

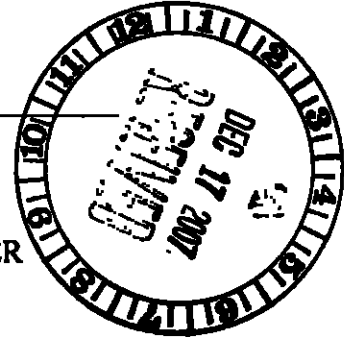
EXPEDITED CONSIDERATION REQUESTED  
BEFORE THE SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO.: 34997

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Office of Proceedings  
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PETITION OF JAMES RIFFIN  
FOR EXPEDITED DECLARATORY ORDER



**MOTION FOR AN ADMINISTRATIVE STAY**

1 Comes now your Petitioner, James Riffin, ("Petitioner"), a Class III rail carrier,<sup>1</sup> who herewith petitions the Surface Transportation Board ("Board") to issue an order staying the December 14, 2007 Order issued by the circuit court of Baltimore County, Maryland, in case number 03-C-04-008920 OC, pending review by the Board of the matter before the circuit court, to determine whether the Board has exclusive jurisdiction over the subject matter before the circuit court, and for reasons states:

2. On December 14, 2007, the circuit court for Baltimore County, Maryland held, without citing any precedent or other legal authority, the Interstate Commerce Act, and in particular, 49 U.S.C. §10501(b), **did not** preempt State and local regulation of transportation by rail carriers,<sup>1</sup> and further held the remedies contained in 49 U S C §§ 10101 - 11908 with respect to regulation of rail transportation, **do not** preempt Maryland State or local remedies.

3. The circuit court then ordered your Petitioner, a Class III rail carrier, to immediately

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<sup>1</sup> 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)

remove all of his railroad maintenance-of-way ("MOW") equipment<sup>2</sup> from Petitioner's Cockeysville MOW facility ("Site"), including all of the railroad ties (several thousand), rails (6,000 linear feet), switches (three), and other track material stored at the Site, all of the railroad bridge steel stored at the Site (several thousand tons), a rail car that is at the Site to be repaired, and to remove all earth, stone, ballast, tracks and a concrete retaining wall placed on the Site by Petitioner, then plant grass on the Site and never use the Site for any purpose

### **BACKGROUND INFORMATION**

4. On February 9, 2007, your Petitioner petitioned the 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. The Petitioner asked the Board to specifically address the following issues.

(1) Does the Interstate Commerce Act ("ICA") completely preempt State and local regulation of transportation by rail carrier,

(2) Is 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, subject to the exclusive jurisdiction of the Board;

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

(4) Are State or local permitting or preclearance requirements of any kind, including building permits, zoning ordinances, and environmental and land use permitting requirements, that would

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<sup>2</sup> Two 40-ton Burro railroad cranes, two Canron scarifiers, two Canron ballast equalizers, one Plasser cribber, one Canron tamper, six MOW personnel movers, several MOW equipment wagons, a grapple-truck, an 80-ton hydraulic crane, three front-end loaders, a 60-inch roller compactor, a truck tractor and four semi-trailers used to transport Petitioner's MOW equipment, and one bulk commodities semi-trailer, used to transport bulk commodities from rail cars to shippers

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, completely preempted by the ICA, and

(5) Is 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, to be determined exclusively by the Board.

**5. To date, the Board has not rendered a decision.**

**6** On November 28, 2007, your Petitioner requested the Board address Petitioner's request for a Declaratory Order expeditiously, since Allegany County, Maryland is refusing to allow Petitioner to repair his line of railroad in Allegany County, Maryland, arguing the ICA does not preempt Allegany County's permitting regulations with respect to construction activities related to transportation-by-rail-carrier.

## **THE CONTROVERSY**

**7. Baltimore County:** In 2004, your Petitioner began constructing a rail carrier MOW / rail car maintenance and repair facility on property owned by your Petitioner, which property is located in Cockeysville, Maryland, and is immediately adjacent to the Cockeysville Industrial Track. The property is zoned Manufacturing Light, which, per Baltimore County Zoning Regulations (BCZR §253.1 B 13), permits "railroads" as a matter of right. There is an existing private siding on property adjacent to the Site, which private siding Petitioner has the right to utilize. On March 8, 2004, Petitioner filed a Notice of Exemption ("NOE") to acquire and operate that portion of the Cockeysville Industrial Track that is adjacent to his Cockeysville property. See FD No. 34484 ("MD NOE"). This NOE became effective on March 15, 2004. The State of Maryland objected, arguing it owned the right-of-way and that it would not consent to sell or permit the Petitioner to use the right-of-way [The issue of whether Maryland needed Commission approval prior to acquiring the right-of-way real estate, is the subject of FD No. 34975]. Due to the controversial nature of the MD NOE, the Board revoked Petitioner's MD

NOE on April 20, 2004.<sup>3</sup> Petitioner's first rail carrier status, lasted only five weeks.

8. On April 28, 2004, Petitioner filed another NOE, this time seeking authority to acquire and operate a line of railroad in York County, Pennsylvania. See FD No. 34501 ("PA NOE"). This NOE became effective on May 5, 2004. And once again, the State of Maryland objected, even though the line of railroad was not in Maryland. And once again, on February 23, 2005, the Board revoked Petitioner's PA NOE, reiterating that Petitioner may have been "attempting to use the cover of Board authority allowing rail operations in Pennsylvania to shield seemingly independent operations and construction in Maryland from legitimate processes of state law."

