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SERVICE DATE – AUGUST 21, 2017

SURFACE TRANSPORTATION BOARD

DECISION

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

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

Docket No. AB 55 (Sub-No. 686X)

CSX TRANSPORTATION, INC.—DISCONTINUANCE OF SERVICE EXEMPTION—IN
HUDSON COUNTY, NJ

Docket No. AB 290 (Sub-No. 306X)

NORFOLK SOUTHERN RAILWAY COMPANY—DISCONTINUANCE OF SERVICE
EXEMPTION—IN HUDSON COUNTY, NJ

Digest:¹ The Board denies James Riffin’s request to reconsider or reopen its April 28, 2017 decision, which upheld sanctions imposed on Riffin, including terminating his participation in these cases. The Board also denies Riffin’s request for a stay.

Decided: August 18, 2017

On May 30, 2017, James Riffin (Riffin) filed a “Petition to Reconsider/Reopen” the Board’s April 28, 2017 decision denying his appeal of an Administrative Law Judge (ALJ) decision to sanction Riffin for his conduct in the above-captioned proceedings and, among other things, terminate Riffin’s participation in these proceedings (collectively, the Harsimus Abandonment Proceeding). Riffin contemporaneously filed a motion to stay the Board’s April 28 decision. The Board will consider Riffin’s May 30 filing as a petition to reopen and will deny it.² The Board will also deny as moot Riffin’s motion to stay.

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decision, EP 696 (STB served Sept. 2, 2010).

² Any request to reconsider here is untimely. See 49 C.F.R. § 1115.3.

BACKGROUND

The Harsimus Abandonment Proceeding involves Consolidated Rail Corporation's (Conrail's) request for authority to abandon an approximately 1.36-mile portion of a line of railroad, known as the Harsimus Branch, located in the City of Jersey City, N.J. The Harsimus Branch, most of which is in an area of commercial development, has not been used for rail service in decades. The Harsimus Abandonment Proceeding began in 2008, but the Board held it in abeyance while a related proceeding underwent protracted litigation in the federal courts.³ After that litigation concluded, the Board vacated the abeyance and restarted the historic and environmental review process. See Harsimus Abandonment Proceeding, AB 167 (Sub-No. 1189X) et al., slip op. at 6 (STB served Aug. 11, 2014).

On June 8, 2015, Riffin filed a notice of intent to file an offer of financial assistance (OFA) in the Harsimus Abandonment Proceeding and began participating in the discovery process. The Board issued decisions on discovery-related matters on May 22, 2015, November 2, 2015, and July 1, 2016. On July 5, 2016, the resolution of all pending and future discovery disputes between the multiple parties in the Harsimus Abandonment Proceeding was referred to a Federal Energy Regulatory Commission (FERC) ALJ pursuant to the Memorandum of Understanding between FERC and the Board authorizing the referral of certain discovery matters pending before the Board to FERC ALJs for resolution. See Harsimus Abandonment Proceeding, AB 167 (Sub-No. 1189X) et al. (STB served July 5, 2016). The ALJ held hearings concerning the referred discovery disputes on August 24, 2016, and October 24, 2016. (See Tr., Aug. 24, 2016; Tr., Oct. 24, 2016.) The subject of the August 24 hearing included a motion to compel discovery from Riffin filed by the City of Jersey City, Rails to Trails Conservancy, and Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition (collectively, the City). During the hearing, the parties represented to the ALJ that they had reached an agreement regarding production of documents. (Tr. 13-15, 17-18, Aug. 24, 2016.) Riffin further agreed during the hearing to produce additional information relating to his bankruptcy proceedings and the ALJ issued an order memorializing the parties' agreement regarding these discovery responses. (See id. at 21; Harsimus Abandonment Proceeding, AB 167 (Sub-No. 1189X) et al. (STB served Aug. 25, 2016).)

³ Conrail filed a notice of exemption in the Harsimus Abandonment Proceeding to abandon the Harsimus Branch following a 2007 decision by the Board in a related case finding that the Harsimus Branch is a line of railroad subject to its abandonment licensing authority. City of Jersey City—Pet. for Declaratory Order, FD 34818, (STB served Aug. 9, 2007). The courts ultimately agreed that the Harsimus Branch is a line of railroad. Consol. Rail Corp. v. STB, 571 F.3d 13, 19 (D.C. Cir. 2009) (sending the case to district court for a determination of the status of the Harsimus Branch); City of Jersey City v. Consol. Rail Corp., 968 F. Supp. 2d 302 (D.D.C. 2013) (finding that Harsimus Branch was conveyed as a line of railroad in 1976), aff'd, No. 13-7175 (D.C. Cir. Feb. 19, 2014).

