

HALE AND DORR ^{LLP}
C O U N S E L O R S A T L A W

haledorr.com

THE WILLARD OFFICE BUILDING
1455 PENNSYLVANIA AVENUE, N.W. • WASHINGTON, D.C. 20004-1008
202-942-8400 • FAX 202-942-8484



JOHN C. CHRISTIE, JR.

202-942-8400
john.christie@haledorr.com

210548

April 9, 2004

BY HAND DELIVERY

ENTERED
Office of Proceedings

APR - 9 2004

Part of
Public Record

The Honorable Vernon Williams
Secretary
Surface Transportation Board
1925 K Street NW
Washington, DC 20423-0001

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

Dear Secretary Williams:

Enclosed please find the original and ten copies of the Comments of Progress Rail Services Corporation, with a Certificate of Service, and the Verification of P. Doug Creech, its Vice President Car Repair Division. Also enclosed is a 3.5" disc containing these papers in a format compatible with WordPerfect 8.0 as required by the Board's rules.

Please date-stamp the enclosed extra copy of the Application and return it to our waiting messenger. Thank you very much for your cooperation.

Sincerely,

John C. Christie, Jr.

JCC:cms

BOSTON LONDON MUNICH NEW YORK OXFORD PRINCETON RESTON WALTHAM WASHINGTON

Hale and Dorr LLP is a Massachusetts Limited Liability Partnership

BEFORE THE
SURFACE TRANSPORTATION BOARD

210548

TTX Company – Application for Approval of Pooling

Of Car Service with Respect to Flatcars

Finance Docket No. 27590 (Sub-No 3)



COMMENTS OF
PROGRESS RAIL SERVICES CORPORATION

ENTERED
Office of Proceedings

APR - 9 2004

Part of
Public Record

PROGRESS RAIL SERVICES CORPORATION
1600 Progress Drive
P.O. Box 1037
Albertville, AL 35950
256-593-1260

John C. Christie, Jr.
Hale and Dorr LLP
1455 Pennsylvania Avenue NW
Washington, DC 20004
202-942-8400
Attorneys for the Commentator

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

**TTX Company – Application for Approval of Pooling
Of Car Service with Respect to Flatcars
Finance Docket No. 27590 (Sub-No 3)**

Comments of Progress Rail Services Corporation

Pursuant to the notice published at 69 Fed. Reg. 5662 (February 5, 2004), Progress Rail Services Corporation ("Progress Rail"), through its attorneys Hale and Dorr LLP, offers the following comments concerning the Application for Reauthorization of the TTX Flatcar Pool ("Application"). By this Application, TTX seeks the Board's approval of a fifteen-year extension of its existing flatcar pooling authority, together with certain clarifications and amendments.

Progress Rail is one of North America's principal suppliers to the railroad industry, supplying locomotive and railcar repair and maintenance services, car parts and track components to both railroads and passenger car rail systems. Progress Rail is a wholly owned subsidiary of Progress Energy, Inc., a public utility holding company with corporate headquarters based in Raleigh, North Carolina.

Progress Rail is headquartered in Albertville, Alabama. It has in excess of eighty operating facilities services strategically located in over twenty states, Canada and Mexico. All facilities are certified by the Association of American Railroads ("AAR") as

required. Progress Rail also dispatches mobile crews in order to provide services in other locations as necessary.

Progress Rail is one of over 125 independent entities providing repair services to railroad freight cars.¹ Many of these entities, like Progress Rail, have multiple service locations located around the country, including companies such as RESCAR, Inc., Trinity Railcar Repair, Transco Railway Products and Millenium Rail, Inc.

The facts alleged in these Progress Rail comments are verified by P. Doug Creech, Vice President Car Repair Division. Mr. Creech's notarized verification is submitted with these comments. Mr. Creech has participated in this industry for over fifteen years and is knowledgeable with respect to the subjects discussed in these comments.

