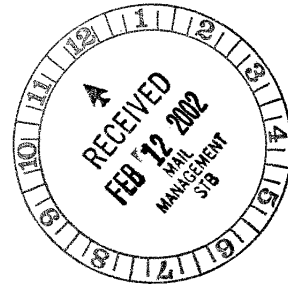


204744

**BEFORE THE
SURFACE TRANSPORTATION BOARD**



Finance Docket No. 33980

**RIVERVIEW TRENTON RAILROAD COMPANY - ACQUISITION AND
OPERATIONS EXEMPTION - CROWN ENTERPRISES**

204745

Finance Docket No. 34040

**RIVERVIEW TRENTON RAILROAD COMPANY --
ACQUISITION AND OPERATION IN WAYNE COUNTY, MICHIGAN**

**RESPONSE OF RIVERVIEW TRENTON RAILROAD COMPANY
TO FEBRUARY 8 REPLY COMMENTS OF COUNTY OF WAYNE
AND GRAND TRUNK WESTERN RAILROAD**

**ENTERED
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February 12, 2002

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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The County and its allies continue to engage in classic shotgun litigation. First, they submit a series of filings that raise allegations based on unsupported or untrue assumptions and innuendoes. Then they claim that the matter is so complex that further procedures are needed because of the number of issues they have raised.¹

The repetitive nature of the County's recent filings underscores that further proceedings in these cases, or the issuance at this point of a procedural schedule in the Petition for Exemption proceeding, would spawn only more repetition, that they have nothing new to say except that they want delay at all costs. The County (which has already had discovery on this matter

¹ RTRR files this Response reluctantly, recognizing that the Board has already been burdened with frequent and repetitive filings in this case and that this submission may spawn yet another counter-submission. At the same time, RTRR feels compelled to reply since the County and its allies keep throwing mud at RTRR, hoping something will stick.

through the parallel federal action) has neither made nor responded to any "new" arguments in its latest submission; the issues remain ripe for decision. But the County knows that if it can delay the RTRR project with additional proceedings before this Board, then it will be better positioned to pursue its bogus (and currently enjoined) eminent domain claims and achieve its "not in my backyard" goal of stifling RTRR. Further, delay would also economically prejudice RTRR -- which plans to benefit from the substantial sums it is investing in this rail project -- but would prejudice the ability of area shipper and transportation interests to benefit from RTRR service. The Board should not oblige either the County's attempted abuse of the Board's processes to achieve its own anti-railroad ends or GTW's efforts to stifle competition.²

The only *bona fide* question in these proceedings is whether RTRR has met the standards for exemption set forth at 49 U.S.C. § 10502 with respect to its operation of a shortline that will carry freight for all shippers, interchanging it to and from the national rail system under arrangements to be forged with nearby Class I railroads. All the verbiage aside, RTRR has met those standards. Specifically, regulation is not necessary to carry out the Rail Transportation Policy because the RTRR operations will advance the goals of that Policy by promoting efficient and competitive rail transportation.³ Further, the RTRR service is of limited scope, and not even

² The Board is required by the Rail Transportation Policy to remove, not erect, regulatory barriers to new rail service, even service that local communities may not like. 49 U.S.C. §§ 10101(1), (2), (15).

³ GTW obviously perceives RTRR as a competitive threat. This explains its vocal opposition. It bears note that GTW is the same railroad that just lost an adverse abandonment proceeding at the Board in which the Board determined that it should be required to forego its rights to certain track it was not using, but was unwilling to allow another railroad to use. STB Docket No. AB-31 (Sub No. 38), *CSX Corporation and CSX Transportation, Inc -- Adverse Abandonment Application -- Canadian National Railway Company and Grand Trunk Western Railroad, Inc* (served February 1, 2002).

the County or its friends have alleged that shippers may suffer from an abuse of market power by RTRR.

This is not a local zoning proceeding in which the Board is to balance transportation needs for the area against other possible uses for the property, as the County asks it to do. Nor is this a popularity contest in which parties should be awarded for inundating the Board with late-in-the-day public and political opposition that is largely founded on misperceptions of the project. The Board's role, framed by statutory standards, is to protect and advance broader rail transportation interests. The land use, traffic and other claims made by the County and its friends about potential RTRR impacts are properly addressed through the environmental assessment process. SEA, after receiving public comment, has already completed that process.⁴

The County/GTW offer nothing new in support of their claim that RTRR has invoked Board jurisdiction "for an improper purpose." To state the obvious, RTRR invoked Board jurisdiction because it intends to operate a railroad that is subject to Board jurisdiction, just as other similar shortlines have invoked Board jurisdiction in the past.

In the face of facts disproving their often-repeated claim that RTRR did not disclose its rail plans until after the eminent domain efforts were launched, this time the County/GTW argue that RTRR did not signal its intention to provide Board-regulated rail common carriage. To the extent this point is even relevant, the evidence shows that RTRR's affiliates disclosed their intention to provide rail service at the site well before the County threatened to stifle those plans.

