

206660

# Fink, Zausmer & Kaufman

A PROFESSIONAL CORPORATION

Mark J. Zausmer  
Richard C. Kaufman  
Michael L. Caldwell  
Gary K. August

Mark Beougher  
Mischa M. Gibbons\*  
Michael C. Lewis  
Amy M. Sitrer  
Marcy A. Tayler

\* Also Admitted in Illinois

31700 Middlebelt Road  
Suite 150  
Farmington Hills, MI 48334-2374  
(248) 851-4111 Fax (248) 851-0100  
www.lawsite.com

**Lansing Office:**  
721 N. Capitol, Suite 2  
Lansing, MI 48906-5163  
(517) 374-2735  
Fax (517) 487-0372

**Of Counsel:**  
David H. Fink  
Julie I. Fershtman  
Eli Grier  
Harvey I. Wax

November 15, 2002



**BY HAND**

Mr. Vernon A. Williams, Secretary  
Surface Transportation Board  
Office of the Secretary  
Case Control Unit  
1925 K Street, N.W.  
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 Line of Railroad in Wayne County, MI**

Dear Mr. Williams:

Enclosed for filing in the above-referenced docket please find an original and ten (10) copies of the Supplemental Brief of Wayne County. Also enclosed is a diskette containing the text of this filing in WordPerfect 6/7/8 format.

Very truly yours,

FINK, ZAUSMER & KAUFMAN, P.C.

**ENTERED  
Office of Proceedings**

**NOV 18 2002**

**Part of  
Public Record**

*Mark J. Zausmer / RCM*  
Mark. J. Zausmer

Enclosures

**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**

**SUPPLEMENTAL BRIEF OF WAYNE COUNTY**

**ENTERED  
Office of Proceedings**

**NOV 18 2002**

**Part of  
Public Record**

**I. INTRODUCTION**

Wayne County has reviewed the supplemental report of RTR dated October 16, 2002, and the reply of City of Trenton to the so-called Riverview Trenton Railroad Company's ("RTR") rebuttal dated October 31, 2002. The RTR brief contains hyperbolic claims regarding misrepresentations allegedly made by Wayne County representatives and others. These claims of deceit by RTR are misplaced and are designed to divert the Board's attention from the most recent issue to arise in this matter - the need for further environmental review.

**A. Wayne County Has Not Made Any Misrepresentation Regarding  
The DTE Site.**

As explained in detail in the previous briefs filed in this matter, Wayne County, in conjunction with Trenton and Riverview, has tried valiantly to find a mutually acceptable resolution to the dispute before the Board. One of many alternatives proposed to RTR was relocation of their

proposed operation to a site adjacent to the subject 76-acre parcel. That property, which is owned by Detroit Edison, has commonly been referred to as the "DTE site." A brief review of the origin of the DTE site proposal will clarify that Wayne County has not made any misrepresentation to RTR or this Board.

The City of Trenton retained the SmithGroup, a nationally renowned planner, to assist in designing plans for the riverfront. This work was paid for by the Trenton Brownfield Authority and the report was issued on July 24, 2002. See Status Report of Wayne County, Exhibit F (September 19, 2002). Out of this planning process came the vision of a possible swap which would enable RTR to be relocated to the DTE site with DTE partnering with the local communities on redevelopment of the 76 acres involved in these proceedings. RTR and DTE representatives participated in the planning process which ultimately led to the SmithGroup Plan. This plan showed DTE as being involved in development of RTR's 76-acre site and RTR being moved to a portion of the current DTE site.

