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May 12, 2004

BY HAND

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

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

Dear Secretary Williams:

Enclosed please find the original and ten copies of TTX Company's "Rebuttal in Support of Approval of Its Flatcar Pooling Application Without the Imposition of New Conditions."

I am also enclosing three 3.5" discs containing the Rebuttal in a format compatible with WordPerfect 9.0.

Please date-stamp the enclosed extra copy of the Rebuttal and return it with our waiting messenger. Thank you very much for your cooperation in this matter.

Sincerely,

David L. Meyer

Enclosures

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BEFORE THE
SURFACE TRANSPORTATION BOARD

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

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



**TTX'S REBUTTAL IN SUPPORT OF
APPROVAL OF ITS FLATCAR POOLING APPLICATION
WITHOUT THE IMPOSITION OF NEW CONDITIONS**

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May 12, 2004

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* These statements supplement the 51 letters provided with TTX's Application and its submissions of February 18 and April 6. We include them to ensure that the views of these supporters are in the record.

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

**TTX'S REBUTTAL IN SUPPORT OF
APPROVAL OF ITS FLATCAR POOLING APPLICATION
WITHOUT THE IMPOSITION OF NEW CONDITIONS**

TTX Company and the rail carriers that participate in TTX's flatcar pool ("TTX") submit this Rebuttal in support of TTX's Application for reauthorization of the TTX flatcar pooling agreement, without the imposition of any new conditions, pursuant to 49 U.S.C. § 11322(a).¹

I. INTRODUCTION AND SUMMARY

TTX's Application seeks Board authority to continue one of modern railroading's greatest success stories. For more than three decades, during which the railroad industry and the regulatory and competitive environment in which it operates have undergone considerable change, the TTX flatcar pool has continually and consistently advanced the interests of railroads and their customers in an efficient and growing supply of flatcars.

Numerous beneficiaries of TTX's flatcar pool – North America's railroads; shippers of intermodal containers and trailers, finished automobiles, forest products, heavy equipment, and other commodities moved via flatcar; the Nation's ports; manufacturers of

¹ By new conditions, we refer to any condition not incorporated in the Application itself, which for example acknowledges (at 46-47 & 6 n.4) the appropriateness of the Board's continuing oversight and the limitations on TTX's authority to assign and allocate flatcars imposed in 1989.

railcars and other rail equipment; and the Department of Defense – stand before the Board unanimous in their support for reauthorization of the full scope of TTX’s flatcar pooling activities.

TTX’s Application received unqualified support from the National Industrial Transportation League, the Intermodal Association of North America, and dozens of individual shippers, ports, and other users of flatcar services that filed comments in this proceeding. TTX’s Application also received strong support from the equipment supply community and from all four of North America’s flatcar builders: Greenbrier, Johnstown America, National Steel Car, and Trinity Industries.

This broad array of interests confirms the wide spectrum of benefits and lack of countervailing anticompetitive harms produced by the TTX flatcar pool. All but a few supporters endorse not only TTX’s request for a 15-year extension of its existing flatcar pooling authority, but also TTX’s request for confirmation of its right to innovate within the limits of its Pooling Agreement.

This extensive support demonstrates that TTX’s Application more than satisfies the statutory standard for approval: the flatcar pool facilitates “better service to the public” *and* generates “econom[ies] of operation,” without any offsetting adverse effects on competition. 49 U.S.C. § 11322(a).

A handful of TTX’s supporters voice reservations about certain aspects of TTX’s Application. Some are uncertain whether a 15-year term of approval is necessary. Others suggest that a new application should be required before TTX may adjust its pooling activities within the scope of the Pooling Agreement. And a few offer specific suggestions aimed at further improving the efficiency of TTX’s pooling activities. As we explain in this

Rebuttal, none of these concerns warrants imposition of any new conditions on approval of TTX's Application. Limiting the term of TTX's approval, or placing other restrictions on TTX's ability to take actions within the scope of the Pooling Agreement, would sacrifice important benefits of the TTX pool without providing any offsetting advantages.

Standing alone, against the unanimous support expressed by North America's railroads, their customers, and TTX's suppliers – the only parties with legitimate standing to assess whether TTX's pooling activities are in the *public* interest – is a small group of TTX's competitors. Seeking additional profit opportunities, a group of financial conglomerates that have an interest in the railcar leasing business (collectively, the "leasing opponents") – led by First Union Rail, CIT Rail Resources, GE Railcar, and GATX Rail – ask the Board to impose crippling handicaps on TTX's ability to operate its pool and to exclude from TTX's pool important types of flatcars. Similarly, Progress Rail Services, North America's largest independent provider of railcar repair and maintenance services, seeks additional business by having the Board bar TTX from repairing and maintaining its own cars – practices fundamentally tied to the pool's public interest benefits.

These opponents do not speak for the public interest. Their pursuit of *private* interests leads them to seek conditions that would undermine the *public* benefits generated by TTX's pool. The leasing opponents' request that TTX be stripped of its ability to price pooled cars would destroy a fundamental attribute of the pool – the fungibility of TTX equipment – and in effect preclude TTX from owning or investing in flatcars. Progress Rail's request that TTX be barred from repairing and maintaining its own cars would likewise undermine crucial benefits that flow from TTX's stewardship of a fleet of safe and reliable cars for the benefit of the rail network as a whole. And the leasing opponents'

demands that TTX be precluded from pooling non-intermodal flatcars would deprive the railroads and their shippers of access to numerous efficiently-operated fleets, including multilevel flatcars used to carry the finished automobiles; centerbeams used to meet the burgeoning demand for forest products; chain tie-down cars used to carry farm equipment, other large vehicles, and, in times of armed conflict, armored vehicles and other military equipment to ports for overseas deployment; heavy-duty flatcars used to deliver electric generators and other heavy, oversized machinery; and other important types of flatcars that railroads have decided are most efficiently supplied – *i.e.*, acquired, maintained and managed – as part of the TTX flatcar pool.

In seeking to strip away significant aspects of TTX's existing pooling functions, TTX's competitors ultimately highlight the benefits that TTX's pool generates for railroads, their customers, and the North American rail system. They criticize TTX for being *too efficient* and charging *too little* for the use of pool flatcars, but these efficiencies and low rates are the core public benefits that TTX offers. If the TTX flatcar pool truly threatened competition or the public interest, as these opponents claim, then shippers, car builders, and component suppliers would be lining up to complain. Instead, those groups are TTX's strongest supporters. TTX's detractors make one point overwhelmingly clear: any additional restrictions placed on TTX's pooling authority will harm, through higher prices and less efficient supply, those who depend on flatcar service.

II. THERE IS BROAD-BASED SUPPORT FOR REAUTHORIZATION OF TTX'S FLATCAR POOL AND GRANTING TTX'S APPLICATION WITHOUT NEW CONDITIONS

The parties with the strongest interest in the efficient supply of high-quality flatcars have voiced almost unanimous unconditional support for the reauthorization of the

TTX flatcar pool. More than 60 shippers, equipment suppliers, railcar builders, ports, intermodal operators and important shipper organizations have recognized that TTX plays a unique and valuable role in supporting the growth and competitiveness of every commodity that moves by flatcar.² Support for reauthorization of the flatcar pool comes from every quarter and covers every aspect of TTX's constellation of flatcar pooling functions. These supporters recognize and affirm that the "whole" of TTX's flatcar pooling authority is greater than the sum of its parts.

A. TTX's Application Is Supported by a Broad Cross-Section of Those Interested in Better Service and Efficiency of Flatcar Utilization

TTX enjoys widespread support from every constituency that shares the public's interest in the efficiency of railroad transportation and car supply, in addition to the North American railroad industry itself as represented by TTX's nine railroad members.

Shippers. Shippers of every stripe support TTX's Application without qualification, including:

- The National Industrial Transportation League ("NITL" or "NIT League"), the nation's largest and most diverse and influential shipper organization;
- The Intermodal Association of North America ("IANA"), the nation's largest intermodal shipper organization;
- Most of North America's major ports, including the Ports of Los Angeles, Long Beach, Oakland, Seattle, Tacoma, Charleston, Hampton Roads, and the Port Authority of New York and New Jersey;

² An up-to-date list of letters supporting approval of TTX's Application is set forth as Exhibit A.

- Numerous steamship lines, including APL, China Shipping, Hanjin Shipping, Hyundai Intermodal, “K” Line, Maersk, NYK Line, and OOCL;
- Numerous intermodal marketing companies (“IMC’s”) and other intermodal shippers such as Cornerstone, Hub Group, J.B. Hunt, and Schneider;
- The United States Department of Defense;
- Auto industry shipper Mazda;
- Shippers in the forest product industry, such as Georgia Pacific, Roseburg Forest Products, and Longview Fibre; and
- Shippers of large equipment that moves by rail on heavy-duty flatcars, such as General Electric Gas Turbines, LLC, and Alstom Power Equipment.

Numerous shippers echo the Port of Los Angeles’ view of the broad range of benefits that TTX generates: “In terms of professional projections of future equipment need, prompt response to market changes, massive capital investment and the efficient management of a very complex national fleet, there is no doubt that TTX supplies an invaluable need to our Port complex and to the nation.” Letter of the Port of Los Angeles (TTX April 6 Submission, Tab 34). NIT League catalogues these benefits in even greater detail, pointing to TTX’s “substantial efficiencies in loaded miles” and noting that “TTX’s car use charges have decreased [and] TTX has purchased substantial new equipment since 1994.” Comments of NITL at 6-7.

Car Builders and Railroad Equipment Suppliers. All four of the major railcar builders support reauthorization of TTX’s flatcar pooling activities. National Steel Car does so “most vigorously” because “the TTX railroad car equipment pool is unique in its efficiency and productivity, is unparalleled on a worldwide basis, and, in fact, is the envy

of the world.” Comments of National Steel Car Limited at 8. Johnstown America also offers unconditional support for reauthorization of the TTX pool. Letter of Johnstown America (TTX April 6 Submission, Tab 27). Greenbrier supports continuation of the full measure of TTX’s pooling authority, support that is all the more significant given Greenbrier’s vehement opposition to TTX’s reauthorization in 1989. It now says that, “because TTX’s pooling operations have worked well over the past ten years, Greenbrier supports renewal of the authority under which TTX has successfully owned and operated a pool of free running flat cars.” Comments of the Greenbrier Companies at 1. Trinity Industries likewise “enthusiastically supports the continuation of antitrust immunity for pool operations” because “[t]here is no doubt that TTX’s operation of the flatcar pool to date has served the public interest.” Comments of Trinity Industries at 6.

Numerous other suppliers of railroad equipment – such as Augusta Air Brake, American Allied Railway Equipment, Standard Car Truck Company, Portec, and many others – similarly register their strong support for the TTX pool. They repeatedly acknowledge TTX’s importance as a partner in research and development and a reliable, non-cyclical customer. Suppliers value their collaboration with TTX because “more than any of our other customers, [TTX] works closely with us to improve the design and reliability of our products [and] facilitates rapid adoption of new ideas and new technologies.” Letter of Strato (TTX April 6 Submission, Tab 42). The SECO ratings system instituted by TTX, which is particularly important to equipment suppliers, “benefits the entire industry [and] allows our company to offer other customers a measure of the quality we provide.” Letter of Stanrail Corp. (TTX April 6 Submission, Tab 41). Equipment suppliers also attest to the important role of TTX’s long-range planning in

stabilizing and smoothing the cyclical nature of railcar investment, stating that “[i]n many instances over the years, TTX has single-handedly carried the car building and related industries.” Letter of MeridianRail Services (TTX April 6 Submission, Tab 30). They view TTX as more than just another customer; it has “played a very critical role in the survival” of their business, its absence would be “devastating,” and it has been “one of the few highlights in an otherwise bleak economic outlook.” *Id.*; *see also* Letter of Augusta Air Brake Company (TTX April 6 Submission, Tab 21).

Seldom is there a proposal before the Board that achieves the level of widespread support as TTX’s Application. TTX’s supporters reflect a broad consensus that TTX’s flatcar pool benefits the shipping public and consumers in general and should be reauthorized without new conditions.

B. Supporters of TTX’s Application Recount the Wide Array of Benefits Generated by the Flatcar Pool

TTX’s supporters bring a variety of perspectives to bear in describing the TTX activities that benefit them the most. As a whole, they provide a ringing endorsement of the full spectrum of pooling benefits that TTX demonstrated in its Application and that the ICC repeatedly recognized in its decisions addressing the TTX flatcar pool. As an integrated pool that acquires, maintains and manages its cars, TTX’s flatcar pool generates benefits ranging from improved car utilization, to more efficient preventive maintenance and repair, and to innovative research and development. *E.g., American Rail Box Car Co. & Trailer Train Co.*, 347 I.C.C. 862, 900-905 (1974). TTX’s many supporters describe each of these facets of TTX’s public interest role based on their own experiences.

Car Movement Efficiency. Shippers and others identify the efficiencies generated by the free-running nature of TTX’s fleet and TTX’s expert management as

among the major reasons for reauthorization. For example, the major shipper organizations recognize the “operating efficiencies and service enhancements resulting from increased equipment utilization” generated because “TTX manages its fleet to minimize nonproductive empty miles and maximize loads.” Letter of the IANA (TTX April 6 Submission, Tab 25); *see also* Comments of NITL at 6. Individual shippers similarly detail the efficiencies made possible by the TTX pool, including “routing optimization, a reduction in miles traveled over the road, a reduction in the congestion of the main corridors and a reduction in overall energy consumption,” and “a consistent supply of railcars, [and] optimize[d] flexibility on choice of railroads and lanes.” Letter of Canadian Tire Corp. (TTX Feb. 18 Submission, Tab 1); Letter of China Shipping N.A. (TTX Feb. 18 Submission, Tab 2). National Steel Car similarly explains that “TTX is a model of efficiency and organization, providing seamless, as-needed service to the railroads.” Comments of National Steel Car at 6. GE Gas Turbines, which uses TTX’s heavy-duty flatcars to move turbines, transformers, and other equipment used by power generators, describes how the availability of pooled cars to all railroads benefits shippers, explaining that the TTX pool “tends to foster competition between the railroads” and mitigates the disadvantages faced by captive shippers. Letter of GE Gas Turbines (Tab L).

Increased Capital Expenditures. Other supporters note the role TTX plays in encouraging increased investment in additional flatcar capacity. For example, after listing the specific benefits flowing from the TTX pool, IANA concludes that the TTX pool makes a “positive contribution to the intermodal system by adding capacity that is needed to handle the increase in freight shipments, while affording customers an efficient and economical way to manage assets.” Letter of IANA (TTX April 6 Submission, Tab 25). Similarly, car

builders and equipment suppliers recognize that TTX's long-term perspective as the owner of pooled flatcars allows it to maintain a significantly higher and steadier level of investment than could individual railroads. As Timken observes: "in recent years when the freight car build has been the lowest in the past 2 decades, individual railroads alone could not sustain the same level of investment and growth that TTX has provided." Letter of Timken Corp. (TTX April 6 Submission, Tab 43). Greenbrier "applauds TTX's focus on long-term investment in railcars," which has resulted in a steady pattern of steady fleet expansion that helps avoid car shortages. Comments of Greenbrier at 10.

Hyundai Intermodal also explicitly connects TTX's ownership of its fleet and more efficient investment, explaining: "[s]ince TTX takes the capital and ownership risk, expansion of the intermodal fleet with new and modified equipment can occur more rapidly." Letter of Hyundai Intermodal (TTX April 6 Submission, Tab 24).

Research, Development, and Innovation. Other parties highlight TTX's vital role in research, development, and innovation. Equipment suppliers view TTX as a leader in research and development, explaining that "TTX facilitates rapid adoption of new ideas and new technologies," and "TTX is always looking to be on the cutting edge of technology and quality within our industry. TTX, in my opinion, is the backbone of our industry through their creative thinking, planning, and doing." Letter of Miner Enterprises (TTX April 6 Submission, Tab 31); *see also, e.g.*, Letter of Rail Exchange (TTX April 6 Submission, Tab 35). TTX participates actively in ongoing collaborations with customers and suppliers to improve equipment. As Mazda explains, for example, "TTX works with the auto industry to develop and implement improvements to its equipment to improve ride

quality and reduce damage to our products.” Letter of Mazda North American Operations (TTX April 6 Submission, Tab 29).

Other parties highlight TTX’s commitment to working with customers to bring about innovative transportation solutions. To cite two of many examples, J.R.C. Transportation describes TTX’s role in developing and implementing an innovative new non-intermodal car type – the Uni-Level car, introduced in 2003 – that allows railroads to penetrate new markets that formerly were the exclusive province of trucks. JRC has used TTX cars to arrange for the shipment of new luxury motor homes by rail and explains that, “[w]ithout TTX, it would not have been possible for us to achieve this industry first.” Letter of J.R.C. Transportation (TTX April 6 Submission, Tab 28).

The Department of Defense’s Military Surface Deployment and Distribution Command (“SDDC”), which relies heavily on TTX to provide chain tie-down cars for military exercises and mobilizations, describes TTX’s indispensable role in meeting the Army’s needs: “TTX has a long history of being responsive to the needs of DOD, a history of which TTX and its railroad owners should be justifiably proud.” And it catalogues several instances in which TTX made major changes to its equipment to accommodate current and future military needs, including when the SDDC asked TTX “to modify the design of some cars . . . so that they could be equipped with chain-tiedowns in an emergency, [and] TTX’s response was simply to go ahead and make the changes at its own expense.” Comments of SDDC at 3.

Maintenance and Repair. Others praise TTX’s life-cycle approach to repair and maintenance. As Roseburg Forest Products states: “Just as important as having an empty flat at the right place at the right time is getting the loaded flatcar to the customer

without unexpected transit delays due to the flatcar being shopped for a mechanical defect.” Letter of Roseburg Forest Products (TTX April 6 Submission, Tab 37) at 3. Shippers value the fact that TTX’s “efficient maintenance practices ... lower[] our company’s costs from delays due to malfunctioning equipment.” Letter of Mazda North American Operations (TTX April 6 Submission, Tab 29). “TTX intermodal cars generate substantial efficiencies ... in the repair and maintenance of pool equipment.” Comments of NIT League at 6.

C. TTX’s Supporters Emphasize that Benefits Flow from TTX’s Pooling of All Types of Flatcars

TTX’s supporters leave no doubt that the benefits of TTX’s flatcar pool cut across all of TTX’s flatcar types. TTX’s indispensable role in supplying an ever-growing fleet of highly-efficient intermodal equipment is unquestioned. Even TTX’s most vehement opponents acknowledge the benefits TTX brings to the North American intermodal fleet. *See* Comments of First Union at 18 & n.8; Comments of GE Railcar Services Corp. at 2. Some of the leading participants in intermodal transportation underscore the importance of TTX’s flatcar pool in building and growing a highly-efficient fleet of intermodal flatcars. For example, American President Lines (“APL”) strongly supports a 15-year reauthorization because it relies on the “smooth functioning of the TTX flatcar pool for the growth and success of [its] business.” APL specifically cites TTX’s role in ensuring an adequate supply of equipment and supporting development of new equipment types and improvements to existing cars. Letter of APL Ltd. (Tab J). Maersk similarly believes that approval of a 15-year extension of TTX’s authority is of “critical importance” to “ensure that TTX will continue to supply efficient and economical flatcars in the years to come,” and that “TTX promotes intermodal growth through all of its efforts to provide an efficient and adequate supply of flatcars.” Letter of Maersk (TTX Feb. 18 Submission, Tab 8) at 2-3. And Pacer

International agrees that “TTX has become an important player in the intermodal transportation industry and serves it well.” Comments of Pacer International Inc. at 2. The leading intermodal shipper association, along with legions of IMC’s, trucking companies and other intermodal participants, echo these views.³

TTX’s role in facilitating the efficient supply of other flatcar types receives similar recognition. GE Gas Turbines, a major user of heavy-duty flatcars to move power generation equipment, “strongly” supports unconditional reauthorization, stating that “[a]s the power generation business has grown, particularly since 1999, [it] was the TTX Company which recognized the need for increased heavy duty flatcar capacity “[W]ithout [TTX’s] continuing investment in and high quality maintenance of this fleet, it would have been difficult to impossible to get to sites the power generation equipment needed.” Letter of GE Gas Turbines (Tab L). Another heavy-duty flatcar user – Alstom Power Equipment – supports a 15-year extension because TTX’s flatcar pool “allows companies such as ours the flexibility to have railcars move freely across the entire rail network and [be] available for shipments on all railroads and all lanes,” thus “accomodat[ing] competitive shifts in demand for certain railcars that we need.” Letter of Alstom Power (Tab I).

Similarly, forest products shippers that rely on centerbeam and bulkhead flatcars enthusiastically support TTX’s pooling of the specialized equipment used in their

³ See, e.g., Comments of NIT League at 6; Letter of Intermodal Association of North America (TTX April 6 Submission, Tab 25); Letter of the Port Authority of New York and New Jersey (Tab L); Letter of Dart Transit (TTX Application, Vol. II, Tab L); Letter of Hub Group (TTX Application, Vol. II, Tab L); Letter of Hyundai Intermodal (TTX April 6 Submission, Tab 24); Letter of “K” Line (TTX Feb. 18 Submission, Tab 8).

industry. *See* Letter of Roseburg Forest Products (TTX April 6 Submission, Tab 37) at 3; Letter of Georgia Pacific (TTX Feb. 18 Submission, Tab 4); Letter of Longview Fibre Company (TTX Application, Vol. II, Tab L). The Nation's principal user of chain tie-down flatcars – the Department of Defense's SDDC – documents the extraordinary benefits that TTX's pool has created and urges the Board to provide TTX with greater freedom to adjust the pool's composition and operation to meet SDDC's future needs. Comments of SDDC at 2-3, 6-8. And automotive shippers acknowledge the benefits of TTX's role in pooling automotive flatcars. Letter of Mazda North American Operations (TTX April 6 Submission, Tab 29); Comments of DaimlerChrysler & Ford Finished Vehicle Logistics Groups; *see also* Comments of First Union Rail Corp. at 18 & n.8.

* * *

The extraordinary mosaic of benefits that these supporters describe is sufficient by itself to justify reauthorization of the TTX flatcar pool without the imposition of any new conditions.

III. CONCERNS EXPRESSED BY A FEW TTX CUSTOMERS/SUPPLIERS DO NOT WARRANT IMPOSITION OF ANY NEW CONDITIONS

Other than two groups of entities that complain about the competition provided by TTX's efficient pooling of flatcars – which we address in Section IV below – the parties commenting in this proceeding voice unanimous and overwhelming support for reauthorization of the full scope of TTX's flatcar pooling activities. However, a small handful of TTX's supporters express concerns about various aspects of TTX's Application or offer suggestions regarding the pool's future operations. In this section, we address each of those concerns and explain why they do not warrant any hesitation in approving TTX's application without new conditions.

A. Department of the Defense

The Department of Defense, through SDDC, strongly supports the reauthorization of the TTX pool “to further the National Defense objective of the National Transportation Policy.” Comments of SDDC at 1. It specifically urges the Board to approve TTX’s request for clarification that TTX has the flexibility to make changes in its car contracts and operations that fall within the bounds of the Pooling Agreement. *Id.* at 6-8. SDDC notes that TTX has worked extensively with SDDC to increase the availability and longevity of chain tie-down cars, the main car type used in military exercises and deployments. SDDC also describes the superior utilization of chain tie-down cars that the TTX pool achieves: for example, the “combination of greater utilization and lower costs under TTX ownership has enabled TTX to keep a greater number of these cars in service, despite the downturn in demand for them, than would otherwise have been the case if they were owned by individual railroads.” *Id.* at 2.

SDDC, however, expresses disappointment that TTX’s fleet of chain tie-down cars has not achieved an optimal degree of utilization efficiencies. SDDC observes, for example, that during the 2003 mobilization for Operation Iraqi Freedom, some participating railroads tended to hold TTX chain tie-down cars on their own lines rather than releasing them for distribution to railroads with immediate loading needs. *Id.* at 4-6. It therefore requests that TTX be required to review and respond to the Board regarding “how it will improve the arrangements used to distribute the chain tie-down flatcars used by DOD.” *Id.* at 6.

TTX does not dispute that the distribution of these cars has not achieved the same levels of efficiency as TTX’s intermodal fleet. But Board action is not needed to motivate TTX to continue to improve utilization of these cars. As Mr. Wells explains,

achieving efficient utilization of the chain tie-down fleet during periods of heavy SDDC demand poses unusual challenges. For security-related reasons that are both unique and unavoidable, SDDC typically is not able to provide railroads with much advance notice of major movements of military equipment. As a result, railroads that have idle TTX chain tie-down cars on their systems are understandably reluctant to release that equipment out of concern that an urgent need may suddenly arise to supply empty cars to military bases that they serve. Rebuttal Verified Statement of Thomas F. Wells (“Wells RVS”) (Tab H) at 4.⁴

As SDDC explains, TTX’s involvement has to a considerable degree *overcome* these disincentives and allowed for much better utilization (and reinvestment) than if these cars were owned by individual railroads. Comments of SDDC at 5; Wells RVS at 4-6. During major deployments such as Operation Iraqi Freedom, TTX directs railroads with cars in stored or non-revenue status to return them to service in order to maximize the size of the available fleet. TTX provides SDDC with timely reporting on the location and load/empty status of all chain tie-downs in the TTX pool so that SDDC can arrange with railroads for service, and more accurately forecast the arrival of empty equipment for loading. TTX also consults with individual railroads to identify unloaded cars that can be moved back into productive service on another line. Wells RVS at 5. To develop further strategies for increasing efficiency during periods of peak demand, TTX is participating with SDDC and the railroads in the so-called “Assured Access Cross Functional Working Group,” which is actively addressing the issues of chain tie-down car supply and service and

⁴ On the other hand, SDDC incorrectly suggests that TTX’s distribution mechanism for these cars involves the assignment of particular cars to particular railroads, with those railroads committing to “pay the per diem charge for certain specific car numbers.” There is no such assignment or commitment; all such cars are subject to TTX’s standard “turn-back” policies. Wells RVS at 5, n.1.

considering alternative car distribution methodologies. If feasible steps are available to improve utilization, TTX can be counted on to take them without the need for any Board-imposed reporting requirement. *Id.* at 6.

B. NIT League

As noted above, the NIT League recognizes the wide array of benefits that TTX's flatcar pool generates for shippers, and accordingly it "supports the Board's approval of TTX's application, without changes or conditions." Comments of NITL at 3. NIT League's comments also express, "in the spirit of offering constructive suggestions to TTX," the concern of some of its members about the adequacy of future car supply. NIT League therefore suggests that TTX "develop structures to obtain increased customer input" on "commercial issues of concern," although it does not propose that the Board impose any condition in this regard. *Id.* at 7.

TTX appreciates the support of NIT League and its member shippers and their desire to forge a closer working relationship on issues of common concern, such as car supply. TTX has a long history of collaborating with shippers, railroads, and other interested parties to develop and implement forecasts of future car demand that are as accurate as possible, and TTX welcomes constructive input that will assist it in achieving its overriding objectives of providing the flatcars the Nation's railroads need to meet future transportation demand efficiently and effectively. Wells RVS at 6.⁵ There is no cause for

⁵ Many commentators emphasize the benefits in equipment availability that TTX provides as a result of its long-term planning horizon. *E.g.*, Letter of Hanjin Shipping Company (TTX Feb. 18 Submission, Tab 5); Letter of the Port Authority of New York and New Jersey (Tab M); Letter of Port of Los Angeles (TTX April 6 Submission, Tab 34); Letter of Strato Inc. (TTX April 6 Submission, Tab 42).

concern about TTX's continued commitment – if its flatcar pool is reauthorized – to making the substantial investments in flatcar capacity needed to meet growing intermodal and other demands.⁶

C. DaimlerChrysler/Ford

The joint comments of DaimlerChrysler and Ford, which support reauthorization and observe that TTX “provides a vital service to the automotive industry and is a vital part of our success,” also raise issues relating to a separate railroad pool that covers multi-level cars used to transport motor vehicles and boxcars used to transport automobile parts. Comments of DaimlerChrysler/Ford at 1. That so-called “Multilevel Reload Pool” was originally approved by the ICC in *The Baltimore & Ohio R.R. – Pooling of Car Service Regarding Multi-Level Cars*, Finance Docket No. 29653 (ICC served Aug. 29, 1981). DaimlerChrysler and Ford express concerns about the pace of investment in new automotive equipment, noting that the “railroads haven’t reacted quickly enough to the current TTX modeling methodology to effectively include all [auto] manufacturers’ requirements.” *Id.* These concerns do *not* relate to the operation of TTX’s flatcar pool, and they accordingly provide no basis for imposing any conditions in this case.

As Mr. Wells explains, TTX plays a different role in connection with the Reload Pool than with its flatcar pool. The traditional 89-foot multilevel autorack car consists of a rack assembly welded to a standard 89-foot flatcar. The rack assemblies are

⁶ TTX understands that the particular concern reflected in NIT League’s comments relates to the railroads’ autorack fleet, and specifically involves investments in the racks attached to TTX (and other) flatcars that allow them to carry finished automobiles. Those racks, however, are not owned by TTX and are not part of TTX’s flatcar pool – they are owned by railroads on an individual basis, as discussed in the next section. Wells RVS at 7; *see also* Section III.C. below.

generally owned by individual railroads; most of the flatcars to which they are attached are owned by TTX as part of its flatcar pool. TTX manages the Reload Pool as an agent for the ten railroads that comprise the pool. As manager, TTX issues orders needed to distribute empty multilevel cars for reload, consistent with distribution rules for the different types of rack assemblies, not the underlying flatcars. (The instructions apply to the racks, and the underlying cars follow the racks.) Wells RVS at 7.⁷ TTX also runs the computer model developed by the pool participants to estimate future equipment requirements and develop recommended fleet sizes. This modeling exercise yields only recommendations; individual railroads make their own individual decisions whether to acquire racks. *Id.* at 7-8⁸

DaimlerChrysler's and Ford's basic complaint is that the railroad owners of rack assemblies have not acquired as many racks as the modeling exercise suggests would be ideal.⁹ Their recommended conditions all address the connection between their desire for investment in pool equipment and the railroads' – not TTX's – supply of that equipment. TTX has no authority to require railroads to acquire new rack assemblies or alter the Reload Pool's distribution rules. Wells RVS at 7-8.

⁷ As TTX explained in its Application, the development of the 89-foot autorack provided an efficient means of reusing standard 89-foot intermodal flatcars that fell out of favor with the shift in the intermodal arena towards more-efficient doublestack and spine-car equipment. Hulick VS at 18.

⁸ The multilevel pooling agreement was amended in 1995 to enable railroads and shippers to obtain and use information necessary for TTX (as contractor for the pool participants) to run the pool's fleet sizing model. In response to concerns advanced by the Department of Justice, the agreement was restructured to ensure that the results of the modeling exercise would only be recommendations, and that each railroad's decision to provide equipment would be the result of bilateral negotiations between railroads and shippers. *See The Baltimore & Ohio R.R. – Pooling of Car Service Regarding Multilevel Cars*, Finance Docket No. 29653 (Sub-No. 6) (ICC served June 30, 1995).

⁹ *See* Comments of DaimlerChrysler/Ford at 1 (“The railroads haven’t reacted quickly enough to the current TTX modeling methodology . . .”).

In fact, DaimlerChrysler's and Ford's comments illustrate the difficulties that can arise when pooled equipment is acquired and owned by individual pool participants. As TTX explained in the Application, TTX makes decisions to acquire equipment for its flatcar pool based on overall demand – it is indifferent as to which participant will handle the traffic. Wells VS at 5. Although TTX is not expressing a view regarding the source of DaimlerChrysler's and Ford's dissatisfaction with the supply of rack assemblies, it is apparent that when pooled equipment must be acquired and owned separately by pool members, different considerations come into play – whether as a matter of each owner's self-interest or differing views regarding future demand – and there is a corresponding impact on the pool's effectiveness. Wells RVS at 7-8.

D. Concerns About the Duration of TTX's Proposed Authorization

In its Application, TTX asked the Board to reinstate the Pooling Agreement's original provisions relating to duration.¹⁰ TTX's request has the overwhelming support of shippers and shipper organizations, including NIT League IANA, and dozens of others. *See* Exhibit A; pages 10-11, above. These supporters recognize that the public interest benefits of the TTX pool would be enhanced – in both the long- and short-term – by a longer period of authorization, and that any concerns arising in the future could be addressed through the Board's ongoing oversight jurisdiction.

Some commentators suggest that the Board limit any extension of TTX's authority to five or ten years. All but one of these commentators are TTX's competitors –

¹⁰ The agreement approved by the ICC in 1974 provided for an initial term of 15 years, followed by automatic one-year renewals until the parties concluded that they wished to terminate the agreement. It also allowed parties to withdraw from the agreement, following the expiration of the initial 15-year term, upon twelve months' notice. Application at 38-42.

principally leasing companies – which have obvious incentives to impose unnecessary burdens and uncertainties on TTX’s future activities.¹¹ The other – DaimlerChrysler/Ford – addresses issues unrelated to TTX’s flatcar pool, as discussed above.¹² None of the proponents of a shorter term takes issue with TTX’s evidence demonstrating the benefits that would flow from a 15-year term or explains why Board oversight would be inadequate to address any concerns that arise in the interim.

1. The TTX Flatcar Pool Is a Paradigm Case for Long-Term Authorization

TTX has proven that it can survive with a shorter term of authorization, but a 15-year term would increase the public benefits afforded by the pool. A longer term would create greater certainty, which would place TTX in a better position to plan for the future and raise capital at low cost. *See* Application at 41; Reardon VS at 16. Moreover, the reauthorization process itself consumes substantial resources in terms of dollars and management effort that could be better spent managing the pool if TTX were authorized for a longer term. Application at 40; Reardon VS at 16; Rebuttal Verified Statement of Professor Joseph P. Kalt (“Kalt RVS”) (Tab F) at 3. The Board should encourage TTX’s

¹¹ Two – Greenbrier and Trinity Industries – are principally car builders but have significant leasing arms. Another – Pacer – operates its own extensive car fleet.

¹² DaimlerChrysler and Ford are incorrect when they assert (Comments at 1) that the term of authorization “should not have a significant impact on capital financing as TTX is financed through railroad ownership and any purchase plans will be underwritten by the railroads.” As TTX explained in the Application, TTX finances its acquisitions independently, without any guarantees from any railroad, and without capital infusions other than retained earnings. Reardon VS at 4; *see also* Thees RVS at 2; pages 50-51, below.

long-term planning horizons and long-term investment in the rail industry and avoid unnecessary regulatory burdens.¹³

The pool participants – who are in the best position to assess the advantages associated with the term of their collaboration – have once again *chosen* to enter a pooling agreement having a term of 15 years. Given the strong incentives that TTX’s participants have – as users of flatcars – to arrange for their flatcar supply in the most efficient manner possible, that election is itself a strong indication of the benefits likely to follow from a longer term.

To put into context the interests of those proposing a shorter term, one might consider how the leasing opponents would react if told that their ability to lease cars might terminate after five or ten years. They might reduce their future investments (to limit their potential exposure) or demand higher car hire rates on their existing cars (to recover their costs in a shorter timeframe). No one can reasonably deny that artificial restrictions of this kind would increase uncertainty and lead to higher costs for users of rail cars and, ultimately, for shippers that use rail service. *See* Kalt RVS at 3, 44; *see also* Rebuttal Verified Statement of Thomas Thees (“Thees RVS”) (Tab G) at 3.

TTX is subject to the same basic forces. As Professor Kalt explains from an economic standpoint and Thomas Thees of Morgan Stanley explains from a corporate finance perspective, truncating the agreed term of the TTX pooling agreement would be bad policy. Existing and potential lenders and credit rating agencies are sensitive to the term of

¹³ *See, e.g.*, 49 U.S.C. § 10101(4), (5) (describing the national rail transportation policy “to ensure the development and continuation of a sound rail transportation system” and “to foster sound economic conditions in transportation”).

TTX's pooling authorization. *See* Thees RVS at 3. Given the long-lived nature of TTX's flatcars (which last for more than 40 years), TTX typically finances its acquisitions with comparably long debt maturities. However, the uncertainty created by the possibility that pooling authority will expire before those debts mature translates into higher borrowing costs and discourages efficient investment decision-making without any offsetting regulatory benefit. *Id.*; Kalt RVS at 3, 44. As another of TTX's lenders explains in supporting a 15-year term, the period of TTX's reauthorization should be "be as long as possible in order to facilitate a closer match with the long-term payback period of our investment." Letter of Fifth Third Bank (Tab K). As long as TTX faces the uncertainties of a shorter, artificially constrained authorization period, it will face artificial obstacles to achieving the best available financing terms, thereby inhibiting its ability to invest in cars for the Nation's railroads and make those cars available at rates reflecting the lowest possible cost structure. Kalt RVS at 3; Thees RVS at 3; Rebuttal Verified Statement of Thomas R. Brown ("Brown RVS") (Tab D) at 6-7. It is understandable why the leasing opponents might seek such a result, but it is not consistent with the public interest. TTX's shipper supporters understand these basic principles and thus support TTX's request for a 15-year term.

Thirty years of experience with the TTX flatcar pool further justifies its long-term authorization. The flatcar pool has an established record of generating significant public benefits without producing anticompetitive harm since it was first authorized in 1974. There is no sign that the results will be different over the next 15 years. The past three decades have seen many significant regulatory and structural changes in the railroad

industry, including the passage of the 4R Act in 1976,¹⁴ the Staggers Act in 1980,¹⁵ and the ICCTA in 1995;¹⁶ the implementation of car hire depreservation beginning in 1993;¹⁷ and the reduction in the number of Class I railroads from 40 in 1974 to only seven today as a result of mergers and reorganizations. Throughout these many changes, the TTX flatcar pool has repeatedly proven its value to the railroad industry. Based on TTX's record – reflected in past authorization proceedings, the pending Application, and the comments of TTX's many supporters – the Board should be confident that the intrinsic merits of TTX flatcar pool are robust and will continue to benefit the railroad industry no matter what changes might occur in the next 15 years.

Indeed, no party to this proceeding identifies any future circumstances in which TTX's public benefits could be eliminated or in which the pool could lead to anticompetitive harm. A few of TTX's competitors allude to potential changes arising from car hire depreservation or future railroad mergers (*e.g.*, Comments of First Union at 6, 8), but none attempts to explain how either factor would alter the pool's fundamental benefits. In fact, car hire depreservation and trends toward railroad consolidation have been features of the railroad landscape for many years. By 1997, when the first round of comments were due under the oversight process established in *TTX III*, not a single leasing company expressed any concern about the TTX pool despite the fact that the depreservation process was well

¹⁴ Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 (1976).

¹⁵ Staggers Rail Act of 1980, Pub. L. 96-448, 94 Stat. 1895 (1980).

¹⁶ ICC Termination Act of 1995, Pub. L. 104-88, 109 Stat. 803 (1995).

¹⁷ Depreservation was implemented in 1993 for all cars built after 1991. *Joint Petition for Rulemaking on Railroad Car Hire Compensation*, 9 I.C.C. 2d 80 (1992), *aff'd*, 9 I.C.C. 2d 1090 (1993).

underway and already applied to many tens of thousands of freight cars. By the second round of oversight comments in 2001 – when there was a similar absence of concern about TTX – depreservation was almost completely phased in, and the most recent merger among Class I railroads (the Conrail transaction) had been consummated for two years. Even today, none of TTX’s opponents offers any evidence that these or any other developments have affected the flatcar pool’s fundamentally pro-competitive benefits. In sum, no party offers any concrete reason for rejecting a 15-year term.

2. A 15-Year Term Would Not Foreclose Board Oversight or Place Additional Burdens on Parties that Might Raise Future Concerns About TTX

Restoring the original 15-year term would not cause the Board to abdicate its regulatory responsibilities. TTX expects that its pooling authority would remain subject to Board oversight, including the possibility of reopening and reconsideration if the Board ever had reason to question whether the pool’s operation was continuing to serve the public interest.¹⁸ In light of this ongoing oversight jurisdiction, there is no reason to impose term limits that are inconsistent with the agreement reached by TTX’s participants. If some future event unexpectedly shifts the calculus of TTX’s benefits, the sensible approach would be for the Board to exercise its inherent oversight powers to deal with that eventuality when it occurs. Indeed, except with regard to the TTX flatcar pool, neither the ICC nor the Board

¹⁸ TTX agrees with Pacer (at 3 n.2) that, as in 1994, approval should be conditioned on “the continuing right of any interested person to petition for reopening and reconsideration on the ground that the pooling operation has not resulted in better service to the public or economies of operation or that it has unreasonably restrained competition,” and that, as the ICC did in 1994, the Board should reserve “the right to modify its approval, or to revoke its approval entirely if that action deemed warranted.” *TTX III* at 10. Indeed, TTX made the same point in its Application (at 41).

has ever imposed term limits in authorizing railroad equipment pools or any other pools within the Board's jurisdiction.¹⁹

Restoring the original 15-year term would not increase the burden on any party that may seek to challenge TTX's pooling authority in the future. If, at any time in the future, a party were to present evidence – in the context of a reauthorization proceeding or in an oversight setting – suggesting that the TTX flatcar pool was no longer facilitating better service to the public or economy of operation, or was causing undue competitive harm, the Board would have to decide whether the record supported such a claim. Approval of a 15-year term would not change this standard, or alter the nature of the evidence required to address it. It would simply enable TTX and the Board to focus their attentions on any *specific* concerns about the pool that might be raised, rather than imposing on TTX the

¹⁹ The ICC has followed this pattern as to all of the extant railroad industry pools. See, e.g., *The Baltimore & Ohio R.R. – Pooling of Car Service Regarding Multi-Level Cars*, ICC Finance Docket No. 29653 (ICC served Aug. 19, 1981) (approving agreement among 20 railroads for the pooling of multi-level service without restriction as to term); *Railroad Car Service Pooling Application*, ICC Finance Docket No. 30067 (ICC served Sept. 26, 1983) (approving agreement among 12 major railroads for the pooling of service for RBL cars without restriction as to term); *Railroad Car Service Pooling Application (Boxcars)*, ICC Finance Docket No. 30907 (ICC served April 27, 1987) (approving arrangement among 14 railroads for the pooling of car service with respect to certain boxcars without restriction as to term); *Railroad Car Service Pooling Application (Boxcars)*, Finance Docket No. 30969 (ICC served Oct. 9 1987) (approving agreement among 22 railroads, for the pooling of car service with respect to certain boxcars without restriction as to term). Similarly open-ended approval has consistently been granted to non-rail pools as well. See, e.g., *Groendyke Transport, Inc. – Pooling Agreement*, STB Docket No. MC-F-20941 (STB served June 7, 1999) (approving agreement among nine motor carriers that transport hazardous materials for the pooling of service, traffic, and revenues without restriction as to term); *North American Van Lines, Inc. and the Fortress Corp. d/b/a/ Fortress FAE Worldwide – Pooling Agreement*, STB Docket No. MC-F-20920 (STB served June 29, 1998) (approving agreement between two motor carriers to pool shipments of museum items, fine art work, and without restriction as to term; approved agreement specifically provided for evergreen one-year renewals, unless terminated by the parties); *Suburban Transit Corp. – Pooling – American Limousine Service, Inc.*, STB Docket No. MC-F-20915 (STB served June 4, 1998) (approving agreement of three bus lines to coordinate service and pool revenue in connection with their motor passenger transportation services without restriction as to term).

resource-intensive burden of periodically developing – and imposing on the Board the obligation of adjudicating – a broad-based application that may meet with no opposition or spark only narrow concerns. *See Brown RVS* at 6.

