



# Top Transportation Policy Issues for 2009

## A Soy Transportation Coalition Briefing Paper

Prepared for the Soy Transportation Coalition and United Soybean Board by Market Solutions LLC

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This year is becoming one of the most active in more than a decade in policy and regulatory decision making to address critical transportation and infrastructure issues affecting the competitiveness of U.S. soybean producers and American agriculture. Infrastructure funding was an important part of Economic Stimulus Legislation passed early in the year. Legislation directed at addressing rail competition and service improvements, antitrust protection of railroads, incentives for investment in freight rail infrastructure and overall U.S. surface transportation policy, funding and regulation are all being considered by Congress, the Administration and regulatory agencies.

This briefing paper presents highlights of issues with potentially important implications for soybean producers and their customers, the Soy Transportation Coalition (STC) and the United Soybean Board (USB) Transportation Initiative. Market Solutions LLC has produced detailed briefing papers on a number of specific topics. Those marked with (\*) below and others on the attached list are available from the STC.

### **In the U.S. Congress**

- **Economic Stimulus Legislation.** The American Recovery and Reinvestment Act of 2009 signed into law in February, 2009 included over \$85 billion in transportation and infrastructure spending out of a \$787 billion total. This includes grants for spending on grants for passenger and freight railroads, bridges, ports. Locks and dams, airports, and broadband. Some proposals that did not find their way into the final bill, including freight railroad infrastructure tax credits, short line maintenance tax credits extension and increases, capital grants to short line and regional railroads, and reduced interest rates on financing under the Railroad Rehabilitation & Improvement Financing (RRIF) Program (\*) are likely to be considered as separate legislation.
- **Railroad Antitrust Enforcement Bills (\*)** (S. 146/H.R. 233) introduced in the new 111<sup>th</sup> Congress would amend federal antitrust laws to provide expanded coverage and eliminate exemptions for railroads. This means that the courts, Department of Justice and State Attorneys General would not have to defer to the Surface Transportation Board (STB) in the event of suits under the antitrust laws or in evaluating proposed mergers. The Senate Judiciary Committee reported S. 146 favorably to the full Senate, where it has been placed on the Senate Legislative calendar and is expected to be considered on the Senate floor soon. This is putting pressure on supporters of legislation to address other rail competition and service issues as well as the railroads to consider ways to reach agreement same time as it is unlikely that Congress will pass multiple bills related to rail transportation. During the 110th Congress similar antitrust legislation was reported favorably to the full Senate and House of Representatives by their respective Judiciary Committees. Staff report that both the Senate and House leadership are committed to bringing the bills to the floor in 2009.

- **Rail Competition and Service Improvement Legislation (\*)** expected to be reintroduced in the new 111th Congress is intended to address a variety of transportation challenges facing soybean producers and their customers, as well as a variety of other shipper and stakeholder groups. Sponsors of previous versions of the legislation now chair the Senate and House of Representatives Committees with jurisdiction over the bills. While a number of shipper groups have supported similar bills, introduced as H.R. 2125 and S. 953 in the last Congress, railroad industry representatives have strongly opposed them. Various sources report that this year railroads are being urged to help identify solutions to the problems the legislation seeks to address that would also work for the railroads. Important topics addressed in previous provisions of the bills include encouraging competitive rail service at switching points, paper barriers, rate complaints and service. These are all very important to soybean producers, but it is not clear that the provisions as previously proposed would be sufficient to achieve needed improvements. Provisions to make final offer arbitration similar to that used in Canada available for resolving rail rate and service disputes have long been a priority for wheat and barley producers, but remain controversial. Options to achieve a similar impact by providing agricultural producers and shipper groups standing to file complaints are being discussed as an alternative that might achieve similar results.
- **Surface Transportation Board (STB) Reauthorization** is a priority on the agenda of the House of Representatives Transportation and Infrastructure Committee for 2009 and being considered by the Senate Commerce, Science and Transportation Committee in drafting new rail competition legislation. Authorization for the STB, which has regulatory oversight responsibility for the railroads, actually expired in 1998. Shipper groups argue that with the improved economic health of the railroads since they were deregulated by the Staggers Act in 1980 reauthorization should underscore the importance of the STB in protecting the interests of shippers as well as ensuring the economic health of the railroads. The STB has been making efforts to better balance the interests of shippers and railroads in recent years. It will be important to require such balance when the agency is reauthorized. Options being considered including expanding staff and resources of the STB.
- **Freight Railroad Infrastructure Tax Credit (\*)** legislation has been re-introduced in 111th Congress as H.R. 272, the Freight Rail Infrastructure Capacity Expansion Act of 2009. The bill is intended to increase investment in freight rail-related infrastructure including facilities and locomotives through a 25 percent investment tax credit and expensing rather than depreciation for investments. The credit would apply to specific types of investments by railroads and some other companies. Freight rail traffic is projected to increase 70 percent by 2020. Taxpayers invest heavily in highway and waterway transportation infrastructure but generally count on private investment to finance rail infrastructure. This creates an incentive to shift traffic to publicly maintained transportation modes. To meet future transportation needs it makes sense for there to be a more balanced approach to public sector investment, but what terms will yield benefits for shippers as well as railroad stockholders?

