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Before the
Surface Transportation Board

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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**

**JAMES RIFFIN’S REPLY TO THE CITY’S, ET. AL’S
MAY 2, 2016 MOTION TO COMPEL RIFFIN TO RESPOND TO
THE CITY’S, ET. AL.’S MARCH 28, 2016 DISCOVERY REQUEST**

1. Comes now James Riffin, who herewith files his Reply to the Motion to Compel that was filed by Charles Montange, counsel for the City of Jersey City, the Rails to Trails Conservancy, and the Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition (collectively “**Montange**”), and in reply states:

2. Riffin incorporates by reference herein, his arguments in his May 3, 2016 Motion to Strike Montange’s Motion to Compel.

3. In a decision served on May 22, 2015, at p. 8, the Surface Transportation Board (“STB”) admonished the parties in this proceeding:

“The Board recognizes the lengthy history of this proceeding and the complex and controversial issues that have been presented. That is why the Board is permitting a reasonable amount of discovery in this proceeding, notwithstanding the normal practice of limiting discovery in abandonment proceedings. We note, however, that **the record has become voluminous and, in our opinion, needlessly so.** Although the Board cannot limit the filings submitted by the parties in the future, **we expect the parties to exercise sound judgment when weighing the need for future motions or objections.**”
Bold added.

4. In the May 22, 2015 decision, at p. 4, the STB also stated the rules regarding discovery in an abandonment proceeding (which this is):

“In Board proceedings, parties generally are entitled to discovery “regarding any matter, not privileged, **which is relevant to the subject matter involved in a proceeding.**” 49 C.F.R. §1114.21(a)(1). Further, it “is not grounds for objection that the information sought will be inadmissible as evidence if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.” *Id.*, § 1114.21(a)(2). **However, discovery is typically disfavored in abandonment cases. Thus, parties seeking discovery in abandonments must demonstrate relevance and need.** *Cent. R.R. of Ind. – Aban. Exemption – in Dearborn, Decatur, Franklin, Ripley, & Shelby Cntys., Ind. (Dearborn)*. AB 459 (Sub. No. 2X) (STB served Apr. 1, 1998.)”
Bold added.

5. In this proceeding, “the subject matter involved in a proceeding” is:

A. Should Conrail be authorized to abandon its Harsimus Branch?

B. Did Conrail or the LLCs “intend[] to avoid the requirements of section 306108 of the NHPA.” November 2, 2015 decision at 5.

C. Should the Offer of Financial Assistance (“OFA”) process be permitted to move forward?

6. As for the first issue (should abandonment be authorized), there is a consensus that Conrail should be granted authority to abandon the Harsimus Branch. [Conrail has established the criteria in 49 CFR 1152.50. (There has been no traffic on the Line for the 2-year period prior to 2009, when Conrail filed its Notice of Exemption (“**NOE**”).]

7. While Montange has argued that Conrail and the LLCs intended to avoid the requirements of section 306108 of the NHPA, to date, the STB has not ruled on this issue.

8. In the May 22, 2015 decision, at p. 6, the STB did rule that the valuation information specified in 49 CFR 1152.27(a) and (d), must be provided. Conrail dutifully provided, and filed with the STB, valuation information on **June 1, 2015**.

9. As for permitting the OFA process to move forward, the STB, at p. 6 of its May 22, 2015 decision, stated:

“Conrail’s claim that the City Parties will be unable to submit a successful OFA may ultimately prove correct, but the Board’s determination of whether to grant a request for an OFA **occurs after** the valuation information has been provided and **an OFA is filed**. Thus, the Board typically **does not consider or address the factors necessary to determine whether an OFA might be granted until the offeror** receives the valuation information in 49 C.F.R. §§ 1152.27(a) and (d) (which is in the abandoning railroad’s possession) and **files an OFA**. Accordingly, we will grant the City Parties’ motion to compel Conrail to produce the valuation information described in 49 C.F.R. §§ (a), (d) limited to the operation of and property comprising the Harsimus Branch only. ... Here, because of the unique circumstances of this case, the Board will decide whether to make the notice of exemption effective and will set a due date for OFAs in a future decision.”

10. In *Stewartstown Railroad Company – Adverse Abandonment – In York County, PA*, AB 1071, Riffin filed a motion asking the STB to determine whether Riffin would have to “submit a more recent personal financial statement for his contemplated OFA.” In a December 12, 2012 decision denying Riffin’s motion, the STB stated:

“It would be inappropriate for the Board, in effect, to rule formally on the sufficiency of Riffin’s evidence in the abstract, **before Riffin’s OFA, if any, has been filed**. The

Board notes that it is the OFA offeror's obligation to provide accurate information sufficient to show, **when the offer is filed**, that the offeror has or will have the means to carry out its offer."

11. Presently, this proceeding is in a 'holding pattern.' The next thing that has to occur, is a public meeting, whereat interested person may submit comments concerning the reach of the NHPA: Does the STB have the authority to impose conditions that would condition how a former railroad property may be used after abandonment?

12. Rumor has it, that such a public meeting is not likely to be scheduled anytime soon. The STB did not get all of the funds that it last requested from Congress. Consequently, the STB must 'find' sufficient funds to pay the expenses of such a public meeting.

13. Proceedings, such as this Motion to Compel proceeding, consume what limited resources the STB has available. Which is why the STB admonished the parties to limit their filings in this proceeding.

14. Which brings Riffin to his first comment in reply:

Montange's Motion to Compel was totally unnecessary.

15. Montange acknowledged, at p. 5 of his Motion to Compel:

"There are no current filing deadlines set."

16. The only 'deadlines,' are those arbitrarily created by, and made by, Mr. Montange. It would appear that Mr. Montange scheduled his yearly trek to Europe for the month of May. Just why he wanted a response from Riffin just a few days before he decided to take a month's vacation, is unexplained, and perplexing. Did he intend to mull over Riffin's response while trekking in Europe? I would expect one to concentrate on the sights in Europe, while in Europe, as opposed to thinking about Riffin while vacationing in Europe.

17. Montange e-mailed his discovery request to Riffin on March 28, 2016. Montange also sent a hard copy to Riffin via first class mail, which arrived April 2, 2016. Montange **quite arbitrarily** picked **April 19, 2016**, as the date by which he wanted a response. (He probably picked that date for the sole reason that he knew that he was scheduled to leave for his yearly European trek on May 3, 2016.) On March 30, 2016, Riffin acknowledged receipt of Montange's discovery request. Riffin cautioned Montange that Daniel Horgan, counsel for the LLCs ("**Horgan**"), could seek similar discovery from Montange, if Montange persisted with his discovery request. Riffin further indicated that he would formally reply by Montange's April 19, 2016 date. Riffin totally forgot about Montange's discovery request. (Such is what happens when one gets past 70, and Riffin is past 70.)

18. On April 20, 2016, Montange sent Riffin an e-mail, **trying** to remind Riffin that Riffin's response was due on April 19, 2016. On April 26, Montange sent Riffin another e-mail, **trying** to remind Riffin that Riffin's response was overdue. Riffin actually saw these two e-mails on **April 28, 2016**. (Eric Strohmeyer telephoned Riffin on April 28, 2016, and told Riffin that Montange was getting agitated since Montange had not received Riffin's response. That was when Riffin remembered about Montange's discovery request.)

19. Riffin has told the world, in multiple filings, that Riffin does not have internet service at his residence, and that Riffin only looks at his e-mail if someone telephones Riffin and tells Riffin that he needs to look at his e-mail. (Riffin does not have, nor does he ever want to have, a 'Smart Phone,' which is capable of sending and receiving e-mail, or a telephone which is capable of 'texting,' or engaging in any other form of 'social media.')

