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**Before the
Surface Transportation Board**

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 WRITTEN ARGUMENT

1. Comes now James Riffin, (“**Riffin**”) who herewith files his written arguments.
2. Courts can read a lot faster than Riffin can speak. To minimize the resources the Court must devote to the October 24, 2016 Discovery Hearing before ALJ Dring, Riffin will put into writing the majority of what he would say at the Discovery Hearing. Doing so permits ALJ Dring to concentrate on what is being said, and eliminates any need to take notes regarding what Riffin puts in this writing.

THE ISSUES

3. This proceeding is an **abandonment** proceeding, which was filed pursuant to 49 CFR 1152.50. (No service for two years.) The **primary issue** in an abandonment proceeding, is whether the ‘public convenience and necessity permits abandonment of the line at issue.’ **IF** abandonment is authorized, then a second issue presents: Should the abandonment be subject to any ‘historic’ or ‘environmental’ conditions. **IF** someone expresses an interest in filing an Offer of Financial Assistance (“**OFA**”) to acquire the line, then, **after** the STB has made a determination that abandonment is authorized, and **after** the STB has imposed whatever historic and environmental conditions that it feels are needed, **then, and only then**, will the STB address the OFA issue.

4. It is a hard and fast rule in all judicial proceedings: Speculative issues will not be addressed.

5. Whether the STB will permit the OFA process to move forward, is unknown at this time. Consequently, any rulings regarding the OFA process, at this point in time, would be rulings on ‘speculative’ issues, which a court is not supposed to be ruling on.

A WEE BIT OF HISTORY

6. The United New Jersey Railroad and Canal Company (“**UNJRCC**”), chartered a railroad from the Hudson River, at Exchange Place (the East end of present day Columbus Blvd), to Kearny, NJ, about 7 miles away. The Main Line went where present day Columbus Blvd is, to Journal Square, and thence to Kearny. The Pennsylvania Railroad (“**PRR**”) leased the UNJRCC for 999 years. Around 1900, the PRR decided to build an elevated **freight main**, from CP Waldo (about 1,000 feet East of Journal Square), south of, and parallel to 6th Street, to the Harsimus Cove Yard. The original right-of-way (where Columbus Blvd is), from Exchange Place to CP Waldo, was dedicated exclusively to **passenger service**, becoming the **passenger main**. The PRR and the New York Central (“**NYC**”) railroads merged, becoming the Penn Central.

7. In **1968**, the Penn Central abandoned the **Passenger Main**, from Exchange Place to CP Waldo. The right-of-way was sold to Jersey City, which built Columbus Blvd on it.

8. The Penn Central filed for bankruptcy protection. In **1973**, the trustee for the Penn Central, sold 10 acres of the Harsimus Cove Yard (in the southeast corner, adjacent to the waterfront), to the William J. Morris Realty Co. In **1974**, the trustee sold an additional 14 acres of the Harsimus Cove Yard (still adjacent to the waterfront, basically the remainder of the Yard East of the Light Rail Line, south of 6th Street), to the W.J. Morris Realty Co.

9. In **1976**, what remained of the Harsimus Branch, and everything appurtenant thereto, was conveyed to **Conrail via the FSP, as Line Code 1420. The Hudson Street Industrial Track, (“HSIT”), Line Code 1440**, was also conveyed to Conrail. (The HSIT went from the south side of the Harsimus Cove Yard south down Hudson Street, then West in Essex Street.)

10. In **1985**, Conrail sold the remaining portions of the Harsimus Cove Yard, to National Bulk. Conrail **reserved a rail easement** in order to continue providing rail service to remaining shippers. Conrail operated its last train on the Harsimus in **1988**.

11. **January 31, 1994**, National Bulk sold 18 acres of the portion of the Harsimus Cove Yard that it bought from Conrail, to **G&S Investors**. On **May 20, 1994**, Conrail terminated its rail easement across the Harsimus Cove Yard. G&S Investors built today’s **Metro Plaza** on the 18 acres that it acquired from National Bulk.

