BELLY OF THE BEAST

BLAME THE SHERMANS

by Frank N. Wilner

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First blame Roger Sherman for not insisting that his choice of the words "private property" follow "life" and "liberty" in the preamble to our Declaration of Independence. The ambiguous "pursuit of happiness" could mean anything from enjoying chocolate chip ice cream to taking an uninvited nap on somebody else's lawn.

Next, blame Senator John Sherman for charging through that loop hole to trample the sanctity of private property with his antitrust law, which arguably caused greater economic destruction than did his brother—Union Gen. William Tecumseh Sherman—on his fiery march from Atlanta to the sea.

The legacy of the Shermans is big government. The absence in our Constitution of an unequivocal right to private property inflicts pain unassuaged by the Fifth Amendment's takings clause. That clause allows bureaucrats to forcibly transfer assets to a favored segment of society at a cost to us all.

One of the most frequent takings of private property—and here owners are not reimbursed—occurs when the Justice Department or Federal Trade Commission prevents a corporate merger. But at least when most corporations do merge, their private property is relatively safe from further tinkering by trustbusters.

Well, that's not the case when it comes to railroads. The federal statute regulating railroad mergers actually exempts those transactions from the antitrust laws—but the result is an even more onerous assault on private property.

The antitrust exemption applies to railroad mergers only after a favorable decision by the Surface Transportation Board. During the STB's deliberations, the Justice Department's antitrust division may present its own arguments favoring or opposing a railroad merger. But the STB needs to give the trustbusters' opinion no more weight than they give to a handscrawled letter submitted by bitter widow Jones whose husband died in a train wreck.

For sure, when Union Pacific Railroad acquired competitor Southern Pacific in 1996, the STB ignored a passionate plea by the DOJ's top trustbuster, Anne Bingaman, that the STB "just say no."

Yet railroad stockholders and their private property might be better served if rail mergers were subject only to the regulatory standards affecting all other corporate mergers.

Were railroads instead governed by the antitrust laws, they might not face the substantial and debilitating hurdles invented by the greens. An environmental impact analysis required as part of the rail merger approval process subjects rail merger applications to EPA and White House scrutiny. That frequently results in mandated costly mitigation, which disrupts efficient train operations, jeopardizes rail employment, and increases transportation costs. Nonrail mergers may require DOJ approval, but the greens are kept at bay.

More dreadful is that once the STB approves a rail merger, well, the merger isn't really approved. The STB imposes a five-year oversight during which it has authority to alter the terms of the transaction. So after the two corporate eggs have been scrambled, the STB may order divestiture of revenue producing assets, such as a lucrative route between New York and Chicago, to a competitor.

Such post-transaction divestiture could entirely upset the favorable benefit-cost ratio that encouraged the merger in the first place. But after consummation of the transaction, it is too late to withdraw the application. In other words, government gets to say, "The joke's on you."

That is precisely what is occurring following the Union Pacific-Southern Pacific merger. Union Pacific's service has been subpar so competing Kansas City Southern and some shippers have petitioned the STB to order divestiture to KCS of key Union Pacific routes in the Houston-Gulf Coast Area.

Alas, no railroad's private property is safe under the current scheme governing railroad mergers.