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April 9, 2004

By UPS overnight mail
(Monday delivery)

ENTERED
Office of Proceedings



Vernon A. Williams, Secretary
Surface Transportation Board
Case Control Unit, Suite 713
1925 K Street, N.W.
Washington, DC 20423-0001

APR 12 2004

Part of
Public Record

Re: Finance Docket No. 27590 (Sub-No. 3), *TTX Company - Application For
Approval Of Pooling Of Car Service With Respect To Flatcars*

Dear Mr. Williams:

Enclosed please find an original and 10 copies of Comments Of First Union Rail Corporation, for filing with the Board in the above referenced matter.

Kindly acknowledge receipt by date stamping the enclosed duplicate copy of this letter and return in the self-addressed stamped envelope.

Very truly yours,

Tom McFarland

Thomas F. McFarland
Attorney for Commentor

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BEFORE THE
SURFACE TRANSPORTATION BOARD

TTX COMPANY - APPLICATION FOR	)	
APPROVAL OF POOLING OF CAR	)	FINANCE DOCKET
SERVICE WITH RESPECT TO	)	NO. 27590 (SUB-NO. 3)
FLATCARS	)	

**COMMENTS OF
FIRST UNION RAIL CORPORATION**

Pursuant to the Board's notice issued on February 5, 2004, (69 F.R. 5662), FIRST UNION RAIL CORPORATION (First Union Rail) hereby submits comments on the application filed by TTX Company (TTX) on January 6, 2004 to extend its flatcar pooling authority for 15 years from October 1, 2004.

First Union Rail respectfully requests that the Board consider scheduling oral hearings in this matter in view of the far-reaching effects of pooling of flatcars with antitrust immunity. Oral hearings would make it easier for all affected parties to make their views known.

IDENTITY OF FIRST UNION RAIL

First Union Rail is a subsidiary of Wachovia Corporation, one of the largest banking institutions in the United States. First Union Rail is one of the industry's largest general-purpose railcar lessors. We specialize in providing quality railcars of all types, customized finance and operating leases, and marketing and transportation services. First Union Rail owns over 70,000 railroad freight cars and related assets, with an estimated market value in excess of \$2 billion. Over 10,000 of those freight cars are flatcars.

It is vital to First Union Rail and other non-railroad-owned freight car lessors that they be able to compete with railroad-owned interests on a level playing field. This proceeding bears directly on our collective ability to do so.

VERIFICATION BY FIRST UNION RAIL'S PRESIDENT

The facts alleged in First Union Rail's Comments are verified by Mr. J.J. Thomas, its President. Mr. Thomas's notarized verification is attached to these Comments. Mr. Thomas is uniquely qualified to testify about TTX and independent freight car lessors. Over 13 years of Mr. Thomas's nearly 40-year railroad career were spent in the employ of TTX's predecessor, Trailer Train Company (Trailer Train). The most recent 17 years of his career have been spent in the employ of independent freight car lessors.

After gaining experience in railroad operations with Milwaukee Road, Mr. Thomas joined Trailer Train in 1974 to head up car management for the newly-formed nationwide boxcar (Railbox) pool. He became Assistant Chief Transportation Officer of Trailer Train in 1980, with responsibility for nationwide pools of boxcars, gondola cars, specially-equipped flat cars and auto-rack cars. Mr. Thomas left Trailer Train in 1987 to become Vice-President Sales for Chrysler Rail Transportation, a major independent railcar lessor. He became President of First Union Rail at the inception of its operations, effective May 1, 1994.

CHANGED CIRCUMSTANCES SINCE PREVIOUS CONSIDERATION OF FLATCAR POOLING

It has been 15 years since this agency last gave in-depth consideration to the issues associated with pooling of flatcars.^{1/} The report issued at that time by the Board's predecessor,

^{1/} A less thorough review of the subject matter occurred ten years ago in *TTX*
(continued...)

the Interstate Commerce Commission (ICC), appears in *Trailer Train Co., et al - Pooling - Car Service*, 5 I.C.C.2d 552 (1989)(referred to hereafter as “1989 Decision”). There have been substantial changes in circumstances in that 15-year period that should be taken into account by the Board in considering TTX’s request for extension of its pooling authority at this time.

There has been a significant change in equipment ownership from Class I railroads to private companies, such as First Union Rail, as shown below:

United States Freight Car Fleet				
	1-1-87	1-1-97	1-1-03	Change from 1987 to 2003
Private	437,318	582,344	691,329	increase of 254,011 cars, or + 58%
Class I RR*	<u>798,631</u>	<u>570,869</u>	<u>477,751</u>	decrease of 320,880 cars or - 40.2%
TOTAL	1,235,949	1,153,213	1,169,080	

* Excludes non-Class I railroad ownership

Source: AAR Railroad Equipment Reports (1986-2003)

It should be noted that in 1987 ownership of the U.S. freight car fleet (excluding non-Class I railroad ownership) was comprised of 35.4 percent private cars and 64.6 percent Class I railroad cars. In 2003, this had changed to 59.1 percent private cars and 40.9 percent Class I railroad cars. Private ownership is understated (and Class I railroad ownership is overstated) as many lessor-owned cars carry Class I marks and are therefore reflected in the Class I totals. The private cars shown above include cars owned by TTX.

