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Before the Surface Transportation Board

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

ENTERED  
Office of Proceedings  
February 2, 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  
Protective Appeal/Petition to Reopen  
from

Discovery Order of 4 January 2017

and

Motion to Compel Consolidated Rail Corporation (Conrail)  
To Make Available the Files of Ryan and Fiorilla and Related  
Depositions and Materials, and  
To the Extent Necessary to  
Reopen, Reconsider and/or Clarify  
Conrail's Document Discovery Obligations

City of Jersey City, Rails to Trails Conservancy, and  
Pennsylvania Railroad Harsimus Stem Embankment Preservation  
Coalition ("City et al") hereby (1) appeal (or in the  
alternative seek reopening) of the discovery cut off in this  
proceeding in the event this Board grants relief to Riffin  
pursuant to his interlocutory appeal and (2) seek to reopen,  
reconsider, or clarify this Board's May 22, 2015 decision  
limiting City et al's discovery against Consolidated Rail  
Corporation ("Conrail"), under which City et al have recently

ascertained that Conrail has utterly failed to make available the files of Ryan and Fiorilla, the two Conrail representatives who negotiated the illegal sale of the Harsimus Branch with 212 Marin Boulevard, LLC, et al ("LLCs" or "the Hyman interests"), which sale occurred on or about July 12, 2005.

I. Protective Appeal/Motion to Reopen/Motion to Reconsider

A. Background

At the hearing before ALJ Dring on October 24, 2016, City et al stated it would not pursue further discovery against the LLCs in the event that Mr. Riffin were excluded from AB 167-1189X, viewing known discovery issues as moot if Riffin were in fact dismissed from the proceeding. When ALJ Dring orally ordered Mr. Riffin's dismissal from the proceeding on that date, City et al accordingly did not pursue its motion to compel discovery from "the Hyman interests." See Transcript of Oct. 24, 2016 hearing at, e.g., pp. 36 & 81. ALJ Dring subsequently served a written Decision on October 26 inter alia dismissing Riffin from the case and also imposing a prospective discovery cut-off. On January 4, 2017, Judge Dring issued an Order actually terminating discovery in this case based on his statements at the October 24 hearing.

Commencing on October 25, Riffin began filing a series of motions, petitions and/or supplements and comments on same directed at obtaining appellate relief. One of Riffin's many

filings was a November 14, 2016 "appeal" from ALJ Dring's October 26, 2017, decision dismissing Riffin from AB 167-1189X. City opposed all appellate relief sought by Riffin.

On December 20, 2017, Riffin filed a motion to dismiss AB 167-1189X, contending in his motion that STB lacked jurisdiction.

On December 21, the Board indicated that it was considering Riffin's "petition" to "clarify" regulations applicable to his desire to appeal and to seek other relief, and was "tentatively" accepting Riffin's appeal.

On January 9, 2017, City et al replied in opposition to Riffin's motion to dismiss, and also filed a protective appeal and motion to reopen the discovery order of 4 January, 2017. City et al noted that if the Board granted Riffin's appeal, then City et al were unfairly prejudiced by the discovery cut-off, and were entitled to more discovery against Riffin and other parties.

By decision served January 26, 2017, this Board granted Riffin's "petition for other relief" to the extent of indicating that he could file "a new interlocutory appeal of the October 26 Decision" pursuant to 49 CFR 1115.9 and 1115.1 within seven days of January 26. The Board dismissed Riffin's November 14 appeal, noting again that Riffin could file a new interlocutory appeal by February 2. The Board struck Riffin's motion to dismiss and

Conrail's and the City's replies. The Board denied City et al's January 9 motion as "moot" in light of dismissal of Riffin's appeal.

On January 31, 2017, Riffin filed his new interlocutory appeal. Pages 1-30 (and associated exhibits) appear to be essentially identical to Riffin's November 14 appeal. Page 30 (commencing with the heading "Lack of Jurisdiction") through page 37 appear to be a rehash of Riffin's December 20 motion to dismiss. Pages 37 to 38 include a motion for a stay.

