

Petition for Declaratory Order -)
Hudson Street Industrial Trackage/) F.D. 36078
Harsimus Branch)

ENTERED
Office of Proceedings
December 6, 2016
Part of
Public Record

Reply on behalf of
City of Jersey City,
Rails to Trails Conservancy, and
Pennsylvania Railroad Harsimus Stem Preservation Coalition

On November 16, James Riffin, a "frequent litigant" before this agency,¹ filed a petition for a declaratory order for a

¹ Earlier this year, this Board struck several of Riffin's pleadings in Norfolk Southern Railway - Ac. And Op. - Certain Lines of the Delaware and Hudson, F.D. 35873, served March 24, 2016, and in the course of its decision, noted that "Riffin is a frequent litigant before the Board and the courts and has a history of inappropriate filings." Shortly after this episode, Norfolk Southern Railway Company filed a Petition for Rulemaking to Address Abuses of Board Processes, docketed at EP 727, on May 26, 2015. The Petition focused on abuses by Riffin of the OFA process. After taking comments, STB declined to issue the relief sought by NS (Decision, EP 727, served Sept. 23, 2015). But echoing prior admonitions by STB and the courts concerning Riffin, STB indicated it would instead more vigorously enforce existing regulations dealing with inappropriate behaviors. Slip op. at 4. As to such prior admonitions, see, e.g., Balt. County v. Riffin, 2007 U.S. Dist. LEXIS 99000, *3-4 (D. Md. Oct. 4, 2007) ("Riffin has made numerous attempts to disrupt valid state proceedings by filing civil rights complaints seeking injunctive relief against Baltimore County and by removing proceedings to this Court, forcing state proceedings to a grinding halt. Riffin's use of federal litigation to stonewall efforts by local authorities to enforce state law is abusive and this Court declines to facilitate those efforts any further."); Norfolk S. Ry. - Aban.

determination of some sort about the location of the Harsimus Branch as well as some additional trackage (the Hudson Street Industrial Trackage), all east of Marin Boulevard in Jersey City, New Jersey. Since that time, Riffin has purported belatedly to file three supplements to his Petition, which this Board records as filed on Dec. 1, 2 and 5.

The Harsimus Branch has already been the subject of over almost twelve years of litigation before this agency and in federal and state courts. It is currently the subject of an abandonment proceeding - AB 167-1189X, supra, note 1 - that was originally filed by Conrail in 2009. Mr. Riffin was dismissed from AB 167-1189X for failure to comply with an order compelling discovery in a decision by Administrative Law Judge Dring filed

Exemption -- in Norfolk & Virginia Beach, Va., AB 290 (sub no. 293X) (STB served Nov. 6, 2007), appeal dismissed sub nom Riffin v. STB, 331 Fed. Appx. 751 (D.C. Cir. 2009) (concluding, based on strong evidence that Mr. Riffin had filed in bad faith, that "we will closely scrutinize any future filings by Mr. Riffin ... and we strongly admonish Mr. Riffin that abuse of the Board's processes will not be tolerated"); Riffin v. Balt. County, 2012 U.S. Dist. LEXIS 98213, *13-15, 2012 WL 2915251 (D. Md. July 16, 2012) ("Mr. Riffin's litigation history bespeaks an utter disregard for the Court's procedures, which can only be remedied by appropriate sanction."). In Conrail - Ab. Ex. - in Hudson County, AB 167-1189X, served Oct. 26, 2016, at p. 2, ALJ Dring in dismissing Mr. Riffin from an abandonment proceeding found that "Mr. Riffin is not a reliable witness as to the truth of the matter to which he asserts. His deportment suggests evasiveness, deliberate obtuseness, faulty memory, and mental reservation."

on October 26, 2016. Riffin was ordered to file no more papers in the proceeding, other than for reconsideration. F.D. 36078 is merely another Riffin effort to circumvent that order. The Harsimus Branch does not need more Riffin proceedings, with their myriad of supplements, confusingly filed just before due dates.

In all events, the Riffin petition does not state a case for a declaratory judgment proceeding in light of AB 167-1189X. Riffin's real purpose is not to vindicate any railroad or shipper interest, but instead to earn a commission from developer Steve Hyman on any settlement Hyman can achieve from Conrail, Jersey City, or other local developers in order to be relieved of Riffin's delay tactics on Mr. Hyman's behalf. City of Jersey City, Rails to Trails Conservancy, and Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition ("City et al") respectfully request the Board to deny Riffin's petition for the reasons stated herein.

I.

"Under 5 U.S.C. § 554(e) and 49 U.S.C. § 721, the Board may issue a declaratory order to terminate a controversy or remove uncertainty. The Board has broad discretion in determining whether to issue a declaratory order. See Intercity Transp. Co. v. United States, 737 F.2d 103 (D.C. Cir. 1984); Delegation of

Auth.—Declaratory Order Proceedings, 5 I.C.C. 2d 675 (1989)."

212 Marin Boulevard, LLC, et al – Pet. For Dec. Order, F.D.

35825, served Aug. 11, 2014. Mr. Riffin's F.D. 36078 proceeding is barred by an order of dismissal issued by ALJ Dring on October 26, 2016. In any event, Mr. Riffin has failed to demonstrate a meaningful controversy or uncertainty for which any Board action is required.

II.

On October 26, 2016, ALJ Dring dismissed Mr. Riffin from AB 167-1189X (and related proceedings) and ordered him to file no further papers other than for reconsideration. As of December 2, 2016, Mr. Riffin had filed some four (arguably five) appellate papers with the Board.² In addition, and evidently to circumvent ALJ Dring's order, Mr. Riffin filed F.D. 36078 seeking what amounts to a determination of the location and endpoints of the east end of the Harsimus Branch. Any issues relating to the endpoint of lines east of Marin Boulevard in Jersey City at this point is clearly part of the AB 167-1189X proceeding. Riffin's petition should have been filed, if

² Mr. Riffin also appears to be trying to institute another declaratory proceeding for purposes of obtaining appellate relief from Judge Dring's October 26, 2016 decision dismissing him from AB 167-1189X. See Riffin's "Clarification" filed in AB 167-1189X, November 29, 2016. City et al oppose this subterfuge by Riffin as well. See City et al "Reply" in AB 167-1189X, filed Dec. 5, 2016.

anywhere, only in that proceeding. Yet it has nothing to do with appellate procedures from Riffin's dismissal in that proceeding. Thus, Riffin's petition in F.D. 36078 is barred by Judge Dring's order until and unless this Board reverses Judge Dring, and permits Riffin back into AB 167-1189X. Riffin's petition should be accordingly be dismissed.

III.

Mr. Riffin's petition on its face requests the agency to determine whether there are "one or more track segments" of the Harsimus Branch (for which Conrail is seeking abandonment authority in AB 167-1189X) that cross the "Metro Plaza" site east of Marin Boulevard that might qualify as lines or railroad. Riffin also wants STB to determine if the Hudson Street Industrial Trackage is a "line of railroad" requiring abandonment authorization, and if so, how it "connects" to the Harsimus Branch, and finally, whether the status quo of the Harsimus Branch must be maintained "until the OFA process in 1189X concludes." The Hyman interests unsuccessfully sought to raise these issues in Special Court in City of Jersey City v. Consolidated Rail Corporation, 968 F.Supp.2d 302, 307 (DDC 2013). The Hyman interests also raised the Hudson Street Industrial Trackage again throughout their Petition in F.D. 35825, supra, but the Board treated the matter as irrelevant to

resolution of that proceeding. Addressing that matter now is no more necessary or appropriate than it has been before.

