

45708
EB

SERVICE DATE – APRIL 28, 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 This decision denies James Riffin’s appeal of an order dismissing him from these proceedings, striking his pleadings, and ordering him to pay certain attorney’s fees.

Decided: April 27, 2017

On January 31, 2017, James Riffin (Riffin) appealed the October 26, 2016 decision (October Sanctions Decision) issued by an Administrative Law Judge (ALJ) at the Federal Energy Regulatory Commission (FERC) that, among other things, dismissed Riffin from these proceedings (collectively, the Harsimus Abandonment Proceeding). The appeal will be denied.

BACKGROUND

The Harsimus Abandonment Proceeding involves a request by Consolidated Rail Corporation (Conrail) 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 line, which is in an area of heavy commercial development, has not been used for rail service in decades. The Harsimus Abandonment Proceeding began in 2008 but was held in abeyance while a related

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. See Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

proceeding underwent protracted litigation in the federal courts,² after which the Board vacated the abeyance, restarted the historic and environmental review process, and began ruling on discovery motions filed by the parties. See Harsimus Abandonment Proceeding, AB 167 (Sub-No. 1189X), et al., slip op. at 2-6 (STB served Aug. 11, 2014).

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 in the Harsimus Abandonment Proceeding was referred to a FERC ALJ pursuant to the Memorandum of Understanding (MOU) between FERC and the Board authorizing the referral of certain discovery matters pending before the Board to FERC ALJs for resolution. See generally Harsimus Abandonment Proceeding, AB 167 (Sub-No. 1189X), et al. (STB served July 5, 2016).

The ALJ held a hearing on August 24, 2016, (August Hearing) to address a motion to compel Riffin to respond to discovery requests filed by the City of Jersey City, Rails to Trails Conservancy, and Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition (collectively, the City) on July 5, 2016. (See generally Tr., Aug. 24, 2016.) The City primarily sought, through its motion to compel, email communications between Riffin and the LLC Intervenor.³ In response, Riffin had initially either claimed not to have any responsive documents or objected to the discovery requests on the basis of privilege, availability, or relevance. (See City 2d Mot. to Compel, Ex. B, July 5, 2016.) On the eve of the August hearing, however, Riffin approached the City's counsel at a restaurant, displayed his laptop, and advised counsel that he could view the pertinent documents at that time. (Tr. 13-15, Aug. 24, 2016.) Ultimately, Riffin and the City's counsel agreed that Riffin would provide the requested documents. (Id. at 15.) Based on that agreement and further representations made at the hearing, the ALJ issued a written decision directing Riffin to provide "all e-mail communications between him and the [LLC Intervenor] that Mr. Riffin retains in his possession" to the City and Conrail by August 26, 2016. Harsimus Abandonment Proceeding, AB 167 (Sub-No. 1189X) et al., slip op. at 2 (STB served Aug. 25, 2016) (August Discovery Order). The ALJ warned Riffin

² 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, slip op. at 1 (STB served Dec. 19, 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 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).

³ The LLC Intervenor (the LLCs) are 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.

that there would be consequences for noncompliance and that he would entertain a motion for sanctions if Riffin did not fully and timely comply with his order. (Tr. 17-19, Aug. 24, 2016.)

On September 15, 2016, the City filed a motion for sanctions against Riffin, including a request that Riffin be dismissed from the proceeding, alleging that Riffin had failed to comply with the August Discovery Order. The City argued that the extreme sanction of dismissal was warranted because Riffin had violated an order in response to a motion to compel. (City Mot. for Sanctions 16-18, Sept. 15, 2016.) The City also argued that further admonishments and orders for compliance would be ineffective because Riffin has ignored such orders in this and other proceedings. (*Id.* at 9-12.) In response, Riffin argued that he had complied with the August Discovery Order and that he was not abusing Board procedures and, thus, sanctions were not appropriate. (*See generally* Riffin Reply, Sept. 26, 2016.)

