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Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, D.C. 20423

Docket Nos AB 167 (Sub No. 1189X)
AB 55 (Sub No. 686X)
AB 290 (Sub No. 306X)

Re: Conrail - Ab Ex - in Hudson County, NJ, AB 167-
1189X, and related cases

Reply to Mr. Riffin's October 31 "Petition(s)"
and Request for Leave to Exceed 30 Pages to the
extent 49 CFR 1152.25(e)(3) Is Applicable

Dear Ms. Brown:

Attached please find City of Jersey City et al's Reply to the "Petition(s) for Other Relief" filed by Mr. Riffin in these proceedings on October 31, 2016. Mr. Riffin's "Petition(s)" contained both a request for appellate relief under Part 1117 and a request for a stay under section 1115.5, evidently pending judicial review.

As explained in the Reply, Mr. Riffin's pleading is filed in an abandonment proceeding, and City et al accordingly believe his request for appellate relief under Part 1117 must be treated as a petition to reopen under 49 CFR 1152.25(e)(4). The standards are the same for petitions to reopen or reconsider under Part 1115. Likewise, Mr. Riffin's request for a stay would appear to fall under section 1152.25(e)(7), but the standards are essentially the same as for stays under Part 1115. 49 CFR 1152.25(e)(7)(iii) requires that Replies to stay requests must be filed within five (5) days of the stay request. This Reply is timely because it is filed within that period.

49 CFR 1152.25(e)(3) limits petitions to reopen and replies to such petitions, to 30 pages in length. There are no page

limitations on petitions to stay, or replies to same. There are no page limitations on Part 1117 petitions, or replies to same.

City et al's Reply tendered herewith exceeds 30 pages. However, City et al's Reply is a combined Reply not only to Mr. Riffin's "Petition(s)" under Part 1117 analyzed as a petition to reopen, but also to Mr. Riffin's request for a Stay. In addition, it addresses Mr. Riffin's professed uncertainties concerning what appellate channels, if any, are open to him from the October 26, 2016, order dismissing him from this proceeding. Because of the multiple issues posed in Mr. Riffin's "Petition(s)," good cause exists to grant leave for a Reply in excess of 30 pages, if leave is required, in order to ensure a complete record. City et al accordingly request that this agency grant such leave to the extent section 1152.25(e)(3) or any other page restriction is otherwise applicable.

As indicated in the Reply, Mr. Riffin shows no entitlement to any relief. Because his Petition(s) amount to a continued effort to avoid a discovery order, the sanction of attorneys' fees should continue to be available, and City et al request an award of their fees and costs relating to Mr. Riffin's invocation of additional procedures. 49 CFR 1131(b)(2)(iv). As our Reply explains, Mr. Riffin makes no showing for a stay, much less one pending judicial review, but if a stay were granted, it should be conditioned on his posting a bond in an amount no less than \$300,000. This amount corresponds to the amount proposed by the Board for OFA applicants in Ex Parte 729, served Sept. 30, 2016.

Thank you for your assistance in this matter.

Respectfully submitted,



Charles H. Montange
for City of Jersey City,
Rails to Trails Conservancy,
and PRR Harsimus Stem Embankment
Preservation Coalition

Att. Reply on behalf of City et al.

cc. parties per certificate of service, Judge Dring (courtesy copy) (all w/att.)

Before the Surface Transportation Board

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

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 Reply
to "Petition(s) for Other Relief"
Filed Oct. 31 by Mr. Riffin

City of Jersey City, Rails to Trails Conservancy, and
Pennsylvania Railroad Harsimus Stem Embankment Preservation
Coalition ("City et al") reply in opposition to any and all
relief sought by Mr. James Riffin in his "Petition(s) for Other
Relief" filed on October 31, 2016 ("Pet."). Riffin states that
he is filing his pleading under 49 CFR 1115.5 and/or 49 CFR
1117.1. See Pet. 1 para 1. He further states that his "desire[]
... and inten[t]" is to appeal from Administrative Law Judge
("ALJ") Dring's Order served October 26, and "if necessary" to
"request a stay" of that order. See Pet. 2 para 3. ALJ Dring
issued two orders served October 26, 2016. City et al will
treat Riffin as seeking review of both orders, but unless
otherwise indicated any reference to an order served October 26
shall be the first of the two issued that day.

For the reasons stated below, Mr. Riffin is entitled to no relief, let alone a stay, from either order or from both.

I. Preliminary Procedural Matters

A. Opposition to More Rounds of Appeals

Although Riffin indicates that he is employing (Pet. 1 para 1) and intends to employ (Pet. 2 para 3) 49 CFR 1117.1 to appeal, he also asks the Board to "clarify" whether appellate procedures will be under 49 CFR Part 1115 (which excludes abandonment proceedings) or 49 CFR 1152.25(e) (which governs abandonment proceedings). See Pet. 2 para 6. He seems to be asking for a decision from the Board to allow him yet another opportunity to appeal on top of his October 31 pleading after clarification. No clarification is needed.

The Board's regulations governing appeals are clear. 49 CFR 1115.1 provides that Part 1115 does not apply in abandonment proceedings. It states that appellate procedures in abandonment proceedings are governed by the appellate provisions in Part 1152. Those are found at 49 CFR 1152.25(e). 49 CFR 1152.25(e)(1) confirms this reading by stating that it embodies the appellate procedures for abandonment proceedings. Section 1152.25(e)(1) goes on to provide for appeals from certain

actions by the Director of the Office of Proceedings. All other actions implicitly are administratively final.¹

However, section 1152.25(e)(4) allows a party to file a petition to reopen "any administratively final action of the Board." Any reopening is governed by 49 USC 1332(c) which authorizes the Board to reopen on showings of material error, new evidence, or changed circumstances. Consonant with the statute, 1152.25(e)(4) provides that the party seeking further review "shall state in detail the respects in which the proceeding involves material error, new evidence, or substantially changed circumstances." These showings are essentially the same as those required to reopen under 49 USC 1115.4, or to obtain discretionary appellate review by timely petition for reconsideration under 49 CFR 1115.3.

In short, under the appellate rules applicable in abandonment proceedings, the October 26 orders are final and by their terms immediately effective.² The only path for further review is a petition to reopen under 49 CFR 1152.25(e)(4), in accordance with 49 USC 1332(c), but this is similar to all other

¹ It is worth pointing out that the parties treated the Board's earlier discovery rulings in this proceeding as administratively final.

² Under 49 CFR 1152.25(e)(7), the filing of a petition to reopen "shall not stay the effect of a prior action."

regulations administered by the agency dealing with reopening or reconsideration, including those under Part 1115.

Federal rail policy expressly calls for "expeditious handling and resolution of all proceedings required or permitted to be brought under [this Board's rail jurisdiction]." 49 U.S.C. 10101(15). Neither this Board nor City et al should incur the burden of multi-rounds of appellate procedures after enduring Mr. Riffin's multi-round discovery antics as well. To the extent that Riffin has failed to address in his October 31 pleading the standards for a petition for reconsideration or reopening, the failure is on him. It is not cause for more burden on the parties or the Board.

