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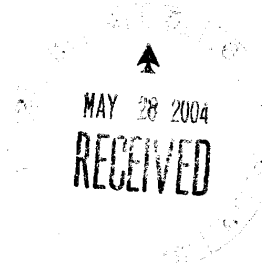
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May 28, 2004

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By Hand Delivery

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



**Re: STB Finance Docket No. 27590 (Sub-No. 3), Application of
TTX Company for Approval of Pooling of Car Service With
Respect to Flat Cars**

Dear Secretary Williams:

Enclosed for filing in the above-referenced docket are an original and ten (10) copies of "Certain Commenting Parties' Motion for Leave to Supplement Record and Submission of Additional Facts" by Bombardier Capital Rail, Inc., CIT Rail Resources, David J. Joseph Co., First Union Rail Corporation, and General Electric Railcar Services Corporation. Also enclosed are three diskettes, each containing a copy of the pleading.

Thank you for your assistance in this matter.

Sincerely,

R. Latane Montague, IV

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Enclosures

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cc: (w/encl.) The Honorable Roger Nober (courtesy copy)
All Parties of Record

BRUSSELS BUDAPEST* LONDON MOSCOW PARIS* PRAGUE* WARSAW
BALTIMORE, MD BOULDER, CO COLORADO SPRINGS, CO DENVER, CO LOS ANGELES, CA MCLEAN, VA MIAMI, FL NEW YORK, NY

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BEFORE THE SURFACE TRANSPORTATION BOARD

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

**TTX COMPANY—
APPLICATION FOR APPROVAL OF POOLING OF CAR SERVICE
WITH RESPECT TO FLATCARS**

**CERTAIN COMMENTING PARTIES' MOTION FOR LEAVE
TO SUPPLEMENT RECORD
AND
SUBMISSION OF ADDITIONAL FACTS**

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May 28, 2004

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Bombardier Capital Rail, Inc., CIT Rail Resources, David J. Joseph Company, First Union Rail Corporation, and General Electric Railcar Services Corporation (collectively, the "Commenting Parties"), each of which has earlier submitted comments herein, hereby request leave to supplement the factual record in this proceeding with additional facts that are critical to a full understanding of certain specific factual issues raised by TTX in its Rebuttal In Support of Approval of Its Flatcar Pooling Application, filed May 12, 2004 ("TTX Rebuttal").¹ These critical facts are set forth below, and are followed by an explanation of their relevance, which is provided in support of the motion to supplement the record.

¹ The TTX Rebuttal refers to the private car leasing companies that filed adverse comments as "a small group of TTX's competitors." In fact, the vast majority of the major private general-purpose car leasing companies in North America filed adverse comments in this proceeding. Collectively, these leasing companies own approximately 466,000 cars or 36% of the total North American freight car fleet.

Procedural Context

In its February 5, 2004 notice published in the Federal Register (69 Fed. Reg. 5662-5663), the Board established an initial procedural schedule for this proceeding. That schedule was revised by the Board in a decision dated March 10, 2004. The Board's March 10, 2004 decision directed that comments on the TTX application be filed by April 12, 2004, and that the applicant's rebuttal be filed by May 12, 2004. The Board's procedural schedule did not provide an opportunity for commenting parties to respond to the applicant's rebuttal, and stated that a decision on the merits would be issued by September 1, 2004.

TTX's May 12, 2004 rebuttal makes it clear that there remain a number of issues of disputed fact and law in this proceeding, but in light of the Board's current expedited procedural schedule, the Commenting Parties are not attempting to reply or provide a rebuttal to those numerous areas of ongoing dispute.² However, TTX has raised a significant new factual issue in its rebuttal that cannot be fully understood by the Board without additional facts that have not been provided by TTX. To assure that the Board has a complete factual record, and a full understanding of the new facts raised by TTX in its rebuttal, the Commenting Parties are submitting the following supplement to the record in this proceeding. These supplemental facts are followed by a discussion of the relevance of this information to the Board's deliberations, which the Commenting Parties submit in support of their motion to supplement the record.

² The Commenting Parties believe these issues of disputed fact and law should be addressed in the context of oral arguments before the Board, which have already been requested by the NIT League and First Union in their earlier comments.

