

Before the Surface Transportation Board
Conrail -- Abandonment)
--in Hudson County, NJ.) AB 167 (Sub-no. 1189X)

242182
242183
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and
CSX Transp. - Discon. of)
Service - same) AB 55 (Sub-no. 686X)

ENTERED
Office of Proceedings
December 2, 2016
Part of
Public Record

and
Norfolk Southern -)
Discon. of Service - same) AB 290 (Sub-no. 306X)

City of Jersey City, et al's Comment in Opposition
"Appeal of an Initial ALJ Decision"
Filed Nov. 14 by Mr. Riffin

In an oral order from the Bench on October 24, as confirmed in a written order filed October 26, ALJ Dring dismissed Mr. Riffin from this proceeding, and granted other sanctions, for failure of Mr. Riffin to act responsibly in connection with an order compelling discovery into which he had voluntarily entered. On October 31, Mr. Riffin filed a "Petition(s)" stating an intent to appeal, and otherwise requesting a stay and for relief under Part 1117. Riffin's October 31 filing on its face seemed to call for relief under whatever appellate procedures the agency's rules afforded. City of Jersey City, Rails to Trails Conservancy, and Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition ("City et al") on November 4, 2016, replied in opposition to that filing, explaining that on examination of the agency's regulations, the

only appellate relief available was by means of a petition to reopen/reconsider, and that Riffin made none of the showings required for reopening or reconsideration.

On November 14, Mr. Riffin filed an additional pleading, accompanied by a voluminous set of appendices, which he labels an "Appeal of an Initial ALJ Decision." On November 21, Riffin filed a "Supplement" to that "Appeal." In short, by now Riffin has filed three documents seeking appellate relief. City et al hereby oppose any and all relief sought by Riffin in any of these efforts. Many of City et al's arguments in our Reply to Riffin's October 31 "Petition(s)" are germane to Riffin's Nov. 14 "appeal" and City et al accordingly adopt and incorporate them all here.

I. Summary of Argument

Riffin styles his latest papers as an "appeal" and states they are pursuant to 49 CFR 1115.2 (appeals from ALJ orders). Appeal at p. 2. He expressly states that he does not desire or seek to reopen. Id.¹ Riffin does not have a right to appeal under section 1115.2: Part 1115 and 49 C.F.R. 1152.25(e) make

¹ Riffin's October 31 pleading asked the agency to clarify whether Part 1115 appellate procedures or 49 CFR 1152.25(e) appellate procedures were applicable in this abandonment proceeding. City et al responded that by the terms of the regulations, City et al Reply filed November 4, 2016. 49 CFR 1152.25(e) procedures were the only ones applicable. Riffin makes no response to City et al's showing that only section 1152.24(e) applies.

clear that appellate procedures applicable in an abandonment (such as AB 167-1189X) are those set out in 49 C.F.R. 1152.25(e). Section 1152.25(e) does not provide for appeals in the situation here; it only provides for petitions to reopen or reconsider.

In his November 14 "Appeal," Riffin confirms he does not seek to reopen. He has therefore waived or forfeited any right to appellate relief.

Were the Board further to consider the "Appeal," Riffin has shown no entitlement to any relief. This is confirmed by his subsequent "Supplement."

Before addressing the "Appeal" proper, City et al will address the (belated) November 21 "Supplement."

I. Riffin's "Supplement" Underscores His Evasive Intent and Indicates Destruction of Responsive Documents

On November 21, 2016, Riffin filed a belated "Supplement" to his appeal. In the Supplement, Riffin in effect admits that he destroyed emails at some point after he was ordered to produce them on August 24 (orally) and August 25 (in writing). He says that City et al "should have taken advantage of Riffin's production" of his emails either on the night before the hearing (August 23), or on the day of the hearing (August 24). Riffin Supplement on p. 2. He argues that City et al waived its right to object for failure to avail itself of these alleged

opportunities. The only waiver is by Riffin: he confirmed before the Judge that he would forward his emails and expressly consented to an order to forward his responsive emails. See August 24 Transcript p. 17, lines 13-22, and other citations collected in note 9 infra. He has thus waived the right to object that City et al should have accessed his responsive emails the night before the hearing or the day of the hearing. PYCO Industries, Inc. - Feeder Line Application - Lines of South Plains Switching, Ltd. Co., F.D. 34890, served June 9, 2010, slip op. at 6 (party cannot flip positions). Alternatively, Riffin is estopped from advocating a position directly opposite to what he consented to before Judge Dring. Id. slip op. at 5.

Pursuant to Judge Dring's ruling, City et al had no obligation to find a place to copy emails late on a Sunday night in Washington DC, or at the FERC offices immediately after the August 24 hearing, even assuming copy machines and printers were available for that purpose (to City et al's knowledge, they were not). Nothing in Judge Dring's oral or written orders authorizes Riffin to destroy whatever responsive emails he chooses and forward only those responsive emails he chooses, or to ignore or abridge his commitment, embodied in an order, to forward his emails to City et al. Riffin has simply acted in contempt of Judge Dring's order.