B. Riffin's Part 1117 Appeal Amounts to a Petition to Reopen

When a party files a Part 1117 petition where the relief available requires reopening, the Board treats the Part 1117 petition as one to reopen.³ Section 1322(c) authorizes the Board to reopen or reconsider only in the event of "material error, new evidence, or substantially changed circumstances." 49 CFR 1152.25(e)(4) reiterates this requirement. So do 49 CFR 1115.3

³ See, e.g., Canadian National Railway Co. and Grand Trunk Corp. - Control - EJ&E West Co., F.D. 35087, served Sept. 8, 2008, slip op. at 2. See also City of Peoria and The Village of Peoria Heights, Il - Ad. Disc. - Pioneer Industrial Railway Co., AB 878, served April 15, 2008, slip op. at 2 (Part 1117 petition in effect a defective petition to reopen or reconsider that fails to meet the standards for such petitions).

and 1115.4, were they applicable. As discussed in Part II, infra, Riffin fails to show any material error, changed circumstance, or new evidence. Riffin's request for relief must therefore be denied. Accord, 212 Marin Blvd. LLC - Pet. Dec. Order, F.D. 35825, served April 25, 2015, slip op. at 3-4.

C. Riffin's 1115.5 Showing for a Stay Fails to Meet the
Criteria for a Stay under 1115.5

Riffin indicates that the stay request embodied in his "Petition(s)" is pursuant to 49 CFR 1115.5, which deals with stays of effective dates, including for judicial review,⁴ for proceedings other than abandonment proceedings. 49 CFR 1152.25(e)(7) governs petitions for stay in abandonment proceedings. The Board's standards for granting a stay appear to be the same regardless of the applicable regulation, so City et al will treat the stay request as invoking the applicable regulation.

The Board's standards for addressing a petition for a stay are:

"(1) whether there is a strong likelihood that petitioner will prevail on the merits of any challenge to the action sought to be stayed; (2) whether petitioner will suffer irreparable harm in the absence of a stay; (3) whether issuance of a stay would substantially harm other parties; and (4) whether issuance of a stay would be in the public interest. Hilton v. Braunskill, 481 U.S. 770, 776 (1987); Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977); Virginia

⁴ Riffin seems to indicate (e.g., Pet. 3, para 6.D) that he intends to seek judicial review.

Petroleum Jobbers Ass'n v. Fed. Power Comm'n, 259 F.2d 921, 925 (D.C. Cir. 1958). A party seeking a stay carries the burden of persuasion on all the elements required for such extraordinary relief. Canal Auth. Of Fla. v. Callaway, 489 F.2d 567, 573 (5th Cir. 1974)."

The New York, Susquehanna and Western Railway Corporation - Disc. of Service Exemption - in Broome and Chenango Counties, NY, AB 286-5X, served Sept. 30, 2008, slip at 2.⁵

As discussed in Part III, *infra*, Riffin fails to carry his burden for a stay.

II. Riffin Fails to Show New Evidence, Changed Circumstance or Material Error to Justify Reconsideration/Reopening

Riffin's October 31 "Petition(s)" makes no allusion to any new evidence (arising after 26 October) that could conceivably meet the criteria for reopening on the grounds of new evidence, nor does he show any changed circumstance. The only possible basis for Riffin's 49 CFR 1117.1 petition must therefore be some claim that ALJ Dring committed a material error in granting sanctions against him for failure to proceed in good faith in making discovery responses pursuant to an earlier order compelling Mr. Riffin to do so.

A. Riffin's Record of Abusive Litigation Tactics

⁵ The Board follows the same standard for petitions to stay a decision pending reconsideration or reopening. San Joaquin Valley Railroad Company - Ab. Ex. - in Tulare and Kern Counties, CA, AB 398-5X, served Sept. 30, 2008, slip at pp. 3-4.

Mr. Riffin, who bears the burden of proof, faces an uphill struggle of his own creation, in terms of demonstrating error, much less material error. Although not a licensed attorney, Riffin is trained in law. But he has compiled a record as a frequent litigant with a history of inappropriate filings, disregard for applicable procedures, bad faith filings, and an abusive use of litigation.⁶ Earlier this year, this Board struck several of Riffin's pleadings in Norfolk Southern Railway - Ac. And Op. - Certain Lines of the Delaware and Hudson, F.D. 35873, served March 24, 2016, explaining that his remarks therein were

⁶ See, e.g., Balt. County v. Riffin, 2007 U.S. Dist. LEXIS 99000, *3-4 (D. Md. Oct. 4, 2007) ("Riffin has made numerous attempts to disrupt valid state proceedings by filing civil rights complaints seeking injunctive relief against Baltimore County and by removing proceedings to this Court, forcing state proceedings to a grinding halt. Riffin's use of federal litigation to stonewall efforts by local authorities to enforce state law is abusive and this Court declines to facilitate those efforts any further."); Norfolk S. Ry. - Aban. Exemption -- in Norfolk & Virginia Beach, Va., AB 290 (sub no. 293X) (STB served Nov. 6, 2007), appeal dismissed sub nom Riffin v. STB, 331 Fed. Appx. 751 (D.C. Cir. 2009) (concluding, based on strong evidence that Mr. Riffin had filed in bad faith, that "we will closely scrutinize any future filings by Mr. Riffin ... and we strongly admonish Mr. Riffin that abuse of the Board's processes will not be tolerated"); Riffin v. Balt. County, 2012 U.S. Dist. LEXIS 98213, *13-15, 2012 WL 2915251 (D. Md. July 16, 2012) ("Mr. Riffin's litigation history bespeaks an utter disregard for the Court's procedures, which can only be remedied by appropriate sanction.").

"not only irrelevant to the proceedings, but is also wholly inconsistent with the professional standards we expect persons filing with the Board (including pro se filers) to meet in every interaction with each other, the Board, and our staff. We direct Riffin to refrain from any future submission of unprofessional material to the Board, its staff, or practitioners. Further unprofessional conduct will not be tolerated. Should Riffin repeat such conduct, he should expect summary redaction of his filings (pending Board action to strike those filings), further professional censure, and additional Board action. Riffin is a frequent litigant before the Board and the courts and has a history of inappropriate filings."

Shortly after this episode, Norfolk Southern Railway Company filed a Petition for Rulemaking to Address Abuses of Board Processes, docketed at EP 727, on May 26, 2015. The Petition focused on abuses by Riffin of the OFA process. After taking comments, STB declined to issue the relief sought by NS (Decision, EP 727, served Sept. 23, 2015). But echoing prior admonitions by STB and the courts concerning Riffin (e.g., note 4, supra), STB indicated it would instead more vigorously enforce existing regulations dealing with inappropriate behaviors. Slip op. at 4. In short, Riffin has been repeatedly admonished by STB and courts since at least 2007, including several times this year already. This is the context in which ALJ Dring's orders must now be reviewed, to the extent they are subject to further review.

B. Judge Dring's Orders Were within the Scope of
Applicable STB Discovery Regulations

The law on sanctions in discovery matters where, as here, a party (Riffin) is in violation of an order compelling the party to make discovery is set forth at 49 C.F.R. 1114.31(b)(2). That regulation authorizes for an order (1) that facts concerning which discovery is sought to be deemed admitted, (2) prohibiting the infringing party from introducing evidence, (3) striking pleadings of the infringing party in whole or in part, (4) dismissing the party from the proceeding, and/or (5) requiring the infringing party to pay reasonable expenses, including attorneys' fees.

