

CHARLES H. MONTANGE

ATTORNEY AT LAW

426 NW 162ND STREET
SEATTLE, WASHINGTON 98177

(206) 546-1936

FAX: (206) 546-3739

For Filing: 19 June 2017

243797

243798

243799

ENTERED
Office of Proceedings
June 19, 2017
Part of
Public Record

Ms. Cynthia T. Brown, Chief
Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20024

Re: Consolidated Rail Corp. - Ab. Ex. --
in Hudson County, NJ,
AB 167 (Sub-no. 1189X)
And related cases AB 55-686X and
AB 290-306X

Dear Ms. Brown:

Enclosed for e-filing on behalf of City of Jersey City,
Rails to Trails Conservancy, and Pennsylvania Railroad Harsimus
Stem Embankment Preservation Coalition ("City et al") please
find a Reply in Opposition to Mr. Riffin's "Petition to
Reconsider/Reopen."

Similarly, enclosed for e-filing please find City et al's
"Reply in Opposition to Riffin's 'Motion to Stay.'"

Thank you for your assistance in this matter.

Respectfully submitted,



Charles H. Montange
Counsel for City et al.

Encls. (1) Reply to Pet. Recon. (16 pp)
(2) Reply to "Motion to Stay" (29 pp)

cc. Service list (w/encls.)

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
In Opposition to
Riffin's
"Petition to Reconsider/Reopen"

City of Jersey City, Pennsylvania Railroad Harsimus Stem
Embankment Preservation Coalition, and Rails to Trails
Conservancy ("City et al") reply as follows in opposition to Mr.
Riffin's ("Riffin's") May 30 "Petition to Reconsider/Reopen."

I. Applicable Standards

Mr. Riffin concedes (Riffin Pet at p. 1 para. 2) that he
did not timely file a petition to reconsider. He also did not
timely request an extension of time, nor provide any
justification for an extension of time, to file a petition for
reconsideration. His petition must therefore be treated as a
petition to reopen out-of-time.

Riffin faces a heavy burden. "Petitions to reopen
previously final agency decisions are to be granted only in the

most extraordinary circumstances.” Farmers Export v. United States, 758 F.2d 733, 737 (D.C.Cir. 1985). Indeed, reopening/reconsideration as sought by Riffin is governed by 49 U.S.C. 722(g), now recodified at 49 U.S.C. 1322(c). That statute provides that a party may seek, and STB may grant, reopening only on the basis of new evidence, changed circumstance, or material error. See BNSF Rwy v. STB, 473, 479 (D.C. Cir. 2006).

Riffin does not advance new evidence or changed circumstance. Instead, he explicitly (Riffin Pet p. 2 para 4) argues for reopening solely on grounds of “material error.”

II. Riffin Fails to Bear His Burden to Show Material Error

Riffin fails to show any error, much less material error, for at least three reasons.

First, Riffin is specifically barred from raising in this appeal any issues other than those going to the merits of the ALJ’s decision. In this Board’s decision served January 26, 2017 in this proceeding, this Board stated that “Riffin is restricted to filings addressing his appeal [of the ALJ’s decision] only.” Slip op. at 4. In this Board’s decision denying Riffin’s Appeal served April 28, 2017, slip op. 5 n.5, this Board indicated that this means that Riffin is restricted to arguments that “go the merits of the ALJ’s decision.”

But the only material error Riffin asserts in his petition to reopen is that this Board, and therefore the Administrative Law Judge (ALJ), lacks jurisdiction over him in connection with his participation in the proceeding. In particular, Riffin now claims that the Board's jurisdiction to compel discovery applies only in "Complaint" proceedings and then only to "rail carriers." He basically argues that the Board lacks any jurisdiction over him in its proceedings. The Riffin-exemption claim now made by Riffin does "not go to the merits of the ALJ's decision" and is thus "outside the scope of the matters Riffin is permitted to include in his appeal." Decision in AB 167-1189X, served April 28, 2017, slip op. at p. 5 n.5, citing decision served Jan. 26, 2017.

