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Office of Proceedings
December 22, 2016
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Public Record

Before the
Surface Transportation Board

JR - 29

STB DOCKET NO. AB-167 (Sub-No. 1189X)

CONSOLIDATED RAIL CORPORATION – ABANDONMENT EXEMPTION –
IN HUDSON COUNTY, NJ

STB DOCKET NO. AB-55 (Sub-No. 686X)

CSX TRANSPORTATION, INC. – DISCONTINUANCE OF SERVICE EXEMPTION –
IN HUDSON COUNTY, NJ

STB DOCKET NO. AB-290 (Sub-No. 306X)

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

RIFFIN'S NOTE REGARDING THE STB'S DECEMBER 21, 2016 DECISION

1. Comes now James Riffin, (“**Riffin**”) who herewith respectfully provides the Surface Transportation Board (“**STB**”) with the below Note regarding the STB’s December 21, 2016 Decision ‘tentatively’ accepting Riffin’s §1115.2 appeal of ALJ Dring’s October 26, 2016 Order.

2. Riffin wrote his Petition for Review a week ago. He informed the ‘active’ parties in this proceeding that he intended to / needed to, mail his Petition for Review to the D.C. Circuit on Wednesday, December 21, 2016. (Mail it on Wednesday, for arrival on Thursday. Friday, December 23, 2016, being the Friday before Christmas, the Court may be closed.)

3. Riffin checked the STB's web site at 2 pm. No decision. Riffin thought about taking his Petition for Review to the UPS terminal, but decided to postpone doing that until 6 pm. (He wanted to use the hour of daylight to work on his roof.) At 5:45 pm, Riffin quit working, then put his tools away. At 5:55 pm he began walking to his car. As he was walking, his cell phone rang. It was Eric Strohmeyer. Strohmeyer asked if Riffin had seen the STB's decision. Riffin said no. Strohmeyer read the STB's decision to Riffin. Instead of going to the UPS terminal (a ten-minute drive), Riffin went to the library, where he downloaded a copy of the STB's decision.

4. Had Strohmeyer not called when he did / had the STB not rendered its decision when it did, Riffin's Petition for Review would have been on its way to the D.C. Circuit, and would have been filed about 10 am on Thursday, December 22, 2016.

5. A suggestion to the STB: If a party's deadline for filing a Petition for Review is imminent, and if the STB wishes to make a decision to forestall the filing of a Petition for Review, the STB may wish to consider doing what appellate courts do: A clerk of the court telephones, to advise that a decision has been rendered. Stopping something 12 minutes before it occurs, is cutting it a bit close.

6. A further suggestion: The STB should decide what it wants the outcome in this proceeding to be, then devise a plan to implement that desired outcome. Riffin would suggest that dismissing the proceeding, without prejudice, might be the best solution. Dismissing the proceeding, as the Newark Court dismissed Riffin's Complaint, with leave to re-file, 'permits the mess to be cleaned up.'

7. A further note: The STB has long held that the burden of proof is upon the party initiating a filing. In the case of an abandonment proceeding, it would seem to Riffin to be axiomatic that a carrier initiating an abandonment proceeding, demonstrate that the track segment the carrier seeks to abandon, is a line of railroad, since the STB can only grant abandonment authority for lines of railroad. If there is a dispute as to whether a track segment is a line of railroad, a prudent approach (perhaps a required precondition), would be for the carrier to seek a

determination as to whether a track segment is a line of railroad. Since the carrier is initiating the abandonment proceeding, the burden of proving that the track segment is a line of railroad, is / should be, on the carrier.

8. In this proceeding, Conrail has strenuously advocated that all the track segments conveyed to Conrail East of CP Waldo, are excepted track segments, and that the STB has no jurisdiction to grant abandonment authority for any of those track segments. Since Conrail questions the STB's jurisdiction, the burden should have been / is, on Conrail, to first demonstrate that the STB has the requisite jurisdiction, **before** Conrail filed its abandonment Notice of Exemption.

9. Conrail has never attempted to meet its burden of proof. It has relied upon City et al.'s burden of proof. For the track segment between CP Waldo and the West side of Marin Blvd.

10. Conrail also failed to comply with the ICC's / STB's long standing (since the SP 1972 case in Los Angeles) **requirement** that all sales of the real property underlying a line of railroad, first be passed by the ICC / STB.

11. It is Conrail's failure to follow the rules, that created this mess. G&S Investors' predecessor in title, National Bulk / G&S Investors / and the LLCs, made matters worse, when they acquired the real property associated with Harsimus, without further inquiry. And it is their 'stick their head in the sand' position that has aggravated this mess.

12. The STB, on December 15, 2016, served a decision in FD 35991, wherein the STB reiterated that it intends to enforce its rules. Riffin has made all of the active parties in this proceeding, and in his FD 36078 proceeding, aware of the STB's FD 35991 decision. (He e-mailed them a copy.) Riffin has indicated that the STB is highly likely to impose the same FD 35991 conditions in Jersey City. (It would be appropriate.) The responses Riffin has received, has been 'denial.'

13. Dismissing this proceeding would be easy: Conrail has failed to demonstrate that the

STB has the requisite jurisdiction for the track segments East of Marin Blvd. Per *Railroad Ventures*, Conrail's NOE cannot be bifurcated.

14. The dismissal order could direct Conrail to seek a determination as to whether the track segments East of Marin Blvd are lines of railroad, **before** Conrail re-files an abandonment pleading. If it is determined that track segments East of Marin Blvd are lines of railroad, then the STB could impose the FD 35991 conditions.

15. Riffin is not quite sure if the STB could impose the FD 35991 conditions **before** a determination is made regarding the proper classification for the track segments East of Marin Blvd. (Probably not.)

16. The Forest City parties, and the LLCs, have a substantial cloud on their title. Which needs to be removed. And soon. The question is: What is the best way to accomplish that goal? What has been tried to date, has not worked.

Respectfully,

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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd Day of December, 2016, a copy of the foregoing Riffin's Note Regarding the STB's December 21, 2106 decision, was served on all of the parties in this proceeding, either via e-mail, or via U.S. Postal Service, postage prepaid. A copy was also served on all of the parties in the FD 36078 proceeding.

James Riffin