B. Argument

Because Riffin has now filed an interlocutory appeal per the Board's January 26 Decision, the relief sought by City et al in our January 9 motion is no longer moot. In the event this Board grants relief to Riffin, then this Board either (a) should reconsider its January 26 Decision dismissing City et al's January 9 motion as moot, instead hold it in abeyance while the Board considers granting relief to Riffin, and then grant it, or alternatively, (b) should grant this protective appeal/motion to reopen.

In all events, should this Board grant relief to Mr. Riffin allowing him continued participation in this proceeding, City et al must be allowed (i) to obtain additional discovery against him (including, but not necessarily limited to, additional documentary discovery as well as a deposition), and (ii) to

pursue City et al's motion to compel discovery against the Hyman interests, including potentially additional discovery against them depending on what further Riffin discovery indicates.<sup>1</sup> Discovery may be necessary against other parties as well. It would be highly prejudicial to permit Riffin's continued participation in this proceeding without allowing City et al to pursue discovery, since City et al's agreement not to pursue discovery against the LLCs was in good faith reliance on Riffin's exclusion from the proceeding, as indicated in the relevant transcript.

Accordingly, without waiver of any of City et al's arguments that Riffin is not entitled to any appellate relief, City et al again reiterate that they make a protective appeal/petition to reopen ALJ Dring's Order served January 4, 2017 terminating discovery. As an "appeal," it is timely (within the 7 days provided by the Board's January 26 decision for interlocutory appeals). As a petition to reopen, it is justified on the basis of material error, changed circumstances and new evidence: namely, it is a denial of due process to allow a party back into the proceeding who was excluded due to failure

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<sup>1</sup> City et al have been advised that there have been multiple meetings and other contacts between Mr. Riffin and Mr. Hyman since Mr. Hyman's exclusion from the proceedings on October 24, 2016, including meetings with Mr. Horgan and 212 Marin Boulevard LLC, et al.

to make adequate discovery, and then deny discovery against that party, his counterparties, and other parties with whom he is or may be in collusion. Riffin and the LLCs should not be immunized from discovery by procedural ploys including appeals. Moreover, any relief this Board grants to Riffin constitutes a changed circumstance, as well as new evidence, justifying relief to City et al from the discovery cut-off.

Insofar as the Order served January 4, 2017 is foreshadowed by earlier orders of ALJ Dring commencing on October 24, 2016, City et al also seek reopening of all such orders on the same basis.

This general appeal/petition for reopening is protective only. If the Board upholds the relief against Mr. Riffin ordered by ALJ Dring, then City et al withdraw their protective appeal/petition to reopen.

II. Motion to Compel Conrail and to the extent necessary to Reopen, Reconsider and/or Clarify May 22, 2015 STB  
Discovery Limitations Against Conrail

A. Background

During the pendency of Riffin's appellate efforts, City et al was informed by counsel for Chicago Title Company that Consolidated Rail Corporation (Conrail) had designated Ryan and Fiorilla as Conrail's corporate representatives for purposes of discovery in connection with Chicago Title's claims against Conrail for fraudulent misrepresentations to Chicago Title (or

its agents) in respect to Conrail's illegal sale of a portion of the Harsimus Branch to 212 Marin Boulevard LLC, et al. in 2005. Ryan and Fiorilla were extensively involved in that sale.

Counsel for Chicago Title informed City et al that Chicago Title in discovery had received extensive files from Ryan and Fiorilla. Counsel for Chicago Title also informed City et al that he had supplied copies of the files to Conrail, but due to a protective order, felt constrained not to supply the files to City et al. Counsel for City et al requested Conrail to make available those files by email on January 30, 2017, which Conrail declined to do by email the following day. Exhibit A.

Prior to being informed by Chicago Title that Ryan and Fiorilla had extensive files, City et al was unaware that such documents existed. The Ryan and Fiorilla files should have been supplied to City et al years ago in F.D. 34818 but were not. The Ryan and Fiorilla files were also specifically requested in City's document request number 12, which Conrail is required to respond to pursuant to this Board's Decision served May 22, 2015, slip at 16. No such files were produced.

