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Surface Transportation Board
Finance Docket No. 34552



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PETITION FOR DECLARATORY ORDER

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SURFACE
TRANSPORTATION BOARD

SEP 14 2004

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SURFACE
TRANSPORTATION BOARD

James Riffin d/b/a The Northern Central Railroad (Petitioner), a Class III carrier by rail, herewith petitions this Board for a Declaratory Order, to determine the following:

I. QUESTIONS PRESENTED

- A. When a non-carrier files a notice of exemption to acquire and operate line, if not revoked, when does the non-carrier become a carrier subject to the exclusive jurisdiction of the Board?
- B. If a carrier has authority to operate line in one state, are that carrier's railroad facilities in an adjacent state, which facilities are not connected to the interstate rail system, subject to the exclusive jurisdiction of the Board?
- C. If a carrier subject to the exclusive jurisdiction of the Board, elects to construct a railroad facility, must that carrier first either apply for, or obtain, permits from local or state authorities, before beginning construction of that facility, or have those permitting requirements been preempted by 49 U.S.C. § 10501 (b)? More specifically:
 - a. If the proposed facility is to be built in a riverine floodplain, and local law prohibits any type of construction in a riverine floodplain, may the local or state authority prohibit the construction of the facility by arguing the carrier failed to apply for a permit, or by refusing to issue a permit?

- b. If the carrier elects to install plumbing, electrical, fire suppression or freight or passenger elevator systems at the facility, may the local or state authority prohibit the installation of, or use of any of those systems, by arguing the carrier failed to apply for a permit, or by refusing to issue a permit?
- c. If the carrier elects to connect the facility's plumbing system to a municipality's public water or public sewer system, or elects to connect the facility's electrical system to the electrical grid of a electricity supplier, or its natural gas system to the natural gas distribution system of a natural gas supplier, may the local or state authority prohibit the connection of the facility's plumbing, electrical or fire prevention systems to the public system, by arguing the carrier failed to apply for a permit for the installation of those systems within the facility, or by refusing to issue a permit for the installation of those systems within the facility?
- d. If a carrier has an existing facility which is adjacent to, but not connected via a spur track, to the interstate rail system, a portion of which facility the carrier uses exclusively for railroad purposes, a portion of which facility is used by independent contractors who provide printing, sign-making, graphics, and office support services both to the carrier and to the general public, may the State or a local authority subject that facility to its regulatory authority?
More specifically:
 - i. May the State compel the carrier to permit the State access to the facility for the purpose of sampling the air within the facility, which sampling would be at the expense of the carrier?
 - ii. May the State compel the carrier to remediate pollutants placed in the soil of the facility by a previous non-carrier owner of the facility?
- e. If a carrier has an existing facility which is adjacent to, but not connected via a spur track, to the interstate rail system, a portion of which facility the carrier uses exclusively for railroad purposes, may a local authority prohibit the installation or use of a fuel storage tank (which is used to store fuel used by the rail carrier's rail operations) on that portion of the facility used exclusively by the rail carrier, by either arguing no permit was obtained prior to installation of the fuel storage tank, or by refusing to issue a permit granting permission to

install or use the fuel storage tank?

II. STATEMENT OF FACTS

Riffin's Notice of Exemption:

1. On April 28, 2004, Riffin filed a Notice of Exemption ("NOE"), Finance Docket No. 34501, to acquire and operate 19 miles of rail line in York County, Pennsylvania. The NOE was decided on May 13, 2004, and had a Service Date of May 20, 2004. The State of Maryland filed Comments regarding this NOE on May 18, 2004. Riffin filed an Answer to Maryland's Comments on May 28, 2004. Maryland filed a Petition to Revoke this NOE on August 20, 2004, more than 3 months after Riffin filed the NOE. Riffin filed his Answer to Maryland's Petition to Revoke on September 14, 2004.

Cockeysville railroad facility:

2. On April 2, 2003, Riffin acquired title to a parcel of land commonly known as 10919 York Road, Cockeysville, Maryland ("Site"), which is in Baltimore County, Maryland. This site is approximately 1,000 feet from the end of rails which are connected to the interstate rail system. After acquiring title to the Site, Riffin began storing a large quantity of railroad track maintenance equipment, railroad ties and railroad ballast at the Site. Circa February, 2004, Riffin began clearing, filling and grading approximately 9,000 square feet of the Site, all of which area is within the 100-year riverine floodplain of Beaver Dam Run, a non-navigable stream which flows through Riffin's land. 300 linear feet of sediment control fence was erected, which fence was placed between Riffin's land-disturbing activities and the adjacent Beaver Dam Run. Riffin erected a concrete retaining wall which separates the filled area from Beaver Dam Run. The area between the retaining wall and Beaver Dam Run was seeded and mulched, and presently has a full cover of 4" tall grass growing on it. The area between the concrete retaining wall and the building, is to have track placed on it. Riffin plans to store his track-maintenance equipment and rail cars on this track. The concrete retaining wall was designed to intercept rainwater from the track area, then divert that rainwater into a rock-filled trench beneath the retaining wall. The water then would seep into the ground water, thereby replenishing the nearby creek. Case law interpreting 49 U.S.C. § 10501 (b) has held railroads are not required to obtain permits from local or state authorities prior to instituting railroad construction activities, and that the regulation of rail carriers has been **completely preempted** by federal law. Consequently, Riffin did not seek to obtain a permit from Baltimore County or the State of Maryland for these activities. In addition, Baltimore County law stipulates no development is permitted in a

riverine floodplain. Consequently, if Riffin had applied for a permit, it would have been denied.

