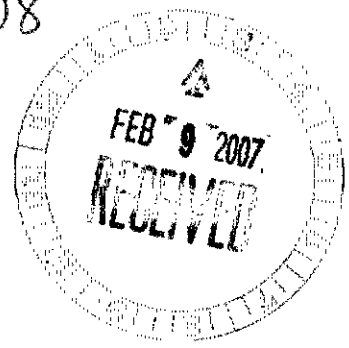


218608



EXPEDITED CONSIDERATION REQUESTED

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO.: 34997

PETITION OF JAMES RIFFIN
FOR EXPEDITED DECLARATORY ORDER

ENTERED
Office of Proceedings
FEB 9 - 2007
Part of
Public Record

FILED
FEB 9 - 2007
SURFACE
TRANSPORTATION BOARD

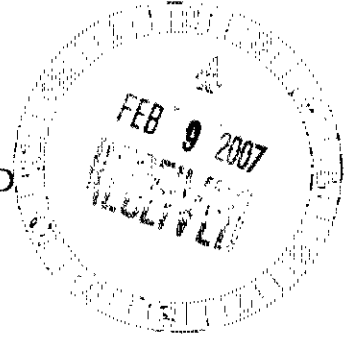
Filed by: James Riffin
1941 Greenspring Drive
Timonium, MD 21093
(443) 414-6210

Date: February 9, 2007

FEE RECEIVED
FEB 9 - 2007
SURFACE
TRANSPORTATION BOARD

EXPEDITED CONSIDERATION REQUESTED
BEFORE THE SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO.: 34997



PETITION OF JAMES RIFFIN
FOR EXPEDITED DECLARATORY ORDER

1. Petitioner, James Riffin, ("Riffin" or "Petitioner"), a Class III rail carrier,¹ respectfully petitions the Surface Transportation Board ("Board"), pursuant to the Board's authority under 5 U.S.C. §554 (e) and 49 U.S.C. §721 (b) (4), to enter a declaratory order to terminate a controversy, and / or to remove uncertainty, as to the preemptive reach of the Interstate Commerce Act, specifically declaring that:

(1) the Interstate Commerce Act ("ICA") completely preempts State and local regulation of transportation by rail carrier;

(2) the construction, acquisition, maintenance and / or operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or of facilities, including rail carrier yards, rail carrier freight depots, and rail carrier maintenance-of-way ("MOW") facilities, are subject to the exclusive jurisdiction of the Board;

(3) the remedies provided in 49 U.S.C. §§10101-11908 with respect to regulation of rail transportation are exclusive and preempt the remedies provided under State or local law;

(4) State or local permitting or preclearance requirements of any kind, including building permits, zoning ordinances, and environmental and land use permitting requirements, that would affect the construction, acquisition, maintenance and / or operation, of rail lines, spur, industrial,

¹ See *CSX Transportation, Inc. – Abandonment Exemption – In Allegany County, MD*, STB Docket No. AB-55 (Sub-No. 659X) (STB served August 18, 2006); *James Riffin d/b/a The Raritan Valley Connecting Railroad – Acquisition and Operation Exemption – On Raritan Valley Connecting Track*, STB Finance Docket No. 34963, (STB served December 20, 2006); and *James Riffin d/b/a The Northern Central Railroad – Acquisition and Operation Exemption – in Baltimore City, MD*, STB Finance Docket No. 34982, (STB served January 26, 2007).

team, switching, or side tracks, or rail carrier facilities, including rail carrier yards, rail carrier freight depots, and rail carrier MOW facilities, are completely preempted by the ICA; and

(5) What constitutes a line of rail, spur, industrial, team, switching, or side track, or a rail carrier facility, including a rail carrier yard, rail carrier freight depot, or a rail carrier MOW facility, is to be determined exclusively by the Board.

1. THE CONTROVERSY

2. On November 19, 2004, the circuit court for Baltimore County, Maryland, found that the ICA did not preempt Maryland's environmental regulations, and further found that the construction and operation of Petitioner's MOW facility located in Cockeysville, Maryland ("Site"), was subject to Maryland's and Baltimore County, Maryland's preclearance and permitting requirements. The circuit court then ordered the Petitioner to remove all of his MOW equipment (tamper, ballast equalizers, scarifiers, Burro cranes, cribber) and materials (concrete ties, ballast, rails) from the Site, then return the Site to the condition it was in prior to Petitioner's construction of this MOW facility. On appeal, Maryland's Court of Special Appeals did not address the preemption issue. On September 17, 2004, the United States District Court for the District of Maryland, Baltimore Division, found that the ICA did not completely preempt State and local laws that had the effect of regulating transportation by rail carrier.

3. Maryland's Environmental laws mandate Petitioner must obtain a permit from Maryland's Department of the Environment ("MDE") prior to doing any work in a floodplain. Baltimore County's Environmental laws prohibit placement of equipment or materials of any kind in a floodplain. Petitioner's Allegany County, Maryland line and Petitioner's Cockeysville MOW facility, are both in a floodplain. Maryland's and Baltimore County's environmental departments have adamantly insisted Petitioner must first obtain a permit from those departments prior to doing any work in a floodplain. Petitioner has argued that since the ICA completely preempts State and local regulation of transportation by rail carrier, and since Petitioner's activities on his Cockeysville and Allegany County rail properties fall within the definition of transportation by rail carrier, he need not obtain prior approval from these State and local agencies prior to performing maintenance work on his Allegany County line of railroad, nor need

he obtain approval from these State and local agencies prior to constructing or operating his Cockeysville MOW facility, or prior to placing his MOW equipment and materials at his Cockeysville MOW facility.

2. REQUEST FOR ORDER

4. Petitioner respectfully requests the Board institute a declaratory order proceeding, then render a decision addressing the preemptive reach of the ICA. Instituting a declaratory order proceeding, then addressing the preemptive reach of the ICA, would terminate the controversy between Petitioner and the State of Maryland, would provide guidance for both the Baltimore County circuit court and the 4th Circuit Court of Appeals, and would reduce the uncertainty associated with Petitioner's Allegany County line (must he first obtain a permit from MDE prior to maintaining his line?), and would reduce the uncertainty associated with Petitioner's Cockeysville MOW facility (must Petitioner discontinue operations, then abandon his Cockeysville MOW facility?).

3. REQUEST FOR EXPEDITED CONSIDERATION

5. Petitioner's Allegany County line needs some maintenance work. Until the issue of whether Petitioner must obtain a State and / or local permit prior to doing this maintenance-of-way work is resolved, Petitioner's line will continue to deteriorate.

6. The issue of whether the ICA completely preempts State and local regulation of transportation by rail carrier, is currently before the 4th Circuit Court of Appeals.

7. A hearing is scheduled for March 7, 2007, in the circuit court for Baltimore County, Maryland, to determine whether the Petitioner should be held in contempt of court for failing to remove his MOW equipment and materials from his Cockeysville MOW facility, and for failing to discontinue all activities at this site.

4. STATEMENT OF FACTS

8. On December 14, 2005, the Board granted a corporate affiliate of Petitioner authority to acquire and operate a line of railroad in Allegany County, Maryland. On June 20, 2006, Petitioner acquired the line. On August 18, 2006, the Board granted Petitioner authority to acquire and operate the line in his own personal name. See footnote 1.

9. Inspection of the Allegany County line revealed it needed maintenance work. (The creek adjacent to the line had eroded sections of the way. These eroded sections need to be repaired. The line needs additional ballast and ties.) The line is in a floodplain. Maryland's Environmental laws prohibit any activity in a floodplain without prior State and local approval. Petitioner has argued, to no avail, that he does not need State or local approval prior to performing work on his rail line. Until the issue of whether Petitioner must obtain a permit prior to working on those portions of his line that is in a floodplain is resolved, this needed maintenance work cannot be performed.

