

CONGRESS AND THE RAILROADS VERSION 20.10

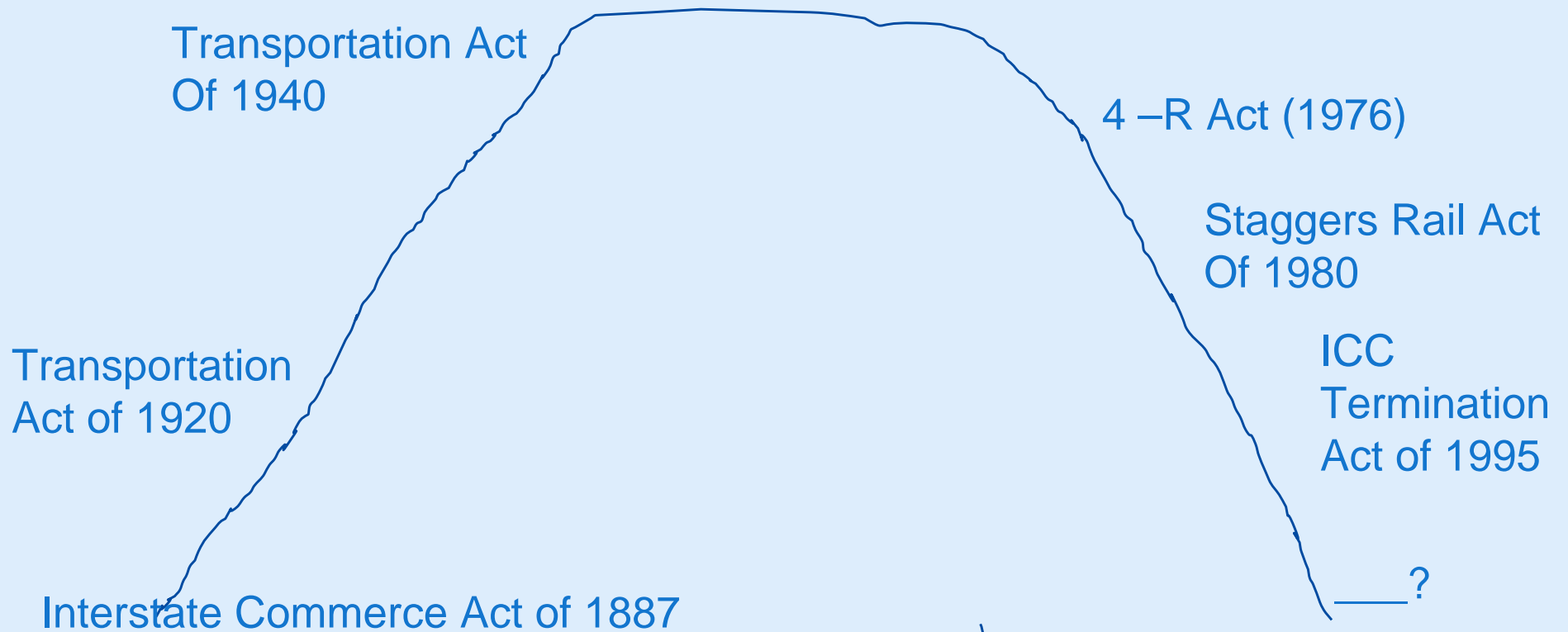
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- A Brief History
- Rail Shippers' Case for Legislative Reform
- Railroad Antitrust Enforcement Act of 2009
- Surface Transportation Board Reauthorization Act of 2009
- Will They Really Do That?
- The Usual Caveats

A BRIEF HISTORY



RAILROAD REGULATION 1940-1976

- Routine Suspension of Proposed Rate Increases
- General Increase Proceedings for Inflation Adjustments
- Regulation of Minimum Rates
- Prohibitions Against Rebates, Discounts and Contracts
- Compelled Preservation of Unprofitable Branch Lines
- Pervasive Regulatory Lag

RAILROAD REVITALIZATION AND REGULATORY REFORM ACT OF 1976 (4-R ACT)

- Market Dominance as a Test for Agency Jurisdiction
- Tightened Standards for Suspension of Rate Increases
- Shifted Burden of Proof
- Loosened Standards for Rate Discrimination
- Established the Concept of Revenue Adequacy
- Capital Incentive Rates

