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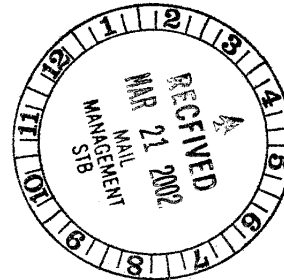
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March 21, 2002

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 Supplemental Evidence and Argument of County of Wayne, City of Trenton, and Grand Trunk Western Railroad Incorporated. The original of this filing has been submitted reflecting consecutive page numeration and three disks containing electronic versions of these documents in WordPerfect format are also submitted in conformity with the Board's rules.

Respectfully,

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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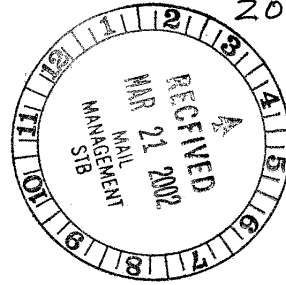
WASHINGTON

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LONDON

**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 SUPPLEMENTAL EVIDENCE AND ARGUMENT OF
COUNTY OF WAYNE, CITY OF TRENTON, AND GRAND TRUNK
WESTERN RAILROAD INCORPORATED**

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I. Introduction

The Board's February 15 Decision invited "Wayne County and the other public bodies" to provide information about the County's eminent domain activities with respect to the property owned by the Riverview Trenton Railroad Company ("RTRR"). Noting the lack of specific information regarding "what property may be condemned, who would condemn it, under what authority and for what specific purpose," the Board solicited such information, as well as a "timetable for condemnation," and "any other pertinent information on the condemnation issue."

What the Board received was a 37 page Joint Opposition by Grand Trunk Western Railroad ("GTW"), the County and the City of Trenton, and a separate filing by the City of Riverview, both of which largely discuss issues beyond the scope of the Board's specific request. Not until page 31 does the Joint Opposition address the issues identified by the Board, conceding that:

[T]he County had not [at the time it initiated its eminent domain inquiry in November 2000] and has not at this time decided to take [the RTRR] parcel.

The County thus admits that it has never determined to exercise its eminent domain powers with respect to RTRR's property. Indeed, the County has no concrete plans for the RTRR property, other than the speculation that the property could be used, perhaps, for some form of unidentified non-transportation commercial or mixed-use development or parkland. Further, because it has not made any decision to proceed with condemnation, the County offers no timetable for any taking it might pursue.

The County's admission is an astonishing, but not surprising, acknowledgement that its eminent domain "defense" to RTRR's Petition is frivolous. Throughout this proceeding the County has asserted that RTRR's Petition is advanced not to pursue bona fide railroad operations, but only to thwart the County's eminent domain efforts. RTRR has demonstrated, however, that its planned rail operations were publicly communicated to the County long before eminent domain was even a gleam in the County's eye.¹ Now, thanks to the Board's February 15 inquiry, the issue is laid to rest by the County's confession that it has never determined to exercise its eminent domain authority against RTRR's property.

The County's acknowledgment that it has made no decision on taking discredits the County's simultaneously-made contention that the RTRR parcel is a "linchpin" for future riverfront development in the area. As shown further below, this hyperbolic claim bears no resemblance to the reality of the historically industrial RTRR parcel, which is sandwiched between manufacturing plants and other industrial facilities. Nor does it correlate with the

¹ The record evidence on that issue is summarized in Appendix A to this Reply.

finding of the Board's own Section of Environmental Analysis ("SEA") that the RTRR property is appropriately suited for rail use.²

The County's revealing response to the Board's request for information on its eminent domain intentions is virtually lost in a sea of rhetoric on issues other than those as to which the Board requested information. In the first part of their submission, the County and its allies repeat the same allegations as to RTRR's intentions that they have raised *ad nauseum*, this time frequently quoting from their own prior filings as if doing so will make the allegations true. The repetition notwithstanding, they remain untrue. RTRR will not burden the Board with yet another response in the body of this reply. Rather, Appendix A to this submission will once again demonstrate that there is no substance to these claims.

In the second part of their Joint Opposition, the County and its allies endeavor to show that RTRR does not need to be a railroad. RTRR's substantive March 7 submission should put that issue to bed. We also address this in greater detail below.

The third section of the Joint Opposition offers a description of parks and development projects in the Greater Detroit area, seemingly in an effort to turn this proceeding into a battle over the best use for the RTRR property. RTRR will demonstrate below not only that the County has painted an incomplete and misleading picture of the area, but more fundamentally that the Board's role here is not to judge whether some other vision for the property might be

² It is interesting that the County chose not to attach any maps or other visual aids to its submission. RTRR has done so and will show that the RTRR property is far from the centerpiece for future access to the Detroit River, but rather is surrounded by other industrial properties, including chemical and steel plants, a point discussed further below.

more appropriate. This proceeding instead concerns only whether RTRR has met the statutory standard for an exemption, which it has.

Two over-arching points should color the Board's consideration of the March 7 filings. First, in considering the submissions it has received from the opponents of RTRR, the Board should contrast the County's uncertain and unfixed vision for radically changing the historically industrial nature of the RTRR property with RTRR's extensive and specific evidence of the transportation needs that RTRR will meet with its rail project. In RTRR's March 7 filing, RTRR (unlike the County and its allies) responded to the Board's specific requests with verified evidence from an RTRR official and other knowledgeable transportation officials, as well as numerous shipper support letters. RTRR's submission demonstrated without qualification that there is both a need and a demand for the type of rail services it plans to offer to shippers that seek to expand their use of intermodal transportation alternatives. RTRR described its business plan and its goals for attracting traffic that today moves via all-highway routings and for developing cooperative arrangements with the major railroads. It also addressed the benefits that it will bring to shippers in terms of flexibility, independence and neutrality in dealing with other transportation providers, and described how its plan builds upon the principles that support existing neutral rail terminals. RTRR's evidence demonstrates without doubt that its status as a railroad, and the rail services it intends to provide, are essential elements of its plan, which could not be fulfilled were it merely to build an intermodal facility that would be served by other railroads. In that regard, RTRR intends to negotiate arrangements with other railroads and to offer the shipper a full package of transportation services, which include the transportation and interchange of freight with other railroads.

Second, the Board should consider GTW's anomalous role in this proceeding as a confederate of the County (and now with the City of Trenton as well). Representing no interest but its own, GTW has become the lead actor here, aggressively seeking through filing after filing to stifle another railroad from initiating operations in the Detroit area. A rail Goliath in comparison to start-up RTRR, GTW was not invited by the February 15 decision to submit any information. Plainly, GTW has nothing to offer on the specific eminent domain questions that the Board directed explicitly to "Wayne County and the other public bodies."

GTW's motivation for joining in a strange alliance with the County and local communities is undeniably based strictly on GTW's perception of its commercial self-interest. The Board should view GTW's "contribution" to this proceeding in that light. In a marriage of convenience, GTW has latched onto the County, hoping that the County (under the guise of eminent domain) will further GTW's anti-competitive objectives. RTRR, on the other hand, seeks no more than to enjoy the same right to operate as a railroad that GTW and other railroads already enjoy. The Board should not deny RTRR that right, or give credence to GTW's fundamentally anti-competitive efforts.

II. Reply to Joint Opposition

In the first part of this reply, RTRR will address the decisional criteria applicable to this proceeding found in the Interstate Commerce Act, and the Board's role in furthering Rail Transportation Policy in the exercise of its jurisdiction. RTRR will then demonstrate that the County has no fixed notion of what it would do with RTRR's property and certainly has not legitimately invoked the scepter of eminent domain. This is not surprising, as the property is plainly industrial and much of the County's discussion of possible alternative land uses is not

credible. In the last part of this Reply, RTRR will address the jurisdictional issues that its opponents have, once again, raised.

A. The Board's Role is to Implement the Interstate Commerce Act, Not to Sit as A Super-Land-Use Agency

The County and its allies seek to turn this into a local land use proceeding in which the Board would, in effect, balance the concrete transportation needs and plans that RTRR has identified against a series of conflicting and unfocused visions offered by the County as to how the RTRR property might be alternatively developed. According to the County, the property might be used for commercial development, it might become parkland or part of a greenway, it might be developed into another Baltimore-style "Inner Harbor" project or it might be put to some other multi-functional use.³ This potpourri of options illustrates the County's inability to identify the "specific purpose" for condemning the land that the Board solicited.

RTRR supports steps to improve the so-called Downriver Area. But the County's presentation to the Board of its pretty visions for the possible use of the RTRR property overlooks the fact that the Board's role in this proceeding is not to sort through a series of speculative possibilities for alternative use, but to determine whether RTRR has satisfied the statutory requirements for an exemption set forth in 49 U.S.C. 10502.⁴

³ The County claims without any obvious support that, "[t]he DSC site (including the Crown property) is the largest and highest priority site identified" in an unspecified "plan for redevelopment" along the Detroit River. Joint Opposition at 20. It also claims that the property has been targeted for "mixed development reuse." *Id.* at 21. And the County claims that in 2000 it, and the Cities of Riverview and Trenton, were "investigating the potential for the reclamation of the DSC and Crown sites for park, open space and mixed-use development, prior to Crown purchasing this site." Joint Opposition at 28.

⁴ If this were a full application under 49 U.S.C. § 10901, the Board would be *required* to grant authorization to construct, acquire or operate over a line of railroad *unless* it finds that the
(Continued ...)