12. Conrail offered the Embankment portion of the Harsimus to Jersey City (“**JC**”). JC declined to buy the Embankment portion. Conrail advertised the Embankment portion for sale. The only entity that expressed any interest, was **Steve Hyman**. Mr. Hyman formed a number of LLCs, which took title to the Embankment portion in **2005**.

13. In **2006**, a new mayor and new City Council persons were elected. They suddenly wanted the Embankment portion for a ‘trail’ and for ‘park purposes.’ They offered to buy the

Embankment portion from Mr. Hyman, for the same price that Mr. Hyman had paid: \$3 million. Mr. Hyman was willing to sell, but wanted to make a profit. Jersey City was unwilling to offer more than the \$3 million that Mr. Hyman had paid for the Embankment portion.

14. Jersey City hired Charles Montange, a well-known ‘rails to trails’ lawyer. Mr. Montange quickly realized that the Embankment was a line of railroad, and that Conrail had never obtained authority to abandon any portion of the Harsimus Branch. He also knew that if Conrail were to abandon the Harsimus, Jersey City could file an Offer of Financial Assistance (“**OFA**”) to acquire the ‘constructive’ rail easement that was, by law, still impressed upon the Embankment. And the beauty of it was: Rail easements have a Net Liquidation Value of Zero Dollars. That means that Jersey City could acquire the Embankment for the cost of hiring Mr. Montange. A really good deal, if you could pull it off. [Under the OFA statute, 49 U.S.C. 10904, an OFA offeror can effectively **compel** the carrier to convey its easement for zero Dollars, while under 49 U.S.C. 10905, (public purpose), conveyance **cannot be compelled**.]

15. Mr. Montange, not being very conversant with the dictates of the Final System Plan (“**FSP**”), filed his **FD 34818 Declaratory Order** proceeding. Mr. Montange asked **the STB** to determine that the Embankment portion (and **only** the Embankment portion) of the Harsimus, was **conveyed** to Conrail as Line Code 1420, via the Final System Plan. [He did not know that only the U.S. District Court for the D.C. District, sitting as the Special Court, may resolve ‘**conveyance**’ issues. (The ‘nature of’ what was conveyed.)]

16. The STB studied how the Harsimus **was used** by the Pennsylvania Railroad (“**PRR**”), and by Conrail (from 1976, when Conrail acquired the Harsimus, until 1988, when Conrail operated its last train on the Harsimus). The STB determined that since the Embankment portion of the Harsimus was the **only portion** of the Harsimus still in existence in 1976 (the ‘Passenger Main,’ having been abandoned in 1968), the Embankment portion **must be** Line Code 1420.

17. The D.C. Circuit vacated the STB’s FD 34818 decision, holding that only the Special Court could determine the nature of what was **conveyed** to Conrail via the FSP. City et al. and

the LLCs stipulated in the Special Court that the Embankment portion of the Harsimus was **conveyed** to Conrail as Line Code 1420. Conrail took no position. The Special Court then granted Summary Judgment, holding that the Embankment portion was conveyed to Conrail as Line Code 1420, a ‘line of railroad.’

18. Conrail filed its **Notice of Exemption** (“**NOE**”) to abandon the entirety of the Harsimus Branch, on **January 9, 2009**. Jersey City and Eric Strohmeier, filed Notices of Intent to File an OFA to acquire portions of the Harsimus. (Jersey City to the West Side of Marin Blvd. Mr. Strohmeier to the end of the Line, at MP 1.36, which is East of the Light Rail Line.) The LLCs appealed the STB’s FD 34818 decision to the DC Circuit. The STB stayed the NOE proceeding until the court litigation was resolved. The STB lifted the Stay on **August 11, 2014**. However, the STB continued to hold the OFA process in abeyance, and **continues to hold** the OFA process in abeyance (until completion of its more detailed Historic and Environmental review).

