

**Before the
Surface Transportation Board**

JR - 8

242258

STB FINANCE DOCKET NO. 36078

PETITION FOR A DECLARATORY ORDER

(Hudson Street Industrial Track / Harsimus Branch

(Jersey City, Hudson County, NJ)

ENTERED
Office of Proceedings
December 14, 2016
Part of
Public Record

FIFTH SUPPLEMENT TO PETITION FOR DECLARATORY ORDER

ADDITIONAL TECHNICAL REASON

WHY A PROCEEDING SHOULD BE INSTITUTED

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

2. Riffin has always been under the impression that leave to amend is liberally granted, and that no leave to amend is needed prior to any replies. His impression may be wrong. In which case, Riffin respectfully requests leave of the Surface Transportation Board (“**STB**”) to amend his Petition for Declaratory Order a total of five times, to date, including this fifth amendment.

3. No amendment has prejudiced any party. (Other than a need, if desired, to reply.) Each amendment has provided the STB with additional relevant information.

4. The alternative to permitting Riffin to amend his Petition for Declaratory Order, would be to reject Riffin’s Petition for Declaratory Order, without prejudice to refile, in one new Petition

for Declaratory Order. Doing so would delay the proceeding somewhat, and would require additional replies from interested parties.

5. Ultimately, the real decision should be on the merits. Failing to institute a Declaratory Order Proceeding, is likely to have some very dire results. (The identification of those potential dire results, is the purpose of this fifth supplement. See below.)

6. Riffin apologizes for the piece-meal fashion in which he has filed his Petition. His goal is, and has always been, to identify for the STB, issues, which need to be addressed and resolved, **prior** to the conclusion of the more detailed historic and environmental review in the AB 167 (Sub. No. 1189X), et al., (“**1189X**”) proceeding, so that there are no impediments to resolving the 1189X proceeding at the conclusion of the more detailed historic and environmental review in the 1189X proceeding. His further goal is to try to eliminate potential issues that could be raised in a judicial review proceeding.

CSX’s *ROCKY MOUNT*

7. With the above in mind, Riffin provides the STB with the following additional **technical** reason why the STB should institute a Declaratory Order Proceeding:

8. In Riffin’s JR-7 (Rebuttal to Respondents’ Opposition), in ¶37, Riffin, in rebuttal to City et al.’s Opposition, referenced *CSX Transportation, Inc. – Abandonment Exemption – In Rocky Mount, Nash County, NC*, STB Docket No. AB-55 (Sub. No. 562X), Served December 1, 1999 (“**Rocky Mount**”). Since writing JR-7, Riffin has re-read the *Rocky Mount* decision, including the July 27, 2000 Served denial of a Petition to Reopen the STB’s December 1, 1999 Served decision. And Riffin has thought about the relevance of the *Rocky Mount* decision to the 1189X proceeding.

9. Riffin strongly urges all of the parties to read the *Rocky Mount* decisions. And invites all parties to reply to this JR-8 Technical Reason Supplement (and address the merits).

10. In *Rocky Mount*, CSX filed a Notice of Exemption (“**NOE**”) to abandon a 3,000 foot track segment. The New Southern of Rocky Mount (“**NSRM**”), a non-carrier, timely filed an Offer of Financial Assistance (“**OFA**”), to acquire the track segment, for \$17,500. CSX consented to sell the track segment to NSRM. Three days later, the City of Rocky Mount filed a motion **to dismiss** the NOE, for ‘lack of jurisdiction,’ arguing that the track segment was excepted track, and as such, could **NOT** be the subject of a NOE to abandon. The STB determined that the track segment was in fact excepted track. The STB then **dismissed the NOE** and vacated **all** of its prior decisions. The NSRM filed a Petition to Reopen, which was denied.

THE SIGNIFICANCE OF *ROCKY MOUNT* IN 1189X

11. If a track segment is not line, it cannot be the subject of an NOE to abandon.

12. Conrail has advocated, and continues to advocate:

“Conrail has consistently taken the position that neither the properties constituting the defunct Hudson Street IT nor the properties constituting the defunct Harsimus Cove Yard were conveyed as regulated lines of railroad. Rather, they constituted spur and yard track over which the Board had no abandonment authority.” Conrail Reply in FD 36078 at 3.

11. The only portion of the Harsimus that has been determined to be line, is the segment between CP Waldo and the West side of Marin Blvd.

12. Since Conrail advocates that all track segments East of Marin Blvd are excepted track, and since there has been no determination contrary to what Conrail advocates, **none of the track segments east of Marin Blvd may be the subject of an NOE** (such as Conrail’s 1189X NOE).

13. Conrail’s 1189X NOE is ‘false and misleading,’ for Conrail, in the 1189X NOE, (A) depicts on its Map, and (B) seeks authority in its NOE, to abandon the track segments East of Marin Blvd, even though Conrail advocates that the track segments East of Marin Blvd are excepted track. By depicting the track segments East of Marin as ‘line’ on its Map, and by seeking abandonment authority for the track segments East of Marin, Conrail, in its NOE, is

‘misrepresenting’ (if not expressly, then impliedly) that the track segments East of Marin are line, while continuing to advocate that the track segments East of Marin are excepted track.

