

STATE ATTORNEYS GENERAL
A Communication from the Chief Legal Officers of the States of
Montana, Ohio, South Dakota, Arizona, Arkansas, California, Connecticut,
Delaware, Iowa, Kentucky, Maine, Maryland, Massachusetts, Minnesota, New
Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, and Utah

March 17, 2009

Via Facsimile

Honorable Harry Reid
Majority Leader
United States Senate
Washington, DC 20510

Honorable Mitch McConnell
Minority Leader
United States Senate
Washington, DC 20510

Honorable Nancy Pelosi
Speaker of the House of Representatives
Washington, DC 20515

Honorable John Boehner
Minority Leader, House of Representatives
Washington, DC 20515

RE: Support for the Railroad Antitrust Enforcement Act of 2009
(S. 146 and H.R. 233)

We, the undersigned Attorneys General, are writing to urge you to help consumers by eliminating the exemption from the antitrust laws currently enjoyed by the railroad industry. We urge you to enact the Railroad Antitrust Enforcement Act of 2009 (S. 146 and H.R. 233), which has been approved by the Senate Judiciary Committee and is pending before the House Judiciary and Transportation and Infrastructure Committees.

The antitrust laws have helped provide consumers with lower costs, a greater variety of products and services and robust innovation. Unfortunately, the railroad industry has not benefited from the application of these laws because of antitrust exemptions created in an era when railroads were subject to extensive regulation. That regulatory regime has been dismantled by the Railroad Revitalization and Regulatory Reform Act¹ and the Staggers Act² and the railroad industry's exemption from the antitrust laws is no longer necessary or desirable.

¹ Pub.L. No. 94-210 (1976).

² Pub.L. No. 96-448 (1980).

Currently, transactions approved by the Surface Transportation Board (STB) under 49 U.S.C. §11321–11328, including mergers, acquisitions and consolidations, pooling arrangements, some leases, trackage rights and agreements to divide traffic, are exempt from antitrust challenge by the federal agencies, state Attorneys General, or private parties. Some rate- and charge-related agreements approved by the STB under 49 U.S.C. § 10706 are also exempt. With respect to mergers and acquisitions, the Federal Trade Commission is precluded by statute from reviewing rail mergers,³ and the Department of Justice is only able to offer its views of a transaction to the STB, which is not bound to follow the recommendation. In reviewing mergers, the STB applies a “public interest” standard which is not focused on competitive issues.⁴

The National Association of Attorneys General (NAAG) long has disfavored antitrust exemptions for specific industries. A unanimous 2005 Resolution adopted by NAAG notes that NAAG has “consistently opposed legislation that weakens antitrust standards for specific industries because there is no evidence that any such exemptions would either promote competition or serve the public interest.” The resolution states that NAAG, “opposes establishing weakened antitrust standards for specific industries as such weakened standards would affirmatively harm consumers, and as there has been no demonstration that such weakened standards would in any way benefit competition.”

The antitrust exemption currently enjoyed by the railroad industry does not seem to have benefited competition. Since 1980, the major freight railroad industry has consolidated from over 40 Class I providers to seven Class I’s, four of which control over 90% of the nation’s rail traffic. In this concentrated market, shippers have reported that they are subjected to supra-competitive rates on monopoly routes. In other contexts, shippers report that the rail carriers enter into contracts with operators of connecting short line tracks that unduly punish those short lines for doing business with competing carriers. Still others have cited the rail carriers’ refusals to segment long-haul transportation quotes so as to permit interconnecting rail carriers to compete on some portions. All of these practices, approved by the STB, and exempt from antitrust challenge, may be anticompetitive.

The Railroad Antitrust Enforcement Act of 2009 seeks to remedy this anticompetitive situation by prospectively authorizing the federal agencies and state Attorneys General to challenge anticompetitive business practices and mergers and acquisitions in the railroad industry. Enactment of the Railroad Antitrust Enforcement Act is an important step toward the goals of improving the financial viability and efficiency of our nation’s rail system, protecting shippers from anticompetitive practices, and ensuring that consumers benefit from lower prices and more innovation.

³ 15 U.S.C. §21(a)

⁴ Union Pac. Corp., 1 S.T.B. at 86–88.

We respectfully urge you and your colleagues to report and pass this important legislation as soon as possible.

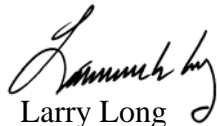
Sincerely,



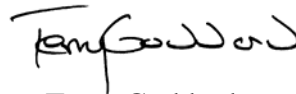
Steve Bullock
Attorney General of Montana



Richard Cordray
Attorney General of Ohio



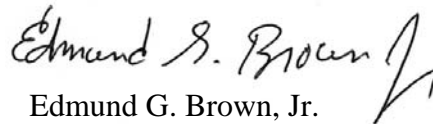
Larry Long
Attorney General of South Dakota



Terry Goddard
Attorney General of Arizona



Dustin McDaniel
Attorney General of Arkansas



Edmund G. Brown, Jr.
Attorney General of California



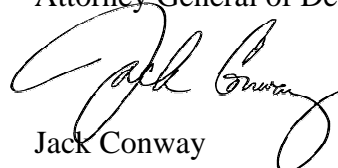
Richard Blumenthal
Attorney General of Connecticut



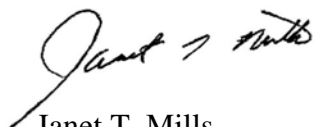
Joseph R. Biden, III
Attorney General of Delaware



Tom Miller
Attorney General of Iowa



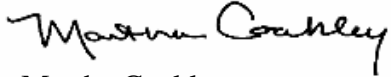
Jack Conway
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Attorney General of Maryland



Martha Coakley
Attorney General of Massachusetts




Anne Milgram
Attorney General of New Jersey



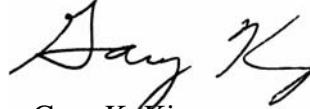
Roy Cooper
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Wayne Stenehjem
Attorney General of North Dakota



Mark L. Shurtleff
Attorney General of Utah

cc: Honorable Patrick Leahy
Chairman
Senate Committee on the Judiciary

Honorable John Conyers
Chairman
House Committee on the Judiciary

Honorable James Oberstar
Chairman
House Committee on Transportation
and Infrastructure

Honorable Arlen Specter
Ranking Member
Senate Committee on the Judiciary

Honorable Lamar Smith
Ranking Member
House Committee on the Judiciary

Honorable John L. Mica
Ranking Member
House Committee on Transportation
and Infrastructure