9. On October 21, 2005, Petitioner, knowing full well that if the true identity of the Offeror were to be known, an objection would be filed, filed an Offer of Financial Assistance under the pseudonym WMS (in which Petitioner had a 98% ownership interest), to purchase from CSX the Georges Creek line of railroad CSX had filed to abandon. On December 18, 2005, the Board granted WMS authority to acquire and operate the Georges Creek line of railroad. See footnote 1, *supra*. On June 14, 2005, the Petitioner filed a request to substitute Petitioner as the prospective purchaser of the Line. [On March 2, 2006, Petitioner had wired to CSX 3/7 of the purchase price. On June 20, 2006, Petitioner wired to CSX the balance of the purchase price.] And sure enough, as soon as it became known the Petitioner was the one actually purchasing the Line, an objection was filed with the Board. On August 18, 2006, the Board granted Petitioner, in his individual capacity, authority to acquire and operate the Georges Creek line of railroad.

10 On December 6, 2006, Petitioner filed a NOE to acquire and operate the Raritan Valley Connecting Railroad. See FD No. 34963. This NOE became effective on January 5, 2007. The parties are still waiting for a decision in FD No. 33388 (Sub-No 100), before proceeding

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<sup>3</sup> The Board was concerned Petitioner did not have a genuine interest in becoming a rail carrier, and was concerned Petitioner may have been attempting to use the Board's processes to avoid State and local regulation of the Site. Since that time, Petitioner has acquired a line of railroad, at considerable expense, has attempted to acquire additional lines of railroad, has acquired considerable MOW assets, has acquired a blue-carded like-new locomotive, and has acquired a significant number of interchange approved, freight rail cars. Petitioner would argue there can be no doubt Petitioner's interest in becoming, and in operating as, a rail carrier, is genuine. Petitioner has consistently argued the proper forum to discuss Maryland's concerns is before the Board, not before a State court that has no understanding, and has no desire to obtain an understanding, of railroad law, or the Board's practices or procedures.

any further with this NOE.

11. On November 19, 2004, at a hearing in the circuit court for Baltimore County, in Case No 03-C-04-008920 [the same case which is the subject of the requested Stay], counsel for the Plaintiffs made the following statements (See the attached **Exhibit J**):

“The economic regulation of railroads .. is completely preempted ” T p 38, lines 13-14. Statement by Adam D. Snyder, counsel for the Maryland Department of the Environment Plaintiff.

“The county adopts and incorporates by reference the arguments set forth by counsel for the state ” T p. 40, lines 14-15. Statement by Robert Loskot, counsel for the Baltimore County Plaintiff.

12 In spite of the opposing counsel’s admission that the economic regulation of railroads has been preempted by Federal law, and in spite of Petitioner presenting a memorandum of law citing numerous cases that have held Federal law preempts State and local regulation of transportation by rail carrier, and in spite of Petitioner quoting directly from the 9<sup>th</sup> Circuit’s opinion in *City of Auburn v US Government*, 154 F. 3d 1025, at 1031 (9<sup>th</sup> Cir. 1998), wherein the 9<sup>th</sup> Circuit stated Environmental regulation constitutes economic regulation, the circuit court still held Federal law does not preempt State and local regulation of transportation by rail carrier.

13 Robert Loskot, counsel for Baltimore County prepared an Order for the court which enjoined Petitioner from any further construction activities at the Site without first obtaining permission, enjoined Petitioner to stabilize all exposed soils, enjoined Petitioner to install all necessary sediment controls, and enjoined Petitioner to relocate all equipment presently at the Site. The Court signed the proposed Order as written. The Order did not give a date by which all exposed soils had to be stabilized, nor did it give a date by which sediment controls had to be installed or the equipment at the Site had to be removed

14. Over a period of time, all equipment that was at the Site at the time of the injunction, was relocated. Over a period of time, new material has been brought to, and placed on the site. All necessary sediment controls were installed. As of December 14, 2007, 99.6% of the Site had been stabilized with grass or crusher-run stone. [The Site is approximately 110,000 SF in size.

Less than 500 SF needed to be stabilized as of December 14, 2007. Any rain water falling on this 500 SF of exposed soil, would drain to a sediment control pond, where it would be contained.]

15. On December 3, 2004, Clay Troy, a Maryland Department of the Environment Inspector, visited the Site. Petitioner indicated to Mr. Troy where water was percolating up through the soil, due to a failed storm water drain system. Petitioner specifically drew the attention of Mr. Troy to a bundle of 8-inch diameter commercial plastic sewer pipe, which bundle contained approximately 800 linear feet of plastic pipe, and told Mr. Troy that Petitioner desired to replace the existing (failed) storm drain piping system with the plastic pipe in that bundle. Mr. Troy gave Petitioner "verbal authorization to .. replace the drain line." August 23, 2006 Affidavit of Clay Troy, ¶ 6. The following spring / summer of 2005, Petitioner began replacing the failed storm water drain system.

16. On September 8, 2005, Mr. Troy visited the Site and noted:

"Mr. Riffin was in the process of lowering in an approximately 4' x 4' x 4' concrete clean-out drain of the sort that you typically see in municipal storm sewer and other major public works construction projects. Mr. Riffin indicated that this was the broke drain pipe that he had discussed with me in December 2004 and that the line would run all the way along the southern side of the warehouse, adjacent to Beaver Dam Run. I informed Mr. Riffin that this work far exceeded the scope of the activities for which he sought, and obtained, permission in December 2004 and that, accordingly, that permission was revoked effective immediately." August 23, 2006 Affidavit of Clay Troy, ¶ 9.