^{1/}(...continued)

Company, et al. - Application for Approval of Pooling of Car Service with Respect to Flat Cars, Finance Docket No. 27590 (Sub-No. 2), decision served Aug. 31, 1994 (not printed).

In addition, there have been substantial consolidations of Class I railroads, thus changing both the railroad network^{2/} and the ownership of TTX. As a result, only a handful of major rail carriers currently own and control TTX, as shown below:

Trailer Train Ownership

1987 - 19 owners

CSX Transportation	19 percent
Norfolk Southern	14 percent
Union Pacific	11 percent
Burlington Northern	11 percent
Fifteen other rail carriers	45 percent

TTX Ownership

2004 - 9 owners

Union Pacific	36 percent
CSXT	20 percent
Norfolk Southern	20 percent
Burlington Northern & Santa Fe	17 percent
Five other rail carriers	7 percent

Source: Annual reports of railroads submitted to the Board

It should be noted that a single railroad, Union Pacific, owns 36 percent of TTX and the top four shareholders collectively own 93 percent of TTX's stock. This consolidation primarily benefits the remaining few major shareholders of TTX.

The initial formation of the Trailer Trail flatcar pool (and grant of corresponding antitrust immunity) was predicated on a perceived need for standardized intermodal flatcars that would enable the railroad industry (consisting of nearly 50 Class I railroads at that time) to increase its

^{2/} In 1989, there were 18 Class I railroads. Currently, there are only 7 Class I railroads.

market share of a growing, but relatively low-margin business. As stated by the ICC, "Trailer Train was organized to meet the demand for a nationwide fleet of flatcars for TOFC service."^{3/} Since the inception of the pool, new flatcar types and designs have been introduced into the railroad industry and TTX's fleet, so in this context the term "flatcar" now includes specialty cars such as centerbeams (to name just one), which are used for the transportation of forest products. The numerous types of specialized flatcars that are under TTX pooling authority are listed in Appendix 1 attached to these Comments. These specialized car types have significantly different loading and economic characteristics than intermodal and auto-rack flatcars. The table below reflects the substantial growth in specialized flat cars since the last in-depth review of TTX flatcar pooling.

TTX Flatcar Fleet (from Annual Reports)^{4/}

Flatcar Type	1989	2003
Intermodal ^{5/}	38,801	36,635
Auto-Rack	32,706	48,988
Specialized ^{6/}	<u>13,380</u>	<u>29,786</u> (122.6 percent increase)
TOTAL	84,887	115,409

^{3/} *American Rail Box Car Co. - Pooling*, 347 I.C.C. 862 (1974); 1974 ICC LEXIS 34 at *9.

^{4/} In addition to the flatcars shown, TTX owned the following numbers of boxcars and gondola cars in the years shown:

	1989	2003
Boxcars	13,268	15,098
Gondola cars	<u>1,196</u>	<u>1,180</u>
TOTAL	14,464	16,278

^{5/} There were an estimated 77,602 platforms on the intermodal cars in 1989, and 176,500 platforms in 2003, according to the TTX 2003 Annual Report. Therefore, although the number of intermodal cars declined by 2,166 from 1989 to 2003, the number of intermodal platforms actually increased by 98,898 or 127 percent.

^{6/} Specialized flatcars made up a little more than 15 percent of the TTX flatcar fleet in 1989; by 2003, specialized flatcars comprised more than 25 percent of that fleet.

There have been major changes in freight car usage since pooling was initially considered. A major reason for pooling was to avoid the effect of Car Service Rules 1 and 2. Those rules were prescribed by the ICC. They required a railroad at destination to send the empty car back to its owner, or in that direction, unless the owner authorized reloading or diversion. The rules were designed to prevent the car owner from losing control over the car. Pooling of cars enabled destination railroads to keep foreign-owned cars in service without violating the car service rules. Under the more flexible car service rules in effect today, unless a specific exception applies, foreign cars can be loaded without regard to route or destination. There are also fewer railroads today to cause concern that they will lose control of their cars. Consequently, bilateral car use agreements and those flexible car service rules easily could accomplish much of what pooling of cars accomplishes.

New technology has also brought higher-capacity cars into the rail industry with the widespread introduction of 286,000-pound gross-rail-load cars in the 1990s.

