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SURFACE TRANSPORTATION BOARD

DECISION

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

TTX COMPANY, ET AL. — APPLICATION FOR APPROVAL  
OF POOLING OF CAR SERVICE WITH RESPECT TO FLATCARS

Decided: August 31, 2004

TTX Company (TTX)<sup>1</sup> and the participating railroads<sup>2</sup> (jointly referred to as TTX) seek a 15-year extension of their authority to enter into a pooling agreement for railroad flatcars pursuant to 49 U.S.C. 11322. TTX's flatcar pooling was first approved for an initial term of 15 years by the Board's predecessor, the Interstate Commerce Commission (ICC), in American Rail Box Car Co. – Pooling, 347 I.C.C. 862 (1974) (Railbox Pool); it was extended for 5 years in Trailer Train Co. – Pooling – Car Service, 5 I.C.C.2d 552 (1989) (Trailer Train); and it was extended again for an additional 10 years in TTX Company, et al. – Application for Approval of the Pooling of Car Service with Respect to Flat Cars, Finance Docket No. 27590 (Sub-No. 2) (ICC served Aug. 31, 1994) (TTX-1). TTX also requests a clarification of the scope of its pooling authority. For the reasons set forth below, we will extend TTX's pooling authorization for 10 years, beginning October 1, 2004, and we will grant TTX's request for clarification concerning the scope of that authority.

BACKGROUND

TTX owns and manages for the benefit of the ten participating Class I and Class II railroads an extensive fleet of specialized flatcars that are used in rail transportation of containers, truck trailers, automobiles, lumber, extra-dimensional loads, and other commodities. TTX was formed in 1955, but it was not until 1974 that its functions were found to be subject to the ICC's jurisdiction. In 1974, the ICC approved TTX's pooling arrangement for a period of

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<sup>1</sup> Formerly Trailer Train Company, which changed its name to TTX on July 1, 1991.

<sup>2</sup> The Burlington Northern and Santa Fe Railway Company; Canadian National Railway Company, through its U.S. affiliates Illinois Central Railroad Company and Grand Trunk Western Railroad Company; Canadian Pacific Railway Company, through its U.S. affiliate Soo Line Railroad Company; CSX Transportation, Inc.; Florida East Coast Railway Company; Guilford Rail System; The Kansas City Southern Railway Company; Norfolk Southern Railway Company; and Union Pacific Railroad Company.

15 years. See Railbox Pool. After that decision, the ICC granted TTX authority to assign<sup>3</sup> or allocate<sup>4</sup> up to 10% of its intermodal cars to participating railroads for periods of up to 3 years. Trailer Train Co., et al. – For Approval of the Pooling of Car Service with Respect to Flatcars, Finance Docket No. 27590 (ICC served Mar. 27, 1984) (Review Board Decision). The permitted assignment or allocation percentage was later increased to 20% of TTX’s fleet, and the maximum period for assignment or allocation was extended to 5 years for certain car types.

In 1987, TTX applied for a 15-year extension of its flatcar pooling authority, to begin at the conclusion of its initial term in 1989. TTX’s extension request was opposed by the Antitrust Division of the United States Department of Justice, the State of Oregon, Gunderson, Inc. (an Oregon-based railroad car builder owned by The Greenbrier Companies), and other protestants. Although it found that pooling would be in the interest of better service to the public or of economy of operation and would not unreasonably restrain competition, the ICC, in response to the concerns expressed by opponents, approved only a 5-year extension of TTX’s pooling authority in the 1989 Trailer Train decision. In that decision, the ICC rescinded TTX’s authority to assign and allocate flatcars, and directed the ICC’s Office of Compliance and Consumer Assistance (OCCA) – later renamed the Office of Compliance and Enforcement (OCE) – to monitor TTX’s operations on an annual basis. Trailer Train, 5 I.C.C.2d at 608-09.

In 1994, pursuant to another (this time unopposed) request by TTX for a 15-year extension of its pooling authority, the ICC granted TTX a 10-year extension. In so doing, the ICC granted TTX limited assignment authority to promote the testing and evaluation of new and innovative flatcar types. TTX-1, slip op. at 5. Pursuant to TTX’s request, the ICC also confirmed that specially equipped TTX flatcars could continue to be placed in shipper-controlled pools, commonly referred to as “Rule 16(c) shipper pools,” provided that TTX cars placed in such pools remained subject to the 5-day turnback provisions that apply to all TTX-owned flatcars.<sup>5</sup> Id. at 6-10. Finally, acting upon TTX’s request to suspend OCE’s annual monitoring

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<sup>3</sup> Assignment is a financing device similar to leasing, under which a railroad guarantees rental payments to TTX for an agreed-upon minimum period of time in order to secure specific cars from TTX. See Trailer Train, 5 I.C.C.2d at 557.

<sup>4</sup> Allocation is another financing device similar to assignment, except that, while the participating railroad secures a particular number of cars guaranteed for that railroad’s use by TTX, the railroad does not secure specific cars from TTX’s fleet. See id.

<sup>5</sup> The 5-day turnback provision refers to a form of notification that may be issued to TTX by a railroad currently in control of TTX equipment. The turnback notice advises TTX that the equipment is not needed for service on the notifying railroad and allows TTX to order the equipment to be repositioned for use on another railroad or to be placed in storage.

of TTX's activities, the ICC directed OCE to prepare monitoring reports at the end of years 3 and 7 of the 10-year extension period, and reserved the option to direct OCE to prepare another monitoring report in year 9. Id. at 5-6.