17. The failed storm drain system was responsible for draining nearly an acre of roof area. There were nine existing roof drains, each 6 inches in diameter, all of which fed to the failed storm drain system. When rain is falling at a rate of 2.4 inches per hour (1/32 inch / minute or a fairly steady rate of rainfall), a roof area of one acre will collect 1,100 gallons of water per minute, or about 10,000 pounds of water per minute! All of this rain water needs to be removed from the roof quickly, otherwise the weight of the water can cause the roof to collapse. To remove this quantity of water from a roof, requires a substantial storm drain system. The existing storm water drain system ranged from six to 15 feet in the ground. OSHA rules mandate trench protection devices when excavating more than 4 feet in the ground. Trench protection devices

require the trench to be at least 5 feet wide. Petitioner would have assumed Mr. Troy was aware of this, since he inspects commercial construction sites on a regular basis. Petitioner does not find it credible that Mr. Troy did not comprehend the magnitude of the task of replacing the existing storm water drain system. And once Petitioner started removing the existing storm water drainage system, he was obligated to finish the job of installing the new drainage system, for without a functioning drainage system, rain water would collect on the roofs of Petitioner's buildings, which could cause the roofs to collapse. So Petitioner proceeded to complete installation of the storm water drainage system, much to the consternation of Mr. Troy and Baltimore County. Today, the Site has a professional grade storm water drainage system. Unfortunately, the circuit court's December 14, 2007 Order enjoins the Petitioner to completely remove this \$300,000.00 storm water drainage system.

**18 On or about November 8, 2007, the Plaintiffs filed a Complaint for Constructive Civil Contempt ("Contempt Petition") in the circuit court. On November 8, 2007, the circuit court issued a Show Cause Order, directing the Petitioner to appear before the court on December 14, 2007, to show cause why he should not be held in contempt of court, providing a copy of the Show Cause Order and Contempt Petition was served on Petitioner by November 19, 2007.**

**19 On November 16, 2007, Adam Rosenblatt, counsel for Baltimore County, called Petitioner to request permission from Petitioner to serve Petitioner by placing a copy of the Show Cause Order and Contempt Petition in Petitioner's mail box. Petitioner stated he was driving a truck, was not near Mr. Rosenblatt, and did not expect to return to the Baltimore area prior to November 26 or 27, 2007. Petitioner then stated that if and only if the Plaintiffs agreed to reschedule the Show Cause Hearing until after a January 19, 2008 preliminary injunction hearing, would Petitioner consent to this improper form of service. Mr. Rosenblatt refused to ask the circuit court to reschedule the Show Cause Hearing, then proceeded to file an affidavit with the circuit court, certifying he had placed the Show Cause Order in Petitioner's mailbox. Mr. Rosenblatt did not certify he placed a copy of the Contempt Petition in Petitioner's mail box. Petitioner obtained a copy of the Show Cause Order and Contempt Petition on November 23, 2007, or some four days after the November 19, 2007 deadline for serving Petitioner. The copy of the Contempt Petition provided to the Petitioner, had hard-to-discern black and white**

photocopies of the color photographs that were in the Contempt Petition filed in the court.

20. Petitioner filed a Motion to Dismiss Show Cause Order with the circuit court, arguing since neither the Show Cause Order nor Plaintiffs' Petition for Constructive Civil Contempt were personally served on Defendant in accordance with Maryland Rules 2-123 [must be served by a non-party] or 2-124(a) [must be served on individual or authorized agent of individual], by the November 19, 2007 deadline for service on the Petitioner, the Show Cause Order lapsed and became null and void on November 20, 2007. The court ruled the purpose for serving an individual was to give notice to the individual of an impending hearing. The court reasoned because Petitioner had been notified by telephone of the date of the Show Cause hearing, and because Petitioner ultimately obtained a copy of the Show Cause Order, and because Petitioner could have gone to the court house to look at the copy of the Contempt Petition that was filed in the court (which would have permitted Petitioner to look at, but not reproduce, the numerous color photographs in the Contempt Petition), Petitioner had received sufficient notice, then denied Petitioner's Motion to Dismiss Show Cause Order.

21 During the **December 14, 2007** hearing in the circuit court, the Petitioner stated the reason he has been unwilling to apply for any kind of State or local permit, is because in *Boston and Maine Corp v Town of Ayer*, 330 F.3d 12, 16 (1<sup>st</sup> Cir. 2003), the 1<sup>st</sup> Circuit stated "A town may seek enforcement of voluntary agreements a railroad has entered into with a town " Effectively, once a rail carrier seeks a permit from a State or local agency, the rail carrier gives up any and all preemptive rights the rail carrier may have under the ICA.

22. During the December 14, 2007 hearing in the circuit court, the Petitioner argued State and local regulation of transportation by rail carrier, and all State remedies with respect to regulation of transportation by rail carrier, had been preempted by the ICA, and specifically by 49 U.S.C. § 10501(b). The Petitioner provided the court with a copy of the attached Memorandum of Law. The court, without citing any precedent or other legal authority, ruled it did have jurisdiction over the Site, ruled that the Site was subject to all State and local regulatory statutes, ruled the Site was subject to all State and local remedies for violation of those State and local regulations, and further ruled Federal law did not preempt State and local regulation of the Site.

23. At the conclusion of the **December 14, 2007** circuit court hearing, the circuit court held it did have jurisdiction over Petitioner's Cockeysville MOW / rail car maintenance and repair facility; the Site was subject to all State and local permitting requirements; the Petitioner was in contempt of court; then Ordered Petitioner to post a \$250,000.00 cash bond with Baltimore County; to remove **everything** from the Site (**literally everything**); to plant grass on the Site (to restore the Site to the condition it was in prior to Petitioner purchasing the Site), and to cease using the Site for any purpose (prior to Petitioner's purchase of the Site, the Site had not been used)

24. **Allegany County:** As stated in Petitioner's November 28, 2007 filing in this proceeding, Petitioner needs to repair three washouts on his line of railroad situated in Allegany County, Maryland. The Petitioner needs to construct 2,000 feet of passing track, and a 1,000-foot siding, in order to be able to interchange with CSX. The Petitioner also needs to construct rail car inspection and maintenance facilities, rail yards, and a transload / intermodal facility along his Line. Allegany County permitting individuals, and the Allegany County office of law, have told the Petitioner that the Code of Allegany County does not permit rail carriers (or anyone else, except Federal, State or local governmental entities) to do any kind of construction activity without first obtaining a permit from the County. Petitioner's request for a temporary restraining order enjoining Allegany County from attempting to regulate Petitioner's rail-carrier-related construction activities, was denied by the Allegany County circuit court on **October 17, 2007**.

