

LAW OFFICE

211857

MCLEOD, WATKINSON & MILLER

MICHAEL R. MCLEOD
WAYNE R. WATKINSON
MARC E. MILLER
RICHARD T. ROSSIER
CHARLES A. SPITULNIK
RICHARD PASCO
ALEX MENENDEZ
ELIZABETH A. HAWS
AMY B. JONES

ONE MASSACHUSETTS AVENUE, N.W.
SUITE 800
WASHINGTON, DC 20001-1401
(202) 842-2345
TELECOPY (202) 408-7763

KATHRYN A. KLEIMAN*
OF COUNSEL
(*Admitted in Virginia only)

ROBERT RANDALL GREEN
LAURA L. PHELPS
GOVERNMENT RELATIONS

August 20, 2004



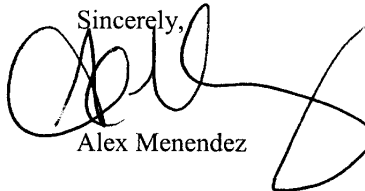
Hon. Vernon A. Williams, Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

Re: *James Riffin, d/b/a The Northern Central Railroad – Acquisition and
Operation Exemption, Finance Docket No. 34501*

Dear Sir:

I am enclosing an original and ten (10) copies of the Petition of the State of Maryland to Revoke the Verified Notice of Exemption in the above referenced proceeding. Please date stamp the extra copy of this document and return to our messenger. In addition, we are enclosing a 3.5" diskette with this document.

Thank you for your assistance.

Sincerely,

Alex Menendez

Enclosures

ND: 4837-3834-5472, Ver 1

ENTERED
Office of Proceedings
AUG 23 2004
Part of
Public Record

211857

**BEFORE THE
SURFACE TRANSPORTATION BOARD**



FINANCE DOCKET NO. 34501

**JAMES RIFFIN, d/b/a THE NORTHERN CENTRAL RAILROAD – ACQUISITION
AND OPERATION EXEMPTION**

**PETITION OF THE STATE OF MARYLAND
TO REVOKE THE VERIFIED NOTICE OF EXEMPTION**

EXPEDITED HANDLING REQUESTED

Communications with respect to this
document should be addressed to:

CHARLES A. SPITULNIK
ALEX MENENDEZ
McLeod, Watkinson & Miller
One Massachusetts Avenue, NW
Suite 800
Washington, DC 20001
(202) 842-2345

Counsel for the State of Maryland

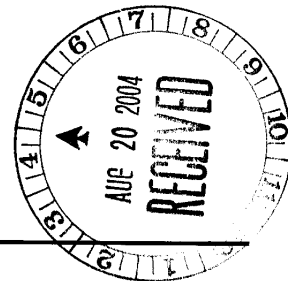
Dated: August 20, 2004

ENTERED
Office of Proceedings

AUG 23 2004

Part of
Public Record

BEFORE THE
SURFACE TRANSPORTATION BOARD



FINANCE DOCKET NO. 34501

JAMES RIFFIN, d/b/a THE NORTHERN CENTRAL RAILROAD – ACQUISITION
AND OPERATION EXEMPTION

PETITION OF THE STATE OF MARYLAND
TO REVOKE THE VERIFIED NOTICE OF EXEMPTION

EXPEDITED HANDLING REQUESTED

The State of Maryland (“Maryland”), through counsel and pursuant to 49 U.S.C. § 10502(d) and the Surface Transportation Board (“Board”) regulations at 49 C.F.R § 1150.32 (c) hereby files this Petition to Revoke (“Petition”) the Verified Notice Of Exemption Filed in this proceeding on April 28, 2004 (“*Pennsylvania NOE*”) filed by James Riffin d/b/a The Northern Central Railroad (“Mr. Riffin”). In support thereof Maryland states as follows:

I. BACKGROUND FACTS

Maryland files this Petition to Revoke in an effort to stop Mr. Riffin’s latest attempt to use the Board’s jurisdiction to insulate his “dinner/excursion train” from Maryland’s environmental laws. Previously, on March 8, 2004, Mr. Riffin filed a Verified Notice of Exemption to acquire and operate track within Maryland and Pennsylvania for the dinner train (“*Maryland NOE*”) in the matter styled *James Riffin d/b/a The Northern Central Railroad -- Acquisition and Operation Exemption -- In York County, Pa., and Baltimore County, Md., STB*

Finance Docket No. 34484. On April 2, 2004, Maryland petitioned to revoke the *Maryland NOE* because Mr. Riffin did not own the property at issue and because it was concerned that Mr. Riffin would attempt to use the NOE to circumvent State environmental laws. Indeed, inspections in the previous month indicated that he had already started to do so, clearing and grading a large portion of the 100-year floodplain adjacent to Beaver Dam Run without obtaining the required permit under § 5-503 of the Environment Article, Maryland Code Annotated (“Environmental Violation”). When MDE officials confronted Mr. Riffin with the Environmental Violation on April 8, 2004, Mr. Riffin produced the Board’s April 7, 2004, publication of the *Maryland NOE*, see 69 FR 18420, and claimed it qualified him as a railroad immune from all state environmental regulation.

On April 20, 2004, the Board revoked the *Maryland NOE*, stating that:

While NCR claims that it can overcome impediments to its ownership of property at issue in this proceeding, Maryland has raised sufficient concerns here, not only regarding NCR's ability to obtain title to property, but also regarding NCR's proposal in general, to make it inappropriate for NCR to use the expedited class exemption procedures in this case.

James Riffin d/b/a The Northern Central Railroad -- Acquisition And Operation Exemption -- In York County, Pa, and Baltimore County, Md., STB Finance Docket No. 34484 (Service Date: April 20, 2004) (“*Revocation Decision*”). After this Board revoked the *Maryland NOE*, Maryland believed that the issue had been resolved.

