

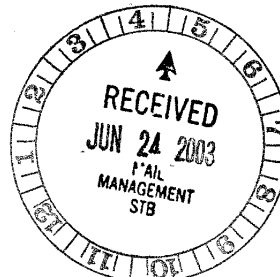
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June 24, 2003

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 please find an original and 10 copies of the Response of Riverview Trenton Railroad Company in Opposition to Petition for Reconsideration.

Respectfully,

David H. Coburn
Attorney for Riverview Trenton Railroad
Company

DHC:dj
Enclosure

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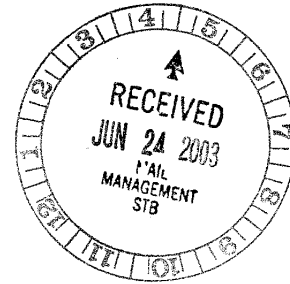
PHOENIX

LOS ANGELES

LONDON

BRUSSELS

**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**

**RESPONSE OF RIVERVIEW TRENTON RAILROAD COMPANY IN OPPOSITION
TO PETITIONS FOR RECONSIDERATION**

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Railroad Company

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**



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COUNTY, MI**

**RESPONSE OF RIVERVIEW TRENTON RAILROAD COMPANY IN OPPOSITION
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Riverview Trenton Railroad Company (“RTR”) hereby submits this response in opposition to the Petitions for Reconsideration filed by the Cities of Riverview and Trenton and the County of Wayne (collectively, “Local Government Opponents”). Those Petitions seek reconsideration of the Board’s May 15, 2003 Decision granting RTR’s Petition for Exemption to acquire and operate a rail line.¹

Petitioners bear the burden of demonstrating that the Board’s action “will be affected materially because of new evidence or changed circumstances” or that the prior decision “involves material error.” *See* 49 CFR § 1115.3(b). They have not alleged any relevant changed circumstances or new evidence and, as shown further below, have not shown any error, much

¹ Each of the Petitioners has also filed a petition for judicial review of the Board’s May 15 Decision in the U.S. Court of Appeals for the Sixth Circuit. The Board has moved to dismiss, or hold in abeyance pending action on its petition for reconsideration, the judicial review proceeding filed by the City of Riverview until the Board has disposed of the petition for reconsideration. *City of Riverview v. Surface Transportation Board*, No. 03-3814 (motion filed July 13, 2003). RTR assumes that the Board intends to do likewise in the more recently filed judicial review proceedings instituted by the County of Wayne and City of Trenton.

less material error in the May 15 Decision. In fact, this proceeding was characterized by repeated filings by the Local Government Opponents in which they made the same unfounded arguments over and over again, in filing after filing. The Board's May 15 Decision rejecting their claims obviously has not resulted in any change in their strategy. Virtually all of the arguments that they raise have been raised and answered before.

A. Reply to City of Riverview

Riverview argues that the Board's decision should be reversed because: (1) the Board failed to consider the alleged disparity between RTR's initial acreage as described in its Petition for Exemption and the larger acreage that Riverview claims RTR will affect; (2) the Board's Environmental Assessment was biased and incomplete; and (3) the Board's decision was arbitrary, capricious and an abuse of discretion.

Riverview's first point is predicated on its allegation that, "RTR has expressed the intention of acquiring an additional 60 acres adjacent to the original 76 acres, an expansion to nearly double the area, which would amplify the concerns of the City on an exponential basis." As RTR has repeatedly advised the Board, RTR has not changed its railroad plans from those described in its petition for exemption. Further, even if it were to acquire additional property at some future point, it has no intention of changing its planned rail operations. As the Board found, referring to affidavits submitted by Local Government Opponents claiming (incorrectly) that RTR has plans different from those disclosed to the Board, "affidavits related to unsuccessful negotiation proposals plainly do not demonstrate that this [RTR] proposal has

changed. Accordingly the EA is fully adequate and we see no reason to conduct further environmental review.”²