Finally, the full implementation of car-hire depreservation occurred on January 1, 2003, at which time rates for the use of railroad-marked cars were no longer prescribed by the Board,^{7/} and a purported market-based pricing system was fully introduced to the railroad freight car industry.

After careful consideration of all of these changes, First Union Rail questions the overall benefits of pooling today and to whom many of the benefits accrue. Particularly when the pooling authority allows TTX and its shareholders, through antitrust immunity, the ability to

^{7/} See, *Railroad Car Hire Compensation - Rulemaking*, 9 I.C.C.2d 80 (1992), providing for phased-in car-hire depreservation over a 10-year period, fully effective on January 1, 2003.

artificially set below-market rates on established car-types, which lessors are often strongly encouraged to accept, if they wish to have their cars used. Despite its length, the TTX application has not adequately addressed these substantial changes. We would respectfully suggest that the Board should authorize a pooling agreement and exempt its activities from the antitrust laws only if all of the issues affecting its decision are thoroughly considered.

COMMENTS

STATEMENT OF FIRST UNION RAIL'S POSITION

- (1) We oppose TTX's request that the term of pooling authority for flatcars be extended by 10 to 15 years; the term should be no longer than 5 years;
- (2) We oppose TTX's request that the Board permit it to make changes in its car contract and policies that allegedly are within the scope of the approved agreement without submitting the changes to the Board for a determination of whether they can be implemented without Board approval;
- (3) We concur with the ICC's prohibition against assignment and allocation of TTX flatcars;
- (4) We support pooling authority only for intermodal and auto-rack flatcars, and only if antitrust immunity for pricing of such cars is withheld;
- (5) We request that pooling authority not be renewed for specialized flatcars or, at the least, that the Board institute a proceeding to consider the justification for continued pooling authority for specialized flatcars;
- (6) We request that the Board institute a proceeding to consider the justification for continued pooling authority held by TTX for boxcars and gondola cars; and

(7) We request that the Board consider scheduling oral hearings in this matter.

We submit the following in support of those positions.

THE TERM OF ANY APPROVED AGREEMENT SHOULD BE LIMITED TO 5 YEARS

TTX seeks a 15-year term for the extension of an approved pooling agreement. For the reasons explained below, First Union Rail urges the Board to limit the term of any pooling authority to five years.

TTX's predecessor (Trailer Train) asked for a 15-year term for the pooling agreement under consideration in the *1989 Decision*, but the ICC granted only a 5-year term, stating (5 I.C.C.2d at 603):

We have also decided that on expiration of the current agreement and car contract on October 1, 1989, Trailer Train's pooling authority and antitrust immunity should be extended for an additional 5 years, rather than 15 years requested by Trailer Train. We believe the term should be reduced to 5 years because the current market and regulatory climate in which Trailer Train operates is so dynamic. The uncertainties in these areas require a substantially shorter extension term . . .

Experience confirmed the wisdom of the Board's *1989 Decision* on the term of the extension. In the 15-year period sought by TTX's predecessor, the Board replaced the ICC, depreservation of car-hire rates was implemented, significant Class I consolidation occurred, TTX ownership became much more concentrated, car ownership dramatically shifted from Class I railroads to private companies, and significant new technology in freight cars came into being. The shorter term provided for by the ICC permitted a more timely review of pooling in light of those important developments.

In requesting a 15-year term, TTX has argued that the regulatory and market conditions in which TTX operates are far more settled today than in 1989 or 1994 (Application at 40). First Union Rail strongly disagrees. One has to question TTX's logic. The environment in the rail industry is equally dynamic today, if not more so. The world and domestic marketplace will continue to evolve, altering the demand for transportation services and equipment. Full implementation of car-hire depreservation is only 15 months old. Its effect will be played out in the upcoming years. Additional concentration in the railroad industry (and TTX ownership) is likely to occur in the future in the form of merger, consolidation or other means of alliance. Technological change in the form of new car designs and building materials will continue and accelerate. If independent lessors are allowed to compete on a level playing field, private railroad car ownership will continue to increase and Class I ownership will decline. In light of those likely changes, 15 years is far too long before the Board revisits the propriety of any TTX pooling authorization.

First Union Rail does not support TTX's request for an "evergreen" renewal of any granted pooling authority for yearly periods at the end of its term. As is the case with boxcars and gondola cars, while in a dynamic environment an "evergreen" renewal does not adequately bring the issues involved with the extension of any pool to the forefront for a thorough assessment as to whether its continuation is justified. We understand that TTX's request is based on a concern that a challenge to a TTX request for renewal of the agreement might not be decided at the expiration date of the agreement. Should that occur, we believe that a more appropriate solution would be to provide for the agreement to continue until the Board issues its final decision, including time for any right to appeal.

