pdf. Because the total number of rail shippers has increased over the past twenty years, the percentage represented by captive shippers has decreased, but their actual number may not have.

on average, 20.9% higher, costing captive shippers an estimated excess of $1.3 billion on an annual basis.[7]

A May 2009 study by the Consumer Federation of America (CFA) found that captive shippers pay on average between 75 and 100 percent more than shippers in more competitive markets.[8] CFA estimates that the lack of competition costs captive shippers an additional $3 billion per year.[9]

Subjecting "Bottlenecks" to Antitrust Scrutiny

Enactment of this legislation would subject so-called "bottlenecks" to appropriate antitrust scrutiny. Bottlenecks are situations in which shippers have, for some segment of the shipping route, only a single rail line transportation option to a point of interconnection with other carriers. Oftentimes, the rail carrier operating the bottleneck will quote the shipper a single quote for the entire, or "long haul," route, and will refuse to offer the alternative of a separate price for the single-carrier portion of the route. This practice, upheld by the STB in a 1996 decision and affirmed by the Eighth Circuit,[10] denies captive shippers the benefits of competition on the other portions of the route where they are not otherwise captive.

Under current law, it is legal for rail carriers controlling bottleneck situations to use their monopoly power in the segment they control to extract the maximum profit possible from shippers who depend on that segment, and deny them compartmentalized rates. The higher cost borne by the shippers generally translates into higher costs for consumers for the goods being transported.

H.R. 233 would subject post-Enactment Date bottleneck pricing to the antitrust laws. In a 2004 letter to then-Chairman Sensenbrenner, the Department of Justice stated that "[i]f [bottlenecking] were subject to the antitrust laws, it could be evaluated as a refusal to deal in possible violation of Section 2 of the Sherman Act, or as a tying arrangement in possible violation of Section 1 of the Sherman Act." [11]

Subjecting "Paper Barriers" to Antitrust Scrutiny

Enactment of this legislation would also subject so-called "paper barriers" to appropriate antitrust scrutiny. "Paper barriers," also known as "interchange commitments," are a range of contractual obligations between smaller railways (so-called "short line" rail carriers) and the owners of the larger interstate (or "trunk line") railways off of which the short lines branch. Many of these contracts limit the short line rail carriers from doing meaningful business with any major rail carrier other than the one from which they leased or purchased their track.

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[7] Testimony of Curtis Grimm to the U.S. House of Representatives Committee on Transportation and Infrastructure, Subcommittee on Railroads (March 31, 2004).

[8] Hearing on H.R. 233, the Railroad Antitrust Enforcement Act of 2009, Before the Subcomm. on Courts and Competition Policy of the H. Comm. on the Judiciary, 111th Cong. 62 (2009) (statement of Dr. Mark N. Cooper, Consumer Federation of America).

[9] Id.

[10] See Central Power & Light Co. v. Southern Pacific Transportation Co., 1 S.T.B. 1059 (1996), clarified at 2 S.T.B. 235 (1997), aff'd sub nom. MidAmerican Energy Co. v. STB, 169 F.3d 1099 (8th Cir. 1999). The Eighth Circuit's review was limited to determining whether there were compelling indications that the Board's interpretations of the applicable statutes were not correct. 169 F.3d at 1106.

[11] Letter from Assistant Attorney General William Moschella to Hon. F. James Sensenbrenner, Jr. (September 27, 2004).

The terms of these leases can be anticompetitive. The rent due on the track leases typically decreases markedly with increasing volumes of traffic sent to the trunk line. This has the effect of substantially lessening the competitive presence of other railways that connect to the short line, and effectively eliminating the competitive options available to shippers using the short line.

H.R. 233 would subject post-Enactment Date enforcement of paper barriers to the antitrust laws. In its 2004 letter to then-Chairman Sensenbrenner, DOJ stated that "[i]f paper barriers were subject to the antitrust laws, they would be evaluated under section 1 of the Sherman Act. The Department would examine whether the restraint is ancillary to the sale of the trackage—i.e., whether the restraint is reasonably necessary to achieve the procompetitive benefits of the sale." [12]