All relief granted by ALJ Dring against Riffin from the Bench on October 24 or in his orders of October 26 is clearly within the scope of section 1115.31(b)(2). It is exactly what this Board indicated would be appropriate in the event of non-compliance with an order compelling discovery. See Denver & Rio Grande Railway Historical Foundation - Pet. Dec. Order, F.D. 35496, served April 30, 2012, slip at 2 (warning party subject to an order compelling discovery that failure properly to respond within seven days may result in the imposition of sanctions as listed per section 1115.31(b)(2)). Riffin cannot claim that Judge Dring acted outside the scope of the governing regulation.

C. Riffin's Claims of Error are Spurious

Insofar as Mr. Riffin offers any argument against Judge Dring's orders, it is found at pp. 18 to 22 of his "Petition(s)." He makes three basic arguments, discussed below, that might be construed to bear on whether ALJ Dring committed a "material error" justifying reopening.

1. August 24 order was not "fatally defective."

Riffin first attacks the October 26 orders by claiming that Judge Dring's earlier August 24 order compelling Riffin to make discovery improperly required him to forward emails, and was otherwise "fatally defective." Pet. 17-19. Mr. Riffin consented to the order compelling him to make the discovery, and agreed to forward his emails. He is estopped from contesting that to which he agreed. Mr. Riffin's argument demonstrates exactly the mindset to obstruct discovery with inconsistent and changing positions that ALJ Dring found upsetting at the hearings. Riffin next argues that the August 24 order is "fatally defective" (Pet. 18-19). For all purposes germane here, Riffin agreed to the order. He waived later objection, or is estopped.

2. Riffin did not "fully comply" with the discovery order.

Riffin next claims that he "fully complied" with the August 25 order (Pet. 19-20). But on August 25-26, 2016 Riffin contemporaneously indicated to City et al that he had spent only roughly two hours identifying and forwarding his emails,

acknowledged that he arbitrarily limited his search to a select few representatives of the LLCs, found even that search tedious because it involved individual examination and forwarding, and then said that if City et al wanted anything more, City et al should go see Judge Dring. This amounts to arbitrary curtailment, not full compliance. Riffin's statements at the October 24 hearing dug his hole deeper. Riffin admitted that he only looked for emails involving Mr. and Mrs. Hyman or attorney Horgan. But City et al's discovery request sought emails between Riffin and any representative of the LLCs. Riffin acknowledged at the hearing that Mr. Hyman frequently consulted additional attorneys other than Mr. Horgan and at one point orated concerning one of them (Mr. Nagel) for whom he prepared a memorandum outlining his plan to sue the Metro Plaza developers, but claimed to forget. Transcript of Oct. 24, 2016 Hearing in AB 167-1189X at 55-59. Mr. Riffin claimed no obligation to remember with whom he was dealing on behalf of the LLCs in his mission to back-stop the LLCs, other than Mr. and Mrs. Hyman and Horgan. This is patent evasion by a man who claims he is the LLCs' "back-stop."

To take another example: Riffin did not make available any emails involving his OFA-based lawsuit against Forest City/G&S to enjoin Metro Plaza in downtown Jersey City. In response to City's motion for sanctions which cited this flaw, Riffin

responded (Reply filed Sept. 26, 2016) at pp. 9-10 with a claim that his OFA-inspired litigation against Forest City/G&S was totally irrelevant, and then at pp. 12-13 he admitted that he had met with a representative of Forest City/G&S, but then evasively suggested that his activities and communications in regard to Metro Plaza were not as City et al initially described.⁷ But Riffin's October 31 "Petition(s)" implicitly

⁷ The Intervenor LLCs have complained about unequal treatment if other developers proceeded with projects east of Marin Boulevard whereas they could not west of Marin Boulevard, see, e.g., 212 Marin Boulevard, et al, Petition for Declaratory Judgment, F.D. 35825, petition at 25 and 28, filed May 8, 2015. Riffin indicates he is implementing this argument. E.g., Riffin "Petition(s)" at p. 8, esp. para 36 ("unequal treatment"). The point is that both Riffin and the LLCs themselves view property east of Marin as relevant to this proceeding.

Riffin lays out part of his scheme to help the LLCs achieve equal treatment in a memorandum he prepared for one of the LLC Intervenor's attorneys (Nagel) for the benefit of the LLC Intervenor in Exhibit G to City's Motion for Sanctions. He proposed to rely on his proposed OFA to enjoin "Wasser/Forest City from development of the Metro Plaza property." He apparently hoped to get Forest City to sue Conrail for "\$800 million." Riffin proposes that he would lift his injunction against Metro Plaza "provided Conrail negotiates an acceptable settlement." Memo, Riffin to Nagel "Re: Steve Hyman's Embankment Properties" p.1, in Motion for Sanctions Ex. G. A portion of Riffin's complaint (relying on his proposed OFA for standing purposes) is Exhibit H to the Motion.

In order to conceal evidence of an agreement between Riffin and the Intervenor LLCs to implement a suit against Forest City/G&S, both Riffin and the Intervenor LLCs have claimed it is irrelevant, or that it is simply an imagined conspiracy. The Intervenor LLCs even filed a cross-motion for sanctions (filed October 5) against City et al for seeking discovery on that basis. City et al replied on October 20 with a verified statement from Mr. Wasser indicating that Mr. Hyman brought Riffin uninvited to a meeting at Mr. Wasser's office. Mr. Riffin there told Mr. Wasser that Riffin had an agreement with

underscores the relevance of the Forest City/G&S matter because Riffin's entire case for irreparable injury for purposes of justifying a stay rests upon maintaining his OFA so he can sue Forest City/G&S. Pet. 24.⁸ Mr. Wasser's Verified Statement indicates (see footnote 7) that Riffin has a commitment that the LLC Intervenor will compensate him (Riffin) for any recovery the Intervenor LLCs receive by reason of his (Riffin's) activities. This not only indicates that Riffin is acting as a surrogate for the LLC Intervenor, but also that Riffin's statements at pp. 9-10 and 12-13 of his Reply filed September

Mr. Hyman for 5% of whatever monetary recovery the LLCs might obtain through the resolution of their dispute with Jersey City and Conrail. Mr. Hyman had Riffin present his arguments to Mr. Wasser. Wasser Verified Statement attached to Reply on behalf of City et al to LLCs' Motion for Sanctions against City et al" at pp. 2 para 5, filed October 20, 2016. On the same day (July 20), Riffin filed his OFA-based complaint. Mr. Wasser attached a copy of the full complaint to his verified statement.

⁸ Because City et al was concerned that Mr. Riffin in fact was deleting or destroying emails, or otherwise failing to produce them, City et al filed document requests for similar information against the LLC Intervenor. (The LLC Intervenor had also offered up stipulations for the purposes of assisting Riffin in evading discovery, but the stipulations put into question, inter alia, who was speaking for the LLC Intervenor. City et al also sought documents relating to these issues.) The LLC Intervenor responded with blanket objections, and City et al filed a motion to compel against the LLCs at the same time as City moved for sanctions against Riffin. The LLC Intervenor filed a motion for sanctions against City et al for seeking discovery into Riffin's dealings with the LLCs.

Dismissal of Riffin from the proceeding moots the need for discovery on Riffin/Intervenor LLCs connections. However, if in response to Riffin's motion, Riffin is allowed to remain in the proceeding, then City et al's discovery and motion to compel against the LLC Intervenor is no longer moot.