The first question to ask is what interest triggers Mr. Riffin's concern about these matters. Mr. Riffin is not a resident of Jersey City; he resides in Maryland. He does not own property in Jersey City. He thus neither lives nor owns property near any rail line in Jersey City. He does not operate a railroad anywhere, and so far as City et al is aware, has never operated a railroad. He is not a shipper in Jersey City, or anywhere else to our knowledge. He appears devoid of any concrete interest in the Harsimus Branch or in the Hudson Street Industrial Trackage. The location of rail lines in Jersey City should be of no interest to him. Since STB has limited resources, it presumably is not interested in entertaining declaratory petitions by parties such as "frequent litigant" Riffin whose interest is at most abstract.

The closest Riffin comes to stating an interest is at pp. 5-6 of his petition where he states that "the OFA process" for the Harsimus Branch commenced "on January 6, 2009." He asserts that the status of the Branch must be maintained as it existed on January 6, 2009, and that he (Riffin) late-filed a notice of intent to OFA on June 8, 2015. He further explains that he filed a Complaint in USDC for NJ on July 20, 2016, seeking a

determination of the line status of "track segments that traversed the Metro Plaza." He says that if the track segments are "lines," then he will ask the USDC for NJ to order the developers "to maintain the status quo of the Metro Plaza parcel, until the OFA process is concluded." In short, Riffin intimates that he wishes to preserve the status quo as to any "lines" in the Metro Plaza parcel pending his OFA, if he files one. However, Riffin fails to mention that this Board, acting through an Administrative Law Judge, entered a Decision served October 26, 2016, striking all of Riffin's pleadings from AB 167-1189X, dismissing him from the proceeding, and barring him from further participation in that proceeding. This disposes of any OFA-based interest on the part of Riffin.³

³ This Board has previously rejected Riffin's purported interest in filing OFA's in Jersey City. In Conrail - Ab. Ex. - in Hudson County, AB 167-1190X, served May 17, 2010, slip at 5, this Board noted that Riffin could not be deemed financially responsible to pursue an OFA in light of a recent bankruptcy filing showing he had \$400,000 in assets, \$4,000,000 in liability, no specialized rail equipment, and only modest rental property income. In any event, the Board in that proceeding exempted the abandonment from OFA because of interference with a valid public purpose (operation of the Hudson-Bergen light rail system). Slip at 4-5. The Hudson-Bergen light rail system constitutes the eastern boundary of the Metro Plaza project. It also appears to occupy and/or traverse portions of the old Hudson Street Industrial Trackage (e.g., Hudson Street and Essex Street). Any Riffin OFA across Metro Plaza and into the Hudson Street trackage among other things would massively interfere with the light rail system, requiring at the very least several unplanned crossings. The same overriding public purpose recognized in AB 167-1190X would preclude yet another hypothetical Riffin OFA in 1189X.

But there is more going on than Riffin's ephemeral projected OFA: Riffin's invocation of the OFA process is an abuse of STB procedures, in that it has nothing to do with the provision of rail service.⁴ Riffin's real interest is hinted at pp. 13-14, para 50, where he says, "who knows, once the parties realize that the STB will render a decision, the parties may even at least make an attempt to resolve this mess on their own with some sort of settlement agreement." As the record in AB 167-1189X demonstrates, Riffin has initiated litigation against Forest City Ratner Companies, et al, who recently commenced a billion (approximate) dollar redevelopment project in the old Harsimus Cove Yard. See Riffin v. Forest City Ratner Companies, et al., USDC for NJ 16-CV-04433-ES, filed July 20, 2016 ("Metro Plaza case"). Mr. Riffin filed that case immediately after accompanying Hyman to a meeting with a principal of the project (Mr. Wasser) to threaten the Metro Plaza developers with the litigation. See Wasser Certification (Verified Statement), attached as Exhibit A.⁵ Mr. Riffin explained that he would get a 5% commission from Mr. Hyman on any recovery for the Hyman

⁴ STB says that 49 USC 10904 (OFA remedy) is for "a party genuinely interested in providing continued rail service on a line that would otherwise be abandoned to acquire that line for continued rail service." Conrail, supra, AB 167-1190X, served May 17, 2010, slip at 3.

⁵ The Certification, dated October 18, 2016, was originally filed on October 20, 2016, as an Exhibit to City et al's Reply to LLCs' Motion for Sanctions...." in AB 167-1189X.

interests. Mr. Riffin bases his standing for his federal suit against the Metro Plaza developers on his now defunct OFA. (See excerpts of Riffin's Complaint annexed to Wasser Certification). Since Riffin's participation in AB 167-1189X has recently been dismissed due to his failure to comply with an order compelling discovery into his relationship with the Hyman interests, he is now relying on F.D. 36078 to support his claim of continued standing. On November 30, 2016, Riffin filed with USDC for NJ a pleading stating that if STB institutes a declaratory proceeding, then the agency will set schedule, and if the agency does not institute a declaratory proceeding, Riffin will file an action in "Special Court." In either event, Riffin assures the USDC for NJ that he "expects much litigation" and that he "does not expect the issues will be decided any time soon." Riffin Motion for Leave to File a Reply (Exhibit B at p. 3, para 8C and 9) in the Metro Plaza case, filing dated Nov. 30, 2016.

In short, Riffin is relying now on this declaratory proceeding (F.D. 36078) and a threat to institute an action in Special Court⁶ in order to hold up the (roughly) one-billion-dollar Metro Plaza project as well as (presumably) AB 167-1189X indefinitely unless the parties reach a settlement with Hyman whereby Riffin will get his 5% commission. It is an abuse of

⁶ Notwithstanding his pretensions, Riffin lacks any standing to maintain an action in Special Court.

the OFA process for a developer to use an OFA to acquire property for development, and it is therefore an abuse of the OFA process for Mr. Riffin to use an OFA on behalf of a developer (Mr. Hyman) for that purpose. STB should not tolerate such actions from "frequent litigant" Riffin.

In all events, Riffin's effort to use the declaratory proceeding to extort a settlement for Mr. Hyman by holding up indefinitely the Metro Plaza development (and possibly other projects as well) in downtown Jersey City is not grounds for STB to initiate a declaratory proceeding. Mr. Riffin has been expelled from AB 167-1189X. He cannot file an OFA. He has no interest in AB 167-1189X and thus cannot present a controversy for resolution in F.D. 36078. His "petition" in effect does not resolve controversy; it instead creates controversy.

IV.

There is an additional, independent and compelling reason why Riffin fails to state a controversy or meaningful issue for STB resolution: that reason is that the Board is already addressing all truly relevant issues in the AB 167-1189X proceeding. In such circumstances, initiating another proceeding - whether in F.D. 36078 or in "Special Court" - is unnecessary. Even worse, it could further delay the already much delayed resolution of 1189X. That of course is Riffin's

announced intent for his declaratory proceeding. In a November 29, 2016 filing in AB 167-1189X, he boasts that any effort to constrain his filings results in him "broadening the inquiry."⁷

Conrail in AB 167-1189X is basically seeking abandonment of whatever lines it operated east of Marin Boulevard.⁸ Its intent is to encompass in that proceeding a line commencing at CP Waldo to its endpoint. In the circumstances here, it is unnecessary to determine the exact endpoint or location of the Harsimus Branch east of Marin Boulevard, nor the endpoints or exact location of any lines or ancillary trackage adjacent thereto east of Marin, nor the status of any particular former trackage east of Marin. This flows from the fact that there are no shippers on the Hudson Street Industrial Trackage or the Harsimus Branch. Indeed, Riffin admits that Conrail's last customer "was gone by 1992." Pet. Dec. Order at p. 3, para 7.

⁷ Riffin's Reply to the LLCs' November 21, 2016 Motion to Strike, AB 167-1189X, filed Nov. 29, 2016, p. 5 para 11.