Riffin also argues (Supplement at 2, citing a letter from Yahoo! Inc.) that the emails he destroyed are no longer available from Yahoo! Inc. (his email service provider) pursuant to 18 U.S.C. 2701, et seq.² If this is true, then Riffin appears only to be confirming a criminal violation on his part of 18 U.S.C. 1519: he seems to be confessing that he destroyed evidence (emails) which this agency through ALJ Dring ordered to be made available to City et al and to Conrail. Nothing in the Yahoo! Inc. letter excuses Riffin's contemptuous evasion of Judge Dring's order.

A close reading of the Yahoo! Inc. letter seems to indicate that the Yahoo! Inc. staff preparing the letter did not realize that Riffin was a "user" of their email service. Contrary to Riffin's reading of Yahoo! Inc.'s letter, 18 U.S.C. 2701(c)(2) on its face indicates that Riffin (a "user" of the email service) could authorize disclosure by Yahoo! Inc. of that which Riffin intentionally deleted, at least to the extent it remains in the Yahoo! Inc. system.³ City et al understands that the Yahoo email servers retain emails deleted by users for at least a period of time. Whether the material is still available or

² City objects to Riffin's effort to include the Yahoo! Inc. letter in the record. It is not new evidence, but newly generated evidence he could have put into the record before Judge Dring.

³ In addition, under section 2701(c)(3), the information may be available under 18 U.S.C. 2703, 2704 or 2718.

not, the point is that Riffin has attempted to destroy it rather than to conform to Judge Dring's order to supply it, and now claims the material is unavailable. Riffin's "Supplement" thus constitutes a compelling argument in favor of sanctions, and indeed suggests that Judge Dring's order be summarily affirmed under whatever appellate procedure is available to Riffin.

City et al will now turn to Riffin's November 14 "appeal."

III. Part 1115 Is Not Applicable and Riffin Now Waives Reopening

A. Riffin Has Disavowed All Available Appellate Relief

Part 1115 by its terms is not generally applicable to all decisions by officers of the agency. 49 CFR 1115.1 states that "[t]hese appellate procedures [Part 1115] ... do not apply to ... matters of an interlocutory nature." Even more important for purposes here, the third sentence of section 1115.1(a) states that abandonments are governed by "separate appellate procedures exclusive to those proceedings. (See 49 CFR part 1152)." 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. Riffin has no right to appeal under 49 CFR 1115.2, his appeal must be dismissed.

Section 1152.25(e)(4) allows a party to file a petition to reopen "any administratively final action of the Board." This does afford Riffin a potential avenue for administrative review of Judge Dring's orders. He therefore is entitled to no relief.

In short, since the Board's regulations do not provide for any appeal in the circumstances here, this Board's appellate review is limited to that provided under 49 USC 1332(c) (formerly codified at 49 USC 722(c)), which limitation is embodied in 49 C.F.R. 1152.25(e)(4). STB lacks discretion to reopen or to reconsider decisions except as provided by 49 USC 1332(c). BNSF Rwy v. STB, 453 F.3d 473, 479 (D.C. Cir. 2006) ("the criteria for granting reconsideration are limited by statute"). This Board has expressly acknowledged that it "does not have the power to reopen or reconsider" except as provided by the statute. Railroad Ventures, Inc. - Ab. Ex. - Between Youngstown, OH, and Darlington, PA, AB 556-2X, served Feb. 15, 2007, slip at 5.

49 USC 1332(c) allows the Board to reopen or to reconsider administratively final decisions only upon showings of material error, new evidence, or changed circumstances. Consonant with 49 USC 1332(c), 49 CFR 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."

In response to Riffin's October 31 Part 1117 "Petition(s)," City et al indicated that the only appellate relief available to orders issued in an abandonment proceeding was pursuant to 49 CFR 1152.25(e), and that only a petition to reopen/reconsider pursuant to 49 USC 1332(c) and 49 CFR 1152.25(e)(4) was available for the order at issue here. See City et al Reply filed Nov. 4. Both 49 USC 1332(c) and 49 CFR 1152.25(e)(4) condition reopening on a showing of material error, new evidence, or changed circumstances.

Riffin utterly fails to make any such showings. Indeed, he expressly states that he does not wish to seek reopening. Riffin Appeal at p. 2. This constitutes waiver or forfeiture of the remedy. By waiving the remedy, he also waives any claim that the agency errs in failing to afford him appellate relief. BSNF Rwy, supra, p. 479 (no error when argument waived); PYCO Industries, Inc. - Feeder Line Application - Lines of South Plains Switching, Ltd. Co., F.D. 34890, served June 9, 2010, slip op. at 6 (same). Since Mr. Riffin has now waived reopening, neither his October 31 Part 1117 "Petition(s)," nor his November 14 "Appeal," nor his November 21 "Supplement" should be treated as a petition to reopen or to reconsider. Mr. Riffin has foreclosed himself from appellate relief.

