

Before the Surface Transportation Board

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STB Docket No. AB-167 (Sub-No. 1189X)

CONSOLIDATED RAIL CORPORATION—ABANDONMENT EXEMPTION—IN
HUDSON COUNTY, NJ

STB Docket No. AB-55 (Sub-No. 686X)
CSX TRANSPORTATION, INC.—DISCONTINUANCE OF SERVICE
EXEMPTION—IN HUDSON COUNTY, NJ

STB Docket No. AB-290 (Sub-No.306X)
NORFOLK SOUTHERN RAILWAY COMPANY—DISCONTINUANCE OF SERVICE
EXEMPTION—IN HUDSON COUNTY, NJ

Reply to James Appeal from
Order of Dismissal, Pursuant to 49 C.F.R. §§ 1115.1 and 1115.9

The LLC Intervenors 212 Marin Boulevard, LLC, 247 Manila Avenue, LLC, 280 Erie Street, LLC, 317 Jersey Avenue, LLC, 354 Cole Street, LLC, 389 Monmouth Street, LLC, 415 Brunswick Street, LLC, and 446 Newark Avenue, LLC (the “LLCs”) respectfully file this reply in opposition to the appeal filed by James Riffin (“Riffin”) to overturn an Order entered on October 24, 2016 by the Honorable John P. Dring, A.L.J., which dismissed Riffin from these proceedings and striking his filings, including his notice of intent to file an Offer of Financial Assistance. The basis for Judge Dring’s order was that Riffin violated a prior Order entered by Judge Dring on August 24, 2016 resolving a discovery dispute between Riffin and the City of Jersey City, Rails to Trails Conservancy, and the Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition (the

“City et al.”). For the foregoing reasons, Judge Dring’s Order should be affirmed, and Riffin dismissed from these proceedings (the “Harsimus Abandonment”).

Statement of the Matter

On March 28, 2016, the City et al. served document demands on Riffin. The Board had granted, over the City’s and Conrail’s objections, Riffin’s motion to file a notice of intent to participate and a notice of intent to file an OFA well beyond the deadline for filing such notices. See, November 2, 2015 Decision, at 6. On April 29, 2016, Riffin provided a response to the requests, in which Riffin objected to all of the City et al.’s requests on various grounds. The City et al. filed a motion to compel Riffin to respond on May 2, 2016—Riffin’s discovery response and the City et al.’s motion to compel apparently crossing in the mail. The City et al. withdrew their motion to compel as being moot on June 7, 2016, after acknowledging Riffin had provided a response.

The City et al. filed a second motion to compel on July 5, 2016. That motion was directed toward requiring Riffin to provide responses to the requests that Riffin had objected to answering. That same day, the Director of Proceedings issued a decision and order referring all discovery matters to Judge Dring. The LLCs opposed the motion on July 25, 2016 on the basis that to the extent the City et al.’s discovery demands directed toward Riffin sought information that had been deemed irrelevant in a Board decision dated May 22, 2015 and which the City et al. sought in order to prove a conspiracy between Riffin and the LLCs, the motion should be denied. Riffin opposed the motion on July 28, 2016.

Judge Dring scheduled a hearing on the motion for Monday, August 24, 2016. See, August 5, 2016 Decision. Despite having objected to the discovery requests and opposed the motion to compel, and for reasons that have never been rationally explained, Riffin went to a restaurant in Washington, D.C., on the evening of Sunday, August 23, 2016. Riffin had learned that Charles Montange, Esq., Andrea Ferster, Esq., and Eric Strohmyer would be having dinner there. Based on accounts given at the August 24, 2016 hearing, Riffin arrived with his laptop computer (uninvited), and offered to grant Montange access to Riffin's Yahoo e-mail account, which Riffin claims is the account through which he sends and receives e-mails. At the restaurant, Riffin performed a simple search of his e-mail account using the search term "Hyman." Due to the time and the location, a weak Wi-Fi signal, Montange declined the invitation to inspect Riffin's e-mail account at that time. Montange requested, as an alternative, Riffin forward to him all e-mails between him and the LLCs. Riffin agreed to do so. See, Transcript of August 24, 2016 Hearing, at T13-9 to 15-3.