Effectuating the Recommendations of Antitrust Experts

H.R. 233 is consistent with the recommendations of the Antitrust Modernization Commission established by Congress to assess and make recommendations regarding antitrust issues. The Commission concluded that "[s]tatutory exemptions from the antitrust laws undermine, rather than upgrade, the competitiveness and efficiency of the U.S. economy" in that they "reduce the competitiveness of the industries that have sought antitrust exemptions." [13] The Commission observed that "antitrust exemptions create economic benefits that flow to small . . . groups, while the costs . . . are . . . usually passed to a large population of consumers through higher prices, reduced output, lower quality, and reduced innovation." [14]

Shippers forced to pay anticompetitively high rates for rail transportation would naturally pass along the additional costs in the form of higher retail prices for the goods being shipped, such as household items and food products. When the goods being shipped are for use in providing another product or service, higher shipping costs would similarly be passed along; for example, higher shipping costs for coal used in electric power generation would result in higher electricity rates. Passage of H.R. 233 would open industry practices to scrutiny by the Antitrust Agencies, which could lead to more competitive rates for shippers and, ultimately, lower prices for end consumers.

The Section of Antitrust Law of the American Bar Association (Antitrust Section) has endorsed this legislation, stating that it supports the removal of the industry's exemptions, thereby "completing the industry's transition to competition." [15] The Antitrust Section observed that "[a]ntitrust exemptions for the railroad industry . . . do not appear to be justified by any non-competition related value" and appear to be little more than "naked economic protectionism." [16]

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[12] Id.

[13] Antitrust Modernization Commission, Report and Recommendations 335 (April 2007).

[14] Id.

[15] Hearing on H.R. 233, the Railroad Antitrust Enforcement Act of 2009, Before the Subcomm. on Courts and Competition Policy of the H. Comm. on the Judiciary, 111th Cong. 3 (2009) (statement of M. Howard Morse, Chair, Exemptions and Immunities Committee, ABA Section of Antitrust Law).

[16] Id.

HEARINGS

The Committee on the Judiciary's Task Force on Antitrust and Competition Policy held a hearing on February 25, 2008, on H.R. 1650 (the predecessor bill in the 110th Congress). Testimony was received from Representative Tammy Baldwin (D-WI); Susan M. Diehl, Senior Vice President for Logistics and Supply Chain Management, Holcim, Inc.; Terry Huval, Director of Utilities, Lafayette Utilities System (Lafayette, Louisiana) and Chairman, American Public Power Association; G. Paul Moates, Partner, Sidley Austin LLP, on behalf of Association of American Railroads; and Dr. Darren Bush, Associate Professor of Law, University of Houston Law Center (Houston, Texas).

The Subcommittee on Courts and Competition Policy held a hearing on May 19, 2009, on H.R. 233. Testimony was received from Representative Rodney Alexander (R-LA); M. Howard Morse, Chair, Exemptions and Immunities Committee, American Bar Association Section of Antitrust Law; J. Michael Hemmer, Vice Chairman, Policy and Advocacy Committee, Association of American Railroads; Terry Huval, Director of Utilities, Lafayette Utilities System (Lafayette, Louisiana) and Chairman, American Public Power Association; and Dr. Mark N. Cooper, Director of Research, Consumer Federation of America.

COMMITTEE CONSIDERATION

On July 30, 2009, the Subcommittee on Courts and Competition Policy met in open session and ordered the bill H.R. 233 favorably reported, with an amendment in the nature of a substitute, by voice vote, a quorum being present. On September 16, 2009, the Committee met in open session and ordered the bill H.R. 233 favorably reported with an amendment, by voice vote, a quorum being present.

COMMITTEE VOTES

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that there were no recorded votes during the Committee's consideration of H.R. 233.

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 233, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, October 6, 2009.

Hon. JOHN CONYERS, Jr., *Chairman,*
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 233, the Railroad Antitrust Enforcement Act of 2009.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Mark Grabowicz, who can be reached at 226–2860.

Sincerely,

DOUGLAS W. ELMENDORF,
DIRECTOR.

Enclosure

cc: Honorable Lamar S. Smith.
Ranking Member

H.R. 233—Railroad Antitrust Enforcement Act of 2009.

H.R. 233 would expand the authority of the Department of Justice (DOJ) and the Federal Trade Commission (FTC) to prosecute, under the Sherman and Clayton Acts, certain antitrust violations relating to railroads. Currently, the Surface Transportation Board (STB) has the primary authority to regulate mergers, acquisitions, rate-setting, and pooling arrangements under the Interstate Commerce Act. The roles of DOJ and FTC are generally limited to investigating potential violations and providing advice to the STB.