B. In All Events, Riffin's Voluminous Exhibits Do Not Constitute "New Evidence" on which Appellate Relief May Be Granted and Arguments Based on Them Are Waived

Mr. Riffin appended several hundred pages of exhibits to his "Appeal." All could have been presented before or at the October 24 hearing (and since most appear to be pleadings, they were before the Judge, who indicated that he had read everything). None therefore qualifies as "new evidence" that might be relied upon to support a petition to reopen or reconsider Judge Dring's October 26 decision, even if Riffin had not waived the reopening remedy. Friends of Sierra Railroad v. ICC, 881 F.2d 663 (9th Cir. 1989). Insofar as Riffin propounds exhibits or arguments based on those exhibits which he never supplied to Judge Dring, he has waived or forfeited those matters as grounds for appellate relief. BNSF Rwy, supra; Pyco, supra.

III. Riffin's Appeal Misrepresents Reality, Is Based on Arguments Waived or Forfeited, and otherwise Ignores his Pattern of Evasion, Obstruction and Misrepresentations

Consideration of any appellate relief for Riffin from Judge Dring's order imposing sanctions must begin with the fundamental fact that "[w]ithout 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). In order to safeguard the integrity of its fact-

finding processes, an agency must enforce its discovery process with sanctions.

A. Riffin Engaged in, inter alia, Evasion, Misrepresentation, and Willful Rendering of Inadequate Performance

Riffin claims that he has complied with the relevant discovery order (Decision served August 25, 2016), but the record shows a history of deception, evasion, and delay. The reality is as follows: Alarmed at evidence indicating an agreement between the LLC Intervenor (212 Marin Boulevard, LLC et al) and Riffin to subvert the OFA process, City et al served Riffin with document requests on March 28, 2016, seeking all emails or other exchanges between himself and the LLCs (defined to include agents and representatives). Mr. Riffin pledged a timely response, reneged, and then reneged again.⁴ Faced with an evasive charade, City et al filed a motion to compel on May 2. By letter postmarked that day, Riffin served a response, consisting of objections and a denial that he had any responsive emails (he said he deleted same on receipt).⁵ The response mooted the first motion to compel, and City et al withdrew it.⁶

⁴ City et al's November 4, 2016 Reply to Riffin at p. 19 n.14; City et al's first Motion to Compel, filed May 2, 2016, at pp. 1-3.

⁵ Riffin's objections and denial are set forth in Exhibit B to City's Second Motion to Compel, filed July 5, 2016.

⁶ Withdrawal of Motion to Compel as Moot, filed June 7, 2016 (reserved right to file another motion to compel).

City et al then filed a second motion to compel, supported by a verified statement from a person (Eric Strohmeier) familiar with Riffin's emails, showing that Riffin did have responsive emails.⁷ Riffin claimed in response that he saved his emails on a flash drive and they were indecipherable.⁸ Judge Dring scheduled a hearing for Monday, August 24. City et al arranged for a witness to attend the hearing to corroborate that Riffin had decipherable responsive emails. The evening before the hearing, Riffin showed up unannounced when counsel was attempting to have dinner with the witness in Washington, D.C.. Riffin belatedly acknowledged he had decipherable responsive emails, and offered to show his emails to the extent the restaurant wifi supported the effort. A quick review showed that voluminous responsive emails existed, and that they were decipherable and that they included attachments, but were well beyond what could be dealt with at 9 PM over a Washington D.C. restaurant wifi connection with a hearing scheduled the next morning. Riffin indicated that he would forward the responsive emails. Because of Riffin's track record, counsel stated he should so represent the next day at the hearing.

⁷ Exhibit C to Second Motion to Compel, filed July 5, 2016.

⁸ Riffin Reply to Second Motion to Compel, filed July 28, 2016 at p. 12 (with alleged indecipherable emails attached).

At the hearing the next day, Riffin in effect acknowledged misrepresentation and evasion, and consented to forward the emails to City et al and to Conrail.⁹ Judge Dring warned Riffin that he expected full compliance with his order, and that Riffin would face the full array of sanctions if he failed to make discovery.¹⁰ On August 25, Riffin complained that he had spent about two hours in a public library forwarding emails, and that the library was closing. He evidently felt that forwarding the emails for two hours was already too onerous. When City et al objected to deficiencies in the response (including to Riffin's

⁹ August 24, 2016 Transcript at 14 lines 17-18 (information exists despite contrary prior representations), p. 15 lines 1-3 (noting Riffin would forward emails), p. 15 lines 8-9 (Riffin confirms City et al's representations correct and agrees to forward emails, saying he is also going to supply them to Horgan), p. 16 (lines 2-6) (Conrail requests copy), p. 17 lines 13-20 (Riffin again confirms agreement to forward emails).