(Neither counsel nor any representative of the LLCs was present at the August 23, 2016 dinner, and were not involved in negotiating the compromised resolution of the City's motion to compel.)

The next day, August 24, 2016, the parties appeared before Judge Dring, and Montange explained that he had reached an agreement with Riffin, under which the latter would forward all e-mails between him and the LLCs to Montange. August 24, 2016 Transcript, at T14-22 to 15-3. Riffin affirmatively

agreed on the record to provide those e-mails. T15-8 to 12. Riffin further agreed to provide those e-mails to counsel for Conrail. T17-13 to 16. Finally, Riffin promised to make available docket numbers for several bankruptcy proceedings to which he had been the petitioner. T19-13 to 16. Riffin did note that he deletes e-mails. T17-5 to 8. For their part, the LLCs noted that they maintained their objections to the requests. T22-21 to 23-12. The LLCs also disclosed in the interest of openness and completeness that the City had recently served them with document demands, interrogatories, and requests for admissions, and that the LLCs would likely object to those requests on various grounds.

After allowing all parties the put their positions on the record, Judge Dring resolved the pending motion to compel by entering an order requiring Riffin to do what he had agreed to do the night before and in open court that morning. The City et al. has specifically requested entry of an order. T16-14 to 17-4. Although he felt an order was unnecessary, Riffin did not object to entry of an order. T18-1 to 3. Judge Dring then cautioned Riffin that failure to comply with the order could result in sanctions. T18-9 to 19-2.

Following the hearing, Riffin claims he set to work producing the e-mails. Riffin forwarded 103 e-mails on August 25, 2016. The LLCs' only knowledge of Riffin's activities comes from e-mails he exchanged with Montange following his forwarding the 103 e-mails. Riffin now claims that he agreed to provide e-mails between himself and the LLCs. Riffin interprets that agreement literally, meaning he argues to this Board on appeal that he agreed only to provide copies of e-mails between the actual LLCs. As corporate entities, the LLCs do not send

or receive e-mails, but instead act through their human agents. Then, contradicting himself, Riffin expands the scope of his agreement to include the LLCs' attorney of record in these proceedings (the undersigned, Daniel E. Horgan, Esq.), the sole member and manager of the LLCs Victoria Hyman, and the former manager of the LLCs Steven Hyman.

On August 26, 2016, the LLCs responded to the discovery demands the City had served on them. While opposing most of the demands, the LLCs did provide several documents to demonstrate there is no conspiracy between the LLCs and Riffin. Some of the documents the LLCs produced were communications with Riffin that Riffin had not provided to the City, which Riffin had apparently deleted. Riffin has admitted that for unexplained reasons, and despite the pending administrative proceeding and litigation Riffin initiated in the United States District Court for the District of New Jersey, he routinely deleted e-mails. (Riffin also claims he rarely uses e-mails and does not have a Smart phone.)

On September 15, 2016, the City moved for sanctions against Riffin and to dismiss him from the case. Riffin opposed the motion; the LLCs responded to the motion to address accusations the City made against them and an alleged conspiracy with Riffin. Conrail joined in the motion.

The City et al. also moved to compel the LLCs to answer the discovery demands that had been served on them.

Judge Dring entertained oral argument on October 24, 2016. That proceeding lasted one hour and thirty-nine minutes. During argument, Judge

Dring gave Riffin ample opportunities to explain why the City's accusations of deficiencies were incorrect. See, October 24, 2016 Transcript, at T49-1 to 12. A review of the exchanges between Judge Dring and Riffin (T37 to 76), Riffin was evasive. He repeatedly went off topic. Judge Dring requested that he address specific subjects multiple times, and Riffin did not respond. Judge Dring asked Riffin on three occasions why he had stopped sending e-mails after only two hours, and never got a straight answer.

During argument, Riffin stated unequivocally that he was not challenging the August 24, 2016 order: "I didn't think your order was incorrect." T61-19 to 20.

At the conclusion, Judge Dring made the following ruling: "As a remedy, I am going to strike your – all of your pleadings from the dockets that are before us today in the Harsimus branch proceeding. I am going to prohibit you from participating further, from introducing in evidence any other documentation, documents or evidence in these dockets. I'm dismissing you from the proceedings, and I'm awarding Mr. Montange the attorney's fees that he requested in his motion." T77-11 to 19.

