

CHARLES H. MONTANGE

ATTORNEY AT LAW

426 NW 162ND STREET
SEATTLE, WASHINGTON 98177

(206) 546-1936

FAX: (206) 546-3739

3 June 2014

By E-File

236146

236147

236148

ENTERED

Office of Proceedings

June 3, 2014

Part of

Public Record

Hon. Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board
395 E Street. S.W., Room 100
Washington, D.C. 20423

- Re: (1) 212 Marin Blvd et al - Pet. Dec. Order, F.D.
35825, filed May 8, 2014;
(2) City of Jersey City et al -Pet.Dec. Order, F.D.
34818, filed Jan. 12, 2006
(3) Consolidated Rail Corporation - Aban. Exemp.-in
in Hudson County, NJ, AB 167 (Sub-no. 1189X),
placed in abeyance by this Board by a decision
served April 20, 2010

Dear Ms. Brown:

On May 28 and again on June 2, the petitioners 212 Marin Blvd, et al in F.D. 35825 ("the LLCs"), who are also interveners in F.D. 34818 and AB 167 (Sub-no. 1189X), filed Letters embodying motions to strike the pleadings of City of Jersey City, Rails to Trails Conservancy, and Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition ("City et al") filed May 23 and May 28 in the above captioned proceedings. The Letter motions to strike are without merit as shown in City et al's Reply tendered herewith for filing in the captioned proceedings.

We reiterate a concern expressed in the conclusion of our Reply today: motions to strike should not be used as vehicles to make impermissible replies to replies, nor to delay or to evade lifting the abeyance order in AB 167 (Sub-no. 1189X).

Thank you for your assistance in this matter.

Respectfully submitted,


Charles H. Montange

cc. service list

Before the Surface Transportation Board

212 Marin Boulevard, LLC, et al.)
Petition for a Declaratory Order) F.D. 35825
of Exemption)

Related proceedings:

City of Jersey City, et al. -)
Petition for a Declaratory Order,) F.D. 34818
filed January 10, 2006)

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

Reply to LLCs' Two Letter Motions to Strike

Claiming that certain pleadings filed by City of Jersey City, Rails to Trails Conservancy, and Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition (City et al) in the above dockets are "redundant, irrelevant, immaterial, impertinent" but evidently "perhaps short of being scandalous," 212 Marin Boulevard LLC, et al. ("the LLCs") by Letter filed May 28 have moved pursuant to 49 C.F.R. 1104.8 to strike City et al's pleadings. The May 28 motion to strike must be denied.

The LLCs filed another Letter motion to strike on June 2. The June 2 Letter motion must be denied as well.

F.D. 35825. As to F.D. 35825, the LLCs in their May 28 Letter motion specifically claim that City et al has made ad hominem arguments and referred to SLAPP suits filed by the LLCs

in state courts. We assume the LLCs refer to their history of changing and inconsistent positions,¹ the threats by their principal to bankrupt opponents and attorneys for their opponents,² and all their state litigation, including the SLAPP

¹ After initially consenting to this Board's jurisdiction in F.D. 34818 in 2006, the LLCs -- after losing -- claimed on rehearing that the Harsimus Branch was not conveyed to Conrail as a line of railroad, and that only the U.S. District Court for the District of Columbia had jurisdiction over that issue (major flip flop #1). On the basis of this flip flop, the D.C. Circuit vacated the Board's decisions in F.D. 34818 until the U.S. District Court resolved the underlying issue. After another trip to the D.C. Circuit for the LLCs and Conrail to contest the standing of City et al (City et al has standing), the case finally reached the merits at U.S. District Court. At this point, the LLCs again flip flopped, saying that the property was conveyed to Conrail as a line (major flip flop #2). They also said that Conrail had misled them (as well as this agency, City and the Courts) with fraudulent misrepresentations. Conrail suggested that the LLCs joined in the crux of the fraudulent misrepresentations. Notwithstanding admission that the property was conveyed as a line of railroad, the LLCs resisted summary judgment that this agency had jurisdiction on the ground they wanted to sue Conrail for fraud and City et al over other lines illegally abandoned by Conrail. At that point, the U.S. District Court in fact issued summary judgment that the Harsimus Branch was conveyed as a line and STB has jurisdiction. The LLCs nonetheless appealed. The D.C. Circuit summarily affirmed the District Court.

