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April 5, 2004

Surface Transportation Board
1925 K Street, NW
Washington, D.C. 20423-0001

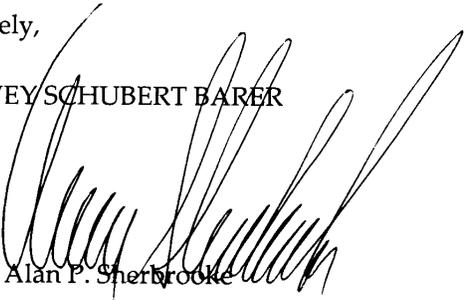
Re: STB Finance Docket No. 27590 (Sub-No. 3)

Enclosed for filing in the above-captioned matter please find an original and ten copies of the Comments of The Greenbrier Companies. One copy of those Comments has been sent to applicants' representatives, David L. Meyer and Patrick B. Loftus.

Sincerely,

GARVEY SCHUBERT BARER

By



Alan P. Sherbrooke

cc: D. Meyer w/ encl
P. Loftus w/ encl

210527

Please reply to ALAN P. SHERBROOKE
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APR -7 2004

Part of
Public Record

BEFORE THE SURFACE TRANSPORTATION BOARD

210527



Finance Docket 27590 (Sub-No. 3)

TTX Company, *et al* – Application for Approval of Pooling of Car Service With Respect to
Flatcars

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Comments of The Greenbrier Companies

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Public Record

Pursuant to the notice published at 69 Fed. Reg. 5662 (February 5, 2004) The Greenbrier Companies, through their attorneys, Garvey Schubert Barer submit these comments supporting continuation of TTX Company's approval to pool flatcars.

Because TTX is "not seeking any changes to the scope of TTX's existing authority or the elimination of any existing limitations on TTX's ability to assign cars,"¹ and 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. Greenbrier believes that no substantive changes are needed to the authority under which TTX has provided significant benefits to the industry for the last ten years.

Greenbrier understands its unique role in this docket. In 1988 and 1989, Greenbrier challenged certain aspects of TTX's application for renewed pooling authority. That challenge

¹ Reardon V.S. at 8.

was a daunting experience for Greenbrier. Initiating and prosecuting that proceeding consumed an extraordinary amount of time of several of Greenbrier's key executives and its costs for lawyers and expert witnesses ran into several millions of dollars. Today, however, Greenbrier is pleased to endorse the renewal of TTX's pooling authority. 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.

TTX's operation of a pool of free running cars has never been controversial from Greenbrier's standpoint. Greenbrier did not oppose the pool in 1988. Greenbrier agreed then, and it agrees now, that in a network industry like railroading, a neutral pool of cars is economically efficient. As TTX's witness Dr. Joseph P. Kalt correctly points out, TTX's free running pool provides coordination functions that are useful in a network industry. The TTX pool does provide the TTX owners with more direct control over car movements than such owners have over the thousands of free running cars that are not managed by TTX. The benefits of TTX's free running pool are clear and Greenbrier applauds the concept.

What *was* controversial in 1988 was TTX's pricing policy on leasing of equipment, which Greenbrier believed was not compensatory and which unduly increased TTX's market share to the detriment of other buyers and lessors of freight cars or which differentiated unfairly among car builders. Greenbrier has seen no evidence of these practices in the past decade.

Also controversial in 1988 was assignment and allocation of cars. However the ICC excluded TTX from that market in 1989:

In contrast to the benefits derived from the operation of a pool of free-running flatcars, Trailer Train's car assignments are essentially a method of equipment financing and leasing. These activities are at best tangential to the operation of a freight car pool and more appropriately the function of individual railroads or third party lessors operating outside the pool. We therefore conclude that Trailer Train's existing practice of assigning railcars is not shown to be in the public interest and does not meet the first test under section 11342. Assignment authority will be excluded from our extension of pooling authority.

Trailer Train Co. – Pooling – Car Service, 5 I.C.C. 2d 552, 603 (1989). In footnote 38 and elsewhere in its application TTX makes it clear that it does not seek to overturn that decision.² Greenbrier agrees with and supports that result. 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 where, as in this case, it would amount to establishing a government sanctioned leasing cartel.