However, on April 28, 2004, Mr. Riffin filed the Verified Notice of Exemption in this proceeding (“*Pennsylvania NOE*”), again seeking to use the expedited class exemption procedure under 49 C.F.R. § 1150.31, this time with respect to track located entirely in Pennsylvania. And, as Maryland initially feared, Mr. Riffin is once again attempting to use the NOE and this Board’s jurisdiction to insulate himself and his “dinner/excursion train” from Maryland’s environment

laws.

As Maryland described to the Board in its earlier Petition to Revoke, MDE filed an action in the Circuit Court for Baltimore County (Case No. 03-C-03-013144) ("State Court Action") (filed Nov. 26, 2003) to require Mr. Riffin to allow MDE access to an office building Mr. Riffin owns and operates in order to investigate indoor air quality concerns. Mr. Riffin moved to dismiss on the ground that Mr. Riffin is a rail carrier providing transportation subject to this Board's jurisdiction and that, as a result, 49 U.S.C. § 10501 preempted all State environmental laws. On April 26, 2004 the State Court ruled that, even if Mr. Riffin were a railroad, the Board's jurisdiction did not preempt MDE's efforts at conducting indoor air quality sampling because such regulation would not affect rail operations and ordered Mr. Riffin to allow MDE access to his office building.

On that same day, Mr. Riffin filed a Notice of Removal seeking to remove the case to federal District Court by arguing, once again, that the Board has exclusive jurisdiction over Mr. Riffin's activities and that Maryland State law is preempted. As part of the pleading in the removal action, Mr. Riffin agreed that the equipment that he maintained at the site did not qualify him as a railroad, but:

[w]hat did qualify Riffin as a carrier which is subject to the exclusive jurisdiction of the STB, is the STB's decision to grant Riffin permission to acquire and operate 19 miles of line in York County, Pennsylvania (Finance Docket No. 34051, decided May 13, 2004)

Riffin's Response to Plaintiff's Reply in Support of Motion to Remand at p. 5, a copy is attached hereto as Exhibit A.

Consistent with his litigation position with respect to the office building, Mr. Riffin is now using the *Pennsylvania NOE* to justify violation of Maryland's water pollution laws at another, separate site located at 10919 York Rd., Cockeysville, Maryland. On July 21, 2004, an

MDE inspection revealed that, despite an MDE Order, Mr. Riffin, armed with the *Pennsylvania NOE*, is continuing to carry out grading and construction activities within both the 100-year floodplain and the stream channel of Beaver Dam Run – a Use III-P Maryland waterway protected as a natural trout water and public water supply. Mr. Riffin's activities are causing sediment pollution of Beaver Dam Run in violation of at least four Maryland laws. *See* MD. CODE ANN., ENV'T ART. § 4-101 *et seq.* (sediment control laws requiring the installation of silt fences and other sediment control devices); § 4-413 (sediment pollution of Maryland waters); § 5-503 (requiring a permit for conducting activities within the waters of the State, including the 100-year floodplain), § 9-322 (requiring a permit for discharges of pollutants to waters of the State). When an MDE inspector confronted Mr. Riffin with his many violations, Mr. Riffin responded by stating that he was aware that he was violating Maryland Laws but that he was a railroad and would continue with the construction activity regardless of what Maryland issued.

Maryland, along with Baltimore County, is in the process of instituting an action in the proper court to enforce its own laws against Mr. Riffin in order to protect the health and quality of Maryland's waterways. However, Mr. Riffin's claim to railroad status complicates Maryland's efforts. Maryland seeks to revoke the *Pennsylvania NOE*, then, so that Mr. Riffin cannot continue to wrap himself and his putative railroad in the cloak of this Board's jurisdiction.

II. APPLICABLE LAW

A notice of exemption that contains false or misleading information is void *ab initio* and can be revoked. *See* 49 CFR § 1150.32(c); *Atlantic Western Transportation, Inc.--Continuance in Control Exemption- Georgia Midland Railroad, Inc.*, STB Finance Docket No. 34468 (Service Date: March 12, 2004); *Iowa, Chicago & Eastern Railroad Corporation--Acquisition and Operation Exemption--Lines of I&M Rail Link, LLC*, STB Finance Docket No. 34177 (Service

Date: July 22, 2002). The party seeking revocation has the burden of proof, and petitions to revoke must be based on reasonable, specific concerns demonstrating that reconsideration of the exemption is warranted. *See, e.g., Minnesota Comm. Ry., Inc.--Trackage Exempt.--BN RR Co.*, 8 I.C.C.2d 31, 35 (1991).

III. ARGUMENT

A. **The Pennsylvania NOE should be revoked because the facts do not support a conclusion that Mr. Riffin's alleged railroad is in any way subject to the Board's jurisdiction.**

Under the licensing provisions of 49 U.S.C. § 10901, a noncarrier may acquire and operate a rail line only if the Board makes an express finding that the proposal is not inconsistent with the "public convenience and necessity." In other words, the Board must examine and weigh the public interest. *Revocation Decision* at p. 3. However, the Board may exempt a party from the formal application procedures of section 10901 on the grounds that full regulatory scrutiny is not necessary to carry out the rail transportation policy and that either the exemption is limited in scope or regulation is not needed to protect shippers from an abuse of market power ("Exemption Process"). *See* 49 U.S.C. § 10502 and 49 C.F.R. § 1121. In the *Revocation Decision*, the Board implies and has described the implementation of the Exemption Process as follows:

....there are some situations in which approval would be so routine and uncontroversial that there is an expedited "class exemption" procedure allowing parties to obtain Board authorization subject only to an after-the-fact Board review if objections are received. Thus, under 49 CFR 1150.31, a noncarrier can obtain approval to acquire and operate a line of railroad within 7 days. **That authority can later be revoked under 49 U.S.C. 10502(d) or treated as void ab initio if the exemption notice is found to have contained false or misleading information.** *See Class Exemption — Acq. & Oper. of R. Lines Under 49 U.S.C. 10901*, 1 I.C.C.2d 810, 812 (1985), *aff'd Illinois Commerce Comm'n v. ICC*, 817 F.2d 145 (D.C. Cir. 1987). **Moreover, the class exemption process is not appropriate for controversial cases in which a more detailed record is required than is**

produced through a notice of class exemption. See *Riverview Trenton Railroad Company — Acquisition and Operation Exemption — Crown Enterprises, Inc.*, STB Finance Docket No. 33980 (STB served Feb. 15, 2002).