10. In 1999, Petitioner made his first attempt to acquire and operate a line of railroad. (He spent over a year trying to ascertain whether reinstituting rail service on former lines of railroad on Maryland's eastern shore was viable. He concluded it was not viable.) On July 7, 2003, Petitioner filed his first Notice of Exemption ("NOE"), see FD 34375, to acquire and operate that portion of the Cockeysville Industrial Track ("CIT") (former Northern Central line) that lies between Cockeysville, Maryland and the Maryland / Pennsylvania line, a distance of 20.9 miles. Norfolk Southern ("NS"), who had operating rights on the portion of the line between Cockeysville and Baltimore, objected, stating it would not permit Petitioner to connect his proposed line of railroad with NS' line of railroad. Faced with this obstacle, Petitioner withdrew his NOE. On March 8, 2004, Petitioner filed his second NOE, see FD 34484, to acquire and operate the 2.9 miles of the CIT that was adjacent to Petitioner's Cockeysville properties, and an additional 20.9 miles of that portion of the former Northern Central line that was in York County, Pennsylvania. The State of Maryland objected, arguing it owned the 2.9 miles of line in Cockeysville, and stating it would never consent to Petitioner operating on this line. The Board, finding the NOE to be controversial, elected to revoke the NOE. Not to be deterred, on April 28, 2004, Petitioner filed his third NOE, to acquire and operate only that portion of the former Northern Central line that was in York County, Pennsylvania. See FD 34501. The State of

Maryland filed another objection. Ten months later, the Board elected to revoke Petitioner's third NOE on the grounds that it too was controversial. In its decision, the Board indicated that if Petitioner desired to acquire and operate a line of railroad, Petitioner should use a different procedure. Not long thereafter, CSXT filed to abandon its Georges Creek subdivision in Allegany County, Maryland. Petitioner, mindful that every time he tried to acquire a line of railroad, Maryland filed an objection, elected to file an Offer of Financial Assistance ("OFA") (a different procedure) in the name of a limited liability company. After the transaction had been consummated (and could not be revoked), Petitioner sought and received authority to operate the line in his own name. See footnote one. And sure enough, as soon as it became known that Petitioner was the purchaser of the line, Maryland (via the Allegany County Commissioners), filed an objection.

11. In December, 2005, Norfolk Southern filed to abandon its operating rights on that portion of the CIT between Baltimore and Cockeysville. See AB 290-237X. It also requested the abandonment be exempted from the Board's OFA procedures. Petitioner objected to the OFA exemption request, then filed a Notice of Intent to File an OFA to purchase the line. Petitioner also pointed out that NS' petition had two typographical errors, and failed to address the unauthorized sale of the line from Conrail to the Maryland Transit Administration ("MTA"). On April 3, 2006, the Board denied NS' petition. On December 22, 2006, the MTA filed a Declaratory Order petition (see FD 34975) asking the Board to find that the MTA did not acquire common carrier obligations on the line when it purchased the line. Petitioner still desires to acquire this line, and with some luck and fortitude, will acquire the right to provide freight rail service on this line.

12. In the meantime, Petitioner has acquired authority to operate the Raritan Valley Connecting Track, in Somerset County, New Jersey (see FD 34963), and shortly hopes to acquire authority to operate that portion of the former Maryland and Pennsylvania railroad line that is near Penn Station in Baltimore City (see FD 34982). And as expected, Maryland (via the MTA), has filed an objection to Petitioner acquiring and operating any portion of the Maryland and Pennsylvania line.

13. While it is not obviously clear why Maryland has so steadfastly objected to all of Petitioner's efforts to operate rail lines in or near Maryland, the common thread to all of these objections is the Cockeysville Industrial Track. As stated above, the MTA bought this line in 1990, then proceeded to use it for commuter light rail service. The MTA adamantly does not want rail freight service on this line. Norfolk Southern has been amenable to discontinuing, permanently, freight rail service on this line. Absent Petitioner's efforts to acquire this line, it would have been abandoned. And therein lies Maryland's dilemma: How does it prevent this line from being used for rail freight service? Maryland's only recourse is to ensure Petitioner never utilizes any portion of the CIT for anything that relates to rail freight service.

14. In April, 2003, Petitioner purchased two Cockeysville properties adjacent to the CIT, intending to use them as his future MOW facility. During February, 2004, Petitioner began clearing an overgrown portion of the site. In March, 2004, MDE inspectors visited the site. Petitioner revealed to the inspectors that he intended to use the site as his future MOW facility. MDE then made a concerted effort to prevent Petitioner from ever using the site as a MOW facility. As stated above, each time Petitioner acquired authority to acquire and operate any portion of the CIT, MDE made the proceeding controversial, thereby inducing the Board to revoke Petitioner's NOE's. To date, MDE has been successful, for MDE has been successful in using Maryland's State courts to enjoin Petitioner from completing his Cockeysville MOW facility.

5. SUMMARY OF ARGUMENT

15. The 5th and 8th Circuit Courts of Appeal, and three U.S. District Courts have explicitly stated the Interstate Commerce Act ("ICA") **completely preempts** State and Local regulation of transportation by rail carriers. The 8th Circuit and the U.S. District Court for the N.D. of Georgia have explicitly stated: "The ICA provides both a forum and a set of remedies that is exclusive and completely preempts competing state law claims." The U.S. Supreme Court has stated: "[I]t would be inconsistent with [federal] policy," we observed, "if local authorities retained the power to decide" whether the carriers could do what the [Interstate Commerce] Act authorized them to do." The Supreme Court has further held that: "Once an area of state law has been completely

preempted, any claim based on that preempted state law claim is considered from its inception to raise a federal claim and therefore arises under federal law.”

16. Your Petitioner would argue the ICA has completely preempted all State and local regulation of transportation by rail carriers, and, consequently, Petitioner’s Allegany County rail line and Petitioner’s Cockeysville MOW facility, are subject to the exclusive regulatory authority of the Board.

6. STATUTES INVOLVED²

17. 49 U.S.C. § 10501 (b):

“(b) The jurisdiction of the Board over –

(1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and

(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,

is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

18. 49 U.S.C. §10102. Definitions

In this part –

(1) “Board” means the Surface Transportation Board;

(2) “car service” includes (A) the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, other vehicles, and special types of equipment used in the transportation of property by a rail carrier, and (B) the supply of trains by a rail carrier;

(3) “control”, when referring to a relationship between persons, includes actual control, legal control, and the power to exercise control, through or by (A) common directors, officers,

² The Interstate Commerce Act (“ICA”), enacted in 1887, is codified in 49 U.S.C. §§10101 - 11908. The ICA has been amended several times, the two most recent amendments being the Staggers Rail Act (1980) and the Interstate Commerce Commission Termination Act (“ICCTA”) (1996) [which amended, then reenacted, the ICA. One significant change brought about by the ICCTA, was the abolishment of the Interstate Commerce Commission, which was replaced by the Surface Transportation Board (“Board” or “STB”)]. Two other significant changes brought about by the ICCTA, was a broadening of the exclusive jurisdiction of the Board, which, under the ICCTA, includes wholly intrastate tracks, thereby eliminating concurrent State and Federal jurisdiction over wholly intrastate tracks (which the Staggers Rail Act had provided for). In addition, the ICCTA eliminated §10101(a)(1)(E), which stated: “(E) to cooperate with each State and the officials of each State on transportation matters;”

stockholders, a voting trust, or a holding or investment company, or (B) any other means;

(4) “person”, in addition to its meaning under section 1 of title 1, includes a trustee, receiver, assignee, or personal representative of a person;

(5) “rail carrier” means a person providing common carrier railroad transportation for compensation, but does not include street, suburban, or interurban electric railways not operated as part of the general system of rail transportation;

(6) “railroad” includes –

(A) a bridge, car float, lighter, ferry, and intermodal equipment used by or in connection with a railroad;

(B) the road used by a rail carrier and owned by it or operated under an agreement; and

(C) a switch, spur, track, terminal, terminal facility, and a freight depot, yard, and ground, used or necessary for transportation;

(7) “rate” means a rate or charge for transportation;

(8) “State” means a State of the United States and the District of Columbia;

(9) “transportation” includes –

(A) a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use; and
(B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property;”

(10) “United States” means the States of the United States and the District of Columbia.”