In accordance with the ICC's orders in TTX-1, OCE solicited public comments in 1997 and 2001 to determine whether it should recommend any modifications to TTX's flatcar pooling authority. No comments were filed in either instance. OCE therefore did not recommend, and the Board did not order, any modifications to TTX's pooling authority. In 2001, citing the apparent lack of public concern over TTX's flatcar pooling activities, the Board discontinued its monitoring of TTX for the remainder of the 10-year term that would expire in 2004. TTX Company, et al. – Application for Approval of the Pooling of Car Service with Respect to Flat Cars, STB Finance Docket No. 27590 (Sub-No. 2) (STB served Nov. 7, 2001).

### The TTX Application

On January 6, 2004, TTX filed this application for a 15-year extension of its flatcar pooling authority, which otherwise would expire on October 1, 2004. TTX seeks approval to continue its flatcar pooling activities under the terms and conditions set forth in TTX-1. It also asks that we clarify its authority to act within the scope of its pooling agreement to modify car contracts and other policies without first having to seek further Board approval.<sup>6</sup>

TTX originally sought to add an "evergreen" provision to its Pooling Agreement that would automatically extend its pooling activities for 1-year intervals (at the end of the 15-year period) to eliminate the risk that its pooling authority might terminate automatically while a reauthorization request was pending. In response to opposition to that request, TTX now proposes instead to modify its Pooling Agreement so that it would continue in effect, provided that an application seeking renewal or modification of TTX's pooling authority is pending before the Board, until 180 days after the Board has issued a final decision on the request and all appeals of that decision have been exhausted or the time to appeal has expired.

In the application, TTX depicts its flatcar pool as a success, noting that, among other things, it has produced substantial railroad operating efficiencies that have resulted in cost savings to railroads and shippers alike without any offsetting harms. As examples of the benefits of its flatcar pool, TTX points to its critical role in the development of intermodal railroad equipment (e.g., flatcars that carry highway trailers and shipping containers), and its critical role

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<sup>6</sup> In its application, TTX also criticizes the ICC's decision in Trailer Train (as modified by TTX-1) generally restricting TTX's flatcar assignment and allocation practices. However, while it invites the Board to revisit the issue, TTX expressly does not request that the Board lift those restrictions. See Application, Vol. 1, p. 6 n.4, pp. 42-43 n.29, and p. 49 n.38. For that reason and in the absence of a fully developed record on this issue, we will not consider the matter further.

in meeting the future growth demands of the rail intermodal market. TTX describes how its pooling of both intermodal flatcars and non-intermodal flatcars such as autorack cars (which have enclosed superstructures and are used in the transport of new automobiles), centerbeam flatcars (which are specially designed to transport lumber), and chain tie-down flatcars (which are designed to transport military, farming, and heavy industrial equipment) produces public benefits with respect to: (1) equipment research and development; (2) fleet repair and maintenance; (3) TTX's ability to spread the risk of investment in equipment better than could each individual member railroad; and (4) TTX's ability to achieve substantial capital savings by maximizing the efficient use of pooled equipment. TTX argues that the benefits achieved through flatcar pooling could not be achieved through any other means, and that an extension of its pooling authority would not unreasonably restrain competition. Moreover, TTX stresses that the pool imposes no restrictions on the participating railroads' ability to procure cars from other sources, including from the car leasing market.

As evidence that a 15-year extension would be in the public interest, TTX has introduced into the record over 60 supporting letters from railroad shippers, containership operators, ports, railroad equipment manufacturers, and others. Many of these letters explain how TTX enhances competition for intermodal movements, fosters new and growing opportunities for intermodal shippers, and ensures that shippers of lumber, steel, and heavier or oversize shipments (such as power generation equipment) have access to a larger, lower cost, and higher quality supply of specialized flatcars than would likely be available in the absence of the TTX pool. Congressman Don Young, Chairman of the Committee on Transportation and Infrastructure of the U.S. House of Representatives, has also written to express his support for TTX's application.

#### Formal Responses to the TTX Application

Eighteen parties filed formal replies to TTX's application. Two of the 18 – the National Industrial Transportation League (NITL) and National Steel Car Limited (NationalSC) – support the application in full. Five others – the U.S. Army's Military Surface Deployment and Distribution Command (SDDC), Greenbrier Companies (Greenbrier), Pacer International (Pacer), and DaimlerChrysler Corporation and Ford Motor Company (filing jointly) (D-C/Ford) – support the application subject to relatively modest modifications or conditions. The remaining 11 commenters, primarily car leasing companies or entities associated with them, object to major elements of TTX's application and seek significant limitations on TTX's pooling authority if an extension is granted. These 11 commenters are: Bombardier Capital Rail Inc. (Bombardier), CIT Rail Resources (CIT), C.K. Industries, Inc. (CKI), First Union Rail Corporation (First Union), GATX Rail (GATX), General Electric Railcar Services Corporation (GE Rail), David J. Joseph Co. (Joseph), Mitsui Rail Capital, LLC (Mitsui), North America Freight Car Association (NAFCar), Progress Rail Services Corporation (Progress), and Trinity Industries, Inc. (Trinity).

The 5 parties that support TTX's application subject to modest adjustments or conditions express concern about either the availability of a particular flatcar type in the pool or the

duration of TTX's extension or both. Specifically, SDDC, which cites the benefits to national defense that flow from the efficient use of TTX's pool of chain tie-down flatcars, particularly in times of armed conflict, urges us to direct TTX's owner railroads to find ways to be more flexible and efficient in responding to the Department of Defense's needs for this equipment. According to SDDC, individual railroads have allowed parochial concerns to impede more productive utilization of such specialized flatcars when military deployment is at its highest levels.

Focusing on the fleet of autorack flatcars that TTX manages, D-C/Ford suggest that the Board create a "Balanced Commodity Equipment Planning Board" to ensure that TTX is fully responsive to the autorack flatcar requirements of automobile manufacturers. D-C/Ford also recommend that the Board grant TTX only a 5-year extension. Similarly, Greenbrier supports TTX's application, but recommends only a 10-year extension, while Pacer proposes that TTX pooling be authorized for an additional 7-year term with OCE-managed oversight and reporting in years 3 and 5. Pacer also asks that we prohibit TTX from making changes to its car contracts and policies without first obtaining Board approval to do so.