¹⁰ 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.

failure to include emails from or to agents or representatives of the LLCs other than the Hymans or Horgan, and emails concerning Riffin's OFA-based lawsuit against Forest City/Ratner in Jersey City), Riffin said 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. In accordance with Riffin's advice, City et al accordingly filed the motion for sanctions.

At the hearing on October 24, Mr. Riffin filed a rather rambling "Written Argument" the gravamen of which was the contention that Riffin's relationship with the Hymans (evidently as some kind of "licensee") was not relevant (Written Argument at 11). In Riffin's view, abusive use of the OFA process should not be a concern to the STB. He goes on to argue that the City et al "have no right to any of the irrelevant, immaterial, collateral-issue documents that City et al improperly seek." Id. 13. He then said that City et al. should "sit down and shut up," accused counsel as having a "vivid (paranoid) imagination,"¹¹ and called for sanctions against City et al. Id.

¹¹ Since Mr. Wasser supplied a verified statement, filed by City et al on October 20, in this proceeding, indicating that Riffin acknowledged a deal with the Hyman interests to mis-use the OFA process in return for a 5% commission from the Hyman interests on their monetary recovery, Mr. Riffin's remarks in his Written Argument appear misleading and incorrect, as well as insulting to City et al. Since Riffin says he has an agreement with the Hyman interests for compensation for OFA-related activities, there is nothing "imaginary" about the matter. There is, of

By consenting to make discovery and to an order so requiring, Riffin waived all objections to the discovery. BNSF Rwy, supra; Pyco Industries, supra. Riffin's central thesis reflected a mindset that was contumacious of Judge Dring's August 24 order. Riffin's contempt of the order compelling discovery, entered with Riffin's consent, is also reflected in his oral remarks at the hearing.

The agency is not required "to rethink its decisions whenever an affected party changes its mind..." Pyco, supra, slip op. at 8, citing Conn. Trust for Historic Pres. V. ICC, 841 F.2d 479, 484 (2d Cir. 1988). STB "is not expected to 'behave like Penelope, unraveling each day's work to start the web again the next day.'" Pyco, supra, quoting W. Coal Traffic League v. ICC, 735 F.2d 1408, 1411 (D.C. Cir. 1988). Rather than allow Riffin to twist the agency into knots by belatedly changing his position, Judge Dring -- adopting the reasoning and arguments set forth in City et al's motion for sanctions -- properly entered all sanctions, in accordance with his August 24 warning to Mr. Riffin. In addition, Judge Dring, in imposing sanctions made a credibility finding against Riffin, from the Bench on October 24, and embodied in his Order issued October 26 as follows:

course, considerable concealment which City et al sought to address through discovery.

"[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).

As part of his effort to evade discovery, Riffin sent emails to City et al excusing his failure to meet deadlines, or his failure to produce documents, on grounds of "forgetfulness," age, and lack of knowledge in how to use email systems. He also from time to time claimed that his ability was constrained by lack of access to the internet, forcing him to rely on access during limited hours at a public library. Riffin includes those and similar claims in his pleadings.¹² Yet Riffin manages to e-

¹² E.g., Riffin Appeal at 14 para 40. Riffin also falsely claimed he had no emails, or decipherable emails in his effort to evade discovery. See pp. 11-12 supra.

file with this Board, and to serve by email voluminous pleadings, encompassing hundreds of pages of emails and other exhibits, as manifest in his email service of his "appeal" late on the evening of November 14. He made yet another filing on November 16 (his new petition for a declaratory order concerning the Hudson Street Industrial Trackage, docketed as F.D. 36078, which he claims is associated with the Harsimus Branch), serving counsel from the AB 167-1189X proceeding. Riffin's forgetfulness, technical inability, and email access restrictions seem to apply only as excuses for evasion. They do not apply when he files his pleadings. Judge Dring's credibility determination on this record is unassailable.

Nor can Riffin hide behind his pro se status. He apologized to the Jersey City Council for his "legal speak" on the subject of OFA's on the ground that he could "not forget [his] post-graduate studies at the law schools of the University of Baltimore and the University of Pennsylvania."¹³ Riffin by his testimony is a trained lawyer, and STB describes him as a "frequent litigant." Note 14, infra.

As to the dismissal remedy and other remedies, a case that Riffin cites in his October 31 Petition [Pet. 21 citing Fair Housing v. Combs, 285 F.3d 899, 905-06 (9th Cir. 2002)] upholds

¹³ Memo, Riffin to Jersey City Council, Re Acquisition of Harsimus Branch using OFA process, Sept. 22, 2014, p. 1.

dismissal where, as here, the litigant misrepresented to counsel and the court that documents did not exist when they did. Riffin expressly represented that he had no responsive documents, when he did. Then he represented they were indecipherable, when they were legible. Black's Law Dictionary (7th ed. 1999) 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." Riffin's conduct in this discovery matter exhibits all the hallmarks of "bad faith." Riffin has compiled quite a track record of admonishments for abusive litigation practices by the courts and by this agency.¹⁴ Judge Dring expressly warned him on

¹⁴Earlier 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 "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.