#### B. Argument

In its May 22, 2015 Decision, this Board modified City et al's document request number 12 to relate only to files prior to January 1, 2005. This appears to have been a typographical error by the agency, for the illegal sale by Conrail

(represented by Ryan and Fiorilla) to the LLCs did not take place until on or about July 12, 2005 (see Petition in F.D. 34818, filed Jan. 12, 2006, at p. 7). Important and substantial communications concerning regulatory status involving Ryan and Fiorilla must have occurred during and throughout calendar year 2005 when the actual sale occurred, because the City itself raised the issue of regulatory status with Conrail in writing during early 2005. The Board's time restriction denies City et al meaningful discovery and constitutes reversible error, and must be revised to include the period up to at least January 1, 2006. The typographical error of limiting discovery to documents prior to 2005 constitutes material error.

The Ryan and Fiorilla files were also within the ambit of numerous other discovery requests by City et al (for example, what the Board refers to as an email request in its May 22, 2015 decision). To the extent Conrail hides behind the Board's typographical error, or other limitations, in the May 22, 2015 decision to excuse its failure to supply the Ryan and Fiorilla files, and any related documents from the Conrail Law Department, the railroad has failed to disclose important, material, and relevant information, or at the very least documents that may lead to relevant evidence, on the issues of anticipatory demolition and denial of opportunity for reasonable comment under the National Historic Preservation Act. This

Board represented to the Advisory Council on Historic Preservation (ACHP) in September of 2016 that it was allowing discovery into matters relating to anticipatory demolition and that such discovery was on-going. See Letter, Rutson (STB) to Vaughn (ACHP), Sept. 21, 2016. This representation is false or misleading to the extent this Board allows Conrail to continue to evade making available to City et al the same files that have been made available to Chicago Title in litigation involving misrepresentations, fraudulent or negligent, concerning the regulatory status of the Harsimus Branch in and before 2005.

City et al are entitled to the full Ryan and Fiorilla files, and to any documents generated or held by the Conrail legal department, in connection with the Harsimus Branch from CP Waldo to at least Marin Boulevard without time restrictions that expire before the illegal sale occurred. It is material error, a denial of due process, and contrary to this Board's representations to ACHP if the documents in question are not made available to City et al.

A party such as Conrail is under a duty to supplement its discovery responses when it learns that its response is no longer correct. 49 C.F.R. 1114.29(b). City et al informed Mr. Jenkins and Mr. Sloane (counsel for Conrail) on January 30 by email that Chicago Title had furnished a set of the Ryan and Fiorilla documents to Conrail. Thus, even if Conrail's

attorneys failed to inquire before, or their client was otherwise not forthcoming concerning the existence of those files, they now know. Under 49 C.F.R. 1114.29(b) Conrail, and its attorneys, have a duty to supplement. Alternatively, pursuant to 49 C.F.R. 1114.29(c), City et al move that this Board order Conrail to supply the Ryan and Fiorilla files pertaining to the sale of the Harsimus Branch to the LLCs, along with the relevant depositions as they become available, to City et al. In addition, any documents discussing the regulatory status of the Harsimus Branch prior to January 1, 2016 must be produced.

There is no burden on Conrail: Chicago Title's attorney has confirmed to City et al that Chicago Title itself supplied copies of the Ryan and Fiorilla files to Conrail. In essence, Chicago Title has done Conrail's work for it in terms of assembling the files.

Ryan and Fiorilla are evidently Conrail's designated representatives in the Chicago Title litigation due to their knowledge concerning claims about regulatory status of the Harsimus Branch. It is unconscionable that Conrail should conceal their files from City et al, and from this Board, in AB 167-1189X. This problem is acute in this case, for the Board's Office of Environmental Analysis ("OEA") has previously informed City et al it is not equipped to conduct, and is not conducting,

any investigation or discovery on behalf of the Board into the issues of anticipatory demolition or denial of opportunity for reasonable comment under the National Historic Preservation Act. To City et al's knowledge, no one at the agency is doing so. Yet the Board's May 22, 2015 Decision seems to acknowledge that these matters are relevant and material to this proceeding. OEA's Ms. Ruston has implicitly so represented and acknowledged to ACHP.

