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Before the
Surface Transportation Board

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

**JAMES RIFFIN’S MOTION TO STRIKE THE CITY’S, ET AL.’S
IRRELEVANT, IMMATERIAL, SCANDALOUS, IMPERTINENT MATTER
IN CITY’S, ET AL.’S JUNE 7, 2016 MOTION TO WITHDRAW**

1. Comes now James Riffin, who herewith files his Motion to Strike the Irrelevant, Immaterial, Scandalous, Impertinent Matter in City’s, et al.’s Motion to Withdraw the City’s, et al.’s Motion to Compel (“**Motion to Withdraw**”) that was filed by Charles Montange, counsel for the City of Jersey City, the Rails to Trails Conservancy, and the Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition (collectively “**Montange**”), and in support hereof states:

2. 49 CFR 1104.8 states that the Surface Transportation Board (“**STB**”) “may order that any redundant, irrelevant, immaterial, impertinent, or scandalous matter be stricken from any document.”

3. Riffin argues that **everything** in Montange’s June 7, 2016 Motion to Withdraw, with the exception of Mr. Montange’s cover letter, and the second and third paragraphs of the actual Motion to Withdraw (found on pp. 2-3 of the actual Motion), is “redundant, irrelevant, immaterial, impertinent, or scandalous matter,” and was filed for “improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation,” FRCP Rule 11(b)(1), and as such, should properly be stricken

4. In a decision served on **May 22, 2015**, at p. 8, the STB admonished the parties **not to file** any ‘unnecessary’ pleadings.

5. One line was all that was needed. Two lines at the most:

A. “City et al. moves to withdraw its Motion to Compel, the matter now being moot.”

B. “Riffin [untimely] filed his Response.”

6. Instead, Mr. Montange filed **8 pages** of “redundant, irrelevant, immaterial, impertinent, or scandalous matter.”

7. Riffin specifically objects to the following “redundant, irrelevant, immaterial, impertinent, or scandalous matter:”

8. “Mr. Riffin has represented ... that he aspires to obtain financing to OFA the Harsimus Branch from the LLCs, **presumably for development rather than rail purposes.**” **Response:** Riffin has made it clear that he desires to provide **rail service** over the **entirety** of the Harsimus, unlike Jersey City, the PA RR Harsimus Stem Embankment Preservation Coalition and the Rails

to Trails Conservancy. Mr. Montange's remark has nothing to do with the issues in this proceeding.

9. "Riffin and the LLCs are exchanging a plethora of emails and attached documents that contain, or encompass, plans on the part of the LLCs and Riffin to thwart this Board's jurisdiction and/or to subvert the OFA process." **Response:** Riffin is decidedly **not** trying to "thwart this Board's jurisdiction and/or to subvert the OFA process." Riffin, like Jersey City, is strongly advocating that the STB **does have jurisdiction** and that the OFA process should be permitted to move forward. To say that the LLCs are trying to "thwart this Board's jurisdiction," in light of the LLCs stipulation before the Special Court that the Embankment was conveyed to Conrail as a line of railroad, which is subject to the STB's jurisdiction, is a gross misstatement / misrepresentation of the truth. As for the OFA process, the LLCs have the right to object to the OFA process. After all, if the OFA process is successful, the LLCs will be divested of possession of their properties, totally without any compensation. Perfectly legal. Just not very equitable.

10. "**Riffin ... views Discovery as a 'fight.'**" Truthful statement. Just not relevant to the issues before the STB. 'Reasonable cooperation' does not mean providing everything requested, particularly when what is requested has nothing to do with the issues being considered. Riffin dares say, discovery is viewed as a 'fight' by all lawyers. Witness the 'fight' between Montange and the LLCs and Conrail over Montange's and Mr. Horgan's discovery requests.

