

Before the Surface Transportation Board

242584
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242586

Conrail -- Abandonment)
) AB 167 (Sub-no. 1189X)
--in Hudson County, NJ.)

ENTERED
Office of Proceedings
February 7, 2017
Part of
Public Record

and

CSX Transp. - Discon. of)
Service - same) AB 55 (Sub-no. 686X)

and

Norfolk Southern -)
Discon. of Service - same) AB 290 (Sub-no. 306X)

City of Jersey City, et al's Reply to
Riffin's
"Appeal of an Initial ALJ Decision"
Re-filed on January 31 by Mr. Riffin

City of Jersey City, Pennsylvania Railroad Harsimus Stem
Embankment Preservation Coalition, and Rails to Trails
Conservancy ("City et al") reply as follows to Mr. Riffin's
("Riffin's") January 31 "Appeal" from ALJ Dring's October 26
Decision dismissing Riffin from AB 167-1189X and related
proceedings. Pp. 1-30 of Riffin's January 31 "Appeal" in
essence is identical to his "Appeal" filed November 14, 2016
(Riffin's November 14 Appeal was dismissed by this agency in its
Decision served January 26, 2017). Pp. 30-37 of Riffin's
January 31 "Appeal" reiterate the gravamen of Riffin's December
20 "Motion to Dismiss" AB 167-1189X for lack of jurisdiction
(Riffin's December 20 Motion was stricken from the record by

this Board's January 26, 2017 Decision). Pp. 37-38 of Riffin's January 31 "Appeal" is a "request" for stay.

City et al will first deal with Riffin's appeal insofar as it is grounded on his arguments that this Board lacks jurisdiction (Riffin pp. 30-37). City et al will then turn to his other appellate arguments (pp. 1-30), and then his "request" for a stay. For the reasons stated, all relief to Riffin should be denied.

I. Riffin's Jurisdictional Argument (Riffin 31-37) Is
Waived or Barred by Law of the Case

Riffin did not argue to ALJ Dring that this Board, or ALJ Dring on behalf of the Board, lacked jurisdiction in AB 167-1189X and related proceedings. Riffin's argument at pp. 30-37 that this Board and ALJ Dring lacked jurisdiction is therefore waived as a ground for this interlocutory appeal. "[A] litigant cannot argue that an agency committed material error when the error 'was induced by [the litigant's] own failure to raise the argument in good time,'" BNSF Ry. v. STB, 453 F.3d 473, 479 (D.C.Cir. 2006)" Pyco Industries, Inc. - Feeder Line Application - Lines of South Plains Switching, Ltd., Co., F.D. 34890, served June 11, 2010, slip op at 6. Riffin forfeited the issue by not raising it before ALJ Dring. See id. slip at 7.

In any event, both the Special Court and this Board have already rejected Riffin's jurisdictional argument multiple times

when raised by 212 Marin Boulevard LLC, et al (hereinafter "the LLCs" or "the Hyman interests"). The Special Court determined that the Harsimus Branch was conveyed to Conrail as a "line of railroad" subject to STB jurisdiction in 1976. City of Jersey City v. Consol. Rail Corp., 968 F. Supp. 2d 302 (D.D.C. 2013), summarily aff'd, No. 13-7175 (D.C. Cir. Feb. 19, 2014). In issuing summary judgment, the Special Court rejected efforts by the Hyman interests to further litigate the status of lines east of Marin Boulevard. 968 F. Supp. 2d 306-7.

Upon remand to STB, the Hyman interests again sought to derail AB 167-1189X by contending, inter alia, that there had been a severance or de facto abandonment. This Board rejected these efforts in 212 Marin Boulevard - Pet. Dec. Judgment, F.D. 35825, served April 24, 2015, stating, "[r]ailroad lines subject to the Board's licensing requirements remain subject to Board jurisdiction unless and until the Board authorizes the line's abandonment and the abandonment is consummated. See City of Creede, Colo.-Pet. for Declaratory Order ..., FD 34376, slip op. at 8 (STB served May 3, 2005); Atchison, Topeka & Santa Fe Ry.-Aban. Exemption-in Lyon Cnty., Kan. ..., AB 52 (Sub-No. 71X), slip op. at 4 (ICC served June 17, 1991)."

At essentially the same time, the Hyman interests in AB 167-1189X moved to compel Conrail to supply information germane to the regulatory status (e.g., regulated or excepted track) of

rail property east of Marin Boulevard. This Board rejected the LLCs' argument. The Board held that the status and location of portions of trackage east of Marin Boulevard was irrelevant:

"Both the Board and the courts have already found that the Harsimus Branch is a rail line subject to the Board's abandonment authority, so the issue as to status of the relevant property has been addressed and resolved. See 212 Marin Boulevard, LLC - Pet. for Declaratory Order, F.D. 35825 (STB served April 24, 2015). Moreover, the record shows that Conrail is seeking abandonment authority for the Harsimus Branch in this proceeding and not the Hudson Street Industrial Track, so requests associated with the latter are clearly beyond the scope of issues here. Accordingly, the requests do not seek information that is relevant to this ongoing proceeding, and will therefore be denied."

Conrail - Ab. Ex. - in Hudson County, NJ, AB 167-1189X, served May 22, 2015, slip at 5-6. In short, it is now law of the case several times over that status issues are resolved for purposes of AB 167-1189X. Even for Riffin, the agency is not required to "behave like Penelope, unraveling each day's work to start the web again the next day." PYCO Industries, supra, slip at 8, quoting W. Coal Traffic League v. ICC, 735 F.2d 1408, 1411 (D.C.Cir. 1984).¹

¹ Riffin's jurisdictional argument in any event is defective on its merits. Riffin's argument is predicated on Conrail's suggestions from time to time that its trackage east of Marin Boulevard was yard track (Riffin at 31). But what a railroad calls a particular piece of trackage is not dispositive for purposes of determining whether it is "excepted" or "regulated" for abandonment purposes. See Petition, City of Jersey City et al. - Petition for Declaratory Order, F. D. 34818, filed January 12, 2006, at pp. 21-25 (collects cases). Conrail's claims as to status for regulatory purposes, regardless where made, are thus fundamentally irrelevant to this agency's jurisdiction. Here, among other things, the Harsimus Branch was used to convey

II. Riffin's Remaining Appellate Arguments
Fail to Meet the Standards for Relief

A. To Prevail, Riffin Must Show that ALJ Dring's
Decision Would Be Materially Affected by New Evidence
or Changed Circumstance, or Involves Material Error

Pursuant to the clear language of 49 C.F.R. 1115.1(a) and
1152.25(e)(1), 49 C.F.R. Part 1115 does not apply to abandonment

traffic on electrified lines through the yard to floats across the Hudson River. See Secretary of Agriculture v. United States, 347 U.S. 645, 649 (1954) (ICC regulation of line haul rates over Harsimus Branch to Manhattan). This alone compels the conclusion that the Branch was a regulated line all the way to the Hudson River. But the regulatory status of the Harsimus Branch is no longer an issue. Conrail has indicated in its Notice of Exemption filings that "Conrail is seeking abandonment of all of Harsimus Branch property that Conrail was deeded that could be claimed to be a line of railroad[.]" Env. Report at p. 4, supra. In short, whatever Conrail "thinks" about status of a particular track, the railroad is no longer contesting the issue and is now (belatedly) seeking requisite abandonment authority for any portion of the Harsimus Branch that could be viewed as a line subject to STB abandonment jurisdiction east of Marin Boulevard. Since Conrail no longer contests the matter, this moots any jurisdictional issue about the Harsimus Branch, as the Special Court and this Board have so many times now already determined. Riffin at 33-34 also references Railroad Ventures, which deals with maintaining status quo as to property subject to an "offer of financial assistance" ("OFA"). Riffin seems to suggest that he is somehow hampered in his ability to pursue an OFA east of Marin because of Conrail's statements concerning yard track in another proceeding. Again, since Conrail has explained in AB 167-1189X that it is seeking abandonment authority for anything that could be claimed to be a line of railroad in the area in question, Riffin's purported OFA ability is not adversely affected. Riffin's argument is also premature. It is not clear any party will actually file an OFA relating to properties east of Marin. City, as we have repeatedly indicated, does not plan to do so: an OFA east of Marin Boulevard (other than within a segment of the Sixth Street right of way as extended east of Marin) would presumably interfere with the operation of the vitally important Hudson-Bergen light rail system.

proceedings. Pursuant to 49 C.F.R. 1152.25(e)(1), if Mr. Riffin wishes further review of ALJ Dring's order dismissing him from AB 167-1189X, Mr. Riffin must file a petition to reopen, meeting the criteria for reopening, 49 C.F.R. 1152.25(e)(2)-(4). Mr. Riffin disavows seeking any reopening (Riffin Jan. 31 Appeal at p. 2), and for reasons stated in previous pleadings, he fails to satisfy the criteria for reopening.