In fulfilling that role, the Board is required to take into account the Rail Transportation Policy ("RTP"), 49 U.S.C. 10101, and to determine whether RTRR's Petition, as supplemented in subsequent filings, meets the statutory standard for exemption. RTRR has repeatedly demonstrated that its rail project will satisfy specific goals of the RTP, including promotion of competition, promotion of safe and efficient rail transport, fostering of sound economic conditions and enhancing coordination between rail and other modes.⁵ Thus, regulation of RTRR is not necessary to carry out the RTP, satisfying the first criteria for exemption.⁶

Notably, the RTP does not provide that, in determining whether to authorize new rail operations, the Board is to weigh whether the line and property to be used by the new railroad might be put to some alternative, non-transportation use favored by local authorities. Nor is the Board assigned the statutory role of weighing a credible proposed rail transportation use against other, speculative uses for the property. Indeed, were local, land-use based opposition to rail projects to be assigned a governing decisional role, many rail proposals would founder.

proposed construction, acquisition, or operation is *inconsistent* with the public convenience and necessity. In evaluating public interest under 49 U.S.C. 10901, the Board commonly reviews *transportation* impacts in the relevant region, such as the addition of new competitors and the modification of service to existing shippers. *See, e.g., Dakota, Minnesota & Eastern Railroad Corporation Construction Into the Powder River Basin*, 3 S.T.B. 847, 893-94 (1998), *final approval granted*, S.T.B. Docket 33407 at 2-6, 32-34, 41 (served Jan. 30, 2002) (affirming preliminary findings related to transportation benefits and impacts). The ICC and Board are also guided by the Rail Transportation Policy in evaluating public interest and convenience. *See Alameda Corridor Construction Application*, Docket No. 32830 at 18-19 (served May 13, 1996).

⁵ 49 U.S.C. 10101(1), (3), (4) and (5).

⁶ The other statutory criteria for exemption are that the transaction is of limited scope or that regulation is not needed to protect shippers from the abuse of market power. 49 U.S.C. 10502(a)(2) (A), (B). No party has disputed that these criteria are met.

In a tortured effort to tie its arguments to the RTP, the County cites the provision of the RTP that calls for the Board to "minimize the need for Federal regulatory control." 49 U.S.C. 10102(2). On the basis of its contention that local regulatory interests should outweigh RTRR's interest in providing rail common carriage, the County argues that the Board should apply this provision to altogether "eschew" a federal role here in favor of County/City regulation. Joint Opposition at 16. The County, however, cites no statute or precedent for the novel proposition that the Board can simply decline jurisdiction over rail projects that may be unpopular with some parties and instead, defer to local control. Of course, there is no legal predicate for the contention that the Board can reduce the scope of its own jurisdiction. RTRR has shown, and will further explain below, that it will provide rail common carriage, a service over which the Board unquestionably has exclusive jurisdiction under section 10501(b). Moreover, the Board would in fact fulfil the very RTP obligation on which the County relies, i.e., to "minimize" (not eliminate) regulatory control, by granting the requested exemption from regulation.

This is not to suggest that there is no role for the Board in terms of considering the views of local authorities. The Board encourages local authorities to voice their opposition and endeavor to demonstrate why a particular project or transaction may not be consistent with the RTP or why the standards for exemption have not been met. The County and its local government allies now have had their bite at that apple and it is up to the Board to assess whether they have made a convincing case in light of the decisional standards set forth in section 10502. RTRR submits they have not; indeed, they virtually ignore the federal decisional standards in favor of their own regulatory control over land use and their parochial interests.

Further, the gist of the land use case presented in the Joint Opposition is focused on issues that are more appropriately considered -- and that already have been considered -- in the

environmental phase of this proceeding. Overlooked entirely in the County's filing is the fact that the Board's own Section of Environmental Analysis has found no incompatibility between RTRR's project and its use of the property at issue. See section 5.1 of the Draft Environmental Assessment ("EA") issued October 15, 2001. SEA noted its explicit awareness of local government views that the property might be redeveloped for other uses. *Id.* Further, SEA concluded that there were no problems with the RTRR project in terms of interference with area recreational resources or in terms of its visual impacts on the area. See section 5.11 of the Draft EA. None of these findings were disturbed in the Post-EA, which addressed comments filed on the Draft EA by the County and others. In now making its plea for a different approach to land use, the County is, in effect, asking the Board to overturn SEA's findings in favor of the County's unfocused vision of how the property conceivably could be put to alternative uses. The County has not demonstrated why the Board should take the extraordinary step of rejecting SEA's findings, and the Board should not do so.⁷

In short, while the Board's processes and environmental analysis here allow local officials to participate in shaping the Board's action, those local interests clearly do not override the Board's authority to regulate interstate commerce or mandate that the Board determine the best

⁷ As it has previously, the County and its allies attack the very credibility of SEA's process and contend (on the basis of the views of their own environmental contractor who submitted a report weeks after the environmental record closed) that SEA did not adequately consider a variety of issues, including environmental contamination, possible future port development and the carriage of hazardous materials. RTRR has previously responded to these claims. See February 6, 2002 letter from RTRR to Vernon Williams. RTRR demonstrated that there is already in place a plan, developed consistent with state law, to address environmental contamination issues; that the future port development remains too speculative to warrant environmental review at this stage and that RTRR has adequately addressed its plans to transport any hazardous materials and will, of course, do so in conformity with regulatory requirements. The Draft EA, and Post EA, have addressed these issues as well.

possible use of land to be dedicated for rail purposes.⁸ The County, and GTW, may want to pick and choose how Detroit shippers will move their freight and who will move it, but the Interstate Commerce Act grants them no such power. And the County and its allies cite no precedent in which the Board or its predecessor has denied a petition for exemption or application on the basis that a local community's land use notions outweigh legitimate transportation interests.⁹

The exclusive jurisdiction of the STB over transportation was discussed in *Borough of Riverdale -- Petition for Declaratory Order -- The New York Susquehanna and Western Railway Corporation*, STB Finance Docket No. 33466 (served Sept. 10, 1999). There, the local government sought to preclude NYSW from constructing a truck terminal on its premises. NYSW argued that such local authority was preempted by section 10501(b) of the Interstate Commerce Act, 49 U.S.C. § 10501(b). In opening the proceeding (which was subsequently dismissed when the parties settled), the Board reviewed the status of court and agency

⁸ The submission by the City of Riverview does not dictate a different result. That submission consists of a five year old "Master Plan of Future Land Use" adopted by the City in 1997. The plan is merely aspirational and there is no evidence that the City has taken any steps to acquire the RTRR property or otherwise implement its plan.

⁹ Indeed, if GTW wanted to build an extension of a line in the Detroit area and/or build a new intermodal facility, it is beyond question that it could do so (subject to any Board approval it might need for a line extension) and that it would aggressively argue that the County or local governments could not stop it from doing so. It is hypocritical indeed for GTW to now wrap itself in the banner of local land use in order to kill a project that it apparently views as an economic threat. In fact, GTW itself has invoked federal preemption on other occasions to override local regulation. See e.g., *Grand Trunk Western Railroad v. City of Fenton*, 184 Mich. App. 166, 457 N.W. 2d 120 (Mich. App. 1990), *aff'd* 439 Mich. 240, 482 N.W.2d 706 (Mich. Sup. Ct. 1992) (GTW sought and obtained injunctive and declaratory relief that local ordinance imposing restricted speed was preempted); *CSX Transportation, Inc., Consolidated Rail Corporation, Norfolk and Western Railway and Grand Trunk Western Railroad v. The Public Utilities Commission of Ohio*, 901 F.2d 497 (6th Cir. 1990) (railroads won summary judgment that PUC was federally preempted from enforcing local hazardous materials transportation regulations).

interpretations of preemption of 10501(b). It noted that in 1980, Congress adopted “an exclusive Federal standard, in order to assure uniform administration of the regulatory standards of the Staggers [Rail] Act of [1980]”¹⁰ and that in 1995, “in the ICCTA, Congress broadened the express preemption, so that both “the jurisdiction of the Board over transportation by rail carriers” and “the remedies provided under [49 U.S.C. 10101-11908] are exclusive and preempt the remedies provided under Federal or State law.” 49 U.S.C. 10501(b). *Riverdale* at 5. The Board particularly noted that in *Norfolk Southern Ry. v. City of Austell*, No. 1:97-cv-1018-RLV, 1997 U.S. Dist. LEXIS 17236 (N.D. Ga. 1997), the court addressing the preemption issue “found that a local land use permit was not required before a railroad could construct and operate an intermodal facility” and held that “a city may not . . . attempt to regulate land use and planning via local laws when Congress’ intent to preempt such local laws is clear and manifest.” *Austell* at 17 n.6. These and other cases cited in *Riverdale*, and decided subsequent to it, make clear that local authorities cannot use land use and zoning restrictions as a means to preclude rail activities in interstate commerce.¹¹

¹⁰ See H.R. Rep. No. 104-311, reprinted in 1995 U.S.C.C.A.N. 807-808, from which the Board was quoting.

¹¹ E.g., *Joint Petition for Declaratory Order—Boston and Maine Corp and Town of Ayer, MA*, No. 33971 (STB Dec. 22, 2000) (application of state laws to the construction of a vehicle loading facility may be preempted by federal law where the facility is “an integral part of a railroad’s interstate operations.”)

III. The County's Land Use Vision is Unfocused and Deserves Little Weight in this Proceeding

A. The County Has No "Specific Purpose" for the RTRR Property

While urging the Board to allow local control over RTRR's property and claiming that the property is of central importance to redevelopment of the area, the County concedes (as noted above) that it has not previously or at this time "decided to take this parcel" through its power of eminent domain. Joint Opposition at 31. The County claims that it only initiated a preliminary investigation of the RTRR property before it was enjoined from proceeding further, and therefore has not made any determination at this stage as to whether or not to move forward.