3. On August 25, 2004, Baltimore County and Maryland's Department of the Environment ("Plaintiffs") filed a Complaint in the Circuit Court for Baltimore County, Maryland ("Complaint"), for Injunctive Relief and a Motion for a Temporary Restraining Order, asking the circuit court to enjoin Riffin from continuing with his activities at this railroad facility. Riffin filed a Motion to Dismiss for Lack of Jurisdiction with the circuit court, which was denied. On September 9, 2004, the circuit court found that 49 U.S.C. §10501 (b) did not preempt State or local regulation of this railroad facility, then signed a Preliminary Injunction ordering Riffin to cease all activities at the Site, and to remove the hundreds of tons of ballast and under-burden (unique, high load-bearing dirt to be placed beneath track ballast) stockpiled at the Site. The Plaintiffs' Complaint further asks the Court to compel Riffin to remove all fill material placed at the Site, to remove the concrete retaining wall, and to restore the Site to the condition it was in prior to Riffin's construction activities.

Greenspring railroad facility:

4. In 1999, Riffin acquired title to a parcel of land commonly known as 1941 Greenspring Drive, Timonium, Maryland ("Greenspring Site"), which is located in Baltimore County, Maryland. This site is adjacent to rails connected to the interstate rail system, but does not have a spur track. Riffin uses a portion of this site exclusively for railroad purposes (to store material and equipment used in his railroad operations). A portion of this site is leased to independent contractors who provide printing, sign-making, graphics, and office support services both to Riffin's railroad and to the general public. The portion of the Greenspring Site occupied by the independent contractors, contains typewriters, computers, telephones, duplicating and printing equipment, vinyl cutting and laminating equipment, and numerous other pieces of 'equipment,' all of which relate to the movement of passengers or property by rail. (This equipment may be used to create, and / or print, signage, schedules, manifests, menus, bills of lading and other material used by a rail carrier. This equipment may be used to keep track of property, to prepare invoices, to communicate with customers, to keep ledgers, to order additional equipment or materials, and other 'back-room' activities.) **All** of this equipment would constitute 'equipment of any kind regardless of ownership or an agreement concerning use.' **All** of this equipment relates in some manner to the "movement of passengers or property, or both, by rail." Riffin pays for all electricity, water, sewer and insurance costs, property taxes, and site maintenance costs (landscaping, lawn mowing, snow removal).

5. In 1988, a previous owner of this site placed chlorinated solvents on the ground of the site, thereby contaminating the site. The EPA investigated the site in 1990, then determined the contamination did not warrant any further action.

6. In 2002, the Maryland Department of the Environment ("MDE") obtained a grant which provided funding which allowed MDE to revisit sites previously investigated by the EPA. MDE asked Riffin to grant MDE permission to sample the ground water at the site, which Riffin granted after being threatened with legal action. While at the site, MDE observed an empty 6,000 gallon above-ground fiberglass fuel storage tank installed at the site. The tank was inside a containment vessel lined with an impermeable liner, which vessel was large enough to contain the full contents of the tank, were the tank to develop a leak. MDE ordered Riffin to remove the tank, arguing Riffin had not obtained a permit from MDE to place the tank there. Riffin pointed out that a MDE permit was necessary only if the tank had a capacity of greater than 10,000 gallons. MDE then filed a complaint with Baltimore County authorities, suggesting the tank had been installed without a county permit.

7. Riffin wants to use the tank to store fuel used in his railroad operations. (The capacity of the tank permits Riffin to buy truck-tanker loads of fuel, for a few pennies above the New York commodities price for fuel.) On May 24, 2004, a Baltimore County fireperson, issued a civil citation to Riffin, ordering Riffin to remove the tank, citing Baltimore County's Fire Prevention Code as authority for his actions. On August 25, 2004, the District Court of Maryland for Baltimore County, found that 49 U.S.C. §10501 (b) did not preempt State or local regulation of this tank, then signed an Order directing Riffin to remove the fuel storage tank.

8. On April 26, 2004, pursuant to a Complaint for Injunctive Relief filed by MDE, the Circuit Court for Baltimore County found that 49 U.S.C. §10501 (b) did not preempt State or local regulation of Riffin's Greenspring railroad facility, then ordered Riffin to permit MDE access to the Greenspring Site for the purpose of sampling the air inside the building at the site, and to permit MDE to remediate any pollutants found at the site, all at Riffin's considerable expense.

Respectfully submitted,



James Riffin d/b/a The Northern Central Railroad
Petitioner

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Before the
Surface Transportation Board
Finance Docket No. 34552



**MEMORANDUM OF LAW IN SUPPORT OF
PETITION FOR DECLARATORY ORDER**

James Riffin d/b/a The Northern Central Railroad ("Petitioner" or "Riffin"), a Class III rail carrier, herewith files this Memorandum of Law in Support of Petition for Declaratory Order.

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III. STATE LAW, AS APPLIED IN THIS CASE, IS COMPLETELY PREEMPTED

9. The Plaintiff is attempting to subject the railroad facility site commonly known as 10919 York Road, Cockeysville, Maryland ("Site") to its regulations.

