



October 14, 2011

## Legislation

**Obama Jobs Plan Fails in Senate.** President Obama's \$447 billion "American Jobs Act" fell short of Senate passage this past week. The proposal was widely opposed by Republicans and some Democrats who were concerned with the proposed 5.6 percent tax on millionaires in order to pay for the legislation.

The Senate voted 50 to 48 on the cloture motion to bring debate to a halt and proceed to a later vote on final passage. However, a filibuster-proof 60 vote majority is required to proceed. All Republicans and two Democrats – Ben Nelson (NE) and John Tester (MT) – opposed the President's proposal by voting against cloture. Even if the Senate had supported the plan, the proposal would have encountered certain rejection in the Republican-controlled House of Representatives.

The President's plan includes \$50 billion in immediate investments for highways, transit, rail, and aviation and \$10 billion to establish a National Infrastructure Bank.

The President and various members of Congress are now considering whether to break the entire legislation into smaller parts – including transportation spending – and try to pass them separately.

**Mica predicts infrastructure bank "Dead on arrival".** During an October 12 hearing on the proposed establishment of a National Infrastructure Bank, House Transportation and Infrastructure Committee Chairman John Mica (R-FL) stated that "a national infrastructure bank is dead on arrival in the House." Chairman Mica contends that it would take at least a year to establish such a bank and would add to the federal bureaucracy. Mica would prefer providing assistance to those infrastructure banks already in existence in a number of states.

The National Infrastructure Bank under President Obama's "American Jobs Act" is based on the proposal advocated by Senators John Kerry (D-MA) and Kay Bailey Hutchison (R-TX). Under their proposal, the bank would only issue loans and loan guarantees, not grants. Funding assistance would be limited to 50 percent of a project's costs – limited the financial exposure of taxpayers. To be eligible to receive assistance, a project must have a dedicated funding stream, such as tolls, to ensure the money is repaid.

**This past July,** Senators Ron Wyden (D-OR), John Hoeven (R-ND), and Mark Begich (D-AK) introduced legislation to create a tax credit bond program dedicated to transportation infrastructure. The program – Transportation and Regional Infrastructure Project bonds ("TRIPs") – would provide \$50 billion in new transportation funding by allowing states and local governments to complete new projects across all modes, including roads, bridges, transit, rail, and waterways.

The legislation would allow State Infrastructure Banks to issue \$50 billion in bonds over a six year period. An annual amount of approximately \$900 million from customs user fees will be placed in a TRIP Bond Trust Account and invested for the life of the bonds (30 years) which will be used to repay the entire \$50 billion principal amount. The interest

portion of the bonds would be provided in the form of tax credits. Instead of interest payments, bond holders would receive tax credits that can be applied against the holders' federal income tax liability.

Each state infrastructure bank will be authorized to issue \$1 billion over six years for project in their state, and they may combine to work together on larger projects of regional and national significance.

**Congress passes highway bill extension.** In late September, Congress passed and President Obama signed a six month extension of the Safe, Accountable, Flexible, and Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU). The extension will maintain funding levels for the nation's surface transportation system through March 31, 2012.

Every six years, the U.S. Congress reauthorizes legislation that determines the volume of spending, the recipients of that spending, and the revenue sources of that spending for the nation's surface transportation system. SAFETEA-LU originally had an expiration date of September 30, 2009. Since Congress was unable to reach consensus on a new six year authorization, the current legislation has been extended since then.

## **Administration**

**Obama proposes new lock and dam financing approach.** As a part of his deficit reduction plan announced last month, President Obama is proposing a new \$1.1 billion approach for maintaining the nation's inland waterways.

The proposal, the "Inland Waterways Capital Investment Act of 2011," would impose an annual user fee on each vessel that transports commercial cargo on the inland waterways of the United States. The owner of the vessel would be responsible to pay the fee. The Secretary of the Army, who oversees the Army Corps of Engineers, would have authority to determine the amount and structure of the fee for each fiscal year with the goal of collecting the following amounts for future fiscal years:

- 2012: \$35,000,000
- 2013: \$75,000,000
- 2014 thru 2021: \$900,000,000

In designing the fee, the Secretary of the Army may establish a two-tiered fee system, under which the fee for vessels that do not utilize locks would be lower than the fee for those vessels that do utilize locks. Therefore, those barge shipments – often transporting agricultural products or inputs – originating in and destined to states along the upper Mississippi River, Ohio River, and Illinois River would be assessed the higher fee due to the necessity of utilizing locks to complete the delivery.

The proposed fee would be in addition to the 20 cent per gallon tax on diesel fuel commercial shippers currently pay that goes into the Inland Waterways Trust Fund. The revenue from the diesel tax is matched by the federal government to provide funding for lock and dam maintenance and construction.

**GAO to study impact of Jones Act on Puerto Rico.** The U.S. Government Accountability Office (GAO) has agreed to a request from Resident Commissioner Pedro Pierluisi to undertake a study on the impact of the Jones Act in Puerto Rico, and the broader U.S. economy. Commissioner Pierluisi is the representative of Puerto Rico to the U.S. Congress.

