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Before the
Surface Transportation Board

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STB DOCKET NO. AB-167 (Sub-No. 1189X)

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

STB DOCKET NO. AB-55 (Sub-No. 686X)

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

STB DOCKET NO. AB-290 (Sub-No. 306X)

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

49 CFR 1115.5 and 1117. 1

PETITION(S) FOR OTHER RELIEF

1. Comes now James Riffin, (“**Riffin**”) who herewith respectfully files this 49 CFR 1115.5 / 1117.1 Petition(s) for Other Relief.

2. On **October 26, 2016**, ALJ Dring Served a decision wherein he granted City et al.’s¹ Motion for Sanctions against Riffin, and imposed sanctions upon Riffin.

¹ City of Jersey City, Rails to Trails Conservancy and Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition.

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3. Riffin desires to, and intends to, **appeal** ALJ Dring’s October 26, 2016 Served Order, and, **if necessary**, desires to, and intends to, **request a stay** of ALJ Dring’s October 26, 2016 Served Order.

4. 49 CFR 1115.5 Petitions for Other Relief, are the means by which one:

A. Petitions for a stay (if the decision is not automatically stayed);

B. Requests an “extension of the compliance date;”

C. Requests a “modification of the date the terms of the decision take effect.”

5. 49 CFR 1117.1 Petitions (For Relief) Not Otherwise Covered, are the means by which one:

A. Seeks “relief not provided for in any other rule.”

RELIEF SOUGHT

6. Riffin respectfully Petitions for the following relief:

A. A determination as to which of the STB’s two appellate procedures, Riffin is required to use, in appealing ALJ Dring’s October 26, 2016 Served Order: 49 CFR 1115 or 49 CFR 1152.25(e);

B. A determination as to whether ALJ Dring’s October 26, 2016 Served Order is an “**Administratively Final**” 49 CFR 1152.25(e)(2) “Board[] decision in abandonment or discontinuance proceedings,” and as such is subject to immediate Judicial Review pursuant to 49 CFR 1152.25(e)(5);

C. **IF** 49 CFR 1115 is the proper appellate procedure to be used:

- a. A “modification of the date the terms of the decision take effect;”
- b. An “extension of the compliance date” for filing an appeal pursuant to 1115.2(e);
- c. A modification of the number of pages an appeal may contain;

D. **IF** 49 CFR 1152.25(e) is the proper appellate procedure to be used:

- a. A **stay** of the effectiveness of ALJ Dring’s October 26, 2016 Served Order pending resolution of the judicial review process.

APPLICABLE REGULATIONS

7. 49 CFR 1115.6 states in pertinent part:

“These rules do not relieve the requirement that a party exhaust its administrative remedies before going to court. Any action appealable **as of right** must be timely appealed.”

8. 49 CFR 1115.1 states in pertinent part:

“Abandonments and discontinuance **proceedings** instituted under 49 U.S.C. **10903** are governed by separate appellate procedures exclusive to those proceedings. (See 49 CFR part 1152).”

9. 49 CFR 1115.2, **Initial Decisions**, states in pertinent part:

“This category includes the initial decision of an **administrative law judge**”

- (a) An appeal of right is permitted.

- (d) Appeals and replies shall not exceed 30 pages in length, **including** argument, and **appendices or other attachments**, but excluding a table of cases and an index of subject matter.”
- (e) Appeals must be filed **within 20 days** after the service date of the decision or within any further period (**not to exceed 20 days**) the Board may authorize.
- (f) The timely filing of an appeal to an initial decision will stay the effect of the action pending determination of the appeal.”

10. 49 CFR 1152.25(e)(1) states in pertinent part:

“(e) *Appellate procedures* – (1) *Scope of rule*. Except as specifically indicated below, these appellate procedures are to be followed in **abandonment and discontinuance proceedings** in lieu of the general procedures at 49 CFR 1115. Appeals of **initial decisions of the Director of the Office of Proceedings determining:**

- (i) Whether offers of financial assistance satisfy the standard of 49 U.S.C. 10904(d) for purposes of instituting negotiations or, in exemption proceedings, for purposes of partial revocation and instituting negotiations.
- (ii) Whether partially to revoke or to reopen abandonment exemptions authorized, respectively, under 49 U.S.C. 10502 and 49 CFR part 1152 subpart F for the purpose of imposing public use conditions under the criteria in 49 CFR 1152.28 and / or conditions limiting salvage of the rail properties for environmental and historic preservation purposes; and
- (iii) The applicability and administration of the Trails Act [16 U.S.C. 1247(d)] in abandonment proceedings under 49 U.S.C. 10903 (and abandonment exemption proceedings), issued pursuant to delegations of authority at 49 CFR 1011.8(c)(4) and (5),

Will be acted on by the entire Board as set forth at 49 CFR 1011.2(a)(7).

11. 49 CFR 1152.25(e)(2) states in pertinent part:

“(2) *Appeals criteria*. Appeals to the Board’s decision in abandonment or discontinuance **proceedings** will not be entertained. Those decisions are administratively final upon the date they are served.”

12. 49 CFR 1152.25(e)(5) states in pertinent part:

“(5) *Judicial Review*. (i) Parties may seek judicial review of a Board action in an abandonment or discontinuance **proceeding** on the day the action of the Board becomes final.”

