

SERVICE DATE - AUGUST 27, 2003

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34040

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

Decided: August 25, 2003

This decision denies reconsideration of the Board's decision granting the Riverview Trenton Railroad Company (RTR) an exemption to acquire and to operate a line of railroad in Wayne County, MI.

BACKGROUND

By decision served on May 15, 2003 (May 2003 Decision), the Board granted an exemption to RTR under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10901 to acquire and to operate a line of railroad in the towns of Riverview and Trenton in Wayne County, MI. The exemption allows RTR to operate over: (1) 1.5 miles of rail line on its own property, a 76-acre parcel that RTR purchased from its noncarrier parent, Crown Enterprise, Inc. (Crown);<sup>1</sup> and (2) via easement, track within an adjacent 195.45-acre industrial site owned by a non-affiliate, Detroit Steel Center, Ltd. (DSC).<sup>2</sup> RTR's stated intent is to use the exemption to establish an intermodal terminal involving rail, motor, and possibly barge traffic and also to transport DSC's traffic.

The Board's Section of Environmental Analysis (SEA) issued for public review and comment a detailed Environmental Assessment (EA) of RTR's proposed acquisition and subsequent intermodal operations in Wayne County. SEA addressed the comments in a Post Environmental Assessment (Post EA), and a Supplemental Post EA. SEA found that, with the imposition of certain conditions to mitigate the environmental impacts of the proposed action, RTR's proposal would not significantly affect the environment. The exemption was granted

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<sup>1</sup> Crown is a real estate development subsidiary of CenTra, Inc. (CenTra). CenTra is a holding company that also owns several transportation companies, including a trucking company, Mason Dixon Lines, Inc.

<sup>2</sup> RTR's 76-acre parcel and the adjacent parcel owned by DSC were formerly owned by the McLouth Steel Company (McLouth), which used the track to service its plant. On its property, DSC operates a steel mill.

subject to the environmental and monitoring conditions SEA had recommended, including the requirement that RTR designate a community liaison. More detailed background information appears in the May 2003 Decision.

Petitions for reconsideration were filed by the City of Riverview (Riverview) on June 3, 2003, the County of Wayne on June 4, 2003, and the City Trenton (Trenton) on June 5, 2003 (jointly, petitioners). Petitioners allege that the May 2003 Decision failed to deal adequately with the following issues: (1) homeland security; (2) future barge traffic allegedly to be handled by RTR; (3) emergency vehicle access; (4) failure to evaluate the full acreage that could be affected by RTR's proposal (because RTR allegedly plans to acquire acreage other than that described in its petition for exemption); and (5) the American Heritage Rivers Executive Order 13061, which petitioners allege requires the Board to consider public access to the Detroit River and non-industrial uses of the property. In addition, Riverview argues that the Board's EA was biased because it was based, in part, on information provided by URS Corporation, an environmental consultant. On June 24, 2003, RTR responded to the petitions for reconsideration (hereafter, RTR's Response).

#### DISCUSSION AND CONCLUSIONS

Pursuant to 49 U.S.C. 722(c) and 49 CFR 1115.3, a petition for reconsideration will be granted only if the prior action will be affected materially because of new evidence or changed circumstances and/or the prior action involves material error. The petition must state in detail the nature of, and reasons for, the relief requested. Here, petitioners have not shown that reconsideration is justified by new evidence, changed circumstances, or material error.

Homeland Security. Petitioners claim that having the RTR facility along the Detroit River and across from the Canadian Border may pose a threat to homeland security that warrants further consideration by the Board. But as explained in the May 2003 Decision, RTR's project will not raise security concerns that are any different from those that affect any other railroad or facility located near Canada.<sup>3</sup> Petitioners have presented no evidence showing that the security issues relating to RTR's proposed intermodal terminal are separate and distinct from homeland security issues facing the railroad industry generally; that RTR is unlikely to comply with the

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<sup>3</sup> In the May 2003 Decision, the Board stated, at 12 n.30:

But 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 the Federal agencies with jurisdiction to adopt appropriate measures to enhance the security of the railroad industry as a whole, including the Transportation Security Administration and the Federal Railroad Administration.

regulations of the other agencies with jurisdiction over homeland security matters; or that such compliance would not ensure an adequate level of security. Thus, reopening to consider homeland security is not warranted.