19. 49 U.S.C. § 10101 Rail transportation policy.

“In regulating the railroad industry, it is the policy of the United States Government –

(1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail;

(2) to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required;

(3) to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Board;

(4) to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense;

(5) to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes;

(6) to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to

attract capital;

(7) to reduce regulatory barriers to entry into and exit from the industry;

(8) to operate transportation facilities and equipment without detriment to the public health and safety;

(9) to encourage honest and efficient management of railroads;

(10) to require rail carriers, to the maximum extent practicable, to rely on individual rate increases, and to limit the use of increases of general applicability;

(11) to encourage fair wages and safe and suitable working conditions in the railroad industry;

(12) to prohibit predatory pricing and practices, to avoid undue concentrations of market power, and to prohibit unlawful discrimination;

(13) to ensure the availability of accurate cost information in regulatory proceedings, while minimizing the burden on rail carriers of developing and maintaining the capability of providing such information;

(14) to encourage and promote energy conservation; and

(15) to provide for the expeditious handling and resolution of all proceedings required or permitted to be brought under this part.”

7. ARUGMENT

7 A. Complete Preemption Turns State Claim Into Federal Claim From Its Inception.

20. In *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 at 63, 107 S.Ct. 1542 at 1546, 95 L.Ed. 2d 55 (1987), the court made the following comments:

“Federal pre-emption is ordinarily a federal defense to the plaintiff’s suit. As a defense, it does not appear on the face of a well-pleaded complaint, and, therefore, does not authorize removal to federal court. *Gully v. First National Bank*, [299 U.S. 109 at 113, 57 S.Ct. 96 at 98, 81 L.Ed. 70 (1936)]. One corollary of the well-pleaded complaint rule developed in the case law, however, is that Congress may so completely pre-empt a particular area that any civil complaint raising this select group of claims is necessarily federal in character. For 20 years, this Court has singled out claims pre-empted by §301 of the LMRA for such special treatment. *Avco Corp. v. Machinists*, 390 U.S. 557, 88 S.Ct. 1235, 20 L.Ed.2d 126 (1968).

“The necessary ground of decision [in *Avco*] was that the preemptive force of §301 is so powerful as to displace entirely any state cause of action ‘for violation of contracts between an employer and a labor organization.’ Any such suit is purely a creature of federal law, notwithstanding the fact that state law would provide a cause of action in the absence of §301.” *Franchise Tax Board of Cal. v. Construction Laborers Vacation Trust*, 463 U.S. 1 at 23, 103 S.Ct. 2840 at 2853, [77 L.Ed. 2d 420 (1983)].” “

21. In cases where complete preemption exists, “any complaint that comes within the scope of the federal cause of action necessarily ‘arises under’ federal law.” *Franchise Tax Board v. Const. Laborers Vac. Trust*, 463 U.S. 1 at 24, 103 S.Ct. 2840 at 2854, 77 L.Ed. 2d 420 (1983).

“[A] plaintiff’s characterization of a claim as based solely on state law is not dispositive of whether federal question jurisdiction exists. In certain instances, the preemptive force of a federal statute is so complete that it transforms complaints styled as ordinary common-law claims into ones stating a federal claim.” *Peters v. Union Pac. R.R. Co.*, 80 F.3d 257, 260 (8th Cir. 1996) (citing *Metropolitan Life Ins. Co. v. Taylor*, *supra*.) “Once an area of state law has been completely preempted, any claim based on that preempted state law claim is considered from its inception to raise a federal claim and therefore arises under federal law.” *Id.* (citing *Humphrey v. Sequentia, Inc.*, 58 F.3d 1238, 1242 (8th Cir. 1995)). *See also, Deford v. Soo Line R.R.*, 867 F.2d 1080, 1084 (8th Cir.) (holding that complete preemption “prohibits a plaintiff from defeating removal by failing to plead necessary federal questions in complaint”), *cert. denied*, 492 U.S. 927, 109 S.Ct. 3265, 106 L.Ed. 2d 610 (1989).”

7 B. SUPREME COURT CASES HOLDING THE ICA PREEMPTS STATE LAW

22. To date, the Supreme Court has addressed the preemptive reach of the ICA a total of 10 times. A synopsis of the court’s decision in five of those cases, is presented below:

A. *Chicago & N.W. Transp. v. Kalo Brick & Tile*, 450 U.S. 311, 101 S.Ct. 1124, 67 L.Ed.2d 258 (1981) [***Kalo Brick***] Held:

“The Interstate Commerce Act is among the most pervasive and comprehensive of federal regulatory schemes and has consequently presented recurring pre-emption questions from the time of its enactment. Since the turn of the century, we have frequently invalidated attempts by the States to impose on common carriers obligation that are plainly inconsistent with the plenary authority of the Interstate Commerce Commission or with congressional policy as reflected in the Act.” U.S. at 318; S.Ct. at 1130.

B. *Chicago v. Alchison, T. & S.F.R.Co.*, 357 U.S. 77, 87, 78 S.Ct. 1063, 1069, 2 L.E.2d 1174 (1958). Held: “that a city ordinance requiring a license from a municipal authority before a railroad could transfer passengers, an activity also subject to regulation under the ICA, was facially invalid as applied to an interstate carrier. “[I]t would be inconsistent with [federal] policy,” we observed, “if local authorities retained the power to decide” whether the carriers could do what the Act authorized them to do.” *Kalo Brick* at U.S. 318, S.Ct. at

1130-31. (Emphasis added.)

C. *Missouri Pacific R.Co. v. Stroud*, 267 U.S. 404, 408, 45 S.Ct. 243, 245, 69 L.Ed. 683 (1925). “[T]here can be no divided authority over interstate commerce, and ... the acts of Congress on that subject are supreme and exclusive.” *Kalo Brick* at U.S. 318-319, S.Ct. at 1130.

D. *Texas & Pacific R. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446, 27 S.Ct. 350, 357, 51 L.Ed.553 (1907): “a state-court action “would be absolutely inconsistent with the provisions of the act.” ” *Kalo Brick* at U.S. 318, S.Ct. at 1130.

E. *Transit Comm’n v. United States*, 289 U.S. 121, 129, 53 S.Ct. 536, 538, 77 L.Ed. 1075 (1933):

“Among those evils is “[m]ultiple control in respect of matters affecting [interstate railroad] transportation,” because such control, in the judgment of Congress, has proved “detrimental to the public interest.” 289 U.S., at 127, 53 S.Ct., at 538.” *Kalo Brick* at U.S. 321, S.Ct. at 1131.

