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KAPLAN KIRSCH ROCKWELL

March 5, 2007

Honorable Vernon A. Williams
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-0001

Re: *Petition of James Riffin for Declaratory Order*
Finance Docket No. 34997

Dear Sir:

I am enclosing for filing the Reply of the Maryland Transit Administration and the Maryland Department of the Environment in the above referenced proceeding. This is an electronic filing in accordance with the Board's rules.

Sincerely,

Charles A. Spitulnik

Enclosure

cc: James Riffin

122499

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**BEFORE THE
SURFACE TRANSPORTATION BOARD
Washington, D.C.**

Finance Docket No. 34997

**PETITION OF JAMES RIFFIN
FOR DECLARATORY ORDER**

**REPLY OF THE MARYLAND TRANSIT ADMINISTRATION
AND
THE MARYLAND DEPARTMENT OF THE ENVIRONMENT**

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Dated: March 5, 2007

**BEFORE THE
SURFACE TRANSPORTATION BOARD
Washington, D.C.**

Finance Docket No. 34997

**Petition of James Riffin
For Declaratory Order**

**REPLY OF THE MARYLAND TRANSIT ADMINISTRATION
AND
THE MARYLAND DEPARTMENT OF THE ENVIRONMENT**

The Maryland Transit Administration (“MTA”) and the Maryland Department of the Environment (“MDE”) hereby submit their reply to the Petition of James Riffin for Expedited Declaratory Order, filed on February 9, 2007 (the “Petition”). The Board should deny the request of Petitioner James Riffin (“Mr. Riffin”) to issue a Declaratory Order because the statement Mr. Riffin asks this Board to make here is contrary to law, and because Mr. Riffin has not submitted a set of facts to which the Board can apply its well established precedent on this subject. Mr. Riffin has not presented a description either of the activity he proposes to conduct at sites that actually are rail facilities within the jurisdiction of this Board, or of how the enforcement of the state or local regulations prevents him from fulfilling any common carrier obligations he may have. Accordingly, the Board cannot address the substantive issues raised by Mr. Riffin when he presented no concrete factual basis to which the Board can apply those legal principles.

BACKGROUND

Mr. Riffin owns a number of commercial properties in Timonium and Cockeysville, Baltimore County, Maryland, and has a history of coming up with imaginative theories for why various State and local regulations do not apply to him and his ventures. *See, e.g., Riffin v. People's Counsel for Baltimore County*, 137 Md. App. 90 (2001) (rejecting argument that bungee jumping operation prohibited by County code was instead a "recreational facility"). In late 2003, Mr. Riffin's attention turned to the ICC Termination Act of 1995¹ ("ICCTA"), claiming that ongoing efforts by MDE to test the indoor air quality of a Timonium office building owned by Mr. Riffin and leased out to an office support company (Tech-Team), a sign-making company (Signsations, Inc.), and a document preparation service (DocuPrint Imaging, Inc.) were preempted by the Board's exclusive jurisdiction under § 10501(b).

In 2004, Mr. Riffin again invoked this Board's exclusive jurisdiction under the ICCTA in an effort to de-rail an enforcement action that MDE and Baltimore County brought after Mr. Riffin began stripping, filling, and grading his Cockeysville property. Mr. Riffin's activities there resulted in the discharge of soil and sediment to Beaver Dam Run, a tributary of the Gunpowder River, which feeds into the Loch Raven Reservoir, the main water source for Metropolitan Baltimore. While Mr. Riffin claims that the property constituted a "maintenance of way" facility, he owns no "way" (that is, no railroad right-of-way) to maintain in the vicinity of that facility.

Since then, Mr. Riffin has expanded his efforts, claiming the right to operate as a railroad on segments of the Cockeysville line used by MTA for its light rail operation, and seeking authority to establish rail service on property in downtown Baltimore near the Baltimore

¹ Pub. L. No. 104-88, 109 Stat. 803 (1995)

Streetcar Museum, F.D. No. 34982, *James Riffin d/b/a the Northern Central Railroad – Acquisition and Operation Exemption – In Baltimore City, MD (“Riffin – Baltimore City”)* and acquiring a line of railroad in Allegany County, Maryland. Docket No. AB-55 (Sub.-No. 659X), *CSX Transportation Inc. – Abandonment Exemption – In Allegany Co., MD* (Service Date August 18, 2006).

With each step, Mr. Riffin has sought to invoke the Board’s jurisdiction as a means to achieve his ends, whether it be to protect himself from liability for chemical contamination at the Timonium property or sediment pollution at the Cockeysville property, or to unseat the important public services performed by the light rail system and the Streetcar Museum. So far, the Board has rebuffed his efforts, rejecting his attempts to claim the right to operate as a railroad on segments of the Cockeysville line and on the property used by MTA for its light rail operation, F.D. No. 34484, *James Riffin D/B/A The Northern Central R. – Acquisition and Operation Exemption – In York Co., PA, and Baltimore Co., MD, slip op.* (Service Date April 20, 2004) (“*Riffin I*”); F.D. No. 34501, *James Riffin D/B/A The Northern Central Railroad – Acquisition and Operation Exemption – In York Co., PA, slip op.* (Service Date February 23, 2005) (“*Riffin II*”), and staying temporarily the effective date of his claims to rail operating status on the property in downtown Baltimore pending resolution of questions about the purported transaction that have been raised by MTA, as well as CSX Transportation, Inc. and the Baltimore Streetcar Museum. *Riffin – Baltimore City* (Decision, Service Date February 8, 2007).

Now, and once again, Mr. Riffin comes to this Board making unsubstantiated claims about his ownership and rights with respect to railroad transportation properties, and seeking a statement of law that is contrary to this Board’s precedent and relief for which he has not presented an adequate justification. Neither a member of the bar of any court nor a certified

practitioner pursuant to this Board's rules, he comes to this Board and wastes its resources and the resources of every party that is forced to respond to his claims that his putative railroad operations are completely outside the reach of state law because, he alleges, the provisions of 49 U.S.C. §10501(b) completely preempt all application of any state law.

As discussed above, this is not Mr. Riffin's first attempt to secure a statement that the ICCTA completely preempts all state law in every respect. When MDE brought its enforcement action in Timonium and Cockeysville cases, Mr. Riffin sought to remove the matter to federal court, arguing that the ICCTA completely preempts all state law as it relates to any railroad facility. The Court rejected Mr. Riffin's claim of complete preemption, stating the following:

Those principles of federalism compel this Court to find that the applicable statute in question, the Interstate Commerce ... [Commission] Termination ... [Act], can be read sensibly not to have a preemptive effect and this is consistent with other cases which rule in favor of a presumption against preemption. A presumption which the defendant, Riffin, has failed to overcome in this case. The Supreme Court in the *Metrodonna [sic]* case, at 518 U.S. and particularly at page 485 [*Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 116 S.Ct. 2240, 2250-51 (1996)] noted these very principles of federalism. The First Circuit in *Boston and Maine Corporation v. Town of ... [Ayer]* [330 F. 3d 12 (1st Cir. 2003)] noted that local regulations of railroads are not preempted by the ICCTA when the laws are deemed reasonable and nondiscriminatory environmental restrictions, which do not unduly burden interstate commerce or unduly restrict the railroad from conducting its operations.

Md. Dep't. of the Environment, et al. v. James Riffin, et al., Docket No. RDB-04-2848 (D. Md.) ("*MDE v. Riffin – Federal*"), Transcript of Motions Hearing held September 8, 2004 at 57-58.²

The Maryland state courts have similarly rejected Riffin's claims of complete preemption of all state laws based on his status as a rail carrier. After the federal court remanded the cases back to the state court, the Circuit Court for Baltimore County issued the injunctions requested

² A copy of the transcript of that hearing is attached to this Reply at Exhibit I.

by MDE and Baltimore County³ and Mr. Riffin appealed to the Court of Special Appeals. Reciting the history of Mr. Riffin's three unsuccessful attempts to convince this Board that he and his Cockeysville property actually constitute a legitimate railroad operation, the Court of Special Appeals concluded that the case as to the Cockeysville property was moot because, in view of this Board's revocation of his Notices of Exemption, "the record clearly indicates that ... appellant had no authority to either operate a railroad or invoke the STB's exclusive jurisdiction." *Riffin v. Md. Dept. of the Environment*, Docket No. 1593 and 1802, *slip op.* at 10-13, 14 (Md. Ct. Spec. App., Feb. 3, 2006)⁴. As a result, according to the Court, "the STB's revocation of appellant's third NOE renders any preemption issues, or arguments by appellant that his conduct is subject to the exclusive jurisdiction of the STB, moot." *Id.* at 14. The Court then proceeded to affirm the grant of MDE's and Baltimore County's motions for summary judgment. The Maryland Court of Appeals denied Mr. Riffin's attempt to have that decision reviewed⁵ and on January 8, 2007, the U.S. Supreme Court denied a petition for a writ of *certiorari*,⁶ declining to address the eleven (11) questions Mr. Riffin had presented to the Court, one of which was whether 49 U.S.C. §10501(b) completely preempts all state and local regulation of transportation by rail carrier.

While Mr. Riffin pursued all of his appeals (and even filed federal lawsuits against the Maryland Assistant Attorney General and the Baltimore County Assistant County Attorney prosecuting the cases, which lawsuits were dismissed *sua sponte*) he continued with his development of the Cockeysville property in defiance of the State court injunction and in

³ *MDE, et al. v. Riffin, et al.*, Docket No. 03-C-04-008920 (Cir. Ct. Baltimore Co., Nov. 19, 2004), *slip op.* A copy of that order is attached hereto as Exhibit 2.

⁴ A copy of this decision is attached hereto as Exhibit 3.

⁵ *Riffin v. Department of the Environment*, Petition Docket No. 93, *slip op.* (Md., June 16, 2006), a copy of which is attached as Exhibit 4.

⁶ *Riffin v. Md. Department of the Environment*, Docket No. 06-617, ___ U.S. ___, 127 S.Ct. 967, 75 U.S.L.W.3350 (2007) (denying Petition for a writ of *certiorari*).

continuing violation of several State and local environmental regulations, including regulations administered by the State under the Clean Water Act. When MDE and Baltimore County initiated contempt proceedings, Mr. Riffin again began a series of procedural maneuvers to frustrate the State court's jurisdiction, removing the case for a second time to federal court, appealing the federal court's remand in the Fourth Circuit Court of Appeals (despite 28 U.S.C. § 1447(d), which bars such appeals), and unsuccessfully moving the State court for a postponement.

Now Mr. Riffin turns to this Board with the current declaratory judgment proceeding, seeking once again to turn back three years' worth of adverse court decisions. As the Board observed in the Cockeyville and Timonium matters:

The Board has a responsibility to protect the integrity of its processes, and the Board is concerned that Riffin may be using the licensing process in improper ways.

Riffin II, slip op. at 6 (footnote with citations omitted). Not much has changed since then. For the reasons set forth below, the Board should deny the relief requested.

ARGUMENT

THE PETITION FOR DECLARATORY RELIEF SHOULD BE DENIED BECAUSE IT IS NOT SUPPORTED BY LAW OR FACTS.

Mr. Riffin asks this Board to make a statement of law that is inconsistent with the Board's precedent. Although the Petition describes in broad strokes the work that Mr. Riffin claims needs to be completed at both the Cockeyville and Allegany County sites, he provides no specifics as to why the work is necessary for his continuation of interstate rail service (in Allegany County) or what connection the work he proposes to complete in Cockeyville has to interstate rail service in the first place. He has not explained why the state statutes at issue preclude his completion of the work within his railroad right-of-way. Even though the work at

both sites could involve issues related to potential pollution of state waterways, he has not provided any information as to how the work relates to the federal environmental provisions that the State administers through its own regulatory agencies. In short, while Mr. Riffin disagrees with the decisions of the state and federal courts in Maryland that have already addressed the question he attempts to raise here, he has not presented sufficient information upon which this Board could base a decision as to whether the state statutes and regulations actually are preempted. Accordingly, the Petition for Declaratory Relief should be denied, expeditiously as he requests.

A. This Board's Precedent Confirms that Mr. Riffin Has Misstated Applicable Law.

Contrary to Mr. Riffin's sweeping assertions, the scope of the preemption of state law provided by Section 10501(b) is not unlimited. Mr. Riffin correctly cites numerous cases that have broadly construed the reach of §10501(b). *See, e.g., City of Auburn v. U.S.*, 154 F.3d 1025, 1030 (9th Cir. 1998), *cert. denied*, 527 U.S. 1022 (1999); *CSX Transp., Inc. v. Ga. Pub. Service Comm'n*, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996). However, this Board and the Courts (including Courts that have reviewed Mr. Riffin's proposed schemes) have acknowledged, that §10501(b) preemption is not complete. Instead, this Board has concluded as follows:

... [S]tate and local permitting or pre-clearance requirements are preempted because by their nature they interfere with interstate commerce, but ... non-discriminatory enforcement of other types of state and local requirements, such as building and electrical codes, generally would not be preempted. Thus, individual situations need to be reviewed individually to determine the impact of the contemplated action on interstate commerce.

Borough of Riverdale – Petition for Declaratory Order – The N.Y., Susquehanna and Western Ry. Corp., STB F. D. No. 33466, *slip op.* at 2 (Service Date Feb. 27, 2001) (“*Riverdale II*”). The Board has made clear that state or local regulation is permitted “where it does not interfere with

interstate rail operations.” *Borough of Riverdale – Petition for Declaratory Order – The N.Y., Susquehanna and W. Ry. Corp.*, STB F.D. No. 33466, 4 S.T.B. 380, 386 (1999) (“*Riverdale I*”). Quoting the earlier STB decision that had led to the 9th Circuit’s decision in *City of Auburn, supra*, the Board gave the following examples of state and local regulation that, in appropriate circumstances, would not be preempted:

Even in cases where we approve a construction or abandonment project, a local law prohibiting the railroad from dumping excavated earth into local waterways would appear to be a reasonable exercise of local police power.... A railroad that violated a local ordinance involving the dumping of waste could be fined or penalized for dumping by the state or local entity.

Riverdale I, 4 S.T.B. at 386.

Finally, the Board has also made it clear that “nothing in section 10501(b) is intended to interfere with the role of state and local agencies in implementing Federal environmental statutes, such as the Clean Air Act, the [Clean Water Act], and the [Safe Drinking Water Act].” *Boston & Maine Corp. & Town of Ayer*, STB Finance Docket No. 33971, *slip op.* at 9 (May 1, 2001), (“*Town of Ayer I*”). State laws that implement these federal environmental statutes, like one of the Maryland water pollution laws at issue at the Cockeysville property, are not preempted by the ICCTA because, as the STB has put it, requiring Mr. Riffin to comply with Maryland water pollution laws does not run afoul of the ICCTA.

The Board’s own precedent confirms that the statement of law Mr. Riffin asks this Board to make would not be accurate. As a result, the Petition for Declaratory Order should be denied.

B. Mr. Riffin Has Made No Factual Showing That Would Justify Issuing the Requested Order.

Mr. Riffin’s request has a second fatal flaw. Not only has he misstated the applicable law, he has not satisfied the requirement to demonstrate how or why compliance with Maryland laws will prevent him or the railroad he purports to operate from fulfilling his/its common carrier

obligations. Because Mr. Riffin has not provided the Board with the information it needs to make that assessment, the Petition for Declaratory Order must be denied.⁷

In a decision denying reconsideration of *Town of Ayer I*, the Board stated the following when assessing the need to accommodate seemingly conflicting federal mandates:

This is a case-specific and fact-specific determination. One must look at the objective effects (i.e., all of the facts and circumstances) to determine whether the local body's regulation, as applied, unduly burdens or unreasonably interferes with interstate commerce.

F.D. No. 33971, *Joint Petition for Declaratory Order—Boston and Maine Corp. and Town of Ayer, MA, slip op.* (Service Date October 5, 2001) ("*Town of Ayer II*") at 4. Similarly, the Board has stated that state or local regulation is permitted "where it does not interfere with interstate rail operations." *Riverdale II* at 386.

This Board has required that determinations of preemption must be based on an assessment of the facts and of whether the complained-of state or local statute will in fact impede the ability of the railroad to fulfill its obligations in interstate commerce. The judicial rulings on the preemption of the state and local environmental, land use, and other laws presented in the long list of cases presented by Mr. Riffin do not disturb the Board's own interpretation of the information it needs to address preemption questions. In this situation, the Board's interpretation of how to apply the preemption provisions of the ICCTA requires more information than Mr.

⁷ This Board's decisions in *The New York City Econ. Dev. Corp. – Petition for Declaratory Order*, STB F.D. No. 34429, *slip op.* (Service Date July 15, 2004) ("*NYCEDC*") and cases like it where the Board ruled that various state environmental protection laws were preempted do not compel a different conclusion. In *NYCEDC*, for example, while reiterating the broad scope of the preemption of state environmental statutes under 49 U.S.C. §10501(b), *slip op.* at 8, the Board had before it a record that demonstrated that the state agencies had failed to act for more than 11 months on applications filed in accordance with the state's environmental regulations (*slip op.* at 3), and that the Petitioner in that proceeding was voluntarily undertaking mitigation measures to address wetland impacts (*slip op.* at 9 fn.7). In clear distinction, Mr. Riffin has made no attempt to work with the state agencies and has made no showing that failure on the part of those agencies to act is preventing him from moving forward with his proposed work. The Board in *NYCEDC* had before it a record that allowed the fact-based determination that the incomplete record in this proceeding lacks.

