

Before the Surface Transportation Board

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

ENTERED
Office of Proceedings
January 9, 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 Objection and Initial Reply
to Riffin's "Motion to Dismiss"
and various subsequent pleadings

City of Jersey City, Rails to Trails Conservancy, and
Pennsylvania Railroad Harsimus Stem Embankment Preservation
Coalition ("City et al") object and herein make an initial reply
to Riffin's Motion to Dismiss this proceeding filed on December
21, 2016, and Riffin's now-usual sequence of supplementary
thoughts and additions filed December 21 (Riffin's "Note to
Accompany") and 23 ("Riffin's Note Regarding the STB's December
21, 2016 Decision").¹

¹ City et al initially intended to take the position that no
reply was necessary since Riffin was barred from further
participation in this case (accord, Conrail letter in AB 167-
1189X, filed Dec. 21, 2015), but the Board has not ruled on
Riffin's pending efforts to appeal other than to provisionally
accept some sort of appellate oversight. See Decision in AB
167-1189X served Dec. 21, 2016. City et al therefore are filing
a reply so Riffin cannot claim some kind of default for what

A. Riffin's Motion to Dismiss Is a Nullity

ALJ Dring's order served in this proceeding on October 26, 2016 bars Riffin from further filings. This Board has not granted Riffin's motion to stay the order, and there is no regulation providing an automatic stay. Riffin's motion to dismiss is thus barred. It is illegitimate, and must be stricken from the record as provided by Judge Dring.

In addition, Mr. Riffin in this proceeding purports to be acting on behalf of the Hyman interests for a commission.² In so doing, he is acting in unlawful evasion of this Board's qualification requirements set forth in 49 CFR 1103.2-.3. Mr. Riffin is a law school graduate. If he 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.

City et al view as a meritless motion. City et al reserve the right to reply further should Riffin remain in the proceeding.² 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 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.

But Mr. Riffin is not a member in good standing of the bar of the highest court in any jurisdiction. Moreover, he is not a registered practitioner before the STB per 49 CFR 1103.3. See Norfolk S. Ry.Co. - Pet. Ex. - in Baltimore City and Batimore County, MD, AB 290-311X, served Jan. 23, 2012, slip op. at 6 (Riffin neither licensed attorney nor STB-approved practitioner). His actions in this proceeding are thus equivalent to the unauthorized practice of law. This Board should strike all of his pleadings as a violation of the pertinent regulation.

In any event, the Hyman interests should not be allowed to appear like the two-faced god Janus in this proceeding, claiming one thing via attorney Horgan and another via Mr. Riffin. Representation by tag team is fundamentally unfair, and amounts to a denial of due process to the other parties in the proceeding.

B. If This Board Intends to Entertain Riffin's Motion to Dismiss, then the Motion Must Be Denied

The only ground for dismissal offered by Riffin is that Conrail said in Riffin's new declaratory proceeding (F.D. 35076) that it regarded trackage east of Marin Boulevard (i.e., in or

beyond the Cove Yard) as ancillary or "excepted" track over which STB lacks abandonment jurisdiction under 49 U.S.C. 10905.³

Riffin's claim is forfeited. The fact that Conrail regards the track east of Marin Boulevard as "excepted" track is hardly news in AB 167-1189X. Conrail (like the Hyman interests) claimed that all of the Harsimus Branch was a "spur" in F.D. 34818. When they lost that argument, both Conrail and the LLCs appealed to the D.C. Circuit. While the appeal was pending, Conrail on January 7, 2009, and then again on February 26, 2009, filed a "Notice of Exemption" for the Harsimus Branch without waiver of the argument on appeal. The railroad expressly explained in its administrative 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[.]" Notice of Exemption (both Jan. 7 and Feb. 26), supra, Ex. B (Environmental Report) at p. 4.

In July 2012, the Hyman interests changed their position, stipulating that the Harsimus Branch from CP Waldo to Marin Boulevard was a line of railroad subject to STB abandonment

³ In opposing Riffin's petition, Conrail stated that it regarded trackage in the Harsimus Cove Yard and Hudson Street Industrial Trackage as "spur and yard track over which the Board has no abandonment jurisdiction." Conrail Dec. 5, 2016 Reply in FD 36078 at p. 3. That was Conrail's defense in F.D. 34818 as well. E.g., Conrail's Reply in F.D. 34818, filed Feb. 1, 2006, at p. 3 (always treated as spur or yard track).

jurisdiction. The Special Court subsequently (30 September 2103) so ruled over the objection of the Hyman interests, and the D.C. Circuit summarily affirmed this result, again over the objection of the Hyman interests. When STB reactivated AB 167-1189X, Conrail in 2014 explained in detail that it continued to be the railroad's position that the property east of Marin was "excepted" or spur track. See Conrail's "Reply" to the Hyman interests' "Motion to Clarify Responses to Requests for Admissions and to Otherwise Compel Proper Responses to Requests for Admission" filed Dec. 19, 2014, in AB 167-1189X.