Based on information provided by DOJ, CBO estimates that implementing H.R. 233 would have no significant effect on the Federal budget. We expect that DOJ would continue to perform investigations of railroads (investigations under current law are similar to those that would be performed under the bill) and that few of those investigations would result in enforcement actions. Accordingly, CBO expects that DOJ's workload would not increase substantially under the bill. CBO also expects that DOJ, rather than FTC, would handle antitrust enforcement matters specified under the bill; thus, we do not anticipate that FTC would incur significant additional enforcement costs.

Anyone convicted of antitrust violations specified in the bill would be subject to criminal fines, which are recorded as revenues, deposited in the Crime Victims Fund, and later spent. Thus, enacting H.R. 233 could increase revenues and direct spending, but CBO estimate that any such effects would be insignificant given the small number of cases that would likely be affected.

H.R. 233 contains no intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on State, local, or tribal governments.

H.R. 233 would impose a private-sector mandate, as defined in UMRA, on railroads because it would eliminate their exemptions from certain antitrust laws. It is unclear how making railroads subject to the standards of those antitrust statutes would affect current business practices, if at all. The extent to which railroad carriers would have to forgo business opportunities and what the value of those lost opportunities would be are also uncertain. Because of those uncertainties, CBO has no basis for estimating the cost to railroad carriers or whether that cost would exceed the annual threshold established in UMRA for private-sector mandates ($139 million in 2009, adjusted annually for inflation).

On March 12, 2009, CBO transmitted a cost estimate for S. 146, the Railroad Antitrust Enforcement Act of 2009, as ordered reported by the Senate Committee on the Judiciary on March 5, 2009. The two bills are similar, and the cost estimates are identical.

The CBO staff contact for this estimate is Mark Grabowicz. The estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

PERFORMANCE GOALS AND OBJECTIVES

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 233 will bring the pro-competitive benefits of the antitrust laws into the rail carrier industry by eliminating certain antitrust exemptions from current law.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee finds the authority for this legislation in article I, section 8, clause 3 of the Constitution.

ADVISORY ON EARMARKS

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 233 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(e), 9(f), or 9(g) of Rule XXI.

SECTION-BY-SECTION ANALYSIS

The following discussion describes the bill as reported by the Committee.

Sec. 1. Short title. Section 1 sets forth the short title of the bill as the "Railroad Antitrust Enforcement Act of 2009."

Sec. 2. Application of the Antitrust Laws to Rail Common Carriers. Section 2 of the bill applies the antitrust laws to the railroad industry by eliminating industry-specific antitrust exemptions. Section 2(a) of the bill modifies Section 7 of the Clayton Act to empower the Antitrust Agencies to enforce the Federal antitrust laws against mergers and acquisitions involving rail carriers. Section 7 of the Clayton Act prohibits mergers and acquisitions that are like-

ly to substantially lessen competition. The sixth undesignated paragraph of Section 7 currently exempts "transactions duly consummated pursuant to the authority" of specified agencies, including the STB. Section 2(a) of the bill removes that exemption with respect to transactions involving rail carriers.

Section 2(b) of the bill modifies section 11(a) of the Clayton Act to extend ordinary application of other antitrust provisions to rail carriers. Section 11(a) of the Clayton Act currently vests enforcement authority for sections 2, 3, 7, and 8 of the Clayton Act (prohibiting anticompetitive price discrimination, anticompetitive exclusive dealing requirements, anticompetitive mergers, and anticompetitive interlocking directorates, respectively) in the STB with respect to common carriers subject to its jurisdiction, instead of in the Antitrust Agencies, where it would ordinarily be vested. Section 2(b) of the bill removes rail carriers from that provision, so that the enforcement authority for those sections is vested in the Antitrust Agencies.

Section 2(c) of the bill modifies section 16 of the Clayton Act to remove the prohibition on private parties seeking injunctive relief against a rail carrier for a violation of the antitrust laws. Section 16 of the Clayton Act permits private parties threatened with loss or damage by a violation of the antitrust laws to sue for injunctive relief. Under current law, section 16 exempts common carriers subject to the jurisdiction of the STB from suit for injunctive relief by anyone except the United States. Section 2(c) of the bill removes this exemption with respect to rail carriers, so that private parties can seek injunctive relief where appropriate as in other industries.