The LLCs originally claimed that the River Line abandonment severed Harsimus in their rehearing petition in F.D. 34818 in 2007, with the Board finding to the contrary. Conrail never made the argument. In their appeal to the D.C. Circuit from F.D. 34818, neither the LLCs nor Conrail argued that the River Line abandonment caused a severance. This constitutes waiver of the issue, and bringing it up again in F.D. 35825 is yet another major flip flop (#3).

² The LLCs' strategy, as their manager Mr. Hyman has stated on the record, is to use legal proceedings for the improper motive of bankrupting the LLCs' opponents:

-- "I'm going to sue anybody in Jersey City that says the word 'embankment' because my rights and my wife's rights have been

suit filed against their opponents and the attorneys of their opponents consistent with the purpose declared by the LLCs' principal.³

The LLCs claim their conduct is irrelevant, and that its memorialization should be stricken, or they ask to file a reply concerning it. But City et al are perfectly entitled to point out a history of changing positions, including waivers of claims, as well as threats or coercion by (and in) long and protracted litigation. All of this supports use of summary procedures to dismiss or deny F.D. 35825. Accord, Washington

abused." Transcript at p. 134, March 30, 2011, In the Matter of Case Z09-010; "A" Appeal 212 Marin Boulevard, LLC, et al, Zoning Board of Adjustment, City of Jersey City, County of Hudson.

-- "Where I am right now is that we're going to devastate the City unless you back off and the City agrees to let it happen." See id. transcript p. 140, April 5, 2011.

-- "What I said to [Stephen Gucciardo, Maureen Crowley and Jenny Meyer, three members of the Coalition's board of directors] is when this is over, I'm going to bankrupt you all personally. And then I turned to the [attorney for the Coalition, Janine Bauer] and I said, 'you, too.'" Id. 146.

³ A strategic lawsuit against public participation (SLAPP suit) is typically filed by a developer seeking to prevent opponents from pursuing legal remedies against his project. In the LLCs' main SLAPP suit, 212 Marin Boulevard, et al. v. Montange, et al., Superior Court, Hudson County HUD-L-2196-11, Decision served July 18, 2011, slip op at 5, the court specifically found that the LLCs were trying "to manage both sides of the pending federal litigation" to prevent the City from acquiring the Embankment "at a substantially lower cost" with "vastly different fiscal implications" than use of state law eminent domain procedures, and negating any compensation by the City to the LLCs. In short, the LLCs filed a SLAPP. (The opinion was filed by the LLCs in U.S.D.C. for D.C. 09-1900, document 94-5, filed Nov. 8, 2012, and is there available to the public.)

Post Co. v. Keough, 365 F.2d 965, 968 (D.C. Cir. 1996), cert. denied, 385 U.S. 1011 (1967) ("Summary judgment serves important functions which would be left undone if courts too restrictively viewed their power. Chief among these are avoidance of long and expensive litigation productive of nothing, and curbing the danger that the threat of such litigation will be used to harass or to coerce a settlement").

In addition, it is federal rail policy to resolve proceedings expeditiously (49 U.S.C. 10101(15)), and it is certainly fair to point out the frivolous nature of seven years' litigation over what the LLCs now admit, and juxtapose that with firing up another proceeding on an issue they waived six years ago as well. And as to ad hominem, threats by the LLCs' principal to bankrupt his opponents with litigation are the ultimate ad hominem. As to the LLCs' request to file a reply, the LLCs claim their course of conduct is irrelevant. They have now made that point in their motion to strike. They need file no further reiteration of it.