**TTX'S REQUEST FOR AUTHORITY TO MAKE CHANGES TO ITS CAR
CONTRACTS AND POLICIES WITHOUT PRIOR SUBMISSION TO
THE BOARD SHOULD BE DENIED**

First Union Rail is opposed to TTX's request that it be permitted to make changes in its car contracts and other policies without first submitting them to the Board for a determination of whether they require Board approval. TTX's request is impermissibly vague and unclear. TTX has not identified significant difficulties or delays that it has encountered because of the absence of this permission. The Board cannot lawfully authorize substantive changes in the pooling agreement that are not identified at the time of the authorization. For these reasons, TTX's request is insufficiently supported.

TTX's request should also be denied because it would impermissibly shift the burden and related costs to third parties to prove that particular changes are not within the scope of the approved agreement. It is appropriate that TTX carry that burden inasmuch as TTX was provided with extraordinary relief in the form of pooling authority and antitrust immunity. Further, it is not clear how third parties would ever know of the particular changes TTX has implemented until the third parties have been harmed.

There is a realistic potential for abuse if TTX's request were to be granted. TTX manages freight car-related equipment for rail owners, such as chassis (implementation in 2004), multilevel racks and a railroad boxcar pool. Changes affecting pools of that equipment have a significant competitive effect in the freight car industry. There is a strong concern that TTX and its owners could deem their right to make changes without prior Board approval, to include acquiring equipment for those managed operations. That would be unwarranted. The Board can

avoid controversies of that nature by retaining the requirement that TTX seek prior Board determination of whether the changes require Board approval.

We respectfully remind the Board that after careful consideration of this issue in American Rail Box Car Co. - Pooling, 347 I.C.C. 862 (1974), the ICC reserved for itself the determination of the nature and effect of any changes in approved pooling arrangements, viz. (1974 ICC LEXIS 34 at *48-49):

. . . To allow the Commission to make its own final determination as to the nature and effect of any changes upon the pooling arrangements which are approved herein, Trailer Train and Railbox shall be required to submit to the Commission all changes in either the pooling agreements or the car contracts, including those changes in rates and changes discussed above. All changes which affect the substance of either pooling arrangement or car contract and thus constitute a new pooling agreement will require Commission approval prior to their implementation . . . (emphasis added).

That ICC determination is equally sound today. Non-substantive changes in accordance with the approved pooling agreement may not require prior Board approval, but whether particular changes are non-substantive is for the Board to determine in the first instance, not for TTX or its railroad owners to determine unilaterally.

**ASSIGNMENT AND ALLOCATION OF POOLED FLATCARS BY TTX
CONTINUES TO BE IRRECONCILABLE WITH THE STANDARDS OF
§ 11322(a) FOR APPROVAL OF POOLING AGREEMENTS**

The ICC gave the issue of assignment and allocation of pooled flatcars by TTX very careful consideration in the *1989 Decision*, viz. (5 I.C.C.2d at 590-601). The ICC's conclusions on the basis of that consideration warrant repeating here (at 603):

. . . Trailer Train's car assignments are essentially a method of equipment financing and leasing. Those activities are at best tangential to the operation of a freight car pool and more appropriately the function of individual railroads or third party lessors operating outside the pool. We therefore conclude that Trailer

Train's existing practice of assigning railcars is not shown to be in the public interest and does not meet the first test under section 11342. Assignment authority will be excluded from our extension of pooling authority.

... We agree with DOJ that to the extent the pool is involved in allocation, Trailer Train's car purchasing authority for allocation should be eliminated to prevent any tendency toward de facto assignment and to open entry to the market by third party lessors ...

TTX's application contains argument to the effect that the prohibition against assignment and allocation of pooled flatcars is no longer justified, viz. (Application at 49, note 38):

The limitations placed on TTX's ability to assign and allocate cars in *Trailer Train II* did not reflect any conclusion by the ICC that TTX's flatcar pool would be anticompetitive absent those limitations. Rather, those limitations reflected the ICC's doubts about the benefits that would flow from TTX's involvement in the leasing of flatcars, relative to 'those obtainable from greater participation by third party lessors in a competitive leasing market.' 5 I.C.C.2d at 598; *see also id.* at 562 (conclusion that TTX should not engage in 'assignment of cars or ... purchase of cars for allocation' reached 'for a reason different from DOJ's primary monopsony arguments'). Importantly, moreover, those limitations were established at a time of significant uncertainty regarding the development of third-party leasing markets and the anticipated deregulation of car hire. *Id.* at 562-63, 597-99. TTX believes that experience over the past 15 years - including the development of robust third-party leasing alternatives and the potential for TTX to offer a superior competitive alternative if freed to engage in assignment and unrestricted allocation - no longer justify limiting TTX's authority in this manner.

This appears to be a trial balloon; TTX does not seek relief from the Board (*id.*):

... Nevertheless, ... TTX is not asking the Board to remove those limitations.

