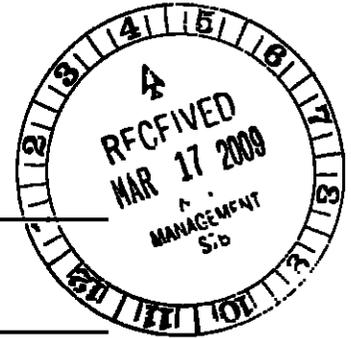


BEFORE THE
SURFACE TRANSPORTATION BOARD



ENTERED
Office of Proceedings
MAR 17 2009
Part of
Public Record

FINANCE DOCKET NO. 35206

PART 1117 PETITION FOR INJUNCTIVE RELIEF

224698

MOTION TO IMPOSE SANCTIONS

1. James Riffin ("Riffin"), pursuant to 49 CFR 1103.5, herewith files this Motion to Impose Sanctions jointly and severally against BNSF Railway Company ("BNSF") and Karl Morrell, counsel for BNSF, and for reasons states:

2. Edwin Kessler ("Kessler") filed a Petition for Injunctive Relief, asking the Surface Transportation Board ("STB") to enjoin the BNSF Railway Company ("BNSF") (1) from refusing to deliver railcar HTTX 93507 to either the Boardman Spur at MP 541.75, or to a point on the Chickasha Line adjacent to property Kessler owns, near MP 541 95, (2) to enjoin BNSF from charging Kessler demurrage, storage or any other charges associated with BNSF's failure to deliver railcar HTTX 93507 to Kessler on or before August 19, 2008; (3) to enjoin BNSF from auctioning the locomotive that is on railcar HTTX 93507; and (4) to enjoin BNSF from refusing to pay to Kessler \$50.00 per day for each day since August 20, 2008, BNSF has deprived Kessler of the use of said locomotive.

3. On February 17, 2009, BNSF filed its Reply to Kessler's Petition for Injunctive Relief

4. Throughout its Reply, BNSF uttered irrelevant, immaterial, impertinent and scandalous matter, in violation of 49 CFR 1104.8, to wit:

BNSF mounted a defamatory diatribe against the character of James Riffin, who was not a party to this proceeding at that time. This abuse of, and personal attack upon James Riffin is in clear violation of 49 CFR 1103.25 and 49 CFR 1104 8

5. The issue before the STB is whether BNSF has a common carrier obligation to deliver railcar HTTX 93507 to either Boardman's Spur, or to the alternate location specified by Kessler, namely, adjacent to Kessler's property near MP 541.95 on the Chickasha Line in Oklahoma City, OK. Rather than address this issue, BNSF chose to "indulge in offensive personal attacks" against Riffin

6. In *Mullaney v. Aude*, 126 Md. App. 639, 730 A.2d 759 (1999), Maryland's Court of Special Appeals had the following to say about 'Rambo litigators' such as Karl Morrell:

"The absence of civility and respect exhibited by lawyers towards one another has been for years the subject of significant concern for bar and bench leaders. In the words of Judge Paul L. Friedman of the United States District Court for the District of Columbia:

[T]his age has also opened its doors to the 'Rambo litigator' which has spawned a generation of lawyers, too many of whom think they are more effective when they are more abrasive *Id* 653

... Clients, not lawyers, are the litigants, and when the ill feeling that may exist between litigants carries over into the conduct and demeanor demonstrated by one lawyer toward another,¹ the legal profession is diminished. *See* Annotation, Attorney's Verbal Abuse of other Attorney Action, 87 A.L.R. 3rd 351, 354 (1978) (relying on Canon No. 17 of the Canons of Professional Ethics). *Id* 654.

Mr Harris's behavior with respect to Ms. Aude and her counsel at the deposition was a crass attempt to gain an unfair advantage through the use of demeaning language, a blatant example of 'sexual [deposition] tactics' With respect to the effect on the profession, we think Judge Waldron stated it well when he said: 'These actions ... have no place in our system of justice and when attorneys engage in such actions they do not merely reflect on their own lack of professionalism but they disgrace the entire legal profession and the system of justice that provides a stage for such oppressive actors' *Id* at 655

Rather than a direct attack on the legal issue or the argument advanced, the demeaning term is used to dismiss the ... attorney's position or relegate it to a lesser status *Id* 657.

If Mr. Harris, by the use of such tactics, can evoke in Ms. Green any emotional response that puts her off-balance, makes her defensive, makes her feel inadequate, or just plain angry and distracted, he has succeeded with his strategy. In so doing, he likely has interfered with the [judicial] process." *Id* 657-658

¹ James Riffin has a J D , and an L L M from the U of Pennsylvania, and other graduate degrees

The imposition of sanctions under these circumstances reinforces the commitment of the judicial system to impartiality. ‘Whether it is men or women who experience the burden of bias ... the public has an interest because the judicial system has failed to adhere to the highest standards of fairness and impartiality.’ *Gender Bias in the Courts*, at 131. This concept was well stated by the Supreme Court of New York when it was presented with a request for sanctions relating to gender-biased insulting remarks made to counsel during depositions:

Seeking sanctions from this court is not a display of an inability to overlook obnoxious conduct, but an indication of a commitment to basic concepts of justice and respect for the mores of the profession of law. The movant has turned to the court to give force to a basic professional tenet. *Principe v Assay Partners*, 154 Misc.2d 702, 586 N.Y.S.2d 182, 186 (1992)” *Id* 659

7. In its Reply, BNSF made the following statement on p. 5:

“Riffin has made numerous frivolous and abusive filings with the Board in recent years. Most notable is Riffin’s conduct in STB Docket No. AB-290 (Sub-No 293X). *Norfolk Southern Railway Company – Abandonment – Petition for Exemption – Norfolk and Virginia Beach, VA* In that proceeding, Riffin filed a Notice of Intent to File an Offer of Financial Assistance.”