I. Introduction

As the TTX Application suggests, the controlling legal standard for the Board's consideration of the issues raised by the Application is established by statute. Application, p. 11. The Board may approve a pooling of railroad traffic, services or earnings if it determines that the pooling authority requested:

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

¹ The Railroad Directory.

49 U.S.C. § 11322(a) (emphasis added). In the past, consideration of a pooling application has involved a weighing of the purported benefits of the arrangement against any restraints on competition which might arise from its implementation. See *Railroad Car Service and Car Hire Pooling Agreement*, Finance Docket No. 30214, decision and order of June 21, 1985, p. 4.

However, it is clear that the burden of proof is on the applicant to demonstrate that a proposed pool meets these statutory standards. *Railroad Car Service Pooling Application*, Finance Docket No. 30067, at 3, 7 (September 16, 1983). This is especially warranted because grants of antitrust immunity are to be strictly construed. *Railroad Car Service and Car Hire Pooling Agreement*, Finance Docket No. 30214 (Slip Opinion), June 21, 1985, p. 4 ("the Commission's policy [is] narrowly construing agreements that would result in a grant of antitrust immunity"); *Improvement of TOFC/COFC Regulation*, 365 I.C.C. 728, 732 (1982) ("narrow construction . . . is traditionally accorded antitrust exemptions").

II. Progress Rail Supports The Renewal of TTX's Car Ownership Pooling Authority For A Period Not To Exceed Five Years

Generally speaking, Progress Rail supports the renewal of TTX's pooling authority with respect to TTX's ownership of intermodal and auto-rack flat cars only (but not with respect to all types of flat cars).² With respect to these two types of flat cars, Progress Rail agrees with the characterization in the Application that this authority has allowed "railroads as a group to squeeze more productivity out of their equipment

² TTX has aggregated numerous car types in its Application and does little to differentiate its diverse ownership.

fleet, reducing operating costs and demands on limited investment dollars.”

Application, p.20. This limited arrangement has certain obvious efficiencies principally because it does tend to provide all of TTX’s participating railroads “with cars being forwarded to the locations where they are most needed at any given time.” *Trailer Train II*, 5 I.C.C. 2d at 562. More cars move less empty than might otherwise be the case absent the pooling opportunity. Transportation costs are reduced overall and service to shippers is improved, as the Application correctly asserts. Application, p. 22.

However, Progress Rail believes that this limited renewal should be for a period no longer than five years and that the fifteen years period requested by the Application is demonstrably too long. The railroad industry has changed dramatically since the TTX pooling agreement was originally approved by the ICC in 1974 and even since the pooling authority was last renewed in 1989. The number of major railroads continues to shrink as do the number of owners of TTX. In 1974, there were 67 Class I railroads; in 1989 there were 15 and in 2003 there were only seven.³ In 1974, there were thirty-two owners of TTX, in 1989 there were nineteen and today there are only nine, with four Class I railroads collectively owning a 93 percent interest.⁴

Moreover, the nature of railcar ownership and the role played by TTX with respect to railcar ownership has also changed dramatically during this same time period. In 1974, the railroads dominated the ownership of railcars, owning

³ AAR Annual Fact Book.

⁴ TTX Annual Reports.

approximately 82 percent of cars then in operation.⁵ In 1989, the railroads still owned a majority of those cars although the percentage of ownership had dropped to 65 percent.⁶ However, by 2003, the balance had completely shifted, the railroads owning only 43 percent and private, non-railroad ownership constituting the balance.⁷ TTX's railcar ownership (which is considered to be "private, non-railroad ownership") has risen dramatically during this period from approximately 67,000 in 1974 to approximately 129,000 today.⁸ In fact, today, TTX is one of the largest single private non-railroad owners of railcars.⁹

Progress Rail expects that future changes in the railroad industry will be similarly dramatic. Were the trends noted above to continue, they could have a very significant influence on the justifications underlying the TTX pooling agreement and on the competitive impact of the TTX pools. Particularly given the rising prominence of TTX in this industry and the blanket antitrust immunity obtained by the approval of the proposed pooling agreement by the Board, it is entirely appropriate that the Board sooner review this issue again than in 2019 as requested by the Application. Although the applicant argues that future pool issues developing prior to that time could be "readily" addressed through the Board's ongoing jurisdiction over the pool (Application, p. 55), the enhanced oversight afforded by more regular and certain Board review of this subject, with the attendant burdens on the applicant, is warranted in this circumstance.