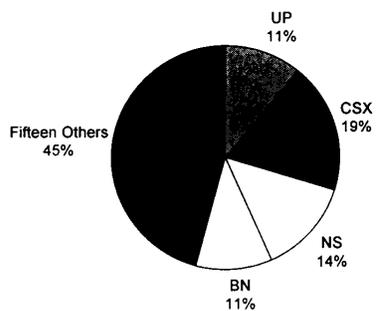
Greenbrier also agrees with TTX that the last thirty years of railroading in the United States have seen tremendous change and that the industry today is dynamic. As Mr. Reardon states, "The market for flatcars – particularly intermodal cars – will always be dynamic in certain respects."³ No one knows what the industry will look like fifteen years from now, but virtually every astute observer would agree that it will look much different in 2019 than it does

² See note 8, below.

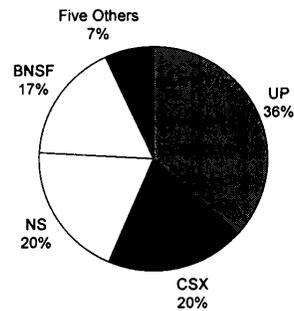
³ Reardon V.S. at 16. See also Brown V.S. at 15 ("Today, a number of factors have combined to make the pace of equipment change much more rapid . . ."); *id.* at 5 (noting "the incredible growth, change, and development that

today. In 1989, who would have predicted that in less than fifteen years the ICC would be abolished and replaced with the STB; that the number of Class I railroads would go from twenty-two in 1980 to only seven in 2003;⁴ that one railroad would own 36.68% of TTX and that its four largest shareholders' collective interest would increase from 54.1% to 93.1% as shown in the following charts;⁵ that 48-foot well cars would be *both* too short (for 53-foot trailers) *and* too long (for 40-foot international containers); and that prescription of car hire for non-TTX free running cars by the ICC – a public agency serving the public interest – would be replaced by a desprescription regime intended to rely on arm's length bilateral negotiations backed up by binding arbitration and administered by the AAR?

TTX Ownership 1987



TTX Ownership 2004



has characterized this industry during the past 25 years" including the "rounds of railroad mergers and changing railroad commercial strategies regarding trailers and containers.")

⁴ American Association of Railroads, *Rail Industry Restructuring* (July 2003) at 2. "Claims that mergers since 1980 have reduced the number of Class I railroads from 40 to 4 (or similar numbers) are false." *Id.*

⁵ In 1989, nineteen railroads owned TTX. The largest shareholder, CSX owned 18.9% of TTX, the second largest, Norfolk Southern, owned 13.5%, and the next largest, UP and BN, each owned 10.8%. Today, UP owns 36.68%, CSX and NS each own 19.59%, and BNSF owns 17.24%. In 1964, 41 railroads owned TTX, each having an identical 500-share interest, or less than 2.5% of the outstanding shares. By 1974, the owners of TTX consisted of

Greenbrier respectfully suggests that humility counsels caution in times of change. As the pace of change increases, the STB should be cautious about lengthening the term of TTX's approval from its current ten years to fifteen. Fifteen years – or even ten years – is a very long time in this industry. TTX's current management has respected the rules laid down in the ICC's 1989 decision, but management and ownership of TTX can change in only a few years. As noted above, railroad mergers have reduced the number of Class I railroads from twenty-two to seven. Increased railroad concentration reduces the transaction costs of bilateral negotiations between railroads, thereby reducing one of the principal benefits of TTX noted by Dr. Kalt.⁶ Railroad mergers also leave TTX more susceptible to the influence of a single railroad owning an influential share of TTX's voting power.

Accordingly, Greenbrier believes that a renewal of the 10 year authority under which TTX has functioned so well is both sufficient and prudent. After all, the difference between the current ten year authority which has served TTX so well and the 15 year authority it seeks

32 operating railroads, one nonrailroad subsidiary of an operating railroad stockholder and one freight forwarder.

⁶ Dr. Kalt's Verified Statement states, "on some purely theoretical level, these coordination problems could be solved perfectly through series of bi-lateral negotiations and agreements." As a practical matter, however, there are too many railroads to make this theoretical solution realistic. With a large number of railroads, the number of bilateral negotiations necessary simply becomes too great and hence "the costs of negotiation and enforcement, limitations to contracting and observability, and problems of incentives and investment preclude this possibility." Kalt V.S. at 6-7. As the number of railroads decreases, however, the number of bilateral negotiations necessary to accomplish the tasks Dr. Kalt describes also decreases. As the required number of bilateral negotiations decreases, the comparative efficiency that TTX enjoys compared to a world without TTX shrinks. In theory, if there were only two railroads, they could negotiate one agreement and achieve the efficiencies that TTX currently achieves.

is only three additional appearances before the Board between now and the turn of the 22nd Century.

