

Before the
Surface Transportation Board

JR - 4

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STB FINANCE DOCKET NO. 36078

ENTERED

Office of Proceedings

December 5, 2016

Part of

Public Record

PETITION FOR A DECLARATORY ORDER

(Hudson Street Industrial Track / Harsimus Branch

(Jersey City, Hudson County, NJ)

THIRD SUPPLEMENT TO PETITION FOR DECLARATORY ORDER

ADDITIONAL REASONS WHY A PROCEEDING SHOULD BE INSTITUTED

1. Comes now your Petitioner, James Riffin (“**Riffin**”), who herewith Supplements the Petition for Declaratory Order that he filed on **October 14, 2016**, and in supplement states:

2. At this stage, the following questions are presented:

A. Is there a controversy and / or uncertainty.

B. Can the Surface Transportation Board (“**STB**”) resolve the controversy or uncertainty?

3. **There is a controversy:** **Conrail** has argued in FD 34818, that it **used** the Hudson Street Industrial Tracks (“**HSIT**”), and the Harsimus Branch tracks, as excepted tracks. **Jersey City**¹ argued in FD 34818, and provided evidence to support its arguments, that Conrail **used** the HSIT

¹ City of Jersey City, Rails to Trails Conservancy and Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition.

and Harsimus tracks for **through** freight. How Conrail **used** the tracks conveyed to Conrail, is in dispute.

4. **There is uncertainty:**

- A. **Conrail** and the **LLCs**² argued in FD 34818, and Conrail represented to the various buyers that purchased some of the land underlying / associated with, the tracks that were conveyed to Conrail, that Conrail **did not need** abandonment authority prior to selling the land underlying the tracks that Conrail used. **Jersey City** argued in FD 34818, and in AB 167 (Sub. No. 1189X), et al., (“**1189X**”), that Conrail **did need** abandonment authority.
- B. The owners of the Metro Plaza parcel are in the process of changing the *status quo* of that parcel / are in the process of spending hundreds of millions of Dollars building new buildings on the Metro Plaza parcel, in reliance upon Conrail’s representations that Conrail did not need abandonment authority prior to conveying to the owners’ predecessor in title, the real property underlying the track segments that traversed the Metro Plaza parcel, which track segments were used by Conrail.
- C. Potential shippers on the HSIT would like to know if a demand for service can be leveled upon Conrail, to provide service on the HSIT.
- D. The U.S.D.C., District of NJ, Newark Division, case number 16-cv-4433-ES, would like to know if the STB desires to exercise primary jurisdiction over the determination of the proper classification for the track segments that traversed the Metro Plaza parcel.

² 212 Marin Blvd LLC; 247 Manila Ave LLC; 280 Erie St LLC; 317 Jersey Ave LLC; 354 Coles St LLC; 389 Monmouth St LLC; 415 Brunswick St LLC; 446 Newark Ave LLC.

5. **The STB can resolve the controversy / uncertainty:**

- A. Determining how a carrier used / uses its tracks, is within the expertise of the STB.
- B. So long as the STB does not attempt to ascertain the **nature** of what was conveyed to Conrail via the Final System Plan (“**FSP**”), the exclusive jurisdiction of the Special Court is not invoked.

6. This proceeding vs. the FD 34818 proceeding:

- A. In the FD 34818 proceeding, the primary issue was **where is Line Code 1420 located**. Conrail argued that Line Code 1420 was limited to the right-of-way along present day Columbus Blvd. Jersey City argued that the right-of-way for Line Code 1420 was along the south side of 6th Street, over the Embankment. The STB held that since the Columbus Blvd right-of-way had been abandoned prior to the FSP, and since the Embankment right-of-way was the only right-of-way in existence when the FSP was implemented, the Line Code 1420 right-of-way had to be over the Embankment. On appeal, the D.C. Circuit held that where Line Code 1420 was located, was within the exclusive jurisdiction of the Special Court. In the Special Court, Jersey City and the LLCs stipulated that Line Code 1420 was over the Embankment. Conrail took no position. The Special Court so held.
- B. In the FD 34818 proceeding, Conrail argued that Line Code 1420 was not conveyed to Conrail as a ‘line of railroad.’ That whether Line Code 1420 was a line of railroad, was to be determined by how Conrail classified the tracks associated with Line Code 1420. The Special Court held that Line Code 1420 was conveyed to Conrail as a line of railroad, and that Line Code 1420 was located on the Embankment.
- C. In this proceeding, the only ‘location’ issue is where did the HSIT connect to the Harsimus. And where the HSIT connected to the Harsimus, is depicted in Conrail’s

Track charts. So there is very little that Conrail or anyone else, can argue to oppose what Conrail's Track Charts depict.