11. "**The Focus of This Case.**" Riffin, and probably the STB and all the other parties in this proceeding, are getting tired of reading Mr. Montange's rantings about the following subjects. (At the least, the rantings are 'redundant,' for Montange keeps repeating them over and over. They also strike Riffin as being 'scandalous,' for they are being presented for the purpose of denigrating the character / reputation of the parties they are directed at.)

A. "**Conrail's de facto abandonment.**" There is no such thing as a 'de facto abandonment.' See *Vermont & VT Ry – Discontinuance - Crittenden Co. VT*, 3 I.C.C.

2d 903, 907 (1987), *aff'd Preseault v ICC*, 853 F.2d 145 (2d Cir. 1988), *Preseault v. ICC*, 110 S.Ct. 914, 920 (1990), where the ICC stated:

“Indeed, the very purpose of the Out of Service Lines exemption was to lessen regulatory requirements for abandonment of lines over which there had been no service and request for service for at least two years. If our jurisdiction could be eliminated by de facto abandonment, then out-of-service lines could be abandoned without regulatory approval and the exemption would be unnecessary. Even if track is physically removed, ... neither the carrier’s common carrier obligation [n]or the agency’s jurisdiction is terminated.”

See also: *AT&SF – Abandonment Exemption – In Lyon County, KS*, ICC Docket No. AB-52 (Sub-No. 71X), Decided June 11, 1991, 1991 WL 120344, where the ICC held the following:

“Petitioners [industrial park developer] also argue that, in Finance Docket No. 31475, *Tyburn Railroad Company – Notice of Exemption – Operation and Acquisition*, served April 30, 1990 (*Tyburn*), the Commission stated the proposition that a track’s status can change. In *Tyburn*, we did state that, through the expansion of service, a track can lose its spur status and become a line of railroad. **We have long held that a spur can become a line of railroad as service over the track is expanded, but not that the converse of this proposition is also true.**

Santa Fe, relying on *Oregon Short Line R. Co. Abandonment*, 267 I.C.C. 633 (1947) (*Oregon*), states that a carrier cannot unilaterally extinguish its common carrier obligation to provide service over a line, and accordingly, a carrier **cannot change** the status of a track segment from a rail line to spur simply by placing the line out of service. In *Oregon*, the State of Utah challenged our abandonment authority by claiming that a rail line sought to be abandoned was a spur. We **rejected** this argument, stating that:

‘Once having assumed common carrier obligations subject to the jurisdiction of this Commission with respect to a particular line of railroad, **that obligation remains until appropriate authority for abandonment is obtained.** Furthermore, we continuously have cited this principle to justify our continued jurisdiction over rail lines where service has been curtailed or extinguished.’ ” Bold added.

Rail carriers have the absolute right to remove their track infrastructure. And back in 2005, rail carriers could convey the real property underlying their lines of

railroad. See *Maine, DOT – Acq. Exemption, Me. Central R. Co.*, 8 I.C.C. 2d 835 (1991). (“*State of Maine*”). Subject to the caveat that the rail carrier had to retain a permanent easement to provide rail service.

B. “**To circumvent a New Jersey statute that requires this line to be offered to Jersey City.**” Citing 48 N.J.S.A. 43:12-125.1. **Response:** In *City of Jersey City et al. v. Conrail, et al.*, Civil Action No. 09-1900, 741 F. Supp. 2d 131, decided Sept. 28, 2010, (U.S.D.C. D.C., 2010), Judge Urbina had the following to say at p. 142:

“According to the plaintiffs, Jersey City would benefit from application of the New Jersey Statute because it would ‘afford[] the City a protected 90 day period in which to decide whether it wished to acquire the property.’ Yet it is undisputed that Jersey City was, in fact, notified of Conrail’s intent to sell the property before Conrail entered into a contract with the LLCs, but declined to act on that opportunity to acquire the property. ...