3. TTX Would Not Oppose Formal Opportunities to Comment at Appropriate Intervals During the 15-Year Term

One commentor, Pacer, suggests that the Board establish a periodic monitoring requirement during the flatcar pool's term of authorization, analogous to the monitoring established when the ICC reauthorized the flatcar pool in 1994. Comments of Pacer at 2-3; *see TTX III* at 6 (requiring monitoring reports at the end of the third and seventh years of the ten-year term). TTX believes that the Board's existing oversight authority is sufficient to allow interested parties to raise concerns at any time during the pool's term of authorization, and that a formal, pre-scheduled investigation by the agency almost certainly would be an unnecessary diversion of agency resources. Nevertheless, TTX would not oppose the Board's establishment of an oversight process that invited comments at preset future dates. If such a process were desired, an appropriate course would be to solicit comments from interested parties and responses from TTX at the end of the fifth and tenth years of the 15-year term, and determine on the basis of those comments whether to commence an oversight proceeding and on what specific issues. Such a process would reflect a reasonable accommodation of TTX's concerns about incurring unnecessary regulatory costs with any perceived need for a scheduled oversight process.

4. Greenbrier's Proposed Modification to the Pooling Agreement's "Evergreen" Provision Is Too Restrictive

In its Application, TTX sought permission to include in its Pooling Agreement an automatic one-year renewal provision (referred to as an "evergreen" provision). The proposed provision was intended to eliminate the risk that pooling authority

might terminate automatically while a reauthorization proceeding was pending; it did not contemplate perpetual continuation of the flatcar pool without Board oversight.²⁰

One commentor, Greenbrier, recognizes that the evergreen provision addresses a legitimate concern but suggests a narrower alternative – that the pooling agreement and TTX’s pooling authority remain in effect for 180 days after the Board issues a final decision (including exhaustion of any appeals), as long as “a proceeding seeking renewal of TTX’s pooling authority is pending within one year of the date that the Pooling Agreement would otherwise expire.” Comments of Greenbrier at 6. First Union offers a similar proposal. Comments of First Union at 11.

Greenbrier’s suggestion is a constructive one, but its proposal is too restrictive. It would require TTX’s participants to file an application earlier than necessary, imposing unnecessary procedural burdens and limiting the quality of the information TTX could provide. TTX’s participants have no incentive to “game the system” by filing a new application just before their existing pooling authority expires, and thus there is no need to establish an arbitrary filing deadline. As an alternative, TTX would accept a modification of its proposed pooling agreement to provide that the agreement (and thus TTX’s pooling authority) would remain in effect until 180 days after the Board issues a final decision (including exhaustion of any appeals), as long as a proceeding seeking renewal of TTX’s pooling authority was pending before the Board when the 15-year term would otherwise have expired. Language that would implement this concept is set forth at Exhibit B.

²⁰ As TTX explained in the Application, the evergreen provision was not designed to avoid Board review. Application at 41 n.27; Reardon VS at 16. Moreover, TTX could not evade the Board’s inherent oversight jurisdiction no matter how long a term the Board approved.

E. Concerns About TTX's Request for Clarification and Future Activities Beyond the Scope of TTX's Flatcar Pooling Agreement

In its Application, TTX asked the Board to clarify that changes in TTX's car contracts and other policies that fall within the scope of the Pooling Agreement as approved by the Board need not be approved in advance. Application at 42. This request received overwhelming support from shippers and shipper organizations. The Department of Defense's SDDC specifically request that the Board confirm TTX's flexibility so that TTX is not inhibited in its ability to work with SDDC to improve the availability and efficient utilization of the flatcars needed for future military deployments. Comments of SDDC at 6-8.

Several commentators have apparently misunderstood TTX's request. They seem to believe that TTX is seeking permission to modify its Pooling Agreement without prior Board approval or that TTX is seeking a back-door means of engaging in assignment and allocation. Neither is correct.

1. TTX Does Not Seek the Right to Modify the Pooling Agreement Without Prior Board Approval

Addressing TTX's request for clarification, Greenbrier stated: "TTX is authorized to do whatever the Pooling Agreement says TTX can do." Comments of Greenbrier at 8. TTX agrees. Its requested clarification merely seeks a clear statement of this basic principle from the Board.

As TTX explained in its Application, such a clarification is desirable because the ICC's statements in connection with TTX's 1974 authorization raised the spectre that some changes to the day-to-day operations of the flatcar pool might require prior agency approval, even if those changes were permitted by the Board-approved Pooling Agreement.

Application at 43-44. That uncertainty creates a chilling effect that benefits nobody.

Application at 44-45; Reardon VS at 17; Wells VS at 24.

TTX's proposed clarification is not a blank check. TTX would still seek advance approval for any changes to the Pooling Agreement itself. Application at 46.²¹ None of the commentors opposing TTX's request points to any action that TTX could take within the scope of its flatcar pooling agreement that might raise concerns. They express concern only over actions that would plainly *go well beyond* the scope of TTX's pooling agreement which *covers only flatcars*.²² Thus, the requested clarification would not allow TTX "to self-define the scope of its pooling authority" or "expan[d] or change" its antitrust immunity. Comments of CIT Rail, at 21-22.

²¹ This undertaking alone goes beyond the obligations imposed by the ICC in other, more recent pooling approvals. For example, the ICC explained that "future *amendments to pooling agreements* will require our approval only if the amendment will materially or substantively affect the pooling arrangements' responsibilities or operations." *The Baltimore & Ohio R.R. – Pooling of Car Service Regarding Multi-Level Cars*, Finance Docket No. 29653 (Sub-No. 4) (ICC served April 26, 1988) (emphasis added).

²² One commentor, First Union, expresses concerns about changes to TTX's management of "freight car-related equipment for rail owners, such as chassis (implementation in 2004), multilevel racks and a railroad boxcar pool." Comments of First Union at 12. It states that there "is a strong concern that TTX and its owners could deem their right to make changes without prior Board approval, [sic] to include acquiring equipment for those managed operations." *Id.*

First Union fundamentally misunderstands the nature of those operations, which would not be affected by TTX's request for clarification. TTX's chassis management program and TTX's management and operation of railroad boxcar pools are not conducted under the flatcar pooling agreement. In fact, there is no chassis pool. TTX merely helps railroads better monitor their own flows of domestic chassis. Wells RVS at 15. With respect to boxcars, TTX owns one pool (the "Railbox Pool") and manages another (the "North American Boxcar Pool"), but they are not subject to the flatcar pooling agreement. Wells RVS at 13-14, 29. With respect to the Reload Pool, TTX owns many of the flatcars to which the independently-owned rack assemblies that are part of the pool are attached, but distribution of the rack assemblies (along with the underlying cars) is governed by separate pooling authority. Wells RVS at 7-8.

In addition, TTX would continue to inform the Board of changes in its Form A Car Contract, which reflects TTX's car distribution policies and other day-to-day operations. Application at 46. The Board could exercise its oversight jurisdiction to examine any such changes, either on its own initiative or at the request of an affected party.

2. TTX Is Not Seeking any Alteration to Existing Limitations on Assignment and Allocation

In its Application, TTX made clear that it was not seeking to alter the limitations on assignment and allocation that were spelled out in *Trailer Train II* and *TTX III*. Suggestions to the contrary are simply wrong. TTX adheres to the limitations on its authority to assign and allocate cars that were imposed in 1989 and clarified in 1994. *Id.* at 42 n.29. If TTX decides at some future point to request changes to the existing restrictions, it will do so in a public filing with the Board in order to permit a full and open debate on the subject. Assignment and allocation are not issues in this proceeding.

F. Trinity Industries' Suggestion that TTX's "Joint Car Purchasing Threatens Continued High Levels of Innovation"

One of the flatcar pool's many benefits has been its significant contributions to innovations and improvements in flatcar design and technology. Application at 26-29; Hulick VS at 8-25. One commentor, Trinity Industries, asserts that TTX's focus on "efficient pool operations" may not "serve the public interest in encouraging innovation in railcar design," though it nevertheless *endorses* the reauthorization of TTX's flatcar pooling activities, including TTX's role in car purchasing, research and development. Comments of Trinity Industries at 18.

Trinity Industries' assertions about TTX's effect on innovation lack merit for multiple reasons. *First*, TTX need not be the *sole* source of innovation in order to demonstrate that pooling has led to significant innovation-related benefits. Even if Trinity

Industries were correct that “there has been more innovation outside TTX than by [TTX] over the years” (Comments of Trinity Industries at 15), this would not diminish TTX’s significant contributions to flatcar innovation. TTX has never claimed to be the only source of improvement in flatcar design, and its Application in fact explicitly acknowledged the many contributions of others. *See* Application at 27-29.

At the same time, however, Trinity Industries is incorrect in suggesting (Comments at 16-18) that TTX resists innovation out of concern that it might render its existing fleet obsolete. To the contrary, TTX has benefited flatcar users by facilitating innovative design work and bringing successful innovations into the fleet rapidly. Hulick VS at 8-25; Rebuttal Verified Statement of Robert S. Hulick (“Hulick RVS”) (Tab E) at 4-5; Wells RVS at 4-5. TTX embraces innovation in part because it is able to redeploy its existing assets to their most efficient alternative uses – as TTX did when it reconfigured its standard 89-foot intermodal flatcars for use as autoracks. Hulick VS at 31. TTX played an important role in bringing doublestack cars into the broader flatcar fleet. *Id.* at 16. It conceived and helped develop the articulated “spine”-type car for carrying trailers and containers. *Id.* at 17. It took a leading part in the development of the articulated bi-level autorack car. *Id.* at 18. And it led the way in developing and implementing many evolutionary improvements. *Id.* at 20-25; Hulick RVS at 3, 4-5. Numerous shippers and equipment suppliers recognize TTX’s leading role in innovation, and their statements detail

TTX's extensive efforts to develop new equipment and reconfigure and redeploy existing flatcars to more productive uses.²³

Second, and equally important, TTX does not foreclose innovative efforts by others. Railroads and others are free to develop and implement whatever types of flatcar equipment they desire in pursuit of competitive advantages, and they have done so, often with TTX's active assistance. Hulick VS at 25-26; Hulick RVS at 4-5. Some of the examples Trinity Industries cites (Comments at 17) – such as the drop-deck centerbeam car – further confirm that TTX has not stifled experimentation by others.

IV. THE BOARD SHOULD REJECT LEASING COMPANIES' EFFORTS TO IMPOSE ARTIFICIAL RESTRICTIONS ON TTX'S ABILITY TO PROVIDE EFFICIENT CAR SUPPLY OPTIONS

Several financial conglomerates that participate in railcar leasing – led by First Union Rail Corporation (a subsidiary of giant Wachovia), CIT Rail Resources, GE Railcar and GATX Rail – seek restrictions that would significantly undermine the well-established efficiencies and other benefits generated by TTX's pooled intermodal flatcars and completely eliminate TTX's authority to pool non-intermodal flatcars. These TTX competitors readily admit that their goal is to raise the prices they can charge for railcars,

²³ See, e.g., Letter of the Port Authority of New York and New Jersey (Tab M) (modification of 48-foot well cars to carry international containers and modification of 48-foot spine cars to carry 53-foot trailers); Comments of SDDC at 3 (development of dual-use heavy-duty/chain tie-down flatcar); Letter of J.R.C. Transportation (TTX April 6 Submission, Tab 28) (shipment of luxury motor homes using the Uni-Level flatcar); Letter of Hyundai Intermodal (TTX April 6 Submission, Tab 24) (modification of 48-foot well cars to carry 20-foot and 40-foot international containers); Letter of Mazda North American Operations (TTX April 6 Submission, Tab 29) (improvements to autorack flatcars and equipment); Letter of Miner Enterprises (TTX April 6 Submission, Tab 31); Letter of Rail Exchange (TTX April 6 Submission, Tab 35) (“TTX is always looking to be on the cutting edge of technology and quality.”).

and they recognize that the restrictions they ask the Board to impose – eliminating TTX’s ability to price its own cars and excluding non-intermodal flatcars from the pool altogether – would increase costs and thereby reduce overall demand for rail transportation services. Comments of CIT at 11-14; Comments of First Union at 22.

In order to justify their own patently anticompetitive objective, they offer an assertion, reminiscent of Orwell’s Ministry of Truth,²⁴ that TTX’s low prices are “anticompetitive.” Kalt RVS at 15-17. They attempt to support their absurd position with the false claim that TTX’s prices reflect unfair advantages relating to car storage and empty car movements that TTX’s owners provide TTX. They further claim that TTX’s pooling of non-intermodal flatcars produces no economies or operational benefits, despite the clear evidence of such benefits recited in each of the ICC’s previous decisions reviewing the TTX flatcar pool, set forth in TTX’s Application, and presented in the submissions of TTX’s many supporters.

The leasing opponents’ claims are baseless. TTX’s low prices result from the flatcar pool’s proven efficiencies and operational benefits, not any unfair advantages or anticompetitive scheme. The leasing opponents’ proposed “remedy” for TTX’s low prices – elimination of antitrust immunity for TTX’s price-setting – is a thinly disguised effort to eliminate the efficiencies that arise from TTX’s acquisition and ownership of flatcars. It would also threaten the utilization benefits produced by a commonly priced and thus truly fungible fleet of cars. Wells RVS at 9-10; Brown RVS at 4.

²⁴ GEORGE ORWELL, *1984* (“Like an answer, the three slogans on the white face of the Ministry of Truth came back to him: WAR IS PEACE, FREEDOM IS SLAVERY. IGNORANCE IS STRENGTH.”).

The proposal to eliminate pooling of non-intermodal flatcars, moreover, is a naked attempt to remove a valuable car supply option that generates important benefits so that they can increase their own profits, to the detriment of railroads, shippers, and others who benefit from an efficient, effective rail system.

For many years the TTX flatcar pool has co-existed with leasing companies, and leasing companies have prospered. The leasing opponents offer no evidence that they now need or deserve protection from TTX. Instead, they are opportunistically seeking to use this proceeding to disable an efficient competitor.

A. The Leasing Opponents' Attacks Highlight TTX's Beneficial Role

The Board should be comforted, not concerned, by the leasing opponents' attacks on TTX's flatcar pool. Shippers, railcar builders, parts suppliers, and other participants in the rail transportation industry uniformly praise TTX for providing an adequate supply of high-quality, low-cost flatcars in response to market demand. The leasing opponents complain about TTX's flatcar pooling operations because their interests lie in the opposite direction from all of the other industry participants. Their efforts to restrict TTX's pooling authority accordingly confirm that TTX's flatcar pool provides an efficient and effective car supply option that serves the public interest and should be preserved. *See* Kalt RVS at 17-18.

The leasing opponents are not interested in increasing competition for car supply. As Professor Kalt notes, their profits would rise if there were fewer car supply options and flatcar utilization were less efficient, because they could charge higher prices and at the same time lease more cars. *Id.* at 17-18. The predictable result would be less rail service at higher prices. *Id.* at 22; *see also* Brown RVS at 5.

The leasing opponents hardly attempt to conceal their objective or its consequences. They readily admit that they seek to prevent TTX from setting low prices for its cars in order to charge higher prices for their own rail cars. *See* Comments of CIT at 11 (“TTX sets car hire rates . . . at below-market levels”); Comments of First Union at 22 (TTX rates “materially undercut rates prevailing in the market”). In their view, the fundamental “problem” with TTX is that its participants “have *no incentive to use prices to ration demand or achieve profits.*” Comments of CIT, Tye VS at 23 (emphasis added). In other words, they are troubled because TTX has no incentive to raise its prices – instead, its owners want *low* car prices to encourage their use in providing rail transportation services. This is not a problem for anyone but the leasing opponents. For shippers and others who rely on rail service, this is further confirmation that TTX’s interests are precisely aligned with theirs and with the public interest. It should thus come as no surprise that NIT League’s membership, after hearing a detailed presentation by the leasing opponents’ representatives urging NIT League to support their position in this proceeding,²⁵ instead voted to support unconditioned approval of TTX’s application.

Ultimately, the best evidence that the leasing opponents’ positions would not serve the public interest is provided by the actions of NIT League and the other knowledgeable industry participants in this proceeding who stand to gain from the efficiencies generated by TTX’s flatcar pool. If the TTX flatcar pool were not producing real efficiencies but were instead operating anticompetitively to restrict long-term car supply

²⁵ The leasing opponents’ presentation to NIT League – which NIT League’s membership rejected in toto – is Exhibit C hereto. *See* Comments of NITL at 7 (“in considering the issues raised in this case, the League first heard first hand from TTX and other persons”).

options, then shippers, car builders, and parts suppliers would line up to complain to the Board. In fact, these important constituencies overwhelmingly support TTX's flatcar pool. *See* Part II, *supra*. They realize that TTX's low prices reflect genuine pooling efficiencies, and that the low prices and other benefits generated by TTX's flatcar pool are essential to the growth of rail traffic and the long term health of the industry.

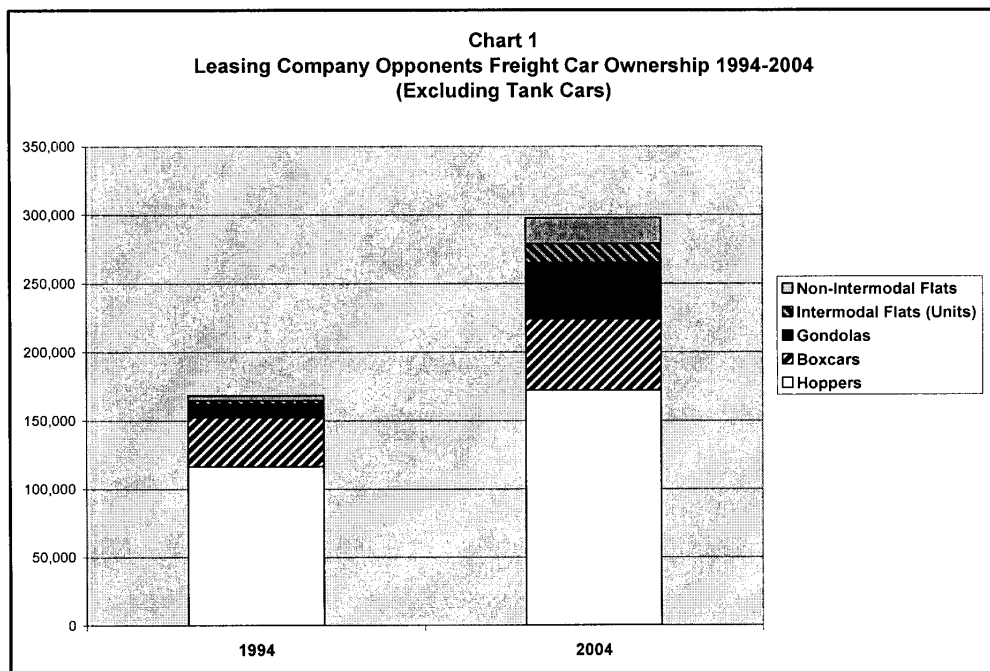
B. There Is a Robust Array of Railcar Leasing Alternatives That Do Not Need Any Special Protection from the Board

The leasing opponents attempt to argue that the TTX flatcar pool undermines their long-term survival, rather than their short-term profits, but they trip over their own facts. Railcar leasing is a very healthy business that faces no threat from TTX. For example, at the same time that CIT and its allies claim that TTX may cause "the withdrawal of CIT and other leasing companies from the market" (Comments of CIT, *McClure VS* at 7), they acknowledge elsewhere that the railcar leasing business is robust. CIT is telling the financial community that its rail leasing business "continues to do exceedingly well" and it anticipates "more growth in rail." CIT First Quarter Earnings Conference, April 22, 2004, pp. 7, 30 (transcript available at www.cit.com). Similarly, GATX Rail observes that, over the past three decades since the ICC first authorized TTX, the "railcar leasing market has expanded dramatically." Comments of GATX Rail at 2. GATX is similarly telling its shareholders that its long-term strategy in the rail sector is one of growth through fleet acquisitions. GATX Presentation to Shareholders, April 23, 2004, p. 7 (available on www.gatx.com). Trinity Industries acknowledges that "[l]easing of railcars . . . has become widespread" and touts the existence of "a broad and diversified railcar leasing industry." Comments of Trinity Industries, *Salop et al. VS* at 14. Its most recent report to the financial community shows a 23 percent increase in railcar leasing revenues due to additions to the

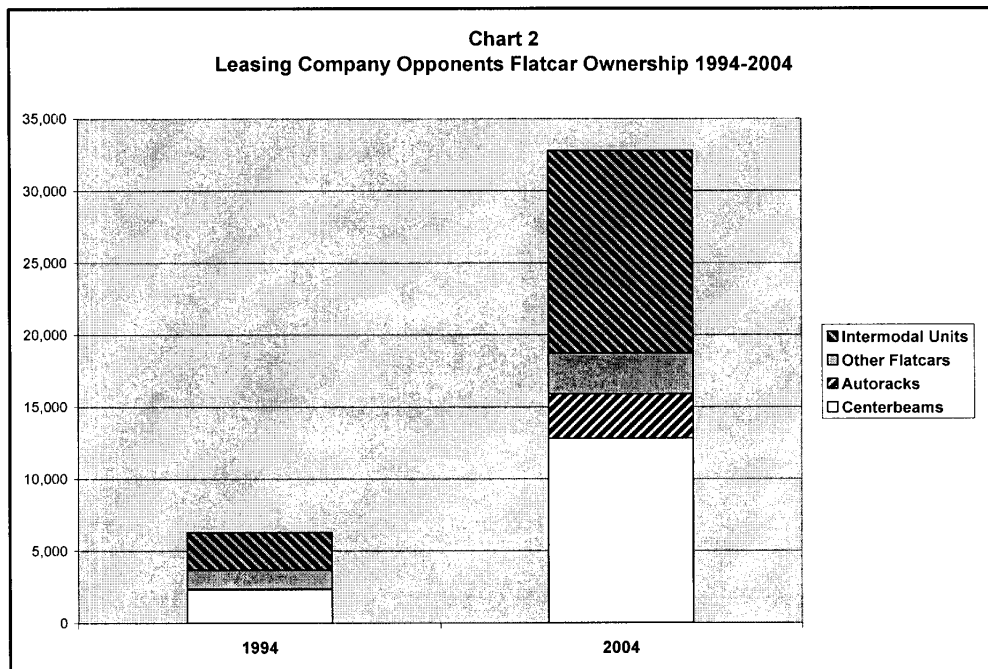
lease fleet and improved fleet utilization and a remarkable 27.4 percent operating profit margin. Trinity Industries, Inc. First Quarter 2004 10-Q, March 31, 2004, p. 16 (available at www.trin.net/invsrela/pdfs/10Q033104.pdf). It is therefore not surprising that, despite having exclusive access to information on their own company finances, CIT and other doomsayers offer no evidence to support their claims that they are faltering under the weight of TTX competition.

Other evidence confirms that leasing companies' railcar acquisitions, as well as railroads' use of leased flatcar equipment, have grown dramatically. Chart 1 shows the dramatic growth since 1994 in the (non-tank car) railcar fleets of just the principal leasing opponents in this proceeding.²⁶

²⁶ These data, from UMLER, represent cars other than tank cars owned by the following entities and their affiliates: Bombardier, CIT, David Joseph, First Union, GATX, GE Rail Services, MRC, Progress Rail Services, and Trinity Industries Leasing. Wells RVS at 21.



The leasing opponents' growth in the flatcar segment is even more impressive, as shown in Chart 2 below. Their leased flatcar fleets grew almost five-fold in the past decade. According to Trinity Industries, between 1997 and 2004, leasing companies expanded their overall flatcar fleets by 33 percent, which includes a 36 percent increase in centerbeam fleets, a 32 percent increase in bulkhead fleets, and a 238 percent increase in autorack fleets. Comments of Trinity Industries, Salop *et al.* VS, Figure 7.



The available evidence also shows that leasing companies are thriving in portions of the car supply business that are unaffected by TTX's flatcar pool. According to Trinity Industries, the leasing companies' combined fleets of 395,989 cars *other than* flatcars (and tank cars) is almost twice as large as the total fleet of 207,656 flatcars in the entire railroad industry. Comments of Trinity Industries, Salop *et al.* VS, Figure 7; *see also* Wells RVS at 21.

The TTX flatcar pool and leasing companies have co-existed for many years. In that time, leasing companies have prospered. The leasing opponents offer no evidence that this will change if TTX's authority to pool flatcars is extended.

C. The Leasing Opponents' Efforts to Preclude TTX from Setting Car-Hire Rates for Its Own Cars Are a Thinly Disguised Attempt to Destroy the Flatcar Pool

Several of the leasing opponents characterize TTX's establishment of car-hire rates for its own cars in the flatcar pool as anticompetitive "collective price fixing" or "collective price setting," and they urge the Board not to "immunize" such activities from antitrust challenge. Comments of CIT at 10-15; Comments of First Union at 18-25; Comments of GE Railcar at 2. These arguments have no merit.

1. The Leasing Opponents Falsely Portray the Relevant Legal Standard and the Relationship Between Pooling Authority and Antitrust Immunity.

In suggesting that the Board strip TTX of its antitrust immunity for pricing pooled flatcars, the leasing opponents – and CIT in particular – paint an inaccurate picture of the relationship between pooling authority and antitrust immunity. They portray a false dichotomy between (a) conduct that is procompetitive and thus does not require antitrust immunity and (b) conduct that is potentially anticompetitive and therefore does not warrant pooling approval. Comments of CIT, Tye VS at 3-4. This "Catch-22" notion would render both the pooling and immunity statutes superfluous, and it is not the law.

Railroads must seek Board authority to engage in pooling. 49 U.S.C. § 11322(a). Pooling inherently involves agreements among parties with a competitive relationship, and thus, while it can create significant benefits, it also raises potential antitrust concerns. When the Interstate Commerce Act was first enacted, pooling was viewed as inherently anticompetitive and prohibited outright. Experience during World War I, when America's railroads were placed under federal control and operated in a more coordinated fashion, led Congress to recognize that pooling – including in particular pooling of freight cars – could lead to significant public benefits. The Transportation Act of 1920 accordingly

enabled the ICC (under § 1(5), now 49 U.S.C. § 11322) to approve pooling proposals when it found that their beneficial effects would outweigh any anticompetitive harms. Congress also stipulated (in § 1(8), now 49 U.S.C. § 11321(a)) that the ICC's judgment could not be second-guessed through private antitrust challenges to approved pools.²⁷ This statutory framework has served the nation well for over 80 years and remains in place today: once the Board grants its approval, antitrust immunity applies to shield the Board's judgment and the participants in the pool from second-guessing in the courts. 49 U.S.C. § 11321(a).

Within this framework, there is no place for the Board to consider whether antitrust immunity should attach to an approved pool or one of its facets. If the pool meets the statutory test, antitrust immunity attaches as a matter of law. Any other approach would undermine the fundamental reason for creating antitrust immunity – to effectuate the Board's judgment that the pools it approved as in the public interest may be carried out by the participants unimpeded by the threat of prolonged, expensive antitrust suits.

2. TTX's Flatcar Pricing Is Not Anticompetitive

The fundamental premise of the leasing opponents' attack on TTX's pricing is that it constitutes a form of collective "price fixing" that is by its nature "anticompetitive." *E.g.*, Comments of CIT at 11-15. This is a mischaracterization. TTX's pricing is in fact a central feature of the flatcar pool and generates significant pro-competitive benefits. The leasing opponents' characterizations are economically incoherent (and the supporting testimony of their economic consultants "contentless," as Professor Kalt explains (RVS at 4)). Those characterizations do not begin to support the condition these opponents seek,

²⁷ See, e.g., H.R. Rep No. 456, 66th Cong., 1st Sess. (Nov. 10, 1919) at 18-19; H.R. Rep. No. 650, 66th Cong., 2d Sess. (Feb. 18, 1920) at 63-64.

which would sacrifice important pool benefits, but they do serve to point out why the pooling statute's grant of antitrust immunity for approved pools is sound policy.

a) TTX Pricing Is a Natural Outgrowth of TTX's Car Ownership

TTX's pricing of its flatcars is a natural and pro-competitive outgrowth of the fact that TTX owns those cars as part of an integrated, pooled fleet. As Professor Kalt explains, the leasing opponents strain to "put the label 'price fixing' onto the fact that TTX is a company that sets prices for what it sells – just like firms all across the economy." Kalt RVS at 16. This is not anticompetitive, a conclusion that is even clearer given that TTX's flatcar customers are same TTX participants who the leasing opponents assert have colluded to fix prices. It makes no sense to think of TTX's participants as anticompetitively "fixing" prices that they charge themselves. *Id.*

TTX's setting car-hire rates for its flatcars is simply the manner in which TTX carries out its pro-competitive objective – memorialized in the Pooling Agreement – of passing on its pooling efficiencies by "maintain[ing] per diem mileage and other charges at the lowest level required to meet TTX's ordinary and necessary costs and expense." Agreement, § 7.10(a) (Application, Tab B). As Professor Kalt explains, the fact that TTX charges low prices – as the leasing opponents complain – indicates that its pricing is pro-competitive. Suppliers of a service – here flatcars – need not conspire with one another in order to lower their prices. Any one of them could lower its prices independently without meeting resistance from its customers. As a result, when a collaboration among competing firms results in lower prices, it necessarily reflects efficiencies generated by the venture rather than an anticompetitive conspiracy. *Id.* at 16.

The leasing opponents' own evidence confirms that TTX is generating significant efficiencies, which in turn explain why TTX's prices are low. For example, a quartet of economic consultants from Charles River Associates laments on behalf of Trinity Industries that "TTX policies currently place railroad leasing companies at a competitive disadvantage" because "leasing companies may be denied *the efficiencies of pool management for flatcars.*" Comments of Trinity Industries, Salop *et al.* VS at 15 (emphasis added).

b) *There Is No Conceivable Risk of TTX Engaging in Anticompetitive Predatory Pricing*

Although the leasing opponents concede that TTX uses its pricing authority to set low rather than high prices, they suggest that this is "anticompetitive" because it threatens to drive them out of the car leasing business, to the long-term detriment of users of railcars. Comments of CIT at 14; Comments of First Union at 21-22. This contention appears superficially to be a form of "predatory pricing" claim, which as applied to TTX is not coherent as a matter of economics and not correct as a matter of fact.

As Professor Kalt explains, economic principles – as also reflected in the evolution of federal antitrust law – properly regard low prices as procompetitive rather than anticompetitive except in the narrow circumstance where they are as long as they are "predatory." Kalt RVS at 16.²⁸ Low prices are regarded as predatory only when they involve pricing *below cost* in the short run in order to eliminate rivals so that prices can be raised to monopoly levels in the future (when the short-term losses are "recouped"). See

²⁸ See also *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 340 (1990) ("Low prices benefit consumers regardless of how those prices are set, and so long as they are set above predatory levels, they do not threaten competition.").

Kalt RVS at 16.²⁹ By contrast, low prices that are the sustainable result of a party's efficiencies – such as TTX's car hire rates – benefit consumers and are not anticompetitive. Kalt RVS at 16-17.

The leasing opponents make no effort to show – nor could they – that TTX's low car hire rates are predatory. Such a suggestion would not be credible for several reasons.

First, TTX's rates are not below TTX's costs. The leasing opponents and their witnesses carefully avoid making any contrary claim, and they accordingly offer no evidence bearing on the relationship of TTX's rates to its costs. Instead, the leasing opponents merely claim that TTX's prices are "below market," which really means that they are below the (*higher*) level that car lessors would they like to charge in the marketplace.

As Mr. Wells explains, every TTX rate covers TTX's costs, *plus* provides a return that supports substantial investments in new flatcar capacity. Wells RVS at 18-19. TTX must charge rates above its costs in order to fulfill its obligation under the flatcar pooling agreement, which requires that TTX set rates sufficient "to meet TTX's ordinary and necessary costs an expenses, including, as appropriate, return on investment, to maintain a financial position enabling it to finance flat car acquisitions . . . and to keep the cars in proper condition . . . and to support continued reasonable enlargement of the number of cars in the pool." Pooling Agreement, § 7.10(a) (Application, Exh. A).

²⁹ See also *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222-224 (1993) (antitrust plaintiffs seeking recovery resulting from a rival's low prices "must prove that the prices complained of are below an appropriate measure of its rival's costs" and also demonstrate that the rival could likely recoup its losses by gaining enough market power to sustain higher than competitive prices).

The revenues generated by TTX's pricing policies have allowed TTX to finance more than \$4.2 billion in capital expenditures for new and redeployed flatcars since 1994, without any guarantees from any railroad or other corporation, and without capital infusions other than growth in retained earnings. Reardon VS at 4-5. TTX is planning to invest an additional \$600 million in new flatcars in the coming year. Wells RVS at 20. It could not do so if it were not earning – and demonstrating to the financial community – adequate returns to support these investments. Reardon VS at 4-5.

In a variant of the leasing opponents' basic criticism of TTX's low prices, CIT complains that TTX has an unfair advantage over leasing companies because it "prices its equipment on the basis of average cost," and that "this is not an option available to leasing companies." McClure VS at 5. Mr. McClure appears to be suggesting that TTX is able to undercut leasing companies by pricing newer cars below cost and making up the difference by overpricing older cars. Mr. McClure is factually incorrect. TTX does not price its cars on the basis of average cost. Wells RVS at 19. TTX does price all of its cars of a common type at a single price in order to create a fungible, free-running fleet, but the price it sets is always adequate to cover the costs of each car. Wells RVS at 19.

Second, as Professor Kalt explains, a "predatory" strategy would only harm consumers if TTX could successfully drive out the leasing companies and recoup its short-term losses by charging monopolistically high prices in the future. Otherwise, the short-term price cutting that would accompany a predatory scheme would merely benefit consumers without any offsetting harm to competition. The prospect of such harm is non-existent for multiple reasons: (1) TTX's participants would not allow TTX to harm alternative supply options or charge participant railroads high rates in the future; (2) TTX's

role in the supply of flatcars poses no threat of driving the leasing companies from the market, and in fact has co-existed with the robust growth (and profitability) of the freight car leasing business; and (3) in any event TTX could not prevent the leasing opponents – which are huge, highly-diversified financial conglomerates – from engaging in railcar leasing whenever they perceived such activities to offer attractive financial returns, as would be the case if car hire rates rose above competitive levels.

The Self-Interest of TTX's Participants Precludes Any Predatory Scheme.

The TTX flatcar pool exists because its railroad participants have concluded that the pool provides an efficient way of meeting their flatcar needs. As Professor Kalt explains, TTX's participants would be injuring themselves if they artificially suppressed other efficient car supply options in favor of TTX. As the leasing opponents themselves recognize, the railroads have no incentive to "ration demand" by incurring unnecessarily high car costs. Kalt RVS at 16; *see also* Wells RVS at 20. The pro-competitive incentives of TTX's participants rule out any possibility that TTX would seek to undermine the viability of freight car leasing or charge themselves "monopolistically" high prices at any point in the future. Kalt RVS at 17.

CIT's witness Tye claims that TTX's railroad owners have an "inherent incentive" to under-price leasing company services even when it is not efficient to do so, because they can recover the losses they incur through TTX by increasing freight rates. Comments of CIT, Tye VS at 22. However, such a strategy would make no sense even if railroads could increase their transportation rates without regard to market conditions. They would gain nothing: if railroads sold themselves car supply at a loss, they would have to recover the lost value by raising their rates just to break even. Mr. Tye does not attempt to

explain the railroads' possible motivation for engaging in transactions that, as he admits, would at best amount to a "wash." Tye VS at 22. To the contrary, railroads' incentives are to obtain equipment from the most efficient provider, whether that provider is a leasing company or TTX, and then set competitive freight rates based on those costs. Kalt RVS at 13.

Leasing Companies Are Thriving Despite TTX's Role in Flatcar Supply. In light of the robust growth in railcar leasing and in the flatcar segment in particular (see Chart 2 & pages 42-45, above), it is not surprising that the leasing opponents offer no evidence that TTX's pricing threatens to drive them out of the leasing business – which would be a crucial step in any successful predatory pricing scheme. They do not suggest, much less prove, that they cannot profitably match TTX's prices, even though any such evidence would be in their possession. In fact, all of the evidence shows that the car leasing business is robust and does not need the Board's protection. See pages 42-45, above.

There is No Conceivable Prospect of Recoupment. Finally, even if TTX wished to engage in a predatory pricing scheme (which it does not), and even if it could successfully drive leasing companies out of the business of leasing flatcars by charging below cost prices (which it cannot), a predatory pricing strategy still could not be successful. TTX would never be able to charge supra-competitive (high) prices because no barriers would prevent railcar lessors from resuming their leasing of flatcars when prices rose. Leasing companies, and particularly the leasing opponents, are some of the Nation's largest

finance companies.³⁰ They would quickly re-enter the market if opportunities to earn monopolistic prices were presented. Kalt RVS at 17.

c) *TTX's Pricing Is Not Inconsistent with Car-Hire Deprescription*

Another objection to TTX's pricing of flatcars that some leasing opponents attempt to characterize as raising "competitive" concerns is their belief that TTX's "collectively set" prices are not consistent with the concept of market-based rates underlying car-hire deprescription. *E.g.*, Comments of CIT at 13. There is no such inconsistency. Car hire deprescription was not designed to eliminate the benefits available from pooling. It was designed instead to get government out of the business of prescribing car-hire rates so that rates could be set by market participants.³¹ TTX prices *are* determined by market participants, not the government. As noted above, moreover, TTX's role in pricing is in substance no different than that of any other firm – including leasing opponents – that

³⁰ For example, "First Union Rail is a subsidiary of Wachovia, one of the largest banking institutions in the United States." Comments of First Union at 3. CIT Rail Resources is a division of CIT Group, "a leading diversified commercial and consumer finance company" with "nearly \$50 billion in assets under management." www.cit.com/main/AboutCIT/ataglace.htm. GE Railcar Services Corp. is a part of General Electric, which reported \$132 billion dollars in revenue in 2003. http://www.ge.com/en/company/companyinfo/at_a_glance/fact_sheet.htm.

³¹ CIT quotes a snippet from an ICC decision in which the Commission discussed whether it was necessary to approve and immunize the railroads' agreement to arbitrate disputes about car-hire rates when bilateral negotiations failed. The Commission did not suggest that pooling was inappropriate; instead, it merely observed that the agreement to arbitrate would not result in collective action and thus arguably did not require Commission approval or antitrust immunity. *Joint Petition for Rulemaking on Railroad Car Hire Compensation*, 9 I.C.C.2d 1090, 1101-02 (1993).

In fact, the decision is instructive on another point: although the ICC believed that antitrust immunity was not needed, it considered and approved the railroads' agreement to arbitrate because the agreement was of the type that, by statute, required agency approval. *Id.* at 1102.

decides upon the level of prices it will charge for its goods or services. Kalt RVS at 16. The only difference from the leasing opponents' own setting of car hire rates is a *procompetitive one* – TTX is highly motivated to achieve efficiencies and pass those efficiencies along to its participants in the form of lower car hire charges.

CIT and other leasing opponents also argue that TTX price-setting unfairly establishes a market “ceiling” on car hire rates established under the depreservation regime. Comments of CIT at 12; Comments of First Union at 21-22. This contention has no bearing on the question of whether TTX's pricing is anticompetitive. If TTX rates *did* establish a ceiling on the level of car hire charges for similar equipment, that result would not be *pro-competitive*, just as it is pro-competitive when the low prices charged by the most-efficient, lowest cost provider in a market affect the prices its competitors charge and in the process lower the market clearing price.

In fact, however, TTX's rates *do not* establish a rate “ceiling” that binds the leasing opponents. Numerous lease cars currently operate at rates equal or higher to those offered by TTX. Wells RVS at Exhibit 2. To some extent this may be the result of the lessors' ability to enter into certain arrangements, such as long-term leases of specific cars in exchange for a guaranteed payment stream, that flatcar users may value, but TTX is not permitted to offer (because it would constitute “assignment”). To some extent these higher prices may reflect imperfections in the car hire depreservation regime, such as where leasing companies are able to introduce railroad-marked cars into the rail network at above-market “default” rates that attach to the cars permanently and are difficult for individual railroad

users to negotiate downward to reflect “market” levels. But whatever the reasons, the fact is that plenty of cars move at rates above the so-called TTX “ceiling.”³²

d) TTX Has No Pricing Advantages That Are Unrelated to Efficiencies It Generates Through Pooling

Finally, the leasing opponents incorrectly claim that TTX has two significant, unfair advantages over leasing companies: (i) TTX participants move empty TTX cars free of charge, and (ii) TTX participants provide free storage for TTX cars. *See* Comments of CIT Rail at 15-16; Comments of First Union at 19-20. TTX has no such advantages.

TTX does not have any unfair advantage with respect to movements of empty TTX cars. Just like leasing companies, TTX pays railroads to deliver new cars and to handle empty equipment to and from repair and storage locations. Under Supplement No. 78 to the Form A Car Contract (Application, Tab M), TTX pays its participants for such services. The “Basic Mileage Rate” and “Incremental Mileage Rate” payments provided for by the Form A Car Contract reimburse the handling carrier for the rail transportation costs they incur and serve as an inducement to move empty TTX equipment promptly. TTX also pays its participants a switching allowance for cars moving to repair shops they serve. TTX paid its participants more than \$6 million in mileage and switching costs in 2003. Wells RVS at 16-17.

TTX does not pay its participants when it directs the movement of empty cars from a railroad with excess capacity to a railroad short of cars, but this is not an unfair

³² Moreover, lower TTX rates do not automatically dictate the results of car hire arbitrations involving similar lessor-owned cars. Lessors are free to argue in the car-hire arbitration process that TTX rates do not provide valid points of comparison. If some arbitrators have concluded that TTX rates do provide a relevant indication of available market alternatives, that outcome stems from the arbitrators’ judgment rather than TTX’s flatcar pool.

advantage that TTX has over leasing companies. Leasing companies never pay for similar movements because – unlike TTX – they never direct railroads to redistribute leased cars to one another. TTX’s redistribution of flatcars is a uniquely beneficial aspect of TTX’s effort to create a free-running pooled fleet. *Id.* at 17.

