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SERVICE DATE – AUGUST 17, 2010

SURFACE TRANSPORTATION BOARD

DECISION

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

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

Decided: August 10, 2010

The Board concludes that no modification to its approval of the activities by TTX Company and its participating railroads (jointly referred to as TTX) pursuant to TTX’s pooling agreement is required.

BACKGROUND

TTX owns and manages for the benefit of its 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 authorized to own and to manage these cars pursuant to a pooling agreement established under 49 U.S.C. § 11322.<sup>1</sup> Under 49 U.S.C. § 11322, the Board may authorize a pooling agreement if it will promote “better service to the public” or “economy of operation” and will not “unreasonably restrain competition.” Such authorization exempts TTX and the railroad participants in their approved pooling activities from the antitrust laws and from all other law as necessary to allow the agreement to be carried out. 49 U.S.C. § 11321(a). In its August 2004 decision,<sup>2</sup> the Board authorized an extension of the TTX pooling agreement for an additional 10-year term and clarified the authorized scope of TTX’s agreement.<sup>3</sup> The Board’s August 2004 decision also required the agency’s Office of Compliance and Enforcement, now the Office of

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<sup>1</sup> A pooling agreement for rail cars is an agreement between or among railroads that, in its basic form, allows the railroad members of the pool to use cars in the pool as they become available. Railroad car pools have also been allowed to establish rates or prices for the use of pooled cars, to purchase pool cars centrally, to engage in centralized maintenance and repair, to standardize design, to conduct joint research and development, and to place cars in pools that are dedicated to particular commodities, shipper groups, or locations.

<sup>2</sup> See TTX Co. – Application for Approval of Pooling of Car Service with Respect to Flat Cars, FD 27590 (Sub-No. 3) 7 S.T.B. 778 (2004).

<sup>3</sup> The August 2004 decision contains a detailed discussion of the background of the TTX pooling agreement.

Public Assistance, Governmental Affairs, and Compliance (OPAGAC), to monitor TTX's operations and to prepare a monitoring report at the end of year 5 of the 10-year term that began on October 1, 2004.

To conduct its monitoring, the Board, by decision served on September 25, 2009, and published in the Federal Register on September 30, 2009,<sup>4</sup> requested comments on whether any of TTX's activities pursuant to the August 2004 Board-approved pooling agreement required action or particular oversight. The Board directed TTX and its members to provide the following information for calendar years 2004 and 2008: (1) fleet size for each type of flatcar provided by TTX; (2) utilization rate of each type of flatcar; and (3) number and percentages of non-intermodal flatcars to dedicated shipper, commodity, or agency pools, and the number of these cars that were recalled from such pools on 5-day notice. The Board also directed TTX and its members to provide information on the outcome of the Assured Access Cross Functional Working Group's consideration of the provision of specialized flatcars for U.S. Department of Defense (DOD) needs.<sup>5</sup>

On November 16, 2009, TTX filed a response to the Board's request for information. First, TTX reported that, between January 1, 2004, and January 1, 2009, the size of the fleet grew in each of the reported categories as follows: (1) the size of the intermodal fleet increased by 7,064 cars, to a total of 43,802; (2) the automotive fleet increased by 238 cars, to a total of 52,731; and (3) the general service fleet increased by 4,569 cars, to a total of 30,776. During the same period, according to TTX, utilization rates decreased in each of the reported categories as follows: (1) utilization of the intermodal fleet decreased from 93.2% to 66.7%; (2) utilization of the automotive fleet decreased from 97.3% to 96.0%; and (3) utilization of the general service fleet decreased from 84.5% to 44.5%. Second, TTX provided data pertaining to non-intermodal flatcars in dedicated shipper, commodity, or agency pools. These cars are assigned by TTX participating carriers to specific traffic flows and are subject to a 5-day recall notice to return to general service. TTX states that the percentage of cars assigned to these pools has been steady for the past 4 years, with approximately two-thirds of the fleet in that type of service. TTX asserts that with the downturn in the economy, more than half the total fleet was in non-revenue storage in 2009. Finally, TTX described the steps that it has taken to improve car availability for DOD Defense and reported that problems that existed in 2004 have been resolved.