ARGUMENT

13. ALJ Dring’s October 26, 2016 Served decision is the “initial decision of an administrative law judge.”

14. Appeals of the “initial decision of an administrative law judge,” are expressly covered by §1115.2.

15. However, ALJ Dring’s October 26, 2016 Served decision, **was rendered** in an “abandonment and discontinuance proceeding.”

16 Decisions rendered in abandonment and discontinuance proceedings “are governed by separate appellate procedures **exclusive** to those proceedings.” See §1115.1.

17. However, the **only initial decisions** referenced in §1152.25(e), are initial decisions of the **Director of the Office of Proceedings**.

18. Also, “appeals to the **Board’s** decision in abandonment or discontinuance proceedings will not be entertained. Those decisions are administratively final upon the date they are served.” See §1152.25(e)(2).

19. So that raises the question: What is the nature of ALJ Dring’s October 26, 2016 Served decision?

20. **IF** ALJ Dring’s October 26, 2016 Served decision is a “**Board**” decision, then the appeals procedures in 1152.25(e) control.

AMBIGUITY

21. In this particular case, the STB's regulations are somewhat ambiguous. And when an agency's regulations are ambiguous, the agency gets to decide how to interpret those regulations.

22. That invokes "policy" considerations.

23. So the next question would be: What does the STB desire its policy to be? Does it wish to be bound by an ALJ decision, when it has delegated some of its authority to an ALJ? Or does it wish to retain the option of reviewing the ALJ's decision, and the option of modifying or vacating an ALJ decision that it may not fully agree with. In effect, if the ALJ's decision is held to be a "Board" decision, then the members of the Board will have delegated **all** of their authority to the ALJ, without having any control over what the ALJ does with their authority.

RIFFIN'S COMMENTS

24. When the STB delegated discovery issues to ALJ Dring in this proceeding, the STB was attempting to lessen its workload. But instead of decreasing the STB's workload, the STB's workload has instead increased. ALJ Dring was supposed to **resolve** discovery disputes. Instead, he has created an entirely new dispute.

25. Counsel for City et al., in his Motion for Sanctions against Riffin, at p. 11, said:

"Failure to deal with Mr. Riffin through enforcement of discovery sanctions and regulations governing inappropriate participation in the agency's processes results in higher costs for litigants, the agency, and **ultimately BAD LAW in the form of efforts to 'control' Mr. Riffin's behavior** outside the sanction process." Bold and Caps added.

26. Riffin argues that ALJ Dring's October 26, 2016 Served order is another example of **"bad law."**

27. City et al. obviously desire to ‘eliminate’ Riffin as a potential OFA competitor. And eliminating Riffin as a potential OFA competitor, also serves Jersey City’s purpose of permitting developers **other than the LLCs**, to do precisely what City et al. have spent years complaining about: Put hi-rises on the Harsimus Branch line of railroad **before abandonment authority is granted**.

28. Riffin is most concerned about the potential for unequal treatment. Of Riffin. Of the LLCs. Of the Metro Plaza Owners.

29. City et al. first asked the STB, and then asked the Special Court, to determine the proper classification for the track segments that traversed the Embankment portion of the Harsimus. This was necessary to determine whether the track segments are still subject to the STB’s jurisdiction. Unfortunately, City et al. limited its inquiry to the track segments between CP Waldo and the **West** side of Marin Blvd. Perhaps because that was the only track segment City et al. desired to acquire via the OFA process.

30. Conrail has certified that the Harsimus went to MP 1.36, which is 2,500 feet or so **East** of Marin Blvd. (Conrail has stated that if CP Waldo is at MP 0.0, then the West side of Marin Blvd is at MP 0.88.) Conrail prudently sought to obtain abandonment authority for the entirety of the Harsimus, from CP Waldo, at MP 0.0, to the end of the line at MP 1.36.

31. City et al. advocate that they desire to preserve the Harsimus rail corridor. A laudable goal. However, City et al. only seek to preserve the rail corridor to the **West** side of Marin Blvd, which is some **900 feet West** of the Light Rail line. So what would Jersey City do with a rail corridor that ends 900 feet West of the Light Rail line? It becomes a stub-ended rail corridor, with no connection to any other rail corridor on its East end. That does not strike Riffin as being very useful. It would be far more useful if the Harsimus rail corridor was preserved at least to the Light Rail line. Then it would be possible to actually connect the Light Rail line with Journal Square (about 900 West of CP Waldo, and on the remainder of the Harsimus rail corridor).

32. Some years ago, City et al. complained, bitterly, that the LLCs were ‘demolishing’ the Harsimus rail assets: First, City et al. complained that the LLCs were demolishing the stanchions a bit West of Newark Avenue. The LLCs acquiesced to City et al.’s complaint: They stopped demolishing the stanchions. Then City et al. complained that the LLCs were seeking demolition permits, to remove the Embankment’s stone walls. The LLCs stopped pursuing demolition permits. The LLCs continue to complain that the LLCs desire to / intend to, ‘develop’ (put hi-rises on) the Embankment portion.

33. Then Riffin came along. Since City et al. never sought a determination as to the proper classification for the track segments that traversed Metro Plaza (immediately East of Marin Blvd, between Marin Blvd and the Light Rail line), Riffin asked the U.S. District Court in Newark, NJ, to determine the proper classification for those track segments. Just like City et al. sought a determination for the Embankment portion.