Beyond these critical facts, it is crystal clear that the County and its local government allies can offer nothing but speculation as to the use to which they would put the RTRR property or how it would fit into their future planning. The fact that Wayne County invoked the threat of eminent domain before it had any sense as to how it might use the property underscores RTRR's contention that the eminent domain efforts were designed to prevent railroad operations, not to promote some legitimate, predetermined public purpose use for RTRR's property. Moreover, Wayne County's Director of Public Services, who was Wayne County's designated witness in the federal court injunction action, testified at his deposition that the County has set aside no funds to pay for the RTRR property and that he was unaware of whether the County has any plans for the property.¹²

The acknowledged absence of a fixed determination by the County to take the property likewise undermines its repeated contention that the property is critically important to potential

¹² See the Deposition Testimony of Cameron G. Priebe, relevant excerpts of which were submitted with RTRR's January 30, 2002 Reply to Notice by County of Wayne and Grand Trunk Western Railroad.

area redevelopment plans.¹³ In that regard, although the McLouth plant closed in 1996, neither the County nor the Cities of Trenton or Riverview have made any concerted effort since that time to purchase the property.¹⁴ The only apparent local government effort to purchase even a part of the property was Trenton's failed attempt in 1998 to purchase just "the northernmost portion of the site." Joint Opposition at 25. In other words, during the last several years the local governments did not take advantage of opportunities to buy or take the land that they claim to need in order to further redevelopment.

But now that the property is to be put to rail use – which obviously they oppose – the local governments suddenly proclaim an intense interest in the property. The County and its local government allies thus exhibit a classic case of "rail-phobia." They have a renewed interest in the property because some local residents do not want another railroad in their backyard and, plain and simple, they are responding to that local community pressure.¹⁵

Not only have the local governments failed to take actions with respect to the RTRR property, but they fail to articulate a clear vision for how they might utilize it. They speak in general terms of "parks, greenways, linked riverfront development and public access" and they cite major projects such as Baltimore's Inner Harbor and Milwaukee's Summerfest grounds. But

¹³ The County's claims with respect to the importance of the RTRR site for future development plans should also be judged against the County's willingness to consider joint use of the site, i.e., use of the site for recreational access to the River and for RTRR's facility. As the County claims that it is prepared to explore joint use, so too is RTRR, as discussed further below.

¹⁴ This is the case despite the fact the City of Riverview's "Master Plan" called in 1997 for the City's acquisition of the "northern tip of the former McLouth Steel property."

¹⁵ The County notes that a "Brownfields" study of the DSC/RTRR property, and other nearby properties, is underway. However, the study is just that, not a concrete proposal for use of the property.

their land use discussion is at the 50,000 foot level and offers no specifics as to what they have planned for this property or how redevelopment of this property would fit in with the adjacent land uses. In response to the Board's "where's the beef?" inquiry, they offer only a sauce of broad visions and vague ideas.

Framed in terms of the governing eminent domain statute, the Uniform Condemnation Procedures Act ("UCPA"),¹⁶ the County is far from being able to meet the standard of proving necessity for a taking, as it must do before moving forward with a taking action. Michigan law unambiguously provides that a condemnation action is not commenced unless and until the governing body declares the necessity of taking the subject property for a public improvement or purpose, and further declares that the improvement is for the use and benefit of the public. Mich Comp. Laws. Ann. § 213.24.¹⁷ Moreover, this is not simply an aspirational statement adopted by

¹⁶ Mich. Comp. Laws Ann. § 213.51, *et. seq.*

¹⁷ Michigan Comp. Laws Ann. § 213.24 provides:

213.24 Condemnation proceedings; necessity declared; authorization; jurisdiction.

Sec. 4. Proceedings may be commenced and prosecuted under this act whenever a public corporation or state agency shall have declared a public improvement or the purposes of its incorporation or public purposes within the scope of its powers make it necessary, and shall declare that it deems it necessary to take private property for such public improvement or for the purposes of its incorporation or for the public purposes within the scope of its powers, designating the same, and that the improvement is for the use or benefit of the public. It shall by resolution direct its attorney to institute the necessary proceedings in its behalf in the circuit court of the county where the private property sought to be taken is located, or if said property is in a city, the proceeding may be instituted in the court in said city having general jurisdiction of condemnation proceedings for the opening of streets and highways.

the Michigan legislature, but rather an edict that Wayne County must follow. Acquisition of Land for Urban Renewal Development (Mich., R 2 West Eight Mile Development Project), 231 N.W.2d 433 (Mich. App. 1975) ("a condemning authority is required to declare a public improvement and necessity for taking private property therefor prior to the commencement of condemnation proceedings.") The County has not claimed that it is prepared to meet this public necessity requirement with respect to the RTRR property. Nor has the County claimed, let alone demonstrated, that it satisfied any of the other conditions precedent to the exercise of eminent domain.

While the County's eminent domain plans are totally inchoate, its November 28, 2000 letter to Crown, as supplemented by its December 29, 2000 letter, advising that the County had hired attorneys to represent the County "relative to a potential eminent domain proceeding" and triggering a mandatory request for information relating to the purchase of the RTRR property, left no doubt that the County wants to keep the property under a cloud of an eminent domain taking. For that reason, RTRR sought to enjoin the County from proceeding to take its property in federal court. The preliminary injunction issued by the Court on April 10, 2002 remains in place.¹⁸

¹⁸ *Riverview Trenton Railroad Company v. County of Wayne*, Case No. 01-70078 (E.D. MI). The County and GTW attempt to distort RTRR's expression in favor of a grant of its petition, thus confirming its railroad status under federal law, into an argument that RTRR favors such action by the Board solely in order to avoid local land control regulation. Joint Opposition at 8. Their argument starts from the proposition that RTRR does not need to operate a railroad and can merely operate an intermodal yard without seeking Board authorization. What they conveniently overlook is that RTRR cannot fulfil its business plan by merely constructing an intermodal yard served by other railroads; that its shortline rail operations and the arrangements it intends to negotiate with other railroads, are an essential part of its business plan.

B. The RTRR Property is Industrial and Surrounded by Other Industrial/Commercial Properties

Despite the County's grandiose and highly speculative visions, the cold reality is that, as the Draft EA found, RTRR owns hardcore industrial property with an existing rail infrastructure. The property has historically been used for industrial and related rail purposes. *See* Draft EA at section 4.2. Moreover, it is an ideal site for the rail operations that RTRR seeks to undertake. *See* Supplemental Evidence, Verified Statements of Richard Urban at 6-7, David Wilson at 2-3, Richard Duffield at 2-3, and John MacGregor at 3-4.

The RTRR property is surrounded by riverfront chemical and similar plants owned and operated by Atofina (formerly Elf Achotem) and Materials Processing to the north; a steel mill owned and operated by Detroit Steel Company ("DSC") to the immediate south; a storage/staging facility, which formerly served the McLouth operation, owned by Levy Company just south of DSC; and other manufacturing and industrial facilities throughout the area, including a Detroit Edison quarry just east of the RTRR property and a major BASF manufacturing plant just north of the Riverview border in Wyandotte.¹⁹ Attached as Exhibit 1 are two maps (the County curiously chose not to include one), both of which show the RTRR property in the context of these other industrial properties that surround it. The first of these maps was submitted with RTRR's Petition; the second shows a broader view of the surrounding view. The maps speak volumes about the County's claim that RTRR's property is somehow standing in the way of greenway, "inner harbor" and other such non-transportation development

¹⁹ These various industrial facilities are substantial. For example, according to its website, Atofina Chemicals began operations in Riverview in 1898, and today employs 192 persons at its plant there, producing alkylamines, organic sulfurs, hydroxylamines and other chemical products. *See* <http://www.elf-atochem.com/plants/riverview.cfm>

along the Detroit River. The maps also complement the map found at Figure 1a of the Draft EA, which likewise shows the substantial industrial and commercial facilities in the area. As the Draft EA reports at section 4.2 (describing land use in the area), "other heavy industries such as Levy, BASF, Elf Atochem [now Atofina], Materials Processing and Edison are located in the immediate vicinity" of the RTRR property. The RTRR site is currently zoned industrial, as the Draft EA also notes in the same section.

Equally significant, there are active rail lines in the immediate area, as also shown on the maps. The GTW and Conrail tracks are right there. The County has neither the authority to move those tracks nor the permission of the railroads who own them, further belying its contentions about development of the area. In the County's view of the world, some railroads are fine, while others are not.

The first of the two maps also discloses that the RTRR property is situated so that there is absolutely no right of way or access from Jefferson Avenue to the portion of RTRR's property located in the City of Trenton. This would literally create an "island" inaccessible from Trenton. Thus, the RTRR property could be of benefit to the City of Trenton in terms of the types of redevelopment projects described in the Joint Opposition only if the DSC property were obtained by the County.

Not only is there no evidence that DSC has agreed to the redevelopment of its property for non-industrial use, but the County's own filing contains evidence to the contrary. Attached at Exhibit J to the Joint Opposition is a March 1 letter from Mr. Michael Wilkinson of DSC that discloses that DSC has invested \$70 million in equipment modernization. The letter also states that DSC is "not indifferent" to other uses for its property, "providing it does not interfere with our business" and that DSC has been discussing with Trenton possible opportunities for use of its

property “dependant on feasibility and market analysis.” Further, the letter also expresses concern -- which is entirely unfounded -- that RTRR might exercise the power of eminent domain to take DSC's business. The letter underscores that DSC intends to continue in business on its property, which is fully consistent with RTRR's plans and expectations. DSC, in fact, has previously expressed its support for the RTRR project in an April 16, 2001 letter filed with the Board in Docket No. 33980, and attached as Exhibit 2 to Mr. Mistura's Verified Statement submitted as part of RTRR's Supplemental Evidence.²⁰

In short, it is impossible that the RTRR property could be, as the County claims, a “linchpin to longstanding and broadly supported plans for the beautification and revitalization of the Detroit River shoreline and Downriver community.” Joint Opposition at 5. If RTRR's property is such a “linchpin,” what of the chemical plants, steel mill and other industrial uses in the immediate area? The County and its allies have never explained how they could develop a greenway in the Riverview-Trenton area, or other viable non-industrial use, given the highly industrial surroundings, absent some much, much broader County initiative to take or buy property than has been described by the County.

