

237548

BAKER & MILLER PLLC

ATTORNEYS and COUNSELLORS
2401 PENNSYLVANIA AVENUE, NW
SUITE 300
WASHINGTON, DC 20037

TELEPHONE: (202) 663-7820
FACSIMILE: (202) 663-7849

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WILLIAM A. MULLINS

(202) 663-7823 (Direct Dial)

January 20, 2015

VIA E-FILING

Cynthia T. Brown, Chief
Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington DC 20423-0001

Re: *Norfolk Southern Railway Company – Acquisition and Operation -
Certain Rail Lines of the Delaware and Hudson Railway Company, Inc.*, STB
Docket FD 35873

Dear Ms. Brown:

Enclosed is Norfolk Southern Railway Company's "Reply to James Riffin's Motion for Stay and Motion for a Protective Order" (NS-12) in response to the pleadings filed by James Riffin on January 13, 2015 and January 14, 2015 in the above referenced proceeding. If there are any questions concerning this filing, please contact me at the address and phone listed above or at wmullins@bakerandmiller.com.

Respectfully submitted,



William A. Mullins
Attorney for Norfolk Southern Railway Company

Enclosures

cc: Parties of Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 35873

NORFOLK SOUTHERN RAILWAY COMPANY

- ACQUISITION AND OPERATION -

**CERTAIN RAIL LINES OF THE DELAWARE AND HUDSON RAILWAY
COMPANY, INC.**

**REPLY TO JAMES RIFFIN'S MOTION FOR STAY AND MOTION
FOR A PROTECTIVE ORDER**

**James A. Hixon
William A. Galanko
John M. Scheib
Maquiling B. Parkerson
Aarthy S. Thamodaran
NORFOLK SOUTHERN CORPORATION
Three Commercial Place
Norfolk, VA 23510
Tel: (757) 533-4939
Fax: (757) 533-4872**

**William A. Mullins
Amber L. McDonald
Crystal M. Zorbaugh
BAKER & MILLER PLLC
2401 Pennsylvania Ave, NW
Suite 300
Washington, DC 20037
Tel: (202) 663-7820
Fax: (202) 663-7849**

**Attorneys for Norfolk Southern
Railway Company**

January 20, 2015

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 35873

NORFOLK SOUTHERN RAILWAY COMPANY

– ACQUISITION AND OPERATION –

**CERTAIN RAIL LINES OF THE DELAWARE AND HUDSON RAILWAY
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**REPLY TO JAMES RIFFIN’S MOTION FOR STAY AND MOTION
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INTRODUCTION

On November 17, 2014, Norfolk Southern Railway Company (“NS”) submitted a Minor Application (NS-1) seeking approval for NS’s acquisition and operation of 282.55 miles of Delaware and Hudson Railway Company, Inc.’s rail lines located in Pennsylvania and New York and for approval of certain other related actions, collectively deemed the “Transaction” in the Application. On December 16, 2014, the Surface Transportation Board (“Board”) accepted NS’s Application for consideration as a minor transaction under the regulations, embraced NS’s two related filings,¹ and adopted a procedural schedule (“December 16 Decision”).² On December 30, 2014, James Riffin filed a “Petition for Review of Surface Transportation Board Decision Served on December 16, 2014” (“Petition for Review”) with the United States Court of Appeals

¹ The related filings seek to modify existing trackage rights agreements that are relevant to the Transaction.

² Notice of the Board’s acceptance of the Application formally was published in the Federal Register on December 22, 2014, 79 Fed. Reg. 76446, although the Board also published this decision on its website on December 16, 2014.

for the Third Circuit.³ Subsequently, Mr. Riffin filed with the Board a Motion for Stay on January 13, 2015, and a Motion for a Protective Order on January 14, 2015. Both Motions should be denied. Mr. Riffin has failed to meet the standard for the Board to grant a stay, and his request for a protective order is unnecessary due to the existence of the Board's existing protective order.⁴

I. JAMES RIFFIN HAS FAILED TO MEET THE STANDARD FOR THE BOARD TO GRANT A MOTION FOR STAY.

Mr. Riffin's Motion for Stay should be denied because it fails to meet the appropriate standard. Under 49 U.S.C. § 721(b)(4), the Board may issue a stay when necessary to prevent irreparable harm. The standard used by the Board in determining whether to grant a stay is set forth in Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977) (citing Va. Petroleum Jobbers Ass'n v. Fed. Power Comm'n, 259 F.2d 921, 925 (D.C. Cir. 1958)). See, e.g., Total Petrochemicals & Refining, USA, Inc. v. CSX Transp., Inc., Docket No. NOR 42121, 2013 STB LEXIS 418 (STB served Jan. 2, 2014). Under this standard, the Board may grant a stay if the requesting party demonstrates: (1) there is a likelihood that it will prevail on the merits of any challenge to the action sought to be enjoined, (2) it will suffer irreparable harm in the absence of a stay, (3) other interested parties will not be substantially harmed by a stay, and (4) the public interest supports the granting of a stay. Mr. Riffin does not even apply this standard in his Motion for Stay; instead, Mr. Riffin erroneously claims that a stay should be granted if his Petition for Review is not frivolous.

³ Petition for Review of Surface Transportation Board Decision Served on December 16, 2014, James Riffin v. Surface Transportation Board and United States of America, No. 14-4839 (3d Cir. Dec. 30, 2014).