Riffin's tiresome reiteration of jurisdictional arguments against STB's actions in AB 167-1189X also runs afoul of this Board's observation that STB jurisdiction has been litigated and determined. Decision served April 28, 2017, slip op. 5 n.5 citing City of Jersey City v. Consol. Rail Corp., 968 F.Supp. 2d 302 (D.D.C. 2013); 212 Marin Blvd LLC - Pet for Dec. Order, FD 32852, served Aug. 11, 2014; James Riffin - Pet for Dec. Order, FD 36078, served April 27, 2017. The Board also denied reconsideration in FD 32852 in a decision served May 24, 2015.¹

¹ In addition, F.D. 34818 and appeals therefrom were also all associated with STB jurisdiction.

This Board's jurisdiction in this case has been hashed over enough and is law of the case. The District Court's ruling that the STB has jurisdiction was summarily affirmed on appeal.

Second, Riffin has waived his "new" jurisdictional argument. He did not raise it before ALJ Dring, nor heretofore on appeal. When a party does not raise an argument, it cannot claim that the Board has erred, much less committed material error, on that issue. The D.C. Circuit has explained that an STB litigant cannot claim that an agency committed "material error" when the alleged error "was induced by [the litigant]'s failure to raise the argument in good time." BNSF Rwy. v. STB, supra, 453 F.3d at 479. "Even a defect in the jurisdiction of the agency ... when not timely raised before the agency, is forfeit." Id. See also Pyco Industries, Inc. - Feeder Line Application - Lines of South Plains Switching, Ltd., Co., F.D. 34890, served June 11, 2010, slip op at 6 (no material error where litigant fails timely to raise argument).

In the case at bar, Riffin agreed to produce certain documents (emails) in response to a motion to compel, and he was accordingly so ordered. He arbitrarily curtailed his response in violation of the order to which he consented. It is hardly "material error" for the agency to enforce an order against a litigant when the litigant has consented to the order, in effect inducing the order of which he now complains. In short, Riffin

has waived any possible relevant jurisdictional argument, is estopped from asserting it, or has otherwise forfeited it.

Third, discovery procedures apply in licensing proceedings. When this Board revised and adopted its evidentiary and discovery regulations (49 C.F.R. Part 1114), the Board indicated that it was relying on the Administrative Procedure Act ("APA," namely 5 U.S.C. 559) and 49 U.S.C. 721, now recodified as 49 U.S.C. 1321, as authority for all of its discovery regulations. See 61 Fed. Reg. 52713 (Oct. 8, 1996) (revision to authority citation). Mr. Riffin fails to show how these statutes are insufficient or unconstitutional for purposes of authorizing the Board's discovery regulations, nor could he.

In fact, Riffin is plainly subject to this Board's discovery regulations. Mr. Riffin is the voluntary participant in an STB adjudicatory proceeding involving a license application by Consolidated Rail Corporation to abandon a line of railroad. In that proceeding, Mr. Riffin among other things has purported to apply to become a railroad by acquiring and operating the Harsimus Branch as a common carrier pursuant to 49 C.F.R. 10904 ("offers of financial assistance" or "OFA's"). Mr. Riffin thus constitutes both a "person" and a "party" in an agency adjudicatory proceeding as all relevant terms are defined in the APA, 5 U.S.C. 551. Mr. Riffin is further listed as a "party" in the official service list. Similarly, City et al are

"persons" and "parties." 49 U.S.C. 1321(d)(1) states that a party to a proceeding may require a witness to produce documents at any time after a proceeding is at issue on petition and answer. 49 C.F.R. 1114.21(a)(1) provides that discovery is available "regarding any matter, not privileged, which is relevant to the subject matter of a proceeding other than an informal proceeding." An abandonment licensing proceeding, including the OFA component of that proceeding, is an adjudication, not an informal proceeding.

