

Statement of

The Honorable Herb Kohl

United States Senator
Wisconsin
October 3, 2007

Good morning. Today we meet to consider a vital piece of legislation to halt anti-competitive practices harming businesses and consumers that depend on freight railroads across the country. Our legislation -- S. 772, The Railroad Antitrust Enforcement Act -- is a bipartisan bill which passed the Judiciary Committee without dissent two weeks ago. Nonetheless, we are holding this hearing today at the request of some members of the Committee who want to further explore this important issue.

Our legislation will eliminate obsolete antitrust exemptions that protect freight railroads from competition and result in higher prices to millions of consumers every day. The railroad industry - unlike every other form of freight transportation - including trucking and aviation -- enjoys immunity from most aspects of antitrust law. No good reason exists for this antitrust exemption. The best argument that the defenders of the current antitrust exemption can make is that it is unfair to subject the railroads to antitrust law because they are subject to regulation. This argument is entirely without merit.

First, dozens of other industries in our economy are regulated yet remain subject to antitrust law. Most importantly, all the other parts of the transportation industry are subject to extensive regulation - including aviation, under the supervision of the Department of Transportation, and trucking, under the supervision of the Surface Transportation Board. Yet they are subject to antitrust law in almost all respects. Other examples abound, ranging from telecom to energy. No other regulated industry possesses the total immunity from Justice Department merger review enjoyed by the railroad industry. And yet the need for antitrust enforcement is greatest in the case of railroads. Unlike the dozens of airline and trucking competitors that shippers may choose from, in many areas of the nation only one freight railroad serves businesses that rely on railroad shipping. Defenders of the railroad antitrust exemption therefore bear a very heavy burden to explain why their industry should be treated any differently from other regulated industries.

Second -- as railroad advocates themselves often point out -- the railroad industry has in fact been substantially deregulated by legislation in recent decades. Most importantly, most railroad rate setting has been removed from the oversight of the Surface Transportation Board. Despite this deregulation, the obsolete antitrust exemptions remained in place, insulating a consolidating industry from obeying the rules of fair competition.

The effects of this unwarranted antitrust exemption are plain to see. 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. Less than three decades ago, in 1979, there were 42. The lack of competition in the railroad industry was documented in an October 2006 GAO 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 harm throughout the economy. Consumers suffer higher electricity bills because a utility must pay for the high cost of transporting coal; manufacturers who rely on railroads to transport raw materials charge a higher price for their goods; and American farmers who ship their products by rail pass on these cost increases in the form of higher food prices.

The ill-effects of this consolidation are exemplified in the case of "captive shippers" - industries served by only one railroad. Two of these captive shippers are testifying at our hearing today. Over the past several years, these captive shippers have faced spiking rail rates -- price increases which they are forced to pass along into the price of their products, and ultimately, to consumers. 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 urged that the antitrust exemptions be removed. The letter stated that [QUOTE] "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."

In Wisconsin and around the nation, victims of a lack of railroad competition abound. About 40 affected organizations in my state alone have told us that they are feeling the crunch of years of railroad consolidation and anti-competitive railroad practices. The reliability, efficiency, and affordability of freight rail have all declined, and consumers are feeling the pinch. For example, to help offset a 93 percent increase in shipping rates in 2006, Dairyland Power Cooperative had to raise electricity rates by 20 percent. Similar stories exist across the country. Dozens of organizations, unions and trade groups - including the American Public Power Association, the American Chemistry Council, American Corn Growers Associations and AFL-CIO and many more affected by monopolistic railroad conduct have endorsed S. 772.

Adoption of S. 772 will be an excellent first step to bring needed competition to the railroad industry. By clearing out this thicket of outmoded antitrust exemptions, railroads will be subject to the same laws as virtually every other industry in 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.

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 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.