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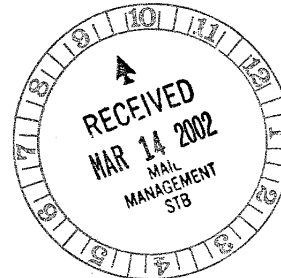
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March 13, 2002

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W., Room 711
Washington, DC 20423-0001



**Re: Finance Docket No. 34040 – Riverview Trenton Railroad Company –
Petition for an Exemption from 49 U.S.C. 10901 to Acquire and
Operate a Rail Line in Wayne County, MI**

Dear Secretary Williams:

Enclosed for filing please find an original and 10 copies of the Reply of Riverview Trenton Railroad Company to Motion of County of Wayne and Grand Trunk Western Railroad Incorporated for Extension of Time for Replies to Supplemental Information of Riverview Trenton Railroad Company. Also please find discs that contain copies of this filing, as required under the Board's rules.

Sincerely,

A handwritten signature in cursive script, appearing to read "David H. Coburn".

David H. Coburn
Attorney for Riverview Trenton Railroad
Company

Enclosure

cc: All parties of record

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Office of the Secretary
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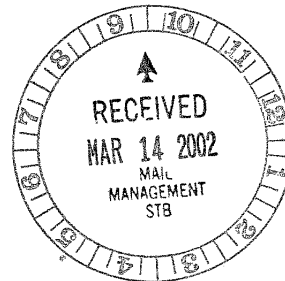
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LONDON

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**



Finance Docket No. 34040

**RIVERVIEW TRENTON RAILROAD COMPANY – PETITION FOR AN EXEMPTION
FROM 49 U.S.C. 10901 TO ACQUIRE AND OPERATE A RAIL LINE IN WAYNE
COUNTY, MI**

**REPLY OF RIVERVIEW TRENTON RAILROAD COMPANY TO MOTION OF
COUNTY OF WAYNE AND GRAND TRUNK WESTERN RAILROAD
INCORPORATED FOR EXTENSION OF TIME TO SUPPLEMENTAL
INFORMATION OF RIVERVIEW TRENTON RAILROAD COMPANY**

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Railroad Company

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**BEFORE THE
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INTRODUCTION

On March 7, 2002, Riverview Trenton Railroad Company (“RTRR”) submitted, as one component of its much larger response to the specific request of the Board for supplemental evidence, an exhibit consisting of a collection of shipper letters demonstrating support for RTRR’s proposed rail service. Pursuant to the Board’s rules at 49 CFR § 1104.14, RTRR simultaneously moved for a protective order to protect the confidentiality of that single exhibit. The County of Wayne (“Wayne County”) and Grand Trunk Western Railroad (“GTW”) (jointly “the Opponents”) have responded through both an initial March 12 reply (“Initial Reply”) and a supplemental March 13 reply (“Supplemental Reply”).

The raw, anti-competitive nature of GTW’s participation is underscored by its opposition to RTRR’s proposed protective order. If a railroad in its infancy, such as RTRR, is required to disclose its customer list to an established Class I railroad who opposes the start-up operation (here the \$24 billion CN/GTW), that will stifle an innovative service offering by a new shortline

railroad. In this regard, the protective order sought by RTRR is consistent with the Rail Transportation Policy of promoting competition and innovation.

In their Initial Reply, the Opponents requested that the Board enter an alternative protective order. But in their Supplemental Reply -- prepared after they reviewed the confidential exhibit of shipper letters -- they respond substantively to the shipper letters thereby undermining their claim that the protective order prejudices their ability to reply.

Additionally, the Opponents have moved for an extension of time to respond to all of the supplemental information submitted to the Board by RTRR on March 7 ("Motion for Time Extension"), including the vast bulk of RTRR's supplemental filing which consists of eight verified statements and other exhibits that have *not* been designated confidential under RTRR's proposed protective order. Even though GTW has been in possession of RTRR's filing since March 7, and, by virtue of an interim Confidentiality Agreement, the protected exhibit since March 12, the Opponents now request that they be given eleven days from the day that the Board acts on RTRR's protective order motion to respond to the entirety of RTRR's March 7 submission.¹ In a "shoot for the moon" approach, they also urge that the Board require RTRR to meet the March 18 deadline for responding to the Opponents' March 7 supplemental filing. This approach would, of course, provide the Opponents the benefit of seeing RTRR's reply well before they have to file their own reply, as well as having substantial extra time to reply to the large, non-confidential portion of RTRR's March 7 filing that they have had since March 7.²

¹ The County's attorneys were scheduled to receive the protected exhibit today, after signing the Confidentiality Agreement yesterday.