The ALJ held a subsequent hearing on October 24, 2016, to address, among other things, a motion for sanctions based on Riffin's alleged noncompliance with the ALJ's August 25 discovery order. (See generally Tr., Oct. 24, 2016.) At the conclusion of the hearing, the ALJ found that Riffin had not complied with the discovery order. (*Id.* at 76-77.) The ALJ also made a credibility determination that Riffin was not being truthful in his representations to the ALJ during the hearings. (*Id.*; see also Harsimus Abandonment Proceeding, AB 167 (Sub-No. 1189X) et al., slip op. at 2 (STB served Oct. 26, 2016).) As a remedy, the ALJ dismissed Riffin from the Harsimus Abandonment Proceeding, struck his filings, prohibited him from submitting further filings, and directed him to pay attorney's fees to the City. (Tr. 77-78, Oct. 24, 2016; see also Harsimus Abandonment Proceeding, AB 167 (Sub-No. 1189X) et al., slip op. at 2 (STB served Oct. 26, 2016).)

Riffin appealed the ALJ's order to the Board on January 31, 2017, and the Board denied the appeal on April 28, 2017, finding that there was no clear error or manifest injustice in the ALJ's findings and imposition of sanctions. See Harsimus Abandonment Proceeding (the April 28 Decision), AB 167 (Sub-No. 1189X) et al. (STB served Apr. 28, 2017). On May 30, 2017, Riffin filed a "Petition to Reconsider/Reopen" the April 28 Decision. He simultaneously filed a motion to stay the April 28 Decision. On June 19, 2017, the City filed replies to Riffin's petition and motion to stay.

DISCUSSION AND CONCLUSIONS

Riffin states that he is seeking relief pursuant to 49 C.F.R. § 1115.3 (petition for reconsideration) or 49 C.F.R. § 1115.4 (petition to reopen an administratively final Board action). Because Riffin filed his petition outside the 20-day reconsideration period under § 1115.3, the Board will only consider it as a petition to reopen under § 1115.4.

A petition to reopen will be granted only if it presents new evidence, substantially changed circumstances, or a material error in the decision being challenged. 49 U.S.C. § 1322(c); 49 C.F.R. § 1115.4. The alleged grounds for reopening must be sufficient to show that, if accepted, they would lead the Board to materially alter its prior decision. Canadian Nat'l Ry.—Control—EJ&E W. Co., FD 35087 (Sub-No. 8), slip op. at 4 (STB served Apr. 26, 2017). If a party has presented no new evidence, changed circumstances, or material error that "would mandate a different result," then the Board will not reopen. *Id.* (quoting Montezuma Grain Co. v. STB, 339 F.3d 535, 541-42 (7th Cir. 2003)).

Riffin bases his petition only on material error. Specifically, he states that the Board "does not have the statutory / Constitutional authority[] to compel Riffin to disclose papers / documents / e-mails, when no 'Complaint' has been filed." (Pet. 2.) Thus, Riffin states that the Board and the ALJ had no authority to summon Riffin to a hearing, consider the City's motion to compel, order Riffin to respond to discovery, or sanction Riffin. (*Id.* at 5.) In support of his argument, Riffin relies on Harriman v. ICC, 211 U.S. 407 (1908) and Federal Trade Commission v. American Tobacco Co. (American Tobacco), 264 U.S. 298 (1924). (Pet. 2-4.)

Riffin's argument that the Board lacked authority to compel the production of documents based on American Tobacco and Harriman is untimely, as he failed to raise it either before the ALJ or in his appeal of the ALJ's order to the Board, waiting instead to assert his new theory for the first time in his current petition to reopen. Thus, this argument is waived by Riffin's "own failure to raise the argument in good time." BNSF Ry. v. STB, 453 F.3d 473, 479 (D.C. Cir. 2006); see also Boston & Maine Corp.—Pet. for Declaratory Order, FD 35749, slip op. at 4 (STB served Oct. 31, 2013) (finding arguments not presented until reconsideration to be waived); Norfolk S. Ry.—Pet. for Exemption—in Balt. City & Balt. Cty., Md., AB 290 (Sub-No. 311X), slip op. at 8 (STB served Jan. 27, 2012) (finding Riffin waived argument raised on reopening); Simplified Standards for Rail Rate Cases, EP 646 (Sub-No. 1), slip op. at 13 (STB served Mar. 19, 2008) ("[N]ew arguments that could have been presented earlier cannot be raised for the first time on reconsideration."); Tex. Mun. Power Agency v. BNSF Ry., NOR 42056, slip op. at 3 (STB served Sept. 24, 2004) ("Nothing in the statute or the Board's regulations obliges the agency to rethink its decisions whenever a party wishes to try out a new theory or finds new information at a late stage in the process.").

