MR. THOMAS: Good morning, Mr. Chairman Nober, Mr. Vice Chairman Mulvey, and Commissioner Buttrey. My name is Jack Thomas. I am President of First Union Rail Corporation. I am here today to present the position of First Union, David J. Joseph Company, and Bombardier Capital Rail, Incorporated, on issues associated with the pooling of flatcars by TAX Company.

We appreciate the opportunity for all of our argument in this matter.

TAX has often stated and made a big deal that in previous hearings there has been no opposition to their petitions for extension of their pooling authority. Well, we are here in spades today.

As Greenbrier accurately points out in their comments, there is a substantial risk associated with antagonizing and taking on opposing positions to the interests of many of our major customers. Although First Union Rail is concerned with its impact its suggestion to alter TTX's pooling authority may have on its relationships with major railroads, we believe that the repercussions of allowing TAX to continue its aggressive expansion into car types other than intermodal cars will become almost irreversible.

TAX has, in their verified statements, attempted to demean the measured responses of the entities with opposing views such as First Union Rail, CIT, GATX, and GE. TAX has referenced a robust lessor industry and cited how dramatically fleets have increased since 1994, and that income is expected to materially increase, as if that is something bad.

These comments are very misleading and provide an inaccurate portrayal of many leasing companies, in particular First Union Rail. The soft economy and resulting car surpluses have made the last four to five years extremely difficult for lessors. For many car types, rental rates dropped by over 60 percent. First Union Rail has been substantially below our corporate hurdle rate requirements for those years.

The independent leasing companies who are represented here today often have diverse views and compete against one another in the car leasing market. The fact that a majority of the independent general purpose lessors have offered suggestions to alter the TAX pooling authority for the first time should cause the Surface Transportation Board to weigh their comments carefully.

TAX has mischaracterized a number of statements submitted as part of this hearing, and I won't review what CIT and GE have stated, but a more careful reading of Johnstown America's filing indicates that they are supporting only the intermodal flatcar pooling.

It should be noted that they use the word "intermodal" and stress it throughout their letter of support. Their submission is not in support of any other car type. In the case of Greenbrier, they are careful to state that any complaint against TAX could incur substantial downside risks, and there is no protection against retaliation. They do state that 15 years is too long for renewal of the pooling authority, and that assignment of equipment is not warranted.

Trinity is very specific about only having pooling authority apply to intermodal cars, and that the authority be limited to no more than five years. In addition, both Greenbrier and Trinity indicate contract changes should not be permitted without prior Board review.

TAX alleges that without the ability to price the pool would be destroyed, yet TAX has taken on the management of at least two pools in which pricing is not part of the operation. In fact, the management function, not the ownership of equipment, was the basis behind the inception of the TAX organization. They pooled the existing cars owned by the railroads at that time.

The automotive pool, which in spite of TAX comments to the contrary, contained

many cars that are not TAX flatcars, and the pool efficiencies for these cars are still evident.

As we are well aware, the world has changed. The rail industry has also changed. When TAX first started business nearly 50 years ago, there were nearly 50 Class 1 railroads. In 1989, the last time there was a significant review of TTX's pooling authority, there were 16 Class 1 railroads. Today, 90 percent of TTX's stock and nearly 80 percent of its revenues belong to four mega railroads.

In addition to the change in the number and size of the rail companies controlling the rail industry, the way in which they do business has also changed. The Staggers Act has allowed for deregulation of rail rates. Confidential contract freight agreements have replaced old rate bureaus and published rate tariffs.

In only takes two railroads over one interchange to reach from one end of the continent to the other. The rail industry has also gone through a transition as to how the payment for the use of railcars by another railroad is administered. The full implementation of car hire deprescription occurred in January 1, 2003.

The system is now purported to be a market-based system where rates are no longer prescribed by the Surface Transportation Board. Deprescription allows for bilateral agreements between railroads at rates at which both agree would more accurately reflect the marketplace.