² RTRR is submitting its reply to the Opponents' Motion for Time Extension and response to the Opponents' Initial Reply and Supplemental Reply as a combined pleading to simplify discussion of these issues. Those latter filings, particularly the Supplemental Reply, effectively constitute a motion by Opponents to declassify RTRR's confidential exhibit. RTRR
(Continued ...)

Regardless of how the Board may rule on this dispute, the Opponents have received all of the submissions filed with the Board on March 7 and are fully armed to continue their opposition. *Indeed, the Opponents' Supplemental Reply – in which Opponents offer substantive (albeit unfounded) criticisms of the shipper support letters --demonstrates conclusively that they are fully capable of arguing their case with the protection RTRR seeks in place.*

The Opponents' claims that RTRR has been unwilling to negotiate an appropriately "neutral" protective order and that RTRR has filed information under seal that is improperly designated as "Highly Confidential" are matters of substantive disagreement, not procedure. RTRR has demonstrated a legitimate need for confidentiality for a single shipper support exhibit (which constitutes the functional equivalent of its customer list), and the Opponents have failed to demonstrate any prejudice that would support the denial of the protective order requested by RTRR. Accordingly, RTRR's motion should be granted.

In the spirit of prompt resolution and eliminating any potential time-related prejudice to either parties' responses to the March 7 supplemental filings, RTRR does not oppose a mutual brief extension to the March 18 deadline for filing replies so as to take into account the short time following March 7 during which Opponents did not have the protected exhibit. RTRR suggests that an extension of the March 18 deadline to March 21 might be appropriate.

FACTUAL BACKGROUND

RTRR is before the Board seeking an exemption from 49 U.S.C § 10901 to operate a rail line so that it can provide common carrier rail service. In a decision served on February 15, 2002 ("February 15 Decision"), the Board requested additional information concerning the issues

additionally seeks to avoid the approach of multiple, daily pleadings that unfortunately characterizes the Opponents' litigation style.

raised by RTRR's petition for an individual exemption in Finance Docket No. 34040. RTRR was requested to provide information describing the potential benefits of its proposed service, including "evidence from those who would benefit from the interchange service." February 15 Decision at 10.

On March 7, 2002, RTRR submitted an extensive series of eight verified statements from an RTRR witness and various other knowledgeable witnesses demonstrating the need for the RTRR rail line, its benefits to interstate commerce and the impact its project would have on reducing truck traffic. None of this extensive filing was submitted under seal, with the exception of a single exhibit to the verified statement of RTRR President Arnold M. Mistura. That exhibit consists of a collection of shipper letters demonstrating support for the RTRR rail line/intermodal facility. These letters verify that there is a range of potential users of RTRR's proposed common carrier service and clearly indicate that both larger and smaller shippers, including major automobile manufacturers and other industry players, are interested in RTRR's service and support the alternative transportation option that it will supply. These letters also provide some information concerning the manner in which some shippers may alter their operations to take advantage of RTRR's service.

Most importantly, as relevant here, these letters reveal the identities of at least a portion of RTRR's prospective customer list. Some of these prospective customers are companies with which affiliates of RTRR already conduct business and who have expressed a serious interest in taking advantage the service offerings of RTRR when authorized by the Board. Due to concerns both with revealing potential customer relationships that RTRR is in the process of forging, particularly given the fanatical opposition of GTW in these proceedings, and protecting these potential customers from the possibility of harassment or ridicule in the politically charged, anti-

RTRR atmosphere that Opponents have promoted, RTRR moved for a protective order to protect the confidentiality of these shipper statements pursuant to 49 C.F.R. § 1104.14.

On Friday, March 8, 2002, after receipt of RTRR's motion, counsel for GTW contacted counsel for RTRR to gain access to the shipper statements that were filed under seal. GTW disagreed with RTRR's proposed protective order and submitted its own draft to RTRR. The parties engaged in some discussions about GTW executing a modified form of the protective order to preserve GTW's rights to challenge the order. On Monday afternoon, March 11, 2002, GTW indicated that it would prepare a "confidentiality agreement" in lieu of a protective order that would allow the outside counsel for GTW to review the shipper statements until the Board is able to rule on the motion for a protective order. Counsel for RTRR reviewed GTW's proposed confidentiality agreement and agreed to its terms the following day after securing approval from RTRR management. The shipper statements filed under seal were made available to GTW at about 1:00 PM on that same day (March 12), immediately after RTRR received the executed Confidentiality Agreement and Undertaking from GTW's counsel. RTRR subsequently received, on Tuesday afternoon, a request from an attorney with the Michigan law firm representing Wayne County to enter into a similar Confidentiality Agreement. RTRR's counsel immediately prepared and faxed such an Agreement to the County's attorney. On Wednesday afternoon, the County's attorney executed the Agreement and Undertaking, and the exhibit was promptly sent to him.