C. The Examples of Redevelopment Offered by the County Do Not Fit this Property

The County's filing provides several examples of Detroit-area redevelopment projects, suggesting that redevelopment of the RTRR property could fit the mold of, for example, the GM

²⁰ DSC's concern about RTRR taking its business is, as noted, unfounded. When in June 2000, Crown Enterprises bought what is now the RTRR property it obtained an easement to operate over the DSC property, evidencing intentions to provide rail service over the DSC property to Class I connections since at least the time of that purchase. RTRR does not understand DSC's new-found concerns.

Global Headquarters/River East project or the UAW-GM Riverfront Joint Training Center. These and similar projects described at pages 23-24 of the County's filing were all undertaken in voluntary cooperation with area landowners; they do not offer examples of projects that proceeded by means of a taking, or without the cooperation of the private landowner. RTRR, as discussed further below, is prepared to continue discussions with the County over opportunities for the joint use of its property, both to meet RTRR's needs and the County's desires. Moreover, for the reasons discussed above, the RTRR property is simply not suitable for development of the type cited by the County.

Likewise, the examples offered by the County of situations where it has used its eminent domain authority to advance specific projects (at page 33 of Joint Opposition) do not fit this case, where the County has failed to identify a specific goal or need, and where the use of eminent domain would interfere with a legitimate transportation goal. Thus, this case is starkly unlike the situation where the County is building a new stadium or expanding an airport, among the examples cited by the County.

D. The Heritage River Designation is Not Relevant

The County/GTW try to gain some mileage out of the fact that the Detroit River has been designated an American Heritage River. This designation has no bearing on the Board's role in this proceeding. The value of the Detroit River as a resource to the area is not what is in dispute here. And, as Exhibit A to the Joint Opposition shows, nothing in the American Heritage River program suggests that that program was designed to inhibit rail use (or other commercial use) of properties that adjoin the River. Nor does the Heritage River program override the Board's power to grant a petition that plainly meets the statutory criteria.

It also bears note that there is already significant access to the Detroit River in Trenton at Elizabeth Park, a County facility located south of the RTRR property. That park has over one mile of access to the waterfront and significant recreational assets and, as noted in SEA's Post-EA, "The proposed RTRR project will not impede access to any of the parks in the City of Trenton, such as Elizabeth Park, which borders the Detroit River." Post-EA at 20. SEA also found that the RTRR project will not impair current views of the River or water quality in the area. *See* Draft EA at 5-2, 5-3, and 5-32.

As noted further below, RTRR also remains prepared to discuss with the County the possibility of joint use of its property so as to allow for recreational access to the River. RTRR believes that its goals are therefore not inconsistent with the goals of the Heritage River program.

E. The "Alternative Site" Suggested by the Opponents is Hardly "Equivalent" to the Riverview/Trenton Site

The County claims that "[w]ithout much difficulty" it located property 25 miles away, in Monroe County, that is also along the Detroit River and that it claims "appears, at worst, equivalent to the Trenton site for the uses planned by RTR." Joint Opposition at 30. The notion that this "alternative" property is 25 miles away – meaning 25 miles distant from the critical mass of automotive suppliers that RTRR would serve in the Detroit area – and yet equivalent to the Trenton site is absurd on its face. Significantly, the nature of any rail access at the Monroe property is unclear and the County offers no specific information on that crucial point. Nor has the County ever made a formal presentation or provided other specific information to RTRR about the Monroe property.

The continuously vague references to this "alternative site" only underscores the County's objective: not in my backyard; but somewhere else, *i.e.*, Monroe County – or maybe

better yet, just a few more road miles away in Ohio. Equally important, the County does not own, control or have any option on the property that it proposes RTRR should use. There is no indication that it is even available for sale were RTRR interested in it as an alternative, which it is not.

The unique benefits of RTRR's property from the perspective of rail operations are fully described in the verified statements of RTRR witnesses MacGregor, Wilson and Duffield. The County's vague references to a distant property conveniently located in another county do not come close to outweighing those benefits.

F. Settlement with the County Would be Promoted by Granting, Not Denying, RTRR's Petition

Brownfield reclamation efforts, Greenway Initiatives and Heritage River beautification efforts are all noble aspirations, but are best accomplished by voluntary participation of private property owners. What the Opponents offer the Board is an appeal to "keep the ball in play" and allow land use by fiat to overshadow a legitimate rail service plan. RTRR has endeavored over the last several months to resolve its differences with the County and the City governments, and has specifically offered to discuss joint use of the property. It is prepared to pursue these efforts further.

The County argues that RTRR's concept, offered in the context of possible settlement, of relocating Jefferson Avenue would cost approximately \$60 million and that if RTRR's Petition is granted, "local authorities can expect to face this and even more unreasonable demands as the price for acquisition or reasonable joint use of the property." Joint Opposition at 29. RTRR believes that the asserted price tag for relocating less than 2 miles of a city street is vastly inflated by several orders of magnitude and that, in any event, federal funding might be available

to assist in any costs. Again, RTRR remains hopeful that some accommodation that is fair to both sides can be reached.²¹

In that regard, the County argues that denial of the RTRR's Petition would preserve "the possibility of a negotiated joint use of the site which would provide some ability of the municipalities to insure 'greenway' development on at least a portion of the parcel." Putting aside that the RTRR property's location precludes its use as some sort of continuous greenway, the County's position is utterly illogical. Denial of RTRR's Petition is tantamount to "checkmate" in favor of the County because with such a denial RTRR would lack the authorization it requires to operate as a railroad. If it could not operate as a railroad, its business plan fails and there is nothing left for it to negotiate in terms of joint use of the property.

By contrast, granting RTRR's Petition will not terminate settlement efforts. RTRR, like its several Detroit-area sister companies, must live with the County and with the Cities and has every incentive to live with them amicably going forward. Railroads, like other businesses, reach accommodations with local governments all the time, and RTRR (which would in any event remain subject to non-discriminatory safety/health regulations and to any mitigation conditions imposed by the Board) will not be different in that regard.

²¹ The Grosse Ile Bridge Company ("GIBC") filed a letter with the Board on March 7, 2002 in which it raised a traffic congestion concern arising from the possibility that Jefferson Ave. might be realigned in a manner that RTRR has offered as a concept for possible resolution of the County's concern. GIBC's concern is unfounded, or at best premature, as there has been no decision to realign Jefferson Avenue at this point. GIBC also raised another traffic congestion concern associated with RTRR's possible use of the north end connection on its property. That issue has already been addressed by SEA, which concluded that there is no basis for such concern.

While the County frames the issue as whether local regulatory control should prevail here, the real issue is whether local governments should be allowed to kill a railroad in its infancy under the cover of preferring an alternative (and non-viable) land use. The Board's answer, consistent with its exclusive jurisdiction and the RTP benefits of the RTRR project, should be an unequivocal no.

IV. The RTRR's Operations Clearly Fall Within the Board's Jurisdiction

The County and its allies offer various spurious statements challenging the Board's jurisdiction over RTRR's proposed operations. They claim that there is "no substantive transportation need" for RTRR to seek the Board's jurisdiction (Joint Opposition at 8); that RTRR can never be more than a "railroad to nowhere" and "cannot meaningfully offer rail service to the general public" because its rail service would be "incidental to its terminal operations." (*Id.* at 7, n.7). They further claim that the RTRR's tracks are "out of service, non-jurisdictional, and of little or no value for their claimed intended use," and that RTRR has "no significant railroad equipment and no experience operating rail common carriers." (*Id.* at 9, n. 8). These statements are both legally and factually incorrect.

A. RTRR Properly Sought Board Authorization for its Rail Operations

A railroad is a common carrier if, like RTRR, it holds itself out for compensation to provide rail transportation services. The term railroad includes the track, terminal, terminal facility used or necessary for transportation. 49 U.S.C. § 10102(5) and (6). As defined in the statute, the term "transportation" includes the equipment, property, facility of any kind related to the movement of property by rail and the services related to that movement. 49 U.S.C. §

10102(9). In receiving, transporting by rail and interchanging freight, RTRR is plainly providing regulated transportation.

The County and GTW incorrectly assert that RTRR's tracks are "non-jurisdictional" because RTRR's rail services will be incidental to its own terminal operations. This attempt to characterize RTRR's operations in connection with its intermodal facility as the equivalent of a railroad serving only its owner's facility over a private line is absurd. A railroad is a private carrier or an in-plant carrier – or the line over which it operates is a private line – if the railroad operations are "performed solely as an arm of its, or an affiliate's, *non-transportation business*." *Hanson Natural Resources Company – Non-common Carrier Status – Petition for Declaratory Order*, ICC Finance Docket No. 32248, slip op. at 18 (served December 5, 1994).²² Where a railroad is created (or a line constructed) for the sole purpose of bringing raw materials to its owner's non-transportation facility and/or moving its owner's end product to market, such railroad (or line) is clearly not open to the public, and therefore, not subject to the Board's jurisdiction.