10. 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)].” “

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

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

12. In *Cedarapids, Inc. v. Chicago, Central & Pacific R.*, 265 F. Supp. 2d 1005 at 1010 (N.D. Iowa 2003), that court, while examining the preemptive effect of ICCTA, made the following comments:

“In *Deford v. Soo Line Railroad Company*, [*supra*, at 1088, that court] examined the issue of whether the complete preemption doctrine applies to the Interstate Commerce Act (“ICA”) for purposes of federal subject matter jurisdiction. The court opined that the “fundamental question [in making such determination] is whether the ... ICA so pervasively occup[ies] the field of railroad governance that a competing state law claim necessarily invokes federal law.” *Id.* at 1084-85. The court determined that its analysis of this issue must

“focus on the nature and purpose of the ICA illustrated by the language of the statute and recent case law, to determine if the complete preemption doctrine applies to the ICA.” In analyzing the nature and purpose of the ICA, the court found:

“The broad grant of power given the ICC in governing railway transactions is illustrated on the face of the ICA. The exclusivity of the ICC’s authority is expressly set out in section 10501 (d) which states: “The jurisdiction of the Commission over transportation by rail carriers, and the remedies provided in this title with respect to the rates, classifications, rules and practices of such carriers is exclusive.” *Cedarapids, Inc. v. Chicago, Central & Pacific R.*, 265 F. Supp. 2d 1005 at 1010 (N.D. Iowa 2003).

“To determine whether the doctrine of complete preemption applies to the ICCTA and preempts Cedarapids’ state law claims in this case, then, the Court must examine whether the ICCTA so pervasively occupies the field of railroad governance that a competing state law claim necessarily invokes federal law.” *Cedarapids* at 1011. After reviewing the history of the ICCTA, the court stated:

“The Court’s review of the nature and purpose of the ICCTA, as evidenced by both the legislative history and the plain language of the statute, **leads the Court to conclude that, in enacting the ICCTA, Congress intended to occupy completely the field of state economic regulation of railroads.** The Court also finds that the ICCTA preempts state regulation of the abandonment of lines of railroad. ... This comports with Congress’ stated desire of deregulation of the railroad industry by ensuring that states do not impose regulations which conflict with or undermine those set forth in the ICCTA and imposed by the STB with respect to the abandonment of tracks.” *Cedarapids* at 1013. Emphasis added.

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

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

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

At 1031, the Auburn court stated:

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

14. Consequently, since “complete preemption” exists, Plaintiff’s state claim has been converted into a federal claim, and the “well-pleaded complaint” rule is inapplicable. “[I]t is an independent corollary of the well-pleaded complaint rule that a plaintiff may not defeat removal by omitting to plead necessary federal questions in a complaint. *See Avco Corp. [supra].*” *Franchise Tax Bd., supra*, at 22, 103 S.Ct.at 2853.

15. “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):

IV. THE SURFACE TRANSPORTATION BOARD HAS EXCLUSIVE JURISDICTION OVER TRANSPORTATION BY RAIL CARRIERS

16. 49 U.S.C. § 10501 (b) states:

“(b) The jurisdiction of the Board over –

(1) **transportation by rail carriers, and the remedies provided in this part with respect to 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**. (Emphasis added.)

17. 49 U.S.C. §10102 (9) **broadly** defines the word ‘transportation’ as follows:

“(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;” (Emphasis added.)

18. It should be noted, the word “integral” does **not** appear before the word “related” in 49 U.S.C. §10902 (9) above, it does not appear in any other portion of the statute, nor is it needed. It should also be noted that there are no qualifying words (such as ‘economic’ or ‘environmental’) preceding the word “regulation” in 49 U.S.C. §10501 (b).

19. When interpreting a statute, “If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *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).

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

“It is difficult to imagine a broader statement of Congress’s intent to preempt state regulatory authority over railroad operations. ...

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. *See* S. Rep. No. 176, 104th Cong., 1st Sess. 14 (1995) (explaining that ICC Termination Act “should not be construed to authorize states to regulate railroads in areas where federal regulation has been repealed by the bill”); and H.R. Conf. Rep. No. 422, 104th Cong., 1st Sess.

167 (1995), U.S. Code Cong. & Admin. News 1995, pp. 793, 852 (stating that “integrated into the statement of general jurisdiction is the delineation of the *exclusivity* of federal remedies with respect to the regulation of rail transportation” (emphasis added).”

21. If **any** item specified in the transportation definition (such as “equipment of any kind”) relates in **any** manner to the movement of passengers or property by a rail carrier, then, “regardless of ownership or an agreement concerning use,” that item is included in the definition of “transportation.” As specified in Riffin’s Affidavit, the Site is used to store equipment and property which relate to the movement of passengers or property by a rail carrier. Consequently, the STB has exclusive jurisdiction over this Site.

22. The definition of ‘transportation’ includes “*equipment of any kind* related to the movement of passengers or property, or both, by rail, *regardless of ownership or an agreement concerning use.*” If ‘equipment of any kind’ relates to the movement of passengers or property by rail, then that equipment is included within the definition of the word ‘transportation.’ In the instant case, there is a large quantity of railroad track maintenance equipment, railroad ties and railroad ballast, all of which “relates to the movement of passengers or property by rail,” at the Cockeysville Site. The portion of the Greenspring Site occupied by the independent contractors, contains typewriters, computers, telephones, duplicating and printing equipment, vinyl cutting and laminating equipment, and numerous other pieces of ‘equipment,’ all of which relate to the movement of passengers or property by rail. (This equipment may be used to create, and / or print, signage, schedules, manifests, menus, bills of lading and other material used by a rail carrier. This equipment may be used to keep track of property, to prepare invoices, to communicate with customers, to keep ledgers, to order additional equipment or materials, and other ‘back-room’ activities.) **All** of this equipment would constitute ‘equipment of any kind regardless of ownership or an agreement concerning use.’ **All** of this equipment relates in some manner to the “movement of passengers or property, or both, by rail.” See **Riffin’s Exhibit One**.

