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Before the  
Surface Transportation Board  
Finance Docket No. 34501

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**JAMES RIFFIN d/b/a THE NORTHERN CENTRAL RAILROAD-  
ACQUISITION AND OPERATION EXEMPTION - YORK COUNTY, PA**

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**RIFFIN'S ANSWER TO MARYLAND'S  
MOTION TO STRIKE NOTICE OF INTENT TO CONSTRUCT A RAILROAD FACILITY  
AND REPLY OF THE STATE OF MARYLAND TO ANSWER OF RIFFIN  
TO PETITION OF THE STATE OF MARYLAND  
TO REVOKE RIFFIN'S VERIFIED NOTICE OF EXEMPTION**

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1. On October 4, 2004 the State of Maryland ("Maryland") filed a Reply of the State of Maryland To Answer of James Riffin d/b/a The Northern Central Railroad to Petition to Revoke Verified Notice of Exemption. ("Reply"), and filed a Motion to Strike the Notice of Intent to Construct a Railroad Facility ("Motion to Strike") that had been appended to Riffin's Answer to Maryland's Petition to Revoke Riffin's Pennsylvania NOE. On October 15, 2004, the City of Baltimore wrote to the Board supporting Maryland's Petition to Revoke Riffin's Pennsylvania NOE and Maryland's Motion to Strike. James Riffin d/b/a The Northern Central Railroad ("Riffin") herewith files his Answer to that Reply and to Maryland's Motion to Strike.

2. In its Reply, Maryland objected to Riffin's contention that Maryland did not have standing to challenge Riffin's Pennsylvania Notice of Exemption ("NOE"). Maryland's objections concern the construction of a railroad facility in Cockeysville, Maryland, **not** the operation of line in Pennsylvania. While Maryland may have standing to challenge Riffin's Maryland construction activities, to do so it first must demonstrate that Riffin's activities have adversely affected the *normal* flow of water in the

adjacent stream (see ¶ 5, *infra*), which to date, it has not done. Riffin strongly disagrees with Maryland's position that it has standing to object to Riffin operating line in Pennsylvania. (See ¶ 3.)

3. Riffin finds it interesting that in Maryland's Opposition to Riffin's Petition for Declaratory Order, Maryland asked the Board to strictly adhere to the guidelines for a declaratory order (which Riffin has done), while in Maryland's Reply, Maryland asks the Board to ignore the guidelines for standing (which Maryland has not done). Maryland has alleged it personally has suffered an actual or threatened injury caused by Riffin's conduct. What Maryland fails to acknowledge, is the conduct Maryland complains of (Riffin building a levee in Cockeyville), has nothing to do with operating line in Pennsylvania (other than Riffin stores his track maintenance equipment in Cockeyville). Likewise, preventing Riffin from operating line in Pennsylvania is not likely to directly prevent Riffin from continuing with his levee-building activities in Cockeyville (see ¶ 5, *infra*).

4. Rather than directly address the issue of the construction of Riffin's Cockeyville railroad facility, Maryland has instead chosen to challenge the authority of the Board to regulate railroad operations, and has mounted an attempt to put Riffin's railroad out of business by asking the Board to revoke Riffin's license to operate line in Pennsylvania. Revoking Riffin's railroad license would result in a loss of rail service for shippers in York County, PA, but would not necessarily prevent the construction of the levee and embankment that Maryland so strongly objects to (see ¶5, *infra*). [An aside: On October 20, 2004, Riffin delivered his first 8 freight cars.]

5. So far, Riffin has only challenged Maryland's assertion that the Board does not have the authority to exclusively regulate railroad facilities. Once hearings begin on the merits of Maryland's claims that Maryland's laws prohibit erecting levees or embankments to protect one's riparian property from the unlawful diversion of flood waters onto one's property, Riffin will show that the Common Law, and Maryland's case law, grant riparian property owners the right to appropriate and use the banks and adjacent land of a non-navigable stream as the property owner sees fit, and that Riffin has the express right to erect levees and embankments for the purpose of repelling flood waters unlawfully diverted onto Riffin's property (as has happened, due to government-sanctioned development upstream from Riffin's property), so long as that use and repulsion does not adversely affect the *normal* flows of water in the adjacent stream. Riffin will also show that the Common Law and Maryland's case law