With respect to Riverview’s challenge to the Environmental Assessment (“EA”), Riverview claims that it was prepared by URS Corporation, which it describes without any foundation as “essentially a division of the STB.” This claim has no merit. The EA in this case was prepared by the SEA staff, not by a contractor. Consistent with Council on Environmental Quality regulations at 40 C.F.R. 1506.5(b), which contemplate the preparation of a preliminary draft EA by an applicant, subject of course to independent verification and evaluation of environmental data and impacts by the agency staff, RTR and URS prepared and submitted to SEA a Preliminary Draft EA. SEA has used this procedure in the past, including in the *Canadian National/Illinois Central* control proceeding, which of course involved a much larger transaction than this proceeding in terms of environmental impacts.³ The Draft EA, Post EA and Supplemental Post EA issued in this proceeding were issued by SEA only after it conducted its own, independent review and verification of any information supplied by RTR and its contractor. The documents also reflect the input received from various public agencies (including the Local Government Opponents) and others. SEA’s Supplemental Post EA -- responding to the same argument Riverview makes in its petition for reconsideration -- correctly explains at page 6 that, “SEA’s participation, oversight and guidance were extensive throughout the process of developing the EA.”

² May 15 Decision at 4, fn. 11. Riverview’s argument that the Board did not consider its claims is thus patently wrong.

³ *Canadian National Railway Company, Grand Trunk Corporation, and Grand Trunk Western Railroad Incorporated -- Control -- Illinois Central Corporation, Illinois Central Railroad Company, Chicago, Central & Pacific Railroad Company, and Cedar River Railroad Company*, Finance Docket No. 33556.

Riverview complains that the EA failed to take into account the 1998 designation of the Detroit River as an American Heritage River, a designation under Executive Order 13061 (issued Sept. 11, 1997). Riverview claims that this designation requires that the Board consider river protection, restoration and community revitalization. This same issue was very belatedly raised by Riverview in a September 20, 2002 “Supplemental Brief of the City of Riverview Concerning the American Heritage Rivers Review Requirement.” That Brief was filed well after the EA in this proceeding was completed and after initial and supplemental evidence had been submitted. Riverview had not previously raised the American Heritage River issue in any of its numerous filings in this proceeding.

RTR responded to Riverview’s arguments with respect to American Heritage River designation in an October 1, 2002 Reply to Riverview’s Supplemental Brief. RTR stands by that filing, which in relevant part stated as follows:

Riverview misapprehends the Executive Order and the nature of the Heritage Rivers initiative. The Executive Order (“EO”), attached to Riverview’s Brief, does not in any way restrict either private property rights or establish new regulatory authority. See EO Section 1(d). It does *not* impact the rights of the Board to act on matters that come before it, such as RTRR’s Petition. Indeed, the Order specifically states that it creates no substantive or procedural rights for any party enforceable against any federal agency. See EO Section 7. Rather, the American Heritage Rivers program is primarily focused on those agencies that are positioned to provide appropriate federal resources to help local planning and other efforts. It thus commits federal planning, functions and programs to assist community efforts to preserve, protect and restore rivers, and to develop formal and informal partnerships to assist such efforts. The program does not, on the other hand, restrict commercial development along designated rivers. In fact, “economic revitalization” is among the explicit goals of the American Heritage Rivers initiative. See EO Section 1(a).

It is not of course within the ambit of the Board, an independent body with adjudicatory responsibilities in this proceeding, to undertake such efforts. Rather, the Board considers the environmental impacts of its actions through the EA (or EIS) process, in which interested parties are given the opportunity to make representations. Here, SEA undertook a thorough review of the RTRR project impacts. SEA’s Draft EA was forwarded to numerous federal agencies, including several agencies that participate in the federal Interagency Committee established by the American Heritage Rivers Executive Order: EPA, Department of Interior (Fish and Wildlife Service) and the Department of Agriculture (Natural Resources Conservation Service). In

addition, the Draft was forwarded to a variety of interested state and local agencies and governments.

SEA received comments from several local government interests, including Riverview and other local government interests. None of these raised the American Heritage Rivers issue.* On the basis of its analysis, SEA properly concluded in its Draft Environmental Assessment and Post-EA documents that the RTRR project would not have adverse impacts on water resources or on access to recreational resources along the Detroit River, including parks and other resources in the general vicinity of the RTRR site. SEA also correctly concluded that RTRR's use of its property would not alter the historic commercial use of that property.

Riverview offers no basis for revisiting these findings. Its request that the Board rely on the American Heritage Rivers initiative to deny the RTRR Petition should be rejected.

The above excerpt from RTR's prior submission offers a complete answer to Riverview's rehashed reliance on the American Heritage River designation. RTR's project involves rail transportation on property that has historically been the site of such transportation. It will not impair Detroit River resources, as the EA properly concluded.