19. Conrail filed its Valuation Information on **June 1, 2015**, certifying that the **entirety** of the Harsimus Branch could be acquired for **\$22,110**. Riffin filed a Notice of Intent to File an OFA on **June 8, 2015**, which Notice was accepted by the STB on **November 2, 2015**.

THE CITY, et. al.’s ‘ISSUES’

20. The City, et al., advocate that they need massive amounts of e-mails, and other correspondence and documents, to ‘prove’ that there is a ‘conspiracy.’ Just what the ‘conspiracy’ might be, **keeps changing**.

21. For a **goodly while**, (from 2006 until August, 2014) the City et al. advocated that there was a ‘conspiracy’ between **Conrail and the LLCs**, to circumvent the STB’s abandonment procedures and the Historic and Environmental rules. (What City et al. likes to characterize as Conrail’s ‘de facto abandonment’ of the Harsimus.)

22. In advocating for the City et al.'s 'de facto abandonment' conspiracy theory, City et al. commenced the FD 34818 litigation.

23. When Conrail filed its **Notice of Exemption** to abandon the entirety of the Harsimus Branch, on **January 9, 2009**, that pretty much eliminated the basis for the City et al.'s 'circumvention of the STB's abandonment procedures' conspiracy theory. (While City et al. continue to argue their 'de facto abandonment' conspiracy theory, there is no 'wind left in the sail' of that argument.)

24. The next City et al. conspiracy theory, was that **Conrail, the LLCs and the STB** were conspiring to circumvent the Historic and Environmental review process, by limiting the STB's review up to the date that abandonment authority would be granted. City et al. argued that the STB had to also consider what would happen **after** abandonment. Specifically, what a potential **buyer** of the abandoned right-of-way might do with the former right-of-way.

25. The STB accommodated the LLCs: The STB ordered a more detailed analysis of the potential historic and environmental consequences that might be associated with granting Conrail abandonment authority. That more detailed analysis continues. In effect, the STB gave the City et al. precisely what they asked for: A more detailed analysis.

26. Shortly after the STB granted City et al. their wish, the City et al. began to complain bitterly that it was 'taking too long' for the STB to do its more detailed analysis. Evidently, the City et al. only wanted a slightly-more-detailed analysis. (Whatever could be ascertained within a few months. Riffin says, 'within a few months,' for it was 'within a few months' after the STB granted City et al.'s wish, that City et al. began to complain that it was 'taking too long.')

27. More recently (since the STB's **November 2, 2015** decision granting Riffin the right to file an OFA, if and when OFAs are permitted to be filed), City et al. has been advocating **different** conspiracy theories:

- A. Initially (shortly after the STB's **November 2, 2015** decision) that the **STB** was 'conspiring' to 'unlawfully' accept Riffin's Notice of Intent to File an OFA.
- B. Then, a few months before the **August 24, 2016** Discovery Hearing, City et al. began advocating another 'conspiracy' theory: That Riffin did not have sufficient financial resources to meet the 'responsible financial person' criteria. [Since the STB's **September 30, 2016** decision in EP 729 (Proposed changes to the Financial Responsibility Rules), the City et al.'s fervor for this 'conspiracy theory' has diminished. (Per the proposed new EP 729 Financial Responsibility Rules, the total price to **acquire** (\$22,110) and to **maintain** the Harsimus (\$8,000 per mile or \$9,600 for the 1.2 mile segment between CP Waldo and the West side of the Light Rail Line which Riffin desires to acquire) would be about **\$31,700**, which Riffin has in just one of his many financial accounts (in addition to the cash that he displayed at the August 24, 2016 hearing)].
- C. And even more recently [since **August 1, 2016**, when City et al. learned that Riffin had served a copy of his U.S.D.C., Newark, NJ Complaint upon four of the five defendants named in Riffin's Complaint (one of which was G&S Investors, of which Greg Wasser is the managing member)], City et al. has come up with an **even newer** 'conspiracy' theory: That the **LLCs / Steve Hyman**, are now conspiring with **Riffin** with regard to Riffin's Newark, NJ Complaint, and that Riffin's Newark, NJ Complaint represents an attempt to 'abuse' the OFA process.