20. On Thursday, April 28, 2016, at 2:11 pm EDT, Riffin e-mailed Montange. Riffin thanked Montange for reminding him about Montange's discovery request, and indicated that Riffin would try to respond by Friday, April 29, 2016.

21. Riffin typed his discovery request. After finishing his response, Riffin remembered that Montange had complained to the STB about Riffin e-mailing Riffin's pleadings to Montange.

See Montange's **September 14, 2015** Motion to Strike at pp. 2-3, where Montange stated:

“City et al **have never** consented to email **service** on City et al by Riffin or any other party to this proceeding. To the contrary, City et al **have requested service of paper copies.**” Bold added.

22. Having remembered how adamant Montange was about getting paper copies via first class mail, Riffin placed his response into an envelope, put postage on the envelope, and then, as promised, placed, on **Friday night, April 29, 2016**, the envelope into a mail box.

23. On the following Monday, May 2, 2016, at about 4 pm, Riffin had occasion to visit a local library. While there, he took the time to look at his e-mail. He noted that he had an e-mail from Mr. Strohmeyer, which had an attachment. The attachment was a copy of Mr. Strohmeyer's pleading supporting Montange's Motion to Compel. There was no e-mail copy of Montange's Motion to Compel. Montange's Motion to Compel was not posted on the STB's web site. So Riffin called Mr. Strohmeyer, and asked Mr. Strohmeyer to read to Riffin, Montange's Motion to Compel, which he did.

24. Since Riffin in fact mailed his response on **April 29, 2016** (when he placed his envelope addressed to Montange into a USPS mail box), the very same day that he said he would send it, there is **no basis whatsoever** for Montange's **May 2, 2016** Motion to Compel.

25. Had Mr. Montange not been compulsive, and had he waited a few more hours before he filed his Motion to Compel, he would have realized that Riffin's response was already enroute. (Actually, Riffin believes that Mr. Montange had actual knowledge that Riffin's response was enroute: Riffin spoke with Mr. Strohmeyer on Wednesday, April 27, 2016, at 5:08 pm, and told Mr. Strohmeyer that Riffin would be sending his response to Montange on Friday, April 29, 2016.)

26. More importantly, had Mr. Montange **simply picked up his telephone and called** Riffin, anytime before he filed his Motion to Compel, he would have learned that Riffin's

response was enroute.

27. But, it would appear to Riffin, that Mr. Montange was ‘hell-bent’ (*Informal*. Stubbornly or recklessly determined), on filing his Motion to Compel. Perhaps hoping that the STB would grant the remedy that he actually desires: Barring Riffin from participating in the OFA process, if and when it ever occurs.

28. Riffin’s theory regarding Mr. Montange’s real motivation in filing his Motion to Compel, is supported by what appears to have transpired a week or so **before** the Motion to Compel was filed: It appears that Mr. Montange actually wrote his Motion to Compel a week or so before he actually filed it. Riffin deduces this since Eric Strtohmyer filed a pleading supporting Mr. Montange’s Motion to Compel, which was docketed on the STB’s web site several hours **before** Mr. Montange’ Motion to Compel was docketed. And since it would be difficult to write a pleading supporting a Motion to Compel without first **actually reading** the Motion to Compel, it would appear that Mr. Montange’s Motion to Compel was actually written a week before it was filed (so that Mr. Strohmeyer had sufficient time to receive, read, then write his response).

29. The Motion to Compel asks the STB to compel Riffin to respond. **Riffin responded BEFORE the Motion to Compel was even filed.** The requested ‘remedy’ (compel Riffin to respond), is no longer a remedy that the STB can provide. In a court, that would be automatic grounds to dismiss a complaint. It likewise should be automatic grounds to dismiss Montange’s Motion to Compel.

30. If Montange feels that Riffin’s response was not to Montange’s satisfaction, then Montange could, if he so desired, file a new Motion to Compel, detailing precisely why he is entitled to more information than Riffin has provided. However, Riffin would suggest that before Montange does file another Motion to Compel, he should review what discovery was granted, and more importantly, what discovery **was not** granted, in the STB’s May 22, 2015 decision, to wit:

Not granted:

- A. Documents regarding transactions between Conrail and the LLCs.
- B. Conrail's policies regarding its real estate policies.
- C. The names and addresses of Conrail's Board of Directors.
- D. **All documents relating to the potential sale of the Harsimus for non-railroad uses.**
- E. **All persons advising or recommending** actions Conrail or the LLCs should take.
- F. All documents relating to the rail regulatory status, historic nature, or sale of the Harsimus
- G. All documents showing Conrail's compliance with / objection to NJ's 1st right of refusal.
- H. Documents regarding ownership of the LLCs.
- I. Documents relating to agreements to toll any statute of limitations defenses.
- J. Documents relating to the potential sale of any interests in the Embankment properties.
- K. Documents sufficient to identify the names of persons advising Conrail, the LLCs, or
Steve Hyman, regarding the Sale of the Harsimus.
- L. Documents relating to the demolition of the Embankment properties.
- M. Documents relating to offers to donate Embankment fill or stones.
- N. Documents relating to any Joint Development agreements.
- O. All **communications between CNJ Rail / Eric Strohmeier and the LLCs**, or their
agents.
- P. All communications between Chicago Title and the LLCs.
- Q. Documents relating to any potential claims by the LLCs against Conrail or attorneys.

31. Montange's Request No. 1 asks for copies of all communications **received** by Riffin from the LLCs, or their owners / agents. Montange's Request No. 2 asks for copies of all communications **sent** by Riffin to the LLCs, or their owners / agents. This request is quite similar to requests E, N and O in paragraph 30, above, which requests were **denied** by the STB as being overly broad, and not having any relevance to issues in this proceeding. Since similar requests were already denied, Montange should either refrain from seeking these requests, or come up with a really detailed, highly persuasive argument why he needs this information to address the issues **presently being considered** by the STB in this proceeding.

32. Montange's Request No. 3 asks for financial responsibility information from Riffin. As the STB made it clear in the May 22, 2015 decision, at p. 6, see ¶ 9 above, and in the *Stewartstown* case, see ¶ 10 above, financial responsibility questions / concerns **only become germane AFTER an OFA has been filed**. Since no OFA has been filed to date, and since the OFA process has been stayed until the Historic Preservation process has been completed,

“It would be inappropriate for the Board, in effect, to rule formally on the sufficiency of Riffin's evidence in the abstract, **before Riffin's OFA, if any, has been filed.**”
Stewartstown, op. cit.

33. As suggested in ¶ 31 above, Montange should consider withdrawing this request. No amount of argument or persuasion is likely to convince the STB to not follow its precedent.

34. Montange's Request No. 4, asks for copies of Riffin's bankruptcy filings. For the same reason stated in ¶ 32 above, this information is not germane at this time, and for the same reason stated in ¶ 33 above, Montange should consider withdrawing this request. In addition, per 49 CFR 1114.24, Riffin argues that since these bankruptcy filings are public records, Montange is obligated to obtain whatever documents he desires from the bankruptcy court.

RIFFIN'S REPLY TO OTHER COMMENTS MADE BY MONTANGE

35. In his Motion to Compel, Montange made a number of other comments, which Riffin will now address.

CONFIDENTIAL INFORMATION

36. Some time ago, Pace Glass executed a Verified Statement wherein Pace Glass indicated that it desired rail service in Jersey City. The Pace Glass Verified Statement was submitted to the STB under seal. A protective order was issued. Horgan attempted to lift the protective order. The STB held that the name of the shipper, and the quantity of material the shipper desired to ship, were 'confidential,' and should not / could not be disclosed, or used, in any other

proceedings, unless submitted under seal.