On October 25, 2016—one day after oral argument—Riffin filed a petition to stay Judge Dring from issuing a written order and decision. The City opposed the motion the same day.

On October 26, 2016, Judge Dring issued two orders and decisions. The first order related to the City's motion to dismiss. That order provides:

1. Mr. Riffin is prohibited from introducing anything further into evidence in the above-referenced dockets.

2. Mr. Riffin's pleadings are stricken from the proceedings in all three dockets. [FN 2: This includes Mr. Riffin's notice of intent to file an Offer of Financial Assistance.

3. Mr. Riffin is dismissed from the proceedings in all three dockets, and prohibited from further participation in them.

4. Mr. Riffin is directed to pay City et al.'s counsel fees. [FN 3 intentionally omitted.]

5. The discovery proceedings in these three dockets will terminate no later than December 30, 2016. Accordingly, all discovery requests must be submitted no later than December 15, 2016.

6. This decision is effective on the date of service.

The second order of October 26, 2016 addressed Riffin's motion for a stay. Judge Dring denied the relief and observed, "Additionally, Mr. Riffin's Motion to Stay violates the bench ruling made at the October 24, 2016 oral arguments, which explicitly prohibited Mr. Riffin from submitting any further pleading into evidence." Judge Dring struck that filing from the proceedings.

Riffin then filed a "petition" seeking the Board's determination of which regulation governed an anticipated appeal from Judge Dring's order of dismissal. On November 14, 2016, Riffin filed an appeal under 49 C.F.R. § 1115.2. He then filed two supplements to "clarify" his appeal on November 21, and November 29, 2016. The LLCs had moved to strike his petition, and Riffin filed opposition to that motion on November 29, 2016.

On December 9, 2016, Riffin filed a document he captioned his "observations" concerning Judge Dring's decision.

On December 20, 2016, Riffin filed a motion to dismiss the Harsimus Abandonment.

On December 21, 2016, the Director of Proceedings issued a decision tentatively accepting Riffin's appeal, subject to ruling on his petition for a ruling on the proper regulation to proceed.

The next day, December 22, 2016, Riffin, filed yet another document stating his views on the December 21, 2016 decision.

On January 17, 2017, Riffin filed another document that provided his "observations" concerning his motion to dismiss.

While Riffin was filing his appeal and other extraneous submissions, on November 16, 2016, he instituted a new action under docket number FD 36070, captioned Petition for Declaratory Order—Hudson Street Industrial Track/Harsimus Branch—Jersey City, Hudson County, NJ. As the title suggests, Riffin raised issues relating to an alleged line of rail called the Hudson Street Industrial Track, as well as the Harsimus Branch. Riffin's petition in that matter was clearly an attempt to stay engaged in the Harsimus Abandonment proceeding despite being dismissed.

On January 26, 2017, the Director of Proceeding granted Riffin's petition in part and denied it in part. The Director clarified that Riffin should proceed under 49 C.F.R. 1115.1 and 1115.9. The Director struck the various motions as moot, including Riffin's motion to dismiss the Harsimus Abandonment. The Director also denied as moot a motion by the City to reopen discovery. The

Director was clear that other than the appeal, Riffin was to file no further papers with the Board.

This appeal under 49 C.F.R. §§ 1115.1 and 1115.9 followed.

Legal Argument

POINT I

Judge Dring's Decision is Entitled to Substantial Deference on Appeal, and Should Be Affirmed

The Board's regulations provide for a variety of sanctions in the event a party fails to comply with an order directing responses to discovery. Pursuant to 49 C.F.R. § 1114.31(b)(2)(iii), to remedy a violation of a prior order to respond to discovery, the Board may enter "[a]n order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the proceedings or any party thereof." On August 24, 2016, Judge Dring entered an order, memorializing the agreement of the City and Riffin, directing Riffin as follows: "Mr. Riffin will provide City, et al. and Consolidated Rail Corporation with all e-mail communications between him and the LLCs that Mr. Riffin retains in his possession. Mr. Riffin will also supply City, et al. the docket numbers for three (3) bankruptcy proceedings involving Mr. Riffin. Mr. Riffin shall comply with this order by close of business on Friday, August 26, 2016." August 24, 2016 Decision, at 2. As noted above, Riffin did not object to entry of an order, and at the October 24, 2016 hearing stated he did not think the August 24, 2016 order was incorrect.