As to what is relevant, the LLCs ask that the Board resolve the case "strictly in accord with the facts presented in [the LLCs'] petition." City et al invite the Board to address the facts (and law) as well, but as shown in our Reply most of what the LLCs recount are not facts, are not relevant under this Board's precedent, or amount to an attempt to re-litigate what

has been decided, or what the LLCs (and Conrail) long ago waived. The Board can hardly disregard the material and relevant facts, controlling precedent and compelling legal principles set forth in the Reply of City et al.

F.D. 34818. The LLCs claim that F.D. 34818 is a "void" proceeding so any filing in it is improper. See LLCs' May 28 Letter. City et al filed a paper in F.D. 34818 because we believe that the LLCs' "Petition" in F.D. 35825 amounts in part to an untimely effort to reopen F.D. 34818 on issues that the LLCs both lost there and waived later in the D.C. Circuit. Hopefully the Board will simply deny F.D. 35825 outright and not get to the point of reopening issues in F.D. 34818 for another round of litigation, as sought by the LLCs.

The sole basis on which the D.C. Circuit relied to vacate this agency's rulings in F.D. 34818 was that the LLCs and Conrail claimed that the Harsimus Branch was not conveyed to Conrail as a line of railroad subject to STB jurisdiction, which the D.C. Circuit said was an issue solely for the U.S. District Court. The LLCs have renounced that position by stipulation, Conrail stipulated not to contest it, and the U.S. District Court found for this agency. In asserting that F.D. 34818 is totally "void," the LLCs engage in rampant bootstrapping, seeking to evade law of the case and estoppel on the basis of a position which the LLCs not only disavowed in U.S. District

Court but also asserted was the result of fraudulent misrepresentations by Conrail to the courts, this agency and the City. Conrail argued compellingly that the LLCs participated in the fraudulent misrepresentations with which they would charge Conrail. Such conduct should not be encouraged by rewarding it in the fashion the LLCs urge, even apart from the allegations of fraud and complicity in fraud. It would lead to unethical behavior by litigants before this agency.

AB 167 (Sub-no. 1189X). The LLCs in their May 28 Letter seem to think that this agency should strike any filing in AB 167 (Sub-no. 1189X) because the Board has not lifted its abeyance order. There is nothing wrong with City et al filing supplemental information with the Board showing the burden on City et al, in the form of delay and the necessity to respond to more dockets filed by the LLCs due to the abeyance order in AB 167 (Sub-no. 1189X). City et al prefers the agency to address issues in AB 167 (Sub-no. 1189X). Since City et al intend to seek meaningful relief against Conrail and the LLCs for their illegal de facto abandonment, including but not limited to invalidation of the deeds from Conrail to the LLCs, or an order barring effectiveness of any abandonment authorization until and unless the property is again owned by Conrail, and/or an offer of financial assistance, that abandonment proceeding will provide the LLCs and Conrail more than enough opportunity to

obfuscate, delay and otherwise continue in their attempts to deprive City et al, and the public, of any meaningful relief. The LLCs have no legal need to open yet more redundant fronts to re-litigate issues they lost and then waived seven or more years ago.

LLCs' June 2 filing. In a Letter filed June 2, the LLCs ask that City et al.'s replies (both of which were timely) in F.D. 35825 be stricken. The LLCs again portray the replies of City et al as not supplying factual or legal information rebutting the LLCs. But the replies most definitely do. As to the May 28 supplemental reply [which attached the River Line Notice of Insufficient Revenue (NIR) filing], the LLCs, with their typically faulty noesis, suggest the River Line NIR is somehow irrelevant. The LLCs rely on the River Line abandonment for their claim of severance. But the River Line abandonment cannot be of broader scope than the NIR, because it was pursuant to 45 U.S.C. 748(c) and thus predicated on the NIR. The scope of the River Line NIR simply does not include any of the Harsimus Branch. Thus abandonment of the River Line as a matter of law cannot sever Harsimus. The LLCs complain about the legibility of the NIR map. The copy is as supplied from STB files and there was a written description in any event. The June 2 letter motion to strike is groundless, or an unpersuasive as well as impermissible reply to a reply.