Section 2(d) of the bill removes the rail carrier exemption from the prohibition in section 5 of the FTC Act against unfair methods of competition, the source of the FTC's antitrust enforcement authority. Section 5(a)(2) of the FTC Act excludes certain industries, including "common carriers subject to the Act to regulate commerce." Section 2(d) of the bill adds a sentence to section 5(a)(2) of the FTC Act that removes rail carriers from this exclusion.

Sec. 3. Termination of Antitrust Exemptions in Title 49. Section 3 of the bill removes rail carrier antitrust exemptions currently in title 49 of the United States Code. Section 3(a)(1) removes exemptions pertaining to STB-approved rate agreements;[17] agreements for "compilation, publication, and other distribution of rates in effect or to become effective;"[18] and STB-approved discussions among shippers regarding compensation to be paid by rail carriers for the use of rolling stock owned or leased by the shippers.[19]

Section 3(a)(2) of the bill removes a sentence in 49 U.S.C. § 10706(d) pertaining to the effect of STB actions on the antitrust laws.

Section 3(a)(3) of the bill revises 49 U.S.C. § 10706(e), removing a requirement that the Antitrust Agencies provide the STB with a competitive assessment of the rate and other agreements currently exempted from the antitrust laws under 49 U.S.C. § 10706(a), and adding in its place a provision clarifying that the antitrust laws apply to those agreements. It also adds a new 49 U.S.C. § 10706(f), requiring the STB to make findings regarding the impact of any

[17] 49 U.S.C. § 10706(a)(2)(A).
[18] 49 U.S.C. § 10706(a)(4).
[19] 49 U.S.C. § 10706(a)(5)(A).

such agreement it is reviewing on shippers, consumers, and affected communities.

Section 3(b)(1) of the bill removes the antitrust exemption in 49 U.S.C. § 11321(a) for Board-approved or -exempted mergers, acquisitions, and related agreements. Section 3(b)(2) of the bill adds a new 49 U.S.C. § 11321(c) that clarifies that the antitrust laws apply to them, except for STB-approved pooling agreements under 49 U.S.C. § 11322, for which the current exemption is preserved. Section 3(b)(2) of the bill also creates a new 49 U.S.C. § 11321(d) that requires the STB to take into account the impact of any rail merger or acquisition on shippers and affected communities.

Sec. 4. Clarifications Regarding Applicability of Regulatory Doctrines. Section 4 of the bill clarifies the applicability of two judicial doctrines to disputes involving rail carriers, the filed rate doctrine (Keogh Doctrine) and the primary jurisdiction doctrine.

Section 4(a) of the bill overturns the filed rate doctrine with respect to rail carriers. This judicial doctrine, created by the Supreme Court[20] during the era of pervasive regulation of the rail carrier industry, precludes recovery of damages in a civil antitrust suit where the rail carrier has filed a rate. Section 4(a) of the bill will allow recovery of antitrust damages regardless of whether the rail carrier has filed a rate.

Section 4(b) of the bill clarifies that in a civil antitrust action brought against a rail carrier, the district court may, but is not required to, defer to the primary jurisdiction of the STB as to issues within the STB's authority.

Section 4(c) of the bill defines the term "antitrust laws" in the customary manner.

Sec. 5. Effective Date. Section 5 of the bill sets forth effective dates. Section 5(a) provides that generally the bill and its amendments take effect on the date of enactment. Section 5(b) specifies that conduct that was exempted under the antitrust laws as the result of approval under an STB order issued before the date of enactment, and occurring before that date or within a 180-day grace period following enactment, would not be subject to civil action under the antitrust laws. Section 5(c) specifies that a merger or acquisition consummated before the date of enactment and exempted from the antitrust laws as the result of approval under an order issued by the STB before the date of enactment would not be subject to civil action to retroactively dissolve or otherwise undo it.

Mergers and acquisitions that take place after the bill's enactment will be subject to the antitrust laws, as will conduct that takes place after the bill's enactment, subject to the 180-day grace period for previously approved conduct.

Subsection (d) defines the term "antitrust laws" for purposes of the effective date provisions, again in the customary manner.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, existing law in which no change is proposed is shown in roman):

[20] Keogh v. Chicago & Northwestern Railway, 260 U.S. 156 (1922).

