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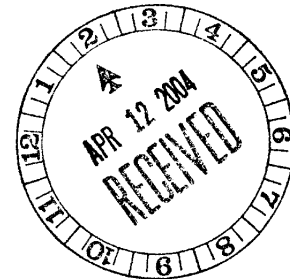
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October 9, 2002

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, DC 20423



Re: Finance Docket No. 27590 (Sub-No. 3)
TTX Company – application for Approval of Pooling of Car Service With
Respect to Flatcars

Dear Secretary Williams:

Enclosed for filing is a signed original and 10 copies of Comments of North America Freight Car Association in the above-captioned case.

Respectfully submitted,

Andrew P. Goldstein
Attorney for
North America Freight Car Association

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BEFORE THE
SURFACE TRANSPORTATION BOARD

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

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

COMMENTS OF
NORTH AMERICA FREIGHT CAR ASSOCIATION

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Dated: April 12, 2004

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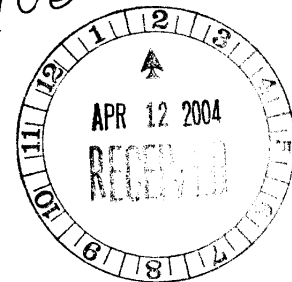
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COMMENTS OF
NORTH AMERICA FREIGHT CAR ASSOCIATION



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Pursuant to the Board's Notice of February 5, 2004, North America Freight Car Association ("NAFCA") hereby submits its comments with respect to the Application of TTX Company ("TTX") to extend its flatcar pooling authority for 15 years from October 1, 2004. NAFCA is an unincorporated association organized and existing for the purpose of furthering the interests of those member entities that supply and use private freight cars. Its members own or operate approximately 400,000 private cars, more than half of all such cars, and include manufacturers, lessors, and operators (as shippers) of privately-owned freight cars.¹

¹ Pursuant to rules established by the Association of American Railroads ("AAR"), freight cars controlled by railroads are deemed to be carrier equipment, and all others are deemed to be private cars. AAR rules require that the reporting marks assigned to private cars end with the letter "X". Under these definitions, TTX is a private car operator. However, TTX is not a member of NAFCA.

NAFCA's Interest in This Proceeding

NAFCA is participating in this proceeding because operators of private cars rely heavily on leasing companies as a source of car supply and because leasing company members of NAFCA have voiced concern that the conditions under which TTX seeks approval of its flatcar pooling Agreement will be harmful to those leasing companies. Events that undermine the financial stability of the freight car leasing industry are potentially harmful to the large number of shippers who must supply private cars because the carriers have withdrawn their own supply of certain types of freight cars.

Table 1 below shows the dramatic changes which took place in the distribution of freight car ownership during the 20th century, when the railroad industry as a whole receded from a position of dominant car supplier. Table 1 shows that the withdrawal of Class I railroads from the business of car supply is even more pointed than that of the railroad industry as a whole, dropping from 87 percent to 38 percent.

Table 1

Freight Car Ownership: 1929-2001²

	<u>All Cars</u>	<u>Class I Railroads</u>	<u>Private Car Operators</u>
1929	2,611,000	2,278,000 (87%)	287,000 (11%)
2001	1,314,000	500,000 (38%)	688,000 (52%)

Two types of freight cars are especially dependent on private car supply. Virtually all 245,317 tank cars in use (99.6%, to be precise) are privately supplied. Sixty-three percent of all covered hopper cars are privately supplied. In two other private car types – open hopper cars and gondolas – private car owners contribute 38 percent of the active

² Source: Railroad Facts, AAR, 2002 Edition.

fleet.³ A conservative estimate of the current replacement value of the private care fleet existing at the end of 2001 is in excess of \$41 billion.