In the early 1990s, the carrying capacity of freight cars as measured by gross weight on rail was increased by 10 percent. This change incented railroads to utilize higher capacity cars in order to take advantage of their track infrastructure.

Another significant factor that has changed since the TAX pooling authority was granted is who provides the freight cars needed to carry the commodities being shipped by rail. The railroads are providing less and less of the cars, and more and more are being provided by private industry. What do these significant changes mean to our industry today?

First and foremost, it means that the Surface Transportation Board must look at TTX's request for extension of pooling authority in light of today's world, not the world as it was. TAX has failed to prove that antitrust immunity is necessary to carrying out pooling of flatcars.

TTX's ability to set rates for their own pools is based upon their stated need to provide a guaranteed minimum return rate in order to have access to the money needed to finance additional cars. The independent lessors represented here have no such guarantees. CIT's and GE's combined statement has carefully reviewed the applicable laws, which indicates the Board has the appropriate authority to grant only such antitrust immunity as deemed necessary.

Antitrust immunity is an extraordinary privilege. It should be reserved for instances in which its necessity is compelling and its harm to competitors is not material. Neither condition would seem to be present in the application by TAX. TAX has no need for antitrust immunity today.

The ruling that this Board will make on this issue will have far-reaching, long-term strategic car supply ramifications for the entire industry due to the long-lived nature of railcars.

TAX has not met their burden of proof in providing quantitative evidence that only they would have regarding the actual pooling efficiencies generated for each non-intermodal flatcar tie-in. Without this specific and verifiable information, the Surface Transportation Board cannot accurately assess the scope of the efficiencies or other public benefits.

TAX indicated that this information was contained in each of the ICC's previous documents reviewing the TAX flatcar pool, and presented in related submissions. There was no quantitative evidence of specific utilization improvements or improved efficiencies over any other owner's cars.

As an indication of better service to the public, TAX references the submissions of its many supporters who coincidentally include their railroad shareholders and a substantial number of parties who rely on TAX for business. As previously pointed out, TAX seems to misconstrue comments as strong statements of support and completely ignores ones in opposition.

GE and CIT referred to a NAFACAR presentation, and I, again, want to reiterate that they are strongly opposed to TTX's pooling authority being extended without changes.

Specialized flatcars have different operational characteristics and service other markets with higher income margins for the rail industry, and TAX has acknowledged that the demand characteristic of TTX's other flatcar types make it harder to achieve utilization gains of the same magnitude of intermodal cars.

However, TAX should not be permitted to abdicate their burden of proof to show clear evidence of better service to the public or economy of operation, as TAX attempts to do by contending the opponents of pooling have failed to provide evidence that pooling does not improve service and does unreasonably restrain competition.

TAX refers to their network approach to maintenance as key operational benefit. TTX maintenance approach is not materially different than First Union Rail's or any other major lessor's maintenance practices. Another alleged benefit which TAX references includes the ability to compete for business without having to invest in unnecessary or duplicative cars.

Only TTX's railroad owners benefit from such practices, and the independent lessors can provide such car types which would provide both railroads and shippers who are not part of the TAX pool an alternative means of car supply. Further, TAX has failed to provide sufficient evidence proving that the pooling of specialized flatcars will not unreasonably restrain competition.

TAX has attempted to narrowly define competition as what takes place between the TAX owners. Under current conditions, the relevant competition is between TAX and the independent lessors. The relevant competitive market is the market for the use of freight cars. TAX has intentionally overlooked the lessors sector of the industry.

The lessors who have filed opposing statements have been referred to as a small group of TAX competitors. In fact, the vast majority of the major general purpose lessors in North America filed adverse comments in this proceeding. Collectively, these leasing companies own approximately 466,000 cars, or 36 percent of the total North American freight car fleet.