The ALJ held a hearing on the City's motion for sanctions on October 24, 2016 (*see generally* Tr., Oct. 24, 2016), during which the ALJ heard testimony and arguments from the parties (October Hearing). At the October Hearing, the City argued that Riffin had not made a good faith response to the discovery requests and that he had not conducted a complete search for documents or produced all responsive documents. (*Id.* at 11-15.) The City relied on emails Riffin had sent to the City's counsel stating that he had forwarded 103 emails and that "[i]f you want any more, you will have to ask [the ALJ] to order it." (City Mot. for Sanctions, Ex. C.) In addition, the City pointed to emails Riffin produced (1) that were missing information identifying the sender, (2) in which the body of the email was empty, (3) that did not include referenced attachments, and (4) that appeared, based on the text, to have omitted parts of the communication. (*Id.*, Exs. D & E; *see also* Tr. 18-19, 29-30, Oct. 24, 2016.) The City also directed the ALJ's attention to responsive emails that Riffin did not include in his production, but that the City had received from other sources as evidence of an incomplete response. (City Mot. for Sanctions, Exs. F, G, & I.) The City further argued that Riffin was required to produce emails with all agents of the LLCs, but that he had improperly limited his response to the owners of the LLCs and their attorney. (Tr. 21-22, Oct. 24, 2016.)

In response, Riffin asserted that he had produced all responsive emails he had. (*Id.* at 41.) Riffin also contended that (1) any responsive emails not produced had been deleted before the August Hearing, (2) any emails missing information appeared that way in his email account, and (3) he had included emails with all individuals he thought were agents. (*See id.* at 37-70.)

At the conclusion of the October Hearing, the ALJ found, based on the evidence and the testimony, that Riffin's claim that he had produced all responsive documents was not credible. (*Id.* at 76-77.) The ALJ also found that Riffin was generally not a reliable witness. (*Id.* At 77.) In his written order, the ALJ explained the basis of these findings, stating that:

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.

Harsimus Abandonment Proceeding, AB 167 (Sub-No. 1189X) et al., slip op. at 2 (STB served Oct. 26, 2016) (October Sanctions Decision) (internal footnote omitted). 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. (*Id.*; see also Tr. 77-78, Oct. 24, 2016.)

Riffin appealed the ALJ's order to the Board on January 31, 2017.⁴ The City and the LLCs filed replies to Riffin's appeal on February 7, 2017, to which Riffin filed a rebuttal on February 10, 2017. On February 17, 2017, the City filed a comment regarding Riffin's rebuttal, to which Riffin replied on March 8, 2017.

DISCUSSION AND CONCLUSIONS

Riffin's Appeal

The Standard. An interlocutory appeal is an appeal prior to a final Board decision on the merits of a proceeding. Finch Paper LLC—Pet. for Declaratory Order (Finch Paper), FD 35981, slip op. at 5 (STB served Jan. 11, 2017). Under 49 C.F.R. § 1115.9(a), a Board employee's ruling on discovery (including an ALJ's ruling) may be appealed on an interlocutory basis only if it meets one of four enumerated circumstances: (1) the ruling denies or terminates any person's participation; (2) the ruling grants a request for the inspection of documents not ordinarily available for public inspection; (3) the ruling overrules an objection based on privilege, the result of which is to require the presentation of testimony or documents; or (4) the ruling may result in substantial irreparable harm, substantial detriment to the public interest, or undue prejudice to a party. *Id.*, FD 35981, slip op. at 5. If an appeal meets at least one of the threshold requirements under § 1115.9(a), the Board will analyze the merits of the appeal under the standard outlined in 49 C.F.R. § 1115.1(c). *Id.* That standard explains that such appeals "are not favored" and "will be granted only in exceptional circumstances to correct a clear error in judgment or to prevent manifest injustice." 49 C.F.R. § 1115.1(c).