Within the private car universe, car leasing companies play a major, vital role. They own twice as many private cars as the shippers, who operate the cars and own about one-third of the fleet.⁴ Car leasing companies play a crucial role in private car supply because their resources are dedicated entirely to the development and maintenance of freight car fleets, unlike shippers, all of which have primary businesses, other than freight car supply, that make demands on their capital and managerial resources. Car leasing companies are better positioned to assume the long-term risks of freight car ownership than are most shippers. Without a leasing industry capable of purchasing larger volumes of newly-built freight cars, with useful lives in excess of 40 years per car, there would be a scant market for newly built private cars and shippers would find it far more difficult and risky to supply the equipment that the Class I railroads are plainly undesirous of furnishing. Car leasing is not a risk-free business (unlike TTX, leasing companies take on new cars without an affiliated group of companies being ready to utilize those cars) and lessors need to spread the risks of car investments among many car types. The more competitive advantages gained by TTX, the more difficult it becomes for leasing companies to invest in flatcars, thereby restricting their ability to spread risk.

A financially healthy private freight car leasing community accordingly is of extreme importance to the many shippers who rely on private cars to move their goods. Shippers of petroleum products, chemicals, and grain products rely on the private tank car fleet. Shippers of plastics, grain, grain products, salt, clay, fertilizer and other bulk

³ Id.

⁴ See Progressive Railroading Fleet Statistics Periodical, May 2003.

commodities require the private covered hopper car fleet. Coal shippers and aggregates shippers utilize open hopper cars, and a variety of products, including scrap metal, move in gondolas.⁵ Without a strong freight car leasing industry to encourage the construction of these private cars, shippers would face steeply increased costs to use rail service or be deterred from using rail service at all.

NAFCA's Position

NAFCA does not oppose the continuation of a flatcar pool, but it is sensitive to and supportive of the concerns raised by car leasing companies regarding certain aspects of the current TTX Application which they believe will enhance the competitive advantage that TTX enjoys in providing flatcar service and weaken their ability to compete as car suppliers.

The points of concern communicated to NAFCA by various leasing companies are that the Application is too expansive, embracing more than just intermodal flatcars for which no demonstrated pooling need has been shown; that the term of approval sought is excessive, should be limited to no more than five years, and should not have any ever-green renewal provisions; that TTX should be denied the permission it seeks to make unilateral changes, without Board approval, to its car contracts with participating railroads of an undefined non-substantive nature; that the Application contains an inappropriate indirect request that the Board act on its own in granting assignment and allocation authority to TTX; and that the Board curtail what some leasing companies regard as unfair pricing activities by TTX.

⁵ Shippers of non-bulk commodities, such as those moving in intermodal service, are not heavily reliant on private rail cars and may well support the TTX Application in its entirety.

NAFCA does not intend to offer detailed arguments in support of each of these concerns, although NAFCA is fully supportive of the leasing company outlook in each instance. NAFCA members, as shippers who operate private cars or companies that lease them to shippers, are familiar with the significant advantages enjoyed by railroads and TTX, in many respects a railroad industry alter-ego, due to their easy access to repair and maintenance facilities owned by railroads and TTX, free or reduced-rate car storage, and free or reduced-rate car relocation services, while private cars are subjected to substantial railroad charges, which have escalated sharply in recent years and are on an upcurve, when they require these same services or facilities, giving TTX an increasing advantage over private car suppliers. The preferential conditions available to railroad-owned and TTX cars place other private car suppliers at a distinct disadvantage, and the Board should curtail efforts by TTX in this proceeding to deepen the disadvantages under which the independent private car fleet operates.

It appears to NAFCA that many of the structural underpinnings upon which pooling by TTX or its predecessor, Trailer Train Company, was approved no longer remain as valid reasons for maintenance of a pooling enterprise which, by definition, is anticompetitive. The Board does not have jurisdiction to approve a pooling proposal unless it finds that the proposal contemplates a surrender of certain competitive relationships between the parties to the pool. American Rail Box Car Co. – Pooling, 347 I.C.C. 862, 875-878 (1974) ("1974 Decision"). Anticompetitive behavior in the form of a car "pool" may be sanctioned by the Board under 49 U.S.C. § 11322(a) only if the Board finds that the pool will have certain countervailing benefits; i.e., that the pool "will be in the interest of better service to the public or of economy of operation; and ... will not unreasonably

restrain competition." NAFCFA is especially concerned about the anticompetitive effects of pooling, which clearly advantage the pooling participants in a marketplace where non-railroad competitors are not permitted to enjoy similar prerogatives yet must still supply vital assets that railroads are unwilling to furnish.