14. Per *Rocky Mount*, the STB **lacks jurisdiction** to authorize abandonment of any track segments East of Marin Blvd.

15. Riffin argues that the STB **cannot alter** what Conrail seeks to abandon. (See *Railroad Ventures*). And if the STB lacks jurisdiction to grant abandonment authority for **all** that Conrail seeks to abandon, the STB **is barred** from granting Conrail any relief. (Such as by bifurcating Conrail’s 1189X NOE into two segments: The segment between CP Waldo and the West side of Marin Blvd; and the segment East of Marin Blvd.)

16. In addition, until the proper classification for the track segments East of Marin Blvd is determined, granting abandonment authority for the CP Waldo to Marin Blvd segment would be highly improvident, for there is a very high probability that such an abandonment would leave multiple stranded line segments East of Marin Blvd.

17. One scenario might go like this: The CP Waldo - Marin Blvd segment is granted authority to abandon. A Complaint is filed in the Special Court to determine whether any track segments East of Marin were conveyed to Conrail as line. There is a very high probability that the Special Court would rule that track segments East of Marin were conveyed to Conrail as line. (Such as the HSIT.) A petition to reopen the 1189X proceeding would be filed, noting ‘material error:’ Multiple line segments were unlawfully stranded. 1189X would be reopened, and vacated.

18. Another scenario might go like this: A motion to dismiss the 1189X proceeding is filed, arguing lack of jurisdiction. Since Conrail advocates that all track segments East of Marin are Excepted, the STB, without any contrary determination, would have to dismiss the 1189X proceeding, since the STB lacks jurisdiction to grant abandonment authority for the track segments East of Marin Blvd, as requested by Conrail.

19. The significance of all of this: There is a very high probability that if the proper classification for the track segments that lie East of Marin Blvd is not determined (and soon), the 1189X proceeding may well be dismissed. Which would mean seven plus years of litigation gets trashed.

20. If, on the other hand, the STB were to institute a declaratory order proceeding to determine the proper classification for the track segments East of Marin Blvd, then any motion to dismiss 1189X could potentially be stayed, until the STB concludes the declaratory order proceeding. Once the proper classification of the track segments East of Marin Blvd has been determined, then it can be decided whether 1189X must be dismissed, (due to a lack of jurisdiction to rule on the totality of what Conrail seeks), or that the 1189X proceeding may continue (if the Harsimus track segment East of Marin Blvd is found to be line, rather than excepted track).

21. In Riffin's Rebuttal, JR-7 at ¶39, Riffin said: "The closer one looks, the messier things get." Riffin just looked a bit closer, and it definitely just got a lot messier.

CHOICES

22. When the STB's jurisdiction is called into question, the STB is **obligated** to determine whether it has jurisdiction. Riffin is questioning whether the STB has the jurisdiction to provide Conrail with the remedy that it seeks in the 1189X proceeding. So now the question becomes: In which proceeding would the STB like to make the determination: In the 1189X proceeding, or in the FD 36078 proceeding.

23. If done in the 1189X proceeding, the STB can only address its jurisdiction over the Harsimus track segments East of Marin. If done in the FD 36078 proceeding, the STB can also address the HSIT. If done in the 1189X proceeding, there are many more parties involved. And if it is determined that the track segments East of Marin are excepted track, as Conrail vigorously advocates, then the entire 1189X proceeding could well be rejected ab initio, at the moment the

determination is made. If determined in the FD 36078 proceeding, then some 'damage control' might be done before the 1189 X proceeding gets trashed.

24. So one might ask: Given the fact that Conrail's position on the proper classification for the track segments East of Marin could have some very dire consequences, why is Conrail continuing to take the position that it is taking? While Riffin does not know the real reason, he can speculate: If Conrail were to admit that the track segments East of Marin are line, then Conrail potentially could be found to have 'knowingly' (knew, or should have known) violated the STB's rules. Which finding could expose Conrail to some very major liability.

25. So there appears to be two choices: Have the STB / Special Court make the determination. (Conrail then could argue that at the time that it conveyed the real properties associated with the lines, it did not 'knowingly' violate the rules.) Or have Conrail and the parties who have potential claims against Conrail, reach an agreement: The potential claimants agree to waive / forgo, any claims that they might have against Conrail, if Conrail stipulates that the track segments East of Marin are line.

26. Since none of the parties (other than Riffin), are willing to broach the subject of settlement, a settlement conference is highly unlikely to occur. Which is why Riffin previously suggested that the STB issue a Show Cause Order, asking the parties to show cause why the STB should not institute a mediation proceeding. And if the parties continue to resist resolving this mess on their own, then let it be known that the STB will impose a solution.

Respectfully,

James Riffin
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CERTIFICATE OF SERVICE

I hereby certify that on or before the 14th Day of December, 2016, a copy of the foregoing Riffin's Fifth Supplement, was served on the following entities by e-mail: Charles Montange, Daniel Horgan, Robert Jenkins, Adam Sloane, Jonathan Broder, Brendan Judge, Matthew Warren, Hanna Chouest, Eric Strohmeyer. A paper copy was also mailed to Mr. Montange.

James Riffin