The § 1115.9 threshold determination. Riffin meets the § 1115.9(a) threshold because his participation in the proceeding was terminated by the ALJ. See 49 C.F.R. § 1115.9(a)(1) (providing the opportunity to appeal a ruling that "denies or terminates any person's

⁴ For a summary of the voluminous filings made after the October Sanctions Decision and before the appeal, see Harsimus Abandonment Proceeding, AB 167 (Sub-No. 1189X), et al., slip op. at 1-2 (STB served Jan. 26, 2017).

participation”). Thus, the Board will address the merits of his appeal under the standard outlined in § 1115.1(c). See Finch Paper, FD 35981, slip op. at 5 (STB served Jan. 11, 2017).

The § 1115.1 merits determination. To prevail under § 1115.1(c), Riffin must meet the high burden of showing that the ALJ’s decision imposing sanctions constituted a clear error of judgment or would result in manifest injustice. In ruling on discovery appeals, the Board has accorded the ALJ broad discretion to act within the scope of his or her authority. See Finch Paper, FD 35981, slip op. at 4 (STB served Mar. 24, 2017); CSX Corp.—Control & Operating Leases/Agreements—Conrail Inc., FD 33388, slip op. at 3, 5 (STB served Feb. 23, 1998). Thus, Riffin must do more than show that the ALJ could have reached a different outcome regarding the motion for sanctions.

Riffin makes two principal arguments in his attempt to meet the clear error/manifest injustice standard. First, Riffin argues that he complied with the August Discovery Order. (Riffin Appeal 1, Jan. 31, 2017.) Second, Riffin contends that the ALJ failed to follow the appropriate criteria for imposing the sanction of dismissal under Federal Rule of Civil Procedure 37, resulting in both manifest injustice and a denial of his due process rights. (Id. at 1-3.)⁵ As discussed below, the Board concludes that Riffin has failed to show that the ALJ’s decision contains a clear error of judgment or results in manifest injustice under § 1115.1(c).

Compliance with Discovery Order. Riffin argues that he did, in fact, provide all responsive documents, and that the ALJ had no reasonable basis for not believing him. (Riffin Appeal 17-24.) But the evidence in the case demonstrates that there were at least some documents that Riffin failed to produce, (see, e.g., City Mot. for Sanctions, Ex. G & J), and that there were several irregularities associated with others that he did produce (see, e.g., id., Exs. D & E). Thus, on this basis alone, the ALJ had reason to conclude that Riffin had failed to provide all responsive documents.

Moreover, at the conclusion of the October Hearing, the ALJ additionally found that, based on his observations during the hearing and the evidence submitted, Riffin’s claim that he

⁵ Riffin also contends that the Board lacks jurisdiction to issue a decision in this proceeding, and therefore the ALJ similarly lacks the necessary jurisdiction. (Riffin Appeal 30-33.) This argument is outside the scope of the matters Riffin is permitted to include in his appeal as it does not go to the merits of the ALJ’s decision. Harsimus Abandonment Proceeding, AB 167 (Sub-No. 1189X) et al., slip op. at 4 (STB served Jan. 26, 2017) (“Riffin is restricted to filings addressing his appeal [of the ALJ’s decision] only”). Further, the issue of the Board’s jurisdiction over the Harsimus Branch has been litigated and decided. See City of Jersey City v. Consol. Rail Corp., 968 F. Supp. 2d 302 (D.D.C. 2013); 212 Marin Blvd., LLC—Pet. for Declaratory Order, FD 32852 (STB served Aug. 11, 2014); see also James Riffin—Pet. for Declaratory Order, FD 36078 (STB served Apr. 27, 2017).

had complied with discovery was not credible. (Tr. 76-77, Oct. 24, 2016.) In a subsequent written order, the ALJ elaborated on this credibility finding, explaining that it was primarily based on (1) the fact that Riffin had contradicted himself, (2) Riffin's evasiveness when questioned, and (3) Riffin's general deportment during the October Hearing. (October Sanctions Decision 2.) The ALJ further held that, because he did not find Riffin to be credible, he did not believe that he was being truthful about his compliance with the August Discovery Order and, thus, was adopting the City's rationale for imposing sanctions, including dismissal. (Id.; see also City Mot. for Sanctions 10-20.)

