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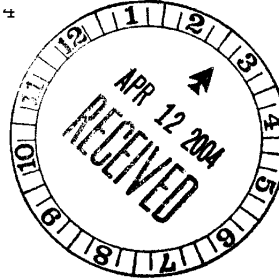
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April 12, 2004



BY HAND DELIVERY

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

Dear Secretary Williams:

Enclosed for filing in the above-referenced docket are  
an original and ten copies of the "Comments of CIT Rail  
Resources." Also enclosed are three diskettes in accordance with  
the Board's rules, each containing an electronic copy of the  
pleading.

Thank you for your assistance in this matter.

Sincerely,

George W. Mayo, Jr.  
Counsel for CIT Rail Resources

GWM/kb

Enclosures

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

BRUSSELS LONDON PARIS\* BUDAPEST\* PRAGUE\* WARSAW MOSCOW TOKYO

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BEFORE THE  
SURFACE TRANSPORTATION BOARD

Application of TTX Company  
for Approval of Pooling of  
Car Service with Respect to  
Flatcars

Finance Docket No. 27590  
(Sub-No. 3)

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Office of Proceedings

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Public Record

COMMENTS OF CIT RAIL RESOURCES

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April 12, 2004

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### Verified Statements:

Stephen McClure  
William B. Tye, Ph.D.

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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

COMMENTS OF CIT RAIL RESOURCES

CIT Rail Resources ("CIT") hereby submits its comments in reply to the "Application for Reauthorization of the TTX Flatcar Pool" (the "TTX Application") submitted by TTX Company ("TTX") on January 6, 2004.

INTRODUCTION

CIT is one of the leading railcar and locomotive lessors in North America. Owning and managing a fleet in excess of 58,000 railcars and approximately 550 locomotives, it provides the rail industry with a broad array of equipment leasing and financial products. Its customers include Class I, regional and shortline railroads, as well as shippers in a wide range of industries including paper, plastics, automotive, food products, steel, coal, cement, and lumber.

CIT has a pressing interest in this proceeding because it operates in direct competition with TTX to supply railcars to

the rail industry. See McClure V.S. at 2. 1/ As regards the range of flatcar types which are the subject of the TTX Application, CIT currently owns and leases to rail carriers and shippers 3,381 centerbeam flatcars and 440 other flatcars of various designs; CIT is a potential entrant into the market for supplying other flatcar types. Because of the manner in which the TTX flatcar pool operates, CIT is finding it increasingly difficult to compete with TTX, and the TTX flatcar pool has become a significant and unjustified barrier to competition for supply of flatcars. Id. at 2-3.

CIT does not urge Board rejection of the TTX Application. Rather, it seeks modification of the pooling authority requested by TTX in the following respects:

1. The pooling authority should only extend to intermodal flatcars as to which TTX has demonstrated material efficiencies being generated through the pooling mechanism, and should not extend to other types of flatcars (such as centerbeam flatcars) where no such efficiencies have been shown.

2. The pooling authority should not extend to collective price fixing by TTX and its owner railroads. In

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1/ As part of these Comments, CIT is submitting supporting Verified Statements from two witnesses: Stephen McClure, the President of CIT ("McClure V.S."); and William B. Tye, a Brattle Group economist with extensive railroad and other regulated industry experience ("Tye V.S.").

addition, TTX - acting collectively through its railroad owners - should not be permitted to establish preferential operating terms for TTX equipment.

3. The pooling agreement should be approved for a term of not more than five years, and it should not have any automatic renewal for either one year or any other term. This will allow a relatively near-term reexamination of the competitive effects of the pool where depreservation of car hire rates and the changing landscape of the railroad industry can be expected to have a material impact on such effects. Moreover, there should be no shifting of the burden of proof away from the proponents of the pool, which would be the practical consequence of any automatic renewal provision.

4. TTX should not be authorized unilaterally to make changes in what it characterizes as "its car contracts and other policies embodying its day-to-day pooling activities" (TTX Application at 9). Rather, to the extent it seeks antitrust immunity for any such changes, it should be required to obtain STB approval prior to effecting them. It is entirely unclear what changes TTX contemplates under this proposed authority - TTX never says - and the STB should not allow TTX to self-define the scope of its antitrust immunity.

5. To the extent that TTX is inviting the Board to grant it assignment and allocation authority (TTX disavows that

it has extended such an invitation), the invitation should be firmly declined for the same reasons it was declined when the Board's predecessor, the ICC, last closely examined the issue.

In the discussion below, we address in order each of the points outlined above, and demonstrate that the Board's approval of the TTX Application should be limited in accordance with our recommendations.

#### ARGUMENT

This proceeding is governed by 49 U.S.C. § 11322(a), which establishes that a rail carrier "may not agree or combine with another . . . rail carrier[] to pool or divide traffic or services or any part of their earnings without the approval of the Board. . . ." The statute goes on to provide that:

The Board may approve and authorize the agreement or combination if the rail carriers involved assent to the pooling or division and the Board finds that a pooling or division of traffic, services, or earnings -

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

Section 11322(b) empowers the Board to "impose conditions governing the pooling or division."

Pursuant to 49 U.S.C. § 11321, as to those features of a pooling agreement approved by the Board under Section 11322, each participating rail carrier "is exempt from the antitrust laws and from all other law, including State and municipal law,

as necessary to let that rail carrier . . . carry out the transaction." In addition, the exemption extends to a "corporation[] or person participating in th[e] approved" pooling agreement.

In its 1989 decision addressing the TTX flatcar pooling agreement, the ICC summarized the standards which should govern the Board's review of TTX's current application: "In exercising our authority to approve or disapprove a proposed pooling agreement, we assess whether any anticompetitive effects flowing from the arrangement are outweighed by the efficiencies or other public benefits flowing therefrom." Trailer Train Co. - Pooling of Car Service with Respect to Flatcars, 5 I.C.C.2d 552, 559 (1989) ("Trailer Train II"). 2/ In performing this balancing analysis, the Board should take into account that "every pooling arrangement represents a potential restraint on competition," but recognize that "such a restraint may be proper and appropriate if necessary to achieve better service or economies in operation." Id.

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2/ The TTX flatcar pooling agreement was first approved by the ICC in 1974. American Rail Box Car Co. & Trailer Train Co. - For Approval of the Pooling of Car Service with Respect to Box Cars, 347 I.C.C. 862 (1974) ("Trailer Train I"). The agreement was most recently approved by the ICC in 1994. TTX Co. - Application for Approval of the Pooling of Car Service with Respect to Flat Cars, Finance Docket No. 27590 (Sub-No. 2), 1994 WL 467250 (I.C.C. served Aug. 31, 1994) ("Trailer Train III").

The antitrust immunity accorded an approved pooling agreement requires that particular care be taken in reviewing the agreement. The Staggers Act amendments to the Interstate Commerce Act and specific requirements of the Rail Transportation Policy adopted thereunder emphasize the importance, where possible, of allowing market forces, rather than regulation, to govern railroad operations. The Board should assess pooling agreements "with an eye toward ensuring that 'effective competition' prevails with a minimum of Federal regulatory oversight." Id. at 560.

In recognition of the central importance of ensuring a competitive rail marketplace, two related principles - consistently applied by the Board and the ICC in the past - should guide the Board in its review of the TTX Application:

(1) "[A] policy of strictly construing agreements that require antitrust immunity because of joint carrier activity that may lessen competition," and

(2) a policy of "approv[ing] only the narrowest proposal that is consistent both with achievement of [potential service and efficiency] benefits and compliance with the statute." Id.

When the TTX Application is assessed in light of these principles, it is clear that the application should not be approved on the terms proposed. Rather, any Board approval of

the application should be conditioned on the modifications discussed below. These modifications appropriately narrow the scope of the TTX Application so that the public interest benefits claimed by TTX may be achieved while at the same time the anticompetitive effects of the pool are appropriately tempered. In addition, the resulting agreement should be subject to strict construction and appropriate Board oversight given its potential threat to competition.

**I. THE POOLING AGREEMENT SHOULD NOT EXTEND TO  
CENTERBEAM AND OTHER NON-INTERMODAL FLATCARS**

Although TTX seeks Board authority to pool flatcars generally, it premises its public interest case for this authority (and related antitrust immunity) on various described efficiencies largely associated with TTX ownership and management of only a subset of the pool: intermodal flatcars. TTX offers essentially no public interest justification for pooling flatcars like centerbeam and other miscellaneous flatcars, which do not handle intermodal movements. 3/ There is no valid reason for

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3/ TTX's fleet of 115,560 railcars includes 13,800 centerbeam and bulkhead flatcars, which TTX describes as "primarily carry[ing] lumber and building materials." TTX Application at 12. It also includes 16,000 other types of flatcars, "which are used to carry products such as pipe, structural steel, agricultural and military vehicles, and heavy equipment." Id. at 12-13.

including these non-intermodal flatcars under the TTX pooling agreement, and the Board should require that they be excluded.

TTX's public interest case is almost totally focused on its intermodal flatcars. TTX highlights the loaded miles per platform realized by its intermodal fleet (TTX Application at 21), its efficient interlining of intermodal equipment in Chicago (id. at 23), its role in the evolution of doublestack and articulated multi-purpose spine cars (id. at 27-28), its redeployment of intermodal flatcars to automotive service (id. at 32), and its general role in the growth of intermodal rail transportation (id. at 36). <sup>4/</sup> These claimed efficiencies do not extend to non-intermodal flatcars.

While TTX's claimed efficiencies focus almost exclusively on intermodal flatcars, non-intermodal flatcars have become the dominant car-type in the TTX flatcar pool. The current TTX flatcar fleet consists of 78,900 non-intermodal flatcars and only 36,600 intermodal flatcars. Id. at 12-13. Thus, today only 32% of the TTX flatcar fleet consists of the

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<sup>4/</sup> Where TTX lays claim to public interest benefits that extend beyond its intermodal railcars, those benefits are typically available independent of the pooling authority being sought by TTX. For example, efficient repair and maintenance of equipment does not require pooling. See McClure V.S. at 2; Tye V.S. at 6, 14. Similarly, equipment can be financed just as efficiently by individual railroads as by TTX. See Tye V.S. at 5, 14-16.

intermodal flatcars upon which TTX bases its efficiency arguments.

TTX's expansion into non-intermodal flatcars has continued to grow dramatically over the ten years since the last review of the antitrust exemption. According to TTX's Annual Reports, TTX's total non-intermodal fleet went from 51,248 cars in 1993, to 78,702 cars in 2003, an increase of over 53%. In 1993, 59% of the TTX flatcar fleet was non-intermodal. By 2003, the non-intermodal fleet had expanded to 68% of TTX's flatcar fleet according to TTX Annual Reports. Over that same time period, TTX's number of intermodal cars has remained about the same. <sup>5/</sup>

As the owner of 3,821 centerbeam and other non-intermodal flatcars, CIT is very familiar with the management and operation of this type of equipment. These cars (regardless of whether owned by CIT or TTX) do not enjoy the multi-directional movement and reload opportunities that characterize the utilization of intermodal flatcars. Rather, they tend to handle movements of such commodities as lumber, engineered wood products, plywood, wall board, steel pipe, plate steel and logs; they often operate in well-defined corridors; and following

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<sup>5/</sup> According to TTX's Annual Reports, TTX had 35,926 intermodal flatcars in 1993, and 36,635 in 2003.

unloading, they are commonly routed empty back to their point of origin. See McClure V.S. at 2, 4-5.

TTX's pooling of centerbeam and other non-intermodal flatcars does not achieve any efficiencies that are not otherwise available in the marketplace. Accordingly, there is no justification for shielding the collective activities of TTX's railroad owners in the acquisition and operation of this type of equipment from the antitrust laws. See Tye V.S. at 12-13. The Board should therefore exclude centerbeam and other non-intermodal flatcars from any pooling authority it grants TTX in this proceeding.

**II. TTX SHOULD NOT BE AUTHORIZED TO ENGAGE IN  
COLLECTIVE SETTING OF CAR-HIRE RATES OR AWARD  
OF PREFERENTIAL OPERATING TERMS**

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In its application, TTX devotes hundreds of pages to explaining its operations and arguing why the public interest would be served by Board approval of its pooling agreement. And yet nowhere does it defend the collective setting of car hire rates or awarding of preferential operating terms in which it and its railroad owner/users engage. Both activities are highly anticompetitive, and neither is attended by any defensible public interest justification. The Board should condition any approval of the TTX pooling agreement on a required modification of the agreement to eliminate both features of the pool.

This is particularly true taking into account the market in which TTX operates. TTX's own data shows that it owns a majority share of all flatcars currently in use. See Tye V.S. at 18. And more specifically, as of 2003, TTX owned 62% of all intermodal cars and 65% of all intermodal platforms. Id. In other words, TTX dominates the flatcar market, and particularly the intermodal flatcar market. 6/

Collective Price Fixing. Adhering to its pricing practice generally, TTX sets car hire rates for centerbeam and other non-intermodal flatcars at below-market levels. TTX can afford to do this because it is tantamount to the railroad owner/users of TTX setting the rates that they will charge themselves. These owner/users can choose to forego a return on their equipment because they can recover the difference through their net realization on shipper charges for the movements utilizing the TTX equipment. See McClure V.S. at 5; Tye V.S. at 22-23.

This is obviously a pricing strategy that leasing companies like CIT cannot pursue. CIT is not in the rail transportation business; it merely leases rail cars. The car-hire rates charged on CIT cars have to be high enough to cover

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6/ TTX's share of auto racks in 2003 was 86%. Its share of all general flatcars was 35%. See Tye V.S. at 19.

all operating and ownership costs, and to provide an adequate return on investment. See McClure V.S. at 5.

This is not true of the car hire rates charged by TTX, an entity structured and operating at the behest of its railroad owner/users with much more limited financial requirements. As described by TTX's President, Mr. Reardon, "TTX has no independent profit motive - its goals are aligned with its participants' goals in reducing rail transportation costs and increasing intermodal traffic." Reardon V.S. at 6-7. 7/

Over time, the TTX rates have the effect of establishing a collectively set ceiling on the rates others can charge for car hire on comparable equipment. See Tye V.S. at 4, 22-23; McClure V.S. at 5-6. Deprescription has served as a

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7/ Section 7.10(a) of the TTX Pooling Agreement elaborates that:

It shall be the policy of TTX to maintain per diem, mileage and other charges at the lowest level required to meet TTX's ordinary and necessary costs and expenses, including, as appropriate, return on investment, to maintain a financial position enabling it to finance flat car acquisitions on reasonable terms and to keep the cars in proper condition for operation at the highest point of efficiency and to accumulate retained earnings adequate to support continued reasonable enlargement of the number of cars in the pool, to that number found to be needed.

Section 7.10(e) adds that where the charges exceed the criteria set in subsection (a), there will be an "adjustment refund" to TTX's railroad owner/users based on the proportionate car utilization of each.

catalyst for this result in a way unforeseen when deprescription was first adopted over 10 years ago, and certainly never examined in any of the earlier ICC reviews of the TTX pooling agreement (each of which pre-dated implementation of deprescription).

In bilateral negotiations over car hire rates, TTX rates are cited as indicative of what applicable rates should be. Where negotiations are unsuccessful and arbitration follows, TTX rates have been used as evidence of market rates and have been adopted by arbitrators to govern car hire paid for non-TTX cars. Forcing TTX below-market rates onto non-TTX cars makes the operation of these cars non-economic. See McClure V.S. at 6-8.

The collective setting of TTX rates by TTX and its railroad owner/users fundamentally undercuts the competitive principles underlying the Board's approval of deprescription. As approved by the Board, the bilateral negotiation and arbitration features of deprescription do not allow parties collectively to set rates; "far from authorizing collective action, the agreement forecloses participants from acting collectively in setting their rates." Joint Petition for Rulemaking on Railroad Car Hire Compensation, 9 I.C.C. 1090, 1102 (1993).

Yet contrary to the Board's deprescription intentions, TTX's rates -- which govern the majority of intermodal flatcars currently in service as well as a broad range of other equipment -- are collectively set. See Tye V.S. at 4, 13-14.

Moreover, using collectively set TTX rates as benchmarks for car-hire rates on non-TTX cars further turns the deprescription rate-setting process on its head. As to both TTX cars and non-TTX cars, deprescription results in collectively set car-hire rates rather than rates established at arms-length and with no collective action. See Tye V.S. at 13-14; McClure V.S. at 5-6.

Ultimately, leasing companies like CIT cannot compete with TTX at the below-market rates TTX charges. TTX's pricing strategy not only threatens to push leasing companies out of the equipment markets they are in, but also effectively precludes them from entering equipment markets they do not currently serve. See McClure V.S. at 6-8. If leasing companies are forced to withdraw from the rail equipment marketplace through TTX's pricing strategy, competition within that marketplace will be materially reduced, overall prices to shippers can be expected to rise, and the adverse public interest consequences will be significant. See Tye V.S. at 17-20.

The Board should require that the collective price fixing feature of TTX's operations be eliminated. TTX can own and operate its flatcar pool, achieving the various efficiencies

it claims, without antitrust immunity collectively to set car-hire rates for equipment in the pool. 8/

Collective Setting of Preferential Terms. TTX and its railroad owner/users have established certain preferential operating terms applying to TTX cars which give those cars an unfair competitive advantage over non-TTX cars. For example, free storage is afforded to cars that have been turned in under the TTX 5-day turn-back rule and for which there is no current need. In addition, TTX cars are moved without charge (including switching) to and from maintenance and storage facilities, to and from users of the equipment, and to their loading points. See McClure V.S. at 8. There is no public benefit associated with these preferences; indeed, the fact that the services are afforded for free suggests that they may well breed inefficiencies.

