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Before the
Surface Transportation Board
Finance Docket No. 34501

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Office of Proceedings

SEP 14 2004

Part of
Public Record

**JAMES RIFFIN d/b/a THE NORTHERN CENTRAL RAILROAD-
ACQUISITION AND OPERATION EXEMPTION-
ON USRA LINE 145, BETWEEN THE MARYLAND / PENNSYLVANIA LINE
(MP 35.6) AND HYDE (MP 54.6), A DISTANCE OF APPROXIMATELY 19 MILES-
ALL LINE LOCATED IN YORK COUNTY, PENNSYLVANIA**

**RIFFIN'S ANSWER TO
PETITION OF THE STATE OF MARYLAND
TO REVOKE THE VERIFIED NOTICE OF EXEMPTION**

1. On August 20, 2004 the State of Maryland ("Maryland") filed a "Petition of the State of Maryland to Revoke the Verified Notice of Exemption" ("Petition") which James Riffin d/b/a The Northern Central Railroad ("Riffin") filed on April 28, 2004 (Finance Docket No. 34501, served May 20, 2004.). What follows is Riffin's Answer to that Petition to Revoke ("Answer to Revocation Petition").

I. THE PETITION SHOULD BE DISMISSED FOR LACK OF STANDING.

2. The Petition filed by Maryland to revoke Riffin's Pennsylvania Notice of Exemption, Finance Docket No. 34501 ("PA NOE") should be dismissed, for Maryland lacks standing to file the Petition.

3. "The "irreducible constitutional minimum of standing contains three elements": (1) an injury

in fact; (2) a causal connection between the injury and the conduct complained of; and (3) the likelihood that the injury will be redressed by a favorable decision. ... "First, the plaintiff must have suffered an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L. Ed. 2d 351 (1992). ... An injury is particularized if it affects "the plaintiff in a personal and individual way." *Lujan*, 504 U.S. at 560 n. 1, 112 S.Ct. 2130." *Flynn v. BNSF*, 98 F. Supp. 2d 1186 at 1190 (E.D. Wash. 2000).

4. In the instant case, the PA NOE is to acquire and operate line in Pennsylvania. The acquisition and operation of line in Pennsylvania does not affect the State of Maryland "in a personal and individual way." *Lujan*, 504 U.S. at 560 n. 1. Consequently, Maryland has failed to establish one of the essential elements for standing.

5. WHEREFORE, for the above reasons, Riffin would move Maryland's Petition be Dismissed due to a lack of standing.

II. EXPEDITED HANDLING IS REQUESTED.

6. Maryland has requested its Petition be handled in an expedited manner. Given the uncertainty that this Petition places on the continued operation of Riffin's Pennsylvania line, Riffin would also respectfully request the Board consider Maryland's Petition and Riffin's Answer to that Petition, in an expedited manner.

III. THE PETITION SHOULD BE DENIED.

7. If it is determined that Maryland has standing to file the Petition, then the Petition should be denied for the following reasons:

A. Applicable Law

8. The Petition correctly stated that if a notice of exemption contains false or misleading information, it is void *ab initio* and may be revoked. The Petition also correctly stated the party

seeking revocation has the burden of proving the notice of exemption contains false or misleading information.

B. Petitioner's Allegations

9. Petitioner has **not** alleged Mr. Riffin's NOE contains a false statement. Petitioner has alleged the NOE contains the following misleading information:

- A. The PA NOE contains the statement: "York County, PA, the owner of the right-of-way has sent a lease proposal to Riffin, which Riffin is reviewing."
- B. The PA NOE contains incomplete information, specifically:
 - a. The PA NOE fails to provide verifiable information relating to the proposed operation.
 - b. Riffin's prior communications with the Board indicate his intention is to operate a dinner train on the PA line.
 - c. The PA NOE contains the statement: "the proposed activities will not affect any historic structures."
 - d. The PA NOE does not explain how the necessary repair or rehabilitation of the line and the proposed operation, would not "affect any historic structures."