An ALJ's credibility determinations based on assessment of demeanor "are entitled to great deference as long as relevant factors are considered and resolutions explained." Atl. Limousine, Inc. v. NLRB, 243 F.3d 711, 718 (3rd Cir. 2001); see also Amadeo v. Zant, 486 U.S. 214, 227 (1998) (stating that fact-finder credibility determinations are given deference); Andrzejewski v. FAA, 563 F.3d 796, 799 (9th Cir. 2008) (acknowledging that an ALJ's credibility determination is entitled to deference by NTSB). Here, the ALJ based his conclusion as to Riffin's demeanor on a number of relevant factors and provided a clear explanation for his determination. Thus, in accordance with the great deference that must be accorded to the ALJ's determination, the Board finds no clear error of judgment or manifest injustice in the ALJ's conclusion that Riffin's assertions regarding his alleged discovery compliance were not credible.

First, the transcripts and evidence show that Riffin indeed contradicted himself multiple times, including on the core issue of whether he had any responsive documents to produce. (Compare City 2d Mot. to Compel, Ex. B at 2 with Tr. 13-15, Aug. 24, 2016 and Tr. 11, Oct. 24, 2016.) Despite initially having claimed that he had no documents responsive to the City's discovery requests,⁶ Riffin later acknowledged that he had responsive emails and he agreed to provide a copy of those emails to the attorney for the City. (Tr. 15, Aug. 24, 2016.) In any event, it is clear that Riffin did not produce all the documents that he indicated were in his possession, and that other documents that he produced were, at a minimum, incomplete or possibly altered. (See Tr. 18-19, 21-23, 29-30, Oct. 24, 2016; City Mot. for Sanctions, Exs. D, E, F, & G.)

⁶ The City originally served its discovery request on Riffin on March 28, 2016. (See City Mot. to Compel 1-2, May 2, 2016.) When Riffin failed to respond, the City filed a motion to compel on May 2, 2016. (See generally id.) That same day, Riffin responded to the City by claiming that he "has not received, nor is he in possession of, any 'documents' from the LLCs." (City 2d Mot. to Compel, Ex. B at 2, July 5, 2016.) He further stated that he does not routinely communicate via email and that he promptly deletes emails he receives after reviewing them. (Id.). Based on Riffin's response, the City withdrew its motion to compel on June 7, 2016. (See City Withdrawal of Mot., June 7, 2016.) On July 5, 2016, the City filed a second motion to compel arguing that the May 2, 2016 responses it had received from Riffin were in fact "misrepresentations and objections." (City 2d Mot. to Compel, Ex. B at 2.)

Second, the record also supports the ALJ's finding that Riffin was evasive when questioned about the completeness of his discovery response. The ALJ asked Riffin multiple times to explain what he meant when he told the City's attorney, "[i]f you want any more, you will have to ask [the ALJ] to order it." (See Tr. 53-55, Oct. 24, 2016; see also City Mot. for Sanctions, Ex. C.) Despite the ALJ asking the question several times and telling Riffin that he had not answered the question, Riffin never explained why, if he had in fact produced all the responsive documents, he had made a statement implying he actually had additional responsive documents in his possession that he would not produce without a further order. (See Tr. 53-55, Oct. 24, 2016.)⁷

In light of the cogent explanation the ALJ provided and the support in the October Hearing transcript for the ALJ's conclusions regarding Riffin's demeanor and credibility, the ALJ acted properly in considering Riffin's deportment in determining whether Riffin had complied with his discovery obligations. (October Sanctions Decision 2.)