Comparable terms are not available to equipment supplied by CIT and other leasing companies. Operating lessors must pay for all the services that TTX receives for free from its

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8/ Indeed, equipment pools are commonly structured so that the pool operator does not have authority to set car-hire rates. See, e.g., Baltimore & Ohio R.R. - Pooling of Car Service Regarding Multilevel Cars, Finance Docket No. 20653 (Sub-No. 6), 1995 WL 385789 (I.C.C. served June 30, 1995); Railroad Car Service Pooling Application (Boxcars), Finance Docket No. 30969, 1987 WL 99573 (I.C.C. decided Sept. 30, 1987); Railroad Car Service Pooling Application (Boxcars), Finance Docket No. 30907, 1987 WL 98307 (I.C.C. 1987).

railroad owner/users. These preferences for TTX equipment serve further to erode the ability of CIT and the other leasing companies to compete with TTX. See McClure V.S. at 8-9; Tye V.S. at 24. The Board should condition its approval of the TTX agreement upon elimination of these preferences.

**III. THE TTX AGREEMENT SHOULD BE APPROVED FOR  
A TERM OF NOT MORE THAN FIVE YEARS AND WITH  
NO AUTOMATIC RENEWAL**

TTX requests that the Board approve its flatcar pooling agreement for a 15-year term, followed by automatic one-year renewals. In other words, TTX is asking the Board to grant perpetual approval to the agreement. The Board should decline this TTX request, and its approval of the agreement should extend for a term of no more than five years.

When TTX requested approval of a 15-year agreement term in 1989, the ICC concluded that "the term should be reduced to five years because the current market and regulatory climate in which Trailer Train operates is so dynamic." Trailer Train II, 5 I.C.C. at 603. In choosing this five-year term, the ICC was influenced by the "technological change and the railroads' market expansion" in the evolving intermodal market, and by the prospect that depreservation of car-hire rates might take place. Id. at 603-04.

Today, comparable considerations mandate that the TTX agreement be approved for no more than a five-year term. The

railroad equipment marketplace is currently attended by many uncertainties. In today's environment, it is simply not possible to assess the long-term effects of the TTX agreement.

For one thing, the overall effects of depreservation - which only went fully into force as of January 1, 2003 - are yet to be completely understood and appreciated. As explained above, TTX's below-market rates are currently playing a key role in the depreserved car-hire environment. Leasing companies like CIT are finding it increasingly difficult to compete with those rates, and they are threatening the ability of leasing companies to stay in the rail equipment marketplace. The impact of the TTX agreement in the context of depreservation is a matter that should be subject to Board review in the near term. See McClure V.S. at 9; Tye V.S. at 7, 20-21.

In addition, the railroad industry itself has experienced an unprecedented transformation in the last decade and a half. Today, there are only seven Class I railroads (all shareholders of TTX), whereas fifteen years ago there were 15. The ownership of TTX has become quite concentrated, with UP owning 36%, CSX and NS each owning 20%, BNSF owning 17%, and five other railroads owning the remaining 7%. See McClure V.S. at 9-10.

With only four major Class I railroads today operating in the U.S., many of the equipment management issues which

pooling was originally intended to address - borne of multiple interchanges of movements among carriers and large numbers of carriers having competing equipment demands - have become far less challenging. 9/ McClure V.S. at 10-11. And today TTX is effectively controlled by two Class I railroads (one in the West and either of two in the East), which are now in a position to set TTX policy and practices for all TTX railroad owner/users.

Whether there will be a continuation of this concentration is unknown. But the concentration that has occurred, combined with the possibility of further concentration, clearly has implications for the TTX agreement. The public

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9/ Thirty years ago, there were more than 40 Class I railroads, car hire rates were prescribed, and car owners and the ICC alike were concerned about managing periodic car shortages and ensuring that car owners did not lose control of their cars. The ICC closely regulated railroad car supply, and enforced Commission-imposed requirements like Mandatory Car Service Rules 1 and 2. These rules required an unloading carrier to send the empty car back to or in the direction of the owning carrier without delay (unless the owner allowed reloading or diversion). Pools like the TTX flatcar pool were designed to bypass this highly regulated car supply environment and to allow railroads to freely utilize foreign cars under negotiated rates where safeguards were established to ensure that all pool participants would be entitled to car access when needed. See McClure V.S. at 10-11.

Today, there are no Board-imposed Car Service Rules. AAR Car Service Rules 1 and 2 have reversed the presumption in the old ICC rules, and allow an unloading carrier to keep foreign empties unless the owner has mandated their return. With negotiated rates and far fewer railroads to pose concerns about inefficient car appropriation, bilateral car use agreements can accomplish much of what the TTX pooling agreement accomplishes in terms of managing efficient car utilization. Id. at 11.

benefits of pooling flatcars at the behest of a handful of dominant Class I railroads, and the associated competitive concerns, are far different from those before the ICC in any of the three prior reviews of the flatcar agreement. The Board can expect the landscape to be significantly different within five years, and thus a scheduled reexamination of the TTX agreement in five years is justified. See McClure V.S. at 9; Tye V.S. at 8.

There is a further reason for limiting the Board's approval of the TTX agreement to a finite, five-year term. Contrary to TTX's argument, it is not enough that an objecting party can ask for review of the agreement at any time; Board approval of the agreement should be set to expire at a scheduled time, subject to TTX's right to request a further extension of the approval. 10/

First, it is appropriate that the burden of proof with respect to Board scrutiny of the agreement should remain with TTX; it should not be shifted, as TTX would have it, to an objecting party. And second, the very nature of the pooling agreement creates impediments to objecting parties ever coming forward. In the case of leasing companies, the same Class I railroads that are owners and users of TTX, are significant

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10/ CIT would have no objection to an extension of the approval period during the pendency of any proceeding addressing renewal of the Board's approval of the agreement.

customers for equipment. In effect, the leasing companies are competing with certain of their biggest customers. It cannot be assumed that in this situation, they (or shippers reliant on rail transportation) will be in a position to complain about the effects of the TTX agreement. See McClure V.S. at 11-12; Tye V.S. at 24.

In sum, it is important that the Board's approval should be limited to a set term, and that term should be no more than five years.

**IV. THE BOARD SHOULD NOT GRANT TTX THE UNILATERAL  
RIGHT TO DEFINE THE SCOPE OF ITS POOLING AUTHORITY**

TTX asks for establishment of a "bright-line standard" "that any amendment or modification to the TTX Pooling Agreement would require prior approval, but that changes in TTX's car contracts and other policies within the scope of the Pooling Agreement as approved by the Board need not be approved in advance." TTX Application at 42. The exception proposed by TTX could effectively swallow the rule, and sets the stage for TTX unilaterally defining the scope of its pooling authority. This is a result the Board should not endorse.

TTX predicates its request on uncertainty it says grows out of the ICC's original 1974 approval of the flatcar agreement, where the Commission was addressing what sorts of changes related to the agreement would require regulatory approval. Id. at 43. TTX purports to find confusion where the ICC stated that "any

such substantive changes in the policies or basic practices upon which initial . . . approval is based constitute an entirely new pooling plan for which Commission approval, prior to implementation, must be sought." Trailer Train I, 347 I.C.C. at 883-84. Neither is TTX apparently helped by the Commission's elaboration that "[a]ll changes which affect the substance of [the] pooling arrangement or car contract and thus constitute a new pooling agreement will require" advance approval. 11/ Id. at 884.

Interestingly, TTX never explains why over the past 30 years it has never before sought relief from the uncertainty it now claims attends the approval given the agreement. And more importantly, TTX never really identifies the added flexibility it is seeking. It says only that although prior approval is not required for changes in its usage charges for car contracts, "it is unclear how this standard would apply to other types of changes in its car contracts and distribution policies that TTX might in the future conclude are appropriate. . . ." TTX Application at 44.

What TTX seems really to be seeking is the right to self-define the scope of its pooling authority, and to do so

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11/ The ICC specified that changes "relating to car-hire rates and charges" did not require prior approval. Trailer Train I, 347 I.C.C. at 882-83.

under the shield of antitrust immunity. Indeed, TTX suggests that but for the ICC's prohibition on car assignment and allocation, this would be the kind of action it would contemplate taking without seeking prior Board approval. See TTX Application at 42, n.29. And yet this is the very kind of action that should be proscribed absent Board review and approval.

TTX invokes the Staggers Act and greater reliance upon marketplace mechanisms as support for its proposal. In doing so, it conveniently ignores that the TTX pooling agreement is not a creature of the marketplace. Rather, it is a vehicle for collective activity among railroad competitors that would run afoul of the antitrust laws but for the exemption it enjoys. As such, its activities are appropriately narrowly defined, and any substantive expansion or change in those activities should be subject to Board review. 12/ See Tye V.S. at 24; McClure V.S. at 12.

**V. TTX SHOULD NOT BE GRANTED THE RIGHT TO ASSIGN OR ALLOCATE EQUIPMENT**

Apparently fearful that the point may be lost on the Board, TTX states at least three times that it is not seeking

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12/ Neither is it satisfactory for TTX to assert that interested parties would always remain free to challenge any changes implemented by TTX. As noted in Part III above, this would inappropriately shift the burden of proof to the complaining party, and given the market position of TTX and its railroad

Board authority to assign or allocate equipment, but always adds the caveat that it believes denial of this authority is unwarranted and that it would support award of the authority if the Board were so inclined. TTX Application at 6, n.4; 42, n.29; 49, n.38. Hamlet was not so conflicted. For the same reasons this authority was denied TTX in 1989, it should still be denied.

As the ICC explained in 1989,

[A]ssignment comes close to arrangements obtainable through commercial leasing from third parties. The net benefits over what third party lessors can offer are very controversial and apparently quite limited. . . . [A]ssignment is not a form of pooling that merits our approval when a competitive market composed of independent lessors operating within the umbrella of the antitrust laws can produce benefits comparable to those that until now could be obtained only through regulatory supervision.

Trailer Train II, 5 I.C.C.2d at 595.

Allocation "runs the risk that the arrangement, especially as applied to relatively specialized equipment, will converge toward assignment." Id. at 598 For this reason, the ICC ruled that "[a]ny form or type of allocation that is functionally equivalent to an assignment is prohibited." Id.

Today, leasing companies like CIT perform the very same function TTX would seek to perform in the assignment and

---

[Footnote continued]

owner/users, there can be no confidence that complaining parties will come forward.

allocation of equipment to its railroad owner/users. In other words, the marketplace already affords the services TTX implicitly seeks authority to provide. And TTX's entry into that marketplace, acting collectively and with antitrust immunity through its railroad owner/users, would completely undercut the competitive operation of that marketplace. See McClure V.S. at 12-13; Tye V.S. at 25.

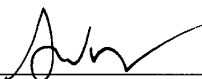
Moreover, it is impossible to square the claimed efficiencies associated with a "free-running" fleet upon which TTX predicates its application, with assignment or allocation of particular cars to TTX owner/users. Such assignment or allocation effectively takes the cars out of the TTX pool, and puts them into an operating posture comparable to cars leased by CIT and other leasing companies. See McClure V.S. at 13; Tye V.S. at 7, 12 n.12.

To the extent that TTX is seeking sua sponte Board approval of TTX assignment/allocation authority, the request should be denied.

CONCLUSION

For the reasons set forth above, CIT requests that any approval of the TTX Application be conditioned upon the modifications to the Application and the TTX flatcar pooling agreement proposed by CIT.

Respectfully submitted,

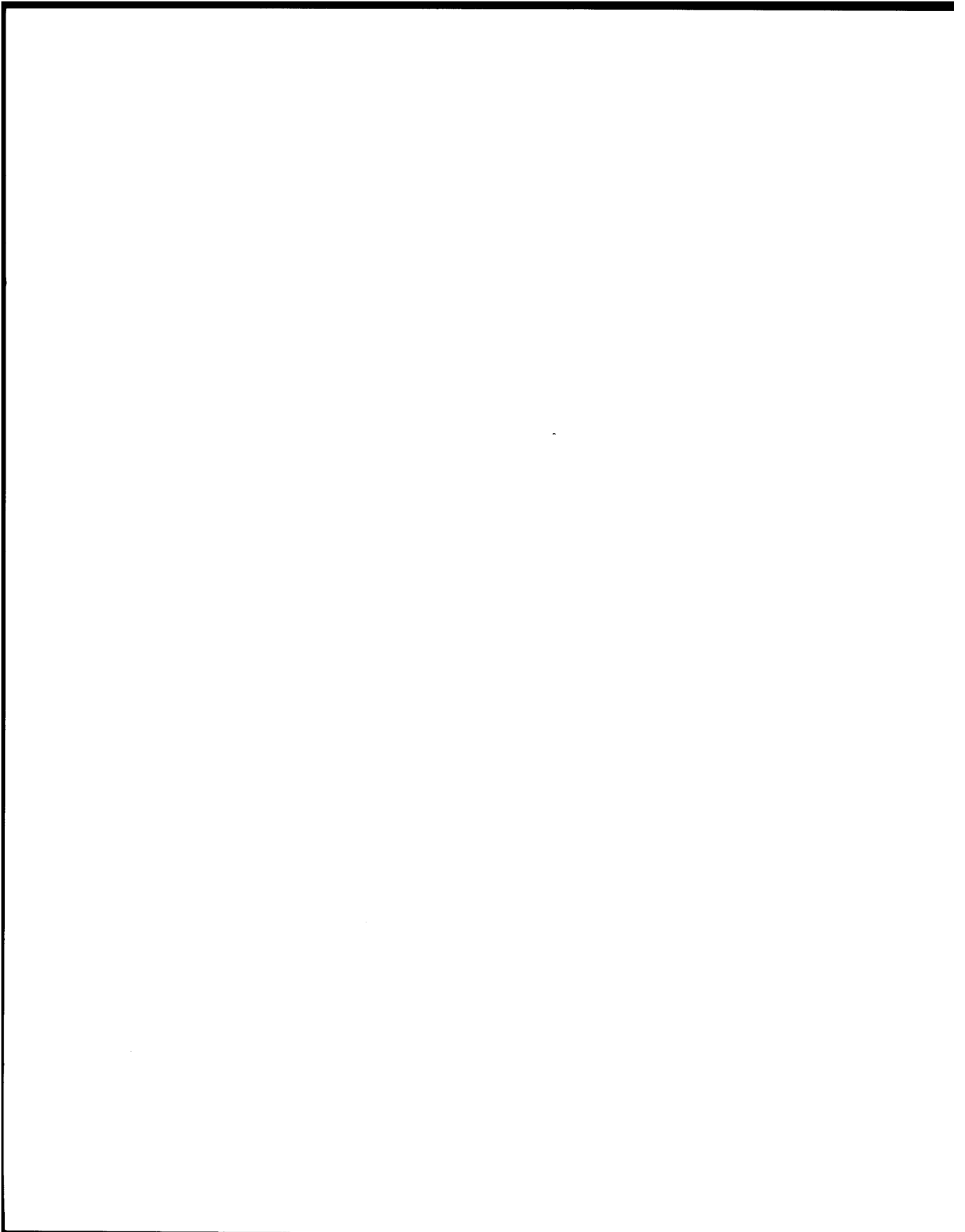


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April 12, 2004



**VERIFIED STATEMENT OF  
STEPHEN McCLURE**

My name is Stephen McClure. I am President of CIT Rail Resources ("CIT"). My business address is 1211 Avenue of the Americas, New York, New York. I have been with CIT Group Inc. for over 30 years in a variety of capacities, and am currently responsible for all rail-related activities within the company. I am a member of the National Freight Transportation Association, the Association of American Railroads, the Railway Supply Institute, the Western Coal Council, and the National Grain and Feed Associations.

**Background and Summary of Testimony**

CIT is a unit of CIT Group Inc., a leading commercial and consumer finance company. CIT provides the rail industry with a broad array of equipment leasing and financial products, owning and managing a fleet in excess of 58,000 railcars and approximately 550 locomotives. It is one of the leading railcar and locomotive lessors in North America.

CIT serves customers in the U.S., Canada and Mexico, operates one of the industry's youngest fleets, and is one of the largest operating lessors of 286,000-pound capacity railcars in North America. CIT's equipment leases range from 3 months to 84 months. Its customers include Class I, regional and shortline

railroads, as well as shippers in a wide range of industries including paper, plastics, automotive, food products, steel, coal, cement, and lumber. Roughly 50% of CIT's operating lease fleet is leased to railroads, and the remaining 50% is leased to shippers. CIT offers full-service leases which include maintenance of the subject equipment (CIT has contract arrangements with railroad maintenance shops throughout the country to respond to maintenance needs as they arise), and net leases under which the lessee is responsible for equipment maintenance.

CIT has a very direct interest in the issues posed by the TTX application in this proceeding. It competes head-to-head with TTX in regard to certain equipment TTX includes in the flatcar pool, most particularly centerbeam flatcars, pipe flatcars, bulkhead flatcars, flatcars for solid municipal waste, and miscellaneous general use flatcars. CIT currently owns 3381 centerbeam flatcars and 440 other flatcars of various designs.

Although TTX implies that these flatcar types are intermodal in nature, in fact they are not. Unlike true intermodal flatcars such as those utilized for TOFC/COFC movements and which can be effectively managed for quick reloads and minimal empty return mileage, centerbeam flatcars and other miscellaneous flatcars typically handle movements that are non-

intermodal in nature and generally are subject to empty return movements after a load has been delivered.