7 C. CASES HOLDING THE ICA COMPLETELY PREEMPTS STATE LAW

23. The following courts have ruled the Interstate Commerce Act (“ICA”), codified at 49 U.S.C. 701-727 (general provisions) and 10101-11908 (rail provisions), **completely preempts** all State and local regulation of rail operations: *Deford v. Soo Line Railroad Company*, 867 F. 2d 1080 (8th Cir. 1989); *Friberg v. Kansas City Southern Ry. Co.*, 267 F.3d 439 (5th Cir. 2001); *Cedarapids, Inc. v. Chicago, Central & Pacific R.*, 265 F. Supp. 2d 1005 at 1010 (N.D. Iowa 2003); *CSX Transp., Inc. v. Georgia Public Serv. Com’n*, 944 F. Supp. 1573 (N.D. Ga. 1996); *Dakota, Minn. & Eastern R.R. Corp. v. So. Dakota*, 236 F. Supp. 2d 989, 1005 (D.S.D. 2002). In accord: *CSX Transp., Inc. – Petition for Declaratory Order*, STB Docket No. 34662, decided March 14, 2005. [The conclusions of the Commission are “entitled to considerable deference.” *Kalo Brick, op. cit.*, U.S. at 321, S.Ct. at 1132.]

7 D. ADDITIONAL CASES HOLDING LOCAL AND STATE REGULATION OF RAILROAD FACILITIES HAVE BEEN PREEMPTED BY THE ICA

24. In *Wisconsin Central Ltd., v. The City of Marshfield*, 160 F. Supp. 2d 1009 (W.D. Wis. 2000), the court made the following statements:

“Environmental laws - statutes of general application - have been found to be expressly preempted under the ICCTA when applied to facilities and property constituting rail transportation.” See *City of Auburn*, 154 F.3d at 1031”. (Emphasis added.) *Wisconsin Central Ltd.* at 1014.

25. In *Soo Line R. Co. v. City of Minneapolis*, 38 F. Supp. 2d 1096, (D. Minn. 1998), that court stated:

“Thus, when section 10501(b) grants the STB exclusive jurisdiction over “transportation by rail carriers,” it logically includes the yard, property, facilities and any intermodal equipment used in connection with a railroad, or related to the movement of passengers or property.” *Id.* at 1099. (Emphasis added.)

26. In *CSX Transp., Inc. v. City of Plymouth*, 92 F. Supp. 2d 643, 658 (E.D. Mich. 2000), that court stated: “To the extent the state law is viewed as having the effect of requiring the railroad to undergo substantial capital improvements, the Court finds that the law is preempted by the Interstate Commerce Commission Termination Act.”

27. In *CSX Transportation, Inc. – Petition for Declaratory Order*, *op. cit.* at p. 6, the Board declared:

“However, the courts have made clear that state or local permitting or preclearance requirements of any kind that would affect rail operations (including building permits, zoning ordinances, and environmental and land use permitting requirements) are preempted. See, e.g., City of Auburn, 154 F.3d at 1029-31; *Soo; Austell; Ridgefield Park*.” [Emphasis added.]

7 E. THE REMEDIES PROVIDED IN 49 U.S.C. §§10101 - 11908 ARE EXCLUSIVE AND PREEMPT THE REMEDIES PROVIDED UNDER FEDERAL OR STATE LAW

28. In *CSX Transp., Inc. v. Georgia Public Serv. Com’n*, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996), that court stated:

“The most natural reading of section 10501 (b)(2) is that the federal remedies provided by the ICC Termination Act **are the only remedies available** as to the regulation of rail transportation, and that **the federal remedies are exclusive of state remedies** except where the ICC Act has expressly provided otherwise.” (Emphasis added)

29. In *Deford v. Soo Line Railroad Company*, 867 F. 2d 1080 at 1091 (8th Cir. 1989), the 8th Circuit stated: “**The ICA provides both a forum and a set of remedies that is exclusive and completely preempts competing state law claims.**” (Emphasis added.)

30. In *CSX Transportation, Inc. – Petition for Declaratory Order*, Finance Docket No. 34662, Decided March 14, 2005, the Board made the following declarations:

Section 10501(b) also expressly provides that “the remedies provided [in 49 U.S.C. 10101- 11908] with respect to ... practices, routes, services, and facilities of such carriers” are “exclusive and preempt the remedies provided under Federal or State law.” Thus, **section 10501(b) does not leave room for state and local regulation of activities related to rail transportation**, including routing matters. (Emphasis added.)

31. The following statement, made by the Supreme Court in *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54, 107 S.Ct. 1549, 1556, 95 L.Ed.2d 39 (1987), is equally applicable to the case at bar:

“ ‘[t]he presumption that a remedy was deliberately omitted from a statute is strongest when congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement.’ “ [quoting *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 147, 105 S.Ct. 3085, 3092-3093, 87 L.Ed.2d 96 (1985).]

“The policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA.”

32. In the instant case, Maryland authorities are asking the circuit court to order Riffin to completely relocate his Cockeysville railroad maintenance-of-way facility to some other location (which would require Riffin to expend substantial capital to acquire some other location), and to impose substantial fines on Riffin, **prior to** final appellate resolution of the underlying legal issue of whether the Plaintiffs’ regulations have been completely preempted by Federal law. The State-law remedies sought by Plaintiffs are **not** included in 49 U.S.C. §§10101 - 11908, and

which, if imposed, would violate Federal law. Permitting the Maryland authorities to utilize their State-law based remedies would undermine Congress' policy choices of including certain remedies and excluding other remedies.

**7 F. A STATE COURT MAY NOT RENDER A BINDING JUDICIAL DECISION
INTERPRETING § 10501 (b) OF THE ICA
[WHICH CONTAINS A PROVISION FOR EXCLUSIVE FEDERAL JURISDICTION]**

33. 49 U.S.C. § 10501 (b) states:

“(b) The jurisdiction of the Board over –

(1) **transportation by rail carriers, and the remedies provided in this part with respect to ... facilities of such carriers; and**

(2) **the construction, ... operation, ... of ... facilities, ...**

is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to **regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.** (Emphasis added.)

34. 49 U.S.C. §10102 (9) **broadly** defines the word ‘transportation’ as follows:

“(9) “transportation” includes –

(A) a ... yard, property, **facility, ... or equipment of any kind related** to the movement of passengers or property, or both, by rail, **regardless of ownership or an agreement concerning use; and**

(B) **services related to that movement,** including receipt, delivery, ... storage, handling, and interchange of ... property;” (Emphasis added.)

35. In *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617, 109 S.Ct. 2037, 2045, 104 L.Ed. 2d 696 (1989) the Supreme Court made the following statement: “Although the state courts are not bound to adhere to federal standing requirements, they possess the authority, **absent a provision for exclusive federal jurisdiction**, to render binding judicial decisions that rest on their own interpretations of federal law. See 28 U.S.C. §1738; *Grubb v. Public Utilities Comm’n of Ohio*, 281 U.S. 470, 50 S.Ct. 374, 74 L.Ed. 972 (1930). Indeed, inferior federal courts are not required to exist under Article III, and the Supremacy Clause explicitly states that “the Judges in every

State shall be bound” by federal law. U.S. Const., Art. VI, cl. 2.” (Emphasis added.)