In his appeal, Riffin also makes several arguments suggesting that he did not know how to comply with the August Discovery Order. Riffin appears to assert that the August Discovery Order was unclear and that this lack of clarity relieved him of his obligation to fully comply with it. (Riffin Appeal 19-24.) For example, Riffin claims that the August Discovery Order does not specify "where" Riffin was to provide the City with the email communications. (Riffin Appeal 19.) But even a cursory review of the transcript from the August Hearing debunks this claim. During the hearing, the process by which Riffin would provide the emails was not only explicitly discussed, but agreed to by Riffin. (Tr. 15, Aug. 24, 2016 ("My suggestion to [the City's attorney] last night was I will e-mail him a copy of whatever is there, and I'm also going to send [Conrail's attorney] a copy . . ."); id. at 17 ("Whatever is in my e-mail account, I have agreed I will give him a copy. . . . He will probably have it on his e-mail account before he gets home."); Tr. 37-38, Oct. 24, 2016 ("The agreement was I was to forward to him whatever e-mails were remaining . . .").)⁸

⁷ Riffin's claim of a faulty memory with respect to particular agents of the LLCs also lacked credibility. For example, Riffin claimed he did not remember Bruce Nagel (an individual the City alleged was an agent of the LLCs). (Tr. 55-57, Oct. 24, 2016.) Yet Riffin had sent a 10-page memo addressed to Nagel outlining Riffin's case strategy only four months prior to the City's request for documents and 10 months prior to the August Hearing. (See City Mot. for Sanctions, Ex. G.)

⁸ Riffin makes a related argument that the Federal Rules of Civil Procedure only require him to make responsive documents available for inspection, but not to produce copies. (Riffin Appeal 22.) Even if Riffin were correct, his argument is irrelevant because the August Discovery Order specifically required Riffin to provide actual copies of the emails to the City. August Discovery Order at 2. Such a requirement is within the authority of a judge to order. See United States v. Ratcliff, 806 F.2d 1253, 1255 (5th Cir. 1986) (noting that trial courts have broad discretion over discovery orders). Moreover, Riffin agreed to provide copies to the City and thus

(continued . . .)

Riffin also fails to support his claim that he turned over all of the emails he sent to or received from the various “agents” of the LLCs. He argues that the August Discovery Order was unclear as to whether the provision of emails between Riffin and the LLCs included “agents” of the LLCs and, thus, Riffin was not required to provide emails other than those with Steve Hyman, Victoria Hyman, and Daniel Horgan (the LLCs’ previous owner, current owner, and attorney, respectively). (Riffin Appeal 19-20.) However, Riffin had multiple opportunities to ask the ALJ for clarification if he had any questions about the scope of the discovery, and yet he did not do so. Instead, when the City challenged the fact that Riffin had limited his interpretation of the August Discovery Order to only require production of emails from specific people, Riffin’s response was that if the City wanted any more emails, the City would “have to ask [the ALJ] to order it.”⁹ (City Mot. for Sanctions, Ex. C.) Nonetheless, when the record is viewed in its entirety (i.e., discovery requests, the motion to compel, the exhibits to the pleadings, the arguments made in the August Hearing, and the ALJ’s verbal and written August holdings), it is clear that Riffin was on notice of what he was required to produce as part of discovery and Riffin has failed to show clear error of judgment or manifest injustice.

Appropriate Criteria for Imposition of Sanctions. Riffin also argues that when he imposed the sanction of dismissal, the ALJ did not comply with Federal Rule of Civil Procedure 37 (Rule 37) which deals with the process for instances in which a party fails to comply with a discovery order. First, Riffin argues that the ALJ’s failure to explicitly consider lesser sanctions

(continued . . .)

waived any objection to that requirement. See Pyco Indus., Inc.—Feeder Line Application—Lines of S. Plains Switching, Ltd., FD 34890, slip op. at 6 (STB served June 11, 2010) (“An agency, however, does not commit ‘material error’ by accepting a party’s waiver of a legal argument.”); BNSF Ry. v. STB, 453 F.3d 473, 479 (D.C. Cir. 2006) (“A reviewing court generally will not consider an argument that was not raised before the agency at the time appropriate under its practice.” (internal quotation omitted)).

