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November 1, 2007

By Fax and Post

Senator Herb Kohl
Chairman, Subcommittee on Antitrust,
Competition Policy and Consumers Rights
Senate Judiciary Committee
United States Senate
Washington, D.C. 20510-4903

Re: Responses to Questions re Railroad Antitrust Enforcement Act of 2007

Dear Senator Kohl:

Enclosed with this letter are my responses on behalf of the Association of American Railroads ("AAR") to the written questions from you and other Committee members regarding my testimony during the October 3, 2007 hearing which you Chaired regarding "An Examination of S. 772, the Railroad Antitrust Enforcement Act".

Thank you for the opportunity to appear and to testify on behalf of AAR. If you have any further questions, I would be pleased to respond to them.

Sincerely,

Paul Moates

G. Paul Moates

Enclosure

Follow-Up Questions for Hearing on
An Examination of S. 772, the Railroad Antitrust Enforcement Act
Paul Moates

From Senator Kohl

1. a) The Antitrust Modernization Commission's April 2007 Report stated:

Statutory immunities from the antitrust laws should be disfavored. They should be granted rarely, and only where . . . [the immunity] is necessary to satisfy a specific societal goal that trumps the benefit of a free market to consumers and the U.S. economy in general.

Do you agree with this principle? If so, please specify the "societal goal" warranting an antitrust exemption that "trumps the benefit of a free market" in the railroad industry?

AAR Response

We agree that antitrust immunities should be rarely enacted and only when they promote specific beneficial goals that might not otherwise be achieved in their absence. Those conditions are satisfied with respect to the limited antitrust immunities that apply to the railroad industry. As explained more fully in the Association of American Railroads' (AAR) written testimony, the railroad antitrust immunities are in place to advance the societal goals embodied in the national rail transportation policy established by Congress and currently set forth at 49 U.S.C. § 10101. This policy, which has evolved (along with the antitrust immunities) for over a century, is intended to promote a viable and efficient rail transportation network. Inasmuch as railroads are not immunized from antitrust challenge to such matters as price fixing, market allocations and group boycotts, the limited immunities facilitate Congressional policy goals but do not serve to hinder generally the effective operation of the free market in the railroad industry.

From Senator Kohl

b) On October 3, 2007 the Federal Trade Commission sent us a letter regarding S. 772 explaining that they were against antitrust exemptions in general, citing to their "long standing view that antitrust exemptions should bear a heavy burden of demonstrating, with factually-supported reasons, the need for a departure from the nation's competitive model." Likewise, in 2004, the Justice Department wrote a similar letter to the Congressman Sensenbrenner regarding the appropriateness of the railroad antitrust exemption stating "such exemptions can be justified only in rare instances, when the fundamental free-market values underlying the antitrust laws are compellingly outweighed by a clearly paramount and clearly incompatible public policy objective. Shouldn't the fact that the nation's antitrust enforcement agencies oppose antitrust exemptions like this one carry great weight with us?

AAR Response

Concern over antitrust exemptions as a general matter by the Federal Trade Commission (FTC) and the Department of Justice (DOJ) certainly should not preclude maintaining limited exemptions that are tailored to serve specific beneficial purposes. It should be noted that neither the FTC nor DOJ specifically stated in their letters that all of the railroads' antitrust exemptions should be eliminated.

From Senator Kohl

2. Do you agree with the recommendation of the Antitrust Modernization Commission, that "even in industries subject to economic regulation, the antitrust agencies generally should have full merger enforcement authority under the Clayton Act"? If so, why shouldn't the Justice Department have the right to independently go to court to block mergers it judges to be anti-competitive under the Clayton Act?

AAR Response

Failure to adhere to the Antitrust Modernization Commission's (AMC) recommendation, which is made as a general proposition, does not necessarily result in all cases in a diminution of competition. The AMC acknowledged that regulatory agencies with relevant expertise in a specific industry play an important role in merger review in those industries. When considering merger enforcement policy, the relevant factors as they relate to each regulated industry must be considered on a case-by-case basis. The AMC noted that mergers in the banking industry are handled differently from mergers in the telecommunications and electric industries. AMC also noted that dual merger review can impose "significant and duplicative costs." Given the continued importance of promoting the national rail transportation policy, and the heightened emphasis that the Surface Transportation Board puts on competitive issues when reviewing rail mergers (as more fully described in the AAR's testimony, pp. 11-12), no change in the current STB merger review process (including the significant input received from DOJ to ensure sufficient consideration is given to antitrust principles) is warranted.

From Senator Kohl

3. a) Why should the railroad industry be treated differently than a competing transportation industry like aviation, which possesses no antitrust exemption?