26, 2015 are misleading and disingenuous. Riffin's effort to evade discovery through misleading statements, inconsistent claims, and foot-dragging is simply inexcusable.

City et al detailed a list of deficiencies in the motion for sanctions. ALJ Dring properly found Riffin not credible in his "explanations."

3. ALJ Dring's October 26 orders are not flawed for lack of specific findings.

Mr. Riffin's final grounds for reopening (Pet 20-21) is that federal court cases under various Federal Rules of Civil Procedure (primarily 16(f) and 37) dealing with matters such as default judgments or dismissals purportedly require consideration of four factors (in another sentence Riffin claims there are five factors) in order to dismiss a party from a proceeding. The four factors Riffin specifically numerates are whether he acted in bad faith, whether the adversary caused the behavior, whether there is a need for deterrence, and whether less drastic sanctions would be as effective.

Assuming arguendo that the factors are relevant,⁹ Mr. Riffin fails to show that ALJ Dring committed any error, much less an

⁹ City et al has found no cases holding that administrative agencies must consider any particular factors, let alone those listed by Riffin, in dismissing parties who infringe discovery orders. City et al has found many orders at two agencies (EEOC and DOL, which deal frequently with pro se litigants like Riffin) that dismiss proceedings for procedural violations.

error that changes the result and thus qualifies as material error.

First, Mr. Riffin never argued to Judge Dring that the presiding officer must make any specific findings in order to impose sanctions. In particular, Riffin made no allusion to any "factors" in his written Reply filed on September 26, 2016. His written "Argument," which he provided ALJ Dring at the hearing on October 24, is bereft of "factors."¹⁰ It is well established that objections are waived if not timely raised.¹¹ Riffin cannot show material error based on an objection he never timely raised.

Second, Judge Dring in fact made the findings that Riffin claims are necessary. In his decision filed October 24, Judge Dring addressed the issues of "bad faith," causation of

¹⁰ The gravamen of Riffin's October 24 "Argument" (and of his oral remarks) is that discovery sought by the City is irrelevant, and he therefore should be excused from compliance with the August 24 Order to which he consented. Violating an Order compelling discovery because he thinks compliance is not worthy of any more than two hours effort amounts to sanctionable and contumacious conduct.

¹¹ See Norfolk Southern Railway - Ac. And Op. - Certain Lines of the Delaware and Hudson, F.D. 35873, served Oct. 18, 2016, slip op. at 7, citing Tex. Mun. Power Agency v. Burlington N. & Santa Fe Ry., 7 S.T.B. 803, 804 (2004) ("The Board generally does not consider new issues raised for the first time on reconsideration where those issues could have and should have been presented in the earlier stages of the proceeding").

behavior, need for deterrence, and less drastic measures by succinctly stating as follows:

"[B]ased on my observations of Mr. Riffin at the October 24, 2016 oral arguments, I am making a demeanor credibility determination in which I find that Mr. Riffin is not a reliable witness as to the truth of the matter to which he asserts. His deportment suggests evasiveness, deliberate obtuseness, faulty memory, and mental reservation. [Footnote 1] Mr. Riffin evaded direct questioning from me several times and contradicted himself on several occasions. He also alleged faulty memory as to the status of various emails and knowledge of certain parties.

"[Footnote 1:] See *Thomas v. Sullivan*, 801 F. Supp. 65, 71 (N.D. Ill. 1992) (Court stated that a reviewing court would not disturb a credibility determination in which an ALJ assigned no credibility to a witness whose behavior gave an impression of evasiveness, deliberate obtuseness, or faulty memory). See also *Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985) (holding that "only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said.")."

Consolidated Rail Corp. - Ab. Ex. - Hudson County, AB 167-1189X, served October 26, 2016, slip op. at p. 2 (first of two decisions that day).

In short, Judge Dring expressly found Riffin evasive and unreliable (i.e., misleading and dishonest). These are hallmarks of "bad faith." See *Black's Law Dictionary* (7th ed. 1999) at 134. Moreover, Judge Dring effectively finds that Riffin's own conduct (unreliability) is the cause of discovery problems. Deterrence of such conduct is obviously necessary to maintain the integrity of agency fact-finding. At the hearing on August 24, 2016, Judge Dring expressly warned Riffin he risked the full range of sanctions if he did not fully comply

with the Judge's order.¹² The warning, like Board admonishments in other proceedings, did not work.

Third, and absolutely fatal to Riffin, none of the cases which Riffin cites requires the presiding judge to make any findings; they simply indicate that the record as a whole should support a determination that the factors are satisfied. E.g., Anderson v. Foundation for Advancement, 155 F.3d 500, 504-05 (4th Cir. 1988) (upholding default judgment for failure to make discovery based on record as a whole); Malone v. U.S. Postal Service, 833 F.2d 128, 130 (9th Cir. 1987) (upholding dismissal based on record as a whole). Moreover, each factor does not have to be met as long as the balance supports dismissal viewing the record as a whole. E.g., Rio Properties v. Rio International Interlink, 384 F.3d 1007, 1022 (9th Cir. 2002)

¹² After indicating he wished to proceed efficiently, Presiding Judge Dring stated as follows:

"As anyone knows, in the [FERC] practice knows, I am very used to having my orders complied with fully by the parties, and in rare instances where parties have not complied, I have issued sanctions.

"And I would certainly entertain the notion in this case of sanctioning anyone who does not comply fully and on a timely basis with any order that I will issue in this case. And my idea of sanctions - you probably know, Mr. Riffin, under the regulations what sanctions are, and I'm not limiting myself to one. I may issue all of the sanctions.

"So just keep in mind, when you agree to do something and I order you to do something, it's going to be done, or there are consequences."

Transcript of August 24, 2016 hearing in AB 167-1189X, at p 18 line 9 to p. 19 line 1.

(public policy favoring merits determinations does not outweigh other factors favoring dismissal); Keefer v. Provident Life and Acc. Ins. Co., 238 F.3d 937, 940-41 (8th Cir. 2000) (no reference to any particular factors but finding that dilatory and contumacious conduct supports severe sanction of dismissal). In all events, the alleged failure to make certain findings is not even error, much less material error.¹³

While Judge Dring's findings are adequate to support the sanctions even under Riffin's "factors" analysis, the point is that Riffin in any event cannot claim error, much less "material error," unless he satisfies his heavy burden of proving that the record as a whole is inconsistent with a determination that the four factors are satisfied. Riffin makes no showing in this

¹³ See Norfolk Southern Railway, *supra*, F.D. 35873, slip at 7: "In a petition alleging material error, a party must do more than simply make a general allegation; it must substantiate its claim of material error. See Can. Pac. Ry.-Control-Dakota, Minn. & E. R.R., FD 35081, slip op. at 4 (STB served May 7, 2009) (denying petition for reconsideration where the petitioner did not substantiate the claim of material error and the Board found none). If a party has presented no new evidence, changed circumstances, or material error that "would mandate a different result," then the Board will not grant reconsideration. See Montezuma Grain v. STB, 339 F.3d 535, 541-42 (7th Cir. 2003); CSX Transp. Pet. for Declaratory Order, FD 35832, slip op. at 3 (STB served Feb.29, 2016); Canadian Nat'l Ry.-Control--EJ&E W. Co., FD 35087 (Sub-No.8), slip op. at 8-9 (STB served Nov.8, 2012); Or. Int'l Port of Coos Bay-Feeder Line Application-Coos Bay Line of Cent. Or. & Pac. R.R., FD 35160, slip op. at 2 (STB served Mar.12, 2009)." Accord, 212 Marin Blvd. LLC, *supra*, served April 24, 2015, slip at 4 (material error is error that mandates a different result).

regard. To the contrary, the record as a whole clearly supports all sanctions applied. City et al will summarize the record on the four factors Riffin enumerates.