34. And if it is determined that the track segments that traversed the Metro Plaza portion of the Harsimus, are still unabandoned lines of railroad, and are still subject to the STB’s jurisdiction, then Riffin will do what City et al. has already done: Ask the entities that are changing the status quo of those track segments, to cease changing the status quo, until the OFA process concludes. Just like City et al. asked the LLCs to stop demolishing the stanchions / to refrain from changing the status quo of the Embankment portion of the Harsimus.

35. And it should be noted, that the entities that are changing the status quo of the track segments that traversed the Metro Plaza portion of the Harsimus, are doing precisely what Jersey City so adamantly is attempting to stop the LLCs from doing: **Building hi-rises** on the Harsimus right-of-way! In open, ‘in-your-face’ defiance of the STB’s authority.

36. Preventing Riffin from walking in the footsteps of Jersey City, strikes Riffin as Unequal Treatment. Either **both** Riffin and Jersey City are abusing the OFA process, or **neither** Riffin and Jersey City are abusing the OFA process. And since the OFA process has not even begun, Riffin argues that neither can abuse the OFA process at this point in time.

37. Getting rid of Riffin definitely makes Jersey City's problems go away. Keeping Riffin in the proceeding, at least makes it a somewhat 'fair fight.'

38. Riffin has thought all along, that if the STB desires to prevent Riffin from obtaining any portion of the Harsimus, it has ample means to make that happen. The decision rendered by ALJ Dring, on its face, prevents Riffin from filing an OFA. However, ALJ Dring's decision has many flaws.

39. But enough of Riffin's 'comments.' At least for now.

ADDITIONAL MATTERS

APPEAL PURSUANT TO §1115

40. **IF** the STB determines that the proper appeals process is pursuant to §1115, **THEN** Riffin seeks the following additional relief:

41. **Some modification of the time by which Riffin's appeal / case-in-chief must be filed.**

42. §1115 Appeals are due within **20 days** after ALJ Dring's October 26, 2016 Served decision. The appellant's case-in-chief is due at the same time that the appeal is filed. The appellant must make reference to particular parts of the record.

43. A most important part of the 'record' in the ALJ Dring proceeding, is a transcript of the October 24, 2016 hearing. While the transcript has been ordered, none of the parties control when the court reporter will provide the requested transcript.

44. Consequently, Riffin would ask that the due date for filing the appellant's **case-in-chief**, be 20 days **after** the transcript has been prepared.

45. This could be accomplished by either:

- A. Changing the effective date of ALJ Dring's order to whatever date the transcript is completed, (a "modification of the date the terms of the decision take effect."); OR
- B. Providing that Appellant's case-in-chief shall be due within 20 days after the transcript is completed. The actual 'appeal' could still be due within 20 days. (The date by which an appeal must be filed, is 'jurisdictional,' and typically cannot be changed. Filing one's case-in-chief, on the other hand, is not 'jurisdictional,' and could be modified by the STB.) [An "extension of the compliance date" for filing an appeal pursuant to 1115.2(e)]. OR
- C. Some other suitable means by which the date the appellant's case-in-chief is due, is dependent upon the date the transcript is completed.

46. **A modification of the number of pages an appeal may contain.**

47. A §1115 appeal is limited to 30 pages, **including** "appendices or other attachments."

48. A transcript would be an "appendix" or an "attachment."

49. Since the October 24, 2016 hearing lasted two hours, Riffin expects the transcript to be several hundred pages long. In addition, the relevant 'record' would be City et al.'s Discovery Request, Motion to Compel, and Motion for Sanctions, along with Riffin's responses to those City et al.'s pleadings, plus the extrinsic evidence Riffin put in the record with his 'Written Argument,' and whatever extrinsic evidence Yahoo provides.

50. Riffin asks that the STB modify the number of pages permitted to **30 pages of argument**. (30 pages **excluding** the table of contents, table of authorities, and appendices.)

APPEAL PURSUANT TO §1152.25(e)

51. In the event the STB determines that an appeal must be pursuant to §1152.25(e), that will ultimately mean that a Petition for Judicial Review will be filed. (That is what Riffin will file. Some other party may elect to file a Petition to Reopen.)

52. In the event that Riffin's appeal must be pursuant to §1152.25(e), that raises another issue. § 1152.25(e)(7)(iii) states:

“(iii) A party may petition for a stay of the effectiveness of **abandonment or discontinuance authorization** pending a request for judicial review.”

53. ALJ Dring's October 26, 2016 Served order **is not** an order granting ‘abandonment or discontinuance **authority**.’ So it appears that §1152.25(e)(7)(iii) **is not** the appropriate regulation by which a stay of ALJ Dring's October 26, 2016 Served order must be sought. Which brings us back to §1115.5, which does permit Petitions for Stay “of an action pending a request for judicial review.” So long as § 1115.5 is applicable. But if the §1152.25(e) appeal process is being used, then to be consistent, §1115.5 would **not** be the applicable regulation.