- **Short Line Rail Maintenance Tax Credits (\*)** were extended through 2009 as part of the “Emergency Economic Stabilization Act of 2008,” late in 2008. The \$3,500 per mile 50 percent credit had expired on December 31, 2007. The legislation permits the credit to be used to offset Alternative Minimum Tax (AMT) liabilities. Short line and regional railroads are urging Congress to further extend the credits through 2012 and increase them to \$4,500 per mile. The credits have been used to help short line railroads increase their ability to carry heavier grain cars, which benefits soybean producers and their customers. The bigger question for the STC is to better understand what package of incentives and regulatory environment would best support addressing opportunities and constraints to short line railroads achieving their full potential to contributing to the service, cost competitive rates and capacity needed by the soybean industry and others in rural America.
- **Water Resources Development Act Reauthorization and Funding for Lock and Dam Projects on the Upper Mississippi River and Illinois Waterway.** The last Water Resources Development Act (WRDA) approved lock and dam improvements over a Presidential veto, but without providing the funding to complete the work. The FY2009 appropriations bill, signed by President Obama in March included \$26.3 million for the environmental management program and preconstruction engineering and design. Congress also plans to consider a new WRDA in 2009.
- **A New Surface Transportation (Highway) Bill.** With expiration of the current “Highway Bill” – SAFETEA-LU in 2009, Congress has already indicated an interest in a new bill that considers surface transportation more broadly. The new transportation secretary is likely to take more of an interest in rural transportation issues than was the case in proposals developed by the Administration last year. Among issues that will be considered and of special importance to soybean producers and their customers: Railroad Rehabilitation & Improvement Financing (RRIF) program extension(\*); agricultural hours of service regulations; interstate highway system weight restrictions; highway trust fund replenishment; proposals to increase emphasis on privatization, toll roads and public-private partnerships; and alternatives to the fuel tax, such as shifting to a tax based on mileage travelled rather than gallons of fuel consumed. During April, the House Transportation and Infrastructure Committee held hearings on the RRIF program and the Senate Commerce, Science and Transportation Committee held hearings on the future of National Surface Transportation Policy.
- **Short Sea Shipping Act.** Opportunities and barriers to taking full advantage of waterborne freight options have been under discussion as a way to reduce highway traffic congestion. For soybean producers, a critical consideration is how effective these could be without repeal or agricultural exemptions from the Jones Act, which limits ownership, crews and registration of vessels moving between U.S. ports. The proposed “Short Sea Shipping Promotion Act of 2009” (H.R. 638) addresses exempting such cargo from harbor maintenance taxes, but does not address other issues.

- **Liability Caps for Transportation of Hazardous Materials.** With railroads looking to shippers to assume potential liability of transporting materials such as anhydrous ammonia, agricultural chemicals and hexane for soybean crushing plants, which is also classified as a toxic inhalation hazard chemical or TIH, a category which also includes chlorine. At the request of the Union Pacific railroad, the STB agreed to consider whether railroads are required to offer rates to carry TIH chemicals if they believe they present safety and security concerns. Congress may be asked to come to the rescue. Options discussed include a mix of commercial insurance and caps on liability limits as been done with the nuclear power industry.
- **Agricultural Futures Markets.** There are proposals to put limitations on SWAPs and speculative positions in futures markets as a result of market volatility and other developments during 2008. Results would be likely to affect basis relationships and the usefulness of futures as a hedging tool. There are also proposals to combine the Commodity Futures Trading Commission (CFTC) which regulates agricultural commodity markets with the Securities Exchange Commission (SEC). All of these will be important to soybean producers and their customers.

## **In Government Agencies**

### **U.S. Department of Transportation (DOT) and U.S. Department of Agriculture (USDA)**

The Rural Transportation Study mandated by the 2008 Farm Bill is underway. What will it provide to help understand how best to meet the needs of agriculture and rural America?