Riffin, being a party to the adjudication, is thus subject to discovery "regarding any matter, not privileged, which is relevant to the subject matter" of the proceeding, including his purported attempted OFA. To make an OFA, Riffin must show he has financial responsibility, and his own filings indicated reliance on the LLCs, making this a highly relevant subject of discovery.² STB's discovery regulations accordingly on their face legitimately apply to Riffin.³

² Riffin in his petition for reopening neither claims nor purports to show that the documents sought were irrelevant. In any event, he has waived any such claims or arguments by consenting to an order to produce the documents. See BNSF Rwy, supra (party waives objection where it induces the conduct to which objection is later made); Pyco Industries, supra (same).

³ Riffin relies primarily on Harriman v. ICC, 211 U.S. 407 (1908). Harriman involved the original Act to Regulate Commerce (24 Stat. 379, Feb. 4, 1887), in which the original Interstate Commerce Commission (ICC) evidently could engage in adjudications only upon "complaint." It pre-dated ICC licensing

III. Brotherhood of Locomotive Engineers Should Be Applied

Mr. Riffin though his voluminous and burdensome practice of filing piecemeal objections, appeals, and petitions⁴ has made clear that his strategy is to prolong these proceedings in order to pressure the Metro Plaza developers and/or Conrail and/or the City of Jersey City somehow to "settle" this dispute so that he can obtain compensation, evidently from the Hyman interests.⁵

Mr. Riffin's efforts here to contest yet again this Board's jurisdiction is part and parcel of his continuing abuse of process in this proceeding.⁶ It further appears that the LLCs

jurisdiction over construction permits and certainly rail abandonment licensing, which are subject to STB's licensing authority. STB operates pursuant to the ICC Termination Act ("ICCTA," 109 Stat 803, Dec. 29, 1995, as subsequently amended) and the Administrative Procedure Act ("APA," 60 Stat 237, June 11, 1946, as subsequently amended) which provide for adjudications in abandonment licensing proceedings and which authorize discovery in the context of adjudications in licensing proceedings. Harriman, among other things, did not involve a licensing proceeding, the ICCTA, or the APA.

⁴ Decision in AB 167-1189X, served April 28, 2017, at p.11 n. 14 ("City plainly was prejudiced by Riffin's continuing delays and refusals ... and the cost of having to pursue compliance [with discovery orders]").

⁵ Id. at p. 10 n. 10 (evidence supplied by City that Riffin is pursuing his course of action to obtain compensation from the owner of the LLCs).

⁶ Indeed, Mr. Riffin claimed in an email to counsel for City et al that he (Riffin) intended to file an appeal to the D.C. Circuit, and to argue that this divested this Board of jurisdiction during pendency of the appeal. Mr. Riffin stated that he has "no intention of stopping" and that "[i]t is not in my nature to give up." Riffin email May 24, 2017 (attached).

directly or indirectly are working with/encouraging Mr. Riffin to delay proceedings, notwithstanding contrary representations by their then-counsel of record.⁷ In order to thwart Riffin's designs, City et al request that this Board state clearly that it is refusing to reopen this proceeding on grounds of material error. Under the doctrine enunciated by the Supreme Court in Brotherhood of Locomotive Engineers v. ICC, 482 U.S. 270 (1982), there is no judicial review available when this agency denies reopening on grounds of material error. Clarity on this point

⁷At the October 24, 2016 hearing before ALJ Dring, Mr. Horgan, then counsel for 212 Marin Blvd. LLC, et al (the "LLCs" or "Hyman interests"), represented that Mr. Steve Hyman was no longer managing the affairs of the LLCs, and that the LLCs disclaimed any involvement with Mr. Hyman. Transcript at 82-83. Counsel for the LLCs requested to be advised by City et al if Mr. Hyman appeared to be representing the LLCs. Transcript at 86. City agreed to do so. Id.

On April 30, 2017, two days after this Board's decision denying Riffin's appeal, Mr. Hyman called an officer of the Embankment Coalition, threatening the officer with a lawsuit against "you." City et al so advised Mr. Horgan.

In early May, Mr. and Mrs. Steve Hyman requested and were granted a meeting with the Mayor of Jersey City. Mr. Hyman solicited the Mayor to accept a telephone call from Mr. James Riffin to discuss matters in AB 167-1189X including the Cultural Resources Identification Report served in this proceeding on May 5, 2017. The Mayor understood both Mr. Hyman and Mr. Riffin to be speaking on behalf of the LLCs and in the presence of Mrs. Hyman, whom counsel for the LLCs represented (Transcript at 82) was the owner of the LLCs.