25. Allegany County has taken the position that Petitioner must seek, then obtain, permission from the County **prior to beginning any type of construction activity**.

## **ARGUMENT**

26. This proceeding presents two factual issues, and two legal issues. The two legal issues are:

A Does the Interstate Commerce Act, as amended by the ICCTA, and in particular, does 49 U.S.C. §10501(b), completely preempt State and local regulation of transportation by rail

carrier?

B Are the remedies specified in the Interstate Commerce Act, exclusive? And if so, do they preempt all State and local remedies with respect to regulation of transportation by rail carrier?

27. Petitioner would argue these two legal issues have been addressed numerous times, with the unanimous conclusion that the ICA completely preempts regulation of transportation by rail carrier and the remedies in Part IV of the ICA are exclusive, and preempt all State remedies with respect to regulation of transportation by rail carrier. See Petitioner's Memorandum of Law attached hereto.

28. The two factual issues are

A. Is Petitioner a rail carrier? There can be no doubt, Petitioner is a rail carrier. See footnote 1, *supra*

B Do Petitioner's activities at his Cockeysville MOW / rail car maintenance and repair facility, and do Petitioner's proposed construction activities on Petitioner's Allegany County line of railroad, fall within the ambit of "transportation by rail carrier?" If so, then regulation of Petitioner's Cockeysville Site and Petitioner's Allegany County line of railroad, falls under the exclusive regulatory domain of the Board, and if so, then State and local regulations requiring Petitioner to obtain permits from State or local officials, has been preempted. As the Board stated in *CSX Transp, Inc – Petition for Declaratory Order*, STB Docket No. 34662, decided March 14, 2005, at p. 6:

**"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, Ridgely Park*." [Emphasis added.]**

**29. Cockeysville, Baltimore County:** Attached is a copy of a November 8, 2007 Affidavit of Kevin R. Sharbonda, which depicts the condition of the Site on November 8, 2007, the date the Contempt Petition was filed in the circuit court. The photograph on page 2 of the Affidavit, shows railroad ties lined up and ready to receive rails, shows a caboose, which is at the Site to be repaired; a grapple truck, which is used to transport / lay railroad ties. In the background on the left is a Canron ballast equilizer. In the background in the middle, is a Canron switch tamper. In the foreground on the left, the edges of a stack of concrete railroad ties can be seen. The top photograph on page 3 of the Affidavit, shows several stacks of concrete railroad ties. On the left, between the Dresser excavator and the white crane, is a Plasser cribber. The bottom photograph on page 3 shows Petitioner's 80-ton hydraulic crane, and one end of Petitioner's Plasser cribber. Petitioner's switch tamper can be seen in the middle background. The top photograph on page 4, shows some (a thousand feet or so) of the 6,000 feet of rails Petitioner owns. The bottom photograph on page 4, on the far right, shows a few of the six MOW personnel movers Petitioner has at the Site. If more photographs were presented to the Board, they would show even more rail carrier MOW equipment and material. Petitioner would argue, the photographs in Mr. Sharbonda's Affidavit clearly show the Site is being used as a rail carrier facility, or more specifically, to store Petitioner's MOW equipment and material, and as a rail car maintenance and repair facility. Due to the circuit court's November 19, 2004 Injunction prohibiting any further construction activities at the Site, the Site has not been completed.

**30. Allegany County:** Presently, Petitioner is being barred by Allegany County (by requiring Petitioner to apply for a permit, which the County is not obligated to issue) from fulfilling his common carrier obligation to maintain his way. And until Petitioner repairs the three washouts on his way, he cannot provide rail service on his Line. And until Petitioner constructs a passing and spur track, he cannot interchange with CSX at the beginning of his Line [There is only one track where Petitioner's Line connects with CSX's line]. And until Petitioner constructs a locomotive / rail car inspection and repair facility, Petitioner cannot comply with FRA regulations regarding the inspection of locomotives. And until Petitioner can construct additional rail yard tracks and transloading facilities at the end of his Line, Petitioner cannot transload goods from rail cars to trucks, or from trucks to rail cars.

## **CONCLUSION**

31. Petitioner has argued the ICA completely preempts regulation of transportation by rail carrier, the ICA preempts all State regulatory remedies with respect to transportation by rail carrier, and has argued he is a rail carrier, and as such his transportation by rail carrier activities are subject to the exclusive regulatory jurisdiction of the Board. Petitioner has further argued, and has presented evidence, demonstrating his activities at his Cockeysville MOW / rail car maintenance and repair facility, and his proposed construction activities on his line of railroad in Allegany County, Maryland, constitute "transportation by rail carrier."