Bad faith. Black's Law Dictionary, *supra*, at 134 defines "bad faith" as "dishonesty of belief or purposes." It includes but is not limited to "evasion of the spirit of the bargain, lack of diligence and slacking off, [and] willful rendering of imperfect performance." In response to foot-dragging and prevarication by Riffin,¹⁴ City et al on May 2, 2016, filed a motion to compel to obtain a response to City et al's March 28, 2015 document requests. Riffin later that day served his "Reply."¹⁵ In his Reply, Riffin stated that he had no documents from the LLCs (including specifically Hyman or Horgan) and he did not "routinely receive nor send, e-mails." He claimed he "discarded" all emails after he received them. Riffin's Reply to March 28, 2016 Request for Documents in AB 167-1189X, at p. 2

¹⁴ The document request response was due on April 19 and Riffin acknowledges he said he would reply by that date, but that he failed to do so. He said he "forgot," indicating this was chronic with him for he was over 70 years old. However, Riffin acknowledges that he received multiple e-mails by the City urging him to respond to City's March 28, 2016 document requests, and a telephone call from another party. He admits he told City et al he would then respond by April 29. But then he evaded doing so because he says he knew counsel was leaving for Europe on May 3. Riffin's Reply to City's first Motion to Compel, filed May 12 but served May 14, 2016, at pp. 5-6.

¹⁵ A copy of Riffin's "reply" is attached as Exhibit B to City et al's Second Motion to Compel. Riffin attached no service certificate to it.

(posted to City et al on May 2, 2016). All these statements by Riffin turned out to be false. He did have emails. He ultimately provided, by his own count, 103 of them.

One of the cases Riffin cites [Pet. 21 citing Fair Housing v. Combs, 285 F.3d 899, 905-06 (9th Cir. 2002)] upholds dismissal because, as here, the litigant misrepresented to counsel and the court that documents did not exist when they did.

City et al obtained a verified statement from the representative (Mr. Strohmeier) of another party (CNJ) familiar with Riffin's emails attesting to the lack of veracity in Riffin's Reply to City et al's document requests,¹⁶ and on July 5 filed another Motion to Compel. In response, Riffin changed his story, this time claiming he stored emails on a flashdrive and that they were indecipherable. Riffin "Reply" to Second Motion to Compel, filed July 28, 2016, at p. 11 paras 41-43 and Exhibit (indecipherable copy of email). Riffin appeared to suggest that if he was compelled to produce documents that counsel be required to go to Baltimore to view the incomprehensible flashdrive documents. Id. Para 45. This was another misrepresentation to City et al and STB that intelligible documents did not exist.

¹⁶ See Exhibit C to City et al's Second Motion to Compel (verified statement of Eric Strohmeier).

City et al requested Mr. Strohmeier to attend the August 24 hearing before ALJ Dring to rebut Riffin's claims, if again made. Aware of Strohmeier's plans to attend (Strohmeier apparently informed Riffin), Mr. Riffin at about 9 PM on Sunday evening showed up at a D.C. restaurant where counsel was attempting to have dinner, acknowledged he did in fact have decipherable email documents, and offered to allow visual inspection of his email if the restaurant had wifi.¹⁷ Judging this "opportunity" vexatious, infeasible and inadequate among other things,¹⁸ counsel advised Riffin that something would have to be worked out at the hearing the next morning. At the hearing the next morning, Mr. Riffin indicated he would forward all (Aug. 24, 2016 Hearing Transcript at 15, lines 2-10) his responsive emails to counsel not only for City et al but also

¹⁷ He there demonstrated that his email inbox demonstrated voluminous emails to and/or from Hyman, but the restaurant's wifi was incompatible with opening all the attachments. See August 24, 2016, Hearing Transcript in AB 167-1189X at 13-14. Riffin recounts his uninvited expedition to the restaurant at p.16 para 68 of his "Petition(s)" filed October 31. Contrary to Riffin "Petition(s)" p. 16 para 69, the only "agreement" between himself and City et al was that manifest in the August 25 order. Counsel for City et al did not limit the discovery to Mr. and Mrs. Hyman and Horgan at the August 24 hearing. E.g., Aug 24 Hearing Transcript in AB 167-1189X at 14, esp. lines 10-16.

¹⁸ Even assuming this was a legitimate tender of documents, Riffin's own cases (Pet 21, citing Fair Housing v. Combs, supra, 285 F.3d at 906) says that "[l]ast minute tender of documents does not cure the prejudice to opponents, nor does it restore to other litigants on a crowded docket the opportunity to use the courts."

for the LLCs and Conrail and that he would provide the docket numbers for his various bankruptcy adjudications. With Riffin's consent (August 24, 2016, Hearing Transcript at p. 18 lines 1-2), ALJ Dring issued a written order compelling this discovery.

In short, as a result of two motions to compel, identification and participation of a witness to call his bluff (twice), and a hearing, Mr. Riffin was shown to have prevaricated at least twice concerning the existence of documents.¹⁹ The multiple prevarications were clearly intended to avoid discovery on issues germane to the integrity of the agency's fact-finding abilities.

With consent from Riffin, ALJ Dring from the Bench, and then in writing (served August 25, 2016), entered an order expressly directing Mr. Riffin to make available to City et al all emails between himself and the LLCs remaining in his possession by August 26, 2016.

On August 25, Riffin forwarded by his count some 103 emails. He then advised counsel by email that this process (including composition of an improperly served "status report" to ALJ Dring) had consumed roughly two hours, and the library from which he worked was closing. Counsel advised that stopping at two hours had breached the discovery order, because inter

¹⁹ For additional Riffin prevarication, see note 14 supra (claim that he would timely respond but he "forgot").

alia he by his own admission had failed to search for emails from agents or representatives of the LLCs (other than the Hymans or Horgan).²⁰ City et al noted that a couple more hours would appear all that would be required to complete Riffin's task. Motion for Sanctions, Exhibit B. Riffin responded on August 26 that "[i]f you want any more, you will have to ask ALJ Dring to order it." Motion for Sanctions, Exhibit C. Faced with an arbitrary termination of discovery response, and an outright refusal to work out differences, City et al filed the Motion for Sanctions in response.

By this point, it is crystal clear that any statement by Riffin concerning his documents or discovery response is as reliable as the thirteenth chime of a clock. Mr. Riffin has engaged in actual prevarication (dishonesty in the form of denial of the existence of documents); followed by more prevarication (assertion that the documents he retained were indecipherable) when caught; followed by evasion, lack of diligence and willful rendering of imperfect performance when caught again. To top this off, Mr. Riffin's written "Argument" against sanctions as filed on October 24, 2016 amounts to a

²⁰ The relevant document requests defined "documents" to include emails that, among other things, were "authored, copied on, or received by consultants, officers, employees, negotiators, board members, [or] attorneys" of any party, including the limited liability corporations in AB 167-1189X. Second Motion to Compel, Exhibit A, pp. 1-2.

jeremiad against providing any discovery, attacking the relevance of that which he was ordered to produce with his consent on August 24. He basically disavows his consent and attacks the order compelling discovery. City et al could go on, but this is enough for a reasonable presiding judge to conclude that litigant Riffin is operating in bad faith.