But that is *not* the case here. RTRR is not an "in-plant carrier" created to serve the interests of only one plant. RTRR is entering the business of holding itself out to the shipping public to provide a set of transportation and related interchange services. RTRR or its affiliated companies will not own or have any financial interest in the commodities that are transported. The service it will provide is clearly Board-regulated transportation – a term, as noted above,

²² See also *Northern Plains Railroad Company -- Construction and Operation Exemption -- Mussellshell and Yellowstone Counties, MT*, ICC F.D. No. 32077, slip at 2 (Dec. 18, 1992) (private rail carriage "is performed solely on behalf of one company and is typically 'an arm of the owner's [non-transportation] business.'"), quoting *Monsanto Co. v. Alton & Southern Ry. Co.*, 339 I.C.C. 319, 321 (1971).

defined statutorily to include not only the movement of cars over rail, but also related services, including the receipt and interchange of freight. Indeed, as RTRR's evidence shows, the core purpose for creating a shortline railroad and building an intermodal facility is to provide a service that will attract more inbound container business to rail as opposed to truck and to encourage Detroit area shippers to use RTRR's intermodal facility and rail services for outbound traffic that currently moves entirely by truck or by truck to intermodal facilities in Chicago. *See e.g., Supplemental Evidence, Urban V.S.* This is clearly service to the public and bears no resemblance to providing private service to an owner's *non-transportation* business.

In fact, RTRR's service is closely analogous to the regulated services provided by the terminal services carrier in *Association of P&C Dock Longshoremen v. The Pittsburgh and Conneaut Dock Co., et al.*, 8 I.C.C.2d 280 (1992). There, the ICC found, over the objections of a dock company which challenged the rail carrier status of the terminal carrier, that its transfer of cargo between vessels and rail cars using tracks and locomotives, and its performance of a variety of related interchange services fell "within the broad scope of services – receipt, handling, storage, transfer and interchange – related to transporting property that, when performed over track with rail equipment, clearly comprises railroad transportation under § 10102." 8 I.C.C.2d at 291-292. The agency proceeded to observe, in terms that speak just as clearly to the facts in this case, that:

[T]he Commission has broadly defined terminal-type rail operations to comprise "all movements of railway cars and locomotives in yards." These movements need not satisfy a distance threshold, nor are they limited to train formation or other related classification activity.

8 I.C.C.2d at 292, quoting *Sioux City Term. Ry. Switching*, 241 I.C.C. 53, 90-92 (1940). The Commission further held that the terminal carrier at issue met the "holding out" requirement of

common carriage by virtue of its relationship with another railroad and the fact that it transported freight for more than a single entity. Here, RTRR intends to hold itself out to serve the public in conjunction with other rail carriers with which it intends to forge rate, service and related arrangements.

Further, the Board has regularly exempted from the scope of regulation shortline railroads that provide switching and related services within the limited geographic confines of a port or near port areas.²³ While RTRR is not operating at a marine port, its operations at a truck/rail intermodal facility – a kind of inland port – are no less regulated rail common carrier services subject to Board jurisdiction.

Further, the Board's jurisdiction under 49 U.S.C. § 10901 includes both the acquisition of an active rail line by "any person" and the start up of common carrier rail operations by a new carrier. As the Interstate Commerce Commission explained, "Section 10901(a), by its terms, applies to every 'railroad line' constructed or operated over by any rail carrier providing transportation subject to [the Board's] jurisdiction" *Hanson*, slip op. at 21. When a new carrier acquires and operates a line over which it will offer common carrier service, the line *becomes* jurisdictional even if its prior use was non-jurisdictional. Thus, Opponents' argument that the line is non-jurisdictional because it currently is not an active rail line is irrelevant. Any new railroad purporting to offer common carrier service must obtain Board authorization to operate a line of railroad.

²³ E.g., *Pacific Harbor Line, Inc. – Operation Exemption – Port of Los Angeles*, STB Finance Docket No. 33411 (Dec. 2, 1997) (exempting acquisition of rights to provide switching services with Port of Los Angeles); *Diamond State Port Railway Company, Inc. – Lease and Operation Exemption – Diamond State Port Corporation and F.A. Potts & Company International, Inc.*, STB Finance Docket No. 33755 (June 25, 1999) (exempting lease and (Continued ...)

The Board made this point clear in *Effingham Railroad Company --Petition for Declaratory Order – Construction at Effingham, Il.*, 2 S.T.B. 606 (1997). There ERRC, a start up railroad, sought a declaration that the Board had no jurisdiction over either its acquisition of a 206.05 foot “switch track” extending from Conrail’s line to a small warehouse in a newly constructed industrial park or over its construction of an additional 9.835 feet of track, part of which was designed to reach an interchange point with another railroad. It claimed that the acquired line was exempt from Board jurisdiction because it was an industrial spur and that the new line was exempt because it would be used solely for switching cars within the industrial park. *Id.* at 609. The Board rejected such arguments, noting that where, through acquisition or construction, a carrier’s trackage extends into territory not already served by that carrier, and particularly where it extends into the territory already served by another carrier, it *becomes* subject to the Board’s jurisdiction, regardless of its prior use. *Id.* at 609-10. The Board emphasized that “[t]he fact that [ERRC] is a new carrier and that this proposal will constitute its entire operation is even more reason not to decline jurisdiction.” *Id.* at 610. ERRC’s intent to interchange traffic with other carriers made it a part of the national rail system, and as such it became a rail carrier with common carrier obligations, subject to the Board’s jurisdiction. *Id.* In a subsequent decision, the Board further explained that the acquisition of any track that becomes the entire line of a new rail common carrier is jurisdictional despite its previous use:

. . . ERRC became the operator of a line of track connecting Conrail to the site of the industrial park. Conrail clearly had operated this short track segment as an exempt siding or spur. However, because it was ERRC’s initial railroad operation, this

operation by new railroad over port-area terminal track previously not subject to Board jurisdiction).

track segment became ERRC's entire line of railroad and was not, as to ERRC, a siding or spur.²⁴

Under the principles set forth in the *Effingham* decisions, RTRR's acquisition and operation of the tracks on the former McLouth Steel Center property clearly fall within the Board's jurisdiction. As RTRR explained in its previous pleadings, and in more detail in its March 7, 2002 Supplemental Evidence, RTRR seeks to own and operate a line of track that connects to NS and CSX through Conrail and to CN through GTW. That line was previously used by GTW (and possibly other carriers) to serve the now-defunct McLouth Steel Center. RTRR has stated on the record that it has engaged in initial discussions with NS, CSXT and CN for interchange with those carriers in order to attract container loads of inbound traffic by rail service to its intermodal facility and will provide classification services and make up trains of outbound traffic for interchange with the Class I carriers. Further, the shipper support that RTRR has obtained, even in its pre-operational stage, and its plan to target automotive industry shippers and other shippers in the Detroit area as described in its Supplemental Evidence, leave no question that RTRR is holding itself out to provide common carrier service to the public and that the track over which it will provide that service is its entire line of railroad. RTRR, like the ERRC in *Effingham*, will become a part of the national rail system, providing transportation subject to the Board's jurisdiction. As such, it properly sought Board authorization for its acquisition and operation of the track.

RTRR also acquired an easement to use rail tracks on adjacent property owned by the Detroit Steel Company (DSC) that currently are used to serve DSC. DSC submitted a letter of

²⁴ *Effingham Railroad Company – Petition for Declaratory Order – Construction at Effingham, IL; Effingham Railroad Company – Operation Exemption – Line Owned by Agracel Corporation; Effingham Railroad Company – Operation Exemption – Line Owned by Total*
(Continued ...)

support in this proceeding in which it stated that it is presently served by NS, CSXT and CN, and that it entered into the easement with RTRR because "when RTRR becomes operational, DSC and its subsidiary Detroit Cold Rolling Company of Gibraltar, Michigan, will require additional rail service options." See Supplemental Evidence, Mistura V.S., Exhibit 2. It expressed its interest in using RTRR to efficiently and economically assemble and arrange for the movement of its traffic through RTRR's shortline railroad and intermodal container transfer facility. RTRR's acquisition of the McLouth Steel Center track, and its right to use the DSC track, means that RTRR, like ERRC in *Effingham*, will be extending its services into a territory currently served by other railroads. Under such circumstances, RTRR would be remiss if it failed to seek Board authorization to acquire and operate this line.²⁵

B. RTRR's Evidence is Consistent with Its Intent to Provide Needed Common Carrier Rail Service

The County and its allies make several factually inaccurate allegations concerning RTRR's ability to provide rail service to the public. First, they contend that the tracks are out of service and of no value for the use intended. Of course, Opponents ignore the Petition for Exemption, and supplemental evidence, that RTRR has invested substantial resources in preparation to rehabilitate the line and construct additional track for the intermodal facility. Petition at 7; Supplemental Evidence, Mistura VS. In addition, RTRR's March 7 supplemental evidence contained statements from various witnesses with expertise in logistics, transportation

Quality Warehouse; STB Docket No. 41986, STB Finance Docket No. 33468, STB Finance Docket No. 33528, 1998 STB LEXIS 253 *9 (served September 18, 1998).