However, relying on a recent non-abandonment proceeding (Finch Paper LLC - Pet. for Dec. Order, F.D. 35981, served Jan. 11, 2017), this Board holds in its January 26 Decision that Mr. Riffin may nonetheless file an "interlocutory appeal" pursuant to 49 C.F.R. 1115.9, provided he meets the criteria in 1115.9. Assuming arguendo that the interlocutory appeal regulation applies,² one of the criteria specified in 1115.9 under which an interlocutory appeal is permitted is a situation in which a decision terminates a person's participation. See 49 C.F.R. 1115.9(a)(1). ALJ Dring's October 26 order clearly terminates Riffin's participation. Thus, if this Board has power to entertain interlocutory appeals in abandonment proceedings,

² As City et al has pointed out, Part 1115 does not apply in abandonment proceedings. An agency is bound to follow its regulations. Here it deviated. STB should comply with its regulations unless and until they are amended to validate the path it is taking in AB 167-1189X.

Riffin may file such an appeal from ALJ Dring's October 26 order terminating Riffin's participation in AB 167-1189X.

49 C.F.R. 1115.9(a)(1) on its face is merely a criterion for qualification to file an interlocutory appeal; it does not state a standard for adjudicating such an appeal. Since the Board has ruled that 1115.2 (which states standards for adjudicating appeals from initial decisions) is inapplicable, the only relevant standards pursuant to 1115.1(b) are those set forth in 1115.3 ("Board actions other than initial decisions"). Section 1115.3 requires the appellant to show that the prior action would be materially affected by new evidence or changed circumstance, or involves material error.

These requirements appear to be tantamount to the standards for reopening, which would otherwise be applicable to further review in an abandonment proceedings per 49 C.F.R. 1150.25(e). In short, the Board must apply what amount to its standards for reopening to its interlocutory review of ALJ Dring's decision.

B. Riffin Fails to Show Material Error, or Any Other
Circumstance Justifying Appellate Relief under
The Appropriate Standard

Riffin's January 31 Appeal at pp. 1-30 at no point argues changed circumstances or new evidence and rests entirely on arguments that ALJ Dring committed a material error. Riffin's argument is essentially a rehash of his Appeal filed November 14, and it relies on the same exhibits (indeed, Riffin did not serve

any exhibits with his January 31 Appeal, indicating that he was relying on what he had filed November 14). City et al replied to Riffin's November 14 Appeal in a "Comment in Opposition" filed December 2, 2017. In the "Comment in Opposition," City et al argued that Riffin must show material error, or changed circumstances or new evidence, to obtain appellate relief and had failed to do so. All the arguments in the "Comment in Opposition" thus remain germane. City et al adopt all arguments set forth therein in response to Riffin's January 31 Appeal. A copy of that "Comment in Opposition" is attached hereto for the convenience of the Board as Exhibit A. City et al also adopt all arguments set forth in City et al's Reply to Riffin's Petition(s), filed Nov. 4, 2016, pp. 6-31, demonstrating that Riffin had failed to show any material error.

Riffin's chief argument (he places it first in his summary at Appeal p. 1) is that he offered to permit inspection of relevant documents "multiple times." This is both untrue (at best extremely misleading), but also, and most important, absolutely irrelevant. Riffin initially did not respond at all to City et al's discovery requests, even after stating he would timely do so. City et al accordingly filed a motion to compel. At that point, Riffin finally responded.³ But his response stated that he had no

³ See City's Second Motion to Compel filed July 5, 2016, at pp. 1-2, in AB 167-1189X (summarizes record).

responsive documents (including emails).⁴ Counsel for City et al at this point obtained a verified statement from a person familiar with Riffin's document practices (Eric Strohmeier). Mr. Strohmeier attested that Mr. Riffin had relevant emails, some with and some without attachments, in his email account.⁵ City et al filed a second motion to compel on July 5, 2016, with the verified statement. Riffin replied chiefly with irrelevancies, but toward the end of his piece claimed that any copy of an email which he made would be indecipherable. See Riffin's Reply at p. 12 (and alleged indecipherable examples attached), filed July 28, 2015. Riffin also claimed he offered to demonstrate the indecipherable emails to counsel if counsel accepted his invitation to journey to Baltimore to see what could not be read. Id. at 12.⁶

In the meantime, ALJ Dring scheduled a hearing on City et al's motion to compel for August 24, 2016. Counsel for City et al arranged for CNJ Railroad's Eric Strohmeier to be present as a potential participant at that hearing to confirm that Riffin in fact had decipherable emails. Apparently after learning that Mr. Strohmeier would attend the hearing, Mr. Riffin showed up

⁴ See Riffin's Reply to March 28, 2016 Doc. Request, at p. 2 (response to first and second requests), attached as Exhibit B to City et al's Second Motion to Compel, *supra*.

⁵ See City's Second Motion to Compel, *supra*, Exhibit C.

⁶ This is not a bona fide offer of an opportunity to inspect and copy in the circumstances, but is evidently the only basis for Riffin to claim that he offered to allow inspection.

unannounced at the restaurant in Washington, D.C. where counsel for City was meeting with Strohmeier over dinner to prepare for the hearing the next morning. Mr. Riffin there for the first time acknowledged that he had extensive responsive emails. He allowed City et al to confirm that they were legible and intelligible. Mr. Riffin agreed to forward all the emails to counsel for City et al by Friday (August 26). See AB 167-1189X hearing transcript of August 24, 2016, at pp. 12-14 (summarizing events). At the hearing, Riffin acknowledged this recitation of events and that he agreed to forward the emails. Id. at 15. Judge Dring indicated he would so order. Judge Dring then specifically warned Riffin that he was prepared to sanction "anyone who does not comply fully and on a timely basis, with any order that I will issue in this case." Aug. 24 hearing transcript at p. 18. Judge Dring specifically put Mr. Riffin on notice that he was subject to "all sanctions" and that "there are consequences" should he fail to comply. Id. 18-19.

Contrary to Riffin, the issue is not whether he offered to allow timely inspection of his emails prior to the August 24 hearing.⁷ The issue is whether he violated the order served

⁷ Instead of offering a bona fide inspection opportunity, Riffin claimed the emails he had were unintelligible until the eve of the hearing.

August 25, to which Mr. Riffin consented in open court.⁸ Riffin's argument in the end is like the thirteenth chime of a clock; it itself is wrong and it suggests the unreliability of everything else from that source.

Riffin's problem is that he did not comply fully and on a timely basis with Judge Dring's order, as shown in City et al's Motion for Sanctions. He was ordered to provide all emails with the LLCs. Order served August 25, 2016, at 2. He now argues that the order only applied to emails between himself and Horgan or Steve or Victoria Hyman. This is evasion, pure and simple. The document requests defined documents to include all writings by agents, employees, consultants and so on (see Second Motion to Compel, Ex. A, pp. 1-2), and City et al's requests were not limited to exchanges solely with Horgan and the Hymans (*id.* at 1-3). Riffin simply unilaterally and arbitrarily limited his response. His contemporary explanation for his curtailed was that he had spent about two hours complying, but the library he was using was closing down. Motion for Sanctions, Exhibit B. When, counsel pointed out various deficiencies by email on August 25 (*id.*), Riffin responded with a "status report" to ALJ Dring expressing frustration with the work in forwarding emails. By email the next

⁸ Many of Riffin's other arguments against the August 25 order as deficient or contrary to other STB orders are waived. Mr. Riffin consented to the August 25 order. He cannot now back out of it. PYCO Industries, supra.

morning, Riffin inter alia professed faulty memory and lack of responsibility, ending by advising counsel for City et al that "[i]f you want any more, you will have to ask ALJ Dring to order it." Id. Exhibit B, Riffin email of August 26, 2016.

City et al's motion for sanctions followed. Riffin audaciously implies at p. 1 in his "summary" that counsel for City et al did not "confer" with him in order to avoid this "court action." But Counsel attempted to confer; Riffin rebuffed all attempts to resolve the discovery dispute, as shown by Exhibit B in the Motion for Sanctions. Riffin now belatedly relies on FRCP 37(a). Were it applicable (as Riffin incorrectly presumes), City et al's efforts more than satisfy it. But his arguments fail as never timely presented to Judge Dring. See Pyco Industries, supra (waiver).

In sum, Riffin's approach to discovery was fraught with untruths, misleading claims, and foot dragging. He only admitted to emails when confronted with a witness with personal knowledge that Riffin had engaged in repeated misrepresentations. Judge Dring put Riffin on notice of possible sanctions at the first hearing. At the second hearing, after listening to Riffin's explanations for why two hours of effort to forward email per his agreement and the ALJ's order was too much, Judge Dring found that Mr. Riffin's representations and general demeanor were not credible. As further demonstrated in Exhibit A, attached hereto,

and in City et al's Motion for Sanctions, the record supports ALJ Dring's findings and all the sanctions which he imposed. Riffin shows no material error. To the contrary, Mr. Riffin's antics constitute a case study in how to abuse the discovery process, replete with repeated concealment, untimely and curtailed responses, professed forgetfulness, and excuses that amount to efforts to renege on what was expressly agreed.