RIFFIN'S REPLIES

28. **NONE** of City et al.'s 'conspiracy theories' have anything to do with the issues in this proceeding: Whether Conrail should be granted authority to abandon its Harsimus Branch / whether additional historic or environmental conditions should be imposed / whether the OFA process should be permitted to move forward.

29. This is a NOE proceeding. Under normal circumstances, this proceeding would have concluded within 120 days after Conrail filed its NOE. Discovery is disfavored in abandonment proceedings primarily because abandonment proceedings are supposed to be expedited. But for the fact that City et al. **demanded** a more detailed historic / environmental review, this NOE proceeding would have concluded, literally, years ago.

30. At every turn, City et al. has interjected extraneous issues which have prolonged this NOE proceeding for **seven years now (since 2009), and still counting!**

31. If this Court were to grant City et al.'s additional discovery requests, that would spawn even more irrelevant, collateral litigation, which would delay the conclusion of this proceeding by even more years, while these collateral issues were litigated.

32. Riffin asks:

A. What does it matter who is the managing member of the LLCs? Or when the LLCs elected to change their managing member? Or what is the mental condition of a former managing member? Or with whom the LLCs have communicated? Or what agreements the LLCs may have executed with non-carriers? What does that have to do with granting abandonment authority to Conrail? And by what right or authority would the STB impose its regulatory authority over non-carrier entities such as the LLCs? The LLCs are Intervenors. Subjecting Intervenors to extensive discovery requests would seriously 'chill' the intervention by interested parties in abandonment proceedings.

B. In a NOE proceeding, (such as this one) the procedure to be followed is: The Exemption is granted. If someone wishes to contest that exemption, that challenge is to be pursuant to a Petition to Revoke.

a. If a challenging entity desires to use discovery, that challenging entity must so

indicate, **in their initial pleading**. “Discovery **shall be completed** 30 days after the petition to revoke is filed.” 49 CFR 1121.2.

C. What is the difference between Riffin’s Newark, NJ Complaint and the City et al.’s FD 34818 Petition for Declaratory Order / the City et al.’s Petition for Declaratory Order that it filed in the Special Court? Both asked the Court / STB, to determine whether particular track segments were ‘lines of railroad.’ No one ever argued that City et al. was attempting to ‘abuse the OFA process,’ by asking whether the track segments on the Embankment portion of the Harsimus were ‘lines of railroad.’ So why would Riffin asking the Newark District Court to ascertain the proper classification for the track segments that traversed the portion of the Harsimus East of Marin Blvd, be an ‘abuse of the OFA process?’ Since the OFA process **only applies** to ‘lines of railroad,’ it must first be determined that a particular track segment is a ‘line of railroad.’ City et al. limited its inquiry to that portion of the Harsimus that it had an interest in: From CP Waldo to the West side of Marin Blvd. While it would have been more efficient had the entirety of the Harsimus Branch been looked at by the Special Court, the parties to that proceeding chose to limit their inquiry to the portion between CP Waldo and the West side of Marin Blvd. Since Riffin’s interest continues to the West side of the Light Rail line, which is East of Marin Blvd, Riffin now seeks a determination for the track segment that lies to the East of Marin Blvd.

Jersey City consorted with, and **continues to consort with** (or as Mr. Montange would characterize it if done by anyone else, ‘conspired with’) two other entities: Rail to Trails Conservancy, and the PRR Harsimus Stem Embankment Preservation Coalition. Consorting with, or working in concert with, another entity, in pursuant of a ‘lawful goal,’ is **not an unlawful** conspiracy / consortium.