²⁵ It should be noted that to date, despite the flood of paper they have filed in this proceeding, the Opponents have not endeavored to address the *Effingham*, *Associated P&C Dock* or other legal precedents that RTRR has advanced on numerous occasions.

facility development and rail construction who demonstrated that the existing rail infrastructure on the property – particularly with its existing connections to three Class I railroads – makes it ideal for the intended purpose. *See e.g.*, Supplemental Evidence, Statement of Richard Urban, at 5-6. Mr. Urban and witness James Zamjahn, both former auto company logistics officials, describe the particular need for RTRR's services by the automotive industry. *Urban V.S.* at 5; *Zamjahn V.S.* at 4-6. Among other firms with rail expertise, RTRR has hired the engineering firm of Consoer Townsend Envirodyne Engineers, Inc. to design the preliminary track layout within the facility, and even provided a rendering of the planned facility as Exhibit 4 to its Petition. *See also* Supplemental Evidence, Duffield V.S. at 1. Witness MacGregor pointed out that the property is of sufficient size to permit construction of the additional tracks needed for RTRR to operate the intermodal facility and perform necessary rail services. *See* Supplemental Evidence, MacGregor V.S. at 2.²⁶

Second, Opponents argue that RTRR has no significant railroad equipment and no experience operating rail common carriers. A new carrier can readily acquire the equipment and experience that it needs to operate a rail line. As RTRR stated in its Petition, it has explored various options for leasing or purchasing locomotives. Petition at 7. Based on its discussions with equipment providers, RTRR has determined that, upon authorization from the Board, the

²⁶ GTW has previously claimed that the planned operations of RTRR are impractical due to physical constraints on the track layout and the status of the connection at the north end of the property. RTRR has already responded to these claims in detail in its December 20, 2001 submission to the environmental docket in this proceeding. The verified statements of Messrs. Duffield and Wilson further put to rest GTW's claims. The RTRR facility is in fact precisely suited to the rail service that it intends to offer, particularly given the ability that the property offers to physically interconnect with both Conrail and GTW, the ample size of the property, the existing rail infrastructure and the grade-separated crossing that RTRR will utilize.

necessary equipment will be available. RTRR has also been in discussions with WATCO Companies, Inc., a national rail service and maintenance provider, and with a local company, concerning options for providing operational activities. *Id.* The options being considered range from having RTRR lease equipment and employees with which to provide services itself to enlisting the services of a turnkey operator. Although no decision has been made as to the specific operator, based on its discussions to date, RTRR is confident that it will be prepared to offer rail service once it is authorized to do so. RTRR also has had initial discussions with representatives of all three of the Class I railroads serving the Detroit area concerning its plans and particularly with respect to entering into interchange agreements with those carriers. RTRR will vigorously pursue further discussions at such time as the Board acts on its Petition.

The Board should also judge such claims against the fact that RTRR is affiliated with a large, multi-faceted group of transportation companies owned by CenTra. These companies have considerable transportation experience, including experience on the motor carrier and logistics side of intermodal services. While RTRR represents an initial rail venture of these companies, the successful transportation ventures of its sister companies will help ensure that RTRR will be well-equipped to pursue its venture. Given the continued opposition to its rail plans, RTRR cannot justify further capital expenditures until the Board acts on its Petition.

RTRR's supplemental evidence also provides testimony on the need for intermodal operations in the Detroit area and the feasibility and desirability of RTRR's proposed operations.

RTRR's president, Arnold Mistura described RTRR's business plan as follows:

. . . RTRR will develop a package of transportation and related services that will attract new freight now moving via all-highway routings to intermodal routings under attractive arrangements that would be negotiated with the major railroads and with trucking firms. RTRR anticipates that it will be able to negotiate such

arrangements by virtue of its ability to consolidate and tender large volumes of containers to the major railroads, saving them the burden of interchange costs. Its goal is to offer the most efficient interchange of freight possible, so that shippers can benefit from the natural advantages of both trucking and rail. RTRR anticipates that in some cases shippers will deal exclusively with RTRR, which will then transport freight under a single bill of lading pursuant to arrangements to be made with railroads and trucking companies. RTRR will hold its rail services out to all shippers, operating like any other common carrier.

See Supplemental Evidence, Mistura V.S. at 5. Witness Richard Urban describes RTRR's proposed service, which in essence combines the core competencies of rail and truck to achieve an efficient intermodal service that will be more competitive with all-highway service. RTRR will also manage the unloading and storage of container loads of inbound parts, and the subsequent distribution of parts by truck in small lot quantities and in a sequence that meets the just in time requirements of the manufacturers in the Detroit area. *See Supplemental Evidence, Urban V.S.* Economist Irwin Silberman analyzes the commercial opportunities and public benefits of the RTRR operation and concludes that a market exists for RTRR's proposed innovative services – particularly the concept of “just in time” rail delivery by partnering with the Class I railroads. *See Supplemental Evidence, Silberman V.S. at 1.* As RTRR Witness David Wilson, previously Vice President of Operations for GTW, explains, “Operating a shortline will allow RTRR to accomplish a seamless interface to the shipper,” adding that, “The shortline that RTRR would operate will provide it with the independence and flexibility that other consolidation operations do not have.” *See Supplemental Evidence, Wilson V.S. at 3-4.* And former executive director of purchasing and logistics official for General Motors, James Zamjahn, confirms that “RTRR's proposed operation of a shortline railroad . . . will clearly meet

an industry need and will greatly enhance the management of automotive parts inventories.” See Supplemental Evidence, Zamjahn V.S. at 6.

Witness Richard Schiefelbein, a former FRA and ICC official with years of experience in the rail industry, demonstrates from his analysis of the operations at the Port of Houston and at the Ports of Los Angeles and Long Beach, the increased efficiency and benefits derived from an independently-operated intermodal facility, such as the facility at the Port of Houston. After describing the benefits of neutral rail switching operations at major ports, he concludes that “[w]ith its operation of the railroad, RTRR could provide a similar benefit for shippers . . . a benefit that it could not provide if it were simply a terminal operator.” See Supplemental Evidence, Schiefelbein V.S at 8. He notes that the RTRR could establish joint rates with the line haul carriers and “serve as the shipper’s single point of contact for both the rail transportation and the value-added services.” He emphasizes that RTRR’s proposal to combine the concepts of a rail line and intermodal facility “puts the two concepts together in a unique transportation service package offering, with significant benefits and efficiencies for shippers.” *Id.* at 8-9.²⁷

The verified statements of RTRR’s witnesses, including that of RTRR’s President, Arnold Mistura, together with the letters of support from prospective shippers, provide conclusive evidence that RTRR was not conceived to avoid condemnation, as Opponents allege, but as an integral part of the concept of improved intermodal service that is of vital importance to shippers, and particularly to the automotive industry. RTRR has attained the validation of

²⁷ RTRR anticipates that the opponents of its project may take issue with RTRR’s business plan and state that it is not workable or practical. RTRR’s Supplemental Evidence underscores that it has developed a rational and innovative concept for its shortline service and that the independence and flexibility afforded by its own rail operation is central to its success.

officials who, until recently, held key logistics management positions with major automotive manufacturers, both of whom express confidence that RTRR's services will be attractive to that important industry sector. Further, even though it is not an operating railroad, and has not yet initiated a wide-scale marketing effort, RTRR has already attracted the support reflected in the over 45 shipper letters attached as Exhibit 1 to Mr. Mistura's verified statement.²⁸ Notably, supporting shippers include area automobile manufacturers, Ford (which supplied a letter from a traffic manager at one of its facilities who views RTRR's shortline plans as a means to "more efficiently interchange much" freight with Class I railroads) and Volkswagen; other shippers, ranging from national entities such as General Electric to local business such as Tri-State Hospital Supply Corp.; and major ocean carriers that require their freight transported between major U.S. ports and the Detroit area.

Some of the letters were supplied by shippers located outside of the Detroit area, which underscores RTRR's attractiveness to shippers that today use primarily all-highway routings to deliver freight to the Detroit area. For example, General Electric moves a large amount of freight to automotive suppliers and automotive assembly plants in the Detroit area from many facilities outside the area. Volkswagen, by contrast, moves freight primarily by highway today from its automotive suppliers in the Detroit area to its facilities in other U.S. cities and in Mexico, and is keenly interested in intermodal services that RTRR can offer. BorgWarner, a

²⁸ The County and GTW's attempt to undermine these statements by arguing that some (and far from all) of them are "form" letters is unpersuasive. As the County and GTW must surely understand, busy officials may not have time to compose an individualized letter of support, but that does not diminish the importance of their decision to execute a letter that expresses their broad support for the transportation alternative offered by RTRR, and attesting to their view favoring "an additional option for container interchange service."

major supplier for automobile, light and heavy vehicles, imports parts from Europe to, for example, its South Carolina facility and from there supplies finished products (transmissions, drive trains, torque converters, etc.) to Detroit area assembly plants.

Other prospective shippers include major automotive industry suppliers with substantial facilities in the Detroit area. For example, Metaldyne (and its sister companies), together operate nearly 50 automotive parts manufacturing sites in Michigan supplying products (transmissions, transfer cases, axles, drive trains, wheels, etc.) to points throughout the world. Aetna Industries is a supplier of products such as drive trains, suspensions, and floor pans to Chrysler, Ford, and General Motors, including Saturn, and could benefit from efficient outbound intermodal service to get its products to distant assembly plants in the South and elsewhere. Lear Corporation, a supplier of interior trim to major automotive firms (including Honda, Nissan and Mercedes) could benefit from an enhanced ability to bring large quantities of plastic, steel and raw materials to its Detroit facilities by rail, as could Guardian Automotive, which also makes automotive parts and could utilize intermodal services to transport bulk raw materials to the area.

Major ocean carrier and logistics firms such as APL, P&O Nedlloyd and HSAC Logistics require intermodal services to move containers by rail between the Detroit area and the various ports that they serve in other parts of the United States.²⁹ Thus, for example, P&O Nedlloyd observes that it would use the RTRR facility to improve the efficiency of intermodal interchange

²⁹ RTRR's shipper support exhibit included letters from two entities that are part of the CenTra family of companies, Central Global Express, Inc. and Logistics Insight Corporation. These entities, a freight forwarder and a logistics firm, respectively, would benefit from RTRR's operations in the services that they offer to their customers. Also included were letters written by independent contractors who work for another CenTra entity, The Mason and Dixon Lines, Inc.

for its freight, while LogiSys, Inc., a third party logistics provider, explains that it will use the RTRR to "enhance the flexibility of our intermodal transportation options by allowing us more efficient access to the national railway system and reducing our drayage costs."