Failure to address any specific claim of Riffin herein or in Exhibit A should not be taken as an admission, but as a sign City et al deems the claim irrelevant, obviously incorrect, or waived.

C. Riffin's Appeal Should Be Stricken

1. Riffin Is Disqualified

Mr. Riffin, a law school graduate, is a frequent filer before this agency,⁹ ordinarily purporting to represent solely his own interests. However, in this proceeding by his own admission he purports to be acting on behalf of Steve Hyman, and City et al have submitted a verified statement indicating that Riffin has represented to third parties that he is doing so for a commission.¹⁰ In short, Mr. Riffin purports to be representing

⁹ See City et al Reply to Riffin's Petition(s) in AB 167-1189X, filed Nov. 4, 2016, at 7-8 (collects material).

¹⁰ Mr. Riffin candidly stated to this Board that his objective in participating in this proceeding is to protect the Hyman interests and that he is Mr. Hyman's "back-up plan." Riffin Response, AB 167-1189X, filed June 11, 2015, at pp. 9-10. Mr. Riffin has explained that he will receive a "commission" from

Hyman for remuneration. His actions in this proceeding amount to an unlawful evasion of this Board's qualification requirements set forth in 49 CFR 1103.2-.3.

If Riffin claims he is an attorney, he is not qualified to represent parties before the Board unless he is a member in good standing in the bar of the highest court in a jurisdiction as specified in 49 CFR 1103.2. But Mr. Riffin is not a member in good standing of the bar of the highest court in any jurisdiction. He thus cannot act on behalf of Mr. Hyman as an attorney before this Board.

Mr. Riffin is not a registered practitioner before the STB per 49 CFR 1103.3. See Norfolk S. Ry.Co. - Pet. Ex. - in Baltimore City and Baltimore County, MD, AB 290-311X, served Jan. 23, 2012, slip op. at 6 (Riffin neither licensed attorney nor STB-approved practitioner).¹¹ Riffin therefore cannot represent Mr. Hyman as a non-attorney.

the Hyman interests if he is able to force a settlement or outcome favorable to Mr. Hyman through his machinations in or related to AB 167-1189X or by litigation against other developers. Certification of Gregg Wasser, Appendix I to City et al's Reply to the Motion for Sanctions sought by the Hyman interests against City et al for pursuing discovery issues, in AB 167-1189X, filed Oct. 20, 2016. Riffin by his own statements thus appears to be representing Mr. Hyman on a contingent fee basis.

¹¹ In addition, Riffin is not a shipper or a railroad, and has no residence or office in New Jersey or any adjoining state.

It follows that Mr. Riffin's actions in this proceeding are equivalent to the unauthorized practice of law. This Board should strike his Appeal as a violation of the pertinent regulation.

Whether or not the LLCs acting through Mr. Horgan disavow Riffin (except to the extent his actions are useful to the LLCs in the future), Riffin has indicated he is pursuing Mr. Hyman's interests for remuneration. That is enough to trigger 49 CFR 1103.2-.3. Representation by tag team, one of whom is an unauthorized practitioner, is disingenuous, misleading, fundamentally unfair, and amounts to a denial of due process to the other parties in the proceeding.

2. Riffin's Appeal Exceeds the Page Limit

Under 49 C.F.R. 1115.3(d), Riffin's interlocutory appeal is limited to 20 pages.¹² Riffin's appeal is double this limit without seeking leave. His appeal should be stricken.

D. Certifications as to Attorney's Fees

Contrary to Riffin's claims, counsel for City et al in compliance with ALJ Dring's order certified to the amount of costs and attorney's fees claimed for preparation and argument

¹² 49 C.F.R. 1150.25(e) (3) provides for 30 pages for appeals in abandonment proceedings. Riffin's paper exceeds this as well.

of the motion for sanctions.¹³ No further certification is required.

III. Riffin's Stay Request Should Be Denied

Riffin at pp. 37-38 requests a stay of (a) ALJ Dring's entire October 26 decision or, alternatively, (b) the portion requiring Riffin to pay attorney's fees.

Riffin has moved several times for an administrative stay. His first motion, to ALJ Dring on October 25, was denied in a Decision served October 26, 2016. ALJ Dring noted that STB follows the standard federal practice requiring parties seeking a stay to show (1) a likelihood of success on the merits, (2) irreparable harm if the stay is not granted, (3) no substantial harm to other parties, and (4) that the public interest supports granting the stay. ALJ Dring stated that Riffin "does not purport to make any of these showings" and instead that Riffin represented he sought delay only to assemble evidence that would not address Judge Dring's multiple grounds to dismiss him from the proceeding in the first place.

Riffin sought another stay in his "Petition(s) for Other Relief" at pp. 12-25, filed in AB 167-1189X on October 31, 2016. In the Board's Decision served January 26, 2017, the Board not

¹³ See Exhibit A to Certification of Costs and Comment on Further Pleadings by Mr. Riffin, filed Oct. 25, 2016, in AB 167-1189X.

only failed to enter a stay, but stated that "[a]n interlocutory appeal under [section] 1115.1 and [section 1115.9] does not stay the effect of the FERC ALJ's October 2016 Decision pending a Board ruling on the appeal." Decision at p. 3. The Board indicated that "at this point, Riffin is restricted to filings addressing his appeal only...." Decision at p. 4. City et al views these statements as not only a denial of a stay, but also an indication that Riffin at this time is limited to seeking an interlocutory appeal, and not a stay.

If the Board nonetheless entertains Riffin's renewed stay request, that request is totally without merit. Riffin fails to show a likelihood of success on the merits for the reasons set forth herein and in Exhibit A. As to irreparable injury, Riffin's original argument in his October 31 petition (at p. 24) was that the United States District Court for New Jersey would dismiss Riffin's Complaint against the owners of Metro Plaza, resulting in the loss of "rail assets" in the absence of a stay. City et al understands that the Complaint has been dismissed, mooted Riffin's prior argument. He now asserts his irreparable harm is loss of an opportunity to possibly file an OFA in AB 167-1189X. Riffin cannot claim irreparable injury whenever there is a curtailment to his activities as a kind of gadfly at STB. He needs to show some real harm. He is neither a shipper nor a railroad nor a resident of New Jersey let alone Jersey

City, nor does he show how he could hope to file a successful OFA in AB 167-1189X. There is no harm. In any event, this Board has not issued a schedule to file an OFA in AB 167-1189X, and is unlikely to do so until Riffin's interlocutory appeal is resolved. If the interlocutory appeal is resolved in Riffin's favor, his claim is moot. If the appeal is resolved against him, he can determine whether to seek judicial review and a stay pending judicial review, based on the decision of the Board and what showings he thinks he can make in response. A stay pending judicial review in order to preserve an opportunity to file an OFA is obviously premature to argue now.

Riffin makes no showings as to the interests of others or the public interest. If the interlocutory order were stayed, Riffin would presumably file more improper motions, like his motion to dismiss which was stricken by the Board in its January 26 Decision. City et al is harmed by repeatedly having to address Riffin motions, petitions, supplements, and comments in this proceeding. The public interest in expeditious handling and resolution of proceedings [(49 CFR 10101(15))] is also harmed by any further improper and superfluous Riffin pleadings.

Riffin independently seeks a stay from his obligation to pay attorney's fees, claiming that if he pays same, Jersey City will not be required to refund due to sovereign immunity should he prevail on appeal. Assuming *arguendo* sovereign immunity ever

applied to the City of Jersey, sovereign immunity in New Jersey as to torts has been replaced by the NJ Tort Claims Act, NJSA 59:1-1 to 12-3, and as to contracts by the NJ Contractual Liability Act, NJSA 59:13-1 to -10. Riffin fails to show how a claim he might accrue for a refund of a payment (or overpayment) is immunized under either Act, much less beyond the preemptive power of STB, since it involves federal rail regulation by the Board. Moreover, Rails to Trails Conservancy and Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition are not "sovereigns" but non-profit organizations.

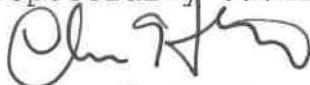
Riffin has not paid, or offered to pay, any attorney's fees per ALJ Dring's order. City et al has not yet instituted litigation against Riffin to demand payment. City et al intend to seek attorney's fees and costs for expenditures relating to Riffin's invocation of the appellate process. If this Board upholds ALJ Dring, then Riffin should pay City et al's attorney's fees and costs per ALJ Dring's order. City et al intend to oppose any request for a stay pending judicial review. City et al adopt pp. 31-40 of their Reply filed Nov. 4, 2016 to Riffin's "Petition's" as further argument against a stay.

Conclusion

Mr. Riffin is entitled to no relief in response to his interlocutory appeal.

City et al renew their request for attorney's fees and costs for responding to Mr. Riffin's appeals from the award of sanctions. Riffin should be held responsible for City et al's attorney's fees and costs for responding to Riffin's appellate filings relating to the sanctions order for the same reasons the sanctions were imposed in the first instance. City et al provide herewith an updated Appendix setting forth a Certification of additional attorney's fees and expenses for response to Mr. Riffin's November 14 and January 31 appeals and related supplements.