Because of the manner in which the TTX flatcar pool operates, CIT has found it increasingly difficult to sustain its competitive position with respect to its non-intermodal flatcars. This is a consequence of TTX's pricing strategy of establishing below-market car hire daily rates for this type of equipment, and the special preferences given collectively by the Class I railroads (which are the owners of TTX) to TTX equipment. In time, unless a level competitive playing field is established, CIT will be forced out of the market for non-intermodal flatcars.

So as to permit the creation of a level competitive playing field, CIT is urging the Board in this proceeding to (1) exclude non-intermodal flatcars from the TTX flatcar pool; (2) eliminate antitrust immunity for the pool's collective setting of car-hire rates and establishment of preferential terms for TTX equipment; (3) limit approval of the pool to not more than a 5-year term with no automatic renewal; (4) decline to allow TTX to make unilateral changes in car contracts and other policies governing pooling operations absent Board approval; and (5) reiterate that the pool shall not engage in assignment or allocation of equipment.

1. Exclusion of Non-Intermodal Flatcars from the Pool

TTX makes its public interest case for approval of the flatcar pooling agreement based on various efficiencies associated with management of its intermodal flatcar equipment. This equipment handles true intermodal movements, such as trailer and container movements. Because intermodal movements transit many geographic areas, tend not to be one-way and directional in nature, and include the movement of empty containers and trailers (which count as a loaded flatcar movement), good management of intermodal equipment creates broad-based reload opportunities and empty movements of the equipment can be minimized.

This is not the case with centerbeam flatcars, pipe flatcars, bulkhead flatcars, flatcars for solid municipal waste, and miscellaneous general use flatcars. These flatcars are actually non-intermodal in nature. The non-intermodal flatcars owned by CIT as well as those owned by TTX tend to handle lumber, engineered wood products, plywood, wallboard, steel pipe, plate steel, and logs. These flatcars are generally used in one-way movements where after unloading at their destination, the cars typically are routed empty back to their origination point for reloading. To the best of CIT's knowledge, TTX achieves no greater efficiencies in managing these cars than do individual railroads and shippers.

Accordingly, there is no justification for including these non-intermodal flatcars in the TTX pool.

## **2. Elimination of Collective Pricing and Preferences**

TTX has set the car-hire rates for its centerbeam flatcars and other non-intermodal flatcars at below-market rates, following its practice with respect to all the equipment included in the TTX flatcar pool. TTX is in a position to do this because, in effect, these are rates that the TTX-owner railroads are charging to themselves. They have the option to forego a return on their investment and to make up the difference in what they charge shippers for movements using the TTX equipment.

TTX prices its equipment on the basis of average cost. No "for profit" business would invest in new equipment based on the return of an average cost of its assets, especially as those assets have been purchased over the course of 50 years. Obviously, this is not an option available to leasing companies like CIT and other third-party investors in new equipment.

Further, leasing companies have been pressured by the railroads that are the owners/users of TTX, into accepting rates equal to or below TTX rates. If those rates are not met, then a leasing company has only one choice, which is to take the cars back from these railroads and remarket them to shippers or shortlines. Unfortunately, to use the cars, shippers are required to obtain OT-5 authority and shortlines have to secure

at least informal consent from the very railroads from which the cars may have been reclaimed, which can make it difficult to put the cars back into service.

There is a further reason why TTX rates serve to establish a ceiling on the rates others can charge for car hire on comparable equipment. This is because in bilateral negotiations over car-hire rates, the TTX rates are cited as indicative of what the applicable rates should be. And it has been reported that where the negotiations are unsuccessful and arbitration follows, TTX rates are being used as evidence of market rates, and being adopted by arbitrators to govern the car hire paid for non-TTX cars. Because the TTX car-hire rates are below-market, saddling non-TTX cars with these rates soon makes the operation of these cars uneconomic.

In due course, leasing companies like CIT cannot compete on such a basis. The TTX pricing strategy threatens not only to push leasing companies out of the equipment markets they are in, but also discourages them from becoming new entrants into equipment markets they do not currently serve. Perhaps this is best exemplified by the fact that TTX is far-and-away the largest owner of intermodal flatcars. CIT is not interested in entering this market given TTX's pricing strategy related to these types of cars.

Operating lessors like CIT typically try to mitigate their overall business risks by investing in many car types so that a recession in one industry or car type will not dramatically impact their business. But as TTX expands into other car types such as autoracks, non-intermodal flatcars, boxcars, and gondolas - and employs its below-market pricing strategy in regard to those car types - leasing companies are finding fewer car types in which they can invest. Since the business risks that leasing companies have to overcome increase as the number of car types that can be invested in decreases, their choices are either to generate higher returns on their investment in car types that TTX does not own by increasing prices on those car types (thereby hurting that class of shipper) or, more likely, dramatically reducing investment in all types of railcars.

CIT has only invested a relatively small amount of its capital in intermodal flatcars because it does not believe that it is prudent to invest in a car type that is dominated by TTX. It now appears that TTX plans to supply autoracks to the railroad industry. Whereas autoracks had begun to emerge as a significant opportunity for leasing companies, TTX's announced intention to supply these cars has sharply diminished CIT's interest in them. The net effect is that the withdrawal of CIT and other leasing companies from the market for equipment dominated by TTX will

deprive shippers and the rail industry (especially shortlines, which are not owner/users of TTX and have been heavily dependent upon leasing companies for equipment) of a much needed capital source.

TTX - acting collectively through its railroad owners/users - also gives its equipment a competitive advantage by according it preferences not available to equipment owned by CIT and other leasing companies. These include free storage for TTX equipment that is not in use, and free transportation (including switching) for the equipment to its loading point, to and from the users of the equipment, and to and from storage and maintenance facilities. By contrast, operating lessors like CIT have to pay significant amounts to move their equipment to and from storage and maintenance facilities, and between lessees, all of which reduce the lessor's return on equity. Because the railroad owners of TTX do not afford comparable benefits to non-TTX equipment (such as non-intermodal flatcars leased by CIT), this equipment is placed at a competitive disadvantage vis-à-vis the TTX equipment. These preferences for TTX equipment further erode the ability of CIT and other leasing companies to compete with TTX.

CIT urges the Board not to extend antitrust immunity to TTX's setting of car hire rates and establishment of preferences for its cars, so that the unjustified competitive advantage TTX

achieves for its equipment through the collective action of its owner railroads will be eliminated. This will then allow leasing companies like CIT and other car suppliers to compete effectively with CIT, to the net benefit of the public.

### 3. Term of Pooling Agreement

CIT urges that the TTX pooling agreement be approved by the Board for a term of no longer than five years (subject to the modifications discussed above), and that there be no provision for automatic renewal of the agreement.

The railroad equipment marketplace is currently in a state of flux. Because of this, it is not possible accurately to assess the long-term effects of the TTX pooling agreement.

First, depreservation only came fully into effect last year, and its precise impact is yet to be completely understood. As noted above, there has already been an interplay between the below-market TTX rates and the establishment of car-hire rates for non-TTX equipment in the depreserved environment. The role that TTX rates play in this environment will require continued review, and a reexamination of the pooling agreement as a whole should be scheduled for the relatively near term.

Second, the railroad industry itself has undergone a significant evolution over the last decade and a half. Today, there are only seven Class I railroads (all shareholders of TTX), whereas fifteen years ago there were 15. The ownership of TTX

has become quite concentrated, with UP owning 36%, CSX and NS each owning 20%, BNSF owning 17%, and five other railroads owning the remaining 7%. It is unknown whether this trend toward concentration will continue, but it clearly has a bearing on the justification for and operation of the flatcar pool.

Among other things, with only four large Class I railroads in the U.S. today, the management of equipment by these railroads is far less complicated than when the TTX flatcar pool was last thoroughly examined 15 years ago and certainly than when the pool was first approved 30 years ago. Indeed, 30 years ago, the ICC closely regulated railroad car supply, and enforced Commission-imposed requirements like Mandatory Car Service Rules 1 and 2, which required an unloading carrier to send the empty car back to or in the direction of the owning carrier without delay (unless the owner allowed reloading or diversion).

Such rules were necessary in a highly regulated world where car hire was prescribed, there were more than 40 Class I railroads, and the car owners and the ICC - concerned about managing periodic car shortages - wanted to ensure that car owners did not lose control of their cars. But this highly regulated world also created car supply inefficiencies, and pools like the TTX flatcar pool were designed to allow railroads to freely utilized foreign cars under negotiated rates where

safeguards were established to ensure that all pool participants would be entitled to car access when needed.

Today, there are no Board-imposed Car Service Rules. AAR Car Service Rules 1 and 2 have reversed the presumption in the old ICC rules, and allow an unloading carrier to keep foreign empties unless the owner has mandated their return. With negotiated rates and far fewer railroads to pose concerns about inefficient car appropriation, bilateral car use agreements can accomplish much of what the TTX pooling agreement accomplishes in terms of managing efficient car utilization. This fundamental change in the rail equipment marketplace is continuing to evolve, and is a further reason for reexamining the TTX pooling agreement and its public interest justifications sooner rather than later.

In addition, it is important that review of any extension of the pooling agreement occur at a scheduled time, rather than require that an objecting party petition for Board review. For one thing, the latter approach inappropriately shifts the burden of proof to the objecting party. And for another, potential objecting parties are placed in a very awkward position by the pooling agreement. The TTX railroad owners are typically substantial customers of such parties (in the case of leasing companies) or the providers of critical transportation services (in the case of shippers). The Board's review of the

pooling agreement should not be dependent upon such parties bringing forward objections to the agreement.

4. Changes to Car Contracts and Pooling Operations

CIT opposes TTX's request that it be permitted to make changes to car contracts and day-to-day pooling operations without obtaining prior Board approval. In effect, TTX is asking the Board to grant it a blank check to conduct its pooling operations in any way it wants, and to have the benefit of antitrust immunity while doing so.

TTX never explains exactly what it wants the flexibility to do, but asserts that if anyone objects, they can always seek Board relief. For reasons noted above, this is not a viable failsafe; there are many reasons why a party with objections would not be in a position to come forward.

The better course is for the Board to review and approve any changes of the type TTX seems to contemplate.

5. Assignment and Allocation

TTX makes it a point to state repeatedly that it is not seeking authority to assign and allocate cars. But each denial is accompanied by an assertion that the ICC's earlier refusal to approve this authority is no longer justified, and that TTX would support a grant of this authority if the Board were so inclined.

For the same reasons the ICC denied TTX assignment and allocation authority, CIT urges the Board to keep these

prohibitions in place. There is no justification for granting TTX antitrust immunity to, in effect, go into exactly the same business in which CIT and other leasing companies are engaged: providing dedicated cars to Class I railroads. Indeed, the entire concept of TTX assigning or allocating cars to its member railroads is antithetical to the very pooling efficiencies which TTX argues support approval of its agreement.

For example, TTX claims that the reason pool operation is so efficient and so good for the industry is that TTX cars are not subject to the car service rules controlling how a car can be handled by a non-owning railroad (these rules are promulgated by the railroads themselves through the AAR). However, a TTX car that is assigned to a TTX railroad owner/user would be under the control of that railroad and therefore could be made subject to the very car service rules that TTX claims its pool circumvents. In addition, the assignment or allocation of cars to TTX's railroad owner/users would reduce TTX's flexibility to move cars to the railroad with the greatest need, further negating justification for the pool. Additionally, such assignment and allocation would exacerbate the dependence of shortline railroads on their connecting Class I carrier(s), where Class I's have historically failed to provide shortlines with an adequate supply of quality railcars.

VERIFICATION

I, Stephen McClure, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement. Executed on April 8, 2004.

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

Stephen McClure



**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 )

**VERIFIED STATEMENT  
OF**

**WILLIAM B. TYE**

**on behalf of**

**CIT RAIL RESOURCES**

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April 12, 2004

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**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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

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**VERIFIED STATEMENT OF WILLIAM B. TYE**

**1    QUALIFICATIONS AND EXPERIENCE**

2    My name is William B. Tye and I am a Principal of *The Brattle Group*, an economic,  
3    management, and environmental consulting firm in Cambridge, Massachusetts; Washington, DC;  
4    San Francisco, California; and London, United Kingdom. I have testified before regulatory  
5    commissions and published extensively on the subjects of antitrust and regulation generally and  
6    cooperation among competitors.

7

8    More specifically, I have offered testimony in numerous proceedings before this Board and its  
9    predecessor, the Interstate Commerce Commission (ICC), involving the rail industry, including  
10    proceedings involving competition and antitrust. I have also been involved in similar matters  
11    before other regulatory agencies. I have written papers and provided expert testimony in the  
12    subject areas of cooperative service offerings among competitors and competitive access in other  
13    industries such as electric utilities and telecommunications carriers. For example, I recently  
14    provided two affidavits on behalf of the Australian Competition and Consumer Commission  
15    (ACCC), a public agency, before the Australian Competition Tribunal. The subject concerned  
16    appropriate interconnection fees charged for through service by telecommunications carriers.

1 Through my professional experience, I have gained a broad knowledge of the economic issues  
2 arising from the requirement that firms in network industries (such as railroads) cooperate in  
3 certain respects to provide efficient, economical service. I am the author of dozens of  
4 publications, including a book on motor carrier rate bureaus. My qualifications and experiences  
5 are detailed in my resume, included as Appendix A to this verified statement. As the resume  
6 indicates, I have over thirty years experience as a transportation economist. I am a past national  
7 President of the Transportation Research Forum.

8

9 **SUBJECT MATTER OF STATEMENT**

10 In this proceeding, I have been asked by CIT Rail Resources to review, and to provide testimony  
11 in regard to competitive issues raised by, TTX's application for STB approval of its pooling  
12 agreement with respect to flat cars. In this connection, I have focused particularly upon the  
13 Verified Statement of Joseph P. Kalt,<sup>1</sup> filed by TTX in support of its application. I have also  
14 carefully reviewed the ICC decisions<sup>2</sup> in the last three proceedings in which the TTX agreement  
15 has been reviewed, as well as other pertinent ICC and Board decisions, such as the car hire  
16 depreservation decisions.

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<sup>1</sup> Verified Statement of Joseph P. Kalt, January 5, 2004 (hereinafter "Kalt V.S.").

<sup>2</sup> *American Rail Box Car Company, et al.—For Approval of the Pooling of Car Service With Respect to Box Cars*, 347 I.C.C. 862 (1974) (hereinafter "*Trailer Train I*") *Trailer Train Company, et al. — Pooling of Car Service with Respect to Flatcars*, 5 I.C.C. 2d 552, 1989, WL 238863 (I.C.C.), decided June 14, 1989 (hereinafter "*Trailer Train II*"); *TTX Company, et al. — Application for Approval of the Pooling of Car Service With Respect to Flat Cars*, Finance Docket No. 27590 (Sub-No. 2) 1994, WL 467250 (I.C.C.), decision served August 31, 1994 (not printed) (hereinafter "*Trailer Train III*").

1   **SUMMARY OF CONCLUSIONS**

2   As one reads the Kalt V.S., a remarkable feature immediately strikes the reader: it never even  
3   mentions the critical issue at stake in this proceeding, whether the TTX agreement should be  
4   given antitrust immunity. Nor does it discuss whether the purported benefits could be achieved  
5   with alternatives that do not present the potential harm to competition inherent in the broad grant  
6   of antitrust immunity TTX requests. In addition, nowhere does it suggest that the claimed pool  
7   efficiencies cannot be achieved without the very significant anticompetitive consequences  
8   attendant on joint rate setting that TTX requests this Board to approve. The implications of these  
9   omissions can be seen by considering the twin pillars of the argument of the Kalt V.S.:

- 10           1.     The TTX pooling agreement is able uniquely to achieve certain claimed  
11                    efficiencies; and  
12           2.     The market in which TTX operates is highly competitive and there is no  
13                    threat of anticompetitive behavior by TTX.

14

15   There are sound reasons for questioning these claims, but, even if they were true, they beg the  
16   central question: Why does TTX need such a broad grant of antitrust immunity? The more one  
17   thinks of it, the Kalt V.S. incorporates a fundamental contradiction. Either:

- 18           1.     There is no threat of antitrust violations as a result of TTX's activities; in  
19                    such case, there is no explanation of why antitrust immunity is needed to  
20                    achieve the claimed efficiency gains;

21   or:

- 22           2.     Certain otherwise anticompetitive activities are necessary to achieve the  
23                    claimed efficiency gains and antitrust immunity is therefore being sought

1                   on the basis that the efficiency gains justify anticompetitive consequences  
2                   of TTX's activities.

3

4   This contradiction is particularly problematical with regard to pricing policy. Notably, the  
5   application and the Kalt V.S. are silent on any claimed efficiency gains in pricing, even though  
6   TTX sets prices on behalf of all the carrier owners. Section 7.10 (b) of the proposed agreement  
7   states that "Rates and charges, orders and regulations shall be observed by all Railroad  
8   Participants in the flat car pooling plan." In effect, the pool, and not the individual railroad  
9   owners, determines common car hire terms and rates to be charged. With the depreservation of  
10   the Commission's regulation of car hire rates, the pool is not just buying and routing cars—it has  
11   become, in effect, a rate bureau. This is particularly troublesome given the fact that TTX is a  
12   joint venture of all the major railroads, owns a substantial share of the U.S. flat car rolling stock  
13   (see below), and a majority share of TTX is controlled by only two railroads. This pricing power  
14   is exacerbated, as shown below, by the tendency for TTX's price to become a "ceiling price,"  
15   and by the fact that TTX's ownership by the railroads means that it is not competing on equal  
16   terms with non-affiliated lessors who do not enjoy these special benefits.