⁴ In contrast to ICC Finance Docket No. 32204, *Ozark Mountain Railroad -- Construction Exemption* (served Dec. 15, 1994), where the ICC determined that a matter was better suited for handling through the application process, this is not a construction case in which the financial ability of the proponent was placed at issue and in which the proponent failed to respond to requests for financial and other data. Here, requiring RTRR to submit an application
(Continued ...)

And from the beginning the plan has been to operate the RTRR line as a common carrier in conjunction with the Class I railroads that operate adjacent to the RTRR line. That is the very essence of the project since merely moving freight by rail from one point on RTRR's property to another would obviously serve no purpose.⁵

Finally, as to their oft-repeated jurisdictional claims, the County/GTW appear to acknowledge that these issues are ripe for decision and thus ask the Board to rule now that it has no jurisdiction over the RTRR project. Their jurisdictional claims are focused primarily on the RTRR class exemption filing, as to which they repeat the argument that the class exemption cannot be used to transform non-jurisdictional track into jurisdictional rail line. They attempt to distinguish the cases RTRR has cited in rebuttal of their argument by claiming that those cases involved existing carriers. Notably, the Board has never drawn such a distinction or articulated a

would yield only repetitious filings and delay, while enhancing the County's ability to continue its efforts to kill RTRR through an unjustified taking.

⁵ The County and GTW claim that RTRR has not rebutted their reliance on the site plans and related descriptions of those plans filed with Trenton and Riverview. That is wrong. This argument too has been made and answered, both in this proceeding and in the federal court case. RTRR has explained that those site plans, filed by Crown, were intended to reflect the short-term use of the property until the RTRR line could be placed into operation. RTRR April 2, 2001 Reply to Petitions to Revoke at 17; Mistura Affidavit filed with RTRR's March 8, 2001 Reply at ¶¶ 11-13.

They also repeat their claims that RTRR invoked Board jurisdiction only after learning of the eminent domain plans from the County's November letters. Again, this ground has been plowed. Mr. Mistura has consistently testified that there were several parcels of land in the area broadly described in those November letters and thus Crown reasonably requested a legal description of the property threatened with being taken. See Mistura Affidavit at ¶¶ 16-19. Mr. Blashfield has also testified that the class exemption filing was not related to the November letters. But, again, even if there were a relationship, this would prove nothing – RTRR was within its rights to invoke Board jurisdiction for a rail line that is within the Board's jurisdiction. It cannot be faulted for either of its Board exemption filings, whereas the County's use of its eminent domain power to stifle rail operations is open to serious question – and has in fact been preliminarily enjoined by a federal court.

reason why such a distinction should exist. But were the County correct, its argument does not even purport to reach RTRR's Petition for Exemption, which was filed to provide the Board with an alternative approach were it to be unable for any reason to allow the class exemption to remain in effect.

The only jurisdictional claim that purports to reach RTRR's Petition for Exemption is the bogus claim that RTRR does not qualify as a rail common carrier. Once again, this point has been fully addressed in prior filings – RTRR intends to hold out its service, in conjunction with other railroads, to all shippers.⁶

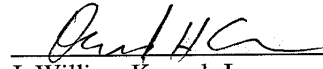
⁶ To reiterate, RTRR will operate no differently than any number of regulated common carrier terminal or port-area railroads. The length of the lines of these carriers and the fact that they may operate within a confined area does not preclude such carriers from operating as common carriers subject to Board regulation. *E.g., Association of P&C Dock Longshoremen v. The Pittsburgh and Conneaut Dock Co.*, 8 I.C.C.2d 280 (1992). Like the shortline rail common carrier in that case, RTRR will conduct regulated rail transportation, as those terms are defined in section 10102(6) and (9); operate under arrangements pursuant to which it will interchange intermodal traffic with Class I railroads; and hold itself out to the shipping public. *See also Effingham Railroad Company -- Petition for Declaratory Order -- Construction at Effingham, IL*, 2 S.T.B. 606 (1997), *aff'd* by decision served Sept. 18, 1998 (Board has jurisdiction over new shortline that will serve territory it has not previously served in connection with national rail system.) RTRR likewise will be a new carrier that will serve a new territory, handling freight in connection with national rail system carriers.

Further, RTRR is unlike the ocean-carrier owned railroad in *Ciaccio v. New Orleans Pub. Belt R.R.*, 285 F. Supp. 373, 375-76 (E.D. La. 1968), the case cited by the County/GTW. The railroad there was a mere appendage of an ocean carrier, used only to service the ocean carrier's loading/unloading and freight staging needs, and did not hold itself out to the public to provide rail service. The Court found that it was not a common carrier on those grounds, which have no application to the setting in this proceeding, in which RTRR will hold itself out directly to the shipping public and not operate as a mere appendage to some other carrier.

CONCLUSION

RTRR has met the qualifications for exemption. The Board should so find.

Respectfully submitted,



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February 12, 2002

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of February 2002, a copy of the foregoing Reply was served by hand delivery or first class mail, postage pre-paid upon the following:

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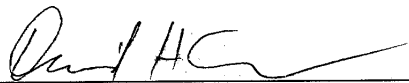
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