(b) Whether adversary caused the behavior. City et al had nothing to do with Riffin's misconduct. City et al merely brought it to ALJ Dring's attention. Riffin's only argument on "causation" is his claim (Pet. 23) that City et al did not make a "good faith effort" to resolve discovery disputes in response to an August 5 order from ALJ Dring. In Riffin's Reply to City et al's Second Motion to Compel, Riffin represented that his documents were saved in indecipherable form. He offered that counsel could visit Baltimore to verify that fact (which fact turned out to be untrue). Counsel is not required to waste time and money visiting Riffin in Baltimore to be shown indecipherable documents, when counsel possessed information from a third party (Strohmeyer) indicating Riffin was prevaricating. Counsel is not required to play Riffin's costly games. Riffin renders resolution of discovery disputes impossible due to his chronic misrepresentation concerning his documents. Neither City et al nor STB needs to "negotiate" with him based on claims he makes which are untrue or at best half-

truths, let alone fly to Baltimore for the entertainment. City et al's failure to fly off to see him did not cause him to prevaricate.

(c) Need for deterrence. Any federal agency is properly concerned with measures to assure the soundness of its fact-finding process. "Without an adequate evidentiary sanction, a party served with a discovery order in the course of an administrative adjudicatory proceeding has no incentive to comply, and often times has every incentive to refuse to comply." Atlantic Richfield Co. v. U.S. Dep't of Energy, 769 F.2d 771, 796 (D.C. Cir. 1984). Mr. Riffin has a history of disregard for judicial and STB procedures. See text at note 6 and note 6 *supra*.

Riffin's history in this discovery matter is more of the same, involving repeated bouts of outright prevarication. At the August 24 hearing resulting in the order compelling discovery, ALJ Dring warned Riffin that he should fully and timely comply in providing his discovery response. See note 12 *supra*. At least two of the cases cited by Riffin (Rio Properties, *supra*, 284 F.3d at 1022; Anderson, *supra*, 155 F.3d at 505) uphold dismissals and defaults where the culpable party has been warned. (Indeed, all of the relevant cases cited by Riffin uphold dismissals, defaults, or exclusions of evidence due to tardy and evasive behavior, warning or no warning.)

Despite warning, Mr. Riffin by his own admission stopped – refused to comply – after two hours, and told City et al that if it wanted more, to go see Judge Dring. The thrust of Riffin's position at the sanctions hearing (see his Argument filed that date) is that the discovery compelled in the August 25 order is irrelevant. It was an argument to nullify an order to which Riffin had consented. Any presiding officer is fully justified in finding a need for deterrence. The agency must safeguard the integrity of fact-finding, and also protect itself from wasteful repetitive hearings in which Mr. Riffin shifts his position in order to litigate that which he formerly acceded.

(d) Lesser sanctions. As already explained (see note 6 and text supra), the Board has admonished Mr. Riffin many times, recently observing that he is a frequent litigator with a history of inappropriate filings." ALJ Dring admonished Riffin at the first hearing to no avail. See note 12 supra. Repeated admonitions have not worked. See text at note 6 supra. Per Riffin's own cases, further or more explicit discussion of lesser sanctions is unnecessary where there has been a warning (Malone, supra, at 132-33). Judge Dring warned Riffin on August 24, 2016, that he was prepared to impose all available sanctions. See note 12 supra. In the end, the simple fact of the matter is that Riffin has engaged in a cascade of disruptive, dishonest and bad faith dealings despite warnings

and that calls into question anything he says on the facts at issue. That does not just justify dismissal; it necessitates dismissal.

The Malone case on which Riffin relies provides a list of factors that are somewhat different from those enumerated by Riffin. Malone in particular lists factors like (i) the public's interest in expeditious resolution of litigation, (ii) a tribunal's need to manage its docket, (iii) risk of prejudice to defendant, and (iv) public policy in favor of disposing of cases on their merits. Malone at 130. For sake of completeness, City et al notes that the record as a whole also shows all Malone factors are satisfied.

Expedition. Federal rail policy calls for expeditious handling and resolution of cases (49 USC 10101(15)). Riffin's obstreperous conduct has prolonged the proceeding. His "Petition(s)" threatens more delay, and in fact seeks a stay pending judicial review (potential one to two-year delay).

Management. Riffin's obstreperous conduct has disrupted the proceeding. In his "Petition(s)" he contends that the agency's effort through ALJ Dring to resolve discovery matters has created new issues and resulted in delay.²¹ Riffin seems to

²¹ Riffin appears to blame the Board for causing delays by assigning an ALJ in order "to lessen [the Board's] work load," and then blames the ALJ for "increase[ing]" that workload by "creat[ing] an entirely new dispute." Pet 6 para 24.

challenge the Board to ignore (put up with) his antics or he will increase his disruption of proceedings with more contrived issues. The Board should not serve as Riffin's playground. Dismissal is an appropriate case management response to such a disruptive and unreliable litigant.

Prejudice to City et al. If Riffin remains in the proceeding, City et al are entitled to full and complete discovery of Riffin's relationship to the Hyman interests. He claims he is their back-stop. He says he has an agreement with the Hyman interest to compensate him should his efforts result in monetary recovery to them. See note 7, Wasser Verified Statement. Rather than respond fully to discovery on these matters, Riffin has instead engaged in evasion and prevarication. This not only prejudices City et al's ability to make their case that Riffin and the Intervenor LLCs are abusing the Board's remedies, but also in doing so undermines the integrity of STB's fact-finding processes.

Riffin's only argument on the issue of prejudice is his claim that inasmuch as the City received from another source a document (a memo he wrote to an attorney for the LLCs outlining an OFA-based attack on the Metro Plaza development to their mutual advantage) which he failed to produce, the City was not prejudiced. Pet. 23. City et al are prejudiced, inter alia, by Riffin's repeated false claims of lack of documents, followed by

Riffin's acknowledged failure before Judge Dring subsequently to look for documents other than those from or Mr. or Mrs. Hyman and Horgan and his professed forgetfulness. See Fair Housing, supra, 285 F.3d at 906. Riffin appears to deny the existence of anything that he believes the City cannot positively prove he has, and then claim he forgot when his bluffs are called. As Judge Dring found, this renders him unreliable.

Public policy favoring merits disposition. First, the public policy in favor of merits disposition does not trump policies favoring maintaining the integrity of the agency's fact-finding process. Atlantic Richfield, supra. Accord, Rio Properties, supra, 284 F.3d at 1022 (policy favoring merits resolution does not outweigh other factors). Riffin in relying on the policy (Pet. 21) seems erroneously to think it requires a presiding judge to ignore his failure to comply with discovery rules. Obviously that is not the case, for the cases Riffin cites manifest multiple examples of dismissals and default judgments due to failure to comply with discovery rules.

In any event, since City and CNJ remain in the OFA process, there will be a merits disposition. Indeed, Riffin's dismissal from these proceedings will aid in that purpose. Ironically, Riffin told counsel for City et al (rather gleefully) that he (Riffin) intends to piggyback on City's OFA merits showings. He also explains that he expects the LLC Intervenor to require

Conrail to sell the property to him if City's showings are accepted by the agency.²² In short, he for all intents and purposes does not plan to address the merits. He simply wishes to facilitate Conrail's unlawful sale of the Harsimus Branch to the LLC Intervenor by improper use of the OFA remedy.²³

If there are any more factors in some court case under the Federal Rules that are not addressed above, City et al is confident that they are satisfied in the record in AB 167-1189X.