We hesitate to provide extensive argument in favor of continued prohibition of TTX assignment and allocation when TTX has not placed the matter at issue at this time. It is sufficient to point to the ICC's analysis in the *1989 Decision* that correctly establishes unequivocally that if the prohibition were to be removed, TTX would function as a

government-sanctioned leasing cartel. Nothing in TTX's application purports to justify such an anticompetitive operation.

While TTX is correct in pointing out in note 38 that assignment and allocation were not condemned as anticompetitive in the *1989 Decision*, that was because the ICC had already condemned those activities under the first standard of § 11322(a) -- that in the circumstances they would not be in the interest of better service to the public or of economy of operation -- so that it was unnecessary to consider those activities under the second standard on restraint of competition. The ICC certainly did not find that those activities do not restrain competition, as attempted to be implied by TTX. Those activities certainly would unreasonably restrain competition in the freight car leasing market. The so-called "robust third-party leasing alternatives" referred to in note 38 could quickly disappear if a cartel of the major rail carriers having antitrust immunity could lease freight cars in competition with independent third parties who lack that immunity. The Board should clarify that its prohibition of assignment and allocation by TTX stands.

**POOLING AUTHORITY SHOULD BE GRANTED ONLY FOR
INTERMODAL AND AUTO-RACK FLATCARS, AND ONLY IF
ANTITRUST IMMUNITY FOR PRICING OF SUCH CARS IS
WITHHELD**

In order to approve an agreement for pooling of rail carrier traffic, services or earnings under 49 U.S.C. § 11322(a), the Board must find that such pooling:

- (1) will be in the interest of better service to the public or of economy of operation,
and
- (2) will not unreasonably restrain competition.

The Board's predecessor explained the meaning of those standards in the *1989 Decision*, as follows (5 I.C.C.2d at 599):

Under the standards by which a pooling proposal is weighed, the Commission is called upon to review alternatives that, while permitting the pool to achieve its basic service benefits and efficiency goals, will ensure that effective competition prevails, and will reduce or eliminate the potential for anticompetitive conduct . . . (emphasis in original).

Pursuant to 49 U.S.C. § 11322(b), the Board may impose conditions to approval of pooling agreements. The Board's predecessor effectively imposed a condition to approval of pooling in the *1989 Decision* by withholding authority for TTX's predecessor to assign or allocate pooled flatcars. (5 I.C.C.2d at 605).

By virtue of 49 U.S.C. § 11321(a), a rail carrier, corporation or person participating in a pooling agreement approved under § 11322 "is exempt from the antitrust laws . . . as necessary to let that rail carrier, corporation or person carry out the (approved) transaction . . .". It is a fundamental rule that a statute granting antitrust immunity is to be narrowly construed. In accordance with that rule, antitrust immunity should be granted only for those activities that are clearly necessary and integral to achieving the purposes of the antitrust exemption. As applied to pooling agreements approved by the Board, therefore, 49 U.S.C. § 11321(a) grants antitrust immunity only to such activity as is integral and necessary to the operation of a freight car pool.

TTX has sought approval for pooling of flatcars in the aggregate, i.e., all types of flatcars. Presumably, the pooling authority sought does not include TTX boxcars and gondola cars for the simple reason that those cars are not flatcars. As the application does not mention boxcars or gondola cars, we assume that such cars are operating under an annual "evergreen" provision. The commodities which these cars handle are more limited in scope, somewhat mitigating much

of the reloading efficiencies that have been demonstrated in the intermodal flatcar pool. As a result, we believe that these cars tend to be more one-way cars. In any event, although not formally covered in this proceeding, we respectfully request that the Board more thoroughly investigate whether the boxcar and gondola pools materially improve service and economy of operation within the meaning of 49 U.S.C. § 11322(a)(1).

Whereas the evidence in support of pooling in the TTX application is limited to intermodal flatcars, the conclusions that TTX seeks to draw from the evidence have been expanded to apply to all flatcars in the aggregate (including specialized flatcars). The verified statement of TTX Witness Wells at 13-14 cites a number of statistics to show that pooling of the intermodal fleet has resulted in benefits in operating efficiency. However, those statistics apply only to intermodal flatcars. They do not apply to any type of specialty flatcar. Specialty flatcar types have significantly different loading characteristics and economics than intermodal flatcars. It is plainly unwarranted to draw conclusions about the flatcar fleet as a whole on the basis of evidence applicable only to intermodal flatcars.

The ICC's approval of pooling in the *1989 Decision* was predicated solely on pooling of free-running intermodal flatcars. The ICC there said (5 I.C.C.2d, at 562, emphasis added):

We find a continuing place for pool management of a free-running fleet of intermodal cars . . .

Similarly, the ICC there concluded (*id.*, at 601):

The basic plan is designed to permit continuation of improved intermodal flatcar use through flexibility in the movement of pool cars . . .