Revocation Decision at p. 3 (emphasis added). Furthermore, this Board has held that where “there are substantial factual and legal issues raised and that the Board has a responsibility to protect the integrity of its processes,” the Exemption Process is not appropriate. *Id. citing The Land Conservancy of Seattle and King County — Acquisition and Operation Exemption — The Burlington Northern and Santa Fe Railway Company*, STB Finance Docket No. 33389 (STB served Sept. 26, 1997); see also *ICC v. American Trucking Ass’n*s, 467 U.S. 354, 364-65 (1984) (agency has inherent authority to protect its statutory processes from abuse).

As was the case in the *Maryland NOE*, in the instant action Mr. Riffin appears to be interested in operating a dinner train on the line that is the subject of the *Pennsylvania NOE*. Also like the *Maryland NOE*, Mr. Riffin is attempting to use the expedited class exemption procedures. The Board clearly stated that its expedited class exemption procedures was not appropriate in the *Maryland NOE* because “Maryland has raised sufficient concerns here, not only regarding NCR’s ability to obtain title to property, **but also regarding NCR’s proposal in general, to make it inappropriate for NCR to use the expedited class exemption procedures in this case**” *Revocation Decision* at p. 3. (emphasis added). Furthermore, the Board stated that:

Given that there are substantial factual and legal issues raised and that the Board has a responsibility to protect the integrity of its processes, under the particular circumstances presented here, the Board will revoke the notice of exemption. Should NCR choose to pursue its proposal, it should provide more detailed information, in the form of a petition for an individual exemption under 49 U.S.C. 10502 and 49 CFR 1121, or a full application under 49 U.S.C. 10901 and 49 CFR 1150, as those procedures are designed to elicit a more complete record.

Revocation Decision at p.3 (emphasis added).

This proceeding is no different. The proposed activity outlined in the *Pennsylvania NOE* gives no hint that the activity Mr. Riffin proposes for the tracks he has acquired brings the track or his operations within the ambit of the Board's jurisdiction. As was the case with the circumstances leading to the *Revocation Decision*, at the very least, Mr. Riffin should be required to either file a petition for an individual exemption under 49 U.S.C. § 10502 and 49 CFR § 1121, or a full application under 49 U.S.C. §10901 and 49 CFR § 1150. In view of Mr. Riffin's track record, the Board must have that additional information in order to confirm that his proposal is *bona fide* and feasible, and that the putative railroad will be one that triggers the Board's jurisdiction and its attendant rights and responsibilities.

B. The Pennsylvania NOE should be revoked because it contains false and misleading information

Despite this Board's specific direction to Mr. Riffin in the *Revocation Decision*, the *Pennsylvania NOE* fails to provide verifiable information relating to the proposed operation, thus presenting the same questions about the legitimacy of his use of the expedited class exemption procedure. In addition to the questions about the use of the class exemption due to lack of verification of statements made both in the *Pennsylvania NOE* and in prior proceedings, Mr. Riffin's prior communications with this Board that indicate his intention to operate a dinner train on track that is now wholly within a single State and unrelated to interstate commerce raise additional questions about the Board's jurisdiction over the operation proposed for the subject line. See *Napa Valley Wine Train, Inc. Petition for Declaratory Order*, STB Finance Docket No. 31156 (Service Date: September 19, 1991).

Moreover, Mr. Riffin states in the *Pennsylvania NOE* that:

No agreement [with respect to acquisition of the right-of-way that is the subject of the *Pennsylvania NOE*] has been reached. **York County, PA, the owner of the right-of-way has sent a lease proposal to Riffin, which Riffin is reviewing.**

Pennsylvania NOE at p. 1 (emphasis added). However, counsel for Maryland has contacted York County personnel to determine the status of the transaction. York County provided Maryland's counsel with a letter dated April 16, 2004 from David S. Craun, County Solicitor to James Riffin ("*York County Letter*") relating to the proposed transaction. Specifically, that letter indicates that Mr. Riffin attended a Board of Commissioner's Workshop on April 12, 2004 and requested information about County requirements for a lease. See *York County Letter* attached hereto as Exhibit B. Based on this request, York County forwarded to Mr. Riffin the County Letter that included the expired lease agreement that York County previously had with Northern Central Railway, Inc.¹ as an exemplar and stated that:

...consistent with the general lease terms and operating regulations, **please submit a written business plan, including a description of your proposed business activities, annual income, annual expenses, capital investment requirements, and construction and permanent financing, if any.**

York County Letter. Furthermore, as of the end of May 2004, the County had not forwarded a lease proposal to Mr. Riffin for the operations identified in the *Pennsylvania NOE* and Mr. Riffin had not submitted requested documentation that would provide a basis for sending him such a proposal. Moreover, to the best of Maryland's knowledge, this situation remains unchanged.