The 11 commenters who favor substantial restrictions to TTX's flatcar pooling authority have requested that the Board impose more severe restrictions on TTX than now exist. In particular, 7 of these 11 commenters urge us to limit TTX's pooling authority to intermodal flatcars only,<sup>7</sup> while the remaining 4 would have us limit pooling to intermodal and autorack flatcars only.<sup>8</sup> These commenters acknowledge that pooling intermodal and/or autorack flatcars yields public benefits that could not likely be obtained through other means. They maintain, however, that few, if any, benefits flow from the pooling of other types of flatcars, and that there are possible competitive harms that outweigh any such benefits.

Relying on the ICC's comments in Trailer Train and TTX-1 (in which the agency expressed a concern with TTX activities that could undercut the agency's interest in fostering a competitive third party railroad car leasing market), 8 of these commenters<sup>9</sup> argue that TTX should not be permitted to set prices for the use of its flatcars. They assert that TTX sets its flatcar usage rates at levels that are below those that leasing companies profitably can charge for similar equipment. They further contend that, as a result of TTX's car pricing practices, leasing companies generally avoid competing with TTX, and that they may be driven from the flatcar supply market. These commenters also claim that TTX's low flatcar usage rates have been used against leasing companies unfairly in car hire arbitration proceedings.

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<sup>7</sup> CIT, GATX, GE Rail, Mitsui, NAFCar, Progress, and Trinity.

<sup>8</sup> Bombardier, CKI, First Union, and Joseph.

<sup>9</sup> Bombardier, CIT, CKI, First Union, GE Rail, Joseph, Mitsui, and NAFCar.

All 11 of these commenters oppose TTX's request to have us clarify that TTX is able to make changes to car contracts and other policies consistent with its Pooling Agreement without obtaining further Board approval. Several argue that TTX has failed to explain why TTX needs such a clarification to produce public benefits from the pooling arrangement. In addition, many of them are concerned that, through the requested clarification, TTX seeks an open-ended license to make substantive changes to its pooling operations.

In addition, 2 of these commenters—First Union and Progress—argue that TTX's car maintenance and repair activity is a service distinguishable from flatcar pooling, and that TTX's pooling authority should not extend to flatcar repair and maintenance.

All 11 of these commenters oppose the requested 15-year extension term. Ten of them recommend a 5-year extension,<sup>10</sup> while CKI recommends an extension of no more than 10 years. In support of a limited extension period, these commenters rely on the following considerations: (1) the railroad industry has been undergoing, and will continue to undergo, significant change, which assertedly warrants more frequent review of pooling; (2) depreciation of the costs applicable to the use of railroad-owned equipment was only recently fully implemented,<sup>11</sup> and the effects on private equipment supply markets are not yet fully known; (3) significant Class I railroad consolidation has occurred, resulting in more concentrated ownership of TTX; (4) car ownership is progressively shifting away from individual railroads to third party suppliers, thereby altering the dynamics of railroad equipment supply; (5) significant new technology in freight cars is changing elements of the car supply market in ways that assertedly could be hindered by longer-term pooling; (6) more frequent agency review of pooling protects the public interest against abuse but, at the same time, would not unduly burden TTX or hinder its ability to obtain capital; and (7) TTX has been able to function successfully under both a 5-year term (following Trailer Train), and a 10-year term (following TTX-1, in which TTX's 15-year extension request was not opposed).

Finally, First Union and Trinity invite us to use this proceeding as a forum to revisit TTX's pooling of other, non-flatcar equipment such as gondolas and boxcars.

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<sup>10</sup> Bombardier, CIT, First Union, GATX, GE Rail, Joseph, Mitsui, NAFCar, Progress, and Trinity.

<sup>11</sup> Railroad-owned equipment car hire charges were at one time set by an ICC-prescribed formula. However, such cars are now "depreciated," and car hire charges are determined entirely by market forces. See Railroad Car Hire Compensation – Rulemaking, 9 I.C.C.2d 80 (1992), 9 I.C.C.2d 582 (1993), 9 I.C.C.2d 1090 (1993), appeal dismissed, Southern Pac. Transp. Co. v. ICC, 69 F.3d 5893 (D.C. Cir. 1995).

### TTX'S Rebuttal

In rebuttal, TTX points out that there is considerable support for continued flatcar pooling, as evidenced by the numerous letters of support engendered by its application, as well as the formal statements of support from Pacer, Greenbrier, NITL, and others. In specific response to SDDC, TTX admits that, during times of high military deployment, TTX member railroads' practices – which are beyond TTX's ability to control – cause chain tie-down flatcars to be utilized less efficiently than they could be under more ideal circumstances. At the same time, TTX states that it is committed to exploring new strategies to overcome obstacles to more efficient utilization of such flatcars in times of heavy military demand. TTX adds that it is participating with railroads and SDDC in the "Assured Access Cross Functional Working Group" to find better ways to respond to SDDC's flatcar needs when they arise.

In response to the concerns of D-C/Ford, TTX points out that the size of the TTX-managed autorack fleet is determined by the TTX member railroads, who are individually responsible for deciding upon the number and type of autorack assemblies that each will build on TTX-supplied flatcars and contribute to the TTX fleet. TTX argues that, because it does not determine the number of autoracks placed into the fleet, D-C/Ford's concerns should be addressed to the individual, contributing railroads.<sup>12</sup>

Turning to the arguments that an extension should be for a term of less than 15 years, TTX points to the success of the flatcar pool during the past 30 years and argues that a longer term extension permits it to raise capital at lower cost, resulting in lower flatcar supply prices to the consumer. TTX states that more frequent extension requests occasioned by shorter term extensions would consume substantial TTX resources and more frequently divert TTX's management from the day-to-day functions of its business. TTX notes that at any time we can exercise our oversight powers to address circumstances that might warrant modification to, or termination of, TTX's flatcar pooling authority. Finally, although it believes that our general oversight authority is sufficient, TTX states that it would not object to a formal, scheduled oversight process, should we choose to provide one as in TTX-1.