CLAYTON ACT

* * * * * * *

SEC. 7. That no person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

No person shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more persons engaged in commerce or in any activity affecting commerce, where in any line of commerce, or in any activity affecting commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

This section shall not apply to persons purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce or in any activity affecting commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: *Provided,* That nothing in this section shall be held or construed to authorize or made lawful anything heretofore prohibited or made illegal by the antitrust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided.

Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Secretary of Transportation, Federal Power Commission, Surface Transportation Board *(excluding transactions involving a rail carrier as defined in section 10102 of title 49 of the United States Code)*, the Securities and Exchange Commission in the exercise of its jurisdiction under section 10 of the Public Utility Holding Company Act of 1935, the United States Maritime Commission, or the Secretary of Agriculture under any statutory provision vesting such power in such Commission, Board, or Secretary.

* * * * * * *

SEC. 11. (a) That authority to enforce compliance with sections 2, 3, 7, and 8 of this Act by the persons respectively subject thereto is hereby vested in the Surface Transportation Board where applicable to common carriers subject to jurisdiction under subtitle IV of title 49, United States Code *(excluding a rail carrier as defined in section 10102 of such title)*; in the Federal Communications Commission where applicable to common carriers engaged in wire or radio communication or radio transmission of energy; in the Secretary of Transportation where applicable to air carriers and foreign air carriers subject to the Federal Aviation Act of 1958; in the Federal Reserve Board where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce to be exercised as follows:

* * * * * * *

SEC. 16. That any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections two, three, seven and eight of this Act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided,* That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit for injunctive relief against any common carrier subject to the jurisdiction of the Surface Transportation Board under subtitle IV of title 49, United States Code*, except against a rail carrier (as defined in section 10102 of such title)*. In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff.

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FEDERAL TRADE COMMISSION ACT

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SEC. 5. (a)(1) * * *

(2) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, savings and loan institutions described in section 18(f)(3), Federal credit unions described in section 18(f)(4), common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Federal Aviation Act of 1958, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended, except as provided in section 406(b) of said Act, from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce. *For purposes of this paragraph with respect to unfair methods of competition, the term "common carriers" excludes a rail carrier as defined in section 10102 of title 49 of the United States Code.*

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TITLE 49, UNITED STATES CODE

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Subtitle IV—Interstate Transportation

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PART A—RAIL

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CHAPTER 107—RATES

Sec.
10701. Standards for rates, classifications, through routes, rules, and practices.
* * * * * * *
[10706. Rate agreements: exemption from antitrust laws.**]**
10706. Rate agreements.
* * * * * * *

SUBCHAPTER I—GENERAL AUTHORITY

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§ 10706. [Rate agreements: exemption from antitrust laws] *Rate agreements*

(a)(1) * * *

(2)(A) A rail carrier providing transportation subject to the jurisdiction of the Board under this part that is a party to an agreement of at least 2 rail carriers that relates to rates (including charges between rail carriers and compensation paid or received for the use of facilities and equipment), classifications, divisions, or rules related to them, or procedures for joint consideration, initiation, publication, or establishment of them, shall apply to the Board for approval of that agreement under this subsection. The Board shall approve the agreement only when it finds that the making and carrying out of the agreement will further the transportation policy of section 10101 of this title and may require com-

pliance with conditions necessary to make the agreement further that policy as a condition of its approval. If the Board approves the agreement, it may be made and carried out under its terms and under the conditions required by the Board[, and the Sherman Act (15 U.S.C. 1, et seq.), the Clayton Act (15 U.S.C. 12, et seq.), the Federal Trade Commission Act (15 U.S.C. 41, et seq.), sections 73 and 74 of the Wilson Tariff Act (15 U.S.C. 8 and 9), and the Act of June 19, 1936 (15 U.S.C. 13, 13a, 13b, 21a) do not apply to parties and other persons with respect to making or carrying out the agreement. However, the]. *The* Board may not approve or continue approval of an agreement when the conditions required by it are not met or if it does not receive a verified statement under subparagraph (B) of this paragraph.

* * * * * * *

(3)(A) * * *

(B)[(i)] In any proceeding in which a party alleges that a rail carrier voted or agreed on a rate or allowance in violation of this subsection, that party has the burden of showing that the vote or agreement occurred. A showing of parallel behavior does not satisfy that burden by itself.