8. For BNSF’s edification (the STB is already aware of what appears in this ¶8 and in ¶¶ 9-13), Riffin filed a Petition for Review of the Board’s *Virginia Beach* decision in the U.S. Court of Appeals for the District of Columbia Circuit. It was docketed Case No. 07-1483. The Respondents filed a Motion to Proceed without oral argument. In an Order filed on February 20, 2009, the Court of Appeals denied Respondents’ Motion.² Oral argument is scheduled for April 13, 2009 at 9:30 a.m. [Mr. Morrell and any other interested parties are invited to attend.] If requested, Riffin could cite a number of appellate decisions that have held that given what the DC Circuit has Ordered, the case **does not** lack ‘substantial justification,’ and thus is **not** ‘frivolous’ See FRCP Rule 11. [Riffin is intimately familiar with the law regarding sanctions having recently read over 80 cases involving sanctions, then having authored an 11-page paper on sanctions]

9. On p. 4 of its Reply, BNSF made derogatory remarks about Riffin’s efforts to construct his Cockeyville Maintenance-of-Way (“MOW”) facility. BNSF made a snide reference to

² Question If the Court of Appeals was inclined to affirm the STB’s decision, why would it bother to waste its time on oral argument, particularly when the Respondents requested to proceed without oral argument?

James Riffin – Petition for Declaratory Order, STB Finance Docket No. 34997. In FD 34997, the STB held that Riffin’s MOW facility was not subject to the STB’s jurisdiction, because it was not physically adjacent to Riffin’s Allegany County, MD line of railroad. The STB cited its *Hi Tech* decision as precedent, FD 34192. (In *Hi Tech*, the STB held that trucks hauling garbage on public highways were not subject to the STB’s jurisdiction. What that has to do with a MOW facility still eludes Riffin.) Riffin filed a Petition for Review. It was docketed Case No. 08-1190 in the U.S. Court of Appeals, District of Columbia Circuit.

10. In the STB’s Brief, the STB cited as precedent: *Suffolk & Southern Rail Road – Lease and Operation Exemption – Sills Road Realty*, STB FD No. 35036, Served August 27, 2008. The STB’s decision in Riffin’s Declaratory Order proceeding was served on May 2, 2008. How a decision that was served 3 months after Riffin’s Declaratory Order decision could be precedent, still eludes Riffin.

11. Riffin cited *Buffalo S. R.R. v. Vill. of Croton-On-Hudson*, 434 F. Supp. 2d 241 (S.D.N.Y. 2006), which held that a railroad facility in eastern NY (on the Hudson River) was subject to the STB’s exclusive regulatory authority even though the rail carrier’s line was in western NY (in Buffalo). Since judicial determinations of the STB’s jurisdiction take precedence over the STB’s determination of its jurisdiction, and since the *Buffalo Southern* decision was rendered two years before Riffin’s Declaratory Order decision, Riffin argued that the STB was bound to follow the precedent set by *Buffalo Southern*. Riffin also cited *Pike v. Bruce Church*, 397 U.S. 137, 146, 90 S.Ct. 844, 849 (1970), which held that how an interstate entity allocates its interstate resources, is to be determined by the interstate entity, not by a State: “The necessary tendency of the statute is to impose an artificial rigidity on the economic pattern of the industry.”

12. In Riffin’s Declaratory Order proceeding (and in Case No. 08-1208, another Petition for Review involving Riffin and the STB), the DC Circuit issued an Order some months ago stating that the Court would make its decision without oral argument. On March 13, 2009, the Court reversed itself on its own motion, and issued a new Order stating it was scheduling case Nos. 08-1190 and 08-1208 for oral argument, to be heard on the same day before the same panel of judges.³ The date for oral argument should be announced within the next two weeks.

³ See footnote 2

13 Riffin has petitioned three of the STB's decisions to the DC Circuit. All three were initially to be decided without oral argument. All three now are scheduled for oral argument. Due to BNSF's disparaging remarks about Riffin, Riffin has filed Notices to participate as a Party in this proceeding, and in BNSF's Declaratory Order proceeding In *Christiansburg Garmet Co v EEOC*, 434 U.S. 412, 421-22, 98 S.Ct 694, 700-01, the Supreme Court stated: "The course of litigation is rarely predictable." How true!

14. Given the above developments, Riffin would argue that BNSF's assertion that Riffin is a 'frivolous litigant,' lacks merit, was made in bad faith, lacks substantial justification, and was meant to harass Riffin, and thus, is sanctionable under 49 CFR 1103.5, and FRCP Rule 11.

15. Pursuant to 49 CFR 1103.5, Riffin asks that the STB **find that BNSF and Mr. Morrell, in the February 17, 2009 Reply of BNSF to Petition for Injunctive Relief, in the above entitled proceeding, did knowingly, and with intent to defame, "indulge in offensive personal attacks" on Mr. Riffin, in clear violation of 49 CFR 1103.25.**

16. Riffin asks that the STB sanction BNSF and Mr. Morrell appropriately. [At a minimum, BNSF and Mr. Morrell should be required to publicly apologize to Riffin Riffin further suggests that striking the entire BNSF February 17, 2009 Reply, would be an appropriate sanction.]

Respectfully,



James Riffin

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of March, 2009, a copy of the foregoing Motion to Impose Sanctions was mailed via first class postage, postage prepaid, to Karl Morell, Ball Janik, Ste 225, 1455 F St NW, Washington, D.C. 20005, counsel for BNSF Railway Company, and to Edwin Kessler, 1510 Rosemont Drive, Norman, OK 73072.



James Riffin