Supplemental Facts

The TTX Rebuttal states that “railroads tend to place [non-intermodal flatcars] in so-called 16(c) shipper pools.” TTX Rebuttal at 69. Following this recent disclosure, a deeper review of TTX’s assignment practices has revealed that TTX’s assignment of non-intermodal flatcars is significantly broader and more extensive than the tendency alluded to in the TTX Rebuttal.

According to the Universal Machine Language Equipment Register (“UMLER”), as of January 1, 2004, approximately 97% of TTX’s centerbeam flatcars, and over 60% of other flatcars (non-intermodal, non-auto rack and non-centerbeam), are directly assigned to either specific shippers, or directly to the railroads under commodity pools or agent pools.³

Although Trailer Train III allowed TTX to assign specially-equipped flatcars to specific shippers under AAR Car Service Rule 16(C), it appears that TTX has expanded this practice to include assignments directly to the railroads through *agent* and *commodity* pools under Rule 16(D) as well, without seeking prior approval of the Board, and in contravention of the general prohibition on assignment set forth in Trailer Train II.⁴

³ Over 8% of the TTX boxcars seem to be similarly assigned.

⁴ Code of Car Service Rule 16(C) provides that:

[a]ssignment by a carrier of specific cars for the use of a shipper at a particular point must be reported by the Designated Pool Reporter to Business Services of the Association of American Railroads. This reporting must comply with the formats and time limits prescribed in the UMLER Data Specification Manual. Business Services of the Association of American Railroads will maintain a current record of cars assigned and distribute such information to car owners assigning cars to a specific shipper at each location, as well as to the roads originating traffic from such assignment, including originating switching line serving the shipper involved. The foregoing provisions of this paragraph need not apply when all cars assigned to the use of a shipper at a particular point are system cars of a single road haul carrier serving the shipper at such point.

Code of Car Service Rule 16(D) provides that:

[a]ssignment by a carrier of specific cars covered by CSD 145, and 435 series to agency or commodity pools must be reported by the Designated Pool Reporter to Business Services of the

The total number of specialized flatcars (non-intermodal and non-autorack flatcars) that are assigned by TTX amounts to approximately 21,600 cars, of which approximately 4,000 are assigned to specific shippers, approximately 7,600 are assigned to railroads under commodity pools, and approximately 10,000 are assigned to railroads under agent pools.⁵

Relevance of Supplemental Facts

These additional facts are directly relevant to three issues raised by TTX in its application and its rebuttal in support of its application. TTX has: (1) requested authority to determine unilaterally the scope of its pooling authority with respect to changes to pool operating practices and car distribution policies; (2) asserted that it is not assigning cars in contravention of the Board's decisions, and dismissed the need for the Board to reiterate the standing prohibition on assignment and allocation; and (3) requested authority to continue pooling both intermodal and non-intermodal flatcars under its antitrust exemption. The Commenting Parties have submitted timely objections on each of these three issues, among others. Although there remain many additional areas of disagreement between TTX and the individual Commenting Parties, the nature and extent of TTX's assignment practices with respect to non-intermodal cars are highly relevant to the Board's decision on these three aspects of the pooling application.

Association of American Railroads. This reporting must comply with the formats and time limits prescribed in the UMLER Data Specification Manual. The foregoing provision of this paragraph need not apply when all cars assigned to an agency or commodity pool are system cars.

The current version of Rule 16 contains an interpretation that was added after the ICC's 1994 Trailer Train III decision which provides that a "haulage rights carrier (tenant) [may] create UMLER 16-C pools for shipper, agent, contaminated, and commodity pools." This provision addresses instances where a railroad that has a haulage agreement needs to assign cars to a shipper or area it does not directly serve.

⁵ The facts alleged in these comments are verified by representatives from each of the Certain Commenting Parties. These verifications are attached to this motion.

1. Changes to Pool Operating Practices Without Prior Board Authorization

In its application, TTX requests confirmation that “changes in TTX’s car contracts or other policies that arise during the course of the pool’s operation” including “changes in TTX’s distribution model” can be made without seeking prior approval of the Board. TTX Application at 42, 44. In its rebuttal, TTX further explains that it is seeking clarification that “changes to the day-to-day operation of the flatcar pool” and “changes in TTX car contracts and other policies” do not require prior Board approval. TTX Rebuttal at 34. As explained below, TTX’s practice and policy of assigning cars directly to the railroads under *commodity* and *agent* pools, apparently in contravention of the prohibition on assignments set forth in Trailer Train II, are direct evidence of the need for more, rather than less Board oversight of TTX’s “day-to-day operations.”