In its motion for sanctions, the City identified numerous deficiencies in Riffin's production of e-mails pursuant to the order, including (a) deletion of identification of persons who received the e-mails, text of e-mails, and attachments to e-mails; (b) providing a reply to an e-mail, while not providing the original e-mail; (c) failure to provide e-mails to and from agents of the LLCs; (d) failure to provide e-mails prior to 2015, despite the fact such e-mails are known to exist; (e) limiting production to communications between Mr. and Mrs. Hyman and the LLCs' attorney; (f) failure to provide e-mails with an attorney named Bruce Nagel; and (g) failing to provide e-mails exchanged with representatives of the LLCs concerning a lawsuit Riffin brought in the United States District Court for the District of New Jersey.

In Riffin's reply to the motion for sanctions and at the October 24, 2016 hearing, Riffin provided inadequate explanations for each of these deficiencies. In fact, Riffin has admitted that he routinely deletes e-mails. He claims he has followed Judge Dring's orders, however, because Riffin only agreed to produce e-mails in his possession. Riffin has not explained when e-mails were deleted, and whether e-mails were deleted after he received the City et al.'s document demand.

Another example of Riffin's evasiveness was his insistence during argument and in this appeal that he only agreed to provide e-mails sent to and from the LLCs, and that agents of the LLCs were excluded. Such a position is absurd, as the LLCs are corporate entities and as such do not send or receive e-mails, but instead act through their human agents. Riffin's position is pure

sophistry. In any event, during the August 24, 2016 hearing, Montange was clear he wanted e-mails from the LLCs and their agents. See, August 24, 2016 Transcript, at T14-13 to 16 (“I’m certain he has documents with other attorneys that have been forwarded to him, either by the Hymans or that he’s corresponded with directly by e-mail.”).

During the October 24, 2016 hearing, Judge Dring repeatedly asked Riffin why he stopped producing e-mails after two hours’ effort. After Judge Dring asked on three separate occasions, Riffin never provided a rational, coherent response. Judge Dring directed Riffin to address the City’s specific allegations, and he did not give satisfactory answers.

After reviewing the motion papers and hearing Riffin’s argument, including his refusal to answer direct questions, his rambling responses, and evasion, Judge Dring granted the motion and incorporated the City’s arguments for dismissing Riffin. Judge Dring further added as a basis his own credibility findings after spending over an hour and a half at the hearing observing Riffin’s demeanor and credibility. Judge Dring found, “Moreover, based 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. 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.” In a footnote to

this quote, Judge Dring wrote, “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.”).

It bears mention that Riffin admits in his appeal that he has faulty memory.

Judge Dring cautioned Riffin during the October 24, 2016 hearing that he was not being credible, and Riffin continued his pattern of evasiveness. Riffin had an opportunity to deal forthrightly with Judge Dring and the parties; he chose not to do so.

Finally, the LLCs respectfully suggest the Board consider Riffin’s post-dismissal conduct. After being ordered not to file anything other than an appeal, he filed a motion for a stay, a petition for rulemaking, and a motion to dismiss the Harsimus Abandonment action, as well as multiple replies and comments to his submissions. Riffin also filed a separate action relating to the Harsimus Branch. Riffin has proven himself to be a serial abuser of the Board’s rules, and he has been sanctioned on other occasions. See, e.g., Norfolk Southern Railway Co.—Acquisition and Operation—Certain Rail Lines of the Delaware and Hudson Railway Co., Inc., STB Docket No. FD 35873, Service Date October 18, 2016;

Norfolk Southern Railway Co.—Acquisition and Operation—Certain Rail Lines of the Delaware and Hudson Railway Co., Inc., STB Docket FD 35873, Service Date March 24, 2016 (striking four filings); and J. Corman RR. Co./Allentown Lines, Inc.—Abandonment Exemption—in Lehigh County, PA, STB Docket No. AB 550 (Sub-No. 3X), Service Date November 25, 2015.