Greenbrier accepts TTX's statement that the "evergreen" series of automatic one year renewals which it seeks is not intended to avoid Board review.⁷ Greenbrier agrees that TTX needs some contractual mechanism to assure that – in the unlikely event that anyone cares to repeat Greenbrier's multimillion dollar 1988 challenge to a TTX application for renewal of its authority, and if such a hypothetical proceeding threatens to last beyond the termination date of the Pooling Agreement – the Board is not forced to decide hastily and TTX is not put under the unfair pressure of an imminent expiration of its Pooling Agreement. But Greenbrier respectfully submits that there is a better way: Amend the Pooling Agreement such that if a proceeding seeking renewal of TTX's pooling authority is pending within one year of the date that the Pooling Agreement would otherwise expire, then the Pooling Agreement shall remain in effect until the Board issues a final decision (including exhaustion of any appeals) and for 180 days thereafter.

This alternative approach provides TTX the continuity it seeks and, at the same time, ensures that the Board is not relinquishing its regulatory responsibilities under Section 11322. In the event the renewal application is challenged, this approach will also have the salutary

⁷ "TTX's participants likely would seek Board approval for an additional fixed term before the initial 15-year term expires, rather than relying on one-year extensions. However, a provision for automatic extensions ensures continuity and avoids some of the uncertainty created by an agreement that terminates automatically." TTX Application at 41, n.27.

effect of not forcing a hasty decision by the Board or placing TTX in the unfair position of having its pooling authority expire while its renewal application is pending.

Greenbrier is puzzled by TTX's request that the Board

clarify . . . that TTX may make changes in the car contracts and other policies that embody its day to day pooling activities, as long as those changes fall within the scope of the Board-approved Pooling Agreement and the explicit limitations on TTX's 'assignment' and 'allocation' of cars imposed in 1989.⁸

It is unclear whether TTX is seeking clarification from the Board as to the nature of the changes it may make to the car contracts without prior Board approval or whether TTX is seeking a ruling from the Board that it may make substantive changes without prior approval.

Greenbrier has no objection to the Board clarifying the scope of permissible changes to the car contracts. Greenbrier, however, doubts that the Board may lawfully prospectively authorize prospectively substantive changes that are currently unknown.

In the 1974 decision, the ICC correctly observed that all "changes which affect the substance of either pooling arrangement or car contract . . . constitute a new pooling agreement [which] will require Commission approval prior to their implementation." *American Rail Box Car Co. – Pooling*, 347 I.C.C. 862, 883-84 (1974). Pursuant to Section 11322, all pooling arrangements, such as the TTX Pooling Agreement, must be approved by the Board. In approving a pooling arrangement, the Board must make two statutory findings: the pool (1) must "be in the interest of better service to the public or of economy of operation; and (2) will

⁸ TTX Application at 8-9. *See also id.* at note 29: "TTX would continue to adhere to the limitations on its authority to assign and allocate cars"

not unreasonably restrain competition.” 49 U.S.C. 11322 (a)(1) and (2). It is unclear to Greenbrier how the Board could make these requisite findings now as to future substantive changes to a pooling arrangement.

In any event, TTX has not identified any delays or difficulties it has encountered in changing the car contracts.

TTX is authorized to do whatever the Pooling Agreement says TTX can do. If what the Pooling Agreement says TTX can do is ambiguous, then TTX should propose an amendment to the Pooling Agreement eliminating the ambiguity. The Board can then evaluate whether the amendment merits approval. Absent additional information, however, Greenbrier is simply unable to discern a need for clarification.

Greenbrier appreciates that TTX only seeks authority to make changes that “fall within . . . the explicit limitations on TTX’s ‘assignment’ and ‘allocation’ of cars imposed in 1989.” *Id.* The limitation on TTX’s request is particularly laudable in light of TTX’s apparent belief (as stated in the first four sentences of footnote 38) that it *should* be allowed to re-enter the leasing business.⁹ Greenbrier accepts TTX’s disavowal of any attempt to overturn the ICC’s decision