Future Barge Traffic. The Board did not err by not evaluating the impact of future barge traffic that petitioners claim may be handled by RTR's facility. As explained in the Post EA at 18 and the May 2003 Decision at 4, SEA did not evaluate the impacts of barge traffic because RTR has no specific plans to introduce rail-to-barge service.

Petitioners have neither explained why the Board's failure to analyze barge traffic constitutes material error nor presented new evidence or evidence of changed circumstances that would make an analysis of barge traffic appropriate. Petitioners fail to show that RTR has current plans for barge service at the facility.<sup>4</sup> It is possible that RTR might attempt to develop barge traffic at an undetermined date in the future, providing that the necessary permits can be obtained and the necessary equipment can be installed. See Post EA at 18. But SEA reasonably declined to analyze the environmental impact of a speculative future barge project because an effective environmental analysis is not possible until information is available on such matters as the anticipated commencement date of barge traffic, its projected traffic volume, the commodities to be shipped by barge, and the nature of the site changes that would be required for RTR to handle barge traffic. The National Environmental Policy Act (NEPA) does not require speculative analyses of the type sought by petitioners.<sup>5</sup>

Emergency Vehicle Access. Contrary to what petitioners maintain, the Board fully considered emergency vehicle access issues (see EA at 5-10). Moreover, the May 2003 Decision imposed a mitigation condition requiring that RTR notify the appropriate emergency response

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<sup>4</sup> None of the maps, photographs, and diagrams submitted by RTR reveals the location of existing or future barge/rail transloading equipment or storage areas. Moreover, none of the shippers supporting RTR has expressed an interest in barge service.

<sup>5</sup> Sierra Club v. Marsh, 976 F.2d 763, 768 (1st Cir. 1992) (in determining whether impacts are too speculative to warrant analysis, it is relevant to ask, "Can one describe them 'now' with sufficient specificity to make their consideration useful?"); Dubois v. United States Department of Agriculture, 102 F.3d 1273, 1286 (1st Cir. 1996); 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 (STB served Feb. 20, 2002) (claims about possible construction of facility were unsupported by evidence and too speculative to warrant environmental analysis).

providers at least 2 hours prior to using the at-grade crossing at the north end of its property. Petitioners have not shown that this mitigation is inadequate, that circumstances have changed significantly since SEA's analysis was prepared, or that SEA's environmental analysis and conclusions are based on material error.

Acreage Involved in Project. SEA acted reasonably in basing its environmental analysis on the 76 acres described by RTR in its petition for exemption and subsequent pleadings. Petitioners argue that the Board should have considered an additional 60 adjacent acres that, they allege, RTR may acquire later. But the record does not show that RTR has concrete plans to acquire any more property than the original 76 acres or that RTR has any intention of changing its planned rail operations.<sup>6</sup> Petitioners have failed to show that RTR's proposal has substantially changed.<sup>7</sup> Nor do petitioners allege that RTR intends to operate more trains or to attract more highway traffic than was considered in the EA. Accordingly, as the Board explained in the May 2003 Decision at 4, the scope of the analysis in the EA is fully adequate, and there is no need to conduct further environmental review.

American Heritage Rivers Executive Order 13061. Riverview asserts that the Detroit River is an American Heritage River subject to Executive Order (EO) 13061, issued on September 11, 1997, and that this designation requires the Board to consider river protection, restoration, and community revitalization. Riverview first raised this issue in a supplemental brief filed on September 20, 2002, after the EA, Post EA and Supplemental Post EA were completed.<sup>8</sup> Riverview plainly had numerous opportunities to raise this issue earlier and to have it considered in the Board's EA, Post EA, or Supplemental Post EA. Thus, Riverview is in a poor position to complain that the issue was not specifically addressed in the May 2003 Decision.