Opponents' suggestion that RTRR might have filed its motion prior to March 7 fails to account for the fact that the February 15 Decision allowed for only a very brief period to prepare RTRR's filing. Its further suggestion that RTRR might have tried to negotiate a protective order in advance with Opponents is belied by the tone and content of their own filings.

ARGUMENT

I. THE ENTRY OF A PROTECTIVE ORDER IS APPROPRIATE

The Opponents' principal attack on RTRR's motion is the alleged lack of protectable information contained in the shipper letters and the circumstances under which those letters were made available to them. These arguments minimize the legitimate concerns presented by RTRR, while underscoring the lack of prejudice that Opponents face under the protective order proposed by RTRR.

A. The Nature of the Information Requested by the Board Mandates Protection in This Proceeding

The Board's February 15 Decision essentially asked RTRR to provide the Board with evidence that RTRR has support in the shipper community. To demonstrate the credibility of its plan to provide common carrier service, RTRR was therefore put in the position of providing to the Board the names of at least some of those entities that would use, and benefit from, its service. As RTRR explains in its March 7 filing, it is not at this stage an operating railroad and it is not actively marketing its services at this time. Nonetheless, RTRR was able to demonstrate through the submission of over 45 letters that there is already considerable support for its proposal in the community of potential beneficiaries, and a willingness on the part of major shippers to consider RTRR as a viable transportation option – much to the apparent consternation of Opponents.

As the Board is well aware, RTRR's petition is opposed by local government entities who inflexibly oppose RTRR's rail operations in their venues. These governmental entities have been involved in organizing and promoting community opposition to RTRR, and have orchestrated the filing of dozens of identical form letters with the Board reflecting opposition to

RTRR. Further, another railroad, GTW, is actively opposed to RTRR. Given the "scorched earth" nature of this joint opposition, RTRR credibly believes that Opponents may seek to use their influence, market or political, to deter shippers from supporting RTRR. Each of these parties has shown a great willingness to recruit public and political involvement in this proceeding, not only to misrepresent the true nature of RTRR's proposed entry into the rail business, but also to build support, *outside of the Board proceedings*, in opposition to RTRR. Due to the demonstrated willingness of these parties to pursue their campaign beyond the context of Board proceedings, RTRR has a legitimate concern that the disclosure of the identity of its prospective customer base could result in undue pressure on individual companies located in the area to abandon support for RTRR.

Particularly telling in this regard is GTW's role. It is GTW's attorneys that are leading the charge in opposition to RTRR's motion for a protective order. The only conceivable basis for GTW's opposition is that it perceives a competitive disadvantage in RTRR's planned rail operations. The ferocity of GTW's opposition more than confirms the need for a protective order. GTW, like any other railroad or carrier of any kind, almost certainly would not publicly disclose its own customer list or reveal the types of services used by these customers.

In fact, it appears that Opponents are intent upon contacting RTRR's supporting shippers to perhaps persuade them from continuing that support. In their Motion for Extension, Opponents state at page 7 that since RTRR contacted its supporters, Opponents should have the "same right" to do so through their in-house personnel. In other words, County or GTW officials, or both, want to contact RTRR's supporters for the obvious purpose of persuading them to see things the Opponents' way, thereby interfering with RTRR's business relationships, undermining its efforts in this proceeding and potentially pressuring those businesses that

decided to support RTRR. Were the tables turned, GTW would no doubt seek to deter such conduct in order to protect its business arrangement mostly from commercial interference.

Although prior Board decisions granting protective orders have focused on the disclosure of specific contract terms or volumes in granting protective orders, this has not been an absolute requirement. *See Rio Grande Industries, Inc., SPTC Holding, Inc. and the Denver and Rio Grande Western Railroad Company – Control- Southern Pacific Transportation Co.*, Docket No. 32000 (served June 6, 2001). The Board has recognized the need to protect future business negotiations, *see e.g., SWKR Operating Co. – Abandonment Exemption In Cochise County, AZ*, Docket No. AB-441 (served Sept. 15, 1997), and the Board has noted that it will resolve doubts in favor of protecting asserted confidentiality. *See The Central Illinois Railroad Co. – Lease and Operation Exemption – Lines of the Burlington Northern and Santa Fe Railway Company at Chicago, Cook County, IL*, Docket No. 33960 (served March 2, 2001).