Following release of the SmithGroup Plan, Mayor Brown of Trenton engaged in discussions with a DTE representative, Dennis Gipson, regarding DTE's willingness to engage in the property swap envisioned by the SmithGroup Plan. Mr. Gipson was not favorably disposed to this transaction and, on August 9, 2002, Mayor Brown wrote him a letter expressing disappointment regarding DTE's unwillingness to implement the SmithGroup Plan.<sup>1</sup>

On August 14, Mayor Brown faxed Dewitt Henry, Director of Wayne County Jobs and Economic Development Department, a July 1, 2002, letter from Gregory McDuffee of SmithGroup

---

<sup>1</sup> Copies of the various letters referred to herein are attached as exhibits to the October 31, 2002, reply of City of Trenton to RTR's rebuttal.

to DTE's chairman, Anthony Early, and the August 9, 2002, letter from Mayor Brown to Mr. Gipson. Mayor Brown requested that Mr. Henry intervene with a more senior Edison representative to secure Edison's cooperative participation in this plan. Mr. Henry then contacted Steve Ewing, president of Edison, who said that he wanted to help and directed Mr. Henry to speak with Harold Gardner, Senior Vice-President of Corporate Services. Mr. Henry spoke with Mr. Gardner and sent him the SmithGroup Plan. From that point on, Mayor Brown dealt with Mr. Gardner, and Mr. Henry was not directly involved in these discussions.

It was Wayne County's understanding, based upon discussions among Trenton and Wayne County representatives, that there were cooperative and productive discussions that were ongoing in late August and early September regarding a possible swap of the 76 acres and the DTE site. These discussions included various alternatives, including the prospect of a long-term lease. It was also Wayne County's understanding that one of the primary impediments raised by DTE to a deal was that DTE needed a portion of its current site to handle its fly-ash, a by-product of DTE's generating plants. Trenton representatives felt that there were alternatives that were available to address DTE's fly-ash issue which would enable these property swap discussions to move forward. At no time during the August and early September settlement discussions with RTR did Wayne County believe that DTE had irrevocably rejected all prospects for a deal. Rather, Wayne County believed that a property swap was a realistic alternative that could still be explored if RTR was amenable to such a transaction.

Contrary to RTR's claim that Wayne County knew that the DTE swap was not a viable alternative at the time it was proposed during settlement negotiations, Wayne County was using its efforts to facilitate a dialogue between Trenton and DTE officials so that any impediments, including

the critical fly-ash problem, could be resolved and this swap finalized in the best interest of all parties. Wayne County recognized in August and September that such a transaction would be complicated and would require good faith efforts of senior principals of all parties concerned in order to make this a reality. Given additional time, Wayne County still believes that it could work with DTE and RTR to resolve differences and complete this property swap.<sup>2</sup>

## **II. IN LIGHT OF THE PLANS REVEALED BY RTR DURING NEGOTIATIONS,<sup>3</sup> FURTHER ENVIRONMENTAL REVIEW IS REQUIRED**

The issues of whether additional environmental review is required turns on an analysis of RTR's future plans. The eight affidavits filed with Wayne County's submission dated October 8, 2002, belie any belated protestation by RTR that its additional plans revealed during the negotiations are so speculative that their potential environmental impacts may be ignored. These affidavits of local officials and counsel, who were present during the negotiating meetings, confirm that RTR intends to acquire significant additional property from the adjacent Detroit Steel Company, Ltd., ("DSC") site to expand the intermodal facility that was the subject of the Board's environmental review in this proceeding. See Reply of Wayne County to Status Report of RTR at 1-4 (October 8, 2002). According to those filings, in addition to revealing RTR's plans during negotiations, RTR representatives went so far as to request concessions from Wayne County, Trenton and Riverview

---

<sup>2</sup> Wayne County was forthcoming with the Board regarding potential difficulties related to the DTE/RTR property swap. See Reply of Wayne County to Status Report of Riverview Trenton Railroad at 5 n.3 (October 8, 2002).

<sup>3</sup>Notably, as reflected by the pleadings in this matter reporting on the details of negotiations, the parties to the negotiations ordered by the Board in this proceeding discussed and ultimately agreed that the contents of their negotiations would not be confidential. Thus, this proceeding does not raise policy issues concerning party rights to maintain confidentiality in their negotiations.