⁵ AAR Statistical Data – Railroad Equipment Reports.

⁶ *Id.*

⁷ *Id.*

⁸ TTX Annual Reports.

⁹ AAR Statistical Data – Railroad Equipment Reports.

III. Progress Rail Submits the Extension of TTX's Pooling Authority to the Repair and Maintenance of Railcars Should Be Eliminated As It Fails to Meet the Standard Imposed by 49 U.S.C. § 11322(a)

The Application asserts that the repair and maintenance of pool equipment are among the efficiencies achieved through the existing pool authority, in part resulting from "the geographic scope and accumulated expertise of TTX's own maintenance facilities and forces." Application, p. 30. As discussed above, TTX has today become one of the nation's largest single non-railroad owners of railcars. As such, it obviously also has become one of the largest single non-railroad *customers* for repair and maintenance services. At the same time, TTX has aggressively moved to offer repair and maintenance facilities and services as a *competitor* of other providers of those services, both with respect to its own pool cars *as well as* with respect to cars owned by others, both railroad and non-railroad. This fact, together with the substantial advantages, directly and indirectly, which TTX enjoys by virtue of the pooling agreement and its ownership by North America's leading railroads, sets up a serious potential threat to competition in the provision of railroad repair and maintenance services. Although Progress Rail takes no issue with TTX's need to provide oversight concerning the repair needs of its own pool cars, Progress Rail does believe that the Board should re-examine whether TTX should be able to perform repair and maintenance services under the aegis of its pooling agreement with attendant antitrust immunity.¹⁰

¹⁰ The existing and the proposed TTX Pooling Agreements speak of the pooling of "car service." "Car service" is defined as "meaning those functions defined in Section 10102(2) of the Act, including the design, acquisition, financing, utilization, *maintenance* and accounting for the use of freight cars." (Emphasis added). In fact, Section 10102(2) makes no express reference to maintenance.

In order to place these issues in context, a brief discussion of railroad repair and maintenance in the United States is useful. Generally speaking, these services have been accomplished in three different types of facilities by several different types of providers. The first type of facility is a general repair shop (or "back shop") where work ranging from routine maintenance to general overhauls to substantial rebuilding of cars is performed. General repair shops exist in different parts of the country where the cars needing the work done have to be taken. TTX owns and operates three of these facilities. Over the past several years, the Class I railroads have substantially reduced their ownership of these types of shops and today own a relatively small number. The majority of these types of facilities, numbering approximately 250, are owned and operated by independent service providers such as Progress Rail.

The second type of repair facility, frequently styled as "rip tracks," are used for light repair needs. Rip track sites are found in large numbers, conveniently located on or near train yards and designed for the purpose of making minor repairs as the cars move through them. They are typically located on railroad property and are railroad owned. Although most railroads do their own repair work at these types of sites, this repair service is contracted out to third parties in certain cases. TTX competes for contracts here as a service provider to the general population of railcars (not exclusively TTX owned cars) as does Progress Rail and other independents.

The third type of common repair facility is one typically located at a place with a primary purpose other than railcar repair. The most common example of this type is a

“ramp facility” located at an intermodal site. While railroad cars are awaiting the loading or unloading of shipping containers or truck trailers, the idle time can be effectively employed for minor repairs and maintenance. Repairs performed within these intermodal sites are expressly intended to take advantage of the idle cars. Because these locations are often a staging area for very limited types of railroad cars, the repair work tends to be very specialized in terms of the type of work accomplished. Although the pattern can vary from place to place, typically the owner of the entire loading/unloading intermodal facility leases a site to a railroad for a ramp facility and the railroad in turn contracts out to a service provider for the repair work done there. Car repairs made at the ramp facility are billed to the owner of the car by the service provider, in accordance with AAR time standards and labor billing rates. TTX bids for this service work against Progress Rail and other independent service providers.