⁹ “The limitations placed on TTX’s ability to assign and allocate cars in Trailer Train II did not reflect any conclusion by the ICC that TTX’s flatcar pool would be anticompetitive absent those limitations. Rather, those limitations reflected the ICC’s doubts about the benefits that would flow from TTX’s involvement in the leasing of flatcars, relative to ‘those obtainable from greater participation by third party lessors in a competitive leasing market.’ 5 I.C.C. 2d at 598; see also *id.* at 562 (conclusion that TTX should not engage in ‘assignment of cars or purchase of cars for allocation’ reached ‘for a reason different from DOJ’s primary monopsony arguments’). Importantly, moreover, those limitations were established at a time of significant uncertainty regarding the development of third-party leasing markets and the anticipated deregulation of car hire. *Id.* at 562-63, 597-99. TTX believes that experience over the past 15 years – including the development of robust third-party leasing alternatives and the potential for TTX to offer a superior competitive alternative if freed to engage in assignment

on the assignment and allocation issues as stated in the last sentence of footnote 38. However circumstances can change in fifteen years, or even in ten. In the future, a different management team at TTX (or a different balance of power among TTX's owners) might "consider[] changes in TTX's distribution model." (Application at 44.) In implementing those changes, it might be tempting to expand the clarifications that TTX seeks today in ways that would test the meaning of the ICC's ban on assignment and allocation. In short, Greenbrier is concerned about how such clarifications might be interpreted by a future TTX which was more persuaded by the first four sentences of footnote 38 than by its last sentence.

Of course if that happened, Greenbrier or any aggrieved party could file a complaint with the Board. With all due respect, however, the burdens of initiating a complaint are substantial, as are the potential downside risks associated with antagonizing the largest United States owner and buyer of freight cars. Greenbrier is not eager to repeat the experience of contesting a major customer's right to exist or to accuse it of misconduct. No whistleblower statute protects Greenbrier or other suppliers against retaliation. Greenbrier stipulates that TTX has treated Greenbrier and, it believes, others fairly. However, in the years since the dispute of the 1980s – and even during the period of that dispute – TTX management and

and unrestricted allocation – no longer justify limiting TTX's authority in this manner. Nevertheless, as stated above . . . TTX is not asking the Board to remove those limitations." Application at 49, n. 38. *See also id.* at 42-43, n. 29: ("TTX would continue to adhere to the limitations on its authority to assign and allocate cars that were imposed in 1989 and clarified in 1994, unless the Board enters an order releasing TTX from those limitations. As noted below (at footnote 38), TTX does not believe that any valid purpose is served by maintaining those restrictions and it would support a Board order lifting them. However, TTX is not seeking such an order in this proceeding.")

ownership was and is subject to change as heretofore mentioned. It may seem unlikely today that such a complaint could put Greenbrier in jeopardy. But the industry is cyclical, and in the inevitable downturn to come, Greenbrier, like other car builders will become vulnerable.

Greenbrier also applauds TTX's focus on long-term investment in railcars. That focus serves a valuable role in the marketplace at a time when cost cutting to achieve short term goals at some individual railroads is depressing car hire rates on non-TTX free running cars through the AAR administered depreciation process. Beyond that, the focus on short term cost cutting by railroads has contributed to severe shortages of supplies for building railcars, and in the present environment, a shortage of railcars. Those are some of the factors that have at times caused an under-investment in cars and resulted in railroad incapacity to handle potential business. TTX's long-term focus provides an important counter weight to such tendencies with respect to intermodal and automotive equipment.

Accordingly, Greenbrier supports renewal of TTX's pooling authority on the same terms that have served TTX, the industry, and the shipping public well for the last ten years. TTX is not broken. It does not need to be fixed. It needs – and deserves – renewal of its

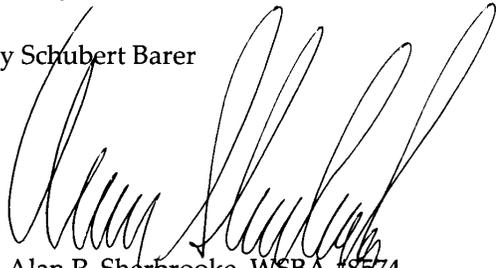
current pooling authority, but the term and the conditions associated with this authority should be carefully considered for the reasons described above.

DATED this 5th day of April 2004

Respectfully submitted,

Garvey Schubert Barer

By

A handwritten signature in black ink, appearing to read "Alan P. Sherbrooke", written over the printed name.

Alan P. Sherbrooke WSBA #3574
Of Attorneys for The Greenbrier Companies

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