- D. In this proceeding, there can be no controversy that Line Code 1440 was conveyed to Conrail via the FSP, just as all of the other Line Codes were conveyed to Conrail as lines of railroad. And there can be no controversy that Line Code 1440 is the HSIT, for that is what it is called in the deed of conveyance.
- E. In this proceeding, there is no need to go to the Special Court, for the nature of what was conveyed to Conrail is not an issue. The only issues are: Did Conrail **use** Track 210 (HSIT) for through traffic? Where did Track 210 (HSIT) connect to Track 213 (Harsimus)? Has Conrail ever obtained abandonment authority for Track 210 (HSIT), or the portion of Track 213 East of Marin Blvd?

OTHER ISSUES

7. In a reply filed by the LLCs on December 2, 2016, the LLCs argued that Riffin does not have 'standing' to file his Petition for Declaratory Order. To support this argument, the LLCs correctly note that ALJ Dring dismissed Riffin from the 1189X proceeding. The LLCs argue:

"Unless the Board reverses Judge Dring, Mr. Riffin has no cognizable, legitimate interest in pursuing any relief, anywhere, concerning the subject of his present petition on the Hudson Street Industrial Track. Therefore, Mr. Riffin's appeal to the Board from Judge Dring's ruling should be decided **before** any other related proceedings are permitted to move forward." Reply at 3.

8. The LLCs also note, Reply at 2, that the LLCs received an e-mail on December 1, 2016, from Eric Strohmeyer, that:

"CNJ will be moving to **DISMISS** Mr. Riffin's petition for lack of jurisdiction."

9. Were Riffin to remain dismissed from the 1189X proceeding, it evidently is reasoned, Riffin would no longer have sufficient standing to maintain a Complaint in the Newark District Court, nor would Riffin have sufficient standing to maintain a Complaint in the Special Court. (Both of which require Article III standing, which requires a ‘particularized injury.’)

10. It appears to Riffin that the consensus of opinion is: If Riffin is dismissed from the 1189X proceeding, everyone’s problems will suddenly disappear. This, of course, is dependent upon Riffin ‘being the problem.’

11. In actuality, the ‘problem’ is Conrail’s failure to follow the rules: Conrail could have, and should have, sought abandonment authority for Line Codes 1420 and 1440, back in 1992 or so, after Conrail delivered its last rail car. Had Conrail simply followed the rules, none of this mess would exist. And had the parties that bought the real property associated with Line Codes 1420 and 1440, simply hired a lawyer somewhat versed in railroad law, they would have known that lines of railroad can only be abandoned with STB authority. And they could have insisted that Conrail simply file a §1152.50 NOE to abandon Line Codes 1420 and 1440.

12. Unfortunately, no one bothered to follow the rules.

13. And Riffin is the messenger that is making it known that no one followed the rules. And now that it is known, getting rid of Riffin does not eliminate the rule-violation problem. Nor does it make anyone’s ‘problem’ go away. It merely sweeps the problem back under the rug.

**DISMISSING RIFFIN FROM 1189X / DENYING RIFFIN’S PETITION
WILL NOT ‘SOLVE’ ANYONE’S PROBLEMS**

14. Dismissing Riffin from the 1189X proceeding / denying Riffin’s Petition for Declaratory Order, will not ‘solve’ anyone’s ‘problems.’ Yes, it will deprive Riffin of one means for establishing Article III standing. But not all means.