The RTRR support letters constitute, in a very real sense, a portion of RTRR's prospective customer list. It is indisputable that this kind of information is confidential, proprietary and entitled to protection. Customer lists and customer information are routinely regarded by the courts as confidential and a valuable asset sufficient to qualify for trade secret protection. *See, e.g., Bohler-Uddeholm America, Inc. v. Ellwood Group, Inc.*, 247 F.3d 79, 107 (3d Cir. 2001) (holding that Penn. law recognize customer lists can qualify for trade secret protection); *Morgan Stanley DW, Inc. v. Rothe*, 150 F. Supp. 2d 67, 76 (D.D.C. 2001); *Merrill Lynch v. Ran*, 67 F. Supp. 2d 764, 775 (E.D. Mich. 1999) (under Michigan law a customer list may constitute a trade secret entitled to protection); *see also Judicial Watch, Inc. v. Export-Import Bank*, 108 F. Supp. 2d 19, 132 (D.D.C. 2000) (customer lists exempt from disclosure under FOIA; court held that "lists of customers are confidential financial information. If a

competitor had a list of the insured's customers, the competitor could contact those customers and attempt to lure them away from the insured by offering to sell the same goods at lower prices. This could substantially harm the insured's competitive position.""). The information that start-up RTRR seeks to guard through a protective order is precisely the kind of information that the courts routinely shield from disclosure.

The protective order proposed by GTW and the County does not recognize concerns of a similar nature. Unless the County, GTW, and other parties were prepared to agree that the identity of RTRR's customers is "competitively sensitive" - - which RTRR submits it is - - the definition of the term "Highly Confidential" in the GTW/County proposal is too narrow and would not offer the protection that RTRR requires in the context of this proceeding.

In sum, noting the context of the Board's request and the nature of the information being disclosed, RTRR has fashioned a suitable protective order granting full access to the Opponents' counsel while eliminating public exposure of RTRR's business supporters. RTRR's motion for a protective order, while perhaps not typical,³ is suitably grounded in prior case decisions and is required by the circumstances of these proceedings and the potential harm that can result outside of these proceedings.

B. The Opponents Have Conclusively Demonstrated That They Will Not be Prejudiced by RTRR's Proposed Protective Order

Wayne County and GTW have failed to demonstrate that they will suffer any prejudice if the RTRR protective order is entered. What they *have* demonstrated in their Supplemental Reply is that they are not prejudiced at all. Opponents' counsel – led by GTW's experienced rail

³ Railroads are not typically asked to supply the functional equivalent of customer lists in Board proceedings.

counsel – are fully able to review the content of these shipper letters and assess the degree of support that they provide for RTRR’s claimed service benefits. Simply put, these “garden-variety” support letters speak for themselves and should not be controversial. That GTW and Wayne County do not like the fact of substantial shipper support for RTRR is not a legitimate reason for denying confidentiality.

Demonstrating with their own words that they are not impaired in their ability to substantively respond to the support letters, Opponents’ Supplemental Reply includes a list of ten bullet points that in one manner or another attack the content of the individual statements. Thus, even though the underlying statements are currently being recognized by both parties as “Highly Confidential” while awaiting the Board’s ruling on this motion, GTW and Wayne County have demonstrated that they can conduct a thorough analysis of those statements, and prepare their reply, under the restrictions of a protective provision.⁴ These are, after all, simply expressions of support for RTRR by entities involved in shipping or transporting property; they speak for themselves as to the matters for which they are offered.

The Opponents also claim that the limitations included under RTRR’s proposed protective order would impose “significant burdens” and result in “substantial inefficiencies and added costs.” Opps. Supp. Mem. at 5. Significantly, the Opponents do not identify the supposed significant burdens and added costs, revealing that there are no such millstones. Regardless, whatever logistical burden attends compliance with the protective order is more than offset by

⁴ While the Opponents’ Supplemental Memorandum reveals their counsels’ ability to dissect these statements – in much less than 11 days – RTRR disputes that this is even its “central evidence.” Rather, the 100 pages of verified statements not filed under seal provide the principle support within RTRR’s supplemental information for an exemption.

the need for protection provided to RTRR and its prospective shippers by a confidentiality agreement.