Riverview's final point is a conclusory one, namely, that the Board's decision is arbitrary, capricious, an abuse of discretion and contrary to law. In support of this claim, Riverview contends that the Board erred in refusing to consider the impacts of barge traffic that it claims may use the RTR facility. However, the Board properly found that SEA did not assess barge traffic impacts because "RTR has no specific plans to introduce barge service, and, therefore, there would have been no way for SEA to effectively analyze it."⁴ RTR in fact has no current

* In its March 7, 2002 Supplemental Evidence and Argument, Wayne County noted (at page 20) the federal designation of the Detroit River, but did not claim that this designation requires denial of RTR's Petition or that it is cause for further environmental review. In its March 21 Reply, RTR noted that the River's designation did not mean that commercial development could not proceed along the River and did not override the ability of the Board to grant RTR's Petition.

⁴ May 15 Decision at 4.

plans for barge traffic at the facility.⁵ The National Environmental Policy Act does not require speculative analyses of the sort Riverview seeks. *See Lange v. Brinegar*, 625 F.2d 812, 818 (9th Cir. 1980), *cert. denied*, 416 U.S. 961 (1974) (“The precise impact of potential ... development ... cannot be determined until decisions are made as to whether, when and where such construction should occur. Until then, an attempt to measure the possible [] impact would be an exercise in speculation.”); *Illinois Central Railroad Company -- Construction and Operation -- In East Baton Rouge Parish, LA*, STB Finance Docket No. 33887 (served Feb. 20, 2002) (claims about possible of construction of facility were unsupported by evidence and too speculative to warrant environmental analysis.)

B. Reply to City of Trenton

The City of Trenton’s Petition makes the same points as its Local Government ally, the City of Riverview. It speaks of RTR’s intentions to acquire more property as if this were an irrefutable fact, ignoring the fact that RTR has acquired no additional property. More importantly, like Riverview, Trenton fails to explain how it would matter to this proceeding even if RTR were to expand its property holdings at some future date. Specifically, Trenton has not alleged, and cannot legitimately claim, that RTR intends to operate more trains, or generate more highway traffic, than was considered in the EA. Thus, it fails to show how any future enlargement of the RTR property holding would result in environmental impacts that were not fully assessed.

Trenton also raises the same American Heritage River argument addressed above.

Trenton had not raised this issue previously, undermining its new-found claim that this was a

⁵ Riverview also claims in connection with its last point that the Board does not explain how its recommendations will be imposed or enforced. RTR is of course obligated to adhere to conditions imposed on the Board’s approval of its exemption, and intends to do so.

critical issue that should have been addressed by the Board. Further, RTR has already responded to this point and shown that the argument does not merit reconsideration.

C. Reply to Wayne County

Wayne County's Petition raises a different issue, claiming that the RTR facility may pose a threat to homeland security that should have been assessed by the Board. It is indeed unfortunate that any party, much less a government entity like Wayne County, would raise bogus security concerns to achieve the County's obvious objective of not allowing RTR to operate a railroad for reasons having nothing whatever to do with security. Homeland security is too important a matter to diminish it in the way that Wayne County has done.

To the extent that Wayne County's contentions merit any reply at all, the short and complete answer is that nothing in RTR's plan to operate a railroad and intermodal facility gives rise to security concerns that are any different than those relevant to any railroad. As the Board correctly stated in its decision, "RTR, like any other railroad, must comply with all applicable regulations covering homeland safety and security. Railroads are legally bound to comply with the comprehensive across-the-board safety measures adopted by Federal agencies with jurisdiction to adopt appropriate measures to enhance the security of the rail industry as a whole, including the Transportation Security Administration and the Federal Railroad Administration."⁶ RTR will of course comply with all federal laws and regulations governing homeland security. Wayne County has failed to show (or even attempt to show) why such compliance would not ensure an adequate level of security. Nor has it shown how RTR is different from any other railroad in the Detroit area (or any other place) relative to security. Its Petition merits no further

⁶ May 15 Decision at 12, fn. 30.

comment.

CONCLUSION

For the reasons stated above, the petitions for reconsideration fail to meet the burden imposed on Petitioners and should be denied.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "J. William Koegel, Jr.", with a stylized flourish at the end.

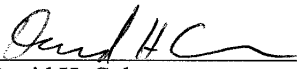
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Attorneys for Riverview Trenton
Railroad Company

June 24, 2003

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of June, 2003, a copy of this Response of Riverview Trenton Railroad Company in Opposition to Petition for Reconsideration was served upon all parties of record by first class mail, postage prepaid.


David H. Coburn