15. It should be obvious from Riffin's multiple OFA filings, that Riffin desires to be a rail carrier. And it should be obvious from Riffin's AB 167 (Sub. No. 1190X) OFA, that Riffin desires to provide freight rail service in Jersey City. And that there are multiple shippers in Jersey City that desire aggregates, that desire to ship other bulk commodities. City et al. has filed a Verified Statement with the STB in the 1189X proceeding from one such shipper. And has alluded to having received multiple requests for freight rail service in Jersey City.

16. And it should be obvious, that Riffin has a strong desire to facilitate the provision of freight rail service in Jersey City. Such as by becoming a shipper and / or a carrier, himself. (That is, receiving aggregates in his own name, then trucking those aggregates to the entities that ultimately desire aggregates / providing transload services.)

17. So it should come as no surprise to anyone, that when ALJ Dring decided to dismiss Riffin from the 1189X proceeding, Riffin began to look for other ways to provide freight rail service in Jersey City. And it should come as no surprise that Riffin has been looking for, and negotiating to acquire, a suitable location in Jersey City to receive / transload aggregates, by rail.

18. What may surprise some, is that Riffin is close to executing agreements to implement his plans to receives aggregates by rail in Jersey City. And it may come as a surprise which rail line Riffin will use to receive those aggregates: The HSIT.

19. So shortly Riffin will have a 'particularized legal interest' that relates to the HSIT: May he level a demand for freight rail service upon Conrail? (Or whomever may ultimately acquire the HSIT / Harsimus.)

20. And to answer the 'can he level a demand for service upon Conrail' question, he needs to know if Track 210 is a 'line of railroad?' If so, Riffin can level a demand for service. If not, then not.

21. By acquiring a parcel adjacent to the HSIT, Riffin acquires Article III standing, totally independent of the STB.

22. So while dismissing Riffin from the 1189X proceeding / denying Riffin's Petition for Declaratory Order, may provide some with some 'psychic' satisfaction, it will not deprive Riffin of sufficient Article III standing to prevent Riffin from filing a Complaint in the Special Court, re-filing his Complaint in the District Court, nor will it prevent Riffin from leveling a demand for service upon Conrail / filing a formal Complaint against Conrail, if Conrail refuses to provide the requested service.

23. It should be remembered: City et al. has been advocating for years:

A. The Harsimus is needed for continued freight rail service / it is feasible to provide rail service on the Harsimus / provision of such freight rail service would be profitable / and that there is substantial community support in favor of reinstituting freight rail service on the Harsimus.

B. The existing Light Rail tracks could be used to provide freight rail service in Jersey City when the Light Rail system is not being used for commuter rail service.

24. Riffin has every intention of holding City et al. to their representations.

25. That also means that whomever acquires the Harsimus line of railroad, would be obligated to provide sufficient track infrastructure to provide freight rail service to the HSIT. (And since Jersey City has argued that the Embankment walls need to be preserved, that would require putting in a number of railroad bridges in order to re-connect each Embankment section.)

CONCLUSION

26. The STB has several options: It can keep Riffin in the 1189X proceeding, and it can

address the issues in Riffin's Petition for Declaratory Order. Doing so would keep the issues 'in house,' and under the control of the STB. Or the STB can keep Riffin out of the 1189X proceeding, and deny Riffin's Petition for Declaratory Order. And if that is done, Riffin will seek his relief in the Special Court, and in the Newark District Court.

27. The parties to these proceedings, and the owners / redevelopers of the Metro Plaza parcel, can either continue with their present courses of actions, or they can decide to convene a settlement conference, where an attempt can be made to try to find a way to resolve this mess without resort to continued litigation.

28. The 'problem' of Conrail's failure to follow the rules is not going away. What needs to be decided, is in which forum is the problem going to be resolved.

Respectfully,

James Riffin
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CERTIFICATE OF SERVICE

I hereby certify that on or before the 5th Day of December, 2016, a copy of the foregoing Third Supplement to Petition for Declaratory Order, was served on the following entities by e-mail: Charles Montange, counsel for City et al.; Daniel Horgan, counsel for the LLCs; Robert Jenkins, Adam Sloane, and Jonathan Broder, counsel for Conrail; Brendan Judge, counsel for the owners / developers of the Metro Plaza parcel; Eric Strohmeier, COO of CNJ Rail.

James Riffin