**7 G. THERE IS NO BEGINNING PRESUMPTION AGAINST PREEMPTION
WHEN THE STATE REGULATES IN AN AREA WHERE THERE HAS BEEN
A HISTORY OF SIGNIFICANT FEDERAL PRESENCE**

36. There is no beginning presumption against preemption when the State regulates in an area where there has been a history of significant federal presence. *See: U.S. v. Locke*, 529 U.S. 104, 108; 120 S. Ct. 1135, 1147. (Holding: “an “assumption” of nonpreemption is not triggered when the State regulates in an area where there has been a history of significant federal presence.” ... “The state laws now in question bear upon national and international maritime commerce, and in this area there is no beginning assumption that concurrent regulation by the State is a valid exercise of its police powers.”); *See also: CSX Transp., Inc. v. City of Plymouth*, 92 F. Supp. 2d 643, 649 (“There can be no doubt that just as Congress has regulated ships and vessels since the beginning of the Republic, it has similarly done so with respect to our nation’s rail system. Both Congress and the courts have traditionally recognized a need to regulate railroad operations at a national level. Enacted in 1887, the Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887), has been described as “among the most pervasive and comprehensive of federal regulatory schemes.” (Citations omitted.) “As amended, the Act still governs federal railroad regulation. Congress’ power to regulate the railroad industry has been well-recognized. (Citation omitted.) The preclusive effect of federal regulation has been repeatedly acknowledged. (Citations omitted.) “These decisions and Acts of Congress, as well as the numerous federal regulations which pertain to this area, have created “an extensive federal statutory and regulatory scheme.” *Locke*, 120 S.Ct. at 1148. Accordingly, in this area, as in *Locke*, where the state statute at issue bears upon an area traditionally regulated by the federal government, “there is no beginning assumption that concurrent regulation by the State is a valid exercise of its police powers.” *Id.*”); *See also Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230.

**7 H. MARYLAND’S DEPARTMENT OF THE ENVIRONMENT HAS ADMITTED
THE ICA COMPLETELY PREEMPTS ECONOMIC REGULATION
OF TRANSPORTATION BY RAIL CARRIER**

37. At a September 8, 2004 U.S. District Court hearing, Mr. Snyder, attorney for the Maryland Department of the Environment, made the following statement:

“The state agrees that economic regulation, state and local economic regulation has been held to be completely preempted by the ICCTA.” T. (USDC) 28.

38. In *City of Auburn v. U.S. Government*, 154 F. 3d 1025 at 1030 (9th Cir. 1998), that court stated:

“In fact, there is nothing in the case law that supports Auburn’s argument that, through the ICCTA, Congress only intended preemption of economic regulation of the railroads. All cases cited by the parties find a broad reading of Congress’ preemption intent, not a narrow one. *See also Georgia Public Service Comm’n v. CSX Transp., Inc.*, 225 Ga. App. 787, 484 S.E. 2d 799, 801 (1997); *In re Burlington Northern R.R.*, 249 Neb. 821, 545 N.W.2d 749, 751 (1996).

Pre-ICCTA case law addressing federal preemption over railroad operations also supports a broad reading of the statute.”

At 1031, the Auburn court stated:

“We believe the congressional intent to preempt ... state and local [environmental] regulation of rail lines is explicit in the plain language of the ICCTA and the statutory framework surrounding it.” (Emphasis added.)

39. Consequently, since the ICA completely preempts regulation of transportation by rail carriers, since Petitioner is a rail carrier, and since Maryland’s state claim has the effect of regulating transportation by rail carrier, Petitioner would argue, Maryland’s state claim is in fact a federal claim, and a U.S. District Court would have subject matter jurisdiction over this matter. “[I]t is an independent corollary of the well-pleaded complaint rule that a plaintiff may not defeat removal by omitting to plead necessary federal questions in a complaint. *See Avco Corp. [supra]*.” *Franchise Tax Bd., supra*, at 22, 103 S.Ct.at 2853.

40. Petitioner would also argue that since Maryland’s state claim conflicts with federal law, it is without legal effect. “Preemption doctrine is founded in the Supremacy Clause of the United States Constitution and invalidates any state law that contradicts or interferes with an Act of

Congress. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S.Ct. 2608, 2617, 120 L.Ed. 2d 407 (1992) (state laws that conflict with federal law are “without effect”);” Quoted in *Soo Line R. Co. v. City of Minneapolis*, 38 F. Supp. 2d 1096 at 1098 (D. Minn. 1998).

7 I. PREEMPTION GUIDELINES

41. In *CSX Transp., Inc. v. Georgia Public Serv. Com’n*, (“CSX”) 944 F. Supp. 1573, 1580 - 1581 (N.D. Ga. 1996), that court stated:

“Preemption doctrine is rooted in the Supremacy Clause of the United States Constitution, *Teper v. Miller*, 82 F.3d 989, 993 (11th Cir. 1996). See U.S. Const. Art. VI, cl. 2. Because it requires that conflicts between state and federal law be resolved in favor of federal law, the Supremacy Clause prohibits the enforcement of any state law that conflicts with a valid federal statute. *Taylor v. General Motors Corp.*, 875 F.2d 816, 821 (11th Cir. 1989).

The Eleventh Circuit discussed the proper framework for resolving preemption questions in *Teper v. Miller*, *supra*. In *Teper*, the court recognized that there are three categories of preemption: (1) express preemption, where Congress defines explicitly the extent to which its enactments preempt state law; (2) field preemption, where Congress’s regulation of a field is so pervasive or the federal interest so dominant that an intent to occupy the entire field can be inferred; and (3) conflict preemption, where state law stands as an obstacle to the accomplishment of the full purposes and objectives of a federal statute. *Id.* At 993. The Court noted that the overriding principle which should guide any preemption analysis is whether Congress intended to preempt state law. *Id.* See *Medtronic v. Lohr*, 518 U.S. 470, 485, 116 S. Ct. 2240, 2255, 135 L.Ed. 2d 700 (1996) (stating that purpose of Congress is “ultimate touchstone” in every preemption case) (citing *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S. Ct. 2608, 2617, 120 L.Ed. 2d 407 (1992)); and *Illinois Commerce Commission v. ICC*, 879 F.2d 917, 921 (D.C.Cir. 1989) (noting that critical question in any preemption analysis is ‘whether Congress intended that federal regulations supersede state law’).”

... The intent of Congress to expressly preempt state law is “primarily discerned from the language of the preemption statute and the statutory framework surrounding it.” *Medtronic*, *supra*. The policy behind the federal statute, as well as its legislative history, may also be relevant in determining whether Congress intended the statute to preempt state law. *Id.*”

42. In *CSX Transp., Inc. v. City of Plymouth*, 92 F. Supp. 2d 643 (E.D. Mich. 2000) [wherein the City of Plymouth attempted to regulate how long a train blocked a highway crossing], the

court cited the following from *United States v. Locke*, 529 U.S. 104, 108, 120 S. Ct. 1135, 1147-1148 (2000), (a case involving maritime preemption):

“In *Locke*, the Court made clear that “an ‘assumption’ of nonpreemption is not triggered when the State regulates in an area where there has been a history of significant federal presence.” ... “The *Locke* Court noted that “Congress has legislated in the [area of maritime commerce] from the earliest days of the Republic, creating an extensive federal statutory and regulatory scheme.” *City of Plymouth* at 648.

“Important for our purposes here, the Court expressly stated:

“The state laws now in question bear upon national and international maritime commerce, and in this area there is no beginning assumption that concurrent regulation by the State is a valid exercise of its police powers. Rather, we must ask whether the local laws in question are consistent with the federal statutory structure, which has as one of its objectives a uniformity of regulation for maritime commerce.” *Locke* at 1148. *City of Plymouth* at 648.