Another example of incomplete information in the *Pennsylvania NOE* arises out of the statement there that "the proposed activities will not affect any historic structures." However, at least four historic structures are located on the line at issue along the York County Heritage Rail Trail. The York County Heritage Rail Trail was established in 1992, covers 176 acres, is 21

¹ What also seems to be unclear in the *Pennsylvania Notice of Exemption* is whether Mr. Riffin has the authority to operate as "Northern Central Railroad." A search of the Pennsylvania Corporate records does not identify a "Northern Central Railroad" that is registered to do business in the State. However, there is a registration for a "Northern Central Railway, Inc." as a foreign business corporation, which appears to be the entity that had previously contracted with York County for operation of train service on the subject lines. Despite the similarity in name between the former contractor with York County and Mr. Riffin's "doing business" entity, there is no evidence of a connection between Mr. Riffin and that other corporation.

miles long, and connects to Maryland's 20-mile long Northern Central Railroad Trail. See <http://www.york-county.org/gov/Parks/RailTrail.htm> (a copy of the web page is attached hereto as Exhibit C). Specifically, the York County Heritage Rail Trail contains the following historic structures: 1) Colonial Courthouse; 2) Hanover Junction; 3) New Freedom Train Stations and 4) Howard Tunnel. See <http://www.york-county.org/gov/Parks/RailTrailHistory.htm> (a copy of the web page is attached hereto as Exhibit D). The *Pennsylvania NOE* does not explain how the necessary repair or rehabilitation of the line and the proposed operation, which seeks to operate on a line that is either adjacent to or part of the York County Heritage Rail Trail, would not "affect any historic structures."

As was the case with the *Maryland NOE*, the *Pennsylvania NOE* raises more questions than it answers. Despite receiving specific instructions from this Board in the *Revocation Decision*, Mr. Riffin has elected not to follow those instructions but has submitted instead another Notice that includes far less information than the Board has indicated it would like to see from him with respect to transactions into which he proposes to enter.

IV. EXPEDITED CONSIDERATION IS REQUIRED BECAUSE MR. RIFFIN IS USING THE BOARD'S PROCESS TO INSULATE HIMSELF WHILE HE KNOWINGLY VIOLATES MARYLAND'S ENVIRONMENTAL LAWS

Maryland is seeking expedited consideration of this matter by the Board because Mr. Riffin is once again using the Board jurisdictional as a vehicle to violate Maryland's water pollution laws. As referenced above, a July 21, 2004 inspection has revealed that Mr. Riffin, armed with the *Pennsylvania NOE*, has resumed his grading and construction activities in an environmentally sensitive area in the state of Maryland. As a result, Mr. Riffin is violating at least four Maryland laws, yet claiming that he would keep working because this Board's publication of the *Pennsylvania NOE* defines him as a rail carrier that is subject to the exclusive jurisdiction of the Board.

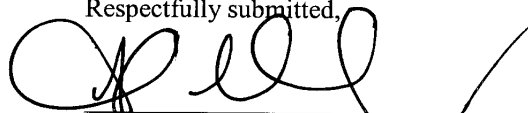
As mentioned above, Maryland is in the process of instituting an action in the proper court to enforce its own laws against Mr. Riffin in order to protect the health and quality of the public and their waterways. However, Mr. Riffin's claim to railroad status complicates Maryland's efforts and Maryland seeks to revoke the *Pennsylvania NOE* so that Mr. Riffin cannot try to use this Board's jurisdiction to insulate his "dinner/excursion train" from valid State environmental laws. Mr. Riffin's abuse of the Board's jurisdiction is causing significant environmental damage to Maryland's waterways. Accordingly, Maryland seeks expedited consideration so that it may act quickly to prevent further environmental damage from occurring.

V. CONCLUSION

As Maryland mentioned in the Comment it filed on May 18, 2004, the State was concerned that the *Pennsylvania NOE* was yet another scheme by Mr. Riffin in which he may attempt to improperly use the Board's process to once again argue that he and his "dinner/excursion train" are protected from State laws by the cloak of this Board's jurisdiction. Mr. Riffin's conduct has confirmed that this concern was justified. Mr. Riffin continues to create a fiction that he has become a railroad and is using the Notice in the proceeding as a shield to obstruct the enforcement of valid public safety laws of the State of Maryland. The Board must revoke the notice of exemption to prevent Mr. Riffin from continuing to abuse the Board's process of jurisdiction.

In view of the foregoing, the State respectfully requests the STB to grant this Petition to Revoke the Verified Notice of Exemption filed by James Riffin *d/b/a* The Northern Central Railroad on an expedited basis.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'CS', is written over a horizontal line.

CHARLES A. SPITULNIK
ALEX MENENDEZ
McLeod, Watkinson & Miller
One Massachusetts Avenue, NW
Suite 800
Washington, DC 20001
(202) 842-2345

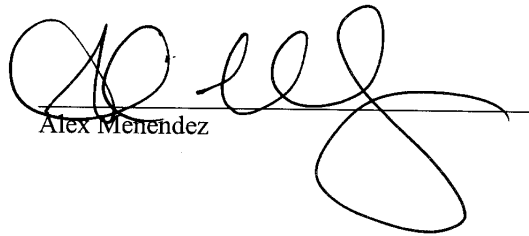
Counsel for the State of Maryland

Dated: August 20, 2004

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of August, 2004, a copy of the foregoing PETITION
OF THE STATE OF MARYLAND TO REVOKE THE VERIFIED NOTICE OF EXEMPTION
was served by first class mail, postage prepaid, upon:

James Riffin d/b/a The Northern Central Railroad
1941 Greenspring Drive
Timonium, MD 21093



Alex Menendez

A

IN THE UNITED STATES DISTRICT COURT 3: 52
FOR THE DISTRICT OF MARYLAND

STATE OF MARYLAND
DEPARTMENT OF THE
ENVIRONMENT
Plaintiff

V.