The concept of pooling applies only to free-running cars, and the only flatcars shown by TTX to be free-running are intermodal flatcars.

The fact is that specialized flatcars, such as centerbeam cars, do not achieve the same operating benefits from pooling as do intermodal flatcars because specialized flatcars are in large part one-way cars. That is, centerbeam cars generally move under load only in one direction. They generally return empty to the origin of their load or to a point close to that origin. Pooling of such cars does not result in materially improved service, nor operating economy, within the meaning of the first standard of 49 U.S.C. § 11322(a).

For these reasons, First Union Rail submits that the Board can make the finding required by 49 U.S.C. § 11322(a)(1) for approval of pooling -- that pooling “will be in the interest of better service to the public or of economy of operation” -- only as to pooling of intermodal flatcars and auto-rack flatcars.^{8/} We submit further that the Board cannot make that finding as to pooling of specialized flatcars, such as centerbeam cars, because there is no evidence in TTX’s application that would support such a finding. If TTX wants authority to pool specialized flatcars, it should be required to file a separate application for such authority wherein the propriety of pooling of that type of flatcar can be adequately considered.

However, even as to intermodal cars and auto-rack cars, pooling cannot be lawfully authorized unless the Board can make the second finding required by 49 U.S.C. § 11322(a)(2) -- that such pooling “will not unreasonably restrain competition.” For the reasons explained below, the Board cannot lawfully make that finding unless it withholds antitrust immunity for pricing from the grant of pooling authority.

^{8/} First Union Rail reluctantly supports pooling authority for auto-rack flatcars because they have loading and unloading characteristics similar to intermodal flatcars. There are limited origin points in the automobile production area, and limited destination points at major distribution centers. Like intermodal flatcars, auto-rack flatcars generally move in high volume, not as single cars.

As the United States Department of Justice (DOJ) pointed out when pooling of flatcars was under consideration in 1989, “TTX is a unique structure in the American economy; in no other industry do all of the participants jointly purchase their equipment.” (DOJ Comments, Aug. 28, 1988, at 5). TTX’s role is unique in regard to flatcar pricing, as well. TTX’s railroad owners establish rates for use of TTX’s flatcars unrestrained by rate prescription, regulation or the antitrust laws. Independent lessors like First Union Rail are subject to the antitrust laws in setting rates for use of their flatcars.

TTX’s application attempts to create the impression that the major railroads are distant third-parties who will readily go to other supply sources for their flatcars if TTX’s rates and services are not competitive. (*See, e.g.,* VS Reardon at 8; VS Brown at 27-29). That portrayal of competitive conditions in the flatcar market is not accurate. In reality, the major railroads, as the owners who control TTX, themselves set TTX’s car-hire rates, establish TTX’s service standards, and determine TTX’s freight car acquisitions. The desires of TTX’s railroad owners inevitably determine TTX’s direction. As owners of TTX who can and do receive dividends, it is reasonable to conclude that the railroads give preferential usage to TTX cars over those of an independent lessor. It is highly misleading to contend that there are meaningful competitive alternatives to TTX in the eyes of its railroad owners.

TTX and its railroad owners provide significant services for each other that are not available to independent freight car lessors. The railroads provide for empty transportation and car storage of TTX cars without charge. Independent lessors must pay the railroads for transportation of lessor-owned cars and must pay railroads or third parties for storage of temporarily idled cars. These significant costs place independent lessors at an immediate

economic competitive disadvantage vis-à-vis TTX. Correspondingly, TTX provides car inspection and maintenance services at the owners' facilities. While we do not know the fees, if any, that a railroad owner pays TTX for performing these services on the railroad's behalf, nor what TTX bills the railroad owner for repairs to owner's equipment, TTX's cost of providing these services would be expected to be on par with those a third party contractor would incur. However, TTX also repairs cars owned by independent lessors under AAR Rule 1 and bills for those performed repairs at the inflated AAR labor rates (either directly or through the owner railroad), which again puts the independent lessors at a significant competitive cost disadvantage. As these field maintenance operations (FMO) continue to grow in number, they will only exacerbate the cost disadvantage to independent lessors. Further, to the extent that these TTX FMO operations preclude other third party service providers from entering those markets, independent lessors will have arguably fewer competitive repair and inspection service options available for all cars in independent lessors' fleets.

TTX presents many statements testifying to its preventive maintenance programs, modification programs, research and development work with component suppliers and railcar builders, and to the reliability of the TTX fleet over a car's long life cycle. TTX is not the sole provider of these types of maintenance related activities. First Union Rail engages in similar preventive and ongoing maintenance activities as does TTX, and we believe the other major car lessors do as well. As a matter of practice, First Union Rail, and we believe the other major car lessors as well, also modify cars to make them more commercially desirable, when appropriate. TTX is certainly not unique with respect to the provision of maintenance, and there is nothing within TTX's maintenance activities per se that is dependent upon TTX's pooling authority.