Riffin has provided. With respect to the Allegany County line, Mr. Riffin has made general statements about the need to rehabilitate the line due to erosion but has not provided any specifics about the work he proposes to undertake, whether that work will be within the existing railroad right-of-way, or what environmental harm the work will entail. Nor has Mr. Riffin provided any support for his allegation that MTA or MDE are blocking his purported need to rehabilitate the line. In actuality, Mr. Riffin has for the past several months engaged in no dialog with the State or local authorities about the proposed work or the methods to be used to protect water quality within the adjacent stream. In the absence of such specifics, neither this Board nor any other party can determine whether preemption truly applies.

While Mr. Riffin similarly provides little, if any, factual information with respect to the Cocksylville property, the preemption issue has already been resolved repeatedly by the many federal and State court decisions that have already been rendered with respect to his activities there. But even if the Board were to choose to consider the issue again, the available facts demonstrate that preemption does not apply. Inasmuch as Mr. Riffin owns no active right-of-way and has no authority to acquire or operate rail carrier property or to hold himself out as a rail carrier anywhere near the Cocksylville property,⁸ it is difficult to conceive how a purported maintenance of way facility has any connection at all to this Board's jurisdiction. While Mr. Riffin states in the Petition that he "still desires to acquire" the Cocksylville line used by MTA for its light rail operation, Petition at 6, ¶11, and "hopes" that the proceeding pending at F.D. No. 34982 will give him the authority to operate rail lines in the Baltimore area, *id.*, at 6, ¶12, he currently owns no property in the vicinity that is used to provide transportation subject to this Board's jurisdiction.

⁸ See, *Riffin I*; *Riffin II*; *Riffin- Baltimore City* (staying effective date of Notice of Exemption).

On this record, then, Mr. Riffin is left with the same argument that he made, and lost, before the federal district court, namely, that his ownership of rail line anywhere gives him the ability to claim preemption of state and local law wherever he may elect to take actions that he asserts are related to rail service. See Transcript of Proceedings attached hereto as Exhibit 1, at 38-39. This Board has already once before rejected Mr. Riffin's attempts "to use the cover of Board authority allowing rail operations in Pennsylvania to shield seemingly independent operations and construction in Maryland from legitimate processes of state law." *Riffin II*, slip op. at 6 (Feb. 23, 2005). It should do so again here.

CONCLUSION

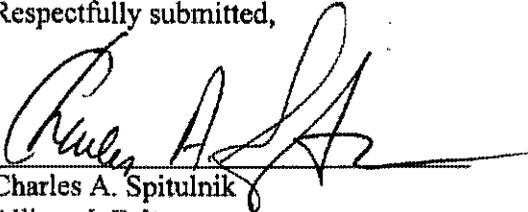
Mr. Riffin's request for a sweeping declaration of complete preemption of all state law postulates a holding that is inconsistent with this Board's precedent. While the Board's rules permit the issuance of a declaratory order, a proceeding will be instituted only when there is an actual, concrete dispute. 5 U.S.C. §554(e); 49 C.F.R. §1011.75. There is no dispute as to the legal question posed by Mr. Riffin, because his posited statement is directly contrary to well-established STB precedent. Nor is there any showing of a dispute over the application of the law to facts since the Petition presents no facts that would permit this Board to make the necessary conclusions of law.

This Board has routinely accepted the notion that some state and local laws remain enforceable *vis-à-vis* a railroad because they do not interfere with the railroad's ability to fulfill its common carrier obligation. The Board has also acknowledged that state agencies' actions taken to implement federal environmental laws are not preempted by the ICCTA. Mr. Riffin here asks the Board to issue a declaratory order without presenting the factual showing normally

required to confirm that a dispute about application of prevailing law to facts exists. As a result, this Board should deny the Petition for a Declaratory Order and close this proceeding.

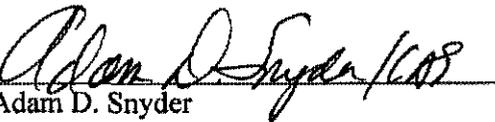
WHEREFORE, and in view of the foregoing, MTA and MDE respectfully request this Board to expeditiously deny the Petition for Declaratory Relief.

Respectfully submitted,



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Counsel for the Maryland Department of the
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Dated: March 5, 2007

122329

Certificate of Service

I hereby certify that I have this 5th day of March, 2007, caused to be served a copy of the foregoing Reply of the Maryland Transit Administration and the Maryland Department of the Environment upon the following parties of record:

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



Charles A. Spitulnik

Exhibit 1

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

MARYLAND DEPARTMENT Civil No. RDB-04-2848
OF THE ENVIRONMENT

AND

BALTIMORE COUNTY,
MARYLAND

Plaintiffs,

V.

Baltimore, Maryland

JAMES RIFFIN

September 8, 2004

AND

3:00 p.m.

THE SIX M COMPANY,

Defendants.

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE RICHARD D. BENNETT
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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10 Proceedings recorded by mechanical stenography, transcript
11 produced by notereading.

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P R O C E E D I N G S

THE COURT: Madam Clerk, if you'll call the case, please?

THE CLERK: Before the Court is civil case number RDB-2848, the Maryland Department of the Environment, et. al. v. James Riffin, et. al. This matter is before the Court for hearing. Counsel and party, please identify yourselves for the record.

MR. RIFFIN: I'm James Riffin. I'm one of the defendants.

MR. LIVINGSTON: My name is Scott Livingston. With me is my colleague and my partner, Pat Roddy. We represent Six M and if it please the Court, Mr. Roddy is a member of the Maryland Bar, but he is not a member of the U.S. District Court for the District of Maryland. Subject to leave of court, we request that Mr. Roddy be able --

THE COURT: Mr. Livingston, you are a member of this court, correct?

MR. LIVINGSTON: Yes.

THE COURT: All right. Well, then Mr. Roddy can certainly come in pro hac vice and just for purposes of these proceedings certainly.

MR. LIVINGSTON: Thank you very much.

THE COURT: Without question. And for the plaintiffs, Maryland Department of Environment?

1 MR. SNYDER: Thank you, Your Honor. Adam Snyder,
2 Assistant Attorney General on behalf of the Department of the
3 Environment.

4 THE COURT: Mr. Snyder, nice to see you.

5 MR. MAYHEW: And Paul Mayhew, associate counsel for
6 Baltimore County.

7 THE COURT: Yes. From the Office of the County
8 Attorney of Baltimore County, correct?

9 MR. MAYHEW: Yes, Your Honor.

10 THE COURT: All right. As I understand it, the
11 plaintiffs are the Maryland Department of the Environment and
12 Baltimore County. And on August the 30th of this year, the
13 plaintiffs brought suit against the defendants, James Riffin and
14 his contractor, the Six M Company, in Baltimore County Circuit
15 Court seeking injunctive relief and civil penalties for
16 defendants' alleged violations of various state and local
17 environmental regulations stemming from construction activity in
18 proximity to protected waterways. The defendant then removed to
19 federal court and in the interim, the plaintiffs have sought a
20 temporary restraining order which was issued by Judge Dana Levitz
21 of the Circuit Court for Baltimore County on August 30 and that
22 hearing, the temporary restraining order that was issued is due
23 to expire tomorrow, September 9, 2004. Is that correct,
24 Mr. Snyder?

25 MR. SNYDER: That is correct, Your Honor.

1 THE COURT: And this is one of three different cases.
2 Is that correct? Mr. Riffin shows up several times on my docket.

3 MR. RIFFIN: Your Honor is correct.

4 THE COURT: Yes. And are all these removals,
5 Mr. Riffin?

6 MR. RIFFIN: Yes, they are, Your Honor.

7 THE COURT: So the same issue is involved in all of
8 them, correct?

9 MR. RIFFIN: Essentially.

10 MR. MAYHEW: If I might, Your Honor, I believe there's
11 a timeliness issue involved in one of the three.

12 THE COURT: Right. Right. Right. There is a case,
13 RDB-04-1342, then RDB-04-2789 and then this one, RDB-04-2848.
14 All of which are actions brought against Mr. Riffin. All of
15 which Mr. Riffin has removed here to federal court. Is that
16 correct, Mr. Riffin?

17 MR. RIFFIN: Yes, it is, Your Honor.

18 THE COURT: All right. And one of them actually
19 involves a claim that was already adjudicated in state court. Is
20 that correct, Mr. Riffin?

21 MR. RIFFIN: That's also correct, Your Honor.
22 Actually, all three of them have had a state court judge --

23 THE COURT: Mr. Riffin, one of the things you have to
24 do if you're going to address the Court, you got to stand, sir,
25 if you would. Thank you very much.

1 MR. RIFFIN: Actually, all three of them have had a
2 state court judge rule on the issue of the lack of jurisdiction
3 and in all three cases, that state court judge just said that
4 it's his opinion that the statute does not preempt whatever it is
5 the underlying case is about.

6 THE COURT: Right.

7 MR. RIFFIN: So the issue I understand that we're going
8 to address this afternoon is complete preemption.

9 THE COURT: Right. The issue we're going to address
10 today is the matter of this particular case in the matter of the
11 motion to remand and we'll address that. But I'm just verifying
12 that essentially the same underlying issue relates to the other
13 two cases that are still pending before me. One of them just
14 came to me within a week and a half ago and the other was fully
15 briefed. I think, Mr. Snyder, you're in the other case as well
16 and that one was briefed on the motion to remand and in that case
17 there's a timeliness issue as well I think. Is that correct?

18 MR. SNYDER: That is correct, Your Honor.

19 THE COURT: That's not an issue in this case. But on
20 that case, the earlier case was a timeliness issue.

21 MR. SNYDER: It's both. Yes.

22 THE COURT: But you also addressed the preemption issue
23 as well.

24 MR. SNYDER: That's correct.

25 THE COURT: Right. And I think it was completely

1 briefed and ready for ruling by this Court about seven weeks ago
2 or so and we're still catching up on some things.

3 All right. I'll be glad to -- this is the motion of
4 the plaintiffs for a remand to the Baltimore County Circuit
5 Court. Mr. Snyder, I'll be glad to hear from you, sir.

6 MR. SNYDER: Thank you, Your Honor. I briefed a lot of
7 these issues in the Motion for Remand that was filed this morning
8 as well as the previous briefs that I filed in the 1342 case. So
9 I want to, I'm going to be, skate only superficially on the
10 complete preemption issues.

11 THE COURT: All right. Can I clarify one thing while
12 you're up, Mr. Snyder? Just remain standing. I've just
13 literally two minutes before I came up here on the bench, I was
14 given a copy of a Motion to Remand for Failure to Obtain Proper
15 Consent pursuant to which Six M Company, a defendant in this
16 case, submitted a Motion for Remand to the Circuit Court of
17 Maryland which I presume means the Circuit Court of Baltimore
18 County. So it's the position of the Six M Company that the Six M
19 Company also wants this case to be remanded to the Circuit Court
20 for Baltimore County. Correct?

21 MR. RODDY: Yes, sir, Your Honor. That has only been
22 submitted to you. That has not been submitted to the state
23 court.

24 THE COURT: No. That's right. I'm just saying I just
25 literally got it --

1 MR. RODDY: That's correct, Your Honor. That is the
2 first submission that we --

3 THE COURT: So the defendant, Six M, joins with the
4 plaintiffs with respect to having this case be remanded back to
5 the state court?

6 MR. RODDY: Yes, sir. I believe the grounds are
7 different --

8 THE COURT: I'll be glad to hear from you in a minute
9 on that. Okay. And we will address that motion as well. So
10 basically, Mr. Riffin, you're the only person that thinks you
11 belong here in this federal courtroom.

12 MR. RIFFIN: That's correct, Your Honor.

13 THE COURT: All right. Well, we'll get right to the
14 core of it then. Go right ahead, Mr. Snyder.

15 MR. SNYDER: Well, the procedural issue that I was
16 going to touch upon before getting into the complete preemption
17 issue is that Mr. Riffin's Notice of Removal did not state on the
18 face of it that he had coordinated with the co-defendants to
19 obtain their consent to removal. It's been rendered somewhat
20 moot here by the Six M Company's Motion To Remand. So I'll skip
21 ahead.

22 The other threshold before you even get into the scope
23 of preemption under the ICCTA is whether Mr. Riffin himself even
24 qualifies as a railroad under the ICCTA. He is a gentleman doing
25 business as a railroad. He's not incorporated and it is the

1 department's position that he has not received any authorization
2 from the Surface Transportation Board which the Federal Rail
3 Agency established under the ICCTA to operate a railroad and to
4 build the railroad at issue here. What Mr. Riffin has done, he
5 files notices of exemptions is what they're called before the
6 Surface Transportation Board which are supported by an affidavit
7 by Mr. Riffin saying that he intends to operate a railroad on a
8 certain lines of track and under the Surface Transportation
9 Board's regulations, it is required by law to publish that
10 application, that notice of exemption within thirty days and it
11 becomes automatically effective within seven days. That gives
12 parties an opportunity to tell the STB that this application,
13 this notice of exemption is faulty. So Mr. Riffin's claim to
14 railroad status is just that. He has filed a piece of paper with
15 the Surface Transportation Board that says I want to be a
16 railroad and the Surface Transportation Board has published that.
17 Maryland, some two weeks ago, filed a petition to revoke that
18 notice of exemption when it has now become clear that Mr. Riffin
19 is claiming that that application to the Surface Transportation
20 Board constitutes his authorization to operate a railroad here.

21 Another point that I think is important is that
22 Mr. Riffin has never sought the approval of the Surface
23 Transportation Board to construct a railroad and the issues are
24 quite different. In one respect, it's relevant here. If the
25 Surface Transportation Board were to say Mr. Riffin, you are a

1 railroad and we understand that you're constructing a railroad,
2 they would institute environmental review processes that the
3 state and the locality could participate in. There's no such
4 review going on. Mr. Riffin's position in this case is that he
5 can undertake construction of this railroad without any
6 environmental review by anyone whatsoever. And we, the State and
7 the County, well, speaking for the State believe that the ICCTA
8 does not stand for that proposition. That no case stands for
9 that proposition.

10 When you get into the merits of the preemption, we'll
11 get into a lot of fact-bound decisions about whether a particular
12 state and local environmental regulation unreasonably interferes
13 with the operation of a railroad. That's the standard that the
14 courts have applied and that the transportation board applies.
15 They say that not all state and local regulation is preempted and
16 in fact, there's a Surface Transportation Board case almost
17 directly on point that says that dumping of earth into waterways
18 and the dumping of waste materials into waterways is not
19 something that's preempted by the ICCTA. So whatever the merits
20 are of the preemption defense, there is no complete preemption
21 here that would justify removal because there are plenty of
22 cases, plenty of Surface Transportation board decisions out there
23 that rule that particular state and local regulation is not
24 preempted. Therefore, without complete preemption, there's no
25 basis to remove this case which on its face is entirely based on

1 state law. That's it in a nutshell, Your Honor. If you have any
2 questions, I'll be --

3 THE COURT: These same arguments certainly apply in the
4 other two cases pending before this court, do they not?

5 MR. SNYDER: I would think they would. One of the
6 cases involved only the county and not the State. 1342 does
7 involve the State.

8 THE COURT: So the identical argument you pose would
9 also relate and that's the pending Motion to Remand that has been
10 fully briefed, correct?

11 MR. SNYDER: Yes. The removal jurisdiction --

12 THE COURT: Is there any reason why this Court in
13 dealing with the precise issue before it in 2848 cannot also
14 apply the same ruling in 1342?

15 MR. SNYDER: Not on the complete -- no. On the
16 removability issue, they're the same.

17 THE COURT: Okay.

18 MR. SNYDER: Thank you, Your Honor.

19 THE COURT: All right. Thank you very much. I'm going
20 to entertain the Motion for Remand for Failure to Obtain Proper
21 Consent by Six M at this time and then I'll give Mr. Riffin an
22 opportunity to respond. Who would like to speak for Six M on the
23 Motion to Remand for Failure to Obtain Proper Consent?

24 MR. RODDY: I would, Your Honor.

25 THE COURT: Mr. Roddy?

1 MR. RODDY: Your Honor, we just believe that the Notice
2 of Removal fails because a critical element is missing and that
3 is the consent of a co-defendant. Different from the previous
4 cases which you have heard in this, on this particular property
5 that the plaintiffs just talked about, there is a co-defendant in
6 this case and no consent has been obtained and nowhere in the
7 Notice of Removal, in fact nowhere on the court's own document
8 intake sheet does any reference to a co-defendant exist. There
9 are exceptions. However, none of these exceptions apply to my
10 client. And in this circuit it is well settled law that there's
11 a rule of unanimity and that is that within thirty days of notice
12 and we are well within that thirty days of notice for my client,
13 the defendant has the ability to consent. After that thirty
14 days, his ability is waived. But we are well within that
15 thirty-day period as your chronology at the beginning so
16 illustrated. My client has not consented and for reasons that
17 are in their best interest wishes this matter to be taken up in
18 state court since this is wholly a matter as far as Six M is
19 concerned of alleged violations of state and county law. Six M
20 does not have any thing to add to this court, Your Honor, as to
21 the argument that's before you in the other motion for removal or
22 in the motion for removal -- in the Notice of Removal or in the
23 other Motion for Remand. We are simply here on the narrow issue
24 of Six M's alleged violations of county and state law and wish
25 those to be heard in state court.

1 THE COURT: Right. Mr. Roddy, can your client make any
2 representations to the Court as to whether or not there was any
3 effort by Mr. Riffin to procure your client's consent to the
4 removal?

5 MR. RODDY: Mr. Riffin had discussions with me last
6 week, Your Honor. At that time, he did not ask for consent and I
7 was not under any obligation to present that to my client at the
8 time because I was not asked.