C. Riffin's Response to Petitioner's Allegations.

10. The concerns in Maryland's Petition were all raised in the Comments of the State of Maryland ("Comments"), filed with the Board on May 18, 2004. Riffin's Answer to Comments of the State of Maryland, were filed with the Board on May 28, 2004.

11. Riffin incorporates into this Answer to Revocation Petition, by reference, Riffin's Answer to Comments of the State of Maryland, as if fully set forth herein.

12. Riffin's PA NOE and Answer to Comments of the State of Maryland, contains information which not only is verifiable, but the State of Maryland has already verified (by calling York County personnel (Comments p.5), by reading material sent to Maryland by York County personnel (Comments p. 5-6), and by visiting York County's web site (Comments p. 6-7). Riffin even provided a telephone number and contact person for the Genesee and Wyoming railroad in York, PA.

13. While Riffin's July, 2003 communications with the Board discussed operating a dinner / excursion train in Baltimore County, this proposal was withdrawn in July, 2003. Since then Riffin has focused on providing freight service on the York County line. Since the Board granted Riffin permission to acquire and operate the York County line, in addition to the activities described in Riffin's Answer to Maryland's Comments, Riffin has done the following:

A. He has been granted permission to use a 15+ acre York, PA facility with existing spur track on it.

B. He has purchased six tanker cars, to be used to transport ethanol. He also has three 89-foot flat cars, which may be used for intermodal purposes.

C. He is about to receive delivery of two 2,000 horsepower locomotives.

D. He has purchased two cabooses. (While cabooses are no longer required on the end of a freight train, they may be used to secure the line when backing into a spur. They also add a nice touch to the end of a freight train.)

E. He is actively looking for at least six gondola cars, which he will use to transport railroad ties to the line, and several hopper cars, which can be used to transport ballast.

F. He has arranged to acquire a large number of railroad ties, which will be used to rehabilitate the line.

G. He has acquired a complete set of track-maintenance equipment, which he will use to rehabilitate the line. (A cribber, switch tamper, track liner, road master tamper, two ballast equilizers, four scarifiers, spike pullers and inserters, two 30-ton Burro cranes, a trac gopher, 3 800-amp welders to weld rail with, a Gradal with high-rail gear, etc.) He has also acquired several hundred tons of ballast material.

H. Riffin has spoken with a number of potential shippers along the line, who have a desire to

utilize Riffin's freight services once they commence.

14. Over the next two weeks, Riffin plans to obtain letters / affidavits from York County individuals who will attest that York County, and individuals residing in York County, have a strong desire to see freight service reinstituted on the line Riffin proposes to acquire and operate. As Riffin acquires these letters / affidavits, he will forward copies to the Board for its consideration.

15. There are three reasons why a NOE should be revoked:

- A. If it contains false or misleading statements.
- B. If it is controversial.
- C. If it is not in the public interest.

16. Maryland has not complained that Riffin's PA NOE contains false statement. None of the statements in the PA NOE are misleading. Riffin's proposal to acquire and operate 19 miles of line in York County has been decidedly **uncontroversial** in York County, Pennsylvania. The operation of that line is decidedly in the public interest, for it will reinstitute service over a line that the State of Pennsylvania and York County have fought hard to preserve. Consequently, there is no reason to revoke Riffin's PA NOE.

**IV. Since the Petition to Revoke was not timely filed,
Granting the Petition would be unreasonable.**

17. Maryland had an opportunity to file its Petition to Revoke shortly after Riffin filed his PA NOE. Since Maryland's Petition to Revoke contains the same concerns raised by Maryland in its Comments, there is no good reason why Maryland could not have filed its Petition to Revoke at the same time it filed its Comments. Riffin deliberately waited more than 30 days after he filed his Answer to Maryland's Comments, before expending large sums of money acquiring additional rail cars and locomotives, ballast material, railroad ties, and track maintenance equipment, for he fully expected Maryland would file a Petition to Revoke. Instead of timely filing a Petition to Revoke, Maryland chose to wait **more than 3 months** after the service date of Riffin's PA NOE, long after Riffin committed large sums of irretrievable money toward completion of this project. To revoke Riffin's PA

NOE at this late stage, would be decidedly unreasonable, and may be construed to be arbitrary or capricious, particularly in light of the fact that Maryland is complaining about the operation of line in a neighboring state. Maryland's Petition to Revoke may also be construed to violate the Dormant Commerce Clause, for to grant the Petition to Revoke would favor interstate commerce in Maryland at the expense of interstate commerce in Pennsylvania. See *Dakota, Minn. & Eastern R.R. Corp. v. South Dakota*, 236 F. Supp. 2d 989 at 1014, 1015 (D.S.D. 2002), and the cases cited therein.