In short, Conrail has maintained that the track east of Marin was spur track from the inception of the proceeding, but has also indicated - since the inception of the proceeding -- that it sought abandonment authority for "all of the Harsimus Branch property ... that could be claimed to be a line of railroad."

Riffin's motion to dismiss is equivalent to a motion or petition to reconsider Conrail's two-year-out-of-service exemption. 49 C.F.R. 1152.50(d)(3) requires that petitions to reconsider abandonment exemptions must be filed within 20 days of the Board's publication of the exemption. Publication was initially on or about March 18, 2009. Under the regulation, Riffin should have made his line status argument by early April, 2009, over seven years ago. Conrail's basic position was on

record and remained on the record throughout this period, including when Riffin filed his notice of intent to participate and his notice of intent to OFA on June 8, 2015. In the circumstances, Riffin "appears to have forfeited [his] claim concerning proper identification of the Line by failing to dispute in a timely manner [the railroad's] assertion"

Norfolk Southern Railway Co., supra, AB 290-311X, served Jan. 23, 2012, slip at 8. In all events, Riffin's motion to dismiss amounts to another vastly out-of-time motion to reopen. He must show, but fails to show, material error,⁴ changed circumstances, or any new evidence. His motion therefore must be denied. See BNSF Rwy v. STB, 453 F.3d 473, 479 (D.C.Cir. 2006).

⁴ Riffin (Motion at p. 1) cites CSX - Ab. Ex. - In Rocky Mount, AB 55-Sub 562X, served Dec. 1, 1999, but that case involved trackage that was entirely "excepted." Here the CP Waldo to Marin Boulevard segment is conclusively determined to be regulated rail line. Riffin (Motion at 4) cites Railroad Ventures, Inc. v STB, 299 F.3d 523, 523 (6th Cir. 2002) for the proposition that Conrail cannot amend or alter what an OFA offeror seeks to buy. But Conrail's Notice of Exemption indicates the railroad is seeking to obtain abandonment authority for anything east of Marin Boulevard that is a line. See Conrail Env. Report, supra, at 3-4. In the circumstances, Riffin fails to show how Conrail's calling something spur or line or yard east of Marin amends or alters what an OFA offeror may seek to buy. See also Iowa Terminal R. Co. v. ICC, 853 F.2d 965, 971 (D.C. Cir. 1988) (OFA applicant can seek any railroad property necessary for rail purposes adjoining a line). Moreover, contrary to Riffin's intimations (Motion at 5), City has previously indicated it has no OFA interest east of Marin, intending in that area to rely on its existing ownership of 6th Street extended from Marin to intersection with the Hudson Bergen light rail system.

Riffin's claim is barred. Riffin's motion is also barred by law of the case. When the LLCs 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, Conrail properly noted that STB had already taken the position that it did not need to know the status of rail property east of Marin in order to deal with the Branch west of Marin. See id. at 5, citing LLCs' "Motion to Clarify" in AB 167-1189X at Exhibit E at p. 17 (citing in turn City of Jersey City et al - Pet Dec. Order, F.D. 34818, served Dec. 19, 2006, p. 6 n.10). In response to the LLCs' motion to compel, this Board explained that the Hyman interests were arguing that status and location of portions of the Harsimus Branch and the Hudson Street Industrial Trackage were unresolved. The Board held that these matters were irrelevant. This Board stated as follows:

"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.

Riffin cannot move to dismiss (or reconsider) on the basis of disputes over status of the track east of Marin when the Board has already determined that the status of the track east of Marin is not relevant or at least no longer relevant to resolving the case.

City et al have long maintained (see LLCs' "Motion to Clarify" in AB 167-1189X at Exhibit E at pp. 17-18) that the status of track east of Marin is irrelevant to this case. No interpretation of the Final System Plan or anything allegedly within the jurisdiction of the Special Court is necessary to resolve AB 167-1189X.