When the Board's predecessor, the Interstate Commerce Commission ("ICC"), initially approved what is now the TTX flatcar pool in the 1974 Decision, there were critically different facts and regulatory provisions in play that no longer are present.

First, the railroad industry was comprised of more than 40 Class I railroads plus a number of smaller railroads that handled cars of the type for which pooling authority was sought. Thirty-one railroads initially sought authority to participate in the original flatcar pool. 1974 Decision, 347 I.C.C. at 863.

Second, car hire (the compensation paid to a railroad owning a freight car by another railroad on whose lines the freight car finds itself) was set by an ICC-established formula. See Chicago, B. & Q. R. Co. v. New York, S. & W. R. Co., 332 I.C.C. 176 (1968).⁶

Third, the ability of a railroad to utilize or reload a "foreign" car belonging to another railroad was strictly circumscribed by what the ICC referred to as "mandatory Car Service Rules 1 and 2," formerly prescribed by that agency at 49 C.F.R. 1033.1 and 1033.2. 1974 Decision at 887. Essentially, the ICC's Car Service Rules 1 and 2 required a railroad promptly to return cars of "foreign" railroad ownership to or in the direction of the owning carrier. A major objective of the original TTX pool was to change the car use environment from one under which freight car use was circumscribed by Car Service

⁶ The car-hire formula there established was revised pursuant to statutory directive in Car Service Compensation – Basic Per Diem Charges, 358 I.C.C. 716 (1977).

Rules 1 and 2 to an environment in which freight cars would be "free-running"; that is, no longer required to be returned promptly to or in the direction of the owning railroad.

1974 Decision at 886.

There were several reasons that impelled the freight car regulatory structure in place in 1974. In the absence of Car Service Rules 1 and 2, a railroad that invested in freight cars and loaded them to off-line destinations might never see the cars again, or at least might not see them for long periods of time, were they loaded by the receiving railroad to a destination on one of the nation's more than 40 Class I railroads and if each succeeding recipient of the cars similarly was entitled to use the cars to destinations of their choice. The fact that there were so many Class I railroads inhibited as a practical matter the use of bilateral agreements to govern the handling of freight cars, and the existence of ICC-established car hire compensation also discouraged bilateral car use agreements.

Those conditions no longer exist. In 1980, the ICC did away with mandatory Car Service Rules 1 and 2. Investigation of Adequacy of Freight Car Ownership, 362 I.C.C. 844 (1980). Thereafter, the AAR altered its Code of Car Service Rules and Interpretations – Freight to conform with the ICC's relaxed approach toward freight car handling. AAR Car Service Rule 1 now provides:

Unless covered by a Car Service order or directive, or moving under the optional empty mileage charge provision ... in Car Service Rule 5, foreign cars may be loaded without regard to route or destination.

Car Service Rule 2 now provides that empty foreign cars not needed for loading "may be" returned to the owning railroad or to the railroad from which the car was received under load.⁷ Thus, pooling authority no longer is required in order to allow a car

⁷ AAR Car Service Rules 1 and 2 may be found in The Official Railway Equipment Register.

to be "free running." A railroad in possession of an empty foreign car can load that car to any destination unless the owning railroad has requested a different form of handling that is reflected in a Car Service order or directive. This outlook plainly opens the door to "free running" freight cars without the necessity of an anticompetitive pooling arrangement.