August 24 that he would be subject to all sanctions if he did not comply with the discovery order. One of the cases Riffin elsewhere cites (Oct. 31 Petition at 21) expressly holds that explicit consideration of lesser sanctions than dismissal is unnecessary where there has been a warning. Malone v. U.S. Postal Service, 833 F.2d 128, 132-33 (9th Cir. 1987) (upholding dismissal based on record as a whole).

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, STB indicated it would instead more vigorously enforce existing regulations dealing with inappropriate behaviors. Slip op. at 4. As to such prior admonitions, 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.").

B. Riffin's Latest Objections Are Waived, Contrived, or Misleading, or a Combination Thereof

City et al now turn to Riffin's specific grounds for appeal, as summarized by him at p. 1 of his November 14 pleading.

Waiver. Riffin makes a number of arguments that he has waived. For example, he claims that Judge Dring erred because the City failed to avail itself of inspection of his emails. Appeal at 1 para 1. Riffin seems to believe that the August 25 order, to which he consented, is wrong because City et al should have inspected his emails the night before the hearing or "immediately after" the hearing. Appeal p. 24 para 67. (This is the thrust of his November 21 Supplement as well.) As to any inspection opportunity before the hearing (there was no credible opportunity anyway), Riffin's objection is waived by consent to the order compelling discovery. See BNSF Rwy, supra; Norfolk Southern Rwy Co. - Pet. Ex. - in Baltimore City and Baltimore County, MD, AB 290-311X, served May 4, 2010, slip at 4 (Riffin's arguments waived or forfeited if not timely presented); id. served Jan. 27, 2012, slip at 8 (Riffin's arguments forfeited because not timely raised). The order, to which Riffin agreed, required him to forward his emails to City et al and Conrail. It did not require City et al to inspect and to copy the emails at FERC or some restaurant that might allow use of its wifi

connection and supply a printer to make copies in Washington, D.C. Riffin cannot consent to the August 25 order and then complain of it. PYCO Industries, supra, F.D. 34890, served June 11, 2010, slip at 6-8 (party knowingly waives argument).

Riffin argues (Appeal p. 1 para 9) that STB denied similar discovery in a May 22, 2015 decision. This is an attack on the August 25 order, to which Riffin consented, ordering him to produce documents. Riffin consented to discovery and to the August 25 order. Riffin waived or forfeited this argument.

E.g., BNSF Rwy, supra; Pyco, supra.¹⁵

Riffin claims (Appeal p. 1 para 6) that FRCP 37(a)(2)(A) and (4)(A) prohibit sanctions unless accompanied by a certification that the party seeking sanctions had conferred with the party being sanctioned. This is both waived (never presented to Judge Dring) and specious. First, there is no certification requirement in the relevant Board regulations. Second, even if the FRCP were applicable, there is no certification requirement when sanctions are imposed, as here, for violation of a court's order. See FRCP 37(b). Third, City et al's motion for sanctions included the relevant email chain showing that counsel for City et al urged Mr. Riffin to complete

¹⁵ This Riffin argument is also spurious. The May 22, 2015 order did not deal with discovery relating to Riffin. Mr. Riffin first announced he was Mr. Hyman's back-up plan in his pleading in AB 167-1189X filed June 11, 2015, at p. 10.

discovery, and was told by Riffin to see Judge Dring instead. In a nutshell, Riffin foreclosed further consultation. Fourth, and in any event, under 49 CFR 1104.4, the signature of City et al's counsel to the motion for sanctions constitutes a certification of "good ground" and need not be further verified.

Riffin also claims an award of attorney's fees requires a certification. There is no such requirement in FRCP 37(b) or the Board's rules. However, City et al provided a certification as to the attorney's fees. Motion for Sanctions against Riffin filed Sept. 15, 2016, Ex. K. Riffin's only objection was that he did not want to pay for City et al's extensive efforts to negotiate a solution to discovery issues with Daniel Horgan (counsel for the LLCs) so as to avoid moving for sanctions.¹⁶ City et al agreed to provide an updated certification confirming exclusion of all efforts to avoid the motion for sanctions, but, without objection from Mr. Riffin, inclusive of all work through October 24.¹⁷ In accordance with soliloquy at the hearing, City filed a "Certification of Costs and Comment on Further Pleadings by Mr. Riffin" on October 25, 2016.¹⁸ Riffin makes no objection

¹⁶ Oct. 24 Transcript at 77-78 & 79.

¹⁷ Oct. 24 Transcript at 79-80.

