

SURFACE TRANSPORTATION BOARD

ENTERED
Office of Proceedings
November 23, 2015
Part of
Public Record

FINANCE DOCKET NO. 35950

**SECOND SUPPLEMENT TO
PETITION OF NORFOLK SOUTHERN RAILWAY COMPANY
FOR DECLARATORY ORDER**

The Petition filed by Norfolk Southern Railway Company (“NSR”) requests that the Surface Transportation Board (“STB”) issue a declaratory order that the action initiated in the Circuit Court for the Tenth Judicial District of Tennessee at McMinn County, Tennessee (“Court”) by James LaMar Dugan, Dugan Professional Building and Rental, LLC, Doctors Dugan and Dugan, LLC, and James L. Dugan, II (collectively, “Plaintiffs”) to recover from NSR damages allegedly stemming from NSR’s vegetation control along and NSR’s drainage culvert embedded directly beneath NSR’s active mainline track in Athens, Tennessee is preempted by the Interstate Commerce Commission Termination Act of 1995, 49 U.S.C. § 10501(b).

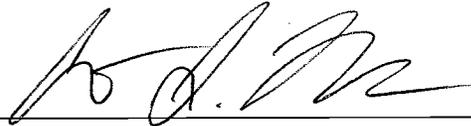
As previously disclosed to the STB, NSR filed a Motion to Stay (“Motion”) the Plaintiffs’ claims against NSR with the Court on October 2, 2015. See NSR Supplement (filed Oct. 6, 2015).

NSR files this Second Supplement to notify the STB that on October 29, 2015 the Court held a hearing on the Motion. A copy of the Court’s order on the Motion (“Order”) is attached hereto as Exhibit A. For purposes of this STB proceeding, the Court granted a de facto stay,

although the Court technically denied NSR's Motion.¹ Notably, the Court decided not to hold any hearing or trial on the Plaintiffs' claims against NSR until it receives "the STB's direction and directive." Order, Transcript at 4, lines 1-3. Thus, the Court has asked the STB to determine whether Plaintiffs' claims against NSR are preempted by the ICC Termination Act of 1995, 49 U.S.C. § 10501(b).

Therefore, NSR respectfully requests that the STB issue a declaratory order that the Plaintiffs' claims against NSR are preempted by § 10501(b).

Respectfully submitted,



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*Counsel for Norfolk Southern
Railway Co.*

¹ The Court concluded that there would be no prejudice if the parties proceed with discovery until the STB issues a declaratory order: "until [the STB] say[s] it, I think it's my duty to keep this thing moving." Order, Transcript at 3, lines 21-22.

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of this Supplement in STB Finance Docket No. 35950 by first class mail, properly addressed with postage prepaid, or via more expeditious means of delivery upon all known parties of record.



Aarthy S. Thamodaran
Counsel for Norfolk Southern Railway Co.

November 23, 2015

SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35950

**SECOND SUPPLEMENT TO
PETITION OF NORFOLK SOUTHERN RAILWAY COMPANY
FOR DECLARATORY ORDER**

EXHIBIT A

**IN THE CIRCUIT COURT FOR THE TENTH JUDICIAL DISTRICT OF
TENNESSEE AT McMINN COUNTY, TENNESSEE**

JAMES LaMAR DUGAN, individually and on §
behalf of DUGAN PROFESSIONAL §
BUILDING AND RENTAL, LLC; DUGAN §
PROFESSIONAL BUILDING AND RENTAL, §
LLC; DOCTORS DUGAN AND DUGAN, §
LLC; and JAMES L. DUGAN, II §

Plaintiffs/Petitioners, §

vs. §

CITY OF ATHENS, TENNESSEE, §

and §

ATHENS UTILITY BOARD, §

and §

NORFOLK SOUTHERN RAILWAY §
COMPANY, f/k/a SOUTHERN RAILWAY §
COMPANY, §

Defendants/Respondents. §

No.: 2014-CV-258
12-Person Jury Demanded

FILED

NOV 16 2015

2:29 pm
RHONDA J. COOLEY
CIRCUIT COURT CLERK
BY W D.C.

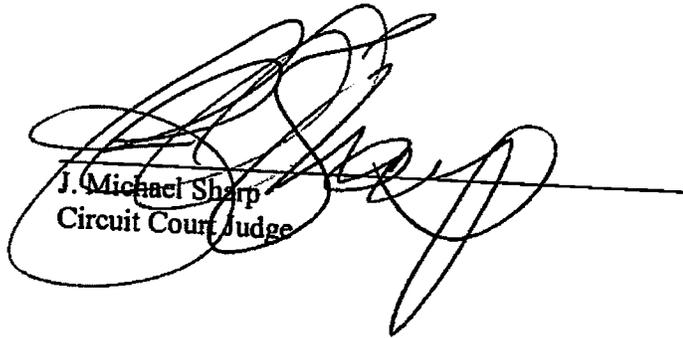
ORDER ON MOTION TO STAY

The Defendant, Norfolk Southern Railway Company's Motion to Stay the Plaintiffs' proceedings against it came on for hearing on October 29, 2015. The Court has considered the submissions of Norfolk Southern Railway Company and the Plaintiffs, argument of counsel for all parties, including the City of Athens and Athens Utility Board, and the record as a whole, and hereby

ORDERS that the Defendant, Norfolk Southern Railway Company's Motion to Stay is denied and the Court further adopts as if set forth verbatim herein its ruling (transcript attached as Exhibit A) as the Order of the Court.