9 THE COURT: All right. Thank you very much.
10 Mr. Riffin, first of all, with respect to the position of the Six
11 M Company, the requirements of 28 U.S.C. Section 1446 are fairly
12 clear, are they not, in that you must have the consent of your
13 co-defendants, correct?

14 MR. RIFFIN: I would agree that in normal
15 circumstances, that's probably correct. However, I actually
16 think this case falls on whether or not complete preemption is
17 manifest in this case. If the ICCTA completely preempts the
18 regulation of railroad facilities and if this Court finds that
19 this site is a railroad facility, then there is no -- it's
20 irrelevant whether I even filed the Notice of Removal as it turns
21 out because the case law has held that where complete preemption
22 --

23 THE COURT: What case law?

24 MR. RIFFIN: I've got a lot of discussion in this in
25 all my memorandums, Your Honor.

1 THE COURT: What memorandum have you submitted to the
2 Court on this?

3 MR. RIFFIN: With regard to my Notice of Removals, I
4 have a rather long memorandum of law which accompanies it and in
5 that --

6 THE COURT: Addressing the Six M issue?

7 MR. RIFFIN: I haven't addressed the Six M issue
8 because I haven't -- I didn't know about it until just now. I
9 knew about it even later than Your Honor did. I get back to if
10 we have complete preemption, the case law indicates that the case
11 raises a federal issue from the moment it is filed, it is
12 appropriate to be in this court and this court is the only court
13 that can hear it. There's also something else that's addressed
14 in my Notice of Removal, which is also applicable in this case.
15 In Grubb v. Public Utilities Commission of Ohio, a Supreme Court
16 case decided in 1930, the Supreme Court held --

17 THE COURT: What's the cite on that case, sir?

18 MR. RIFFIN: The cite would be 281 U.S. 470, 50 Supreme
19 Court 374, 74 Lawyers Edition 972. I make mention of it on page
20 30 of my memorandum in support of my Notice of Removal.

21 THE COURT: All right. Go ahead.

22 MR. RIFFIN: In that case, the Supreme Court held that
23 absent a provision for exclusive federal jurisdictions, state
24 courts may make binding judicial decisions regarding the
25 interpretation of a federal statute. The statute that we're

1 discussing, 49 U.S. Code 10501(b) has a provision for exclusive
2 jurisdiction. Based on the ruling of the Supreme Court in this
3 case, it would appear that no state court has the authority to
4 render a binding judicial decision based on the issue of whether
5 or not the ICCTA preempts all state regulation.

6 THE COURT: So the bottom line is your response to the
7 Motion to Remand for Failure to Obtain Proper Consent by Six M is
8 quite simply complete preemption, correct?

9 MR. RIFFIN: Complete preemption, Your Honor.

10 THE COURT: And you would agree with respect to the
11 motion of the plaintiffs, Maryland Department of Environment and
12 Baltimore County, that if there's ordinary preemption, remand is
13 appropriate, but your point is is that there's complete
14 preemption.

15 MR. RIFFIN: There is complete preemption --

16 THE COURT: All right. Then I just want to zero in on
17 that if that's the basis of your argument as to both motions.
18 One, on the matter of your classifications of railroad,
19 Mr. Snyder noted that your claim is based upon the fact that you
20 filed an application and he argues that there's been no
21 authorization from the Surface Transportation Board with respect
22 to your being classified as a railroad. What is your response to
23 classifying yourself as a railroad?

24 MR. RIFFIN: I would disagree with Mr. Snyder. He's
25 not familiar with Surface Transportation Board procedure law or

1 decisions. He made mention to the Court that the notice of
2 exemption which is Finance Docket -- it's my Exhibit Number 2.
3 It's Finance Docket 34501. He made mention that this notice of
4 exemption did not give me authority to operate or build a
5 railroad is actually what he said. The notice of exemption is to
6 acquire and operate rail line in York County, Pennsylvania.
7 Contrary to Mr. Snyder's belief --

8 THE COURT: What's your status in Maryland with respect
9 to being a railroad and operating a rail line?

10 MR. RIFFIN: If one is a rail carrier any place in the
11 United States, one is subject to the exclusive jurisdiction of
12 Surface Transportation Board. That's my position. That's the
13 Surface Transportation --

14 THE COURT: I didn't ask your position, sir.

15 MR. RIFFIN: Okay.

16 THE COURT: I asked you a factual question. What is
17 the basis of your -- are you operating a railroad now?

18 MR. RIFFIN: I am operating a railroad in York County,
19 Pennsylvania --

20 THE COURT: Are you operating a railroad in Maryland,
21 sir?

22 MR. RIFFIN: I'm not operating rail line in Maryland.
23 I am operating railroad facilities in Maryland.

24 THE COURT: And what are the railroad facilities which
25 you're operating?

1 MR. RIFFIN: One of which is 10919 York Road which is
2 the subject of the immediate litigation. I also let 1941
3 Greenspring Drive.

4 THE COURT: And what is that facility? What are you
5 operating there?

6 MR. RIFFIN: It is a facility which I use to store,
7 handle, maintain railroad-related equipment.

8 THE COURT: So it's a storage facility for equipment.
9 Is that correct?

10 MR. RIFFIN: At 10919, it is primarily at this moment
11 in time a storage facility for railroad-related equipment. Yes,
12 Your Honor.

13 THE COURT: And with respect to that railroad-related
14 equipment, how do you transport that railroad-related equipment
15 when you seek to utilize it in Maryland?

16 MR. RIFFIN: If I want to use it in Maryland, I put it
17 on a truck and take it to wherever it is I need to take it. If I
18 want to use it in Pennsylvania, I put it on a truck and take it
19 to wherever it is I need to take it.

20 THE COURT: Clearly, you don't put it on any rail line,
21 correct?

22 MR. RIFFIN: I generally don't. It's less expensive
23 and it's a whole lot quicker if you put it on a low boy.

24 THE COURT: All right.

25 MR. RIFFIN: The nature of the equipment is such that

1 it's not so large that you can't transport it on a low boy.
2 That's how it got there. Typically, anyone who is doing track
3 maintenance work -- this is all track maintenance equipment is
4 what it is. But typically, whomever is doing track maintenance
5 work, you generally transport your equipment to the site with a
6 truck that it's just easier and quicker and less expensive. Once
7 you get it there, you'll put it on the train tracks. It has
8 something called high rail --

9 THE COURT: What other basis is there for your
10 classifying yourself as a railroad?

11 MR. RIFFIN: The authority granted to me by the Surface
12 Transportation Board on May 20, 2004 granted me the authority to
13 operate line and if one operates line, that constitutes being a
14 railroad.

15 THE COURT: Well, the position of the State is is that
16 you merely --

17 MR. RIFFIN: Right. One --

18 THE COURT: I tell you what, Mr. Riffin. I'll try not
19 to interrupt you, but it's good for you not to interrupt me.

20 MR. RIFFIN: Yes, sir.

21 THE COURT: Okay. Because what's important is for me
22 to get it, not so much for you to get it. So it is going to be
23 of no benefit to you for you to seek to educate me unless you
24 answer my questions. Okay. So I know as anxious as you are to
25 indicate your full knowledge of the topic, it will be more

1 helpful if you'll let me just go step by step. With respect to
2 your contention that you are a railroad, the facts before the
3 Court are there is no railroad line in Maryland that you're
4 operating on and that you're not operating any railroad line in
5 Maryland. But apparently, you have railroad facilities and
6 equipment that you transport by low boy by truck. Correct?

7 MR. RIFFIN: That is correct, Your Honor.

8 THE COURT: All right. Okay. Now then the second
9 thing is having that been established before the Court, what else
10 do you argue causes you to be classified as a railroad?

11 MR. RIFFIN: Actually, we're using the wrong term
12 terminology.

13 THE COURT: Just use my terminology, Mr. Riffin.
14 That's the important thing. Just answer my question, sir. Okay.
15 Just answer my question. This isn't complicated and I've been
16 flooded with a series of papers in the last 16 hours including
17 something two minutes before I got on the bench. Okay. So it's
18 very simple. The Court makes a factual finding. There is no
19 railroad line and there is no -- you've admitted there's no
20 railroad line. So you're not operating a railroad in Maryland.
21 Now you've indicated that you have railroad equipment and I'm
22 trying to cut to the core of this. In terms of railroad
23 equipment, I understand your argument on railroad equipment and I
24 understand the significance that you attach to having applied to
25 the Surface Transportation Board for a classification and I

1 understand Mr. Snyder's position with respect to the significance
2 or lack thereof of the application and I'll hear from him again
3 in his response because it's his motion. So he has the last say.
4 But I'm just trying to clarify. What else do you argue
5 constitutes you as a railroad? Your application to the Surface
6 Transportation Board and your storage facility with railroad
7 equipment essentially are the two points you've argued thus far,
8 correct?

9 MR. RIFFIN: It is, Your Honor.

10 THE COURT: All right. What else causes you to be
11 constituted as a railroad?

12 MR. RIFFIN: Your Honor needs to be aware that the
13 decision rendered by the Surface Transportation Board was a
14 decision. They did not rubberstamp my notice of exemption. They
15 made a decision.

16 THE COURT: All right. And what was that decision?

17 MR. RIFFIN: The decision was made on May 13th. It was
18 published -- it had a service date of 5-20-2004.

19 THE COURT: All right.

20 MR. RIFFIN: And the decision was it has, the Surface
21 Transportation Board has granted me their permission to operate
22 rail line in Pennsylvania. Once one receives permission to
23 operate rail line wherever, you are subject to their exclusive
24 jurisdiction. 10501(b) specifically states the Surface
25 Transportation Board has exclusive jurisdiction over railroad

1 facilities, facilities of rail carriers. I would like to point
2 out that statute does not require a railroad facility to be in
3 fact owned or operated by the rail carrier which is making use of
4 what's being used, stored, whatever, at that facility. It is not
5 relevant whether I'm a rail carrier in Maryland, in Pennsylvania
6 or even at all as it turns out with regard to a railroad
7 facility. A railroad facility is defined as a facility which
8 has, stores and it's a long list of other words that they use
9 equipment of any kind regardless of ownership which relates to
10 the movement of passengers or freight by rail. That's the --

11 THE COURT: In the same state in which the facility is
12 located or anywhere in the United States?

13 MR. RIFFIN: Anyplace in the United States. No place
14 in this statute do any parts of this statute say that the statute
15 applies only to interstate things. And in fact, when the ICCTA
16 was passed, they specifically eliminated the previous provision
17 that was in the Stagger's Rail Act which gave states the right to
18 regulate wholly interstate track. Under the ICCTA, it
19 specifically states the Surface Transportation Board now has
20 exclusive jurisdiction over spur industrial side switching track.
21 Whether they're interstate, intrastate, it doesn't matter.

22 THE COURT: Or whether they're operational or not?

23 MR. RIFFIN: Or whether they're operational or not.

24 THE COURT: So your argument essentially is then
25 because the Surface Transportation Safety Board has granted you

1 permission to operate a railroad line in Pennsylvania, that ergo,
2 that decision has been made that you are a railroad.
3 Accordingly, any storage facility in Maryland even if not in
4 Pennsylvania and even if there's not an actual line in
5 Pennsylvania still falls within the parameters of the permission
6 by the Surface Transportation Board. Ergo, you are a railroad in
7 Maryland or any other state in the United States.

8 MR. RIFFIN: I would add to what Your Honor just said
9 that as the statute reads, it doesn't really matter if I'm a rail
10 carrier or not. I am arguing I am a rail carrier. It is my
11 facility. But I would say that even if I weren't a rail carrier,
12 it's still a railroad facility and it's still subject to the
13 exclusive jurisdiction of the Surface Transportation Board
14 because that's what the statute specifically expressly states.

15 THE COURT: All right. With that addition, did I
16 correctly summarize your position?

17 MR. RIFFIN: Yes.

18 THE COURT: Okay. All right. So anything else on the
19 matter of your status as a rail carrier?

20 MR. RIFFIN: I was granted permission to acquire and
21 operate the line. I've actually started doing that.

22 THE COURT: In Pennsylvania.

23 MR. RIFFIN: In Pennsylvania. I have a contract to
24 complete delivery of a number of freight movements, freight car
25 movements. I don't remember if Mr. Snyder raised it a few

1 minutes ago, but he raises in his brief. He has argued for a
2 very long time that the Surface Transportation Board chooses not
3 to exercise jurisdiction over a dinner excursion train if that
4 train stays within a state and I would agree that that's the
5 position of the Surface Transportation Board as I understand it.
6 A tiny bit of history.

7 THE COURT: Well, no. I don't want to go into all
8 that. My point is any other points on the matter of your status
9 as a rail carrier?

10 MR. RIFFIN: Once one gets their first permission to
11 acquire and operate rail line, any additional permissions that
12 you want when you actually put it in your application of whatever
13 form it takes, the term that you use on all future additional
14 filings is a carrier. If you read the application carefully, it
15 said initially I was a noncarrier.

16 THE COURT: I think I understand your argument. I'm
17 just trying to stay crystallized on this point and we'll move to
18 the next one. So anything else you want to argue on the matter
19 of your status as a rail carrier?

20 (No response.)

21 THE COURT: Why don't you sit down for a minute,
22 Mr. Riffin? I understand your argument. Mr. Snyder,
23 essentially, on the matter of status as a rail carrier,
24 essentially as I understand Mr. Riffin's argument is that the
25 Surface Transportation Board has given him permission to operate

1 a railroad line in Pennsylvania and apparently, he's doing so,
2 correct?

3 MR. SNYDER: Your Honor, I don't -- and this is the
4 first I've heard that he's actually doing --

5 THE COURT: Well, let's presume for the sake of
6 argument that he is. That he's not made a misrepresentation of
7 the Court because I can't imagine anybody would come into federal
8 court and make a misrepresentation like that. So if he is, his
9 argument is is that storage facilities related to rail equipment
10 in Maryland, even if he doesn't have the line operating in
11 Maryland, all fall within that permission granted by the Surface
12 Transportation Board and ergo, that he is a rail carrier and
13 satisfies the definition of being a railroad or a rail carrier.
14 That's essentially his argument. Your response on that.

15 MR. SNYDER: The May 20th decision that he describes --

16 THE COURT: Of the Surface Transportation --

17 MR. SNYDER: -- of the Surface Transportation Board --

18 THE COURT: -- with respect to the Pennsylvania line.

19 MR. SNYDER: Right. Does not give him the right to
20 acquire and operate. What it actually says is that -- let me
21 give you just a little bit of history.

22 THE COURT: Go ahead.

23 MR. SNYDER: It's not the first time Mr. Riffin has
24 tried to get the Surface Transportation's Board's approval. He
25 filed a notice of exemption about a year ago. He withdrew that

1 when the rail line that he sought to operate turned out to be
2 owned by someone else and they objected. So he withdrew that.
3 Then he filed another notice of exemption this past spring. The
4 State of Maryland petitioned the Surface Transportation Board to
5 revoke that notice of exemption and the board revoked, in fact
6 did revoke his notice of exemption advising Mr. Riffin that there
7 were serious questions about his plans and that if he wanted to
8 pursue this further, he should provide more detailed information.
9 The board in its May 20th decision said NCR, which is the
10 Northern Central Railroad which Mr. Riffin is doing business as
11 was advised that if it sought to pursue the matter, it should
12 provide more detailed information in the form of an individual
13 exemption petition under the relevant statutes as those
14 procedures are designed to elicit a more complete record. NCR
15 instead chose to file this notice for the necessary authority to
16 acquire and operate the described line in York County in the
17 event that it's able to reach an agreement with the commissioners
18 of York County for that acquisition. So although the board does
19 use the words, acquire and operate, but they're not saying that
20 you have our blessing to go and do this project and you are now a
21 railroad, they specifically asked Mr. Riffin to submit himself to
22 a more detailed process before the board so it could determine
23 whether in fact he is a railroad.

24 THE COURT: The documents you're referring to from the
25 approval or the statement from the Surface Transportation Board

1 is with your materials submitted in this --

2 MR. SNYDER: It is. It's Exhibit 15 to the state and
3 county's motion for preliminary injunction and temporary
4 restraining order.

5 THE COURT: All right. Okay. Thank you.

6 MR. SNYDER: So the board hasn't given him approval to
7 acquire and operate railroad. In fact, they specifically said
8 you've got to come in and give us more information because
9 Maryland has already told us that you're not a railroad and that
10 you're trying to do things and one of the things that he
11 originally proposed to do is to build a rail line up the Northern
12 Central Hiking Biking Trail between Cockeysville and York County,
13 Pennsylvania, something that the State of Maryland believes it
14 owns and that people from metropolitan Baltimore heavily use for
15 a variety of recreational pursuits. So we had grave concerns
16 about what Mr. Riffin was planning to do. The board said submit
17 more detailed information. Mr. Riffin chose to go this kind of
18 peremptory route instead.

19 THE COURT: All right. Well, let's assume -- the Court
20 does not, the Court does not make a finding at this time that --
21 you may sit down, Mr. Riffin.

22 MR. RIFFIN: I have an objection to what he just said.

23 THE COURT: It's his motion, your response, his
24 surreply. In federal court, there's a motion and a proponent for
25 a motion and then there's opposition and then there's a response.

1 It's his motion. He's argued. You have responded and then he's
2 had the surreply because it's his motion, his burden. You may
3 sit down now. I don't need to hear any more on the matter of
4 whether or not you are a railway or not.