17

18   In the past, the Board has relied on the carriers' claims of efficiency gains from pooling to  
19   mitigate concerns over anticompetitive potential from pooling. Moreover, the Board has not  
20   previously been asked to consider the weight of the pool's efficiency claims in light of joint rate  
21   setting by the pool's rail carrier owners now that car-hire rates have been depreserved.  
22   However, even if some of the efficiency gains prove credible, it is clear that they could be

1 achieved with far less scope for the antitrust immunity and related potential for competitive  
2 harm. But there are also reasons for skepticism over the claimed efficiency gains.<sup>3</sup>  
3 For example, the “risk diversification” argument is invalid, as would be evident from  
4 examination of first principles in any finance text book taught at Professor Kalt’s Kennedy  
5 School of Government. Member railroads do indeed avoid the direct financial obligations from  
6 direct car ownership as a result of TXX’s activities; but these same risks are merely transferred  
7 to the carriers’ ownership position in TTX. The Kalt V.S. ignores the offsetting increased risk  
8 from ownership of shares in TTX. The basic principles of finance tell us that such financial  
9 transactions do not make risk go away, but merely move it around.<sup>4</sup> Any railroad could achieve  
10 this same diversification by owning a portfolio of various types of railcars leased to a variety of  
11 carriers and shippers. Indeed, equipment trusts and leases are used without antitrust immunity to  
12 achieve efficient capital costs in a wide variety of industries (including railroads). In fact, if the  
13 desire is to shield railroads from these risks, an even more effective way to accomplish it is for  
14 the carriers to induce shippers or lessors to assume them in the competitive marketplace instead  
15 of TTX.  
16  
17 Further, some of the claimed efficiency gains appear to arise from “robbing Peter to pay Paul.”  
18 There seem to be efficiencies to be achieved from the ability to route “free-running” flat cars to

---

<sup>3</sup> *Trailer Train III* contains a lengthy comment on whether these various ancillary activities (equipment purchase, research and development, maintenance and repair, *etc.*) constitute “pooling” activities within the meaning of the Act. As a non-lawyer, I am not challenging these findings. Rather, the issue is whether, like assignment and allocation, many of these instead represent “tangential” activities that do not require antitrust immunity and competitive market forces can be relied upon.

<sup>4</sup> Enron’s financial shenanigans reaffirmed the lesson that financial risk cannot be eliminated by moving it into subsidiaries.

1 meet demands.<sup>5</sup> But some of the claimed efficiency gains appear not to be true efficiency gains.  
2 Rather, the gains are taken out of the hide of competitors because of rail owner preferences for  
3 TTX.

4

5 Finally, with respect to “maintenance and repair” and “standardization and innovation,” these  
6 would clearly appear to be activities that are undertaken by any firm in a competitive industry  
7 without antitrust immunity. If TTX must have such immunity to achieve whatever unique  
8 benefits it claims, we need to hear more specifically what aspect of these activities cannot be  
9 undertaken unless the parties also undertake activities that violate the antitrust laws. Otherwise  
10 we cannot balance the claimed benefits with potential competitive harms.

11

12 The obvious solution to these difficulties is to require TTX to constrain the scope of the  
13 application’s antitrust immunity to shield only activities that are necessary to achieve  
14 demonstrable efficiency gains that cannot be achieved in a manner consistent with the antitrust  
15 laws. In the absence of more compelling evidence, the Commission should restrict both the  
16 scope and time of the immunity to include, at a minimum,

- 17 1. Approval of the antitrust immunity only to the cars which appear to have  
18 operational efficiency gains, which seem limited to operating a “free  
19 running” fleet of intermodal flat cars, *i.e.*, flat cars that move containers  
20 and motor trailers;

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<sup>5</sup> *Trailer Train II*, 5 I.C.C. 2d at 591, fn. 30, defined “free running” as:  
to indicate cars that upon being unloaded can be reloaded with a shipment for any destination by  
any railroad (e.g., by being turned over on short notice to Trailer Train for redeployment where  
most beneficial in the U.S. rail network).

- 1           2.     Elimination of antitrust immunity for price fixing activities, with the  
2                 objective of achieving the Commission's objectives of establishing a  
3                 bilateral negotiating regime as specified in the Commission's  
4                 deprescription decisions for car hire<sup>6</sup>;
- 5           3.     Limitation of the term of the agreement to a period of not more than five  
6                 years with no automatic renewal, so as to set a scheduled reassessment of  
7                 the need for antitrust immunity;
- 8           4.     No approval of the request by TTX to "make changes in the car contracts  
9                 and other policies that embody its day-to-day pooling activities, as long as  
10                those changes fall within the scope of the Board-approved Pooling  
11                Agreement" (Application, p. 9); and
- 12          5.     Explicit reaffirmation of the prohibition on assignment<sup>7</sup> and allocation<sup>8</sup> as  
13                antithetical to the claimed benefits of a "free running" pool.

---

<sup>6</sup> The Commission's explicitly stated purpose in approving car-hire deprescription was to avoid any collective ratemaking process requiring antitrust immunity:

[W]e shall discuss shortly, we agree with DOJ, DOT, and the proponents that the arbitration agreement does not result in—indeed, *intrinsically does not permit—carriers setting rates collectively*. Arguably, therefore, there is no reason for the agreement to be submitted, or for us to approve it: *if we approve it, we still are not immunizing collective ratemaking*, and if we were to withhold our approval on the ground that it is not needed, we would not be subjecting any of the activities that the carriers are proposing to antitrust exposure. Indeed, if we find, as we shall, that the *agreement does not result in any activity as to which protection from the antitrust laws is needed*, then it seems almost superfluous for us to approve it. [Emphasis added.]

*Joint Petition for Rulemaking on Railroad Car Hire Compensation, Ex Parte* No. 334 (Sub- No. 8), November 3, 1993, 9 I.C.C.2d 1090, 1101, 1102 (hereinafter, "*Car Hire Compensation*").

<sup>7</sup> The ICC defined "assignment" as follows: "Assignment is a financing device similar to leasing, under which a railroad guarantees rental payments to TTX for a minimum period (typically 3 to 5 years) for specific cars dedicated to the railroad." *Trailer Train III*, fn. 3.

<sup>8</sup> The ICC defined "allocation" as follows: "Allocation is a device under which railroads enter into 3 to 5-year rental agreements with TTX in return for a guaranteed supply of particular types of cars, but not specific cars." *Ibid.*, fn. 4.

1  
2 The economic circumstances of the rail industry have changed materially since the last contested  
3 proceeding on flat car pooling in 1989 and there is every indication that the circumstances can be  
4 expected to continue to change. The U.S. rail industry and the shipping public have a large stake  
5 in the achievement of an efficient, competitive rail industry, including car supply.<sup>9</sup> In this  
6 environment, the TTX agreement should be reexamined in no more than 5 years.

7

#### 8 **APPROPRIATE ECONOMIC STANDARDS**

9 The failure of the Kalt V.S. to address the issue of the antitrust immunity requested by TTX  
10 means that it articulates no economic standard by which to judge whether antitrust immunity is  
11 warranted for the agreement. It is therefore necessary to return to the statutory framework as  
12 discussed by the ICC in *Trailer Train II*, 5 I.C.C. 2d at 559:

13 Under 49 U.S.C.S. § 11342, the Commission may approve a pooling agreement if  
14 it finds that the proposal “(1) will be in the interest of better service to the public  
15 or of economy of operation; and (2) will not unreasonably restrain competition.”  
16 In exercising our authority to approve or disapprove a proposed pooling  
17 agreement, we assess whether any anticompetitive effects flowing from the  
18 arrangement are outweighed by the efficiencies or other public benefits flowing  
19 therefrom. [cite omitted] As we observed in our original approval of the Trailer  
20 Train pool in 1974:

21 Prior decisions of this Commission \* \* \* have recognized that  
22 every pooling arrangement represents a potential restraint on  
23 competition but that such a restraint may be proper and appropriate  
24 if necessary to achieve better service or economies in operation.

25

26 ... Similarly, we are obligated to determine whether a proposed pooling  
27 agreement is as beneficial as alternative mechanisms for achieving the purposes  
28 of the pool and whether those purposes could be achieved with less restraint on

---

<sup>9</sup> The industry’s service problems continue. See Daniel Machalaba, “Union Pacific Seeks to Reduce Use: Crew Shortages Prompt Requests to Some Customers to Limit Railroad Traffic,” *The Wall Street Journal*, April 5, 2004, p. B2.

1 competition. [cite omitted] We may also impose conditions governing a pooling  
2 arrangement.  
3

4 Based on this statutory framework, and consistent with the *Staggers Act* objective of replacing  
5 regulation with competition and the marketplace, the Commission outlined its approach to  
6 evaluating applications for pooling agreements:

7 Since our authorization of a pooling agreement enables participants to operate  
8 within the scope of that authorization without regard to the usual antitrust  
9 constraints, certain principles must guide our determination of whether to afford  
10 this immunity to a proposed arrangement.

11 ... As we have often recognized, the *Staggers Act* amendments to the Interstate  
12 Commerce Act were intended to place greater reliance on the marketplace. ... In  
13 short, the Rail Transportation Policy directs that we assess proposed transactions,  
14 including pooling agreements, with an eye toward ensuring that "effective  
15 competition" prevails with a minimum of Federal regulatory oversight.

16 In light of these guiding principles, *we have followed a policy of strictly*  
17 *construing agreements that require antitrust immunity because of joint carrier*  
18 *activity that may lessen competition.* ... Accordingly, when we assess a proposal  
19 that will, if approved, sanction conduct by the parties that will be free from the  
20 constraints of the antitrust laws, we closely assess the proposal and its potential  
21 service and efficiency benefits. *We are inclined to approve only the narrowest*  
22 *proposal that is consistent both with achievement of those benefits and*  
23 *compliance with the statute.* [Emphasis added.] [5 I.C.C. 2d at 559-60.]  
24

25 If economic analysis is to help the Board in this task, the analysis must therefore start with the  
26 premise that approval of any pooling agreement *necessarily restrains the disciplinary effects of*  
27 *the antitrust laws.*<sup>10</sup> This is a cost, and it should be incurred only if there are tangible benefits.

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<sup>10</sup> As the name itself suggests, the Board is being asked to approve a document that incorporates both "pooling" and "agreement" among the nation's rail carriers in its very title. Of course, an "agreement" is the fundamental proof required in a *Sherman Act* price fixing antitrust case. Indeed, in *Trailer Train I*, the Commission came to grips with the competitive issues very frankly:

An additional prerequisite to exercise of Commission jurisdiction under section 5(1) is that there be an actual competitive relationship between the carriers involved.

\* \* \*

*All parties contend, and we agree, that car supply is one area in which railroads do compete.* In the *Pullman* cases, where the proposed pooling arrangement was quite similar to those herein, the Commission recognized that the use of a separate railroad-owned agency to discharge the

1 And it must be impossible to achieve these benefits any other way, *i.e.*, with a less encompassing  
2 scope for the immunity, a lesser requirement for regulation to replace the lost discipline of  
3 antitrust enforcement, and a greater scope for the competitive forces of the marketplace.

4

5 A case study of how this framework for analysis should be applied is provided by the  
6 Commission's analysis in *Trailer Train II* of Trailer Train's 1989 proposal to "assign" specific  
7 railroad cars to specific railroads. The Commission rightly concluded that such a practice not  
8 only failed to achieve any benefits of "free running" rail cars that could move over multiple  
9 railroads, but it conferred on the pool an unnecessary artificial advantage of antitrust immunity to  
10 the pool-owned cars to the detriment of non-rail affiliated competitors, thereby thwarting  
11 competitive forces:

12 However, in our view, Trailer Train's assignments are essentially a method of  
13 equipment financing and leasing which does not satisfy the requirements of  
14 § 11342. As set forth in more detail below, we conclude that these activities are,  
15 at best, tangential to the operation of a freight car pool and more appropriately the  
16 function of individual railroads or third party lessors operating outside the pool. It  
17 is likely that third party lessors have not had full opportunity, because of Trailer  
18 Train's antitrust immunity and incumbency in the car rental market, to establish  
19 their relative efficiency in providing comparable services to the railroads. By  
20 ruling out further assignment and purchase of cars for allocation (the latter  
21 essentially to avoid de facto assignment), we believe that we can provide such an  
22 opportunity, *thereby replacing a system that requires regulatory oversight with*  
23 *greater reliance on freely operating market forces.* [Emphasis added.]  
24

---

carrier duty to provide adequate car service *would constitute a measure of restraint on potential competition from the individual railroads providing their own cars at independently established rates.* While the Trailer Train and Railbox pooling agreements specifically acknowledge that the participating railroad retain their right to maintain and enlarge their individually owned car fleets, *any degree of participation will constitute a partial surrender of one form of competition for common traffic. It is our view that such an adoption of a common policy and practice toward the provision of car service in fact constitutes the pooling of such service and the partial surrender of an existing form of competition between railroads.* [Emphasis added.]  
347 I.C.C. 862, 877, 878.

\* \* \*

... it is our view that Trailer Train has not sufficiently proven that the benefits achieved through assignment and allocation could not otherwise be achieved, either by Trailer Train or third party lessors, *by alternative means in a market without antitrust immunity*. Thus, we have decided to exclude or restrict these functions in authorizing an extension of the pool. [Emphasis added.]

\* \* \*

Trailer Train's argument that assignment has promoted introduction of high-technology equipment in a market environment that presents high risks to individual railroads is well taken. So are the arguments that the three to five year terms available through assignment have been beneficial and attractive to railroads and steamship lines. Yet the record in this case shows that *all these benefits would flow from any leasing arrangement from private commercial entities operating without antitrust immunity.* [Emphasis added.]

[5 I.C.C. 2d at 563, 590, 595.]

The Commission's reasoning in *Trailer Train II* regarding assignment and allocation is the economically appropriate approach. It recognizes that the granting of antitrust immunity itself is inherently anticompetitive and ought not to be undertaken unless significant benefits cannot otherwise be achieved. It recognizes that if competition can be made to work, the immunity grants an artificial competitive advantage to the pool and suppresses the development of competitive alternatives, while adding to the need for regulation to replace the lost discipline of competition. The solution to this problem is to craft the immunity to the narrowest scope necessary to achieve otherwise unavailable significant benefits.

Clearly, applicant and the Kalt V.S. have not even attempted to apply this test or to show that renewal of the existing agreement meets this standard. The Kalt V.S. does not even mention the antitrust immunity, nor does it consider whether any benefits of the pool can be achieved by any

1 less anticompetitive means. As explained below, this omission is significant, because changed  
2 circumstances justify significant restrictions in the scope of the immunity.

3

#### 4 **CLAIMED EFFICIENCY GAINS FROM THE POOLING AGREEMENT**

5 The appropriate economic standard starts with an assessment of the true economic benefits of  
6 pooling and a pruning away of the dubious benefit claims that are either nonexistent or could be  
7 achieved by other more competitive alternatives.<sup>11</sup> I start with what appears to be the most  
8 credible benefits claims.

#### 9 **“Free Running” Flat Cars**

10 There appears to be some consensus that there is an efficiency inherent in a “free running” fleet  
11 of intermodal flat cars (to serve what was historically called TOFC/COFC) that can move about  
12 the various railroads, either in interline service or in response to fluctuating demands by the  
13 carriers.<sup>12</sup> The benefit appears to come from the fact that the car can “reload” another movement  
14 rather than return to its origin empty. However, these benefits do not extend to service by flat  
15 cars that are essentially committed to shuttle service (such as center beam flat cars used for forest

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<sup>11</sup> Note the tension between the Kalt V.S.’s claims that TTX is uniquely able to achieve certain efficiency gains, while competitors without carrier affiliations (and the carriers themselves) nevertheless provide effective alternatives that would constrain the exercise of market power without the benefit of the antitrust immunity. If such alternatives indeed provide such effective competition, TTX’s alleged efficiency advantages cannot be that compelling. On the other hand, if the efficiency advantages of TTX are unique and significant, by the same token the allegedly competing alternatives become less effective, because they are competitively handicapped by the lack of immunity.

<sup>12</sup> However, as explained below, TTX states that it believes it should engage in assignment and allocation of flat cars to specific railroads. As the Commission has previously noted, such activities are antithetical to the concept of a “free-running” pool, since cars are put in the service of a specific railroad. The fact that TTX continues to be anxious to participate in assignment and allocation undercuts the claimed benefits of a “free-running” pool.

1 products and the like). And, given the fact that there are other pooling agreements without such  
2 extensive antitrust immunity and bilateral arrangements that accomplish these same objectives, it  
3 is not a foregone conclusion that antitrust immunity is required to achieve even the purely  
4 operational benefit of pooling. In any event, just as the Commission restricted assignment and  
5 allocation in *Trailer Train II*,<sup>13</sup> the immunity should extend only to equipment types that are  
6 actually achieving the benefits of a “free running” service. These are the “free running”  
7 intermodal flat cars, and not flat cars that are in non-intermodal service.

#### 8           **Pricing**

9 The application and the *Kalt V.S.* are notably silent on any claims of pricing efficiency gains.  
10 Yet the major railroads have ceded pricing authority to the pool for a substantial share of the  
11 supply of flat cars (see discussion below). TTX, as a result of the Commission’s deprescription  
12 orders, has unnecessarily become a *de facto* rate bureau. This result completely undercuts the  
13 Commission’s deprescription orders to replace the formula system with a series of bilateral  
14 agreements among the parties supplemented by arbitration.<sup>14</sup> No evidence has been forthcoming  
15 to demonstrate that TTX’s price-fixing activities are essential to the operational economies of a

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<sup>13</sup> In *Trailer Train II*, the ICC stated that “Our decision therefore excludes Trailer Train [now TTX] from that market [short term leases for dedicated markets under assignment] and confines it to *the only market in which it has satisfied the statutory standard, that of operating a free-running pool.* [Emphasis added.] 5 I.C.C. 2d at 597.