37. Riffin participated in Norfolk Southern's ("NS") FD 35873 proceeding. (NS sought, and received, authority to acquire 282 miles of Delaware and Hudson line.) Riffin filed, in the Third Circuit, a Petition for Review of the STB's FD 35873 decision. The STB challenged Riffin's right to file his Petition for Review in the Third Circuit. The STB argued that Riffin had no 'business interests' in the Third Circuit.

38. Riffin responded, by detailing his 'business interests' in New Jersey and in Pennsylvania. In his pleading, Riffin discussed Pace Glass' desire for freight rail service.

39. Riffin attempted to submit his pleading 'under seal.' His pleading was clearly marked: "Confidential." Riffin asked for a protective order, to keep his pleading 'sealed.'

40. On **February 4, 2016**, the Third Circuit issued its Order, wherein it:

A. Transferred Riffin's Petition for Review to the D.C. Circuit; and

B. **Denied** Riffin's request for a protective order, holding that the information in Riffin's confidential pleading, **did not meet** the criteria for 'confidential' material.

41. On Tuesday, **March 29**, 2016, at 12:22 pm (a bit past noon), Riffin **filed** a Petition for Writ of Certiorari in the Supreme Court, asking the Supreme Court to review the Third Circuit's order transferring Riffin's Petition for Review to the D.C. Circuit. Riffin's Petition was **docketed** on **March 30, 2016**.

42. Included in the Appendix of Riffin's Petition for Certiorari, was a copy of Riffin's Confidential Third Circuit pleading.

43. Riffin sent a courtesy copy of his Petition for Certiorari to Charles Montange.

44. Charles Montange photocopied several pages from Riffin's Petition for Certiorari, then appended those pages to his Motion to Compel.

45. Charles Montange attempted to redact Pace Glass' name from what he submitted.

46. Charles Montange missed one: In paragraph 12, on p. 77 of Riffin's Petition for Certiorari.

47. Riffin argues: The Third Circuit ruled that the name of the shipper, Pace Glass, **was not confidential information**. That ruling trumps the STB's ruling that the name of the shipper, was confidential information.

48. There is a doctrine called the "law of the case." That doctrine states that if a court rules on an issue which was not raised as an issue, and which no party asked the court to address, that ruling will apply if the non-issue issue becomes an issue at a later time.

49. So while no one has asked a U.S. Circuit Court of Appeals to address the issue of whether Pace Glass' name should have been kept confidential, the Third Circuit has addressed the issue, and issued its ruling on this issue: Pace Glass' name is not 'confidential.'

50. And then Charles Montange discloses Pace Glass' name in a very public pleading placed on the STB's web site.

51. Up until the time Charles Montange put Pace Glass' name on the STB's web site, it was highly unlikely that anyone would have known that Pace Glass was the putative shipper. (Other than those who have a copy of the Pace Glass Verified Statement. Riffin knows about Pace Glass, for Riffin actually met with officials of Pace Glass regarding their desire for freight rail service.)

52. The other thing that Montange attempted to redact, was the Net Liquidation Value ascribed to the fee simple real property underlying the Harsimus Branch that Conrail still retains. Conrail, in a **June 1, 2015** filing, disclosed that the average price for the real property that it held in fee, was a bit less than **\$18,000 an acre**, (\$17,835.82), see p. 5, that the **minimum amount** of fee simple real property that would need to be conveyed in an OFA proceeding would be **1.24 acres**, see p. 5, that the total net liquidation value of that portion of Conrail's fee simple real property that was subject to the OFA process, was **\$22,109.51**, and that the Net Liquidation Value for the easement impressed on the Embankment Properties, was Zero Dollars. See p. 5.

53. The Net Liquidation Value information is decidedly not confidential. (Nor should it be.)

BARRING RIFFIN FROM THE OFA PROCESS

54. Montange's real goal appears to be to bar Riffin from participating in the OFA process. The obvious reason for such a desire, is to eliminate the 'competition.' If more than one OFA is filed, Conrail, at its **sole option and discretion**, may decide with whom it will negotiate. See 49 U.S.C. 10904 (f)(3) and see 49 CFR 1152.27 (l [L])(1). Only if Conrail does not reach an agreement with the first offeror, is the second offeror afforded an opportunity to negotiate an OFA with Conrail. See 49 CFR 1152.27 (l [L])(2)(i). And since the Memorandum of Understanding between the LLCs and Conrail states that Conrail must do whatever it can to perfect the LLCs' title, it would be expected that Conrail will negotiate with whichever OFA offeror that the LLCs demand that Conrail negotiate with. Since it presently is unknown if more than one OFA will be filed, or if any will be filed for that matter, which OFA offeror the LLCs will prefer (if there are more than one), is presently unknown. However, Montange and Riffin have made it very clear that both plan to file an OFA. And given the animosity between the LLCs and Montange, one would not expect the LLCs to ask Conrail to pick Jersey City's OFA, as opposed to Riffin's OFA. So it is very understandable why Montange would like to eliminate Riffin from the running. And eliminating Riffin from the running appears to be the only way that Jersey City's OFA offer is likely to be accepted.

55. Sort of like picking the president / supreme leader of North Korea, Syria or Egypt. You get a choice of one. [Sort of like picking what color you wanted your Ford Model A to be: You had a choice of Black or Black.]

EVADING THE OFA PROCESS / THE STB'S JURISDICTION

56. Montange argues that he needs the requested information in order to 'prove' that Conrail / the LLCs are attempting to evade (A) the STB's jurisdiction and (B) the OFA process.

57. The STB's jurisdiction was questioned. It was held that the Harsimus branch, and in particular, the right-of-way over the Embankment Properties, was conveyed to Conrail as a line of railroad (as Line Code 1420). That issue has been decided, and is no longer an issue:

“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 the status of the relevant property has been addressed and resolved. ... Accordingly, the requests do not seek information that is relevant to this ongoing proceeding, and will therefore be denied.” May 22, 2015 at 6.

58. 'Evading' the OFA process is fairly easy to do. [And is quite lawful / and fairly commonly done. See for example AB 167 (Sub. No. 1190X), also a Jersey City abandonment proceeding.] Conrail and the LLCs could have asked the STB to exempt this proceeding from the OFA process. They chose not to.

59. What is interesting to Riffin, is the 1190X right-of-way is a far more ideal location to provide freight rail service. If Jersey City truly wanted to provide freight rail service, why did it not try to obtain the 1190X site, like Riffin did? While Jersey City, to date, has not disclosed from whom it “continues to receive inquiry from shippers in this regard,” Motion to Compel at p. 6, rumor has it that the presently unknown other shippers are aggregate companies located in Jersey City. The same shippers that expressed a strong interest in getting rail service at the 1190X site.

Deprive the public of meaningful comment under section 106 of the NHPA

60. Montange argues that the information he requests from Riffin will somehow help prevent the public from being deprived “of meaningful comment under section 106 of the NHPA.” Just how the information requested from Riffin will help prevent the public from being deprived “of meaningful comment under section 106 of the NHPA,” is unexplained. Since this proceeding has been stayed for the sole purpose of providing the public with “meaningful comment under section 106 of the NHPA,” Riffin argues that the information requested from Riffin cannot possibly be used to ensure that the public is provided with “meaningful comment under section 106 of the NHPA,”

ANTICIPATORY DEMOLITION OF THE EMBANKMENT PROPERTIES

61. Montange further argued that Riffin’s information is needed to prevent “anticipatory demolition of the Embankment Properties.” Motion to Compel at 4. To Riffin’s knowledge, no one is presently attempting to demolish any of the Embankment Properties. Certainly not Riffin. So if no one is actually **trying** to demolish the Embankment Properties, how could Riffin’s information even remotely prevent a ‘none event,’ from becoming an ‘event?’