5 MR. RIFFIN: That wasn't the point I was trying to
6 make.

7 THE COURT: Fine. Mr. Riffin, when I call upon you,
8 sir, you can stand and argue.

9 MR. RIFFIN: Thank you.

10 THE COURT: The Court does not make a finding at this
11 time that Mr. Riffin is a railway or a railroad. But for the
12 sake of argument in light of the more fundamental question of
13 complete preemption, Mr. Riffin has -- it appears everyone agrees
14 that the whole issue here is the matter of, the issue of complete
15 preemption. Clearly, the State of Maryland and Baltimore County
16 in their Motion to Remand pending in this action, 04-2848, have
17 noted complete preemption. Mr. Riffin has clearly noted that
18 it's not a matter of just ordinary preemption, but complete
19 preemption and has indicated a knowledge of the fact that there
20 must be complete preemption by federal law for there to be
21 jurisdiction in this court and he's even noted that in connection
22 with the clear failure to comply with 28 U.S.C. Section 1446,
23 Mr. Riffin's position is is that it's irrelevant because there is
24 complete preemption here in federal court. So even if he did not
25 comply and did not get the consent of his co-defendant, Six M

1 Company, which also seeks to remand this case back to the Circuit
2 Court for Baltimore County, it is of no moment because there is
3 complete preemption. So the issue to be addressed now by
4 everyone here is the matter of complete preemption. Again, for
5 the record, I'm not finding that Mr. Riffin is a railroad or a
6 railway at this time. But for the sake of argument to move
7 forward to address a fundamental issue, we'll assume for the sake
8 of argument that Mr. Riffin is a railroad or a railway within the
9 meaning of the Interstate Commerce Commission Termination Act.
10 And so I'll be glad to hear from you now on the matter of
11 preemption, Mr. Snyder.

12 MR. SNYDER: Thank you, Your Honor. The general rule,
13 of course, is that a, you determine the removability of the
14 complaint based upon the causes of action stated in the
15 complaint. The causes of action in the complaint are entirely
16 state-law related. It's not based on federal law. Now the cases
17 are unanimous in that a federal defense, a federal preemption
18 defense by itself is not enough to justify a removal to federal
19 court. What there has to be is complete preemption as Your Honor
20 has summarized here. The state agrees that economic regulation,
21 state and local economic regulation has been held to be
22 completely preempted by the ICCTA. That's the thrust of what the
23 ICCTA is all about, the regulation of how railroads operate in
24 America. When it comes to environmental regulation and local
25 land use requirements, however, it's a more, it's a factual

1 decision. Whether a particular regulation is preempted is
2 governed by whether it has, whether it substantially interferes
3 with rail operation. It's not a blanket preemption which you
4 would need to have in order to have complete preemption and which
5 you do have in the economic regulation context. Now there is a
6 case out there that Mr. Riffin will cite, the City of Auburn
7 case, it's a Ninth Circuit case that says words to the effect of,
8 well, we don't really think there's a difference between economic
9 and environmental regulation because environmental regulation can
10 be imposed in a way to stop a railroad and frustrate its
11 operations to the point where a state and local entity could kill
12 a rail project. That's true enough. So the analysis for
13 environmental regulation and local land use requirements is
14 whether it will have the potential to, you know, whether it
15 operates to stop a railroad, does it substantially interfere with
16 rail operations. Again that's a factual finding that out of the
17 gate means that there's not complete preemption here because if
18 there were complete preemption, there wouldn't be any factual
19 inquiry. It would just be all state and local regulation is
20 preempted, which is Mr. Riffin's position, but the State believes
21 it's not supported by the case law. We could get into the merits
22 about what types of activities, the types of laws that the State
23 is arguing were violated here, but that goes beyond the complete
24 preemption issue and goes into the merits of this federal
25 preemption defense, which doesn't again doesn't justify removal

1 of this case. But three of the four laws at issue here --

2 THE COURT: What are the laws at issue here?

3 MR. SNYDER: Without citing chapter and verse, there's,
4 one, the failure to get what's called a waterway construction
5 permit which is every time you build, you conduct construction
6 activities in the 100-year floodplain of a stream or a stream
7 channel, you have to get a permit from the Maryland Department of
8 the Environment. Another one is whenever, is a sediment control
9 law that whenever you grade earth or disturb earth or move it
10 around, you have to get an approved sediment and erosion control
11 and grading control plan from Baltimore County to insure that
12 best management practices are employed so that the construction
13 activities are carried out in the most environmentally sensitive
14 manner. Another one is the sediment pollution law which
15 basically says if you don't do sediment controls and you're
16 leaving piles of dirt sitting around in the floodplain of a
17 stream or if you're dumping it into the stream itself, you're
18 causing sediment pollution and sediment pollution has a variety
19 of ill effects on Maryland's waterways that I've detailed in the
20 motion that gave rise to this hearing. The final law involved is
21 a water pollution permit law that if you are going to discharge
22 pollutants to Maryland waters, you have to get a permit to do
23 that. Now you don't have to do it. You can build a rail line
24 without discharging water to the stream, discharging pollutants.
25 But if you're going to do it, you have to get a permit. Now with

1 the possible exception of the Waterway Construction Act, none of
2 these laws govern -- well, certainly none of these laws even
3 without the exception govern rail operations specifically.
4 They're not targeted rail lines. They just want to treat all
5 construction the same way. But the --

6 THE COURT: These would be the same provisions if
7 someone was constructing a roadway, correct?

8 MR. SNYDER: Exactly. But when you read some of these
9 cases, some of them are rather broad and if a state law that
10 requires a railroad to go through a permitting process to get a
11 permit which if denied would prevent the railroad to construct
12 its line is arguably preempted under certain cases. Others not.
13 These other issues though, the sediment control, sediment
14 pollution, water pollution, fall directly under a Surface
15 Transportation Board decision. It's in the brief. And it's the
16 Bureau of Riverdale Petition described. Well, it's a lengthy
17 quote in my motion where the Surface Transportation Board says
18 yes, there's very broad preemption here under the ICCTA. But
19 state and local laws prohibiting the dumping of soil and sediment
20 into waters and the dumping of waste materials into waters, those
21 are the types of things that aren't preempted. So we think we
22 win on the merits here of the federal preemption defense and
23 easily win on the complete preemption issue. Thank you, Your
24 Honor.

25 THE COURT: All right. Thank you. Let me ask you this

1 just so I understand, Mr. Snyder. Clearly in terms of the
2 analysis where there's complete preemption or partial or what's
3 called ordinary preemption which comes up in this case and ERISA
4 cases and employment retirement income security cases and many
5 other cases, essentially, correct me if I'm wrong, the analogy
6 would be, an example might be if a state passed an environmental
7 law that found it was environmentally harmful for trains to come
8 through the state and the train was required to be shut down and
9 pulled by mules through the State of Maryland across and over
10 into Virginia, at which time they could then operate wherever
11 they wanted, then clearly, that would be such an extreme example
12 that the federal law would completely preempt state law with that
13 kind of draconian, severe environmental regulation, correct?

14 MR. SNYDER: I think you're right, Your Honor.

15 THE COURT: And so that with respect to the matter of
16 sediment control, pollution control, water discharge, that your
17 argument is is that they are routine environmental protections
18 local, the steps taken by state and local authorities because
19 presumably Mr. Mayhew was joining in this argument and there are
20 certain regulations of the county that may be a little bit
21 different than a state in terms of permitting process. Correct,
22 Mr. Mayhew?

23 MR. MAYHEW: Yes, Your Honor.

24 THE COURT: In terms of clearing land away. But as
25 long as it's deemed to be a reasonable application and does not

1 interfere with the operation of the railroad, that there's still
2 not been complete preemption, correct?

3 MR. SNYDER: That's correct, Your Honor.

4 THE COURT: All right. Okay. I understand your point.
5 Thank you.

6 On this, Mr. Roddy, I'll note that Mr. Riffin has taken
7 the position that his clear lack of compliance with respect to
8 not obtaining the consent of a co-defendant as required under 28
9 U.S.C. Section 1446 can be excused because there's complete
10 preemption is essentially the argument he's made on that. So
11 I'll certainly be willing to entertain any argument that you have
12 on behalf of Six M with respect to whether or not there's
13 complete preemption or not.

14 MR. RODDY: Well, first of all, Your Honor, I am not
15 sure that that is at all the state of federal law.

16 THE COURT: Well, I'm not agreeing that it is either
17 quite frankly --

18 MR. RODDY: -- and would like leave of the Court to
19 brief that specific argument as to whether 28 U.S.C. 1441 through
20 1447 is inapplicable in a case of complete preemption.

21 THE COURT: I'm not for a minute accepting that
22 Mr. Riffin with great deal of confidence asserts that to be
23 federal law. I'm just saying that that's his argument.

24 MR. RODDY: I understand, Your Honor.

25 THE COURT: And if you want to -- I'll be glad to hear

1 from you if you want to address the matter of complete
2 preemption. And you don't need to. I know you --

3 MR. RODDY: There are clearly two points I wish to make
4 to the Court on this.

5 THE COURT: Sure.

6 MR. RODDY: Point number one is Six M -- the alleged
7 violations that the Department of Environment and Baltimore
8 County allege against Six M implicate no federal law. That's
9 number one. Number two is I believe that under 1441, should this
10 Court so wish, this Court could in fact divide the causes of
11 action, divide the complaint into those which do deal with the
12 federal question and those which do not deal with the federal
13 question and have those that do not deal with the federal
14 question remanded to a court of state jurisdiction and I would
15 like also to ask the leave of the Court to brief that matter
16 further because I believe that that is the subject of case law
17 interpreting 1441.

18 THE COURT: All right. Well, let's wait to see if
19 that's necessary or not. You don't want to address the matter of
20 complete preemption?

21 MR. RODDY: Well, Your Honor, no.

22 THE COURT: Okay. That's fine. You may be seated.
23 Trying to give you an opportunity. That's all.

24 MR. RODDY: No. I appreciate the opportunity and I
25 just, it really is something beyond the scope of my client's

1 matter here.

2 THE COURT: I understand. Mr. Riffin, I'd be glad to
3 hear from you now on this point, sir.

4 MR. RIFFIN: With Your Honor's permission, I'd like to
5 address what Mr. Snyder raised a few minutes ago.

6 THE COURT: All right.

7 MR. RIFFIN: Mr. Snyder made reference to his Exhibit
8 15. What I'd like Your Honor to be aware of is that Exhibit 15
9 has to do with a totally different case which has nothing to do
10 with what we're talking about today and has nothing to do with
11 the May 20th decision from the Surface Transportation Board
12 giving me permission to operate line in York County.

13 THE COURT: In Pennsylvania.

14 MR. RIFFIN: In Pennsylvania.

15 THE COURT: The record should reflect there is no York
16 County in Maryland.

17 MR. RIFFIN: That's true, Your Honor.

18 THE COURT: So each time that Mr. Riffin refers to York
19 County, he's referring to York County, Pennsylvania and not
20 Maryland. Go ahead, Mr. Riffin.

21 MR. RIFFIN: I'll take a few seconds to dwell on
22 that --

23 THE COURT: You need not. You need not.. I've heard
24 all the argument I need to hear on whether you're a railway or
25 not.

1 MR. RIFFIN: Okay. I'm basically in agreement with
2 Mr. Snyder that if this facility was not a railroad facility, one
3 would need that long list of permits that he says should have
4 been acquired before one could do what it is I've been doing.
5 I'm in basic agreement with his position. Where I disagree with
6 him is that a rail carrier -- the construction of a railroad
7 facility is subject to the exclusive jurisdiction of the Surface
8 Transportation Board. There have been numerous courts and STB
9 decisions, all of which have been unanimous in holding that any
10 preclearance permitted requirements by a state or local
11 jurisdiction are preempted. Every case has said that. Even in
12 the Riverdale case. I've discussed the Riverdale case in my
13 memo. In the Riverdale case, the Surface Transportation Board
14 did not make a decision. It had no facts to make a decision
15 with. They speculated is all they did. The case ultimately was
16 dismissed because there wasn't an issue. So the STB speculated
17 that rail carriers may be subject to fire, electrical, plumbing,
18 et cetera, codes. The STB's position on preemption is totally
19 irrelevant. Case law has held in the case of preemption, the
20 only forum that may make a decision regarding preemption is the
21 judicial forum. It is an exclusive prerogative of the judiciary
22 to make that decision.

23 THE COURT: You do recognize, do you not, that in all
24 of these cases, it is well established under principles of
25 federalism that there is a presumption against preemption.

1 MR. RIFFIN: Most definitely, Your Honor.

2 THE COURT: All right.

3 MR. RIFFIN: We start off with that presumption.

4 THE COURT: You start off with a presumption that the
5 states being independent sovereigns in our federal system. There
6 is a presumption that Congress does not intend to intrude upon
7 traditional prerogatives, which means that in the absence of a
8 clarity of intent as some cases have said, Congress cannot be
9 deemed to have significantly changed that balance. Do you
10 recognize that?

11 MR. RIFFIN: Oh, most definitely, Your Honor.

12 THE COURT: So you start with a presumption against
13 preemption and you start with the burden of having to show that
14 there is complete preemption, not ordinary preemption or not
15 preemption with respect to certain issues. You start with the
16 presumption against you and you also start with the fact and then
17 with that presumption against you, you must show that there is
18 complete and total preemption, correct?

19 MR. RIFFIN: I would agree with Your Honor.

20 THE COURT: All right. And rather than going case by
21 case, I understand your argument is is that all the cases
22 overwhelmingly support your position as far as you're concerned.

23 MR. RIFFIN: That's correct, Your Honor.

24 THE COURT: All right.

25 MR. RIFFIN: And the few cases where they've intimated

1 that they didn't think preemption occurred, either they didn't
2 really address the issue because it wasn't an issue before the
3 Court and so the Court's opinion was strictly dicta at best,
4 speculation at worst or the facts are so radically different,
5 they're just totally different from what's going on in this case.
6 We start off with you have to look at the statute itself. If the
7 statute explicitly says it preempts, then there is no further
8 inquiry. That's where you stop the inquiry. In this case, we
9 have a statute that specifically states the jurisdiction of the
10 board over transportation by rail carriers and the remedies
11 provided in this part with respect to facilities of such carriers
12 and the construction, operation of facilities even if the tracks
13 are located or intended to be located entirely in one state --

14 THE COURT: Let me ask you something, Mr. Riffin. In
15 terms of your argument -- this goes back to the matter of your
16 argument as to you're being a railway or a railroad. Your
17 argument, as you interpret this statute, is such that there is
18 complete preemption with respect to any inherent state authority
19 of local power. If you have permission to operate a rail line in
20 let's say Alaska, you have a rail line to operate in Alaska, not
21 in York County, Pennsylvania, but Alaska and in connection with
22 your rail line in Alaska, you have equipment that you store in
23 Maryland somewhere and let's say it's railroad equipment,
24 correct, for my sake of my argument. Your argument is because
25 you are operating a rail line in Alaska, that there is complete

1 preemption with respect to any local or state control over your
2 facilities having to do with the railroad that you choose to keep
3 here in Maryland and ship by truck from Maryland to Alaska. Is
4 that correct?

5 MR. RIFFIN: I'm basically essentially in agreement
6 with Your Honor. It doesn't --

7 THE COURT: That's the hypothetical I'm posing.

8 MR. RIFFIN: I agree. That is my position --

9 THE COURT: That's your position.

10 MR. RIFFIN: -- and I believe that's what the
11 statute --

12 THE COURT: So that's how you interpret the statute?

13 MR. RIFFIN: That's how I interpret the statute, Your
14 Honor.

15 THE COURT: And therefore, that --

16 MR. RIFFIN: I think it is that broad.

17 THE COURT: I understand and your position is that it's
18 so broad that it would control the local powers with respect to a
19 state or a county or a city with respect to land use,
20 environmental concerns or anything else. Just total, complete
21 preemption based on language that you just cited.

22 MR. RIFFIN: I would agree with Your Honor. That I
23 believe that is what that statute explicitly says. That's what
24 Congress wrote.

25 THE COURT: Because as I read, for example, Florida

1 East Coast Railway Company v. City of West Palm Beach, the
2 Eleventh Circuit clearly doesn't interpret it that broadly. I
3 don't have any Fourth Circuit cases before me. But my reading of
4 Florida East Coast Railway Company v. City of West Palm Beach,
5 Eleventh Circuit case, the Eleventh Circuit would totally reject
6 that argument, but I'm just trying to make sure I understand what
7 your argument is.

8 MR. RIFFIN: Actually, I'm not sure that the Eleventh
9 Circuit would reject the argument because of the facts of that
10 particular case. In that particular case, the facility that was
11 the subject of the litigation while the land was owned by the
12 railroad, the only thing that, the only connection, the only
13 nexus of the railroad to that land was it owned it and it brought
14 rail cars there full. It removed rail cars after the tenant of
15 that property emptied them. That's Rinker. In that case, if you
16 read that decision, what the courts, both the District Court and
17 the Circuit Court in Florida were looking at is the ownership of
18 equipment is very relevant if that equipment relates to the
19 movement of passenger or freight by rail. If on the other hand,
20 what is happening are services which don't relate to the
21 transportation by rail of freight or passengers, then for those
22 services, ownership of those services is very important. And in
23 that particular case, Rinker leased the land from the railroad.
24 After it did that, Rinker unloaded the rail cars, graded the
25 aggregate --

1 THE COURT: So actually, rail cars running in this
2 area, correct, in this case, in the case you're talking about
3 right now --

4 MR. RIFFIN: In the Florida East Coast case --

5 THE COURT: Yes.

6 MR. RIFFIN: -- the underlying and I actually think
7 part of the reason why the courts are ruling in favor of the city
8 has to do with how the case got started.