<sup>14</sup> In raising the issue of whether “antitrust immunity is necessary or appropriate,” the Commission addressed the proposal to establish car hire rates bilaterally in place of Commission prescribed rates:

The agreement plainly is *not one that forced participants to be parties to collectively set rates.* To the contrary, *the essential purpose of the agreement is to force participants to negotiate their rates one-on-one,* and if unsuccessful, to go to arbitration. Thus, far from authorizing collective action, *the agreement forecloses participants from acting collectively in setting their rates.* [Emphasis added.]

See *Car Hire Compensation*, 9 I.C.C. 2d at 1102.

1 “free running” fleet.<sup>15</sup> This deficiency should be corrected by restoring price competition among  
2 the owner railroads for TTX’s flat car fleet, as explained below.

3 **“Maintenance and Repair” and “Standardization and Innovation”**

4 “Maintenance and repair” do not appear to be activities central to the achievement of the benefits  
5 of a “free running” fleet.<sup>16</sup> If the carriers believe that TTX could not undertake such activities  
6 without antitrust immunity, this should motivate an inquiry into exactly what about these  
7 activities runs afoul of the antitrust laws and whether the activities can be conducted without  
8 harm to competition. If less competitively harmful means are available, TTX needs to explain  
9 why they should not be pursued to avoid the need for the immunity.

10

11 Likewise, “standardization and innovation” also require a demonstration that antitrust immunity  
12 is necessary. If so, the competitive harm should be identified and less anticompetitive  
13 alternatives considered.

14 **“Risk Diversification”**

15 There is no valid evidence that TTX diversifies risk or, if it does, other less anticompetitive  
16 alternatives could not achieve the same results. Carriers can avoid the risks of direct car  
17 ownership, but only by shifting the risks to third parties, such as unaffiliated lessors. The Kalt

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<sup>15</sup> Indeed, since earlier approvals of the TTX agreement occurred prior to implementation of car hire rate depreservation, TTX needs to come forward with an explanation of why jointly-set rates are necessary to achieve pool efficiencies in a depreserved environment.

<sup>16</sup> In *Trailer Train II*, the Commission found that any efficiency gains of Trailer Train in maintenance and repair were not unique:

Although Trailer Train’s repair record has served it well in attracting business, several car lessors have, as noted above, offered leasing bids including full maintenance at terms that have been found very competitive with Trailer Train. (5 I.C.C. 2d at 597.)

1 V.S. ignores the fact that the rail carriers reacquire the same risks of rail car ownership through  
2 their proportionate share ownership of TTX. The risks they avoid by not owning the cars  
3 directly is offset by the risks they reacquire by owning TTX. By the same token, elimination of  
4 antitrust immunity for ratemaking by the carrier owners would not change the diversification of  
5 risk, but merely clarify it. As the Commission pointed out with regard to the argument in *Trailer*  
6 *Train II* about “high risks to individual railroads” with regard to assignment, “all these benefits  
7 would flow from any leasing arrangement from private commercial entities operating without  
8 antitrust immunity.”

9

10 By the same token, basic principles of corporate finance indicate that discrepancies between  
11 TTX’s debt rate and that of its carrier owners is not a measure of an inherent efficiency  
12 advantage. Rail carriers have historically sought to achieve the same financing benefits through  
13 leasing agreements, equipment trusts, and the like. A rail carrier’s corporate debt rates, on the  
14 other hand, reflect all of the risks of the enterprise, including car ownership.<sup>17</sup> Equipment  
15 financing has always been viewed as less risky because of the better options available to lenders  
16 in the case of default (the equipment can be repossessed).

17

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<sup>17</sup> Interestingly the application views assignment (entitlement to specific cars) and allocation (guaranteed rentals by a rail carrier for a longer term entitlement to a specified number of cars) as a desirable practice for TTX. Of course, individual rail carriers would be bearing the risks of car ownership even more directly as a result of assuming assignment and allocation commitments to TTX. The claimed “risk diversification” arguments cannot be very compelling if the carriers are so eager to sign up for the payment mechanisms and risks inherent in assignment and allocation that are ostensibly avoided by merely owning TTX.

1 In any event, if TTX has any efficiency advantages in financing and risk management, it should  
2 demonstrate them in competition on equal terms with the available alternatives in the  
3 marketplace, not behind the shield of antitrust immunity.

4 **“Improved Equipment Utilization”**

5 TTX has provided claims of improved equipment utilization. It may be that there are certain  
6 operational efficiencies that arise from the operation of a “free running” fleet. However, the  
7 antitrust immunity should not be extended beyond the fleet that actually benefits from true  
8 pooling of operations. In addition, TTX also receives special treatment collectively established  
9 by its owner railroads, thereby raising questions as to whether some of these “efficiencies” are  
10 offset by lower efficiency from TTX’s competition resulting from these artificial advantages.

11

12 The obvious solution is to simply condition TTX’s application on the elimination of any  
13 preferences to TTX by the owner carriers. Such a prohibition would extend to free switching,  
14 free storage for turned-back cars, free transportation to the next loading site, and free  
15 transportation to and from maintenance and storage sites. The Commission would then be  
16 assured that any apparent efficiencies are derived from true competitive advantages and not  
17 artificial ones. And it would ensure a level playing field for TTX and its competitors so that  
18 competition on equal terms will prevail.

19 **“Coordination” of Investment**

20 The Kalt V.S. makes one passing reference to the “coordination” of investment and proceeds to  
21 justify this alleged benefit on the basis of “risk diversification.” As discussed above, there is no  
22 reason to believe that TTX is uniquely able to diversify risk or that antitrust immunity is required

1 to achieve any such benefits. Nowhere is there any justification for the “coordination” of the flat  
2 car investment decisions of the entire rail carrier industry. Indeed, shielding these collective  
3 decisions from antitrust scrutiny would provide an ideal venue for attempted cartelization of the  
4 industry. There is no reason why such investment decisions, like hopefully the rest of the rail  
5 industry’s investment decisions, should not be the unilateral responsibility of the individual rail  
6 carriers. If TTX is in fact enjoying lower prices as a result of collective acquisition decisions, it  
7 would be only as a result of monopsony power (*i.e.*, buyer market power).

8

#### 9 **RELEVANT ECONOMIC MARKETS AND MARKET POWER**

10 The relevant product market for analyzing alleged benefits and competitive harm is the supply of  
11 and demand for flat cars (*i.e.*, car types covered by the proposed agreement) to carriers *and rail*  
12 *customers*.<sup>18</sup> There seems to be agreement that the relevant geographic market is origins and  
13 destinations covered by the agreement. The claim that rail carrier transportation service faces  
14 effective competition from other modes of transportation, such as motor carriers,<sup>19</sup> does not  
15 translate into an effectively competitive market for the supply and demand for the services of rail

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<sup>18</sup> In *Trailer Train II*, the ICC defined a relevant product market for measuring monopsony power (buying market power) as “freight cars other than tank cars.” The Commission used that relevant market as appropriate for measuring monopsony power (on the grounds that suppliers can switch production among many car types). However, rail customers for flat car service obviously cannot readily switch to coal cars, covered hopper cars, boxcars, *etc.* The Kalt V.S. and the application would appear to concur, as does *Trailer Train II* [“Rail intermodal equipment is specifically designed to accommodate TOFC/COFC traffic” (5 I.C.C. 2d at 582)].

<sup>19</sup> As the Commission noted in *Trailer Train II*, 5 I.C.C. 2d at 583, fn. 23:

We do recognize, however, that for certain intermodal traffic moving over long distances (notably 1,000 miles or more), trucks are not adequately competitive with railroads so as to act as a significant restraint on rail prices. This is especially true, as pointed out by DOJ, with regard to landbridge and mini-landbridge TOFC/COFC markets. The containers move in specialized double-stack flatcars over long distances, and therefore motor carrier transportation is not an effective competitive force on these markets.

1 flat cars. It is the latter market where TTX seeks antitrust immunity, and it is the relevant market  
2 where the Commission's balancing test must be applied.

3

4 Interestingly, the figures at the end of the Kalt V.S. do not present data on TTX's share of this  
5 relevant market. The Kalt V.S. only shows "TTX Flatcars" as a percent of total flat car  
6 "deliveries" peaking in 1990 at 87.3 percent and drifting downward to 37.0 percent in 2002. The  
7 "Application" (p. 54) shows the data in Table 1:

| <b>Table 1</b>                         |       |
|----------------------------------------|-------|
| <b>TTX Share of Flat Car Purchases</b> |       |
| 1985-1988                              | 64.0% |
| 1990-1993                              | 84.6% |
| 1999-2002                              | 54.2% |

8

9 TTX's own data show at a minimum that TTX owns a majority share of the flat car fleet, in as  
10 much as they appear to have been accepting delivery on a majority of the cars.

11

12 The data required to calculate market shares may be found in the Universal Machine Language  
13 Equipment Register ("UMLER"). Exhibit 1 shows that for 2003, TTX owned 62 percent of all  
14 intermodal flat cars (33,068 out of 53,179) and 65 percent of all intermodal platforms (162,119  
15 out of a total of 247,213).<sup>20</sup>

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<sup>20</sup> "Intermodal flat cars" include all AAR Equipment Type Codes "P" and "S," and all AAR Equipment Type "Q" equipment except RoadRailers, a carless technology which is technically included within Type Code Q, but was not included in the intermodal flat car total referenced above. AAR Equipment Type Codes are defined in the UMLER Data Specification Manual at Section IX.

- Equipment Type Code "P" includes Conventional Intermodal Cars which are flat cars, specifically equipped to carry trailers, containers, chassis, or removable trailer bodies for the transportation of freight in TOFC/COFC service that are over 33M pounds tare weight.

1 Furthermore, the data in Table 2 show that the major rail carriers are funneling most of their fleet  
2 car investment decisions through TTX.

3

| <b>Table 2</b>                                       |                       |
|------------------------------------------------------|-----------------------|
| <b>Intermodal Flat Cars in UMLER Database (2003)</b> |                       |
| <b>Owner</b>                                         | <b>Number of Cars</b> |
| BNSF                                                 | 1,473                 |
| CSX                                                  | 295                   |
| Norfolk Southern                                     | 679                   |
| Union Pacific                                        | 350                   |
| TTX                                                  | 33,068                |

4

5 Exhibit 2 shows that TTX's share of auto racks<sup>21</sup> is even higher; at 86 percent. Exhibit 3 shows  
6 that TTX's share of all general flat cars<sup>22</sup> is lower (35 percent), but this is the category where  
7 TTX does not attempt to show efficiency gains. The longer list of car owners for general flat

- 
- Equipment Type Code "Q" includes Lighter-weight Flat Cars and Low Profile Intermodal Flat Cars (Spine cars) which include: i) conventional Type P flatcars that are under 33M pounds tare weight; ii) articulated multiunit/multiplatform cars; or iii) steel wheel Railsets for Carless technology (This carless technology was not included in the intermodal total above) all specially equipped to carry trailers, containers, chassis, or removable trailer bodies for the transportation of freight in TOFC/COFC service.
  - Equipment Type Code "S" (Stack and Well Cars) are intermodal flat cars capable of carrying double stacked containers.

<sup>21</sup> "Auto rack" refers to AAR Equipment Type Code V "Vehicular Flat Car," which is a flat car specifically equipped with superstructure or containers for transporting set-up vehicles, not suitable for miscellaneous commodities.

<sup>22</sup> Exhibit 3 contains 2003 UMLER data on AAR Equipment Type Code "F" flat cars. AAR Equipment Type F includes the following AAR designations: "FB Bulkhead Flat Cars" equipped with fixed or permanently attached movable bulkheads or ends a minimum of three feet in height and flat floor for general commodity loading; "FBC Centerbeam Flat Cars" constructed with a center beam above the car deck for bulkhead to bulkhead; "FD Depressed Center Flat Cars" of special construction have the portion of the floor extending between trucks depressed to provide necessary overhead clearance for lading; "FL Flat Logging Cars"; "FM Ordinary Flat Cars" for general service; "FW Flat Cars" with hole to enable lading to be lowered due to clearance limits.

1 cars suggests that this category of cars is more likely to be in dedicated service and not “free  
2 running.”

3

4 Despite the claim that TTX’s relationship with the rail carriers is claimed to be “nonexclusive,” it  
5 is clear that the carriers’ unilateral investment in flat cars is *de minimis*. This is important  
6 because the Board’s predecessors relied on TTX to supplement, not supplant, individual carrier  
7 investment decisions. The data also show that, to the extent there are competitive options  
8 available, they come chiefly from the non-affiliated leasing industry. If effective competition is  
9 to prevail, the Board must take action in this proceeding to ensure that a healthy independent  
10 leasing industry is able to compete on equal terms with TTX.

11

#### 12 **CHANGED ECONOMIC CIRCUMSTANCES**

13 Substantial changes have ensued in the rail industry following each of the past approvals of the  
14 TTX agreement, and these point to the need for a restricted scope for any antitrust immunity.  
15 Most obvious is the continuing merger and consolidation activity, justified in large part by the  
16 elimination of the need for joint-line service. By the same token, these mergers reduce the need  
17 for “free running” cars and the benefits of pooling and enhance the feasibility of accomplishing  
18 the benefits of pooling with bilateral deals.

19

20 Even more significant is the Commission’s approval of car hire depreservation.<sup>23</sup> Now that all  
21 car-hire rates are depreserved, there are no direct regulatory constraints on those rates and they

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<sup>23</sup> *Railroad Car Hire Compensation—Rulemaking*, 9 I.C.C.2d 80 (1992), providing for phased-in car-hire depreservation effective for all freight cars as of January 1, 2003.

1 are to be set by the marketplace. If the Board approves the application as it now stands, TTX  
2 will effectively be a rate bureau setting rates collectively where depreservation was specifically  
3 designed to avoid this result.

4

5 Developments over the last decade and a half call for a fresh look at the reasoning in *Trailer*  
6 *Train II* and a fresh look at TTX's role in a competitive rail market.<sup>24</sup> As explained above, many  
7 of the claimed benefits are either illusory or achievable by less anticompetitive alternatives.  
8 Therefore the Board should condition the award of antitrust immunity as described below.

9

10 **SUMMARY OF RECOMMENDED CONDITIONS FOR APPROVING THE POOLING**  
11 **AGREEMENT**

12 As the TTX agreement is currently structured and operates, it does not meet the requirements for  
13 approval of a pooling agreement under the economic standards set forth in *Trailer Train II*. The  
14 antitrust immunity associated with approval of the agreement should be scaled down to  
15 encompass only the minimum necessary to achieve the operational efficiencies of a "free  
16 running" fleet. At a minimum, this would require adoption of the five conditions identified  
17 above. For the most part, these recommended conditions are self-evident from the discussion of  
18 alleged pooling benefits above and require no further elaboration. However, it may be useful to  
19 elaborate further on some of the reasons for the conditions and some of the practical issues that  
20 they may raise.

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<sup>24</sup> The Kalt V.S. infers the following from the fact that the Board received "no negative comments" in the 1994 review: "this repeated pattern of explicit and implicit recognition of the positive contribution of TTX is justified" (p. 11). Conversely, I wonder if the Professor would acknowledge that the range of objections filed in this proceeding justify the opposite conclusion.

1           **1. Limitation of Antitrust Immunity to “Free-Running” Intermodal Flat Cars**

2   The application says nothing about TTX’s ownership of other car types, such as boxcars and  
3   gondolas. The proceeding label is “flat cars” and there is no discussion of antitrust immunity for  
4   other car types. The Board should not approve the agreement unless it specifically applies only  
5   to “free running” intermodal flat cars, the only car type for which operating efficiencies of a  
6   “free-running” fleet are claimed.

7           **2. Elimination of Antitrust Immunity for Collective Ratemaking Activity**

8   TTX collectively sets the car hire rates for rail equipment on behalf of its member carriers. As a  
9   result of rail mergers, only two carriers now control a majority of the stock. Furthermore, this  
10   pricing power extends beyond the TTX fleet, as TTX’s competitors complain that TTX’s prices  
11   become the “ceiling price” for other negotiations. Non-affiliated lessors have no right to a true  
12   resolution of pricing disputes, where the arbitration process established under car-hire  
13   deprescription to resolve such disputes can rely on TTX rates to set the rates for non-TTX cars.

14  
15   Perhaps these problems could be assumed away if TTX could be relied upon to price  
16   competitively. However, the fact is that TTX is owned by the rail carriers. It apparently views  
17   its charge not to make a profit but to hold down the railroads’ cost of flat car services.<sup>25</sup> Since  
18   the owner railroads gain as a buyer of flat car services what they lose as a seller (*i.e.*, the  
19   transactions are a “wash”), every incentive is to underprice TTX’s services. Of course,  
20   competitors like leasing companies that are not rail-carrier affiliated enjoy no such advantages,  
21   but must contend with the “ceiling price” effect of TTX’s pricing. The TTX member carriers

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<sup>25</sup> Interestingly, the TTX Application, p. 22, states that “TTX’s usage charges are generally significantly lower than the car hire rates railroads pay for comparable equipment owned by others....”

1 have no incentive to use prices to ration demand or achieve profits.<sup>26</sup> The net result is a  
2 collective ratemaking system with antitrust immunity without proper incentives for competitive  
3 pricing.