The Opponents do refer to some specific logistical concerns. In their initial reply, the County and GTW suggest that they may seek to “investigate the veracity of the statements.” Opponents’ Initial Reply at 9. In their Motion for a Time Extension they assert that “given the large number of statements, and the local nature of many of the enterprises, outside counsel cannot hope fully to assess and understand the issues surrounding the individual businesses involved without the assistance of in-house personnel familiar with those businesses and local issues.” Motion for Time Extension at 7. Despite these claims, in prior rail proceedings, the Board has recognized that prejudice does not inherently result when access to information is limited to a party’s attorney. *See Arizona Public Service Company and Pacificorp. V. The Atchison, Topeka and Santa Fe Railway Company*, No. 41185 (STB served July 29, 1997), slip op. at 4-5 (counsel does not need to share confidential information with carrier’s management to make its case). In whatever manner that the Opponents’ counsel intends to contest RTRR’s submission, it is clear that outside counsel with access to the documents is perfectly capable of doing so without public disclosure or in-house review of confidential information.

Lack of prejudice from further disclosure is particularly apparent in light of the limited purpose for which the Board requested submission of these statements – analysis of RTRR’s business plans to operate as an interstate carrier. The Board has expressly stated in applying its presumption of granting confidentiality, it will consider whether “the opposing party can show that the removal of the designation is necessary for it to make its case, to argue an appeal adequately, or to satisfy a statutory goal.” *See The Central Illinois Railroad Co. – Lease and Operation Exemption – Lines of the Burlington Northern and Santa Fe Railway Company at*

Chicago, Cook County, IL, Docket No. 33960 at 2 (served March 2, 2001). Although Wayne County and GTW may prefer the option of using this information to expand their opposition in public arenas, the proposed restrictions do not cause prejudice to their opposition before the Board.

Finally, the Opponents take issue with the fact that the letters do not contain detailed rate and shipping information or reveal specific cargo that will be tendered. This is a straw man. It is not surprising that the shippers are not able to provide detailed data in their statements given that RTRR is not approved to operate as a carrier and cannot engage in the business of soliciting freight at this stage. It is inherently unreasonable to expect specific details on specific traffic levels that might be tendered by any particular shipper at a point when RTRR is neither operating nor marketing its services. The type of information that one *would reasonably expect* from a third party supporters in this situation – an expression of interest in using RTRR's services for the benefit of the supporter's own business operations – is contained in the letters. This simple truism is simply ignored by GTW, along with the compelling volume of support that RTRR was able to document in the short time frame allowed.

Admittedly, maintaining confidentiality here is more beneficial to RTRR's interests than to the potential shippers. It is unremarkable that the shipper support letters do not request confidentiality. Those letters were not solicited or received in support of a protective order, but in support of RTRR's service. They were intended simply to inform the Board of potential beneficiaries of RTRR's proposed rail service. They convey precisely the information being sought.

In sum, RTRR has presented legitimate business concerns supporting the entry of a protective order, both in terms of the identity of a portion of its own potential customer base

(which would be revealed by the letters as a whole) and with its developing business relationships. GTW and Wayne County have failed to demonstrate any prejudice in the entry of a protective order. They have not justified the denial of a protective order under prior Board decisions, and RTRR's motion for a protective order accordingly should be granted.

II. RTRR DOES NOT OPPOSE A MUTUAL BRIEF TIME EXTENSION

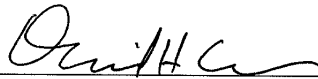
Although the majority of the Opponents' arguments contained in their Motion for Extension are addressed above, RTRR submits these brief additional points for clarification.

RTRR does not oppose a modest extension of time, on the condition that it is granted to both parties in submitting reply comments to the information submitted on March 7. Although the Opponents have already conducted an assessment of the shipper statements, RTRR is willing to agree to an extension of time to eliminate any potential for prejudice. Clearly the Opponents' disagreement with the language of the proposed protective provision has not restricted their ability to submit to its terms pending a decision by the Board, and the efforts expended in negotiating a temporary confidentiality agreement were indisputably expended on both sides. Thus, there is no reason to now allow the Opponents yet additional chance to respond to RTRR's submissions by granting the Opponents' request for sequential filing dates, a procedure that fails to account for the fact that Opponents have had the vast bulk of RTRR's submission since March 7 and for the prejudice that would result were they allowed to reply after RTRR had already done so.

CONCLUSION

For the above reasons, RTRR urges the Board to grant its motion and adopt the protective order submitted by it on March 7. RTRR also does not oppose a mutual time extension until March 21 for the submission of replies.

Respectfully,



J. William Koegel, Jr.

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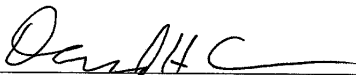
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Attorneys for Riverview Trenton Railroad
Company

March 14, 2002

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of March, 2002, a copy of the above-referenced pleading was served by hand delivery (to persons in Washington, DC) or federal express upon counsel for all parties of record.



David H. Coburn