- What role for USDA in transportation policy? USDA has occasionally testified before the STB on rail transportation issues, but has long limited its role to analysis and reporting. Will USDA transportation monitoring and analysis get the support it needs? Could it expand transportation analysis to include soybean meal and oil, for which rail transportation is even more important than for soybeans? What about in-depth analysis of the full costs and benefits to U.S. agriculture and rural America of the shift to unit and shuttle trains and reliance on private investment to fund railroads, while the public sector invests heavily in highways, waterways and ports?

### **Surface Transportation Board(\*)**

The STB has had responsibility for regulatory oversight of the railroads since the Interstate Commerce Commission (ICC) was abolished. The agency considers and makes decisions on a variety of critical issues affecting soybean producers and their customers. Some of these include rail rate complaints, common-carrier obligations affecting rail service, paper barriers affecting shipping options via short line and regional railroads, cost of capital methodologies, which affect how the railroads are regulated, railroad mergers and acquisitions, fuel surcharges and a variety of other topics. This makes continuing to follow developments at the STB critical for soybean producers and their customers. Among specific issues to be considered in 2009:

- **Reauthorization.** As mentioned above, this is on the agenda for Congress in 2009. Authorization actually expired in 1998. Reauthorization could provide an opportunity to require more balance in the STB's consideration of shipper and railroad interests.
- **New Commissioner and Chair.** Francis Mulvey was confirmed for a second term ending December, 2012 and was named as Acting Chairman of the STB in March. Former Chairman Charles D. "Chip" Nottingham's term as a commissioner expires in December, 2010. The Board has one vacancy with the departure of Douglas Buttrey in March. His term expired last December, though he could have remained until confirmation of a successor or the end of 2009. Commissioner Mulvey has indicated that as Chairman, he hopes to make the STB more responsive to shipper needs and service complaints as well as environmental concerns. He also plans to continue work on speeding up STB processes and to continue hold 4-6 hearings annually.
- **STB Hearings on Rail Competition and Service,** originally scheduled for May 18-19, 2009 have been delayed indefinitely at the request of Senators Jay Rockefeller and Frank Lautenberg of the Senate Commerce, Science and Transportation Committee, who said the Committee wanted to first conduct its legislative review of issues related to STB reauthorization, according to John Boyd of the Journal of Commerce.
- **Rail Rate Complaint Process.** Historically, rate complaint cases have cost \$3-4 million to bring before the STB because complainants had to develop costing of a hypothetical new railroad using what is called the full stand-alone cost (SAC) methodology. As a result, that complaint process has not been accessible to most shippers, and has not served as an incentive for railroads to settle disputes with customers.

During 2007/2008 the STB introduced two new procedures for small and medium sized complaints, a Simplified Stand Alone Cost (Simplified SAC) approach applicable to cases where potential relief would amount to up to \$5 million over five years; and a Three Benchmark approach, where potential relief is limited to \$1 million per complaint over 5 years. Court cases have been filed to challenge the procedures by both railroads and shipper groups. Because the potential legal costs and risks involved in challenges to decisions under any new rate complaint process are expected to be large, a legislative solution may be needed to this issue. This should be examined in more detail by the STC in the year ahead. The National Grain and Feed Association (NGFA) has suggested that increasing the rate relief caps to \$3 million for small cases and \$10 million for medium cases would make the process more useful.

- **Defining Railroad Common Carrier Obligations.** The STB has held hearings on the meaning of the railroad's common carrier obligation aimed at clarifying their service obligations. This led to additional hearings to specifically address issues related to providing transportation and shifting of liability in transporting "hazardous materials" which include anhydrous ammonia, agricultural chemicals and hexane. Results of recent study commissioned by the STB compared the rail industry to other networked industries, such as telecommunications, trucking and postal service. The challenge

faced in all such industries is that providing service in some areas is highly profitable and attracts competition, while other areas are likely to be underserved without some sort of regulation of local or federal government incentive to provide service. This is an important issue for agriculture and rural areas. While the railroads have been somewhat deregulated, and rely on private capital for investment they still have a “common carrier obligation” that remains to be clarified. This is different than the “universal service obligation” that applies to telecommunication and the post office, but decisions on how it differs will affect rail costs, service and capacity available to soybean producers and their customers.