JAMES RIFFIN, *et. al.*
Defendant

* BY _____ CITY

*

• CIVIL ACTION NO.:

• RDB - 04 - CV - 1342

*

* * * * *

RIFFIN'S RESPONSE TO PLAINTIFF'S
REPLY IN SUPPORT OF MOTION TO REMAND

Now comes your Defendant, James Riffin d/b/a The Northern Central Railroad ("Riffin"), who provides this Court with Riffin's Response to Plaintiff's Reply in Support of Motion to Remand, and who opposes Plaintiff's Motion to Remand, and for reasons states:

1. Plaintiff, in its Reply in Support of Motion to Remand ("Reply"), made the following statements:

"... but argues that it was not until the Department filed its Motion for Summary Judgment that he could, under the second paragraph of §1446 (b), "ascertain []" that the case was removable." (Emphasis added.) *Reply* at 1.

"Factually, the Department's Motion for Summary Judgment was not the "first time it could be ascertained" that this case, even under Mr. Riffin's view of it, was removable. Mr. Riffin concedes that the non-preemption arguments the Department raised in its Motion for Summary Judgment simply "reiterated the arguments it presented in its Response to Defendants' Motion to Dismiss," which Response was filed on February 26, 2004 – two months before Mr. Riffin filed his Notice of

Removal. Answer at ¶¶ 9-10.

Mr. Riffin has been aware of his preemption arguments from the moment he received the Department's Complaint on December 9, 2003. In fact, he moved to dismiss the case on just these preemption grounds on February 9, 2004 – almost three months before he filed his Notice of Removal.” *Reply* at 2, 3. (Emphasis added.)

2. Riffin's response to Plaintiff's statements:

Riffin would agree he has felt from the moment he received Plaintiff's Complaint, that the matter presented in Plaintiff's Complaint was preempted by federal law. Unfortunately, how Riffin views the Complaint is irrelevant. The case law on 28 U.S.C. § 1446 (b) clearly states, a Complaint is removable *only if* the Complaint, on its face, indicates it arises under the Constitution or a law or treaty of the United States. *Gully v. First National Bank*, 299 U.S. 109 at 113, 57 S.Ct. 96 at 98, 81 L.Ed. 70 (1936); *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). In this case, the Complaint, on its face, did not present a claim which arose under the Constitution or a law or treaty of the United States. Therefore, it was not removable. Consequently, the 30-day time limit for filing a Notice of Removal was not triggered by the Complaint.

The second paragraph of 28 U.S.C. § 1446 (b) states that if the initial pleading is not removable, then a right to file a Notice of Removal will arise when and if the defendant receives a copy of an “amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable” Plaintiff, in its Reply at 3, indicated it filed a Response to Defendants' Motions to Dismiss (“Response”) on February 26, 2004. Riffin has stated this Reply did address Riffin's arguments that the Complaint presented a claim that was preempted by Federal law. While Plaintiff has not argued this Response constituted an “other paper,” from which it could be ascertained Plaintiff's claim was removable, Riffin will address this potential argument:

MD, Dept. of the Environment
Office of the Attorney General

JUL 02 2004

RECEIVED

Riffin's Motion to Dismiss due to federal preemption was a defense. As such, "... it does not appear on the face of a well-pleaded complaint, and, therefore, does not authorize removal to federal court." *Gully, op. cit.; Franchise Tax Board, op. cit.* Since Plaintiff's Response to Riffin's motion to dismiss was a response to Riffin's defense, it could be argued, that Response did not appear on the face of Plaintiff's well-pleaded complaint, and as such, it did not, or should not, constitute an "other paper" from which it could be ascertained Plaintiff's claim was removable. While Riffin has been unable to locate a case which addressed this particular question, Riffin would concede a court is unlikely to rule the filing of a response to a defendant's defense would constitute such "other paper" from which it could be ascertained Plaintiff's claim was removable. (If a court were to rule the filing of a Response did constitute such "other paper," then the court would have made it possible for a defendant to make a case removable simply by filing a preemption defense, then waiting for the plaintiff to respond to that defense.) Consequently, unless this court decides the filing of Plaintiff's Response to Riffin's Motion to Dismiss does constitute an "other paper" from which it could be ascertained plaintiff's claim was removable, the filing of this Response did not give rise to a right of removal, and consequently, did not trigger the 30-day time limit for filing a Notice of Removal.

Plaintiff filed a Motion for Summary Judgment ("Motion"), which was received by Riffin on April 8, 2004. This Motion specifically addressed the federal law issues raised by Riffin. 28 U.S.C. § 1446 (b) specifically states the receipt by the defendant of a "motion ... from which it may first be ascertained that the case is one which is or has become removable ..." creates a right of removal, which triggers the running of the 30-day time limit for filing a Notice of Removal. If this Court finds that this Motion constitutes a "motion ... from which it may first be ascertained that the case is one which is or has become removable ..." then the receipt by Riffin of a copy of this Motion created a right of removal which triggered the 30-day time limit for filing a Notice of Removal.

3. Plaintiff, in its Reply, made the following argument:

If the Interstate Commerce Commission Termination Act ("ICCTA") does in fact completely preempt Plaintiff's state-law cause of action, then, since case law has held where complete

preemption exists, any claim based on that preempted state law claim is considered from its inception to raise a federal claim. And if Plaintiff's state-law claim is considered to raise a federal claim from its inception, then Riffin's right of removal arose on the date Riffin received the Complaint, which admittedly was more than 30 days prior to the date Riffin filed his Notice of Removal.

4. Riffin's response to Plaintiff's argument:

The essence of 28 U.S.C. §1446 (b), is that the defendant's right of removal comes into existence when the defendant receives a copy of an "initial pleading" or an "amended pleading" or a "motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable." In the instant case, there has been no finding that federal law completely preempts Plaintiff's state-law cause of action. The only case Riffin could find where the issue of whether the ICCTA completely preempted state law, was addressed in *Cedarapids, Inc. v. Chicago, Central & Pacific R.*, 265 F. Supp. 2d 1005 at 1013 (N.D. Iowa 2003). In that case, the court found that the ICCTA completely preempted the economic regulation of railroads and the abandonment of lines of railroad. In *City of Auburn v. U.S. Government*, 154 F. 3d 1025 at 1030 - 31 (9th Cir. 1998), that court held the ICCTA preempted state environmental laws which purported to regulate railroads. Those two cases, while persuasive, would not constitute precedent in this Court, since they were decided in other jurisdictions.