only grants the *public* an interest in the *normal* flow of water in an un-navigable stream, and specifically holds that the public has no legally recognized interest in flood waters, which have been held to be surface waters, and that only other property owners, *not the State*, may maintain an action concerning increased flooding of adjacent properties resulting from erecting levees. Riffin will also point out that case law has held that if one's levee-building activities only cause a *de minimus* impact on adjacent or upstream properties, then that *de minimus* impact is not actionable. (One case held that if one's levee raised adjacent flood waters by six inches, that six-inch rise only had a *de minimus* impact). [So far, Riffin has accumulated 24 riparian property rights cases, which review riparian rights under Common Law, Civil or French Law, Spanish Law, and treaties and acts of Congress dating back to 1782. While this has been a fascinating review of the history of riparian rights, it is not terribly relevant to the issues at hand, other than to suggest to the Board that Maryland's position with regard to Riffin's levee-building activities, are not as strong as Maryland intimates.]

6. On page 6 of Maryland's Reply, Maryland asserts the first time it had knowledge that Riffin was arguing 49 U.S.C. §10501 (b) preempted Maryland's environmental laws, was on or about August 20, 2004, the date Maryland filed its Petition to Revoke Riffin's Pennsylvania NOE. The facts indicate otherwise. On **April 2, 2004**, Maryland filed a Petition to Revoke Riffin's Maryland and Pennsylvania NOE (Fin. Doc. No. 34484). On page 7 of that Petition, Maryland specifically refers to Riffin's assertion that 49 U.S.C. §10501(b) preempts Maryland's environmental laws. On **February 9, 2004**, Riffin filed a Motion to Dismiss for Lack of Jurisdiction with the Circuit Court for Baltimore County (Case No. 03-C-03-013144). A copy of Riffin's Motion to Dismiss was served on Maryland on that same date. In that Motion to Dismiss, Riffin argued 49 U.S.C. §10501(b) preempted Maryland's environmental laws. On **March 5, 2004**, Riffin served a copy of his Notice of Intent to Construct, Operate and Maintain a Railroad Facility, on Baltimore County officials, and on **April 8, 2004**, served a copy on Maryland Department of the Environment officials. Riffin also attached a copy of 49 U.S.C. §10501(b) to that Notice, and attached copies of the STB's Riverdale I & II and Town of Ayer decisions, and a copy of the 1st Circuit Court of Appeal's Town of Ayer decision. (A copy of Riffin's Notice of Intent was attached to Riffin's Answer to Maryland's Petition to Revoke.) As Riffin stated in his Reply, Maryland's Petition to Revoke Riffin's Pennsylvania NOE was decidedly **untimely** filed, having been filed some **3 months** after the Board served Riffin's Pennsylvania NOE, two months after Maryland filed its comments, and two months after Riffin changed his position in reliance upon the

airline industries, but give little support to the railroad industry. Consequently, railroads must fight for every little crumb. If Riffin is able to prevail against Maryland, perhaps this will make it a bit easier for some other railroad to prevail against some other state's attempt to infringe upon the Board's authority. Riffin believes if the Board were to revoke his Pennsylvania NOE, that would be akin to a soldier being killed by 'friendly' fire. Riffin is asking the Board to let Riffin continue with his fight in the courts, for Riffin believes if he prevails, the outcome will be a victory not only for Riffin, but also for the entire railroad industry.

Respectfully submitted,



James Riffin d/b/a The Northern Central Railroad

**CERTIFICATE OF SERVICE**

I hereby certify, that on this 29<sup>th</sup> day of October, 2004, a copy of the foregoing Riffin's Answer to Maryland's Motion to Strike Notice of Intent to Construct a Railroad Facility and Reply of the State of Maryland to Answer of Riffin to Petition of the State of Maryland to Revoke Riffin's Verified Notice of Exemption, was mailed, postage prepaid, to Charles A. Spitulnik, of McLeod, Watkinson & Miller, Suite 800, One Massachusetts Avenue, NW, Washington, DC 20001, counsel for the State of Maryland, and to Dawn S. Lettman, Asst. City Solicitor, Baltimore City Law Department, 100 N. Holiday Street, Baltimore, MD 21202.



James Riffin