These and other shippers have advised RTRR of their interest in further discussions to identify specific loads or volumes that they would tender to RTRR at the time that RTRR is up and running. RTRR is confident that once it becomes operational many additional shippers will choose to take advantage of its services. In fact, RTRR is currently in discussions with major automotive companies in the area in addition to those that have already expressed their support for RTRR. Once it makes specific transportation arrangements with long-haul railroads and other transportation providers, RTRR will actively market its services broadly to a variety of shippers that it believes will benefit from intermodal transportation.

CONCLUSION

RTRR has shown that none of its opponents' arguments are persuasive, but rather are unfounded and meritless. RTRR has demonstrated that it has properly sought Board authorization to operate a railroad that will meet a well-documented transportation need and that RTRR has satisfied all of the conditions for issuance of an exemption.

RTRR's petition, therefore, should be granted. Further, RTRR urges the Board to act expeditiously on its petition so that the issues raised by its opponents can be laid to rest and it

can proceed to forge arrangements with other carriers and make the investments needed to initiate operations.

Respectfully,

A handwritten signature in dark ink, appearing to read "J. William Koegel, Jr.", written over a horizontal line.

J. William Koegel, Jr.
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March 21, 2001

APPENDIX

**Appendix to RTRR Reply to
Supplemental Evidence and Argument of County of Wayne, City of Trenton
and Grand Trunk Western Railroad Incorporated**

In this Appendix, RTRR will reiterate its response to the arguments that the County and GTW have repeated concerning RTRR's intentions before the Board and the propriety of its representations to the Board.

1. The County/GTW wrongly impugn RTRR's motivations, arguing that RTRR seeks permission to become a rail common carrier solely in order to avoid condemnation of its property, and not for purposes related to a legitimate transportation need. RTRR's consistent submissions to this Board concerning its rail plans, and most notably its May 1, 2001 Petition for Exemption and its March 7, 2002 Supplemental Evidence, should leave no doubt that RTRR's motivations in this proceeding arise from its intent to provide a rail transportation service that will satisfy a public need and promote interstate commerce. It also bears note that the County attempted to make the same arguments in the federal court proceeding in which RTRR has sought to enjoin the taking of its property. These arguments obviously did not convince the federal court; the Board should likewise reject them.

The County/GTW argue that RTRR manufactured its intention to operate a railroad and made its initial Board filing, *i.e.*, its December 2001 notice of exemption filed under the Board's class exemption rules in Docket No. 33980, because it learned just prior to that filing that the County was interested in possibly taking the RTRR property. This is not true. As RTRR has previously shown, well prior to the time it received any hint that the County might be interested in taking its property, it made a strategic decision to enter the shortline business and made public pronouncements of its intent to operate a rail line. Local officials were in fact fully aware of this

and made efforts to find alternative sites that would satisfy RTRR's need for access to the national rail transportation system.

In fact, as RTRR has detailed in its January 30, 2001 Reply to the Notice by Wayne County and GTW and elsewhere, RTRR and its affiliated entities had been planning a rail facility for what is now the RTRR property since at least early 2000, ten months before the County initiated the first steps in the eminent domain process, and County and other local officials were well aware of these plans for months prior to the County's eminent domain actions in late 2000. RTRR thus demonstrated in its prior submissions¹ that::

- RTRR's ultimate parent, CenTra, had outlined plans for a rail development in the area in a January 2000 memorandum.²
- When the property was purchased by RTRR's direct corporate parent, Crown, from DSC in June 2000, a rail easement was obtained allowing future rail operations over the track on DSC's property and thereby allowing freight to be transported by rail to the point of connection with the nearby Class I railroads.³ This easement agreement plainly contemplates rail operations by Crown or its successor, i.e., RTRR.
- Crown officials advised County and local officials in March 2000, and thereafter, regarding the plans for rail use of the property. Those very officials admitted this under oath in their testimony in the federal court proceeding. In fact, those same officials conducted a search

¹ See March 8, 2001 RTRR Reply to Petition to Revoke at 7-15 and April 8, 2001 RTRR Reply to Petitions to Revoke at 4-6 and 15-20.

² See March 7 Blashfield Verified Statement (V.S.), submitted with RTRR's March 8 Reply, at paragraphs 2 through 6 and Exhibits 1 and 2.

³ See June 2, 2000 Railway Easement Agreement attached as Exhibit 3 to May 1, 2001 Verified Petition for Exemption.

for alternative sites, recognizing that similar rail access would be critical for an alternative property.⁴ All this occurred months before eminent domain was ever mentioned.

- A June 26, 2000 article in a local business publication discussed Crown's acquisition of the property and its plans to take advantage of the property's rail potential. That article in fact quotes Mr. Blashfield as noting the advantage of the property given that it has "a rail line." The Mayor of Trenton was quoted as opposing the project in that same article, which was written months before the eminent domain action.⁵
- A July 22, 2000 letter from the Mayor of Trenton to the residents of that community announced a town meeting to discuss the plans for using the property "as an intermodal rail, shipping and trucking facility, and container storage yard."⁶ This letter leaves no doubt that Trenton understood that the property would be put to rail use.
- A September 6, 2000 internal CenTra memorandum discusses CenTra's need to form a rail subsidiary "to accommodate the new railroad operations and intermodal entities."⁷

Armed with no evidence to support its claim that rail plans were concocted to avoid an eminent domain (which the County has now conceded it has no imminent intention of pursuing), the County and GTW are reduced to making the strained argument that RTRR has not come

⁴ See Affidavit of Dan Stamper, President of Detroit International Bridge Company, a subsidiary of CenTra, Inc. at ¶ 8; Deposition of Patricia D. Hartig (Mayor of Trenton) at pp. 15-25; Deposition of DeWitt Henry (Wayne County Assistant County Executive) at pp. 22-23. The Stamper Affidavit is attached to RTRR's March 8 Reply and excerpts of the Henry and Hartig deposition transcripts are also attached to that same filing at Exhibits 5 and 6, respectively, to Mr. Blashfield's March 7 V.S.

⁵ See Blashfield March 7 V.S., Exhibit 4.

⁶ See Blashfield March 7 V.S., Exhibit 7.

⁷ See Blashfield April 2 V.S. at ¶ 5 and Exhibit 1 to that Verified Statement.

forward with any evidence "that it originally saw itself as a rail common carrier, or that it intended to seek authority for its operations from the Board." Joint Opposition at 6. Apart from the fact that there is no requirement that a start-up railroad make public pronouncements of its intentions to operate as a common carrier prior to approaching the Board, this is tantamount to criticizing a company that announces its intention to enter a particular line of business for not stating that it also intends to obtain whatever authorizations it needs to do so. Their argument illustrates the extent to which the RTRR opponents will go to make something out of nothing since RTRR's intention from the very beginning has been to operate as a rail common carrier, subject to the Board's jurisdiction, by holding itself out to serve all of the shippers who choose to utilize its intermodal services. And RTRR's Supplemental Evidence should put any question on that score to rest, as that evidence demonstrates that there is a legitimate transportation reason for RTRR seeking authority to operate as a rail common carrier in its own capacity in furtherance of its long-standing plans to interchange freight, and forge arrangements, with other railroads.

2. The County/GTW argue that RTRR has abused the Board's processes by means of various alleged misrepresentations in its filings with the Board.⁸ Joint Opposition at 9-11. Again, there is no substance to these claims. In fact, the County/GTW choose to ignore the fact that the Board's February 15 Decision expressly held that the Board did *not* revoke RTRR's class exemption filing on the ground that it was void *ab initio*, as would have been the case had it found any misrepresentations.

⁸ The alleged abuse of Board processes also arises, they claim, from RTRR's efforts to seek authorization for a rail line that they claim will not fall within the scope of the Board's jurisdiction and was conjured up to avoid local land use controls. These arguments have already been addressed elsewhere in this reply, and shown to be without merit.

Further, it bears note that none of the alleged misrepresentations runs to the May 1 Verified Petition for Exemption that is before the Board in this proceeding. RTRR filed that Petition to put to rest procedural questions about its use of the class exemption process. It appears that even the revocation of that class exemption by the Board has not satisfied RTRR's opponents, who continue to raise the same arguments.

The first alleged set of misrepresentations is that RTRR's now-revoked December 2000 class exemption notice claimed that RTRR *will* acquire trackage and right of way that they claim it had previously acquired, that the notice mischaracterized the track as a line of railroad and that the notice incorrectly claimed an exemption from environmental review. The notice did not misrepresent on these points -- RTRR was seeking authority to acquire track that it intended (and still intends) to operate as a jurisdictional line of railroad. RTRR's notice thus referenced an acquisition of what would become a jurisdictional line of railroad when the notice became effective. As to the environmental point, RTRR subsequently remedied any defect in regard to environmental review by voluntarily submitting to the Board, with its Petition for Exemption, a full Environmental Report and cooperating with SEA in the preparation of a Draft EA.

The County/GTW argue that RTRR knew of the "condemnation proceedings" before the property was transferred to RTRR and attempted to "cover up" this fact. RTRR has addressed this claim before, noting that it was not until Crown received the County's December 29, 2000 letter that Crown or RTRR could, with any certainty, decipher the County's prior requests for information, which were couched in very vague terms given the number of parcels owned by them in the area, did in fact embrace the most of the RTRR property.⁹ In any event, RTRR has

⁹ See RTRR January 30, 2002 Reply to Notice at 12-15.

demonstrated that its actions were dictated by its desire to start rail operations and its witnesses have so testified.¹⁰ However, even if one were to assume that RTRR and its affiliates knew of the County's intentions at the time the class exemption notice was filed with the Board (and of course RTRR certainly knew at the time of its May 1, 2001 Petition in this proceeding), this would not in any way undermine the fact that RTRR has a legitimate rail plan and intends to operate a railroad.