TTX also does not have any unfair advantage relating to car storage. Even if TTX enjoyed “free” car storage, that fact would not reflect anything anticompetitive about the pool. Instead, it would merely reflect one consequence of a railroad’s election to supply its car needs itself – *i.e.*, through TTX – rather than obtaining cars from others. One would not expect a railroad to “charge itself” for storing its own idle cars, and for the same reason it is perfectly natural that TTX’s owners do not charge TTX to store cars that are owned through the pool. At the same time, however, railroads that store their own (or TTX cars) *do* bear the economic costs associated with whatever storage they provide, and in that sense such storage is not “free.” Wells RVS at 18-19; Kalt RVS at 17 n.47.

In fact, however, railcar lessors have a significant advantage over TTX with respect to storage. When railroads place surplus leased cars into storage, they must continue to pay the lease costs, and must absorb the storage costs as well. Leasing companies are thus able to shift the full costs of storing idle cars to the railroads. Wells RVS at 17-18. TTX cars, however, are subject to “turn-back.” If a TTX participant invokes the turn-back provision, then once the turn-back period expires (the period is five days under the current Form A Contract), the participant is no longer required to pay car usage costs. Until TTX can get the car back into service, it must absorb the full opportunity cost of lost utilization. Thus, not only do leasing companies never pay storage costs during the term of a lease, but

they also never face the business risk associated with turn-back. As a result, they should be able to offer *lower* rates than TTX, but apparently would prefer not to. *Id.*

The only situation in which a leasing company must pay storage costs is when a lease has expired and market conditions are such that the lessor cannot immediately find a new lessee.³³ However, TTX also incurs storage costs for cars that it cannot place into service because it must arrange storage by railroads that are not TTX participants. In 2003, TTX paid shortlines and other railcar storage providers more than \$3 million for car storage. Wells RVS at 17-18.

3. Precluding TTX From Pricing and Owning Its Own Cars Would Have a Devastating Effect on the Pool and Its Benefits

The leasing opponents' proposal that TTX be stripped of its antitrust immunity for pricing would spell the end of the pool as we know it. In suggesting that this step would not have a significant effect on the pool's benefits – benefits they acknowledge to be significant (at least with respect to the intermodal arena) – the leasing opponents do not appear to have given any serious thought to the practical implications of their proposed condition. Comments of CIT at 10; Comments of First Union at 23-25.

As TTX's Tom Wells and intermodal expert Tom Brown explain, doing away with TTX's pricing immunity would in effect destroy the pool. It would extinguish TTX's ability to set uniform prices for pooled cars and thereby strike at the heart of the

³³ In many instances, leased cars actually carry reporting marks of short-line railroads. In theory, these short-lines could provide the leasing companies with free storage for surplus cars, but in practice they often do not have enough total trackage to hold even a small portion of all the cars they have released into the rail network with their reporting marks. Wells RVS at 18, n.4.

benefits that TTX's flatcar pool generates for intermodal (and other) rail transportation through a fungible fleet of free-running cars. Brown RVS at 4-5; Wells RVS at 9.

It would also effectively preclude TTX from owning its own cars, which would vitiate the wide array of other benefits that the pool generates. Wells RVS at 9; Kalt RVS at 18-22. The flatcar pool involves more than the common management of a fleet of cars. It encompasses a broad range of activities aimed at providing an adequate and efficient supply of high-quality flatcars at the lowest possible price, all of which turn on TTX's ownership of cars. TTX creates benefits not only by maintaining a whole-network perspective on car distribution, but also by maintaining a whole-network, cradle-to-grave perspective on flatcar acquisition, maintenance, and redeployments. Wells VS at 4. The leasing opponents suggest that all of these benefits could be realized without pricing authority, but that simply is not true. If TTX did not have antitrust immunity for its pricing activities, it could not acquire and own its own cars, and the well-recognized benefits associated with TTX's acquisition and ownership of pooled flatcars would be lost.

a) The Notion of Arm's Length Pricing Agreements Between TTX and Its Participants Makes No Sense

The leasing opponents assert that TTX could respond to the loss of antitrust immunity for pricing by engaging in "arm's-length rate negotiations with each of its railroad owners." Comments of First Union at 23. As both a practical and a legal matter, that assertion is ill-conceived. Because TTX is a joint venture among owners that are viewed as competitors of one another in many respects, any rate negotiations that it might undertake, particularly with its owners, would be readily susceptible to characterization by a potential antitrust plaintiff – potentially one of TTX's leasing opponents – as a rate-setting conspiracy. Indeed, the strident assertions by some of the leasing opponents that TTX's

pricing of its own cars reflects blatantly anticompetitive price-fixing illustrate the dangers of proceeding without immunity. TTX's Board of Directors, which has responsibility for approving TTX's rates and charges, is comprised of representatives of TTX's owners, so TTX could not engage in "secret" negotiations with its railroad owners – each owner would have the right to know what the others were paying and in a very real sense they would collectively control what the others were paying. Without antitrust immunity, therefore, TTX's pricing would be constantly subject to legal challenge. And without centralized pricing, a core feature of the TTX free-running fleet – the fungibility of TTX equipment – would be destroyed. Wells RVS at 8-10; Kalt RVS at 25.

The leasing opponents provide no answer to this dilemma. They assert that several pooling arrangements, including the FMI Boxcar Pool, the National Boxcar Pool, the North American Boxcar Pool, and the Multilevel Reload Pool, operate efficiently without antitrust pricing immunity. Comments of CIT at 14-15 & 15 n.8; Comments of First Union at 23-24.³⁴ However, the experiences of these other pools in fact undercut the leasing opponents' arguments.

The FMI Boxcar Pool and the National Boxcar Pool no longer exist. The FMI Boxcar Pool failed in 1987, and the National Boxcar Pool failed a short time later.

³⁴ First Union also cites TTX's plan to manage railroad-owned domestic chassis, as well as railroad-operated "pools" consisting of a mix of one railroad's equipment and equipment owned by a specific shipper. Comments of First Union at 24. These arrangements do not involve pooling under 49 U.S.C. § 11322. First, there is no "chassis pool." Wells RVS at 15. TTX helps rail carriers better monitor the flow of their domestic chassis, but it does not manage chassis distribution among railroads. *Id.* Second, shipper "pools" are irrelevant, and not subject to the pooling statute, because they do not involve pooling among competing rail carriers. In any event, both examples involve situations in which the equipment is *not* commonly owned, and thus they do not represent examples in which ownership and pricing authority exist separately.

Wells RVS at 10-13. In each case, the pool participants separately acquired and owned the pooled equipment, and the lack of pooled ownership and pricing contributed directly to their demise. *Id.* In the National Boxcar Pool, independent pricing of pooled equipment led to car hire concerns which in turn caused railroads to place restrictions on which pool cars they would accept. These restrictions in turn forced the pool manager to direct cars based on parochial considerations rather than based on efficiency. The result was increased empty miles, cycle time and customer dissatisfaction. Wells RVS at 12-13.

The National Boxcar Pool re-emerged in 2003 under TTX management as the North American Boxcar Pool, but it has already suffered some of the same types of disruptions that led to the demise of its predecessor, and it has not been able to match the operational efficiencies achieved by TTX-owned cars in the TTX Railbox Pool. *Id.* at 13-14.

In short, none of these pools has created the full range of benefits generated by the TTX flatcar pool, and TTX's opponents do not explain how TTX could continue to fulfill those pooling functions without owning its cars or having the authority to set the prices that railroads pay when they use those cars.

Second, TTX acknowledges that the Multilevel Reload Pool has achieved considerable success in improving the *utilization* of autorack equipment (although, as noted below, at page 64, it apparently is less effective at investing in an adequate supply of equipment). But, contrary to the leasing companies' implication, one of the important factors in this success has been the uniformity of prices for the pooled equipment. A majority of the *cars* are owned by TTX and thus used by participants at TTX's uniform Form A Car Contract rates. The racks are also priced uniformly, pursuant to a fee schedule

established by the AAR pursuant to a formal grant of antitrust immunity under 49 U.S.C. § 10706.³⁵ Moreover, the ICC has granted the participants in the Reload Pool authority (and antitrust immunity) to pool “car hire on equipment [*i.e.*, the racks] that has been assigned for central distribution.”³⁶ This experience thus undercuts rather than supports the leasing companies’ arguments. Wells RVS at 14-15; Kalt RVS at 20.

b) Without the Ability to Price, the Pool Would Be Destroyed

The leasing opponents’ attacks on TTX’s pricing of pooled flatcars is in substance also an attack on TTX’s ownership of those cars. As Professor Kalt explains, ownership simply cannot feasibly be separated from pricing. Kalt RVS at 7-8. No company would invest in assets if it had no control over the return those assets would generate. As Mr. Wells observes, each TTX participant should have a say in the price it pays, because each has a significant investment in TTX. At the same time, each participant should also have a say in what the others pay, because each has an interest in ensuring that none of the others takes undue advantage of the joint investment. If the leasing opponents’ proposal were accepted, the only available “solution” would be to dismantle the flatcar pool (much as these same opponents propose TTX be required to do with respect to non-intermodal flatcars). Wells RVS at 8-9.

³⁵ See AAR Code of Car Hire Rules and Interpretations, Rule 1(D)(2) & Schedule S. The underlying Section 10706 agreement applies, *inter alia*, to “rates of compensation applicable nationwide for the use of foreign line and non-shipper furnished freight cars, and other transportation equipment” (Agreement, p. 1) such as the “multi-level and auto-rack superstructures” governed by Schedule S rates. The agreement has had antitrust immunity since 1950. See *Railroads Per Diem, Mileage, Demurrage & Storage Agreement*, ICC Section 5B Application No. 7, 1 I.C.C.2d 924, 925 (1985) (explaining background of agreement on collective establishment of car hire charges and reaffirming approval of agreement as amended).

³⁶ *The Baltimore & Ohio R.R. – Pooling of Car Service Regarding Multi-Level Cars*, ICC Finance Docket No. 29653 (Sub-No. 3) (ICC served May 8, 1986), p. 4.

The TTX flatcar pool could not produce its current level of benefits and efficiencies if TTX were precluded from acquiring, owning and setting prices for the flatcars in the pool. As the ICC explained in rejecting challenges to TTX's acquisition and ownership of flatcars in 1989: "The economies and better service from management of the free-running fleet – whether with respect to utilization, or to repair, maintenance, and standardization – depend on centralized purchasing and joint ownership." *Trailer Train II*, 5 I.C.C.2d at 562. The benefits from acquiring and owning cars in the flatcar fleet are just as significant today as ever. Application at 19-37; Wells VS at 4; Hulick VS at 3-8. Indeed, if TTX were not able to own its cars and set a single price for them, each separate owner would establish its own rates, and the central feature of a free-running fleet – the fungibility of TTX cars – would be destroyed. Wells RVS at 9-10; *see also* Kalt RVS at 25.

When individual participants own equipment that is pooled solely for purposes of centralized management, they can remove their equipment from the pooled fleet when demand is high and equipment supply is tight. Indeed, that is what happened in the boxcar pools cited by CIT and First Union. Wells RVS at 10-16;³⁷ Brown RVS at 4-5; *see also Trailer Train II*, 5 I.C.C.2d at 572 ("Trailer Train aptly points out that the failure of the FMI pool was linked to the tendency of participating individual roads to exercise frequently, as demand conditions changed, their right to withdraw on short notice equipment they had contributed.").

³⁷ Mr. Wells draws on the first-hand experience of Emmit Posey, presented to the ICC in sworn testimony in 1993, to explain in further detail the experiences of the failed FMI Boxcar Pool. Wells RVS at 10-11.

Lack of centralized ownership also leads to other problems, including quality control. Car quality was a persistent problem in the National Boxcar Pool. Railroads tended to contribute older and poorly maintained cars to the pool while retaining newer cars in better condition for their own higher priority on-line shippers. Despite pool rules requiring participants to maintain the pool cars they contributed to high standards, customers frequently rejected pool cars because of their poor condition. Wells RVS at 12-13.

As another example, when participants own the pooled equipment, their individual self-interest or disparate calculations of demand may lead them to contribute less equipment than shippers demand. Kalt RVS at 21-22. Indeed, comments from DaimlerChrysler and Ford in this proceeding suggest that such a situation may be affecting the Multilevel Reload Pool cited by both CIT and First Union. Comments of DaimlerChrysler/Ford at 1.

The advantage of a pool on TTX's model is also illustrated by the failure of the AAR "TD-3, Heavy Duty Flatcar Fleet," a fleet of highly specialized flatcars used primarily for the transport of "High & Wide" loads such as power generation equipment. The pool was comprised of cars, contributed by participants, that were rapidly aging and in poor condition. Because the underlying traffic was highly cyclical, the participants made little if any investment in maintenance or replacement. Customers frequently rejected cars because of their poor condition and concerns about car hire and loading charges. In 1997, the AAR ceased operation of this pool due to the declining number of cars in the fleet and the mechanical condition of those that remained. By contrast, TTX has successfully pooled the same types of flatcars, applying uniform usage charges and maintenance standards, and investing in 490 new and rebuilt cars in the late 1990s. Wells RVS at 15-16; Letter of GE

Gas Turbines (Tab L) at 1 (“[a]s the power generation business started to grow, particularly since the year 1999, i[t] was the TTX Company which recognized the need for increased heavy duty railcar capacity in the US.”).

TTX’s competitors would unquestionably benefit if TTX were unable to generate the economies associated with car acquisition, utilization, and repair and maintenance. They would benefit if the pool dissolved in times of high demand or if it did not meet shippers’ day-to-day needs. In such circumstances, the leasing opponents would be able to lease more of their cars at higher prices, but the railroads, shippers, and consumers would be left to foot the bill.

D. The Leasing Opponents’ Efforts to Extinguish Efficient Pooling of Non-Intermodal Flatcars Are Equally Without Merit

The second major thrust of the leasing opponents’ attacks seeks to eliminate TTX’s ability to pool non-intermodal flatcars. A few of these opponents – such as First Union – grudgingly acknowledge the significant benefits that TTX’s pool generates for automotive flatcars, and thus “support pooling authority for auto-rack flatcars because they have loading and unloading characteristics similar to intermodal flatcars.” Comments of First Union at 18 n.8. But all of the leasing opponents ask the Board to exclude from the pool cars *other than* intermodal and automotive flatcars.³⁸

None of these opponents offers any *evidence* supporting their effort to amputate the TTX flatcar pool. They do not argue that TTX’s pooling of these cars causes

³⁸ Comments of First Union at 18 (limit approval to pooling of intermodal flatcars and auto-rack flatcars); Comments of Bombardier (same, adopting First Union’s position); Comments of CK Industries at 4 (same); Comments of Mitsui Rail Capital at 1 (same); Comments of D.J. Joseph at 4 (same); Comments of CIT at 2 (limit to intermodal flatcars); Comments of GATX at 9 (same); Comments of GE Railcar at 3 (same).

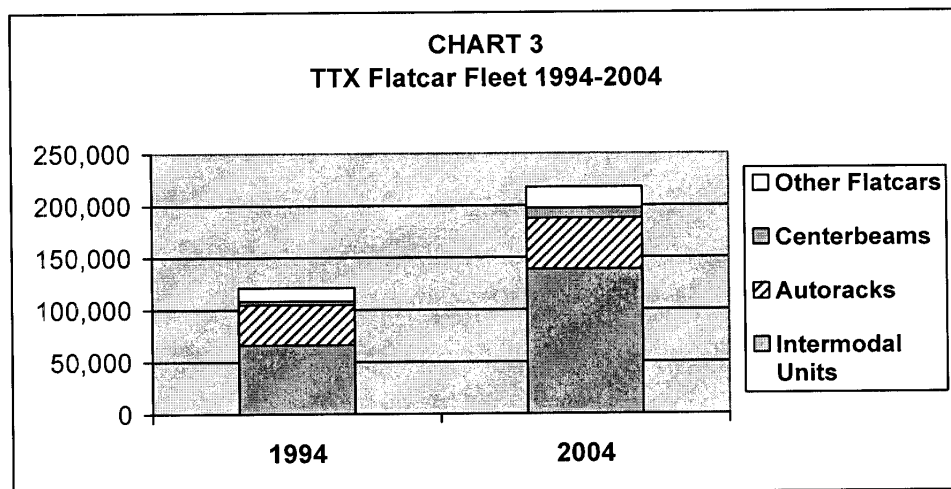
anticompetitive (or other) harms. Rather, their sole basis for carving up the pool is the curious assertion that TTX's Application – in the course of presenting overwhelming evidence of the benefits generated by pooling of *intermodal* cars – did not adequately demonstrate that its pooling of non-intermodal flatcars contributes to “better service to the public or ... economy of operation.” Comments of First Union at 17-18 (“evidence in support of pooling is limited to intermodal flatcars”) (emphasis in original); Comments of GATX at 8-9 (TTX's evidence “primarily highlights the benefits of pooling intermodal cars”); Comments of CIT at 8-10 (“TTX's public interest case is almost totally focused on its intermodal flatcars”).

This contention is both hollow³⁹ and wrong. The record in fact contains considerable evidence of the benefits that flow from TTX's pooling of non-intermodal flatcars. Before turning to a more detailed discussion of that evidence, it is useful to set the record straight on some basic facts that TTX's opponents misrepresent. CIT, for example, implies that TTX's intermodal fleet has been stagnant in recent years while TTX has expanded “dramatically” into non-intermodal flatcars. Comments of CIT at 8-9. CIT and GATX both assert that non-intermodal flatcars have come to “dominate” TTX's fleet. *Id.* at 8; Comments of GATX at 9. These opponents simply misread the facts. Non-intermodal flatcars have long been an important part of the TTX flatcar pool, but they have not displaced intermodal cars as the centerpiece of TTX's fleet.

³⁹ Underscoring the lack of substance to the attacks on TTX's pooling of non-intermodal flatcars, two of TTX's opponents appear to acknowledge that TTX might well be able to show significant benefits from pooling of other car types. GATX (at 9-10) invites the submission of specific data concerning such cars, while First Union proposes (at 18) that TTX be required to file a “separate application” for authority to pool such cars. The record in this proceeding already contains ample evidence of these benefits.

The opponents' mischaracterization of the relative size of TTX's flatcar fleets may stem from a measurement error. An increasing portion of TTX's intermodal fleet consists of articulated, multi-unit doublestack and spine cars that have as many as ten platforms (each platform having the carrying capacity of one 40- to 53-foot trailer or container). The average TTX intermodal car today has 4.76 platforms, compared with only two platforms on the traditional 89-foot intermodal flatcar. As a result, the size of TTX's intermodal fleet is appropriately measured in "units" – each of which is the equivalent of two platforms (or one traditional 89-foot flatcar) – rather than "cars." Viewed properly – as depicted in Chart 3 – TTX's flatcar fleet has been and remains predominantly an intermodal fleet. Wells RVS at 27-29. Moreover, TTX's intermodal fleet has continued to grow faster than its non-intermodal fleet. The capacity of TTX's intermodal flatcars has grown by over 100 percent since 1994; the non-intermodal fleet has also grown, but at a slower 44 percent pace. Wells RVS at 28.⁴⁰

⁴⁰ Although TTX continues to make significant investments in non-intermodal flatcars, those purchases are a small percentage of its total acquisitions. Over the last 15 years, TTX's annual purchases of non-intermodal/non-autorack flatcars were below 20 percent of its total acquisitions (and would be an even lower percentage if TTX's intermodal acquisitions were expressed on a unit basis), except during three years when TTX purchased almost no intermodal or automotive flatcars because of depressed demand forecasts. Wells RVS at 28.



TTX's non-intermodal cars thus continue to comprise an important but relatively modest part of TTX's fleet. The TTX flatcar pool contains a variety of non-intermodal car types, including more than 49,000 autorack flatcars, approximately 10,000 centerbeam flatcars used to carry forest products, 4,000 chain tie-down flatcars used to carry military vehicles and other heavy equipment, and nearly 16,000 other specialty flatcars, such as bulkhead cars and 100-ton steel deck cars. The leasing opponents' suggestions that the Board exclude these car types from TTX's pool ignore the substantial evidence of benefits that flow from the pooling of these cars.

1. TTX Generates Substantial Benefits By Pooling Non-Intermodal Flatcars

The leasing opponents' assertions that TTX's pooling of non-intermodal flatcars yields no benefits rest on a fundamentally flawed and overly narrow view that the "concept of pooling applies only to free-running cars." Comments of First Union at 17. GATX appears to believe that "pooling benefits" stem only from utilization improvements that are "generally attainable only with free-flowing cars that travel in multiple directions."

Comments of GATX at 9. And CIT appears to believe that pooling of flatcars cannot “achieve any efficiencies” unless cars “enjoy the multi-directional movement and reload opportunities that characterize the utilization of intermodal flatcars.” Comments of CIT at 9-10.

This myopic view of the potential gains from pooling is contrary to the facts and inconsistent with well-established Board precedent. Even if it were true – and it is not – that TTX’s non-intermodal flatcars were purely “one-way cars” incapable of achieving better utilization through pooling, their inclusion in the TTX pool nevertheless would generate substantial benefits. As the ICC made clear in 1994, the “concept of a free-running pool of cars was never the ultimate goal” of the Board’s repeated authorization of the TTX flatcar pool. *TTX III* at 10. In the 1994 proceeding, the ICC gave in depth consideration to the array of non-intermodal car types in TTX’s pool – including centerbeams, bulkhead flats, chain tie-down cars, and various other specialty cars. The ICC was well aware that railroads tend to place those cars in so-called 16(c) shipper pools, which removed the cars from the free-running fleet. Nevertheless, recognizing that the broad array of TTX’s pooling benefits applied equally to these types of cars, the ICC did not hesitate to reauthorize the full scope of TTX’s pooling activities, and explicitly to approve the placement of TTX cars in 16(c) shipper pools. *TTX III* at 6-10; *see also* Wells RVS at 25.

*a) Non-Intermodal Cars Benefit from the Wide Array of TTX
Pool Benefits in Addition to Improved Utilization*

Pooling of TTX’s non-intermodal flatcars generates the wide array of benefits described in TTX’s Application, none of which could be attained as efficiently or to the same degree in other ways. Leaving aside the very real utilization benefits (which we address below), pooling these cars provides the railroads with a form of insurance –

allowing them to share the risks of acquiring and maintaining a fleet of cars adequate to meet demand peaks that none would be prepared to bear individually. *See* Kalt RVS at 6-7. Pooled cars of these types can be – and are – shifted seamlessly and on short notice from one railroad to another in response to shifts in demand, allowing for a more efficiently sized pool (which, incidentally, is contrary to the self-interest of leasing companies). *Id.* at 7. Moreover, because pooled specialty flatcars are available to any pool participant, railroads are able to compete for business without facing the burdens of unnecessary and duplicative investments in specialized cars. *See* Wells RVS at 24-25; Kalt RVS at 6-7.

Pooled cars also benefit from TTX's whole-network approach to maintenance that lowers the railroads' costs of operating the fleet. And TTX's ownership of non-intermodal cars as part of its pool allows them to benefit from TTX's development and implementation of improvements and innovations, described in detail by Mr. Hulick (VS at 8-25; RVS at 3), and ultimately allows them to be reconfigured and redeployed in the manner that is most efficient for the railroad network as a whole. Hulick RVS at 3.

TTX's Application is replete with evidence of the broad array of pooling benefits in addition to the specific "utilization" economies upon which the leasing opponents focus. Application at 23-33; Reardon VS at 12, 13-14; Wells VS at 4; Brown VS at 18; Hulick VS at 8-33. Benefits of this sort have repeatedly been recognized by the ICC as important manifestations of the positive role played by TTX's flatcar pool in providing better service and efficiency, and they are equally applicable to TTX's non-intermodal car types. *Trailer Train I*, 347 I.C.C. at 900-01; *Trailer Train II*, 5 I.C.C.2d at 562, 569, 602; *TTX III* at 4; *see also* Wells RVS at 25.

CIT asserts that some of these kinds of benefits – like efficient repair and financing terms (CIT at 8 n.4) – do not necessarily require pooling. It is no doubt true that non-pool owners of flatcars sometimes are able to arrange for the efficient repair and maintenance of their equipment, or that lessors as major financial institutions can arrange efficient financing terms. But these details do not scratch the surface of the pervasive and systemic advantages available from the TTX pool, as TTX's evidence demonstrates and the ICC has repeatedly found. Indeed, the most telling indication that pooling offers such advantages is the fact that the Nation's railroads have chosen to arrange to supply a portion of their non-intermodal flatcar needs through the TTX pool. In light of their many other options – including acquisitions on an individual basis and leasing from one of the many large railcar lessors, including TTX's opponents here – there can be no question that the railroads' election to supply these cars via the TTX pool is a compelling and indeed virtually dispositive indication of the significant efficiencies they expect to generate. Kalt RVS at 2.

The Board need not rely on TTX for evidence of these benefits. TTX's Application is supported by the very constituencies that benefit most from TTX's pooling of non-intermodal flatcars. NIT League, automotive manufacturers, forest products shippers, manufacturers of power generation equipment that use heavy-duty flatcars and the Department of Defense (SDDC) all make heavy use of TTX's non-intermodal flatcars, and, as noted above, these parties strongly support the continuation of TTX's authority to pool these flatcar types.⁴¹ SDDC, for example, highlights TTX's beneficial role in maintaining

⁴¹ E.g., Comments of NIT League at 3; Letter of Mazda North American Operations (TTX April 6 Submission, Tab 29); Letter of Georgia Pacific Corp. (TTX Feb. 18

(footnote continued ...)

and improving its fleet of chain-tie-down cars, for which demand is cyclical. As SDDC explains, in order to expand the supply of cars capable of handling SDDC's military shipments, TTX is upgrading its existing fleet to extend its useful life for an additional ten years and is seeking approval to perform further upgrades to selected cars to extend their useful life to 65 years. At its own expense, TTX has designed and started to introduce a modified 89-foot, 100-ton flatcar that will be used mainly for non-defense-related shipments but can be adapted quickly to function as a chain tie-down car in the event of a military mobilization. Comments of SDDC at 3; *see also* Hulick RVS at 3.

Similarly, GE Gas Turbines and Alstom Power describe how TTX's investments in and pooling of heavy duty flatcars fosters competition between railroads and improves the choices available to captive shippers, such as power plants, that require such flatcars to move turbines, generators, and transformers. Letter of GE Gas Turbines, (Tab L); Letter of Alstom Power (Tab I).

J.R.C. Transportation highlights TTX's instrumental role in developing the innovative Uni-Level car, which would not exist but for TTX's development efforts. Letter of J.R.C. Transportation (TTX April 6 Submission, Tab 28); *see also* Hulick VS at 19-20.

And several forest product shippers tout TTX's constructive role in making centerbeams more readily available. Letters of Roseburg Forest Products (TTX April 6 Submission, Tab 37) at 3; Georgia Pacific (TTX Feb. 18 Submission, Tab 4); and Longview Fibre Company (TTX Application, Vol. II, Tab L).

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Submission, Tab 4); Letter of Longview Fibre Company (TTX Application, Vol. II, Tab L); Letter of Roseburg Forest Products (TTX April 6 Submission, Tab 37).

b) Pooling of Non-Intermodal Flatcars Also Generates Improved Utilization

Pooling of non-intermodal flatcars also generates utilization benefits of the kind that the leasing opponents wrongly regard as the only bona fide justification for pooling. The leasing opponents are simply mistaken when they assert that TTX's non-intermodal flatcars are purely "one-way" cars. For example, GATX describes automotive flatcars as typically moving loaded in only one direction "in well-defined corridors." Comments of First Union at 9. Even First Union knows better. *See* Comments of First Union at 18 n.8. In fact, TTX's automotive flatcars achieve very high degrees of utilization efficiencies – with a ratio of empty miles to loaded miles far below one-to-one. Wells RVS at 26. These utilization benefits are achieved through intensive management of autorack distribution by the Multilevel Reload Pool. Although the Reload Pool's distribution functions are separate from TTX's flatcar pool (see pages 61-62 above), it could not function effectively unless the flatcars underlying the racks were regarded by the railroads as fungible, free-running cars. Wells RVS at 14-15. Directions to relocate particular racks would be met with resistance if the racks were accompanied by a high-priced or otherwise unsatisfactory car, and it is obviously impossible to swap racks from car to car on a routine basis.⁴² The fact that the vast majority of the autorack cars in the Reload Pool are free-running TTX cars thus enables the Reload Pool to achieve its utilization successes. Wells RVS at 27.

⁴² As noted above, the usage rates for the racks themselves are set by a uniform fee schedule established by the AAR pursuant to formal antitrust immunity granted under 49 U.S.C. § 10706. *See* page 62, above.

Similarly, through the active management of non-intermodal flatcars that railroads have placed in 16(c) shipper pools, TTX is able to arrange for railroads to trade cars between 16(c) assignments in order to minimize the actual miles that particular cars must travel for their next load. To illustrate, if one TTX centerbeam car placed by Railroad A in a 16(c) pool for a shipper in the Southeastern United States comes empty on the West Coast, and another TTX centerbeam placed by Railroad B in a 16(c) pool for a shipper in the Pacific Northwest comes empty on the East Coast, TTX can arrange for railroads A and B to swap these cars, minimizing the distance each must travel to the next load. Wells RVS at 25. Between April 2003 and March 2004, for example, TTX arranged for over 7,000 swaps of TTX centerbeam cars from one pool to another – the equivalent of 69.5 percent of TTX’s total centerbeam fleet. Almost 2,000 such cars were swapped more than once during the year. Wells RVS at 25-26; Kalt RVS at 36-39.

Swaps among 16(c) pools are possible because of several interlocking features of TTX’s flatcar pool: (1) the sharing of information about the location of pool cars; (2) the fungibility of TTX’s pool cars, which are built and maintained to common standards and are subject to the same Form A Car Contract governing car hire charges and other terms of use; and (3) TTX’s expertise in managing the pool, which allows it to take advantage of opportunities to minimize unnecessary empty movements. Wells RVS at 25. Cars that are leased or owned by individual railroads could not be swapped as effectively – no doubt explaining why the leasing opponents believe so firmly that there is little if any opportunity to achieve utilization efficiencies for these types of cars. *E.g.*, Comments of CIT, McClure VS at 4. TTX’s experience is different, and provides yet another reflection of the unique benefits of the flatcar pool.

The demand characteristics of TTX's other flatcar types make it harder to achieve utilization gains of the same magnitude. For example, demand for bulkhead flatcars tends to be concentrated in certain regions, resulting in fewer opportunities for efficient swaps across railroads. And chain tie-down cars experience cyclical demand, resulting in empty cars often being available near loading opportunities. TTX's pool management, however, generates utilization efficiencies even for these cars. TTX arranged over 2,100 pool swaps of these other non-intermodal flatcar types during the same 2003-2004 period – the equivalent of 16 percent of TTX's fleet of these types. Wells RVS at 26.

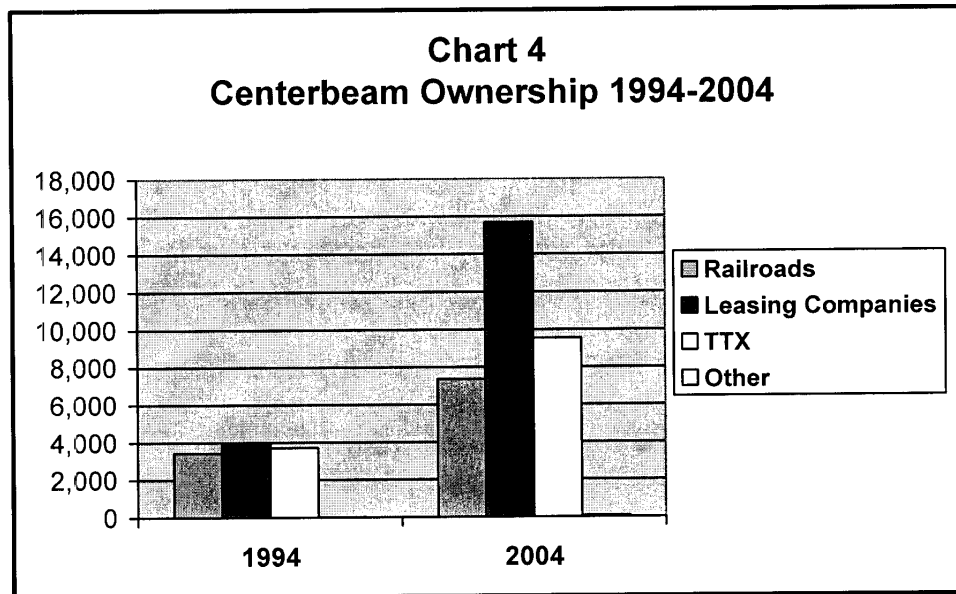
By arguing against the pooling of non-intermodal flatcars, the leasing opponents seek to deny shippers and railroads the benefits of TTX's efficiency and to remove an important supply option that other railroads and their customers value. Foreclosing TTX's participation in the supply of non-intermodal flatcars would grant leasing opponents an exclusive franchise to operate in these arenas – disrupting supply and increasing the costs to shippers and railroads for the sole purpose of enhancing the leasing opponents' profits.

2. TTX's Non-Intermodal Flatcars Pose No "Competitive" Threat to The Leasing Opponents or Anyone Else

The leasing opponents that desire to limit TTX's pool do not attempt to show that the inclusion of non-intermodal cars in TTX's pool poses competitive concerns,⁴³ and for good reason. TTX's relatively modest additions to its fleet over the past ten years in response to growing demand for centerbeams and certain other flatcar types have not

⁴³ The closest they come is the demonstrably false assertion of CIT witness McClure (VS at 3) that CIT has "found it increasingly difficult to sustain its competitive position with respect to its non-intermodal flatcars" as a consequence of TTX's "below-market car hire daily rates."

appreciably altered TTX's share of these cars. For example, TTX increased its fleet of centerbeam cars by 157% since 1994, but its percentage of the national fleet of such cars decreased from 34 percent to 29 percent. That is because, over the same period, leasing companies have increased their collective fleets by 300% and increased their share of these cars from 35 percent to 48 percent, as depicted in Chart 4 below. *See Wells RVS at 28.* CIT, which voices the most specific complaint about the supposed erosion in its competitive position, increased its ownership of centerbeams from zero in 1994 to 3,381 in 2004. CIT Comments, McClure VS at 2; Wells RVS at 28.⁴⁴

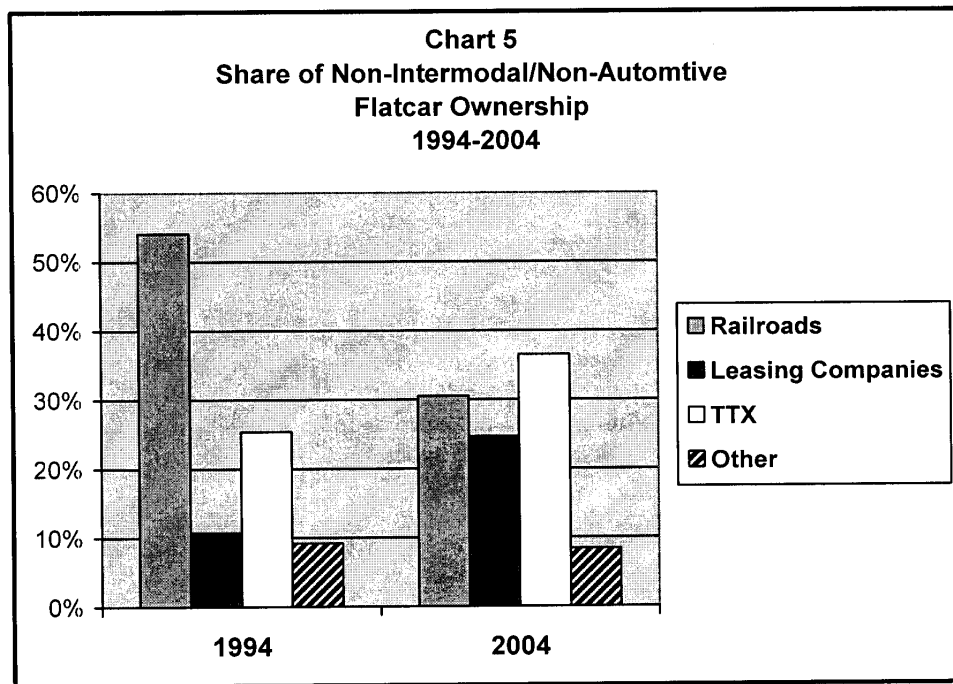


Other car types tell the same story. According to UMLER data presented by Trinity Industries' consultants, for example, TTX's fleet of bulkhead flatcars was smaller

⁴⁴ UMLER data reveals 2,625 CIT centerbeams in 2004; CIT witness McClure states that CIT "currently owns 3,381 such cars." TTX is uncertain as to the cause of the difference, but it accepts CIT's data. Wells RVS at 28, n.7.

than that owned by leasing companies in 1997 and remains so today. Comments of Trinity Industries, Salop *et al.* VS at 36. Similarly, although TTX has rapidly expanded its fleet of automotive flatcars since 1997 in response to growing demand, the leasing companies have added such cars even faster – expanding their fleets by an aggregate of 327 percent. *Id.* at 36; *see also* Chart 2 (showing increase in leasing opponent ownership since 1994).

In the face of these basic marketplace facts, the hyperbolic claims by leasing opponents to the effect that TTX has undergone an “unanticipated transformation into the dominant flatcar supplier” (Comments of GATX Rail at 6) are inexplicable. Outside the intermodal and automotive arenas, where the benefits of TTX’s pool are at their zenith, TTX’s share of flatcars is well below 50 percent. Although that share has grown somewhat since 1994 as railroads have decreased their direct ownership of such cars – and as TTX has made crucial investments in centerbeams and heavy-duty flatcar capacity (*see* pages 67-68, above; *see also* Wells RVS at 30; Letter of GE Gas Turbines (Tab L) – the leasing company share of these cars has increased even faster, as shown in Chart 5 below.



* * *

The leasing opponents claim that the Board must limit TTX's pooling authority in order to preserve "competition." In fact, their proposed limitations are nothing more than a self-interested attempt to eliminate or severely restrain competition provided by TTX. The leasing opponents ask the Board to restrict TTX's authorized pooling activities and thus prevent TTX from creating and passing along, in the form of lower prices, the efficiency and operating benefits that TTX generates by acquiring, owning, and pricing a fleet of pooled equipment. They recognize that TTX's low prices threaten their own profit levels, but they fail to identify any credible threat to competition. If there were any real threat to competition, the Board would have heard about it from the shippers, car builders, component suppliers, and the other participants in the railroad industry that truly care about preserving car supply competition in order to promote the rail industry's long-term growth.

V. PROGRESS RAIL'S CHALLENGE TO TTX'S RIGHT TO MAINTAIN AND REPAIR POOL FLATCARS IS MERITLESS

Progress Rail – which styles itself a “competitor” of TTX in the provision of railcar repair and maintenance services – contends that TTX poses a “serious potential threat” to competition for the repair and maintenance of TTX’s “own pool cars” as well as cars owned by others. Comments of Progress Rail at 6. Progress Rail asks the Board to “eliminate” TTX’s authority to repair and maintain railcars. *Id.* at 12. “[O]ne of North America’s principal suppliers” of repair and maintenance services (*id.* at 1), Progress Rail is in effect asking the Board to compel TTX to acquire such services from Progress Rail rather than performing those repairs itself. The Board should reject Progress Rail’s blatantly anticompetitive request.

A. TTX’s Repair and Maintenance Activities Are Integral, Efficiency-Generating Features of the Pool

Repair and maintenance of TTX’s pool flatcars have been central features of the flatcar pool from its inception. In 1974, when the ICC first authorized the pool, it was understood that Trailer Train (TTX’s previous name) would direct the repair and maintenance of its own cars and that such practices generated significant public benefits: “[t]he carefully formulated and highly effective preventive maintenance and repair program followed by Trailer Train ... have resulted in Trailer Train cars being out of service only 2-3 percent of the time and will thus have a beneficial effect on the availability and quality of pool cars and on their overall productivity.” *Trailer Train I*, 347 I.C.C. at 900.

In 1989, when the ICC reauthorized the flatcar pool, TTX’s role in repairing and maintaining its flatcars remained a core function of the pool. The ICC again found that “97 percent of [TTX’s] fleet is available for use ... due to Trailer Train’s preventive

maintenance and repair program,” and concluded that the “efficiencies and savings” from TTX’s “maintenance programs” were among the core benefits flowing from TTX’s equipment ownership. *Trailer Train II*, 5 I.C.C.2d at 569; *see also id.* at 570-71. The ICC accordingly found that TTX’s “general pooling functions, including ... repair and maintenance, provide significant benefits in terms of better service to the public and economy of operations.” *Id.* at 569.⁴⁵

TTX continues to generate significant efficiencies and cost savings through its repair and maintenance programs. Hulick VS at 26-30. Progress Rail does not seriously challenge these benefits.⁴⁶ Instead, it suggests that “a large number of other owners of railcars” are “well served” by independent service providers such as Progress Rail. Comments of Progress Rail at 8. According to Progress Rail, TTX’s decision to repair and

⁴⁵ In light of the ICC’s express findings in prior cases, Progress Rail’s passing suggestion (at 6 n.10) that repair and maintenance may fall outside the pooling statute is frivolous. Although the statutory definition of “car service” does not refer specifically to the “maintenance” of cars, the ICC has viewed car service “broadly,” and it plainly encompasses all activities relating to the “control” and “supply” of such cars, including choices regarding their repair and maintenance. *Trailer Train II*, 5 I.C.C.2d at 565.

⁴⁶ Progress Rail asserts (without offering any evidence) that TTX “on occasion” has limited the repairs performed by independent providers and bypassed alternative repair facilities in order to perform work at TTX’s own facilities, and that TTX’s maintenance support staff inefficiently duplicate personnel in place at TTX’s owner railroads. Comments at 9-10. As Mr. Hulick explains, these assertions are baseless. TTX’s owners would not allow it to engage in inefficient activities or duplication of effort such as Progress Rail alleges. In point of fact, TTX’s repair and maintenance forces provide the rail industry with a vital and highly efficient resource. TTX administers its maintenance activities with a very small number of administrative personnel – about one for every \$26 million in repair and maintenance expenditures, a highly efficient ratio. Contrary to Progress Rail’s suggestion, moreover, TTX bypasses more proximate repair facilities only when specialized repairs and modifications are being performed that cannot be undertaken by less experienced staff at other shops, or when facility requirements or maintenance and material inventory plans dictate. Hulick RVS at 8-9.

maintain its own cars at its own facilities “only serve[s] to displace availability in the currently existing capacity for these services” at providers such as Progress Rail. *Id.* at 9.

In fact, TTX chooses to manage the repair and maintenance of its own cars because doing so promotes efficiency and reliability. TTX has strong incentives to serve its railroad participants by operating the pool in the most-efficient, lowest-cost manner consistent with the objectives of providing safe, reliable and high-quality equipment that meets the needs of rail customers.

