

H.R.X

IN THE HOUSE OF REPRESENTATIVES

December, 2022

Mr. Kean (for himself) introduced the following bill;

A BILL

To amend the Federal antitrust laws to provide expanded coverage and to eliminate exemptions from such laws that are contrary to the public interest with respect to railroads.

Be it enacted by the Senate and the House of Representatives of the United States of America in Congress Assembled,

SEC. 1. SHORT TITLE.

This Act may be cited as the “Railroad Antitrust Enforcement Act of 2022”.

SEC. 2. INJUNCTIONS AGAINST RAILROAD COMMON CARRIERS.

The proviso in section 16 of the Clayton Act (15 U.S.C. 26) ending with “Code.” is amended to read as follows: “Provided, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit for injunctive relief against any common carrier that is not a railroad subject to the jurisdiction of the Surface Transportation Board under subtitle IV of title 49, United States Code.”.

SEC. 3. RAIL MERGERS AND ACQUISITIONS.

The sixth undesignated paragraph of section 7 of the Clayton Act (15 U.S.C. 18) is amended to read as follows: “Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Secretary of Transportation, Federal Power Commission, Surface Transportation Board (except for agreements described in section 10706 of title 49, United States Code, and transactions described in section 11321 of that title), the Securities and Exchange Commission in the exercise of its jurisdiction under section 10 (of the Public Utility Holding Company

Act of 1935), the United States Maritime Commission, or the Secretary of Agriculture under any statutory provision vesting such power in the Commission, Board, or Secretary.”.

SEC. 4. LIMITATION OF JURISDICTION.

The Clayton Act is amended by adding at the end thereof the following:

“Sec. 29. In any civil action against a common carrier railroad under section 4, 4C, 15, or 16 of this Act, the district court shall not be required to defer to the primary jurisdiction of the Surface Transportation Board.”

SEC. 5. FTC ENFORCEMENT.

- (a) Section 11(a) of the Clayton Act (15 U.S.C. 21(a)) is amended by striking “subject to jurisdiction” and all that follows through the first semicolon and inserting “subject to jurisdiction under subtitle IV of title 49, United States Code (except for agreements described in section 10706 of that title and transactions described in section 11321 of that title);”
- (b) Section 5(a)(2) of the Federal Trade Commission Act (15 U.S.C. 44(a)(1)) is amended by striking “common carriers subject” and inserting “common carriers, except for railroads, subject.”

SEC. 6. EXPANSION OF TREBLE DAMAGES.

Section 4 of the Clayton Act (15 U.S.C. 15) is amended by—

- (1) redesignating subsections (b) and (c) as subsections (c) and (d), respectively; and
- (2) inserting after subsection (a) the following:

“(b) Subsection (a) shall apply to common carriers by rail subject to the jurisdiction of the Surface Transportation Board under subtitle IV of title 49, United States Code, without regard to whether such railroads have filed rates or whether a complaint challenging a rate has been filed.”

SEC. 7. TERMINATION OF TITLE 49 EXEMPTIONS.

- (a) Section 10706 of title 49, United States Code, is amended –

- (1) in subsection (a) –

- (A) in paragraph (2)(A), by striking “, and the Sherman Act (15 U.S.C. 1 et seq.),” and all that follows through “or carrying out the agreement” in the third sentence;

- (B) in paragraph (4)—

- (i) by striking the second sentence; and
 - (ii) by striking “However, the” in the third sentence and inserting “The”; and
- (C) in paragraph (5)(A), by striking “, and the antitrust laws set forth in paragraph (2) of this subsection do not apply to parties and other persons with respect to making or carrying out the agreement”; and
- (2) by striking subsection (e) and inserting the following:

“(e) Application of antitrust laws.—

“(1) IN GENERAL.—Nothing in this section exempts a proposed agreement described in subsection (a) from the application of the Sherman Act (15 U.S.C. 1 et seq.), the Clayton Act (15 U.S.C. 12, 14 et seq.), the Federal Trade Commission Act (15 U.S.C. 41 et seq.), section 73 or 74 of the Wilson Tariff Act (15 U.S.C. 8 and 9), or the Act of June 19, 1936 (15 U.S.C. 13, 13a, 13b, 21a).

“(2) ANTITRUST ANALYSIS TO CONSIDER IMPACT.—In reviewing any such proposed agreement for the purpose of any provision of law described in paragraph (1), the Board and any other reviewing agency shall take into account, among any other considerations, the impact of the proposed agreement on shippers, on consumers, and on affected communities.”

(b) Section 11321 of title 49, United States Code, is amended—

(1) in subsection (a)—

(A) by striking “The authority” in the first sentence and inserting “Except as provided in sections 4 (15 U.S.C. 15), 4C (15 U.S.C. 15c), section 15 (15 U.S.C. 25), and section 16 (15 U.S.C. 26) of the Clayton Act (15 U.S.C. 21(a)), the authority”; and

(B) by striking “is exempt from the antitrust laws and from all other law,” in the third sentence and inserting “is exempt from all other law (except the antitrust laws referred to in subsection (c)),”; and

(2) by adding at the end the following:

“(c) Application of antitrust laws.—

“(1) IN GENERAL.—Nothing in this section exempts a transaction described in subsection (a) from the application of the Sherman Act (15 U.S.C. 1 et seq.), the

Clayton Act (15 U.S.C. 12, 14 et seq.), the Federal Trade Commission Act (15 U.S.C. 41 et seq.), section 73 or 74 of the Wilson Tariff Act (15 U.S.C. 8–9), or the Act of June 19, 1936 (15 U.S.C. 13, 13a, 13b, 21a).

“(2) ANTITRUST ANALYSIS TO CONSIDER IMPACT.—In reviewing any such transaction for the purpose of any provision of law described in paragraph (1), the Board and any other reviewing agency shall take into account, among any other considerations, the impact of the transaction on shippers and on affected communities.”.

SEC. 8. ENACTMENT.

- (a) The provisions of this Act shall come into force immediately upon passage.
 - (b) A civil action under section 4, 15, or 16 of the Clayton Act (15 U.S.C. 15, 25, 26) or complaint under section 5 of the Federal Trade Commission Act (15 U.S.C. 45) may not be filed with respect to any conduct or activity that occurred prior to the date of enactment of this Act that was previously exempted from the antitrust laws as defined in section 1 of the Clayton Act (15 U.S.C. 12) by orders of the Interstate Commerce Commission or the Surface Transportation Board issued pursuant to law.
 - (c) A civil action or complaint described in paragraph (1) may not be filed earlier than 180 days after the date of enactment of this Act with respect to any previously exempted conduct or activity or previously exempted agreement that is continued subsequent to the date of enactment of this Act.
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