However, TTX does have another significant competitive economic advantage: as the railroad owners of TTX continue to amend the Interchange Rules or implement technologies that will increase railcar maintenance costs, with most of the operating benefits accruing to the railroads, the incremental maintenance costs to TTX can immediately be offset by TTX rate adjustments. Independent lessors do not have the ability to ‘unilaterally’ increase rental rates to offset the increased maintenance costs that provide little direct benefit to the car owner. TTX, in its “holistic” approach, would support whatever initiatives were proposed by its railroad owners, as TTX effectively suffers no financial harm from their implementation. The same is clearly not true for independent car owners when the car owners’ share of the overall benefit is less than its share of the cost.

In addition, under depreservation of the car-hire rates, or in some cases through the freight rates, some Class I railroads are strongly encouraging independent lessors to accept artificially-established TTX rates as market rates, or risk having their cars sit idle. It can sometimes be difficult to redeploy these cars elsewhere (to a shipper or shortline railroad) as their placement may be dependent upon Class I railroad OT-5 approval (shipper) or on freight rates which do not penalize their usage (shipper or shortline).

All of the TTX advantages referred to above and the ongoing pressure to accept TTX car-hire rates are making it increasingly more difficult for independent lessors to justify new investment in TTX car-types and to compete on existing cars for which TTX has antitrust pricing immunity. Our belief and concern is that this will ultimately lead to far fewer car supply options available to Class I railroads, shippers and shortlines. In an industry in which there appears to be a substantial long-term need to replace older, lower-capacity cars with newer, higher-capacity

equipment, and to replace and upgrade the locomotive fleet and reinvest in infrastructure, this would appear to be a highly undesirable result.

These TTX advantages have only been magnified with the implementation of car-hire depreservation, the increased concentration and strengthened market power of the major railroads, and the other important changed circumstances identified earlier. With antitrust pricing immunity, Class I railroads have the ability to jointly establish car-hire rates on TTX cars that materially undercut rates generally prevailing in the market. Some railroads have attempted to use their market power to force car-hire rates on lessor-owned cars to the TTX level. With car-hire depreservation now fully in place, and with no antitrust pricing immunity, independent lessors lack pricing freedom to compete on a level playing field.

This situation could be viewed as a form of monopsony. That concept is the mirror image of monopoly. It arises when one or more companies gain enough buying power to push their suppliers' prices down. There is often nothing wrong when big companies squeeze suppliers for lower prices. Hard bargaining by profit-minded business buyers can help drive down prices for consumers. But when some dominant buyers have the ability to use their power to distort the market by pushing prices down, consumers can lose. Sellers will stop innovating, or producing, or, in the present case, stop investing, if they can't get a fair price. Price fixing and other collusive action is just as unlawful when the victims are sellers rather than buyers.

First Union Rail submits that in view of the many competitive advantages which TTX has over independent lessors, as identified in the foregoing, and the anticompetitive conduct of some TTX owners in regard to car-hire rates, the Board cannot find under 49 U.S.C. § 11322(a)(2) that pooling of TTX flatcars will not unreasonably restrain competition. TTX's application could

potentially be denied in its entirety on that basis. That drastic action need not be taken, however, inasmuch as there is an alternative that would permit both achievement of the efficiency benefits of pooling of intermodal and auto-rack flatcars, and the preservation of effective competition. As articulated in the *1989 Decision* (5 I.C.C.2d at 599), the Board is to look for a solution that both permits the pool to achieve its basic service benefits and efficiency goals, and ensures that effective competition prevails by reducing or eliminating the potential for anticompetitive conduct.

That solution would be attained if approval of pooling of intermodal and auto-rack flatcars were to be conditioned on withholding of antitrust pricing immunity for such cars. TTX could be granted antitrust immunity for the service aspects of pooling of such cars and perhaps for purchasing, but not for establishing car-hire rates. TTX should be required to conduct arm's-length rate negotiations with each of its railroad owners in the same manner as car-hire rates are negotiated by independent lessors under depreservation. Such a condition, imposed under 49 U.S.C. § 11322(b), would enable the Board to find that pooling of intermodal and auto-rack flatcars would not unreasonably restrain competition within the meaning of 49 U.S.C. § 11322(a)(2).