In its Application, TTX waxed on about how “the TTX flatcar pool achieves a high degree of efficiency in the repair and maintenance of pool equipment” in part because of “the geographic scope and accumulated expertise of TTX’s own maintenance facilities and forces.” Application, p. 30. However, in fact, TTX, as well as a large number of other owners of railcars (railroad and non-railroad) are well served by the existence of a number of providers of these services operating across the country in widely dispersed and convenient locations, including independent providers such as Progress Rail. Other private car owners achieve equally high utilization and efficiency by employing privately owned facilities for all of their repair and maintenance requirements. In fact, most leasing companies and other private railcar owners do not

own repair facilities or use their own employees to perform repair and maintenance to their railcars.

It is the existence of this highly competitive environment that has generated these service opportunities, resulting in the efficiencies and cost savings that the railroad industry (and TTX) has benefited from in the past. Put another way, these efficiencies and cost savings are not an inevitable consequence of the TTX pooling agreement (or TTX's maintenance authority such as may be contained therein) as the Application suggests, but rather flow from this competitive network of service providers. TTX performed maintenance and repairs only serve to displace availability in the currently existing capacity for these services. As the Department of Justice said upon the occasion of the last major review of the TTX pool, the Applicant has failed to show that its maintenance and repair functions are "unique or could not be easily duplicated by any owner of freight cars."¹¹

TTX claims efficiencies in its repair and maintenance operations. TTX emphasizes its "holistic approach that aims to minimize costs for the rail network as a whole, including the operational disruption associated with unplanned train stops and the need to switch bad ordered cars." Application, p. 31. However, the fact is that, on occasion, TTX has limited the repairs performed by independent providers and avoided more conveniently located, alternative repair facilities in order to move cars to a distant TTX facility for performance of the repair work. This is clearly less efficient, increases

¹¹ Post Hearing Brief of the United States Department of Justice, *Trailer Train Co., et al*, Finance Docket No. 27590 (Sub-No. 1), August 29, 1988, p. 79.

overall costs and is entirely inconsistent with the "holistic approach" claimed by TTX. In addition, TTX employs a large administrative staff that supports its maintenance business. This staff and its activities are an inefficient duplication of personnel, infrastructure and technology currently in place. TTX owner railroads employ sufficient and knowledgeable personnel to advise and determine ongoing maintenance requirements and policies.

Moreover, Progress Rail believes that in this context TTX wears too many hats. TTX's pooling authority and its ownership by North America's leading railroads, together with its increasing prominence as a purchaser of car maintenance and repair services, pose a serious threat to competition in the market for these services as TTX has become a more active competitor as a general provider of these services to its own cars *and* cars owned by others. There is a clear and present danger that the level competitive playing field which has existed in the past in the car maintenance and repair service market is being eroded -

- TTX enjoys a cost advantage over its independent repair competitors when railcars are transported to TTX repair shop facilities by its owner railroads. Progress Rail is informed and believes that the principal railroad owners of TTX provide that transportation without charge and, in many instances, by-pass a number of privately owned, competitive and qualified shops. The cost of comparable transportation must be borne by TTX's privately owned repair competitors (or the actual car owners).

- TTX has used its leverage as a prominent purchaser of repair services and its connections with its owner railroads, which establish the time standard and labor billing rates for railcar repairs, to drive down the costs of repair. On occasion, these rates have been driven to levels significantly below those that are reasonably competitive, thereby reducing the economic incentive and ability of others to compete for this business. As an owner of railcars and a purchaser of repair and maintenance services, TTX retains the right to inspect and audit independent suppliers. Roughly analogous to allowing the fox in the hen house, TTX can potentially use this information and these inspection rights to unfairly compete and disrupt private enterprise.

