

April 12, 2004

Via Messenger

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

RE: STB Finance Docket No. 27590 (Sub-No. 3), *TTX Company, et al.—Application for Approval of Pooling of Car Service with Respect to Flatcars*

Dear Secretary Williams:

Enclosed please find the original and ten (10) copies of the National Industrial Transportation League's Comments submitted in the above-referenced docket.

If you have any questions, please do not hesitate to contact me. My office telephone number is (202) 331-8800.

Sincerely,



Nicholas J. DiMichael
Michael H. Higgins

Attorneys for:

The National Industrial Transportation League

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 27590 (SUB-NO. 3)

***TTX COMPANY, ET AL.—APPLICATION FOR APPROVAL OF POOLING OF CAR
SERVICE WITH RESPECT TO FLATCARS***

COMMENTS

of

THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

THE NATIONAL INDUSTRIAL TRANSPORTATION
LEAGUE
1700 North Moore St.
Arlington, VA 22209

By its attorneys,

Nicholas J. DiMichael
Michael H. Higgins
THOMPSON HINE LLP
1920 N Street, N.W.
Suite 800
Washington, D.C. 20036

Due and dated: April 12, 2004

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 27590 (Sub-No. 3)

***TTX COMPANY, ET AL.—APPLICATION FOR APPROVAL OF POOLING OF CAR
SERVICE WITH RESPECT TO FLATCARS***

**COMMENTS OF
THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE**

Comes now the National Industrial Transportation League (“NITL” or “the League”), by and through its attorneys, and submits these Comments in STB Finance Docket No. 27590 (Sub-No. 3), *TTX Company, et al.—Application for Approval of Pooling of Car Service with Respect to Flatcars* (“the proceeding”). In the proceeding, TTX Company and certain participating railroads (collectively, “TTX” or “Applicants”) filed an application seeking the Board’s approval to extend for fifteen years TTX’s flatcar pooling authority. As noted in more detail herein, the League supports the Board’s approval of TTX’s application, without changes or conditions.

I. IDENTITY AND INTEREST OF THE LEAGUE.

The League is the oldest and largest nationwide organization representing parties concerned with the transportation of goods. The League has over 600 separate company members who conduct industrial and/or commercial enterprises throughout the United States and internationally and use all modes of transportation to move commodities in interstate, intrastate, and international commerce. League members ship substantial volumes of commodities by railroad that travel aboard railcars supplied by TTX or similar railcars supplied by other entities. Accordingly, the League has a substantial interest in the Board’s resolution of the issues raised in

this proceeding, which implicate both integrated operation of the nation's railroad system and competition within the rail industry and the transportation industry, as a whole.

II. THE LEAGUE SUPPORTS APPROVAL OF THE APPLICATION WITHOUT CHANGES OR CONDITIONS

Under 49 U.S.C. §11322(a) of the ICC Termination Act (ICCTA), the Board may approve and authorize a pooling agreement if the agency finds that a pooling or division of traffic, services, or earnings will: (1) “be in the interest of better service to the public or of economy of operation”; and, (2) “will not unreasonably restrain competition.” The Board may impose conditions governing approval of the requested pooling or division. *Id.* Thus, in exercising its authority to approve or disapprove a proposed pooling agreement, the Board must assess whether any anticompetitive effects flowing from the arrangement are outweighed by the efficiencies or other public benefits flowing therefrom. See, *Trailer Train Co., et al – Pooling of Car Service with Respect to Flatcars*, 5 I.C.C.2d 552, 559 (1989) [*TTX II*].

Under the statute, a rail carrier, corporation or person participating in an approved transaction under Section 11322 “is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that rail carrier, corporation, or person carry out the transaction” 49 U.S.C. §11321(a). Thus, under the statute, even if the agency finds that pooling is in the interest of better service to the public and that it would not restrain competition, antitrust immunity should not automatically flow. Rather, the Board must make a separate finding that antitrust immunity is “necessary” to let the applicant carry out each of the claimed benefits of the transaction. In other words, simply because a pooling agreement meets the tests of Section 11322(a) does not end the Board's inquiry: the Board must also find that the

requested scope of antitrust immunity is “necessary” for the applicant to carry out each of the claimed benefits of the transaction.

Accordingly, the agency has found that it is obligated to determine whether a proposed pooling agreement is as beneficial as alternative mechanisms for achieving the purposes of the pool, and whether those purposes could be achieved with less restraint on competition. *TTX II*, at 559. In making this determination, the Board has looked closely at the Staggers Act amendments, which were intended to place a greater reliance on the marketplace, including the very first declaration of the Rail Transportation Policy implemented by the Staggers Act, to “allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail.” *Id.* at 559-560.

The burden of proof is on the applicant to demonstrate that a proposed pool meets the statutory standards of Section 11322(a) and that antitrust immunity is necessary to carry out the transaction. *See, Railroad Car Service Pooling Application*, Finance Docket No. 30067 (September 16, 1983), p. 3, 7.