54. So that leaves §1117.1 as the ‘catch-all’ regulation.

55. Which raises another issue: When must a Petition for Stay be filed?

56. If the appeal is per 1115.2, no Petition for Stay needs to be filed. A stay is automatic.

57. If the Petition for Stay is per 1115.5, then since ALJ Dring's October 26, 2016 Served order was effective upon service, §1115.5(b) controls, which states that a Petition for Stay must be filed before a Petition for Review is filed, but “as close to the service date as practicable.”

58. And if §1117.1 is the applicable regulation for a Petition to Stay in this circumstance, then there is no deadline by which the Petition to Stay must be filed.

GROUND FOR A STAY

59. §1152.25(e)(7)(iii) states:

“The reasons for the desired relief shall be stated in the petition, and the petition shall be filed not less than 15 days prior to the effective date of the **abandonment authorization.**”

60. Since ALJ Dring’s October 26, 2016 Served order does not provide for an “ effective date of the **abandonment authorization,**” it is ambiguous when a Petition for Stay would have to be filed in this particular instance, if Riffin’s appeal is per §1152.25(e).

61. In *1830 Group – Acquisition Exemption – In Allegany County, MD*, FD 35438, at 2 (Served November 17, 2010), the STB reiterated its long-standing criteria for granting a stay:

- A. Likelihood will prevail on the merits;
- B. A showing of irreparable harm in the absence of a stay;
- C. Prejudice to any other parties if a stay is granted;
- D. Public interest supports granting a stay.

62. Riffin will **briefly** address each of the four ‘stay’ criteria. Once Riffin receives a copy of the transcript of the October 24, 2016 hearing, he will more fully address the four ‘stay’ criteria.

LIKELIHOOD RIFFIN WILL PREVAIL ON THE MERITS

63. Riffin will be arguing ‘material error,’ ‘new evidence,’ and ‘changed circumstances.’

RELEVANT FACTS

64. On **March 28, 2016**, City et al. mailed a “Request for the Production of Documents” to Riffin (“**Request**”).

65. The Request asked that Riffin “**deliver copies** of the documents requested below to **counsel for City et al** [at (sic)] **his address below** on or before that date **pursuant to reasonable terms for payment for costs of duplication and delivery** agreed to **in writing with CNJ.**” [“CN J” is not a Riffin typo.]

66. On **May 2, 2016**, Riffin responded to City et al.’s Request, stating that Riffin had no documents, and that production of any documents would be burdensome, and not relevant to the issues before the STB in the 1189X proceeding.

67. On **July 5, 2016**, City et al. filed a Motion for Sanctions, wherein City et al. argued:

A. Riffin’s denial that he has any ‘documents’ is belied by a Verified Statement from Eric Stronmeyer, wherein Mr. Stronmeyer certified that he had looked at Riffin’s e-mail account on or about June 24, 2016, and that he had seen e-mails between Steve Hyman and Riffin. Sanctions Motion (“**Sanctions**”) at 2-3.

B. City et al. **gave Riffin three options** (Sanctions at 3):

a. “If he has no documents on May 2, 2016, then he should file a verification under penalties for perjury.”

b. “**Otherwise he should produce the responsive documents ...**

c. “Or be removed from the proceeding.”

C. City et al. further stated (Sanctions at 7):

“The discovery City et al now seek is not disruptive nor is it burdensome. Riffin **could fulfill it by supplying his exchanges with Mr. Hyman or the LLCs’ various attorneys.** ... [T]his likely **could easily be done by electronic search of key words.**”

D. City et al. concluded by saying (Sanctions at 9):

“In sum, this Board **should order Riffin immediately to respond** to Exhibit A fully and completely without further objection, **and bar him from any further**

participation in the OFA portion of this proceeding should he fail to do so. City requests that Riffin be required to respond fully and completely and without objection no later than **ten days** after STB issues a decision in this matter.”

68. On **August 23, 2016**, Riffin drove to D.C. (the ‘place of the action’). At about 9 pm, Riffin met with Charles Montange (“**Montange**”), counsel for City et al. At that meeting, Riffin placed his lap top computer in front of Mr. Montange. Riffin’s Yahoo e-mail account was open, and fully accessible. Riffin “produced” his e-mail account, then invited Montange “to inspect” his e-mail account. (Which is precisely what 49 CFR 1114.30(a)(1) and FRCP 34(a) requires a party to do.)

69. After some further discussion, Montange and Riffin agreed that Riffin **would forward** to Montange whatever e-mails between Steve Hyman, Vickie Hyman and Daniel Horgan, **remained** in Riffin’s e-mail account.

70. Riffin suggested that Montange **take a few minutes to verify the number of e-mails remaining** in Riffin’s E-mail account, between Riffin and the Hyman’s / Mr. Horgan, so that he could verify that he in fact received all of the e-mails that remained in Riffin’s e-mail account.

71. Had Montange taken **10 minutes** or so to count the number of e-mails between Riffin and the Hyman’s / Mr. Horgan, he would have noted that there were 103 of them. He then would have been able to verify that the 103 e-mails that Riffin forwarded to Montange, corresponded to the number of e-mails remaining in Riffin’s e-mail account on August 23, 2016.