TTX has found that it can most effectively provide for the repair and maintenance of that equipment by participating actively in those functions rather than contracting them out entirely to others. There is nothing unusual about this approach. Railroads have long maintained their own car repair facilities and, notwithstanding the growth in recent years of independent rail service providers, every major owner of rail equipment – including such lessors as GE Railcar Services, GATX Rail, Trinity Industries, and Greenbrier – operates its own maintenance facilities. Hulick RVS at 6. When it makes economic sense, TTX has chosen to supplement its own repair activities with independent service providers – including Progress Rail. *Id.* at 6, 11.

By playing a central role in the maintenance and repair of pool flatcars, TTX can better implement its holistic approach to minimize costs across the entire rail network. Having its own workforce with in-depth experience in dealing with its flatcars and other equipment ensures that TTX can repair cars quickly and efficiently. With incentives to reduce overall costs, TTX also takes a preventive approach to maintenance, which, in turn, has spurred innovative solutions for diagnosing and addressing repair and maintenance problems. *Id.* at 7-8.

Precluding TTX from repairing and maintaining its own cars would significantly degrade reliability and increase costs. TTX would be forced to disband its shops and field maintenance operations (“FMOs”) and instead rely solely on independent contractors such as Progress Rail, the same contractors that TTX has consciously chosen for only a supporting role because TTX’s own forces and facilities perform more effectively and efficiently. Moreover, because independent contractors derive their profits from fixing failures, they would lack TTX’s incentives to develop innovative solutions to maintenance and repair problems. *Id.* at 7.

B. Progress Rail’s Assertion that TTX’s Maintenance Activities Threaten Competition Is Without Merit

Even if Progress Rail’s proposed condition were not so fundamentally at odds with common sense and the ICC’s repeated findings that TTX car repair and maintenance generates public benefits, it would still be unwarranted. Progress Rail fails to provide any support for its assertion that TTX’s maintenance and repair functions “set[] up a serious potential threat to competition.” Comments of Progress Rail at 6.

First, as Progress Rail implicitly acknowledges (at 6), TTX is fundamentally a *customer* of repair and maintenance services rather than a competitor. TTX’s repair and maintenance activities are tightly focused on satisfying TTX’s own need for such services. Although TTX does occasionally repair and maintain non-TTX cars, those repairs are a tiny fraction of TTX’s overall repair and maintenance activity. In 2003, for example, work on non-TTX cars accounted for only two percent of repair activities at TTX’s shops and ten percent at FMOs. This activity merely reflects the fact that under AAR rules, railroads must arrange for the repair of freight cars generally at the location where a car is “defective.” At those locations where TTX has repair operations to serve its own fleet, it is often convenient

and efficient for railroads to contract with TTX for repair on non-TTX cars as well. Hulick RVS at 9. Thus, when Progress Rail asserts (Comments at 6) that TTX has “aggressively moved to offer repair and maintenance services as a competitor of other providers,” it is in reality merely saying that TTX has chosen to supply a portion of the repair and maintenance needs of its flatcar fleet internally instead of turning to independent providers.

Moreover, as a *consumer* of repair and maintenance services – with a strong interest in competitive and efficient markets for such services – TTX makes significant use of independent repair facilities and thus has no incentive to undermine their effectiveness. As Mr. Hulick explains, TTX has contractual relationships with a network of 21 independent repair facilities (“IRFs”). TTX chooses these providers through a competitive selection process based on factors such as quality, the ability to return cars to service quickly, and labor rates. All told, in 2003 TTX spent over \$62 million on independent shop repairs, accounting for approximately 30 percent of TTX’s shop repair and maintenance budget. Hulick RVS at 11.⁴⁷ TTX also uses private repair companies to perform non-directed repairs, such as when a car needs immediate servicing and cannot be sent to a specific shop. In 2003, Progress Rail accounted for over 70 percent of TTX’s non-directed repairs performed by private contractors. *Id.* at 1.

Second, TTX’s repair and maintenance of its own and other railcars does not pose even the slightest threat to the existence or continued growth of independent service providers such as Progress Rail. The market for such services is thriving. As Progress Rail notes, over 125 independent entities throughout North America are providing repair services

⁴⁷ Nine percent of TTX’s total expenditures for IRF repairs was paid to Progress Rail for repairs performed at three of its facilities. Hulick RVS at 11.

for railroad freight cars. Comments of Progress Rail at 2. Many of these companies own multiple repair facilities across the country. Progress Rail, for example, operates over 80 facilities in more than 20 states, Canada, and Mexico. *Id.* at 1; *see also* Hulick RVS at 10-11.

Progress Rail and others face no threat from TTX. Compared with the overall market for repair and maintenance services, TTX's own role is very small. Of the 40 to 50 full-scale car repair facilities, TTX operates only three. Hulick VS at 10. Of the many hundreds of rip tracks and other field maintenance operations located throughout the North American rail network, TTX operates only 35 FMOs, all of them geared toward maintaining TTX equipment in the field at strategically-placed intermodal terminals and other locations through which TTX's flatcars most often flow. *Id.* Progress Rail and others have been successful in establishing similar operations at other locations; TTX's FMOs are located at a small fraction of the 290 intermodal terminals in North America. Hulick RVS at 12.

Third, there is no merit to Progress Rail's assertions (at 10-11) that TTX's involvement in repair and maintenance activities somehow pose a "clear and present danger" of "eroding" the "level competitive playing field" for such services. This argument is premised on the incorrect belief that TTX's owners move TTX equipment "without charge" to repair locations. As discussed above, TTX in fact pays the railroads to move its empty equipment, including for repair. *See* page 56 above; Wells RVS at 16-17.

Progress Rail also asserts that TTX has driven down "time standard and labor billing rates ... below those that are reasonably competitive." Comments of Progress Rail at 11. This assertion is puzzling. If TTX is able to repair and maintain its own equipment quickly and efficiently, that of course reflects the efficiencies and cost savings associated

with TTX's repair and maintenance functions. Such benefits strongly support rather than detract from approval of the TTX pool. If, on the other hand, Progress Rail is suggesting that TTX has somehow manipulated the standard billing rates established under the AAR's car repair billing system, it is simply mistaken. Two AAR committees – the Arbitration and Rules Committee and the Car Repair Billing Committee – establish time standards and labor rates that are used to determine repair costs unless parties agree otherwise.⁴⁸ Many of the industry's large non-railroad car owners – including Greenbrier and GE Rail Services (as well as TTX) – sit on these committees along with railroad representatives. TTX is just one voice among many, and has no ability to control the standard charges developed through this process. Hulick RVS at 13. Indeed, when TTX repairs non-TTX cars, it too is compensated according to standard AAR charges, and thus has no incentive to suppress those charges below cost. *Id.*

Progress Rail also appears to complain about the competitive bidding process by which TTX has been chosen to operate FMOs at certain intermodal ramps where, Progress rail acknowledges, "TTX owned cars predominate." Comments of Progress Rail at 11. As Mr. Hulick explains, TTX works with railroads to establish FMOs in order to repair TTX's cars more efficiently. Because TTX cars "predominate," it is obviously efficient for TTX to be responsible for repairs at those locations. Hulick RVS at 12. Once FMOs have

⁴⁸ The AAR car repair billing regime exists because railcars flow throughout the interconnected North American rail network and may end up needing repair unexpectedly anywhere on that network. The regime provides an efficient mechanism for ensuring that railroads are compensated fairly for making repairs to cars belonging to others when and where they need them, and for ensuring car owners that they will be billed reasonable, cost-based charges for repairs no matter where on the rail network their cars may end up needing repair. *See, e.g., Association of America Railroads, 2002 Office Manual of the AAR Interchange Rules*, Rule A.

been established, they do not turn away non-TTX cars, but the volume of repairs performed on non-TTX equipment is very small – in the range of ten percent. *Id.* For these repairs, moreover, TTX’s charges are – as Progress Rail notes – based on either standard AAR billing rates, just as Progress Rail’s charges would be, or in the case of services not covered by that regime (such as brake tests), on TTX’s costs for such services plus a reasonable return, just as Progress Rail’s would be.

Finally, Progress Rail’s suggestion (Comments at 11-12) that TTX’s service as an “auditor” of car repair bills on behalf of railroads and other car owners gives TTX unfair insight into “pricing policies and privately negotiated rates” of its competitors is foolhardy. When customers hire TTX to perform this role, they do so because they value TTX’s expertise in interpreting and understanding repair invoices and records; Progress Rail and other providers of repair services are equally free to market the same services to repair customers. Moreover, TTX’s auditing role does not give it any improper “insights.” Most of the repairs that TTX audits are billed at standard AAR billing rates that are well known to all. Hulick RVS at 14-15. Moreover, TTX voluntarily places a firewall around the personnel involved in these auditing services to eliminate even a perception that its involvement on railcar repair might create a conflict of interest. *Id.* at 15. And even if TTX did gain any other “insights” into the practices of other repairers, those would be insights that *customers* of repair services would have chosen to give TTX, indicating that they did not regard the information as competitively sensitive. Those same customers, of course, always have the right to pass this information on to TTX, Progress Rail or other repair providers without regard to any auditing. Hulick RVS at 15.

VI. THE BOARD SHOULD NOT ENTERTAIN REQUESTS BY TWO COMMENTORS TO INTRUDE INTO TTX'S POOLING OF BOXCARS AND GONDOLAS

Two commentors – First Union and Trinity Industries – question TTX's role in the acquisition and ownership of boxcars and gondolas. First Union asks the Board to “thoroughly investigate” TTX's pooling of such cars. Comments of First Union at 17. Trinity Industries complains about TTX's recent investments in boxcars and seeks a condition affirmatively forbidding TTX from engaging in the “joint purchasing and centralized ownership of railcars other than flatcars.” Comments of Trinity Industries at 7, 11.

As First Union correctly observes, however, these cars are not covered by the pooling authority at issue in this proceeding, “for the simple reason that they are not flatcars.” Comments of First Union at 17. TTX operates separate small pools of boxcars and gondolas under ICC-authorized pooling agreements that are not at issue in this proceeding. *See American Rail Box Car – Pooling*, 347 I.C.C. 862 (1974) (Railbox Pool); *Railgon Co. & Trailer Train Co. – Pooling of Car Service Regarding Gondola Cars*, Finance Docket No. 29121 (ICC served March 17, 1980).⁴⁹ The pooling agreement currently under consideration is limited by its terms to “flatcars,” and TTX is thus not seeking any authority herein to pool car types other than flatcars. *See Proposed Amended TTX Flatcar Pooling Agreement*, § 7.1 (limiting pool to “general and special purpose flat cars”). The Board should reject any attempt to use this proceeding to interfere with TTX's separate authority to pool boxcars and gondolas.

⁴⁹ As discussed above (at page 35 n.22), TTX is also the operator of the ICC-approved pool of railroad-owned boxcars.

Because a discussion of boxcars and gondolas is outside the scope of this proceeding, TTX will not accept these parties' invitation to justify the continued existence of these pools. Nevertheless, the suggestion that there is some cause for concern can be rejected out of hand.

First, TTX's plan to acquire a total of 5,000 boxcars in 2003 and 2004 – TTX's first purchases of such cars in more than a decade – was implemented only because other car owners, including the leasing opponents, failed to make the investments necessary to maintain the size of the Nation's boxcar fleet, which had been depleted by retirements over the years. Wells RVS at 29. TTX should be complimented rather than criticized for stepping up to the plate to make these important investments. *See also* Kalt RVS at 28-29.

Second, even with this spike in boxcar acquisitions in 2003 and 2004, TTX still poses no conceivable threat of "monopsonizing" the market for freight cars. Even during these spikes, according to the data presented by Trinity Industries' group of experts, TTX's acquisitions have accounted for less than ten percent of all acquisitions of cars other than flatcars and tank cars. *See* Salop *et al.* VS at 32. Adding TTX's ongoing flatcar acquisitions, TTX's overall share of all non-tank acquisitions was still well below any threshold of potential concern. Kalt RVS at 29-30. The same would be true even if TTX increased its acquisitions of boxcars and gondolas, because those car types are a small fraction of the overall market for freight cars, and leasing companies continue to invest in these areas. *Id.*

VII. REQUESTS FOR "ORAL HEARINGS"

Two commentators suggest that the Board schedule some form of "oral hearing" in this proceeding. NIT League notes the Board's recent policy of "holding

hearings on matters of significance to the industry or to individual railroads and/or users” and commends a procedure that would allow for an exchange of views on the issues raised in this case. Comments of NITL at 7. First Union requests that the Board “consider scheduling oral hearings” to “make it easier for all affected parties to make their views known.” Comments of First Union at 3, 10, 25.

To the extent these commentators are referring to the Board’s recent practice of scheduling oral *argument* in important cases, TTX would leave to the Board’s discretion whether further discussion of the issues at oral argument would assist the Board. The Board has scheduled such arguments for the purpose of allowing parties to “to summarize and emphasize the key points of a party’s case, and provide an opportunity for questions that the Board may have regarding any issue in the proceeding.”⁵⁰ The Board may well conclude that the issues presented by TTX’s application are sufficiently straightforward – and the support from shippers and other representatives of the public interest sufficiently overwhelming – that oral argument is unnecessary. If the Board does choose to schedule oral argument, TTX would of course welcome the opportunity to participate and respond to any questions the Board might have.

⁵⁰ *Public Service Co. of Colorado d/b/a Xcel Energy v. Burlington Northern & Santa Fe Ry.*, STB Docket No. 42057 (STB served Feb. 17, 2004) (“*Xcel*”), p. 2 (emphasis added); *Canadian National Ry. & Grand Trunk Corp. – Control – Duluth, Missabe & Iron Range Ry., Bessemer & Lake Erie R.R., & Pittsburgh & Conneaut Dock Co.*, STB Finance Docket No. 34424 (STB Decision No. 6 served Feb. 27, 2004), p. 2 (same); *see also Southern Motor Carriers Rate Conference, Inc.*, STB Section 5a Application No. 46 (Sub-No. 20) (STB served Mar. 23, 2004) (scheduling oral argument following submission of comments to discuss “the issues raised by [the] Application”). The Board’s further observation in the *Xcel* case is equally applicable here: “No additional written comments may be filed in connection with the oral argument (other than the written summary discussed below), as an extensive written record will already have been developed in this proceeding.” *Xcel*, p. 1.

On the other hand, if these commentators are proposing an oral hearing that would involve submission of new evidence, or comments from new parties that have thus far not participated in this proceeding, such a procedure would be unjustified and inconsistent with Board practice. The Board has no policy favoring “oral hearings” of this sort. Rather, in proceedings (such as this) that are handled under modified procedure, the Board’s rules provide that “oral hearings will not be held” unless material facts are in dispute, and then only if the party seeking them “set[s] out in full the reasons why the matter cannot be resolved through submission of written statements.”⁵¹ The Board’s procedures for handling control cases under 49 U.S.C. § 11323 similarly provide that the Board’s decision whether to hold an oral hearing will be determined based on the “needs indicated by the written comments.”⁵² The commentators that suggest an “oral hearing” have not even attempted such a showing.

Nor would it be appropriate to schedule a hearing to solicit views from the public at large. Parties with an interest in this matter have had ample opportunity to submit their views on TTX’s pooling authority, and such views are already on the record in

⁵¹ See 49 C.F.R. § 1112.10; *Boston & Maine Corp. – Abandonment – In Hartford & New Haven Counties, CT*, STB Docket No. AB-32 (Sub-No. 83) (STB served Jan. 13, 1998) (denying request for oral hearing); see also, e.g., *North San Diego County Transit Development Board – Petition For Declaratory Order*, STB Finance Docket No. 34111 (STB served Aug. 21, 2002) (denying request for oral hearing because requesting party did not demonstrate why “it is unable to make its case on a written record”).

⁵² 49 C.F.R. § 1180.4(e)(1); see also *Canadian National Ry., Grand Trunk Corp., & WC Merger Sub, Inc. – Control – Wisconsin Central Transportation Corp., Wisconsin Central Ltd., Fox Valley & Western Ltd., Sault Ste. Marie Bridge Co., & Wisconsin Chicago Link Ltd.*, STB Finance Docket No. 34000 (STB served May 9, 2001) (requiring parties requesting an oral hearing to provide reasons supporting the request and explain why “the disputed material facts that can be resolved only at a hearing”).

abundance, as reflected principally in the more than 60 statements of interested parties supporting unqualified approval of the Application.

CONCLUSION

For the reasons set forth herein, in TTX's Application, and in the comments of TTX's numerous supporters, there is no question that the reauthorization of the TTX flatcar pool is in the interest of both "better service to the public" and "economy of operation" and involves no "unreasonable restraint" on competition. The Board should accordingly approve the Application without any new conditions.

Respectfully submitted,

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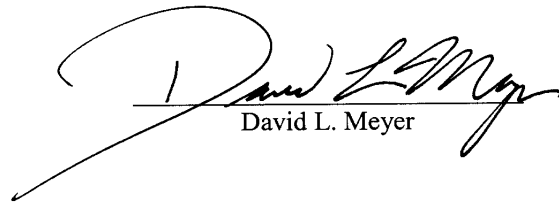
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May 12, 2004

CERTIFICATE OF SERVICE

I, David L. Meyer, hereby certify that on May 12, 2004, a true and correct copy of the foregoing document was served by first class mail, postage pre-paid, or other more expeditious means on all known parties of record.


David L. Meyer

A

EXHIBIT A

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(AS OF MAY 12, 2004)**

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* Statements included with this Rebuttal are denoted with an asterisk.

SUPPORTER*

LONGVIEW FIBRE COMPANY
MAERSK
MAZDA NORTH AMERICAN OPERATIONS
MERIDIAN RAIL SERVICES
MINER ENTERPRISES INC.
NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE
NATIONAL STEEL CAR LTD.
NORTHSTAR GROUP, INC.
NYK LINE (NORTH AMERICA) INC.
OOCL INC.
PENNSY CORPORATION
*PORT AUTHORITY OF NEW YORK AND NEW JERSEY
*PORTEC RAIL PRODUCTS, INC.
*PORT OF LONG BEACH
PORT OF LOS ANGELES
PORT OF OAKLAND
PORT OF SEATTLE
PORT OF TACOMA
*PRECISION ROLLER BEARING COMPANY, LLC
R.H. LITTLE COMPANY
RAIL EXCHANGE, INC.
ROSEBURG FOREST PRODUCTS
SCHAEFER EQUIPMENT, INC.
SCHNEIDER NATIONAL
SOUTH CAROLINA STATE PORTS AUTHORITY
STANDARD CAR TRUCK COMPANY
STANDARD STEEL
STANRAIL CORPORATION
STRATO INC.
TIMKEN CORPORATION
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SUPPORTER*

TRINITY EQUIPMENT COMPANY
VIRGINIA INTERNATIONAL TERMINALS, INC.
*WABTEC CORPORATION
YANG MING (AMERICA) CORP.
YELLOW FREIGHT SYSTEM, INC.
ZEFTEK, INC.

TAB

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B

EXHIBIT B

ALTERNATIVE LANGUAGE ADDRESSING SO-CALLED "EVERGREEN" PROVISION OF PROPOSED POOLING AGREEMENT

ARTICLE IX - DURATION

9.1. This Agreement shall take effect on October 1, 1974, and shall continue in effect for an initial period of fifteen (15) years. Thereafter, this agreement shall continue in effect for a first additional term of five (5) years from October 1, 1989, a second additional term of ten (10) years from October 1, 1994, and a third additional term of fifteen (15) years from October 1, 2004, and thereafter shall remain in effect, provided that an application seeking renewal or modification of TTX's and the Railroad Participants' authority to pool flatcars under Section 11322 of the Act is pending before the STB, until 180 days after the STB has issued a final decision and all appeals from that decision have been exhausted or the time to appeal has expired. This Agreement shall inure to the benefit of and be binding upon the parties hereto and their respective successors and assigns.

REDLINE SHOWING DIFFERENCES FROM PROPOSED POOLING AGREEMENT ACCOMPANYING APPLICATION

ARTICLE IX - DURATION

9.1. This Agreement shall take effect on October 1, 1974, and shall continue in effect for an initial period of fifteen (15) years. Thereafter, this agreement shall continue in effect for a first additional term of five (5) years from October 1, 1989, a second additional term of ten (10) years from October 1, 1994, and a third additional term of fifteen (15) years from October 1, 2004, and thereafter shall remain in effect, provided that an application seeking renewal or modification of TTX's and the Railroad Participants' authority to pool flatcars under Section 11322 of the Act is pending before the STB, until 180 days after the STB has issued a final decision and all appeals from that decision have been exhausted or the time to appeal has expired. ~~be automatically extended for successive one year periods until terminated by agreement of the parties.~~ This Agreement shall inure to the benefit of and be binding upon the parties hereto and their respective successors and assigns.

ARTICLE X ~~WITHDRAWAL~~

~~10.1. Following expiration of the third additional term provided hereinabove, any of the railroad participants, a party hereto or which shall become a party hereto, shall have the right to withdraw from this Agreement upon not less than twelve (12) months written notice of its intention to do so given to each other party, provided that such withdrawal shall not relieve it from any obligation as to which it may (either directly or indirectly) be jointly, severally or contingently liable hereunder.~~

TTX Application For
Reauthorization of the Flatcar Pool

“A Lessor’s Perspective”

NIT League Railroad Committee
Washington, DC, March 23, 2004

Who Am I?

- Represent 7 major lessors who own approximately 470,000 cars.
- Presentation represents both a consensus and individual views on this subject.
- Each retains right of independent action.

What Is TTX?

- Railroad owned consortium with pooling authority and anti-trust immunity.
- “It is a unique structure in the American economy. In no other industry do all the major participants jointly purchase their equipment.” (*Excerpt from the Department of Justice, August 29, 1988 filing to the ICC.*)

What Is TTX Requesting?

- 15 year extension for flatcar pooling authority, year to year thereafter.
- Right to make changes within scope of Pooling Agreement without STB approval.
- TTX believes no valid reason to limit their ability to assign or allocate. Would fully support STB order eliminating this restriction.

Lessors' Position

- The lessors, with reservation, support renewal of the intermodal flatcar pooling authority with very specific limitations.
 - The requested extension is too long.
 - No changes without STB approval.
 - No assignment or allocation.
 - Clarification of boxcar/ gondola pooling authority.
 - STB consider options increasing competition.

The Extension Is Too Long

- Tremendous change over the last 15 years.
 - Class I railroad consolidation (19 to 7). Expected future consolidation further dilutes pooling benefits.
 - Concentration of TTX ownership.
 - UP owns 36.68% and top 4 collectively own 93.1%
 - Implementation of depreciation.
- The next 15 years will be equally dynamic.

The Extension Is Too Long

- “We believe that the term should be reduced to 5 years because the current market and regulatory climate in which Trailer Train operates is so dynamic. The uncertainties in these areas require a substantially shorter extension term.”
(Excerpt from the June 14, 1989 ICC decision)

– Would support a 5 year renewal of intermodal flatcar pool.

No New Changes Without STB Approval

- Cannot support, vague and unclear.
- TTX has not identified difficulties/ delays.
- Burden shifts to 3rd parties to oppose.
- STB cannot lawfully authorize substantive changes that are unknown.

No Assignment and Allocation

- Support ICC 1989 decision.
- Method of financing and leasing on behalf of shareholders.
- Tangential to operation of a pool, function of individual railroads or third party lessors.
- Anti-competitive concerns.

Boxcars/ Gondolas

- Seek clarification whether boxcars and gondolas are included in this filing.

Competitive Impact of TTX

- TTX has unfair economic advantages over other lessors.
 - RR's (Shareholders) establish rates/ service standards.
 - Not for profit.
 - Free transportation, free storage, and preferential usage.

Why Should You Care?

- Pressure to meet artificially established low rates act as a barrier of entry for new cars and pose great difficulty in competing on existing equipment.
 - At least one railroad is charging higher freight rates for non-system, non TTX cars.

Why should You care?

- Increasingly more difficult for lessors to justify investment in TTX car types.
 - Loss of competition, fewer supply options for users and shippers.
 - Reduced car supply.
- Higher lessor risk profile, less car type diversity.
- Longer lease terms.

Level The Playing Field

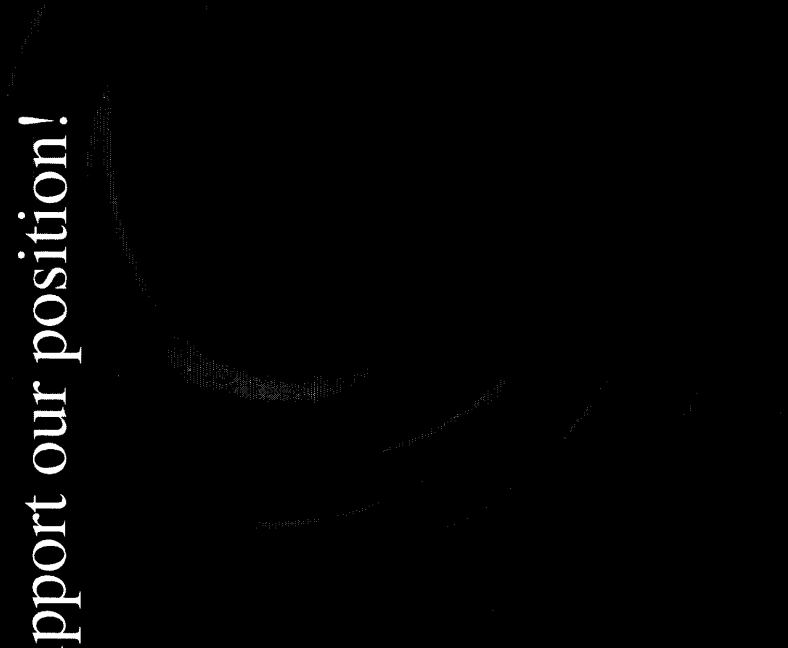
- Ability for all to compete in an unregulated, free market.
- Pooling without anti-trust immunity.
 - No price setting/ sharing.
 - TTX to negotiate rates with each railroad through arms length bilaterals (deprescription).

Level The Playing Field

- STB reassessment of pooling specialty flatcars/ other car types.
 - Do not meet intermodal flatcar profile/ justification.
 - Can achieve efficiencies through railroad pools and car service rules.
- No additional car types added to the pool with anti-trust immunity.

What Would We Like NIT League To Do?

- Support our position!



D

REBUTTAL VERIFIED STATEMENT

OF

THOMAS R. BROWN

I offer this rebuttal statement to explain how the conditions requested by a small group of self-interested railcar leasing companies would seriously undermine the two core benefits that TTX provides to the intermodal industry: its ability to promote the growth of intermodal business by supplying low-cost intermodal flatcars and its ability to manage those cars efficiently as a fungible fleet. Intermodal transportation is the arena with which I have the most familiarity and expertise, and it is the arena in which the Nation's railroads, their customers, and ultimately the economy as a whole are looking to TTX to facilitate investment in and efficient operation of a growing fleet of intermodal flatcars.

These leasing companies (which I call the "Opponents"), do not challenge the significant public and private benefits created by TTX through its investment in intermodal equipment and technology and its management of an efficient, free-running fleet of intermodal cars. Nor do they question the critical role that rail intermodal must play in meeting the future demands for freight carrying capacity in North America, where freight volumes are forecasted to increase by 65 percent over the next two decades. They acknowledge the value of rail intermodal and its vital role for intermodal growth and our economy, as demonstrated in the Application. Yet, Opponents are not bashful about suggesting that the significant public benefits of the TTX flatcar pool be limited by the Board for their private benefit – and at the expense of intermodal shippers and marketers and, ultimately, to the detriment of the Nation's economy.

The Opponents' proposed conditions would make TTX less effective as an equipment provider and pool operator, less certain about its future and therefore less able to invest in innovative intermodal solutions, and ultimately would create an inefficiency tax on intermodal users – solely to permit a small number of leasing companies to become more profitable. None of the Opponents seriously claims to be in any economic danger. (Indeed, the general perception in the intermodal business community is that these companies are prospering.) Rather, the Opponents complain that, under current circumstances, they cannot make as much money or grow as fast as they would prefer. They seek to improve their own competitive posture at the expense of the users of intermodal service by asking the Board to make TTX less efficient. As a businessperson and entrepreneur, I know that profitability and growth come from sound strategy implemented through effective tactics, not by using a regulatory process to tilt the playing field as the Opponents' thinly-veiled approach suggests.

Emblematic of the Opponents in this case, CIT writes that, “[i]t 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.” Comments of CIT at 2 (emphasis added). The Board needs to realize that such claims are the mirror-opposite of reality. The commercial and public users of intermodal service – who unanimously support reauthorization of TTX's flatcar pool – understand this. They know that TTX has been an engine of competition, not a “barrier to competition.” They have not experienced car shortages or other adverse consequences that one might expect to occur were TTX creating anticompetitive barriers to efficient flatcar supply. To the contrary, they have enjoyed a growing supply of high-quality, low-cost intermodal

equipment. Nor can intermodal users detect any public (or other) benefit from taking the courses of action CIT and the other Opponents propose to the Board, which would themselves impose anticompetitive barriers to the railroads' ability to choose to provide flatcars through the efficient pooling mechanism that TTX makes possible. Shippers and intermodal marketing companies will understand that CIT and its allies are complaining that TTX is *too efficient* and, accordingly, cynically seeking to use the Board's jurisdiction over the TTX pool in this proceeding to contravene TTX's continued effective operation for the sake of their private individual and corporate benefit.

I can assure the Board from long personal experience that the intermodal business in the United States has grown by finding the most efficient, lowest cost solutions to providing an intermodal alternative to highway carriage, not through a system of arbitrarily applied organizational constraints to favor one component of the intermodal supply chain over another, as the Opponents' suggestions would have the Board create. For example, until the entry of the large truck lines (such as J. B. Hunt and Schneider National, often referred to as "bi-modal carriers") into the intermodal business in the late 1980s, domestic intermodal marketing was dominated by Intermodal Marketing Companies ("IMCs"). Many IMCs initially found it difficult to compete with these new bi-modal competitors when they entered the marketplace in the late 1980s. A number of them felt disadvantaged by the railroads' willingness to offer contracts to the bi-modal carriers; some even felt that the initial arrangements between the carriers and truck lines unfairly eased their entry into the market. Should the IMCs have sought regulatory intervention to make the bi-modal carriers less efficient and should regulators have intervened? Demonstrably not. Though the bi-modal carriers were larger scale

companies (than most of the IMCs) with more sophisticated information technology and more experience in managing assets than IMCs, their competition prodded IMCs to work harder and ultimately both groups of competitors became more adept at securing new intermodal business for the railroads. Over time, both IMCs and bi-modal carriers have prospered and the most efficient of each continue to grow their business. What's more, the introduction of the bi-modal carries has added to the general penetration of intermodal into the truckload marketplace while intermodal marketing companies have broadened their scope of service offerings to include truck brokerage and logistics services. Had the IMCs sought regulatory intervention – as the leasing companies have done in this case – and effectively won some “balancing mechanism” to offset the “competitive advantages” of their new rivals, the intermodal market would be smaller today and its service offerings less robust; both shippers and the public would have been penalized. Rather than creating a “balancing mechanism,” regulatory intervention would have, in fact, imposed an “inefficiency tax” on intermodal marketing. The leasing companies’ strategy in this case poses the same kind of threat to the public interest.

When certain of the Opponents suggest that the Board should approve the TTX application subject to eliminating TTX’s antitrust immunity for pricing its intermodal cars to using railroads (and in the process eliminating its *ability* to set such prices), they argue as if such a limitation would be a light touch on the fabric of TTX. To the contrary, such a limitation would undermine a core value of TTX to the community of intermodal users: its ability to provide a fleet of fungible equipment priced in accord with TTX’s policy of charging the lowest price that covers its costs and an appropriate return to support reinvestment. Apparently, Opponents envision a new intermodal state

that is unknown in this business – one in which a national pool might be efficiently operated without direct ownership of equipment and without the ability to determine prices for users. This has never happened before and is just as unlikely in the future. If this were possible, Opponents, singly or together, would no doubt be operating such pools today. Instead, they suggest that the Board effectively remake TTX into some form of flatcar management company that is far from its core value and which would dramatically limit its benefits to shippers, the public, and the industry.

Opponents' primary goal appears to be to find some means of making intermodal flatcars (and other flatcar types that TTX owns) cost users more so that leasing companies can extract higher rents from the marketplace. From long personal experience in negotiating intermodal rates, I know that when vendors argue for "market rates" they are not arguing to lower their rates; to the contrary, they are signaling their intent to charge higher prices. Interestingly, the Opponents offer no evidence to demonstrate that competing with TTX is forcing them to price below their costs. The force of their argument is that they would like the Board to assist them in raising their margins at the same time that they secure a larger share of the market – an unlikely outcome in a market economy. TTX demonstrated in the Application that rail intermodal is a highly competitive business where the aggressive prices set by trucks must be bettered and where carrier margins are very narrow. For the Board to impose an inefficiency tax in this environment by limiting TTX's effectiveness as Opponents suggest would ultimately mean one of two things: shippers would either pay more for intermodal service or they would use less of it – to no public or intermodal industry benefit.

Nowhere in their filings do the Opponents demonstrate that TTX is anything other than an efficient provider of the flatcar types it supplies to the marketplace. To the contrary, TTX's efficiency as an equipment provider has been well established in this proceeding and in the marketplace. It is that efficiency which is at the heart of the Opponents' unease. TTX's efficiency and effectiveness is at the heart of its value to shippers and intermodal marketers; it should not be traded away for the narrow private benefits and protections sought by Opponents.

Additionally, the suggestion that the reauthorization period should be limited to less than 15 years is not sensible from a business perspective. Though the Opponents treat this lightly – as if there would be little actual consequence to a shorter reauthorization period – the length of reauthorization is very important to TTX and to intermodal shippers and marketers. Having to file a new application on significantly shorter intervals is expensive and wasteful – for TTX management, for its owning roads and for the intermodal users and operators. The concerns expressed by commenters seeking to curtail the duration of TTX's authority – largely those of unanticipated changing conditions – could more effectively be handled through the Board setting a periodic call for comments within the fifteen year period. If parties had concerns arising from events currently unanticipated, they could more readily and less expensively express them through such comments to the Board when these events arise.

Even more importantly, limiting TTX's reauthorization period creates uncertainty about a critical part of the intermodal supply chain – the provision of intermodal equipment. Again, this negatively impacts the core of TTX's value proposition. Without a long-term planning and investment horizon, it becomes more

difficult for managers to take risks on innovative intermodal technologies and systems. To realize rail intermodal's future potential, new shorter haul markets must be economically developed which will likely require new equipment and loading technologies. TTX has demonstrated its effectiveness in this context, both as an equipment innovator itself and as an early adopter of innovations developed by others. It is highly unlikely that smaller, privately-held car fleet operators could play these roles. TTX has also demonstrated an ability to usefully and efficiently redeploy assets as service requirements change; this can only be done in a long-term context. TTX has most recently demonstrated this ability as it enables the intermodal industry's rapid conversion from a box fleet dominated by 48-foot containers to one that is more truck-competitive and made up of largely of 53-foot containers. The conversion of 89-foot flatcars to auto racks is another and longer term example of the vital importance of this function to the industry. Limiting TTX's authority constrains its ability to play this important role.

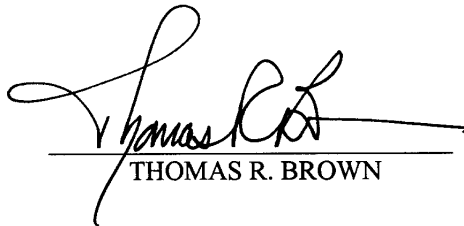
TTX, with a 15-year reauthorization and enabled with no more than the authority and antitrust immunity it has operated under since its inception, creates at least four key benefits for shippers and users of intermodal that the Board should strive to protect. First, it efficiently redeployes equipment assets as market conditions change. Second, it takes a long term view on what it invests in; supporting innovation and weathering fluctuations in demand. Third, it spreads the risk of large scale equipment ownership over a larger revenue base in good times and bad. Fourth, its uniform pricing allows all flatcars to serve any destination or handle any load; minimizing switching and empty miles. Restrict the authorization period unnecessarily, eliminate the pricing authority, and TTX's value proposition will be significantly undermined.

Shippers, intermediaries, stack train operators, motor carriers, ports, and others all have had the opportunity to review and respond to the TTX Application. None of those critical users of the intermodal network, who depend on flatcar supply for the efficient operation of their own supply chains, question TTX's commercial or public value, nor do they write to complain of harms that could be in any way logically solved by the actions Opponents suggest. Opponents argue a narrow case to their own narrow benefit. I urge the Board to accept the TTX Application as submitted.

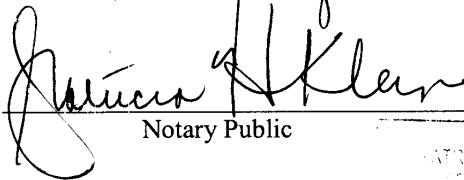
VERIFICATION

COMMONWEALTH OF PA)
COUNTY OF Bucks) ss

THOMAS R. BROWN, Principal, Strategic Directions, LLC, being duly sworn,
deposes and says that he has read the foregoing statement, knows the contents thereof and that
the same are true as stated.


THOMAS R. BROWN

Sworn to and subscribed before me
this 5th day of May, 2004.


Notary Public

My Commission expires _____.



E

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

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

REBUTTAL VERIFIED STATEMENT

OF

ROBERT S. HULICK

REBUTTAL VERIFIED STATEMENT

OF

ROBERT S. HULICK

My name is Robert S. Hulick. I previously submitted a verified statement as part of TTX's Application. I am submitting this rebuttal verified statement to address a variety of issues raised by parties that filed comments on the Application.

In Part I of my statement, I briefly address the arguments made by railcar lessors that TTX's pooling authority should be limited to intermodal flatcars. I explain how the multitude of efficiencies described in my previous statement apply to intermodal and non-intermodal cars alike. I also rebut Trinity Industries' assertion that TTX has somehow discouraged innovation in the rail industry. In fact, since its inception, TTX has been a major source for improvements and innovations to flatcars and related components.

In Part II, I address the claims made by Progress Rail, a major rail repair service provider, that repair and maintenance activities should be excluded from TTX's pooling authority. I explain why TTX has a repair and maintenance program and demonstrate just how crucial that program is to the efficient operation of TTX's flatcar pool. I also explain that TTX's repair and maintenance activities pose no threat to Progress Rail or other independent providers of repair and maintenance services.

I. RESPONSE TO COMMENTS BY LEASING COMPANIES AND TRINITY INDUSTRIES

A. TTX's Pooling Activities Benefit Intermodal and Non-Intermodal Flatcars

The leasing opponents in this proceeding have asked the Board to exclude non-intermodal flatcars from TTX's pool, arguing that TTX has not adequately demonstrated how its pooling of non-intermodal flatcars produces tangible benefits. In

making this assertion, these companies ignore the ample evidence that is already in the record.

The many benefits of the TTX pool that I described in my verified statement accompanying the Application are no less applicable to TTX's non-intermodal flatcars than they are to intermodal flatcars. I discussed at length (at pages 4-5) the holistic approach that TTX takes to minimize costs across the rail network for its entire fleet, not just for cars in intermodal service. I also described (at pages 8-25) how TTX's R&D efforts are directed at improving all car types, not just intermodal cars. For example, TTX has been a leader in extending the useful life of chain tie-down cars for military use. We have also developed a modified heavy-duty flatcar that can be quickly converted to function as a chain tie-down car in the event of a military mobilization. TTX also designed and conducted a test regime to evaluate the impact of extended service on multi-level flatcars, resulting in approval from the industry and the FRA to allow for a 65-year life, instead of the previous 50-year limit. Our innovations in railcar componentry often benefit non-intermodal cars and intermodal cars alike. For example, TTX championed a modified air brake hose height and developed a universal trolley mechanism for both intermodal and non-intermodal cars to prevent unwanted hose uncouplings. Similarly, we recently completed a multi-million dollar program to improve the ride quality of the industry's autorack fleet through better truck technology. The same truck technology is now applied to other types of equipment in our fleet.

TTX's repair and maintenance activities, which I discuss in more detail below, also benefit both intermodal and non-intermodal cars, and TTX's redeployment programs have led to substantial cost savings by converting and redeploying underutilized

cars to more productive non-intermodal service. *See* Hulick VS at 31-33. The leasing companies have conveniently ignored all of this evidence, but TTX's record of applying the benefits of pooling to the non-intermodal flatcars in TTX's fleet is impossible to dispute.

B. TTX is a Positive Force for Innovation

Trinity Industries argues that TTX does not have the same competitive motivations as individual railroads to innovate and that individual railroads will have fewer incentives to innovate to the extent they rely on TTX. In my initial verified statement, however, I explained (at pages 8-25) the key role that TTX plays in developing and, more important, implementing innovations that benefit the rail industry as a whole. TTX's large existing fleet of cars does not dissuade it from implementing useful innovations. To the contrary, the breadth of TTX's pool is a significant advantage, because TTX can redeploy older designs to more efficient uses, as I explained in my initial statement (at pages 31-33).

TTX spends millions of dollars on research and development activities to improve its fleet. These efforts have led to the improvement of existing car types for intermodal, automotive and other services, as well as the creation of entirely new car types, such as the Uni-Level car for transporting finished tractor-trailers and other large vehicles. *See* Hulick VS at 16-20. TTX has also spurred innovations in component design, such as yaw dampers, truck dampening systems, drawbar arrangements and articulated connectors. *See id.* at 22-23. At the same time, TTX is not an obstacle to innovation by railroads, car builders and others. I am proud that many of the car builders and equipment suppliers we

interact with echo this view.¹ Not only are others free to innovate outside the TTX pool, they have done so, often with TTX's active support. The RoadRailer and Iron Highway technologies are two recent examples. *See* Hulick VS at 25-26. Trinity mentions several others. Comments of Trinity at 15-18.

II. PROGRESS RAIL'S ATTACK ON TTX'S REPAIR AND MAINTENANCE FUNCTIONS

Progress Rail argues that TTX should not be permitted to maintain or repair its own cars. In seeking to eliminate these functions, Progress Rail either misunderstands or ignores how critical the maintenance and repair functions are to TTX's flatcar pool. Progress Rail's requested condition would destroy important benefits of the TTX flatcar pool and is completely unjustified, since TTX's role in repairing and maintaining flatcars does not pose any threat to Progress Rail or any other independent provider of repair and maintenance service.