32. WHEREFORE, your Petitioner would implore the Board to render a decision in this proceeding at its earliest convenience, so that your Petitioner may begin to reconstruct his Allegany County way, so that Petitioner may begin to fulfill his common carrier obligation to maintain his way and to offer rail service on his Line, and so that Petitioner may avoid removing all of his MOW equipment and material from his Cockeysville MOW facility, may avoid totally dismantling his Cockeysville MOW / rail car maintenance and repair facility, and may avoid being compelled to expend very substantial sums of capital (in excess of \$500,000.00) posting a cash bond with Baltimore County, and paying to have all of his MOW equipment and material, removed from the Site, and paying to dismantle his entire Cockeysville MOW facility

33 Since Maryland and Baltimore County are sovereign entities, if the Order of the circuit court is not stayed, Petitioner will have to expend huge sums of money, with no monetary recourse against Maryland or Baltimore County, if ultimately it is determined that regulation of Petitioner's Cockeysville Site falls within the exclusive jurisdictional domain of the Board.

34. Furthermore, since Baltimore County, Allegany County, and the U S. District Court for Maryland, Baltimore Division, have held the ICA does not preempt transportation by rail carrier, and have held rail carriers are subject to State and local regulatory statutes, if the Board does not exercise its jurisdiction, and unequivocally make it known that it has exclusive regulatory authority over transportation by rail carrier, then Maryland and Maryland's local governments will have established precedents that will permit Maryland and Maryland's local governments to regulate transportation by rail carrier And Maryland's State courts will have precedent to support its position that in Maryland, rail carriers are subject to State and local regulation And the next time Maryland, or a local Maryland governmental entity, elects to regulate the activities of another Maryland rail carrier, Maryland's State courts will have precedent to justify its position that rail carriers in Maryland are subject to State and local regulation. [There currently

is a major effort on the part of Baltimore City to regulate CSX's movement of hazardous material through Baltimore. If Maryland were to experience a major rainfall event, and the Patapsco or Potomac rivers were to flood, as they are wont to do, and if some of CSX's tracks were to be washed out, then Baltimore County's and Allegany County's courts would have precedent to compel CSX to apply for a permit prior to repairing any washouts along its line in Baltimore or Allegany Counties. And if a county were to file suit against CSX, Norfolk Southern, Maryland Midland, or any other Maryland railroad, and the rail carrier were to try to remove the suit to the U.S. District Court for Maryland, Baltimore Division, then Judge Bennett is highly likely to rule that the ICA does not *completely* preempt all State and local regulation of transportation by rail carrier, and thus the U.S. District Court does not have subject matter jurisdiction over the matter. (Judge Bennett has made it abundantly clear in a number of decisions involving the Petitioner, that he **does not** believe the ICA *completely* preempts all State and local regulation of transportation by rail carrier.))]

Respectfully submitted,



James Riffin

IN THE CIRCUIT COURT  
FOR BALTIMORE COUNTY, MARYLAND

Plaintiff's  
Ex I

STATE OF MARYLAND  
DEPARTMENT OF ENVIRONMENT,  
et al.,

Plaintiffs,

VERSUS

CASE NO.  
03-C-04-008920

JAMES RIFFIN, et al.,

Defendants.

NOVEMBER 18, 2004

REPORTER'S OFFICIAL TRANSCRIPT OF PROCEEDINGS ON APPEAL

BEFORE THE HONORABLE VICKI BALLOU-WATTS, JUDGE

APPEARANCES ON BEHALF OF THE PLAINTIFF -

DEPARTMENT OF ENVIRONMENT:

ADAM D. SNYDER, ESQUIRE

BALTIMORE COUNTY:

C. ROBERT LOSKOT, ESQUIRE

ON BEHALF OF THE DEFENDANTS:

PRO SE

REPORTED BY:  
MARY ANNE DOCCOLO, RPR  
Official Court Reporter  
401 Bosley Ave., M-08  
Towson, Maryland 21204  
(410) 887-2635

1           So I believe that Mr. Riffin has admitted liability  
2 for everything up until May 20th, and we've got -- that those  
3 claims and that liability is ripe for summary judgment. I'm  
4 getting into the summary judgment stuff. Let me back up.  
5 I'll get to that in a moment.

6           Even if he is a railroad, the law in this area --  
7 and it's a law that's all over the place -- is that state  
8 laws that are quote, unquote pre-clearance requirements, that  
9 tell a railroad if you can or cannot build on a certain piece  
10 of property are preempted. That seems to be the tenor that's  
11 coming out of, at least, the Surface Transportation Board's  
12 decisions. But the laws at issue in this case today are not  
13 directed at railroads. They're not directed as the economic  
14 regulation of railroads, which is completely preempted. And  
15 they aren't pre-clearance requirements, with perhaps one  
16 exception; that being Title 5, Subtitle 5 of the Environment  
17 Article. That provision says you've got to get a permit  
18 before you construct anything in waters of the state,  
19 including the floodplain.

20           Mr. Riffin has this new argument today about the  
21 statute says water with -- waters within the state, but  
22 defines waters of the state to include floodplain, because  
23 waters of the state is different from waters within the  
24 state. It doesn't include floodplain.

25           The regulations bridge that gap, if there is a gap.

1 this new motion. And I guess we'll have an opportunity to  
2 get that at another day.

3 THE COURT: Yes.

4 MR. SNYDER: I would love to be able to avoid  
5 another trip to court and talk about it today because I think  
6 it can be resolved in just a couple of sentences. But I'm  
7 going to rest on the preemption argument now, unless my  
8 colleague wants to add something.