9 THE COURT: Well, what I'm saying in Florida East Coast
10 Railway Company, unlike here, you actually had a rail line, you
11 had cars operating on a rail line. But you didn't have a
12 situation of a rail line in another state in which the whole
13 argument of being a railway is that you're storing equipment
14 relating the to rail line. In Florida East Coast Railway
15 Company, you had an actual line in the jurisdiction, correct? It
16 was being operated, upon which the railroad was operating,
17 correct?

18 MR. RIFFIN: But what the state was complaining about
19 was not the operation of the railroad and in fact, both the
20 District Court and the Circuit Court, they intimate that. If
21 Florida East Coast Railroad was doing what Rinker was doing,
22 there would be complete preemption. But it's the fact that it is
23 being done by a nonrail carrier, the activities that were
24 occurring at that cite were being carried on by someone who had
25 nothing to do with rail carriers. They weren't a rail carrier.

1 They're just a local aggregate distribution company and that's
2 all they're doing. The railroad brings the aggregate on a car.
3 They empty the car, grade it, clean it, put it on a truck and
4 take it to wherever it is they need it.

5 THE COURT: Let me ask you this.

6 MR. RIFFIN: Nothing to do with the operation.

7 THE COURT: Let me ask you this, Mr. Riffin. If you
8 were deemed to be in total compliance with a local regulation in
9 terms of sediment control or whatever, how is the operation of
10 the railroad being impeded in any way?

11 MR. RIFFIN: In this particular case, the State has
12 indicated that it will not permit me to construct a railroad
13 facility at this site. Essentially, that's the position of the
14 State. You will not construct a railroad facility at this site
15 period. They've intimated that I could ask for their permission
16 to do it and they've at least intimated I think that they might
17 at least entertain the idea of permitting me, but the bottom line
18 is they won't. The bottom line is the Baltimore County code
19 specifically says you shall not do anything in the a river rain
20 floodplain and it's that explicit. You shall do nothing in a
21 river rain floodplain. There is no argument that what I am doing
22 is in a river rain floodplain. I do take objection to
23 Mr. Snyder's statement that I have placed material in the flowing
24 waters of Beaver Dam Run because I have not done that. I've been
25 very careful not to do that. I have not polluted or contaminated

1 that stream in any manner whatsoever.

2 THE COURT: We're not getting into the merits of your
3 environmental dispute with the county and with the State. My
4 point is is that there's clear authority which I've reviewed in
5 preparation of today's hearing which supports the proposition
6 that local regulations of railroads are not preempted by the
7 Interstate Commerce Commission Termination Act when they are
8 deemed to be reasonable and nondiscriminatory environmental
9 restrictions which do not unduly burden interstate commerce. So
10 that there's clear authority for the fact that unless it unduly
11 restricts a railroad from conducting its operation that
12 reasonable and nondiscriminatory environmental restrictions have
13 been upheld by other courts including not just the Eleventh
14 Circuit, the First Circuit, for example, in a case I think the
15 State has cited, noting that that's not been deemed to be
16 unreasonable or discriminatory. And so my question to you is in
17 terms of your arguing to this Court to find complete preemption,
18 where is that, where are those regulations deemed to be in your
19 eyes unreasonable or discriminatory?

20 MR. RIFFIN: If the State prevails and the Court finds
21 that I'm required to get their permit, they're not going to issue
22 the permit. Therefore, I can't use this -- I can't develop this
23 site as a railroad facility as I am presently attempting to do.
24 Their request is that I return this to the condition it was in
25 before I started and the condition it was in before I started,

1 you couldn't do anything here. This facility is being used to
2 store not only railroad track maintenance related equipment.
3 It's also being used to store track ballasts. It will be used to
4 repair rail cars and to store rail cars. Everything at this site
5 integrally. That word is not in the statute by the way. The
6 term economic regulation. The term economic is not there.
7 Neither is the term integral. Those terms have been added in a
8 few court cases, but they're not in the statute. As I said
9 earlier, you need to read the express language of the statute.
10 Those words aren't there. Even if they were there, even if I
11 were to concede that, and I'm not, that in order to be completely
12 preempted, it has to be integrally related to your rail
13 operations, I would say in this case, it is integrally related to
14 my rail operations. Basically, a vast majority of my
15 railroad-related equipment is sitting on this site. Not only
16 equipment, but material to construct railroad property. That's
17 what this cite is used for. If I can't use this site for that
18 purpose, it severely limits my ability to carry on my railroad
19 operations. I don't have permission --

20 THE COURT: To carry on your railroad operations in
21 Pennsylvania.

22 MR. RIFFIN: In Pennsylvania which is what all this
23 relates to. Pennsylvania is only twenty minutes away from this
24 site. That's why this site is very handy. And in fact, the New
25 Freedom end portion of the line which I propose to operate is

1 actually closer to this site than it would be to York. At the
2 present, I don't have a facility in Pennsylvania where I could
3 store what you see on this property. If I am prohibited from
4 storing it on this property, basically, I've just been put out of
5 business. And as the injunction cases point out which we'll hear
6 another day, one of the grounds for an injunction is to enjoin a
7 state from enforcing --

8 THE COURT: If the Court determines there's no
9 jurisdiction, we don't have another day on the injunction.

10 MR. RIFFIN: That's true, Your Honor.

11 THE COURT: You might as well address it now because if
12 I remand this case back to the State, that's it. I don't have
13 jurisdiction. So if you have an argument you want to make on
14 injunctive relief, I suggest you make it now.

15 MR. RIFFIN: A number of cases have ruled. Bank One --
16 I cite them in the memoranda that accompanied my motion, my
17 complaint for injunctive relief, counterclaim for injunctive
18 relief and my motion for preliminary injunction and my request
19 for a permanent injunction. In those cases, normally when one
20 requests an injunction, you have to establish four factors which
21 Mr. Snyder has already pointed out.

22 THE COURT: Under the Blackwelder case of the Fourth
23 Circuit including, one of the four of which is likelihood of
24 success on the merits.

25 MR. RIFFIN: Yes. In those cases, the courts have

1 ruled that if one shows that the statute preempts the state law
2 which you are attempting to enjoin, then two of those essential
3 elements no longer are applicable. You no longer have to show
4 the injunction is in the public interest, nor do you have to show
5 the balance of hardships favors the movant versus the other
6 party. Any harm which the State may suffer becomes irrelevant.
7 Those aren't my words. Those are the words of the court. The
8 courts have also said because the opposing party is the State and
9 because one cannot sue the State for monetary damages, if the
10 actions of the railroad will cause some economic loss to the
11 railroad, that is irreparable harm per se. They also say that if
12 what this State proposes to do with its statute, effectively
13 would put the railroad out of business. That is the most extreme
14 kind of irreparable harm. This is all the Dakota Minnesota
15 case --

16 THE COURT: Well, the simple answer to that is you can
17 store your facilities somewhere else in proximity of your line
18 that you're operating in Pennsylvania.

19 MR. RIFFIN: Except I don't have another facility.

20 THE COURT: And the answer to that is find one. You're
21 not going to seriously suggest to this Court there is no facility
22 anywhere in the entire State of Pennsylvania where you can store
23 railroad equipment, are you?

24 MR. RIFFIN: I wouldn't say that, Your Honor. No.

25 THE COURT: Quite frankly, that would be ludicrous for

1 you to suggest that. I mean the argument that --

2 MR. RIFFIN: I would agree. One could likely find a
3 place someplace in Pennsylvania if you look long enough and
4 you're willing to pay enough that you could do this.

5 THE COURT: Sure.

6 MR. RIFFIN: But in this particular case, all I have to
7 establish for the injunction purposes is will I suffer
8 irreparable harm, will I suffer an economic loss --

9 THE COURT: Well, I don't want to get too far off from
10 this. I want to make sure you have an opportunity to express
11 your view on preliminary injunction and the four-point
12 Blackwelder test because that's what's applicable here is the
13 Blackwelder test on any of these matters from the Fourth Circuit
14 and you don't even get there unless there's the jurisdiction of
15 the Court, which means your most immediate problem is with
16 respect to convincing the Court that there is complete, total
17 preemption as manifested by an intent of Congress with respect to
18 local environmental regulations. That's the precise issue, isn't
19 it?

20 MR. RIFFIN: Yes.

21 THE COURT: So essentially, your view is that local
22 regulations of railroads, regardless of what they are, be they
23 economic, be they environmental are preempted by the ICCTA across
24 the board, correct?

25 MR. RIFFIN: That would be my position. I get that

1 from --

2 THE COURT: Do you have any Fourth Circuit authority to
3 support that?

4 MR. RIFFIN: No court to my knowledge in the Fourth
5 Circuit has had an opportunity to make a decision. This is a
6 case of first impression not only for Maryland, but for the
7 Fourth Circuit.

8 THE COURT: I can't find any authority that would
9 compel this Court to determine that across the board, state and
10 local environmental laws are totally preempted by the ICCTA and
11 that's essentially what you're urging this Court to do.

12 MR. RIFFIN: I believe the Auburn case actually does
13 state that.

14 THE COURT: I understand.

15 MR. RIFFIN: I haven't seen a case which says a
16 railroad is subject to a state's environmental laws. That
17 doesn't mean some state might not rule that. Just no state has
18 so far and I don't think they're likely to. Contrary to what
19 Mr. Snyder represented to the Court, the Surface Transportation
20 Board when you file an application, regardless of which kind you
21 file, you actually have to submit ten copies of what you file and
22 it is distributed to all the department heads and one of those
23 department heads is the Environmental Review Section. My notices
24 of exemption, all three of them were reviewed by the
25 Environmental Section of the --

1 THE COURT: That argument goes back to whether you're a
2 railway or not. I mean my point is for the sake of argument,
3 I've given you the benefit of the doubt not to get bogged down in
4 that. But on the matter of complete preemption, is there
5 anything else you want to argue with respect to complete
6 preemption?

7 MR. RIFFIN: I would just continue to point out what I
8 tried to point out earlier. I was reading to you 49 U.S. Code
9 10501(b) and I said the jurisdiction of the board over railroad
10 facilities is exclusive. Transportation is very broadly defined.
11 A number of courts have indicated is extremely broadly defined.
12 You can't imagine a more broadly defined definition than the
13 words transportation as it turns out. And transportation
14 includes a facility or equipment of any kind regardless of
15 ownership or an agreement concerning use.

16 THE COURT: I understand your argument, Mr. Riffin. I
17 mean you have a very broad definition of transportation and a
18 very broad definition of the Interstate Commerce Commission
19 Termination Act and you've acknowledged that your view of it is
20 is that it precludes any and all state and local environmental
21 laws being enforced with respect to anything defined as a railway
22 and you've also indicated that your definition of a railway would
23 include storing equipment for a rail line, no matter how short in
24 Alaska and shipping equipment from Maryland to Alaska by truck.
25 That in your view that brings you within a definition of a

1 railway in terms of a railway facility. You've clearly indicated
2 to this Court your position regardless of how extreme it is and
3 I'm just trying to make sure that I'm giving you any opportunity
4 to, apart from your personal opinions of the law, if you can give
5 me anything else on which you believe that this Court should go
6 against the presumption against preemption which limits
7 congressional intrusion into State prerogatives and the clear
8 case law and what the Court finds is certain principles of
9 federalism to convince this Court that there is complete
10 preemption across the board by the ICCTA. Anything else you want
11 to add?

12 MR. RIFFIN: I believe, Your Honor, the Cedar Rapids
13 case is on point. In the Cedar Rapids case, the question was has
14 the ICCTA completely preempted the regulation of the abandonment
15 of rail lines? The abandonment of rail lines and rail facilities
16 are in the same statute a few words apart. The only difference
17 is one is, has to do with abandonment of rail lines. The other
18 one has to do with railroad facilities. The Cedar Rapids case.
19 In that case, the court exhaustively reviewed both the Interstate
20 Commerce Commission Act which preceded the Surface Transportation
21 Board and found complete exemption existed prior to ICCTA. Then
22 it went on to say with ICCTA, we have complete preemption. In
23 particular, abandonment of rail lines. The term, abandonment of
24 rail lines, is but a few words removed from the word, facility,
25 in exactly the same statute. I think it would be difficult to

1 argue that abandonment of rail lines is completely preempted, but
2 two words over, that word isn't, which is the word facilities.
3 We start off with reading the statute. The statute is incredibly
4 explicit. It says the Surface Transportation Board has exclusive
5 jurisdiction over rail facilities. The State has argued. If the
6 State does not have the right to enforce its regulations in state
7 court, it has no remedy. I would disagree with the State. This
8 discussion should be occurring before the Surface Transportation
9 Board. If the State objects to the construction, operation or
10 maintenance of this facility, that objection should be addressed
11 to the Surface Transportation Board. The Surface Transportation
12 Board has the authority to order me to do things differently than
13 what I have done. We're in the wrong forum. This should be
14 before the Surface Transportation Board.

15 THE COURT: Well, I think that may be the first time
16 you agree with all the other lawyers because every other lawyer
17 in this courtroom certainly believes we're in the wrong forum
18 this afternoon here in federal court, Mr. Riffin.

19 MR. RIFFIN: The only difference is --

20 THE COURT: Maybe we're making progress here.

21 MR. RIFFIN: They think we should be in a state court.
22 I would say we shouldn't be in the state court. We shouldn't be
23 in this court. I would agree with Your Honor. This court does
24 not even have jurisdiction over this matter. Only the Surface
25 Transportation Board has jurisdiction. And for that reason, the

1 whole case should be dismissed, not only because this Court
2 doesn't have jurisdiction, but the state courts don't have
3 jurisdiction. It is the exclusive right of the Surface
4 Transportation Board to regulate railroad facilities.

5 THE COURT: What is the citation of the Cedar -- I'm
6 sorry. The Cedar Rapids case is a decision by the Northern
7 District of Iowa in 2003, correct?

8 MR. RIFFIN: Yes.

9 THE COURT: And that related to a removal of a
10 committee with respect to abandonment of clear rail lines,
11 correct?

12 MR. RIFFIN: Yes, it was. And it was a removal case.

13 THE COURT: All right. I understand. Anything
14 further, Mr. Riffin? We've made some progress. Now you're even
15 saying we shouldn't be in this courtroom. So I feel like I've
16 made some progress up here. Anything else, Mr. Riffin?

17 MR. RIFFIN: I might reiterate all the previous cases.
18 I've indicated that even the Surface Transportation Board when it
19 speculated that rail carriers may be subject to plumbing, fire,
20 et cetera, codes, it would only be subject to them so long as the
21 local agency did not request the railroad obtain a permit. And
22 in this case, if I'm not obligated to obtain a permit, the State
23 has no case.

24 THE COURT: All right. Thank you, Mr. Riffin. Mr.
25 Snyder, I'll be glad to hear from you to wrap up. It's your

1 motion on this. Well, if you will address the argument -- the
2 defendant, Riffin, has noted in Cedar Rapids v. Chicago Central
3 and Pacific Railroad at 265 F. Sup. 2nd 1005, a case out of the
4 Northern District of Iowa, that the U.S. District Court in that
5 case allowed removal of state law claims and found apparently
6 complete preemption with respect to the matter of abandonment of
7 rail lines. The Court would note for the record here, we don't
8 have rail lines. We have a storage facility relating to a rail
9 line in Pennsylvania. There is no rail line that's been
10 presented to this Court. But I just want to note if there is any
11 other response you want to make to that in case I'm missing
12 something here.

13 MR. SNYDER: I would just underscore that the court
14 itself said that enacting the ICCTA, Congress intended to occupy
15 completely the field of state economic regulation of railroads.
16 And if the language of the statute says that the remedies
17 provided in the ICCTA are exclusive, the remedies available in
18 the ICCTA are overwhelmingly about the economic operation of rail
19 lines. They're not about environmental regulation. You've
20 anticipated all of my comments about the extremeness of
21 Mr. Riffin's position and I won't go into that. I will note
22 though if there's -- at one point Mr. Riffin argued that the
23 Surface Transportation Board's interpretation of the ICCTA is
24 irrelevant because only a federal court can interpret federal
25 statutes. Later on, he argued that we shouldn't even be here.

1 That the Surface Transportation Board has exclusive jurisdiction
2 over these things. Well, if the Surface Transportation Board has
3 exclusive jurisdiction, we should be reading their cases and how
4 they interpret the statute that they are charged with
5 administering and they make clear time and time again that the
6 state and local regulation that's at issue here in this case is
7 not preempted. It's the preclearance permitting requirements
8 that are in certain circumstances. But not the type of sediment
9 control, sediment pollution, water pollution, best management
10 practices that are at issue in this case. Thank you.

11 THE COURT: All right. Mr. Snyder, let me just verify
12 one matter. The other case before this Court is State of
13 Maryland, plaintiff, versus James Riffin, et al., RDB-04-1342,
14 civil case. The identical arguments were presented in that case.
15 Is there any distinction between that case and this case?

16 MR. SNYDER: Not on the complete preemption, but on the
17 merits of the ordinary preemption argument. There are --

18 THE COURT: I thought there were. I looked at some of
19 the submissions.

20 MR. SNYDER: Yes.

21 THE COURT: Mr. Riffin, are they essentially the same,
22 but for the merits of the matter of ordinary preemption versus
23 complete preemption? The same legal issue is involved, correct?