TTX argues that having the Board clarify or confirm that TTX may make changes to car contracts and other policies within the scope of its pooling agreement without obtaining further Board approval is necessary to yield the full measure of pooling benefits. According to TTX, the clarification would ensure that TTX has the flexibility to adapt to changing needs among the users of its equipment. TTX states that, it does not seek the right to modify the Pooling Agreement itself without prior Board approval, but only wishes to confirm that it has the flexibility to better meet the needs of a dynamic equipment supply market.

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<sup>12</sup> Although it does not comment on the adequacy of the autorack fleet, TTX indicates that D-C/Ford's criticisms may be illustrative of the shortcomings of equipment pools where the pooled equipment is acquired and owned separately by the pool members.

TTX argues that the 8 commenters that would have us bar TTX from setting the prices for the use of its equipment have not established, and could not establish, that TTX is engaging in anticompetitive, predatory pricing so as to warrant such corrective action. TTX contends that the commenters' argument simply demonstrates the efficiencies of TTX's operations and the comparatively lower prices that it can offer to equipment users as a consequence. TTX asserts that removing its pricing authority would effectively destroy the flatcar pool.

To counter those who argue that its pooling authority should not extend beyond intermodal flatcars and autorack flatcars, TTX states that it has provided detailed evidence in its application to demonstrate the benefits that flow from pooling of other, specialized types of flatcars. TTX reiterates the benefits that it claims flow from pooling of such flatcars, and it points to letters of support from shippers that use such TTX-supplied flatcars.

TTX also disputes the argument that maintenance and repair operations should be excluded from any extension of its pooling authority. TTX states that repair and maintenance are integral functions of its pooling operations, that they are key to the efficient operation of the pool, and that similar services are provided by equipment leasing companies. TTX further states that its repair and maintenance activities are focused on satisfying TTX's own needs. TTX denies the assertion made by some of the commenters that its member railroads give special treatment to TTX equipment by moving it and storing it for TTX without charge.

Finally, TTX points out that the boxcar and gondola pools that it operates are not within the scope of this proceeding, and should not be considered here.

### The Supplemental Filing

Five of the 18 commenters<sup>13</sup> (supplemental commenters) filed a motion for leave to supplement the record and to submit additional facts. The supplemental commenters state that TTX frequently places its non-intermodal flatcars into dedicated shipper, commodity, or agency pools,<sup>14</sup> and they assert that TTX has concealed the extent to which it engages in this practice. While they acknowledge that, in TTX-1, the ICC confirmed that the use of TTX-owned flatcars in dedicated shipper-controlled pools does not violate the Trailer Train restrictions on assignment, they point out that the agency's decision did not refer to commodity or agency pools.

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<sup>13</sup> Bombardier, CIT, First Union, GE Rail, and Joseph.

<sup>14</sup> It appears that the supplemental filers' and TTX's respective understanding of shipper, commodity, and agency pools are somewhat different. Our understanding of the function and purpose of shipper, commodity, and agency pools is discussed below.



The supplemental commenters assert that the placement of TTX-owned cars into commodity and agency pools violates the agency's restrictions on the assignment and allocation of flatcars. They also claim that, by these actions, TTX is making unilateral changes to its operations and car distribution practices in ways that exceed the scope of its existing pooling authority. Furthermore, they contend that cars placed into shipper, commodity, and agency pools do not enjoy the operating efficiencies that can be obtained by "free-running" intermodal and autorack equipment, particularly with respect to the reduction of empty car mileage and inter-railroad exchanges of equipment. They assert that these additional facts further support limiting TTX's pooling authority to intermodal flatcars only.

#### TTX's Response to the Supplemental Filing

In response to the supplemental filing, TTX points out that it is the member railroads that place TTX-owned cars into shipper, commodity, and agency pools, not TTX itself. TTX argues that such pools (which are governed by Association of American Railroads (AAR) Car Service Rule 16) are commonplace in the industry, particularly with respect to specialized car types, and that the three pool types are largely indistinguishable in function. According to TTX, none of the Rule 16 pools involve the sort of assignment that was prohibited in Trailer Train; rather, unlike the assignment and allocation practices discussed and restricted in Trailer Train, all cars placed in shipper, commodity, or agency pools remain subject to the standard 5-day turnback provisions, whereby, upon 5 days' notice, any railroad may return unneeded cars to TTX. Finally, TTX argues that, even with many specialized flatcars in Rule 16 pools, TTX's management of these cars provides for more efficient deployment than would be the case in the absence of the TTX pool.

### DISCUSSION AND CONCLUSIONS

#### Criteria for Approving a Pooling Application

Under 49 U.S.C. 11322(a), rail carriers may not pool traffic or services, or divide earnings derived therefrom, without our approval. We may approve a pooling agreement if we find that the proposal: (1) will be in the interest of better service to the public or of economy of operation, and (2) will not unreasonably restrain competition. In deciding whether to approve a proposed pooling agreement, we assess whether any anticompetitive effects flowing from the arrangement are outweighed by the efficiencies or other public benefits flowing therefrom. Trailer Train at 559-60. Our authorization of a pooling agreement enables the participants to operate free from the antitrust laws. 49 U.S.C. 11321(a). Thus, we look at whether a proposed pooling agreement is as beneficial as alternative mechanisms for achieving the purposes of the pool and whether those purposes could be achieved with less restraint on competition. Trailer Train at 559.