9 THE COURT: All right. Mr. Loskot, you have  
10 anything to add?

11 MR. LOSKOT: Not at this time, Your Honor.

12 THE COURT: Are you going to adopt and incorporate  
13 by reference your brother counsel's argument?

14 MR. LOSKOT: The county-adopts and incorporates by  
15 reference the arguments sets forth by counsel for the state.

16 THE COURT: All right. Any brief rebuttal on that  
17 issue, Mr. Piffin?

18 MR. RIFFIN: Yes, Your Honor. The state has  
19 indicated they're trying to read more into my filing my NOE,  
20 Notice of Exemption, in Pennsylvania, more than is there.  
21 Originally, the one that was in March was for Pennsylvania  
22 and a little bit in Maryland. The part in Maryland was very  
23 controversial. That's what the board doesn't like. So the  
24 board voided it. It revoked it. And I would argue --

25 THE COURT: And then you refiled?

**MARYLAND DEPARTMENT OF  
THE ENVIRONMENT, *et al.***

**v.**

**JAMES RIFFIN**

**IN THE**

**CIRCUIT COURT FOR**

**BALTIMORE COUNTY**

**Case No. 03-C-04-008920 OC**

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**ORDER**

Before the Court is the Petition for Constructive Civil Contempt filed by the Plaintiffs, State of Maryland, Department of the Environment, and Baltimore County, Maryland. The Court has read and considered said Petition together with any Exhibits attached thereto and has heard and considered the arguments advanced in open court by all parties thereto.

NOW, THEREFORE, in consideration of the above, the Court finds that Defendant James Riffin has not complied with the terms of the permanent injunction issued by this Court on November 19, 2004, and is hereby found to be in CONSTRUCTIVE CIVIL CONTEMPT of Court.

**WHEREFORE**, it is this \_\_\_\_\_ day of December 2007, by the Circuit Court for Baltimore County,

**ORDERED**, that, having found the Defendant James Riffin to be in CONSTRUCTIVE CIVIL CONTEMPT, Defendant James Riffin shall be allowed to purge this Contempt as follows:

(1) By February 15, 2007, Mr. Riffin must permanently remove or cause to be removed all construction and railroad vehicles and equipment from the property located and known as 10919 York Road and 13 Beaver Run Lane, in Cockeysville, Baltimore County, Maryland (“the site”). Mr. Riffin must permanently move all items either to a location offsite and outside the restricted flood plain encompassing his property, or inside his whiskey barrel warehouse or other existing, permanent structure on the site. If the entrance to the existing warehouse needs to be enlarged to in order to move equipment into the warehouse, the Baltimore County Office of Law and Maryland Department of the Environment (MDE) will assist Mr. Riffin in obtaining the required permits, providing that the necessary permits can be lawfully issued.

(2) By the close of business on December 19, 2007, the Baltimore County Office of Law shall provide a list of potential civil engineering firms to Mr. Riffin.

(3) By January 11, 2008, Mr. Riffin must retain one of these firms and provide the firm’s name to the Baltimore County Office of Law. Before retaining one of these engineering firms, Mr Riffin must ensure that the firm is able to meet with the appropriate State and County officials on or before January 25, 2008, in order to discuss the scope and parameters of a restoration plan for the site, the purpose of which is to restore the site to its condition in 2004, prior to Mr Riffin’s deforestation, excavation, and construction activities.

(4) By February 15, 2008, the civil engineering firm that Mr. Riffin hires shall submit a formal mitigation/restoration plan for the site, professionally sealed by the aforesaid civil engineering firm, to DEPRM and MDE for review, comment and approval.

(5) By February 15, 2008, Mr. Riffin shall post cash security or a letter of credit in the amount of two hundred and fifty thousand dollars (\$250,000.00) with the Baltimore County Office of Budget and Finance in order to secure performance of the restoration plan.

**IT IS FURTHER ORDERED**, that once DEPRM and MDE approve the plan submitted by Mr. Riffin's engineers, Mr. Riffin must fully and completely abide by and conform to the plan and all directives and deadlines contained in the plan and/or issued by DEPRM and MDE officials in the course of the plan's implementation.

**IT IS FURTHER ORDERED**, that if Defendant James Riffin fails to comply with any of the aforementioned directives, he will be fined one thousand dollars (\$1,000.00) per day and/or imprisoned until he does comply.

**IT IS FURTHER ORDERED**, that if Mr. Riffin fails to comply with any of the aforesaid conditions and directives, upon application of the County or State, Mr. Riffin will be Ordered to appear before this Judge on a date certain to Show Cause why the aforesaid security should not be forfeited, and why the proper State

and County officials, and/or their agents should not be permitted to enter upon the property for the purpose of completing the restoration plan. Further, should the reasonable costs of completing the restoration plan exceed the posted security then the amount of the overage will be assessed as a lien against the personal and real property of Mr. Riffin.

This Order is hereby issued this \_\_\_\_\_ day of \_\_\_\_\_, 2007

\_\_\_\_\_  
Judge Judith C. Ensor

11/9/2007

**AFFIDAVIT OF KEVIN R. SHARBONDA**

1. My name is Kevin R. Sharbonda. I am over the age of twenty-one (21), have personal knowledge of the facts set forth herein, and am competent to give testimony thereon in this code Enforcement Hearing

2. I am employed by Baltimore County as an Environmental Inspection and Enforcement Officer II in the Inspection and Enforcement Section of the Baltimore County Department of Environmental Protection and Resource Management ("DEPRM"), and have been employed with DEPRM for the last nineteen (19) years. As an Environmental Inspection and Enforcement Officer II, I perform field inspections of proposed building sites, investigate complaints and prepare reports concerning grading, drainage, silting, stormwater management, and sediment control issues. I also act as a supervisor of other inspectors.

3. I am personally familiar with the property located at 10919 York Rd., Cockeysville, Maryland ("Site"). I have visited the property on many occasions in response to reports of construction activities undertaken by Mr. James Riffin, the owner of the Site. I took all of the photographs attached to this affidavit on the dates indicated herein. All of the photographs represent the site as it appeared on those dates with no modification to them other than additions of file numbers, dates and references to specific areas relating to the site.