A. Why TTX Has Repair and Maintenance Operations

The fact that TTX manages the repair and maintenance of its own cars is a natural outgrowth of TTX's role as a car owner. Just like any other owner of freight cars, TTX has an obligation to oversee the repair and maintenance of its cars so that they can perform safely and reliably on the nation's rail network. Decades of experience have taught TTX that it can best satisfy those obligations by developing an appropriate maintenance

¹ *See e.g.* Letter of the Port Authority of New York and New Jersey (modification of 48-foot well cars to carry international containers and modification of 48-foot spine cars to carry 53-foot trailers); Comments of SDDC, at 3, (development of dual-use heavy-duty/chain tie-down flatcar); Letter of JRC Transportation (shipment of luxury motor homes using the Uni-Level flatcar); Letter of Hyundai Intermodal (modification of 48-foot well cars to carry 20-foot and 40-foot international containers); Letter of Mazda North American Operations (improvements to autorack flatcars and equipment).

strategy that involves (1) its own shop facilities; (2) a supplemental network of TTX-authorized Independent Repair Facilities (“IRFs”), including shops owned and operated by Progress Rail, that follow TTX’s strict maintenance guidelines; and (3) running repairs performed as needed, in accordance with interchange rules developed by the Association of American Railroads (“AAR”), by TTX’s own strategically located field maintenance operations, as well as by railroads and contractors when TTX cars need attention elsewhere on the North American rail network.

There is nothing unusual about TTX’s active involvement in the repair and maintenance of its own cars. Railroads have long had substantial car repair and maintenance operations, because they own and rely upon properly-functioning freight cars to provide their transportation services. Most other significant railcar owners – including GE Railcar Services, GATX Rail, Union Tank Company, Trinity, and Greenbrier – operate their own repair and maintenance facilities. GATX Rail, for example, has six shops, nine rip track facilities, and six mobile facilities. Others have comparable repair and maintenance operations. I would expect that Progress Rail, with a fleet of 3,089 cars, routinely repairs its own cars at its ten shops, two rip tracks, and six ramp facilities. Although Progress Rail argues that repair and maintenance services should be off-limits to TTX, car owners’ involvement in these activities is a longstanding and widespread industry practice.

As I explained in my initial statement, TTX’s proactive role in maintaining its flatcars generates very concrete benefits for the rail industry and its customers. I am

gratified that so many shippers and other commentators recognize these benefits and have chosen to share their experiences with the Board.²

TTX's ability to repair and maintain its own cars is particularly important to achieving one of the key benefits that TTX's brings to the rail industry – minimizing disruption to the network because of equipment failure. As I explained in my initial verified statement, TTX does not wait for its cars to “fail” and then have them repaired by whichever repair facility happens to be nearby. Instead, it has implemented a forward-looking preventive maintenance approach that seeks to minimize the overall costs imposed by TTX's equipment on the rail network, including the operational disruptions associated with unplanned train stops and bad-ordered cars. Because it performs most of its own preventive maintenance and heavy repair, TTX can better implement this holistic, network-wide efficiency-maximizing approach. Interaction among TTX's car repair, engineering, and maintenance planning staffs is key to developing and implementing a sound maintenance strategy. TTX's maintenance workforce has a unique reservoir of in-depth knowledge of TTX's own flatcars and provides input that is pivotal in developing guidelines that result in more efficient maintenance practices. At its own facilities, TTX is motivated to do more than just fix what is broken. It maintains cars to avoid failure, and it reviews failures and develops the means to improve the repair procedure or component in order to reduce failures and their impact on the rail network. This preventive outlook has spurred a number of innovations for diagnosing and addressing maintenance issues, as I explained in my initial

² See, e.g., Letter of “K” Line America, Inc. at 2; Letter of Maersk Inc. at 2; Letter of the Port Authority of New York & New Jersey at 2; Letter of Yang Ming (America) Corp. at 1.

verified statement (at pages 29-30). Other private repair service providers, whose business depends on fixing failures, would not have the same incentives to maintain cars in an effort to reduce total network costs.

Progress Rail asserts that certain aspects of TTX's repair and maintenance practices are inefficient, but Progress Rail's statements are not accurate. It asserts that on occasion TTX has limited the number of repairs performed by independent providers and bypassed alternative repair facilities in order to perform the work itself. In fact, the vast majority (97 percent) of TTX equipment repair events occur wherever on the rail network a car is identified as needing repair or at the nearest available location. On the limited occasions when TTX directs cars to shop and bypasses a more-conveniently located repair facility, it has efficiency-related reasons for doing so. TTX bypasses more conveniently located repair facilities only when those facilities are not qualified to make the repair because they have not met TTX's quality, cost, and performance standards; when the car requires specific maintenance steps or modifications that cannot be undertaken by less experienced staff at authorized non-TTX shops; or when other facility or material issues require use of a different facility. These situations where TTX directs cars to its own facilities, while relatively small in number, involve significant dollar expenditures and are precisely the situations where TTX's own involvement in repair and maintenance delivers most of its value.

Progress Rail also claims that TTX's maintenance support staff inefficiently duplicates personnel already in place at TTX's owner railroads. TTX's centralized engineering and planning staff, however, is anything but inefficient. We administer our activities with one employee per \$26 million spent, a highly efficient ratio. Moreover, the

fact that TTX administers its own maintenance *avoids* the duplication that would exist if each railroad had to employ its own separate forces devoted to administer repairs, as would be necessary if TTX's cars were part of numerous separate fleets.

B. TTX's Repair and Maintenance Activities Do Not Threaten Competition

I next address Progress Rail's assertion that TTX is a "serious potential threat to competition" in the area of repair and maintenance. Comments of Progress Rail at 6. This claim could not be farther from the truth. As I discuss below, the independent repair market is robust, and TTX poses no threat to Progress Rail or the numerous other firms that are providing such services to the rail industry.

1. TTX Poses No Threat to Independent Repair Companies

There are several reasons why Progress Rail's concerns about competition are misplaced.

First, any suggestion that TTX's repair and maintenance activities threaten competition ignores the basic fact that TTX undertakes those activities only because it has *its own cars* to repair and maintain. TTX is not in the "business" of repair and maintenance in order to compete against Progress Rail or other independent providers. TTX's essential focus is and will remain on effectively repairing and maintaining our own fleet. TTX performs very few repairs on non-TTX cars. For example, in 2003, non-TTX car repairs, totaling around \$8.8 million, accounted for only five percent of TTX's overall repair activities at TTX's shops and field maintenance operations ("FMOs"). At these same facilities, by comparison, TTX performed approximately \$154 million worth of repairs on its own cars.

The non-TTX repairs that we do perform are merely incidental to the repair of TTX cars. Under AAR rules, railroads must arrange for the repair of freight cars on their lines that require attention, generally where the car is identified as “defective.” At locations where TTX has repair operations to serve its own fleet, it is often convenient and efficient for railroads to contract with TTX to repair non-TTX cars as well.

Second, even if TTX were an active “competitor” for the repair of non-TTX cars, it is hardly a threat to independent repair companies such as Progress Rail. TTX performs a very small share of all repairs and maintenance on railcars in North America, and an even smaller fraction when repairs of TTX’s own equipment are excluded.

Of the approximately 40 to 50 full scale railroad shops across the continent, TTX maintains only three. In addition, there are hundreds of other facilities at intermodal terminals, rip tracks and repair yards owned by railroads and independent companies, but TTX has only 35 FMOs, all of which are strategically located in areas where TTX cars are used most frequently.

Moreover, the business of railcar repair and maintenance is thriving for companies like Progress Rail. Progress Rail recognizes that there are over 125 independent entities providing repair services for railroad freight cars. Comments of Progress Rail at 2. Other providers include RESCAR, Inc., Trinity Railcar Repair, Transco Railway Products, and Millennium Rail, Inc. The number of general repair shops alone owned by independent service providers stands at approximately 250. *See id.* at 7. Many companies own multiple repair facilities across the country. For example, Progress Rail has at least 18 facilities in eleven states throughout the United States. Progress Rail added another repair location in Mira Loma, California, earlier this year, and recently was the successful bidder to establish a

repair operation at an intermodal facility in Rochelle, Illinois (prevailing over an alternative proposal by TTX).

Third, TTX has no incentive to undermine the existence or efficiency of independent repair service providers like Progress Rail, since it is an important *consumer* of their services. As I explained in my initial statement, TTX contracts with a network of 21 privately-owned repair shops (IRFs) to assist in repairing TTX cars. These shops were chosen through TTX's competitive selection process, which is based on quality, the ability to return cars to service quickly, and labor rates. All told, in 2003, TTX spent over \$62 million on independent repairs, representing around 40 percent of its shop maintenance and repair budget. Progress Rail performed about nine percent of TTX's independent repairs at three of its facilities.

TTX cars also receive running repairs at non-TTX facilities when cars need immediate servicing pursuant to AAR interchange rules and the nature of the repair does not dictate that the car be taken to a specific shop. These repairs, which take place outside of the IRF network and are billed under the AAR car repair billing regime, are performed for TTX by both railroads and private contractors. In 2003, Progress Rail accounted for 70 percent of all non-directed repairs on TTX equipment performed by private repair companies. Although railroads still perform most of the non-directed repairs for TTX (and other cars), Progress Rail's share of all non-directed repairs of TTX flatcars has jumped from 12 percent in 2002 to nearly 16 percent in 2003.

2. TTX's Repair and Maintenance Practices Do Not Exclude Progress Rail or Other Independent Repair Providers

Progress Rail makes several specific complaints about the exclusionary effect of TTX's repair and maintenance practices, none of which has merit.

a) *TTX's Establishment of FMOs Does Not Involve Unfair Competition Against Progress Rail*

A principal concern of Progress Rail appears to be TTX's practice of working with railroads to set up FMOs at strategically located intermodal terminals and other facilities through which TTX flatcars must then flow. As I explained in my initial statement, these operations have achieved significant efficiency gains and promise still further benefits as TTX continues to embrace advances in predictive maintenance techniques. Hulick VS at 27.

Equally important, TTX's FMOs do not exclude independent providers like Progress Rail. TTX has FMOs at only a relative handful – approximately 30 – of the 290 intermodal terminals in North America. Progress Rail and other independent providers have been quite successful at setting up similar operations at other locations, especially where TTX equipment is less prevalent.

Moreover, TTX FMOs exist only because they are efficiently positioned to repair *TTX* flatcars, not as competitors in the repair of other equipment. Repairs to non-TTX cars account for only ten percent of FMO repair activity and (as I describe above) are merely incidental to the principal role these operations play in maintaining TTX's high-quality intermodal and automotive flatcar fleets.

Nor does TTX have any "unfair" advantage over Progress Rail in setting up field maintenance operations at intermodal ramps or other rail facilities. Railroads typically award the right to establish an independent repair facility at railroad rip tracks and ramp facilities after a competitive bidding process. When TTX prevails in this process, it is because of the value it brings to car inspection and repairs as compared to other independent service providers. TTX submits bids only at those locations that will contribute to the

effective management of its flatcar fleet. TTX's bids are based on the volume of cars at a location, train schedules, hours of operation, services required, the planned investment in equipment, the required number of employees, the extent of repairs to TTX cars, and the extent of foreign repairs that might be performed on an AAR-billed basis. TTX's proposed fee reflects its underlying costs of doing business at the location up for bid. Railroads examine a variety of factors when awarding the bid, including the price they will pay for services and the quality of the bidder's past performance. The fact that railroads often (but not always) select TTX to establish such operations merely reflects the important role of TTX equipment at some facilities and TTX's value, not any unfair exclusion.

b) TTX Is Not Driving Down Repair Rates to Below Competitive Levels

Another of Progress Rail's complaints is that TTX has somehow driven down AAR time standards and labor rates, reducing the fees earned by Progress Rail. Comments of Progress Rail at 11. However, TTX does not establish these repair charges. Two AAR committees – the Arbitration and Rules Committee and the Car Repair Billing Committee – establish the time standards and labor billing rates that are used to charge for repairs. Major non-railroad owners of freight cars – currently including Greenbrier and GE Rail Services in addition to TTX – sit on these committees, along with railroad representatives. TTX is just one voice among many, and does not determine the outcome of this process. In fact, TTX would not have any interest in reducing repair charges to artificially low levels even if it did have control over the process. To the extent TTX repairs non-TTX cars (as it occasionally does), it is reimbursed at standard AAR billing rates – as are other repairers. It therefore has no incentive to push reimbursement rates below cost

Progress Rail also claims that TTX benefits from an unfair advantage because it can bill repairs to its own cars at “cost.” Comments of Progress Rail at 11. This assertion is at best confusing. When TTX repairs its own cars, it necessarily does so at its own costs. TTX does not bill repairs to *other* cars “at cost.” For most repairs, TTX charges the same rates that Progress Rail does, because it is reimbursed based on standard AAR car repair billing rates rather than TTX’s own costs. TTX may well have cost advantages in repairing those cars because of its own low costs, but those advantages stem from its own efficient and skilled workforce, not any “unfair” advantage. For other services not subject to AAR billing standards – such as air brake tests performed in connection with in-terminal inspections – TTX’s may well charge lower rates when it is more efficient than Progress Rail, but, again, those rates simply reflect whatever efficiencies TTX is able to bring to bear for those particular services.

c) *Progress Rail’s Concerns About TTX’s Auditing Services Are Unfounded*

Progress Rail argues that TTX gains unfair insights into pricing policies of independent repair companies through services it performs auditing repair bills on behalf of some railroads and private car owners. Comments of Progress Rail at 11-12. Nothing about TTX’s auditing services should cause any concern. TTX has provided railroads and others (including such private railcar owners as DuPont and ADM) with assistance in auditing repair bills since 1984. TTX has been successful in offering these services primarily because it has developed state-of-the-art computer systems that facilitate the entire audit and billing process. Customers respect TTX’s expertise in the maintenance auditing field.

TTX’s auditing services provide no unfair competitive advantage. First, most of TTX’s audits involve repairs that were performed at AAR billing rates, which are

published and widely available to anyone in the rail industry. To the extent TTX learns information about repairs billed in other ways, it is because *repair customers* have chosen to pass that information along to TTX, just as they could pass it along to Progress Rail or others. Indeed, Progress Rail itself is free to market its own auditing services.

Second, in providing auditing services, TTX has voluntarily instituted a set of firewalls around the auditors in order to avoid any appearance of a conflict of interest stemming from TTX's involvement in car repair. TTX's billing auditors are located in the Controllers' Department and are separated from TTX's Equipment Department, which operates TTX's rail repair and maintenance services. Moreover, the auditors are subdivided into even smaller groups, and no one group has access to all of the information regarding every customer.

* * *

TTX makes valuable contributions to the rail industry, and its pooling authority should be renewed without conditions. Our research and development efforts have led to improvements and innovations that cut across all types of flatcar and componentry. TTX's network-wide, holistic approach to repair and maintenance benefits both intermodal and non-intermodal flatcars, and, contrary to Progress Rail's assertions, those practices do not threaten competition, but only make the rail system more efficient.

VERIFICATION

STATE OF ILLINOIS)
)
COUNTY OF COOK) ss

ROBERT S. HULICK, Senior Vice President of Equipment for TTX Company,
being duly sworn, deposes and says that he has read the foregoing statement, knows the contents
thereof and that the same are true as stated.

Robert S. Hulick
ROBERT S. HULICK

Sworn to and subscribed before me
this 11th day of May, 2004.

Judith F. Henderson
Notary Public



My Commission expires 5/26/2007

BEFORE THE
SURFACE TRANSPORTATION BOARD

TTX Company – Application for Approval of Pooling
Of Car Service With Respect to Flatcars

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

**REBUTTAL VERIFIED STATEMENT
OF
JOSEPH P. KALT**

I. INTRODUCTION

I.A Witness Identification and Qualifications

My name is Joseph P. Kalt. I am the Ford Foundation Professor of International Political Economy at the John F. Kennedy School of Government, Harvard University. I also work as a senior economist with Lexecon, an FTI Consulting firm. I have previously provided a verified statement in this proceeding, focusing on the economics of TTX Company's (TTX's) pooling of flatcars. This original statement was attached to the Application of TTX.¹ My complete *curriculum vita* was included with my Verified Statement.

I.B Overview of Issues and Findings

In my Verified Statement, I presented findings regarding the implications of TTX's pooling of flatcars for the public interest. I concluded that TTX's pooling does not pose threats to competition that might have adverse effects on shippers, carriers, or car suppliers. Moreover, I found that TTX's pooling of flatcars produces demonstrable positive public benefits. These benefits arise from the network efficiencies of organizing, pricing, and distributing flatcars so

¹ Verified Statement of Joseph P. Kalt (hereinafter "Kalt V.S."), attached as Tab K to the Application for Reauthorization of the TTX Flatcar Pool, Finance Docket No. 27590 (Sub-No. 3), January 6, 2004 (hereinafter "TTX Application").

as to allow railroads (and, hence, shippers) access to a fungible fleet of cars when and where they are needed with a minimum of bargaining costs, free of prospective problems of opportunistic pricing and availability that could otherwise plague a non-pooled system. By producing these benefits, TTX's pooling can meet the shipping public's need for any given level of service with investment in fewer, more efficiently managed cars and a minimum of empty backhauling and repositioning. In addition, TTX's pooling allows for efficiencies and economies in maintenance, and overcomes "free rider" incentives that can otherwise impede innovation – innovation that has been clearly evident at TTX.

I have now been asked by TTX to analyze the submissions of intervenors in this reauthorization proceeding. For the most part, intervenors recognize that TTX is a highly efficient institution in the network industry that is railroading. Shippers and suppliers of related services (such as port operators) quite clearly understand that the flexibility and minimization of transaction costs and operational hassle that pooling of flatcars allows is to their benefit.² Railcar manufacturers (who economic theory says *might* favor a system in which the railroads who are TTX's owners would have to purchase their flatcars individually) also support TTX's reauthorization, consistent with recognition that TTX's efficiencies enhance the efficiency of rail freight service overall and encourage its expansion relative to other modes of freight transportation.³ That relative expansion increases the demand for flatcar manufacturers' business.

Notwithstanding widespread recognition of the benefits produced by TTX's pooling of flatcars, a number of intervenors voice concern about the proposed duration of TTX's reauthorization.⁴ TTX has gone through multiple

² See, for example, Letters of The Port of Los Angeles, China Shipping (North America) Holdings Co., Ltd., and Canadian Tire Corporation, Ltd.

³ Comments of Trinity Industries, Inc. and The Greenbrier Companies; Letter of Johnstown America Corporation; and Brief of National Steel Car Limited.

⁴ These parties are the leasing companies CIT Rail Resources, C.K. Industries, Inc., First Union Rail Corporation, GATX Rail, General Electric Railcar Services Corporation, and

rounds of authorization and reauthorization since its original application and approval in 1974. In each case, the Surface Transportation Board's (hereinafter "the Board") predecessor determined that TTX's pooling of flatcars serves the public interest and warrants authorization. TTX's current proposal would not fundamentally alter the terms of authorization granted in the past, and it eschews provisions (such as car assignment and allocation⁵) that have been controversial in the past. Accordingly, TTX now seeks extension of authorization for a term of fifteen years. A number of intervenors, however, seek here to limit authorization to five or ten years. Such a limitation would be inconsistent with the public's interest.

Railroad flatcars, as well as investment in related innovation, maintenance facilities, and the like, are typically long-lived. When TTX's flatcar pooling has already repeatedly passed regulatory muster, introducing uncertainty and ambiguity into the mid-stream future of those investments by requiring TTX pooling reauthorization on relatively short cycles discourages efficient investment decision-making without a reasonable prospect of offsetting regulatory benefits. It would be naïve to fail to recognize that the occasion of reopening regulatory processes such as reauthorization of TTX's pooling can well serve the private interests of intervenors, while being wholly inconsistent with the public's abiding interest in a healthy and efficient rail transportation system: Reopening regulatory processes can provide all sorts of intervening parties with the opportunity to seek self-interested settlements, concessions, and regulatory requirements from an applying party – TTX – which has durable and often sunk capital at risk. Providing relatively frequent bites at the regulatory apple in this case is poor public policy.

Mitsui Rail Capital, LLC, and also Trinity Industries, Inc., The Greenbrier Companies, Pacer International Inc., the North American Corporate Logistics groups of DaimlerChrysler Corporation and Ford Motor Company, and Progress Rail Services Corporation.

⁵ See TTX Application at 42-43 n. 29, and at 49, n. 38. See, also, Reardon V.S. at 8, attached as Tab F to TTX Application.

The few protests that assert economic grounds for blocking or severely altering TTX's request for authorization come from companies that lease flatcars and/or finance the leasing of flatcars.⁶ Curiously, the centerpiece of these parties' complaint is that TTX's pricing of its sales of flatcar service is somehow too *low* and, therefore (these protestors erroneously claim), TTX should not be provided antitrust immunity, but should somehow engage in bilateral price negotiations with its owners to establish car hire rates.⁷ These lessor intervenors do not – and could not credibly or coherently – assert that TTX is engaged in predatory pricing against them. As I discuss at length below, after wading through lengthy (albeit, economically contentless) argument, it is clear that these parties' complaints amount to the complaints of competitors that TTX is too efficient for their liking. They present no credible or even coherent argument that TTX is on the verge of creating harm to competition or other economic burden. While it is understandable that these parties would see private benefit in shackling TTX's efficiency, doing so would not be in the public interest.

A number of the lessor intervenors also call for the Board to limit TTX's pooling authority to intermodal flatcars and, perhaps, autorack flatcars.⁸ Focusing attention on centerbeam cars, these intervenors assert that benefits which demonstrably flow from TTX's pooling of intermodal flatcars are not present from pooling non-intermodal flatcars in sufficient magnitude to overcome threats to competition purportedly attendant to pooling. Yet, these

⁶ See Comments of Bombardier Capital Rail Inc., CIT Rail Resources, C.K. Industries, Inc., D.J. Joseph Co., First Union Rail Corporation, GATX Rail, General Electric Railcar Services Corporation, and Trinity Industries, Inc.; see also Letter of Mitsui Rail Capital, LLC. A similar argument, to the effect that TTX's efficiency and effectiveness in providing maintenance puts non-TTX maintenance providers at a competitive disadvantage, is asserted by Progress Rail Services Corporation.

⁷ See, for example, Comments of CIT Rail Resources at 10-11.

⁸ See, for example Comments of General Electric Railcar Services Corporation and First Union Rail Corporation.

assertions overlook the operational, maintenance, and risk-reducing benefits of pooling of non-intermodal flatcars, and the purported threats to competition are not coherently identified. In fact, the evidence indicates that pooling of non-intermodal flatcars such as centerbeams does yield efficiencies of utilization and investment-enhancing risk allocations that inure to the public interest. At the same time, imagined threats to competition are not credible.

Let us now turn to examination of the basic economics of pooling and the challenges to those economics presented by certain intervenors.

II. TTX'S APPLICATION FOR REAUTHORIZATION AND INTERVENOR RESPONSES

II.A The TTX Flatcar Pool Resolves Problems of an Integrated Rail Network

The TTX flatcar pool provides an improved solution to a problem endemic to the rail industry – the coordination of investment, operations, and standards across a common network. As a shared common network, the rail industry must develop and establish standards to which shippers and railroads can efficiently adapt. This frequently requires significant investment by railroads, shippers, or both. As a common network, the rail industry must also overcome the limits of bilateral negotiation and contracting to coordinate operations efficiently. This need for coordination makes it vital that TTX receive antitrust immunity that enables TTX to establish a common price for all of its cars of a given type.⁹

TTX ownership and operation of the flatcar pool creates benefits that allow participating railroads to avoid many of the problems that plague efficient

⁹ See discussion of bilateral negotiations in Kalt V.S. at 6-7. With respect to the foregoing citation, intervenor CIT Rail Resources' expert, Dr. Tye, vociferously asserts that I (and TTX in its Application) failed to discuss antitrust immunity for TTX's setting of a common price at which it provides its flatcars to owners/users (see, e.g., Tye V.S. at 3, 8, 11, 13). The demand by Dr. Tye and CIT Rail Resources that the Board end TTX's (and its owners') antitrust immunity is a demand for a regime of bilateral negotiations over price and service conditions. Notwithstanding assertions that I have not examined the efficiencies of common pricing of TTX's fleet, my examination of the inefficiencies of bilateralism is the discussion of the issues Dr. Tye subsumes under his use of the term "antitrust immunity."

operation, use, maintenance, investment in, and innovation of a shared network system. The most obvious are the benefits of railroad- and shipper-neutral placement of flatcars that is accomplished by TTX. By allowing a shared pool of fungible equipment to flow efficiently to loading points when empty, regardless of shipper and railroad, TTX maximizes utilization and overcomes inefficiencies otherwise generated by individual incentives of railroads trying to coordinate the placement of railcars based on individual ownership and car hire rates set via layers of bilateral negotiations.

The benefits generated by TTX's ownership and operation of the flatcar pool go far beyond the significant benefits of improved operational efficiency. More efficient use of equipment reduces the capital needs of the rail industry by permitting railroads to meet any given level of shipper demands with fewer railcars. TTX, through its ownership of the flatcar fleet, also diversifies and reduces the risk that individual railroads assume in ownership of rail equipment. Variation in demand by shippers is not perfectly in sync across railroads. Peak demand by shippers on railroad A for a certain type of equipment will not necessarily occur at the same time as peak demand on railroad B. By providing access to and indirect ownership in a common pool of various types of flatcars, TTX provides insurance to railroads, in the form of access to equipment, against demand fluctuations. Like insurance, diversification by TTX reduces the risk to each railroad of equipment underutilization and thus the risk associated with the acquisition of equipment. Alternative forms of risk diversification may be possible, but any alternate form would require the assumption of risk by some third party and/or numerous bilateral arrangements among the railroads. Successful pooling avoids the problems and costs of these alternative arrangements. The attendant benefits reduce the need for individual railroads to self-insure by investing in larger individual fleets – the cost of which would ultimately have to be borne by the shipping public.

Indeed, these kinds of insurance benefits apply to TTX's pooling of specialized non-intermodal flatcars (like, for example, chain-tiedown equipment utilized by the military and certain industrial equipment shippers) that do not require the same kind of free-flowing fungibility as intermodal flatcars, but that do require a supply of cars be available for shipments that are idiosyncratic in their geography and timing. Much like a community fire department, the individual may not know when service is going to be needed and each might build the capacity to self-supply service, but it saves resources to contribute jointly to a pooling of resources to meet idiosyncratically occurring needs. Mutual insurance pools are common and efficient adaptations under such circumstances.

TTX ownership and pooling of flatcars also overcomes free rider and commitment problems that arise when railcars are not owned and priced by the pool. Without TTX ownership and common pricing, when demand is high, individual railroads have incentives to withdraw their cars from the pool in order to capture the full benefit of the railroad's ownership. Thus, in the absence of ownership by the pool, the high-demand periods during which the operational efficiencies of the pool are most relevant for ensuring optimal utilization of railcars are the times at which the pool may be least effective due to lack of commitment by individual railroads and the friction of bilateral negotiations to price and distribute flatcars.

TTX flatcar ownership and common pricing under its antitrust immunity make efficient pool operation possible. Common pricing by TTX of all of its cars of a given type makes those cars economically fungible. In the absence of uniform pricing for economically equivalent equipment, railroads would no longer be indifferent to the cars that the pool provides to them. Railroads would have the incentive to utilize cars with low car hire rates and turn back cars with higher rates. Likewise they would have the incentive to charge rates as high as

possible for cars they contribute so long as that does not lead to too low utilization or high turn-back rates by the other railroads. During periods of peak demand, a given railroad could well find itself with the ability to opportunistically drive "hard bargains," inflicting friction and transaction costs on the system in the process. With bilaterally established prices, pool-provided cars would no longer be economically interchangeable from the railroads' points-of-view, and the ability of the pool to optimally deploy railcars would be reduced. While some limited amount of price differentiation may not doom a railcar pool, uniform pricing to all railroads of TTX-owned and managed cars permits pool operation that focuses solely on the efficient utilization of the railcar fleet.

Similarly, were individual railroads solely responsible for the maintenance of railroad-owned cars in the pool, they would have the incentive to shirk on their maintenance responsibilities, as the benefit of the maintenance accrues to all members of the common pool, but the costs are incurred by each individual railroad. This mismatch of costs and benefits requires active monitoring and enforcement by the pool and/or inefficiently low levels of maintenance. A comparable incentive arises in terms of the quality of cars that individual railroads contribute to a pool, when the pool does not own the cars. Railroads have the incentive to contribute their lowest quality and most poorly maintained cars to the pool (since the burdens of low quality would be partially shifted to others), while retaining the higher quality cars for their own use. The TTX flatcar pool has successfully avoided these problems common to pools in which equipment is not owned, maintained, and controlled by the pool operator.¹⁰

TTX has the incentive to engage in research and development and innovative activity that benefits the whole rail industry that would not be

¹⁰ See Wells Rebuttal V.S.

hire rates.¹⁴ The efficiencies that have been realized by TTX have not been simply captured by TTX: TTX rates have fallen by more than 25% since 1994.¹⁵

While not limited to intermodal traffic, the public benefits derived from TTX's ownership and operation of the pool of intermodal flatcars is universally recognized.¹⁶ Even those who otherwise request modifications to facets of TTX's pooling application readily acknowledge the public benefits of TTX's pooling of intermodal equipment.¹⁷ As I discuss in more detail below, the pooling of non-intermodal flatcars by TTX also generates significant public benefits and is in the public interest, in contrast to the claims of a small subset of intervenors.

II.B Intervenor Response to TTX's Application

The response to the application of TTX for approval of pooling service of flatcars is distinctly positive. Not a single intervenor outright opposes reauthorization of the pooling authority. This near consensus arises from the undisputed and widespread public benefits that the TTX flatcar pool has provided. The parties that would be expected to object if TTX pooling were not in the public interest—shippers or railcar producers and their suppliers—almost universally support the TTX application with little or no modification.

While not in the economic interest of TTX or its railroad owners, to the extent that TTX's pooling authority and antitrust exemption permitted the

¹⁴ See Wells V.S. at 10-22, attached as Tab G to TTX Application; Wise V.S. at 8-16, attached as Tab I to TTX Application.

¹⁵ Wells V.S. at 20.

¹⁶ After reviewing all of the filings and responses, I have not identified any that claims pooling of intermodal flatcars by TTX fails to deliver public benefits.

¹⁷ "There is no doubt that TTX's operation of the flatcar pool to date has served the public interest." Comments of Trinity Industries, Inc. at 6. "There appears to be some consensus that there is an efficiency in a 'free running' fleet of intermodal flat cars (to serve what was historically called TOFC/COFC) that can move about the various railroads, either in interline service or in response to fluctuating demands by the carriers." Tye V.S. at 12, attached to Comments of CIT Rail Resources. "... First Union submits that the Board can make the finding ... that pooling 'will be in the interest of better service to the public or economy of operation'—only to pooling of intermodal flatcars and auto-rack flatcars." Comments of First Union Rail Corporation at 18.

exercise of market power by restricting car supply and raising car hire rates, shippers would be expected to object.¹⁸ Shippers and others that rely on efficient rail service for the functioning of their business, however, overwhelmingly support the application without modification. Support for TTX's reauthorization comes from North America's largest association of rail shippers – NIT League – and is most clearly expressed in the intermodal sector, where TTX has historically been most active. The large intermodal marketing groups—Hub Group and Cornerstone Systems—and the large trucking companies that depend on railroads for efficient intermodal service actively support the TTX application.¹⁹ Nine of the largest international shipping organizations, which are collectively responsible for shipping millions of containers a year, actively support the application without modification.²⁰ Eight of the largest U.S. container ports, which collectively account for almost three-quarters of U.S. waterborne foreign trade in containerized cargo, actively support the TTX application without modification.²¹

Shipper support is not limited to intermodal shippers alone. The National Industrial Transportation League, which is the largest representative organization of shippers of all types, supports the application without

¹⁸ As discussed in the next section, TTX lacks both market power in the supply of cars and the incentive to restrict car supply.

¹⁹ Letters of J.B. Hunt Transportation, Schneider National, Inc., Yellow Transportation, Dart Transit Company, and Intermodal Association of North America (IANA), which represents all segments of the industry. Only Pacer International Inc., while supporting reauthorization, requests that the authorization period be less than the 15 years requested by TTX and that the Board deny TTX's request for clarification of its authority to alter its operations within the boundaries of the Pooling Agreement.

²⁰ Letters of APL (American President Lines), China Shipping, Hanjin Shipping Company, Hyundai Intermodal Inc., "K" Line America, Inc., Maersk, NYK Line (North America) Inc., OOCL Inc., and Yang Ming (America) Corp.

²¹ Letters of the Ports of Long Beach, Los Angeles, Oakland, Seattle and Tacoma, the Port Authority of New York and New Jersey, South Carolina State Ports Authority, and Virginia International Terminals, Inc., U.S. Waterborne Freight Statistics, http://www.marad.dot.gov/Marad_Statistics/C-Port-Tot.html

modification.²² Similarly, large shippers in the automotive and forest product sectors also support the application without modification.²³ The Port of Los Angeles, the largest container port in the U.S., sees TTX as spurring the ability of the Port and the nation to innovate and attract international trade.²⁴

A potential concern that has been raised in the past is the risk of monopsony power in the buying of railcars by TTX, by which it would artificially restrict the quantity of railcars purchased in order to drive prices of railcar purchases. This would inure to the detriment of railcar manufacturers and parts suppliers. Unlike in 1988, however, no party has raised a claim in the present proceeding that TTX possesses or has exercised market power in the purchasing of railcars. All four of North America's flatcar builders support reauthorization of the pool, some without modification.²⁵ Greenbrier, which claimed monopsony by TTX in 1989, acknowledges that TTX has not engaged in monopsonistic behavior.²⁶ Similarly, Trinity, a major railcar builder and lessor, recognizes that TTX has not achieved monopsony power in the buying of railcars and supports reauthorization of the full scope of TTX's flatcar pooling activities.²⁷ Moreover, numerous suppliers of railcar components, who presumably would be harmed by exercise of any monopsony power by TTX, also support the application without modification.²⁸ Support from these parties is not surprising for, as previously shown in *Kalt V.S.*, TTX lacks monopsony power in

²² Comments of The National Industrial Transportation League.

²³ Letters of Mazda North American Operations, Georgia Pacific Corporation, and Longview Fibre Company.

²⁴ Letter of Port of Los Angeles.

²⁵ Letter of Johnstown America Corporation and Brief of National Steel Car Limited.

²⁶ "In particular, Greenbrier is pleased to tell the Board that Greenbrier does not believe that TTX has abused its market power. Contrariwise, TTX has set published, objective standards for awarding business to suppliers and has adhered to those standards, providing needed capital to the industry." Comments of The Greenbrier Companies at 2.

²⁷ Comments of Trinity Industries, Inc. at 14.

²⁸ Over twenty rail equipment suppliers submitted letters supporting the TTX Application.

the purchasing of rail freight cars.²⁹ The closest that suppliers come to claiming TTX monopsony power to be a problem is to assert that TTX may in the future have such power (and thereby asserting the propriety of a shorter term to TTX's authorization than applied for by TTX).³⁰

Tellingly, most of the requests for Board-composed conditions on TTX's re-authorization arise from a group of railcar lessors. Railcar leasing is a highly competitive business, with numerous financial institutions, specialized companies, and manufacturers that lease railcars.³¹ Leases can encompass a variety of different contractual relationships. For example, railcar leases include finance leases (under which the lessors are effectively lenders who provide financing) and operating leases (which tend to be shorter and under which the lessor may assume more active involvement in management of the railcars).

Railcar lessors are both potential suppliers to and competitors of TTX. TTX in the past has leased railcars, and neither TTX nor its owners have incentives to eschew otherwise economically preferable leasing in favor of ownership. Lessors also lease railcars to railroads and private shippers—leasing represents an alternative to direct purchase by these parties. Thus, flatcar services can be derived from railcars purchased and owned by railroads or private parties, leased from leasing companies, or by utilizing the TTX flat car pool. As competitors to TTX in the provision of flatcar services, these parties' economic interests lie in limiting TTX's efficiency and effectiveness.

Not all leasing companies request modification of TTX's application; indeed certain railcar manufacturer-leasing companies support the application

²⁹ Cite Kalt V.S. at 12-14.

³⁰ See, for example, Comments of Trinity Industries, Inc. at 13-14 and Trinity's experts in Salop, *et al.* V.S. at 7 and 39.

³¹ See, for example, Comments of Trinity Industries, Inc. at 10.

as filed.³² The challenges posed by those who do object fall into three general categories:³³

- Lessors are purportedly unable to compete successfully with TTX in the provision of flatcar services, as the efficiencies generated by the TTX pool allow TTX to charge rates lower than lessors can profitably charge.³⁴ Lessor intervenors assert that the putatively low rates charged by TTX will harm competition for the provision of flatcar services. As such, TTX should not be provided antitrust immunity in the pricing of flatcars.
- Public benefits from non-intermodal flatcars fail to justify the provision of pooling authority to TTX for such cars.³⁵
- Pooling authority for TTX should be reviewed by the Board more frequently than the 15 years requested by TTX and this authority should not continue in an "evergreen" fashion. Moreover, TTX should not be allowed to modify contractual terms without Board approval.³⁶

When challenges regarding anticompetitive impacts of the actions of some regulated party are raised by competitors who suffer from that party's efficiency improvements, while at the same time suppliers and customers who benefit from that party's efficiency improvements support that party, the challenges must be viewed with particular caution and suspicion. I now address the challenges that have been put forth.

³² Letter of Johnstown America Corporation and Brief of National Steel Car Limited at 8.

³³ Several intervenors object to assignment and allocation of equipment. Since TTX is not asking for assignment and allocation authority, I do not address these "objections."

³⁴ Comments of CIT Rail Resources at 11 and First Union Rail Corporation at 21-22.

³⁵ Comments of Bombardier Capital Rail Inc. at 3, CIT Rail Resources at 7, C.K. Industries, Inc. at 4, First Union Rail Corporation at 18, GATX Rail at 4 and 8, General Electric Railcar Services Corporation at 3, and North America Freight Car Association at 4; see also Letter of Mitsui Rail Capital, LLC.

³⁶ Comments of CIT Rail Resources at 16, C.K. Industries, Inc. at 4, First Union Rail Corporation at 11, GATX Rail at 4 and 12, General Electric Railcar Services Corporation at 4, North America Freight Car Association at 4, and Trinity Industries, Inc. at 18 ; see also Letter of Mitsui Rail Capital, LLC.

III. FLATCAR POOLING, COMPETITION, AND ANTITRUST IMMUNITY

III.A Assessing Intervenor's Challenges Re: Seller Market Power in Flatcars

As noted, a number of lessor intervenors urge the Board to end TTX's antitrust immunity. This immunity enables the railroad owners of TTX to establish through TTX a common set of car hire rates rather than having rates set by the individual railroad for the cars each supplies to the TTX pools. Citing to the requirements that the Board consider both (i) the benefits of TTX's pooling to the public or the economy of rail system operation and (ii) any prospect that pooling will unreasonably restrain competition,³⁷ various lessor intervenors assert some version of the claims that TTX's establishment of common car hire rates for given types of flatcars constitutes "collective price fixing"³⁸ and that TTX "dominates the flatcar market" as a seller.³⁹

These claims are economically incoherent and unsupported by any evidence as to TTX. It is true that seller price fixing and market power are indeed matters of general public policy concern. A seller with market power has the ability to profitably raise and sustain prices in a marketplace by restricting supply,⁴⁰ thereby harming buyers of the product or service in question and reducing the overall efficiency of the economy. However, the claims by lessors against TTX's antitrust immunity are not coherent claims of seller price fixing. Having created the spectre of seller market power and chastised the Board for ignoring it if it grants TTX's application, the challenging lessor intervenors actually take seller market power in a novel direction. Specifically, the purported problem with TTX's pricing (and related, purportedly "preferential"

³⁷ See, e.g., Comments of CIT Rail Resources at 4 and Comments of First Union Rail Corporation at 15.

³⁸ Comments of CIT Rail Resources at 2.

³⁹ Comments of CIT Rail Resources at 11 and 14.

⁴⁰ U.S. Department of Justice, 1997 Merger Guidelines at 16.

terms and conditions for its customer/owners⁴¹) is asserted to be that TTX's car hire rates are *too low*. CIT Rail Resources asserts that TTX's rates are "below market."⁴² Characterization of antitrust immunity for TTX's pricing of car services as "collective price fixing"⁴³ strains to put the label "price fixing" onto the fact that TTX is a company that sets prices for what it sells – just like firms all across the economy. Certainly, we are not to worry that TTX is engaging in price fixing against its customers – who are its owners. It is equally implausible that the collusion that the label "collective price fixing" conjures up is a policy concern here. As a general matter, a firm seeking to sell at *lower* prices does not need to conspire with competitors to get its low price to stick with customers.⁴⁴ This is in contrast to the case of a firm trying to set a *higher* price in an otherwise competitive market: customers can turn away from a firm's unilateral attempt to raise its price above competitive levels unless other competitors explicitly or implicitly cooperate and raise their prices, too. This "turning away" (and its threat) by customers is the source of competitive discipline on attempts to set above-competitive prices. A firm wanting to lower its prices confronts no such "discipline" and does not need collusion to achieve its goal; customers like lower prices.

Concerns about seller market power being used to *depress* prices can raise public policy regarding competition only in quite specific circumstances; such concerns with respect to TTX railcar rates are not plausible or economically coherent. Plausible competitive concerns arise only with predatory pricing, by which a seller prices below its costs in the short-run in order to drive competitors from the market and then recoups such losses in the future by raising prices to above competitive levels once it has succeeded. In this case, however,

⁴¹ Comments of CIT Rail Resources at 3, and attached V.S. of Stephen McClure at 8.

⁴² Comments of CIT Rail Resources at 11. See, also, Tye V.S. at 22 and McClure V.S. at 3. Also, Comments of First Union Rail Corporation at 8-9.

⁴³ Comments of CIT Rail Resources at 2.

⁴⁴ Particularly when predatory pricing is not involved – and none is coherently asserted here.

challenging intervenors do not assert, and certainly do not demonstrate, that TTX is pricing car hire below cost. Moreover, for predation to have a reasonable chance of success, the seller must be able to drive out competitors and, when rates are raised in the future, prevent new competition from driving those rates back down. As the lessors acknowledge, railcar leasing is a business with many current and potential competitors of multiple competencies; they are experienced and sophisticated in leasing with access to large amounts of capital. It is implausible that TTX could preclude future competition from railcar lessors in the face of above competitive rates.

To the extent intervenors insinuate predatory pricing on the part of TTX, their insinuations are not economically coherent. The railroads are the customers from whom a predatory TTX would have to recoup its investment in predation – by eventually raising car hire rates above competitive levels. It is not economically credible to claim that TTX owners are allowing TTX to engage in predation so that TTX can subsequently exercise monopoly (seller) market power against those same owners.

It is clear that the complaints of TTX's competitors that its rates are too low are complaints about TTX's efficiency. Trinity Industries' experts say this most openly: "TTX's current Application reflects its understandable pride in the countervailing efficiencies it has achieved through its successful operation of the flatcar pool";⁴⁵ the problem is that this efficiency puts its competitors at a "competitive disadvantage."⁴⁶ As CIT Rail Resources' expert puts it: "... [TTX's] gains are taken out of the hides of competitors" through TTX's attractive pricing and "preferential" service terms.⁴⁷ Trinity's "solution" to this "problem" (albeit,

⁴⁵ Comments of Trinity Industries, Inc. at 12.