V. Riffin's Cockeysville railroad facility.

18. Maryland definitely does not like the fact that Riffin is constructing a railroad facility on land he owns in Cockeysville, Maryland.

A. Riffin's land is adjacent to the former Northern Central right-of-way, which Riffin hopes to utilize someday, and which Maryland adamantly does not want used for railroad purposes. (It has adamantly been opposed to the use of this right-of-way for railroad purposes for more than 30 years.) Rather than file objections concerning the construction of this rail facility with the Board, Maryland has chosen to file suit in Maryland's state courts, where it knows the courts are not likely to closely question Maryland's motives or view of federal law.

B. Riffin admits his construction activities have been in the floodplain of the creek which flows through his land. However, he has taken great measures to insure his activities have not, and will not, adversely affect the water quality of that creek. (He has built a concrete retaining wall, which separates the area where he proposes to lay track that will be used to hold his track-maintenance equipment, from the creek. The area between the concrete retaining wall and the flowing waters of the creek, now has four inches of grass growing on it. The concrete wall was designed to intercept rainwater falling on the track area, then redirect that rainwater to a rock-filled trench beneath the concrete retaining wall, thereby storing that water, and allowing that water to enter the ground water which supplies the creek. See the attached two photographs of the Site.

C. In a previous Board decision, Riverdale II, Finance Docket No. 33466, the Board made reference to *Village of Ridgefield Park v. New York, Susquehanna & Western Ry.*, 750 A.2d 57

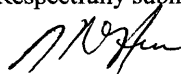
(N.J. 2000). In that case, the Supreme Court of New Jersey suggested it would be appropriate for a railroad to notify the local government "when it is undertaking an activity for which another entity would require a permit." The first week of March, 2004, Riffin gave a number of Baltimore County officials and Maryland Department of the Environment officials a copy of a Notice of Intent to Construct, Operate and Maintain a Railroad Facility, a copy of which is attached to this Answer.

D. The Board and courts have been unanimous in holding that local and State preclearance permitting requirements have been preempted by 49 U.S.C. § 10501 (b). See *City of Auburn v. U.S. Government*, 154 F. 3d 1025; *Soo Line R. Co. v. City of Minneapolis*, 38 F. Supp. 2d 1096; *Riverdale I*, STB Fin. Doc. # 33466; *Flynn v. BNSF* 98 F. Supp. 2d 1186 at 1190. The Board and the court in *Boston and Maine Corp. v. Town of Ayer*, 330 F.3d 12 (1st Cir. 2003), has indicated that a town may seek enforcement of voluntary agreements a railroad has entered into with a town. If a railroad were to apply for a permit, this may be construed as a voluntary agreement to be bound by the permitting entity's regulations.

VI. Conclusion.

WHEREFORE, for the reasons enumerated above, Riffin would request the Board **DENY** Petitioner's "Petition of the State of Maryland to Revoke the Verified Notice of Exemption" filed by Riffin on April 28, 2004, Finance Docket No. 34501, and for such other and further relief as may be appropriate.

Respectfully submitted,



James Riffin d/b/a The Northern Central Railroad

CERTIFICATE OF SERVICE

I hereby certify, that on this 14th day of September, 2004, a copy of the foregoing "Riffin's Answer to Petition of the State of Maryland to Revoke the Verified Notice of Exemption," was mailed, postage prepaid, to Charles A. Spitulnik, of McLeod, Watkinson & Miller, Suite 800, One Massachusetts Avenue, NW, Washington, DC 20001, counsel for the State of Maryland.


James Riffin