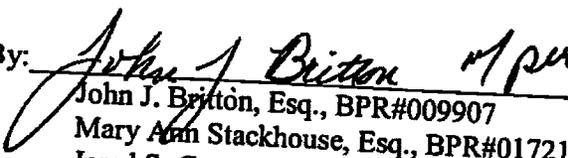
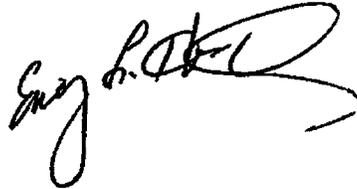


ENTER this 14th day of November, 2015.

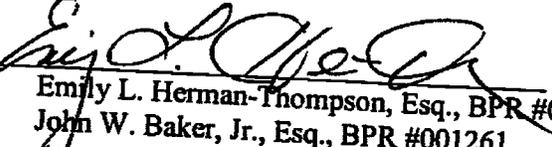

J. Michael Sharp
Circuit Court Judge

APPROVED FOR ENTRY:

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IN THE CIRCUIT COURT FOR THE TENTH JUDICIAL DISTRICT OF
TENNESSEE AT McMINN COUNTY, TENNESSEE

JAMES LaMAR DUGAN, individually and on)
behalf of DUGAN PROFESSIONAL)
BUILDING AND RENTAL, LLC; DUGAN)
PROFESSIONAL BUILDING AND RENTAL,)
LLC; DOCTORS DUGAN AND DUGAN,)
LLC; and JAMES L. DUGAN, II,)

Plaintiffs,)

v.)

No. 2014-CV-258)

CITY OF ATHENS, TENNESSEE,)

and)

ATHENS UTILITY BOARD,)

and)

NORFOLK SOUTHERN RAILWAY)
COMPANY, f/k/a SOUTHERN RAILWAY)
COMPANY,)

Defendants.)

* * * * *

EXCERPT OF PROCEEDINGS

Before: Honorable J. Michael Sharp, Judge

Thursday, October 29th, 2015

Allison L. Gossett
Licensed Court Reporter
P.O. Box 50182
Knoxville, Tennessee 37950
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tennreporter@gmail.com

**CERTIFIED
ORIGINAL TRANSCRIPT**

EXHIBIT A

10-29-15 DUGAN, ET AL V. CITY OF ATHENS, ET AL

1 APPEARANCES:

2
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4
5 John J. Britton, Esq.
6 --and--
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21 FOR DEFENDANT NORFOLK SOUTHERN RAILWAY COMPANY:

22 John W. Baker, Jr., Esq.
23 --and--
24 Emily L. Herman-Thompson, Esq.
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Knoxville, Tennessee 37919

1 (Begin Excerpt of Proceedings.)

2 THE COURT: Counsels, let me say --
3 well, let me say again, you all did a
4 way-better-than-normal job in briefing and getting me
5 the information. I appreciate it. Just from the
6 lawyer's perspective, it was interesting. I haven't
7 had this before, so -- at least not with the railroad.
8 I've had many city drainage cases before, but not quite
9 like this.

10 Here is where I'm at, respectfully, to
11 all of you all: I do not see that there would be any
12 prejudice today by allowing this to go forward because
13 I believe -- given where discovery is in this matter, I
14 believe the discovery can continue. I believe that it
15 should continue. I believe that everything that the
16 lawyers would normally do can be continuing on in the
17 normal course of business by not granting the stay.
18 Knowing full well, though, counsel -- let me say this,
19 and I read a lot, and I can read of all of this -- I
20 think I've got a pretty good grasp on what I'm supposed
21 to do depending on what the STB says. But until they
22 say it, I think it's my duty to keep this thing moving.

23 So, respectfully, I'm going to deny
24 the motion, but I'm going to deny the motion to stay
25 with the extra added piece to the puzzle: We wouldn't

1 have any hearing as far as this -- we wouldn't have a
2 trial in this case until we get the STB's direction and
3 directive. So that's -- that's where I'm at.

4 So I think we're going to go forward.
5 I'm not going to grant the stay. We've got to -- let's
6 keep this thing moving. You guys do your discovery,
7 ladies and gentlemen, whatever you all can work out.
8 We're -- I think -- well, in about a month we're set to
9 be heard, I guess, on your motions. I think you all
10 set it for Polk County; is that right?

11 MS. READ: Yes, Your Honor.

12 THE COURT: Okay. Well, I'm ready to
13 go and will be ready on that day. But there's no -- to
14 me, there's nothing to be gained and there's a fair
15 amount to be lost by granting the stay today. So let's
16 keep moving. So, respectfully, the motion is denied
17 subject to my little addition there at the end. Okay?

18 MR. GARCEAU: Thank you, Your Honor.

19 THE COURT: Any other -- any
20 questions?

21 MS. THOMPSON: Your Honor, do you want
22 me to prepare the order and then circulate?

23 THE COURT: If you would, counsel.
24 And it's okay with me if you want to just attach --

25 MS. THOMPSON: The ruling?

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THE COURT: -- the memo from -- it
doesn't --

MS. THOMPSON: Absolutely.

THE COURT: Whatever works. But yeah.

MS. THOMPSON: Okay. Thank you, Your
Honor.

(End of Excerpt of Proceedings.)

C E R T I F I C A T E

STATE OF TENNESSEE

COUNTY OF KNOX

I, Allison L. Gossett, Licensed Court Reporter, do hereby certify that I reported in machine shorthand the foregoing proceedings; that the foregoing pages, numbered 1 to 6, inclusive, were typed by me using computer-aided transcription and constitute a true and accurate record of said proceedings.

I further certify that I am not an attorney or counsel of any attorney or counsel connected with the action, nor financially interested in the action.

Witness my hand this the 29th day of October, 2015.

Allison L. Gossett

Allison L. Gossett, LCR
TN Licensed Court Reporter No. 028