On December 30, 2009, The Greenbrier Companies (Greenbrier) filed brief comments generally supporting TTX's activities. Greenbrier concluded that it had nothing to report that would require immediate action or oversight at that time.

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<sup>4</sup> See TTX Co. – Application for Approval of Pooling of Car Service with Respect to Flat Cars, FD 27590 (Sub-No. 3) (STB served Sept. 25, 2009), published at 74 Fed. Reg. 50,268 (Sept. 30, 2009).

<sup>5</sup> The Assured Access Cross Functional Working Group was instituted by DOD and had actively pursued options to improve the availability of chain tie-down flatcars. It included participants from TTX, its member railroads, and the U.S. Army's Military Surface Deployment and Distribution Command (commonly identified by its acronym "SDDC").

Also on December 30, 2009, comments were jointly filed by GATX Corporation, CIT Rail, and First Union Rail Corporation (the GATX Lessors). The GATX Lessors objected to the current exclusion of private car lessors from the pool.

On January 15, 2010, TTX replied to the comments of Greenbrier and the GATX Lessors.

On January 25, 2010, the GATX Lessors filed further reply comments. In a letter filed on January 27, 2010, TTX responded that it did not object to Board consideration of the GATX Lessors' filing as long the agency also considers the response contained in its letter. In light of TTX's lack of objection, we will consider the GATX Lessors' reply and TTX's response.

### DISCUSSION AND CONCLUSIONS

OPAGAC has completed its analysis of the record developed during the monitoring process. OPAGAC recommends that the Board not modify the approved TTX pooling agreement. According to OPAGAC, the comments have not raised any concerns regarding TTX's activities pursuant to the pooling agreement. OPAGAC concludes that the GATX Lessors' objection that the pool does not include private car lessors does not fall within the scope of monitoring the existing agreement. OPAGAC attributes the decreased utilization rates reported by TTX between 2004 and 2009 to the economic downturn.

We agree with OPAGAC's recommendation. No comments have been filed to suggest that the TTX pooling agreement is not operating as expected by the Board. Nor has a need been shown to modify the terms of the Board's approval of the existing agreement.

We also agree that the GATX Lessors' objection is not within the scope of this proceeding. The purpose of the monitoring is to inquire whether action must be taken to ensure that the pooling agreement is operating as the Board intended, not to reopen prior Board decisions involving the fundamental nature of the pool, i.e., who is allowed to participate in the pool, whether the pool can purchase cars, whether it can assign cars, etc. The proper procedure for the GATX Lessors to pursue inclusion of private car lessors in the TTX pool would be to file a petition to reopen or to seek inclusion in a future proceeding should TTX seek a further extension of Board authority for its pooling agreement.

Moreover, even if the GATX Lessors' objection to being excluded from participating in the pool were a proper matter for consideration in our monitoring process, the GATX Lessors have failed to show the need for Board action to address their perceived harm. The GATX Lessors claim that the exclusion of their cars from the pool allows the pool to use its "monopoly power" to put TTX's cars first in line for use to the exclusion of cars owned by private lessors. As shown in TTX's response, however, the utilization rate (percentage of total fleet being used) of the GATX Lessors' cars has been approximately 98.6%, compared to TTX's utilization rates of 66.6% for intermodal flatcars and 44.5% for general service flatcars. Thus, we fail to see on this record how exclusion of private car lessors from the pool has harmed the GATX Lessors.

Because there has been no showing that action must be taken to ensure that the pooling agreement is operating as the Board expected, the Board will make no changes to its approval of the agreement.

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

It is ordered:

1. No modification to the Board's approval of TTX's activities pursuant to TTX's pooling agreement is required.
2. This decision will be served on all parties appearing on the service list in FD 27590 (Sub-No. 3), and notice of this decision will be published in the Federal Register.
3. This decision is effective on August 17, 2010.

By the Board, Chairman Elliott, Vice Chairman Mulvey, and Commissioner Nottingham.