72. And had Montange taken a few minutes to look at a few of the Hyman – Riffin e-mails, he would have noted that some of them had no “text,” that some of them did not display the “identification associated with an apparently forwarded email,” that some of them had an “omission of Original Email, Text, and Recipient,” (Sanctions, Ex. D), that the e-mails from Vickie Hyman to Riffin did not have the “Original Email To Which Email supplied by Riffin is Responding,” (Sanctions, Ex. E), and that the “Emails forwarded by CNJ Rail ... But not by Riffin” (See Sanctions, Ex. F), no longer were in Riffin’s e-mail account.

73. At the **August 24, 2016** hearing before ALJ Dring, Montange and Riffin stipulated that were Riffin to forward to Montange all of the e-mails between Riffin and the Hyman's / Mr. Horgan, **remaining in Riffin's Yahoo e-mail account**, and were Riffin to provide Montange with the Case Numbers for Riffin's bankruptcy proceedings, **Riffin would be in full compliance** with Montange's Request for Documents. The Montange / Riffin stipulation was embodied in ALJ Dring's August 25, 2016 Served Order.

74. On **August 25, 2016**, Riffin forwarded to Montange (and to counsel for Conrail and the LLCs, and to Eric Strohmeyer) all of the e-mails between Riffin and the Hyman's / Mr. Horgan, remaining in Riffin's Yahoo e-mail account. On **August 26, 2016**, Riffin forwarded to Montange (and to counsel for Conrail and the LLCs, and to Eric Strohmeyer), the case numbers for Riffin's three bankruptcy filings.

75. On **September 15, 2016**, City et al. filed its Motion for Sanctions against Riffin, arguing that Riffin failed to fully comply with ALJ Dring's August 25, 2016 Served order, in the following 'particulars' (Sanctions at 6):

- A. "(1) Riffin **appears** to have deleted all identification of the recipients of the emails (examples in **Ex. D**) other than himself, or text and attachments, so he has not furnished such mails in their totality;" Sanctions at 6.
- B. "(2) in most cases in which the email he forwarded is **an obvious** 'reply,' he has failed to include the original email (examples in **Ex. E**);" Sanctions at 6.
- C. "(3) he has failed to include emails from himself to any representative or agent for the LLCs although those **impliedly exist** given the emails to him in **apparent response** (e.g., **Ex. E**);" Sanctions at 6.
- D. "(4) he has failed to include emails **prior to 2015**, although City et al is aware **from other sources** that such emails exist (e.g., **Ex. F**);" Sanctions at 6-7.

- E. “(5) he has omitted any communications between himself and representatives of the LLCs **other than the Hymans and Horgan**, even though such emails are known to exist (an example of such an email, in City et al’s hands from another source, is set forth in **Ex. G**);” Sanctions at 7.
- F. “(6) Mr. Riffin refused even to search for exchanges with Bruce Nagel, even though City et al knows that such exist from another source (**Ex. G**);” Sanctions at 7.
- G. “(7) Riffin appears to have omitted all emails between himself and the Hyman interests bearing on the lawsuit Riffin filed in the past 30 days against Forest City over the Harsimus Branch (see excerpted Complaint, **Ex. H**).” Sanctions at 7.
- H. “A prolific emailer, Riffin **obviously** has other emails and documents concerning the Harsimus Branch that he is failing to disclose in violation of the August 25 order. Indeed, the LLCs’ counsel (Horgan) recently supplied one (a demand letter to Forest City dated October 2015) to counsel for City et al. See **Ex. J**.” Sanctions at 8.
- I. “Other examples of Riffin material supplied by sources other than Riffin include **Ex G** and, for that matter, **Ex I’s item 4**.” Sanctions at 9.
- J. “Since Riffin **omitted any of his machinations with the Hyman interests** associated with the rail line or yard east of Marin Boulevard, Riffin has not produced **all responsive documents** despite the August 25 order.” Sanctions at 15.

ARGUMENT

CITY ET AL.’S REQUEST FOR DOCUMENTS IS FATALLY DEFECTIVE

76. City et al.’s “Request for Documents,” is fatally defective. The Request requests that Riffin “deliver copies of the documents requested below to counsel for City et al [at] his address

below” Request at 1.

77. Counsel for City et al.’s office is located in Seattle, Washington.

78. Riffin’s office is located in Cockeysville, MD, a bit north of Baltimore, Maryland.

79. This ‘action’ (proceeding) is located in Washington, D.C.

80. 83 A.L.R. 2d 302, in a Treatise Titled: *Time and place ... for inspection and copying of opposing litigant’s books, records, and papers*, in §10(a), ***At office of producing party – Generally***, states:

Particularly where the books, records, or papers to be inspected or copied are those of a party’s business, and especially where they are **current records in regular use** in carrying on the business, or for other reasons are such that their removal from the place of business would seriously interfere with the carrying on of the party’s business operations, the courts are inclined **to direct that the moving party’s inspection and copying** of such business books, records, or paper **should be performed at the producing party’s office where such records are normally kept**, so as to interfere as little as possible with the producing party’s business operations.”

81. In *Evangelos v. Dachiel*, 553 So. 2d 245, in holding that the proper place for discovery was where the documents were kept (in a storeroom), the court held:

“When producing documents, the producing party shall either produce them as they are kept in the usual course of business or shall identify them to correspond with the categories in the request. ... Since the records were produced as they were then kept, it was error to order the defendant to reorganize the documents. ... It was also error for the trial court to order Evangelos to transport the thirty boxes of documents at his expense to the offices of plaintiff’s counsel.”