Greenbrier, in their submission, accurately described what lessors are really up against, and I quote, "Clearly, the ICC recognized that the grant of unfettered antitrust immunity is an extraordinary privilege and should be reserved for the free-running pool and should not be granted, whereas in this case it would amount to establishing a government-sanctioned leasing cartel."

The Surface Transportation Board has not been charged with removing reasonable business risk for either TAX or the railroad shareholders. Perhaps the most substantial advantage that TAX has over the independent lessors is a guaranteed return. TAX indicates that no company would invest in its assets if it had no control over the return those assets would

generate.

This is the environment in which independent lessors operate. Lessors are expected to assume risks of all types without any guarantee of a return on investment. Lessors cannot control either the rental market or the car hire rates under the deprescription. TAX has indirectly guaranteed a return sufficient to maintain their credit rating.

The price TAX set is always adequate to cover the cost of each car. If the market softened, and some cars are off rent, their rates increase on the remaining cars in service. Interestingly, TTX's pricing methodology tends to parallel the prescribed car hire formula that the railroads and the ICC displaced with the prescription. As demand increases, TAX offers discounts on their rates based upon usage. As demand and usage fall, rates increase.

The formerly prescribed car hire formula was dropped because its rates moved in the same manner, which was considered contrary to how rates were expected to move in the true market. TAX, in their opening statement, characterized itself as an independent investor.

And yet when they talk about the benefits of the pool they state that pooling is a joint investment vehicle, so that the railroads would suffer against themselves. If they are an independent investor, the railroads would not suffer if TAX were not given its antitrust immunity.

In addition to income guarantees, TAX enjoys significant cost advantages that are not available to other lessors. Railcars are long-lived assets, and a lessor's justification acquiring new equipment is predicated on the opportunity to generate a fair return over the long term.

Shippers and non-shareholder railroads who rely on independent lessors to provide equipment are the at-risk parties in this decision making process. It is important and appropriate to reiterate that TAX rates are established directly by a small number of mega railroads. The antitrust immunity that TAX currently enjoys has not been proven for specialized flatcars, and it is not necessary in today's circumstances.

The 1994 decision by the ICC allowing for assignment of specialized flatcars under car service Rule 16©) for shipper assignment did not have the benefit of hindsight, which is another reason for their frequent review of the TAX pooling authority.

The distinction on which the decision in 1994 differed from the 1989 decision banning assignment was the five-day turn back provision in the TAX contract. The TAX specialized flatcars that have been assigned have become part of the railroad owners' core fleet. You heard it stated by the Department of Defense that the five-day turn back has been little utilized for assigning cars and, therefore, has little meaning.

The right to assign has just become another method to fund cars on behalf of the shareholders. That kind of result was what the ICC feared in 1989.

As found by the ICC in 1989, car assignments by TAX have the effect of foreclosing third party equipment lessors from the market and thereby lessen competition. And practical effects, Section 16 pools inhibit the free movement of railcars throughout the rail system.

As noted by CIT and GE, TAX has even expanded their pooling authority to include assignment directly to railroads as well as to shippers. If the practice of authorizing TAX to assign specialized cars is allowed to continue, the government-sanctioned leasing cartel mentioned by Greenbrier will decide the maximum amount of lumber that will be shipped by each lumber shipper, how much paper will be shipped, how much scrap steel will be shipped, and will limit any other commodity for which they control the car supply.

In summary, TAX has mischaracterized the statements of many of the respondents of this hearing. Times have changed, and there is no longer a need for TAX to have antitrust immunity to set rates. TAX has not met its burden of proof for pooling of car types other than intermodal cars. There is no justification for the assignment of specialized flatcars.

In addition, First Union Rail's written comments adequately show that any pooling authority should be no longer than five years, and TAX should not be permitted to make any changes to its contract or operations without prior Surface Transportation Board approval.

Thank you very much for this opportunity to appear.

CHAIRMAN NOBER: Okay. Well, thank you very much.