In the instant case, the question before the court is whether the ICCTA completely preempts the regulation of railroad facilities. The Plaintiff has vigorously argued the ICCTA does not completely preempt railroad facilities from state regulation, while Riffin has argued the ICCTA does completely preempt railroad facilities from state regulation. Until this issue is decided, it cannot be ascertained from the Complaint that the case is one which is or has become removable. The second paragraph of 28 U.S.C. § 1446 (b) addresses this situation, for it states "a notice of removal may be filed within thirty days after receipt by the defendant ... of a copy of an ... **order** ... from which it may first be ascertained that the case is one which is **or has become removable**." (Emphasis added.) If this Court decides the regulation of railroad facilities is completely preempted by the ICCTA, then

issues an order so stating, then when Riffin receives a copy of that order, his right to file a Notice of Removal would come into existence. Under this reasoning, Riffin's Notice of Removal would be timely filed if it were filed within 30 days after the receipt by Riffin of this Court's order.

5. Plaintiff, in its Reply, made the following argument:

"Mr. Riffin's collection of cement mixers, tractors, and fork lifts, Memorandum at 8, in preparation to build an "amusement ride" does not qualify him as a railroad under the exclusive jurisdiction of the ICCTA" *Reply* at 3. (Emphasis added.)

6. Riffin's response to Plaintiff's argument:

Several times Plaintiff has made reference to a letter Riffin wrote to the Surface Transportation Board ("STB"), which letter accompanied his request to withdraw a Notice of Exemption Riffin filed with the STB in 2003. Riffin believes the contents of that letter are totally irrelevant to the present case.

Riffin would agree, his collection of cement mixers, tractors, and fork lifts do not qualify him as a rail carrier which would be subject to the exclusive jurisdiction of the STB. (Rail carriers are subject to the exclusive jurisdiction of the STB, not the ICCTA.) What did qualify Riffin as a rail carrier which is subject to the exclusive jurisdiction of the STB, is the STB's decision to grant Riffin permission to acquire and operate 19 miles of line in York County, Pennsylvania. (Finance Docket No. 34051, decided May 13, 2004.) As the Plaintiff correctly pointed out in footnote 2 of its Response, Riffin's Notice of Exemption became effective 7 days after it was filed. (The Notice of Exemption was filed April 28, 2004. It became effective on May 5, 2004.)

7. Plaintiff, in its Reply, made the following argument:

"(2) the office building is not related to rail operations in any manner other than Mr.

Riffin may occasionally use the services of the retail businesses leasing space therein.” *Reply* at 4.

8. Riffin’s response to Plaintiff’s argument:

The statute in question [49 U.S.C. § 10501 (b)] states “the jurisdiction of the Board over (1) transportation by rail carriers ... and facilities of such carriers; and (2) the ... operation ... of ... facilities ... is exclusive.” The term “transportation” includes “(A) ... 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” 49 U.S.C. § 10102 (9). The statute does not qualify how often services related to that movement need to be used. If the services provided by the “retail businesses leasing space therein” are used once, and they relate to the movement of passengers or property by rail, then they are included within the statute’s definition of transportation. “Equipment of any kind, regardless of ownership or agreement concerning use,” means just that. Any equipment located at the Site which relates to the movement of passengers or property by rail, falls within the definition of ‘transportation.’ In *City of Auburn v. U.S. Government*, 154 F. 3d 1025 at 1030 (9th Cir. 1998), that court stated: “All the cases cited by the parties find a broad reading of Congress’ preemption intent, not a narrow one.” In *CSX Transp., Inc. v. Georgia Public Serv. Com’n*, 944 F. Supp. 1573 (N.D. Ga. 1996), that court 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.” ... The Court will not ignore Congress’ use of broad terms” *CSX* at 1582-83. “It is difficult to imagine a broader statement of Congress’s intent to preempt state regulatory authority over railroad operations.” *CSX* at 1581. In *Soo Line R. Co. v. City of Minneapolis*, 38 F. Supp. 2d 1096 at 1099, that court stated: “The broad nature of Congress’ preemption under the ICCTA is further evidenced by its expansive definitions for the terms “railroad” and “transportation. ... Thus, when section 10501 (b) grants the STB exclusive jurisdiction over “transportation by rail carriers,” it logically includes the yard, property, facilities ... related to the movement of passengers or property.”

9. Plaintiff, in its Reply, made the following statement:

"... There simply is no federal cause of action in the ICCTA that the Department could have pled to gain access to the property." *Reply* at 2.

10. Riffin's response to Plaintiff's statement:

In *Flynn v. Burlington Northern Santa Fe Corp.*, 98 F. Supp. 2d 1186 at 1193 (E.D. Wash. 2000), that court stated: "Plaintiffs appear to have a viable opportunity to raise their environmental concern regarding the Hauser Facility before the STB. This Court cannot assure Plaintiffs that the STB will exert its regulatory authority over the Hauser Facility. If the STB does not do so, it will confirm Plaintiffs' fear that a regulatory void exists that would require a legislative solution."

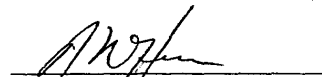
Respectfully submitted,



James Riffin d/b/a The Northern Central Railroad
1941 Greenspring Drive
Timonium, MD 21093
(443) 414-6210

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that on this 30th day of June, 2004, a copy of the foregoing Riffin's Response to Plaintiff's Reply in Support of Motion to Remand, was mailed to Michael V. Forlini, Assistant Attorney General, Maryland Department of the Environment, 1800 Washington Boulevard, Suite 6048, Baltimore, Maryland 21230.