Trailer Train II established a clear general prohibition on the assignment or allocation of TTX cars. 5 I.C.C. 2d at 595. Trailer Train III established two narrow exceptions to the general prohibition on assignment and allocation. The first exception allows for the limited assignment of cars acquired at the request of TTX member railroads for the purpose of testing and evaluating innovative products and designs. 1994 WL 467250, *4.

The second exception provided that specially-equipped (non-intermodal) TTX flatcars may be assigned to *shipper* controlled pools under Car Service Rule 16(C), provided they remain subject to TTX’s 5-day turn-back rule. 1994 WL 467250, *5-*8. In describing the limited exception for Rule 16(C) *shipper* pools, the Trailer Train III opinion expressly and consistently refers only to shipper pools under Rule 16(C). Likewise, the TTX Rebuttal only mentions shipper pools under Rule 16(C). The Trailer Train III opinion makes no

reference to assignments to railroads under Rule 16(D) *commodity* or *agent* pools in outlining the scope of this exception to the general prohibition on assignments. The TTX rebuttal also makes no reference to these railroad assignments under Rule 16(D).

TTX's practice and policy of assigning cars to railroads under Rule 16(D) commodity and agent pools reinforce the importance of Board review of unilateral changes by TTX to its operations and car distribution practices. It would appear that TTX believes that the assignment of cars to railroads, which was clearly prohibited by Trailer Train II, is somehow "within the scope of its pooling agreement." TTX cannot be an impartial judge of its own compliance with the scope of its antitrust exemption and should not be given additional discretion to alter its day-to-day pooling practices without prior Board review and approval.

2. Need To Reinforce Standing Prohibition On Assignment and Allocation

In its application, TTX states in three separate places that it is not asking the Board to alter the existing limitations on assignment or allocation of equipment, but always adds the caveat that it believes denial of this authority is unwarranted. TTX Application at 6, n.4; 42, n.29; 49, n.38. In its rebuttal, TTX states that "TTX adheres to the limitations on its authority to assign and allocate cars that were imposed in 1989 and clarified in 1994" and "[s]uggestions to the contrary are simply wrong." TTX Rebuttal at 36. Despite these statements, TTX appears to be ignoring those limitations with respect to agent and commodity pool assignments of non-intermodal flatcars. Accordingly, these new facts highlight the need for the STB to reinforce the Trailer Train II prohibition on assignment.

3. No Operational Pooling Efficiencies For Non-Intermodal Flatcars

As explained by the TTX rebuttal, these assigned non-intermodal flatcars “have been removed from the free running fleet.” TTX Rebuttal at 69. The handling instructions for all of the cars assigned in this manner require that they be reverse-routed empty to the point of initial loading, unless otherwise specified in writing by the car owner.⁶

In addition to the fact that the commodity and agent assignments appear to be in contravention of the prohibition on assignment, the fact that the vast majority of TTX’s non-intermodal flatcar fleet is not actually operated in free-running TTX pool service fundamentally undercuts TTX’s claim that its pool increases efficiency by reducing empty mileage and improving utilization of non-intermodal and non-autorack flatcars.⁷ Simply put, these assigned cars are not operated in the free-running TTX pool, and are generally used in the same way that the cars of private car lessors are used.

The TTX rebuttal claims that car “swaps” between shipper pools create utilization efficiencies for TTX’s non-intermodal flatcars. TTX Rebuttal at 73. TTX indicates that

⁶ These 21,500 cars have either a “C” designation for shipper pools, an “R” designation for commodity pools, or a “P” designation for agent pools in the Transportation Code Field of UMLER. These cars also show a railroad in the lessee field of UMLER. The handling instructions for each of these codes are indicated in Circular TD-5 of the OT Rules, which require that they cannot be reloaded without specific owner permission, and must be reverse routed unless otherwise specified by the owner pursuant to Car Service Directive No. 145.

Car Service Directive No. 145, which is issued under the provisions of Car Hire Rule 19, A.1.g., is applicable to cars assigned to shippers (16(C)), agent pools (16(D)), or commodity pools (16(D)) carrying railroad reporting marks, or a railroad controlled car as indicated by the lessee field in the UMLER file. Under Car Service Directive No. 145, cars after unloading, must be: a) Handled per owner’s instructions; or b) Returned empty to shipper or agent at loading point in reverse order of loaded movement. Owners may exempt certain cars from these provisions to allow use by other specified lines, but such exemption must be confirmed in writing to the Association of American Railroads in advance.

