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October 17, 1990

The Honorable James S. Rill  
Assistant Attorney General  
Antitrust Division  
United States Department of Justice  
Constitution Avenue & 10th St., N.W.  
Washington, D.C. 20530

Dear Mr. Rill:

Pursuant to the Department of Justice's Business Review Procedures codified at 28 C.F.R. §50.6, this letter and its attachments constitute a request for the Department of Justice's Antitrust Division to review and state its enforcement intentions regarding the formation of an auto shippers committee to function in conjunction with a railroad pooling agreement<sup>1/</sup> ("Agreement") for rail cars that transport automobiles. The proposed committee of automobile shippers would be constituted for the limited purpose of allowing the shippers to meet to formulate recommendations for improved rail efficiency under the Agreement.

Initially, approval for the proposed committee, which would have been formed pursuant to an amendment of the Pooling Agreement, was sought from the Interstate Commerce Commission ("ICC"). (See attached petition of December 17, 1987.) However, the ICC refused to review the committee's structure and operation based on its lack of jurisdiction over non-carrier entities such as automobile shippers. (See attached ICC decision of April 18, 1988.) Although we believe that the proposed committee is entirely pro-competitive, this request is submitted pursuant to the ICC's suggestion that the Department of Justice is the proper entity to review the proposal. See id. at 4.

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<sup>1/</sup> The referenced pooling agreement was reviewed and approved by the Interstate Commerce Commission in 1981. See The Baltimore & Ohio Railroad Company et al. -- Pooling of Car Service Regarding Multi-Level Cars, Finance Docket No. 29653 (attached), served August 19, 1981; Amendments, Finance Docket No. 29653 (Sub-No.3) (attached), served May 8, 1986.

### Background

The original rail car pooling agreement was designed to address inefficiencies in the distribution of multi-level rail cars used to transport motor vehicles. Historically, each multi-level rail car had been assigned to a fleet serving a single vehicle assembly plant. A loaded rail car would be transported to its delivery point and returned empty to the loading plant. The substantial amount of empty rail car mileage incurred in this way by the fleets not only increased the cost of shipping (e.g., fuel costs, wear and tear) but also resulted in a significant underutilization of the equipment.

The 20 railroads that formed the pool sought to eliminate this wasteful cross-hauling of empty rail cars by rerouting them to the vehicle assembly plant closest to the last delivery point for reloading. This has been accomplished under the Agreement by pooling the rail cars assigned to particular shippers or groups of shippers and using central distribution teams to control the distribution of the rail cars. The Agreement contains various provisions aimed at ensuring that the pool is properly and efficiently administered. For example, Article 3 of the Agreement establishes various committees imbued with the authority to carry out the Agreement's mandates. Those committees are: (1) a Railroad Executive Committee made up of signatory railroads; (2) Steering Committees established by the Railroad Executive Committee to manage centralized distribution for a shipper or shippers; (3) Fleet Management Groups established by the Steering Committees to implement centralized distribution of participating multi-level rail cars; and (4) Task Forces authorized by and reporting to the Executive Committee to collect information and conduct research and development concerning the purposes of the pool.

In its 1986 approval of amendments to the Agreement, the ICC expressly stated that the original pool "has been a tremendous success." Amendments, supra note 1, at 1. According to the ICC, the railroad members of the pool, "have been able to achieve substantial improvements in car use and transportation efficiencies under the pool, resulting in significant savings from the reduction in unnecessary transportation and equipment investment costs." Id. In addition, the ICC reported that "shippers have benefitted from an increased availability of cars and from the ability of individual rail members to be more aggressive in obtaining traffic due to reduced costs." Id.

### The Proposed Shippers' Efficiency Committee

The proposed committee, initially developed as an added committee to the internal management structure of the pool, would parallel the organization, structure, and function of the Railroad Executive Committee. The sole purpose of the new committee is to allow shippers

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to meet and to formulate joint recommendations regarding improved efficiency of the pool for presentation to the Railroad Executive Committee.

Currently, the Railroad Executive Committee meets quarterly, or as needed, to oversee the management of the pool. Part of the Railroad Executive Committee meeting is dedicated to a discussion with individual shippers who comment on their experience with the pool and present proposals to enhance the pool's efficiency or streamline its procedures. Since the various shippers have not had a prior opportunity to share their recent "pool" experiences, their views are first aired at the quarterly joint shipper/railroad meeting. Many times the shippers' views are divergent in that they, at least at the outset, suggest solutions to enhance rail efficiency that are different and sometimes even contradictory or mutually exclusive.