4

5 The obvious solution to this problem is to eliminate TTX's authority for collective ratemaking.  
6 Similar restructurings have occurred in many industries undergoing a transition to competition,  
7 as evidenced, for example, in the ICC's depreservation decisions. Indeed, it would be consistent  
8 with the Board's other decisions involving reform of other rate bureaus. The carrier owners  
9 would be required to amend the agreement to cure any unwanted exposure to antitrust liability  
10 arising from collective ratemaking without antitrust immunity.<sup>27</sup>

11

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<sup>26</sup> TTX makes no effort to suggest that it is being run as a stand-alone profit maximizing competitor, but admits that it is being run in the best interests of the rail carrier owners: "TTX has *no independent profit motive*—its goals are *aligned with its participants' goals* in reducing rail transportation costs and increasing intermodal traffic." [Emphasis added.] See Andrew F. Reardon Verified Statement, pp. 6-7. Mr. Reardon's characterization of TTX as a non-profit entity run for the benefit of the carriers is confirmed on p. 5 of the agreement. Obviously TTX's unaffiliated competitors enjoy no such advantages and must operate as profitable enterprises.

<sup>27</sup> In *Trailer Train II*, the Commission apparently agreed with DOJ that "management does not necessarily require ownership of the cars.... DOJ believe that the pool members should be required to justify continuing antitrust immunity for this role.... We agree...." While it is easy to imagine how the carrier owners could benefit from the Kalt V.S.'s claim of "coordinated investment," it is not clear that such benefits are in the public interest. In an era of relying on competition and antitrust enforcement, there are likely few benefits and serious risk of anticompetitive harm likely to occur as a result of conferring antitrust immunity on such collective investment decisions. Interestingly, the TTX Application, p. 25, states that "If TTX did not exist, each railroad would have to justify its equipment expenditures based solely on expectations regarding its *own* individual future traffic levels." This of course is not true, since individual carriers would look to earnings for both "on-line" and "off-line" service of their cars since the cars are supposedly "free running." However, the TTX allegation that "By investing to serve market-wide demand, TTX overcomes these risks" is telling. The whole point of relying on competitive market forces is to place such risks on individual carrier managements, not a cartelized buying agency operating on behalf of the carriers as a group.

1 Another benefit of eliminating the immunity is to help ensure that non-rail-carrier-affiliated  
2 entities compete with TTX on a level playing field. Under the current regime they must compete  
3 with a dominant competitor that is in turn owned by the rail carriers they seek as customers. If  
4 they are dissatisfied, their only recourse is to an arbitration system controlled by the owners of  
5 the dominant firm, where the “market price” for car hire on their equipment can be set based on  
6 TTX rates. TTX does not play by the same rules as everyone else, as evidenced by such  
7 practices as free storage and transportation by the carrier owners. These artificial advantages  
8 would be eliminated by a condition that the carrier owners give no special privileges to TTX.

9 **3. Limitation of the Term of Agreement**

10 For reason’s discussed earlier, the proposed agreement should be limited to no more than five  
11 years with no automatic renewal.

12 **4. No Approval to Make Unilateral Changes**

13 The Application, p. 42, proposes that “changes in TTX’s car contracts and other policies within  
14 the scope of the Pooling Agreement as approved by the Board need not be approved in advance.”  
15 TTX does not state what changes it intends to implement if it receives this authority, but the  
16 changes could be significant. That TTX could make “substantive” changes is clear from the fact  
17 that TTX proposes to do away with the prior requirement that TTX could not make “substantive  
18 changes” without Board approval. (*Trailer Train I*, 347 I.C.C. at 883-4.) The Board should not  
19 grant *carte blanche* prior approval to TTX to implement “substantive changes” under the cloak  
20 of antitrust immunity.

1           **5. No Approval of Assignment and Allocation**

2     The Commission's prohibitions on assignment and allocation remain as valid today as they were  
3     in 1989 and 1994. These activities are antithetical to the notion of a "free running" pool and they  
4     grant antitrust immunity to TTX for pursuing activities that are not true pooling. The result  
5     would be the creation of an artificial advantage to TTX and the suppression of the major  
6     independent competitive force in this market place, the non-rail-affiliated independent lessors, as  
7     shown in Exhibits 1-3.

VERIFICATION

I, William B. Tye, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement. Executed on April 9 2004.

William B. Tye  
William B. Tye

**APPENDIX A**  
**QUALIFICATIONS**  
**OF**  
**WILLIAM B. TYE**

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**WILLIAM B. TYE   Principal**

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Dr. William B. Tye received his B.A. in economics from Emory University and his Ph.D. in economics from Harvard University. Upon leaving Harvard, he became assistant professor of economics and management at the U.S. Air Force Academy, holding the rank of Captain. There he taught quantitative economic theory, econometrics, policy issues in contemporary economics and quantitative decision methods. After leaving the service in 1972, he joined Charles River Associates, a Boston research and consulting firm, as a senior research associate and was promoted to program manager for transportation, and later to vice president and a director of the company. He joined Putnam, Hayes & Bartlett, Inc. in 1980 as a Principal. In August 1990 Dr. Tye and six colleagues founded *The Brattle Group*. *The Brattle Group* is the successor firm resulting from the merger of The Brattle Group, Inc. and Incentives Research, Inc., and was known for a year as Brattle/IRI.

**RECENT ASSIGNMENTS**

Dr. Tye, an expert in economic analysis and public policy, has been an economic consultant for over thirty years. He specializes in regulatory and antitrust issues. His clients have included regulatory bodies, firms in regulated industries and law firms. He has authored or co-authored over one hundred papers and publications, including four books. Some consulting assignments include:

- **Antitrust Analysis:** performed studies of competition in silicon, railroading, international telecommunications, petroleum, electric utilities, natural gas, latex and pipelines.
- **Estimating Damages:** provided economic analysis of damages in a case involving claims of alleged fraud in franchising, damage claims from alleged overcharges in the retailing of gasoline, false advertising in infant formulas, and business interruption.
- **Settlement Values and Strategies:** used business decision and planning tools successfully in consultation with attorneys to develop optimal litigation/settlement strategies in several recent cases.

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- **Regulatory Economics:** testified on mergers between regulated firms, on the economic aspects of automobile franchise regulation in a case between a dealer and an automobile manufacturer, on cost allocation issues involving different petroleum streams on the Trans Alaska Pipeline (TAPS), and on the cost of capital and proper calculation of avoided costs in the electric utility industry.
- **Management:** provided assistance to senior management of a large utility seeking a successful transition to a more competitive business environment.

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“A Rehabilitation of Fully Allocated Cost: Capacity Utilization, Pumpability, and Rate Design on The Trans Alaska Pipeline System (TAPS),” *Journal of Transportation Law, Logistics and Policy*, Vol. 67, No. 1 (Fall, 1999): 17-45 (Part I), and Vol. 67, No. 2 (Winter, 2000): 109-161 (Part II).

“Transportation Mergers,” with John Horn, *Handbook 6: Transport Strategy, Policy and Institutions*, Permagon/Elsevier, forthcoming.

**William B. Tye**  
**Principal**

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“Regulatory Transitions,” *Handbook 6: Transport Strategy, Policy and Institutions*, Permagon/Elsevier, forthcoming.

**TESTIMONY**

Assisted in preparation of expert testimony before the Postal Rate Commission in 1974 and 1976.

Assisted Professor Franklin Fisher in preparation of expert testimony in antitrust litigation (*CBS v. ASCAP*).

Testimony before the Postal Rate Commission on behalf of United Parcel Service, Docket No. R77-1, filed 14 October 1977.

Direct testimony before the Postal Rate Commission on behalf of United Parcel Service, Docket No. MC78-1, filed 4 April 1979, and supplemental testimony, filed 15 June 1979.

Assisted Professor Stewart C. Myers in the preparation of expert testimony on rate base methodology and rate of return in the oil pipeline industry before the Federal Energy Regulatory Commission, Docket No. OR79-1.

Assisted in the preparation of expert testimony on the subject of profit renegotiation for a government contractor performing trucking services, 1979.

Testimony before the Civil Aeronautics Board on behalf of Eastern Airlines, Miami-London Route Case, Docket No. 36764, 13 December 1979.

Testimony before the Civil Aeronautics Board on behalf of Eastern Airlines, Florida-Mexico City Route Investigation, Docket No. 32820, 16 July 1980.

Testimony before the Postal Rate Commission on behalf of United Parcel Service, Docket No. R80-1, filed 13 August 1980.

Testimony before the Motor Carrier Ratemaking Study Commission on behalf of Motor Common Carrier Associations, 19 March 1982.

Testimony before the ICC on behalf of the National Coal Association, *Coal Rate Guidelines—Nationwide, Ex Parte* No. 347 (Sub-No. 1), 13 April 1982.

**William B. Tye**  
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Testimony before the ICC on behalf of The Dayton Power and Light Company (v. Louisville and Nashville Railroad Company), Docket No. 38025, 6 April 1982 (direct) and 7 June 1982 (rebuttal).

Statement prepared for the Motor Carrier Ratemaking Study Commission, "Review of Regulatory Reform and the Trucking Industry: An Evaluation of the Motor Carrier Act of 1980," May 1982.

Testimony before the ICC on behalf of Niagara Mohawk Power Corporation (v. Conrail *et al.*), Docket No. 38336S, 21 July 1982.

Testimony before the ICC on behalf of Commonwealth Edison *et al.* (v. Aberdeen and Rockfish Railroad Company *et al.*), Docket No. 37891 *et al.*, 9 August 1982, 25 October 1982, and 14 February 1983.

Testimony before the ICC on behalf of Consumers Power Company, Docket No. 37854S *et al.*, 6 October 1982, 28 December 1982, and 1 August 1983; in Docket No. 38181S, 15 October 1982, 31 December 1982, and 2 August 1983; in Docket No. 37853S *et al.*, on 12 November 1982, 13 January 1983, and 29 August 1983; and in Docket No. 37857S *et al.*, on 24 January 1983, 25 March 1983, and 10 January 1985.

Statement prepared for the Motor Carrier Ratemaking Study Commission, "The Motor Carrier Market Place Without Collective Ratemaking," 24 November 1982.

Testimony before the ICC on behalf of Delmarva Power and Light Company, Docket Nos. 38329 and 38330, 31 January 1983.

Testimony before the ICC on behalf of Mobil Chemical Company, Docket No. 37850S, 30 March 1983, and 31 May 1983.

Testimony on behalf of Kansas Gas and Electric Company in Civil Action No. 83-1104, United States District Court for the District of Kansas, 19 April 1983.

Testimony before the ICC on behalf of Consumers Power Company, *Ex Parte* No. 347 (Sub-No. 1), "Coal Rate Guidelines—Nationwide," 28 July 1983.

Testimony before the ICC on behalf of Detroit Edison Company, Docket Nos. 38279S *et al.*, 22 December 1983, 13 February 1984, 14 March 1984, and 5 April 1984.

Testimony before the ICC on behalf of National Coal Association, 14 February 1984, in Finance Docket No. 30300, CSX Corporation—Control—American Commercial Lines, Inc.

**William B. Tye**  
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Testimony on behalf of MKT Railroad before the ICC, 10 September 1984, 21 November 1984, and 29 May 1985, in Finance Docket No. 30,400 *et al.*, SFSP Merger Proceedings.

Testimony before the ICC, 31 May 1985 and 8 July 1985, *Ex Parte* No. 445 (Sub-No. 1), *Intramodal Rail Competition*.

Testimony on behalf of Presidential Airlines in Docket No. 43825, *Texas Air—Eastern Acquisition Case*, before the Department of Transportation, 13 May 1986.

Panelist in a two-day colloquium on rail costing issues, 18-19 June 1986, before the Railroad Accounting Principles Board.

Deposition in *Farmers Electric Cooperative vs. Arkansas Power and Light Company*, U.S. District Court for the Eastern District of Arkansas, 27 June 1986.

Affidavit before an arbitration panel in the matter of Marilyn Benjamin, Administrator and Traffic Executive Association, Eastern Railroads, 29 May 1986.

Testimony on behalf of Presidential Airlines in Docket No. 44365, *Joint Application of Texas Air Corporation and People Express, Inc.*, merger proceeding before the Department of Transportation, 21 October 1986.

Deposition in *City of Austin et al. v. Decker Coal Company et al.*, No. A-85-CA-104, U.S. District Court, Western District of Texas, 2 April 1987.

Testimony before the ICC on behalf of the Commonwealth of Massachusetts in Docket Nos. 31250 and 31259, Conveyance of B&M Corporation Interests in Conn River Line, 13 June 1988 and Reply Testimony on 13 July 1988.

Testimony before the Illinois Commerce Commission on behalf of Mississippi River Transmission in *Application of Illini Carrier*, 13 May 1988.

Testimony before the ICC on behalf of the Commonwealth of Massachusetts in *Ex Parte* No. 274 (Sub-No. 11A), *Abandonment Regulations—Costing*, 8 July 1988.

Deposition in *James River Corporation vs. Northwest Pipeline Corporation*, 13-15 March, 12-14 April 1989.

Testimony before the Missouri Public Service Commission, Application of Missouri Pipeline Company, 10 May 1989 and 30 May 1989.

Testimony before the Public Utilities Commission of California, Application No. 88-07-020 *et al.*, 5 January 1990, on behalf of US Sprint.

**William B. Tye**  
**Principal**

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Testimony before the ICC on behalf of Rio Grande Industries, Inc., *Finance Docket No. 31505, Rio Grande Industries, Inc. et al.—Purchase and Related Trackage Rights—Soo Line Railroad Company Line Between Kansas City, MO and Chicago, IL*, 15 February 1990.

Expert's Report and Deposition, in *Litton Industries et al. v. Chesapeake and Ohio Railway Co. et al.*, Northern District of Ohio, Eastern Division, 11 April 1990.

Testimony before the Michigan Public Service Commission, Application of TNT Holland Motor Express, Inc. for Extension of Operations, 20 July 1990.

*Carolina Power & Light Company, Project No. 432*, before the Federal Energy Regulatory Commission, 15 March 1991.

Expert's Report and Deposition, *NCEMC v. Carolina Power and Light Company*, 11 March 1992.

Testimony before the Federal Energy Regulatory Commission, on behalf of Amerada Hess Pipeline Corporation, 30 March 1992 and Rebuttal Testimony, 10 August 1992.

Deposition in *Richard Lundgren, Inc. v. American Honda Motor Co., Inc.*, Civil Action No. 92-1091, Commonwealth of Massachusetts, February 5, 1993, and Testimony before the Superior Court of Massachusetts, Worcester, Massachusetts, 27 September 1994.

Deposition in *Empresas Puertorriquenas de Desarrollo, Inc. v. F.W. Woolworth Co.*, United States District Court for the District of Puerto Rico, 4 March 1993.

Testimony before the Interstate Commerce Commission, *Seaboard Air Line Railroad Company—Merger—Atlantic Coast Line Railroad Company: Petition to Remove Traffic Conditions*, Finance Docket No. 21215 (Sub-No.5), 29 March 1993.

Testimony before the Postal Rate Commission, *Bulk Small Parcel Service*, Docket No. MC93-1, 16 April 1993.

Testimony before the Commonwealth of Massachusetts Department of Public Utilities, DPU 93-167, *For the Purpose of Establishing Guidelines and Standards for Acquisitions and Mergers Of Utilities*, 16 February 1994.

Deposition, *Texaco Puerto Rico, Inc., et al., v. Department of Consumer Affairs*, United States District Court for the District of Puerto Rico, 21 April 1994, Expert's Report and Testimony before the Court, 2 August 1994.

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“Competition in the Market for Trans-Oceanic Facilities-Based Telecommunications Services,” with Hendrik S. Houthakker and Johannes P. Pfeifenberger, before the Federal Communications Commission, June 24, 1994 (also related studies filed October 25, 1996; April 23, 1997 and July 7, 1997).

Prepared Testimony before the Public Utilities Commission of the State of Hawaii, on behalf of Citizens Utilities Company, Kauai Electric Division, 21 July 1994, and oral testimony, 1 May 1995.

Prepared Rebuttal Testimony on behalf of Hawaiian Electric Light Company (Subject: Risks of Purchased Power Contracts), before the Public Utilities Commission of the State of Hawaii, December 1994.

Reply Testimony (with A. Lawrence Kolbe) on Behalf of Edison Electric Institute, Docket No. RM94-7-000, before the Federal Energy Regulatory Commission, 23 January 1995.

“The Economics of Pricing Network Access in the Market for Telecommunications in New Zealand” (with Carlos Lapuerta), prepared for the Minister of Commerce and the Minister of Communications on behalf of Clear Communications, Ltd, 17 February 1995.

Prepared Direct Testimony on behalf of the Designated TAPS Carriers, before the Federal Energy Regulatory Commission and Alaska Public Utilities Commission, Docket Nos. IS94-10-002, *et al.* (Phase II), 14 March 1995.

“Damages from Delay of Essex Government Contract,” Expert’s Report in *Essex Corp. v. Wackenhut Services, Inc.*, in the United States District Court for the District of New Mexico, March 23, 1995, Deposition, April 25, 1995, and Supplemental Report, January 11, 1996.

Testimony before the I.C.C., Finance Docket No. 32549, *Burlington Northern, Inc. and Burlington Northern Railroad Company—Control and Merger—Santa Fe Pacific Corporation and Atchison, Topeka and Santa Fe Railway Company*, May 10, 1995.

Testimony before the U.S. District Court, Southern District of New York, *New York Urban League v. Metropolitan Transportation Authority*, November 2, 1995.

“Post Merger ‘Character of Rivalry’ in the Proposed ‘SOP/UP’ Railroad Merger,” before the Texas Railroad Commission, February 5, 1996.

Testimony before the Surface Transportation Board, Docket No. 32760, *Union Pacific—Southern Pacific* merger proceeding, March 29, 1996.