⁸ In 2008, Conrail initially sought to cover both the Harsimus Branch and the Hudson Street trackage in AB 167-1189X. As Conrail's Env. Report in AB 167-1189X, filed March 12, 2008, at p. 12 indicates, the Hudson Street trackage was located on Hudson and Essex Streets. To the best of City et al's knowledge, that is now part of the Hudson Bergen Light Rail system operated by New Jersey Transit. City et al was unaware of any reason to complicate the already taxing Harsimus Branch proceeding with property now part of the existing light rail system. Under STB precedent, abandonment of the Harsimus Branch would result in abandonment (extinguishment of common carrier responsibility) of any additional trackage ancillary to it.

When there have been no shippers for 25 years, it is no longer necessary or relevant for rail transportation purposes to specify exact endpoints or trackage locations in order to ensure that common carrier service can be provided to remaining shippers seeking it.⁹ In those circumstances, all that is arguably necessary is that Conrail seek abandonment of a through line in the massive yard that used to exist east of Marin. Again, exact location in a yard and terminal area for service to shippers, or the original status of trackage as line or lead, is essentially irrelevant for transportation purposes when there has been no shipper for a quarter century, the track has all been removed, and no one requires such a determination for OFA purposes.

In these circumstances, the only issue in an abandonment proceeding is compliance with environmental and historic preservation laws for wherever the through line may be. Conrail's initial Environmental Assessment, filed on March 12, 2008, in AB 167-1189X, at p.2 indicated that all track had been removed and there were no shippers on the entire Harsimus

⁹ Nor is it necessary to specify some particular location for a legitimate OFA. City of Jersey City has already indicated that it is limiting its OFA east of Marin to property it already believes it owns for viatic purposes (namely the extension of Sixth Street). Mr. Riffin has been excluded from the proceeding. CNJ Railroad has informed the City that CNJ is supporting the City's OFA.

system, including the Hudson Street Industrial trackage. When there are no shippers and the track is removed, the Board's general position is that abandonment of a line in general poses no significant adverse environmental effects. Indeed, the Environmental Assessment, served March 23, 2009, in AB 167-1189X stated that "no rail traffic has moved over the Harsimus Branch for at least a decade and the track was removed many years ago. Consequently, there are no potential environmental impacts from diversion of traffic and salvage." Env. Assessment, AB 167-1189X, at p. 7.

In contrast to the situation east of Marin, west of Marin there are substantial environmental issues. The large Embankment structure is a designated historic landmark, protected under section 106 of the National Historic Preservation Act (NHPA), constitutes habitat, and would involve a massive amount of salvage activities to remove it. While City et al remain concerned about environmental issues relating to the Embankment portions of the Branch, those all relate to the line west of Marin Boulevard. The STB Environmental Assessment conclusion as to no significant adverse environmental effects from diversion of traffic and salvage is (to our knowledge) uncontested as to all former Conrail properties east of Marin Boulevard, regardless of the location, or eastern terminus, of the Harsimus Branch or any other possible line east of Marin

posited as ancillary to the Harsimus, such as the Hudson Street Industrial Trackage. In short, the Env. Assessment in AB 167-1189X appears to cover all abandonment environmental issues for any line east of Marin. This moots the question of location of the through line east of Marin for any NEPA purpose.¹⁰

As with environmental issues, Conrail's initial Environmental Report's history section (pp. 8-11) filed March 12, 2008, in AB 167-1189X, also dealt with the Hudson Street Industrial Trackage, but indicated that the only historic assets involved in the area involved the Embankment and adjoining historic districts and properties. As the Environmental Assessment in AB 167-1189X at p. 13 recognized, the section 106 process, including analysis of impacts on historic assets and mitigation of those impacts, had only just begun in 2009. The agency's website (under the "Environmental" "key cases" icons) includes several documents relating to section 106 analysis for the Harsimus Branch, including a 2008 "Area of Potential Effects" (APE) analysis (taking into account the Hudson Street

¹⁰ Riffin repeatedly makes inaccurate claims or characterizations about the City's actions (e.g., Riffin Pet. Dec. at 3 para 9) or the position of the City or City et al in connection with the application of federal rail regulatory law or other matters (e.g., his "Note" at the end of p. 7 n.7). Our failure to comment on any of Riffin's assertions in no way signifies agreement with his statements. Any statements which he makes that we do not address, we either deny or view as irrelevant, or both.

trackage), material dated May 2016 updating the 2008 APE, and a January 2016 analysis of public comments, all apparently prepared by consultants working for Conrail for use by the agency. The agency's approach appears designed to provide section 106 review adequate to support any rail line terminus or location east of Marin Boulevard, including the Hudson Street trackage.

In short, the existing abandonment proceeding is scoped to address all environmental and historic preservation issues germane to authorizing abandonment of any line remaining east of Marin Boulevard. To the extent the agency's section 106 analysis is not capturing the entire area where a through line may be, at this point City et al would support any reasonable additional section 106 analysis in AB 167-1189X as a far more efficient alternative than through initiating a declaratory before STB or a Special Court proceeding to determine whether an additional abandonment proceeding is necessary before AB 167-1189X can proceed. This approach will also moot any meaningful concern about a stranded line or segmentation.

City et al note that the Embankment properties west of Marin Boulevard are listed on the State Register and eligible for listing in the National Register of Historic Places. City et al reserve all their arguments that the purported sale of these

properties to the Hyman interests constitute (a) a foreclosure of meaningful comment for section 106 purposes, and (b) independently, or as a component, an anticipatory demolition of the Branch to which section 110(k) of the NHPA is applicable. City et al otherwise reserve all remedies in connection with these deficiencies.

City of Jersey City has already informed the agency that the City wishes to file an OFA for the Harsimus Branch from CP Waldo (commencement of abandonment) to Marin Boulevard, and then further eastward only as to any interest retained by Conrail east of Marin Boulevard that lies within the current bounds of Sixth Street as extended. Riffin acknowledges that this is the City's position in his Petition at p. 7, para 29. He incorrectly asserts that City thus also claims there is a rail line traversing Metro Plaza. Sixth Street as extended is the northern boundary of Metro Plaza; it does not traverse that parcel in any sense relevant to Riffin's argument. The City's only interest for rail purposes east of Marin Boulevard is for purposes of preserving a right of way for a line down Sixth Street to intersection with the Hudson-Bergen light rail system.

The City believes that it already holds sufficient interests in Sixth Street as extended to allow that extension.¹¹

The issues which Riffin seeks to raise in his proposed declaratory proceeding before STB or in his hypothetical suit in Special Court are either irrelevant to any legitimate regulatory concerns within the purview of the STB, and contrary to the interests of City et al insofar as Riffin causes a delay in AB 167-1189X as Riffin apparently intends.

Treatment of AB 167-1189X as encompassing all "lines" east of Marin Boulevard will not implicate Special Court jurisdiction because STB need not make a determination that is within the Special Court's jurisdiction, nor does STB need to defer action in AB 167-1189X pending a ruling in a Special Court proceeding Riffin might initiate. Encompassing those issues in AB 167-1189X will deprive Riffin and his developer ally of an opportunity to delay matters in Special Court, assuming Riffin has standing (which we view as doubtful) to bring a case there. It will also moot this declaratory proceeding. And this in turn will preserve the scarce resources of the agency for cases in

¹¹ Riffin claims that Sixth Street was a through line and questions City's title. Riffin Pet. p. 8, para 31. Completion of AB 167-1189X will resolve all Riffin's purported concerns for the City's title. Initiating more declaratory proceedings at STB or in Special Court is not only unnecessary but also antithetical (in terms of causing delay) to resolving Riffin's concern for the City.

which there is a genuine controversy or a question that truly does require resolution.

V.