TTX's Flatcar Pooling Meets the Criteria for Approval

For many years, TTX has served an important role in satisfying the growing demand for railroad cars. Since TTX's flatcar pooling activities were first authorized by the ICC in 1974, the rail industry has undergone substantial change. Through that time, TTX has adapted and consistently has produced significant, undeniable benefits to railroads and shippers that could not have been achieved as easily, if at all, in the absence of the TTX flatcar pool. In this proceeding, over 60 interested parties – shippers, ports, car parts suppliers, car manufacturers, and others – have written in support of continuing the TTX flatcar pool. In addition, NITL fully supports TTX's application, as does the U.S. Department of Defense (through SDDC). Only three specific commenting shippers – D-C/Ford and Pacer International – express reservations about TTX's application, and their concerns focus primarily on the length of the extension, not its scope.

On the record before us, TTX has shown that the pooling of flatcars promotes research and development of new and innovative equipment; permits standardized fleet repair and maintenance to reduce costs; permits TTX's member railroads to spread the risk of investment in equipment; enables TTX's member railroads collectively to respond effectively and efficiently to the dynamics of the North American railroad network; produces substantial capital savings by maximizing the efficient use and distribution of pooled equipment; and, through those capital cost savings, promotes TTX's member railroads' efforts to become revenue adequate. That record and the many years of experience with the pool reflect that the full array of benefits achieved through flatcar pooling cannot be achieved through any other means.

Here, TTX seeks to extend the status quo by continuing its existing flatcar pooling arrangement for another 15 years without significant change to the terms and conditions of the underlying Pooling Agreement. The 11 commenters who seek severe limitations on TTX's flatcar authority are requesting major departures from the basic scope of the pooling authority that TTX has enjoyed, and which has benefitted the railroad industry, for 30 years. As discussed below in connection with each of the specific limitations that they seek, we do not believe that these commenters have shown that any adverse competitive impacts result from pooling to warrant adjustments to TTX's authority. Rather, to depart now from the status quo – especially in the absence of a clear showing that adverse competitive impacts would flow from continuing TTX's pooling authority largely as it now exists – would deprive the railroad industry of many of the benefits of flatcar pooling.

In light of the various benefits achieved from flatcar pooling and the substantial support from a variety of interested parties, we find that an extension of TTX's flatcar pooling authority clearly will be in the interest of better service to the public or of economy of operation. Furthermore, we find that an extension of TTX's flatcar pooling authority, as encompassed in the Pooling Agreement described in this decision, will not unreasonably restrain competition. Consequently, we conclude that TTX's pooling authority should be renewed.

TTX May Make Changes to its Car Contracts/Policies Consistent with its Pooling Agreement

TTX seeks clarification that it is fully authorized to act within the scope of its Pooling Agreement. TTX is concerned that certain language in the 1974 Railbox Pool decision could be read as constraining it from implementing useful changes to its day-to-day operation of the flatcar pool, even though those changes are fully consistent with its approved Pooling Agreement. On the one hand, the ICC stated that, “[a]ll changes which affect the substance of either pooling arrangement or car contract and thus constitute a new pooling agreement will require Commission approval upon implementation.” Railbox Pool, 347 I.C.C. at 883-84. On the other hand, the ICC also said, “[C]hanges involving merely form or particular practices, which are governed by and determined under policies and principles which were previously approved by the Commission and which remain in effect, should not be treated as new pooling agreements and should not require approval by the Commission prior to implementation.” Id. at 883. According to TTX, the requested clarification could encourage it to pursue innovative changes in its day-to-day handling of the pool, to the benefit of railroads and shippers.<sup>15</sup>

We do not read the 1974 Railbox Pool decision to create the ambiguity that TTX fears may exist. Furthermore, we believe that the Railbox Pool decision does not intentionally impose any limitation on TTX’s ability to do anything that its Pooling Agreement would allow.

Moreover, there is nothing in the record to indicate that TTX wishes to use the clarification to bypass the limits of the Pooling Agreement or to enlarge the scope of what it is permitted to do. Certainly, if TTX’s subsequent actions reveal that it is using this clarification as an end-run around the clear limitations of the authority we are granting it in this decision, then we would take prompt and decisive action. But there is no evidence before us that TTX intends to use this clarification in a manner that is inconsistent with the public interest or the intentions of the Board.

Thus, we grant TTX’s request and make clear that, while any amendment or modification to the TTX Pooling Agreement itself would require our prior approval, changes in TTX’s car contracts and other policies that are consistent with the terms of its approved Pooling Agreement need not separately be approved.

The Benefits of Pooling Extend to all Flatcar Types

As noted above, 11 commenters – all of whom are railcar leasing companies or are associated with the leasing industry – would have us limit the TTX pool to intermodal flatcars only or to intermodal and autorack flatcars. They distinguish between the “free-running” nature

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<sup>15</sup> For example, SDDC maintains that the clarification could help facilitate changes in the manner in which TTX-owned chain tie-down flatcars are utilized during times of heavy military deployment.

of TTX's intermodal flatcars (which are more frequently exchanged among member railroads to reduce empty car miles) and the dedicated, sometimes shipper-specific, service into which other, specialized flatcars frequently are placed.<sup>16</sup> They claim that pooling of specialized flatcars yields few, if any, benefits that could not be achieved through other means, and they complain that TTX offers usage rates on specialized flatcars that competitors cannot match without forgoing a reasonable profit.

