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Before the
Surface Transportation Board
Finance Docket No. 34552

**RIFFIN'S ANSWER TO
OPPOSITION OF THE STATE OF MARYLAND TO
RIFFIN'S PETITION FOR DECLARATORY ORDER**

James Riffin d/b/a The Northern Central Railroad (Petitioner), herewith files this Answer to Opposition of the State of Maryland to Riffin's Petition for Declaratory Order.

1. On October 4, 2004, the State of Maryland filed its Opposition of the State of Maryland to [Riffin's] Petition for Declaratory Order, arguing that Riffin's Petition should be denied. Maryland offered the following reasons why it felt the Petition should be denied:

2. Maryland argued the Petition is premature, stating it set forth

“a series of conclusions and assumptions in an attempt to obtain from this Board a declaratory order on a number of questions, all of which are based on the assumption that he is a Class III rail carrier. That, however, is precisely the issue currently pending before this Board in the Pennsylvania NOE proceeding. Until the Board resolves that issue, the questions posed by Mr. Riffin in his Petition are not ripe for resolution.”

Response: 3. **Riffin's Petition contains no conclusions or assumptions.** The questions presented in the Petition are not based on Riffin's assertion that he is a Class III rail carrier. While the questions presented in Riffin's Petition are generic, the answers to which will impact all railroads in the United States, they are based on a real-life controversy that has been waging for more than a year.

4. As Maryland correctly pointed out, the answers to these questions are being litigated in a number of courts, all of which so far have ruled the ICCTA does not preempt local preclearance permitting requirements, and does not vest exclusive jurisdiction over railroad facilities with the Board. On October 25, 2004, Riffin filed his Appellate's Brief with the 4th Circuit Court of Appeals. On or about November 1, 2004, Riffin expects to file an Appellate's Brief with the Maryland Court of Special Appeals. The questions presented in the Petition were asked by the various judges overseeing Riffin's litigation.

5. Normally, if a question arises in a court which involves the interpretation of an agency's regulations, or requires its expertise to answer the question, the court will remit to the agency a request for the agency's position with regard to the question. If the question involves a matter which the agency has been given authority to regulate, the court is bound by the agency's ruling, unless that ruling is arbitrary or capricious. If the question involves the agency's position with regard to the preemptive reach of a statute granting that agency exclusive jurisdiction over a particular subject matter, such as here, the courts have ruled the courts are not bound by the agency's position. However, the court may find the agency's position to be persuasive.

6. The first two questions in Riffin's Petition, involve interpretation of the Board's regulations. Riffin has not been able to find any previous Board rulings which address these two questions. Since these questions have been raised by the judges overseeing Riffin's litigation, Riffin could either have requested that the court forward these questions to the Board, or raise them himself. Riffin chose to present the questions to the Board, rather than ask the court to present the questions to the Board.

7. Regarding the first question presented in Riffin's Petition: Riffin would argue an entity becomes a rail carrier subject to the exclusive jurisdiction of the Board seven days after filing a Notice of Exemption. That entity's status could be voided *ab initio*, if the entity's NOE contained a false or misleading statement. If the NOE were revoked because it was too "controversial," (as happened with Riffin's Maryland NOE, Fin. Doc. No. 34484), then Riffin would argue the entity's rail carrier status ended on the service date of the Notice of Revocation. Likewise, Riffin would argue that if an entity engaged in activities which fell within the definition of "transportation by rail carrier," then those activities would also be subject to the jurisdiction of the Board, even though the

entity had not received permission from the Board to engage in those activities.

8. **Regarding the second question presented in Riffin's Petition:** Riffin would argue if a rail carrier's facilities are located in a state other than the state where the rail carrier's line is located, those facilities are still subject to the Board's exclusive jurisdiction. See *CSX Transp., Inc. v. Georgia Public Serv. Com'n*, 944 F. Supp. 1573 at 1585 (N.D. Ga. 1996), where that court stated:

"Congress has authority to regulate even intrastate aspects of the operation of railroads because railroads are instrumentalities of interstate commerce."

9. **Regarding the third question presented in Riffin's Petition**, which relates to state and local preclearance permitting requirements, Riffin would argue: The resolution of these issues will require some interpretation of the preemptive reach of 49 U.S.C. §10501(b). A number of courts have held they are not bound by the Board's position with regard to the preemptive reach of 49 U.S.C. §10501(b). However, the courts have also indicated a willingness to listen to the Board's position, before rendering their own decision.