Rebuttal Testimony before the Rhode Island Public Utility Commission, “Stranded Cost Recovery,” Docket No. 2320, *Electric Utility Restructuring*, July 23, 1996.

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Testimony before the New Hampshire Public Utilities Commission, Docket No. DE 96-252, AT&T Communications of New Hampshire, Inc., *Petition for Arbitration with NYNEX*, October 7, 1996.

Testimony before the Massachusetts Department of Public Utilities, AT&T/NYNEX Arbitration, Docket No. DPU 96-80181, October 22, 1996.

Testimony before the Federal Communications Commissions, "Economic Implications of the Proposed Hughes - PanAmSat Transactions" (with Johannes P. Pfeifenger), December 2, 1996.

"Analysis of Cure Costs for Contract Breach Damages Suffered by Hormell Brewing Company, Inc. from Beverage Enterprises" (with M. Alexis Maniatis), September 1997.

Expert Report, January 9, 1998, In Re Industrial Silicon Antitrust Litigation, U.S. District Court for the Western District of Pennsylvania. Deposition, February 12-13, 1998; affidavits, April 13, 1998 and July 28, 1998; and testimony, September 8, 1998, and November 4, 1998.

Expert Report of William B. Tye, February 17, 1998, *PTP Industries, Inc. v. America Online, Inc.*, U.S. District Court for the District of Maryland and deposition, April 1, 1998.

Expert Report (with Johannes P. Pfeifenger), *COMSAT Corporation v. The News Corporation, et al.*, U.S. District Court, Central District of California, CV 96-7528-KMW (CTx), July 1, 1998.

Expert Report, *U.S. Airways v. British Airways*, U.S. District Court, Southern District of New York, 96 Civ 572 (MGC), November 6, 1998, and deposition, December 14, 1998.

Prepared Direct Testimony, before the Alaska Public Utilities Commission, No. P-97-4, October 8, 1998; Second Prepared Direct Testimony, July 12, 2000, and Rebuttal Testimony, February 23, 2001.

Verified Statement, *Major Rail Consolidation Procedures*, Before the Surface Transportation Board, STB *Ex Parte* No. 582 (Sub-No. 1), May 16, 2000.

Direct Testimony on Behalf of the Newspaper Association of America, Before the Postal Rate Commission, No. R-2000-1, May 22, 2000.

Rebuttal Expert Report, *Dee-k Enterprises, Inc. et al., v. Heveafil SDN. BHD., et al.*, before the U.S. District Court for the District of North Carolina, No. 3:98-CV-10, December 7, 2000, and deposition, January 5, 2001.

**William B. Tye**  
**Principal**

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Expert Report, *PBM Products, Inc. v. Mead Johnson & Co.*, before the U.S. District Court, Eastern District of Virginia, No. 3:01 CV 199, September 7, 2001 and deposition, September 24, 2001.

Testimony, *Albert Zabin, Esquire et al. v. Stephano Picciotto, et al.*, before the Superior Court, Commonwealth of Massachusetts, Civil Action No. 99-1594, September, 6-7, 17, 2001.

Affidavit on behalf of the Australian Competition and Consumer Commission, before the Australian Competition Tribunal, Files 1 and 2 of 2000, December 10, 2001, in Re: Application by Telstra Corporation, and Second Affidavit, March 2002.

Sworn Declaration on behalf of Big West Oil, LLC, Chevron Products Company, and Tesoro Refining and Marketing Company, in re Protest of Joint Tariff Cancellation Filed by Express Pipeline LLC, before the Federal Energy Regulatory Commission, Docket No. OR02-5-000 *et al.*, April 26, 2002.

Expert Report, Daniel L. McFadden and William B. Tye, Vitamin Antitrust Litigation, before the U.S. District Court, District of Columbia, MDL 1285 Misc. No. 99-0197 (TFH), June 26, 2002 and Deposition, September 17, 2002.

Sworn Declaration, *OMID International, Inc. v KTVU*, before the Superior Court of the State of California in and for the County of San Francisco, CGC-02-405047, May 14, 2003.

Expert Report, U.S. District Court, Northern District of California, *Truck-Rail Handling and Quality Transport, Inc. v. Burlington Northern and Santa Fe Railway*, August 18, 2003, corrected September 18, 2003, and deposition, September 22-23, 2003.

Expert Report, U.S. District Court, Southern District of Maryland, *Sensormatic Security Corporation v. Sensormatic Electronics Corporation, et al.*, November 26, 2003.

**SPECIAL CONSULTING ASSIGNMENTS**

The Joint Economic Committee, U.S. Congress, working on a project entitled "The Capital Grant as a Subsidy Device: The Case of Urban Mass Transportation." The report on this study was published in 1973.

The Office of the Assistant Secretary for Policy and International Affairs, U.S. Department of Transportation, on the subject of subsidy mechanisms for urban mass transportation. He participated in the drafting of a report to the Congress on the subject.

The Assistant Secretary for Metropolitan Development, U.S. Department of Housing and Urban Development. The work involved experimental design for urban mass transportation

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demonstrations and an evaluation of the impact of the urban mass transportation capital grant program in nine U.S. cities.

The U.S. Department of Transportation study entitled "Transportation Needs of the Handicapped."

**PROFESSIONAL ACTIVITIES**

Chairman of a Conference on the Economic Regulation of Urban Transportation in September 1976, sponsored by the Transportation Research Board.

Workshop chairman on market segmentation at the Third International Conference on Behavioral Travel Modelling 1977 in Australia.

Discussion leader at a conference of 150 practitioners of transportation demand analysis sponsored by the U.S. Department of Transportation (Seminar on Emerging Transportation Planning Methods, Daytona Beach, Florida, December 1976). The subject of this session was "Manual Forecasting and Sketch Planning Methods."

Chairman of the workshop on "The Application of Behavioral Travel Demand Models," Second International Conference on Behavioral Travel Demand.

Former Member, Committee on Taxation, Finance and Pricing of the Transportation Research Board.

Attendant at the Fourth International Conference on Behavioral Travel Modelling held in Eibsee, Germany, July 1979.

Former Member, Committee on Pipeline Transportation, of the National Research Council (National Academy of Sciences), Transportation Research Board.

Referee for the *Quarterly Journal of Economics*, the *Journal of Regional Science*, *Transportation Research*, *Transportation*, the *Journal of Industrial Economics*, the *Journal of Policy Analysis & Management*, the *Rand Journal of Economics*, and the *Journal of Law and Economics*.

National President, 1983; Executive Vice President, 1982; and Programs Vice President, 1981; Transportation Research Forum.

Former Member, Editorial Board, *Transportation Antitrust Report*.

Former Member, Editorial Review Board, *Logistics and Transportation Review*.

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Former Council Member, Harvard Graduate Society for Study and Research (Harvard Graduate School of Arts and Sciences).

Former Member, Committee on Surface Freight Transportation Regulation, Transportation Research Board, National Research Council.

Workshop Chair, "Understanding Competition and Antitrust Behavior," The Second International Conference on Privatization and Deregulation in Passenger Demand, Tampere, Finland, June 1991.  
Advisory Committee, *Yale Journal on Regulation*.

Faculty Member, Advanced Regulatory Studies Program, National Association of Regulatory Utility Commissioners, February 16-21, 1992.

Former Member, Dean's Council, Emory College.

**PUBLIC SPEAKING**

"Problems Confronting Regulated Industries in a Period of Runaway Inflation," presented to Delta Nu Alpha, transportation fraternity in Boston, Massachusetts, 1975.

"Urban Transportation: Alternatives for Public Policy," presented to Traffic Clubs International in Denver, Colorado, 1971.

"Current Financial Issues in Regulation of Freight Transportation," presented at the Seminar on Freight Policy Analysis at the U.S. Department of Transportation, Transportation Systems Center, 3 April 1980.

"Transportation and Related Industries in the U.S. Economy" (with John R. Meyer), presented at the Transportation Economic Seminar to the senior staff of the U.S. Department of Transportation, Transportation Systems Center, 7 March 1980.

"Competition Between Public and Private Enterprise," presented to Western Carolina University, 15 January 1981.

"Railroad Ratemaking as Influenced by Market Dominance and Antitrust," presented at the Transportation Seminar Series, Princeton University, 14 April 1982.

"Collective Ratemaking and Antitrust in the Motor Carrier Industry," presented to the Wharton Transportation Club, 15 April 1982.

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“Market Dominance, Rate Reasonableness, and the Staggers Act,” presented at the Center for Transportation Studies, Massachusetts Institute of Technology, 8 October 1982.

“Common Control of Rail and Water Carriers,” before the Seminar on Transportation Policies and Demand for Coal, Iron, and Steel, National Coal Association and American Iron and Steel Institute, Louisville, KY, 27 February 1984.

“Obstacles to the Transition to Deregulation in the Rail Industry: Rail Merger Policy,” 39th Annual Transportation and Logistics Forum and Exposition, National Transportation Defense Association, 23-26 September 1984, San Francisco.

“Competitive Access: A Comparative Industry Approach to Vertical Foreclosure,” Seventh Annual Appalachian Natural Gas Conference, Pittsburgh, PA, 7-8 May 1987.

“Competitive Access,” Gas Antitrust #88, sponsored by *Gas Daily*, Houston, TX, 17-18 September 1988.

“Integrating Coal Transportation and Coal Supply Procurement,” *Electric Power Research Institute: 1987 Fuel Supply Seminar*, Baltimore, Maryland, 6-8 October 1987.

“Transportation Law Concepts of Interest to Energy Lawyers,” Fuel and Energy Industry Subcommittee, American Bar Association, Washington, DC, 26 April 1988.

“Competition and Regulation—Compatible Bedfellows? The Challenge of Regulating a Competitive Energy Industry,” American Bar Association, Washington, DC, 18 January 1989.

“The *Duquesne* Decision: There’s Less Hope for Investors than We Thought” (with A. Lawrence Kolbe), PHB Utility Discussion Series Dinner, Washington, DC, 12 July 1989.

“Regulatory Risk in a Competitive Environment,” *Utilities in the ‘90s: Strategic Issues*, sponsored by Reid and Priest, November 8, 1989, Washington, D.C.

“Equity and Efficiency Criteria in Litigation,” PHB Electric and Gas Utility Discussion Series, Washington, DC, 3 April 1990.

“Regulatory Treatment of Environmental Cleanup Liabilities: Issues and Implications,” Edison Electric Institute Economics Committee Meeting, Denver, Colorado, September 20, 1990.

“Risk of the Natural Gas Pipeline Industry,” Interstate Natural Gas Association of America, Rate Committee Meeting, Montebello, Quebec, September 10, 1990.

“Defining, Proving, and Measuring Antitrust Damages,” American Bar Association, Section of Antitrust Law, 1991 Annual Meeting, Atlanta, Georgia, August 13, 1991.

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“Pricing Market Access for Regulated Firms,” Royal Commission on National Passenger Transportation, Ottawa, Canada, November 13, 1991.

“Regulatory Risk and *Duquesne*,” *NARUC Advanced Regulatory Studies Program*, Williamsburg, Virginia, February 21, 1992.

“Regulatory Risk in the Ratesetting Process,” teleconference sponsored by the Electric Power Committee, the ABA Section of Natural Resources, Energy, and Environmental Law, May 28, 1992.

“Environmental Economics: Who Pays for Clean Energy,” Federal Energy Bar Association, Annual Meeting, Washington, DC, May 21, 1992.

“Regulatory Risk and *Duquesne*,” *Advanced Workshop in Regulation and Public Utility Economics: Eleventh Annual Conference*, sponsored by Graduate School of Management, Center for Research in Regulated Industries, the State University of New Jersey (Rutgers), Mohonk Mountain House, New Paltz, New York, May 27-29, 1992.

“Rate of Return for the 1990s: Does It Account for Environmental Cleanup Liabilities, Technological Advances, and Incentives?,” American Bar Association, Section of Public Utility, Communications and Transportation Law, 1992 Annual Meeting, San Francisco, California, August 10, 1992.

“Incentive Regulation: DOs and DON'Ts,” Third Annual Strategic Utility Planning Conference, Denver, Colorado, June 22-23, 1993.

“Proof of Damages,” Off-the-Record Club, Boston Bar Association, March 18, 1994.

“Impact Upon LDC's Rate of Return Arising From Newly Imposed Business and Regulatory Risks,” *The Changing Environment for the Natural Gas Industry in New England*, sponsored by the New England Gas Association and Federal Energy Bar Association, Boston, Massachusetts, April 6, 1994.

“Economic Issues Relating to Access to Joint Ventures,” American Bar Association, Section of Antitrust Law, Washington, D.C., April 8, 1994.

“Strategic Analysis of Litigation: Structuring Your Analysis to Improve Decisions in Complex Litigation” (with Carlos Lapuerta), American Bar Association, Section of Business Law, Annual Meeting, New Orleans, August 9, 1994.

“A Rehabilitation of Fully Allocated Cost: Capacity Utilization, Pumpability, and Rate Design on the Trans Alaska Pipeline System,” World Conference on Transport Research, Sidney, Australia, 1995.

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“Managing and Valuing the Big Case,” sponsored by the Committee on Civil Practice and Procedure, Section of Antitrust Law, Washington, DC, April 7, 1995.

“The Economics of Pricing Network Interconnection in the Market for Telecommunications in New Zealand” (with Carlos Lapuerta), International Telecommunications Society, *Interconnection: The Key to the Network of Networks*, Wellington, New Zealand, April 10-12, 1995.

“The Economics of Pricing Network Interconnection: Theory and Application to the Market for Telecommunications in New Zealand,” the 16th Bonbright Center Conference, *Competition in the Local/IntraLATA Markets*, Atlanta, GA, March 25-26, 1996.

“What is it Worth? Valuing a Large Antitrust Case,” Civil Practice and Procedure Committee, American Bar Association, Section of Antitrust Law, Annual Spring Meeting, March 28, 1996.

“How to Recover Stranded Costs and Achieve Competition on Equal Terms in the Electric Utility Industry,” Massachusetts Continuing Legal Education, Inc., Seminar on Public Utilities Deregulation, Boston, Massachusetts, June 17, 1996.

“Utilities Stranded Costs—Ramifications of Recovery,” The University of New Mexico School of Law *Symposium on Electric Utility Bypass Policy*, Albuquerque, New Mexico, August 1-2, 1996.

“Power Struggle: Antitrust and the Changing Rules of Electric Utility Competition,” American Bar Association, Section of Antitrust Law, Chicago, Illinois, September 19-20, 1996.

“Compensation for the Risk of Stranded Costs,” 16th Annual Electric and Natural Gas Conference, James C. Bonbright Utilities Center, Atlanta, Georgia, September 16-17, 1996.

“Antitrust Damages,” Chicago Bar Association, January 15, 1997.

“Market Power Issues Raised by Electric Power Restructuring and Rate Regulation,” American Bar Association, Section of Antitrust Law, April 9, 1997.

“Mergers, Acquisitions, and Strategic Alliances,” New Jersey Association of Energy Engineers, 1997 Energy Futures Forum, Woodbridge, New Jersey, April 17, 1997.

“Measuring Market Power in Today’s Bulk Power Markets,” Bulk Power Markets Conference, Vail, Colorado, June 3-4, 1997.

“Competition and Consolidation Issues,” 68th Annual Meeting, Association for Transportation Law, Logistics and Policy, Santa Fe, New Mexico, June 21-25, 1997.

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“Economics as Junk Science,” American Bar Association, Section of Antitrust Law, Annual Meeting, San Francisco, California, August 4, 1997.

“Case Studies of Issues Arising from Damages from a Foreclosed Business Opportunity,” Litigation Section, American Bar Association Annual Meeting, San Francisco, CA, August 6, 1997.

“Long-Term Contracts and Regulatory Transitions,” Transportation Economics, Policy, and Management: A Conference in Honor of John R. Meyer, Harvard University, September 5-6, 1997.

“Competitive Neutrality in Access Disputes,” *The Telecommunications Industry: Effects of the 1996 Act*, The Carlton Hotel, Washington, DC, September 18-19, 1997.

“Damages, Antitrust Litigation: Strategies for Success,” Practicing Law Institute, November 16-17, 1998.

“How to Structure and Present Expert Testimony in a Post-Kumho Environment” and “The Use and Abuse of Expert Testimony in Presenting Proof of Economic Damages” (with Susan J. Guthrie), Ninth Annual National Expert Witness and Litigation Seminar, Hyannis, MA, June 16, 2000.

“Rail Merger and Access Issues Before the U.S. Surface Transportation Board,” *Competition and Access in the Rail Industry Symposium*, Saskatoon, Saskatchewan, Canada, September 16-17, 2000.

“Competitive Neutrality: A Guide for Resolving Interconnection Disputes in the Transition to Competition,” Australian Competition and Consumer Commission, *Regulation and Competition Conference*, Manly Beach, Australia, July 25-26, 2002.

**HONORS**

Phi Beta Kappa, Emory University, 1965.

Ford Career Scholar, Emory University, 1964-1965.

Bachelor’s degree awarded summa cum laude, 1965.

Woodrow Wilson Fellow, Harvard University, 1965-66.

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Office of Metropolitan Development Recognition Award for Meritorious Contributions to Community Development from the U.S. Department of Housing and Urban Development, 1968.

Samuel Andrew Stouffer Fellow at the Joint Center for Urban Studies of the Massachusetts Institute of Technology and Harvard University, 1968-1969.

Air Force Commendation Medal for Meritorious Service, July 1972.

**CHARLES RIVER ASSOCIATES REPORTS (WITH OTHERS)**

"Forecasting Ocean Freight Shipping Rates," 1974.