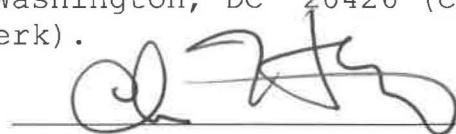
Respectfully submitted,



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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 7th day of February 2017 addressed to the parties or their representatives per the service list below, unless otherwise indicated. The undersigned also certifies the deposit of the foregoing for express delivery (next business day) upon Judge Dring at the Federal Energy Regulatory Commission, Office of Administrative Law Judges, 888 First Street, N.E., Washington, DC 20426 (courtesy email to Judge Dring's law clerk).



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Watchung, NJ 07069 [also by email]

James Riffin
PO Box 4044
Timonium, MD 21094 [also by email]

Supplemental Service List

Per a prior request of the Board, service is also made on the following addressees, although none is believed to continue to represent a party in the proceeding and/or is otherwise superceded.

Stephen Marks
Hudson County
583 Newark Avenue
Jersey City, NJ 07306

Gretchen Scheiman
Historic Paulus Hook Association
121 Grand Street
Jersey City, NJ 07302

Michael Selender
Jersey City Landmarks Conservancy
P.O. Box 68
Jersey City, NJ 07303-0068

Brian P. Stack
411 Palisade Avenue
Jersey City, NJ 07307

The post office is returning mail addressed to Mr. Dan Weber.

APPENDIX

Certification of Fees and Costs

For Response to Riffin's Appellate Papers

Filed October 31 to date in AB 167-1187X

The undersigned hereby certifies under penalties for perjury that he has spent (1) no less than 52.5 hours researching and preparing City et al's response to Riffin's "Petition(s)," "Appeal," and "Supplement" in AB 167-1189X during the period 1 November to 2 December 2016 (1 Nov. to 4 Nov. total of no less than 26.5 hours on Petition(s); 15 Nov. to 17 Nov. and 30 Nov. to 2 Dec., total of no less than 26.0 hours on Appeal and Supplement); (2) no less than 14.0 hours researching and preparing City et al's response to Riffin's January 31 interlocutory appeal (5 to 7 Feb. 2017), and (3) that counsel has incurred the following costs for preparation, service and delivery of the aforementioned pleadings: \$562.67 for purchase of hearing transcripts for the two hearings, \$283.42 for service copies including delivery (USPS and Fed X fees) for service of the Reply to Riffin's "Petition(s)," \$238.50 for service costs (Fed X costs not available) for Reply to Riffin's Nov. 14 Appeal; costs for preparation and service of response to Riffin's January 31 interlocutory appeal not yet available. The undersigned further certifies that these amounts do not

include any time or funds incurred to respond to(a) Riffin's motion to dismiss, (b) Riffin's or F.D. 36078 proceeding, or (c) any motion or appeal filed on behalf of City et al.

Total fee (66.5 hrs x \$200/hr): \$13,300

Total costs (\$562.67 plus \$283.42 plus \$238.50): \$1084.59

Total: \$14,284.59


Charles H. Montange

7/2/202

Before the Surface Transportation Board

Conrail -- Abandonment)
) AB 167 (Sub-no. 1189X)
--in Hudson County, NJ.)

and

CSX Transp. - Discon. of)
Service - same) AB 55 (Sub-no. 686X)

and

Norfolk Southern -)
Discon. of Service - same) AB 290 (Sub-no. 306X)

City of Jersey City, et al's Reply to
Riffin's
"Appeal of an Initial ALJ Decision"
Re-filed on January 31 by Mr. Riffin

Exhibit A

City et al Dec. 2, 2016, Opposition to
Riffin's Nov. 14 Appeal,
As Filed
(pp. 1-32, certificate of service
and Appendix omitted)

Before the Surface Transportation Board
 Conrail -- Abandonment)
) AB 167 (Sub-no. 1189X)
 --in Hudson County, NJ.)
 and
 CSX Transp. - Discon. of)
 Service - same) AB 55 (Sub-no. 686X)
 and
 Norfolk Southern -)
 Discon. of Service - same) AB 290 (Sub-no. 306X)

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ENTERED
 Office of Proceedings
 December 2, 2016
 Part of
 Public Record

City of Jersey City, et al's Comment in Opposition
 "Appeal of an Initial ALJ Decision"
 Filed Nov. 14 by Mr. Riffin

In an oral order from the Bench on October 24, as confirmed
 in a written order filed October 26, ALJ Dring dismissed Mr.
 Riffin from this proceeding, and granted other sanctions, for
 failure of Mr. Riffin to act responsibly in connection with an
 order compelling discovery into which he had voluntarily
 entered. On October 31, Mr. Riffin filed a "Petition(s)"
 stating an intent to appeal, and otherwise requesting a stay and
 for relief under Part 1117. Riffin's October 31 filing on its
 face seemed to call for relief under whatever appellate
 procedures the agency's rules afforded. City of Jersey City,
 Rails to Trails Conservancy, and Pennsylvania Railroad Harsimus
 Stem Embankment Preservation Coalition ("City et al") on
 November 4, 2016, replied in opposition to that filing,
 explaining that on examination of the agency's regulations, the

only appellate relief available was by means of a petition to reopen/reconsider, and that Riffin made none of the showings required for reopening or reconsideration.

On November 14, Mr. Riffin filed an additional pleading, accompanied by a voluminous set of appendices, which he labels an "Appeal of an Initial ALJ Decision." On November 21, Riffin filed a "Supplement" to that "Appeal." In short, by now Riffin has filed three documents seeking appellate relief. City et al hereby oppose any and all relief sought by Riffin in any of these efforts. Many of City et al's arguments in our Reply to Riffin's October 31 "Petition(s)" are germane to Riffin's Nov. 14 "appeal" and City et al accordingly adopt and incorporate them all here.

I. Summary of Argument

Riffin styles his latest papers as an "appeal" and states they are pursuant to 49 CFR 1115.2 (appeals from ALJ orders). Appeal at p. 2. He expressly states that he does not desire or seek to reopen. Id.¹ Riffin does not have a right to appeal under section 1115.2: Part 1115 and 49 C.F.R. 1152.25(e) make

¹ Riffin's October 31 pleading asked the agency to clarify whether Part 1115 appellate procedures or 49 CFR 1152.25(e) appellate procedures were applicable in this abandonment proceeding. City et al responded that by the terms of the regulations, City et al Reply filed November 4, 2016. 49 CFR 1152.25(e) procedures were the only ones applicable. Riffin makes no response to City et al's showing that only section 1152.24(e) applies.

clear that appellate procedures applicable in an abandonment (such as AB 167-1189X) are those set out in 49 C.F.R. 1152.25(e). Section 1152.25(e) does not provide for appeals in the situation here; it only provides for petitions to reopen or reconsider.

In his November 14 "Appeal," Riffin confirms he does not seek to reopen. He has therefore waived or forfeited any right to appellate relief.

Were the Board further to consider the "Appeal," Riffin has shown no entitlement to any relief. This is confirmed by his subsequent "Supplement."

Before addressing the "Appeal" proper, City et al will address the (belated) November 21 "Supplement."

I. Riffin's "Supplement" Underscores His Evasive Intent and Indicates Destruction of Responsive Documents

On November 21, 2016, Riffin filed a belated "Supplement" to his appeal. In the Supplement, Riffin in effect admits that he destroyed emails at some point after he was ordered to produce them on August 24 (orally) and August 25 (in writing). He says that City et al "should have taken advantage of Riffin's production" of his emails either on the night before the hearing (August 23), or on the day of the hearing (August 24). Riffin Supplement on p. 2. He argues that City et al waived its right to object for failure to avail itself of these alleged

opportunities. The only waiver is by Riffin: he confirmed before the Judge that he would forward his emails and expressly consented to an order to forward his responsive emails. See August 24 Transcript p. 17, lines 13-22, and other citations collected in note 9 infra. He has thus waived the right to object that City et al should have accessed his responsive emails the night before the hearing or the day of the hearing. PYCO Industries, Inc. - Feeder Line Application - Lines of South Plains Switching, Ltd. Co., F.D. 34890, served June 9, 2010, slip op. at 6 (party cannot flip positions). Alternatively, Riffin is estopped from advocating a position directly opposite to what he consented to before Judge Dring. Id. slip op. at 5.

Pursuant to Judge Dring's ruling, City et al had no obligation to find a place to copy emails late on a Sunday night in Washington DC, or at the FERC offices immediately after the August 24 hearing, even assuming copy machines and printers were available for that purpose (to City et al's knowledge, they were not). Nothing in Judge Dring's oral or written orders authorizes Riffin to destroy whatever responsive emails he chooses and forward only those responsive emails he chooses, or to ignore or abridge his commitment, embodied in an order, to forward his emails to City et al. Riffin has simply acted in contempt of Judge Dring's order.