We do not see any merit to so limiting TTX's authority. We recognize that different types of flatcars possess different service and demand characteristics, and we understand that pooled intermodal and autorack flatcars generally are deployed so as to achieve a comparatively higher degree of utilization benefits than might other types of flatcars. But, although they may not produce the same number, types, or degrees of benefits as intermodal and autorack cars do, the record still demonstrates that there are nevertheless numerous benefits that flow from pooling non-intermodal and non-autorack flatcars, which are described in the shipper letters of support and in TTX's submissions. And while specialized flatcars may not be free-running in the same way that intermodal flatcars are, a free-running fleet of flatcars is not an indispensable objective of flatcar pooling. See TTX-1 at 10 ("a free running pool was never the ultimate goal in Trailer Train . . ."). Moreover, even if individual railroads often employ them to serve specific shipper needs, specialized flatcars are still "free-running" to the extent that they may be returned to TTX upon 5 days' notice, and can be redeployed by TTX on another railroad immediately thereafter.

Pooling specialized flatcars results in improved asset utilization, largely because of TTX's understanding of railroad network operations, its extensive experience in fleet management, and its direct relationship with its railroad members. Also, TTX spreads the risk of specialized flatcar investment, particularly for those flatcar types that experience highly fluctuating demand, such as chain tie-down flatcars. TTX's non-intermodal flatcar fleet benefits from TTX's whole-network approach to repair and maintenance, which lowers operating costs and increases equipment reliability. In addition, specialized flatcar pooling also fosters innovation and promotes reconfiguration and redeployment of equipment to meet changing flatcar demands. Perhaps the most telling benefit to pooling specialized flatcars, however, is that it clearly results in lower equipment costs to the railroads and ultimately lower prices to the consumers of the railroads' services. The agency has in the past recognized these and other general benefits of flatcar pooling. See, e.g., Trailer Train at 602. Consistent with those past findings, we find that these benefits could not be obtained as thoroughly or as well in the absence of a pool.

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<sup>16</sup> Such dedicated, shipper-specific car services (i.e., shipper, agency, and commodity pools) are discussed in detail below.

TTX May Set Prices for the Use of Pooled Flatcars

The railroad industry clearly benefits from the presence of a third-party railcar leasing market that serves the needs of rail shippers and large and small railroads alike. Certain of the commenters in this proceeding, however, assert that they are unfairly disadvantaged in competing with TTX in the flatcar supply market. They argue that TTX sets its flatcar usage rates at levels at which leasing companies cannot compete. Because of the alleged unfair disparity in the rates that the leasing companies say that they can charge for flatcars compared to TTX, these commenters claim that this situation has caused, or will cause, many equipment lessors to abdicate the flatcar supply market to TTX.<sup>17</sup> They argue that TTX's price-setting practices constitute an unreasonable restraint on competition that outweighs the benefits that could flow from pooling specialized flatcars. However, this allegation is unsubstantiated, and it is not corroborated by any testimony from those who benefit from the presence of the leasing industry as a competitive alternative to TTX – rail shippers and railroads (particularly railroads that are not TTX owners).

Rather, the record indicates that, over the past several years, the railcar leasing industry has emerged as a robust, well-established source of equipment supply for various segments of the railroad industry. It is not the emerging industry that it was in 1989, when the ICC focused attention on its role in Trailer Train. But even at that time the ICC anticipated that TTX's flatcar fleet – available under the unique 5-day turn-back provisions – would exert legitimate “competitive pressure on the terms offered by third party lessors.” Trailer Train at 598. There is no evidence that TTX is engaging in predatory pricing, and none of the commenters specifically so allege. Furthermore, the commenters, who have existed alongside TTX for many years, fail to persuade us that the equipment marketplace or TTX itself has changed so significantly in the past 10 years as to warrant such drastic adjustments to TTX's pooling authority. While it may be that leasing companies forgo heavy involvement in the flatcar leasing business, and choose to focus their investment on other car types, the evidence suggests that this is quite likely because the competitive forces that TTX brings to bear in the flatcar market prompt leasing companies to focus their efforts and investment where the possibility of profit is greater. Thus, because these

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<sup>17</sup> Some of the commenters claim that TTX's flatcar usage rates are being used as evidence of what leasing companies should be charging for their equipment in car hire arbitration proceedings. The practical result of this, the commenters claim, is that they are effectively precluded from earning a reasonable profit on their flatcar investments. It is not clear to us why the Board should address such an issue, or, based on the evidence of record, how TTX's prices are being used in car hire arbitration cases. Although the rates charged for the use of railroad-owned equipment is generally for the marketplace to determine, we recognize that TTX's flatcar pool and the third party leasing companies' car fleets are distinct car supply options with traditionally different characteristics and car type and market focuses.

commenters fail to show that TTX's equipment price-setting practices would unreasonably restrain competition in the flatcar supply market, we will not condition TTX's pooling authority in a manner that impedes TTX's ability to offer lower equipment prices than might be possible in the absence of the pool.

Equally important here is the fact that TTX's pricing practices are central to its operations. TTX argues that precluding it from pricing its own cars would nullify the benefits of pooling, and it is difficult to imagine how TTX would function, if it could at all, without authority to set standard rates for its flatcar fleet. We agree that standardized pricing is an integral and critical aspect of the TTX pool, and that it ensures that the pooled equipment is highly fungible. Accordingly, we will not limit TTX's pooling authority to set prices for the use of its flatcars.

#### TTX May Continue its Repair and Maintenance Functions

We find that TTX's highly efficient car repair and maintenance practices do not constitute a distinct service that should be subject to a separate pooling inquiry apart from the rest of TTX's pooling activity. Since 1974, the agency has recognized that TTX would provide its own repair and maintenance services, and it has consistently acknowledged the benefits that flow from TTX's highly effective car maintenance program. Indeed, it is customary, as some commenters acknowledge, for participants in the car supply market, including leasing companies, to include maintenance and repair services as part of their car supply contracts. Thus, TTX's car repair and maintenance functions – which are focused on satisfying TTX's own needs for such services – are an integral part of the flatcar pooling activity in which it engages.

