

**PART II:  
RAILROAD REFORM LEGISLATION:  
TO BE OR NOT TO BE?**

**ASSOCIATION OF TRANSPORTATION LAW  
PROFESSIONALS**

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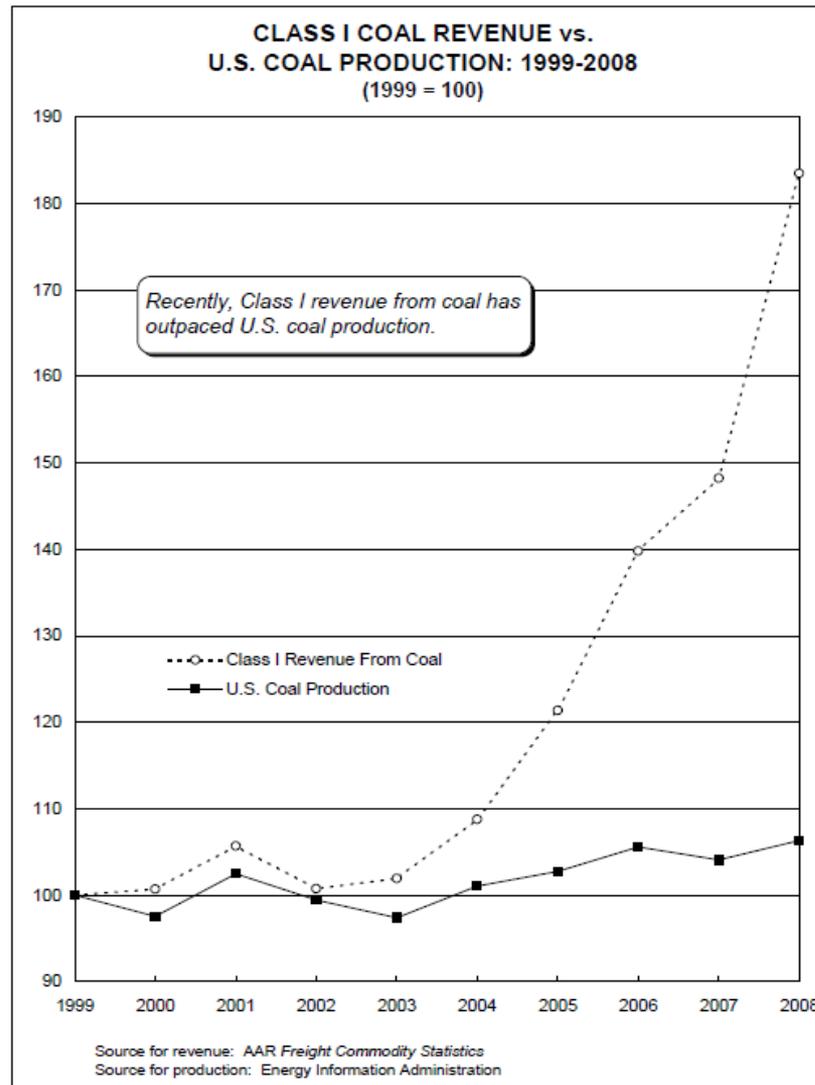
# OVERVIEW

- I. THE NEED FOR LEGISLATION
- II. S. 2889, THE STB REAUTHORIZATION ACT
- III. SENATOR KOHL/ANTITRUST LEGISLATION
- IV. “RHETORIC VS. REALITY”
- V. TO BE OR NOT TO BE?

# I. THE NEED FOR LEGISLATION

- Railroads: Staggers Act goals fulfilled
  - A dramatic rationalization of railroad systems and a financial renaissance
- Shippers: Staggers Act competitive and rate protection goals unfulfilled
  - Railroads are largely deregulated
  - The rate reasonableness protections afforded by Staggers are unfulfilled
  - The competition goals of Staggers have not been met

# I. THE NEED FOR LEGISLATION (con't.)



(Source: AAR, Rail Transportation of Coal,  
Railroad Ten-Year Trends (Vol. 11) p. 39)

# I. THE NEED FOR LEGISLATION (con't.)

- Besides direct rate issues, a mature monopoly/duopoly marketplace has fostered enhanced competitive problems
  - E.g.: -“Take-it-or-leave-it” approach to negotiations;
    - Advent of public pricing;
    - Parallel fuel surcharge programs;
    - Lack of service standards;
    - Pro-railroad rate adjustment mechanisms;
    - Incorporation of other pro-railroad service terms/conditions
- Many shippers believe the STB’s actions and inactions have exacerbated the problems

## II. S. 2889, THE STB REAUTHORIZATION ACT

- S. 2889, introduced (December 17, 2009)
- Senate Commerce Committee mark-up (December 17, 2009)
- Chairman Rockefeller (D-WV) comments:
  - Describes S. 2889 as being 25-years in the making
  - Acknowledges that the bill is a compromise, and that the railroads and the shippers will not get everything they want
  - States that negotiations over the bill have been very fierce, indeed, tougher than with health care “with fewer issues, but more deeply embedded sentiments” by stakeholders
  - Admonishes against any significant “tweaking” prior to floor action

## II. S. 2889, THE STB REAUTHORIZATION ACT OF 2009 (con't.)

### A. Principal Elements of S. 2889:

#### (1) Title I: Administrative Provisions

- Growth in Size of STB/STB Independence. Increases the size of STB from 3 to 5 commissioners, establishes STB as fully independent. (§§ 101-103)
- Reduced Agency Filing Fees. Caps all formal complaint filing fees at STB. (§ 104)