All trackage east of Marin of potential interest to the City is already part of City streets or the Hudson-Bergen light rail system. While City et al definitely seek OFA and other relief west of Marin Boulevard, City et al currently foresees no relief which they intend to see east of Marin. City et al understand that this Board is conducting an environmental and historic review that will encompass germane portions of the former mass of trackage that existed east of Marin. E.g., CSX Transp. - Abandonment at Port Covington - Baltimore, Md., AB 55-258X, 1988 ICC Lexis 313, Sept. 23, 1988, at *6 (historic conditions applied to structures in rail yard associated with rail line abandonment even though yard itself is excepted track). City et al are unaware of any

party with an interest east of Marin that requires any further status determinations before AB 167-1189X may proceed.

Conrail's identification of the line is not false or misleading for purposes of abandonment regulation. The only possible concern in these circumstances is the principle that 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). The Harsimus Branch was used to convey traffic 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).⁵ This suggests that the original Harsimus extended to the River, although a portion on the River itself was (per Conrail's uncontested representation) never deeded to Conrail. Conrail Env. Report, supra, at pp. 3-4 n.3.

In general, it is City et al.'s understanding that even though a railroad is not obligated to seek abandonment authorization for yard track, the railroad is obligated to seek abandonment authority for at least one remaining "through" track

⁵ The relevant track charts for the Harsimus Branch indicate a terminus at MP 1.0, basically at the Hudson River waterfront.

through a yard located at a port from which cargo was transferred to other states and to foreign countries. The railroad has addressed that concern by informing the Board (and the world) 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. Conrail further has explained that it did not go all the way to the River front because it was not deeded that final segment. Id. at pp. 3-4 n.3. Conrail's approach thus appears to be a reasonable effort to satisfy STB requirements without requiring any further status determinations or intrusion into the jurisdiction of the Special Court.

In short, Conrail appears to be have acted reasonably in identifying a through line east of Marin to satisfy any jurisdictional requirements, and without requiring any further status determinations. Whether or not any track east of Marin is excepted track, or regulated track, the agency can simply grant abandonment authority to the extent it is a line. Given these circumstances, Conrail's notice of exemption is not false or misleading for purposes of fulfilling jurisdictional requirements. If it neither over- or under-states the status of trackage in the Harsimus Cove Yard between MP 1.0 and MP 1.3, and it puts the public on fair notice. Any error is harmless

error, and certainly does not amount to grounds to dismiss the proceeding.

C. Riffin Is Simply Rehashing Rejected Arguments

Riffin's new declaratory proceeding in F.D. 36076 and his motion to dismiss at bar here are a rehash of unsuccessful arguments previously made by the LLCs (Hyman interests). This kind of churning violates federal transportation policy, which calls for "expeditious handling and resolution of all proceedings required or permitted to be brought" pursuant to the ICC Termination Act, 49 U.S.C. 10101(15). See also 49 U.S.C. 10101(2) (expeditious regulatory decisions). The focus in this case should be on providing meaningful relief to City et al so the proceeding as to the CP Waldo to Marin Boulevard segment of the Harsimus Branch does not have to be interminably delayed or dismissed due to, inter alia, anticipatory demolition under NHPA section 110(k), 54 U.S.C. 306113, and/or denial/foreclosure of meaningful comment under NHPA section 106, 54 U.S.C. 306108.

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 the same time, the Hyman interests sought discovery from Conrail in support of their efforts to contest the status and location of alleged regulated lines east of Marin. As already indicated, the Board rejected these efforts. Decision served May 22, 2015, supra.

Riffin is regurgitating various arguments that the Hyman interests unsuccessfully have previously deployed at Special Court or before this agency in this proceeding or in other related proceedings to circumvent federal remedies available in AB 167-1189X. Riffin is not a shipper, or a railroad, but by his own admission an operative of the Hyman real estate

interests. He lacks standing in federal judicial proceedings, and should not be permitted to disrupt AB 167-1189X, either directly through a motion to dismiss (tantamount to a petition to reconsider) or indirectly through his other rehash of rejected Hyman interest arguments in F.D. 36078, which he filed on November 16, 2016. Judge Dring properly barred him from filing further pleadings.

Conclusion

Riffin's motion to dismiss should not be accepted for filing. City et al object that it is contrary to Judge Dring's order. If further considered, Riffin's motion must be denied. City et al reserve the right to respond further should this Board consider his motion.

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 9th day of January 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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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.

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