James Riffin

MD, Dept. of the Environment
Office of the Attorney General

JUL 02 2004

RECEIVED

B

THE COUNTY COMMISSIONERS OF YORK COUNTY

BOARD OF COMMISSIONERS
LORI O. MITRICK, PRESIDENT
DOUGLAS E. KILGORE, VICE PRESIDENT
STEVE CHRONISTER, COMMISSIONER



SOLICITOR
DAVID S. CRAUN
ADMINISTRATOR-CHIEF CLERK
CHARLES R. NOLL

COUNTY ADMINISTRATIVE OFFICES
One West Marketway, 4th Floor
York, Pennsylvania 17401
(717) 771-9964
FAX (717) 771-9804

April 16, 2004

James Riffin
1941 Greenspring Drive
Timonium, MD 21093

Mr. Riffin:

As discussed in the Board of Commissioners' Workshop on Monday, April 12, 2004, I am responding to your request for information about County requirements for lease of the Northern Central Rail Line.

First, I am providing a copy of the expired Lease Agreement with the Northern Central Railway. It contains the Agreement between the County and the Commonwealth, and Operating Regulations for the Rail Corridor. Some of the lease provisions were negotiated specifically to meet the needs of the previous tenant and will not necessarily be included in future leases.

Second, consistent with the general lease terms and operating regulations, please submit a written business plan, including a description of your proposed business activities, annual income, annual expenses, capital investment requirements, and construction and permanent financing, if any.

The County looks forward to your response and will expeditiously review it.

If you have any questions, please contact me at 717.771.9306, fax at 717.771.9804, or email at dscraun@york-county.org.

Regards,

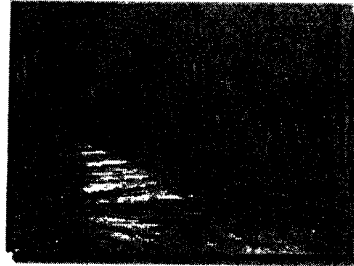
David S. Craun
County Solicitor

Attachment

C



Heritage Rail Trail County Park



Facilities: **Pedestrian, Horse, Bicycle, Train**

Features

Established in 1992 and covering 176 acres, the Heritage Rail Trail County Park is 21 miles long and runs north from the Mason Dixon line just south of the Borough of New Freedom through Glen Rock, Hanover Junction, and Seven Valleys in the Colonial Courthouse in the City of York. The trail connects to Maryland's 20-mile long Northern Central Railroad Trail. In addition to the Colonial Courthouse, three historic structures are located on the trail; Hanover Junction and New Freedom Train Stations and Howard Tunnel. Since the railway is operational, please stay clear of tracks at all times and cross only at established crossings. Take a tour of the trail on the computer.



Activities

The most popular activities on the trail are hiking, jogging, bicycle riding, and horseback riding.

Join us this summer for a 12 to 15 mile ride on the trail. Each ride has a different starting place. Starting time is 6:30 p.m. Sunset Scramble Bike Ride

You may also enjoy a 9 mile moonlight ride. For more information click on the Moonlight Bike Ride.

A Museum is now open on the first floor of the renovated Hanover Junction Train Station. The

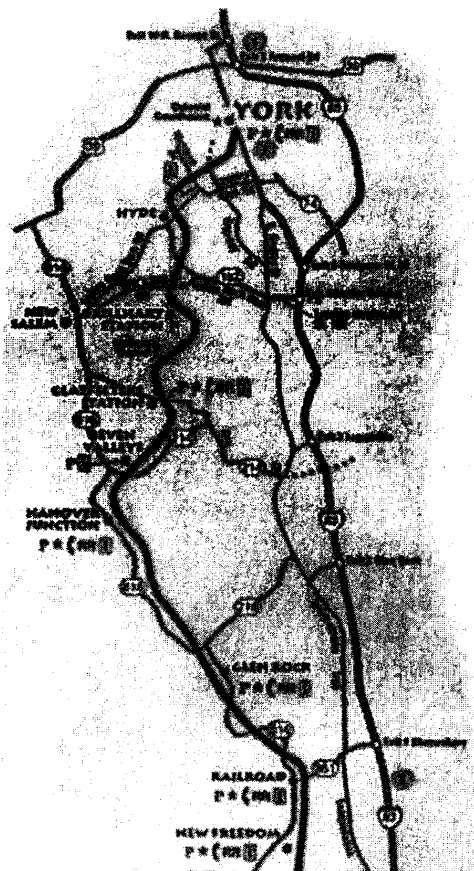
days and hours that the museum is open to the public can be found at the following link.
[Museum](#)

The newly restored New Freedom Train Station is complete. Click here to see the dates and times this station will be open. [New Freedom Train Station](#)

Regulations

Park regulations are posted at all parking lots and road crossings. Alcoholic beverages, camping, fires, weapons, and motorized vehicles are prohibited. All pets must be leashed when on the trail and owners must clean up after their pets. Users should stay on the trail, as the land on both sides is privately owned. In addition, courtesy rules are posted to remind users to respect other users. York County Parks promotes "Carry In, Carry Out" with respect to trash. Please take home what you bring.

Parking



York City - (From North) from I-83 use old exit #10 or new exit #22 (North George St.). Follow N. George St. south for approx. 3 miles to W. Philadelphia St. Turn right on W. Philadelphia St. Follow 2 blocks to Pershing Ave. Follow to Parking Area. (From South) From I-83 use old exit #5 or new exit #15 (S. George St.) Follow north approx. 3 miles to W. Princess St. Turn left on W. Princess St. Follow 2 blocks to Pershing Ave. Turn right on Pershing Ave. Follow 3 blocks to Parking Area. (For more info. on city parking go to www.yorkonline.org) (Free parking is available all on weekends and after 6 p.m. Low cost parking is available at all other times)

Brillharts Station - I-83 to old exit #4 or new exit #14 (Leader Heights Rd.) Follow Leaders Heights Rd. west approx. 1/2 mile to Indian Rock Dam Rd. Follow Indian Rock Dam Rd. approx. 2 miles. Turn left onto Days Mill Rd. Follow approx. 1 mile to parking lot. **From Rt. 30:** Follow Rt. 616 south approx. 3 miles to George St. Turn left onto George St. (E) (In York New Salem) Follow George St. (E) approx. 1/2 mile. Turn right onto Days Mill Rd. Follow approx. 1 mile to parking lot on right.