23. As stated in *Soo Line R. Co.*, *supra*, at 1099:

“The broad nature of Congress’ preemption under the ICCTA is further evidenced by its expansive definitions for the terms “railroad” and “transportation.” The Act defines “railroad” as including in pertinent part:

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

railroad; ...

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

“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.” (Emphasis added.)

24. The word “regulation” is not qualified in the statute, nor is qualification needed. “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 1289 (7th ed. 1999).” *Wisconsin Central v. City of Marshfield*, 160 F.Supp. 2d 1009, 1013 (W.D. Wis. 2000). Plaintiff is attempting to ‘regulate’ the Site, by subjecting the Site to its fire code regulations. Congress drew a line in the sand. It said the regulation of railroad facilities shall be done exclusively by the STB. If a State attempts to regulate a railroad facility, it has impermissively crossed over the line Congress drew in the sand.

25. The Site is used to store property and equipment which relates to the movement of passengers or property by rail. This property and equipment may be used by Riffin’s railroad, or may be used by other rail carriers. Consequently, the Site is a railroad facility. As such, it is subject to the exclusive jurisdiction of the STB.

V. PREEMPTION GUIDELINES

26. In *CSX Transp., Inc. v. Georgia Public Serv. Com’n*, (“CSX”) 944 F. Supp. 1573, 1580 - 1585 (N.D. Ga. 1996), that court stated: “Preemption doctrine is rooted in the Supremacy Clause of the United States Constitution, *Teper v. Miller*, 82 F.3d 989, 993 (11th Cir. 1996). See U.S. Const. Art. VI, cl. 2. Because it requires that conflicts between state and federal law be resolved in favor of federal law, the Supremacy Clause prohibits the enforcement of any state law that conflicts with a valid federal statute. *Taylor v. General Motors Corp.*, 875 F.2d 816, 821 (11th Cir. 1989).

27. 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").

28. 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.*"

29. 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, 120 S. Ct. 1135, 1147-1148 (2000), (a case involving maritime preemption):

"As *Rice* indicates, an "assumption" of nonpreemption is not triggered when the State regulates in an area where there has been a history of significant federal presence." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 67 S. Ct. 1146, 91 L. Ed. 1447 (1947). *Locke* at 1147.

"Congress has legislated in the [area of maritime commerce] from the earliest days of the Republic, creating an extensive federal statutory and regulatory scheme." *Locke* at 1148.

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

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

The City of Plymouth court then stated:

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

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

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

“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.

VI. ICCTA PREEMPTION

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

“Defendants’ argument reflects a misunderstanding not only of the plain language of section 10501(b)(2), but also of the ICC Termination Act generally. The most natural reading of section 10501(b)(2) is that the federal remedies provided by the ICC Termination Act are the only remedies available as to the **regulation** of rail transportation, and that the federal remedies are exclusive of state remedies except

where the ICC Act has expressly provided otherwise. (Emphasis added.) See S.Rep. No. 176, 104th Cong., 1st Sess. 14 (1995) (explaining that ICC Termination Act “should not be construed to authorize states to regulate railroads in areas where federal regulation has been repealed by the bill”); and H.R. Conf. Rep. No. 422, 104th cong., 1st Sess. 167 (1995), U.S.Code Cong. & Admin.News 1995, pp. 793, 852 (stating that “integrated into the statement of general jurisdiction is the delineation of the *exclusivity* of federal remedies with respect to the regulation of rail transportation”) (emphasis added).” *CSX Transp., Supra*, at 1581.

31. Since the ICCTA clearly states all Federal and State remedies are preempted by the ICCTA, under the guidelines enumerated in *Chevron*, 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.

32. 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.)

33. 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."

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

"Perhaps the most significant change to the Staggers Rail Act, which the Court has already discussed, is the ICC Termination Act's express removal from the states of jurisdiction over wholly intrastate railroad tracks. With the extension of exclusive federal jurisdiction over wholly intrastate tracks, one of the few railroad matters previously within the jurisdiction of the state, the ICC Termination Act evinces an intent by Congress to assume complete jurisdiction, to the exclusion of the states, over the regulation of railroad operations. *See* H.R. Conf. Rep. No. 422, 104th Cong., 1st Sess. 167 (1995), U.S. Code Cong. & Admin. News 1995, p. 852 (explaining that **only state regulation of non-rail matters, for example in state criminal statutes, is not preempted by ICC Termination Act** because state regulation of nonrail matters does not "generally collide with the scheme of economic regulation (and deregulation) of rail transportation")." *CSX, Id.* at 1584. (Emphasis added.)

35. In its *CSX* opinion, the court made the following additional comments:

A. "Congress's authority to regulate even intrastate aspects of the operation of railroads is beyond question." P. 1585. Cites omitted.