Riffin's "petition" effectively seeks to re-litigate issues that were dispositively resolved by the Special Court in City of Jersey City et al v. Consolidated Rail Corp., 968 F.Supp.2d 302, 307 (DDC 2013). After the U.S. Court of Appeals for the D.C. Circuit rejected the LLC's and Conrail's attack on the standing of City et al to seek a determination concerning the line status of the Harsimus Branch, the Hyman interests stipulated that the Harsimus Branch was conveyed to Conrail as a "line" subject to STB jurisdiction.¹² After so stipulating, the Hyman interests still refused to consent to judgment, and instead sought to amend their Answer to include cross and counter claims for fraudulent misrepresentation by Conrail and for a determination of the status and location of line code 1440 (Hudson Street Industrial Trackage) and the location of the Harsimus Branch east of Marin.¹³ The Special Court denied leave

¹² Riffin alludes to this stipulation in his Dec. Pet. at p. 4 para 12.

¹³ See "Amended Answer...." (Document 87) filed 10/4/2012 by 212 Marin Blvd LLC, et al in City of Jersey City, et al. v. Consolidated Rail Corporation, USDC for DC 09-cv-1900, pp. 20-30 & prayer for relief p. 42 (asks for setting the location of line codes 1420 and 1440).

to amend. The Special Court viewed the proposed amendments as unreasonably expanding the scope of the litigation into new issues and causing "substantial delay in the resolution of this case." City of Jersey City et al v. Consolidated Rail Corp., 968 F.Supp.2d 302, 307 (DDC 2013). The Special Court viewed its exclusive jurisdiction as involving whether the track was conveyed as a rail line subject to STB jurisdiction. Since the Harsimus Branch by stipulation was so conveyed, the Court granted summary judgment to that effect. Id. 307-08.

Riffin in his F.D. 36078 Petition now seeks almost identical "relief" to that the Hyman interests unsuccessfully sought from the Special Court in 2012. It is no more necessary to cause "substantial delay" to resolution of AB 167-1189X now with the LLCs' issues than it was then. And is certainly vastly more untimely. Riffin (and the LLCs) have waited too long to embark on this path now, even if they had standing, which they do not. The ruling of the Special Court is now the law of the case/res judicata, and Riffin is estopped from re-litigating this issue

VI.

The Hyman interests on December 2, 2016, filed a notice of intent to participate and comment which appears to express concern about delays arising from Riffin's F.D. 36078, and to

call on the Board to resolve any appellate procedures concerning whether Riffin is dismissed from AB 167-1189X. If he is dismissed, then the Hyman interests view Riffin as lacking any concrete interest and standing to pursue claims relating to trackage east of Marin Boulevard "anywhere." 212 Marin Boulevard Notice and Request in F.D. 36078, filed Dec. 2, 2016. City et al take the position Riffin's F.D. 36078 is already barred until and unless this Board reverses Judge Dring.

Riffin in AB 167-1189X represented to the Board that "Riffin is Hyman's 'back up plan'"¹⁴ and has confessed to third parties that he has a deal with Mr. Hyman for a 5% commission if he contributes to a result favoring the Hyman interests. See Exhibit A. He thus employs arguments made elsewhere by the Hyman interests, and from time to time they cannot resist subscribing to aspects of his creed. In consequence, even though Riffin is supposed to be their target, the Hyman interests in their comments filed December 2, 2016, in F.D. 36078 launch another attack on City et al, making a number of factual claims and statements that are misleading or false. We will address one of those (the claim of discrimination or

¹⁴ Riffin Response in AB 167-1189X, filed June 11, 2015, p. 10 para 40E.

favoritism at p. 5-6 of their pleading), without admitting any others, in a footnote.¹⁵

VII.

Riffin filed his petition in this proceeding on November 16, 2016, and then proceeded to supplement it with documents the Board records as filed on December 1, 2 and 5, the days immediately before the due date for replies. City et al object to this abuse of STB procedures.¹⁶ Riffin's petition

¹⁵ As to Hyman interest claims that the City is discriminating against Hyman or showing favoritism to other developers, the Board has rejected such claims since its Decision in City of Jersey City - Pet. Dec. Order, F.D. 34818, served Dec. 19, 2007, slip op at 7. As developers and land use planners elsewhere know, properties differ in terms of characteristics and location. The Embankment portion of the Harsimus Branch is protected by section 106, is a City Landmark, and offers unique viatic benefits (e.g., grade separation) all the way to CP Waldo and to the Bergen Arches Erie Cut. These characteristics are not present east of Marin. Moreover, Sixth Street extended east of Marin Boulevard intersects both the existing Hudson-Bergen light rail system and the Hudson River Waterfront Walkway (already part of the East Coast Greenway), which City regards as adequate for connectivity purposes. In short, the Hyman interests are not being treated unfairly or discriminated against. City is not showing favoritism. City is merely addressing its limited resources to matters where it has an interest. Furthermore, the City notes that the LLCs' admit that Riffin has no standing "anywhere" (at least unless his dismissal from AB 167-1189X is overturned) for his only "interest" is by reason of his late-filed notice of intent to OFA). See LLCs' "Notice and Request" in F.D. 36078, filed Dec. 2, 2016, at p. 3.

¹⁶ In Exhibit B, Riffin told a Court (para 12A at p. 4) that "no discovery" by him was necessary for he intended to rely on the record in F.D. 34818 for purposes of his claims. The record in F.D. 34818 has been available for roughly a decade, thus belying any excuse for belated petitions much less supplementation on the same claims in F.D. 36078. Riffin also tells the Court that

should be dismissed or denied as soon as practicable, not prolonged by interminable supplements to his filings. His filings are irrelevant to refute any of the arguments City et al present here.

City et al note that this Board's rules provide that replies to replies are not permitted. 49 C.F.R. 1104.13(c). City et al object to any further supplements, clarifications, notices, replies, responses, petitions and so forth by Mr. Riffin. Such filings are not permitted.

Conclusion

STB should deny Riffin's petition for a declaratory order. Riffin has been dismissed from AB 167-1189X and barred from filing documents other than those appellate in nature. His petition in F.D. 36078 is a subterfuge to evade that order. In any event, he has insufficient interest to claim a controversy sufficient to warrant a declaratory proceeding at STB. His chief purpose in this proceeding is to hold up the AB 167-1189X

there is a pressing need for prompt resolution of his issues. Exhibit B at p.6. His claims should have been made long ago (or were by others and rejected). They are interposed now to disrupt AB 167-1189X. His admissions in Exhibit B implicate estoppel, waiver and laches as grounds to dismiss F.D. 36078. "The orderly disposition of cases by the Board requires that parties make their arguments at the appropriate time." PYCO Industries - Feeder Line Application - Lines of South Plains Switching, Ltd., F.D. 34890, served June 11, 2010, slip op. at 8.

and the Metro Plaza project in order to obtain a commission from the Hyman interests. In addition, the issues Riffin seeks to raise are moot given the scope of the NEPA and NHPA analysis in AB 167-1189X. To the extent not fully moot, the NEPA and NHPA analysis east of Marin Boulevard in AB 167-1189X should be broadened to ensure that Riffin's issues are rendered moot. City et al request that STB avoid further delays in AB 167-1189X arising from Riffin declaratory proceedings either at the agency or by somehow implicating the jurisdiction of the Special Court or in any way requiring Special Court involvement.

Respectfully submitted,

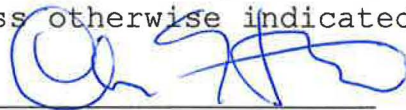


Charles H. Montange
426 NW 162d St.
Seattle, WA 98177
(206) 546-1936
Fax: -3739
Counsel for City et al

Exhibit A - Wasser Verified Statement and excerpts from
Riffin Complaint in Metro Plaza case
Exhibit B - Riffin Motion for Leave served 30 Nov. 2016
in Riffin v. Forest City Ratner Companies,
USDC for NJ 16-cv-04433-ES.