¹⁸ As Riffin knows, the LLCs did not want City et al to take discovery from Riffin. Counsel for City et al spent considerable time with the LLCs' Horgan seeking to negotiate some solution that would avoid a motion for sanctions against Riffin as well as discovery relief against the LLCs. The LLC Intervenor put portions of this negotiation into the record

to the certification (accounting) of attorney's fees and costs filed October 25.

Riffin, repeating an argument in his Oct. 31 Part 1117 "Petition(s)," claims (Appeal p. 1 para 5) that Judge Dring omitted findings required before the sanction of dismissal may be imposed pursuant to case law interpreting FRCP 37. This claim is waived as never presented to Judge Dring. BNSF Rwy, supra. In any event, as City et al pointed out in City et al's Nov. 4 Reply, even if court interpretations of FRCP 37 governed STB sanctions, Rifin's cases (including Malone, supra), do not require specific findings by a presiding judge. Cases involving judicial sanctions only require that the record as a whole be sufficient to allow such findings to be made. As City et al earlier indicated, the record as a whole certainly supports the sanction of dismissal here: Rifin repeatedly misrepresented that he had no documents, and otherwise engaged in evasion, even in the face of a warning by Judge Dring that Rifin would be subject to sanction for any further non-compliance.

(Reply to City et al's Motion to Compel Discovery from LLC Intervenors, filed Oct. 5, 2016 and exhibits thereto). The negotiations raised more questions than they resolved. This puts the lie to all Rifin insinuations that City et al did not seek to resolve discovery matters before filing the motion for sanctions. Rifin's suggestions to the contrary utterly misrepresent reality.

Continued evasion. Another set of Riffin objections manifest his continued evasiveness and underscore the need for sanctions. For example, he says that the order compelling him to furnish emails involving the LLCs did not include emails to agents of the LLCs, and he implies that another order is needed to compel his response as to agents. Appeal at 1 para 2 and para 3. LLCs are incorporeal and operate through humans. Under Riffin's argument, he would not have to supply any emails because the LLCs themselves, not being human, did not send or receive emails. As City et al explained in our November 4 Reply to Riffin's stay motion, City defined LLCs to encompass agents and representatives in the original document requests and the August 24 transcript indicated that City et al sought agents in addition to Horgan or the Hymans. Riffin's claim that he can arbitrarily limit his response to three of the LLCs' agents or representatives (the two Hymans and Horgan) is pure evasion. In any event, as explained in City et al's motion to compel, the emails that Riffin did supply appear to be doctored and/or part of email conversations that he has not fully supplied.

Similarly, Riffin suggests he should be permitted to evade the August 25 order because it did not specify time and place for inspection and copying. Appeal p. 1 para 5. The order, to which Riffin consented, directed Riffin to provide his responsive emails to City et al and to Conrail by August 26.

The consent agreement was they would be forwarded to counsel's email accounts.¹⁹ For Riffin to claim that he is somehow excused from forwarding his emails by August 26, he is reneging on his representations to Judge Dring and to opposing counsel. The record shows ample accord on place and time. Riffin's argument demonstrates an intent to evade and total unreliability in respect to his representations.

Riffin claims (Appeal p. 1, para 4) that he answered Judge Dring's "only" question, which was why he said to City et al "if you want more, ask ALJ Dring." This is hardly grounds for appeal. Judge Dring found Riffin's "answer" deficient, and this was in a context that included Riffin's "Written Argument" and actual oral statements at the hearing. The crux of Riffin's submission was that Riffin should not be required to make discovery responses at all, even after he was ordered, with his consent, to do so. Since STB is not Penelope somehow obligated to unweave and reweave every night (see Pyco, supra, slip op. at 8), Riffin's effort to redo the order to which he consented

¹⁹ Riffin said to Judge Dring that "whatever is in my email account, I have agreed I will give him [counsel for City et al] a copy. I will send a copy to Mr. Jenkins [counsel for Conrail] as well." August 24 Transcript at 17. Mr. Riffin then indicated he would forward the emails from "a library" and that counsel for City et al "will probably have it on his e-mail account before he gets home." Id. Judge Dring responded "[v]ery good. I will enter an order to that." Id.

requiring him to make discovery is simply contumacious and evasive.

Riffin claims that all the deficient emails (City et al objected that many of the emails furnished by Rifin appeared to have omissions or to be part of broader conversations) of which City et al complains involved Steve Hyman, but that the August 25 order did not require Rifin to furnish any emails of Hyman, evidently because it did not specify agents of the LLCs. Appeal p. 25, para 71A. Indeed, Rifin now claims that Hyman emails are irrelevant to the proceeding. P. 26, para 71B-C. He waived this objection by consenting to the August 25 order. BNSF Rwy, supra; Pyco, supra. In any event, at all relevant times, Mr. Hyman has held himself out as a representative of the LLCs and of his wife, Victoria. See Wasser Verified Statement attached to City's Reply to LLCs' Motion for Sanctions filed October 20, 2016 in AB 167-1189X. Mr. Wasser states in paragraph 2 of his Verified Statement that he attended a meeting with Mr. Hyman on July 20, 2016, at which he "understood Mr. Hyman to be speaking to me on behalf of his wife and certain limited liability companies that she controls (the Hyman LLCs)." Mr. Wasser attests that Mr. Hyman then asked him to meet with Rifin, at which point Rifin appeared. On the basis of Rifin's remarks, Mr. Wasser understood that "Mr. Hyman had agreed to pay to Mr. Rifin 5% of whatever recovery the Hyman LLCs might receive"