10. Riffin would argue the explicit language of 49 U.S.C. §10501(b) grants the Board exclusive jurisdiction over **all** activities which fall within the very broad definition Congress gave to the phrase, "transportation by rail," **including** local building, fire, plumbing, electrical, and elevator regulations. As stated in *Edgar v. MITE Corp.*, 457 U.S. 624, 640, 102 S.Ct. 2629, 2639, 73 L.Ed.2d 269 (1982): "The Commerce Clause ... permits only incidental regulation of interstate commerce by the States; direct regulation is prohibited." In *Shafer v. Farmers' Grain Co.*, 268 U.S. 189, 199, 45 S.Ct. 481, 485, the Supreme Court held: "[A] state statute ... which affects interstate commerce only incidentally and **remotely** is not a prohibited state regulation ... **a state statute which by its necessary operation directly interferes with or burdens [interstate] commerce is a prohibited regulation and invalid, regardless of the purpose with which it was enacted.**" The Court then went on to say: "The defendants [attorney general of N. Dakota] make the contention that we should assume the existence of evils justifying the people of the state in adopting the act. The answer is that **there can be no justification for the exercise of a power that is not possessed.**" (Emphasis added.) 268 U.S. at 202, 45 S.Ct. at 486. Local building, etc. codes directly interfere with interstate commerce, for they directly, rather than remotely or incidentally, interfere with a railroad's

ability to construct a railroad facility, which is an 'instrumentality of interstate commerce.'" These codes, if applicable to the construction of a railroad's facility, by their 'necessary operation,' would delay commencement of construction for the period of time it would take a local entity to review the railroad's building plans, and would directly interfere with the construction of the proposed facility, for all local code reviewing agencies have the power, per their code, **not** to grant the requested permit. Furthermore, Congress has decreed it is the policy of the U.S. that railroads be subject to a **uniform** set of regulations. Local building, plumbing, fire, electrical and elevator regulations are a hodgepodge of regulations, and are decidedly **un-uniform**.

11. Prior to Riffin's Petition, the Board had indicated what its position was with regard to preclearance permitting requirements. (It felt they were preempted.) Unfortunately, previously, when asked to address this issue, the Board had very few facts available. Riffin's Petition presents the Board with a discrete, highly focused, set of facts, which directly relate to the questions presented. It is hoped this highly focused set of facts will permit the Board to render an opinion which all rail carriers will be able to relate to, and which may be referred to when other rail carriers are presented with similar preclearance permitting requirements.

12. **Regarding Maryland's argument that there is no ongoing justiciable controversy which is definite and concrete**, Riffin would argue: The facts indicate otherwise. The controversy between Riffin and Maryland is definite, concrete, and has been ongoing for more than a year. It is a real and substantial dispute admitting of specific relief through a decree of a conclusive character. The facts are real, not hypothetical or abstractions. The answers provided by the Board will affect the outcome of the litigation being waged in the State and Federal courts. None of the questions presented in the Petition are dependent on Riffin being a Class III rail carrier. The answer to the first question will determine whether Riffin is a Class III rail carrier, and if so, when he became one. The answer to the second question will affect all railroads, not just Riffin's railroad. (While Riffin does not know if Alaska Rail has a railroad facility in the lower 48 states, if it does, the answer to this question will directly affect Alaska Rail, and other similarly situated railroads.) Consequently, Riffin's Petition is not premature.

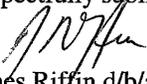
13. Riffin has argued in state and federal courts that the Board has been delegated exclusive jurisdiction over railroad matters, particularly with regard to determining what event determines when

an entity's activities become subject to the jurisdiction of the Board, and whether the Board has jurisdiction over a rail carrier's facility if that facility is located in a state other than the state where the rail carrier's line is located. Riffin believes these are matters which involve the expertise of the Board.

14. Historically, railroads and major shippers have attempted to circumvent the Board's jurisdiction. The Board and its predecessor, the Interstate Commerce Commission, worked diligently to convince Congress to grant the Board jurisdiction over all matters relating to rail carriers.

15. **Conclusion.** Presently, there is an attempt on the part of Maryland to curtail the authority of the Board, by asking the courts to rule the Board does not have authority over facilities that are integrally related to railroad operations. Whatever decision the 4th Circuit Court of Appeals renders, will impact all railroads within the 4th Circuit, and may impact rail operations throughout the United States. Riffin believes the Board should make these courts aware of its position with regard to the issues raised in these courts, in order to lessen the probability the courts will render a decision which abrogates the Board's authority over rail carriers and their operations. For that reason, Riffin has asked the Board to address the issues being raised in these courts, thereby affording the Board the opportunity to advise the courts what its position is on these issues.

Respectfully submitted,


James Riffin d/b/a The Northern Central Railroad

CERTIFICATE OF SERVICE

I hereby certify, that on this 29th day of October, 2004, a copy of the foregoing Riffin's Answer to Opposition of the State of Maryland to Riffin's Petition for Declaratory Order, was mailed, postage prepaid, to Charles A. Spitulnik, of McLeod, Watkinson & Miller, Suite 800, One Massachusetts Avenue, NW, Washington, DC 20001, counsel for the State of Maryland.

James Riffin