B. "Congress has authority to regulate even intrastate aspects of the operation of railroads because railroads are instrumentalities of interstate commerce. *See United States v. Bishop*, 66 F.3d 569, 588 (3d Cir. 1995) (holding that Congress can regulate motor vehicles as an instrumentality of interstate

commerce and stating “the Supreme Court has made clear that airplanes, railroads, highways and bridges constitute instrumentalities of commerce which Congress can regulate under the commerce clause”). Congress has more authority to regulate instrumentalities of interstate commerce because instrumentalities of interstate commerce, as the means of transporting goods and people across state lines, have an inherently substantial effect on interstate commerce. *Id.*”

36. 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.)

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

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

“However, the pivotal question is not the nature of the state regulation, but the language and

congressional intent of the specific federal statute. (Cites omitted.) (Preemption of state law is compelled if Congress' command is explicitly stated in the federal statute's language or implicitly contained in its structure or purpose.)" *Id.* at 1031.

"Additionally, given the broad language of §10501(b), the distinction between "economic" and "environmental" regulation begins to blur. For if local authorities have the ability to impose "environmental" permitting regulations on the railroad, such power will in fact amount to "economic regulation" if the carrier is prevented from constructing, acquiring, operating, abandoning, or discontinuing a line." *Id.* at 1031.

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

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

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

38. 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.)

VII. NO PREEMPTION CASES

39. A few courts, after reviewing the specific facts of a case, have found state laws have not been preempted. A review of those cases follows:

40. The main issue in *In re Appeal of Vermont Railway* ("Vermont"), 769 A.2d 648 (Vt. 2000) was a salt shed, which was located on property previously owned by Cliffside Leasing. Cliffside Leasing was not a railroad. Vermont railroad merged with Cliffside Leasing, thereby acquiring the salt shed property. Prior to this merger, permits had been issued which subjected the storage of salt in the salt shed, and the trucking activities associated with the distribution of salt from the salt shed, to certain expressly defined conditions. After the merger, Vermont railroad argued, pursuant to ICCTA, it was no longer subject to **any** of these preexisting conditions. At trial, many of these conditions were struck, the court having concluded the conditions were preempted by ICCTA. The trial and appellate courts left in place: (A) conditions which controlled the route trucks exiting the facility were to take; (B) pending completion of the Champlain Parkway, the number of trucks which could exit the facility on a daily basis; (C) the hours during which trucking could occur; and (D) conditions designed to avert potential contamination from the salt shed, such as curbing requirements and requirements that salt be handled on impervious surfaces. The court reasoned these conditions affected the **trucking** activities taking place at the property, and the manner in which the salt was stored on the property. It further reasoned these preexisting conditions did not interfere with Vermont's railroad operations.

The Supreme Court of Vermont, after reviewing *Hillsborough County, Fla. v. Automated Med. Labs, Inc.*, 471 U.S. 707, 716, 105 S.Ct. 2371, 85 L.Ed.2d 714 (1985), started with the presumption that "state and local regulation of health and safety matters can constitutionally coexist with federal regulations."

Unfortunately, the Vermont court was not aware *United States v. Locke*, 529 U.S. 104, 120 S. Ct. 1135, 1147-1148 (2000), had been decided 9 months prior to the date the Vermont court made its decision. As discussed in paragraph 27, *supra*, *Locke* held that “there is no beginning assumption that concurrent regulation by the State is a valid exercise of its police powers.”

Even though the parties in this case argued the court was obligated to give deference to the STB’s interpretation of the scope of the preemption provision of the ICCTA, the court, mindful of the *Chevron* ruling, found:

“This rationale, however, does not support the argument that an agency’s interpretation of a statutory provision implicating constitutional questions merits deference, for agencies are in no better position to resolve constitutional questions than the courts. Therefore, while decisions of the STB regarding the preemptive effect of the ICC Termination Act may be persuasive, we are not bound by the Board’s interpretation of that particular provision.

On appeal, the railroad argued the conditions associated with the salt shed violated the Commerce Clause. The appellate court did not address this argument, having noted the railroad was precluded from raising Commerce Clause issues on appeal, since it had failed to raise these issues at the trial level. The Vermont Supreme Court then affirmed the ruling of the trial court.

41. In *Florida East Coast RY v. City of West Palm Beach*, (“FEC”) 266 F. 3d 1324 (11th Cir. 2001), FEC had a rail yard situated in a residential neighborhood. Rinker, an aggregate distributor, had a distribution center 8 blocks away. FEC and Rinker desired to do a like-kind property exchange. With this in mind, FEC leased its rail yard property to Rinker. After the exchange, FEC’s involvement with the property was limited to bringing loaded rail cars to the property, then removing the rail cars after they were unloaded. Rinker unloaded the cars, washed and graded the aggregates, loaded the aggregates onto trucks, then hauled the aggregates to various sites in Florida. Rinker also paid all electricity, water, and landscape maintenance expenses associated with the property. The City of W. Palm Beach cited FEC and Rinker for operating an industrial plant in a residential neighborhood, and for operating a business without an occupational license. The court held that since Rinker was not a railroad, and since the railroad’s only involvement with Rinker’s activities, was the delivery of rail cars to Rinker’s site, Rinker’s activities were not subject to the jurisdiction of the STB, and therefore, its activities were not preempted by the ICCTA.