(the "Local Communities") concerning RTR's potential acquisition of additional land. Reply of Wayne County to Status Report of RTR at 3. The Local Communities have also pointed out that RTR made the need for sufficient land to operate 1.5 miles of *straight* track an absolute prerequisite to its consideration of any site relocation during negotiations. *Id.* at 3-4, n.2. As there apparently is not 1.5 miles of *straight* track at RTR's current site and that site is inadequate for the construction of that length of straight track, this indicates that RTR has a serious need for additional land adjacent to its current site. This further supports the claim of the Local Communities that RTR intends to acquire additional land. Notably, despite RTR having the opportunity to do so, it has not explained the inconsistency between its claimed need for 1.5 miles of straight track during the negotiations, and its claim not to have any plans to acquire the land necessary for such facilities at its current location.

The Local Communities have also commented on the contrast between RTR's discussion of its land acquisition plans, and its statements during negotiations that it had no concrete or imminent plans for use of barges to serve its proposed intermodal facility. *Id.* at 4. The distinction observed by the Local Communities suggests that although the Board's Section of Environmental Assessment ("SEA") found RTR's potential future use of barges to be too speculative for environmental review, RTR's possible acquisition and use of the adjacent DSC property is not too speculative for review.

RTR argues first that its comments concerning its future plans were in the context of requests by the local governments for a commitment from RTR not to buy any additional land, and that its comments related "to future possibilities," "not concrete plans." RTR's Supplemental Report at 7 (October 16, 2002); *id.*, Verified Statement of B. Michael Blashfield at 4. As noted above, however, RTR's version of events is contradicted (i) by the specific affidavits of all other attendees, (ii) the fact that RTR was willing to introduce this as a negotiating point, and (iii) RTR's apparent need for

this land.<sup>4</sup> The fact that RTR might have revealed its plans in a defensive context does not change the fact that its plans were at that time represented to be, and, in fact, appear to be sufficiently clear that the land acquisition would be a foreseeable consequence of the Board's requested action.

RTR also argues that a further land acquisition need not be within the scope of environmental review because even if RTR had decided to pursue the acquisition of additional property, "there is no assurance that RTR or an affiliate entity and DSC will be able to reach agreement on the sale." Id. This argument fails on two grounds. A consequence need not be certain to require environmental review, it need only be reasonably foreseeable. In any event, as the Local Communities have pointed out, if RTR's petition is granted, RTR will have the power of eminent domain under state law. This eliminates any serious doubt as to RTR's ability to acquire the DSC property. See Wayne County Status Report at 3-6 (September 19, 2002).

Finally, RTR argues that no further environmental review is appropriate because "even if RTR or another entity were to acquire additional DSC property, that would have no bearing on the operation of RTR's rail line." RTR Supplemental Report at 7. This argument misconceives the Board's duty under the National Environmental Policy Act. The Board correctly determined as part of its environmental assessment process that it must not only consider the potential environmental impact of RTR's proposed rail operations, but also the potential environmental impacts of its related

---

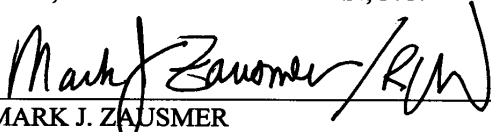
<sup>4</sup> In conjunction with its filing dated October 8, 2002, Wayne County submitted eight affidavits of participants in the settlement discussions which corroborated RTR's intent to acquire extensive property in this area, notwithstanding their claims that this is speculative. Two additional affidavits of attendees at this meeting are being submitted with this reply. The affidavits of James Feudner, City Manager of Riverview, and Gerald Couch, Director of Community Development for Riverview, are attached as Exhibit A. See also Revised Supplemental Affidavit of Martha Rose. Ms. Rose's affidavit is slightly modified from her previous affidavit to reflect that she did not attend the September 6 meeting (Exhibit B).

intermodal terminal operations. The issue now presented to the Board is whether consideration of RTR's terminal operations should be limited to the property that RTR currently owns, or should be extended to the additional property that RTR has indicated it may acquire in the future for that facility. That determination rests on whether or not such a future acquisition is reasonably foreseeable or whether it is too speculative for assessment. As discussed above, and unlike the conclusion drawn by SEA regarding RTR's possible future use of barge transportation, RTR's possible acquisition of DSC's adjacent land does not appear to be too speculative for environmental assessment. Further, to the extent RTR makes the self-serving claim that they are too speculative, RTR simply does not appear to be credible.