The *City of Plymouth* court then stated:

“There can be no doubt that just as Congress has regulated ships and vessels since the beginning of the Republic, it has similarly done so with respect to our Nation’s rail system. Both Congress and the courts have traditionally recognized a need to regulate railroad operations at a national level. Enacted in 1887, the Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887), has been described as “among the most pervasive and comprehensive of federal regulatory schemes.” *Chicago and N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318, 101 S. Ct. 1124, 67 L.Ed. 2d 258 (1981). *City of Plymouth* at 648.

After citing numerous Acts of Congress that affect railroads, the *City of Plymouth* court then concluded:

“These decisions and Acts of Congress, as well as the numerous federal regulations which pertain to this area, have created “an extensive federal statutory and regulatory scheme.” *Locke* at 1148. Accordingly, in this area, as in *Locke*, where the state statute at issue bears upon an area traditionally regulated by the federal government, **“there is no beginning assumption that concurrent regulation by the State is a valid exercise of its police powers.”** *Id.* *City of Plymouth* at 649. (Emphasis added.)

“To the extent the state law is viewed as having the effect of requiring the railroad to undergo substantial capital improvements, the Court finds that the law is preempted by the Interstate Commerce Commission Termination Act.” *City of Plymouth* at 658.

7 J. ICCTA PREEMPTION

43. The Interstate Commerce Commission Termination Act (“ICCTA”), enacted in 1996, amended the ICA. The ICA, as amended by the ICCTA, contains an express preemption clause. As was stated in *CSX Transp., Inc. v. Georgia Public Serv. Com’n, op. cit.* (p. 1581): “It is difficult to imagine a broader statement of Congress’s intent to preempt state regulatory authority over railroad operations.” In the *CSX* case, the Defendants tried to argue the ICCTA’s preemption clause preempted state remedies only when federal remedies are provided under the ICCTA. The court responded to this argument as follows:

“Defendants’ argument reflects a misunderstanding not only of the plain language of section 10501 (b)(2), but also of the ICC Termination Act generally. The most natural reading of section 10501(b)(2) is that the federal remedies provided by the ICC Termination Act are the only remedies available as to the **regulation** of rail transportation, and that the federal remedies are exclusive of state remedies except where the ICC Act has expressly provided otherwise. (Emphasis added.) See S.Rep. No. 176, 104th Cong., 1st Sess. 14 (1995) (explaining that ICC Termination Act “should not be construed to authorize states to regulate railroads in areas where federal regulation has been repealed by the bill”); and H.R. Conf. Rep. No. 422, 104th cong., 1st Sess. 167 (1995), U.S.Code Cong. & Admin.News 1995, pp. 793, 852 (stating that “integrated into the statement of general jurisdiction is the delineation of the *exclusivity* of federal remedies with respect to the regulation of rail transportation”) (emphasis added).” *CSX Transp., Supra*, at 1581.

44. Since the ICCTA clearly states all Federal and State remedies are preempted by the ICCTA, under the guidelines enumerated in *Chevron, U.S.A. Inc. v. Natural Resources Defense*, 467 U.S. 837 at 842-843, 104 S.Ct. 2778 at 2781, 81 L.Ed. 2d 694 (1984), while the court is prohibited from deferring to the Board’s interpretation of the limits of its jurisdiction and preemption, the court may find the Board’s interpretation of the ICCTA to be highly persuasive.

45. The ICCTA grants exclusive jurisdiction to the Surface Transportation Board over “(1) transportation by rail carriers, . . . and . . . (2) the . . . operation. . . of . . . facilities.” USC 10501 (b)(1) & (2). “Transportation” as used in section 10501 (b)(1) is defined very expansively in the ICCTA to include:

“(A) a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, **property**,

facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use; and (B) **services related to that movement**, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property. 49 U.S.C. 10102 (9) (A) & (B). (Emphasis added.)

46. The court in *CSX Transp., Inc. v. Georgia Public Serv. Com'n*, *op. cit.*, stated:

“As discussed, it is clear to the Court that Congress intended the preemptive net of the ICC Termination Act to be broad by extending exclusive jurisdiction to the STB over anything included within the general and all inclusive term “transportation by rail carriers.” 49 U.S.C. 10501 (b)(a). The Court will not ignore Congress’s use of broad terms which include railroad agencies, such as “transportation by rail carriers” and “services” related to rail transportation, merely because Congress specifically denoted its intent to preempt state regulatory authority of wholly intrastate spur and side tracks in the same code section. Intrastate spur and side tracks were explicitly excluded from federal jurisdiction in the ICC Termination Act’s predecessor, the Staggers Rail Act. *See Illinois Commerce Commission v. ICC*, *supra*, at 921. (Recognizing that intrastate spur abandonments were explicitly placed within exclusive jurisdiction of states and outside jurisdiction of ICC under Staggers Rail Act). Thus Congress’s specificity as to intrastate tracks does not detract from its use of widely inclusive terms such as “transportation by rail carriers” in the ICC Termination Act’s preemption clause and statement of the STB’s exclusive jurisdiction. There is no basis on which to argue that Congress intended to carve out regulatory control over agencies as an exception to its otherwise broad preemption of state regulation of railroad operations.”

47. In implementing its deregulatory policy, the ICCTA made several changes to its predecessor, the Staggers Rail Act. The ICCTA deleted language from the policy statement of the Staggers Rail Act dealing with regulatory cooperation between the federal and state governments, and removed sections of the Staggers Rail Act providing for joint federal and state regulatory bodies. *See* S.Rep. No. 176, 104th Cong., 1st Sess. 44 (1995) (discussing ICC Termination Act’s deletion of former 49 U.S.C. §§ 10101, 10341-10344 and describing former sections as outdated). *CSX Transp., Inc. v. Georgia Public Serv. Com'n*, *op. cit.* at 1584.

“Perhaps the most significant change to the Staggers Rail Act, which the Court has already discussed, is the ICC Termination Act’s express removal from the states of jurisdiction over wholly intrastate railroad tracks. With the extension of exclusive federal jurisdiction over wholly intrastate tracks, one of the few railroad matters previously within the jurisdiction of the state, the ICC Termination Act evinces an intent by Congress to assume complete jurisdiction, to the exclusion of the states, over the regulation of railroad operations. *See* H.R. Conf. Rep. No. 422, 104th Cong., 1st Sess. 167 (1995), U.S. Code Cong. & Admin.

News 1995, p. 852 (explaining that **only state regulation of non-rail matters, for example in state criminal statutes, is not preempted by ICC Termination Act** because state regulation of nonrail matters does not “generally collide with the scheme of economic regulation (and deregulation) of rail transportation”).” *CSX, Id.* at 1584. (Emphasis added.)

48. In *Soo Line R. Co. v. City of Minneapolis*, 38 F. Supp. 2d 1096, (D. Minn. 1998), (wherein the City of Minneapolis objected to the railroad’s demolition of some of its structures), that court stated:

“Thus, when section 10501(b) grants the STB exclusive jurisdiction over “transportation by rail carriers,” **it logically includes the yard, property, facilities and any intermodal equipment used in connection with a railroad, or related to the movement of passengers or property.**” *Id.* at 1099. (Emphasis added.)

“The regulatory framework of the ICCTA so pervasively dominates the field in which the City is attempting to act that, in addition to express preemption, congressional intent to occupy the field can also be inferred. *See* 49 C.F.R. §§ 1105.1 - 1105.12.” *Id.* at 1100.

“The language of the Act expresses Congress’ clear intent to preempt state and local regulatory authority over the construction, development, and **operation of railroad facilities in general**, and intermodal facilities in particular.” *Id.* at 1101. (Emphasis added.)