⁹ Riffin also argues that the August Discovery Order was fatally flawed because it did not state “**HOW** it was to be determined **WHAT** e-mails were ‘remaining.’” (Riffin Appeal 19 (emphasis in original).) To the extent Riffin is arguing that he did not comply because he did not know who the LLCs’ agents were, Riffin could and should have sought clarification from the ALJ rather than using the alleged omission as a reason for not complying with the order.

In another argument in the same section of his appeal, Riffin asserts that the August Discovery Order should have included an explanation of how it would be determined “**whether** ‘all remaining e-mails’ had in fact been forwarded to [the City’s counsel], and **whether** the emails that were forwarded to [the City’s counsel] were precisely identical to the e-mails appearing on Riffin’s computer monitor.” (Id. (emphasis in original).) Again, this claim is suspect because only Riffin would know what he turned over and what he withheld. In any case, if he had questions, he should have sought clarification. As it is, he offers no reason—and none is apparent—why he could not comply with the August Discovery Order.

deprived him of due process and resulted in manifest injustice. (Riffin Appeal 26-29.) Second, Riffin argues that the ALJ could not dismiss him from the proceeding without first issuing a show-cause order, holding a hearing, and obtaining certification from the City that a good faith effort had been made to resolve all discovery issues. (Id. at 28-29.)

Riffin's arguments fail to meet the standards for granting his appeal. While the Board may use the Federal Rules of Procedure as guidance "[i]n discovery matters," the Board is "neither governed nor limited by the Federal Rules." FMC Wyo. Corp. v. Union Pac. R.R., NOR 42022, slip op. at 4 (STB served Feb. 4, 1998). Thus, it is not clear error for the Board—or here the ALJ—to not strictly adhere to the procedural requirements of Rule 37, particularly when the sanctions were imposed under Board regulations that specifically provide that "parties 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 id. § 1114.31(b)(2) (containing a non-exhaustive list of available sanctions).

In any event, the goals of the Rule 37 procedural requirements – a show-cause order, a certificate of good faith, and a hearing – are consistent with what occurred here. Contrary to Riffin's claim, a show-cause order is not required under the federal rules prior to imposition of sanctions. See Fed. R. Civ. P. 37(b). Although some courts have indicated a preference for a show-cause order, those courts have done so to ensure fairness to the parties by providing them notice that they may be subject to sanctions and affording them the opportunity to respond. See Edgar v. Slaughter, 548 F.2d 770, 772-73 (8th Cir. 1977). Here, Riffin had ample notification that he would be subject to sanctions for non-compliance, as he was given an explicit warning from the ALJ at the August hearing. (Tr. 18, Aug. 24, 2016.) Riffin was also given notice that sanctions, including possible dismissal from the proceeding, were being actively considered once he was served with the City's motion for sanctions, (City Mot. for Sanctions 7; see also City 2d Mot. to Compel 8-9.) Moreover, although Rule 37 requires a good faith certification from the opposing party, the purpose is to ensure that unnecessary disputes that could have been resolved by the parties do not take up the court's time. See Fed. R. Civ. P. 37(d)(1)(B). While the City did not file a certification that it had attempted in good faith to resolve the dispute before coming to the ALJ, the record shows that the City made good-faith efforts and that Riffin nonetheless refused to comply. Thus, despite the City's efforts to obtain the documents from Riffin, it is clear that this dispute could not be resolved by the parties. Finally, the October Hearing was effectively a show-cause hearing in that it was held, in part, to address a motion for sanctions for discovery violations. See Harsimus Abandonment Proceeding, AB 167 (Sub-No. 1189X) et al., slip op. at 2 (STB served Oct. 12, 2016).