4. I performed inspections of the subject site to verify conditions and document any actions to comply.

642

11/8/2007

5. On November 8th, 2007 I inspected the site for compliance and found active construction activities with no valid permits for any construction activity. There were grading activities around the building and stone being stockpiled and moved. Also documented was lack of sediment and erosion control installations with unstabilized disturbed areas. There are various construction equipment and other vehicles stored throughout the site. There has been no obvious attempt to remove any of the equipment or restoration to original conditions as of this date. Following are pictures documenting the conditions.



The South side of the building showing some sort of rail installations and equipment.



**The East end of the building, showing some excavation activity with a large track hoe.**

**Disturbed areas and no visible erosion or sediment controls.**



**Another view to the other side along the stream.**

11-8-2007  
Riffin Property 10819 York Rd  
Kevin Sharbonda  
SC # 04-0017



**A view of an area South of Beaver Dam Lane and along the stream showing more equipment and some disturbed areas from a rear access off of Beaver Dam Lane.**

11-8-2007  
Riffin Property 10819 York Rd  
Kevin Sharbonda  
SC # 04-0017



*W/d + ACOR*

**This is an area Across the bridge on Beaver Dam Lane near the city watershed property.**

11-8-2007  
Riffin Property 10919 York Rd  
Kevin Sharbonda  
SC # 04-0017



I posted a copy of the citation on the window inside the track hoe near where some earthmoving activity was under way.

I SOLEMNLY SWEAR OR AFFIRM, this 8th day of November 2007, under the penalties of perjury that the foregoing is true and accurate.

A handwritten signature in black ink, appearing to read "Kevin R. Sharbonda".

KEVIN R. SHARBONDA  
Sediment Control Inspector II  
Department of Environmental Protection  
And Resource Management  
401 Bosley Avenue  
M. S. 3404  
Towson, Maryland 21204

MARYLAND  
DEPARTMENT OF THE ENVIRONMENT  
*ET. AL.*

V.

JAMES RIFFIN

\* \* \* \* \*

\* IN THE  
\* CIRCUIT COURT FOR  
\* BALTIMORE COUNTY  
\* Case No. 03-C-04-008920  
\* OC

**MEMORANDUM OF LAW IN SUPPORT OF  
MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION**

Now comes your Plaintiff, James Riffin, a federally licensed Class III rail carrier, (“Plaintiff”), who herewith files this Memorandum of Law in Support of Motion to Dismiss for Lack of Subject Matter Jurisdiction, and states:

**1. SUMMARY OF ARGUMENT**

1. The 2<sup>nd</sup>, 5<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> Federal Circuit Courts of Appeal, and numerous U.S. District Courts, have explicitly stated the Interstate Commerce Act (“ICA”) **completely preempts** State and local regulation of transportation by rail carriers. The 8<sup>th</sup> 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 ”

2. Plaintiff would argue the ICA has completely preempted all State and local regulation of transportation by rail carriers, the “ICA provides both a forum and a set of remedies that is exclusive and completely preempts competing state law claims,” the Plaintiff is a rail carrier providing transportation by rail carrier, and that Plaintiff’s present and prospective activities at his various Baltimore County properties constitute “transportation by rail carrier,” and, consequently, Petitioner’s rail-carrier-related activities at his Baltimore County properties, are subject to the exclusive regulatory authority of the Board.

## **2. STATUTES INVOLVED<sup>1</sup>**

### **3. 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.**

### **4 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, 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,**

---

<sup>2</sup> 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.”

- (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."

**5 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 ”

## **ARGUMENT**

### **3. Complete Preemption Turns State Claim Into Federal Claim From Its Inception.**

6. 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)].” ”

7 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

(8<sup>th</sup> 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 (8<sup>th</sup> Cir. 1995)). *See also, Deford v Soo Line R R* , 867 F.2d 1080, 1084 (8<sup>th</sup> 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) ”

#### 4. SUPREME COURT CASES

8 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 & NW 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 Atchison, 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.

## **5. CASES HOLDING THE ICA COMPLETELY PREEMPTS STATE LAW**

9. 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 (8<sup>th</sup> Cir 1989); *City of Auburn v U S Government*, 154 F 3d 1025 (9<sup>th</sup> Cir 1998); *Friberg v Kansas City Southern Ry Co* , 267 F.3d 439 (5<sup>th</sup> Cir 2001), *Green Mountain R R Corp V Vermont*, 404 F 3d 638 (2<sup>nd</sup> Cir. 2005), *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), *New York, Susquehanna and Western Railway Corp v Jackson*, Case 2:05-cv-04010, decided February 21, 2007 [D.N.J (3<sup>rd</sup> Cir.)] [presently on appeal in the 3<sup>rd</sup> Cir.]; In accord *CSX Transp, Inc – Petition for Declaratory Order*, STB Docket No 34662, decided March 14, 2005 [In accord: *CSX Transp v Williams*, 406 F 3d 667 (D.C.Cir. 2005; John Roberts, Ch. Justice Supreme Court, was a member of the 3-judge panel); *New England Transrail - Petition for Declaratory Order*, STB Docket No. 34797, served July 10, 2007 [Petition for Review filed in the 1<sup>st</sup> Cir on September 10, 2007.].