- In most ramp facility locations, where TTX owned cars predominate, TTX possesses an unfair competitive advantage in obtaining repair service contracts. These contracts and the ensuing revenues typically extend to all repair services performed there whether on TTX owned cars or cars owned by others. Thus, TTX is permitted to repair its cars at "cost" while extracting more favorable AAR established rates from its other customers for these services.

- In conjunction with its expanding repair and maintenance activities, TTX actively markets its abilities "to audit and evaluate" car repair bills received by its member railroads and other customers who choose to subscribe to this service. In performing these "audit services", TTX is able to review and assess repair charges for that railroad or other car owner made by any repair provider (railroad or an independent private supplier). This provides TTX remarkable insight into the pricing policies and privately negotiated rates of its competitors, thus giving TTX a clearly

inequitable and inappropriate position and advantage in the market place as it also competes for this repair work.

Notwithstanding the Application's heavy reliance on the Board's (ICC's) endorsement of these collateral repair and maintenance activities in the past (Application, pp. 15-18), circumstances can and do change, warranting a renewed and rigorous examination as to whether the proffered efficiencies of this aspect of the proposed pooling agreement truly outweigh the potential for anticompetitive impact. TTX's repair and maintenance activities have grown into a distinct and separate business, far beyond the scope of its own pool cars, competing with private enterprise but with all of the unfair advantages inherent in its pool and antitrust immunity.

For the reasons discussed herein, Progress Rail submits that the provision of maintenance and repair services by TTX are not necessary to the successful operation of the pooling agreement, produce no separate efficiencies apart from what already exists in the market for those services and present a real threat to free market competition. As a result, this part of the proposed pooling agreement fails to meet the standards imposed by 49 U.S.C. § 11322(a) and should be eliminated.

Respectfully submitted,

John Christie / N8T

PROGRESS RAIL SERVICES CORPORATION
1600 Progress Drive
P.O. Box 1037
Albertville, AL 35950

John C. Christie, Jr.
Hale and Dorr LLP
1455 Pennsylvania Avenue NW
Washington, DC 20004

CERTIFICATE OF SERVICE

I hereby certify that on April 9, 2004, I served the foregoing comments of
Progress Rail Services Corporation and the Verification of P. Doug Creech by Federal
Express overnight mail (Monday delivery) on the following:

David L. Meyer
Michael L. Rosenthal
Ronald J. Baumgarten, Jr.
Covington & Burling
1201 Pennsylvania Avenue NW
Washington, DC 2004-2401

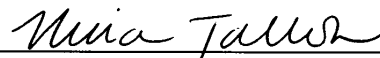
Patrick B. Loftus
General Counsel & Corporation Secretary
TTX Company
101 North Wacker Drive
Chicago, IL 60606

James Maclellan
P.O. Box 151
425 S. Palos Verdes Street
San Pedro, CA 90733-0151

Michael J. Farrell
Standard Steel LLC
500 North Walnut Street
Burham, PA 17009

Michael H. Higgins
Thompson Hine LLP
1920 N. Street, N.W.
Washington, DC 20036-1600

Janet D. Kaminsky
Department of the Army—Military Surface Development
661 Sheppard Place
Fort Eustis, VA 23604-1644



Nina S. Tallon

BEFORE THE
SURFACE TRANSPORTATION BOARD

210548

TTX Company – Application for Approval of Pooling
Of Car Service with Respect to Flatcars
Finance Docket No. 27590 (Sub-No 3)

Verification of P. Doug Creech



VERIFICATION

State of Alabama)
County of Marshall) SS

P. DOUG CREECH, Vice President Car Repair Division of Progress Rail Services Corporation ("Progress Rail"), being first duly sworn, deposes and says that he has read the Progress Rail Comments, knows the contents thereof and that the facts alleged therein are true as stated.


P. Doug Creech

Sworn and subscribed before me this 8th
day of April, 2004

Drone W. Eakin
Notary Public

My Commission expires on June 30, 2005