Beyond that, Riffin asserts that due process requires explicit findings by the ALJ that lesser sanctions would not have been effective. (Riffin Appeal 26-27.) But no such findings are required by the courts. See, e.g., Malone v. U.S. Postal Svc., 833 F.2d 128, 132 (9th Cir. 1987) ("We have indicated a preference for explicit discussion by the district court of the feasibility of alternatives when ordering dismissal. However, we have never held that explicit discussion of

alternatives is *necessary* for an order of dismissal to be upheld.” (internal citations omitted) (emphasis in original)); *see also Hashemi v. Campaigner Publ’ns. Inc.*, 737 F.2d 1538, 1539 (11th Cir. 1984) (“the district court retains the discretion to dismiss a complaint where the party’s conduct amounts to flagrant disregard and willful disobedience of the court’s discovery orders.” (internal quotation omitted)). In addition, that the ALJ’s sanctions here could include dismissal should have come as no surprise to Riffin. At the August Hearing, the ALJ stated that “my idea of sanctions—you probably know, Mr. Riffin, under the regulations what the sanctions are, and I’m not limiting myself to one. I may issue all of the sanctions.” (Tr. 18, Aug. 24, 2016.) And Riffin later acknowledged that the possibility of sanctions was made “very clear.” (Tr. 72, Oct. 24, 2016 (“[Y]ou made it very clear, you don’t comply with your order, there are going to be consequences, and they won’t be pleasant.”).) Because the ALJ was not required to explicitly consider lesser sanctions, and because Riffin was on notice that failure to comply with the ALJ’s order would likely result in sanctions, including possible dismissal, Riffin fails to support his claims of manifest injustice and denial of due process.

Moreover, the record easily supports the conclusion that a lesser sanction would not be effective. There is evidence¹⁰ that Riffin became a party to this proceeding for improper purposes (causing harassment, creating delay, and forcing a settlement to benefit him financially).¹¹ Indeed, as previously noted, the City presented evidence (which the ALJ relied on) showing that Riffin was engaged in a pattern of conduct of obstruction and delay with respect to discovery here¹² and had not changed his behavior when ordered to produce discovery

¹⁰ As argued by the City, there is evidence that Riffin may receive a percentage of any financial settlement the owner of the LLCs obtains in litigation concerning use of the property. (*See* City Reply to LLC Mot. for Sanctions, App. I, V.S. Gregg Wasser at 2, Oct. 20, 2016.)

¹¹ Further, Riffin continues to ignore the warnings he has been given in other cases regarding his unprofessional conduct before the Board. *See Norfolk S. Ry.—Aban. Exemption—in Norfolk & Va. Beach Va.*, AB 290 (Sub. No. 293X), slip op. at 3 (STB served Nov. 6, 2007), *appeal dismissed sub nom. Riffin v. STB*, 331 Fed. Appx. 751 (D.C. Cir. 2009) (discussing witness testimony that Riffin sought to impede that proceeding but “would consider a settlement to withdraw his participation and not cause delay . . .”); *see also Norfolk S. Ry. Co.—Acquis. & Operation—Certain Rail Lines of the Del. & Hudson Ry.*, FD 35873, slip op. at 2 (STB served Mar. 24, 2016) (striking four of Riffin’s pleadings in that proceeding as irrelevant, immaterial, and “wholly inconsistent” with professional standards and directing him to “refrain from future submissions of unprofessional material”).