²² Mr. Riffin in one of his initial filings with STB in this proceeding (Riffin Response filed June 11, 2015, pp. 9-10 & para 40E), and in filings with Supreme Court and Third Circuit in another case (see City et al's First Motion to Compel, filed May 2, 2016, p. 2 n.1 and exhibits C and D to Motion), has already alluded to this scheme. He also alludes to the scheme at p. 8 para 23 of his July 28 reply to City's Second Motion to Compel, where he hints that the LLCs will compel Conrail to select his OFA. Riffin then denies a "written agreement" with the LLC Intervenor (p. 9 para 29). But this is either false or misleading given his statement to Mr. Wasser that he in fact had an agreement for compensation with the LLCs. If Mr. Riffin remains in the proceeding, then City et al at the close of document discovery desire to take his deposition concerning this agreement, and reserve the right to seek depositions on the same subject, and perhaps additional relevant subjects, from the Hymans and perhaps other representatives of the LLCs. City et al are mindful that Judge Dring has found Riffin to be an unreliable witness and have no real choice but to depose him under oath and penalties for perjury if he remains in the proceeding.

²³ In any event, Riffin's notice of intent to OFA was untimely under STB's regulations, and is unlikely to withstand judicial review if ever embodied in an appealable final order. See City et al filings in AB 167-1189X for June 25 and September 14, 2015.

To say, as Riffin does, that Judge Dring abused his discretion (Pet. 20) is absurd. Riffin, after a history of denial and evasion, was warned on August 24 of the consequences of failure to make a full discovery response per the order compelling discovery. Riffin instead remained his unreliable and incorrigible self. Judge Dring so found, and issued the sanctions he warned he would. Accordingly reopening must be denied.

To the extent Riffin makes other claims or assertions, City et al regard them as irrelevant, or belied by the record, and certainly not rising to the level of material error. To the extent contrary to City's interest, City et al denies any such Riffin claims. In sum, Mr. Riffin's "Petition(s)" insofar as it seeks further review must be treated as a petition to reopen on the ground that Judge Dring committed a material error. Riffin fails to bear his burden of showing that Judge Dring committed any error, much less material error.²⁴

III. Riffin Fails to Establish any of the Four Required Elements to Be Entitled to a Stay

²⁴ If this Board grants Riffin relief allowing him to remain in the proceeding, then City et al's motion to compel discovery from the LLCs is no longer moot and must be resolved. In addition, City et al reserves the right to pursue further document discovery against Riffin, and after document discovery is complete, to seek depositions of Riffin and pertinent representatives or former representatives or agents or contractors of the LLCs with whom Riffin has been dealing.

Mr. Riffin's petition to stay has no merit. In order to prevail in a motion for stay, Riffin must make a showing of four factors (Second Decision in AB 167-1189X, served Oct. 26, 2016). He continues to fail in this regard.

Probability of success on the merits. In order to obtain a stay, Riffin must show probability of success on the merits. As the argument against his Part 1117 appeal/de facto petition to reopen shows, Riffin fails to demonstrate a probability of success. He shows no error, let alone material error.

Riffin's stay request seeks more than a stay of a sanctions order pending consideration of his de facto petition for reopening; it also seeks a stay of AB 167-1189X pending judicial review. In order to obtain a stay of the entire proceeding, Riffin presumably needs to demonstrate a likelihood of success in pursuing his OFA. He utterly fails to make such a showing. In any event, he cannot.

The only verified evidence in the record (Wasser verified statement) corroborates statements elsewhere by Riffin that his OFA is for the purpose of advancing the real estate (non-rail) interests of the Intervenor LLCs, for which he will be compensated by the LLCs. Riffin's contradictory claims to be pursuing rail purposes are totally undercut by ALJ Dring's finding that "Mr. Riffin is not a reliable witness as to the truth of the matter to which he asserts." Consolidated Rail

Corp. - Ab.Ex.-in Hudson County, NJ, AB 167-1189X, served Oct. 26, 2016, slip at 2 (first decision).²⁵

In addition, the agency's OFA regulations require Riffin to show financial capacity. During the pendency of AB 167-1189X, STB ruled that Riffin did not qualify to submit an OFA for another Conrail line in Jersey City because of his bankrupt status and lack of relevant rail assets.²⁶ Riffin's only assertions on financial responsibility to date are set forth in his July 28 Reply to City et al's Second Motion to Compel, where he claimed (at p. 10) that STB must set the price for the Harsimus Branch at \$22,109.51 and (at p. 11) that he would show counsel for City et al, if he would but come to Baltimore, that he (Riffin) had \$22,200 in cash. He made a similar argument to

²⁵ As already noted, City et al will also challenge any final order in which Riffin employs an OFA on the ground that his notice of intent to file an OFA was fatally untimely.

²⁶ "Even if we did not exempt the Line from § 10904, Riffin could not be considered a financially responsible party, as he recently filed for bankruptcy protection. Voluntary Petition, In re Riffin, No. 10-11248 (Bankr. D. Md. Jan. 20, 2010). In that petition, Riffin claimed assets of \$400,000, liabilities of over \$4,000,000, no specialized rail equipment, and only modest income from rental property. Insolvency is inconsistent with the financial responsibility to acquire and operate a railroad under the OFA provisions. Moreover, a bankruptcy proceeding could result in any rail line Riffin might acquire becoming encumbered property, thereby jeopardizing its use for continued rail service, contrary to the fundamental purpose of 49 U.S.C. 10904." Conrail - Ab. Ex. - in Hudson County, NJ, AB 167-1190X, served May 17, 2010.

Judge Dring at the August 24 hearing, but Judge Dring properly viewed his claim skeptically, but viewed it as irrelevant to the matter at hand. At the hearing on October 24, Riffin informally claimed to counsel for City et al (and counsel for RTC) that he had some \$36,000 in a bank account. Even if Conrail's purported easement interests in the Harsimus Branch are valued at zero, City et al believes Riffin's showings on financial ability to OFA the Harsimus Branch to be way off the mark. As part of City's OFA, City intends to seek an order voiding Conrail's unlawful sale of the Harsimus Branch to the Intervenor LLCs. Under applicable STB precedent, that property should be conveyed to the City at the price Conrail contracted with the LLCs (\$3,000,000). Only if STB fails to void the unlawful sale is the value of that portion zero as posited by Riffin. But even then, Riffin will need funds to acquire remaining fee interests from Conrail in the Palisades and to address some level of operation. That will greatly exceed Riffin's \$36,000 bank account.

In short, Riffin is unlikely to be able to succeed on the merits of his OFA for the former freight main line of the Pennsylvania Railroad into what is now downtown Jersey City.

Irreparable injury. Riffin must also show that he will incur irreparable injury in the absence of a stay. Riffin's only claim in this regard is that in the absence of a stay,

Riffin's Complaint in U.S. District Court for New Jersey against the owners of Metro Plaza will be dismissed. (Riffin depends on his proposed OFA to justify standing to maintain his lawsuit to enjoin other developers which he has filed to assist the LLC Intervenor.) He says construction activities for Metro Plaza will interfere with use of unabandoned rail lines in that area. Pet. 24.