⁷ In the TTX Application, TTX supports its case for pooling of *intermodal* flatcars with statistics on the ratio of loaded-to-empty miles in service, and the Commenting Parties agree that this is the only appropriate measure of car pooling efficiency, since other measures are not unique to the pool. TTX Application at 21. Although TTX clearly has this type of data on its fleet, it provides no such data with respect to its *non-intermodal* flatcar fleet in either its application or rebuttal.

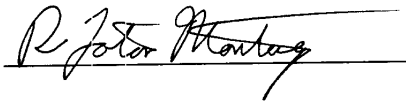
between April 2003 and March 2004, TTX arranged over 7,124 swaps of TTX centerbeam cars “the equivalent of 69.5 percent of TTX’s total centerbeam fleet” (9,529 cars). Wells RVS at 25-26. However, TTX fails to indicate the impact of these swaps on the ratio of loaded-to-empty mileage, which is clearly the more appropriate measure of the true contribution to efficiency. A conservative estimate of annual centerbeam loads is 12 per-car. A fleet of 9,529 cars would thus generate at least 114,348 loads per-year. Under these conservative assumptions, only 6.2% of centerbeam loads in a fleet of 9,529 cars would be accomplished through shipper-to-shipper car swaps.

Accordingly, the new facts related to TTX’s assignments substantiate the position that these non-intermodal flatcars should not be allowed to continue to be pooled by TTX under an antitrust exemption.

Conclusion

For the reasons set forth above, the Commenting Parties hereby request that the supplemental facts included herein be added to the record of this proceeding.

Respectfully submitted,

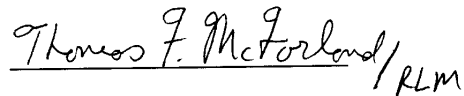


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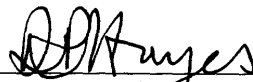
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May 28, 2004

VERIFICATION

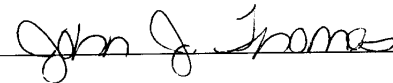
I, Desmond Hayes, declare under penalty of perjury that the foregoing facts are true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement. Executed on May 27, 2004.


Desmond Hayes

VERIFICATION

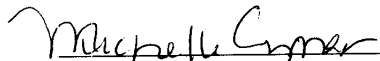
STATE OF ILLINOIS)
) SS
COUNTY OF DU PAGE)

John J. Thomas, President of First Union Rail Corporation, being duly sworn,
deposes and says that he has read the foregoing statement, knows the contents thereof and
that the same are true as stated.

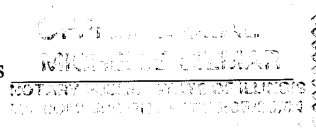


John J. Thomas

Sworn to and subscribed before me
This 27 day of May, 2004.

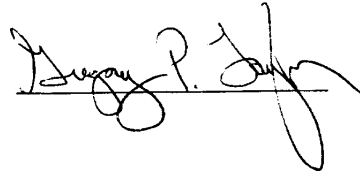

Notary Public

My Commission expires



VERIFICATION

I, Gregory P. Taylor, declare under penalty of perjury that the foregoing facts are true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement. Executed on May 28, 2004.

A handwritten signature in black ink, appearing to read "Gregory P. Taylor", is written over a horizontal line.

VERIFICATION

Richard S. Mitchell

I, Richard S. Mitchell, declare under penalty of perjury that the foregoing facts are true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement.

Executed on May 27, 2004.



A handwritten signature, appearing to be "Richard S. Mitchell", is written over a horizontal line.

VERIFICATION

I, Trey Savage, declare under penalty of perjury that the foregoing facts are true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement.

Executed on May 28, 2004

A handwritten signature in cursive script, appearing to read "Trey Savage", written over a horizontal line.

Trey W. Savage
Vice President Marketing & Sales
The David J. Joseph Company

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of May, 2004, I caused to be served by the means specified below a copy of the foregoing motion to:

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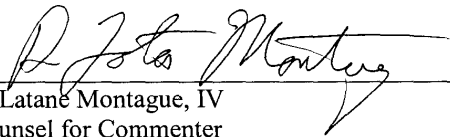
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