49. In *City of Auburn v. U.S. Government*, 154 F.3d 1025 (9th Cir. 1998), the BNSF railroad desired to reopen an abandoned rail line that went through Washington State’s Stampede Pass. The City of Auburn attempted to subject this project to its environmental permitting laws, arguing that its requirements were environmental regulation, rather than economic regulation, claiming this is a “traditional state police power” that Congress did not intend to preempt.

In that case, the court held “there is nothing in the case law that supports Auburn’s argument that, through the ICCTA, Congress only intended preemption of economic regulation of the railroads. All the cases cited by the parties find a broad reading of Congress’ preemption intent, not a narrow one.” *Id.* at 1030.

“However, the pivotal question is not the nature of the state regulation, but the language and congressional intent of the specific federal statute. (Citations omitted.) (Preemption of state law is compelled if Congress’ command is explicitly stated in the federal statute’s language or implicitly contained in its structure or purpose.)” *Id.* at 1031.

“Additionally, given the broad language of §10501(b), the distinction between

“economic” and “environmental” regulation begins to blur. For if local authorities have the ability to impose “environmental” permitting regulations on the railroad, such power will in fact amount to “economic regulation” if the carrier is prevented from constructing, acquiring, operating, abandoning, or discontinuing a line.” *Id.* at 1031.

Regarding the legislative history of a statute, the court stated:

“However, while “[l]egislative history can be a legitimate guide to a statutory purpose obscured by ambiguity ... in the absence of a clearly expressed legislative intention to the contrary, the language of the statute itself must ordinarily be regarded as conclusive.” *Burlington Northern R.R. v. Oklahoma Tax Comm’n*, 481 U.S. 454, 461, 107 S.Ct. 1855, 95 L.Ed.2d 404 (1987) (internal quotations omitted). “The starting point in statutory interpretation is ‘the language [of the statute] itself,’ “ *United States v. James*, 478 U.S. 597, 604, 106 S.Ct. 3116, 92 L.Ed.2d 483 (1986), and where statutory command is straightforward, “there is no reason to resort to legislative history.” *United States v. Gonzales*, 520 U.S. 1, 117 S.Ct. 1032, 1035, 137 L.Ed. 2d 132 (1997).” *City of Auburn* at 1029-1030.

The court then concluded: **“State and local permitting laws regarding railroad operations are preempted by the plain language of the ICCTA, and the statutory framework surrounding it.”** *City of Auburn* at 1033. (Emphasis added.)

50. In *Wisconsin Central Ltd., v. The City of Marshfield*, 160 F. Supp. 2d 1009 (W.D. Wis. 2000), the city attempted to condemn a portion of the railroad’s property in order to realign a highway. Had the city been successful, the railroad would have had to relocate a portion of one of its passing tracks. The city argued the relocation of railroad property is not its regulation. The court made the following statements:

“The ICCTA does not define “regulation” in section 10102. Nevertheless, the plain meaning is apparent. “Regulation” is the “act or process of controlling by rule or restriction” See Black’s law Dictionary.” *Wisconsin Central Ltd.* at 1013. (Emphasis added.)

“ The Court holds that condemnation is regulation. In using state law to condemn the track, defendant is exercising control - the most extreme type of control - over rail transportation as it is defined in section 10102 (9). **The City is impermissibly attempting to subject to state law property that Congress specifically put out of reach.** Congress’ preemptive language and intent is paramount, and the nature of the preempted state regulation is irrelevant. *See City of Auburn (supra).*” *Wisconsin Central Ltd.* at 1013-1014. (Emphasis added.)

“Environmental laws - statutes of general application - have been found to be expressly preempted under the ICCTA when applied to facilities and property constituting rail transportation.” *See City of Auburn (Supra)*, *Id.* at 1014. (Emphasis added.) *Wisconsin Central Ltd.* at 1014.

7 K. THE ICCTA PROHIBITS A LOCAL OR STATE AGENCY FROM REQUIRING THAT PERMITS BE OBTAINED PRIOR TO RAILROAD-RELATED CONSTRUCTION ACTIVITIES

51. In *Norfolk Southern Ry. V. City of Austell* No. 1:97 - cv-1018-RLV, 1997 U.S. Dist. LEXIS 17236, at 17 n.6 (N.D. Ga. 1997) the court found that a local land use permit was not required before a railroad could construct and operate an intermodal facility. The court 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.”

52. On March 14, 2005, the Board issued a Declaratory Order, *See CSX Transportation, Inc. – Petition for Declaratory Order*, Finance Docket No. 34662, Decided March 14, 2005, wherein the Board made the following declarations:

“The Commerce Clause of the Constitution (Art. 1, sec. 8, cl. 3) gives Congress plenary authority to legislate with regard to activities that affect interstate commerce. *Gibbons v. Ogden*, 9 Wheat 1, 196 (1824). One of the areas in which Congress has done so is with respect to railroads, in the Interstate Commerce Act (ICA), now codified in pertinent part at 49 U.S.C. 701-727 (general provisions) and 10101-11908 (rail provisions). The ICA is “among the most pervasive and comprehensive of federal regulatory schemes.” *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981) [**“Kalo Brick”**]; accord *Deford v. Soo Line R.R.*, 867 F.2d 1080, 1088-91 (8th Cir. 1989) (ICA so **pervasively occupies the field of railroad governance that it completely preempts state law claims**). (Emphasis added.)

Although the ICA has long included a preemption clause, Congress further broadened the Act’s express preemption in 1995. Section 10501(b) now expressly provides that “the jurisdiction of the Board over transportation by rail carriers” over any track that is part of the interstate rail network is “exclusive.” And the term “transportation” is defined expansively in the ICA to embrace “a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of ... property ... by rail” as well as “services relating to that movement.” 49 U.S.C. 10102(9).

Section 10501(b) also expressly provides that “the remedies provided [in 49 U.S.C. 10101-11908] with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, **and facilities** of such carriers” are “exclusive and preempt the remedies provided under Federal or State law.” Thus, **section 10501(b) does not leave room for state and local regulation of activities related to rail transportation**, including routing matters. (Emphasis added.)

As the courts have observed, “[i]t is difficult to imagine a broader statement of Congress’ intent to preempt state regulatory authority over railroad operations” than that contained in section 10501(b). *CSX Transp., Inc. v. Georgia Pub. Serv. Comm’n*, 944 F.Supp. 1573, 1581-84 (N.D. Ga. 1996) (*Georgia PSC*). Every court that has examined the statutory language has concluded that the preemptive effect of section 10501(b) is broad and sweeping, and that it blocks actions by states or localities that would impinge on the Board’s jurisdiction or a railroad’s ability to conduct its rail operations. *Friberg v. Kansas City S. Ry.*, 267 F.3d 439, 443 (5th Cir. 2001) (*Friberg*) (state statute restricting a train from blocking an intersection preempted, even though there is no Board regulation of that matter); *City of Auburn v. United States*, 154 F.3d 1025, 1029-31 (9th Cir. 1998) (*City of Auburn*) (**state and local environmental and land use regulation preempted**); *Wisconsin Cent. Ltd. v. City of Marshfield*, 160 F.Supp.2d 1009, 1014 (W.D. Wis. 2000) (*City of Marshfield*) (attempt to use a state’s general eminent domain law to condemn an actively used railroad passing track preempted); *Dakota, Minn. & E.R.R. v. State of South Dakota*, 236 F.Supp.2d 989, 1005-08 (S. S.D. 2002), *aff’d on other grounds*, 362 F.3d 512 (8th Cir. 2004) (revisions to state’s eminent domain law preempted where revisions added new burdensome qualifying requirements to the railroad eminent domain power that would have the effect of state “regulation” of railroads); *Georgia PSC*, 944 F.Supp. at 1573 (state regulation of a railroad’s closing of its railroad agent locations preempted); *Soo Line R.R. v. City of Minneapolis*, 38 F.Supp.2d 1096 (D.Minn. 1998) (*Soo*) (local permitting regulation regarding the demolition of railroad buildings preempted); *Cedarapids, Inc. v. Chicago, Cent. and Pac. R.R.*, 265 F.Supp.2d 1005, 1013-14 (N.D. Iowa 2003) (ICCTA preemption applies broadly to operation on both main line and auxiliary spur and industrial track); *Norfolk S.Ry. v. City of Austell*, No. 1:97-cv-1018-RLV, 1997 U.S. Dist. LEXIS 17236 (N.D. Ga. 1997) (*Austell*) (local zoning and land use regulations preempted); *Village of Ridgefield Park v. New York, Susquehanna & W.Ry.*, 750 A.2d 57 (N.J.2000) (*Ridgefield Park*) (complaints about rail operations under local nuisance law preempted). (Emphasis added.)