¹² For example, in response to the discovery requests at issue, Riffin provided no response at all until the City filed a motion to compel. On the same day that the motion was filed, Riffin sent objections to the discovery response and then claimed that he had no responsive documents. Then, after another motion to compel was filed, Riffin abruptly admitted that he had responsive documents and on the night before the oral argument on the motion to compel, agreed to provide responsive documents. Finally, as discussed above, he failed to fully comply with the ALJ’s August Discovery Order.

in the August Discovery Order. Thus, there was a more than sufficient basis for the ALJ to determine that Riffin was participating in the Harsimus Abandonment Proceeding to harass the other parties and to significantly delay the progress and resolution of the proceeding. Riffin's conduct after filing his November 14, 2016 appeal seems to confirm this point; he filed numerous supplements, comments, and motions, some of which clearly violate the Board's prohibition against filing redundant, irrelevant, immaterial, impertinent, or scandalous matter. 49 C.F.R. § 1104.8.¹³ Given the credibility findings made by the ALJ and Riffin's undeterred dilatory and obstructive behavior, the sanction of dismissal was entirely appropriate here.¹⁴

Based upon review of the ALJ's October Sanctions Decision and the record of this case, the Board finds that Riffin has not shown that the ALJ's order reflects a clear error of judgment or manifest injustice, and his appeal will be denied. As a result, Riffin is dismissed from the Harsimus Abandonment Proceeding, and all filings struck by the ALJ remain stricken. Additionally, Riffin is prohibited from submitting further filings and is directed to pay attorney's fees to the City in accordance with the October Sanctions Decision.

Riffin's Request for a Stay and the City's Protective Appeal

Included in Riffin's appeal is a request for a stay of the ALJ's October Sanctions Decision dismissing Riffin. Because the Board will deny Riffin's appeal, the request for a stay will be denied as moot. For the same reasons, the City's Feb. 2, 2017 "Protective

¹³ Riffin's filings include two supplements to his appeal and filings captioned as "Riffin's Observations Regarding His Appeal of ALJ Dring's October 26, 2016 Served Decision" (filed Dec. 9, 2016); "Note to Accompany Riffin's Motion to Dismiss" (filed Dec. 20, 2016); "Riffin's Note Regarding the STB's December 21, 2016 Decision" (filed Dec. 22, 2016); and "Riffin's Observations Regarding His Motion to Dismiss" (filed Jan. 17, 2017).

¹⁴ Finally, given the record here, there is no merit to Riffin's assertion that, before dismissing him as a sanction, the ALJ was required to make findings that Riffin acted in bad faith, that Riffin's discovery non-compliance prejudiced the City, and that the sanction was necessary for deterrence. (Riffin Appeal 26-27.) As discussed, the ALJ found—with ample record support—that Riffin repeatedly failed to meet his discovery obligations, violated an ALJ order when doing so, made misrepresentations as to whether he had responsive documents, and was not truthful in his statements to the ALJ. See supra at 5-10. Further, the City plainly was prejudiced by Riffin's continuing delays and refusals to comply with discovery requests and discovery orders and the cost of having to pursue compliance. Accordingly, the ALJ acted properly in dismissing Riffin as a sanction. See Fair Housing of Marin v. Combs, 285 F.3d 899, 905-06 (9th Cir. 2002) (dismissal sanction supported when record showed that party repeatedly failed to meet discovery obligations, violated discovery orders, failed to timely produce ordered documents, and misrepresented that documents did not exist); Adriana Int'l Corp. v. Theoren, 913 F.2d 1406, 1412 (9th Cir. 1990) (delay compounded with a failure to produce documents supports a finding of prejudice).

Appeal/Petition to Reopen,” asking for additional discovery if the Board grants Riffin’s appeal, is denied as moot.

It is ordered:

1. Riffin’s appeal is denied. The sanctions imposed by the ALJ in the October Sanctions Decision are effective immediately. Riffin’s pleadings are stricken as described in this decision and Riffin is ordered to pay attorney’s fees to the City.

2. Riffin’s request for a stay is denied as moot.

3. The City’s Protective Appeal/Petition to Reopen is denied as moot.

4. This decision is effective on its service date.

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