POINT II

Riffin’s Arguments Attacking the City’s Discovery Requests and the Propriety of Judge Dring’s August 24, 2016 Order Are Untimely and Should Be Rejected

Riffin’s appeal contains numerous arguments in favor of overturning Judge Dring’s order. None of these arguments should be accepted or even considered, as they are improper and irrelevant. The critical fact is that Riffin voluntarily offered to turn over e-mails to the City, had no objection to entry of the August 24, 2016 order, and specifically claimed on October 24, 2016 that he did not believe the August 24, 2016 order was incorrect.¹

Accordingly, Riffin has waived any arguments that the City et al.’s discovery requests were improper; that the City et al. failed to ask for an inspection; or that the August 24, 2016 order was improper or that it ordered him to do something not otherwise required by the regulations governing discovery.

¹ The LLCs have never withdrawn their objections to the City et al.’s demands both directed to Riffin and to the LLCs. The LLCs reiterate those objections previously articulated, and reserve the right to renew those objections if necessary.

However, Riffin in his appeal now argues that the City's underlining discovery request was improper. He claims he is only obligated to make documents available for inspection. The Board should disregard all of Riffin's arguments that contradict his prior agreement to turn over e-mails or the correctness of the August 24, 2016 order.

POINT III

Riffin's Argument that the Judge Dring lacked Jurisdiction to dismiss Him because the Board Does Not Have Jurisdiction is Improper and Should Be Rejected

Riffin's final argument is the baffling assertion that Judge Dring lacked jurisdiction to dismiss him from the case because the Board lacks jurisdiction over the Harsimus Abandonment. Thus, Riffin argues that he wants to be reinstated to an action that the Board does not have authority to hear. Riffin's obvious purpose in raising this point is that he wants to be allowed back into the case so he can refile his motion to dismiss.

Riffin's anticipated move of seeking to dismiss the Harsimus Abandonment if he is allowed back in is in actuality a reason to deny the motion.

On the merits, Riffin's motion to dismiss is based on a statement made by Conrail in Riffin's other petition involving the Hudson Street Industrial Track and alleged other lines in the former Harsimus Cove yard. Riffin claims Conrail disclaimed the existence of any lines of rail east of Marin Boulevard. Consequentially, Riffin reasons, the Board does not have jurisdiction to

authorize abandonment of the Harsimus Branch because there is a dispute whether the line extends east of Marin Boulevard.

This Board should not be distracted by statements made by Conrail in other proceedings. The Board needs only consult Conrail's exempt abandonment petition from 2009 in the Harsimus Abandonment. Conrail clearly seeks abandonment authority for the length of the Harsimus Branch from mile post 0.00 to mile post 1.36, shown on the map accompanying Conrail's petition as including the line east of Marin Boulevard. Conrail has never amended or modified its petition to exclude tracks east of Marin Boulevard. Therefore, the line to be abandoned includes the line east of Marin Boulevard, and this Board has jurisdiction to grant that relief.

Ironically, Riffin relies on Railroad Ventures, Inc. v. STB, 299 F.3d 523, 552 (6th Cir. 2002), and quotes that decision as follows: "Thus, at the point of filing the abandonment petition, the abandoning rail line owner cannot reduce or diminish the rail line or the nature of the property interests associated with the line." Thus, Conrail cannot, through statements made in other proceedings, alter what it has sought to abandon, or change the regulated states of the Harsimus Branch in the former Harsimus Cove yard.

Conclusion

Riffin voluntarily agreed to turn over e-mails in his possession, thus waiving (for reasons known only to him) his objections to the City's discovery demands. Judge Dring found that Riffin did not comply with the August 24,

2016 order, and that Riffin was evasive and lacked credibility. Riffin is a serial abuser of Board process. The Board should defer to Judge Dring and uphold Riffin's dismissal (and therefore Riffin's disruptive influence) from these proceedings.

Respectfully submitted,

S/ Daniel E. Horgan

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CERTIFICATION OF SERVICE

I, Daniel E. Horgan, hereby certify that I have caused a copy of the foregoing to be served by First Class Mail upon those on the attached Service List by having same deposited with the U.S. Postal Service on February 7, 2017.

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