Riffin also argues (Supplement at 2, citing a letter from Yahoo! Inc.) that the emails he destroyed are no longer available from Yahoo! Inc. (his email service provider) pursuant to 18 U.S.C. 2701, et seq.² If this is true, then Riffin appears only to be confirming a criminal violation on his part of 18 U.S.C. 1519: he seems to be confessing that he destroyed evidence (emails) which this agency through ALJ Dring ordered to be made available to City et al and to Conrail. Nothing in the Yahoo! Inc. letter excuses Riffin's contemptuous evasion of Judge Dring's order.

A close reading of the Yahoo! Inc. letter seems to indicate that the Yahoo! Inc. staff preparing the letter did not realize that Riffin was a "user" of their email service. Contrary to Riffin's reading of Yahoo! Inc.'s letter, 18 U.S.C. 2701(c)(2) on its face indicates that Riffin (a "user" of the email service) could authorize disclosure by Yahoo! Inc. of that which Riffin intentionally deleted, at least to the extent it remains in the Yahoo! Inc. system.³ City et al understands that the Yahoo email servers retain emails deleted by users for at least a period of time. Whether the material is still available or

² City objects to Riffin's effort to include the Yahoo! Inc. letter in the record. It is not new evidence, but newly generated evidence he could have put into the record before Judge Dring.

³ In addition, under section 2701(c)(3), the information may be available under 18 U.S.C. 2703, 2704 or 2718.

not, the point is that Riffin has attempted to destroy it rather than to conform to Judge Dring's order to supply it, and now claims the material is unavailable. Riffin's "Supplement" thus constitutes a compelling argument in favor of sanctions, and indeed suggests that Judge Dring's order be summarily affirmed under whatever appellate procedure is available to Riffin.

City et al will now turn to Riffin's November 14 "appeal."

III. Part 1115 Is Not Applicable and Riffin Now Waives Reopening

A. Riffin Has Disavowed All Available Appellate Relief

Part 1115 by its terms is not generally applicable to all decisions by officers of the agency. 49 CFR 1115.1 states that "[t]hese appellate procedures [Part 1115] ... do not apply to ... matters of an interlocutory nature." Even more important for purposes here, the third sentence of section 1115.1(a) states that abandonments are governed by "separate appellate procedures exclusive to those proceedings. (See 49 CFR part 1152)." 49 CFR 1152.25(e)(1) confirms this reading by stating that it embodies the appellate procedures for abandonment proceedings. Section 1152.25(e)(1) goes on to provide for appeals from certain actions by the Director of the Office of Proceedings. All other actions implicitly are administratively final. Riffin has no right to appeal under 49 CFR 1115.2, his appeal must be dismissed.

Section 1152.25(e)(4) allows a party to file a petition to reopen "any administratively final action of the Board." This does afford Riffin a potential avenue for administrative review of Judge Dring's orders. He therefore is entitled to no relief.

In short, since the Board's regulations do not provide for any appeal in the circumstances here, this Board's appellate review is limited to that provided under 49 USC 1332(c) (formerly codified at 49 USC 722(c)), which limitation is embodied in 49 C.F.R. 1152.25(e)(4). STB lacks discretion to reopen or to reconsider decisions except as provided by 49 USC 1332(c). BNSF Rwy v. STB, 453 F.3d 473, 479 (D.C. Cir. 2006) ("the criteria for granting reconsideration are limited by statute"). This Board has expressly acknowledged that it "does not have the power to reopen or reconsider" except as provided by the statute. Railroad Ventures, Inc. - Ab. Ex. - Between Youngstown, OH, and Darlington, PA, AB 556-2X, served Feb. 15, 2007, slip at 5.

49 USC 1332(c) allows the Board to reopen or to reconsider administratively final decisions only upon showings of material error, new evidence, or changed circumstances. Consonant with 49 USC 1332(c), 49 CFR 1152.25(e)(4) provides that the party seeking further review "shall state in detail the respects in which the proceeding involves material error, new evidence, or substantially changed circumstances."

In response to Riffin's October 31 Part 1117 "Petition(s)," City et al indicated that the only appellate relief available to orders issued in an abandonment proceeding was pursuant to 49 CFR 1152.25(e), and that only a petition to reopen/reconsider pursuant to 49 USC 1332(c) and 49 CFR 1152.25(e)(4) was available for the order at issue here. See City et al Reply filed Nov. 4. Both 49 USC 1332(c) and 49 CFR 1152.25(e)(4) condition reopening on a showing of material error, new evidence, or changed circumstances.

Riffin utterly fails to make any such showings. Indeed, he expressly states that he does not wish to seek reopening. Riffin Appeal at p. 2. This constitutes waiver or forfeiture of the remedy. By waiving the remedy, he also waives any claim that the agency errs in failing to afford him appellate relief. BSNF Rwy, supra, p. 479 (no error when argument waived); PYCO Industries, Inc. - Feeder Line Application - Lines of South Plains Switching, Ltd. Co., F.D. 34890, served June 9, 2010, slip op. at 6 (same). Since Mr. Riffin has now waived reopening, neither his October 31 Part 1117 "Petition(s)," nor his November 14 "Appeal," nor his November 21 "Supplement" should be treated as a petition to reopen or to reconsider. Mr. Riffin has foreclosed himself from appellate relief.

B. In All Events, Riffin's Voluminous Exhibits Do Not
Constitute "New Evidence" on which Appellate Relief May
Be Granted and Arguments Based on Them Are Waived

Mr. Riffin appended several hundred pages of exhibits to his "Appeal." All could have been presented before or at the October 24 hearing (and since most appear to be pleadings, they were before the Judge, who indicated that he had read everything). None therefore qualifies as "new evidence" that might be relied upon to support a petition to reopen or reconsider Judge Dring's October 26 decision, even if Riffin had not waived the reopening remedy. Friends of Sierra Railroad v. ICC, 881 F.2d 663 (9th Cir. 1989). Insofar as Riffin propounds exhibits or arguments based on those exhibits which he never supplied to Judge Dring, he has waived or forfeited those matters as grounds for appellate relief. BNSF Rwy, supra; Pyco, supra.

III. Riffin's Appeal Misrepresents Reality, Is Based on Arguments Waived or Forfeited, and otherwise Ignores his Pattern of Evasion, Obstruction and Misrepresentations

Consideration of any appellate relief for Riffin from Judge Dring's order imposing sanctions must begin with the fundamental fact that "[w]ithout an adequate evidentiary sanction, a party served with a discovery order in the course of an administrative adjudicatory proceeding has no incentive to comply, and often times has every incentive to refuse to comply." Atlantic Richfield Co. v. U.S. Dep't of Energy, 769 F.2d 771, 796 (D.C. Cir. 1984). In order to safeguard the integrity of its fact-

finding processes, an agency must enforce its discovery process with sanctions.

A. Riffin Engaged in, inter alia, Evasion, Misrepresentation, and Willful Rendering of Inadequate Performance

Riffin claims that he has complied with the relevant discovery order (Decision served August 25, 2016), but the record shows a history of deception, evasion, and delay. The reality is as follows: Alarmed at evidence indicating an agreement between the LLC Intervenor (212 Marin Boulevard, LLC et al) and Riffin to subvert the OFA process, City et al served Riffin with document requests on March 28, 2016, seeking all emails or other exchanges between himself and the LLCs (defined to include agents and representatives). Mr. Riffin pledged a timely response, reneged, and then reneged again.⁴ Faced with an evasive charade, City et al filed a motion to compel on May 2. By letter postmarked that day, Riffin served a response, consisting of objections and a denial that he had any responsive emails (he said he deleted same on receipt).⁵ The response mooted the first motion to compel, and City et al withdrew it.⁶

⁴ City et al's November 4, 2016 Reply to Riffin at p. 19 n.14; City et al's first Motion to Compel, filed May 2, 2016, at pp. 1-3.

⁵ Riffin's objections and denial are set forth in Exhibit B to City's Second Motion to Compel, filed July 5, 2016.

⁶ Withdrawal of Motion to Compel as Moot, filed June 7, 2016 (reserved right to file another motion to compel).

City et al then filed a second motion to compel, supported by a verified statement from a person (Eric Strohmeier) familiar with Riffin's emails, showing that Riffin did have responsive emails.⁷ Riffin claimed in response that he saved his emails on a flash drive and they were indecipherable.⁸ Judge Dring scheduled a hearing for Monday, August 24. City et al arranged for a witness to attend the hearing to corroborate that Riffin had decipherable responsive emails. The evening before the hearing, Riffin showed up unannounced when counsel was attempting to have dinner with the witness in Washington, D.C.. Riffin belatedly acknowledged he had decipherable responsive emails, and offered to show his emails to the extent the restaurant wifi supported the effort. A quick review showed that voluminous responsive emails existed, and that they were decipherable and that they included attachments, but were well beyond what could be dealt with at 9 PM over a Washington D.C. restaurant wifi connection with a hearing scheduled the next morning. Riffin indicated that he would forward the responsive emails. Because of Riffin's track record, counsel stated he should so represent the next day at the hearing.