Certificate of Service

The undersigned hereby certifies service by posting the foregoing in the US Mail, postage pre-paid, first class or priority mail, on or before the 6th day of December 2016 addressed to the parties or their representatives per the service list below, unless otherwise indicated.



Service List

James Riffin
PO Box 4044
Timonium, MD 21094

Eric S. Strohmeier
Vice President, COO
CNJ Rail Corporation
81 Century Lane
Watchung, NJ 07069

Daniel Horgan,
Waters, McPherson, McNeill, P.C.
300 Lighting Way
P.O. Box 1560
Secaucus, NJ 07096

Robert M. Jenkins III
Mayer Brown LLP
1999 K Street, N.W.
Washington, D.C. 20006-1101

Exhibit A

Wasser Certification

Excerpts from Riffin Complaint

Riffin v. Forest City Ratner Companies

Before the Surface Transportation Board

STB Docket No. AB -167 (Sub-No. 1189X)

**CONSOLIDATED RAIL CORPORATION - ABANDONMENT EXEMPTION - IN HUDSON
COUNTY, NJ**

STB Docket No. AB-55 (Sub-No.686X)

**SXC TRANSPORATION, INC. - DISCONTINUANCE OF SERVICE EXEMPTION - IN
HUDSON COUNTY, NJ**

STB Docket No. AB-290 (Sub-No.306X)

**NORFOLK SOUTHERN RAILWAY COMPANY - DISCONTINUANCE OF SERVICE
EXEMPTION - IN HUDSON COUNTY, NJ**

Certification of Gregg Wasser

I, Gregg Wasser, being of full age, do hereby certify as follows:

1. I am the President of Jersey City Associates Inc., the General Partner of G&S Investors/Jersey City, L.P., which is a member of GS FC Jersey City Pep 1, LLC ("GS FC Jersey City"). I make this Certification in support of the Motion on Behalf of City of Jersey City et al for Sanctions against James Riffin for Failure to Respond to Discovery (Document) Requests.

2. On July 20, 2016, I attended a meeting with Steven Hyman at my office in New York City. I understood Mr. Hyman to be speaking to me on behalf of his wife and certain limited liability companies that she controls (the "Hyman LLCs"). I further understood that the Hyman LLCs are engaged in the dispute with Consolidated Rail Corporation ("Conrail") and the City of Jersey City, New Jersey ("Jersey City"), that is the subject matter of this action before the Surface Transportation Board.

3. During my meeting with Mr. Hyman, he stated to me that there was someone from out of town whom I should meet or words to that effect. Shortly thereafter, James Riffin appeared at my office without an appointment or any other notice and joined the meeting at Mr. Hyman's behest.

4. I understood Mr. Riffin to be an individual who had previously written to GS FC Jersey City threatening to file a lawsuit relating certain alleged rail rights.

5. When I spoke to Mr. Riffin, I asked him why he was at my office. In response, he stated he had told Mr. Hyman that he wanted 5% of whatever monetary recovery the LLCs might obtain through the resolution of their dispute with Jersey City and Conrail. Mr. Hyman then permitted Mr. Riffin to present to me an argument on why Conrail should pay the Hyman LLCs to settle the dispute. Consequently, I understood that Mr. Hyman had agreed to pay to Mr. Riffin 5% of whatever recovery the Hyman LLCs might receive.

6. Also on July 20, 2016, Mr. Riffin filed a Complaint for Declaratory Order in the United States District Court for the District of New Jersey, captioned *James Riffin v. Forest City Ratner Companies, G&S Investors/Jersey City, L.P., G&S Metro Plaza LLC, GS FC Jersey City Pep-I-Urban-Renewal-LLC, and GS-FC-Jersey City Pep II-Urban-Renewal LLC*, Civil Action No. 16-cv-04433 ES-JAD. A true copy of that Complaint for Declaratory Order is attached hereto as Exhibit A.

I certify that the foregoing statements made by me are true. I understand that any of the foregoing statements made by me are willfully false I am subject to punishment.

Dated: October 18, 2016



GREGG WASSER

EXHIBIT A

IN THE U. S. DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

JAMES RIFFIN

P.O. Box 4044

Timonium, MD 21094

(443) 414-6210

Plaintiff

*

*

*

*

V.

FOREST CITY RATNER COMPANIES

1 Metro Tech Center

Jay Street

Brooklyn, NY 11201

(718) 923-8400

*

*

*

G & S INVESTORS / JERSEY CITY, L.P.

25th Floor

211 E. 43rd Street

New York, New York 10017

(212) 286-8100

*

*

*

G & S METRO PLAZA LLC

25th Floor

211 E. 43rd Street

New York, New York 10017

(212) 286-8100

*

*

*

GS FC Jersey City Pep I Urban Renewal LLC

c/o Forest City Residential Group, Inc.

50 Public Square, Terminal Tower Ste 1100

Cleveland, Ohio 44113

*

*

*

GS FC Jersey City Pep II Urban Renewal LLC

c/o Forest City Residential Group, Inc.

50 Public Square, Terminal Tower Ste 1100

Cleveland, Ohio 44113

*

*

Defendants

*COMPLAINT FOR
DECLARATORY ORDER*

**COMPLAINT FOR DECLARATORY ORDER,
PRELIMINARY INJUNCTION, PERMANENT INJUNCTION**

1. Comes now your Plaintiff, James Riffin ("**Riffin**"), who herewith files this Complaint for a Declaratory Order, asking the Court to determine the property rights of Riffin in a parcel of land situated in Jersey City, Hudson County, New Jersey, commonly known as Metro Plaza ("**Metro Plaza**"), formerly known as the Harsimus Cove Rail Yard, formerly owned by the Penn Central Railway Company, and by the Consolidated Rail Corporation ("**Conrail**"), as detailed below.

2. In the event that the Court determines that Riffin does in fact have property rights in portions of the Metro Plaza Parcel, Riffin further asks the Court to enjoin the Defendants, and their employees, agents, and any person or entity acting on behalf of the Defendants, from changing the status quo of the Metro Plaza Parcel, as it existed on **January 6, 2009**. [The date Conrail filed its abandonment exemption, docketed AB 167 (Sub-No. 1189X), seeking authority to abandon its lines of railroad that traverse Metro Plaza / the former Harsimus Cove Rail Yard. See ¶¶ 15, 68, below.]

THE CONTROVERSY

3. When the Offer of Financial Assistance ("**OFA**") process began in AB 167 (Sub. No. 1189X), (on **January 6, 2009**), [see 49 U.S.C. 10904, 49 CFR 1152.27 and ¶¶ 69-78 below], the rail assets associated with that abandonment proceeding, **must remain in place, undisturbed**, until the OFA process has concluded.

4. Plaintiff argues that beginning in **August, 2015**, the Defendants unlawfully began disturbing the rail assets associated with the Metro Plaza parcel, by demolishing the Pep Boys building, and by beginning to construct the first of multiple hi-rises.

5. Plaintiff further argues that the Defendants' putative title to the Metro Plaza parcel is infirm (is void *ab initio*), since the Metro Plaza parcel is encumbered by multiple lines of railroad, none of which have been abandoned, and since the Defendants, as non-rail carriers, are prohibited by 49 U.S.C. 10901(a)(4) from acquiring any legal interest in a line of railroad, or in the real estate associated with a line of railroad, without prior authority from the Surface Transportation Board.

BRIEF HISTORY OF THE METRO PLAZA PARCEL

6. On April 1, 1976, the **Harsimus Cove Yard** ("Yard"), located in Jersey City, NJ, was conveyed to Conrail via the Final System Plan. Appx 159. Conrail operated several lines of railroad that traversed the Yard. Rail operations in the Yard ceased in 1988.

7. On August 19, 1985, Conrail conveyed to **National Bulk Carriers, Inc.**, the Defendants' predecessor in title, 18 acres of the Harsimus Cove Yard. See liber 3468, folio 64. Appx 191.