Mr. Horgan withdrew as counsel for the LLCs in AB 167-1189X on June 12.

The actions by Mr. Hyman nonetheless appear to be in direct conflict with representations by the LLCs' then counsel of record (Mr. Horgan) to ALJ Dring.

will serve to mitigate litigation burden and delay from additional frivolous Riffin "appeals."

III. Additional Fees and Costs Should be Awarded

This Board has already acknowledged (see note 4 supra) the clearly prejudicial and burdensome nature to City et al of Riffin's "pattern of conduct of obstruction and delay" to thwart compliance with this Board's discovery rules. This Board has also recognized that repeated denials of Mr. Riffin's motions and petitions, even coupled with admonishment, are not effective in preventing Mr. Riffin's misconduct. Decision in AB 167-1189X, served April 28, 2017, slip op. at 10-11. Riffin has recently confirmed to City et al that he has "no intention of stopping" on his misguided tactics (see note 6 supra and attachment). City et al should not be burdened with the costs and delays of responding to Riffin's obstreperous conduct in appellate proceedings any more than at the original proceedings before ALJ Dring. City et al warned Mr. Riffin it would seek additional attorney's fees and costs should he persist (email dated May 23 attached). But Mr. Riffin has persisted, explaining that it is his "nature." City et al accordingly move for an award of fees and costs for all time spent in responding to Mr. Riffin's continued flailing, as manifest again in his frivolous May 30 motion to reopen as well as his duplicative May

30 motion for a stay. City et al will supply a certification of such fees and costs.

IV. Conclusion

Riffin's Petition to Reopen/Reconsider on grounds of material error presents an argument which Riffin waived, and which in all events has no merit. The Petition must be denied. Fees and costs should be awarded to City et al as summarized above.

Respectfully submitted,



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

Of counsel for RTC:
Andrea Ferster
General Counsel, Rails to Trails Conservancy
2121 Ward Ct. NW, #5
Washington, D.C. 20036

Attachment: email exchange in four parts with Mr. Riffin on May 23 and May 24, 2017

ATTACHMENT
Email Exchange

1. "On Tuesday, May 23, 2017 2:59 PM, C. Montange <c.montange@frontier.com> wrote:

Mr. Riffin, please pay the attorney fee award per STB decisions in AB 167-1189X, as detailed in the attached letter, also sent to you today by USPS. Thank you for your cooperation in this matter."

2. " On Tuesday, May 23, 2017 2:54 PM, jim riffin <jimriffin@yahoo.com> wrote:

You are a bit pre-mature. I still get to file an appeal to the D.C. Circuit. (Which I intend to do.) "

3. " On Tuesday, May 23, 2017 6:19 PM, C. Montange <c.montange@frontier.com> wrote:

As my letter notes, the STB did not stay its order. Even were to file an "appeal," this in and of itself does not stay the order.

As to further litigation, we do not believe that a petition seeking further review will avail you, respectively suggest you stop, and of course reserve our rights to file for additional fees and costs should you continue on your course."

4.

To: c.montange@frontier.com;

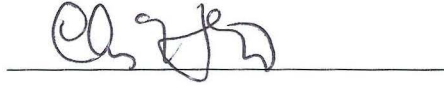
Date: Wednesday, May 24, 2017 12:17 PM

I have yet to ask the STB to stay its order. I will do that shortly. (Now that you have demanded to be paid.) If the STB denies the Stay (as expected), I will ask the D.C. Circuit to stay the order. And once my Pet for Review is filed, the STB loses its jurisdiction over the 1189X proceeding. (At least I plan to make that argument, to the D.C. Circuit.) I have no intention of stopping. (It is not in my nature to 'give up.')