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<sup>6</sup> In a verified statement attached to RTR's Supplemental Report filed on October 16, 2002, witness Dannie Stamper rebuts allegations that RTR admitted an intent to acquire more property during settlement negotiations. RTR has also stated that the planned rail operations detailed in its Board filings would not change even if it were, at some future time, to purchase additional property. See RTR's Response at 2-3; Reply of Riverview Trenton Railroad Company to Status Report of Wayne County, City of Trenton and City of Riverview on Settlement Negotiations, filed on October 1, 2002, at 8.

<sup>7</sup> Trenton alleges that RTR's intention to acquire more property became known "during the course of discovery," but Trenton does not produce the alleged discovery.

<sup>8</sup> See Supplemental Brief of the City of Riverview Concerning the American Heritage Rivers Review Requirement, filed on September 20, 2002.

In any event, as RTR has explained,<sup>9</sup> the terms of EO 13061 show no intent to restrict transportation or industrial projects in river areas that are, like the area surrounding RTR, already heavily industrialized. In fact, “economic revitalization” is among the explicit goals of the American Heritage Rivers initiative. See EO 13061, Section 1(a). Moreover, EO 13061 specifically states that it creates no substantive or procedural rights for any party enforceable against any federal agency. See EO 13061, Section 7.

Here, SEA undertook a thorough review of the RTR project impacts. On the basis of its environmental analysis and the comments received,<sup>10</sup> SEA properly concluded in its EA and Post EA documents that the RTR proposal would not have adverse impacts on water resources or on access to recreational resources along the Detroit River. SEA also determined that RTR’s use of the property would not alter the historic commercial use of the property. Petitioners offer no basis for revisiting these conclusions. Their request that the Board reopen to consider the American Heritage Rivers initiative is rejected.

Alleged Bias. Finally, there is no merit to Riverview’s argument that the EA was biased because it was based, in part, on a Preliminary Draft Environmental Assessment (PDEA) prepared by RTR and the URS Corporation, RTR’s consultant. The regulations of the President’s Council on Environmental Quality implementing NEPA specifically contemplate the preparation of a PDEA by an applicant, so long as there is independent verification and evaluation of the environmental data by agency staff. 40 CFR 1506.5(b).<sup>11</sup> Consistent with that regulation, SEA accepted the PDEA here and, after independently verifying the environmental data and analysis of environmental impacts in it, used information in the PDEA in preparing the Board’s EA, which was issued for public review and comment on October 15, 2001. SEA then

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<sup>9</sup> See RTR’s Reply to Riverview’s Supplemental Brief dated October 1, 2002.

<sup>10</sup> The EA was sent to numerous federal agencies that participate in the federal interagency committee established by the American Heritage Rivers EO: the Environmental Protection Agency; the Department of Interior (Fish and Wildlife Service); and the Department of Agriculture (Natural Resources Conservation Service). None of these federal agencies (or the local government interests that filed comments during the EA process) raised the concern now expressed by Riverview.

<sup>11</sup> Under NEPA, the environmental process is necessarily informal and all-inclusive, and depends on cooperative consultations with the applicant, as well as other agencies and other interested parties with expertise, so that all possible environmental information, issues, and points of view will come before the agency. City of Auburn v. United States, 154 F.3d 1025, 1033 (9th Cir. 1998), cert. denied, 527 U.S. 1022 (1999) (opportunity for public participation provides necessary checks and balances).

issued a Post EA and Supplemental Post EA addressing the written comments received from petitioners and others, and addressing concerns raised at a public meeting attended by approximately 500 persons. Because the agency independently evaluated the information submitted in the PDEA and is responsible for the EA's accuracy, it was entirely appropriate for SEA to permit RTR and URS to submit a PDEA.

In sum, the purported shortcomings in the Board's NEPA review and the May 2003 Decision do not exist. The Board here took the requisite "hard look" at environmental consequences required under NEPA, and none of the petitioners has raised issues that have not already been considered adequately. Petitioners simply disagree with the outcome of the Board's extensive analysis.

It is ordered:

1. The petitions for reconsideration are denied.
2. This decision is effective on its date of service.

By the Board, Chairman Nober.

Vernon A. Williams  
Secretary