8. On January 31, 1994, National Bulk Carriers deeded the majority of the land it acquired from Conrail, to **G & S Investors / Jersey City L.P.** See liber 4690, folio 303. Appx 197.

9. Defendant G&S Investors developed the Parcel.

10. The approximate 8-acre portion of the Yard bounded by Gangemi Drive on the north (6th Street), Marin Blvd. on the west, 2nd street on the south, and the Hudson Bergen Light Rail Line on the East, known as **Metro Plaza**, had structures built on it. The structures were occupied by **Pep Boys**, in the north east corner, **Bed Bath and Beyond**, in the north west corner, by **Shop Rite**, in the south west corner, and by **BJ's Warehouse** in the south east corner. The center / remainder of the 8-acre parcel, was used as a parking lot. See Ex. 2C, Appx 13.

11. In 2005, Conrail sold an adjacent parcel, known as the Embankment (which parcel was south of, and parallel to, 6th Street), to several limited liability companies (the "LLCs"). Jersey

City coveted the Embankment parcel. Litigation between the LLCs and Jersey City began, and continues today.

12. In 2009, at the request of Jersey City, the Surface Transportation Board (“STB”) [the Federal agency that regulates railroads / formerly known as the Interstate Commerce Commission (“ICC”)], determined, and ordered, that **the Embankment parcel was CONVEYED to Conrail as a line of railroad**, and further determined that Conrail **had not sought, nor received, authority** to abandon the Embankment parcel. In 2013, the U.S. District Court for the District of Columbia, sitting as the **Special Court**, granted Jersey City’s motion for summary judgment, determining and ordering that the Embankment parcel **was a line of railroad**. See 09 cv 1900, 2013 WL 5423964 (D.D.C. Sept 30, 2013). The D.C. Circuit affirmed the Special Court’s summary judgment order. See D.C. Circuit Appeal No. 13-7175, Decided February 19, 2014.

13. Per **49 U.S.C. 10903**, lines of railroad may not be abandoned, nor sold, without prior authority from the STB. Per **49 U.S.C. 10901(a)(4)**, non-rail carriers may not acquire a line of railroad, without prior authority from the STB.

14. Conrail **never sought, nor received, authority to abandon, nor to sell, nor did the LLCs, or National Bulk Carriers (the Defendants’ predecessor in title), seek, or obtain, authority to acquire, the lines of railroad that traversed the Embankment parcel (the LLCs’ parcel), and that traversed the Harsimus Yard (traversed the Defendants’ Metro Plaza Parcel).**

15. On **January 6, 2009**, pursuant to 49 CFR 1152.50 (no rail traffic for past two years), Conrail filed an abandonment Notice of Exemption (“NOE”), seeking authority from the STB to abandon its Harsimus Branch. Conrail’s NOE stated that the Harsimus Branch went from Waldo Street, in Jersey City (MP 0.0), through the Harsimus Yard, (MP 0.88 is where the Harsimus Branch crosses Marin Blvd.), to MP 1.36, a point some distance **East** of Washington Street. See Ex. 5-A, Appx 23, a STB graphic depicting the approximate location of the Harsimus Branch.

16. On **March 19, 2009**, Jersey City and CNJ Rail Corporation, pursuant to 49 U.S.C. 10904

LINES OF RAILROAD

20. A line of railroad has been defined as a railroad right-of-way that is used to transport through-traffic rail cars. To be a line of railroad, the right-of-way must service more than one shipper. See Riffin's Verified Statement ("VS") at 4.

21. The Harsimus Cove Yard had at least six lines of railroad traversing it. See Plaintiff's Exhibits 1A - 1D, Appx 1,3,5,7 and VS 36-40.

- A. The Harsimus Branch main line, colored-coded **BLUE** by the Plaintiff on Plaintiff's Exhibits 1B - 1D, Appx 3,5,7, VS 39, as it entered and traversed the Yard.
- B. The Hudson Street Industrial Track, colored-coded **BLUE** by the Plaintiff on Plaintiff's Exhibits 1C - 1D, Appx 5, 7, VS 39, as it entered, traversed the Yard, and connected to the Harsimus Branch.
- C. The railroad right-of-way, colored-coded **BROWN** by the Plaintiff on Plaintiff's Exhibits 1B - 1D, Appx 3,5,7, VS 36-37, that was used to transport rail cars to Elk Warehouse and Chicago Shippers, located on the north side of the pier at the east end of Gangemi Drive (6th Street), that juts into the Hudson River.
- D. The railroad right-of-way, colored-coded **PURPLE** by the Plaintiff on Plaintiff's Exhibits 1B - 1D, Appx 3,5,7, VS 37-38, that was used to transport rail cars to the south side of the pier at the east end of Gangemi Drive (6th Street), that juts into the Hudson River.
- E. The railroad right-of-way, colored-coded **RED** by the Plaintiff on Plaintiff's Exhibits 1B - 1D, Appx 3,5,7, VS 38, that was used to transport rail cars to the car float ferry that transported rail cars to the Brooklyn East District Terminal, in Brooklyn, NY.

F. The railroad right-of-way, colored-coded **ORANGE** by the Plaintiff on Plaintiff's Exhibits 1B - 1D, Appx 3,5,7, VS 39, that was used to transport rail cars to the sidings that went to the warehouses located immediately east of Marin Blvd, between 2nd street and 5th street.

22. At least two of the above lines of railroad [D & E], traversed the portion of the Metro Plaza Parcel that is enclosed within the August, 2015-erected construction fence. See Ex 1-C, 2-A, 2-B, 2-C, 2-E, 5-B, Appx 5, 9, 11, 13, 19, 25, VS 37, 38.

23. Since disturbance of a line of railroad, and the assets associated with that line of railroad, or activities that "can obstruct or impede the efforts of the offeror to provide rail service," are prohibited by Federal law (once an OFA proceeding has commenced), the Defendants' present disturbance and activities, and the Defendants' publicly announced prospective future disturbance and activities, of the Metro Plaza parcel, and the portion of the Metro Plaza Parcel enclosed within the newly-erected construction fence, is prohibited by Federal law.

24. Since Riffin has the right to file an OFA to acquire whatever assets Conrail acquired when it acquired the Harsimus Branch, limited only by Riffin's declared intention of acquiring only rail assets located between MP 0.0 (Waldo Street) and the West side of the Hudson Bergen Light Rail right-of-way, Riffin has Equitable Title to the entirety of the Metro Plaza Parcel, which Equitable Title, once perfected, will be superior to, whatever title the Defendants may lawfully possess in the Metro Plaza Parcel.

25. By 'superior to,' Riffin means that Riffin would have the right to exclusive possession of the full width and length of whatever land he takes title to, from the center of the earth to the heavens.

26. By 'whatever title the Defendants may lawfully possess in the Metro Plaza Parcel,' Riffin means that Riffin questions, and challenges, the Defendants' right to lawfully possess any title to the rights-of-way associated with the lines of railroad that traversed the Metro Plaza Parcel.

27. The Defendants, being non-rail carriers, are prohibited by **49 U.S.C. 10901(a)(4)**, from acquiring **any** title to any portion of the rights-of-way associated with the lines of railroad that traversed the Metro Plaza Parcel, without the authority of the STB. Since neither the Defendants, nor their predecessors in title, have ever acquired authority from the STB to acquire the lines of railroad that traverse the Metro Plaza Parcel, their possession of the lines of railroad that traverse the Metro Plaza Parcel, is unlawful, and their ‘deeds’ are void *ab initio*.

28. Lines of railroad **cannot** be abandoned (**49 U.S.C. 10903**), nor acquired by non-rail carriers [**49 U.S.C. 10901(a)(4)**], without prior STB authority.