82. See also: *Rowlin v. Alabama Dept. Of Public Safety*, 200 F.R.D. 459, 462 (2001) (holding inspecting to occur where documents are kept / provider need not provide copies); *Iiagara Duplicator v. Shackelford*, 160 F. 2d 25, 236 (D.C. Cir. 1947) (inspection to occur where documents are kept / no copying required); *Obiajulu, v. City of Rochester*, 166 F.R.D. 293, 297

(U.S. D.C., W.D. NY, 1996) (inspection at producing counsel's office / no copying required); *Harris v. Sunset Oil Co.*, 2 F.R.D. 93, (USDC WD Washington, 1941) (inspection where documents kept); *Galanos v. U.S.*, 27 F. Supp 298, (USDC D Massachusetts, 1939) (inspect where documents kept / no copying required).

83. Occasionally, inspection may be ordered in the clerk's office where the action is being tried. See *Floyd v. Victory Sav. Bank*, 189 SE 462 (SC 1937); *Culligan v. Rheame*, 67 NW 2d 279 (Wis, 1954).

84. In this proceeding, Riffin repeatedly argued that his only obligation was to offer City et al. an opportunity to inspect his e-mail account, **in Cockeysville, MD, where Riffin keeps his computer**. Riffin decidedly was **not obligated** to “**deliver copies** of the documents requested below **to counsel for City et al [at] his address**” in Seattle, Washington.

85. Riffin **went beyond the bounds** of his Rule 34 (a) / §1114.30(a)(1) obligation “to produce and permit the party making the request to inspect any designated documents.” Riffin took the time and effort to **drive to Washington D.C. before** the August 24, hearing, to permit counsel for City et al. to “inspect” Riffin's e-mail account. And offered Montange an additional opportunity to inspect Riffin's e-mail account “in the office of the clerk of the court.” (More precisely, in the hearing room where the August 24, 2016 hearing was held.)

ALJ DRING'S AUGUST 25, 2016 ORDER IS FATALLY DEFECTIVE

86. A discovery order **must** state the time and place the discovery is to occur. *SEC v. LA Trust Deed & Mortg Excg*, 24 FRD 460 (1959, DC Cal.); *Rosenblum v. Dingfelder*, 1 FRD 179 (1939, DC NY).

87. ALJ Dring's August 25, 2016 Order **did not** specify the **place** where Riffin was to provide City et al. with the documents that City et al. Requested.

CITY ET AL. FAILED TO INSPECT – THEREBY WAIVING OBJECTIONS

88. Riffin afforded City et al. **Two Opportunities** (August 23, 2016, before the August 24, 2016 hearing, and again on August 24, 2016, immediately after the October 24, 2016 hearing) to ‘inspect’ Riffin’s e-mail account, to determine (A) how many e-mails were in Riffin’s e-mail account; (B) the nature of the e-mails in Riffin’s account (content, text, identification); (C) whether specific e-mails that City et al. had in its possession, were still in Riffin’s e-mail account.

89. City et al. **refused to inspect** Riffin’s e-mail account, offering no explanation, other than that it was ‘inconvenient,’ or that counsel for City et al. ‘did not feel like it.’

90. Having been given an opportunity to inspect Riffin’s e-mail account, City et al. **has waived** any right to object to the quantity or quality (content, text, identification) of the e-mails Riffin forwarded to City et al., and has **waived** any objection to Riffin’s failure to forward to City et al. any e-mails already in City et al.’s possession.

RIFFIN FULLY COMPLIED WITH ALJ DRING’S AUGUST 25, 2016 ORDER

91. ALJ Dring’s August 25, 2016 Order ordered:

“Mr. Riffin will provide City, et al. and Consolidated Rail Corporation with all e-mail communications between him and the **LLCs** that Mr. Riffin **retains in his possession**. Mr. Riffin will also supply City, et al. the docket numbers for three (3) bankruptcy proceedings involving Mr. Riffin. Mr. Riffin shall comply with this order by close of business on Friday, August 26, 2016.”

92. The record indicates that Riffin forwarded **all** of the Riffin / Hyman - Horgan e-mails remaining in his e-mail account, on August 25, 2016. **Not just** the e-mails between Riffin and counsel for the **LLCs**, as required by ALJ Dring’s October 25, 2016 Order. See the Appendix to Riffin’s JR-21, Written Argument, which appendix contains a copy of **all** of the e-mails remaining in Riffin’s e-mail account as of August 25, 2016, between Riffin and either the

Hymans or Mr. Horgan, and a copy of **all** of the e-mails forwarded by Riffin to City et al. and to Conrail, on August 25, 2016. City et al. admitted, at the October 24, 2016 hearing, that Riffin had provided City et al., on August 26, 2016, with a copy of Riffin's bankruptcy docket numbers.