AAR Response

When evaluating the appropriateness of a particular antitrust immunity, each industry must be considered on a case-by-case basis, with due consideration given to the nature and structure of the industry, the host of federal policies which apply to the industry, and whether the existence of an antitrust immunity creates a gap whereby market conduct is not subject to government oversight. The fact that two industries might not be treated in an identical way from a regulatory or antitrust perspective does not necessarily mean that a problem exists with respect to either industry's regulatory or antitrust oversight. For example, the economics of the railroad and aviation industries differ in significant regards, including the relative impact of fixed and variable costs and the publicly-funded and publicly-operated nature of many airports and the national air traffic control system. In addition, there are limited antitrust immunities that apply to the aviation industry (49 U.S.C. §§41308-09, 42111) which do not apply to railroads.

From Senator Kohl

b) The railroad industry argues that the pervasive nature of regulation by the STB makes full application of antitrust law unwarranted. But why should railroads be treated any differently than the telecommunications industry, which is subject to pervasive regulation by the FCC yet is fully subject to antitrust law and enforcement by the Justice Department and private parties, including Justice Department actions to enjoin anti-competitive mergers under the Clayton Act?

AAR Response

As indicated in the response to part (a) of this question: the fact that two industries might not be treated in an identical way does not necessarily mean that a problem exists with respect to the regulatory or antitrust oversight of either industry. As explained in the AAR's testimony, the interdependence among rail carriers which, of necessity, interchange freight and equipment constantly, makes the rail network unique in certain respects. While that does not mean current antitrust laws should be ignored, it also does not mean that somewhat different approaches to antitrust enforcement in the rail and telecommunications industries are not warranted.

4. You testified on behalf of the Association of American Railroads (AAR). You argued that the railroad industry is subject to extensive regulation by the STB, and therefore should be immune from antitrust law. Yet, your association's public position appears to be to the contrary. On the AAR website appears a prominent advertisement arguing against "re-regulating" the railroad industry, implying that the industry is currently not subject to regulation. This advertisement states "Freight rail works. Re-regulation doesn't. In 1980, Washington got out of the freight rail business." This advertisement has appeared in Roll Call, among other publications.

Why does the rail industry claim one thing about regulation when testifying before our Subcommittee and another in its public advertisements? Did regulation end in 1980 or not?

AAR Response

I not only did not argue on AAR's behalf that the railroad industry is immune from antitrust law, but in fact stated that citing such a claim as the premise for this legislation (as several of the other witnesses did) is flatly incorrect. Moreover, the AAR's position with respect to regulation of the rail industry is entirely consistent. For nearly a century, the rail industry was pervasively regulated. In 1980, Congress recognized the adverse and crippling effects that that regulation had on the industry and *partially* deregulated the industry through the Staggers Act. That legislation has been remarkably effective in restoring health and vitality to the industry. (See the AAR's testimony pp. 3-4.) However, the rail industry is far being entirely free of regulation, and AAR has never stated otherwise. Today, the STB retains jurisdiction over rail service, market entry and a wide range of rate-related conduct, including the level and structure of rates where there is no effective competition. Some shipper interests are seeking legislation that would re-regulate the rail industry by essentially returning the industry to the pre-Staggers Act days of pervasive regulation, a result that would be to the great detriment of both the railroads and their customers. The AAR strongly opposes those efforts and will continue to do so.

From Senator Kohl

5. In August 2006 the Attorneys General of 17 states and the District of Columbia wrote to the Senate and House Judiciary Committees in support of our legislation to repeal the railroad antitrust exemption. The letter stated that "rail customers in our states in a variety of industries are suffering from the classic symptoms of unrestrained monopoly power: unreasonably high and arbitrary rates and poor service."

What is your response? Are the Attorneys General of 17 states and the District of Columbia misinformed?

AAR Response

To the extent that the letter signed by a minority of States Attorney Generals supporting S.772 suggests that rate and service problems allegedly suffered by some shippers in their states will be remedied by S.772, the AAR respectfully suggests that the predicate is inaccurate. High rates in themselves are not an antitrust violation (nor is poor service), and railroads are not immune from suits challenging illegal price-fixing conspiracies. And we are constrained to point out that when the three shipper witnesses (Messrs. Berg, Vander Schaaf and Szabo) were asked at the October 3, 2007 hearing how S.772 would relieve the problems they claimed to be having with railroads, they could not provide a substantive answer.

From Senator Specter

In your testimony, you state that "[t]he statutory antitrust exemptions that remain exist to avoid dual and potentially conflicting regulation by the courts and the STB."

i. In most cases, however, the doctrine of implied immunity would resolve any potential conflict between STB regulation and the antitrust laws in favor of the regulation, correct?

ii. With that said, are you concerned that the language of S. 772 could prohibit operation of the doctrine of implied immunity and require that STB regulation give way to the antitrust laws?

AAR Response

The question aptly summarizes the main point of the AAR's opposition to S.772: that the limited statutory immunities that apply to railroads exist to avoid dual and potentially conflicting regulation. Were S.772 enacted, there is great potential for such conflicting regulation to occur with regularity. As a general matter, courts look with disfavor on implied immunities. It is likely that the enactment of S.772 would cause many courts to take the position that in all cases Congress intended for private antitrust enforcement to trump STB policy, regardless of the adverse impact this would have on the efficiency and effectiveness of the rail network.