Mr. Riffin told Mr. Wasser that Riffin's purposes in suing Forest City/G&S was to help the LLC Intervenor, and if he was successful, they would pay him a 5% commission.²⁷ Since inability to obtain a commission for mis-use of the OFA remedy is not an injury associated with a rail purpose, it does not qualify as a legitimate irreparable injury on which STB may issue a stay.

On the other hand, Mr. Riffin may be implying that he is serving as the surrogate for STB by seeking a US District Court order to preserve the Harsimus Cove Yard from demolition pending a final outcome in AB 167-1189X. The problem is the ICC Termination Act indicates that his suit violates 49 USC 10501(b). Under section 10501(b), the remedies provided under the ICC Termination Act with respect to regulation of rail transportation preempt and exclude all other federal and state

²⁷ See Wasser Verified Statement, footnote 7, filed Oct. 20, 2016.

remedies. The Act's enforcement provisions are found at 49 USC 11701. Section 11701 empowers a party such as Riffin to file a complaint with the Board, not a Court, for the kind of harm that Riffin claims is irreparable in connection with the Harsimus Branch. Riffin has not filed a complaint with the Board. Sections 11702 and 11703 empower STB or the Attorney General to seek injunctions or otherwise to enforce Board jurisdiction. Riffin is not the STB or Attorney General. Section 11704(a) empowers a person such as Riffin to bring a US District Court action only if the person shows injury from failure of a rail carrier to obey an order of the Board. Riffin cites no STB order disobedience to which has harmed him. Section 11704(b) provides for rail carrier liability for violations of the ICC Termination Act, and section 11704(c) appears to authorize civil suits against rail carriers. Although Conrail unlawfully failed to obtain an abandonment authorization for the Harsimus Branch, Mr. Riffin's suit does not name Conrail or any other rail carrier as defendant. It thus does not appear to be consistent with 49 USC 10501(b). The agency cannot find irreparable injury, much less stay an STB proceeding, for adjudication of a dispute in the wrong forum with the wrong defendants, and the wrong plaintiff. If the Board feels there is a showing of irreparable injury, then under the ICC Termination Act, either

the Board, or on the Board's request, the Attorney General, should be seeking relief.

Mr. Riffin's civil action injury claim is misplaced for another reason. His Complaint against Forest City/G&S alleges the "lines" he purports to protect have long ago disappeared under buildings and parking lots. Riffin Complaint, *supra*, p. 3 para 10. City et al agree. The injury (building construction) which he says is irreparable has already occurred.

Finally, Metro Plaza is not needed for OFA purposes. Riffin describes the property as inside the old Harsimus Cove Yard. E.g., Riffin Complaint at pp. 2-3. Based on inquiry to STB, yard track in general is subject to STB jurisdiction, but is exempt from STB abandonment approval, except for the last through track in a yard, per 49 USC 10906. Conrail could thus lawfully sell off the yard, except the last through track. City et al does not know what trackage Conrail would assert to be the last through track if push came to shove. But as a practical matter, City has viewed that issue as irrelevant: the only former trackage in the yard east of Marin in which the City has an interest for purposes of an OFA, and which still exists as a rail transportation-compatible right of way, is embodied in Sixth Street, but that is already owned by the City. From the City's point of view, that renders moot the location of the last through line in the old Harsimus Cove Yard, and City et al have

never sought either a location or status determination concerning same. In short, Riffin's lawsuit serves no rail need and dismissal of that suit would be a welcome event, not irreparable injury.

Prejudice to other parties. Riffin claims no injury to others because the OFA process has not yet begun. Pet. 24. Yet in the preceding paragraph in his "Petition(s)," he indicates he is irreparably injured because he will lose his ability to enjoin a hundred-million-dollar redevelopment project (Metro Plaza). The owners of Metro Plaza certainly are prejudiced by Riffin's stay request because it subjects them to continued spurious litigation. Moreover, a stay pending judicial review is contrary to public policy set forth in 49 U.S.C. 10101(15) (prompt handling and resolution) and also subjects the City to the burden of continued burdensome litigation by the Intervenor LLCs against the City in various New Jersey state court proceedings. The only party that may support Riffin is the Intervenor LLCs, because Riffin is (by Riffin's own admission) the LLCs' "back-up plan."²⁸ But Riffin's "back-up plan" is an illegitimate use of the OFA remedy for non-rail purposes not only by Riffin but also by the Intervenor LLCs.

²⁸ Riffin's Response to City et al's Request for an OFA due date and opposition to his tardy OFA, at pp. 9-10, esp para 40E, last sentence, filed June 11, 2015.

In sum, insofar as Riffin seeks a stay, he fails to make the requisite showings, and the relief he seeks must be denied. If this Board disagrees, then City et al request that any stay relief be conditioned on Riffin posting a bond. As an outgrowth of the Norfolk Southern petition for rulemaking addressing abuse of the OFA process by Riffin, the Board instituted a rulemaking, in which it now proposes to require a bond equal to 10% of the estimated purchase price for a rail line from each OFA applicants in order to ensure good faith. Offers of Financial Assistance, Ex Parte 729, served Sept. 30, 2016, slip at 8. It is certainly appropriate to insist upon a bond from Riffin as a condition for any OFA-related stay. Since the price for Conrail's fee interest in the eight blocks of the Branch is set at \$3 million by prior sale to the Intervenor LLCs, the bond should be no less than 10% of that amount, or \$300,000. City is incurring annual legal fees on average greater than that amount to defend against state law suits brought by Intervenor LLCs in their attempts to thwart City's own OFA.²⁹ City et al request

²⁹ The LLCs are currently suing the City, inter alia, over its multiple ordinances authorizing an OFA, and over its ordinances authorizing a bond to secure the Harsimus Branch in the event of a successful OFA. The longer AB 167-1189X drags on, the more legal actions the LLCs bring, as part of their misguided effort to resist compliance with federal regulation of railroad abandonments, and state laws (NJSA 48:12-125.1) based on compliance with that regulation. The LLCs counsel has advised that the LLCs desire tens of millions in damages for alleged civil rights violations stemming from City's efforts to obtain

that the bond amount be able to pay City et al's legal fees incurred in federal or state tribunals as a result of litigation by the Intervenor LLCs or Riffin during the pendency of any stay.

Conclusion

Mr. Riffin's Petition should be denied. He fails to show any error, much less bear his burden of proving material error, on the part of Judge Dring. He shows no entitlement to any stay.

Pursuant to 49 CFR 1114.31(b)(2), City et al request an award of costs and attorneys' fees for this additional round of pleading in response to Mr. Riffin's failure to comply with Judge Dring's August 25 order.

Respectfully submitted,



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STB remedies from the unlawful sale of the Harsimus Branch in 2005 without required STB authorization.

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 4th day of November 2016 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).



Service List (current as of Oct. 2016)

Daniel Horgan,
Waters, McPherson, McNeill, P.C.
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P.O. Box 1560
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Daniel D. Saunders
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Mail Code 501-04B
NJ Dept. Environmental Protection
P.O. Box 420
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Jill Edelman, President
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President
The Village Nbd Ass'n
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President
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The Barrow Mansion
83 Wayne Street
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President
Historic Paulus Hook Ass'n
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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.

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