⁴⁶ Comments of Trinity Industries, Inc. at 11.

⁴⁷ Tye V.S. at 6. The extensive discussions of "preferential service" provided to TTX by its owners and characterization of such provision as being "free" (*per* the Comments of CIT Rail Resources at 15, North America Freight Car Association at 5, First Union Rail Corporation at 19-20, and General Electric Railcar Services Corporation at 3) are both factually

Trinity is apparently not conditioning its support for TTX's reauthorization on the matter) would be to require TTX to take other, non-owners into its flatcar pool.⁴⁸ CIT Rail Resources' (and a number of other lessors'⁴⁹) "solution" to this "problem" would be to destroy the efficiencies of TTX by, effectively, destroying its flatcar pooling. Neither "solution" bears up under scrutiny. Let us examine these proposed "solutions" to the fact that TTX is so efficient.

Flatcar Pooling without TTX Ownership: Trinity's and its experts' central assertions are that TTX has, indeed, created substantial efficiencies through its operation of the flatcar pool, but that achieving such efficiencies is "probably not dependent on" TTX owning the cars it manages.⁵⁰ Hence, the purported competitive disadvantage suffered by those not as efficient because TTX could be eliminated by allowing other flatcar suppliers (e.g., lessors like Trinity) to put their own cars into the pool for TTX to manage, but not own.⁵¹ In the view of Trinity's experts, "few, if any, additional efficiency benefits result from TTX *railcar ownership*."⁵² In this view apparently, TTX would become much like an electric system's Independent System Operator (ISO) or BritRail as the manager/operator of traffic scheduling and movement by independently owned rolling stock companies having "open access" to BritRail's network system of tracks and switching and maintenance yards. Yet, the experience of such regimes in which ownership is divorced from management and operations is

erroneous, as demonstrated in *Wells Rebuttal V.S.*, and also represent egregious errors of economic understanding. The owners' treatment of such elements as storage of idle TTX cars, movements for relocation, and the like, would not represent provision of "free" services to TTX. They would represent how the owners have chosen to allocate costly services among pool participants. If the provision of such services within the pool would enable TTX to offer more competitive prices, then that would further reflect the efficiency of the pool.

⁴⁸ Comments of Trinity Industries, Inc. at 11.

⁴⁹ See, e.g., Comments of First Union Rail Corporation at 8-9, 23-24; see also Comments of Bombardier Capital Rail Inc. and C.K. Industries, Inc., and Letter of Mitsui Rail Capital.

⁵⁰ Comments of Trinity Industries, Inc. at 8.

⁵¹ Comments of Trinity Industries, Inc. at 11.

⁵² *Salop, et al. V.S.* at 5 (emphasis in the original).

that, when the shared network of the system needs capital investment, such systems fall far short of hoped-for results.

Under the “restructuring” of the U.S. electric power sector, for example, shippers of power are granted open access to the network of long distance powerlines without relinquishing ownership of their power plants to the ISO; a primary and oft-noted difficulty that such a regime has encountered is the securing of investment to expand the shared network of power lines and overcome transportation bottlenecks.⁵³ Similarly, BritRail has encountered notable difficulty in attracting investment into the shared system of tracks, to the point of crisis.⁵⁴ The underlying problem is one of free riding: Because open access regimes invariably come with non-discrimination rules, individuals, who might otherwise invest in assets that they own and receive returns on, face the common experience of having non-investors being given access to and benefiting from their individual investments. This dampens each individual participant’s willingness to contribute to system upkeep, expansion, and innovation.

TTX could certainly be susceptible to such problems of underinvestment under a regime of non-centralized ownership and “open access.” Such assets as maintenance systems tailored to the needs of its standardized equipment and its operating characteristics, investment in innovation in standardized equipment,⁵⁵ information technology systems that accomplish goals of efficiently moving cars to where they are needed, cars that are needed to relieve shortages, and the like

⁵³ For a summary of problems and recent experience see, Federal Energy Regulatory Commission, Docket No. MO4-2-000, *State of the Markets Report: Assessment of the energy markets for the period January 1, 2002 through June 30, 2003*, Staff Report by the Office of Market Oversight and Investigations, March 2004 at 93-95.

⁵⁴ See, e.g., Jose Gomez-Ibanez, *Regulating Infrastructure: Monopoly, Contracts and Discretion* (Harvard University Press, 2003), esp. chapters 10-13.

⁵⁵ Trinity Industries, Inc.’s experts expend considerable effort discussing innovations *not* participated in by TTX. (See Salop, *et al.* V.S. at 18-22.) Yet, this is a red herring: TTX appropriately invests in the kinds of innovation that improve flatcar *network* operation and management. See Hulick V.S. TTX is not asserting that it invests in each and every type of innovation that might be pursued.

are shared by the owners of the system, with each able to capture revenues from the resulting improvements.

In fact, cases of non-centralized ownership cited by Trinity and its experts in support of the assertion that TTX's efficiencies do not result from centralized TTX ownership differ in material ways from the TTX flatcar pool. Cases of less-than-desired performance from non-centralized ownership pools are quite evident.⁵⁶ Trinity and its experts cite, for example, the autorack car pool operated by TTX and a not-yet-launched intermodal container chassis pool. In the former case, actual experience shows concerns about underinvestment in autoracks. DaimlerChrysler and Ford's primary concern in the TTX reauthorization does not concern TTX primarily, but rather that recommendations from a computerized model developed by the pool for the sizing of the autorack fleet are not adequately reflected in investment in upgrading and expanding the autorack fleet by individual railroads and other investors.⁵⁷ Thus, the concern expressed about underinvestment and under-capacity in the autorack pool is just the type of problem that a centrally-owned pool like TTX's flatcar pool solves. Moreover, to the extent the autorack pool achieves highly efficient utilization of pooled racks and the cars to which racks are attached, it does so in significant part because both the racks and the cars are commonly priced: the cars are distributed through the TTX flatcar pool and the racks are distributed under a fee schedule established by the AAR under Board-granted antitrust immunity.⁵⁸

In the chassis example, there in fact is no pool, as Mr. Wells explains in his Rebuttal Verified Statement. TTX merely assists the railroads in tracking

⁵⁶ In a similar vein, examples of other pools without centralized ownership cited by First Union Rail Corporation at 24 are largely examples of pools operated on and by an individual railroad.

⁵⁷ Letter of the North American Corporate Logistics groups of DaimlerChrysler Corporation and Ford Motor Company

⁵⁸ See Wells Rebuttal V.S.

the location of their chassis. TTX has yet to begin managing the distribution of chassis, in part because railroads have encountered difficulty reaching bilateral agreements allowing the sharing of one another's equipment.⁵⁹ Another example cited for non-centrally-owned equipment pools by Trinity's experts (i.e., Port of Hampton Roads' proposed mandatory chassis pool for those storing chassis at the port⁶⁰) is being created by an entity that enthusiastically supports the application of TTX as filed, seeing TTX's pooling as "vital to our port and the national transportation network."⁶¹

Experience with not-centrally owned pool fleets, as in the case of Fleet Management, Inc.'s (FMI) attempt in the 1980s to operate pools of paper-grade and refrigerated boxcars, shows that they fall prey to precisely the kinds of problems noted above. FMI's manager has noted:

"Because FMI owned no cars, it relied entirely on contributions of cars from its participants. The railroads were willing to participate as long as their obligations were minimal, but they were never willing to make a serious commitment to the pools, particularly when their short-term economic interests conflicted with the broader needs of the pool... [Such] actions created extreme inefficiencies in the network. Fewer cars were available, and they were required to travel further for each load.

Because it did not own the cars, FMI also had no means of enforcing its car movement directives. On occasion, railroads would fail to respond to a directive...

An especially serious problem resulted from the fact that FMI did not manage or control light repairs, heavy repairs, preventative maintenance, or modifications of cars in its pool, as would an owner. The railroad members of the pools were not enthusiastic

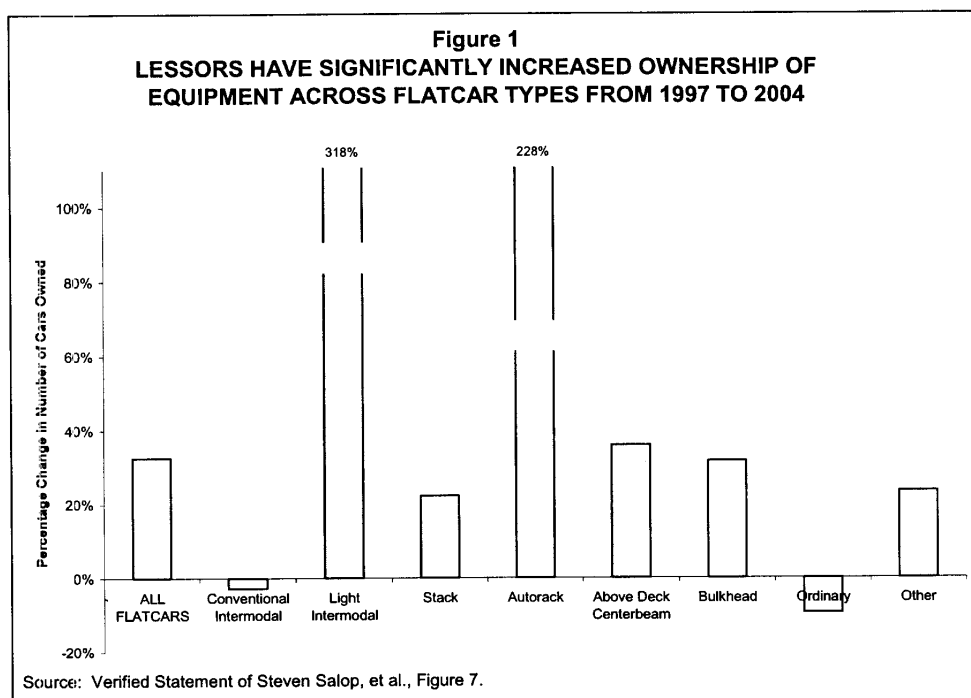
⁵⁹ Wells Rebuttal V.S.

⁶⁰ Salop, *et al.* V.S. at 12.

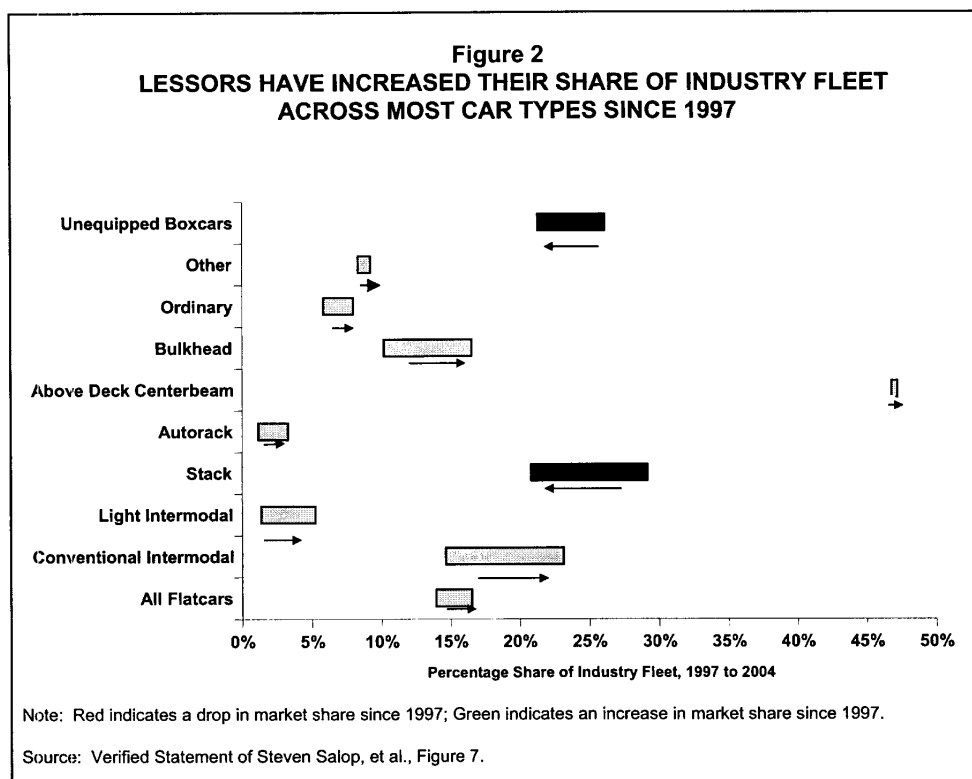
⁶¹ Letter of Virginia International Terminals, Inc.

about keeping each other's cars in good repair, and FMI could do nothing about it."⁶²

Finally, for all of their protestations of "competitive disadvantage" vis-à-vis TTX, lessors have not been pushed from the marketplace. As Figures 1 and 2 indicate, over 1997-2004, lessors have expanded their ownership of cars of all types. In the case of centerbeam cars (on which lessor intervenors' comments most frequently focus), lessors have shown sharp growth in centerbeam ownership (Figure 3). It cannot credibly be claimed that lessors are being driven from the marketplace by predation, TTX's efficiency, or otherwise.

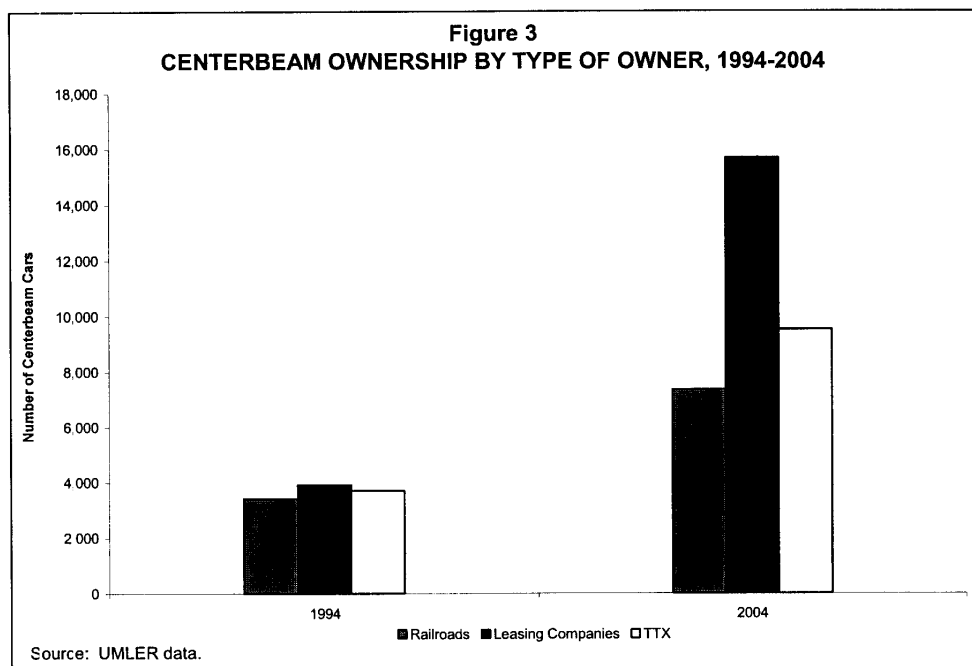


⁶² V.S. of Emmitt J. Posey, *Application of TTX Company and Certain Common Carriers by Railroad for Approval of Amendment of Pooling Agreement and Car Contract Extending Their Terms*, STB Finance Docket No. 27590 (Sub-No. 2), November 17, 1993 at 21-22.



TTX Pooling without Antitrust Immunity: As noted, CIT Rail Resources, First Union, and a number of other lessors endorsing First Union's position would have the Board eliminate the purported "competitive disadvantages" arising from TTX's notable efficiency benefits by eliminating TTX's owners' antitrust immunity in the setting of car hire rates by TTX. In place of TTX setting rates for the cars it provides, these lessors would have TTX somehow engage in bilateral price negotiations with its owners to establish car hire rates,⁶³ or have the owners engage in a system of bilateral negotiations with each other – because, it is asserted, "bilateral car use agreements can accomplish

⁶³ See, for example, Comments of First Union Rail Corporation at 23.



much of what the TTX pooling agreement accomplishes in terms of managing efficient car utilization.”⁶⁴

It is particularly hard to fathom what First Union and its endorsers have in mind in calling for TTX to negotiate bilateral car use agreements and rates between itself and its owners. If First Union means that TTX should aggregate rights to cars from flatcar-long owners in order to resell those cars for hire to flatcar-short railroads, the intervenors’ framework of purported seller market power would still leave TTX as a single (First Union would apparently say ‘monopolist’) marketer of an aggregated pool of cars. Bilateral negotiations between this putatively monopolistic aggregator of cars (i.e., TTX) and its individual owners does not imply an end to purported market power (and it certainly does not imply an end to what First Union, CIT and other lessors asserts is TTX’s “below market” pricing and “competitive advantages”). Bilateral

⁶⁴ McClure V.S. at 11.

negotiations over car hire rates between TTX and its owners – as proposed by First Union and lessors who sign on to First Union’s statement – does not make sense. It certainly does not coherently address the purported (albeit, groundless) ‘problems’ First Union asserts it sees with TTX’s antitrust immunity.

The suggested alternative of inter-owner bilateral car use agreements seems to envision TTX as a broker/coordinator that is tasked solely with managing dispatch, relocations, and loading (by handling the paperwork/electronic notices of who has what rights to what cars). While some function of this type might be performed and be somewhat useful relative to the absence of any such coordination, bilateral negotiation of car use agreements would tend to eliminate the car fungibility that TTX’s pooling and centralized pricing promotes. As stressed in *Kalt V.S.* and above, centralized, common pricing by TTX reduces transactions costs and obviates hold-out and hoarding problems, and it does this precisely at those times when the system is tight and needs smooth and efficient distributions of cars.⁶⁵

In short, TTX’s pricing authority is at the center of the efficiency benefits it yields. Competitors’ attempts to limit TTX passing through benefits to railroads, and ultimately shippers, by eliminating antitrust exemption for TTX’s pricing would certainly tend to push TTX’s prices upward – by destroying sources of efficiency that inure to the shipping public and the nation’s economy. In fact, it was just such attempts to shackle the efficiency of railroads in the name of protecting competitors from “competitive disadvantage” that contributed to rendering the U.S. railroad industry a national embarrassment in the pre-Staggers era. Thwarting the efficiency of the railroad system is not in the public interest.

⁶⁵ Assertions (e.g., Comments of The Greenbrier Companies at 5) to the effect that the transaction costs of bilateral coordination have been reduced by the reduction over time in the number of Class I railroads) is not obvious. As numbers go down, the expected frequency and severity of hold-out problems, for example, actually rises.

III.B Assessing Intervenor's Challenges Re: Seller Market Power in Maintenance

In a curious twist, one intervenor – Progress Rail Services – argues that TTX's pooling authority should be limited to five years because “there is a clear and present danger” that TTX may soon acquire market power “as a general provider” of maintenance services.⁶⁶ TTX pricing of maintenance services (i.e., with antitrust immunity enabling its owners to market TTX's services as a single company) is purported to have “driven [maintenance rates] to levels significantly below those that are reasonably competitive.”⁶⁷

As with complaints of lessors regarding car hire rates, this complaint is a complaint about TTX's efficiency, and less efficient competitors commonly find prices in the marketplace to not be “reasonable.” But even taken on its own terms, such arguments for forcing TTX to eschew its efficiencies in the provision of maintenance services and have its rates pushed upward are not credible. In particular, Progress Rail Services, itself, points out that there are more than 125 independent maintenance companies operating in competition with TTX;⁶⁸ TTX owns but 3 of approximately 250 so-called “back shop” repair facilities, the majority of which “are owned and operated by independent service providers such as Progress Rail”⁶⁹; and so-called “rip track” facilities (for light repair work) exist “in large numbers” and TTX competes as a third party service contractor with the numerous other independent service providers.⁷⁰ There is no plausible risk of monopolization by TTX. As I have pointed out above, the kind of short duration of TTX pooling authority requested by Progress Rail can provide parties with more frequent bites at the regulatory and regulatory settlement apple than is warranted by concerns for the public interest.

⁶⁶ Comments of Progress Rail Services Corporation at 10.

⁶⁷ Comments of Progress Rail Services Corporation at 11.

⁶⁸ Comments of Progress Rail Services Corporation at 2.

⁶⁹ Comments of Progress Rail Services Corporation at 7.

⁷⁰ Comments of Progress Rail Services Corporation at 7.

III.C Assessing Intervenor's Challenges Re: Buyer Market Power in Car Acquisition

No railcar manufacturer or equipment supplier claims that TTX currently possesses or exercises market power in the purchasing of railcars; both Greenbrier and Trinity acknowledge that it doesn't. Rather Trinity's curious claim is that "While TTX has not yet achieved monopsony power in a broadly defined market of freight cars, unlimited expansion of TTX's purchases of non-flat cars would have the inevitable longer-term impact of reducing output and railcar builders' incentives to invest in research and development."⁷¹ It is illogical for "unlimited expansion" of purchases to reduce output.

I have previously addressed the relevant economics and empirical evidence on the potential for monopsony in the initial *Kalt* V.S. The theoretical concern about monopsony power arises when a dominant buyer is able to artificially *reduce* or *restrict* the level of purchases so as to cause sellers to sell at lower price. Thus, the correct concern about monopsony is restriction, not expansion, of purchasing. Indeed, to the extent that the efficiencies of pool management increase the economic value of railcars, railroads have the incentive to expand the volume of transportation services provided to shippers.⁷² The claim therefore is that TTX will somehow expand its level of purchasing to a degree that it will then be in a position to restrict its demand to drive down railcar prices.⁷³

⁷¹ Comments of Trinity Industries, Inc. at 14.

⁷² Of course, if TTX is able to increase the utilization of railcars through efficient maintenance and network optimization, the quantity of railcars necessary to meet shipper demands at a given price may be less and the need to purchase additional cars will be less. This is not monopsony power however; it is a public benefit arising increased efficiency that frees up capital that otherwise would be invested in railcars to be used elsewhere in the economy.

⁷³ *Salop, et al. V.S.* at 27-28 and 37-39. *Salop, et al. V.S.* further claims that potential monopsony power by TTX may cause TTX to drive down railcar prices, leading to a lower level of investment and research by suppliers which would then lead to lower output and higher prices by railcar suppliers. As explained in the text, this claim is unfounded, as railcar supply is quite elastic.

The potential for monopsony power by TTX in railcar purchasing is not a realistic concern. TTX is not an exclusive buyer and lacks the ability to preclude other buyers from purchasing flatcars or other types of cars. Although other potential railcar buyers may not be as efficient in supplying railcar services as TTX, TTX lacks the ability to reduce the total demand for railcar services below competitive levels. Demand from competing railcar purchasers remains as an alternative outlet for railcar manufacturers, and any reduction in railcar demand and resulting supply in railcar services can be filled by other purchasers.

Most significantly, the supply of new non-tank railcars is quite flexible and elastic. As I explained in *Kalt V.S.*, railcar manufacturers can shift between different types of non-tank railcars quite easily. This ability to shift supply to other products gives railcar manufacturers the ability to resist monopsonistic demands from purchasers for reduced prices. Moreover, railcar manufacturers are able to switch to production of other types of steel fabricated products such as barges and bridges.⁷⁴ Indeed, in some cases, non-tank railcars suppliers co-locate barge and railcar production facilities.⁷⁵

In 2003, TTX took delivery on approximately 1,900 boxcars, its only acquisitions of non-flatcar equipment in the last 10 years.⁷⁶ This amounts to less than 20% of non-tank, non-flatcar deliveries in 2003.⁷⁷ Unequipped boxcars represent a railcar equipment segment that traditionally has been in low demand, with old and poorly maintained equipment. Indeed, all portions of the industry, except TTX, are abandoning this equipment segment. According to the

⁷⁴ *Salop, et al. V.S.* does not consider the point I previously made that railcar manufactures operated related business from related facilities that provide limits to the potential exercise of monoposony power by TTX or other railcar purchaser.

⁷⁵ 2003 Annual Report of The Greenbrier Companies at 10.

⁷⁶ Wells Rebuttal V.S.

⁷⁷ 2004 industries totals are obviously unavailable.

information provided by Trinity, non-TTX owned unequipped boxcars declined from over 41,000 in 1997 to less than 16,000, a decline of over 60%; and lessors have reduced the number of unequipped boxcars owned by over 50% during that period.⁷⁸ The number of unequipped boxcars owned by TTX, which accounted for 25% of the fleet in 1997, is basically unchanged. TTX's recent purchasing of boxcars to staunch the disappearance of unequipped boxcars hardly appears to be a competitive risk to lessors or railcar manufacturers.

The evidence on TTX buying behavior and industry outcomes shows no evidence or risk of monopsony, even if TTX were to expand its purchasing of non-flat cars.⁷⁹ The history of the industry shows that it is able to decrease and increase production relatively rapidly with little or no change in the price of cars.⁸⁰ Figure 4 shows the annual deliveries of non-tank railcars for the last several years. Production fell 80% between 1998 and 2002. Since then, production has rebounded rapidly, increasing 50% in one year. Despite these large swings in *industry* demand and production, the average annual price of a

⁷⁸ Salop, *et al.* V.S. at 36. By contrast, the quantity and share of equipped boxcars owned by leasing companies has increased significantly over the past ten years.

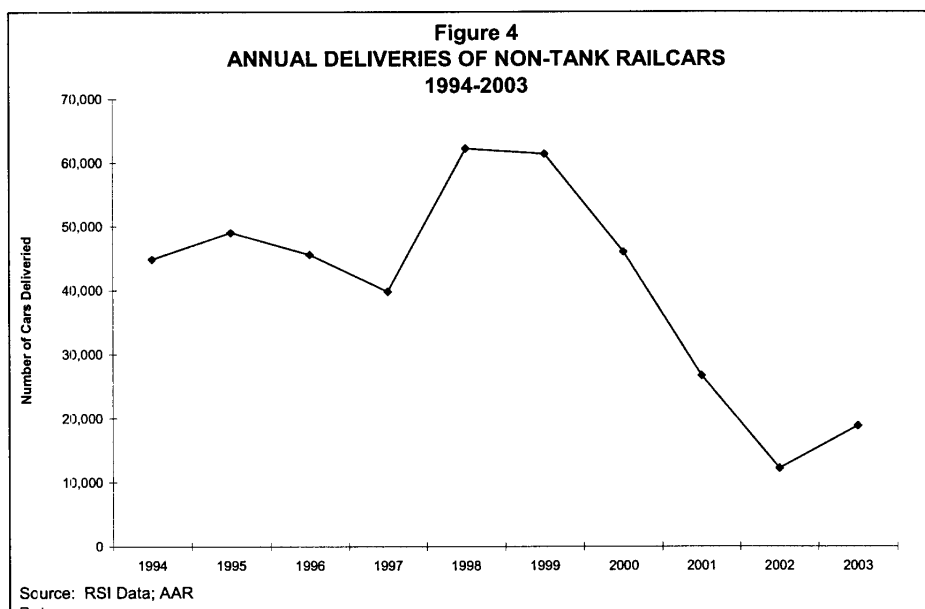
⁷⁹ Salop, *et al.* V.S. takes pains to point out that in Figure 5 of Kalt V.S. I compared TTX's *flatcar* purchases, not TTX's *freight car* purchases, to total industry purchasing. The Salop, *et al.* V.S. then incorrectly states that: "Because the purchases of non-flatcars are excluded, the percentage reported in the application understates TTX's share of all freight car purchases. Professor Kalt does not provide detailed delivery data for TTX non-flatcar purchases to permit us to properly recalculate the data in Kalt's Figure 5." Salop, *et al.* V.S. at 28.

At the time of my initial V.S., annual data for industry railcar deliveries was only available through the end of 2002. For the nine years from 1994 to 2002, TTX had *zero* non-flatcar deliveries. As such, it was hardly necessary to distinguish the two categories.

Also, Salop, *et al.* V.S. purports to presents data on TTX railcar orders, I focus on deliveries. While both measures can provide information on the purchasing practices, in this case deliveries gives a better measure of production and capacity of railcar builders as orders tend to be lumpy in size (buyers typically order railcars in large lots, not a few at a time), it takes time to build cars, and it is backlog that adjusts to short-term differences between orders and production.

⁸⁰ I do not claim that supply of or demand for railcars is *perfectly* elastic, as stated by Salop, *et al.* V.S. at 37. Rather the evidence indicates that the options available to manufacturers and the industry's response to changes in demand indicate no reasonable threat of monopsony power.

standard flatcar purchased by TTX deviated less than 10% from the average price during the last 5 years. As discussed in my initial V.S., this kind of flexibility in the supply capability of car manufacturers indicates quite elastic supply, and such elasticity thwarts purported prospects from monopsony by car purchasers.⁸¹



IV. LESSORS' CHALLENGE TO TTX POOLING OF NON-INTERMODAL CARS

As the evidence on the public benefits of pooling of intermodal flatcars by TTX is unassailable, some lessors have instead contested pooling authority of non-intermodal flatcars by TTX.⁸² They argue that ownership of non-

⁸¹ Kalt V.S. at 14-15.

⁸² These include Bombardier Capital Rail Inc., CIT Rail Resources, C.K. Industries, Inc., First Union Rail Corporation, and GATX Rail.

intermodal flatcars and pooling by TTX of these cars create competitive risks without offsetting public benefits.⁸³ As I demonstrate below, this argument and resulting conclusion are incorrect.

While the arguments by the different lessors differ in details, their claims about non-intermodal cars can be organized as follows:

- "Non-intermodal flatcars do not share the same characteristics as intermodal flatcars. Non-intermodal flatcars can typically move only in one direction and as a result cannot take advantage of the multi-directional reload opportunities that intermodal cars can."⁸⁴ Non-intermodal flatcars tend to serve specific commodities and tend to move loaded one direction in specific corridors, returning empty to the originating area.⁸⁵
- Lessors' claims (addressed in the previous section) that ownership and pooling by TTX will drive out competition from lessors and other potential financiers of railcars, thus harming competitors and competition, support excluding TTX from non-intermodal cars.⁸⁶
- TTX ownership and pooling of non-intermodal railcars will reduce innovation.⁸⁷
- Limiting TTX to intermodal flatcars will prevent potential future monopsony power in buying of railcars by TTX. "While TTX has not yet achieved monopsony power in a broadly defined market of freight cars, unlimited expansion of TTX's purchases of non-flat cars would have the inevitable long-term impact of reducing output and railcar builders' incentives to invest in research and development."⁸⁸

⁸³ Comments of Trinity Industries, Inc. at 13-14.

⁸⁴ Comments of GATX Rail at 9.

⁸⁵ Comments of Bombardier Capital Rail Inc. at 3, GATX Rail at 9, and CIT Rail Resources at 9-10.

⁸⁶ Comments of North America Freight Car Association at 9.

⁸⁷ Comments of Trinity Industries, Inc. at 15-18 and Salop, *et al.* V.S. at 22-23.

⁸⁸ Comments of Trinity Industries, Inc. at 14. See also Tye V.S. at 17.

Public Benefits of Flatcar Pooling Apply to Non-Intermodal Cars

The fundamental public benefits provided by TTX pooling with respect to intermodal flatcars also arise with non-intermodal flatcars. As discussed above these benefits include the following:

- Improved utilization of equipment through operation of free-running pools.
- Reduction in effective cost of car hire through increased utilization.
- Diversification of risk associated with variation in car demand and increased investment in equipment.
- Improved maintenance and car quality.
- Innovation in car design and investment in improved technology.

Each of these benefits of an owned and operated pool applies to non-intermodal flatcars.

What are non-intermodal flatcars? Table 5 presents a categorization of the car types owned by TTX and their typical uses. The largest two groups are the intermodal flatcars and flatcars utilized for vehicular carriage (i.e., autoracks). Autoracks are flatcars to which a rack appurtenance has been attached; TTX typically owns the flatcar while the appurtenance is owned by a railroad. TTX is responsible for the management and operation of the free-running multilevel (i.e., autorack) pool.

Centerbeam flatcars, used almost exclusively for the transportation of lumber products, account for over 40% of the non-intermodal, non-autorack TTX flatcar fleet. The remaining flatcars encompass a variety of chain-tiedown, bulkhead, steel deck and log bunk flatcars. These cars are used for transportation of a variety of products, including machinery, heavy vehicles,

Table 5
CAR TYPES OWNED BY TTX AND THEIR TYPICAL USES

Type of Railcar	Description	Quantity
Intermodal	Flatcars designed to carry containers or truck trailers. (Measured in platforms)	174,981
Autorack	Flatcars with attached enclosed cars used to transport cars and light trucks.	48,998
Centerbeam	Open flatcars with center partition. Primarily used for transporting lumber.	9,529
Other Flatcars		20,166
Bulkhead	Flatcars with a bulkhead at ends to stabilize loads. Used to haul pipe, steel, and building materials.	
Heavy-Duty	Flat-deck cars designed to haul heavy equipment. Used to move generators, turbines, boilers, and other machinery.	
Chain Tie-down	Flatcars with chains to tie down vehicles. Used to transport military, agricultural, and construction vehicles.	
Steel Deck	Flatcar with nailable steel deck. Designed to carry steel products and machinery.	
Log Bunk	Open car with support structure on the sides. Used to haul logs, long pipe, and poles.	
Boxcar	General purpose enclosed car. Often used to haul paper products and packaged food products.	15,184
Gondola	Low freight cars with fixed sides and either open or closed top. Used to carry heavy products, specifically scrap metals and steel products.	1,180

Source: TTX Equipment Overview, available at <http://www.ttx.com/equip/guide.asp>; UMLER.

steel products, pipe, logs, poles, and panels. TTX also owns some gondolas, used primarily for scrap steel, and unequipped boxcars.

The lessors who wish to limit cars that TTX is authorized to own and pool differ as to what types of cars purportedly ought to be excluded. Some object to pooling any flatcar used for anything but intermodal carriage (e.g., GATX and GE Railcar), some to anything but intermodal and autorack flatcars (e.g., First Union), some only to specialized flatcars (e.g., Bombardier), and some to any railcar other than a flatcar of any type (e.g., Trinity). Of course some lessors support in total, or in the main, the TTX application and offer no request for limitations on car types (e.g., Greenbrier and Johnstown America). Given the

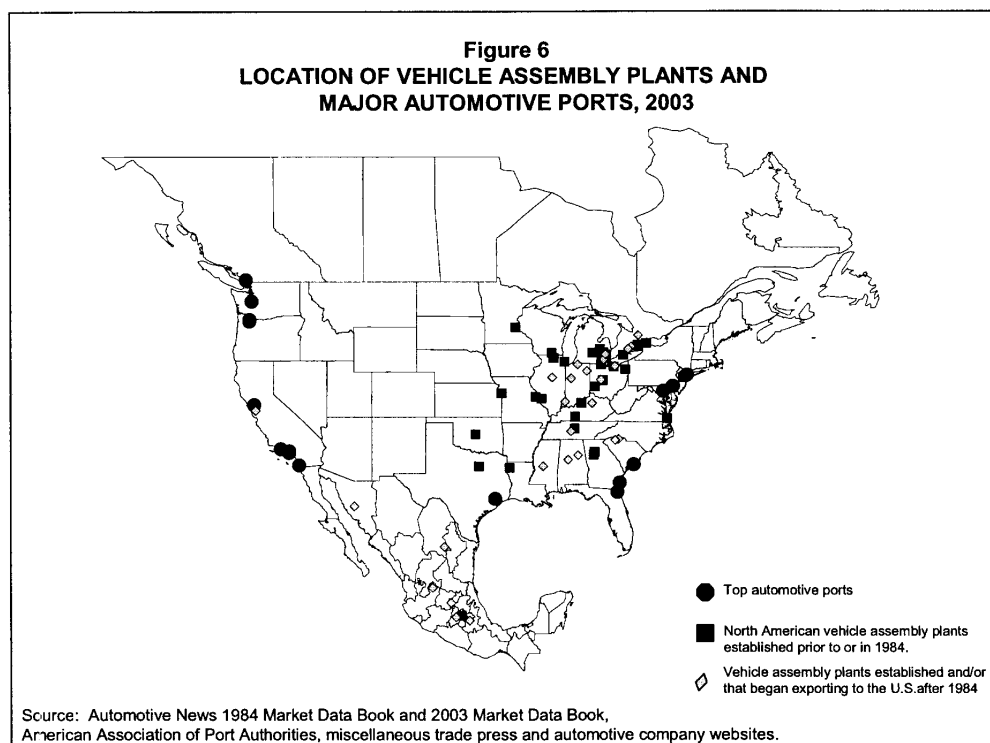
various restrictions proposed, I will go through some of the categories of equipment and examine the public benefits provided by TTX pooling.

Autoracks. Contrary to the claim of some lessors that automobiles shipped on railroads operate in "well-defined corridors" and "cannot take advantage of the multi-directional reload opportunities that intermodal cars can,"⁸⁹ pooling of autoracks has been an enormous success. New automobiles move from the multiple assembly plants in North America (and from the multiple ports for cars assembled overseas) to locations across the country. A particular model of automobile or truck is typically assembled in one plant (or a couple of plants), and that model is then delivered to dealers across the country. Railroads typically move new automobiles from factory to mixing centers and auto ramps (i.e., unloading and staging facilities for automobiles and trucks) located near metropolitan areas for ultimate delivery by tractor-trailer auto carriers. Thus, cars must move from assembly plant or port to locations across the country. Indeed, First Union, which objects to pooling of other car types "reluctantly supports pooling authority for auto-rack flatcars because they have loading and unloading characteristics similar to intermodal flatcars."⁹⁰

As shown in Figure 6, the location of auto assembly facilities has become more geographically dispersed over the last decades. It is easy to see that more efficient utilization of autorack railcars can be achieved by redirecting empty autoracks to nearby plants or ports than to run them back and forth in well-defined corridors. Given the increased geographic dispersion of North American vehicle assembly plants, changed circumstances provide additional need and opportunity for efficient operation of the autorack pool.

⁸⁹ Comments of GATX Rail at 9.

⁹⁰ Comments of First Union Rail Corporation at 18, footnote 8.



As acknowledged by Trinity, operation of the autorack pool by TTX "achieves remarkable efficiency."⁹¹ Moreover, TTX as flatcar pool owner has been able to manage capital invested in railcars efficiently. As demand for intermodal flatcars has changed, TTX has been able to redeploy 89-foot intermodal flatcars to carry automobiles through the addition of an autorack appurtenance to such cars.⁹² When it was clear that redeployment of intermodal flatcars would be no longer be sufficient to meet demand, TTX invested in new 89-foot flatcars for automotive service and took part in developing and deploying new integrated and articulated autorack cars.

⁹¹ Comments of Trinity Industries, Inc. at 9.

⁹² Hulick V.S. at 18.

TTX has also engaged in significant research and development and investment in improving the quality of automobile transportation by railroads as requested by the auto carriers. TTX has just completed a \$425 million dollar program to develop and install a variety of upgrades to improve the quality of the ride of autoracks and reduced damage to automobiles during transport. These improvements have been applied to new railcars, as well as retrofitted to existing cars.⁹³ In the absence of a pool operator with substantial ownership in the pool, it is less likely that investments and research such as these, which benefit all of the existing pool and the shippers they serve, would have been made.

The benefits of the TTX ownership of autorack flatcars and operation of the pool accrue to the benefit of the large and sophisticated automobile manufacturers. In contrast to the view of some lessors that TTX pooling of autoracks is not in the public interest, no automobile manufacturer or shipper has called for the elimination of TTX authority for ownership and operation of an autorack pool.⁹⁴

Centerbeams. Centerbeam flatcars, the third largest general category of TTX-owned flatcars after intermodal and autorack flatcars, are used primarily for the transportation of lumber. One lessor claims that:

... centerbeam cars generally move under load only in one direction. They generally return empty to the origin of their load or a point close to that origin. Pooling of such cars does not result in materially improved service, nor operating economy.⁹⁵

This conclusion apparently reflects the experience of some lessors. Bombardier states: "Based on our experience, pooling of centerbeam cars would not produce the same kind of operating efficiency produced by pooling of

⁹³ Hulick V.S. at 21.

⁹⁴ By contrast, see Letter of Mazda North American Operations.

⁹⁵ Comments of First Union Rail Corporation at 18.

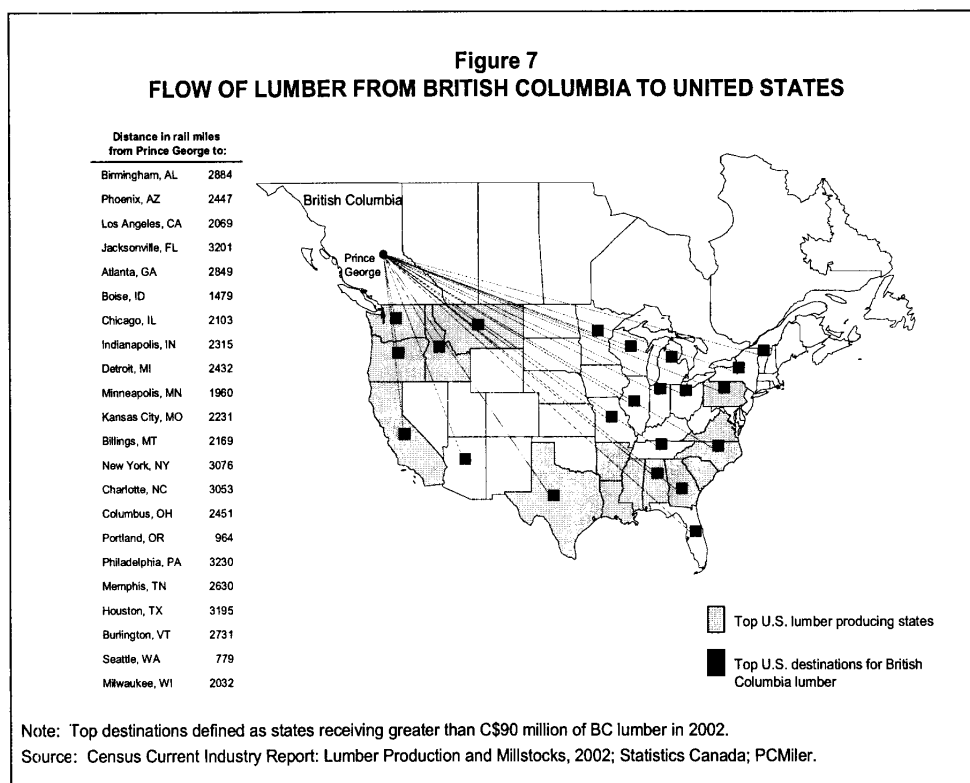
intermodal flatcars. That is so because our centerbeam cars move essentially on a one-way loaded basis."⁹⁶

While this may be the case for cars provided by lessors, this is not necessarily true for centerbeam cars owned and managed by TTX. Similar to automobiles, lumber is delivered throughout North America for ultimate use and is produced in specific lumber producing regions. In North America, the primary lumber producing regions are roughly the Pacific Northwest and British Columbia, Eastern Canada, and the U.S. Southeast. The delivery of lumber from one region into other lumber producing regions provides the opportunity for more efficient utilization than the 50%-empty service implied by one-way service.