ABUSING THE AGENCY’S PROCESSES

62. Montange further argues that Riffin’s information “is germane to ... efforts by the LLCs and / or Conrail [via] ... coordination between Riffin, the LLCs and / or Conrail to ... abuse the agency’s processes.” Motion to Compel at 4.

63. Boy, is that ever a stretch! To date, there has been no “coordination” between Riffin and either Conrail or the LLCs. Just the opposite. Conrail and the LLCs have publicly stated in filings before the STB, that they are in no wise ‘working with,’ or in agreement with, anything that Riffin has postulated.

64. However, the comment does raise the issue of whether **Montange** is attempting to “abuse the agency’s processes.” When this litigation first began, in 2006, Jersey City made it known that it desired to acquire the Embankment Properties for “park” and “trail” purposes. A possible commuter rail extension was also postulated. Nothing was said about **freight** rail uses.

65. Jersey City obtained \$7 million via a bond sale. The bond prospectus said the money would be used to ‘acquire park / green space.’ No mention was made in the bond prospectus that the money might be used to pay for the cost of “freight rail infrastructure.”

66. The issue of whether it is appropriate / lawful, to use the bond proceeds to acquire the Embankment Properties / pay for proposed freight rail infrastructure, is currently before a Hudson County, NJ court. As is the issue of whether the bond proceeds can be lawfully used to pay Charles Montange’s legal fees.

67. 49 CFR 1152.27(c)(1)(ii)(B) states that “governmental entities will be presumed to be financially responsible.” However, in a decision served on April 8, 2011, in *Indiana Southwestern Railway Co. – Abandonment Exemption – In Posey and Vanderburgh Counties, IND*, AB 1065X, the STB held that the presumption of financial responsibility may be rebutted. Ultimately, because Poseyville did not “possess in its accounts sufficient **discretionary** funds to purchase the Lines at the price published in the town’s OFA,” the STB held that Poseyville was not ‘financially responsible.’ Bold added.

68. So the question comes down to this: Does Jersey City, [or Riffin], “possess in its accounts sufficient discretionary funds to purchase the Lines at the price published in the town’s OFA?”

69. Since Conrail has stipulated to the STB that the minimum purchase price for that portion of the Harsimus Branch that lies between MP 0.0 (Chestnut Street) and MP 0.89 (West side of Marin Blvd) [the only portion of the Harsimus Branch that Jersey City has indicated that it desires to acquire] is **\$22,109.51**, see pp. 3 and 5 of Conrail’s June 1, 2015 Valuation filing, **no**

one should even remotely attempt to question whether Jersey City or Riffin could pay the minimum purchase price for acquiring that portion of the Harsimus that lies between MP 0.0 and MP 0.89. [Or even to the West side of the Hudson Bergen Light Rail Line, the point to which Riffin desires to acquire, since Conrail has stipulated that the Net Liquidation Value for the Easement between the West side of Marin Blvd and the West side of the Hudson Bergen Light Rail Line, is Zero Dollars.] [Riffin avers that he has more than \$23,000 in instantly available funds. And if Charles Montange desires to actually see the money, if he comes to Baltimore, Riffin will show him the money.] Jersey City probably has more than \$23,000 in its ‘petty funds’ account.

70. The answer to the question in ¶ 68 depends on the answer to three additional questions:

- A. Does ‘financial responsibility’ include the cost “to arrange for operations for a period of two years?”
- B. How extensive must the “operations for a period of two years” actually be? Some operations over a portion of the line acquired? Operations over the entirety of the line acquired?
- C. Can Jersey City use its ‘bond’ money to pay for the cost of providing freight rail infrastructure?

FINANCIAL RESPONSIBILITY

71. Riffin argues:

- A. 49 U.S.C. 10904 does not define the phrase “financially responsible person.”
- B. 49 CFR 1152.27 (c)(1)(ii)(B) defines the phrase “financially responsible person” to be:

“(B) Demonstrate that the offeror is financially responsible, that is, that it has or within a reasonable time will have the financial resources to fulfill proposed contractual obligations;

C. 49 U.S.C. 10907 defines the phrase “financially responsible person” to be:

“(1) is capable of paying the constitutional minimum value of the railroad line proposed to be acquired; **and**
(2) is able to assure that adequate transportation will be provided over such line for a period of not less than **3 years.**” Bold added.

D. Under *Chevron*, an agency may interpret an ambiguous statute, i.e. provide more detail, providing the additional detail is reasonable. Since 49 U.S.C. 10904 is ambiguous (while 49 U.S.C. 10907 is not ambiguous), the STB is permitted to further define the phrase “financially responsible person,” which the STB did when it promulgated 49 CFR 1152.27(c)(1)(ii)(B). Unfortunately, the definition in the regulations is still somewhat ambiguous. For many years, the STB held that at the time an OFA is made, the only ‘proposed contractual obligation’ was the offeror’s contractual offer to purchase the line for its Constitutional minimum value. And then Mr. Kemp tried to acquire a short segment of UP line. To prevent that, in the decision denying Mr. Kemp’s OFA, the STB added an additional requirement: Sufficient funds to operate the line for two years.

Riffin has several problems with the ‘operate for two years’ condition:

- a. At the time an OFA is filed, the only ‘contract’ that exists, and the only “proposed contractual obligations,” is the one to purchase the line.
- b. In a proceeding such as this one, all of the track infrastructure was removed many decades ago. Riffin argues that it would be unreasonable, and in violation of one’s Constitutional Right to **Equal** Protection of the Law, to require an OFA offeror to put all of the missing track infrastructure back in place, within two years, particularly since the **existing carrier** would only be

required to put any of the track infrastructure back in place, **only if** a ‘reasonable demand for service’ was presented to Conrail. And in this proceeding, no ‘reasonable demand for service’ has been presented, to date. [Riffin argues that a ‘Verified Statement’ from a potential shipper, which only states that the potential shipper ‘desires’ rail service, as opposed to **committing** to ship X number of rail cars per year, for a specified number of years, at a determined rail rate, to determined destination points, is decidedly **not** a ‘reasonable demand for service.’]

- c. In this proceeding, Conrail (unlawfully) removed the switch which connected the Harsimus Branch to the National Rail System, some time **after** notices of intent to file an OFA were filed. ‘Financial Responsibility’ is determined **before** a Petition to Set Terms and Conditions is filed. Until the STB sets Terms and Conditions, and imposes upon Conrail a condition to reinstall the turnout that it unlawfully removed **after** the OFA process had started, Conrail is under no obligation to reinstall the turnout. And until that turnout is reinstalled, operations on the Harsimus cannot commence. And Conrail could, if it so desired, wait several years before it ‘got around to’ reinstalling a turnout. So, unless and until the STB imposes a condition upon Conrail to reinstall a turnout that will reconnect the Harsimus to the National Rail System, the OFA offeror has no means to compel Conrail to reinstall a turnout connecting the Harsimus to the National Rail System. And without the means to compel Conrail to reinstall a turnout, there is no way that an OFA offeror can ensure that rail operations could in fact commence within two years. Consequently, **at the time ‘financial responsibility’ is determined**, there is no way that an OFA offeror can warrant that operations will commence within two years. And **no amount of funds can remedy that impairment**. Only Conrail and the STB have the means to remedy that obstacle. And offering a ‘bribe’ to either Conrail or to the STB, to speed the process up, is decidedly unlawful.