City et al. has made it very clear: Were Jersey City to be successful with its OFA, it would work with, its two partners, and would facilitate the desires of its two partners. The Rails to Trails Conservancy would likely get the trail that it desires. Trails **are**

not ‘continued freight uses.’ Preserving the Embankment’s stone walls **does not** facilitate ‘continued freight uses.’ And ‘continued freight uses’ are the **only uses that justify using the OFA process.**

- D. Rail carriers have long licensed non-carriers to use portions of their right-of-way for non-rail uses. Particularly when those licenses generate substantial license fees. All of which license-uses are fully permitted by the STB, **so long as none of the licensed uses materially interfere with the carrier’s ability to provide rail service.**

Riffin has made it known that he fully intends to use the Harsimus right-of-way for continued freight rail purposes. He has also made it known that he does not need **all** of the air space above the right-of-way. He only needs about 30-feet of air space above the right-of-way. He has made it known that were an entity to seek a license to use that portion of the airspace that is more than 30-feet above the right-of-way, he would be amenable to negotiating such a license. After all, the license fees so generated, would help capitalize his freight operations, and would permit Riffin to offer lower rail rates to rail shippers. There is nothing unlawful about such licensing activities. Nor would such licensing activities be an ‘abuse of the OFA process.’ Quite the contrary. Such licensing activities would further support Riffin’s argument that freight rail service is both ‘feasible,’ and is fully capable of being quite ‘profitable,’ two criteria the STB has indicated needs to be addressed in an OFA.

Riffin argues that any ‘licensing’ discussions he may have had, or may have in the future, are ‘proprietary,’ are not subject to ‘discovery,’ and have absolutely no relevance to the ‘abandonment’ and ‘historical / environmental’ issues currently before the STB. They would only have relevance if and when the OFA process is permitted to move forward, and then only if Riffin elects to disclose them. At this point in time, such potential future licensing agreements are truly ‘speculative.’ And until executed, will remain ‘speculative.’ The STB has repeatedly held that ‘speculative’ sources of income (either from shippers or licensees), are entitled to **no**

weight in an OFA proceeding (and have been consistently rejected by the STB in OFA proceedings).

SPECIFIC ISSUES

33. City et al. asks that Riffin be sanctioned:

A. Because City et. al. **speculates** that Riffin did not send to Mr. Montange all of the e-mails remaining in Riffin's e-mail account, that relate to Steve Hyman, Victoria Hyman, or the LLCs (Daniel Horgan).

Response: Riffin has offered to let Mr. Montange look at his e-mail account, so that Mr. Montange can verify that Riffin sent to Mr. Montange **all** of the Hyman-Horgan-Riffin e-mails remaining in Riffin's e-mail account (not just limited to those requested in City et al.'s Motion to Compel Discovery), up to August 24, 2016. Riffin has asked Mr. Montange if he wants a copy of the non-Harsimus-related e-mails that Steve Hyman has sent to Riffin post August 25, 2016. As for the latter, Mr. Montange has not indicated that he wants non-Harsimus Hyman e-mails. As for offering to let Mr. Montange look at Riffin's e-mail account before the ALJ Dring Hearing, Mr. Montange has indicated that he has **no desire** to look at Riffin's e-mail account before the ALJ Dring October 24, 2016 Hearing. See forwarded e-mails.

B. Because City et al. **speculates** that by Riffin filing his Newark NJ Complaint, Riffin is somehow abusing the OFA process.