from Riffin's OFA and OFA-related litigation. Wasser V.S. para 5. Riffin on the same day filed a lawsuit seeking to enjoin Mr. Wasser's company from constructing Metro Plaza in downtown Jersey City on the basis of Riffin's pending OFA. Wasser V.S. para 6. Mr. Wasser attached a copy of the Complaint filed by Riffin, evidently on behalf of the Hyman interests, to his Verified Statement. In short, Hyman, acting on behalf of the LLCs and his wife, invited Riffin to a meeting with Wasser. Riffin there indicated he had an agreement with the Hyman interests for a commission from them, and then actually took an action (filed a lawsuit against Mr. Wasser's company) pursuant to that agreement. Riffin has obstreperously failed to produce emails dealing with his work on behalf of the Hyman interests in connection with the Metro Plaza litigation. Riffin's November 21 "Supplement" now appears to confirm that he has evidently destroyed relevant emails. In either case, his conduct is dilatory and contumacious in light of the August 25 order. Riffin's argument that emails with Hyman should be ignored is more evasion and exemplifies his continued bad faith.

No denial of due process. Riffin says he was denied due process (Appeal p. 1 para 8). His only other reference to due process is at Appeal p. 28. He there seems to argue that he is denied due process if he is disabled by his procedural antics from an opportunity to be heard on the merits of his proposed

OFA, were he to file one. Riffin claims that dismissals and defaults should be "rare." Appeal p. 28 para G.

Due process is not infringed when the dismissal sanction is imposed on a litigant who fails to make discovery. The public policy favoring merits dispositions does not override other public policies that favor dismissal, including the important interest that an agency must safeguard its fact-finding process from abusive refusal to make discovery. See Rio Properties v. Rio International Interlink, 384 F.3d 1007, 1022 (9th Cir. 2002) (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).

Constitutional due process generally requires a "meaningful opportunity" to be heard before one is deprived of life, liberty or property. BNSF Rwy Co. v. STB, supra, 453 F.3d at 486, citing Mathews v. Eldridge, 424 U.S. 319, 349 (1976). That requirement does not mean that an in-person hearing is constitutionally required whenever an agency like STB decides a case. See Blumenthal v. FERC, 613 F.3d 1142, 1145 (D.C. Cir. 2010). STB generally resolves discovery matters without any in-person hearings. Nonetheless, Riffin here has had two in-person hearings (August 24 and October 24). He has had ample

opportunity to be heard. He has responded with evasion of the discovery process replete with misrepresentations that he had no documents, and culminating in an attack on, and evasion of, an order compelling discovery. Riffin fails to identify any property, life or liberty that he has lost from lack of due process.

Riffin objects (Appeal p. 1 para 7, with a more elaborate version at pp 14-17) that his failure to produce his emails to or from Nagel was not prejudicial, because City et al possesses one (from another source) that Riffin "forgot."²⁰ City et al attached the Nagel email as an example of Riffin's evasive withholding of responsive documents. As the hearing transcript demonstrates, Riffin admitted that Nagel and other attorneys advised Hyman from time to time. Riffin simply did not wish to supply email correspondence with them. The Nagel email serves

²⁰ Riffin states that he has deleted the Nagel email (e.g., Appeal p. 24 para 44). He reiterates that he "routinely" deletes emails. This is similar to a debunked claim Riffin made in response to City et al's initial discovery request that he had no emails, or to City et al's first motion to compel that he had no decipherable emails. According to Mr. Strohmeyer's verified statement (exhibit to second motion to compel) and Riffin's later admissions, Riffin heretofore has not "routinely" deleted his emails. The Nagel email deals with Riffin's proposed suit against Metro Plaza on behalf of the Hyman interests, which he has now filed. It is germane to showing that Riffin's OFA is abusive. Riffin should not delete emails which are responsive to discovery requests. That amounts to evasion of discovery by destruction of evidence. It corrupts the agency's fact finding processes. It is further grounds to sanction Riffin.

as an easily documentable example Riffin's failure to produce responsive documents, and thus of his contumacious, evasive and dilatory conduct. City et al, and this Board and its processes, are prejudiced by Riffin's dilatory and evasive conduct, his selective forgetfulness, his claims to lack documents when he in fact has them, his claims that his documents are indecipherable/unrecoverable when that is not true either, and his arbitrary termination of his response because he found more than two hours of effort tedious. The Nagel email episode supports Judge Dring's finding that Mr. Riffin is not credible in his claims concerning the documents in his possession.