Rather than proceed in the dark, the Board must permit reasonable discovery, encompassing Ryan, Fiorilla, and whatever Conrail Law Department documents or attorneys they may have relied upon. Otherwise STB by default is creating conditions conducive to rubberstamping misconduct by an experienced railroad which clearly should have known better. That is not likely to encourage compliance with agency regulatory processes in the future.

STB commits material error to the extent that it fails to permit reasonable discovery into anticipatory demolition matters, and such failure to permit reasonable discovery occurs if Conrail is not compelled to make available the Ryan and Fiorilla files, and all documents from the Conrail Legal Department prior to January 1, 2016, dealing with regulatory status of the Harsimus Branch. In addition, depositions of Ryan, Fiorilla, and any Conrail attorneys deposed on the

regulatory issues should be made available to City et al when they are available to Conrail.

City et al accordingly move, pursuant to 49 C.F.R. 1114.31 and other applicable authority, that this Board compel Conrail to make the Ryan and Fiorilla files available to City et al, as well as all legal opinions of the Conrail Law Department on which Ryan or Fiorilla relied, and all relevant depositions of Ryan and Fiorilla, as those depositions become available to Conrail. City et al also move that this Board reopen/reconsider/or clarify all pertinent prior rulings consistent with requiring Conrail to make available the Ryan and Fiorilla files, at least to the extent Conrail received them from Chicago Title, as well as all underlying documents and legal analysis from the Conrail legal department upon which Ryan or Fiorilla relied (or which are ultimately made available to Chicago Title by Conrail), and all depositions by Chicago Title of Ryan and Fiorilla and Conrail attorneys, as those depositions become available to Conrail.

Respectfully submitted,

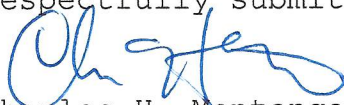
  
Charles H. Montange  
426 NW 162d St.  
Seattle, WA 98177  
(206) 546-1936  
Fax: -3739  
Counsel for City et al

Exhibit A

**Subject:** RE: Conrail and Harsimus Branch  
**From:** Jenkins, Robert M. (RMJenkins@mayerbrown.com)  
**To:** c.montange@frontier.com;  
**Cc:** Jonathan.Broder@Conrail.com; ASloane@mayerbrown.com;  
**Date:** Wednesday, February 1, 2017 8:54 AM

Discovery in the abandonment proceeding was formally terminated by order of Judge Dring in December 2016.

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**From:** C. Montange [mailto:c.montange@frontier.com]  
**Sent:** Monday, January 30, 2017 6:56 PM  
**To:** Jenkins, Robert M.; Sloane, Adam C.  
**Subject:** Conrail and Harsimus Branch

As you almost certainly are aware, Chicago Title has filed certain claims against Consolidated Rail Corporation (Conrail) arising from representations made to Chicago Title concerning the sale of a portion of the Harsimus Branch to the Hyman interests in 2005. I was informed by attorneys for Chicago Title earlier this afternoon that they had received extensive files from Messrs. Ryan and Fiorilla in connection with that transaction. I requested copies, but was informed that the documents were produced pursuant to a protective order. The attorneys for Chicago Title indicated that Conrail's attorneys had copies of all the documents. They suggested that I request same from Conrail. According to attorneys for Chicago Title, Conrail has designated Ryan and Fiorilla as its corporate representatives for purposes of litigation over representations made concerning regulatory status of the Branch. I hereby request copies of the files of Ryan and Fiorilla as furnished to Chicago Title, and as Chicago Title has provided same to Conrail. In addition, I request a copy of deposition of Mr. Ryan (and exhibits thereto) as taken by attorneys for Chicago Title, and same request as to the deposition of Mr. Fiorilla when taken. City et al will pay reasonable expenses, if any, but scanned copies are fine.

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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 2<sup>nd</sup> day of February 2017 addressed to the parties or their representatives per the attached service list. 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).



### Service List (current as of Nov. 2016)

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James Riffin  
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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  
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Gretchen Scheiman  
Historic Paulus Hook Association  
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Michael Selender  
Jersey City Landmarks Conservancy  
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Jersey City, NJ 07303-0068

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

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