[(ii) In any proceeding in which it is alleged that a carrier was a party to an agreement, conspiracy, or combination in violation of a Federal law cited in subsection (a)(2)(A) of this section or of any similar State law, proof of an agreement, conspiracy, or combination may not be inferred from evidence that two or more rail carriers acted together with respect to an interline rate or related matter and that a party to such action took similar action with respect to a rate or related matter on another route or traffic. In any proceeding in which such a violation is alleged, evidence of a discussion or agreement between or among such rail carrier and one or more other rail carriers, or of any rate or other action resulting from such discussion or agreement, shall not be admissible if the discussion or agreement—

[(I) was in accordance with an agreement approved under paragraph (2) of this subsection; or

[(II) concerned an interline movement of the rail carrier, and the discussion or agreement would not, considered by itself, violate the laws referred to in the first sentence of this clause.

In any proceeding before a jury, the court shall determine whether the requirements of subclause (I) or (II) are satisfied before allowing the introduction of any such evidence.]

* * * * * * *

(4) Notwithstanding any other provision of this subsection, one or more rail carriers may enter into an agreement, without obtaining prior Board approval, that provides solely for compilation, publication, and other distribution of rates in effect or to become effective. [The Sherman Act (15 U.S.C. 1 et seq.), the Clayton Act (15 U.S.C. 12 et seq.), the Federal Trade Commission Act (15 U.S.C. 41 et seq.), sections 73 and 74 of the Wilson Tariff Act (15 U.S.C. 8 and 9), and the Act of June 19, 1936 (15 U.S.C. 13, 13a, 13b, 21a) shall not apply to parties and other persons with respect to making or carrying out such agreement. However, the] *The* Board may, upon application or on its own initiative, investigate whether the parties to such an agreement have exceeded its scope, and upon a finding

that they have, the Board may issue such orders as are necessary, including an order dissolving the agreement, to ensure that actions taken pursuant to the agreement are limited as provided in this paragraph.

(5)(A) Whenever two or more shippers enter into an agreement to discuss among themselves that relates to the amount of compensation such shippers propose to be paid by rail carriers providing transportation subject to the jurisdiction of the Board under this part, for use by such rail carriers of rolling stock owned or leased by such shippers, the shippers shall apply to the Board for approval of that agreement under this paragraph. The Board shall approve the agreement only when it finds that the making and carrying out of the agreement will further the transportation policy set forth in section 10101 of this title and may require compliance with conditions necessary to make the agreement further that policy as a condition of approval. If the Board approves the agreement, it may be made and carried out under its terms and under the terms required by the Board[, and the antitrust laws set forth in paragraph (2) of this subsection do not apply to parties and other persons with respect to making or carrying out the agreement]. The Board shall approve or disapprove an agreement under this paragraph within one year after the date application for approval of such agreement is made.

* * * * * * *

(d) The Board may begin a proceeding under this section on its own initiative or on application. [Action of the Board under this section—

[(1) approving an agreement;

[(2) denying, ending, or changing approval;

[(3) prescribing the conditions on which approval is granted; or

[(4) changing those conditions,

has effect only as related to application of the antitrust laws referred to in subsection (a) of this section.]

[(e)(1) The Federal Trade Commission, in consultation with the Antitrust Division of the Department of Justice, shall prepare periodically an assessment of, and shall report to the Board on—

[(A) possible anticompetitive features of—

[(i) agreements approved or submitted for approval under subsection (a) of this section; and

[(ii) an organization operating under those agreements; and

[(B) possible ways to alleviate or end an anticompetitive feature, effect, or aspect in a manner that will further the goals of this part and of the transportation policy of section 10101 of this title.

[(2) Reports received by the Board under this subsection shall be published and made available to the public under section 552(a) of title 5.]

(e) Nothing in this section exempts an agreement approved, or submitted for approval, under subsection (a) from the application of the antitrust laws (as defined in subsection (a) of the 1st section of the Clayton Act, but including section 5 of the Federal Trade Commission Act to the extent such section 5 applies to unfair methods of competition).