Despite the initial divergence and inconsistency of shipper recommendations, it is often the case that through discussion a shipper consensus may be reached concerning implementation of any proposed solutions. However, without some forum or meeting limited to shippers prior to the currently scheduled joint shipper/railroad meeting, any consensus is only achieved after a protracted joint meeting in which the bulk of the time is spent entertaining shipper discussions concerning consensus recommendations. Many times recommendations that might have been agreed to by a consensus of shippers will not be entertained by the Railroad Executive Committee because of initial differences between the shippers. Thus, because the current procedures often delay or even squelch proposals that may enhance the quality or the efficiency of the pool, all of the shippers involved with the multi-level rail car pool wholeheartedly support the proposed Shipper's Committee.

The proposed Shippers' Efficiency Committee will be governed by strict rules of procedure. The Committee will abide by the provisions of the Agreement and will adhere to strict by-laws (see Exhibit A attached) paralleling those that currently bind the Railroad Executive Committee which administers the Agreement. (See attached Railroad Executive Committee Bylaws.) The structure and procedures of the pool have already been reviewed by the ICC, which has commented favorably on the pro-competitive effect of the Agreement.<sup>2/</sup> The sole purpose and

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<sup>2/</sup> Quite frankly, we are somewhat surprised by the ICC's earlier decision regarding its lack of authority to approve the proposed Committee. Although the proposed Committee will be constituted solely of shippers, it was by no means intended to function as an independent entity. The proposed Committee is entirely a creature of the existing Multi-Level Rail Car Pooling Agreement.

function of the Committee will be to exchange information regarding improvement of railroad operating procedures. None of the information involved will concern product price or freight rates or any data that could be used in an anti-competitive manner in the rail or automotive industries.

To ensure that the discussions are limited to railroad efficiency, all Shippers' Efficiency Committee meetings will be conducted pursuant to a published agenda. Meeting minutes will be kept so that strict logs of any discussions will be available. In addition, legal counsel will be present at all meetings to prevent any inappropriate discussions.

Finally, it should be noted that the proposed Shippers' Efficiency Committee will not be exclusionary. The Committee will include all shippers participating in the pool who wish to join. Moreover, the Committee will not be the exclusive forum through which shippers can communicate their recommendations to the Railroad Executive Committee. If a shipper's suggested solution does not achieve a consensus, the shipper can simply return to its Steering Committee and pursue the desired changes on an individual basis.

As demonstrated above and in the attached documents, the proposed committee will in no way serve to reduce competition among the shippers who will constitute its membership. Rather, like the original pool, the proposed Shippers' Committee is fully expected to produce a pro-competitive impact by facilitating the adoption and implementation of proposals aimed at improving the efficiency of rail transportation of automobiles. Wholly aside from the procedures that will be adopted to limit discussion, the potential for any anti-competitive conduct is remote since transportation costs constitute a minuscule percentage of the cost of the automobiles that the shippers manufacture.

#### Conclusion

The Interstate Commerce Commission has already stated that a Pooling Agreement among the various rail carriers of automobiles is a useful tool that will serve to enhance the efficiency and competitiveness of the automobile and rail markets. Indeed, given that the ICC's approval of the Agreement dates to 1981, the original multi-level pool has been a tremendous success. Costs have been reduced, primarily by

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Its sole purpose will be to facilitate a shipper consensus about how to improve the efficiency of the pool. The Committee's functions will be governed by procedures that parallel those that currently bind the pool's Railroad Executive Committee. Finally, the Committee will consider nothing more than what is already discussed in the regular joint railroad/shipper meeting.

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elimination of empty car movements and wasteful cross-hauling of empty cars for reloading. Beyond question, the Agreement has furthered the national rail transportation policy by promoting safe and efficient rail transportation, encouraging the development and continuation of a sound rail transportation system, and fostering sound economic conditions in the rail industry.

The proposed Shippers' Efficiency Committee will only serve to enhance the rail transportation policies and, ultimately, to serve the public through lower rail costs. Thus, we respectfully request that the Department of Justice issue a statement of its present intention not to seek any enforcement action against the formation or operation of the proposed Shippers' Efficiency Committee.

  
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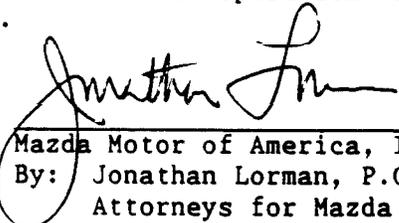
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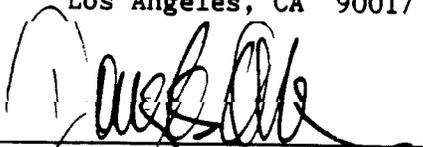
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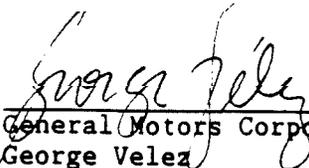
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