The imposition of such a condition would not violate 49 U.S.C. § 11321(a). That statute does not require that the Board grant antitrust pricing immunity in conjunction with approval of the proposed pooling agreement because pricing immunity is not integral and necessary to the operation of flatcar pooling. That is proven by the fact that a number of freight car and railroad equipment pools are being operated efficiently without antitrust pricing immunity. Examples are listed below:

- (1) TTX will manage (2004 startup) a national pool of 48-foot and 53-foot railroad-owned domestic chassis (truck frames and wheels) used in transporting domestic containers over the highway prior or subsequent to movement by rail. The chassis are priced without antitrust rate immunity.
- (2) TTX efficiently manages a national pool of railroad-owned 50-foot boxcars. Currently, there are approximately 9,000 boxcars in the pool. The boxcars are priced without antitrust rate immunity.
- (3) TTX manages a national pool of multilevels used in the transportation of automobiles. Included in that pool are articulated bi-level cars (ABL), aluminum vehicle carriers (AVC), automax cars, and flatcars owned by independent lessors. Car-hire rates are established on all of those cars without antitrust pricing immunity.
- (4) Individual rail carriers manage pools of centerbeam cars consisting of their own cars and shipper-owned cars. These pools have bettered car supply for shippers and improved railroad operating efficiency without antitrust immunity for pricing the cars.
- (5) Individual rail carriers manage pools of covered hopper cars for shipment of grain under circumstances similar to the centerbeam pools identified in No. 4 above. These pools, too, have improved service to shippers and have increased railroad efficiency without antitrust pricing immunity.

Coordinated service activities clearly are essential to the efficient operation of a freight car pool. Combined purchasing activities, too, could be an integral element of a well-functioning

pool. But joint pricing is tangential to operation of a pool, as evidenced by the examples cited above. It follows that the Board would not be withholding antitrust immunity required to be granted under 49 U.S.C. § 11321(a) if it were to require, as a condition to approval of pooling for intermodal and auto-rack flatcars here, that joint pricing activities in relation to the pooled cars not be immunized from operation of the antitrust laws.

CONCLUSION

WHEREFORE, for the reasons stated, the Board should:

- (1) approve the proposed pooling agreement only as to intermodal and auto-rack flatcars, and subject to the condition that such approval does not include a grant of antitrust pricing immunity;
- (2) limit such approval to a term of 5 years;
- (3) decline to renew pooling authority for specialized flatcars or, at the least, institute a proceeding to consider the justification for continued pooling authority for specialized flatcars;
- (4) continue to require TTX to submit all changes in the pooling agreement or car contracts to the Board for determination of whether such changes can be implemented without Board approval;
- (5) continue to prohibit assignment or allocation of pooled TTX cars.
- (6) institute a proceeding to consider the propriety of continued pooling authority for TTX boxcars and gondola cars; and
- (7) consider scheduling oral hearings in this matter.

Respectfully submitted,

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DUE DATE: April 12, 2004

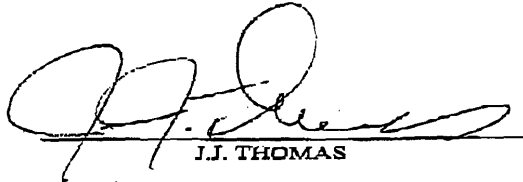
SPECIALIZED FLATCARS

FTTX	Auto/truck frame special loading car
HTTX	60' chain tie-down car for heavy equipment
ITTX	89' chain tie-down car for large trucks
JTTX	Car equipped with miscellaneous devices
MTTX	60' general service, 85' stake pocket, and 89' rail hauling car
OTTX	60' chain tie-down car for farm equipment
PTTX	48' 70-ton bulkhead flatcar
XTTX	89' 100-ton steel deck flatcar
QTTX	Heavy-duty flat or depressed center car
ZTTX	85' car equipped with thirty stake pockets
TTDX	89' chain tie-down car for military equipment
TTHX	60' chain tie-down car for heavy loads
TTJX	68' 100-ton car with securement devices
TTMX	68' 100-ton general service flatcar
TPPX	62' bulkhead flatcar (100- or 110-ton)
TTZX	60' or 73' centerbeam bulkhead flatcar (100- or 110-ton)

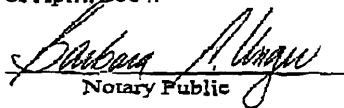
VERIFICATION

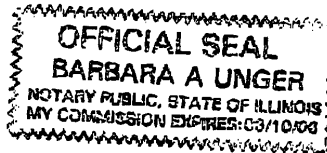
STATE OF ILLINOIS)
) SS:
COUNTY OF COOK)

J.J. THOMAS, being duly sworn on oath, deposes and states that he has read the foregoing comments, that he knows the contents thereof, and that the facts therein stated are true and correct.


J.J. THOMAS

SUBSCRIBED AND SWORN to
before me this 5th day
of April, 2004.


Notary Public



My Commission Expires: 3-10-05

CERTIFICATE OF SERVICE

I hereby certify that on April 9, 2004, I served the foregoing document, Comments of First Union Rail Corporation, by UPS overnight mail (Monday delivery) on the following:

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