93. It should be noted:

- A. **All** of the e-mails that City et al. alleged were 'deficient,' were between Riffin and Steve Hyman. (ALJ Dring's August 25, 2016 Order **did not require** Riffin to forward to City et al. **any** of the e-mails between Riffin and Steve Hyman.)
- B. It was determined at the October 24, 2016 hearing that Steve Hyman **is not a 'party' in this proceeding, nor does he have any legal interest in this proceeding.**
- C. It was determined at the October 24, 2016 hearing that the last time Steve Hyman **had anything to do with the LLCs, was March 2, 2016, some 26 days BEFORE City et al. mailed its Request for Documents to Riffin. It was further determined that Steve Hyman HAS NO PROPERTY INTERESTS in the LLCs. Vickie Hyman is, and has been, the managing member of the LLCs. Daniel Horgan is the SOLE person who has authority to 'represent' the LLCs.** Consequently, any e-mails between Riffin and Steve Hyman **are totally irrelevant and immaterial** in this proceeding.

ALJ DRING'S SANCTIONS CONSTITUTE AN 'ABUSE OF DISCRETION'

94. ALJ Dring's October 26, 2016 Served order **dismissed Riffin from the proceeding.**

95. It has been held by numerous courts that:

- A. Because dismissal is such a harsh sanction, it should be resorted to only in extreme cases. See: *McCargo v. Hedrick*, 545 F 2d 393,396 (4th Cir. 1976); *Dyotherm*

Corp. v. Turbo Mach. Co., 392 F.2d 146, 149 (3rd Cir. 1968).

B. “There is a strong policy in favor of deciding a case on its merits, and against depriving a party of his day in court.” See: *Chrysler Corp. v. Carey*, 186 F.3d 1016, 1020 (8th Cir. 1999).

C. To impose sanctions, a court **must consider and weigh four criteria**:

- a. “Whether the non-complying party acted in bad faith;
- b. “The amount of prejudice that noncompliance caused the adversary;
- c. “The need for deterrence of the particular sort of non-compliance; and
- d. “Whether less drastic sanctions would have been effective.” *Anderson v. Found. for Advance. Educ.*, 155 F.3d 500, 504 (4th Cir. 1998); *Fair Housing of Marin v. Combs*, 285 F.3d 899, 905 (9th Cir. 2002); *Keefer v. Provident Life*, 238 F.3d 937, 940 (8th Cir. 2000); *Trilogy Comm. v. Times Fiber Comm.*, 109 F.3d 739, 744 (Fed. Cir. 1997).

ALJ Dring failed to consider the four criteria.

D. “A district court should consider five factors before imposing the sanction of dismissal: ... If the district court **does not explicitly consider** these five factors, we may review the record independently in order to ascertain whether the district court abused its discretion.” *Rio Properties v. Rio Intern Interlink*, 284 F.3d 1007, 1022 (9th Cir. 2002); *Malone v. U.S. Postal Svc.*, 833 F.2d 128, 130 (9th Cir. 1987). **ALJ Dring failed to consider the five criteria.**

E. “Although we review the district court’s discovery decisions for an abuse of discretion, **we more closely scrutinize dismissal** imposed as a discovery sanction because ‘the opportunity to be heard is a litigant’s most precious right and should be **sparingly denied.**’ *Chrysler Corp. V. Carey*, 186 F.3d 1016, 1020 (8th Cir. 1999). We must determine whether the sanction imposed **is just and specifically**

related to the claim at issue. *Baker v. GM Corp.*, 86 F. 3d 811, 817 (8th Cir. 1996). Also, before imposing the sanction of dismissal, fairness **requires** a court to consider whether a lesser sanction is available or appropriate. *Id.* **ALJ Dring failed to consider any lesser sanction than dismissal.**

- F. “The provisions of Rule 37 which are here involved must be read in light of the provisions of the Fifth Amendment that no person shall be deprived of property without due process of law, and more particularly against the opinions of this Court in *Hover v. Elliott*, 167 U.S. 409, and *Hammond Packing Co. v. State of Arkansas*, 212 U.S. 322. These decisions establish that there are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing **on the merits of his cause.**” *Societe Intern. v. Rogers*, 357 U.S. 197, 209 (1958). **ALJ Dring’s dismissal order violated Riffin’s 5th Amendment right to due process.**
- G. “But this balance also recognizes that in our system of justice the opportunity to be heard is a litigant’s most precious right and should be **sparingly denied. Prior to dismissal** or entering a default judgment, fundamental fairness should **require** a district court **to enter an order to show cause** and hold a hearing ... to determine whether assessment of costs and attorney fees or even an attorney’s citation for contempt would be a more just and effective sanction. **Dismissal** and entry of a default judgment **should be the rare judicial act.**” *Edgar v. Slaughter*, 548 F. 2d 770, 773 (8th Cir. 1977). **ALJ Dring failed to issue a ‘show cause’ order to determine whether a sanction less than dismissal was just.**
- H. “In order to impose sanctions under Rule 37, there **must be** an order compelling discovery, **a willful violation** of that order, **and prejudice** to the other party.” *Chrysler Corp. v. Carey*, 186 F. 3d 1016, 1019 (8th Cir. 1999). See also: *Schoffstall v. Henderson*, 223 F. 3d 818, 823 (8th Cir. 2000); *Reizakis v. Loy*, 490 F. 2d 1132, 1135 (4th Cir. 1974). **Riffin’s violation (if there was one), was**

NOT ‘willful.’ City et al. Were Not Prejudiced. See ‘I’ below.