Even if Riffin's argument had not been waived, it is without merit and, thus, there was no material error in the ALJ's decision or the Board's decision denying Riffin's appeal. American Tobacco and Harriman addressed federal agencies' limits regarding compelling persons or corporations to disclose evidence in an agency-initiated investigation. American Tobacco, 264 U.S. at 304; Harriman, 211 U.S. at 422. Riffin's reliance on these cases is inapposite here for two reasons. First, this was not an agency subpoena nor an investigative proceeding initiated by the Board. Conrail initiated the Harsimus Abandonment Proceeding to obtain Board authority to abandon a line of rail and, during the proceeding, the parties sought discovery from each other.

Second, unlike the appellants in Harriman and the respondents in American Tobacco, Riffin intentionally and voluntarily subjected himself to the Board's jurisdiction by submitting a notice of intent to file an OFA in this proceeding on June 8, 2015. In fact, at that time, he sought the production of documents from Conrail—a request the Board granted. See Harsimus Abandonment Proceeding, AB 167 (Sub-No. 1189X) et al., slip op. at 6 (STB served Nov. 2, 2015). Since then, Riffin actively and voluntarily participated in discovery in this proceeding.⁴ Neither Harriman, nor American Tobacco involved a party that voluntarily and actively participated in agency proceedings, nor did they involve an agency's sanctions against that party for improper conduct during those proceedings, as is the case here.⁵ Accordingly,

⁴ Riffin has also made 40 filings on the record in this proceeding since 2015.

⁵ As the Board explained in its April 28 Decision, the Board's current regulations provide that "[p]arties may obtain discovery . . . regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding" 49 C.F.R. § 1114.21(a), and that, if a party fails to comply with an order compelling discovery, the Board may impose sanctions, see

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Harriman and American Tobacco are not applicable here, and nothing in those cases as applied to the facts of this proceeding demonstrates material error.

In addition, Riffin's characterization of the ALJ order is inaccurate. The order simply formalized Riffin's previously-stated agreement to produce certain documents and information. (See Tr. 17, Aug. 24, 2016 ("Mr. Riffin: Whatever is in my e-mail account, I have agreed I will give him a copy Presiding Judge: Very good. I will enter an order to that."); Harsimus Abandonment Proceeding, AB 167 (Sub-No. 1189X) et al., slip op. at 1 (STB served Aug. 25, 2016) (explaining that the City and Riffin "entered an agreement into the record" and "[t]he Presiding Administrative Law Judge ordered compliance with the agreement").) Thus, the ALJ ordered Riffin to do no more than produce information and documents he previously agreed to provide, further rendering Harriman and American Tobacco inapplicable.

Furthermore, courts have found that American Tobacco and Harriman have since been abrogated. See In re McVane, 44 F.3d 1127, 1134 (2d Cir. 1995) (noting that in Okla. Press Pub. Co. v. Walling, 327 U.S. 186 (1946), and United States v. Morton Salt Co., 338 U.S. 632 (1950), the Supreme Court "decisively abandoned" its position in American Tobacco); Craib v. Bulmash, 777 P.2d 1120, 1124 (Cal. 1989) (stating that "it is now clear that such a restrictive view [as Harriman] of the administrative process is not constitutionally compelled[,] and recognizing that Harriman was abrogated by Morton Salt).

Therefore, Riffin has failed to demonstrate any material error by the ALJ or the Board, and has presented no grounds that would materially alter the Board's prior appeal decision. Contemporaneous with the filing of his petition to reopen, Riffin filed a motion to stay the Board's prior appeal decision. Because the Board denies Riffin's petition to reopen, it also will deny his motion to stay as moot.

It is ordered:

1. Riffin's petition to reopen is denied.
2. Riffin's motion to stay is denied.
3. This decision is effective on the date of service.

By the Board, Board Members Begeman, Elliott, and Miller.

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id. § 1114.31(b)(2) (containing a non-exhaustive list of available sanctions).” April 28 Decision, AB 167 (Sub-No. 1189X) et al., slip op. at 9.