Figure 7 is a map showing the 15 largest lumber producing states in the U.S. shaded in green, and all states in the U.S. receiving more than C\$90 million in lumber from British Columbia. Approximately a third of U.S. softwood lumber comes from Canada, and British Columbia provides a bit more than half of that, amounting to 17% of U.S. softwood lumber consumption.⁹⁷ As can be seen from the map and the accompanying table, lumber from B.C. travels thousands of miles to destinations that are frequently near or in states that are themselves major lumber producers. Lumber produced in other regions also frequently travel long-distances to their customers. Thus the opportunity exists, when network coordination problems are overcome, for cars to be reloaded near the destination rather than returning back empty. Similar opportunities exist to reroute empty cars back to origins by "swapping" the cars rather than returning to their initial origins. For example, if a centerbeam delivers lumber from B.C.

⁹⁶ Comments of Bombardier Capital Rail Inc. at 3. Similarly, "However, these benefits [the fact that a car can 'reload' another movement rather than return to its origin empty] do not extend to service by flat cars that are essentially committed to shuttle service (such as center beam flat cars used for forest products and the like)." Tye V.S. at 12-13.

⁹⁷ British Columbia Ministry of Forests, "Fact Sheet," 2002. www.growingtogether.ca.



to Florida, while concurrently a car from the Southeast delivers lumber to Chicago, mileage and cycle times may be reduced if the empty cars are "swapped" such that the empty centerbeam in Chicago is routed to B.C., while the empty centerbeam in Florida is routed to Georgia.

While not operating at the high level of the intermodal pool, the TTX centerbeam pool is able to achieve similar types of network coordination mileage efficiencies. In the most recent 12 months, TTX changed the railroad to which a centerbeam car was to be directed over seven thousand times, which is equal to 70% of the number of centerbeams in the TTX pool. Thus, approximately 20 times a day, a TTX centerbeam car is redirected from one railroad to another, rather than that car being directed back empty to its originating road. Given

that shippers tend to have a preference for centerbeam cars that are in relatively short supply, improvements in car utilization represent a direct and meaningful public benefit that derives from TTX's ownership and operation of centerbeam flatcars.

TTX ownership and management of centerbeams also benefits shippers through improved reliability of high and standardized maintenance, without the incentive problems arising from ownership by individual railroads.⁹⁸ TTX also is able to diversify the risk of demand and supply fluctuations that occur across producing regions. Lumber production and shipments are subject to swings in demand, due to the house building cycle, which are not synchronous across regions of the country. Production of lumber from various regions are subject to external swings resulting from government actions involving the environment (e.g., the spotted owl), use of public forests, and the off-and-on nature of the U.S.-Canadian softwood lumber trade dispute. Like a town with a municipal fire department, TTX enables railroads to share the risks of non-synchronous swings in demand for lumber transportation.

Other Flatcar Types. As shown in Table 5 above, the remaining flatcars owned and managed by TTX are made up of a variety of different types that are used for a mixture of commodities and special uses. These include various types of chain cars for moving machinery and military equipment, bulkhead cars for moving typically panel goods and steel, and various different car types for moving logs, pipes, steel products, and other miscellaneous products, and heavy-duty cars for moving large heavy equipment such as turbines.

Demands for these types of flat cars arise from a small set of potential uses and users, relative to the demands for intermodal flatcars. By pooling the ownership and management across the railroads, TTX is able to establish and

⁹⁸ See Letters of Roseburg Forest Products and Georgia-Pacific.

maintain a fleet that can be deployed across different railroads in response to variations in these rather specific, idiosyncratic demands. Unlike the case of intermodal traffic, the smaller numbers of potential uses and users involved almost guarantee that risk to individual railroads will be particularly large. For example, demand for the transportation of large steel pipe to build pipelines or water systems will depend on specific construction projects that occur idiosyncratically in different locations and regions at different times.

Many of the uses of these flatcars involve specialized uses for specific purposes, requiring specific (re-)configuration to meet shippers' needs. By pooling the risk among the railroads, TTX is able to invest in limited use, but expensive railcars. These include, for example, heavy duty flat cars which can cost ten times that of a typical intermodal flatcar. Demand for these specialized types of equipment tends to be sporadic and idiosyncratic, and pooling enables the railroads to share the risks and returns of these investments through the mutually-owned TTX pool. As is commonly true for pools where cars are not owned by the pool, a previous attempt to pool heavy duty flatcars in the absence of pool ownership ended in abject failure due to problems with maintenance, lack of new investment, fleet planning, and unwillingness of railroads to accept certain cars due to concerns over variation in car hire rates.⁹⁹ Since the shutdown of that pool, TTX has accelerated its investment in heavy duty flatcars and thereby increased the shipping capacity of U.S. railroads.

Many of the benefits of TTX pooling of specialty flatcars involve TTX's ability to effectively plan and innovate to meet shipper demands, make required investments, and share risk among the railroads. As pointed out by the Department of Defense (DoD), which moves military equipment on chain-tiedown flatcars originally built for markets that are now significantly

⁹⁹ Wells Rebuttal V.S.

diminished, pooling by TTX is able to retain a higher number of low demand cars at a higher quality level than individual railroads would be able to sustain.¹⁰⁰

TTX has been highly responsive to the needs of the DoD, a potentially large shipper.¹⁰¹ TTX has participated in war game and other planning activities with the DoD. It redeployed and modified 500 flatcars to make them suitable for carrying ammunition containers, and invested in additional maintenance on aging flatcars to push back a crisis in deployment capacity of the DoD. When the DoD requested that it be allowed to pay TTX to modify new flatcars so they could be used as chain-tiedown cars in an emergency, despite there being little or no commercial value to that modification except to the military, TTX made the modifications at its own expense.¹⁰² TTX's standardization of lengths and tiedown anchor systems permits the DoD to plan for efficient loading and stockpiling of necessary accessories, knowing that the accessories conform to TTX pool standards. While military demands may be particularly specialized, TTX's centralized planning, standard setting, and investment benefit this customer in a fashion that would be much more difficult to do outside of a mutually-owned pool.

TTX, as owner and operator of the pool, is also able to take risks to develop new business niches that may not be worthwhile for individual railroads to attempt.¹⁰³ For example, TTX is working with railcar manufacturers and equipment suppliers to develop new enclosed flatcars suitable for transporting

¹⁰⁰ Letter on behalf of Department of Defense at 2.

¹⁰¹ Letter on behalf of Department of Defense at 2-3.

¹⁰² Letter on behalf of Department of Defense at 3.

¹⁰³ This is not to imply that individual railroads will not engage in risky or innovative business development investments, but that, to the extent the business opportunities are national in scope, the TTX pool can take risks on behalf of the industry that would not be in individual railroads' economic self-interest.

large trucks, buses, and similar-sized vehicles that traditionally have not been shipped by rail.¹⁰⁴

The only complaint by a shipper with respect to the pooling of specialty flatcars is that the pool is not free-running enough. The DoD's one request to the Board is that TTX develop a system that makes cars the DoD wishes to use more free-running and not subject to hoarding by individual railroads during times of high demand, and that the Board permits TTX to make these types of changes without Board approval.¹⁰⁵ Thus, while TTX can be no less effective in managing the fleet than if the cars were owned by individual railroads, this shipper is requesting that TTX actually be more aggressive in its network management – to achieve a better free-running pool in these types of cars.

Purchasing of Non-Intermodal Cars Does Not Risk Monopsony Power

As discussed previously, while monopsony in railcar purchasing is a theoretical possibility from a mutually-owned pool, the evidence indicates that there is no reasonable risk here. No railcar manufacturer or equipment supplier claims that TTX currently possesses or exercises market power in the purchasing of railcars; both Greenbrier and Trinity acknowledge that it doesn't. As explained in my previous report and in more detail above, purchasing of non-intermodal flatcars and even purchasing of additional boxcars pose no reasonable risk of monopsony market power.

V. PUBLIC POLICY ANALYSIS OF THE PROPER DURATION OF TTX'S REAUTHORIZATION

Notwithstanding widespread recognition of the benefits produced by TTX's pooling of flatcars, a number of intervenors voice concern about the

¹⁰⁴ See Comments of National Steel Car Limited at 7 and Letter of Portec Rail Products Inc.

¹⁰⁵ Letter on behalf of Department of Defense at 6-7.

proposed duration of TTX's reauthorization.¹⁰⁶ TTX has gone through multiple rounds of authorization and reauthorization since its original application and approval in 1974. In each case, the Board (and its predecessor) has determined that TTX's pooling of flatcars serves the public interest and warrants authorization. TTX's current proposal would not fundamentally alter the terms of authorization granted in the past, and it eschews provisions (such as car assignment and allocation¹⁰⁷) that have been controversial in the past. Accordingly, TTX now seeks extension of authorization for a term of fifteen years. A number of intervenors, however, seek here to limit authorization to five or ten years. Such a limitation is inconsistent with the public's interest.

The lessors relate numerous facts about the rail industry to demonstrate the "substantial changes in circumstances" that have occurred since various reauthorizations of TTX pooling authority.¹⁰⁸ They point out the number of Class I railroads have declined through merger, changes in car hire rules, increases in private car ownership, and so on. By contrast, it is claimed, TTX's pooling authority has "remained static."¹⁰⁹ As discussed above, the public benefits of TTX pooling authority are as true now as they have ever been. This is because the benefits of pooling through the mutually provided insurance and the avoided transaction costs of bilateral negotiations are as true now as ever. Although the number of Class I railroads have declined, the volume of private car ownership has increased, and with depreservation of car hire the transaction and incentive costs of car management will remain high. The public benefits of the TTX pooling authority do not arise out of some particular facet of the current state of the rail industry but are the outcome of fundamental economics underlying a network industry like railroads that require enormous quantities of

¹⁰⁶ See footnote 4, *supra*.

¹⁰⁷ See TTX Application at 42-43, n. 29, and at 49, n. 38. See, also, Reardon V.S. at 8.

¹⁰⁸ See, e.g., Comments of First Union Rail Corporation at 4-9, GATX Rail at 4-7, and North America Freight Car Association.

¹⁰⁹ Comments of GATX Rail at 2.

capital (railcars) to be operated and managed efficiently across privately-owned portions of the rail network. Absent radical and complete regulatory and structural overhaul of the rail industry, the public benefits of TTX pooling are unconnected to any ongoing evolution under the existing regulatory structure.

Railroad flatcars, as well as investment in related innovation, maintenance facilities, and the like, are typically long-lived. When TTX's flatcar pooling has already repeatedly passed regulatory muster, introducing uncertainty and ambiguity into the mid-stream future of those investments by requiring TTX pooling reauthorization on relatively short cycles discourages efficient investment decision-making without a reasonable prospect of offsetting regulatory benefits. It would be naïve to fail to recognize that the occasion of mandatory reopening regulatory processes such as reauthorization of TTX's pooling can well serve the private interests of intervenors, while being wholly inconsistent with the public's abiding interest in a healthy and efficient rail transportation system: Reopening regulatory processes can provide all sorts of intervening parties with the opportunity to seek self-interested settlements, concessions, and regulatory requirements from an applying party – TTX – which has durable and often sunk capital at risk. Providing relatively frequent bites at the regulatory apple in this case is poor public policy.

VERIFICATION

COMMONWEALTH OF MASSACHUSETTS)

COUNTY OF Middlesex)

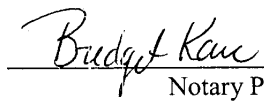
ss

JOSEPH P. KALT, Ford Foundation Professor of International Political Economy
at the John F. Kennedy School of Government, Harvard University, being duly sworn, deposes
and says that he has read the foregoing statement, knows the contents thereof and that the same
are true as stated.



JOSEPH P. KALT

Sworn to and subscribed before me
this 10th day of May, 2004.



Notary Public

My Commission expires May 3, 2007.

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

**TTX Company — Application for Approval of Pooling
of Car Service With Respect to Flatcars**

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

VERIFIED STATEMENT

OF

THOMAS THEES

VERIFIED STATEMENT

OF

THOMAS THEES

My name is Thomas Thees. I am a Managing Director at Morgan Stanley and Company, Inc. I have been employed at Morgan Stanley for 15 years and have extensive experience with TTX's market financings and financial strategies.

I understand that this verified statement will be submitted for the Surface Transportation Board's consideration in connection with a proposed extension of TTX Company's current pooling authority. Although TTX asked me to prepare this statement, the conclusions described herein are entirely my own and those of Morgan Stanley, and have been reached based upon observations made while marketing various TTX offerings of debt securities to finance flatcar acquisitions.

Morgan Stanley has privately placed hundreds of millions of dollars of debt securities over the last two and one-half decades and has served as TTX's principal investment banker throughout this period. I personally have been directly involved with these debt security placements since the early 1990's. Morgan Stanley also works extensively with various of TTX's owner-railroads and other companies within the rail industry, and therefore has extensive knowledge of and expertise with TTX's unique position and role within the rail industry and the broader investment community.

TTX's strong reputation as an efficient provider of a pool of intermodal, auto-carrying, and other types of flatcar equipment is unparalleled in the finance community. One reason for this is that TTX continues to demonstrate a consistent and stable financial

record, which is necessary given its unique pricing philosophy of setting rates just high enough to maintain single “A” ratings with the credit rating agencies. Given the long-lived nature of TTX’s fleet of flatcars, it is prudent in most cases to finance such acquisitions with comparably long debt maturities.

It is my professional opinion, and that of Morgan Stanley, that the term of TTX’s pooling authority is an important element in a long-term investor’s review of the Company’s creditworthiness and its decisions concerning acceptable interest rate levels and maximum lending limits. Existing and potential lenders and the rating agencies are very sensitive to the term of TTX’s pooling authority. Consequently, financing terms beyond the remaining life of the authority create uncertainty and perceived risks that can translate to higher borrowing costs and diminished funding supply.

Although the short-term duration of TTX’s pooling authority affects TTX’s borrowing terms throughout the term of that authority, those effects are particularly acute as the term nears expiration. Prior to TTX’s request for reauthorization in 1993/1994, this topic was of considerable focus in the debt markets, making new debt placements at the time more difficult. Again, in 2004, with a significant acquisition program planned by TTX, the current reauthorization process is an issue among existing and potential new investors.

I have no doubt that access by TTX to the capital markets is restricted and more costly than it otherwise would be by the mere existence of a time-certain expiration date to the pooling authority. Such constraints and costs also increase as each pooling term approaches expiration.

Granting the minimum 15-year term sought by TTX in this Application would, in my opinion, be beneficial to providing the financial community a necessary degree of confidence and financial flexibility, so that “penalties” imposed in the way of higher borrowing costs can be largely avoided. Certainly the longer the renewal term and the greater the financial flexibility perceived, the better for TTX in terms of its borrowing costs. As noted earlier, because of TTX’s unique pricing philosophy, lower borrowing costs translate into lower rates charged for use of their equipment, to the ultimate benefit of the consuming public.

VERIFICATION

STATE OF NEW YORK)
)
) SS
)
BOROUGH OF MANHATTAN)

THOMAS THEES, Managing Director at Morgan Stanley and Co., Inc., being
duly sworn, deposes and says that he has read the foregoing statement, knows the
contents thereof and that the same are true as stated therein.


Thomas Thees

Sworn to and
subscribed before me
this 11th day of May, 2004


Notary Public

My Commission Expires 9/8/07

MEGAN A. DONAHUE
NOTARY PUBLIC, STATE OF NEW YORK
No. 01D06098250
QUALIFIED IN NEW YORK COUNTY
MY COMMISSION EXPIRES SEPT. 8, 2007

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

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

REBUTTAL VERIFIED STATEMENT

OF

THOMAS F. WELLS

REBUTTAL VERIFIED STATEMENT

OF

THOMAS F. WELLS

My name is Thomas F. Wells. I previously submitted a verified statement as part of TTX's Application. I am submitting this rebuttal verified statement to address a variety of issues raised by parties that filed comments on the Application.

In Part I of my statement, I respond to issues raised by the Department of Defense's Military Surface Deployment and Distribution Command ("SDDC"), the National Industrial Transportation League ("NIT League"), and automakers DaimlerChrysler and Ford ("DaimlerChrysler/Ford"). These parties supported reauthorization of TTX's flatcar pool, but they also raised issues that deserve a response or clarification from TTX.

In Part II of my statement, I respond to claims made by First Union Rail Corporation ("First Union"), CIT Rail Resources ("CIT"), GATX Rail ("GATX"), and other lessors of railcars (collectively, the "leasing opponents") that seek significant conditions on TTX's authority, including the elimination of TTX's authority to engage in "collective pricing" and the termination of TTX's authority to pool non-intermodal flatcars.

First, I explain that eliminating TTX's pricing authority over the flatcar pool would have a devastating impact on TTX's pooling efficiencies and operational benefits. In particular, I refute the leasing opponents' claims that other pools have produced comparable benefits without pricing authority. I also correct false claims that TTX enjoys unfair pricing advantages over leasing companies. In addition, I show that leasing companies do not need Board protection from TTX. Leasing companies have not merely survived but thrived over the past ten years, despite the flatcar pool's existence.

Second, I refute the leasing opponents' arguments for the elimination of TTX's pooling authority over non-intermodal flatcars. I show that, contrary to leasing opponents' claims, pooling creates significant, procompetitive benefits for non-intermodal flatcars. I also rebut false accusations that TTX's ownership of non-intermodal flatcars poses a threat to leasing companies.

Finally, I offer a few facts in response to leasing opponents' assertions regarding TTX's boxcar and gondola pools, although those pools operate under different authority than TTX's flatcar pool. I show that TTX's acquisitions of these cars do not raise any concerns.

I. RESPONSE TO COMMENTS OF THE DEPARTMENT OF DEFENSE, NIT LEAGUE, AND DAIMLERCHRYSLER/FORD

The Department of Defense, NIT League, and DaimlerChrysler/Ford all support reauthorization of TTX's flatcar pool, but each offers comments that deserve a brief response.

A. Department of Defense

The Department of Defense's Military Surface Deployment and Distribution Command ("SDDC") fully supports TTX's Application, including TTX's request for clarification of its ability to make operational changes within the bounds of the Pooling Agreement. In its comments, SDDC points to its experiences during the mobilization for Operation Iraqi Freedom ("OIF") in 2003. According to SDDC, "[t]he OIF rail deployment in many respects was a signal success, with SDDC, the railroads, and TTX cooperating on a daily basis to solve car supply needs." Comments of SDDC at 5.

SDDC does, however, express some disappointment that TTX's fleet of chain tie-down cars, which are used to move military equipment and other materiel between bases

and from bases to staging points during training exercises and mobilizations, has not achieved the maximum degree of utilization available from a pooled fleet during periods of peak military demand. TTX recognizes that SDDC has identified an important issue, and it has been working actively with SDDC to address the issue by increasing the size of its fleet and developing methods of improving utilization during periods of peak demand, though the situation is far superior to an alternative in which there was no pooling.

Achieving efficient utilization of the chain tie-down fleet during periods of heavy military demand poses unusual challenges, even with a pooled fleet. The most significant factor affecting the availability of chain tie-down cars for military deployments is their limited number. There are fewer than 7,000 chain tie-down cars available at any one time: TTX owns approximately 5,160, the Department of Defense owns approximately 1,130, and a few other parties own the remainder. Commercial shippers use these cars to transport tractors and other heavy equipment, but their non-military use is limited. In fact, prior to the OIF mobilization, 30 percent of chain tie-down cars were idle. Because of their limited uses, demand for chain tie-down cars is highly cyclical, and they are not an attractive investment for car owners that cannot obtain the efficiencies and operational benefits of pooling. Consequently railroads, leasing companies, and other investors have largely abandoned the market.

TTX and SDDC have been actively working together to find cost-effective ways to improve the supply of chain tie-down cars. Immediately prior to the OIF mobilization, TTX spent more than \$1 million to inspect, repair, and upgrade its chain tie-down cars and to supply chains to military facilities. TTX has also upgraded its own fleet to extend the useful life of these cars for an additional ten years until 2014. TTX is also in the

process of securing approval from the Federal Railroad Administration to perform a more extensive upgrade so that these cars can remain operational for a total of 65 years, or until approximately 2029. In addition, TTX and SDDC have worked together to develop a modified 89-foot, 100-ton flatcar that will be used mainly for non-defense-related shipments but can be adapted quickly to function as a chain tie-down car for military mobilizations. TTX has recently ordered and taken delivery of approximately 500 of these new cars.

TTX and SDDC are also working together to address car distribution issues. Military mobilizations such as Operation Iraqi Freedom create a serious logistical challenge. Mobilizations create a sudden increase in demand, but that demand is often unpredictable because of the secrecy that necessarily surrounds military deployments. As a result, when mobilizations occur, railroads will often retain empty cars on their lines to ensure that they have sufficient equipment on-line to meet the rising demand.¹

TTX involvement has helped to improve car utilization in such situations. During mobilizations, SDDC contracts directly with railroads to provide transportation using TTX's chain tie-down fleet. However, TTX provides SDDC with a weekly report showing the location and status of all chain tie-down cars in the pool so that SDDC can arrange with the railroads for service. TTX also monitors car movements, and when it learns of empty cars that could be routed efficiently to an off-line loading point, it confers with individual railroads to identify those opportunities.

¹ SDDC is incorrect when it suggests that TTX's distribution mechanism for chain tie-down cars involves the assignment of particular cars to particular railroads, with those railroads committing to "pay the per diem charge for certain specific car numbers." There is no such assignment or commitment; TTX's chain tie-down cars are subject to TTX's standard "turn-back" policies.

In addition to its efforts to increase car supply and enhance car utilization as described above, TTX is participating with SDDC and the railroads in the “Assured Access Cross Functional Working Group.” The group is actively seeking to develop long-term solutions to address the military’s transportation needs. TTX is committed to addressing SDDC’s concerns. If feasible steps to improve utilization of chain tie-down cars are identified, TTX will take them.

B. NIT League

NIT League has offered broad support for reauthorization of the TTX flatcar pool. In its comments, NIT League also expresses interest in increasing shippers’ role in TTX’s car supply planning process. TTX encourages shipper involvement. Over the years, TTX has collaborated closely with shippers to anticipate traffic growth and other shifts in demand that require increases in fleet size or the development of new types of equipment. For example, TTX developed the new Uni-Level car, which responded to a market demand to increase the transportation options for shippers of large vehicles, such as buses, trucks, and mobile homes.

By pooling information, TTX is able to develop state-of-the-art forecasts of traffic growth and future equipment needs based on confidential forecasts of the member railroads and other data sources. As the ultimate end-users of TTX’s flatcar fleet, shippers are in a unique position to provide information that can help TTX fine-tune these forecasts and plan for the future. As TTX’s fleet continues to grow to meet increasing demand for flatcars, TTX welcomes any constructive input from shippers regarding their current and future need for flatcars.

C. DaimlerChrysler/Ford

DaimlerChrysler/Ford generally support TTX's Application, but they ask the Board to impose several conditions that are unrelated to the flatcar pool's operations. Their concerns are directed to equipment supply issues under a separate pooling arrangement for automotive multilevel equipment.²

TTX plays a more limited role in connection with the Multilevel Reload Pool than with its flatcar pool. The traditional 89-foot multilevel autorack car consists of a rack assembly welded to a standard 89-foot flatcar. The rack assemblies are generally owned by individual railroads; most of the flatcars are owned by TTX as part of its flatcar pool. TTX manages the Reload Pool as an agent for the ten railroads that comprise the pool. As manager, TTX issues orders needed to distribute empty multilevel cars for reload, consistent with the distribution rules for the different rack assemblies, not the underlying flatcars. (The instructions apply to the racks, and the underlying cars follow the racks.) TTX also assists the railroads in making decisions to acquire rack equipment by running a computer model developed by the pool participants that estimates future equipment requirements and develops recommended fleet sizes based on input from automakers and the railroads. However, this model can only make recommendations. Under the terms of the pooling agreement, individual railroads must make their own purchase decisions.

DaimlerChrysler/Ford's proposed conditions all relate to the automakers' complaint that the railroads have not acquired as many rack assemblies as the Reload Pool computer model recommends. However, TTX has no authority to require railroads to

² *The Baltimore & Ohio R.R. – Pooling of Car Service Regarding Multilevel Cars*, Finance Docket No. 29653 (ICC served Aug. 29, 1981).

acquire additional rack assemblies or alter their distribution. Thus, DaimlerChrysler/Ford's proposed conditions have nothing to do with the issues in this proceeding.

II. RESPONSE TO COMMENTS BY LEASING OPPONENTS

A collection of companies that lease railcars – led by First Union, CIT, and GATX – ask the Board to impose restrictions on TTX's pooling authority that would destroy many of the efficiencies generated by pooling intermodal flatcars and entirely eliminate pooling of non-intermodal flatcars. In reviewing the leasing opponents' requests, the Board should always keep in mind that these companies are TTX's competitors in the market to supply rail cars. As TTX's competitors, they are motivated to make TTX less efficient and less effective, so that they can capture for themselves a higher share of the market at higher prices. If granted, the leasing opponents' requests would have precisely that effect.

A. Elimination of TTX's Authority to Price Its Own Equipment

Several of the leasing opponents ask the Board to preclude TTX from engaging in "collective price setting" of car-hire rates for cars in the flatcar pool. Comments of CIT at 10-15; Comments of First Union at 18-25. This would have a devastating impact on the efficiencies and operational benefits of pooling, and it is entirely unjustified. TTX does not have any pricing advantages over leasing companies, and leasing companies do not need the Board's protection from TTX.

1. Eliminating TTX's Authority to Price Would Have a Devastating Impact on Pooling Benefits

The leasing opponents that ask the Board to preclude TTX from engaging in collective price setting fail to reveal the full implications of their request. TTX cannot enter into true "bilateral" price negotiations with its owners as long as it owns the pooled flatcars. TTX's owners comprise TTX and together own its cars. Each owner would have the right to

know what the others were paying, and each owner would, in effect, collectively control what the others were paying. Moreover, each owner *should* have a say in the price it pays, because each has a significant investment in TTX. By the same token, each owner *should* also have a say in what the other owners pay, because each needs to make sure none of the others takes undue advantage of the joint investment. Thus, true “bilateral” negotiations would only be possible if the pool were dissolved and TTX were no longer permitted to acquire or own railcars. This would end the pool as we know it.

Many of the TTX flatcar pool’s well-established benefits would be lost if TTX were no longer permitted to acquire or own railcars, and all of the benefits would be placed at risk. For example, TTX could not size the fleet to meet market demand; instead, individual railroads would contribute cars or withdraw cars as dictated by their individual interests. Railroads could withdraw cars in times of high demand, when the need for pooling and the operational benefits of pooling would be greatest. Equipment quality would suffer, because individual railroads would have no incentive to provide their best cars to the pool; they would have diminished incentives to maintain their own cars because those cars would be shared by their competitors; and they would have no incentive to perform more than the minimal repairs on the cars owned by their competitors. In addition, TTX would have no incentive to engage in research and development activities, because it could never capture the benefits associated with those activities by acquiring new equipment, modifying existing cars, or reconfiguring and redeploying underutilized cars to more-productive uses.

The leasing opponents’ proposal would also place at risk the operational benefits arising from common management of a fungible fleet of free-running cars. The maximum efficiency benefits of pooling could not be achieved if participants failed to

contribute sufficient quantities of high-quality equipment to attain the optimal fleet size.

The flow of cars would be subject to disruption by owners withdrawing their cars from the pool. Maintenance issues and a lack of standardization among car types would lead shippers to reject more equipment, resulting in a higher proportion of empty movements. Cars would be out of service for longer periods of time while being returned to their owners for major repairs.

In addition, pricing disputes could also preclude the development of a fungible, free-running fleet and lead to inefficiencies. Railroads might refuse to accept higher-priced cars for loading, and they might incur extra switching costs to return higher-priced cars empty to their owners.

These problems are not merely hypothetical. They have all occurred in the very same pools that the leasing opponents offer as supposedly successful examples of pooling without common ownership and pricing.

FMI Boxcar Pool. CIT cites the example of the FMI Boxcar Pool, which the ICC approved in 1987. Comments of CIT at 15 n. 8 (citing *Railroad Car Service Pooling Application (Boxcars)*, Finance Docket No. 30907 (ICC served Apr. 27, 1987)).³ I am surprised that CIT chose the FMI Boxcar Pool as an example of successful pooling. TTX extensively described the FMI Boxcar Pool's failure in connection with its reauthorization in 1994. TTX's witness then was Emmitt J. Posey, the former President of FMI. In describing why the FMI Boxcar Pool failed, Mr. Posey identified the same problems that I described

³ FMI also managed a pool of "insulated and equipped" boxcars (the "RBL pool") that was authorized in *Railroad Car Service Pooling Application*, Finance Docket No. 30067 (ICC served Sept. 26, 1983).

above, including difficulties in sizing the fleet, the withdrawal of equipment in times of high demand, and quality problems associated with maintenance issues:

“Because FMI owned no cars, it relied entirely on contributions of cars from its participants. The railroads were willing to participate as long as their obligations were minimal, but they were never willing to make a serious commitment to the pools, particularly when their short-term economic interests conflicted with the broader needs of the pool.

“For example, participants in the RBL pool were entitled to withdraw from the pool on sixty days’ notice. (The railroads would not participate unless they were free to reduce their participation on short notice.) Withdrawals of cars from the [boxcar] pool were common, particularly when demand for those cars was high.

“The chances of achieving pool efficiencies were sharply reduced during the first year of pool operations when Santa Fe withdrew from the pool altogether and Southern Pacific pulled out most of its cars. Santa Fe’s withdrawal reduced the number of demand points the pool could use for loading, and the Southern Pacific action reduced the available car supply. Both actions created extreme inefficiencies in the network. Fewer cars were available, and they were required to travel further for each load.

“Because it did not own the cars, FMI also had no means of enforcing its car movement directives. On occasion, railroads would fail to respond to a directive to move cars in the pool to another carrier. FMI was not in a position to take any action against the defaulting railroad in such circumstances.

“An especially serious problem resulted from the fact that FMI did not manage or control light repairs, heavy repairs, preventive maintenance, or modifications of cars in its pool, as would an owner. The railroad members of the pools were not enthusiastic about keeping each other’s cars in good repair, and FMI could do nothing about it. Repair and car quality functions are closely associated with car ownership. Non-owner users have insufficient incentives to make significant investments in improving or maintaining cars they do not own, some of which are owned by direct competitors.”

Verified Statement of Emmitt J. Posey in Finance Docket No. 27590 (Sub-No. 2), filed Nov. 22, 1993, at 21-22.

National Boxcar Pool. CIT also cites the example of the National Boxcar Pool, which the ICC also approved in 1987. Comments of CIT at 15 n. 8 (citing *Railroad Car Service Pooling Application (Boxcars)*, Finance Docket No. 30969 (ICC served Oct. 9, 1987)). This is also an odd choice of examples. The National Boxcar Pool fell victim to the same problems that plagued the FMI pools, and TTX has confirmed the details through discussions with officials at AAR, which was the pool's initial operator.

When the National Boxcar Pool commenced operations, demand for boxcars was low. Railroads readily contributed their equipment in the hope that some of their assets would be utilized (and generate off-line car hire). When demand increased, however, railroads exercised their right to withdraw cars. Withdrawals and additions often occurred on a seasonal basis as demand fluctuated. Because railroads could add or withdraw cars on short notice, the pool manager was never able to establish an efficient fleet size. Moreover, each railroad performed market research for its segment of the market, but that information was never shared or made part of an overall plan for the pool's development.

The National Boxcar Pool also suffered from car quality problems. Many railroads contributed their older or poorly maintained equipment to the pool, while retaining their newer or better conditioned cars for their own on-line shippers. AAR did not have the authority to set mechanical standards, inspect, repair, or maintain the quality of the pooled equipment. And despite rules that required pool participants to maintain their equipment, maintenance was often neglected. This led to significant levels of customer rejections of pool equipment.

The National Boxcar Pool also had difficulties related to pricing. Railroads often placed restrictions on which cars they would accept to avoid paying high car usage rates. Those restrictions forced the pool manager in effect to manage several pools within the larger pool and direct cars based on parochial considerations rather than efficiency in order to accommodate the concerns of individual railroads.

The result of these many shortcomings was predictable: increased empty miles, increased cycle times, and increased customer dissatisfaction. As a result, the railroad participants withdrew their cars, and the National Boxcar Pool effectively went dormant in the early 1990s.

North American Boxcar Pool. First Union asserts that “TTX efficiently manages a national pool of railroad-owned boxcars” that are “priced without antitrust rate immunity.” First Union at 24. It is referring to the re-emergence of the National Boxcar Pool under TTX management in 2003 as the North American Boxcar Pool (“NABP”). TTX hopes the pool will produce significant benefits, but it has already experienced several of the problems that arise in the absence of common ownership and pricing.

For example, TTX has not been able to expand the pool as rapidly as it would like to reach an optimal size. In addition, TTX has already seen disputes break out among NABP participants that have led to the withdrawal of cars. One participant recently withdrew 700 boxcars after it was unable to negotiate bilateral price agreements with other participants, who refused to accept the higher-priced cars. Moreover, TTX does not have responsibility for fleet maintenance. As a result, car maintenance costs are higher than they could be, and efficiency is lost because cars spend more time moving empty to and from their owners’ repair facilities than they would if repairs were centrally managed. As a result

of these and other issues, the North American Boxcar Pool has not attained the level of operational efficiencies achieved by TTX's Railbox Pool.

Multilevel Reload Pool. CIT and First Union also cite the example of the Multilevel Reload Pool, which the ICC approved in *The Baltimore & Ohio R.R. – Pooling of Car Service Regarding Multi-Level Cars*, Finance Docket No. 29653 (ICC served Aug. 29, 1981). Comments of CIT at 15 n.8; Comments of First Union at 24. TTX has managed the Reload Pool since it assumed AAR's management function under a 1995 contract.

The Reload Pool is not an example of a pool that has succeeded without common ownership or pricing.

First, TTX owns most of the underlying flatcars. Thus, TTX addresses many of the issues relating to equipment maintenance, promotes standardization, and has strong incentives to engage in research and development.

Second, most of the pool equipment is commonly priced. TTX sets prices for the underlying flatcars it owns (which comprise the majority of the fleet), and prices for the attached racks are established by a uniform fee schedule published by AAR under separate Section 10706 antitrust immunity. Thus, there are no significant opportunities for disputes regarding the price of pooled equipment to divide the participants.

Third, as Mr. Posey explained in the 1994 reauthorization proceeding, the Reload Pool's success is largely attributable to the "heavy involvement" of one group of "very powerful shippers" with "similar interests." Posey VS at 23. There are relatively few automakers, they are very influential, and they are very interested in the efficient redeployment of car capacity through the pool. Railroads have little incentive to withdraw equipment from the pool, because they have little opportunity to offer service outside of the

pool. These characteristics do not pertain to any other industries that benefit from TTX's flatcar fleet.

Even within the Reload Pool, equipment supply issues may arise because the railroads that own the racks necessarily consider their individual interests rather than collective interests when making equipment supply decisions, or they may make disparate calculations of demand that lead them to contribute less equipment overall than shippers desire. DaimlerChrysler's and Ford's filing suggests some dissatisfaction on the part of shippers with equipment supply for the Reload Pool.

TTX Chassis Management. First Union asserts that TTX is successfully managing a "chassis pool." Comments of First Union at 24. There is no such pool. TTX helps rail carriers better manage the flow of their domestic chassis. However, at this point, TTX only helps railroads track their chassis' location. It does not manage chassis distribution, or even act as a clearinghouse between individual railroads. The situation actually highlights the difficulties involved in reaching bilateral agreements regarding the shared use of individually owned equipment. Although many railroads believe that efficient chassis management would produce significant benefits, no two railroads have yet agreed to the price, repair, or other terms necessary to form the bilateral agreements under which TTX would manage distribution of their chassis.

A Counter-Example: Heavy Duty Flatcars. None of the leasing opponents mention AAR's recent experience with its "TD-3, Heavy Duty Flatcar Fleet." This was a pool of highly specialized flatcars used primarily for the transport of "High & Wide" loads, such as power generation equipment. Because the traffic these cars carry is highly cyclical, however, the participants made little if any investment in maintenance or replacement. The

cars contributed by participants were aged and in poor condition. Customers frequently rejected cars because of their poor condition and concerns over varying car hire and loading charges. AAR ceased operation of the pool in 1997 due to the declining number of cars in the fleet and the poor mechanical condition of those that remained. By contrast, TTX has successfully pooled the same types of flatcars, applying uniform usage charges and maintenance standards, and investing in 490 new and rebuilt cars in the late 1990s.

TTX's success where AAR had failed is clear testimony to the critical importance of the integrated pool, meaning common acquisition, ownership, and pricing of pool equipment.

2. TTX Does Not Have Any Unfair Pricing Advantages

Leasing opponents attempt to support their arguments for eliminating TTX's pricing authority by claiming that TTX's low prices result from unfair advantages that TTX has over leasing companies. They assert that (i) TTX participants move empty TTX cars free of charge; (ii) TTX participants provide for free storage of TTX cars; (iii) TTX prices its cars using "average pricing" and leasing companies cannot; and (iv) TTX can offer low prices because it does not have to earn a profit. Each assertion is flatly false. TTX's low prices result from the efficiencies and operational benefits of pooling, not any unfair advantages.

a) TTX Pays for Empty Car Movements

CIT and First Union incorrectly assert that TTX has an unfair advantage over leasing companies because its participants move empty TTX cars free of charge. Comments of CIT at 15; First Union at 19. These companies could have discovered the truth if they had bothered to review the Form A Car Contract, which is on file with the Board and which TTX provided with the Application.

Just like leasing companies, TTX pays railroads to deliver new cars and to handle empty equipment to and from repair and storage locations. Under Supplement No. 78 to the Form A Car Contract, TTX pays its participants a “Basic Mileage Rate” and/or an “Incremental Mileage Rate” for such services, depending on the specific circumstances. These payments reimburse the handling carrier for the rail transportation costs they incur and serve as an inducement to move empty TTX equipment promptly. TTX also pays its participants a switching allowance for cars moving to repair shops they serve. TTX paid its participants more than \$6 million in mileage and switching costs in 2003.

TTX does not pay its participants when it directs the movement of empty cars from a railroad with excess capacity to a railroad short of cars, but this is not an unfair advantage that TTX has over leasing companies. Leasing companies never pay for similar movements because they never direct railroads to make similar movements of leased cars. TTX’s redistribution of flatcars is a unique aspect of TTX’s effort to create a free-running pooled fleet.

b) TTX Has No Unfair Advantage With Respect to Car Storage

CIT and First Union also incorrectly assert that TTX has an unfair advantage over lessors with respect to car storage. Comments of CIT at 15; Comments of First Union at 19. In fact, when cars are idle, leasing companies have a significant advantage over TTX.

When leasing companies supply flatcars to railroads, they rarely pay car storage costs. When a lessee railroad places a surplus leased car into storage, it must continue to pay the lease costs, and it must absorb the storage costs as well. Leasing companies are thus able to shift the full costs of storing idle leased cars to the railroads.

By contrast, TTX cars are all subject to “turn back.” If a participant invokes the turn-back provision, then once the turn-back period expires (the period is five days under the current Form A Car Contract) the participant is no longer required to pay car usage costs. Until TTX can get the car back into service, it must absorb the full opportunity cost of lost utilization. Thus, not only do leasing companies never pay storage costs during the term of a lease, but they also never face the business risk associated with turn-back, and thus they should be able to offer lower rates than TTX.

The only situation in which a leasing company must pay storage costs is when a lease has expired and market conditions are such that it cannot immediately find a new lessee.⁴ However, TTX also incurs storage costs for surplus cars that it cannot place into service. TTX’s participants typically do not have the spare capacity to provide storage for TTX cars, and thus TTX must pay third parties to store surplus cars. TTX paid shortlines and other rail car storage operators more than \$3 million for car storage in 2003.

c) TTX Does Not Use “Average-Cost” Pricing

CIT witness McClure asserts that TTX has an unfair advantage over leasing companies because it “prices its equipment on the basis of average cost,” and that “this is not an option available to leasing companies.” Comments of CIT, McClure VS at 5. The implication is that TTX undercuts leasing companies by pricing newer cars below cost and making up the difference by overpricing older cars. McClure simply does not know how TTX prices its cars.

⁴ In many instances, leased cars carry reporting marks of short-line railroads. In theory, these shortlines could provide the leasing companies with free storage for surplus cars, but in practice they often do not have enough total trackage to hold even a small portion of all the cars they have released into the rail network with their reporting marks.

TTX does not price its cars on the basis of average cost. TTX does price all cars of a common type at a single price, which may be the source of Mr. McClure's flawed assumption. Uniform pricing is one of the ways in which TTX has created a fungible fleet – TTX participants are willing to load any empty TTX car because they are all moving at the same low price. However, the price that TTX sets is always adequate to cover the costs of each car, whether new or old. If TTX is able to offer lower prices than leasing companies, it reflects pooling efficiencies, not any unfair advantage.

d) TTX Earns Adequate Returns

The leasing opponents also falsely imply that TTX can set its rates low because it does not need to earn a return on its investment in railcars. This assertion is false.

TTX has no incentive to undermine the prices charged by leasing companies, except when it is passing along genuine efficiencies. TTX must charge rates above its costs in order to fulfill its obligations under the flatcar pooling agreement, which requires that it set rates sufficient "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 . . . and to keep cars in proper condition . . . and to support continued reasonable enlargement of the number of cars in the pool." Pooling Agreement, § 7.10(a) (Application, Exh. A).

In fact, as demonstrated in the Application, TTX has always generated an adequate return. Through its history, TTX has, when warranted, acted to raise its pricing consistent with its contract. Its pricing has allowed TTX to finance more than \$4.2 billion in capital expenditures for new and redeployed flatcars since 1994, without any guarantees

from any railroad. In addition, TTX will make over \$600 million in flatcar purchases in 2004. TTX could not finance these investments unless it was earning adequate returns.

Moreover, TTX's owners have no incentive to favor TTX when leasing companies offer more attractive terms. The railroads' incentives are to obtain the cars they need at the lowest possible cost, not prop up TTX. In fact, TTX participants lease flatcars from the very same leasing opponents that seek to impose conditions on TTX's activities. Data from the Universal Machine Language Equipment Register ("UMLER") reveal that, as of January 1, 2004, owner railroads were leasing approximately 28 percent of their flatcars from leasing companies.