In light of these guiding principles, the agency has followed a policy of “strictly construing agreements that require antitrust immunity because of joint carrier activity that may lessen competition,” consistent with the generally accepted principle that grants of antitrust immunity are to be narrowly construed. *Id.* at 560 [citations omitted]; *Improvement of TOFC/COFC Regulation*, 365 I.C.C. 727, 732 (1982). The agency has therefore concluded that, in reviewing a pooling application, it must “closely assess” the proposal and its potential service and efficiency benefits and should approve only the “narrowest proposal that is consistent both with achievement of those benefits and compliance with the statute.” *TTX II*, p. 560.

The League very much agrees with the legal approach that the agency has taken in evaluating pooling agreements in the past, including prior applications of TTX for extended pooling authority. The same analysis should be undertaken for this case. The League is, as a general rule, strongly in favor of competition in the provision of rail services, and believes that antitrust immunity should be granted only where a clear public benefit is manifestly demonstrated; where the benefit of antitrust immunity clearly outweighs the anticompetitive effects of granting such immunity; and the proposal is narrowly drawn to achieve those benefits.

Moreover, the fact that the Board has, in the past, approved a particular pooling agreement does not mean that the standards for review and approval should be relaxed. The status of competition and/or the needs of the public may have changed since the Board's prior approval; or the benefits expected may not in fact have been realized. Furthermore, the competitive landscape may in the future change quickly, and the Board should be sensitive to a need for a review if such changes occur.

However, the League has very carefully considered the application of TTX in light of these extremely demanding principles, and has determined that, even in light of such high standards, the Board should grant its approval to the application, without changes or conditions. The League believes that the application should be approved because the TTX pool manifestly benefits the nation's rail system, including both carriers and users of that system.

Among other things, TTX manages its fleet to minimize nonproductive empty miles and maximize loads. These efficiencies produce significant cost savings for railroads and potentially in turn to their customers. TTX intermodal cars generate substantial efficiencies in loaded miles compared to non-TTX cars, and in the repair and maintenance of pool equipment. Moreover,

TTX's car use charges have decreased since the TTX pool was last approved by the agency in 1994, and the TTX pool appears to reduce investment costs. Furthermore, TTX has purchased substantial new equipment since 1994, thus contributing to the infrastructure and car supply needs of the rail industry.

All of these facts and others set forth in TTX's application to the Board indicate that there are significant public benefits from TTX's operations, in the form of better service to the public and of economy of operation, and that TTX's pooling agreement does not unreasonably restrain competition. Accordingly, TTX's application should be approved by the Board, without changes or further conditions.

However, in the spirit of offering constructive suggestions to TTX, the League would state that, as its members were carefully considering this matter, there was significant concern voiced about TTX's ability to provide an adequate supply of certain types of cars in the future, and about the need for greater shipper input into the planning process and the process of ordering and supplying cars. The League respectfully suggests that it would be desirable for TTX to develop structures to obtain increased customer input, such as working groups or customer committees to advise TTX management about commercial issues of concern to its customers.

Finally, the League would note that the Board has recently implemented a policy of holding public hearings on matters of significance to the industry or to individual railroads and/or users. The League has publicly welcomed this procedural step by the agency a number of times. In considering the issues raised in this case, the League heard first hand from TTX and other persons, and the League found that exchange of views very helpful in developing its

position. Thus, the League would commend such a procedure to the Board in this case, to permit the Board to thoroughly consider TTX's application.

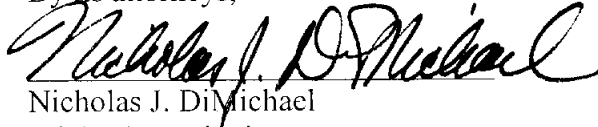
III. CONCLUSION

The League urges the Board to approve the application as submitted.

Respectfully submitted,

THE NATIONAL INDUSTRIAL TRANSPORTATION
LEAGUE
1700 North Moore St.
Arlington, VA 22209

By its attorneys,

A handwritten signature in black ink, appearing to read "Nicholas J. DiMichael", written over a horizontal line.

Nicholas J. DiMichael

Michael H. Higgins

THOMPSON HINE LLP

1920 N Street, N.W.

Suite 800

Washington, D.C. 20036

(202) 331-8800

April 12, 2004

CERTIFICATE OF SERVICE

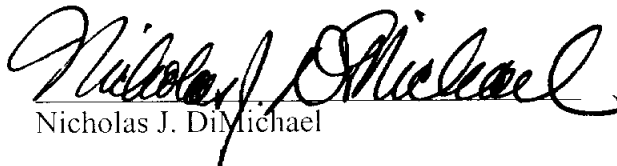
I hereby certify that on this day, April 12, 2004, I have served copies of the foregoing Comments of the National Industrial Transportation League by the means indicated on the parties listed below, as well as other parties of record:

By hand delivery

David L. Meyer
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

By overnight mail

Patrick B. Loftus
TTX Company
101 North Wacker Drive
Chicago, IL 60606



Nicholas J. DiMichael