29. **An easement, whether temporary or permanent, which is used as a line of railroad, cannot be abandoned or ‘terminated,’** without prior STB authority. See 49 U.S.C. 10903, *AT&SF – Abandonment Exemption – In Lyon County, KS*, ICC Docket No. AB-52 (Sub-No. 71X), decided June 11, 1991, VS 16-18, and see *Thompson v. Texas Mexican Ry. Co.*, 328 U.S. 134 (1946), where the Supreme Court said:

“Sec 1(18) [now 49 U.S.C. 10903] embraces operations under trackage contracts, as well as other types of operations.” *Id.* at 144. Bold added.

“Though the contract were terminated pursuant to its terms, a certificate would still be required under s 1(18).” *Id.* at 145.

“There would be no difference in result merely because the trackage contract expired by its terms or was terminated by operation of an escape clause. Until abandonment is authorized, operations must continue.” *Id.* at 147. Bold added.

JURISDICTION – FEDERAL QUESTION

30. 28 U.S.C. 1331 grants U.S. District Courts jurisdiction over “all civil actions arising under the Constitution, laws, or treaties of the United States.”

31. The property rights of the Plaintiff, derive from Federal Statutes [49 U.S.C. 10903 (abandonment of lines of railroad) and 49 U.S.C. 10904 (Offers of Financial Assistance)], and

Federal Regulations [49 CFR 1152.50 (abandonment of lines of railroad – no rail service for past two years) and 49 CFR 1152.27 (Offers of Financial Assistance)].

JURISDICTION – *IN REM*

32. The property rights at issue, involve a parcel of land situated in Jersey City, Hudson County, New Jersey, which Parcel lies within the geographical area over which the Court has jurisdiction.

33. The property rights at issue, have substantial value.

34. The Metro Plaza Parcel, has substantial value.

35. The Defendants may have varying degrees of Property Rights in the Metro Plaza Parcel that is the subject of this Complaint.

JURISDICTION – OVER THE DEFENDANTS

36. All of the Defendants reside in the United States.

37. All of the Defendants will receive personal service of the Complaint and Summons.

38. The Defendants have / have noted their intention to, deliberately engage in substantial, systematic and continuous demolition and construction activities on, about, and concerning the Metro Plaza Parcel that is the subject of this Complaint, as more fully detailed below.

39. A Legal Notice will be published in the *Star Ledger*, a Hudson County newspaper of general circulation, after the Complaint is filed, giving Notice to all interested parties, that this Complaint was filed, and giving Notice that the Court is being asked to determine the Property Rights of Riffin, with respect to the Metro Plaza Parcel. See Plaintiff's Certificate of Service.

40. Multiple Legal Notices will be conspicuously posted on and about the Metro Plaza Parcel, after the Complaint is filed, giving Notice of this Complaint. See Plaintiff's Certificate of Service.

VENUE

41. The Parcel of land that is the subject of this Complaint, is situated in Jersey City, Hudson County, New Jersey, which is within the geographical boundaries of this Court's jurisdiction. Therefore, the Court has Venue to hear the Complaint.

PARTIES

42. James Riffin is an individual who desires to obtain, via the Offer of Financial Assistance provisions of 49 U.S.C. 10904, the lines of railroad situated in Jersey City, that Conrail proposes to abandon, which lines of railroad are the subject of a proceeding before the Surface Transportation Board ("STB") (the Federal agency that regulates railroads), which STB proceeding has been docketed AB 167 (Sub. No. 1189X).

43. Riffin's principal office is located in New Jersey.

44. The Defendants may have varying degrees of property rights in the parcel of land commonly known as Metro Plaza, which parcel of land is bounded on the north by Gangemi Drive (6th Street), on the west by Marin Blvd., on the south by 2nd Street, and on the east by the Hudson Bergen Light Rail Line. ("Metro Plaza" or "Parcel"). The Defendants' putative property rights are summarized below.

45. The principal offices of the Defendants are located in New York, New Jersey and Ohio.

ADDITIONAL FACTS

Exhibit B

Riffin Motion for Leave to File

In

Riffin v. Forest City Ratner

Served Nov. 30, 2016

**IN THE U. S. DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY
NEWARK DIVISION**

JAMES RIFFIN

*

V.

*

Case No.: 16 - CV - 04433 - ES

FOREST CITY RATNER COMPANIES, et. al

*

Return Date: November 24, 2016

* * * * *

MOTION FOR LEAVE TO FILE

A REPLY TO

DEFENDANTS' NOVEMBER 29, 2016 LETTER TO JUDGE DICKSON

1. Comes now your Plaintiff, James Riffin ("**Riffin**"), who respectfully **seeks leave of the Court** to File this Motion for Leave to File a Reply to the Defendants' November 29, 2016 Letter to Judge Dickson ("**Letter**"), wherein the Defendants:

"[R]equest that the time frame during which Mr. Riffin can file a Complaint in this Court be limited to 90-days from the November 17, 2016 hearing." Letter at 1.

2. On **October 27, 2016**, MJ Dickson issued an Order prohibiting the parties in this proceeding from filing any further pleadings without express leave of the Court.

3, On **November 17, 2016**, the Court issued an oral order dismissing, without prejudice, Plaintiff's Complaint, and further ordering that (A) Plaintiff could re-file his Complaint within six months of November 17, 2016; (B) any statute of limits would be tolled during the six-month period; (C) Plaintiff could seek an extension of the six month period if the Surface Transportation Board ("**STB**") failed to provide Plaintiff with the remedies Plaintiff seeks: A determination of whether any of the track segments that traversed the Metro Plaza parcel are

unabandoned, lines of railroad.

4. Once again, Defendants seek to file an additional motion, **without requesting leave of the Court**, asking the Court to amend the oral order rendered on November 17, 2016.

PLAINTIFF'S REPLY

5. In the event the Court grants Plaintiff leave to file this Reply, Plaintiff respectfully replies:

6. The Defendants correctly note:

A. Whether the STB will grant Plaintiff's Petition for Declaratory Order (STB FD 36078), is discretionary; (That is, the STB is **not required** to institute a declaratory order proceeding.¹)

B. Any opposition is due on December 6, 2016.

7. The Defendants **incorrectly surmise** that the STB Declaratory Order proceeding would be "ripe for decision as soon as December 6, 2016." Letter at 1.

8. The sequence of events will be as follows:

A. Sometime after December 6, 2016, the STB will decide whether it will institute a declaratory order proceeding.

¹ There are two potential reasons why the STB would not institute a Declaratory Order proceeding: (A) There is no 'controversy' or 'uncertainty,' and / or the STB is unable to resolve the controversy or uncertainty. (B) The STB does not have the requisite jurisdiction to address the underlying issue. [The STB may determine that the controversy should be addressed by, and resolved by, the Special Court (D.C. D.C.), which has the exclusive jurisdiction to determine which track segments, if any, were **conveyed** to Conrail as lines of railroad. The STB's jurisdiction is limited to determining whether Conrail **used** any of the track segments as lines of railroad.]

B. **IF** the STB institutes a declaratory order proceeding, the STB will set a procedural schedule.

C. **IF** the STB **declines** to institute a declaratory order proceeding, Riffin will then file a Complaint in the Special Court, asking the Special Court to determine what was **conveyed** to Conrail. The Special Court then will set a procedural schedule.

9. Riffin expects much litigation. Riffin does not expect that the issues will be decided any time soon.

10. Jersey City filed a similar declaratory order request on **January 12, 2006**.² See STB FD 34818. The STB instituted the Jersey City declaratory order proceeding on **February 8, 2006**. The STB served its decision in that proceeding on **August 9, 2009**. Then the issue was taken to the Special Court, which rendered its final decision on **September 30, 2013**.