(f) In reviewing any agreement submitted for approval under subsection (a), the Board shall take into account, among any other considerations, the impact of such agreement on shippers, consumers, and affected communities. The Board shall make findings regarding such impact, which shall be—

(1) made part of the administrative record;

(2) submitted to any other reviewing agency for consideration in making its determination; and

(3) available in any judicial review of the Board's decision regarding such agreement.

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CHAPTER 113—FINANCE

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SUBCHAPTER II—COMBINATIONS

§ 11321. Scope of authority

(a) **[**The authority**]** *Subject to subsection (c), the authority* of the Board under this subchapter is exclusive. A rail carrier or corporation participating in or resulting from a transaction approved by or exempted by the Board under this subchapter may carry out the transaction, own and operate property, and exercise control or franchises acquired through the transaction without the approval of a State authority. A rail carrier, corporation, or person participating in that approved or exempted transaction **[**is exempt from the antitrust laws and from all other law,**]** *is exempt from all other law (except the laws referred to in subsection (c)),* including State and municipal law, as necessary to let that rail carrier, corporation, or person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction. However, if a purchase and sale, a lease, or a corporate consolidation or merger is involved in the transaction, the carrier or corporation may carry out the transaction only with the assent of a majority, or the number required under applicable State law, of the votes of the holders of the capital stock of that corporation entitled to vote. The vote must occur at a regular meeting, or special meeting called for that purpose, of those stockholders and the notice of the meeting must indicate its purpose.

* * * * * * *

(c) Nothing in this subchapter exempts a transaction described in subsection (a) from the application of the antitrust laws (as defined in subsection (a) of the 1st section of the Clayton Act, but including section 5 of the Federal Trade Commission Act to the extent such section 5 applies to unfair methods of competition). The preceding sentence shall not apply to any transaction relating to the pooling of railroad cars approved by the Surface Transportation Board or its predecessor agency pursuant to section 11322.

(d) In reviewing any transaction described in subsection (a), the Board shall take into account, among any other considerations, the impact of the transaction on shippers and affected communities.

ADDITIONAL VIEWS

The bill that the Judiciary Committee reported out of Committee on September 16, 2009 marks a significant improvement over previous efforts to repeal the Federal antitrust exemptions for rail carriers. The concerns of the shipping community are real. Rising costs mean that when their existing long-term contracts for the shipment of coal expire, for example, some power companies will face drastically higher rates from the railroads.

To that end, the elimination of some antitrust exemptions for the railroad industry, such as subjecting mergers in the industry to review by the Antitrust Division of the Department of Justice, is justified. However, when eliminating Federal antitrust exemptions, Congress should be careful about the unintended consequences of its actions. The railroads have spent significant capital on business plans that are based, in part, on these existing exemptions. Removal of the exemptions may lead to reductions in service, which would harm not only the railroads, but also the shippers, and the American economy as a whole.

Accordingly, while the elimination of antitrust exemptions may help shippers, there remain issues with this legislation that must be addressed before we can fully support it. Primarily, those concerns are:

(1) Ensuring that the legislation does not create a presumption of illegality with respect to railroad conduct.

(2) Appropriately limiting the remedies available to shippers so that rail traffic is not unduly burdened. For example, the shippers' ability to seek injunctive relief throughout the country could lead to conflicting judgments in adjoining jurisdictions.

(3) Restoring the procedural protections relating to joint rate quotes.

(4) Finding the appropriate balance between the need to protect the railroads' investment backed interests and the necessity of opening up some of the railroads' most concerning practices to antitrust challenge. The railroads, understandably, feel that all previously immunized transactions should remain immunized. The shippers, equally understandably, feel that they should be able to challenge those very transactions.

It is this last concern that makes passage of this legislation most problematic. There is no easy solution to this problem, but both sides should remain at the negotiating table and be willing to make concessions. The American people and our economy deserve no less.

Finally, it has been clear from the Judiciary Committee's hearings on this issue that one of the primary concerns of the shippers is the lack of what they view as an effective regulatory body. While Surface Transportation Board reform remains the province of other committees, it is clear to us that passage of this bill, alone, will do very little to improve the shippers' situation.

While significant progress has been made on this legislation in the last year, the bill as reported must change before we are able to support it without reservation. We are encouraged by the discus-

sions that we have had with the railroads and with the shipping community and remain hopeful that there are compromises possible that will garner our support and result in the bill becoming law.

LAMAR SMITH.
BOB GOODLATTE.

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