STAGGERS RAIL ACT OF 1980

- “Window Period” for Challenges to Existing Rates
- Added the Jurisdictional Threshold (180% of Variable Costs)
- Automatic Rail Cost Recovery Rate Increases
- Authorized Contracts Between Railroads and Shippers
- Restricted State Regulation of Intrastate Rates
- Liberalized Rate Discrimination
- Encouraged Exemptions from Regulation

ICC TERMINATION ACT OF 1995

- Eliminated ICC and Created a 3-Member STB
- Eliminated Agency Authority to Suspend Rate Increases
- Eliminated State Regulation of Intrastate Rates
- Eliminated Mandatory Tariff Filings

RAIL SHIPPERS' CASE FOR LEGISLATIVE REFORM

- Concentration of Rail Industry and Market Power
 - 42 Class I's in 1980; 7 today handle over 90% of rail freight by revenue
- Reduction in Effective Competition and Regional Duopolies
- Price Signaling Through Public Pricing and Protected Forums
- Increases in Rates and Expropriation of Available Rents
- Shifting of Cost Burdens
- The Disappearing Distinction Between Contract and Common Carriage
- Lax Regulation and the Perception of Agency Bias

RAILROAD ANTITRUST IMMUNITY

- Explicit Statutory Immunity:
 - Mergers, Acquisitions and Related Transactions (49 U.S.C. §11321)
 - Joint Rates and Routes (49 U.S.C. §10706)
- Implicit Regulatory Immunity:
 - Railroad Rates, Rules and Practices
 - *Keogh v. CNW Railway* and the Filed Rate Doctrine
 - *Square D. Co. v. Niagara Frontier Tariff Bureau* (1986)
 - ICCTA Eliminates Tariff Filings
- No Recognized Immunity for Price Fixing, Market Divisions, Concerted Refusals to Deal
 - Public Pricing Programs
 - Surcharges and Accessorial Charges

S.146/H.R. 233, THE RAILROAD ANTITRUST ENFORCEMENT ACT OF 2009

- Reported by Senate and House Judiciary Committees
- Intent to Remove All Antitrust Exemptions and Reassert the Roles of FTC and DOJ
- Brings Mergers Within Clayton Act §7
 - DOJ Suits Based on Merger Guidelines
 - Dual Layer review: STB and DOJ
- Repeal of *Keogh* Doctrine and *Square D* Intended to Facilitate Actions Against Bottleneck Rates and Paper Barriers
 - Essential Facilities Doctrine for Bottleneck Rates (Sherman Act §2)
 - Paper Barriers as Tying Arrangements (Sherman Act §1)
- Directs Courts to Refrain From Deferring to STB Under Primary Jurisdiction Doctrine
 - Exposure for Public Pricing and Similar Programs
- Repeals Immunity for Rate Agreements Other Than Pooling Arrangements
 - Joint Rates and Through Routes
- Grace Period from Enactment to Allow Adjustments

WILL IT REALLY DO THAT?

- Has the Merger Barn Door Closed?
- Economic Rationality Defense to Essential Facilities Claims
- Rule of Reason for Tying Arrangements
- Where Are the New Market Entrants?
- Critical Role of DOJ Leadership

S. 2889, STB REAUTHORIZATION ACT OF 2009

- Reported by Senate Commerce Committee
- Increase STB Membership to 5, with Qualifications
- Restore Independent Agency Status and Investigating Authority
- Directive to Revisit Exemptions
- Mandated Policy Studies and Reports
 - Service Metrics and Performance
 - Uniform Rail Costing System
 - Replacement Costs for Asset Valuation
 - Switching, Surcharge and Interchange Practices
 - Application of Revenue Adequacy Constraint on Pricing

S. 2889, STB REAUTHORIZATION ACT OF 2009 (CONT'D.)

- Tighten Regulation of Paper Barriers
 - Pre-Approval Findings
 - Expanded Rights to Challenge
- Liberalize Rules to Compel Bottleneck Rates
- Liberalize Standards for Terminal Trackage Rights
- Binding Arbitration for Small Disputes
- Timetable for Large Rate Cases
- Advance Challenges to Rates

WILL IT REALLY DO THAT?

- URCS and Replacement Cost Studies Could Lead to Protection for Higher Rates
- “Lost Contribution” a Factor in Bottleneck and Terminal Trackage Rights Cases
- No Change in Core Standards for Maximum Reasonable Rates on Non-Bottleneck Movements
- “Pro Competitive” Remedies Require Competitors