- e. A basic tenet of statutory interpretation is: If Congress uses phraseology in one portion of a statute, but does not use similar phraseology in a different portion of a statute, the courts have held that Congress deliberately intended for the portion of a statute without the phraseology, **not** to be subject to the omitted phraseology. And any attempt by an agency to make both sections of the statute subject to the same, or similar, phraseology, will be rejected by a court.
- f. A basic tenet of the Administrative Procedure Act, is that all ‘rules’ must first be subjected to public comments. Prior to 49 CFR 1152.27 (c)(1)(ii)(B) being promulgated, it was subjected to public comment. Adding a requirement for actual operation for at least two years, is a significant change in the rule. Riffin would argue, such a significant change is not permitted without additional formal rule making.
- g. The issue of whether ‘operation for two years’ is a lawful additional condition, to date, has not been addressed by a U.S. Court of Appeals. Kemp did not appeal his adverse decision. Riffin tried, but the challenged decision was summarily affirmed before briefs were even filed. See AB 167 (Sub. No. 1191X). (Philadelphia, 2 miles of line). Riffin is waiting for another opportunity to raise this issue in a U.S. Court of Appeals.
- h. 10904 and 10907 begin from two entirely different beginning points: In a 10904 proceeding, the carrier **desires** to abandon a line segment. In a 10907 proceeding, the carrier **does not** desire to abandon a line segment. (The carrier is strongly resisting divestiture of its right to operate the line segment.) To justify taking a line from a carrier that does not want to abandon its line, Congress added the additional “operate for three years” condition.

- i. In a **10904** proceeding, the line segment typically is in really poor condition. When the ‘2-years out of service’ exemption is used, there are no existing shippers. (In this proceeding, all of the track infrastructure was removed decades ago.) Since in a 10904 proceeding a considerable amount of track work frequently is required, operation of the line as soon as the transfer of operating rights has concluded, may well be impossible. And since there are **no existing shippers**, no shipper is likely to be leveling a ‘reasonable demand for service.’ And even if a demand for service is being leveled, that demand for service likely would not be construed as being a ‘reasonable’ demand for service. (‘Reasonable’ being defined as sufficient demand to warrant / justify the expense of providing the service / putting the track infrastructure back on the ground.) . Remember, a carrier has the right to remove its track infrastructure without receiving any authorization. Such removal is subject to the caveat that in the event a ‘reasonable demand for service’ is leveled, the carrier would have to put track infrastructure back into place. Since putting track infrastructure back into place could easily take more than two years, and since a carrier would not be held to be in violation of its common carrier obligation to provide ‘service upon reasonable demand,’ if it began the process of putting its track infrastructure back into place within a reasonable time after a ‘reasonable demand for service’ had been leveled, requiring an OFA offeror to do **more** than an existing carrier is obligated to do, would likely be held to be a violation of the Constitutional requirement for **Equal** Protection of the Law. That is a significant numbers of reasons why requiring an OFA offeror to have sufficient financial resources to operate a line for two years, is not likely to withstand judicial scrutiny. (Or to even be prudent or a reasonable supplemental requirement.)
- j. In a **10907** proceeding, the line segment is in active use, and has active shippers (who are complaining about poor service). There already is an **existing** ‘reasonable demand for service.’ Since the line is currently being operated, it

can be ‘operated’ by the new operator as soon as the transfer of operating rights has concluded. That is a major justification for Congress imposing the additional ‘operate for three years’ condition.

HOW MUCH OF A LINE MUST BE OPERATED WITHIN TWO YEARS?

72. The next problem is: If one must demonstrate an ability to ‘operate the line for two years,’ just how much of the line must be ‘in operation’ within that two year period of time? All of it? Or a sufficient portion of the line to provide rail service to whatever shipper is demanding rail service?

73. Additional questions are: Must an OFA offeror demonstrate **both** that it is ‘feasible,’ and that the OFA offeror in fact ‘**intends to offer**,’ rail service over the **entirety** of the line that the offeror seeks to acquire?

74. In this proceeding, the above questions are really fundamental questions, that the STB needs to address **before** an OFA is filed, for the STB had decreed that an OFA offeror in this proceeding must demonstrate that it is ‘feasible’ to provide rail service, but has **not** indicated over what portion of the Harsimus, such a showing of ‘feasibility’ must be demonstrated.

75. The STB is fully aware that the Harsimus was connected to the National Rail System at CP Waldo, that the Harsimus was an elevated line, and that the railroad bridges that carried the line to the Harsimus Cove Yard, were removed many decades ago.

RAIL OPERATIONS WEST OF NEWARK AVENUE

76. It would be fairly easy to create a small rail yard on that portion of the Harsimus that lies between CP Waldo and the **West** side of Newark Avenue. Such a rail yard could accommodate the needs of a shipper such as Pace Glass.

77. Were Conrail to reinstall the turnout at CP Waldo that it unlawfully removed after the OFA process began, track could easily be reinstalled on the ground between the CP Waldo turnout and the west side of the Docks Branch right-of-way. The only problem with this site is: There is no access to this site from a public road, without crossing over some of Conrail's fee simple real property. So, to use this site, the STB would have to permit an OFA offeror to buy from Conrail, two acres or so of 'adjacent' rail property, and would have to grant the OFA offeror the right to cross Conrail's Docks Branch at the at-grade crossing that currently is in place on the Docks Branch. All of this is possible, via a Set Terms and Conditions proceeding, and would be in conformity with existing precedent. See *In re Boston and Maine*, 596 F 2d 2 (1st Cir. 1974), *Iowa Terminal v. ICC*, 853 F 2d 965 (DC Cir. 1988) and *Railroad Ventures v. STB*, 299 F 3d 523 (6th Cir. 2002).

78. Another possibility is to ask the STB, in a Set Terms and Conditions proceeding, to compel Conrail to sell to the OFA offeror, two to four acres of Conrail's fee simple real property that is adjacent to the Docks Branch / west and south of Newark Avenue. The STB would also have to order Conrail to install a turnout in the Docks Branch, to permit connecting a new at-grade track to the Docks Branch, which new at-grade track would traverse the newly-acquired two to four acres. Since this real property historically was used for a Pennsylvania Railroad Yard, and historically was a part of the Harsimus Branch (as opposed to being a part of the Lehigh Valley Docks Branch Line), acquisition of this property would be in conformity with the *Iowa Terminal* and *Boston and Maine* cases cited above. (Permitting acquisition of land adjacent to the tracks being acquired.) And since this land historically was used as a rail yard by the Pennsylvania Railroad (which owned the Harsimus Branch), putting new tracks on the ground **would not** constitute 'new construction,' requiring authorization under 49 USC 10901.

79. Reinstalling these tracks at either of the two sites discussed above, would be fairly inexpensive for Jersey City. (\$500,000 or so.) Riffin could **personally** reinstall a 3-track yard in either location, for under **\$10,000**, over the course of six months or so. (Riffin has several hundred track feet of rail, three turnouts, several hundred concrete cross ties, and a thousand or so mandrels in his possession. Riffin owns, and knows how to operate, all of the necessary

maintenance-of-way equipment (tamper, ballast equilizer, track alignment machine, etc.) and heavy construction equipment (motor grader, front end loader, excavators, cranes, 15-yard tandem-axle dump truck, compactors, surveying equipment) that would be needed to put track back onto the ground. He also has the requisite truck tractor, hi-boy and low-boy semi-trailers, and CDL license, to move all of his equipment to the job site. The \$10,000 would be used to buy diesel, to run his equipment, and for ballast. For another \$20,000, he could hire equipment operators, then use them for 1,000 hours (at \$20 per hour). That equates to 25 man-weeks, which equates to 5 people (including Riffin) working full time for six weeks. Which Riffin estimates is the amount of time that it would take him and his small crew, to put 500 track feet of rail back on the ground.