You should be focusing on the Cultural Resources Report. I believe and (will shortly argue) that it is fatally defective. I found it interesting: The Cultural Report said 'all persons' may file comments. The Report came out after my STB appeal was denied. I was not 'excluded.' Enjoy your Memorial Day Holiday. Out here, people go to the beach, beginning on Memorial Day. The water is too cold there to go to the beach. (Are there any?) Unless you like to put a 'wet suit' on.

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 14th day of June 2017 addressed to the parties or their representatives per the service list below, unless otherwise indicated. The undersigned also certifies the deposit of the foregoing for express delivery (next business day) upon Judge Dring at the Federal Energy Regulatory Commission, Office of Administrative Law Judges, 888 First Street, N.E., Washington, DC 20426 (courtesy email to Judge Dring's law clerk).



Service List (current as of June 12, 2017)

Michele Donato
106 Grand Central Avenue
Lavallette, NJ 08735 (LLCs) [also by email]

Robert M. Jenkins III
Mayer Brown LLP
1999 K Street, N.W.
Washington, D.C. 20006-1101 (Conrail) [also by email]

Jill Edelman, President
Powerhouse Arts District Nbd Ass'n
140 Bay Street, Unit 6J
Jersey City, NJ 07302

President
The Village Nbd Ass'n
365 Second Street
Jersey City, NJ 07302

Daniel Frohwith
Jersey City Economic Development Corporation
30 Montgomery St., Suite 820
Jersey City, NJ 07302

Gregory A. Remaud
Conservation Director
NY/NJ Baykeeper
52 West Front Street
Keyport, NJ 07735

Sam Pesin, President
Friends of Liberty State Park
580 Jersey Ave., Apt. 3L
Jersey City, NJ 07302

Eric S. Strohmeier
Vice President, COO
CNJ Rail Corporation
81 Century Lane
Watchung, NJ 07069 [also by email]

James Riffin
PO Box 4044
Timonium, MD 21094 [also by email]

Supplemental Service List

The following are current representatives of parties at their current addresses. In all cases, the STB service list fails to state the correct current representative or the correct current address.

Katherine Marcopul
State Historic Preservation Office
Mail Code 501-04B
NJ Dept. Environmental Protection
P.O. Box 420
Trenton, NJ 08625-0420

[formerly sent to Daniel
Saunders, now retired]

Massiel Ferrara, PP, AICP, Director
Hudson County Division of Planning
Bldg 1, Floor 2
Meadowview Complex
595 County Avenue
Secaucus, NJ 07094

[formerly sent to Stephen
Marks, who is no longer with
the County, and address has
also changed]

Jeremy Jacobson, President
Harsimus Cove Association
20 Erie Street, Apt. #2
Jersey City, NJ 07302

[new President]

President
Historic Paulus Hook Ass'n
192 Washington Street
Jersey City, NJ 07302

[new President]

President
Van Vorst Park Association
The Barrow Mansion
83 Wayne Street
Jersey City, NJ 07302

[new address]

The following former parties (no longer listed as parties) are
receiving a courtesy copy:

Dennis Markatos-Soriano
Exec. Director
East Coast Greenway Alliance
5826 Fayetteville Rd., Suite 210
Durham, NC 27713-8684

Justin Frohwith, President
Jersey City Landmarks Conservancy
54 Duncan Avenue
Jersey City, NJ 07303

President
Hamilton Park Neighborhood Association
PMB 166
344 Grove Street
Jersey City, NJ 07302

Aaron Morrill
Civic JC
64 Wayne St.
Jersey City, NJ 07302

Joseph A. Simonetta, CAE,
Executive Director
Preservation New Jersey
414 River View Plaza
Trenton, NJ 08611

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. In all cases, City et al are attempting to serve the correct representative at the representative's correct address as set forth above.

Stephen Marks
Hudson County
583 Newark Avenue
Jersey City, NJ 07306

Gretchen Scheiman
Historic Paulus Hook Association
121 Grand Street
Jersey City, NJ 07302

Michael Selender
Jersey City Landmarks Conservancy
P.O. Box 68
Jersey City, NJ 07303-0068

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

The post office is returning mail addressed to Mr. Dan Weber.
The correct address for Van Horst Park Association has been
served.