⁷ Exhibit C to Second Motion to Compel, filed July 5, 2016.

⁸ Riffin Reply to Second Motion to Compel, filed July 28, 2016 at p. 12 (with alleged indecipherable emails attached).

At the hearing the next day, Riffin in effect acknowledged misrepresentation and evasion, and consented to forward the emails to City et al and to Conrail.⁹ Judge Dring warned Riffin that he expected full compliance with his order, and that Riffin would face the full array of sanctions if he failed to make discovery.¹⁰ On August 25, Riffin complained that he had spent about two hours in a public library forwarding emails, and that the library was closing. He evidently felt that forwarding the emails for two hours was already too onerous. When City et al objected to deficiencies in the response (including to Riffin's

⁹ August 24, 2016 Transcript at 14 lines 17-18 (information exists despite contrary prior representations), p. 15 lines 1-3 (noting Riffin would forward emails), p. 15 lines 8-9 (Riffin confirms City et al's representations correct and agrees to forward emails, saying he is also going to supply them to Horgan), p. 16 (lines 2-6) (Conrail requests copy), p. 17 lines 13-20 (Riffin again confirms agreement to forward emails).

¹⁰ After indicating he wished to proceed efficiently, Presiding Judge Dring stated as follows:

"As anyone knows, in the [FERC] practice knows, I am very used to having my orders complied with fully by the parties, and in rare instances where parties have not complied, I have issued sanctions.

"And I would certainly entertain the notion in this case of sanctioning anyone who does not comply fully and on a timely basis with any order that I will issue in this case. And my idea of sanctions - you probably know, Mr. Riffin, under the regulations what sanctions are, and I'm not limiting myself to one. I may issue all of the sanctions.

"So just keep in mind, when you agree to do something and I order you to do something, it's going to be done, or there are consequences."

Transcript of August 24, 2016 hearing in AB 167-1189X, at p 18 line 9 to p. 19 line 1.

failure to include emails from or to agents or representatives of the LLCs other than the Hymans or Horgan, and emails concerning Riffin's OFA-based lawsuit against Forest City/Ratner in Jersey City), Riffin said on August 26 that "[i]f you want any more, you will have to ask ALJ Dring to order it." Motion for Sanctions, Exhibit C. In accordance with Riffin's advice, City et al accordingly filed the motion for sanctions.

At the hearing on October 24, Mr. Riffin filed a rather rambling "Written Argument" the gravamen of which was the contention that Riffin's relationship with the Hymans (evidently as some kind of "licensee") was not relevant (Written Argument at 11). In Riffin's view, abusive use of the OFA process should not be a concern to the STB. He goes on to argue that the City et al "have no right to any of the irrelevant, immaterial, collateral-issue documents that City et al improperly seek." Id. 13. He then said that City et al. should "sit down and shut up," accused counsel as having a "vivid (paranoid) imagination,"¹¹ and called for sanctions against City et al. Id.

¹¹ Since Mr. Wasser supplied a verified statement, filed by City et al on October 20, in this proceeding, indicating that Riffin acknowledged a deal with the Hyman interests to mis-use the OFA process in return for a 5% commission from the Hyman interests on their monetary recovery, Mr. Riffin's remarks in his Written Argument appear misleading and incorrect, as well as insulting to City et al. Since Riffin says he has an agreement with the Hyman interests for compensation for OFA-related activities, there is nothing "imaginary" about the matter. There is, of

By consenting to make discovery and to an order so requiring, Riffin waived all objections to the discovery. BNSF Rwy, supra; Pyco Industries, supra. Riffin's central thesis reflected a mindset that was contumacious of Judge Dring's August 24 order. Riffin's contempt of the order compelling discovery, entered with Riffin's consent, is also reflected in his oral remarks at the hearing.

The agency is not required "to rethink its decisions whenever an affected party changes its mind..." Pyco, supra, slip op. at 8, citing Conn. Trust for Historic Pres. V. ICC, 841 F.2d 479, 484 (2d Cir. 1988). STB "is not expected to 'behave like Penelope, unraveling each day's work to start the web again the next day.'" Pyco, supra, quoting W. Coal Traffic League v. ICC, 735 F.2d 1408, 1411 (D.C. Cir. 1988). Rather than allow Riffin to twist the agency into knots by belatedly changing his position, Judge Dring -- adopting the reasoning and arguments set forth in City et al's motion for sanctions -- properly entered all sanctions, in accordance with his August 24 warning to Mr. Riffin. In addition, Judge Dring, in imposing sanctions made a credibility finding against Riffin, from the Bench on October 24, and embodied in his Order issued October 26 as follows:

course, considerable concealment which City et al sought to address through discovery.

"[B]ased on my observations of Mr. Riffin at the October 24, 2016 oral arguments, I am making a demeanor credibility determination in which I find 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. [Footnote 1] Mr. Riffin evaded direct questioning from me several times and contradicted himself on several occasions. He also alleged faulty memory as to the status of various emails and knowledge of certain parties.

"[Footnote 1:] See *Thomas v. Sullivan*, 801 F. Supp. 65, 71 (N.D. Ill. 1992) (Court stated that a reviewing court would not disturb a credibility determination in which an ALJ assigned no credibility to a witness whose behavior gave an impression of evasiveness, deliberate obtuseness, or faulty memory). See also *Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985) (holding that "only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said.").

Consolidated Rail Corp. - Ab. Ex. - Hudson County, AB 167-1189X, served October 26, 2016, slip op. at p. 2 (first of two decisions that day).

As part of his effort to evade discovery, Riffin sent emails to City et al excusing his failure to meet deadlines, or his failure to produce documents, on grounds of "forgetfulness," age, and lack of knowledge in how to use email systems. He also from time to time claimed that his ability was constrained by lack of access to the internet, forcing him to rely on access during limited hours at a public library. Riffin includes those and similar claims in his pleadings.¹² Yet Riffin manages to e-

¹² E.g., Riffin Appeal at 14 para 40. Riffin also falsely claimed he had no emails, or decipherable emails in his effort to evade discovery. See pp. 11-12 supra.

file with this Board, and to serve by email voluminous pleadings, encompassing hundreds of pages of emails and other exhibits, as manifest in his email service of his "appeal" late on the evening of November 14. He made yet another filing on November 16 (his new petition for a declaratory order concerning the Hudson Street Industrial Trackage, docketed as F.D. 36078, which he claims is associated with the Harsimus Branch), serving counsel from the AB 167-1189X proceeding. Riffin's forgetfulness, technical inability, and email access restrictions seem to apply only as excuses for evasion. They do not apply when he files his pleadings. Judge Dring's credibility determination on this record is unassailable.

Nor can Riffin hide behind his pro se status. He apologized to the Jersey City Council for his "legal speak" on the subject of OFA's on the ground that he could "not forget [his] post-graduate studies at the law schools of the University of Baltimore and the University of Pennsylvania."¹³ Riffin by his testimony is a trained lawyer, and STB describes him as a "frequent litigant." Note 14, infra.

As to the dismissal remedy and other remedies, a case that Riffin cites in his October 31 Petition [Pet. 21 citing Fair Housing v. Combs, 285 F.3d 899, 905-06 (9th Cir. 2002)] upholds

¹³ Memo, Riffin to Jersey City Council, Re Acquisition of Harsimus Branch using OFA process, Sept. 22, 2014, p. 1.

dismissal where, as here, the litigant misrepresented to counsel and the court that documents did not exist when they did.

Riffin expressly represented that he had no responsive documents, when he did. Then he represented they were indecipherable, when they were legible. Black's Law Dictionary (7th ed. 1999) at 134 defines "bad faith" as "dishonesty of belief or purposes." It includes but is not limited to "evasion of the spirit of the bargain, lack of diligence and slacking off, [and] willful rendering of imperfect performance."

Riffin's conduct in this discovery matter exhibits all the hallmarks of "bad faith." Riffin has compiled quite a track record of admonishments for abusive litigation practices by the courts and by this agency.¹⁴ Judge Dring expressly warned him on

¹⁴Earlier 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, explaining that his remarks therein were "not only irrelevant to the proceedings, but is also wholly inconsistent with the professional standards we expect persons filing with the Board (including pro se filers) to meet in every interaction with each other, the Board, and our staff. We direct Riffin to refrain from any future submission of unprofessional material to the Board, its staff, or practitioners. Further unprofessional conduct will not be tolerated. Should Riffin repeat such conduct, he should expect summary redaction of his filings (pending Board action to strike those filings), further professional censure, and additional Board action. 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.

August 24 that he would be subject to all sanctions if he did not comply with the discovery order. One of the cases Riffin elsewhere cites (Oct. 31 Petition at 21) expressly holds that explicit consideration of lesser sanctions than dismissal is unnecessary where there has been a warning. Malone v. U.S. Postal Service, 833 F.2d 128, 132-33 (9th Cir. 1987) (upholding dismissal based on record as a whole).