"Public Costs of the Goods Movement System: Manhattan Garment Center Urban Goods Movement Study," 1975.

"Forecast of the 1975 Dry Cargo Shipping Market," 1975.

"Disaggregate Travel Demand Models," NCHRP Project 8-13: Phase I Report, 2 Vols., 1976.

"Energy Impact of Federal Capital Grants Programs for Transportation," 1976.

"Potential Fuel Conservation Measures by Regulated Motor Carriers in the Intercity Freight Market," 1977.

"Impacts of Proposals for Reform of Economic Regulation on Small Motor Carriers and Small Shippers," 1977.

"Transportation," in *Regulation and Energy Consumption*, prepared for the Committee on Measurement of Energy Consumption, National Academy of Sciences, August 1977.

"An Analysis of the Impacts of Selected Transportation Issues on National Transportation Goals," Final Report, 1978.

"Disaggregate Travel Demand Models," NCHRP Project 8-13, Phase II Report, May 1978.

"Disaggregate Travel Demand Models," NCHRP Project 8-13, Draft Final Report, November 1980.

12Apr04

**EXHIBIT 1**

**2003 INTERMODAL FLATCAR SUMMARY:  
SPINE, STACK AND CONVENTIONAL INTERMODAL  
(AAR EQUIPMENT TYPES P, Q, and S (except Road Railer))**

**Exhibit 1**  
**2003 Intermodal Flatcar Summary: Spine, Stack and Conventional Intermodal**

| Owner                          | <u>Conventional</u> |              | <u>Spine</u> |              | <u>Stack</u>  |              | <u>Total</u>  |              |
|--------------------------------|---------------------|--------------|--------------|--------------|---------------|--------------|---------------|--------------|
|                                | Platforms           | Cars         | Platforms    | Cars         | Platforms     | Cars         | Platforms     | Cars         |
| Alaska Railroad Corp           | 40                  | 20           | 129          | 43           |               |              | 169           | 63           |
| BC Rail Ltd.                   | 200                 | 103          | 152          | 69           |               |              | 352           | 172          |
| Bombardier                     | 400                 | 200          | 600          | 200          | 2196          | 366          | 3196          | 766          |
| Burlington No. & Santa Fe      | 44                  | 34           | 61           | 18           | 11758         | 1421         | 11863         | 1473         |
| Canadian National CN           | 1041                | 525          | 1164         | 300          | 2138          | 214          | 4343          | 1039         |
| CGTX                           |                     |              | 475          | 95           | 996           | 166          | 1471          | 261          |
| Class 3 Railroads              | 2                   | 1            | 1            | 1            | 2             | 1            | 5             | 3            |
| Colorado & Wyoming Rwy         | 2                   | 1            |              |              |               |              | 2             | 1            |
| Conrail                        |                     |              | 115          | 23           |               |              | 115           | 23           |
| CP RAIL CP                     | 3436                | 2272         | 35           | 5            | 790           | 133          | 4261          | 2410         |
| CSX Transportation             |                     |              |              |              | 2950          | 295          | 2950          | 295          |
| Dept of Defense                | 640                 | 320          |              |              |               |              | 640           | 320          |
| ECDC ENVIRONMENTAL LC          | 422                 | 211          |              |              |               |              | 422           | 211          |
| Ferrocarril del Sureste        | 30                  | 15           |              |              |               |              | 30            | 15           |
| Ferrocarriles Chiapas May      | 2                   | 1            |              |              |               |              | 2             | 1            |
| Ferrocarril Mexicano SA        | 356                 | 178          |              |              |               |              | 356           | 178          |
| First Union                    | 10                  | 5            | 230          | 46           | 7482          | 1157         | 7722          | 1208         |
| Florida East Coast FEC         | 1570                | 785          | 100          | 50           | 200           | 100          | 1870          | 935          |
| FNM - Ferro. Natl Mexico       | 200                 | 100          |              |              |               |              | 200           | 100          |
| GATX General American          | 228                 | 134          |              |              | 1090          | 149          | 1318          | 283          |
| GE Capital Rail Services       | 2670                | 1335         |              |              | 9450          | 1313         | 12120         | 2648         |
| Greenbrier Leasing             | 2307                | 1215         | 160          | 32           | 9866          | 2436         | 12333         | 3683         |
| Helm Equipment                 | 194                 | 97           |              |              |               |              | 194           | 97           |
| ITG Inc                        | 3                   | 3            |              |              |               |              | 3             | 3            |
| Joseph Transportation          | 90                  | 45           |              |              |               |              | 90            | 45           |
| Kansas City Southern KCS       | 384                 | 192          |              |              | 1134          | 189          | 1518          | 381          |
| Laidlaw Environmental          | 100                 | 50           |              |              |               |              | 100           | 50           |
| Louisiana & Delta Rwy          | 6                   | 3            |              |              |               |              | 6             | 3            |
| Montana Rail Link              | 6                   | 3            |              |              |               |              | 6             | 3            |
| MRC Rail Services              |                     |              |              |              | 1144          | 154          | 1144          | 154          |
| National Steel Car Ltd         |                     |              |              |              | 602           | 101          | 602           | 101          |
| Norfolk & Southern NS          | 849                 | 679          |              |              |               |              | 849           | 679          |
| Northwestern Oklahoma RR       |                     |              |              |              | 30            | 5            | 30            | 5            |
| Odgen Martin Systems           |                     |              |              |              | 136           | 68           | 136           | 68           |
| Ontario Southland Railway      | 1                   | 1            |              |              |               |              | 1             | 1            |
| Other Shippers                 | 122                 | 62           |              |              | 300           | 30           | 422           | 92           |
| Pacer International Stacktrain |                     |              |              |              | 10106         | 1315         | 10106         | 1315         |
| Perini Corporation             | 12                  | 12           |              |              |               |              |               |              |
| Pioneer Railroad Company       | 2                   | 1            |              |              |               |              | 2             | 1            |
| RTI - Railroad Services        | 6                   | 3            |              |              |               |              | 6             | 3            |
| Skip Gibb                      | 2                   | 1            |              |              |               |              | 2             | 1            |
| SOO Line SOO                   | 18                  | 9            |              |              |               |              | 18            | 9            |
| TFM S.A.                       | 414                 | 207          |              |              |               |              | 414           | 207          |
| TMM Logistics S.A. de C.V.     |                     |              |              |              |               |              | 0             | 0            |
| Trinity Railcar Leasing        |                     |              | 57           | 11           | 1232          | 206          | 1289          | 217          |
| TTX Co.                        | 10611               | 5900         | 47842        | 11727        | 103666        | 15441        | 162119        | 33068        |
| Tulare Valley Railroad         | 20                  | 10           |              |              |               |              |               |              |
| Union Pacific UP               | 261                 | 255          | 17           | 7            | 880           | 88           | 1158          | 350          |
| USA Waste Services             | 200                 | 100          |              |              |               |              |               |              |
| Wabash National Finance Co     |                     |              |              |              |               |              | 0             | 0            |
| Westinghouse Electric          |                     |              |              |              | 960           | 96           | 960           | 96           |
| Wheeling & Lake Erie           | 64                  | 32           |              |              |               |              |               |              |
| Wisconsin Central              | 2                   | 1            |              |              |               |              | 2             | 1            |
| <b>Grand Total</b>             | <b>26967</b>        | <b>15121</b> | <b>51138</b> | <b>12627</b> | <b>169108</b> | <b>25444</b> | <b>247213</b> | <b>53192</b> |
| Source: ULMER                  |                     |              |              |              |               |              |               |              |

**EXHIBIT 2**

**2003 AUTO RACK OWNERSHIP  
(AAR EQUIPMENT TYPE V)**

**Exhibit 2**  
**2003 Auto Rack Ownership**  
**(AAR Equipment Type V)**

| <b>Car Owner Description</b> | <b>Car Count</b> |       |
|------------------------------|------------------|-------|
| American Assoc. of Railroad  | 1                |       |
| Bombardier Inc. Trans Eq     | 358              |       |
| Burlington No. & Santa Fe    | 593              |       |
| Canadian National CN         | 1797             |       |
| Class 3 Railroads            | 1                |       |
| CP RAIL CP                   | 323              |       |
| First Union                  | 676              |       |
| GATX General American        | 22               |       |
| GE Capital Rail Services     | 100              |       |
| Grand Trunk GT               | 591              |       |
| Greenbrier Leasing           | 223              |       |
| Henkles and McCoy            | 6                |       |
| Herzog Contracting           | 3                |       |
| Kansas City Southern KCS     | 100              |       |
| Midwest Railcar Corporati    | 20               |       |
| MRC Rail Services            | 383              |       |
| Norfolk & Southern NS        | 778              |       |
| Other Shippers               | 1                |       |
| Progress Rail Services       | 6                |       |
| Railcar Ltd                  | 78               |       |
| Ryan Industries              | 10               |       |
| SOO Line SOO                 | 349              |       |
| St. Lawrence & Hudson        | 386              |       |
| Transportation Corp of Am    | 1                |       |
| Trinity Railcar Leasing      | 2                |       |
| TTX Co.                      | 51287            | 86.3% |
| Union Pacific UP             | 1356             |       |
|                              | <b>59451</b>     |       |

Source: ULMER

**EXHIBIT 3**

**FLATCAR OWNERSHIP (OTHER THAN AUTO RACKS)  
(AAR EQUIPMENT TYPE F)**

**Exhibit 3**  
**2003 Non-Intermodal Flatcar Ownership**  
**(other than auto racks)**  
**(AAR Equipment Type F)**

| <b>Car Owner Description</b> | <b>Car Count</b> | <b>Car Owner Description</b> | <b>Car Count</b> |
|------------------------------|------------------|------------------------------|------------------|
| A & R Leasing                | 1                | DELAWARE & HUDSON            | 9                |
| ABB Power Generation         | 11               | Dept of Defense              | 1566             |
| Adrian & Blissfield Rail     | 69               | Detroit Edison               | 1                |
| Air Products                 | 3                | East Carbon Development C    | 332              |
| Alaska Railroad Corp         | 81               | Eastern Maine Railway        | 1                |
| ALGOMA CENTRAL               | 78               | Elgin Joliet + Eastern       | 167              |
| Alsthon Canada Inc.-trans    | 1                | Escanaba & Lake Supperior    | 54               |
| Aluminum Co of America       | 1                | Ferrocarril del Sureste      | 16               |
| American Assoc. of Railro    | 4                | Ferrocarriles Chiapas May    | 29               |
| American Railcar             | 146              | Ferrocarrill Mexiano SA      | 267              |
| Appalachian Power Co         | 2                | First Union                  | 4513             |
| Arkansas & Missouri RR       | 37               | Flex Leasing                 | 1285             |
| ARKANSAS LOUISIANA & MISS    | 10               | Florida East Coast FEC       | 2                |
| ASHLEY DREW NORTHERN         | 30               | FNM - Ferro. Natl Mexico     | 135              |
| Atlantic and Western         | 95               | Galveston Railroad           | 49               |
| Barnhard Crane & Rigging     | 1                | Garvey International         | 20               |
| BC Rail Ltd.                 | 2586             | GATX General American        | 1508             |
| Bethlehem Steel              | 1                | GE Capital Rail Services     | 1947             |
| Big River Electric           | 1                | GE Company                   | 20               |
| Bombardier Inc. Trans Eq     | 2602             | GE Gas Turbine               | 2                |
| BRANDYWINE VALLEY RR         | 69               | Georgia Northeastern         | 12               |
| Buckingham Branch RR         | 1                | Georgia Pacific              | 412              |
| BUFFALO & PITTSBURGH         | 15               | Georgia Woodlands            | 5                |
| Burlington No. & Santa Fe    | 3394             | Gopher State Scrap & Meta    | 6                |
| C & NC Railroad Corp.        | 2                | Grand Trunk GT               | 281              |
| C & S Directional Boring     | 11               | Green Mountain Railway       | 4                |
| Camas Prarie Railnet         | 206              | Greenbrier Leasing           | 1276             |
| CANAC International          | 101              | Hampton Railway Inc          | 9                |
| Canadian National CN         | 6085             | Heavy Railroad Excavation    | 1                |
| Centex - Am. Gypsum Co.      | 40               | Helm Equipment               | 472              |
| Central Oregon & Pacific     | 31               | Herzog Contracting           | 7                |
| CGTX                         | 874              | Hollis and Eastern Rail      | 155              |
| Chicago Freight Car          | 13               | Illinois Central IC          | 638              |
| Chicago South Shore & Sou    | 33               | INDIANA HARBOR BELT          | 29               |
| CIT Group                    | 2302             | Indiana/Michigan Electric    | 3                |
| CITICORP RAILMARK            | 197              | Intermodal Technologies I    | 4                |
| Class 3 Railroads            | 59               | International Catalyst       | 11               |
| Colorado & Wyoming Rwy       | 19               | International Mill Servic    | 3                |
| COLUMBIA & COWLITZ           | 8                | International Paper          | 579              |
| Commonwealth Edison          | 3                | Iowa Chicago & Eastern R     | 5                |
| Consolidated Rail Corpora    | 4                | ITG Inc.                     | 1                |
| CP RAIL CP                   | 929              | Joseph Transportation Inc    | 958              |
| CSX Transportation CSXT      | 657              | Kansas City Southern KCS     | 654              |
| Dakota Minnestoa Eastern     | 2                | Kasgro                       | 469              |

**Exhibit 3**  
**2003 Non-Intermodal Flatcar Ownership**  
**(other than auto racks)**  
**(AAR Equipment Type F)**

| <u>Car Owner Description</u> | <u>Car Count</u> | <u>Car Owner Description</u> | <u>Car Count</u> |
|------------------------------|------------------|------------------------------|------------------|
| KND Rail Services            | 50               | Quest Communications         | 46               |
| Lake Superior & Eastern      | 1                | Rail Trust Equipment         | 8                |
| Ledcor Communications        | 10               | Railcar Ltd                  | 6                |
| Lehigh Heavy Forge           | 10               | Railtex                      | 11               |
| Long Island Railroad Co.     | 3                | Reading Blue Mountain & N    | 3                |
| Louisville New Albany &      | 50               | Rick Franklin Corp           | 6                |
| LTV Steel Co                 | 1                | RJ Corman Railway Co.        | 6                |
| Maine Central                | 1                | Sante Fe Southern            | 6                |
| Mass Volunteer Fire Dept     | 1                | SAULTE STE MARIE BRIDGE      | 100              |
| Mears / CPG                  | 14               | Seminole Gulf Rwy            | 1                |
| MHF Logistical Solutions     | 2                | Siemens Power Company        | 11               |
| Michels Pipeline             | 10               | So. California Edison        | 2                |
| Montana Rail Link            | 167              | So. Railway of BC            | 208              |
| Montreal Maine & Atlantic    | 132              | SOO Line SOO                 | 135              |
| MRC Rail Services            | 141              | Southeastern Industrial E    | 2                |
| National Steel Car LTD       | 2                | Southwest Rail Leasing       | 21               |
| National Steel Corporatio    | 110              | St. Lawrence & Hudson        | 137              |
| New Brunswick Southern       | 174              | St. Mary's Railroad          | 60               |
| New York Central Lines       | 62               | TEXAS OKLAHOMA EASTERN       | 18               |
| Newport Steel                | 1                | Texas Railcar Leasing        | 21               |
| Norfolk & Southern NS        | 2016             | TFM S.A.                     | 285              |
| Northwestern Oklahoma RR     | 14               | Tlaxcalteca de Industrias    | 4                |
| Nucor Steel Co               | 1                | Transportation Corp of Am    | 1                |
| Ohio & Pennsylvania Rwy      | 5                | Trinity Railcar Leasing      | 99               |
| Ohio Power Company           | 3                | TTX Co.                      | 27867            |
| Ontario Hydro                | 1                | Tulare Valley Railroad       | 84               |
| ONTARIO NORTHLAND            | 138              | Turners Island LLC           | 4                |
| Other Shipper                | 9                | Union Camp                   | 102              |
| Other Shippers               | 342              | Union Pacific UP             | 4228             |
| Paducah & Lousville RRD      | 25               | UNION RR                     | 1                |
| Pan American Railway Co.     | 4                | Union Tank Car               | 129              |
| Pennsylvania Lines LLC       | 46               | Upper Hudson River RR        | 1                |
| PEORIA PEKIN UNION RR        | 49               | Upper Merion & Plymouth R    | 9                |
| Perini Corporation           | 5                | USA Waste Services           | 260              |
| Philadelphia Bethlehem &     | 118              | VAE Nortrak No. America      | 4                |
| PLM                          | 110              | Vaughan Leasing & Rental     | 6                |
| Port Royal Railway           | 1                | Virginia Power Co            | 1                |
| Private Fuel Storage         | 1                | WASHINGTON CENTRAL RR        | 1                |
| PROCOR                       | 910              | WCTU Railway Company         | 124              |
| Progress Rail Services       | 565              | Western Aggregates           | 20               |
| Providence & Worcester       | 5                | Westinghouse Electric Cor    | 4                |
| Puget Sound Power            | 1                | Westvaco Corporation         | 24               |
| Quality Rail Services        | 91               | Wheeling & Lake Erie         | 1                |
| Quebec Gatineau Railway C    | 9                | Wilamette & Pacific Rwy      | 115              |
|                              |                  | Windsor & Hantsport Rwy      | 2                |
|                              |                  | Wisconsin Central            | 375              |
|                              |                  | <b>78702</b>                 |                  |

35.4%

Source: UMLER

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of April, 2004,  
I caused to be served by the means indicated below a copy of the  
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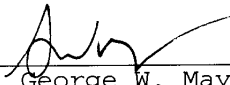
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