## II. S. 2889, THE STB REAUTHORIZATION ACT OF 2009 (con't.)

### (2) Title II: Authority Improvements

- Revises the National Rail Transportation Policy. (§ 201)
- Increases Authority of STB. (E.g., expanded investigatory authority). (§ 202-203)
- Exemptions. Requires STB to study/revise class exemptions. (§ 205)
- Railroad Service/Performance Reporting. (§ 206)
- URCS Revisions. Implements three year proceeding to revise URCS. (§ 207)
- Studies. Mandates STB studies on railroad replacement costs, rail practices, and rail car interchange rules. (§§ 208-210)

## II. S. 2889, THE STB REAUTHORIZATION ACT OF 2009 (con't.)

### (3) Title III: Regulatory Reform

- Paper Barriers. Codifies/supplements current STB standards. (§ 301)
- Bottleneck/Terminal Switching Rates. (§§ 302-303)
  - (1) “Get a rate” upon showing of market dominance.
  - (2) Bottleneck rate “must be reasonable” – reasonableness test requires development of new standards to be established by STB
- Service. New requirement that railroads must “publish reasonable common carrier service expectation ranges” (§ 304)
- Arbitration. STB to establish binding arbitration procedures in lieu of formal STB adjudication (caps on relief). (§ 305)
- Rate Reasonableness Standards. (§§ 306-308)
  - STB may consider a rate case challenge 1 year prior to rate implementation
  - Rate relief caps raised slightly in small and medium cases
- Study/Guidance on Revenue Adequacy Constraint. (One of original *Coal Rate Guidelines* constraints on railroad pricing). (§ 309)

### III. SENATOR KOHL/ANTITRUST LEGISLATION

- Railroad Antitrust Enforcement Act: Legislation, S. 146 and H.R. 233 seeks to repeal many of the remaining antitrust law exemptions, including:
  - Eliminate the “filed-rate doctrine”
  - Make railroad mergers subject to Section 7 of the Clayton Act, authorizing DOJ review over mergers
  - Amend Section 16 of the Clayton Act to allow private parties to seek injunctive relief
- Both S. 146 and H.R. 233 have been favorably reported out of committee
- Antitrust Legislation is on hold in Senate pending resolution of negotiations between the Judiciary and Commerce Committees
  - Negotiations were unable to be resolved prior to S. 2889 mark-up

## IV. "RHETORIC VS. REALITY"

### ■ RHETORIC:

- Reforms shippers seek have the "potential for the industry to lapse into the days of the 1960s and '70s," would result in "substantial reregulation," and "would dry up reinvestment."

### ■ REALITY

- The present debate is not about "price controls" the dramatic expansion of regulation, open access, etc.
- The present debate is over improvements to STB's regulatory policies/decisions and fulfillment of the Staggers Act goals.

## IV. "RHETORIC VS. REALITY" (con't.)

### ■ Then vs. Now

#### Then (1980):

- ICC: \$80M Budget (2,000 staff)
  - Class I RRs: \$25B in Revenues

#### Now (2010):

- STB: \$29M Budget (141 staff)
  - Class I RRs: \$60B in Revenues

#### Compare:

- FERC: \$300M Budget (1,500 staff)
- FCC: \$335M Budget (2,000 staff)

## IV. "RHETORIC VS. REALITY" (con't.)

### ■ "Turn Back the Clock?"

CURRENT LAW	CHANGES IN LEGISLATION
STB has no authority to set rates on its own, absent complaint	No change
STB has no authority to set across-the-board rates on individual commodities or geographic regions	No change
Carrier freedom to establish any rate for transportation, rates are not suspended during pendency of complaint proceedings	No change
If a customer desires to challenge a common carrier rate, it must proceed to file a formal complaint, and seek damages/reparations	No change
STB only has jurisdiction over "market dominant" rail traffic	No change
The <u>minimum</u> rate that the STB can prescribe is a rate equal to 180% of the service costs of the challenged movement	No change

## IV. “RHETORIC VS. REALITY” (con’t.)

- On competition, shippers are seeking “meaningful relief”
- E.g., STB 1996 Bottleneck Decision (on reconsideration) (Chairman Morgan, commenting) (“contract first doctrine”):

*“Some of the shippers have expressed their concern that the Board has not afforded them meaningful relief. I disagree. . . . The Board has taken the opportunity . . . to clarify and strengthen the legal conclusion that **the railroads’ rate and route initiative is not absolute and must be balanced against the statutory objective of promoting competition.** Businesses are resourceful, and they will compete if given the opportunity to do so. Our decisions are significant because they encourage railroads to compete for bottleneck traffic in response to the needs of the shippers.”*

*“I recognize that the relief that these decisions provide is not self-executing. . . . However, if history is any guide, and if shippers are diligent in negotiating, railroads will seek out contracts to capture new business. Initiative can produce positive results. . . . If shippers and competing railroads pursue the competitive avenues afforded them in these decisions, they will find that our decisions have provided real opportunities.”*

## V. TO BE OR NOT TO BE?

- Can a consensus bill be finalized in both Houses that both rails and shippers can support (or that can otherwise withstand remaining opposition)?
- Will there be additional changes/tweaks to S. 2889?
- When will a STB reauthorization bill be introduced in the House?
- How will STB reform/antitrust legislation play out?
- Is there sufficient time left this year?
- If S.2889 is “to be,” and enacted in present form, bill requires 8 follow-up studies/rulemakings (Many core issues referred to STB).

**THANK YOU**

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