## **6. ADDITIONAL CASES HOLDING LOCAL AND STATE REGULATION OF RAILROAD FACILITIES HAVE BEEN PREEMPTED BY THE ICA**

10 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 ]

11. In *Green Mountain R R Corp v Vermont*, 404 F.3d 638 (2<sup>nd</sup> Cir. 2005), the railroad, without first obtaining a permit, began constructing a salt storage shed within a 100-foot buffer zone next to a river. The State issued a notice of violation. The railroad filed suit for a declaratory order in the U.S. District Court. The District Court held the Interstate Commerce Commission Termination Act<sup>2</sup> (“ICCTA”) preempted Vermont’s environmental laws. The 2<sup>nd</sup> Circuit, at p 643, held:

“... in this case preemption is clear: the railroad is restrained from development until a permit is issued, the requirements for the permit are not set forth in any schedule or regulation that the railroad can consult in order to assure compliance; and the issuance of the permit awaits and depends upon the discretionary rulings of a state or local agency ”

12 In *New York, Susquehanna and Western Railway Corporation v Jackson*, Case 2:05 - cv-04010, filed 2/21/2007, the U.S. District Court for the District of New Jersey, found the ICCTA preempts New Jersey’s environmental waste transfer regulations. On March 21, 2007, the 3<sup>rd</sup> Circuit denied New Jersey’s request to stay the District Court’s ruling pending the 3<sup>rd</sup> Circuit’s review of the District Court’s decision

13 The most recent case to address the preemptive reach of 49 U S C §10501(b) is: *New England Transrail - Petition for Declaratory Order*, STB Docket No 34797, served **July 10, 2007** [Petition for Review filed in the 1<sup>st</sup> Cir. on September 10, 2007.]. In this decision, the Board reaffirmed that a State’s environmental laws have been preempted by 49 U S.C §10501(b), and that a **prospective** rail carrier’s **proposed** waste transfer activities would not be subject to a State’s preclearance or permitting regulations, that the Board had the exclusive

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<sup>2</sup> See footnote 2

authority to determine whether an entity would be granted authority to operate as a rail carrier, and that the Board had the exclusive authority to dictate what conditions would attach to the prospective rail carrier's proposed activities

14 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**

15 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.)**

16 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."

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

17. 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)**

18 In *Deford v Soo Line Railroad Company*, 867 F. 2d 1080 at 1091 (8<sup>th</sup> Cir. 1989), the 8<sup>th</sup> 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.)

19. 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.)

20. 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 ”

21. The Baltimore County-law remedies sought by Plaintiff are **not** included in 49 U.S.C. §§10101 - 11908, and which, if imposed, would violate Federal law Permitting Baltimore County authorities to utilize their County-law based remedies would undermine Congress’ policy choices of including certain remedies and excluding other remedies.

## **8. MARYLAND’S DEPARTMENT OF THE ENVIRONMENT AND BALTIMORE COUNTY HAVE ADMITTED THE ICA COMPLETELY PREEMPTS ECONOMIC REGULATION OF TRANSPORTATION BY RAIL CARRIER**

22. At a September 8, 2004 U.S. District Court hearing, Case No. RDB-04-2848, 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 At a November 18, 2004 hearing in the Circuit Court for Baltimore County, in Case No. 03-C-04-008920, the State stated. “...the economic regulation of railroads, ... is completely preempted.” T (CC) 38 Baltimore County stated: “The county adopts and incorporates by reference the arguments set forth by counsel for the state ” T (CC) 40.

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

23 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 US 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

## **10. PREEMPTION GUIDELINES**

24. 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 (11<sup>th</sup> 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 (11<sup>th</sup> 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*" (Emphasis added.)

25. 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 NW 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

## 11. ICCTA PREEMPTION

26. 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, 104<sup>th</sup> Cong., 1<sup>st</sup> 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, 104<sup>th</sup> cong., 1<sup>st</sup> 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.

27 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.

28. 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)."

29 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 ”

30 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, 104<sup>th</sup> Cong., 1<sup>st</sup> 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, 104<sup>th</sup> Cong., 1<sup>st</sup> 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.)

31 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 )**

**“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 ” *Id* at 1101**

32. In *City of Auburn v US Government*, 154 F 3d 1025 (9<sup>th</sup> 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 *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).” *Id* at 1030

**“Pre-ICCTA case law addressing federal preemption over railroad operations also supports a broad reading of the statute.” *Id* at 1031**

**“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.**

**"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.) *Id* at 1031**

"Additionally, given the broad language of §10501(h), 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. (Emphasis added )

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.)**

33 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.**

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

34 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) (“*Austell*”) 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.”** (Emphasis added.)

35. 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 & NW 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 (8<sup>th</sup> 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 (5<sup>th</sup> 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 (9<sup>th</sup> 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 (8<sup>th</sup> 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 Ridgely Park v New York, Susquehanna & W Ry*, 750 A.2d 57 (N.J. 2000) (*Ridgely 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.]

36 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**

### **13. SURFACE TRANSPORTATION BOARD PROCEEDINGS**

37. 49 U.S.C. § 11704 states

**§ 11704. Rights and remedies of persons injured by rail carriers.**

**(b)** a rail carrier providing transportation subject to the jurisdiction of the Board under this part is liable for damages sustained by a person as a result of an act or omission of that carrier in violation of this part

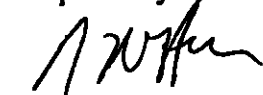
**(c)(1)** a person may file a complaint with the Board under section 11701(b) of this title or bring a civil action under subsection (b) of this section to enforce liability against a rail carrier providing transportation subject to the jurisdiction of the Board under this part

### **14. CONCLUSION**

38 The Plaintiff has argued that the ICA completely preempts State and local regulation of transportation by rail carrier; has argued that his activities at his various Baltimore County properties, falls within the ambit of “transportation by rail carrier,” has argued Congress directed that the remedies in 49 USC §§10101 - 11908 are exclusive and preempt all other Federal or State remedies applicable to transportation by rail carrier, and has argued that Baltimore County’s County-law based remedies have been completely preempted by the unambiguous language of 49 USC §10501 (b)

39. The Plaintiff would also argue that since Baltimore County’s regulations conflict with federal law, they are without legal effect as they pertain to the Plaintiff’s properties. “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. *Cipolone 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).

Respectfully submitted,



James Riffin, Plaintiff