24 MR. RIFFIN: I would say yes. I would agree with Your
25 Honor. Yes.

1 THE COURT: Okay. All right. Thank you, gentlemen.
2 This Court granted a rather speedy hearing in this particular
3 case in light of the fact that the lawsuit in this case was filed
4 on August the 30th, just last, essentially within the last ten
5 days. The lawsuit was filed on August the 30th. There was then
6 a removal. The lawsuit was filed on August 30th. The plaintiffs
7 brought suit against the defendants, James Riffin, and his
8 contractor, the Six M Company. There was a removal to this court
9 on September the 3rd. The Baltimore County Circuit Court on
10 August the 30th issued a temporary restraining order and
11 scheduled a hearing for a preliminary injunction tomorrow,
12 September 9. The ten-day temporary restraining order issued by
13 Baltimore County, the Circuit Court for Baltimore County was
14 scheduled to expire tomorrow, September the 9th at 4:00 p.m.
15 Soon after filing the complaint, plaintiffs learned that the
16 defendants were dumping construction and demolition debris at the
17 construction site at issue. Essentially, then the plaintiffs
18 filed a Motion to Remand this case to the Circuit Court of
19 Baltimore County arguing that in the event that there was not a
20 remand, that that temporary restraining order would essentially
21 expire tomorrow afternoon. Accordingly, this Court immediately
22 scheduled a hearing on the Motion to Remand. The Court would
23 note that literally almost the identical issues are still pending
24 before this Court in another case, the State of Maryland v. James
25 Riffin, Civil Number RDB-04-Civil-1342.

1 The basis of the defendant's removal petition is that
2 his business is a railroad and that he is therefore entitled to
3 the protection of the Interstate Commerce Commission Termination
4 Act, ICCTA, which he claims completely preempts all of the
5 plaintiffs' state law claims and efforts at environmental
6 regulations. The defendant, Riffin, has candidly acknowledged
7 that in his view there can be no enforcement of state or local
8 environmental laws because all such laws would be preempted by
9 his argument that his business is a railroad and all such
10 regulations would be preempted by the ICCTA. As a companion to
11 the Motion to Remand filed by the plaintiffs, Maryland Department
12 of the Environment and Baltimore County, the co-defendants in
13 this case, the Six M Company, the co-defendant, Six M Company,
14 has filed a motion today literally minutes before I took the
15 bench, a Motion to Remand for Failure to Obtain Proper Consent,
16 noting failure of the defendant, James Riffin, to comply with the
17 requirements of 28 United States Code Section 1446. Mr. Riffin's
18 response as to that is that there is complete preemption of the
19 entire question by the ICCTA. Therefore, any lack of compliance
20 with the requirements of Section 1446 are of no moment. The
21 Court, first of all, finds that it is questionable whether or not
22 Mr. Riffin would qualify as a railroad or a railway with respect
23 to his operations in Maryland. But for the sake of argument, the
24 Court will make a finding that even if Mr. Riffin is deemed to be
25 a rail carrier in light of the, some authority he's been given by

1 the Surface Transportation Board to operate a rail line in
2 Pennsylvania, albeit not in Maryland, that even if he is a rail
3 carrier and for the sake of argument, the Court will assume he is
4 a rail carrier, there is simply not complete preemption in this
5 case. Accordingly, on that basis alone, there is not complete
6 preemption in this case. The defendant, Six M Company, has aptly
7 noted a failure to comply with the requirements of 28 United
8 States Code, Section 1446 in Mr. Riffin's notice of removal.
9 Furthermore, because there is a requirement of complete
10 preemption, the Court notes that consideration of preemption
11 under the supremacy clause starts with the basic assumption that
12 Congress does not intend to displace state law. The Court would
13 not that principles of federalism dictate to this Court that in
14 the absence of clarity of intent, Congress cannot be deemed to
15 have significantly changed the federal state balance. If a
16 federal statute's terms can be read sensibly not to have a
17 preemptive effect, the presumption against preemption controls
18 and no preemption may be inferred. Those principles of
19 federalism compel this Court to find that the applicable statute
20 in question, the Interstate Commerce Collision Termination
21 Action, can be read sensibly not to have a preemptive effect and
22 this is consistent with other cases which rule in favor of the
23 matter of a presumption against preemption. A presumption, which
24 the defendant, Riffin, has failed to overcome in this case. The
25 Supreme Court in the Metrodonna case, at 518 U.S. and

1 particularly at page 485 noted these very principles of
2 federalism. The First Circuit in *Boston and Maine Corporation v.*
3 *Town of Air* noted that local regulations of railroads are not
4 preempted by the ICCTA when the laws are deemed to be reasonable
5 and nondiscriminatory environmental restrictions, which do not
6 unduly burden interstate commerce or unduly restrict the railroad
7 from conducting its operations. I don't find that the
8 application of these provisions unduly restrict this railroad,
9 assuming we call Mr. Riffin a railroad and for purposes of this
10 opinion, I'm granting him that he may be a railway, although I'm
11 not making that finding, from conducting his operations. These
12 types of regulations are not intended by Congress to be
13 completely preempted by ICCTA and applying those principles of
14 federalism across the board in this case, the Motion to Remand
15 filed by the Maryland Department of Environment and Baltimore
16 County is granted. The Motion to Remand for Failure to Obtain
17 Proper Consent of the Defendant, Six M Company, is granted.
18 Accordingly, this Court will issue an order granting those
19 Motions to Remand and issue an order remanding this case back to
20 the Circuit Court for Baltimore County. The Court would note
21 that the counsel have indicated that the identical issues apply
22 in the case of *State of Maryland v. James Riffin* in Civil Number
23 RDB-04-1342, a civil case. Baltimore County is not a party in
24 that case, but the same principles apply. Accordingly, for
25 reasons stated on the record in this case, the Motion to Remand

1 of the State of Maryland in that case is granted and an order
2 shall be issued remanding that case back to the Circuit Court.
3 Was that also Baltimore County, Mr. Snyder?

4 MR. SNYDER: Yes, it was, Your Honor.

5 THE COURT: All right. An order will be issued
6 tomorrow remanding that case back to the Circuit Court for
7 Baltimore County for the reasons stated by the Court in this case
8 after having heard argument of counsel and argument of the pro se
9 defendant, Mr. Riffin. An opinion will follow with respect to
10 both of these cases and I will issue an opinion in that regard
11 forthwith.

12 With respect to the matter of the State of Maryland v.
13 James Riffin in Civil Action Number, it would be
14 RDB-04-Civil-2789, I understand in that case, Mr. Snyder, there's
15 a question of propriety of removal with respect to portions of a
16 claim already adjudicated in the State District Court, correct?

17 MR. SNYDER: Your Honor, I believe 2789 is the county's
18 case.

19 THE COURT: I'm sorry. I thought it was. I have State
20 of Maryland v. Riffin in the case captioned State of Maryland v.
21 Riffin.

22 MR. SNYDER: With that number?

23 THE COURT: That how it's captioned by the court. The
24 clerk's office could be in error in that regard. I'm just
25 looking through -- and that essentially arrived, Notice of

1 Removal arrived in that case on September the 2nd. There is no
2 pending motion. There is just a Notice of Removal in that case
3 and it's removal -- perhaps if you can educate me on this, Mr.
4 Mayhew. There's been no response filed yet in terms of seeking
5 of a remand. Can you educate me on that case, please?

6 MR. MAYHEW: Yes, I believe I can and I'll apologize
7 for not being entirely familiar with it because I'm really only
8 down here because Mr. Loskot --

9 THE COURT: I understand.

10 MR. MAYHEW: -- who is handling the case is not
11 licensed to be here. However, my understanding of the case is
12 it's been fully litigated through the Baltimore County court
13 system. The suit was served on him a long time ago. Hence our
14 position is going to be the time to remove it would have been
15 thirty days from the time he was served with that initial suit.
16 Instead he litigated it through the state court system and now
17 seeks to remove essentially a final judgment.

18 THE COURT: All right. According to the submissions --
19 Mr. Riffin, if you'll stand, please, sir? According to the
20 submissions on July 28, 2004, you appeared in the District Court
21 of Maryland for Baltimore County where you presented a Motion to
22 Dismiss for Lack of Jurisdiction to Judge Robert Cahill, Jr. and
23 the Motion to Dismiss -- the plaintiff requested the matter be
24 postponed and the trial was postponed until August 5 and then on
25 August 25 rather, on August 25, the Court held that the Baltimore

1 County Fire Prevention Code was not preempted by ICCTA. Is that
2 correct?

3 MR. RIFFIN: That's true, Your Honor.

4 THE COURT: All right. And essentially, your same
5 arguments with respect to preemption would apply here. Is that
6 also correct?

7 MR. RIFFIN: Complete preemption isn't necessary in
8 that case, but I still think it is preempted and I still think
9 it's complete preemption.

10 THE COURT: All right. So essentially, you've sought
11 to remove the case here to this court after a determination by a
12 judge of the District Court of Maryland for Baltimore County,
13 correct?

14 MR. RIFFIN: That's correct, Your Honor.

15 THE COURT: And you didn't take an appeal of that case
16 in the state system, correct?

17 MR. RIFFIN: That is correct. The statute says that
18 within thirty days of receiving an order and I think Judge
19 Cahill's order was an order.

20 THE COURT: All right. And you disagree with Judge
21 Cahill on that and that's the basis of you removing it to this
22 court, correct?

23 MR. RIFFIN: That's correct, Your Honor.

24 THE COURT: All right. Given I've ruled on two of the
25 three Riffin cases, Mr. Mayhew, I'd like a very quick response by

1 Baltimore County to this if you would please in terms of --
2 Baltimore County will be filing a Motion to Remand. Is that
3 correct?

4 MR. MAYHEW: Yes, Your Honor.

5 THE COURT: All right.

6 MR. MAYHEW: And it will be primarily on procedural
7 grounds that make it real easy for the Court.

8 THE COURT: All right. I'd like to have that be
9 submitted in the next seven days if you could, please?

10 MR. MAYHEW: Yes, Your Honor.

11 THE COURT: All right. So I've ruled on two of the
12 three Riffin cases and Baltimore County will submit on the other
13 case. Is there anything further to be handled from the point of
14 view of the state, Mr. Snyder?

15 MR. SNYDER: No. Thank you, Your Honor.

16 THE COURT: Yeah. Anything further from the point of
17 view of the defendant, Six M Company, Mr. Roddy?

18 MR. RODDY: No.

19 THE COURT: Mr. Livingston?

20 MR. LIVINGSTON: Yeah. We have a proposed order for
21 the Court. It's been attached to our Motion for Remand. If that
22 would be suitable --

23 THE COURT: Let me take look here.

24 MR. LIVINGSTON: That might be suitable right now. It
25 can be executed.

1 THE COURT: That will be great. Hold on one second.

2 (Pause.)

3 MR. LIVINGSTON: Other than a couple of typos, I think
4 it's ready, toward the end there.

5 THE COURT: All right. And I note, Mr. Snyder, you
6 have a proposed order for the Court here remanding as well,
7 correct?

8 MR. SNYDER: Well --

9 THE COURT: It appears you do.

10 MR. SNYDER: Does it appear I do? Okay.

11 THE COURT: No, no. I'm sorry. Wait a minute.

12 MR. SNYDER: I don't think I do.

13 THE COURT: No, no. No, you don't.

14 MR. SNYDER: No.

15 THE COURT: All right. If counsel will wait around,
16 I'll have an order entered and I'll make sure you have a copy of
17 the order.

18 MR. SNYDER: I'd appreciate that, Your Honor.

19 THE COURT: You're going to need this for the state
20 court. Yes, the Six M defendants. Having considered the Motion
21 to Remand and the memorandum of law in support filed by the Six M
22 Company, this Court finds that the Notice of Removal filed by
23 Mr. James Riffin does not contain the required consent of its
24 co-defendants. Accordingly at 4:40 o'clock p.m. It's very
25 precise, Mr. Livingston. I'm impressed. On this 8th day of

1 September, 2004, it is ordered that the case of Maryland
2 Department of Environment, et. al. v. James Riffin, et. al. be
3 remanded to the -- you have the Maryland Circuit Court. It's the
4 Circuit Court for Baltimore County.

5 MR. LIVINGSTON: Yes, sir. And it should be for its
6 proceedings.

7 THE COURT: For its proceedings concerning the Maryland
8 Department of Environment's Motion for Preliminary Injunction.
9 I'll tell you what. Why don't you give me ten minutes? I'm
10 going to take a ten-minute recess and I've got another matter to
11 immediately deal with. Actually, if you all can step back on
12 this and I'll have an order, a complete order addressing both
13 motions in one order. If you all will just wait around for about
14 ten minutes? The Court is not going to take a recess. We're
15 just going to ask counsel to step back for one second.

16 (Recess.)

17 THE COURT: Counsel and Mr. Riffin, I have prepared an
18 order in this particular case, Maryland Department of the
19 Environment, et. al., plaintiffs, v. James Riffin, et. al.,
20 defendants. For the reasons stated on the record in open court
21 this date, it is this 8th day of September, 2004 by the Court
22 ordered, one, that Plaintiffs' Motion to Remand pursuant to 28
23 U.S.C. Section 1447(c) is granted. Two, that defendant, Six M
24 Company's Motion to Remand is granted. Three, that the Clerk of
25 this Court shall transmit a certified copy of this order and the

1 court record herewith to the Clerk of the Court for the Circuit
2 Court for Baltimore County forthwith and that the Clerk of this
3 Court shall close this case.

4 In the companion case of State of Maryland v. James
5 Riffin, Civil Number RDB-04-1342, Mr. Snyder, counsel for the
6 State of Maryland in both cases, and Mr. Riffin, the defendant in
7 both cases, have aptly noted the identical issues on preemption
8 before the Court in that case. There was a pending Motion to
9 Remand that was pending before this Court. As a result of a
10 thorough discussion on the record this afternoon, for the reasons
11 stated on that record in open court, it is this 8th day of
12 September, 2004 by the Court ordered that the Plaintiffs' Motion
13 to Remand pursuant to 28 U.S.C., Section 1447(c) is granted.
14 That the Clerk of this Court shall transmit a certified copy of
15 this order and the court record herewith to the Clerk of the
16 Court for the Circuit Court for Baltimore County and that the
17 Clerk of this Court shall close this case. And counsel will be
18 given copies. Is there anything else from the point of view of
19 the plaintiffs, Mr. Snyder?

20 MR. SNYDER: No, Your Honor.

21 THE COURT: Is there anything else from the point of
22 view of the defendant, 3M Company, Mr. Roddy? Six M. Six M.
23 You probably wished you represented 3M. It's Six M.

24 MR. RODDY: Hope springs eternal, Your Honor. No, Your
25 Honor.

1 THE COURT: All right. Okay. Mr. Riffin, anything
2 further from the point of view of those two cases?

3 MR. RIFFIN: No, Your Honor.

4 THE COURT: All right. And then the third case, I've
5 told Baltimore County to go ahead and file the appropriate motion
6 and we will deal with it. The Court simply cannot violate the
7 clear principles of federalism, Mr. Riffin, with respect to the
8 extremely broad interpretation that you would give the ICCTA and
9 accordingly, the motions have been granted. Thank you, counsel.

10 (Proceedings concluded.)

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Exhibit 2

MARYLAND DEPARTMENT OF THE ENVIRONMENT, et al.,

Plaintiffs,

v.

JAMES RIFFIN, et al.,

Defendants.

* IN THE
* CIRCUIT COURT FOR
* BALTIMORE COUNTY
* Case No. 03-C-04-008920
*
*

ORDER OF PERMANENT INJUNCTION

Before the Court is the Motion to Dismiss filed by defendant James Riffin, which was converted to a motion for summary judgment by Judge John O. Hennegan in open court at the hearing on September 9, 2004; and the Motion to Dismiss Counterclaim and the Cross-Motion for Summary Judgment, filed by plaintiffs, the Maryland Department of the Environment and Baltimore County, Maryland.

The Court has read and reviewed the Complaint for Injunctive Relief and Civil Penalties, and the various and sundry papers filed herein, including the arguments and the grounds and authorities therefor set forth in defendant's Memorandum in Support of Motion to Dismiss, and in plaintiffs' Memorandum in Support of Motion to Dismiss Counterclaim and Cross-Motion for Summary Judgment, together with the exhibits attached thereto, and has heard and considered the arguments advanced in open court by the parties hereto. The Court notes with interest and considers persuasive the reasoning articulated in open court on the record by the Honorable Richard D. Bennett, as set forth on pages 55-59 of Transcript of Motions Hearing, Exhibit 2 to plaintiffs' Memorandum in Support of Motion to Dismiss Counterclaim and Cross-Motion for Summary Judgment.