Neither the JCRA nor any other entity of the Jersey City government submitted a bid in response to the December 2001 or October 2002 bid solicitations. Indeed, the record indicates that the first time that Jersey City expressed any interest in purchasing the property was in October 2003 **Accordingly, Jersey City was expressly notified that the property was for sale and was given an opportunity to decide whether to acquire it, precisely the opportunity it claims it was denied under the New Jersey Statute.**

Moreover, the plaintiffs have not adequately explained why the application of the New Jersey Statute would leave them in any better position than they are in today. The application of the New Jersey Statute would void the sale between Conrail and the LLCs and afford Jersey City an opportunity to purchase the property from Conrail. ... Yet as discussed above, the plaintiffs have not explained how the defendants’ actions prevent Jersey City from acquiring the property now through condemnation. ... Condemnation would nullify Conrail’s sale of the property to the LLCs and permit Jersey City to acquire the property for just compensation. ... The plaintiffs have offered nothing to indicate that this currently available remedy differs in any meaningful way from the remedy they would have had under the New Jersey Statute. ... Accordingly, the plaintiffs have failed to explain how Jersey City has been injured by its inability to avail itself of the New Jersey Statute.”

A Federal Court has already decided: **Jersey City had its ‘first right of refusal.’ Montange should stop beating this drum.**

C. **“Unlawful actions of Conrail and its chosen developer (the LLCs).” Response:**

It has not been demonstrated that Conrail has engaged in any ‘unlawful actions’ in this proceeding. Saying so in writing is defamatory, *per se*. In addition, there is no evidence that **Conrail** desires to ‘develop’ the Embankment properties, and there is no evidence that Conrail chose / hired / solicited the LLCs, to develop the Embankment **for the benefit of Conrail**. It is a mantra Montange keeps repeating, which makes it a ‘redundant’ statement, evidently for the sole purpose of impugning the veracity / reputation of Conrail / the LLCs. Which makes the statement a prohibited ‘scandalous’ statement.

D. **“Fore stall meaningful application of the Nation’s environmental and historic preservation laws.” Response:** The ‘environmental laws’ applicable to rail lines, are codified in 49 CFR 1105.5 -7. There is not even a ‘hint’ that the environmental rules codified in part 1105.5 are being, or would be, violated. [No one, including the City, has even remotely suggested that this proceeding will result in an increase of three / eight trains per day. See 49 CFR 1105.7(e)(4) and (5).] And as for the ‘historic preservation laws,’ the City et al. have gotten precisely what they asked for: A supplemental ‘historic review.’

12. **Conclusion: More than half of what Montange filed, is clearly eligible to be stricken, and should be stricken.** Riffin would suggest that Montange heed the STB’s admonition: Stop filing ‘unnecessary’ pleadings. Stop embellishing pleadings with ‘unnecessary’ verbiage.

PROTECTIVE ORDER

13. There has been much ado about nothing regarding the name of the Shipper that has expressed an interest in obtaining rail service in Jersey City. The protective order motion filed by Mr. Strohmeyer contains an email which clearly indicates the name of the shipper. (Mr. Strohmeyer did a ‘Montange.’ He failed to redact all references to the shipper’s name in his

own filing.) Riffin agrees with Mr. Strohmeier: The shipper is not 'fair game.' No one should be permitted, or allowed, to harass, intimidate, coerce, or involve the shipper in any litigation even remotely associated with the issues presented by this proceeding. The 'bona fides' of the shipper are not, nor should they be, assailable. The shipper sincerely asked for rail service. The shipper still desires rail service. Hopefully someday, rail service will actually become available.

14. WHEREFORE, for the foregoing reasons Riffin respectfully moves the STB to **strike** all portions of the City's et al.'s Motion to Withdraw that are not directly related to the focus of the Motion to Withdraw: The motion to compel has been rendered moot, and thus should be denied, or in the alternative, the City et al. should be permitted to withdraw the Motion to Compel.

Respectfully,

James Riffin
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CERTIFICATE OF SERVICE

I hereby certify that on or before the 8th Day of June, 2016, a copy of the foregoing Motion to Strike was served on all of the parties in this proceeding, either via e-mail, or via U.S. Postal Service, postage prepaid.

James Riffin