42. In *Boston and Maine Corp. v. Town of Ayer*, 330 F.3d 12 (1st Cir. 2003), the railroad wanted to

build a car unloading facility on land that was situated in an Aquifer Protection Area. The Town of Ayer attempted to impose 36 conditions on this proposed facility, then totally banned the facility on the basis that it was a prohibited noisome nuisance. The STB issued a “guidance” decision, but did no fact finding. **For procedural reasons, the trial court never addressed the preemption or Commerce Clause issues that had been raised.** Ultimately, the parties reached an agreement, then dismissed all issues of their appeal, except the issue of attorney’s fees. The appellate court held the railroad was not entitled to attorney’s fees.

The STB’s “guidance” decision found state and local regulation to be permissible “where it does not interfere with interstate rail operations, and localities retain certain police powers to protect public health and safety.” The STB gave three guidelines for permissible state and local regulation:

A. Non-discriminatory enforcement of requirements such as building and electrical codes generally are not preempted. However, the code enforcement agency **cannot** require a railroad obtain a permit prior to doing any work.

B. A town may seek enforcement of voluntary agreements a railroad has entered into with a town.

C. Section 10501(b) should not be interpreted as intending to interfere with the role of state and local agencies in implementing federal environmental statutes.

43. In *CFNR Operating Co. v. City of American Canyon*, 282 F. Supp. 2d 1114 (N.D. Cal. 2003), Apex operated a bulk transfer facility on property leased from a railroad (CFNR). The railroad delivered rail cars containing pumice and cement to Apex’s facility. Apex transferred the pumice and cement to its trucks, then trucked the pumice and cement to a local customer. The City of American Canyon (“City”) had issued a number of citations against Apex for dust, traffic and water run-off. Apex applied for a conditional land-use permit from the City, which the City denied. The railroad filed a complaint seeking declaratory and injunctive relief to prevent the City from interfering with its activities and operations.

Without ruling on the merits, the court stated it appeared the City’s actions were directed against Apex’s non-railroad business activities, rather than at CFNR’s railroad operations. The court indicated this factual situation appeared to be similar to that in *Florida East Coast RY v. City of West Palm Beach*, *op. cit.* The court then stated:

“Taken to its logical conclusion, plaintiff’s argument would mean that any trucking company

who picks up goods from a railroad terminal for delivery to a customer would be free from local regulation. Congress, however, could not have intended such an expansive interpretation of the ICCTA's reach." *CFNR* at 1119.

The court stated *CFNR* had not persuaded it of the possibility of irreparable harm. "To the extent that the claimed harm is economic, including the potential loss of revenues and the present contract, and the escalating fines imposed by the citations, damages would appear to be an adequate remedy." The claims of *CFNR* were prospective, and therefore speculative, and thus did not rise to the level of irreparable harm. The court then denied the request for preliminary injunction, and set the matter for trial.

44. In *Flynn v. Burlington Northern Santa Fe Corp. (BNSF)*, 98 F. Supp. 2d 1186 (E.D. Wash. 2000), the BNSF railroad wanted to build a refueling facility over an aquifer. Flynn, a Spokane county resident, filed suit challenging the county's issuance of conditional use permits for the construction of the refueling facility. **The court ruled it did not have subject matter jurisdiction over the case**, since the Plaintiffs did not have standing and federal question jurisdiction did not exist. The court then dismissed the suit, noting: "A dismissal for lack of subject matter jurisdiction is not a judgment on the merits." *Flynn* at 1193.

In its opinion, the court made the following comments (which had no bearing on the court's decision to dismiss the suit):

"In contrast, manufacturing activities and other facilities owned by railroads which are not integrally related to the railroad's provision of interstate rail service, i.e., non-transportation facilities, are not subject to STB jurisdiction or subject to federal preemption. *Borough of Riverdale - Petition for Declaratory Order - The New York Susquehanna & Western Railway Corp.*, 1999 WL 715272, STB Finance Docket No. 33466 at 10 (9/9/99) [**"Riverdale I"**]. Such facilities, like other non-railroad property, are subject to state and local regulation. *Id.*" *Flynn* at 1189.

VIII. SURFACE TRANSPORTATION BOARD RULINGS

45. **Riverdale I:** STB Finance Docket No. 33466, Decided September 9, 1999. The Borough of Riverdale filed a Petition for a Declaratory order seeking a determination regarding the extent to which certain facilities constructed and operated in Riverdale by The New York, Susquehanna and Western Railway Corporation (NYSW) are covered by ICCTA preemption. The NYSW did **not** file a response to the Borough's Petition.

The railroad built a corn processing facility on its property, which was adjacent to residentially zoned properties. The railroad did not obtain Borough permits prior to constructing the facility. The Borough brought civil suit against the railroad. The **trial court** ruled the railroad was not bound by local zoning regulations as to land use and utilization, since they had been preempted by ICCTA. The court further added that the Borough “shall not use regulatory measures regarding safety, environmental or health matters as a device for getting rid of NYSW’s [Riverdale facilities].” Nor, in the court’s words, could the Borough “preclude or interfere with [NYSW’s] operation of the facilities.” Riverdale I decision at 3.

The Board reviewed prior Board and court decisions, then gave its preliminary conclusions, which it stated could change:

- A. The Borough cannot apply its local zoning ordinances to property used for NYSW’s railroad operations.
- B. Local land use restrictions are preempted by the ICCTA.
- C. State or local laws that would impose a local permitting or environmental process as a prerequisite to the railroad’s maintenance, use, or upgrading of its facilities are preempted by ICCTA.
- D. Local entities cannot require that railroads seek building permits prior to constructing or using railroad facilities. Local authorities can take actions that are necessary and appropriate to address any genuine emergency on railroad property, and that railroads are not exempt from certain local fire, health, safety and construction regulations and inspections.