NOW, THEREFORE, in consideration of the above, the Court finds and holds that there exists no genuine dispute of material fact between the parties, and that plaintiffs are

entitled to judgment as a matter of law. Wherefore, it is this 19th day of November, 2004,
by the Circuit Court for Baltimore County, **ORDERED AND ADJUDGED**

1. that defendant's Motion to Dismiss / Motion for Summary Judgment be, and it is hereby, **DENIED**;

2. that plaintiffs' Cross-Motion for Summary Judgment be, and it is hereby, **GRANTED**;

3. that plaintiffs' Motion to Dismiss Counterclaim be, and it is hereby, **GRANTED**;

4. that Mr. James Riffin, his agents, servants, employees, representatives, and independent contractors, and all persons acting in behalf of or in concert with him be, and they are hereby, **permanently enjoined to comply with all applicable provisions of State and local law, and specifically, Title 5, Subtitle 5 of the Environment Article of the Annotated Code of Maryland; Title 4, Subtitle 4 of the Environment Article of the Annotated Code of Maryland; Title 9, Subtitle 3 of the Environment Article of the Annotated Code of Maryland; Article 33, Title 5 of the Baltimore County Code; and Title 4, Subtitle 1 of the Environment Article of the Annotated Code of Maryland;**

5. that Mr. Riffin be, and he is hereby, **permanently enjoined from conducting or performing any further earth-moving, construction, dumping, excavation, or grading activities at the properties located and known as 10919 York Road and 13 Beaver Run Lane, in Cockeysville, Baltimore County, Maryland ("the Site");**

6. that Mr. Riffin be, and he is hereby, **permanently enjoined to stabilize all exposed soils at the Site with seed and straw, and permanently enjoined to install all necessary sediment controls approved by Baltimore County;**

7. that Mr. Riffin be, and he is hereby, **permanently enjoined** to relocate all equipment presently on or at the Site to an appropriate and legally authorized location other than a location within the boundaries of the Site;

8. that Mr. Riffin be, and he is hereby, **permanently enjoined** from interfering with the activities of the Maryland Department of the Environment or Baltimore County, or their agents, employees, officials, representatives, or contractors, to remove and dispose of all stockpiled fill, ballast, and other stone or cement materials, including concrete railroad ties, from the Site and to store or dispose of said fill, ballast, and other stone or cement materials at appropriate and legally authorized locations pursuant to law;

9. that if Mr. Riffin wishes to conduct any earth-moving, construction, dumping, excavation, or grading activities at any time hereafter, he shall submit grading and sediment control plans to Baltimore County for its approval, and shall apply to the Maryland Department of the Environment for permits under §§ 5-503 and 9-323 of the Environment Article of the Annotated Code of Maryland;

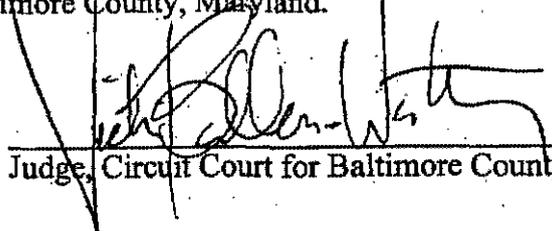
10. that pursuant to section 4-417 of the Environment Article of the Annotated Code of Maryland, Mr. Riffin shall, within 30 days of the date of this Order, pay a civil penalty to the Maryland Department of the Environment in the amount of One Hundred Twenty-Five Thousand and 00/100 Dollars (\$125,000.00), owing to his placement of soil and sediment in a location or condition likely to cause sediment pollution, in violation of section 4-413 of said Article;

11. that pursuant to section 9-342 of the Environment Article of the Annotated Code of Maryland, Mr. Riffin shall, within 30 days of the date of this Order, pay a civil penalty to the Maryland Department of the Environment in the amount of Fifty Thousand and

00/100 Dollars (\$50,000.00), owing to his unpermitted discharge of sediment and other pollutants into the waters of the State, in violation of said Article;

12. that pursuant to sections 33-5-302 (c) and (e) of the Baltimore County Code, Mr. Riffin shall, within 30 days of the date of this Order, pay a civil penalty to Baltimore County, Maryland, pursuant to the provisions Article 33, Title 5, section 33-5-302 of the Baltimore County Code, in the amount of One Hundred Sixty Thousand and 00/100 Dollars (\$160,000.00), to permit the County and State install and maintain effective sediment controls and restore the Site to a stable condition; and

13. that judgment be, and it is hereby, entered on behalf of the Maryland Department of the Environment and Baltimore County, Maryland.

Civil penalties are denied at this time.

Judge, Circuit Court for Baltimore County 11/19/04

True Copy Test
SUZANNE MENSCH, Clerk
Per *Parola O'Hall*
Assistant Clerk

Exhibit 3

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND
Nos. 1593 & 1802
September Term, 2004

JAMES RIFFIN

v.

MARYLAND DEPARTMENT OF THE
ENVIRONMENT, et al.

Salmon,
Adkins,
Sharer,

JJ.

Opinion by Sharer, J.

Filed: February 3, 2006

In this consolidated appeal,¹ we address appellant, James Riffin's, thoroughly litigated contention that, doing business as the Northern Central Railroad ("NCR"), his operations are subject to the exclusive jurisdiction of the United States Surface Transportation Board ("STB") and, pursuant to the Interstate Commerce Commission Termination Act ("ICCTA"), 49 U.S.C. §10501(b)², cannot be regulated by appellees, the Maryland Department of the Environment ("MDE") and Baltimore County ("the County").

Appellant, appearing in this Court pro se, as he did below, presents a number of issues for our review, which we have distilled

¹ On June 20, 2005, following the filing of various motions, this Court issued an order consolidating "[t]he appeal in No. 1802, September Term, 2004... with the appeal in No. 1593, September Term, 2004, for purposes of briefing and argument only."

² 49 U.S.C. § 10501(b) (1996) provides:

(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.

and rephrased to:³

1. Whether the circuit court erred in granting summary judgment in favor of appellees.
2. Whether appellant's due process rights were violated when the circuit court granted the permanent injunction.⁴

Finding that the circuit court neither erred nor violated appellant's due process rights, we shall affirm.

FACTUAL and PROCEDURAL BACKGROUND

Case No. 1802 - The Greenspring Drive Site

Appellant is the owner and lessor of commercial property located at 1941 Greenspring Drive, Timonium, Maryland.⁵ The majority of the approximately 0.7 acre site is occupied by an office building, bordered by small strips of land. There are no

³ In his brief, appellant raised 21 issues with approximately 22 sub-contentions. For completeness we set out his issues, verbatim, in the Appendix to this opinion.

Appellant worded the issues upon which we focus in this opinion as follows:

15. Is the Permanent Injunction issued by the Circuit Court of Baltimore County on November 19, 2004, void, due to a lack of due process?
16. Were there material facts in dispute which would make summary judgment inappropriate?

⁴ On September 13, 2004, appellant appealed the circuit court's issuance of the preliminary injunction. None of the issues raised in this appeal, however, address the preliminary injunction. As such, any arguments regarding the preliminary injunction have been waived. See *Honeycutt v. Honeycutt*, 150 Md. App. 604, 618 (2003); Md. Rule 8-504(a)(5).

⁵ In an earlier incarnation, appellant sought a special exception from Baltimore County zoning regulations to utilize the property as a "commercial recreation facility." The Baltimore County Board of Appeals denied the request, determining that the use sought would actually be a "bungee jumping operation," which is prohibited by the Baltimore County Code. This Court affirmed that judgment in *Riffin v. People's Counsel for Baltimore County*, 137 Md. App. 90 (2001).

railroad tracks or active rail operations on the property.

Appellant leases space in the office building to three tenants - an office support company, a sign-making company, and a document preparation service. None of the tenants hold themselves out as a railroad or as providing rail services.

From approximately 1987 to 1990, the property's previous owner used the site for the production of printed electronic circuit boards. In 1989, investigations revealed high levels of volatile organic compounds and other contaminants in the soil and groundwater beneath the surface of the property. A follow-up survey, conducted by the Environmental Protection Agency and the MDE, in 2000, concluded that the site's potential groundwater contamination required further investigation by the MDE.

On October 12, 2000, the MDE notified appellant of the potential hazard and requested that he conduct his own investigation to "accelerate any necessary remedial actions" at the site. After appellant failed to respond, the MDE issued an administrative order, on July 5, 2001, requiring appellant to perform an assessment of the environmental conditions at the site and to undertake remedial measures if the conditions proved adverse to human health or the environment. Appellant failed to respond to the administrative order.

Appellant ultimately agreed to give the MDE access to conduct an environmental investigation of the site, which the MDE performed

on April 25, 2002. The soil and groundwater data gathered during the MDE's investigation indicated levels of contaminants in the groundwater sufficient to pose a potential health danger to the tenants at the site. Based on this information, the MDE requested full access in order to conduct indoor air sampling and monitoring to determine the extent of any environmental and health hazards. Although appellant initially indicated that he would allow the MDE access, he revoked his consent before any indoor air quality tests could be performed.

On December 1, 2003, after repeated attempts to obtain appellant's compliance with the administrative order, the MDE filed a complaint, in the Circuit Court for Baltimore County, seeking an injunction giving the MDE access to the Greenspring Drive site to implement the planned indoor air quality testing.⁶ Appellant filed a motion to dismiss, claiming that the MDE had no jurisdiction over the site because, since February 1, 2003, he had been doing business as the NCR and, therefore, was subject to the exclusive jurisdiction of the STB pursuant to the ICCTA, 49 U.S.C. §10501(b).

On April 26, 2004, the Circuit Court for Baltimore County rejected appellant's argument and orally granted the MDE access to the Greenspring Drive site. The court's written order, filed May 3,

⁶ The MDE sought to perform the monitoring pursuant to Md. Code Ann., Envir. § 7-222(a), (c)(2) (Repl. Vol. 1996) ("EA"), which authorizes the MDE to address the unauthorized release of hazardous substances. This section allows the MDE to enter a site if necessary to conduct remedial actions or other measures and to pursue an injunction if access is denied.

2004, gave the MDE "full unimpeded access to the building located at 1941 Greenspring Drive, Timonium, Maryland, for purposes of monitoring indoor air quality."

On April 27, 2004, appellant removed the case to the United States District Court for the District of Maryland on the grounds that 49 U.S.C. § 10501 preempted the State's environmental laws. The U.S. District Court rejected appellant's arguments on September 8, 2004, and remanded the case to the Circuit Court for Baltimore County, which had entered a final judgment in the matter some four months earlier. Appellant filed this appeal on September 21, 2004.⁷

Case No. 1593 - The Cockeysville Site

Appellant also owns a parcel of land located at 10919 York Road, Cockeysville, Maryland. This parcel lies adjacent to Beaver Dam Run, a tributary of the Gunpowder River, which in turn feeds into the Loch Raven Reservoir, the primary water supply for metropolitan Baltimore.⁸ A portion of the Cockeysville site lies within the 100-year floodplain of Beaver Dam Run.

In February 2004, appellant began construction of what he claimed would become a railroad storage yard at the site. Over the next few months appellant cleared, filled, and graded approximately

⁷ This appeal was originally dismissed by this Court on January 12, 2005, on the grounds that it was not timely filed. By order, dated June 20, 2005, we vacated our earlier order and reinstated the appeal.

⁸ Beaver Dam Run qualifies as a Use III-P Maryland waterway, COMAR 26.08.02.08I(4), protected as a natural trout water and public supply. COMAR 26.08.02.02B(5).

9,000 square feet of land, stockpiled soil and crushed stone, and constructed a make-shift berm and concrete retaining wall. All of this work was performed within the 100-year floodplain of Beaver Dam Run. Appellant had neither applied for nor received any of the permits and approvals required under state and local law.

Baltimore County officials discovered the work on February 24, 2004, and confirmed that appellant had not obtained the sediment control, flood plain, and grading approvals required by the County. The County then notified the MDE, which first noted the violations in a March 4, 2004, inspection report.⁹ The State and County issued multiple stop-work orders. When confronted with the possibility of further enforcement action, appellant told an MDE inspector "that [the inspector] could issue whatever [the inspector] wanted, but [appellant] would not stop his activities because he was a railroad and, as such, was immune from all state environmental regulations."

The MDE and the County, jointly, filed suit in the Circuit Court for Baltimore County on August 25, 2004. The complaint alleged that appellant's construction work violated four separate State and County laws and sought, *inter alia*, an injunction that

⁹ Appellant's construction activities violated four separate regulatory requirements: (1) grading and filling within the 100-year floodplain without a permit, EA § 5-503 and COMAR 26.17.04.03A; (2) placing stockpiled, exposed, and un-stabilized soil within the 100-year floodplain without a permit, EA §4-413; (3) failing to implement an approved erosion and sediment control plan prior to any land disturbance, EA §4-105(a) and Baltimore County Code §33-5-104(a)(3); and (4) discharging pollutants into the waters of the State without a permit, EA §9-372.

would require appellant to restore the property to its original condition.

On August 30, 2004, the circuit court issued a temporary restraining order preventing appellant from conducting any further construction activities at the site. Three days later appellant filed a motion to dismiss.

That same day, September 2, 2004, appellant removed the case to the U.S. District Court for the District of Maryland on preemption grounds. On September 8, 2004, the U.S. District Court rejected appellant's argument and remanded the case to the circuit court.

In open court, at the hearing on September 9, 2004, the circuit court converted appellant's motion to dismiss into a motion for summary judgment. The court also issued a preliminary injunction requiring appellant to remove and relocate material from the site.¹⁰ The MDE and the County filed a cross motion for summary judgment on September 27, 2004.

¹⁰ On September 15, 2004, appellant filed suit in the U.S. District Court

seeking to essentially appeal both [the District Court's] previous jurisdictional holdings and the state court's grant of the Preliminary Injunction against him. Specifically, [appellant] seeks to have this Court enjoin individuals in the Maryland Attorney General's Office and the Baltimore County Attorney's Office from enforcing the terms of the Preliminary Injunction granted by the state court.

Riffin v. Snyder, No. EDB 04-2964, slip op. at 2 (D.Md. Sept. 16, 2004). The U.S. District Court dismissed the case the very same day. Appellant appealed to the United States Court of Appeals for the Fourth Circuit Court, which affirmed. The issues concerning these federal cases, raised in appellant's brief, are not properly before this Court.

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On November 23, 2004, the circuit court denied appellant's motion to dismiss/motion for summary judgment, granted appellees' cross motion for summary judgment, and issued a permanent injunction. The permanent injunction required appellant "to comply with all applicable provisions of State and local law," cease further excavation, stabilize all exposed soils, install the necessary sediment controls, "relocate all equipment" on the site, and refrain from interfering with the activities of the MDE or the County. Appellant filed his timely appeal on December 2, 2004.

Six days after filing this appeal, appellant moved to stay the enforcement of the permanent injunction. That motion was never ruled upon and the record was sent to this Court on December 28, 2004. On January 31, 2005, appellant moved to stay the enforcement of the permanent injunction in this Court. In an order dated February 17, 2005, we denied appellant's motion. Appellant's petition for review of this Court's order was denied by the Court of Appeals on February 28, 2005.

The Northern Central Railroad

As a prologue to our discussion of the issues raised in this appeal, we must address appellant's contention that, doing business as the NCR, his operations constitute a railroad, subject to the exclusive jurisdiction of the STB.

In his brief, appellant contends that, "[i]n 1999, [he] attempted to reinstitute rail service from Preston to the Choptank

river, and from Goldsboro to the Choptank river." Although this contention cannot be verified from the record before us, the record does reveal that following the MDE's April 25, 2002 environmental investigation at the Greenspring Drive site, and before the MDE filed suit in Baltimore County, the NCR was formed.¹¹ Appellant then sought approval from the STB to begin operating the NCR.

The STB's approval process is described as follows:

Under the licensing provisions of 49 U.S.C. 10901, a noncarrier, such as NCR, 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." That means that the Board must examine and weigh the public interest. Under 49 U.S.C. 10502 and 49 CFR 1121, however, a party may request an exemption 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.

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

¹¹ The exact date of the NCR's formation is unclear. In a July 13, 2003 letter to the STB, appellant stated that the company was formed on May 15, 2003. Appellant's motion to dismiss the Greenspring Drive case, however, states that the NCR was "formed on February 1, 2003."

false or misleading information. 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.

James Riffin D/B/A The Northern Central Railroad, STB Finance Docket No. 34484, 2004 WL 839306 (Apr. 20, 2004) (citations omitted) ("*Riffin 4/20/04*").

Appellant filed three separate notices of exemption ("NOE") with the STB in an attempt to obtain authorization to operate a railroad. In the first NOE, filed July 7, 2003, appellant sought the authority to "construct and operate" 20.9 miles of industrial track near Cockeysville, Maryland. Appellant also sought authority to "acquire trackage rights from Norfolk Southern Corporation," without having consulted Norfolk Southern.¹³ *James Riffin D/B/A NCR*, STB Finance Docket No. 34375, 2003 WL 21662810 (Jul. 15, 2003). On July 14, 2003, appellant filed a letter withdrawing his verified NOE. *Id.*

On March 8, 2004, appellant filed his second NOE with the STB requesting permission to acquire and operate 2.9 miles of rail line in Baltimore County and 20.9 miles of rail line in York County, Pennsylvania. STB Finance Docket No. 34484. Pursuant to the STB's regulations, this NOE became effective and received formal approval

¹³ On July 11, 2003, Norfolk Southern Railroad Company, through its counsel, advised the STB that "there are no current or planned discussions between it and [appellant] that would lead to either the grant of trackage rights over tracks operated by Norfolk Southern or to the right to construct any tracks that would tie into tracks operated by Norfolk Southern." As such, Norfolk Southern "strongly [urged] the Board to stay the effectiveness of the [NOE]."

on March 25, 2004.

The State of Maryland ("Maryland") filed a petition on April 2, 2004, requesting the STB to revoke appellant's second NOE. In an April 20, 2004 decision, the STB revoked appellant's exemption, stating:

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. 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.

Riffin 4/20/04, supra (footnote omitted).

On April 28, 2004, appellant filed his third and final NOE with the STB, requesting permission "to acquire (via a lease) and operate approximately 19 miles of line... in York County, PA." STB Finance Docket No. 34501. Maryland filed a motion for leave to file comments, accompanied by the comments, on May 18, 2004.¹³ Two days later appellant's third NOE received approval.

On August 20, 2004, Maryland filed a petition to revoke appellant's third NOE. Appellant filed his answer to Maryland's petition, as well as a petition for declaratory order, on September

¹³ Appellant replied to these comments on June 2, 2004.

14, 2004, asking the STB to render a formal decision regarding, *inter alia*, appellant's status as a Class III rail carrier.