RAIL OPERATIONS EAST OF NEWARK AVENUE

80. Providing rail service **East** of Newark Avenue, is far more challenging. **Either:**

(A) One reinstalls railroad bridges to connect CP Waldo with the West end of the Brunswick Street Embankment, **OR**

(B) One puts a new turnout into Conrail's Docks Branch, then installs at-grade track, with a curve to the East, which new at-grade track connects with the Harsimus right-of-way under the NJ Turnpike Extension, then follows the Harsimus right-of-way, at grade, to the first Embankment section, at Brunswick Street, a bit East of Newark Avenue. To traverse each Embankment section, portals would have to be placed in the West and East ends of each Embankment section. The fill material in each Embankment section would need to be removed. Once the fill material was removed, a roof could be built over the cavern thus created, creating a fully enclosed working space. Such a working space would be ideal for transloading operations. Operations could be conducted year-round. Noise, odors, dust, etc., would not 'pollute' the surrounding neighborhoods. 'Unsightly' activities would remain hidden from view.

81. The STB and Montage are fully aware that no rail service was ever offered to shippers anywhere on the Harsimus between MP 0.0 (CP Waldo) and MP 0.89 (the West side of Marin Blvd.). That part of the Harsimus was used **exclusively** for **through (overhead)** rail traffic. The Harsimus Cove Rail Yard was where shippers could access their rail cars.

82. Of the two alternatives for rail service **East** of Newark Avenue, the at-grade alternative would be the preferred alternative. Providing freight rail service on **top** of each Embankment section would be, at best, very difficult: How would shippers get access to the top of an Embankment section? How would goods be transported from street level to the top of an Embankment section, or vice versa? Providing rail service on top of any of the Embankment sections would require installation of new railroad bridges, which would be extremely expensive.

83. If one plans to use the **top** of the Embankment sections for freight rail service, it would be extremely difficult to demonstrate that rail service could be provided ‘profitably,’ (one of the criteria the STB has stated must be demonstrated), given the enormous expense of reinstalling the required railroad bridges.

84. Providing rail service **at grade**, on the other hand, can be done ‘profitably,’ since placing track back on the ground at street level would not be very expensive. (\$200 a track foot, if done by a contractor. \$50 a foot, if done by Riffin.)

85. Placing track back on the ground at grade, would **not** cause a “significant adverse affect on a historic property,” in violation of the NHPA. Placing one portal in the west and east ends of each Embankment section, would disturb **less than 2.8 %** of the exterior walls of each Embankment section.¹ In addition, the disturbance would occur in the least visible portion of the Embankment walls, and would be visible only if one were standing between each

¹ Each Embankment has a perimeter of about 1,000 feet. The height of each Embankment, on average, is about 20 feet. That is 20,000 SF of exterior walls. Each portal would be about 14 feet wide and about 20 feet tall, for a total of 270 SF per portal, or a total of 540 SF, which is 2.8% of 20,000 SF.

Embankment section. Riffin would argue that such a minimal disturbance does not rise to the level of being a “**significant** adverse affect on a historic property.”

JERSEY’S CITY’S INTENTIONS

86. It is Riffin’s understanding that Jersey City **has no intention whatsoever of ever providing FREIGHT rail service EAST of Newark Avenue**. It is Riffin’s further understanding that Jersey City’s freight rail plans are to acquire a few acres of Conrail’s fee simple real property adjacent to the Docks Branch, install a new turnout in the Docks Branch, then put a few hundred feet of track on the fee simple land acquired from Conrail. (These plans appear in a Jersey City Council transcript.)

87. These plans by Jersey City would certainly be sufficient to provide limited freight rail service. But that begs the question: Must Jersey City **intend** to use the **Embankment portion** of the Harsimus for **Freight** Rail Service, in order to justify acquiring the **Embankment** portion of the Harsimus via the OFA process? And if Jersey City is required to intend to provide freight rail service on the Embankment portions of the Harsimus, must Jersey City have sufficient ‘dedicated funds’ to pay for the cost of providing the rail infrastructure that would be needed to provide freight rail service on the Embankment portion of the Harsimus?

88. Riffin argues that to justify acquiring the Embankment portion of the Harsimus, one has to at least provide some evidence that one **intends** to provide freight rail service on the Embankment portion of the Harsimus, and that one must provide at least a plausible plan for the provision of such freight rail service on the Embankment portion of the Harsimus.

89. And this is where Riffin begins to have difficulty with Jersey City’s OFA attempt. To date, Jersey City has made it quite clear that it intends to provide freight rail service only on the property West of Newark Avenue. And if that is so, then where is the justification for taking the Embankment portion of the Harsimus for OFA purposes? After all, the OFA process is intended to facilitate ‘continued freight rail service.’ And if Jersey City has no intention of providing

freight rail service on the Harsimus, where is the justification for permitting Jersey City to take the Embankment portion of the Harsimus via the OFA process.

90. Riffin is fully aware that Jersey City will argue that the OFA process permits the taking of a line of railroad for **passenger** rail service, and that Montange will be relying upon a 1980's ICC case where the ICC made such a ruling. However, that case was decided **before** Congress relieved the railroads of their duty to provide passenger rail service. And that case was decided **before** the STB decided, on multiple occasions, that the provision of passenger rail service would be subject to the STB's jurisdiction **only if** such proposed passenger rail service was going to be (A) interstate, or (B) if not interstate, then the passenger service must connect, somehow, with Amtrak. (Either physically connect, or have some provision for through ticketing.) If neither of those conditions can be established, then the STB has consistently held that such passenger rail service is either 'excursion' rail service, or 'commuter' rail service, neither of which is subject to the STB's jurisdiction.

91. In the event that Montange wishes to challenge any of Riffin's contentions, Riffin would ask that the STB grant Montange the privilege of replying to this Reply by Riffin. (Normally, replies to a reply are not permitted. But an exception generally is made when such an unpermitted reply-to-a-reply, will provide the STB with a more complete record.)

RIFFIN'S INTENTIONS

92. Riffin, on the other hand, **has every intention of providing freight rail service EAST of Newark Avenue.** At grade. Through the center of each Embankment section. Just as he described in paragraph 80(B) above. Not only to Marin Blvd, but also between Marin Blvd and the West side of the Hudson Bergen Light Rail line.

93. Riffin's plans are step-wise: If he can get access to the Harsimus between MP 0.0 and

the West side of the Docks Branch,² Riffin would build a small 3-track yard at this location. This yard would be sufficient to meet immediate shipper needs. (Such as those sought by Pace Glass.) As indicated earlier, see ¶¶ 76,77 and 79, Riffin could construct such a yard for as little as \$10,000, if he did all of the work himself, which he is fully capable of doing.

94. Step two would be the installation of a new turnout in the Docks Branch, then installation of track from that new turnout, to the Harsimus right-of-way, under the NJ Turnpike Extension. While Riffin was waiting for Conrail to put the new turn out in, Riffin would begin demolition of the remaining stanchions in the Harsimus right-of-way. Removing the stanchions would be quite easy for Riffin: He has two medium-sized excavators (200 series, for those who know their excavator sizes), and a very large hydraulic hammer which fits these two excavators. Riffin estimates that each stanchion could be removed in two to three days. Total cost to Riffin: About \$500. For the diesel to run the excavators, and the diesel to run his tandem-axle dump truck, which would be used to carry the concrete debris to a different location. Once this small segment of track was in place, Riffin could offer even more freight rail transloading services.