- **Paper Barriers.** The STB has reviewed issues related to paper barriers or interchange agreements that require short line and regional railroads that purchase or lease track from a Class I railroad to deal exclusively with that Class I railroad. The Board has agreed to review paper barriers on a case-by-case basis when short lines are created, but left it to shippers or the short lines to complain about previous barriers. As this is a very important issue for many soybean industry customers, it will require additional attention, either through the STB or via new legislation. Proposals to ban paper barriers and interchange agreements have the potential to make Class I railroads more likely to abandon track segments rather than spinning them off to short lines, so a middle ground will be needed.
- **Ongoing consideration of railroad cost of capital methodology,** which affect how profitable railroads are considered by the regulatory system, and affect the way they are regulated. Using the new methodology approved last year, Class I railroad average rate of return on net investment increase to 11.2 percent in 2008, up 1.1 points over 2007. Class I railroad operating revenues reached \$61.2 billion with net railway operating income of \$9.3 billion in 2008.
- **Fuel Surcharge regulation and reporting** which affect how increases and decreases in fuel costs are passed on to shippers by the railroads, and how much transparency there is in doing so.
- **Rail Competition Study follow up.** The STB contracted for a study of rail competition at the recommendation of the Government Accountability Office (GAO) which identified special issues with competition and rates facing grain and oilseed shippers. While the study confirmed that grain shippers have problems, it did not answer most of the detailed questions raised by the GAO and shipper representatives related to grains and oilseeds, attributing this to data limitations. The STB contracted for additional analysis, which was released in March. Comments from interested parties have been invited.

### **Commodity Futures Trading Commission (CFTC)**

While the CFTC does not address transportation issues directly, it provides oversight of the commodity futures industry, which affects contract specifications, delivery locations, storage charges and speculative position limits that have an indirect impact on the relationships between cash and futures market prices, and the basis relationships and prices received by

soybean producers. This issue is discussed in more detail in a separate Market Solutions LLC report for the STC. Among topics of special importance for soybean producers at the CFTC in 2009:

- The CFTC plans to look at delivery points, storage fees, position limits on storage and delivery certificates and changing contract specifications as ways to improve cash and futures market convergence
- While all official reports from the CFTC to date report that market fundamentals have been behind commodity futures prices run-ups and volatility, analysis continues. Studies have found violations of position limits for soybeans and raised other issues with how hedging and speculation by funds and via SWOPs and other instruments that are not currently cleared on commodity exchanges or regulated by the CFTC or others. The CFTC and Congress are both continuing to try to better understand what drove market volatility, price levels and basis movements during 2006-2008.
- **New Chair and Commissioners to be appointed.** Commissioner Michael Dunn was named acting Chairman in January 2009. The Senate approved nomination of Gary Gensler as Chairman on May 19. Commissioner Walter Lukken, who was previously the Acting Chairman has announced his intention to step down. Bart Chilton and Jill Sommers are the other Commissioners, with an additional nominee awaiting confirmation. Commissioner Dunn and Commissioner Bart Chilton were both previously at USDA and had an interest in agricultural transportation issues.

#### **For Additional Analysis: Key Issues for Soybean Producers and Customers**

Four major issues affecting rail transportation are likely to be central to discussions and decision making related to rail transportation during 2009.

- Access to competitively priced switching at railroad junction points to give shippers more competitive and cost effective shipping options (reciprocal switching, interchange agreements, and paper barriers).
- Options for rail rate complaints that provide potential relief that justifies the cost of the challenge in the smaller cases most likely to be useful for agricultural shippers.
- Options for agricultural producers and other shipper groups who are affected by railroad actions related to rates and/or service to be able to take collective action when benefits to a single shipper might not justify the costs or risks of retaliation.
- Liability shifting and other issues and practices affecting costs and services available to rail customers that in turn affect soybean producers and others in agriculture.

Soybean producers and their customers will want to understand all of these issues. Some specific topics that can contribute to this include:

- **The role of short lines and regional railroads** in meeting the transportation needs of soybean producers, their customers and rural America – performance, opportunities, challenges, and options to increase their usefulness

- **Unit and Shuttle Trains.** How much of the benefit of moving to larger and more regular grain trains is a result of efficiency gains, and how much is simply a case of shifting costs to farmers, rural communities, and federal, state and local governments who maintain roads and travel further to reach such facilities. What is the optimum solution from a public policy perspective?
- **Private Rail Cars, Specialty Car requirements.** How has shifting costs and liabilities affected rail service, costs and capacity for soybean producers, their customers and others in agriculture? The railroads are seeking an investment tax credit for investments in purchased and leased locomotives. Should investments in rail cars by their customers get similar treatment?
- **Captive Shippers and Competitive Shipping Options.** The STC has commissioned studies of these issues, but they will need to be updated as more recent data become available to better document problems and evaluate the potential benefits of possible solutions.
- **Binding Arbitration of Rail Rate and Service Disputes.** This has long been a priority for wheat and barley producers, but what lessons can be learned from Canada's experience that can help soybean producers better understand the costs and benefits and determine if and how such a process might be useful in the United States?



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