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. 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.").

B. Riffin's Latest Objections Are Waived, Contrived, or Misleading, or a Combination Thereof

City et al now turn to Riffin's specific grounds for appeal, as summarized by him at p. 1 of his November 14 pleading.

Waiver. Riffin makes a number of arguments that he has waived. For example, he claims that Judge Dring erred because the City failed to avail itself of inspection of his emails. Appeal at 1 para 1. Riffin seems to believe that the August 25 order, to which he consented, is wrong because City et al should have inspected his emails the night before the hearing or "immediately after" the hearing. Appeal p. 24 para 67. (This is the thrust of his November 21 Supplement as well.) As to any inspection opportunity before the hearing (there was no credible opportunity anyway), Riffin's objection is waived by consent to the order compelling discovery. See BNSF Rwy, supra; Norfolk Southern Rwy Co. - Pet. Ex. - in Baltimore City and Baltimore County, MD, AB 290-311X, served May 4, 2010, slip at 4 (Riffin's arguments waived or forfeited if not timely presented); id. served Jan. 27, 2012, slip at 8 (Riffin's arguments forfeited because not timely raised). The order, to which Riffin agreed, required him to forward his emails to City et al and Conrail. It did not require City et al to inspect and to copy the emails at FERC or some restaurant that might allow use of its wifi

connection and supply a printer to make copies in Washington, D.C. Riffin cannot consent to the August 25 order and then complain of it. PYCO Industries, supra, F.D. 34890, served June 11, 2010, slip at 6-8 (party knowingly waives argument).

Riffin argues (Appeal p. 1 para 9) that STB denied similar discovery in a May 22, 2015 decision. This is an attack on the August 25 order, to which Riffin consented, ordering him to produce documents. Riffin consented to discovery and to the August 25 order. Riffin waived or forfeited this argument.

E.g., BNSF Rwy, supra; Pyco, supra.¹⁵

Riffin claims (Appeal p. 1 para 6) that FRCP 37(a)(2)(A) and (4)(A) prohibit sanctions unless accompanied by a certification that the party seeking sanctions had conferred with the party being sanctioned. This is both waived (never presented to Judge Dring) and specious. First, there is no certification requirement in the relevant Board regulations. Second, even if the FRCP were applicable, there is no certification requirement when sanctions are imposed, as here, for violation of a court's order. See FRCP 37(b). Third, City et al's motion for sanctions included the relevant email chain showing that counsel for City et al urged Mr. Riffin to complete

¹⁵ This Riffin argument is also spurious. The May 22, 2015 order did not deal with discovery relating to Riffin. Mr. Riffin first announced he was Mr. Hyman's back-up plan in his pleading in AB 167-1189X filed June 11, 2015, at p. 10.

discovery, and was told by Riffin to see Judge Dring instead. In a nutshell, Riffin foreclosed further consultation. Fourth, and in any event, under 49 CFR 1104.4, the signature of City et al's counsel to the motion for sanctions constitutes a certification of "good ground" and need not be further verified.

Riffin also claims an award of attorney's fees requires a certification. There is no such requirement in FRCP 37(b) or the Board's rules. However, City et al provided a certification as to the attorney's fees. Motion for Sanctions against Riffin filed Sept. 15, 2016, Ex. K. Riffin's only objection was that he did not want to pay for City et al's extensive efforts to negotiate a solution to discovery issues with Daniel Horgan (counsel for the LLCs) so as to avoid moving for sanctions.¹⁶ City et al agreed to provide an updated certification confirming exclusion of all efforts to avoid the motion for sanctions, but, without objection from Mr. Riffin, inclusive of all work through October 24.¹⁷ In accordance with soliloquy at the hearing, City filed a "Certification of Costs and Comment on Further Pleadings by Mr. Riffin" on October 25, 2016.¹⁸ Riffin makes no objection

¹⁶ Oct. 24 Transcript at 77-78 & 79.

¹⁷ Oct. 24 Transcript at 79-80.

¹⁸ As Riffin knows, the LLCs did not want City et al to take discovery from Riffin. Counsel for City et al spent considerable time with the LLCs' Horgan seeking to negotiate some solution that would avoid a motion for sanctions against Riffin as well as discovery relief against the LLCs. The LLC Intervenor put portions of this negotiation into the record

to the certification (accounting) of attorney's fees and costs filed October 25.

Riffin, repeating an argument in his Oct. 31 Part 1117 "Petition(s)," claims (Appeal p. 1 para 5) that Judge Dring omitted findings required before the sanction of dismissal may be imposed pursuant to case law interpreting FRCP 37. This claim is waived as never presented to Judge Dring. BNSF Rwy, supra. In any event, as City et al pointed out in City et al's Nov. 4 Reply, even if court interpretations of FRCP 37 governed STB sanctions, Riffin's cases (including Malone, supra), do not require specific findings by a presiding judge. Cases involving judicial sanctions only require that the record as a whole be sufficient to allow such findings to be made. As City et al earlier indicated, the record as a whole certainly supports the sanction of dismissal here: Riffin repeatedly misrepresented that he had no documents, and otherwise engaged in evasion, even in the face of a warning by Judge Dring that Riffin would be subject to sanction for any further non-compliance.

(Reply to City et al's Motion to Compel Discovery from LLC Intervenor, filed Oct. 5, 2016 and exhibits thereto). The negotiations raised more questions than they resolved. This puts the lie to all Riffin insinuations that City et al did not seek to resolve discovery matters before filing the motion for sanctions. Riffin's suggestions to the contrary utterly misrepresent reality.

Continued evasion. Another set of Riffin objections manifest his continued evasiveness and underscore the need for sanctions. For example, he says that the order compelling him to furnish emails involving the LLCs did not include emails to agents of the LLCs, and he implies that another order is needed to compel his response as to agents. Appeal at 1 para 2 and para 3. LLCs are incorporeal and operate through humans. Under Riffin's argument, he would not have to supply any emails because the LLCs themselves, not being human, did not send or receive emails. As City et al explained in our November 4 Reply to Riffin's stay motion, City defined LLCs to encompass agents and representatives in the original document requests and the August 24 transcript indicated that City et al sought agents in addition to Horgan or the Hymans. Riffin's claim that he can arbitrarily limit his response to three of the LLCs' agents or representatives (the two Hymans and Horgan) is pure evasion. In any event, as explained in City et al's motion to compel, the emails that Riffin did supply appear to be doctored and/or part of email conversations that he has not fully supplied.

Similarly, Riffin suggests he should be permitted to evade the August 25 order because it did not specify time and place for inspection and copying. Appeal p. 1 para 5. The order, to which Riffin consented, directed Riffin to provide his responsive emails to City et al and to Conrail by August 26.

The consent agreement was they would be forwarded to counsel's email accounts.¹⁹ For Riffin to claim that he is somehow excused from forwarding his emails by August 26, he is renegeing on his representations to Judge Dring and to opposing counsel. The record shows ample accord on place and time. Riffin's argument demonstrates an intent to evade and total unreliability in respect to his representations.

Riffin claims (Appeal p. 1, para 4) that he answered Judge Dring's "only" question, which was why he said to City et al "if you want more, ask ALJ Dring." This is hardly grounds for appeal. Judge Dring found Riffin's "answer" deficient, and this was in a context that included Riffin's "Written Argument" and actual oral statements at the hearing. The crux of Riffin's submission was that Riffin should not be required to make discovery responses at all, even after he was ordered, with his consent, to do so. Since STB is not Penelope somehow obligated to unweave and reweave every night (see Pyco, supra, slip op. at 8), Riffin's effort to redo the order to which he consented

¹⁹ Riffin said to Judge Dring that "whatever is in my email account, I have agreed I will give him [counsel for City et al] a copy. I will send a copy to Mr. Jenkins [counsel for Conrail] as well." August 24 Transcript at 17. Mr. Riffin then indicated he would forward the emails from "a library" and that counsel for City et al "will probably have it on his e-mail account before he gets home." Id. Judge Dring responded "[v]ery good. I will enter an order to that." Id.

requiring him to make discovery is simply contumacious and evasive.

