

Rail Anti-Trust Legislation Postponed but Coming, Though Pricing Impact Still Several Years Away

Vote Pulled this week in Senate, in favor of More Comprehensive Bill Later; "Bad Bill" Needs to be Defeated, Norfolk Southern CEO Says

SCDigest Editorial Staff

Two leading senators pushing for a bill that would eliminated much of the rail carriers' anti-trust exemptions decided to postpone a vote that was scheduled for this week, but only in a likely effort to pursue even more comprehensive legislation that would more directly impact rail policy.

The bottom line: Washington observers believe some form of a bill is likely to be passed sometime still this year, but the impact on rail shipper pricing is likely to be 3-5 years away. Key question is what amendments rail carrier lobbyists can drive into the current proposals.

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"This bill is not just about antitrust law, it is an attempt to overturn long-established regulatory policies that have provided enormous benefits to shippers and American consumers," said Union Pacific Railroad Senior Vice President of Law and General Counsel **J. Michael Hemmer**.

The rail carriers argue in part that these bills should not be implemented in isolation, but rather in the context of and in coordination with a broader national rail policy

"I still am very optimistic that at the end of the day

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we can defeat a bad bill," Norfolk Southern CEO Wick Moorman said earlier this week. "We have a lot of allies" on Capitol Hill and elsewhere. Moorman said the legislation would ultimately reduce rail service and jobs.

As there are several versions of potential legislation out there, the subject is confusing. The Rail Antitrust bill that was temporarily withdrawn this week included the following provisions:

- **Eliminates the provision against court injunctions against the railroads:** This may enable rail shippers to sue in federal courts to test various rail carrier policies, such as so-called "bottleneck pricing," and perhaps get a court to force the carrier to quote separately each leg of a multi-leg route.
- **Eliminate the "rate file" doctrine:** Currently, shippers cannot sue for damages for excessive rates due to perceived "rail cartel" pricing if the rail carrier has filed those rates with the Surface Transportation Board. The bill would elimi-

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nate this precedent.

- **Federal Trade Commission Authority:** The FTC would have some new jurisdiction over the rail carriers, including anti-trust authority/unfair competition, which it now lacks due to the anti-trust exemption.
- **Strip STB of Merger Authority:** The bill would hand authority over mergers and acquisitions in the rail industry over to the FTC and Justice Dept., where it resides for most other businesses.
- **Courts not Required to Defer to STB Primary Jurisdiction in Anti-trust actions:** This policy severely limited what courts could really do in various law suits.

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However, the actions this week by Senators Kohl and Rockefeller could mean some of these provisions will be combined with Rockefeller's other upcoming legislation that targets even more broadly STB reform and rail competition enhancements.

In a shipper-friendly [letter to majority leader Henry Reid pulling](#) the vote on the bill, the Senators said, "The Commerce and Judiciary committees intend to work together on comprehensive rail competition legislation."

Of primary interest to shippers continues to be

the bottleneck pricing issue.

The U.S. rail network includes many situations in which only one railroad, often now referred to as the "bottleneck carrier," serves either an origin or a destination of a potential freight movement (the so-called "bottleneck segment," but more than one railroad serves the rest of the line between origin and destination (the "non-bottleneck segment"). In other words, a shipper had two more carriers that serve both the origin and destination, but not the entire move, as somewhere along the way there is one or more "monopoly" segments.



This in practice enables a carrier to eliminate competition on a whole route even if just a small portion is on a single carrier leg. (See [Should Rail "Bottleneck" Segment Pricing Finally be Revised?](#)).

Two transportation lawyers recently discussing the issues with Ed Wolfe of Wolfe Research say they do not expect a vote on a more comprehensive bill before September or October. More importantly, even if such a bill passes, it will likely take 3-5 years for various current policies, such as bottleneck pricing and paper barriers to competition, to be challenged and adjudicated in federal courts. That process would likely be faster if a more comprehensive bill that specifically tackles bottleneck pricing is passed, versus the anti-trust type legislation that addresses the issue indirectly.

It is also not clear how much authority the STB would in fact ultimately cede, and shippers could expect a log jam of cases in the courts and before the STB soon after the