One of the commenters (Progress) alleges that TTX's car repair and maintenance functions could unreasonably restrain competition. Progress' concerns focus on what it describes as a potential threat to competition in the car repair marketplace.<sup>18</sup> The alleged potential threat to car repair companies is, at best, speculative. We will not limit TTX's beneficial repair and maintenance functions in the absence of solid evidence of existing or imminent market abuse.

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<sup>18</sup> In addition, along with other commenters, Progress claims that TTX enjoys certain advantages over leasing companies and car maintenance/repair providers because TTX's member railroads provide certain services – such as empty car transportation and storage – to TTX free of charge. TTX denies these allegations, and there is no independent evidence that TTX is enjoying preferential treatment with respect to railroad-provided empty car transportation or storage.

Review of TTX's Non-Flatcar Pools Exceeds the Appropriate Scope of this Proceeding

First Union and Trinity urge the Board to use this proceeding to review not only TTX's flatcar pool, but also TTX's gondola and boxcar pools. We conclude that no reason has been shown to justify expanding this proceeding in that fashion. TTX's boxcar and gondola pools were approved in separate agency proceedings, and those pools are not the subject of TTX's application here. However, interested parties may seek to reopen the proceedings under which TTX's boxcar and gondola pools were approved if there is new evidence or a material change in circumstances that calls into question whether those pools still satisfy our pooling criteria or whether the governing pooling agreements should be modified.

TTX and its Member Railroads Should Continue to Work with the Department of Defense to Overcome Inefficiencies in the Deployment of TTX's Chain Tie-Down Flatcar Fleet

The U.S. Department of Defense, through SDDC, supports the continuation of the TTX flatcar pool, given the importance of the pool in meeting the military's demand for chain tie-down flatcars. But, in light of certain inefficiencies that evidently occur in individual railroad handling of such flatcars during times of high military deployment, SDDC asks us to direct TTX and its member railroads to find ways to be more efficient and responsive to SDDC during such times. While we are mindful of the importance of SDDC's concerns, we do not believe that so conditioning our approval of TTX's application is necessary or appropriate here.

TTX, its member railroads, and SDDC are already participating in an Assured Access Cross Functional Working Group, which is actively pursuing options to improve the availability of chain tie-down flatcars. Also, we understand that the Department of Defense is considering whether to devote more resources to its own fleet of specialized flatcars. These are positive steps toward overcoming some of the difficulties SDDC has experienced in the past, and we are confident that the parties will find ways to improve chain tie-down flatcar utilization during peak military mobility. We encourage their efforts, and believe that, in this situation, solutions are better facilitated through the continuation of ongoing dialogue, rather than through our intervention. Should the parties request it, we would be willing to convene a meeting among TTX, its member railroads, and the Department of Defense, and any other interested parties to discuss chain tie-down flatcar issues. Also, as always, should the Department of Defense alert us to a service emergency that threatens the nation's ability to provide for its defense, then we are prepared to take an active role in ensuring that U.S. military transportation needs are met.

The Board is Available to Facilitate Discussions on Autorack Supply

While supporting a 5-year extension of TTX's pooling authority, D-C/Ford express concerns about the adequacy of the railroad industry's automobile transportation equipment, and they call for the creation of a Balanced Commodity Equipment Planning Board to address railcar demand projections and industry efforts to meet future demand. They ask that TTX and its member railroads be directed to participate in this planning board as a condition of our approval

of the application. We are concerned about the railroad industry's responsiveness to the needs of its shippers and its ability to provide adequate equipment to meet shipper demand. And we recognize that TTX can and will be a key player in rising to the challenges of future demand. Thus, while we do not believe that the condition suggested by D-C/Ford is necessary and appropriate, we would be willing, if requested, to host a meeting with shippers, individual railroads, and TTX, to discuss how railroads can better respond to the needs of the automobile industry. We believe that, in offering our services in this way, we can help facilitate private sector agreements that will foster greater investment in, and more efficient utilization of, the types of cars that the automobile manufacturing industry requires.

Placement of TTX-Owned Flatcars in Shipper, Agency, and Commodity Pools is Permissible

The supplemental commenters ask us to revisit a railroad practice that we believe the ICC already effectively addressed and resolved in TTX-1. Specifically, they assail the apparently common practice whereby TTX-owned cars, in the possession and under the control of individual member railroads, are placed in shipper, agency, and commodity pools, all of which are provided for under AAR Car Service Rule 16. Despite the fact that an individual railroad may place TTX-owned cars in such pools, and may leave them in such pools for comparatively long periods of time, these cars remain subject to the central provision of the Pooling Agreement: member railroads are always free to return unneeded cars to TTX, and can thereby avoid further usage charges, upon 5-days' notice to TTX.

AAR Car Service Rule 16 governs the means by which a railroad may dedicate equipment under its control to shipper, agency, and commodity pools. Although it appears that the supplemental commenters and TTX differ as to which subpart of Rule 16 governs each of the three specific pools, that side dispute need not distract us here. What matters is that we understand what each pool accomplishes so that we may evaluate the impact of each on TTX's flatcar pooling activities.

The ICC discussed Rule 16 shipper pools in great detail in 1994. See TTX-1 at 6-10. In short, a shipper pool consists of railroad-supplied cars, typically cars specially suited to handle specific products, which are assigned by the railroad for the use of a particular shipper at a particular location. Once dedicated to a shipper pool, a car must be returned to the shipper at the origin loading point when the car is empty, unless the shipper instructs otherwise. At the shipper's discretion, cars can be removed from a shipper pool on 1-day's notice. Id. at 8.

