

NACD KEY ISSUE: RAIL COMPETITION

NACD ISSUE

Addressing the problem of shippers that are dependent on rail service being subject to unreasonable prices and conditions from railroads that have monopolies in key areas.

BACKGROUND

Over the past 30 years, there has been major consolidation throughout the railroad industry. Today, there are only 7 major freight railroads operating in the United States, down from 40 in 1980, when the Staggers Rail Act was enacted into law. The purpose of the Staggers Act was to deregulate the rail industry in order to strengthen it and make it more financially viable. At the time, the Interstate Commerce Commission (ICC) was charged with protecting captive customers, or customers served by only one railroad. In 1995, Congress abolished the ICC and established the Surface Transportation Board (STB) as an agency within the Department of Transportation to review all railroad mergers, rates, and service issues.

Unfortunately, both the ICC and the STB have made several rulings in favor of railroads over the years that have resulted in very little to no competition throughout the rail industry. During the 1980s, the ICC adopted an extremely expensive and unworkable rate challenge process for shippers and also allowed rail consolidation and the abandonment of tracks. Throughout the 1980s and 1990s, both the ICC and the STB approved the creation of short line railroads that were allowed to lease track from major railroads under the condition that they delivered and received traffic only from that railroad. In 1996, the STB ruled that railroads have the right to deny their captive customers access to a competing railroad, a ruling now known as the “bottleneck” decision.

Today, with only seven major freight railroads and a situation where these railroads have monopolies in their areas, freight rail customers in a variety of industries, including the chemical industry, are subject to exorbitant prices, unfavorable terms, and poor service. **To address this problem, legislation is pending in Congress to eliminate the antitrust exemption** that the railroads currently enjoy. Legislation was also introduced in the last Congress to reform the STB so that competition in the industry is promoted and rail customers are protected from monopoly power.

LEGISLATIVE UPDATE

On March 5, 2009, the Senate Judiciary Committee approved S. 146, the Railroad Antitrust Enforcement Act, sponsored by Senator Herb Kohl (D-WI). This legislation would bring railroad mergers and acquisitions under the purview of the Clayton Act, which would allow the federal government, state attorneys general, and private parties to file suit to enjoin anti-competitive mergers and acquisitions. It would also restore the review of these mergers to the Justice Department and the Federal Trade Commission (FTC). It would also eliminate the exemption that prevents FTC scrutiny of railroad common carriers and the antitrust exemption for railroad collective ratemaking. It would allow state attorneys general and other private parties to sue railroads for treble damages and injunctive relief for violations of the antitrust laws, including collusion that leads to excessive and unreasonable rates. A companion House bill, H.R. 233,

sponsored by Representative Tammy Baldwin (D-WI), is pending in the House Judiciary and Transportation and Infrastructure Committees.

In the last Congress, Senator John Rockefeller (D-WV) and Representative James Oberstar (D-MN) introduced S. 953/H.R. 2125, the Railroad Competition Service and Improvement Act to direct the STB to establish policies to promote effective competition among rail carriers and reliable rail transportation service for rail customers. Specifically, it would require rail carriers to establish rates and provide requested service between any two points on the carrier's system, upon a shipper's request; prohibit the STB from issuing certificates authorizing construction and operation of railroad lines; prescribe procedures for STB review of any activity alleged to have resulted in a restriction of competition; mandate rail carrier entry into reciprocal switching agreements where the STB finds it is practicable and in the public interest, or where such agreements are needed to provide competitive rail service; require the STB to designate any state or substantial part of a state as an area of inadequate rail competition after making certain findings; require the STB to post rail service complaints on its Web site; establish time limits for the STB to act on complaints regarding new or revised rail rates, rules, or practices; establish an Office of Rail Customer Advocacy; grant rail customers access to a process for determining rail rate reasonableness in railroad market dominance cases; authorize the STB to investigate rail carrier violations on its own initiative; and require the STB Board to initiate investigations upon receiving complaints alleging rail carrier violations. This legislation has not yet been reintroduced in the current Congress.

NACD POSITION

NACD members depend on rail service to send and to receive shipments and are increasingly facing the problems of frequent substantial price hikes and undependable service. Many chemical distributors depend on rail service to safely and effectively transport large quantities of hazardous materials and have no choice but to accept the terms demanded by the railroads. Because there is only one rail carrier in many areas, companies do not have the option of choosing another carrier. In addition, for certain materials, it would be impractical and would increase the opportunity for loading and unloading incidents to use trucks as an alternative. The increased costs and shipment delays caused by the current rail situation are ultimately passed down the supply chain, raising prices to the consumer level.

NACD supports both S. 146/H.R. 233, the Railroad Antitrust Enforcement Act and the yet-to-be-reintroduced Railroad Competition Service and Improvement Act. All of these bills would provide needed recourse to freight rail customers that have been subject to increasingly high prices and poor service because of the railroads' monopoly in so many service areas. Removing the railroads' antitrust exemption and reforming the STB to address the needs of rail consumers would lead to more competitive pricing and reliable service.