The Board then ordered the parties to submit filings for its consideration.

46. **Riverdale II:** STB Finance Docket No. 33466, Decided February 23, 2001. The parties settled all of their differences. Consequently, there was no longer any basis for the Board to review this situation.

47. The Board interpreted the court’s ruling in *Flynn v. Burlington Northern Santa Fe Corp. (BNSF)* to be that a railroad would have to comply with local codes for electrical, building, fire, and plumbing, unless the codes restrict the railroad from conducting its operations or unreasonably burden interstate commerce. The Board’s reasoning on the issue of local codes for electrical, building, fire and plumbing was somewhat circuitous and flawed.

In *Riverdale I*, the Board **speculated** that a railroad **may** be subject to local electrical, building, fire

and plumbing codes. The court in *Flynn* altered the Board's comments by stating the railroad "will be required" to comply with local building, etc. codes, citing *Riverdale I* as authority. The Board in *Riverdale II* then altered the *Flynn* court's remarks and stated: the court "found" that the railroad would have to comply with local building, etc. codes. A close reading of *Flynn* will reveal the court did **not** find that a railroad had to comply with local building, etc. codes. The court found that it did not have subject matter jurisdiction over the case, then granted the railroad's Motion to Dismiss. The issue of whether a railroad must comply with local building, plumbing, electrical or fire codes, had no bearing on the court's finding that the court did not have subject matter jurisdiction in this case.

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

48. In *Norfolk Southern Ry. V. City of Austell* No. 1:97 - cv-1018-RLV, 1997 U.S. Dist. LEXIS 17236, at 17 n.6 (N.D. Ga. 1997) the court found that a local land use permit was not required before a railroad could construct and operate an intermodal facility. The court held that "a city may not . . . attempt to regulate land use and planning via local laws when Congress' intent to preempt such local laws is clear and manifest."

49. In *Borough of Riverdale* STB Fin. Doc. No. 33466, September 10, 1999, the STB made the following statements:

"Similarly, recent precedent has made it clear that, to the extent that they set up legal processes that could frustrate or defeat railroad operations, state or local laws that would impose a local permitting or environmental process as a prerequisite to the railroad's maintenance, use, or upgrading of its facilities are preempted because they would, of necessity, impinge upon the federal regulation of interstate commerce. *City of Auburn*, 154 F.3d at 1029-31. *Stampede Pass*, slip op. at 6-7." *Borough of Riverdale*, *supra* at 8.

"Given the broad language of 49 U.S.C. 10501 (b) and the case law interpreting it, our preliminary view is that local entities such as the Borough can not require that railroads seek building permits prior to constructing or using railroad facilities because of the inherent delay and interference with interstate commerce that such requirements would cause." *Borough of Riverdale*, *supra* at 9

“Our jurisdiction over railroad facilities, like that of the former ICC, is limited to those facilities that are part of a railroad’s ability to provide transportation services...” *Borough of Riverdale, supra* at 10

50. 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.

“We further hold that although the Village may not require permits of the Railroad, the Railroad must notify the Village when it is undertaking an activity for which another entity would require a permit.” *Ridgefield Park* at 66.

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

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

52. In *Mellon v. Southern Pacific Transport Co.*, 750 F. Supp. 226, (W.D. Tex. 1990) that court made the following statements:

“The incidental use doctrine allows railroads to contract with third parties and controls the permissible scope of railroad authorized right-of-way uses and allows third party commercial uses of the railroad right of way. See *Grand Trunk R.R. v. Richardson*, 91 U.S. 454, 468-69, 23 L. Ed. 356 (1875). In *Grand Trunk*, the Supreme Court held certain structures, though not used exclusively for railroad purposes, were properly located on railroad property. The *Grand Trunk* Court stated:

It must be admitted that a railroad company has the exclusive control of all the land within the lines of its roadway, . . . Such erections would not have been inconsistent with the purposes for which its charter was granted ... And, if the [railroad] company might have put up the buildings why might it not license others to do the same thing . . . *Id.*

The 1899 Supreme Court case of *Hartford Fire Insurance Co. v. Chicago, M & St. P.R. Co.*, 175 U.S. 91, 99, 20 S.Ct. 33, 36, 44 L.Ed. 84 (1899), also holds a railroad right-of-way may be occupied by others, in the manner in which the railroad considers best fitted to promote the public use. "It may, in its discretion, permit them (right-of-way) to be occupied by others with structures convenient for the receiving and delivery of freight upon its railroad, so long as a free and safe passage is left for the carriage of freight and passengers." *Id.*" *Mellon* at 229.