95. Step three would be to seek a declaratory order from the STB. In such a declaratory order, Riffin would ask the STB to rule on whether a rail carrier has the absolute right to relocate its tracks anywhere within its right-of-way, either horizontally or vertically, without express authority from the STB. (Such relocation is subject to the exclusive jurisdiction of the STB, but is not regulated by the STB. Similar to the 10906 exception for excepted track.) Riffin would expect the STB to follow its long-standing precedent and rule that a rail carrier does have the right to relocate its tracks anywhere within its right-of-way, and that such relocation is not subject to either the STB's regulation, or to local or State regulation. One of the cases Riffin will cite is Ed Kessler's case in Oklahoma City, OK, where the STB held that the BNSF had the right to relocate its tracks a few hundred feet south of where they had been. (Outside of BNSF's

² By convincing the STB, in a Set Terms and Conditions proceeding, that such access is necessary, and that such access has long been associated with the Harsimus Branch. (It has been. There was signal equipment adjacent to the Harsimus at this location. Access to this signal equipment was over the very land that Riffin desires to acquire.)

existing right-of-way, onto land recently acquired by BNSF for that very purpose.) See FD 35164, *Petition of BNSF for Declaratory Order*.

96. Step four would be to extend the track from the West side of Newark Avenue to the west end of the first Embankment section, at Brunswick. While the right-of-way was being prepared to accept track, a portal would be built into the West end of the first Embankment, at Brunswick. Once a portal had been built, the track would be extended to the western portal. Fill material would be excavated, placed into rail cars, then railed to another site. This process would continue until the tracks were extended to the West side of Marin Blvd. Since there is a fair amount of fill in each Embankment, it could take a month or so to remove the fill from each Embankment section.³ Once again, since Riffin has two excavators, he could remove the fill material at very little expense to Riffin. (The price of the diesel consumed, plus the cost to rail the fill material to a suitable location, such as to Manville, NJ, where the fill material could potentially be used to construct a levee around that portion of Manville that periodically gets flooded. Remuneration for providing / transporting the fill material to Manville, would more than pay for the cost of removing / transporting the fill material to Manville.)

97. In the event that Jersey City objected to Riffin laying track across some of Jersey City's streets, Riffin would first remind Jersey City that the real property underlying Jersey City's streets, where the Harsimus right-of-way is located, actually belonged to the Pennsylvania Railroad (the PRR had fee simple title to its right-of-way), and that at best, Jersey City has a license to use the surface of that right-of-way for highway purposes. Jersey City would not likely be successful in arguing in a State court, that it had acquired an easement by prescription, or title

³ In theory, it could be done in 11 days. The inside dimensions of each Embankment is about 90' wide by 390' long by 20' high. That equates to 26,000 cubic yards. Each of Riffin's excavators can excavate about 1,200 cubic yards per day, or 2,400 cu yd per day. In 11 days, Riffin's two excavators could excavate about 26,000 cu yds. That would require three operators, one of which would be Riffin. (One for each excavator. One to move rail cars.) At \$200 / day for the two non-Riffin operators, that equates to \$4,400 in labor costs. Add \$1,600 for diesel. Total cost to excavate each Embankment: About \$6,000. Total actual cost to excavate six Embankment sections: About \$36,000. Plus the cost to cut portals and to lay track. 2,400 cu yds would fill 48 open-hopper rail cars. A decent-sized train per day.

by adverse possession, since ‘time’ does not run against the sovereign (the Federal government), and since Jersey City’s / New Jersey’s eminent domain law is preempted by Federal law, when it comes to railroad property. Of course, the at-grade crossings would have to comply with applicable FRA at-grade crossings regulations. Since Riffin would propose to operate his trains across City streets only at night, when traffic was light to non-existent, Riffin’s operation of his trains would not result in any significant adverse consequences for those traversing Jersey City’s streets.

98. Once the first Embankment section was ‘cavernized,’ it could immediately begin to be used for freight rail transloading purposes. Riffin will note that he owns a fully functional 35-ton piece of equipment that can move a dozen or so rail cars. He lost his 50-tonner in Oklahoma.

99. Due to the narrow width of the Harsimus right-of-way, there is no place on the right-of-way, between MP 0.0 and MP 0.89, where one could turn one’s locomotive, or rail cars, around. Historically, locomotives and rail cars were turned around in the Harsimus Cove Yard. It would be fairly easy to construct a wye within the bounds of the former Harsimus Cove Yard. Such a wye would make it possible to turn one’s locomotives and rail cars around.

100. To date, Conrail has acknowledged that it has a ‘constructive’ rail easement across the former Harsimus Cove Yard. As it turns out, Conrail has more than just a ‘constructive’ rail easement across the former Harsimus Cove Yard. Conrail has two ‘dedicated’ easements, which easements were reserved by Conrail for continued freight rail purposes, when Conrail sold the Harsimus Cove Yard to **National Bulk Carriers on August 19, 1985**, which conveyance is recorded in the Hudson County Register’s Office in **liber 3468, folio 64**, at folio 65-66.

101. Riffin also argues that Conrail **used** at least **six** of the Harsimus Cove Yard tracks as ‘lines of railroad,’ which ‘lines of railroad’ Conrail still retains, since Conrail has never been granted authority to abandon any of these lines of railroad.⁴ And it is these lines of railroad, and

⁴ Riffin’s argument is different from the Line Code 1420 argument advanced by Montange. Montange’s argument focused on what was **conveyed** to Conrail via the Final

the property adjacent to them, that Riffin desires to acquire via the OFA process, in order to be able to build a wye, which he needs in order to turn his locomotives and rail cars around.

102. The present owners of that portion of the Harsimus Cove Yard that is bounded by Marin Blvd on the West, Gangemi Drive (6th Street) on the North, the Hudson Bergen Light Rail Line on the East, and 2nd Street on the South, are fully aware that there are multiple rail easements on that property, for Riffin sent them a letter so advising them in October, 2015. The owner of that property is also fully aware of the litigation that has been ongoing for the past 11 years with regard to the Embankment properties.

103. Robert Jenkins, counsel for Conrail, made an interesting argument at the October 18, 2011 oral argument in *In re: City of Jersey City, et. al., vs. Conrail, et. al.*, Case No. 10-7135, wherein Mr. Jenkins argued:

“It’s not a cloud on the title if someone doesn’t claim there’s ... there’s a problem.” T. P. 43, L. 13-15.

104. The court did not agree with Mr. Jenkins, for the Court retorted:

“Let me just ... there is ... but whether there’s someone out there or not, there’s two separate questions. One is, is there someone who might or might not claim it, but there is a question whether there is or not as to whether there’s a cloud, right?” T. P. 44, L. 21-25, P. 45, L. 1-2.

“You don’t ... you don’t need a challenger to create the cloud, ...” T. P. 45, L. 12-13.

105. **To conclude:** Riffin intends to provide freight rail service from MP 0.0 (CP Waldo) to

System Plan. Riffin’s argument is based on the long-established doctrine that how one **uses** tracks, determines whether the track is a ‘line of railroad,’ or 10906 ‘excepted’ track. The six tracks identified by Riffin were **used** by the Pennsylvania Railroad, by the Penn Central Railroad, and by Conrail, for the movement of **through / overhead** traffic, which makes these six tracks ‘lines of railroad.’ And once a track becomes a ‘line of railroad,’ it remains that way until authority to abandon is granted, and such authority to abandon is actually exercised.

the West side of the Hudson Bergen Light Rail Line. He intends to institute rail service over the entirety of the Line, over a period of time. If Conrail timely re-installs the Harsimus Line turnout that it unlawfully removed after the OFA process began, Riffin could be providing rail service within six months of acquiring the Line. Not over the entirety of the Line, but on a portion of the Line. And over the course of two years, Riffin would expect that he could be offering rail service over the entirety of the Line. Providing, of course, that yet to be filed litigation does not delay Riffin's time line.