11. While it is reasonable to expect the STB to render a decision either granting, or denying, Riffin's request for a declaratory order proceeding within a week or two after December 6, 2016, (the FD 34818 decision was rendered in less than 30 days) it is totally **unreasonable** to expect that the issues will be resolved within 90 days. [It took seven years to resolve the FD 34818 issue (ultimately holding that the Embankment portion of the Harsimus was **conveyed** to Conrail as a line of railroad).]

² Jersey City limited its declaratory order proceeding to that portion of the Harsimus Branch that lies **West** of Marin Blvd. Riffin's declaratory order proceeding addresses the portion of the Harsimus that lies **East** of Marin Blvd, and addresses the Hudson Street Industrial Track, which lies **East** of Marin Blvd. (From a point within the Metro Plaza parcel, south down Hudson Street, then east along Essex street to its terminus. Had Jersey City included the portion of the Harsimus Branch that lies **East** of Marin Blvd, there would be no need for Riffin's declaratory order proceeding. It all would have been sorted out several years ago. So any 'uncertainty' is solely due to Jersey City's decision to limit its inquiry to the portion of the Harsimus that lies **West** of Marin Blvd.

12. Riffin **does not expect** his declaratory order proceeding to take very long to resolve:

- A. All of the discovery (or at least most of it) has already been completed. (Riffin will be using the same material in his declaratory order proceeding that was adduced in the FD 34818 proceeding.)
- B. Jersey City has advocated both in its FD 34818 proceeding, and in the 1189X proceedings, that there is a 'line of railroad' traversing the Metro Plaza parcel:

"Conrail should have obtained authority from ICC or STB to abandon that portion of the **Harsimus Cove facility** which was **through track** ... as a 'line of railroad.' " Jersey City's Opening Statement in FD 34818 at 36.

"City has no objection if Conrail in response to this Board's ruling in this case decides to seek an abandonment authorization, encompassing the **through line** from MP 1.3 to MP 1.0 **in the Cove**. In general, Conrail should bring itself into compliance with applicable law." Jersey City Opening Statement in FD 34818 at 36-37.

"Based on inquiry to STB, yard track in general is subject to STB jurisdiction, but is exempt from STB abandonment approval, **except for the last through track in a yard**, per 49 USC 10906. Conrail could thus lawfully sell off the yard, **except the last through track**. City et al.'s November 4, 2016 Reply at p. 37 - 38, to Riffin's October 31, 2016 Petition for Other Relief in 1189X.

13. Since most, if not all, of the discovery has been completed, and since Jersey City has **already admitted** to the STB that there is **at least one line of railroad traversing the Metro Plaza parcel**, the pace of the proceeding should be much accelerated. However, given the intensity of the litigation that Riffin is expecting, it still will take some time to resolve the issue of how many unabandoned lines of railroad traverse the Metro Plaza parcel.

14. While Riffin is hopeful that a final determination can be obtained within six months, it is **highly unlikely** that a final determination will be obtained within 90 days.

15. Riffin appreciates the uncertainty that the Defendants feel. However, the uncertainty is of the Defendants own making: The Defendants bought real property known to have been used

extensively for through rail traffic.³ The Defendants failed to intervene in the FD 34818 proceeding. Had the Defendants intervened in the FD 34818 proceeding (or had the Defendants instituted their own declaratory order proceeding some years ago), the Defendants would have already learned whether unabandoned lines of railroad traverse the Metro Plaza parcel.

16. And given the intensity, and notoriety, of the litigation associated with the adjacent, Embankment portion of the Harsimus Branch, the Defendants were on notice, quite some years ago, that there was a very high probability that unabandoned lines of railroad traversed the Metro Plaza parcel. (After all, the Harsimus quite obviously did not abruptly terminate on the West side of Marin Blvd, some fifteen feet up in the air. And had the Defendants done even a modest amount of historical research before acquiring the Metro Plaza parcel, the Defendants would have known that the Colgate Palmolive company occupied a substantial part of Jersey City next to the water front, south of present day Columbus Blvd, for decades, and that thousands of rail cars traversed the Metro Plaza parcel en route to the Colgate Palmolive company, and to other industries / shippers located along Hudson and Essex streets. Which would make the track segments traversing the Metro Plaza parcel 'lines of railroad.'

17. In *City of Jersey City v. 212 Marin Blvd. et al.*, Superior Court of New Jersey, Appellate Division, Docket No. A-2207-13T1, decided August 28, 2015, the court held:

"On July 12, 2005, the LLCs purchased the Embankment properties from Conrail. ... At the time the sale took place in 2005, Conrail had not petitioned the STB for abandonment. Although the record is not entirely settled about whether the LLCs were **actually aware** of the abandonment requirement, the federal statute's clear mandate **makes this point irrelevant**. **ALL** of the parties to this transaction **were constructively on notice of this and any other relevant legal requirement** related to the purchase of this property." *Id.* at 7. Underline in original. Bold and caps added.

³ The STB held, in its **August 9 2007** decision in FD 34818, that the Harsimus Branch had been **used** as a line of railroad **since its inception**. The STB further held that the Embankment portion of the Harsimus was **conveyed** to Conrail as a line of railroad. While the Circuit Court vacated the STB's decision on jurisdictional grounds, the Special Court ultimately agreed with the STB's findings.

18. Riffin agrees with the Defendants: There is a pressing need to as-quickly-as-possible, determine whether unabandoned lines of railroad traverse the Metro Plaza parcel. For if there are unabandoned lines of railroad that traverse the Metro Plaza parcel, the Defendants' title to their parcels is decidedly less than fee simple.

19. However, Riffin does not control how quickly the process will play out.

20. WHEREFORE, Riffin respectfully seeks leave of the Court:

A. To file this Motion for Leave to File a Reply to the Defendants' November 29, 2016 Letter (Motion) to modify the Court's November 17, 2016 oral order;

B. To file the above Reply to the Defendants' November 29, 2016 Letter (Motion);

C. **And** in addition to the relief noted above, Riffin prays that the Court **leave its order as stated from the bench;**

D. And for such other and further relief as would be appropriate.

Respectfully,

James Riffin
P. O. Box 4044
Timonium, MD 21094
(443) 414-6210

CERTIFICATE OF SERVICE

I hereby certify that on or before the 30th Day of November, 2016, a copy of the Foregoing Motion for Leave to Reply to Defendants' November 29, 2016 Letter Request, was e-mailed to bjudge@connellfoley.com, and a paper copy was mailed, via First Class Mail, to Brendan Judge, Connell Foley, 1085 Raymond Blvd., 19th Floor, Newark, NJ 07102.

James Riffin

**IN THE U. S. DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY
NEWARK DIVISION**

JAMES RIFFIN

*

V.

*

Case No.: 16 - CV - 04433 - ES

FOREST CITY RATNER COMPANIES, et. al

*

* * * * *

ORDER GRANTING

PLAINTIFF'S MOTION FOR LEAVE TO FILE A REPLY

TO THE DEFENDANTS' NOVEMBER 29, 2016 LETTER TO MJ DICKSON

This matter, having come before the Court upon the motion of James Riffin, Plaintiff, for the entry of an order granting Plaintiff Leave to File a Reply to the Defendants' November 29, 2016 Letter to the Honorable Magistrate Judge Dickson, and the Court having considered the within application, and any opposition thereto, and having heard oral argument, if ordered, and for good and sufficient cause having been shown;

IT IS ON THIS _____ day of _____, 2016,

ORDERED that the Plaintiff's Motion for Leave to File a Reply to the Defendants' November 29, 2016 Letter to the Honorable Magistrate Judge Dickson, is hereby **GRANTED**, and it is further

ORDERED that Plaintiff's Motion for Leave to File, and Plaintiff's Reply to the Defendants' November 29, 2016 Letter to the Honorable Magistrate Judge Dickson, is hereby **ACCEPTED** into the Record in this proceeding.

Joseph A. Dickson, U.S.M.J.