At 232-233, the *Mellon* court made the following additional statements:

"Because no federal law directly addresses railroad rights-of-way other than the above statute which authorizes contracts with telephone companies, this Court is concerned with implied, rather than express, preemption. The law of implied preemption provides that "where failure of . . . federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such [state] regulation is appropriate or approved pursuant to the policy of the statute, States are not permitted to use their police power to enact such a regulation." *Ray*, 435 U.S. at 179, 98 S.Ct. at 1004-05, citing *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U.S. 767, 774, 67 S.Ct. 1026, 1030, 91 L.Ed. 1234 (1947). A finding of implied preemption must follow. An implied preemption under *Ray* arises when the policymaker appears to be saying "we haven't done anything because we have determined it is appropriate to do nothing." *Missouri Pacific Railroad Co. v. Railroad Commission of Texas*, 833 F. 2d 570, 576 (5th Cir. 1987). Virtually all state regulations affecting the train itself appear preempted by federal law, but Congress when it enacted § 10749 failed to resolve a situation such as this. Under these circumstances, we are compelled to conclude that Federal law impliedly occupies the entire field so as to preclude any application of state law relating to railroad right-of-ways."

X. MARYLAND LAW GRANTS MARYLAND RAILROADS THE RIGHT TO CROSS OR DIVERT AN UNNAVIGABLE STREAM

53. § 9-304 of Maryland's Public Utilities Article states:

§ 9-304. Crossings – Streams.

(Aa) *Power to cross or divert streams.* – (1) A Maryland railroad company may cross or divert

an unnavigable stream whenever it is necessary to construct a railroad.

54. Riffin could not find any section in Maryland's Environment Article stipulating Maryland's Environment Article supercedes § 9-304 of Maryland's Public Utilities Article.

55. Since Riffin is a Maryland railroad, (See **Riffin's Exhibit One**) Riffin has the statutory right to cross or divert Beaver Dam Run.

XI. CONCLUSION

56. The Cockeysville Site and Greenspring Site are railroad facilities. The operations at these sites, and the material and equipment stored at these sites, are integrally related to the movement of passengers or property by rail. Riffin maintains and pays for the electricity, water, heat, landscaping, snow removal and property taxes at both sites. The underlying public policy for vesting exclusive regulatory jurisdiction over railroad facilities with the STB, is to ensue railroads are subject to a **uniform** set of regulations. State and local regulations, especially those that pertain to building, plumbing, electrical, fire suppression and prevention, elevators, and environmental matters, are a hodgepodge of regulations, with no uniformity. Consequently, both sites are subject to the exclusive regulatory jurisdiction of the STB. All local, state and federal remedies have been preempted.

57. 49 U.S.C. 10501 (b) clearly and explicitly states:

"The jurisdiction of the Board over - (1) transportation by rail carriers ... and (2) the construction, acquisition, operation of ... facilities ... is exclusive. ... [T]he remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law."

58. 49 U.S.C. 10102 (9) broadly defines "transportation" to include:

"(A) a locomotive, car, vehicle, vessel, warehouse, sharf, 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;”

59. Unlike the situation in *In re Appeal of Vermont Railway* (salt shed case), *Florida East Coast Ry* (Rinker aggregates distribution), and *CFNR Operating Co.* (Apex pumice and cement distribution), as Riffin’s Affidavit states, the material and equipment being handled, maintained and stored at the Site belongs to Riffin, and relates to the movement of property or passengers by rail. And unlike the above three cases, Riffin pays the cost of providing electricity, heat and water for the Site and is responsible for maintaining the Site.

60. The Site is a railroad facility. All of the preemption cases make it clear, the regulation of railroad facilities falls within the exclusive domain of the Surface Transportation Board. As was stated in the *Wisconsin Central Ltd.* case at 1013 (¶ 18, *supra*):

“Regulation” is the “act or process of controlling by rule or restriction.”

61. The Plaintiffs are attempting to “control” the Site, by asking the Court to order Riffin to stop all activity at the Site and to obtain a permit for the grading and filing activities that are occurring at the Site.

62. The Plaintiffs are impermissibly attempting to subject to state law, property that Congress specifically put out of reach. *Wisconsin Central Ltd.* at 1013-1014. The Plaintiffs are also attempting to impermissibly require Riffin to incur considerable capital costs (Plaintiffs have asked the court to order Riffin to remove all of the fill material and the concrete retaining wall from the Cockeysville Site, to pay the cost of sampling, then remediating the pollution caused by a previous owner of the Greenspring Site, and to pay the cost of relocating Riffin’s fuel storage tank to another site), which, as the *City of Plymouth* case spells out (at 658) (see the last ¶ of ¶29, *supra*), is prohibited by the ICCTA.

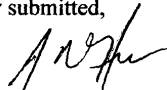
63. The Board’s remedies with respect to the regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law. The operation of the railroad facilities at the two Baltimore County sites, and the remedies with respect to the regulation of that rail transportation use, lie exclusively with the Surface Transportation Board, and preempt all other Federal and State remedies, including the remedies sought by the Plaintiffs.

64. As was noted earlier, the Congressional exemption of rail carriers from state and municipal regulation was “clear, broad and unqualified.” *Norfolk & Western Ry. Co. v. American Train Dispatcher*

Ass'n, 499 U.S. 117, 127-134; 111 S. Ct. 1156; 113 L.Ed. 2d 95 (1991). "It is difficult to imagine a broader statement of Congress' intent to preempt state regulatory authority over railroad operations." *CSX Transp. Inc. v. Georgia Public Service Comm's*, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996). Not only did Congress exempt railroad operations from state regulatory authority, it also exempted railroad operations from other Federal regulatory authority.

THEREFORE, the regulation of these two railroad facilities lies exclusively with the Surface Transportation Board.

Respectfully submitted,



James Riffin d/b/a The Northern Central Railroad
Petitioner