3. The Leasing Opponents Do Not Need the Board's Protection

The leasing opponents attempt to argue that the TTX flatcar pool undermines their long-term survival, but the facts show otherwise. The leasing opponents in this proceeding are components of large financial conglomerates that treat railcar leasing as a financial product. If these companies cannot produce satisfactory returns by leasing railcars, they will simply direct their financial resources elsewhere. It is not plausible that TTX would reduce rates in order to drive out leasing companies so that it can later raise its rates, because its owner-railroads would be the ones left paying the higher rates. TTX's owners would never permit that.

Moreover, car ownership data and the leasing opponents' own statements show that leasing companies have thrived over the past the past ten years, despite the flatcar pool's existence. The data also show that, contrary to the claims of the leasing opponents, TTX prices do not create a price "ceiling."

a) The Leasing Opponents Are Thriving

The available data show that leasing companies have significantly expanded their car fleets in the past ten years while co-existing with TTX. In order to evaluate claims that TTX threatens leasing companies' existence, I asked TTX personnel to analyze changes in car ownership between 1994 and 2004 using data from UMLER.⁵ The data show that the leasing opponents have been rapidly expanding their fleets of all cars, including flatcars.

In Chart 1, which is set forth at page 44 of TTX's Rebuttal Narrative, I show the growth in the railcar fleets of the principal leasing companies participating in this proceeding for all cars except tank cars.⁶ The data show an overall growth of 77 percent, from 168,347 cars to 297,625 cars. The growth of these leasing companies in the flatcar segment is even more dramatic, as shown in Chart 2, at page 45 of the Rebuttal Narrative. The data show an overall growth of 426 percent, from 6,237 cars to 32,789 cars.

b) Public Pronouncements Reflect Leasing Opponents' Positive Outlook

In their less-guarded moments, the leasing opponents cannot help but reveal their positive outlook. These companies speak about their financial outlooks in glowing terms when they talk to the investment community. For example, GATX told its shareholders on April 23, 2004, that its long-term strategy in the rail sector was one of

⁵ I have provided the underlying data for the charts described in Exhibit 1 to this statement.

⁶ These data, from UMLER, represent cars other than tank cars owned by the following entities and their affiliates: Bombardier, CIT, David Joseph, First Union, GATX, GE Rail Services, MRC, Progress Rail Services, and Trinity Leasing.

growth through fleet acquisitions.⁷ CIT told securities analysts on April 22, 2003, that its rail leasing business “continues to do exceedingly well,” and it anticipates “more growth in rail.”⁸ Trinity Industries Railcar Leasing and Management Service Group reported in their Form 10-Q for the First Quarter 2004 that railcar leasing revenues were up, and its operating profit margin was an astounding 27.4 percent.

Even in this proceeding, the leasing opponents’ acknowledge that they have long co-existed with TTX. GATX observes that, over the past three decades since the ICC first authorized TTX, the “railcar leasing market has expanded dramatically.” Comments of GATX at 2. Trinity acknowledges that “[l]easing of railcars . . . has become widespread” and touts the existence of “a broad and diversified railcar leasing industry.” Comments of Trinity, Salop *et al.* VS at 14.

c) TTX Prices Do Not Create a Ceiling

Some of the leasing opponents argue that TTX prices unfairly create a “ceiling” on the prices that leasing companies can charge. However, that statement is not true. As evidence that TTX rates do not establish a price “ceiling,” I provide a comparison between certain TTX rates and AAR “default” rates in Exhibit 2. If TTX were imposing a price “ceiling,” one would expect the default rate to be at or below the TTX rate. When the default rate exceeds the TTX rate for a particular quarter, it means that cars are moving under the higher rate. The exhibit shows that TTX often offers the lowest rate, as one would

⁷ GATX Presentation to Shareholders, April 23, 2004, p. 7 (available at www.gatx.com).

⁸ CIT First Quarter Earnings Conference, Apr. 22, 2004, pp. 7, 30 (transcript available at www.cit.com).

expect from a highly efficient provider, but it also shows that cars often move under default rates that exceed rates set by TTX.

B. Elimination of TTX's Pooling Authority For Non-Intermodal Flatcars

All of TTX's leasing opponents ask the Board not to renew TTX's authority to pool cars other than intermodal and automotive flatcars. Some ask the Board to remove TTX's authority to pool automotive flatcars as well. They claim that TTX has not shown any benefits from pooling non-intermodal flatcars and that TTX's pooling of non-intermodal flatcars threatens their existence. However, TTX pooling of non-intermodal flatcars generates the same types of efficiencies and operational benefits as pooling of intermodal flatcars.

1. Pooling Generates Significant Benefits With Respect to Non-Intermodal Flatcars

The leasing opponents entirely ignore the evidence contained in TTX's Application that describes the significant benefits generated by TTX's pooling of non-intermodal flatcars. They are under the misperception that pooling benefits stem only from improvements in car utilization and that, because TTX's non-intermodal flatcars often operate in so-called 16(c) shipper pools, their utilization is no better than for non-TTX cars. Comments of First Union at 17; Comments of GATX at 9; Comments of CIT at 9-10.

As I explained in my initial verified statement, TTX's flatcar pool involves much more than just common management of a fleet of cars. The flatcar pool creates significant benefits associated with TTX's acquisition, ownership, maintenance, and research and development relating to the flatcars in its fleet. My statement demonstrated that these benefits apply to TTX's pooling of both intermodal and non-intermodal flatcars.

In my verified statement, I described how TTX's benefits extend to all of TTX's flatcar types. I explained that TTX ownership and management of centerbeam cars, heavy duty flatcars, and bulkhead flatcars provides important capacity to the railroad industry and allows carriers to compete for business without making inefficient, duplicative investments. Wells VS at 19. I explained that TTX ownership and management allows carriers to compete for business that they might not have pursued without the ability to use pooled assets. *Id.* I also explained that TTX's research and development efforts extended to non-intermodal flatcars and described TTX's redeployment of such cars to new uses. *Id.* at 18. With respect to autoracks, I described TTX's extraordinary investments of time and money in researching and developing truck technology to reduce vehicle damage during transport, and our investments in new car types, such as the new "Uni-Level" car. *Id.* at 19. Other TTX witnesses also described these benefits. Hulick VS at 8-9; Reardon VS at 9-12.

The leasing opponents ignore all of that evidence and focus only on whether pooling of non-intermodal flatcars produces the type of improvements in car utilization that can be achieved from managing a free-running fleet of cars. However, as the Board's predecessor has recognized, the concept of a free-running pool of cars is merely one of pooling's many benefits. *See TTX III* at 10 ("The concept of a free-running pool of cars was never the ultimate goal . . .").

In fact, in the 1994 TTX reauthorization proceeding, the ICC considered in depth the issues relating to TTX's pooling of non-intermodal flatcars, including in particular the placement of TTX cars in 16(c) shipper pools. The ICC concluded that the broad array of TTX's pooling benefits applied to TTX's non-intermodal flatcars, and it did not hesitate

to reauthorize the full scope of TTX's pooling authorities. *See id.* Indeed, the ICC explicitly approved the placement of TTX cars in 16(c) shipper pools. *See id.*

Moreover, contrary to the assumptions of the leasing opponents, pooling of non-intermodal flatcars also generates the types of utilization benefits that those opponents wrongly regard as the only valid justification for pooling. The leasing opponents are clearly wrong when they assert that TTX's non-intermodal flatcars are purely "one-way" cars. Through active management of non-intermodal flatcars that railroads have placed in 16(c) shipper pools, TTX is able to arrange for railroads to swap cars between 16(c) pools in order to minimize the time and miles that particular cars move empty before their next load.

For example, if one TTX centerbeam car assigned by Railroad *A* to a 16(c) pool for a shipper in the Southeastern United States comes empty on the West Coast, and another TTX centerbeam assigned by Railroad *B* to a 16(c) pool for a shipper in the Pacific Northwest comes empty on the East Coast, TTX can arrange for *A* and *B* to swap the two cars, minimizing the empty distance that each must travel to the next load.

These swaps are possible because of several interlocking features of TTX's flatcar pool: (1) TTX knows where its cars are located; (2) TTX's pool cars are fungible, in that they are built and maintained to common standards, are subject to the same car usage charges and terms of use; and (3) TTX's expertise in managing the pool allows it to take advantages of opportunities to minimize unnecessary empty movements.

TTX engages in a significant amount of swapping. With respect to centerbeam cars, in the period between April 2003 and April 2004, TTX arranged for 7,124 swaps of TTX centerbeam cars from one 16(c) pool to another – the equivalent of 69.5

percent of TTX's total centerbeam fleet. Almost 2,000 cars were swapped more than once during the year.

TTX also generates benefits from swapping chain tie-down cars, bulkhead flatcars, and other specialty flatcars, though to a lesser degree. Demand for bulkhead flatcars tends to be concentrated in certain regions, resulting in fewer opportunities for swapping. Chain tie-down cars experience cyclical demand, so empty cars are often available near loading opportunities when demand is low. Nevertheless, TTX's pool management generates utilization efficiencies even for these car types. TTX arranged over 2,100 pool swaps of these other non-intermodal flatcar types during the same 2003-2004 period – the equivalent of 16 percent of TTX's fleet of these types.

Some of the leasing opponents argue that pooling has not created any utilization benefits for autorack cars. They should know better, and some apparently do. GATX incorrectly describes automotive flatcars as typically moving loaded in only one direction “in well defined corridors.” Comments of GATX at 9. But First Union recognizes that automotive flatcars “have loading and unloading characteristics similar to intermodal flatcars.” Comments of First Union at 18 n.8. In fact, TTX's automotive flatcars achieve very high degrees of utilization – they move empty only 46 miles for every 100 loaded miles, well below the 1:1 ratio of empty to loaded miles associated with one-way movements.

These utilization benefits are achieved through intensive management of autorack distribution by the Reload Pool. The Reload Pool seeks to match loads with the nearest available empty cars – directing the movement of the rack, not the car. Although the Reload Pool's distribution functions are separate from TTX's flatcar pool, it could not

function effectively unless the flatcars underlying the racks were regarded by the railroads as fungible, free-running cars. Instructions to relocate particular racks would be met with resistance if the racks were accompanied by a high-priced or otherwise unsatisfactory car. The fact that the vast majority of the autorack cars in the Reload Pool are free-running TTX flatcars thus enables the Reload Pool to achieve its high levels of utilization.

2. TTX's Ownership of Non-Intermodal Flatcars Does Not Threaten Leasing Companies' Ability to Compete

Several of the leasing opponents urge the Board to focus special attention on TTX's non-intermodal flatcars because, they claim, such cars have come to "dominate" TTX's fleet. Comments of CIT at 8; Comments of GATX at 9. Those claims are wrong. The leasing opponents' data are misleading because they compare car counts, which do not accurately portray changes in capacity.

The traditional intermodal flatcar was an 89-foot flatcar capable of carrying two intermodal trailers or containers. Today, an increasing share of TTX's intermodal flatcars are three- or five-unit articulated doublestack and spine cars, some of which can carry as many as ten loaded containers. TTX's intermodal fleet averages 4.7 platforms per car, compared to two for the traditional 89-foot flatcar. Because many of TTX's newer intermodal flatcars can handle much larger volumes than older cars, TTX measures its intermodal flatcar capacity in terms of units – the equivalent of two platforms, or the carrying capacity of two containers, – rather than cars.

Chart 3, set forth at page 68 of the Rebuttal Narrative, shows the changes in TTX's flatcar fleet from 1994 through 2004. The chart shows that, properly measured, TTX's flatcar fleet remains predominantly an intermodal fleet. It also shows that, contrary to the leasing opponents' portrayal, TTX's intermodal fleet has continued to grow faster

than its non-intermodal fleet. The capacity of TTX's intermodal flatcars fleet has grown by over 100 percent since 1994, as compared to 44 percent growth for the non-intermodal fleet. Since 1989, TTX purchases of non-intermodal flatcars have annually represented less than 20 percent of TTX's total purchases. The only exceptions were 1994, 1996, and 2002, when TTX's intermodal and automotive flatcar purchases were very low due to depressed demand forecasts in those areas.

TTX modest additions to its non-intermodal flatcar fleet over the past ten years in response to growing demands for centerbeams and certain other flatcar types have not appreciably altered TTX's share of these cars. For example, TTX increased its fleet of centerbeam cars by 157 percent since 1994, but its percentage of the Nation's fleet of such cars has decreased from 34 to 29 percent. That is because, over the same period, leasing companies (including TTX's opponents here) increased their collective centerbeam fleets by 300 percent and increased their share of these cars from 35 percent to 48 percent, as shown in Chart 4, which is set forth at page 76 of the Rebuttal narrative. CIT, which complains the loudest about the supposed erosion of its competitive position, increased its ownership of centerbeams from zero in 1994 to 3,381 in 2004.⁹

Data for other flatcar types tell the same story. As shown in Chart 5 at page 78 of the Rebuttal Narrative, outside the intermodal and automotive arena, TTX's share of flatcars is well below 50 percent. That share has grown somewhat since 1994 as railroads have decreased their direct ownership of such cars, and as TTX invested in centerbeams and

⁹ UMLER data reveal 2,635 CIT centerbeams in 2004. CIT witness McClure states that CIT "currently owns 3,381 such cars." McClure VS at 2. TTX is uncertain as to the cause of the discrepancy, but it does not dispute CIT's figures.

heavy-duty flatcars when others were not investing. But leasing companies' share of these cars has grown even faster, more than doubling in the last 10 years.

C. Elimination of TTX's Pooling Authority For Boxcars and Gondolas

The current proceeding addresses the reauthorization of the TTX flatcar pool and does not involve the TTX's Railbox and Railgon pools, which operate under separate grants of pooling authority. Nevertheless, two leasing opponents have raised questions about the TTX boxcar and gondola pools. Comments of First Union at 9-10; Comments of Trinity at 7, 11.

There is little cause for concern that TTX's investments in boxcars and gondolas threaten to displace leasing companies' investments, but even if it did, it would simply be a reflection of the efficiencies that pooling creates. TTX owns a very small share of boxcars and gondolas. Currently, TTX owns 6.7 percent of boxcars and 0.5 percent of gondolas. TTX's share has not increased significantly over time. Since 1994, TTX's share of boxcars has risen slightly from 6.2 percent to 6.7 percent. TTX's share of gondolas has fallen over the same time period, from 0.7 percent to 0.5 percent.

The increase in TTX's share of boxcars is largely attributable to TTX's plan to acquire approximately 5,000 boxcars by the end of 2004. TTX acquired these boxcars because it perceived that the industry was not investing sufficiently to meet market demand – it saw an opportunity that leasing companies had apparently decided not to pursue. TTX thus stepped in to provide the level of investment necessary to maintain the boxcar fleet. TTX's investment represents a much needed infusion of new equipment into the aging fleet, not a threat to leasing companies.

III. CONCLUSION

In my initial verified statement, I described the efficiencies and operating benefits generated by TTX's flatcar pool. None of the comments filed in this proceeding present any reason to question my description of those benefits. Nor do they provide any basis for imposing new restrictions on TTX's pooling authority. The only parties opposing TTX's full reauthorization are TTX's competitors, and their only complaint is that TTX uses its pooling efficiencies to offer low prices to flatcar users. I can think of no better evidence that TTX is delivering on its promise to provide an adequate supply of high-quality, low-cost railcars for the benefit of the shipping public.

EXHIBIT 1

DATA UNDERLYING CHARTS

CHART 1		
Leasing Company Opponents Freight Car Ownership 1994-2004 (Excluding Tank Cars)		
	1994	2004
Boxcars	36,054	51,785
Hoppers	116,268	171,894
Gondolas	9,788	41,268
Non-Intermodal Flats	3,619	18,609
Intermodal Flats (Units)	2,618	14,069
Total	170,341	299,629

CHART 2		
Leasing Company Opponents Flatcar Ownership 1994-2004		
	1994	2004
Centerbeams	2,326	12,818
Autoracks	0	3,078
Other Flatcars	1,293	2,824
Intermodal Flats	2,618	14,069
Total	8,231	34,793

CHART 3		
TTX Flatcar Fleet 1994-2004		
	1994	2004
Intermodal Units	66,500	138,650
Autoracks	38,300	49,100
Centerbeams	3,714	9,548
Other Flatcars	12,786	20,252
Total	123,294	219,554

CHART 4		
Centerbeam Ownership 1994-2004		
	1994	2004
Railroads	3,432	7,355
Leasing Companies	3,919	15,692
TTX	3,712	9,529
Other	16	69
Total	13,073	34,649

CHART 5		
Share of Non-Intermodal/Non-Automotive Flatcar Ownership 1994-2004		
	1994	2004
Railroads	54.09%	30.49%
Leasing Companies	10.74%	24.65%
TTX	25.35%	36.48%
Other	9.17%	8.38%
Total	100%	100%

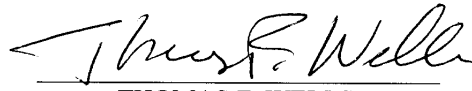
Exhibit 2
Default Rates Compared With TTX Rates 1Q & 2Q2004

AAR Car Type	Description	Miles/Day	TTX Rate	2Q 2004 Default Rate			1Q 2004 Default Rate		
				Rate/Hour	Rate/Mile	Total	Rate/Hour	Rate/Mile	Total
Q152	TTLX/UTTX 5 Unit 48' Trailer Only	300	56.03	0.420	0.044	23.28	0.420	0.044	23.28
Q451	NTTX 5-Unit 48' Container Only	300	47.86	1.890	0.060	63.36	1.890	0.060	63.36
Q730	TRRX 3-Unit All Purpose(6-28' or 3-57' Trailers)	300	41.06	1.800	0.087	69.30	1.800	0.087	69.30
Q751	TTAX 5-Unit 48' All Purpose	300	50.99	1.800	0.087	69.30	1.800	0.087	69.30
Q752	TTAX 5-Unit 53' All Purpose	300	52.19	1.800	0.087	69.30	1.800	0.087	69.30
S162	DTTX 5-Unit Articulated 125 Ton 40' Wells	300	65.76	1.850	0.068	64.80	1.850	0.068	64.80
S367	DTTX 5-Unit Articulated 125 Ton 48' Wells	300	65.76	1.890	0.068	65.76	1.890	0.068	65.76
S635	DTTX 3-Unit Articulated 125 Ton 53' Wells	300	43.26	1.690	0.050	55.56	1.690	0.050	55.56
S312	DTTX Single-Unit Stand Alone 48' Wells	300	16.20	0.540	0.039	24.66	0.540	0.039	24.66
S313	DTTX Single-Unit Stand Alone 48' AP Wells	300	16.44	0.510	0.015	16.74	0.510	0.015	16.74
S615	DTTX Single-Unit Stand Alone 53' Wells	300	16.44	0.850	0.020	26.40	0.850	0.020	26.40
S332	DTTX 3-Unit Drawbar 48' Wells	300	49.50	2.010	0.040	60.24	2.010	0.040	60.24
S333	DTTX 3-Unit Drawbar 48' AP Wells	300	50.46	1.610	0.040	50.64	1.610	0.040	50.64
S635	DTTX 3-Unit Drawbar 53' Wells	300	45.18	1.690	0.050	55.56	1.690	0.050	55.56
F103	OTTX/HTTX 60' 70-Ton Chain Tie-Down	100	12.96	0.420	0.051	15.18	0.420	0.051	15.18
F243	TTPX 68' 100-Ton Bulkhead 155,000-185,000 LD Limit	100	15.36	0.500	0.050	17.00	0.500	0.050	17.00
F343	TTPX 68' 100-Ton Bulkhead 185,000-200,000 LD Limit	100	15.36	0.400	0.040	13.60	0.400	0.040	13.60
F405	XTTX 89' 110-Ton Plain Flat 85-89' Inside Length	100	25.20	1.200	0.060	34.80	1.200	0.060	34.80
F383	TTZX 73' 100-Ton Centerbeam	100	14.16	0.500	0.050	17.00	0.500	0.050	17.00
F483	TTZX 73' 110-Ton Centerbeam	100	14.16	0.500	0.050	17.00	0.500	0.050	17.00

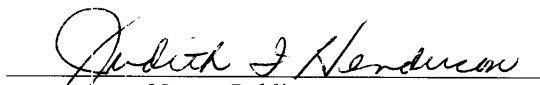
VERIFICATION

STATE OF ILLINOIS)
)
COUNTY OF COOK) ss

THOMAS F. WELLS, Senior Vice President of Fleet Management for TTX Company, being duly sworn, deposes and says that he has read the foregoing statement, knows the contents thereof and that the same are true as stated.


THOMAS F. WELLS

Sworn to and subscribed before me
this 11th day of May, 2004.


Notary Public



My Commission expires 5/26/2007

αβγδ

Power Environment

Heat Recovery and Plants

May 7, 2004

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

Re: Finance Docket No. 275 (Sub-No.3)
TTX Company – Application for Pooling Reauthorization

Dear Mr. Williams,

With over 100,000 employees and a diverse portfolio of industries that range from building 2/3rds of the worlds train metros, high speed bullet trains, 1/4 of the world's power plants and even building the largest cruise ship in the world, the Queen Mary 2, Alstom Power knows of the importance of having an existing, efficient and economical flatcar service that can move our over-dimensional loads when needed throughout our various industries.

Regarding TTX's application to the Surface Transportation Board (STB) for reauthorization of its flatcar pooling authority. Alstom Power Inc. strongly support an extension of TTX's flatcar pooling authority because we rely on the smooth functioning of the TTX flatcar pool for the continued growth and success of our power generating business.

Alstom is very dependent on flatcar pooling as we have a number of sites through the United States and by allowing TTX to obtain reauthorization of its flatcar pooling authority it allows companies such as ours the flexibility to have railcars move freely across the entire rail network and available for shipments on all railroads and all lanes. We feel the TTX pool of railcars accommodates competitive shifts in demand for certain railcars that we need and that allows us to compete in the power generation market.

TTX's fleet and its ability to move railcars among rail carriers has allowed us to provide a competitive advantage in certain markets that we normally would not be able to compete in and we rely on TTX's ability to provide the high number of flatcars as needed. TTX willingness to develop new types of flatcars and improve existing cars is of critical importance to the continued growth and success of our business.

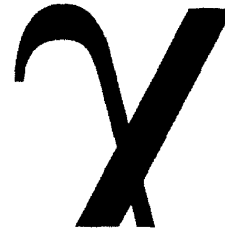
Alstom strongly supports TTX's application for a fifteen-year extension of its pooling authority to ensure TTX will continue to supply efficient and economical flatcar service for years to come.

Sincerely,



Frank Rodriguez
Alstom Power Inc.
Transportation Manager - HRSG

2000 Day Hill Road
Windsor, CT 06095-0500
Tel.: 860-285-4058
Fax: 860-285-9733
www.power.alstom.com



J



April 2, 2004

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

RE: Finance Docket No. 27590 (Sub-No. 3)
TTX Company – Application for Pooling Reauthorization

Dear Mr. Williams

My name is Scott Smith, and I am the Director of Logistics – North America for APL (American President Lines). I am starting my 20th year with APL and have held positions in Equipment Logistics, Cargo Logistics, and most recently this Logistics position, responsible for all Rail Logistics along with Service Reliability, for the past 6 years. Prior to coming to APL, I was in the Trucking Industry for 18 years in various positions including AVP-Operations for a 58 terminal company.

APL is a \$5 billion company operating around the world. We have services in Europe, South America, and Asia. Much of our traffic travels to the intermodal points by rail. We project that we will move 373,000 shipments by rail this year in the United States and Canada. Our major lanes are San Pedro to and from Chicago, New York, Memphis, Dallas, and Atlanta, and also from Seattle to and from Chicago, New York, and Memphis.

All of this intermodal traffic travels in our containers (20', 40', 45', and 48') on rail provided cars.

We understand that TTX is seeking reauthorization of its flatcar pool. We strongly support an extension of TTX's flatcar pooling authority, because we rely on the smooth functioning of the TTX flatcar pool for the growth and success of this part of our business. We also support this reauthorization because it will strengthen the intermodal transportation system in which we participate.

Some of APL's supporting reasons for this reauthorization are that we think the industry benefits from TTX's research and design activities. TTX has worked with car builder, parts suppliers, and shippers to develop new equipment types and improve the performance of the existing cars in its fleet. TTX benefits in promoting the growth of rail

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Oakland, CA 94607-5500 USA
USA
www.apl.com

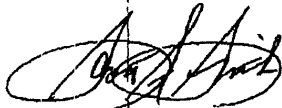
intermodal traffic. This Intermodal growth is important to the U.S. economy and TTX promotes this through all of its efforts to provide an efficient and adequate supply of high-quality flatcars. If other equipment supply options – such as car leasing – could provide additional benefits, TTX would not prevent railroads from taking advantage of those options.

TTX has been able to respond rapidly to shifts in equipment demand with increased investment in particular equipment types. They have expanded its double-stack fleet in response to the increasing importance of double-stack traffic, including our international container traffic.

The availability of a shared pool of intermodal cars ensures that, whichever railroad we use, and whichever lanes we need to travel in, we will have access to an adequate supply of railcars.

In closing, we support TTX's application for a fifteen-year extension of its pooling authority to ensure that TTX will continue to supply efficient and economical flatcar service in the years to come.

Sincerely,

A handwritten signature in black ink, appearing to read "Scott A. Smith", is written over a horizontal line.

Scott A. Smith
Director of Logistics Services NA
APL

K



John H. Kemper, CCM
Vice President
Large Corporate
1701 Golf Road - Tower 1 - 9th floor
Rolling Meadows, IL 60008
847.354-7165
847-354-7330 Fax

May 12, 2004

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

RE: Finance Docket No. 27590 (Sub-No. 3)
TTX Company - Application for Pooling Reauthorization

Dear Mr. Williams,

My name is John Kemper and I am a Vice President of Fifth Third Bank, headquartered Cincinnati, Ohio. TTX Company has been a client of the Bank for many years. I am personally familiar with TTX and have followed their credit in various capacities for over 15 years. The bank has been both a long-term and a short-term lender to TTX, on both a secured and unsecured basis. Other areas of involvement include providing a payroll account and a money market investment vehicle to the Company. I have always found TTX to be a strong credit, efficiently operated, and with excellent, stable financial results. I believe they play an important role in the railroad industry by providing a highly reliable pool of intermodal and other flatcar types for use by the nations railroads.

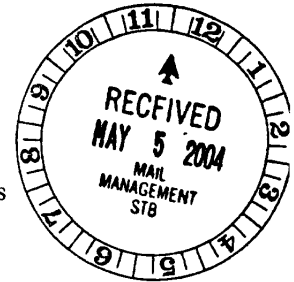
We understand that TTX is seeking reauthorization of its flatcar pooling agreement. I strongly support its Application for extension of the pooling authority for a 15-year period. Particularly as a long-term lender to TTX in the role of equity participant in leveraged finance leases, it is important that this period be as long as possible in order to facilitate a closer match with the long-term payback period of our investment.

Sincerely,

A handwritten signature in dark ink, appearing to read 'John H. Kemper'.

John H. Kemper
Vice President

L



GE Gas Turbines, LLC
Transportation & Logistics

April 30, 2004

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

RE: Finance Docket No. 27590 (Sub-No.3)
TTX Company – Application for Pooling Authorization

Mr. Williams:

As introduction, my name is Bobby L Brown, and I hold the position of Transportation Specialist with General Electric Gas Turbines at Greenville, SC. My career in transportation spans over 30 years with experience in all modes, air, truck, rail, & ocean. For the last ten years I have moved heavy equipment such as transformers, generators, and gas turbines via rail for General Electric Company to both domestic and international customer jobsites.

GE gas turbines ship via rail flatcars to North American customers and through ports of export to customers all over the globe. We have shipped over one thousand machines from GE Greenville over the last five years alone. And, these turbines range in carload weights from 290 thousand pounds to sometimes over 800 thousand pounds each.

So it is imperative for our company and the power generation business in general, that heavy-duty flat cars be available in sufficient numbers and capacities to service this great demand. For every gas turbine delivered by rail to a jobsite, there are also approximately twenty flatcar loads delivering to that site. So, where it is common for a jobsite to have multiple turbines in service, the volume of heavy-duty rail cars moving to that site can be huge.

We understand that the TTX Company has applied for extension of their flatcar pooling authority. We strongly offer our support of this authority because the success of our company relies on the ample supply of well-maintained heavy-duty rail cars for safe and timely delivery of our turbines to customers.

As the power generation business has grown, particularly since year 1999, is was the TTX Company which recognized the need for increased heavy duty rail flatcar capacity in the US. Without their continuing investment in and high quality maintenance of this fleet, it

would have been difficult to impossible to get to sites the power generation equipment needed to complete these projects.

Further, with the availability of this large pool of TTX equipment to US shippers of heavy and dimensional freight, it tends to foster competition between the rail roads and mitigate the burden of choice of services of these sometime captive shippers. As TTX equipment is free to move among all shippers over all US and North American rail roads, market access is guaranteed to both large and small shippers without prejudice through equal access to this type of this very necessary rail equipment.

We support TTX's application for extension of pooling authority because we consider their services and the rail flatcar equipment, which they provide, to be essential to the successful delivery of our power generation equipment to our customers.

Sincerely,

A handwritten signature in black ink, appearing to read "Bobby L. Brown". The signature is fluid and cursive, with the first name "Bobby" being more prominent.

Bobby L Brown
GE Logistics

M

THE PORT AUTHORITY OF NY & NJ

PORT COMMERCE DEPARTMENT
225 PARK AVENUE SOUTH, 11TH FLOOR
NEW YORK, NY 10003

April 9, 2004

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

Subject: Finance Docket No. 27590 (Sub- No. 3)
TTX Company – Application for Pooling Reauthorization

Dear Honorable Williams:

My name is Donald H. Lotz, and I am the Manager of Intermodal Development for the Port Authority of New York and New Jersey. My responsibilities include providing support for planning and operating decisions related to the movement of cargo by rail between the Port of New York and New Jersey and inland markets.

The Port of New York and New Jersey is the third largest container port in the United States and the largest port on the East Coast. It is a key gateway for intermodal cargo between Europe and Asia and the United States. The Port Authority of New York and New Jersey ("the Port Authority") is an agency of the States of New York and New Jersey whose bi-state compact was approved by Congress. Foremost among the statutory responsibilities of the Port Authority is the protection of the commerce of the New York/New Jersey Port District, statutorily defined as an area that is roughly a 25-mile radius around the Statue of Liberty.

The facilities of a great port such as New York/New Jersey cannot be efficiently operated unless export/import traffic can move freely to and from the terminal facilities. Recognizing the expansion of export/import traffic, with the corresponding highway congestion that could result, the Port Authority in the early 1990's began to invest in the expansion of its rail transportation capacity. The impact has been remarkable, with volumes moving by rail increasing from 50,000 in 1993 to nearly 233,000 in 2003. With traffic levels expected to increase in the future, the need for a sufficient supply of flat cars for this business is vital to ensuring the smooth flow of commerce for the nation.

Therefore, the Port Authority wishes to express its support for TTX's application for STB reauthorization of the flatcar pool. Without this pooling arrangement, it is felt that there could be frequent disruptions to intermodal equipment supply operations at critical times. In terms of professional projections of future equipment needs, prompt response to market changes, massive capital investment, and the efficient management of a very complex national fleet, there is no doubt that TTX supplies an invaluable service to the Port of New York and New Jersey and to the nation.

Additionally, the TTX system does not prevent any other equipment supply options. If other equipment supply options, such as car leasing, could provide additional benefits, TTX would not prevent railroads from taking advantage of those options.

THE PORT AUTHORITY OF NY & NJ

Following is a summary of the advantages derived from the TTX pooled fleet system:

Benefits from TTX Management of a Pooled Fleet

- TTX pool cars move across the railroad network without restrictions.
- The TTX pool accommodates seasonal, competitive, and other shifts in demand.
- The availability of a shared pool of intermodal cars ensures that, whichever railroad we use, and whichever lanes we use, we will have access to a supply of railcars.
- The availability of a shared pool of intermodal flatcars increases rail-to-rail competition by eliminating car supply issues as a possible impediment to competition.
- The size of TTX's fleet and its ability to move flatcars among rail carriers has allowed us to expand our business, relying on TTX's ability to provide a higher number of flatcars as needed.
- The TTX pool ensures that railroad terminals we use remain as fluid as possible, rather than being tied up by switching of cars of different ownership.

Benefits from TTX's Efficient and High-Quality Maintenance

- TTX has demonstrated its commitment to provide a fleet of high-quality, well-maintained intermodal cars.
- TTX's experience and expertise in maintaining intermodal cars and its incentives to provide high-quality equipment ensure that our rail traffic moves with minimum disruption.
- TTX's proactive and efficient maintenance practices make TTX equipment more dependable and allow rail networks to operate more reliably, lowering our company's costs from delays due to malfunctioning equipment.

Benefits from TTX Research and Design Activities

- TTX has demonstrated a commitment to improve the quality of its fleet.
- TTX has worked with us and other shippers to develop new and improved intermodal equipment to meet our evolving needs.
- new types of intermodal equipment and improve the quality of existing equipment.

THE PORT AUTHORITY OF NY & NJ

- We have benefited from TTX's efforts to redeploy existing equipment to new uses in response to evolving demand.
- TTX is involved in a major effort to convert 48-foot well cars into cars more suited to carrying 20-foot and 40-foot international containers.
- TTX is undertaking a new effort to modify 48-foot spine cars to handle 53-foot trailers

Benefits in Promoting the Growth of Intermodal Traffic

- Intermodal transportation has grown dramatically, and its future expansion is critical to a healthy, productive economy.
- Increased use of intermodal transportation conserves fuel and reduces congestion and wear on our nation's highways.
- TTX provides a national vision of intermodal car needs.
- TTX's flatcar pool is the base upon which rail intermodal's success is built.
- TTX's ability to achieve operational and maintenance savings creates lower car costs, which can be passed along to the shipper community, thus encouraging further growth of intermodal traffic.
- The continued growth of intermodal transportation and the continuation of the TTX flatcar pool will increase our company's ability to operate successfully.

In closing, the Port Authority would like to emphasize again that the steady expansion of intermodal rail to and from our region makes it imperative that the STB approve the TTX application. Not doing so would cause disruption to international trade and commerce that would have negative consequences to the regional as well as the national economy.

Sincerely,



Donald H. Lotz
Manager, Intermodal Development
Port Commerce Department

Shipping Systems Division
122 West 22nd Street, Suite 101
Oak Brook, Illinois 60523-1562

Telephone: 630 573-4778
Fax: 630 573-4659
web: www.portecrail.com



March 24, 2004

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



RE: Finance Docket No. 27590 (Sub-No.3)
TTX Company – Application For Pooling Reauthorization

Dear Mr. Williams,

I am a division President and General Manager of Portec Rail Products, Inc. a major supplier of railcar parts to the railroad industry. My division supplies many of the tie-down securement devices and locking mechanisms used on railroad flatcars and intermodal cars. I have been involved in the railroad supply business for over 35 years and have held my present position for 10 years.

I understand that TTX Company is seeking reauthorization of its flatcar pool. I strongly support an extension of TTX's flatcar pooling authority, not only because TTX Company is an important customer for us but also because of the significant benefits TTX's flatcar pool provides for the U.S. railroad industry.

The TTX flatcar pool has been a tremendous success since its inception in the mid-1950s. Over the years the dedication of TTX to acquiring and maintaining enough railcars to meet the needs of the railroads has been a strong contributing factor to the growth and financial stability of the railroads. TTX has been able to keep up with the changing needs of the rail industry from flatcars to auto rack cars, intermodal cars, gondolas and boxcars. They continue to work with suppliers on the latest technological advancements and, in particular, to improve ride quality of their cars.

TTX has worked with railcar builders and parts suppliers to develop new equipment and improve the performance of their existing fleet of cars. Portec Rail Products, Inc. has been involved with TTX engineers to develop a securement system for their new Uni-Lever enclosed flatcar that is expected to help the rail industry recapture the business of transporting large trucks (Class 8), farm equipment, buses and recreational vehicle. In addition, we also are involved with TTX to design and develop a new tie-down securement to improve the safety and transport of large diameter gas line pipe on flatcars.

I consider the approval of TTX's application for a fifteen-year extension of its pooling authority to be of critical importance to the continued growth and success of the railroad industry and of our business.

Sincerely,

A handwritten signature in dark ink, appearing to read "L.J. Sieja", with a stylized, cursive script.

L.J. Sieja
President & General Manager
Portec Rail Products, Inc.
Shipping Systems Division



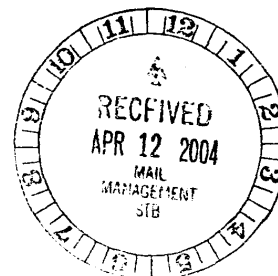
The Port of Long Beach

P.O. BOX 570 • LONG BEACH, CA 90801-0570 • TELEPHONE (562) 437-0041 • FAX (562) 901-1725

March 23, 2004

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

RE: Finance Docket No. 27590 (Sub-No. 3)
TTX Company – Application For Pooling Reauthorization



Dear Mr. Williams:

I am Don Wylie, Managing Director of Maritime Services for the Port of Long Beach, California, the second largest port in the United States. We are a landlord port leasing facilities to numerous private sector companies that load and discharge oceangoing vessels. In CY2003 our terminals handled the equivalent of 4.6 million twenty-foot containers. Approximately half of this cargo originated in or was destined to points east of the Rocky Mountains. All of this cargo moved by rail. Numerous studies indicate that international trade, and specifically trade with Pacific Rim countries will double or even triple by 2020. It is not inaccurate to state that West Coast ports are struggling to build and modernize our infrastructure to deal with this dramatic growth.

Likewise, we are concerned about the American railroad's capacity and ability to move these massive amounts of cargo into the future. For this reason, we strongly support reauthorization of TTX's flatcar pool, because it will strengthen the intermodal transportation system in which we participate. In recent years, there have been occasions when a shortage of intermodal rail cars has delayed movement of international cargo into and out of Southern California. With fully one third of US waterborne trade moving through the Ports of Los Angeles and Long Beach, we must have an adequate supply of rail equipment. Intermodal growth is important to the U.S. economy, and TTX promotes intermodal growth through all of its efforts to provide an efficient and adequate supply of high-quality flatcars. Further, TTX facilitates continuing investment by the U.S. railroad industry in intermodal equipment supply.

We support TTX's application for a fifteen-year extension of its pooling authority to ensure that TTX will continue to supply efficient and economical flatcar service in the years to come. We consider approval of TTX's application to be of critical importance to the continued growth and success of our business.

Sincerely,

Don Wylie
Managing Director, Maritime Services

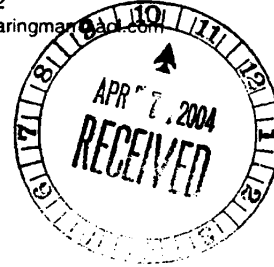
DW:sar

PRESIDENT'S "E" AND "E-STAR"
AWARDS FOR EXCELLENCE IN EXPORT

PRECISION

Roller Bearing Company, LLC

150 Osprey Cove Lane • Ponte Vedra Beach, Florida 32082
Ph: 904-543-8977 • Fax: 904-543-0644 • Cell: 847-274-2112 • E-mail: Dwbbearingman@aol.com



March 26, 2004

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

FD-2759 (Sub-No. 3)

Dear Mr. Williams,

I am part owner of Precision Roller Bearing Company, LLC which is a company that manufacturers and reconditions bearings/components for rail equipment. I have been in the rail supply business my entire career (27 years).

TTX Company is one of my customers and I wanted to take this opportunity to explain why we strongly support an extension of TTX's flatcar pooling authority. This arrangement enables TTX to contribute a very positive role to the railroad industry by fostering a significant expansion of intermodal traffic which in turn contributes to the over all health of our economy. The individual railroads alone probably could not sustain the same level of investment and growth in the fleet size without the capital that TTX makes available for this purpose. TTX also has demonstrated over time that they can work closely with car builders, part suppliers and shippers in an effort to develop new equipment types and also improve the performance of existing cars in its fleet. TTX's fleet assists the railroads in their efforts at competing against the trucking industry. Our highways will become safer as more freight is shipped by the railroads. In addition to the safety issues, we need to consider the damage to our roadways caused by excessive use of trucks in shipping freight. TTX's pooling arrangement helps keep some of this freight off of our nations highways.

In closing I would once again stress that TTX must be granted a 15 year extension of its pooling authority to ensure that they can continue to supply an efficient and economical flatcar service for years to come. We consider the approval of TTX's application to be critical to the continued growth and success of our business as well as our nations economy.

Sincerely,

Precision Roller Bearing Company, LLC

A handwritten signature in black ink, appearing to read "DW Bartley". The signature is written in a cursive, flowing style.

Davison W. Bartley
Vice President Sales and Marketing



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April 30, 2004

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

RE: Finance Docket No. 27590 (Sub-No. 3)
TTX Company - Application for Pooling Reauthorization

Dear Mr. Williams:

My name is David Nettleton and I am Vice President of Sales for Wabtec Corporation. My responsibilities include the sales of our freight product components to the freight car builders, private car companies and the leasing companies. I have a degree in Business Administration from St. Norbert College, located in DePere, Wisconsin and a Masters Degree in Business Administration from Rockhurst College located in Kansas City, Missouri. I have spent my entire 25 year career in the railway supply industry and have been Vice President of Sales for the past 6 years. I have worked as an outside salesman for Griffin Wheel Company for 18 years prior to joining Wabtec Corporation.

Wabtec is one of the largest publicly traded companies in the railway supply industry. Our product line includes the following: air brakes, air brake systems, empty-load device, hand brakes, slack adjusters, draft gears, truck-mounted brakes and our newest product, the UBX brake system. Wabtec has been in business for the past 60+ years and TTX is currently one of our largest customers. Wabtec is perceived by our customer base as one of the leaders in new product development and providing quality products in "just-in-time delivery mode".

We support TTX's efforts to seek reauthorization of its flat car pool. Wabtec believes that the flat car pool improves the thru-put of intermodal traffic throughout the industry.

Wabtec has had an excellent relationship with TTX Company for the past 30 years. Working closely together, Wabtec has been able to utilize TTX as a testing ground for new product development, which has had a positive impact on numerous new products introduced by our company.

As you know, the intermodal business has experienced double-digit growth within the past several years. This growth would not be possible without the combined efforts of the railroads, TTX Company and the supply community. The pooling of cars is an integral part of insuring that the railroads meet the demand of their customer base.

If the Surface Transportation Board decides not to renew the TTX Charter this would have a negative effect on the movement of intermodal equipment throughout the entire country. Obviously, this would impact the success of many businesses throughout the United States and retard the current economic growth which we are now experiencing.

As a result, Wabtec Corporation supports TTX Company's efforts to renew its 15-year flat car pooling agreement.

Sincerely,



David Nettleton
Vice President - Sales