C. FRCP 37

Riffin relies on FRCP 37 for several of his arguments. He neglects to mention that FRCP 37(a)(4) states that evasive and incomplete disclosures, answers and responses "must be treated as a failure to disclose, answer or respond." Riffin has been nothing if not evasive and incomplete. In short, Riffin's conduct constitutes failure to make discovery under the Federal Rules.

Moreover, at least by the time City et al made its March 28 discovery requests, Riffin was on notice that his electronically stored information was sought. FRCP 37(e) provides for sanctions against parties who fail to preserve electronically stored information in anticipation of litigation. Riffin in his Appeal

appears to City et al to admit that he is routinely deleting electronically stored information germane to City et al's discovery requests. Riffin's November 21 "Supplement" in effect confirms he destroyed emails after being ordered to forward them. Sanctions are necessary in response to destruction of evidence.

Riffin fails to show any error, let alone material error, nor does he show any new evidence, nor changed circumstance, justifying any appellate relief. His Appeal in fact exhibits a desire to evade and confirms Judge Dring's character finding against Riffin. In any event, Riffin has waived all appellate relief to which he is entitled.

IV. Judge Dring's Credibility Determination Against Riffin Finding Is Entitled to Deference

Judge Dring found in his credibility determination (Decision, October 26, p. 2) 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." An ALJ's credibility determination "is entitled to considerable deference." Lee v. Sullivan, 988 F.2d 789, 793 (7th Cir. 1993), citing Steward v. Bowen, 858 F.2d 1295, 1302 (7th Cir. 1988). This flows from the fact that the ALJ is "in the best position to observe the witnesses." Walker v. Bowen, 834 F.2d 635, 641 (7th Cir. 1987).

Other cases state that "[a]n ALJ's credibility determinations will be affirmed on appeal unless they are 'patently wrong.'" Herr v. Sullivan, 912 F.2d 178, 181 (7th Cir. 1990) citing Kelley v. Sullivan, 890 F.2d 961, 965 (7th Cir. 1989). Since the record below is replete with examples of misrepresentations and evasions by Mr. Riffin, Judge Dring's finding (set forth in the October 26 decision) that Riffin was unreliable is not "patently wrong" and instead must be given substantial deference.

Conclusion

Mr. Riffin's Appeal should be denied. Pursuant to 49 CFR 1115.1, section 1115.2 does not apply to abandonment proceedings. 49 C.F.R. 1152.25(e) by its terms governs appellate practice in abandonment proceedings. Section 1152.25(e) provides for appellate relief here only by a petition to reopen/reconsider. Riffin has waived reopening. He thus is entitled to no relief. In any event, he fails to show any error, much less bear his burden of proving material error, on the part of Judge Dring. If he is allowed to appeal, the appeal should be denied. Judge Dring's finding that Riffin is not a reliable witness must be upheld. Riffin fails to show any grounds for appeal under 1115.2. Indeed, Riffin's statements [such as his indication he has deleted the Nagel email, that his deletions are "routine", that Steve Hyman is somehow irrelevant to the discovery, and - per his November 21 Supplement - that he

has rendered his emails inaccessible] indicate that Riffin is destroying evidence responsive to the August 25 order compelling discovery. Riffin relies on FRCP 37 for several of his arguments. FRCP 37(e) states that evasive and incomplete responses must be treated as a failure to respond. Judge Dring warned Riffin he would be subject to sanctions if he failed to comply with the August 25 order. Riffin failed to comply.

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. A certification of fees and costs for Riffin's appellate procedures is attached as an Appendix.

Respectfully submitted,



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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 2d day of December 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).



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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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The post office is returning mail addressed to Mr. Dan Weber.

APPENDIX

Certification of Fees and Costs

For Response to Riffin's Appellate Papers

Filed October 31 to date in AB 167-1187X

The undersigned hereby certifies under penalties for perjury that he has spent no less than 52.5 hours researching and preparing responses to Riffin's "Petition(s)," "Appeal," and "Supplement" in AB 167-1189X during the period 1 November to 2 December (1 Nov. to 4 Nov. total of 26.5 hours on Petition(s); 15 Nov. to 17 Nov. and 30 Nov. to 2 Dec., total of 24.5 hours on Appeal and Supplement), plus costs to date of \$562.67 for purchase of hearing transcripts for the two hearings, and \$283.42 for service copies including delivery (USPS and Fed X fees) for service of the Reply to Riffin's "Petition(s)." Costs for service of the Reply to Riffin's Appeal and Supplement are not yet available for inclusion.

Total fee (52.5 hrs x \$200/hr): \$10,500

Total costs (\$562.67 plus \$283.42): \$846.09

Total: \$11,346.09

 2 Dec 2016

Charles H. Montange