The cases cited above illustrate that Congress broadly divested states and localities of a regulatory role over rail transportation. By enacting section 10501(b), Congress foreclosed state or local power to determine how a railroad’s traffic should be routed.

The District contends that section 10501(b) only preempts direct “economic” regulation of railroads, and not a state or local measure aimed at protecting its residents. However, **as the courts that have examined that provision have uniformly concluded, any notion that**

the statutory preemption in section 10501(b) is limited to direct state and local economic regulation is contrary to the broad language of the statute and unworkable in practice. *See, e.g., Friberg*, 267 F.3d at 443; *City of Marshfield*, 160 F.Supp.2d at 1014 (section 10501(b) is broad enough to “expressly preempt more than just those laws specifically designed to regulate rail transportation”). In *City of Auburn* the court found that state and local environmental and land use permitting was preempted. 154 F.3d at 1030-31. As that court explained, if local authorities had the power to impose “environmental” permitting regulations on the railroad, such power would in fact amount to “economic” regulation if the carrier could thereby be prevented from constructing, acquiring, operating, abandoning, or discontinuing a line. Thus, the scope of section 10501(b) is broader than just direct economic regulation of railroads. (Emphasis added.)

The District suggests that the D.C. Act is not preempted because it does not totally bar the transportation of hazardous materials, but instead includes a process whereby a carrier can obtain a permit under certain circumstances and includes an exception in case of a temporary emergency elsewhere in the transportation system. **However, the courts have made clear that state or local permitting or preclearance requirements of any kind that would affect rail operations (including building permits, zoning ordinances, and environmental and land use permitting requirements) are preempted.** *See, e.g., City of Auburn*, 154 F.3d at 1029-31; *Soo*; *Austell*; *Ridgefield Park*. [Emphasis added.]

53. In *Ridgefield Park v. NY, Susqu. & Western*, 750 A. 2d 57 (N.J. 2000), the Supreme Court of New Jersey made the following statements:

“The language of the statute does not expressly limit preemption to strictly “economic regulation” nor does it state that the states retain historic police powers over railroads and their property. We are told, pursuant to the clear language of the statute, that the “construction” and “operation” of the railroad’s “facilities” falls within the Board’s express and exclusive jurisdiction. 49 U.S.C.A. § 10501 (b) (1) and (2). By definition, a railroad’s “facility,” “warehouse,” “yard,” “property,” “instrumentality,” and “equipment of any kind related to the movement of passengers or property,” “regardless of ownership or an agreement concerning use” are all within the scope of the Act’s concept of “transportation.” 49 U.S.C.A. § 10102 (9) (A). Thus, pursuant to the statutory language, the Board appears to have exclusive jurisdiction over everything pertaining to the railroad’s facility in the Village mentioned in the Act’s definition of transportation ...” *Ridgefield Park* at 62.

54. In *City of Auburn v. U.S. Government*, *supra*, at 1033, the 9th Circuit Court of Appeals held:

“State and local permitting laws regarding railroad operations are preempted by the plain language of the ICCTA, and the statutory framework surrounding it.”

55. In *Soo Line R. Co. v. City of Minneapolis*, 38 F. Supp. 2d 1096 at 1101 (D. Minn. 1998), that court made the following statements:

“The Court concludes that the City’s demolition permitting process ... is expressly preempted by the ICCTA. The language of the Act expresses Congress’ clear intent to preempt state and local regulatory authority over the construction, development, and operation of railroad facilities in general, and intermodal facilities in particular. CPR’s demolition of the five buildings and subsequent construction, development, and operation of the proposed bulk transfer facility is subject only to such regulations and requirements as may be imposed by the STB pursuant to the ICCTA.”

8. CONCLUSION

56. Petitioner has argued the ICA completely preempts State and local regulation of transportation by rail carrier, and has argued Congress directed that the remedies in 49 USC §§10101 - 11908 are exclusive and preempt all other Federal or State remedies. Maryland’s state-law based remedies have been preempted by the unambiguous language of 49 USC §10501 (b).

WHEREFORE, your Petitioner respectfully requests this Board issue a declaratory order declaring that:

(1) the Interstate Commerce Act (“ICA”) completely preempts State and local regulation of transportation by rail carrier;

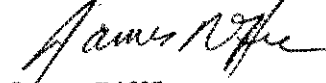
(2) the construction, acquisition, maintenance and / or operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or of facilities, including rail carrier yards, rail carrier freight depots, and rail carrier maintenance-of-way (“MOW”) facilities, are subject to the exclusive jurisdiction of the Board;

(3) the remedies provided in 49 U.S.C. §§10101-11908 with respect to regulation of rail transportation are exclusive and preempt the remedies provided under State or local law;

(4) State or local permitting or preclearance requirements of any kind, including building permits, zoning ordinances, and environmental and land use permitting requirements, that would affect the construction, acquisition, maintenance and / or operation, of rail lines, spur, industrial, team, switching, or side tracks, or rail carrier facilities, including rail carrier yards, rail carrier freight depots, and rail carrier MOW facilities, are completely preempted by the ICA; and

(5) What constitutes a line of rail, spur, industrial, team, switching, or side track, or a rail carrier facility, including a rail carrier yard, rail carrier freight depot, or a rail carrier MOW facility, is to be determined exclusively by the Board.

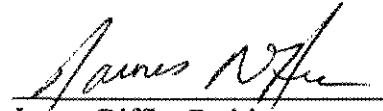
Respectfully submitted,



James Riffin
Petitioner

CERTIFICATE OF SERVICE

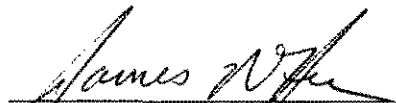
I HEREBY CERTIFY, that on this 9th day of February, 2007, a copy of the foregoing Petition for Declaratory Order was mailed to the Baltimore County Office of Law, 2d floor, Old Court House Building, Towson, Maryland, counsel for Baltimore County, Maryland, and a copy was mailed to Adam D. Snyder, Assistant Attorney General, Maryland Department of the Environment, 1800 Washington Boulevard, Suite 6048, Baltimore, Maryland 21230, counsel for the Maryland Department of the Environment.


James Riffin, Petitioner

**VERIFICATION OF JAMES RIFFIN IN SUPPORT OF HIS
PETITION FOR DECLARATORY ORDER**

I, James Riffin, declare under penalty of perjury, that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this pleading.

Executed on February 9, 2007 by:


James Riffin