The County/GTW argue that RTRR falsely claims to have been created as a corporate entity before Crown was notified of possible condemnation proceedings. RTRR submits that under Michigan's Railroad Code it was formed as a corporation when, on November 1, 2000, its incorporators subscribed its articles of incorporation. Mich Comp. Laws § 462.201(1). The County/GTW, which originally made their argument on the basis of Michigan's general corporate statute, which is inapplicable here, now argue on the basis of the Railroad Code that RTRR was not formed as a corporation until its articles were filed. However, the statute they rely on (Mich Comp. Laws § 462.201(2)) merely defines certain powers that cannot be exercised until the articles are filed; the section relied on by RTRR addresses formation of the corporation. This entire issue, however, constitutes a dance on the head of a pin: there is no question that RTRR's articles were executed on November 1, before any of the eminent domain letters cited by the County/GTW were sent -- thereby further undermining the manufactured claim that RTRR was formed in response to the eminent domain threat.

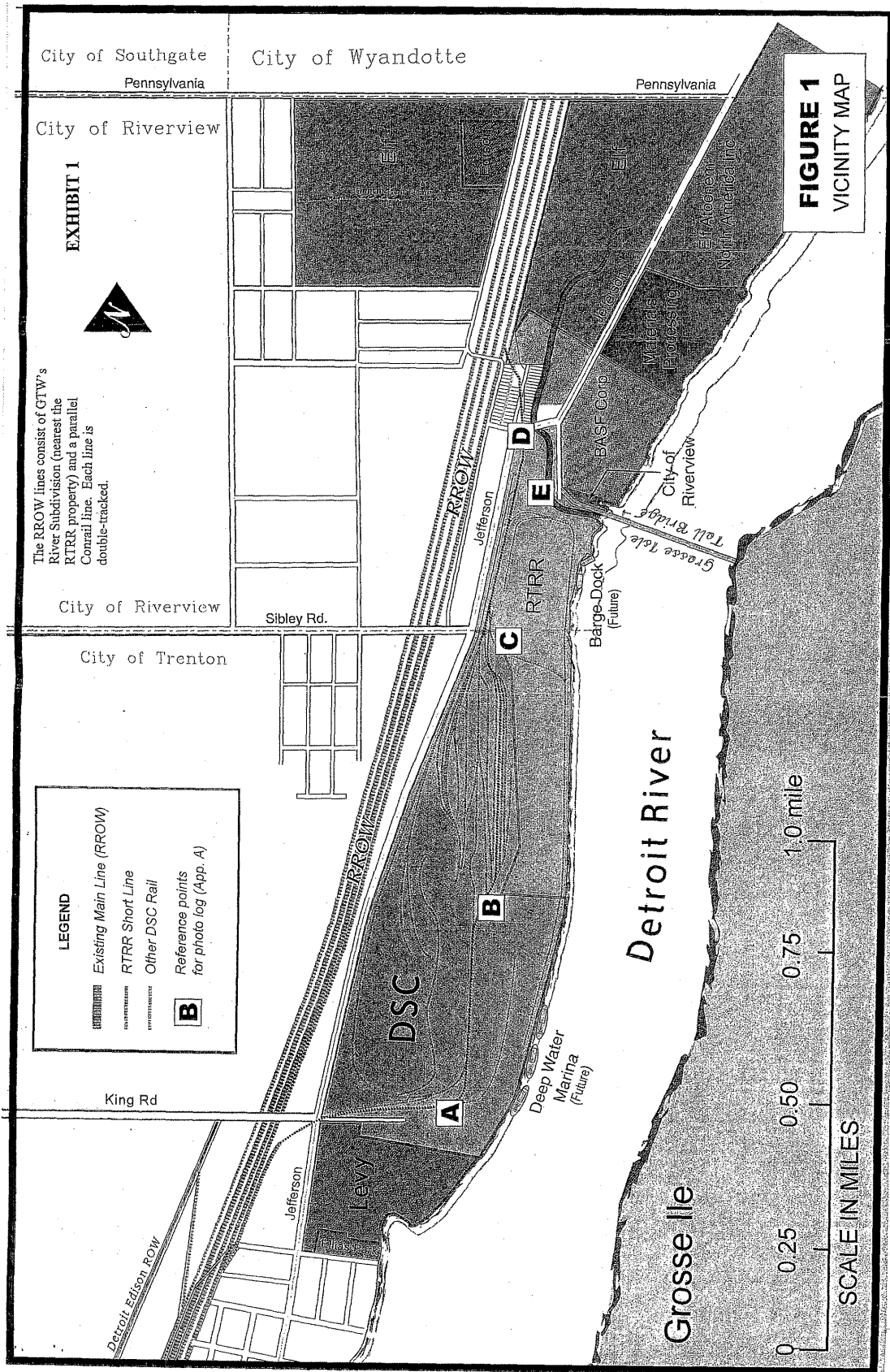
Finally, the County/GTW claim that RTRR has even misrepresented the issues they have raised by noting, in its January 30 Reply to their Notice, that the opponents "do not appear to contend that RTRR's Petition for Exemption [in contrast to its class exemption notice] is beyond

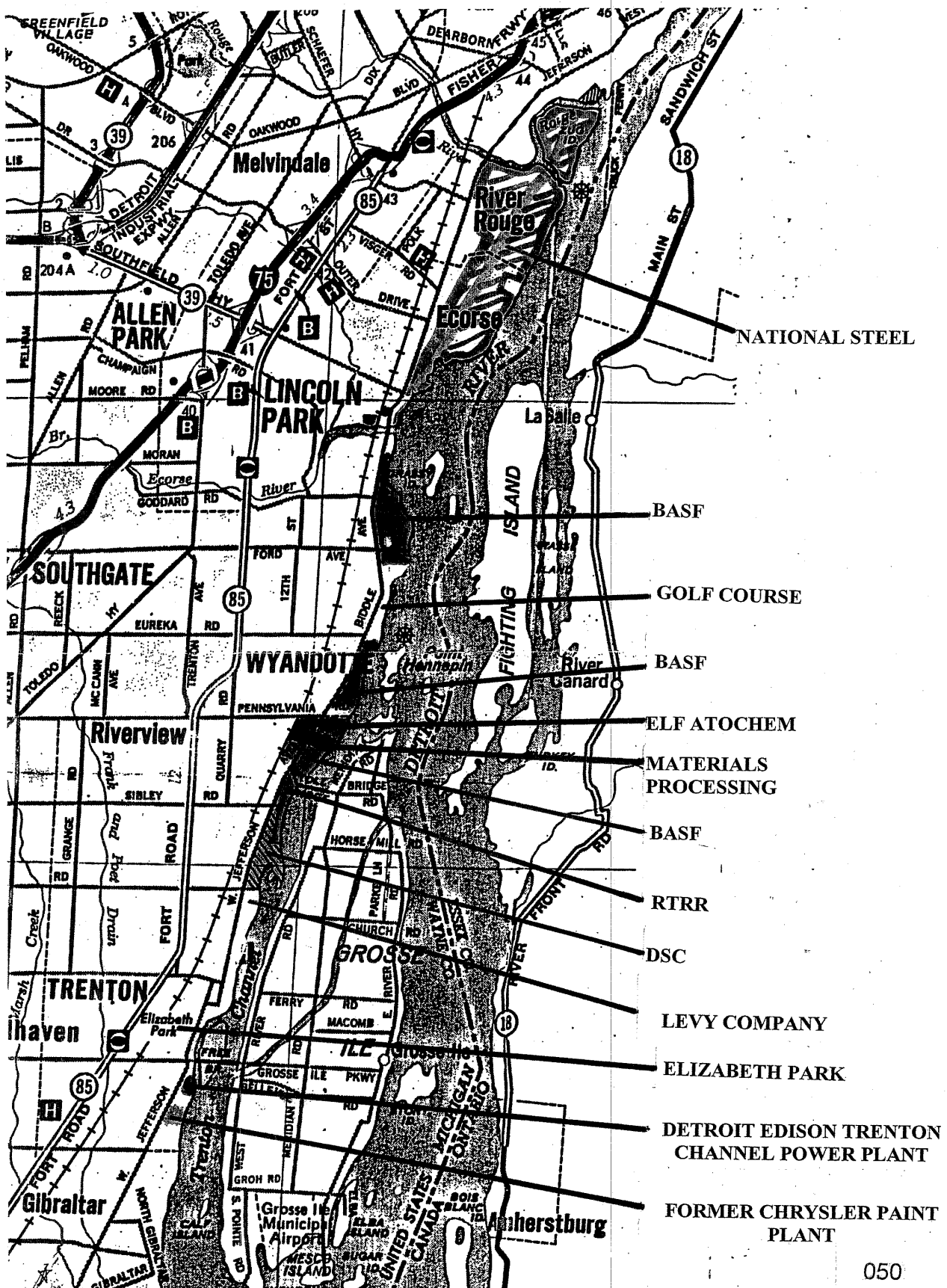
¹⁰ *Id.* at 13-15.

the Board's jurisdiction." Joint Opposition at 10. RTRR's statement did no more than reflect the opponent's own concession at page 20 of their January 25 Notice that "the inappropriateness of the class exemption procedures for a transaction to convert non-rail property into jurisdictional rail line" was not applicable to RTRR's Petition for Exemption. Indeed, if the County and GTW believe that the Board lacks authority to consider RTRR's Petition, they have yet to say so.¹¹

¹¹ RTRR is of course aware that the County/GTW challenge whether RTRR's rail line (as opposed to its Petition) is subject to the Board's regulatory control and has responded at length to their arguments.

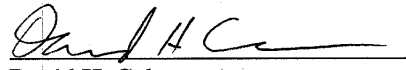
EXHIBIT 1





CERTIFICATE OF SERVICE

I hereby certify that on the 21st 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