Conclusion

Even assuming arguendo the course of action of Conrail's chosen developer (the LLCs) has been (to quote the LLCs' May 28 Letter) "perhaps short of being scandalous," the LLCs' May 28 motion to strike, or to file more replies to replies, nonetheless has no merit and should be denied. The LLCs' June 2 Letter motion is also devoid of merit. Motions to strike should not be employed as vehicles to attempt to make impermissible replies to replies [49 C.F.R. 1104.13(c)], nor should they be used to delay or to evade re-start of AB 167 (Sub.-no. 1189X).

Respectfully submitted,



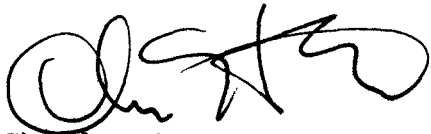
Charles H. Montange
426 NW 162d St.
Seattle, WA 98177
(206) 546-1936
Fax: -3739

Counsel for City of Jersey City,
Rails to Trails Conservancy,
And Pennsylvania Railroad Harsimus
Stem Embankment Preservation Coalition

Of counsel: Andrea Ferster
General Counsel
Rails to Trails Conservancy
The Duke Ellington Building
2121 Ward Court, NW
5th Floor
Washington, D.C. 20037

Certificate of Service

The undersigned hereby certifies service of the foregoing upon the addressees in the Service List below by deposit of same in the U.S. Mail, postage pre-paid, first class or equivalent, this 3d day of June 2014.



Charles H. Montange

Service List

[AB 167 (Sub-no. 1189X)]

- with address corrections as of Jan 2014 -

Robert Jenkins III, Esq.
Mayer Brown LLP
1999 K Street, NW
Washington, D.C. 20006-1101
For Conrail

Daniel Horgan, Esq.
Waters, McPherson, McNeill PC
300 Lighting Way
Secaucus, NJ 07096
For 212 Marin et al

And the following self-represented individuals or entities:

Daniel D. Saunders
State Historic Preservation Office
Mail Code 501-04B
NJ Dept. Environmental Protection
P.O. Box 420
Trenton, NJ 08625-0420

Massiel Ferrara, PP, AICP, Director
Hudson County Division of Planning
Bldg 1, Floor 2
Meadowview Complex
595 County Avenue
Secaucus, NJ 07094

Janice Armstrong
Sr. Program Director
Preservation New Jersey
310 W. State St.
Trenton, NJ 08618

Justin Frohwith, President
Jersey City Landmarks Conservancy
54 Duncan Avenue
Jersey City, NJ 07303

Eric Fleming, President
Harsimus Cove Association
344 Grove Street
P.O. Box 101
Jersey City, NJ 07302

President
Hamilton Park Neighborhood Association
PMB 166
344 Grove Street
Jersey City, NJ 07302

Jill Edelman, President
Powerhouse Arts District Nbd Ass'n
140 Bay Street, Unit 6J
Jersey City, NJ 07302

President
The Village Nbd Ass'n
365 Second Street
Jersey City, NJ 07302

President
Van Horst Park Association
91 Bright Street
Jersey City, NJ 07302

President
Historic Paulus Hook Ass'n
192 Washington Street
Jersey City, NJ 07302

Dennis Markatos-Soriano
Exec. Director
East Coast Greenway Alliance
5315 Highgate Drive, Suite 105
Durham, NC 27713

Gregory A. Remaud
Conservation Director
NY/NJ Baykeeper
52 West Front Street
Keyport, NJ 07735

Sam Pesin, President
Friends of Liberty State Park
580 Jersey Ae., Apt. 3L
Jersey City, NJ 07302

Aaron Morrill
Civic JC
64 Wayne St.
Jersey City, NJ 07302

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