Response: ALJ Dring has authority to impose sanctions for failing to comply with his discovery-related orders. Riffin has fully complied with ALJ Dring's discovery order relating to Riffin. ALJ Dring has no authority to impose sanctions for activities outside of the discovery process. Such sanctions, are within the exclusive purview of the STB. In addition, nothing that Riffin has done to date, would warrant any type of

sanctions, for Riffin has merely **imitated** the actions taken by City et al. It is **not** an abuse of the OFA process for Riffin to consort with, communicate with, or otherwise associate with **anyone** (whether a party to the 1189X proceeding or not), just as it is **not an abuse** of the OFA process for Jersey City to consort with Rails to Trails Conservancy, PRR Harsimus Stem Embankment Preservation Coalition, Conrail, G&S Investors, Greg Wasser, or any other entity. (Since neither Conrail, G&S Investors, Greg Wasser, or any other entity not a client of Mr. Montange, are ‘clients’ of Mr. Montange, any communications between Mr. Montange and these non-clients, **would not be subject to the Attorney-Client privilege.**)

34. City et al. **speculates** that there is an ‘agreement’ between Riffin and Steve Hyman / Victoria Hyman / the LLCs.

Response: There is no written, executed agreement of any kind between Riffin and either Steve Hyman, Victoria Hyman, or the LLCs. The LLCs have been very adamant, for multiple years (long before Riffin got involved in the 1189X proceeding), that the LLCs **oppose** any and all efforts to OFA the Embankment portion of the Harsimus, regardless of by whom, and adamantly will **not** support any OFA efforts.

And even if there were any written agreement between Riffin and any other entity, such agreement would not be subject to discovery, for any such agreement has absolutely no relevance to the issues before the STB in the 1189X proceeding.

35. The short and the long of City et al.’s baseless arguments / demands, is that Jersey City wants to **eliminate** all OFA competition, so that Jersey City is virtually guaranteed that it will be successful in its long-sought goal of acquiring the Embankment portion of the Harsimus **for free** (plus the cost of Mr. Montange’s fees).

36. And the long and the short of City et al.’s baseless arguments / demands, is that without these demands, there would be nothing for Mr. Montange to do! (The 1189X proceeding is in a

holding pattern.) Without these baseless discovery / conspiracy arguments / litigation, Mr. Montange would have nothing to bill Jersey City for. His 'billable hours' income would plummet. Riffin argues that Mr. Montange's efforts are nothing more than a ruse to keep the litigation going, to give his clients the impression that he is 'working diligently' defending / advocating for, their 'rights.' And Riffin argues that City et al. **have no right** to any of the irrelevant, immaterial, collateral-issue 'documents' that City et al. improperly seek.

CONCLUSION

37. Over the past seven years, City et al. have alleged no less than **five conspiracy theories!** All involving different parties. All without any basis in reality. All just a figment of Charles Montange's vivid (paranoid) imagination.

38. Riffin argues that it is time for City et al. to 'sit down and shut up.' Let the STB finish the historic / environmental task that City et al. demanded that it complete for City et al. Once that task has been completed, then, and only then, should City et al. be heard from again. (The 'sit down and shut up' admonition should be applicable to all of the 1189X parties, not just to City et al. See paragraph 43 below.)

39. Riffin argues that City et al.'s Motion for Sanctions against Riffin should be **denied**.

40. Riffin argues that City et al.'s Motion to Compel discovery from the LLCs should be **denied**.

41. Riffin argues that the LLCs Motion for Sanctions against City et al. should be **granted**.

42. Riffin argues that Riffin's Motion to Strike portions of Conrail's Reply should be **granted**.

43. Riffin argues that the parties should be admonished, that there is to be no more discovery requests, unless those discovery requests directly concern the issue of whether Conrail should be granted abandonment authority.

44. And for such other and further relief as would be appropriate.

Respectfully,

James Riffin
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Timonium, MD 21094
(443) 414-6210

CERTIFICATE OF SERVICE

I hereby certify that on or before the 24th Day of October, 2016, a copy of the foregoing James Riffin's Written Comments, was served on all of the parties in this proceeding, either via e-mail, or via U.S. Postal Service, postage prepaid, with the exception of Charles Montange. Since Mr. Montange does not accept service via e-mail, a paper copy will be hand-delivered to him at or before the October 24, 2016 Hearing before ALJ Dring. (A paper copy mailed to Mr. Montange would not arrive before the October 24, 2016 hearing.)

James Riffin