Nor are the other prior impediments to a system of bilateral freight car agreements still present. In 1993, the ICC agreed to "deprescribe" car hire, and install a system under which bilaterally negotiated car hire rates would replace prescribed rates. This regime was phased in and became fully effective on January 1, 2003. See Railroad Car Hire Compensation – Rulemaking, 9 I.C.C. 2d 1090 (1993); 49 C.F.R. Part 1033. If a car-owning railroad cannot reach agreement with a connecting line on car-hire rates, a default rate initially may be set by the using line. *Id.* Coupled with the replacement of mandatory Car Service Rules 1 and 2 by the more flexible approach of AAR Car Service Rules 1 and 2, the industry is positioned to sustain "free-runners" without the necessity of pooling. Additionally, the number of railroads between which bilateral flatcar use agreements could be negotiated in lieu of a pooling arrangement has been sharply reduced, thereby removing a practical problem that existed in 1974. Only nine railroad systems presently participate in the TTX flatcar pool (Application at 6), in contrast with the 31 participants in the original Agreement.

Accordingly, it appears far more possible to attain today, without pooling authority, many of the operational benefits upon which flatcar pooling initially was predicated and approved: namely, a fleet of free-running cars not bound by mandatory Car Service

Rules 1 and 2; car hire reflective of market considerations rather than regulatory prescription; and greater ease of car management.

NAFCA is not aware that a flatcar pool has been reevaluated thoroughly under the statutory criteria in light of the changes that have occurred to the fundamentals of the freight car interchange structure that existed in 1974. Part of the Board's task when confronted with a pooling request is to determine whether the objectives of the pool can be satisfied through means other than a pooling arrangement with anticompetitive components. Trailer Train Co., et al. – Pooling – Car Service, 5 I.C.C. 2d 552, 559 (1989) (“1989 Decision”). It would seem that the changes that have taken place in the structure of the interchange system since the flatcar pool first was approved warrant a reexamination of the pool and an evaluation of the current Application in light of current conditions.

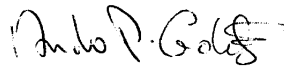
The basic pooling arrangement proposed by TTX may well generate benefits for TTX and its owning railroads; enhanced car purchasing power, a network of in-house repair facilities; centralized managerial expertise; and even certain operational advantages. On the other hand, what may be benefits to TTX and its owners can be disadvantages to the competitors of TTX; namely, car leasing companies. TTX has clear preferential advantages in the supply and maintenance of flatcars, making it difficult for leasing companies to find profitable competitive opportunities. Those problems, in turn, weaken the ability of those firms to operate effectively in other segments of their business.

In reviewing the TTX Application, the Board should bear in mind that pooling is far less essential today to achieving improved service goals than it was when Trailer Train first sought pooling approval. There is less reason than previously to give TTX the benefit of the doubt and more reason than before to limit the prerogatives sought by TTX

to only those which are clearly demonstrated to be both essential to the pool and lacking in the potential to unreasonably restrain competition. The ability to make unilateral changes in the structure of the pool and in the arrangements between participants, the power to engage in equipment assignments that compete directly with leasing company activities, the ability to perpetuate the pool through automatic extensions of the pool's term are among the conditions sought by TTX that should not be approved because they are unnecessary to further the pool's legitimate purposes and because they place TTX in an unnecessarily favored position that its competitors cannot enjoy.

Given the increasing reluctance of the railroad industry to supply certain significant categories of freight cars and the consequent need of shippers to rely on a healthy car leasing industry capable of meeting the car supply needs that the railroads eschew, the Board should give careful consideration to the concerns of the car lessors as expressed by them in this proceeding. Pooling approval should not be regarded as a right of the railroad industry, but as a privilege to be granted only when other alternatives are unavailable; and even then, only to the minimum extent necessary, as the ICC found in the 1989 Decision.

Respectfully submitted,

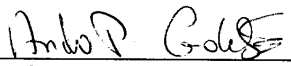


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Comments of North America Freight Car Association has been served on all parties of record, by first-class mail, this 12th day of April 2004.



Andrew P. Goldstein

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