According to Pierluisi, "The purpose of the study is to determine, once and for all, the impact that the Jones Act has on our economy. The GAO has the credibility and expertise to analyze this issue, and to present its conclusions to members of Congress who, in the final analysis, are the only ones who can make a change to the underlying law."

“Now it is important for the business sector, labor unions, shipping companies and local government officials, among other stakeholders, to make themselves available so that the GAO can hear their different perspectives,” he added.

In responding to Commissioner Pierluisi, the GAO indicated that it will commence work on the study this year.

The Merchant Marine Act of 1920 (the “Jones Act”) is the statute sponsored by U.S. Senator Wesley Jones (Washington) that restricts the carriage of goods or passengers between U.S. ports to U.S. built and flagged ships. In addition, at least 75 percent of crewmembers must be U.S. citizens. Many shipper interests contend that the prevention of competition due to the Jones Act results in higher transportation costs – most acutely felt by islands like Hawaii and Puerto Rico since a high percentage of the freight arriving and departing from their ports is from or destined to the U.S. mainland.

**President Obama Announces the Creation of a Presidential Emergency Board.** President Obama on October 6<sup>th</sup> signed an Executive Order creating a Presidential Emergency Board to help resolve an ongoing dispute between major freight rail carriers and their unions.

The move prevents a possible nationwide strike by the Brotherhood of Locomotive Engineers and Trainmen, that could have started just after midnight on October 7th. The union voted earlier to approve a strike beginning effective at 12:01 am on the 7<sup>th</sup> unless the president intervened.

By creating a review board, Obama puts off any potential strike or lockout of workers by the freight railroads until at least early December – putting the final deadline after the peak rail shipping season that extends through autumn.

In his statement, the President explained, “Freight rail is vital to our economy and our future. It’s in our national interest to make sure our freight rail system runs smoothly, since a disruption could affect businesses across the country and cause unnecessary damage to our already-fragile economy.

The largest rail labor group, the United Transportation Union, that mainly represents train conductors, had earlier approved a new contract with the railroads. However, train engineers, track workers, and others continued to negotiate for different contract terms.

The Presidential Emergency Board will provide a structure for the two sides to resolve their disagreements. The Presidential Emergency Board will hear evidence and, within 30 days, will deliver a report to the President recommending how the dispute should be resolved.

## **Surface Transportation Board**

**STB to hear grain shipper testimony on Norfolk Southern dispute.** On October 25, the Surface Transportation Board (STB) will hear oral arguments in a dispute between Norfolk Southern Railway and five grain shippers.

Ag Processing, Inc. (AGP) originally filed a petition with the STB. Bunge, Archer Daniels Midland, Louis Dreyfus, and Perdue Agribusiness later joined the petition.

At issue is whether Norfolk Southern is justified in imposing a charge or penalty on loaded rail cars that exceed an individual car’s weight limit due to weather conditions (ice, snow, etc.) encountered after the cars were delivered to Norfolk Southern and no longer in the care of the grain shippers. The grain shippers contend it is unreasonable to be assessed the charge since they no longer have operational control over the cars.

The STB previously ordered the parties to mediate the dispute, but that was not successful.

**STB to examine effects of BNSF purchase price.** The Surface Transportation Board (STB) has instituted a public proceeding to examine the regulatory effects of the price Berkshire Hathaway paid when it acquired BNSF Railway.

“In May, the Western Coal Traffic League petitioned the Board to adjust its costing system as a result of the purchase price. BNSF opposed this effort,” explained STB. “The Board has discretionary authority to issue a declaratory order to terminate a controversy or remove uncertainty. While this proceeding is under way, the Board will continue using the purchase price at issue in its costing and revenue adequacy calculations. If the Board later determines that different calculations are in order, it will consider any necessary recalculations or revisions at that time.”

At issue is whether the premium paid by Berkshire Hathaway when it acquired BNSF two years ago should be included when the Surface Transportation Board determines whether BNSF rates are reasonable or not.

Revenue to Variable Cost Ratios (R/VC) are used by the U.S. Surface Transportation Board (STB) to evaluate and measure the profitability and reasonableness associated with railroad freight charges. For example, if a railroad’s freight charges are \$2,000 per carload and the variable costs for that movement are \$1,000 per carload, the R/VC would be 200%. In order for a rate to be regarded as potentially excessive, and subject to STB jurisdiction, the R/VC ratio must be equal to or greater than 180%.

The STB stipulates that railroads can charge customers rates in order to recoup their costs (and make a reasonable profit) of providing that service. An acquisition premium would result in the railroad needing to generate additional revenue on its operations in order for the owners to recoup their costs. One could argue that including the acquisition premium would increase the estimated variable costs of the railroad, which could result in a railroad having the latitude to charge higher rates to its customers - not because normal variable costs (fuel, labor, etc.) have escalated, but simply because of the acquisition premium.

The proponents of this motion argue that the listed stock price that BNSF was traded at before the acquisition should be used to determine the value of the company - not the purchase price.

Opening evidence will be submitted to the STB by October 28. Reply evidence is due on November 28 with rebuttal evidence due by December 12.