### III. CONCLUSION

Based upon the foregoing and the previous submissions filed by Wayne County and the cities of Trenton and Riverview, Wayne County requests that the petition for exemption be dismissed for lack of jurisdiction, be denied on the merits,<sup>5</sup> or, in the alternative, that a further environmental assessment be undertaken.

FINK, ZAUSMER & KAUFMAN, P.C.

  
MARK J. ZAUSMER  
Special Assistant Corporation Counsel  
for Wayne County  
31700 Middlebelt Road, Suite 150  
Farmington Hills, Michigan 48334  
248-851-4111

DATED: November 15, 2002

---

<sup>5</sup>At the end of its Supplemental Report and Response (page 8-9), RTR sets forth a number of bullet points in a vain attempt to bolster its effort to avoid dismissal or denial of its petition. Not one of those points is apt. Each either ignores or misstates the arguments in opposition to its petition or mischaracterizes the facts and evidence.

### CERTIFICATE OF SERVICE

I certify that I have this 15th day of November, 2002, served copies of the foregoing Supplemental Brief of Wayne County to be delivered to each of the following by first-class mail or by a more expeditious manner of delivery:

Mr. J. William Koegel, Jr.  
Mr. David H. Coburn  
Steptoe & Johnson, LLP  
1330 Connecticut Avenue NW  
Washington, DC 20036

Mr. Richard S. Edelman  
O'Donnell, Schwartz & Anderson, P.C.  
1900 L Street, N.W., Suite 707  
Washington, DC 20036

The Honorable Carl M. Levin  
United States Senate  
Washington, DC 20510

Mr. Jonathan M. Broder  
Vice President Law and General Counsel  
ConRail  
2001 Market Street, 16<sup>th</sup> Floor  
Philadelphia, Pennsylvania 19103

Mr. David Hirsh  
Harkins Cunningham  
801 Pennsylvania Avenue NW, Suite 600  
Washington, DC 20004

Mr. Randall A. Pentiuk  
Mr. Jayson J. Hall  
Pentiuk, Couvreur & Kobiljak, P.C.  
20300 Superior Street, Suite 230  
Taylor, Michigan 48180

Mr. Daniel C. Sullivan  
Sullivan & Hincks  
Two West 22<sup>nd</sup> Street, Suite 350  
Oak Brook, Illinois 60523

The Honorable John D. Dingell  
House of Representatives  
Washington, DC 20515

Mr. Wallace C. Long  
Howard & Howard  
39400 Woodward Avenue, Suite 101  
Bloomfield Hills, Michigan 48304

Mr. Sean Finn  
Grand Trunk Railroad  
455 N. City Front Plaza Drive, 20<sup>th</sup> Floor  
Chicago, Illinois 60611

*Lenore Donnelly/skw*  
LENORE DONNELLY



STATE OF MICHIGAN )  
 ) ss.  
COUNTY OF WAYNE )

1. That I am the City Manager of the City of Riverview, with offices at 14100 Civic Park Drive, Riverview, Michigan 48192-7689.

3. That during the course of the negotiations RTRR officials stated that RTRR intended to acquire acreage in addition to the 76 it had already purchased from DSC, for the operation of its intermodal transportation business. On more than one occasion I was advised by RTRR that it had actually offered to purchase the entire DSC Ltd. site for its operations.

5. That I have personal knowledge of the assertions contained in this Affidavit and am prepared to testify to these facts as a witness in open court.

  
JAMES FEUDNER, City Manager

Subscribed and sworn to before me this 22nd Day of October, 2002.