Cars in agency pools, instead of being dedicated to a particular shipper at a specific location, are routed to a location close to multiple shippers that produce the commodity that the cars in question are equipped to handle. (An agency pool apparently derives its name from the fact that the location to which pooled cars may be directed frequently was a station which was staffed by a station agent.) By comparison, cars placed in commodity pools are neither shipper-



specific nor location-specific, but instead are permitted to be loaded only with a specific commodity or commodities. In all cases, however, cars in all three of the pools are dedicated to a particular use and/or user.

In 1994, the ICC addressed the nexus between the TTX pool and AAR Rule 16 shipper pools. The ICC determined that, so long as the cars remain subject to the usual 5-day turnback provisions, the railroad practice of placing flatcars in shipper pools was distinguishable from flatcar assignment that was prohibited in Trailer Train, and it found that the practice benefits shippers without restraining competition. See id. at 9. Although the ICC did not address agency and commodity pools specifically in TTX-1, we find that those pools equally support the same findings. Thus, we conclude that the placement of TTX-owned cars in shipper, agency, or commodity pools does not constitute assignment in violation of the restrictions first set forth in Trailer Train.

It is important that all railroad cars, whether part of a collective pooling arrangement or not, are used as efficiently as practicable and that they are used in ways that enable the railroads to meet the service needs of their shippers. By placing TTX-owned flatcars in shipper, agency, and commodity pools, the member railroads of TTX are best able to meet these dual objectives. We do not agree with the supplemental commenters that cars placed in any of the Rule 16 pools do not benefit from the utilization efficiencies of the pool because they are not free-running in the way that the commenters believe that they should be. As explained above, pooling has other goals and purposes in addition to fostering a free-running fleet of flatcars. And, in any event, the 5-day turnback provisions applicable to TTX's entire flatcar fleet clearly ensure that all TTX flatcars are in some respect always free-running.

#### TTX's Flatcar Pooling Authority Will Be Extended for 10 Years

TTX requests that we extend its flatcar pooling authority for 15 years, while numerous parties argue that the extension should be limited to a shorter period of time. Some argue that the extension should only be for 5 years, while others argue for a 7-year or 10-year extension.

We are persuaded that a longer pooling term than 5 or 7 years would yield added benefits. As TTX has explained, a longer term would afford TTX greater certainty, which would improve its ability to plan for the future and raise capital at lower cost. In addition, as TTX asserted, each reauthorization application takes resources that could be spent on TTX's fleet, and temporarily diverts management attention away from TTX's core business activities. Thus, a longer extension would facilitate TTX's long-term planning and investment in the rail industry, and would avoid unnecessary regulatory burdens on TTX. And as TTX points out, its 30-year track record supports a longer extension term, and no party in this proceeding seriously challenges the financial and planning benefits that would flow from a longer extension of its pooling authority.

We will authorize a 10-year extension because it will provide an opportunity for the railroad industry and its customers to realize the demonstrated beneficial effects of granting the application. In addition, we will provide for continued monitoring of TTX's operations. We direct OCE to prepare a monitoring report at the end of year 5 of the 10-year extension authorized here. This modest downward adjustment of the extension period and the additional formal year 5 review balances the clear benefits of a longer extension against the competing considerations voiced by other parties. Also, in accordance with TTX's proposal on rebuttal, the Pooling Agreement will be allowed to remain in effect at the expiration of the 10-year period, if an application seeking renewal or modification of the pooling authority is pending before the Board, until 180 days after the Board has issued a final decision on the request and all appeals of that decision have been exhausted or the time to appeal has expired. Finally, as TTX acknowledges, we retain continuing oversight jurisdiction over TTX's pooling activities. We can revisit any element of the Pooling Agreement or TTX's pooling authority at any time upon proper showing, not just under the formal year 5 oversight process.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. TTX's pooling of railroad car service and the division of revenues derived therefrom with respect to flatcars – under the Pooling Agreement described in this decision – is approved and authorized for an additional 10-year term beginning October 1, 2004.

2. TTX's request for clarification – that, while any amendment or modification of the TTX Pooling Agreement would require the Board's prior approval, changes to TTX's car contracts and policies that are consistent with the terms of the Pooling Agreement approved herein need not be approved in advance – is granted.

3. OCE shall prepare a monitoring report at the end of year 5 of the 10-year term authorized by this decision. TTX shall submit to OCE upon its request information determined by OCE to be relevant to the preparation of its monitoring report, and shall continue to advise OCE of revisions to its Form A, BX, and/or D car contracts.

4. This decision will be effective on October 1, 2004.

By the Board, Chairman Nober, Vice Chairman Mulvey, and Commissioner Buttrey. Vice Chairman Mulvey concurred in part and dissented in part with a separate expression.

Vernon A. Williams  
Secretary

VICE CHAIRMAN MULVEY, *concurring* in part and *dissenting* in part:

I concur with the majority in authorizing TTX's pooling of railroad car services and the division of revenues derived therefrom with respect to intermodal and autorack flatcars for an additional ten-year term. The record before us amply demonstrates that the pooling of these types of flatcars will be in the interest of better service to the public or of economy of operation and will not unreasonably restrain competition.

I dissent with regard to the ten-year extension of pooling authority to additional types of flatcars. In reviewing requests for pooling authority, the Board follows the generally accepted principle that grants of antitrust immunity are to be narrowly construed. Given that standard, it does not appear to me that petitioners have sufficiently demonstrated on this record that the pooling of specialized flatcars will promote better service to the public or economy of operation, or that it will not unreasonably restrain competition.

I understand that petitioners have been pooling this equipment for some time, and I recognize that an order immediately denying authority could be disruptive. Therefore, I would have extended immunity for specialized flatcars, but for an interim period. This would have given the Board an opportunity to re-examine the case for pooling specialized flatcars before locking into a long-term authorization, and it would have required the petitioners to present stronger evidence in support of the benefits they allege.