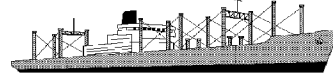




# Rollin' On



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## **RAILROADS: ASSISTANCE FROM, REGULATING, AND SUPREMES**

### *Help wanted:*

#### **Railroads in the forefront:**

**A**s we view the current destruction and devastation in the New Orleans and Mobile areas, we are reminded how interconnected the lower 48 states truly are. The virtual shutdown of all rail, water, motor carrier, air and intermodal traffic in that area and surrounding states has impacted shipments across the entire nation. Most of the terminal and other staging facilities are under water, and however bad current conditions are, they are destined to get worse over the next few days.

The impact is nationwide, as both west and east coast ports are holding shipments whose destinations are located in that region. With the infrastructure severely impacted – interstates washed out, flooded highways, you name it – there is no current prediction when these shipments will eventually be released. The congestion in some ports which are already stretched capacity, such as Los Angeles and Long Beach, will only get worse. The fate of those local cartage truck drivers, already operating in tough circumstances, is now worse.

At some point, the few remaining Class 1 railroads will be front and center in the nation's effort to help that region recover. In the East the efforts of the only Class 1 railroads, the NS and CSX, will be watched and scrutinized by Congress and the public. In the West, the BNSF and the UP, already struggling to offer effective service, will be in the nation's gunsights, as will the 'tweener railroad, the Kansas City Southern Railway. If these entities don't pull through when necessary, the entire nation will suffer.

#### **The Obligatory Disclaimer**

This newsletter is for informational purposes, does not provide legal advice and does not create an attorney-client relationship.

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Even with their best efforts, it will be a difficult task. The miles of track of these Class 1 railroads has been cut in half over the past 40 years. The shortline railroads, who have acquired much of this track, will need to make sure their feeder operations are fully functioning. But the Class 1's are the 800 gorillas, having more than doubled their market share during the past 25 years.

#### **Regulating railroads:**

#### **Congress to the rescue.**

The power to regulate the railroads is vested in Congress, a logical though not exciting fact given the other option of regulation by the various states. In 1887 Congress passed legislation concerning railroads, and it has been regulating, or deregulating railroads, ever since. The legislation became necessary due to the discriminatory and preferential practices of the railroads at that time. Congress stepped in and required rates to be just and reasonable, nondiscriminatory and nonpreferential. Pretty bold stuff.

In passing this legislation, Congress needed to establish an agency to oversee the enforcement of these laws, and it created the Interstate Commerce Commission, the first independent governmental agency. Since the railroads were so powerful at that time, the ICC became very powerful as well, though its power was a step below that of the United States Supreme Court.

#### **Summer Sweepstakes:**

#### **U.S. Supreme Court nominee(s)**

As I've commented earlier, the stakes in last year's presidential

election (you know, the one decided by the voters as opposed to the earlier one decided by the U.S. Supreme Court), were very high, not only because of the direct power of the presidency, but also due to the fact that the president, whoever that may be, would undoubtedly have the opportunity to select not only one, but perhaps several, justices to serve on the nation's highest court. This power cannot be overstated. Whereas the executive branch has zillions of employees, and the legislative branch has 100 senators and 435 congressional representatives, the U.S. Supreme Court has only nine justices. True, they have clerks and secretaries and other support staff, but it comes down to nine people. For any of you who have served on boards of directors of companies, or been involved in nonprofits or other types of entities, you know the potential power that one individual might exert. Even many of the president's actions are subject to review by the highest court.

Thus with the resignation of Sandra Day O'Connor, a swing vote on the current court, the nation will be treated to several days and sound bites in regard to the nomination of Judge Roberts. Justice O'Connor wielded much power by virtue of her swing vote. Thus her successor could have an immediate impact from day one. And there may be others to follow in the near future.

And it's not like there are posted job qualifications that are required. Justice Thomas didn't have the credentials of many circuit court judges, sitting in various counties across the country, when he was nominated.

That's all for now. Until next time, keep the cargo *rollin'*!

#### **Short Bio**

Admitted to the state bars of Oregon, Alaska, Florida and Massachusetts. Practicing law for over 25 years and emphasizing transportation law, business law and related litigation