I. “A party’s misconduct is **harmless** if it involves an honest mistake, coupled with **sufficient knowledge by the other party of the material that has not been produced.**” *Stallworth v. E-Z Serve*, 199 F.R.D. 366, 369 (DC MD Ala. 2001). **The e-mails City et al. complain about, were already in the possession of City et al. Therefore, City et al. WERE NOT PREJUDICED by Riffin’s failure to forward to City et al. a copy of what City et al. already possessed.**

J. ALJ Dring Served an Order on **August 5, 2016**, wherein he ordered:

“[T]he parties are strongly encouraged to make intensive, good faith efforts to resolve outstanding discovery disputes without the need for judicial intervention, both prior to the conference and thereafter.”

K. Rule 37(a)(2)(A) states:

“(A) If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions. The motion **must include a certification that the movant has in good faith conferred or attempted to confer** with the party not making the disclosure in an effort **to secure the disclosure without court action.**”

L. City et al. **failed to make** the ‘good faith conferred’ certification **required by** Rule 37(a)(2)(A). (And **failed to make any effort** to “secure disclosure without court action.”) ALJ Dring **failed to find** that City et al. had made a ‘good faith effort’ ‘to resolve outstanding discovery disputes without the need for judicial intervention,’ as **required by** ALJ Dring’s August 5, 2016 order. **These failures are fatal defects in ALJ Dring’s October 26, 2016 Sanction Order.**

M. City et al. **Lied to ALJ Dring** when City et al. said Riffin had “failed to include emails prior to 2015.” Sanctions at 6-7. The Appendix to Riffin’s JR-21 Written Argument clearly shows that two 2014 e-mails (12/8/14 and 12/24/14) were

forwarded to City et al. on August 25, 2016. See the fifth and sixth ‘Aug. 25 forwarded e-mails’ lines on the page entitled: E-Mails Forwarded 8/25/16, P. 1.

IRREPARABLE HARM IN THE ABSENCE OF A STAY

96. If ALJ Dring’s October 26, 2016 Served order is not stayed, Riffin’s Complaint in the U.S. District Court, Newark Division, will be dismissed. The owners of the Metro Plaza parcel will continue to alter the *status quo* of the lines of railroad that traverse the Metro Plaza parcel. Once hi-rises are built on the unabandoned lines of railroad that traverse Metro Plaza, it will no longer be possible to use the unabandoned lines of railroad that traverse Metro Plaza. These harms are ‘irreparable,’ for economic compensation will not replace the loss of the rail assets that traverse the Metro Plaza parcel.

NO PREJUDICE TO ANY OTHER PARTY IN THIS PROCEEDING

97. Staying ALJ Dring’s October 26, 2016 Served order **will not prejudice** any other party in this proceeding. Permitting Riffin to retain his OFA rights, will not prejudice any other party, for the OFA process has yet to begin. None of the other parties in this proceeding, are a party to Riffin’s Complaint in the USDC, Newark, Division.

PUBLIC INTEREST

98. Since there is a high probability that ALJ Dring’s October 26, 2016 order will be vacated, and since it is in the public interest NOT to infringe upon anyone’s Constitutional Right to Due Process, and since it is in the public interest for an ALJ to comply with the discovery rules as interpreted by numerous courts, and since it is clear that ALJ Dring **did not comply** with the well-established discovery-sanction rules, it is in the public interest to STAY ALJ Dring’s October 26, 2016 Served order dismissing Riffin from this proceeding, until ALJ Dring’s order is reviewed on appeal.

PRAYER FOR RELIEF

99. Riffin respectfully prays that the STB provide him with the following relief:
- A. Determine whether his appeal of ALJ Dring’s October 26, 2016 Order is to be pursuant to §1115, or pursuant to §1152.25(e), and if pursuant to §1152.25(e), whether Riffin’s appeal would be an ‘initial decision’ appeal, and if not, that ALJ Dring’s October 26, 2016 Served order is “Administratively Final” as to Riffin. (Since Riffin was put ‘out of court,’ ALJ Dring’s October 26, 2016 Served order would **not be** an ‘interlocutory order’ as to Riffin.)

 - B. If Riffin’s appeal is to be pursuant to §1115, then:
 - a. Extend the date by which Riffin’s case-in-chief is to be filed, to be a date 20 days **after** the transcript of the October 24, 2016 hearing becomes available;

 - b. Order that the **argument portion** of Riffin’s case-in-chief is not to exceed 30 pages, **excluding** the table of contents, table of authorities cited, signature page, certificate of service page, and any appendices.

 - C. If Riffin’s appeal is to be pursuant to §1152.25(e), then:
 - a. Specify by what date Riffin must file a Petition to Stay ALJ Dring’s October 26, 2016 Served order.

 - D. **IF** ALJ Dring’s October 26, 2016 Served order **is not automatically** stayed by the filing of an appeal by Riffin, **then stay** the effectiveness of ALJ Dring’s October 26, 2016 Served order until ALJ Dring’s order has been reviewed on appeal.

 - E. And for such other and further relief as would be appropriate.

Respectfully,

James Riffin
P. O. Box 4044
Timonium, MD 21094
(443) 414-6210

CERTIFICATE OF SERVICE

I hereby certify that on the 31st Day of October, 2016, a copy of the foregoing James Riffin's Petition(s) for Other Relief, was served on all of the parties in this proceeding, either via e-mail, or via U.S. Postal Service, postage prepaid.

James Riffin