Jill E. Lilly

Notary Public, Wayne County, Michigan

My Commission Expires: 4-20-05

12

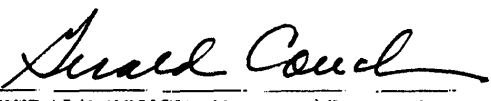
**AFFIDAVIT  
TO SURFACE TRANSPORTATION BOARD**

STATE OF MICHIGAN )  
 ) ss.  
COUNTY OF WAYNE )

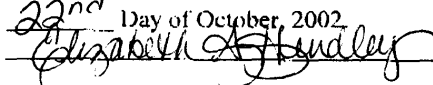
The undersigned, being first duly sworn, states as follows:

1. That I am the Community Development Director for the City of Riverview, with offices at 14100 Civic Park Drive, Riverview, Michigan 48192-7689.
2. That in the capacity I participated, along with my staff, in STB ordered negotiations with representatives of the Riverview-Trenton Railroad (RTRR) during the period from June 22, 2002 through September 13, 2002.
3. That during the course of the negotiations RTRR officials stated that RTRR intended to acquire acreage in addition to the 76 it had already purchased from DSC, for the operation of its intermodal transportation business. On more than one occasion I was advised by RTRR that it had actually offered to purchase the entire DSC Ltd. site for its operations.
4. Specifically, at a meeting with RTRR representatives, on September 3, 2002, at the Riverview City offices those RTRR representatives stated that RTRR would like to acquire as much as 1,000 acres in the area to complete its business plan which would include all of the balance of the DSC Ltd. Property (150 acres), additional properties to the south of DSC Ltd., as well as properties to the north of the RTRR site in the City of Riverview, which include that owned by BASF.
5. That the City of Trenton was specifically asked by RTRR, to include as apart of a proposed stipulated settlement agreement before the STB, a provision whereby the City would give RTRR a window period to exclusively pursue the purchase of an additional 60 acres of DSC property adjacent to the RTRR site, without interference from the City.
6. That I have personal knowledge of the assertions contained in this Affidavit and am prepared to testify to these facts as a witness in open court.

Further, affiant sayeth not.

  
GERALD COUCH, Director of Community  
Development

Subscribed and sworn to before me this

22<sup>nd</sup> Day of October, 2002  


Notary Public, Wayne County, Michigan  
My Commission Expires: 6/30/06

F:\R-7C - PRVW\LTRR AFFIDAVIT.021

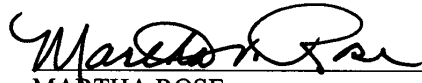


AFFIDAVIT  
TO SURFACE TRANSPORTATION BOARD

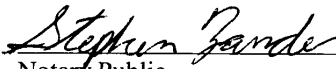
STATE OF MICHIGAN     )  
                                  ) SS  
COUNTY OF WAYNE     )

The undersigned, being first duly sworn, states as follows:

1. That I am the Director of Administration for the County of Wayne, DPS.
2. That in that capacity, I participated in STB ordered negotiations with representatives of the Riverview-Trenton Railroad (RTRR).
3. That during the course of the negotiations, RTRR officials stated that RTRR intends to acquire acreage in addition to the 76 it had already purchased from DSC, for the operation of its intermodal transportation business.
4. Specifically, at a meeting with RTRR representatives, on August 27, 2002, at the Riverview City Offices, these RTRR representatives stated that RTRR's business plan for the immediate area adjacent to the 76 acres included 250 acres.
5. Specifically, at a meeting with RTRR representatives, on September 3, 2002, at the Riverview City Offices, these RTRR representatives stated that RTRR would like to acquire as much as 1,000 acres in the area to complete its broader business plan. This would include all of the balance of the DSC Ltd. Property (149 acres), additional properties to the south of DSC Ltd., as well as properties currently owned by BASF to the north of the RTRR site in the City of Riverview.
6. That I have personal knowledge of the assertions contained in this Affidavit and am prepared to testify to these facts as a witness in open court.

  
\_\_\_\_\_  
MARTHA ROSE  
Director of Administration

Subscribed and sworn to before me  
this 14 day of November, 2002.

  
\_\_\_\_\_  
Notary Public  
County of Oakland A/I Wayne  
My Commission Expires: 10/20/06