Glatfelter Station - I-83 to old exit #3 or new exit #10 (Loganville) Follow signs to Rt. 214. Take Rt. 214 west for approx. 4 miles to Glatfelters Station Rd. Turn right on Glatfelters Station Rd. Parking area is approx. 1 mile on the right.

Seven Valleys - I-83 to old exit #3 or new exit #10 (Loganville) Follow signs to Rt. 214. Take Rt. 214 west to the borough of Seven Valleys. Parking lot is on right at Eysters machine Shop.

Hanover Junction - I-83 to old exit #3 or new exit #10 (Loganville) Follow signs to Rt. 214 west to for approx. 5 miles to Rt. 616 south (Right Turn) Follow Rt. 616 south. Parking lot is on the left. **From Rt. 30:** Take Rt. 616 south. Parking lot is approx. 6.5 miles on left.

Glen Rock - I-83 to Glen Rock old exit #2 or new exit #8 (Glen Rock). Follow Rt. 216 west for approx. 4.5 miles to Glen Rock. Right on Water St. Cross railroad tracks and turn right. Follow for approx. .1 mile, Rail Trail Parking lot is on the right.

Railroad - I-83 to old exit #1 or new exit #4 (Shrewsbury). Take 851 West. Parking is 3 miles on the right.

Trail Distances from the Colonial Courthouse - South		Trail Distances from Maryland Line - North	
		Maryland State Line -	0.00 miles
		New Freedom Train Station -	1.50 miles
		Railroad Parking Lot -	3.00 miles
		Glen Rock Parking Lot -	3.00 miles
		Hanover Junction Train Station -	6.25 miles
York County Colonial Courthouse -	0.00 miles	Seven Valleys Bridge Overpass -	6.25 miles
Richland Avenue Overpass -	1.35 miles	Glatfelters Station Parking Lot -	10.50 miles
Hyde -	2.60 miles	Howard Tunnel -	10.50 miles
Days Mill Road Crossing -	4.10 miles	Days Mill Road Crossing -	11.50 miles
Howard Tunnel -	5.85 miles	Hyde -	11.50 miles
Glatfelters Station Parking Lot -	7.60 miles	Richland Avenue Overpass -	13.50 miles
Seven Valleys Bridge Overpass -	9.60 miles	York County Colonial Courthouse -	13.50 miles
Hanover Junction Train Station -	10.6 miles		15.25 miles
Glen Rock Parking Lot -	14.85 miles		17.00 miles
Railroad Parking Lot -	18.10 miles		17.00 miles
New Freedom Train Station -	19.60 miles		18.50 miles
Maryland State Line -	21.10 miles		19.75 miles
			21.10 miles
			21.10 miles

Link to _____

York County Rail Trail Authority

Link to

Cycling in Maryland

To obtain additional information please write or call:

York County Parks
400 Mundis Race Road
York, PA 17402
(717) 840-7440

Please send your Comments and Questions
about York County Parks to parks@york-county.org



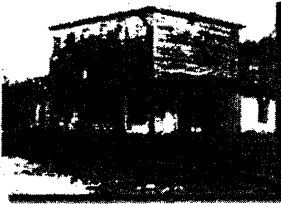
D

Historic Sites found along the Heritage Rail Trail

History of the Trail:

The 19th century saw the growth of the Northern Central Railroad, a vital link between Washington, D.C., Harrisburg, upstate New York and Lake Ontario. Its passage through York County brought prosperity to the area's farmers, merchants and manufacturers and spurred the growth of communities like Glen Rock, Hanover Junction and the town of Railroad.

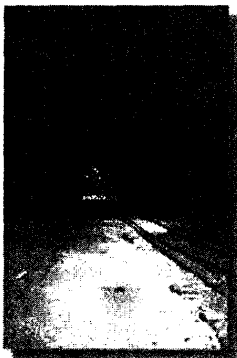
The railroad was also a prime target for the Confederate Army prior to the Battle of Gettysburg, as Rebel troops cut telegraph wires and destroyed bridges in their efforts to isolate Washington from the rest of the Union. After the tragic Battle,



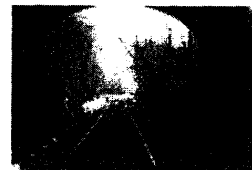
President Lincoln traveled via the Northern Central to the Gettysburg battlefield, his train stopping in Hanover Junction on November 18 and 19, 1863. The station was restored to its 1863 Civil War appearance in 2001 and a Civil War museum is open to the public.



The historic railroad stations in New Freedom and Hanover Junction today serve as reminders of our past. They are both listed on the National Register of Historic Places. New Freedom Station was restored to its 1935 appearance in 2003 and a railroad museum is open to the public. Both stations offer space for tenants. New Freedom is the highest point on the trail. It is downhill to both Maryland and York from here.



Approximately 5.5 miles south of the Colonial Courthouse is the Howard Tunnel. It is the oldest continuously operational railroad tunnel in the world. The brick lined, 370 foot tunnel originally opened for traffic in 1838. The tunnel was rehabilitated in 2003.



Following the declared bankruptcy of the Penn Central Railroad in 1970 and the major destruction of the rail line in 1972 by Hurricane Agnes, the County of York purchased the rail corridor in 1990 through a special agreement with the Pennsylvania Department of Transportation. Construction of the trail was completed in August 1999.

Visit the Friends Groups page.