Riffin claims that all the deficient emails (City et al objected that many of the emails furnished by Riffin appeared to have omissions or to be part of broader conversations) of which City et al complains involved Steve Hyman, but that the August 25 order did not require Riffin to furnish any emails of Hyman, evidently because it did not specify agents of the LLCs. Appeal p. 25, para 71A. Indeed, Riffin now claims that Hyman emails are irrelevant to the proceeding. P. 26, para 71B-C. He waived this objection by consenting to the August 25 order. BNSF Rwy, supra; Pyco, supra. In any event, at all relevant times, Mr. Hyman has held himself out as a representative of the LLCs and of his wife, Victoria. See Wasser Verified Statement attached to City's Reply to LLCs' Motion for Sanctions filed October 20, 2016 in AB 167-1189X. Mr. Wasser states in paragraph 2 of his Verified Statement that he attended a meeting with Mr. Hyman on July 20, 2016, at which he "understood Mr. Hyman to be speaking to me on behalf of his wife and certain limited liability companies that she controls (the Hyman LLCs)." Mr. Wasser attests that Mr. Hyman then asked him to meet with Riffin, at which point Riffin appeared. On the basis of Riffin's remarks, Mr. Wasser understood that "Mr. Hyman had agreed to pay to Mr. Riffin 5% of whatever recovery the Hyman LLCs might receive"

from Riffin's OFA and OFA-related litigation. Wasser V.S. para 5. Riffin on the same day filed a lawsuit seeking to enjoin Mr. Wasser's company from constructing Metro Plaza in downtown Jersey City on the basis of Riffin's pending OFA. Wasser V.S. para 6. Mr. Wasser attached a copy of the Complaint filed by Riffin, evidently on behalf of the Hyman interests, to his Verified Statement. In short, Hyman, acting on behalf of the LLCs and his wife, invited Riffin to a meeting with Wasser. Riffin there indicated he had an agreement with the Hyman interests for a commission from them, and then actually took an action (filed a lawsuit against Mr. Wasser's company) pursuant to that agreement. Riffin has obstreperously failed to produce emails dealing with his work on behalf of the Hyman interests in connection with the Metro Plaza litigation. Riffin's November 21 "Supplement" now appears to confirm that he has evidently destroyed relevant emails. In either case, his conduct is dilatory and contumacious in light of the August 25 order. Riffin's argument that emails with Hyman should be ignored is more evasion and exemplifies his continued bad faith.

No denial of due process. Riffin says he was denied due process (Appeal p. 1 para 8). His only other reference to due process is at Appeal p. 28. He there seems to argue that he is denied due process if he is disabled by his procedural antics from an opportunity to be heard on the merits of his proposed

OFA, were he to file one. Riffin claims that dismissals and defaults should be "rare." Appeal p. 28 para G.

Due process is not infringed when the dismissal sanction is imposed on a litigant who fails to make discovery. The public policy favoring merits dispositions does not override other public policies that favor dismissal, including the important interest that an agency must safeguard its fact-finding process from abusive refusal to make discovery. See Rio Properties v. Rio International Interlink, 384 F.3d 1007, 1022 (9th Cir. 2002) (public policy favoring merits determinations does not outweigh other factors favoring dismissal); Keefer v. Provident Life and Acc. Ins. Co., 238 F.3d 937, 940-41 (8th Cir. 2000) (no reference to any particular factors but finding that dilatory and contumacious conduct supports severe sanction of dismissal).

Constitutional due process generally requires a "meaningful opportunity" to be heard before one is deprived of life, liberty or property. BNSF Rwy Co. v. STB, supra, 453 F.3d at 486, citing Mathews v. Eldridge, 424 U.S. 319, 349 (1976). That requirement does not mean that an in-person hearing is constitutionally required whenever an agency like STB decides a case. See Blumenthal v. FERC, 613 F.3d 1142, 1145 (D.C. Cir. 2010). STB generally resolves discovery matters without any in-person hearings. Nonetheless, Riffin here has had two in-person hearings (August 24 and October 24). He has had ample

opportunity to be heard. He has responded with evasion of the discovery process replete with misrepresentations that he had no documents, and culminating in an attack on, and evasion of, an order compelling discovery. Riffin fails to identify any property, life or liberty that he has lost from lack of due process.

Riffin objects (Appeal p. 1 para 7, with a more elaborate version at pp 14-17) that his failure to produce his emails to or from Nagel was not prejudicial, because City et al possesses one (from another source) that Riffin "forgot."²⁰ City et al attached the Nagel email as an example of Riffin's evasive withholding of responsive documents. As the hearing transcript demonstrates, Riffin admitted that Nagel and other attorneys advised Hyman from time to time. Riffin simply did not wish to supply email correspondence with them. The Nagel email serves

²⁰ Riffin states that he has deleted the Nagel email (e.g., Appeal p. 24 para 44). He reiterates that he "routinely" deletes emails. This is similar to a debunked claim Riffin made in response to City et al's initial discovery request that he had no emails, or to City et al's first motion to compel that he had no decipherable emails. According to Mr. Strohmeier's verified statement (exhibit to second motion to compel) and Riffin's later admissions, Riffin heretofore has not "routinely" deleted his emails. The Nagel email deals with Riffin's proposed suit against Metro Plaza on behalf of the Hyman interests, which he has now filed. It is germane to showing that Riffin's OFA is abusive. Riffin should not delete emails which are responsive to discovery requests. That amounts to evasion of discovery by destruction of evidence. It corrupts the agency's fact finding processes. It is further grounds to sanction Riffin.

as an easily documentable example Riffin's failure to produce responsive documents, and thus of his contumacious, evasive and dilatory conduct. City et al, and this Board and its processes, are prejudiced by Riffin's dilatory and evasive conduct, his selective forgetfulness, his claims to lack documents when he in fact has them, his claims that his documents are indecipherable/unrecoverable when that is not true either, and his arbitrary termination of his response because he found more than two hours of effort tedious. The Nagel email episode supports Judge Dring's finding that Mr. Riffin is not credible in his claims concerning the documents in his possession.

C. FRCP 37

Riffin relies on FRCP 37 for several of his arguments. He neglects to mention that FRCP 37(a)(4) states that evasive and incomplete disclosures, answers and responses "must be treated as a failure to disclose, answer or respond." Riffin has been nothing if not evasive and incomplete. In short, Riffin's conduct constitutes failure to make discovery under the Federal Rules.

Moreover, at least by the time City et al made its March 28 discovery requests, Riffin was on notice that his electronically stored information was sought. FRCP 37(e) provides for sanctions against parties who fail to preserve electronically stored information in anticipation of litigation. Riffin in his Appeal

appears to City et al to admit that he is routinely deleting electronically stored information germane to City et al's discovery requests. Riffin's November 21 "Supplement" in effect confirms he destroyed emails after being ordered to forward them. Sanctions are necessary in response to destruction of evidence.

Riffin fails to show any error, let alone material error, nor does he show any new evidence, nor changed circumstance, justifying any appellate relief. His Appeal in fact exhibits a desire to evade and confirms Judge Dring's character finding against Riffin. In any event, Riffin has waived all appellate relief to which he is entitled.

IV. Judge Dring's Credibility Determination Against Riffin Finding Is Entitled to Deference

Judge Dring found in his credibility determination (Decision, October 26, p. 2) 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." An ALJ's credibility determination "is entitled to considerable deference." Lee v. Sullivan, 988 F.2d 789, 793 (7th Cir. 1993), citing Steward v. Bowen, 858 F.2d 1295, 1302 (7th Cir. 1988). This flows from the fact that the ALJ is "in the best position to observe the witnesses." Walker v. Bowen, 834 F.2d 635, 641 (7th Cir. 1987).

Other cases state that "[a]n ALJ's credibility determinations will be affirmed on appeal unless they are 'patently wrong.'" Herr v. Sullivan, 912 F.2d 178, 181 (7th Cir. 1990) citing Kelley v. Sullivan, 890 F.2d 961, 965 (7th Cir. 1989). Since the record below is replete with examples of misrepresentations and evasions by Mr. Riffin, Judge Dring's finding (set forth in the October 26 decision) that Riffin was unreliable is not "patently wrong" and instead must be given substantial deference.

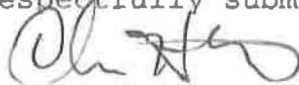
Conclusion

Mr. Riffin's Appeal should be denied. Pursuant to 49 CFR 1115.1, section 1115.2 does not apply to abandonment proceedings. 49 C.F.R. 1152.25(e) by its terms governs appellate practice in abandonment proceedings. Section 1152.25(e) provides for appellate relief here only by a petition to reopen/reconsider. Riffin has waived reopening. He thus is entitled to no relief. In any event, he fails to show any error, much less bear his burden of proving material error, on the part of Judge Dring. If he is allowed to appeal, the appeal should be denied. Judge Dring's finding that Riffin is not a reliable witness must be upheld. Riffin fails to show any grounds for appeal under 1115.2. Indeed, Riffin's statements [such as his indication he has deleted the Nagel email, that his deletions are "routine", that Steve Hyman is somehow irrelevant to the discovery, and - per his November 21 Supplement - that he

has rendered his emails inaccessible] indicate that Riffin is destroying evidence responsive to the August 25 order compelling discovery. Riffin relies on FRCP 37 for several of his arguments. FRCP 37(e) states that evasive and incomplete responses must be treated as a failure to respond. Judge Dring warned Riffin he would be subject to sanctions if he failed to comply with the August 25 order. Riffin failed to comply.

Pursuant to 49 CFR 1114.31(b)(2), City et al request an award of costs and attorneys' fees for this additional round of pleading in response to Mr. Riffin's failure to comply with Judge Dring's August 25 order. A certification of fees and costs for Riffin's appellate procedures is attached as an Appendix.

Respectfully submitted,



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