Subsequent to the filing of his appeals in the cases presently before this Court, but prior to our review, the STB revoked appellant's third NOE in a February 23, 2005 decision, stating that:¹⁴

it appears that NCR is attempting to use the cover of Board authority allowing rail operations in Pennsylvania to shield seemingly independent operations and construction in Maryland from legitimate processes of state law. Maryland has shown its legitimate state interest in construction matters within its borders and, once again, has raised sufficient concerns regarding NCR's proposal to make it inappropriate for NCR to use the expedited class exemption procedures in this case. See April 20, 2004 Decision. The Board has a responsibility to protect the integrity of its processes, and the Board is concerned that [appellant] may be using the licensing process in improper ways. Given the particular circumstances and controversy presented here, the Board will revoke the exemption in STB Finance Docket No. 34501.

James Riffin D/B/A NCR, STB Finance Docket No. 34501, 2005 WL 420419 (Feb. 23, 2005) (footnote omitted) ("Riffin 2/23/05").

The STB also addressed appellant's declaratory order request, stating:

[G]iven the context in which [the declaratory order request] was filed - as an adjunct to a second notice to obtain authority to provide

¹⁴ We take judicial notice of the STB's February 23, 2005 revocation of appellant's railroad status because the revocation is a fact capable of accurate and ready determination by a resort to the STB decision, the accuracy of which, as a public document, cannot reasonably be questioned. See Md. Rule 5-201(b).

operations about which substantial questions have been raised - we see no basis for granting the petition for declaratory order at this time. The declaratory order petition raises numerous questions about precisely how non-railroad activities could be shoehorned into the 49 U.S.C. 10501(b) preemption so as to shield them from the otherwise legitimate reach of state law. But because NCR has no authority to conduct any railroad operations at this time and because serious questions have been raised about the bona fides of its proposals, we will not speculate on how we might rule if it did have such authority. Accordingly, we decline to institute a proceeding on NCR's petition for declaratory order.

Riffin 2/23/05, *supra* (emphasis added).

DISCUSSION.

Appellant's Railroad Status

On April 20, 2004, six days before the circuit court's hearing in the Greenspring Drive case (No. 1802), the STB revoked appellant's second NOE, thereby eliminating any claim or authority that he might assert to operate a railroad and/or subject his operations to the STB's exclusive jurisdiction. Because his third NOE was not filed until April 28, 2004, appellant was precluded from claiming any authority under it before the circuit court on April 26, 2004. Even assuming, as appellant argues, that the third NOE automatically became effective seven days after it was filed, appellant did not receive authority from the STB until after the circuit court issued its May 3, 2004 order:

Additionally, we note that the STB's February 23, 2005

decision effectively revoked any authority that appellant's third NOE may have provided subsequent to the issuance of the circuit court's order. Thus, the record clearly indicates that before the circuit court, as well as this Court, appellant had no authority to either operate a railroad or invoke the STB's exclusive jurisdiction.

We hold that, because appellant's appeal of the Greenspring Drive case (No. 1802) is premised entirely upon his contention that he is "a federally licensed Class III rail carrier," and presents no other issues, the case is moot. See *Coburn v. Coburn*, 342 Md. 244, 250 (1996) ("A case is moot when there is no longer an existing controversy between the parties at the time it is before the court so that the court cannot provide an effective remedy.").

Therefore, we decline any invitation to address the merits of the Greenspring Drive case and shall dismiss the appeal in No. 1802 as moot. See *id.*; Md. Rule 8-602(a)(10). As such, the circuit court's May 3, 2004 order granting the MDE "unimpeded access" to the Greenspring Drive building remains in effect.

In the Cockeysville case (No. 1593), we hold that the STB's February 23, 2005 revocation of appellant's third NOE renders any preemption issues, or arguments by appellant that his conduct is subject to the exclusive jurisdiction of the STB, moot. Similarly, we will not entertain any of these moot issues relating to appellant's status as a railroad because any opinion on these

issues "would be an academic undertaking." *B & P Enters. v. Overland Equip. Co.*, 133 Md. App. 583, 639 (2000).

Our further discussion, therefore, will focus only on two relevant state law issues raised in appellant's brief.

1. *Whether the circuit court erred in granting summary judgment in favor of appellees.*

Appellant argues that "it was inappropriate for the circuit court to grant [appellees'] Cross Motion for Summary Judgment" because there are ten facts which "are material, and are in dispute." A review of appellant's ten "facts" reveals, however, that no less than four relate to appellant's claim of railroad status. As discussed, *supra*, issues related to appellant's railroad status were rendered moot by the STB's February 23, 2005 decision and are not properly before this Court. Therefore, we address appellant's six remaining facts in turn.

Pursuant to Maryland Rule 2-501(f), a court shall grant summary judgment "if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law." This Court will review the grant of summary judgment *de novo* and will

determine whether there is any dispute of material fact, and, if there is none, we then determine whether the court was legally correct in its ruling. As we undertake this review, "we construe the facts properly before the court, and any reasonable

inferences that may be drawn from them, in the light most favorable to the non-moving party." "We ordinarily will uphold the grant of summary judgment only on a ground relied on by the trial court."

Stanley v. American Fed'n of State & Mun. Employees Local No. 553,
165 Md. App. 1, 13 (2005) (citations omitted).

In his brief, appellant contends that the following facts are both material and disputed:¹³

- E. Does the scope of [appellant's] present construction plans exceed one acre?
- F. Did [appellant] install sediment controls prior to his land disturbing activities at his Cockeysville facility?
- G. On what date did [appellant] first "change the natural ground level" at his Cockeysville facility?
- H. Did [appellant] construct an obstruction in, or change the cross-section of, a "stream or body of water?"
- I. Did [appellant] place soil in a position where it was "likely to be washed into waters of the State by runoff?"
- J. What was the cost to re-install sediment controls and to restore the Cockeysville site to a stable condition?

We find, however, that these facts were either immaterial or not in dispute before the circuit court.

Immaterial Facts

The Court of Appeals has stated that

¹³ We adopt appellant's *seriatim* alphabetical designation.

[i]n order to prevent the granting of a motion for summary judgment the objecting party must show more than that there was a question of fact presented, he must, of course, also show that the resolution of that question will somehow affect the outcome of the case, i.e., that it is a material fact.

Parklawn, Inc. v. Nee, 243 Md. 249, 254 (1966).

Here, appellant has failed to demonstrate how the resolution of (1) whether the scope of appellant's present construction plans exceed one acre; (2) whether appellant installed sediment controls prior to his land excavating activities;¹⁶ (3) the date appellant first changed the natural ground level at the site; and (4) the cost to re-install sediment controls and restore the site, will affect the outcome of the case. Resolution of these facts will do little to determine whether appellant, without ever having applied for or obtained the required permits, cleared, filled, and graded approximately 9,000 square feet of land within the 100-year floodplain.

Based upon our review of the record, we hold that facts enumerated by appellant in paragraphs E, F, G, and J of his brief, while disputed, are immaterial because their resolution would not affect the outcome of the case. See *Stewart Title Guar. Co. v. West* 110 Md. App. 114, 133 (1996).

¹⁶ We noted that, along with being immaterial, appellant stipulated to appellee's counsel proffer that he "had installed a silt fence at one point in the past," and that the "silt fence had been overrun and buried by dirt at the site and was no longer functional."

Undisputed Facts

Facts enumerated in paragraphs H and I of appellant's brief, although material, were not in dispute before the circuit court. Our review of the record reveals that appellant stipulated that he had constructed an obstruction in, or changed the cross-section of, a stream or body of water.

Attached as an exhibit to appellees' cross-motion for summary judgment, was the September 9, 2004 preliminary injunction hearing transcript. That transcript discloses appellant's stipulation to appellees' counsel's proffer, which included statements that:

[Appellant] also graded the floodplain flat in preparation for construction of a railroad. All of this grading had the affect of changing the cross section of the 100 year floodplain at Beaver Dam Run.

Additionally, whether appellant placed soil in a position where it was "likely to be washed into waters of the State by runoff," in contravention of Md. Code Ann., Envir. § 4-413 (Repl. Vol. 1996) ("EA"), was not at issue before the circuit court.

Section 4-413 provides, in pertinent part, that

it is unlawful for any person to add, introduce, leak, spill, or otherwise emit soil or sediment into waters of the State or to place soil or sediment in a condition or location where it is likely to be washed into waters of the State by runoff of precipitation or by any other flowing waters.

(emphasis added).

The Environment Article consistently defines waters of the

state as including "[t]he flood plain of free-flowing waters determined by the Department of Natural Resources on the basis of the 100-year flood frequency." See EA §§ 4-101.1(d)(2), 5-101(j)(5), and 9-101(1)(2) (emphasis added). During the motions hearing before the circuit court on November 18, 2004, appellant acknowledged that:

Since waters of the state is defined as the floodplain, I would have to agree with the state's position that, have I introduced soil into the floodplain of Beaver Dam Run? Yes, I have.

Thus, that issue was conclusively resolved.

Viewing the evidence in the light most favorable to appellant, we find that the circuit court was legally correct in its ruling, and did not err in granting appellees' motion for summary judgment.

2. Whether appellant's due process rights were violated when the circuit court granted the permanent injunction.

Appellant argues that the circuit court abused its discretion in granting the permanent injunction because "[a] copy of the proposed order was not served on [him] prior to being signed by the court." Specifically, appellant contends that the permanent injunction is "void, due to lack of due process." We disagree.

Appellant cites *Madaio v. Madaio*, 256 Md. 80, 83 (1969), for the proposition that "[t]he right to receive notice and to be afforded an opportunity to be heard in any proceeding to which finality is to be accorded is established beyond question in this

country." While this is an accurate statement of the law, Madaio is inapposite to the present case.

In *Madaio*, the Circuit Court for Montgomery County, on December 20, 1966, denied Mr. Madaio's complaint for divorce but ordered him to pay child support and alimony "pending further Order of Court." *Id.* at 81. Two years later, on December 27, 1968, Mr. Madaio obtained a divorce in the Circuit Court for Arlington County, Virginia. *Id.* Mrs. Madaio was never personally served in Virginia and did not appear to contest the action. *Id.* The decree did not contain any provision for her support. *Id.*

One month after obtaining the divorce decree in Virginia, Mr. Madaio filed a motion in the Circuit Court for Montgomery County to vacate the December 20, 1966 pendente lite support orders and to have the case dismissed. *Id.* A copy of this motion was not received by Mrs. Madaio's attorney until January 30, 1969. *Id.* at 81-82.

On that same day, the circuit court, without a hearing, ordered that Mr. Madaio's motion be granted and the case dismissed. *Id.* at 82. Mrs. Madaio claimed that she was not notified of the court's order until February 6, 1969. On February 13, Mrs. Madaio filed a motion to strike the court's order "on the ground that she had not been afforded an opportunity to be heard." *Id.* On February 25, the circuit court, without an opinion, denied Mrs. Madaio's motion to strike and allowed the January 30th order to stand. *Id.* The Court of Appeals reversed. *Id.* at 85.

Unlike Madaio, in the case sub judice, appellant was provided an opportunity to be heard, and was in fact heard, at every stage of the proceedings. Appellant was present at the September 9, 2004 hearing and received a copy of the preliminary injunction. The material terms of the preliminary injunction were identical to those of the permanent injunction, and differed only in scope. Appellant, therefore, cannot, in good faith, argue that he was not apprized of what issues would be addressed by the permanent injunction.

Appellant was afforded the "opportunity to show cause why [the permanent injunction's] objectionable provisions are not warranted" at the November 18, 2004, motions hearing. As such, appellant's due process rights were not violated when the proposed order was signed by the court prior to his being served with a copy.¹⁷

JUDGMENT OF THE CIRCUIT COURT
FOR BALTIMORE COUNTY IN CASE
NO. 1593 AFFIRMED;

CASE NO. 1802 DISMISSED AS MOOT;

COSTS ASSESSED TO APPELLANT.

¹⁷ Without citing a single case, appellant contends, in his brief, that, "[n]umerous times, Maryland's Court of Appeals has ruled if a proposed order has not been served on a party prior to the court signing the order, then that order is void." The only case of which this Court is aware is a criminal case in which, unlike the present case, a proposed consent order for restitution was not sent to a party and the court signed the order without a hearing. See e.g. *Lopez-Sanchez v. State*, 388 Md. 214, 219 (2005), cert. denied ___ S.Ct. ___, 2006 WL 37262 (Jan. 9, 2006).

Appendix ¹⁸

5. May a state court render a binding judicial decision based upon its interpretation of 49 U.S.C. 10501(b), (which contains a provision for exclusive federal jurisdiction)? No.
6. Does the Commerce Clause of the U.S. Constitution prohibit State or local regulations of "instrumentalities of interstate commerce?" Yes.
7. Do the State and local statutes invoked in this case, by their necessary operation, directly and/or indirectly interfere with or burden interstate commerce? Yes.
8. Is there a beginning presumption against preemption when the State attempts to regulate "transportation by rail carrier" (an area where there has been a history of significant federal presence)? No.
9. Does 49 U.S.C. § 10501(b) completely preempt all state and local regulation of rail carrier facilities? Yes.
 - 9A. Preemption guidelines:
 - 9B. ICCTA preemption:
 - 9C. Complete Preemption guidelines:
 - 9D. State Law applied in this case, is completely preempted:
 - 9E. Cases holding the ICCTA completely preempts State and local regulations.
 - 9F. No preemption cases:
 - 9G. Surface Transportation Board ruling:
10. Must railroad facilities be adjacent to a railroad's main line, or in the same state as a railroad's main line, in order to be 'instrumentalities of interstate commerce,' subject to the exclusive jurisdiction of the STB? No.
11. Does the ICCTA preempt local and State regulations requiring that permits be obtained prior to railroad-related construction activities? Yes.

Injunction questions:

12. May state or local officials be enjoined individually? Yes.
13. When State law is preempted, does the question of harm to the State, and the matter of public interest, drop from a case involving injunctive relief against that preempted State law? Yes.

¹⁸ We adopt appellant's numbering, as it appears in his brief.

Surface Transportation and Board jurisdiction questions:

14. Does a federal or state court have the authority to determine whether a facility is a railroad facility, or whether an entity is a rail carrier? No.
- 14A. The Surface Transportation Board has exclusive jurisdiction over transportation by rail carriers:
- 14B. Riffin is a Class III rail carrier subject to the exclusive jurisdiction of the STB:
- 14C. Who is a rail carrier and what constitutes a rail carrier facility, is to be determined exclusively by the STB:
- 14D. Riffin's two Maryland facilities are rail carrier facilities:

Due process question:

15. Should the permanent injunction be voided since it was not served on Riffin prior to it being signed by the court? Yes.

Summary judgment question:

16. Was summary judgment appropriate, since material facts were in dispute? No.

Stream related questions:

17. Does §9-304 of Maryland's Public Utility Companies Article grant a Maryland Railroad the right to cross or divert streams? Yes.
18. Does Maryland's common law grant a riparian land owner the right to repel unlawful waters? Yes.
 - 18A. Maryland is a common law state:
 - 18B. Riffin is a riparian land owner:
 - 18C. Maryland's law regarding surface and stream waters:
 - 18D. Maryland's case law regarding unlawful waters:
 - a. Unlawful waters:
 - b. Acts of God:
 - c. Flood waters:
 - 18E. "Waters of the State:"
 - 18F. Riffin's levee:
19. Are the flood waters which inundate Riffin's Cockeysville facility, unlawful waters? Yes.
 - 19A. Navigable waters:
 - 19B. The outer limits of a river or stream is denoted by its "high water mark" under "ordinary conditions:"
 - 19C. Percolating, Surface, Contained, Stream, Flood, and Unlawful Waters:

- a. Percolating waters:
- b. Surface waters:
- c. Contained waters:
- d. Stream waters:
- e. Natural watercourse:
- f. Flood waters:
- g. Unlawful waters:

Plaintiff's failure to state a Cause of Action and/or lack of Standing questions:

- 20. a. The remedies granted by the circuit court are not authorized by the statutes:
- b. Do the Plaintiffs lack standing? Yes.
- c. Does the Plaintiffs' Complaint fail to state a cause of action? Yes.
- d. Riffin's levee will not cause irreparable harm to the Plaintiffs:
- e. The balance of hardships tips in favor of Riffin:
- f. The public interest would be better served by allowing Riffin's levee to remain:

Maryland law questions:

- 21. Does §5-503 of Maryland's Environment Article require that a person obtain a permit prior to changing the cross section of a stream's floodplain? No.
- 22. Must a person notify the MDE Director prior to commencing construction activities encompassing less than one acre? No.
- 22A. Riffin's grading activities fall within the auspices of MDE's General Permit for Construction Activity:
- 22B. A "desire to re-track 20 miles of railroad right-of-way, does not constitute "a common plan of development," when that desire is incapable of being realized:
- 23. If during numerous substantial rainfall events, soil placed adjacent to a stream does not in fact wash into the stream, was that soil in a "location where it is likely to be washed into waters of the state?" No.
- 24. Is the penalty specified in §4-116(c)(3) of Maryland's Environment Article, to be based on the actual cost of compliance, or an estimate of that cost? Actual cost.

Stockpiling sand, stone and gravel questions:

- 25. Does §33-5-201 of the Baltimore County Code, grant a property owner the right to stockpile sand, stone and gravel, without first obtaining a permit? Yes.

Exhibit 4

JAMES RIFFIN

v.

DEPARTMENT OF THE ENVIRONMENT,
et al.

* IN THE

* COURT OF APPEALS

* OF MARYLAND

* Petition Docket No. 93
September Term, 2006

* (Nos. 1593 & 1802, Sept. Term,
2004, Court of Special Appeals)

O R D E R

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals and the answers filed thereto, in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert M. Bell

Chief Judge

DATE: June 16, 2006