RESOLUTION

106. Riffin is not particularly enthralled with the actions of any of the parties in this proceeding. It is Riffin's belief that none of the parties have 'clean hands.' Conrail created the mess when it sold the Embankment properties to the LLCs without bothering to institute an abandonment proceeding. Something Conrail has done on multiple occasions. Jersey City was afforded an opportunity to purchase the Embankment properties. It chose not to. It was only after the LLCs bought the Embankment properties, that Jersey City suddenly began to 'covet' the Embankment Properties. The LLCs offered to sell the Embankment properties to Jersey City on multiple occasions. For as little as \$7 million. (The LLCs now want at least \$40 million, which is at least close to what the current fair market value would be, in light of the fact that a one-acre parcel less than 1,000 feet from the Embankment properties, was sold for \$10 million in 2015. Since the Embankment properties comprise about six acres, that equates to \$60 million.) All of the 'was it conveyed to Conrail as a Line of Railroad' litigation was unnecessary, since Conrail **used** the tracks on the Embankment properties for 'through / overhead' traffic, which use caused the tracks to become 'lines of railroad,' even if they had not been conveyed to Conrail as the Line Code 1420 line of railroad. The LLCs could have ended the litigation by filing a petition to acquire and operate shortly after it was determined that the Harsimus was conveyed as a line of railroad. The LLCs then could have filed to abandon the Line after two years, if it turned out that no shippers really in fact wanted freight rail service on the Harsimus, and then could have asked the STB to exempt the LLCs' abandonment from the OFA process, which the STB likely would have granted. Instead, the parties continue to litigate every minute thing possible.

107. It is Riffin's firm belief that if the parties to this proceeding do not reach a settlement, this proceeding will drag on for another five years or so. Particularly in light of the OFA issues that Riffin has identified in this pleading. Consequently, Riffin continues to advocate that the parties at least try to reach a settlement.

ANOTHER ISSUE

108. It has long been Riffin's belief that Jersey City's ultimate strategy to acquire the Embankment properties, was to first acquire the Embankment properties via the OFA process, provide a modicum of rail service, then at the end of two years, with Conrail's consent, at the end of five years, without Conrail's consent, petition to abandon the Line, then when abandonment authority is authorized, transfer the Line to a Trail Entity, which would then hold the Line in perpetuity. Much like what has happened with Conrail's Hi Line in New York City.

109. Such a strategy would not be illegal. Nor would it be an abuse of the STB's processes, providing some freight rail service is actually provided.

110. The difference is: Conrail ultimately agreed to a Trail agreement for the Hi Line.

111. In this proceeding, it is unlikely that the LLCs, or their successors, will ever willingly permit their properties to be permanently taken away from them via the OFA / Rails to Trails process.

112. Up until two weeks ago, I did not think that the LLCs had any hope of defeating a Rails to Trails strategy. Then, two weeks ago, I was sent a copy of the U.S. Court of Federal Claims June 9, 2011 decision in *Biery v. U.S.*, Case No. 07-6931, a copy of which is appended hereto, and a copy of the *Romanoff Equities, Inc. v. U.S.* decision. See 815 F. 3d 809.

113. In the *Biery* decision, the Court of Federal Claims held that if a railroad easement is no longer used for railroad purposes, the easement terminates, and the land reverts back to the original / adjacent owners. The Court further held that a 'trail use' of the former right-of-way

does not constitute ‘railroad use,’ even when the trail is subject to being reconverted back into a line of railroad. The end result was: Because the STB authorized the right-of-way to be converted into a trail, that was a ‘taking,’ which warranted compensation. So the U.S. Government was ordered to compensate the present day owners of the underlying real property, for the present day fair market value of the trail corridor, since the ‘trail’ use was a ‘new’ use.

114. In the *Remanoff* decision, the U.S. Court of Appeals for the Federal Circuit held that because the rail easement stated that the easement could be used “for railroad purposes **and** such other purposes,” it was permissible to use the easement for the Hi Line pedestrian ‘trail.’

115. In this proceeding, there is no express rail easement. (Other than the National Bulk Carriers easement that Conrail reserved.) There only is a ‘constructive’ rail easement. Which presumably is only for ‘railroad use.’ Thus the easement on the Embankment properties is more like the *Biery* easement. Which means that were Jersey City to attempt to convert the Harsimus into a trail at some future date, the LLCs, or their successors, would likely have a good cause of action against the U.S. Government for an unconstitutional ‘taking,’ and could demand, and receive, compensation from the U.S. Government for Jersey City’s ‘taking’ of the Embankment properties.

116. In the *Biery* case, the U.S. Government did not give up the trail, in order to avoid paying compensation for the trail ‘taking.’

117. Which raises an interesting question: If the U.S. Government were opposed to converting the Embankment properties into a ‘trail,’ (due to the amount of compensation the U.S. would have to pay for taking the property for a ‘trail’ use), could the U.S. Government prevent the conversion of the Line into a trail? If so, where would such an argument be raised? Not before the STB, for the STB’s role in a Rails to Trails proceeding is ‘ministerial.’ That is, if the criteria for trail use is met, the STB has no discretion to prevent the conversion of the Line into a trail.

118. What Riffin finds even more interesting, is the STB, while apparently fully aware of the *Biery* proceeding, and similar proceedings, has not participated in any of those proceedings. Riffin also finds it interesting who the Department of Justice assigned to defend against these ‘trail’ suits: A Justice agricultural-law attorney from New Hampshire (the *Biery* trail was in Kansas), and a Justice Environmental-law attorney based in the Department of Justice building in D.C., for the Hi-Line case. And even more interesting is the fact that neither of these two Justice attorneys know who Robert Nicholson is. (He is the Justice attorney who represents the U.S. in all STB Petitions for Review. He knows his railroad law quite well, having been litigating STB appeals for a really long time.)

119. If the ‘rails to trails’ issue interests the reader, Riffin would suggest reading the *en banc* decision in *Preseault v. U.S.*, 100 F 3d 1525 (U.S. Court Appeals, Federal Circuit, 1996). In this decision, the court held that the removal of track infrastructure, under **Vermont** law, constituted an abandonment, which terminated the railroad’s easement **before** the right-of-way was converted into a ‘trail.’ The court further held that while the Federal government has the **power** to convert a railroad right-of-way into a trail, it also has the **obligation**, under the ‘taking’ clause of the Fifth Amendment, **to compensate** the underlying fee owner for the value of the trail easement so taken. (Riffin believes that the dissent had the better legal argument, but the dissent could not muster enough votes to prevail with their arguments.)

CONCLUDING REMARKS

120. This is a very long pleading. Not everything in this pleading is addressed solely toward the actual issues the STB is being asked to decide. Certainly not the issue that is presently before the STB. (Supplemental Historic Comments.) However, nearly everything in this pleading either addresses comments made by Montange, or issues that, while not presently at issue, are likely to become an issue once the Historic Preservation process concludes. Riffin, being mindful of the ‘20 laches’ that he received in the STB’s March 24, 2016 decision striking Riffin’s supplemental comments in FD 35873 / AB 156 (Sub. No. 27X), has tried to ‘just keep to the facts’ in this pleading. As stated above, it is Riffin’s hope and desire that the parties reach a

settlement before the STB expends any more of its very limited resources on this way-too-long proceeding.

121. I hereby certify, under the penalties of perjury, that the foregoing is true and correct to the best of my personal knowledge and belief. (In case you did not notice, I just turned this pleading into a ‘Verified Statement.’)

Respectfully,

James Riffin
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CERTIFICATE OF SERVICE

I hereby certify that on or before the 14th Day of May, 2016, a copy of the foregoing Reply to Montange’s Motion to Compel Riffin to Respond, was served on all of the parties in this proceeding, either via e-mail, or via U.S. Postal Service, postage prepaid.

James Riffin