⁴ Norfolk Southern Railway Company – Acquisition and Operation – Certain Rail Lines of the Delaware and Hudson Railway Company, Inc., STB Docket No. 35873 (STB served December 17, 2014) (“December 17 Decision”).

Furthermore, the Board consistently has held that a party seeking a stay bears the burden of persuasion on all four elements. See, e.g., Middletown & N.J. R.R. – Lease & Operation Exemption – Norfolk S. Ry., FD 35412, slip op. at 2 (STB served Oct. 6, 2010). In its attempt to persuade, Mr. Riffin’s Motion for Stay asserts the Board “lost its jurisdiction” when Mr. Riffin’s Petition for Review was filed with the Third Circuit. In support of this assertion, Mr. Riffin cites his own comments, posted on the Board’s website on January 12, 2015, in which he stated that “the proceeding has been effectively stayed until further notice from the Third Circuit,” and cites Blinco v. Green Tree Servicing, LLC, 366 F.3d 1249 (11th Cir. 2004), which allows the stay of litigation in a district court pending a non-frivolous appeal of the denial of a motion to compel arbitration. However, Blinco and its rationale do not apply to the issue of whether to stay the Board’s December 16 Decision.⁵

Mr. Riffin has failed to demonstrate any of the elements required for the Board to grant a stay. As argued in NS-10, Mr. Riffin’s arguments challenging the Board’s December 16 Decision are entirely without merit; and, Mr. Riffin has not shown that the balance of interests supports granting a stay. As such, the Board should deny the Motion for Stay.⁶

⁵ Mr. Riffin argues, without any legal support, that this decision from the Eleventh Circuit involving the Federal Arbitration Act should control the Board’s decision regarding his Motion for Stay. Even Mr. Riffin acknowledges that this decision “is not directly on point” and that he “was unable to find a 3rd Circuit case that dealt with the issue of the propriety of a stay pending review of an early stage appeal.”

⁶ Even if Mr. Riffin had applied and satisfied the correct standard warranting a stay, Mr. Riffin has challenged a non-final Board decision. As the Board emphasized in its December 16 Decision, “this is not a final determination.” As such, Mr. Riffin is not entitled to a stay pending judicial review, because his request for judicial review of the Board’s decision is improper at this time. See, e.g., Total Petrochemicals & Refining, USA, Inc. v. CSX Transp., Inc., Docket No. NOR 42121, 2013 STB LEXIS 418 (STB served Jan. 2, 2014).

II. JAMES RIFFIN'S MOTION FOR A PROTECTIVE ORDER IS UNNECESSARY, AS THE EXISTING PROTECTIVE ORDER ADEQUATELY PROTECTS HIS AND OTHER PARTIES' EVIDENTIARY SUBMISSIONS.

Mr. Riffin's Motion for a Protective Order should also be denied. Mr. Riffin has moved for a protective order in order to file highly confidential documents which "include marketing and operational information, which Riffin does not want published in the public docket." However, the Board's December 17 Decision already extends a protective order to Mr. Riffin and all other parties in the proceeding, allowing them to designate materials as confidential or highly confidential to protect proprietary business, personal, or other confidential information, consistent with 49 C.F.R. § 1104.14. The existing protective order is consistent with protective orders previously issued by the Board, provides any party, including Mr. Riffin, with the ability to protect from public disclosure any marketing and operational information that Mr. Riffin classifies as confidential or highly confidential, and addresses Mr. Riffin's other concerns, including: the limitation on use of confidential material solely for purposes of the Board proceeding; the provision of confidential material to outside counsel only upon completion of a confidentiality undertaking; the destruction of confidential material upon completion of the Board proceeding; restricted attendance at Board hearings where confidential material will be used, and restricted access to transcripts of the same; and compliance by all parties with the protective order in the absence of a good cause showing. There is no policy justification, or legal support, for the notion that there should be two protective orders in a single Board proceeding. Consistent with prior precedent, the Board should deny Mr. Riffin's Motion.⁷

⁷ See Stewartstown Railroad Co. – Adverse Abandonment – in York County, PA, Docket No. AB 1071 (STB served Apr. 25, 2012) where the Board denied Mr. Riffin's motion for a protective order, noting that the proposed order was "unnecessary, as the Board previously

CONCLUSION

As demonstrated in these comments, Mr. Riffin has failed to meet the standard for the Board to grant his Motion for Stay, and his Motion for a Protective Order is unnecessary.

Accordingly, the Board should deny the requested motions.

Respectfully submitted,



James A. Hixon
William A. Galanko
John M. Scheib
Maquiling B. Parkerson
Aarthy S. Thamodaran
NORFOLK SOUTHERN CORPORATION
Three Commercial Place
Norfolk, VA 23510
Tel: (757) 533-4939
Fax: (757) 533-4872

William A. Mullins
Amber L. McDonald
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BAKER & MILLER PLLC
2401 Pennsylvania Ave, NW
Suite 300
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Tel: (202) 663-7820
Fax: (202) 663-7849

January 20, 2015

Attorneys for Norfolk Southern Railway
Company

issued a protective order in this proceeding” that would cover the materials Mr. Riffin sought to protect.

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing "Reply to James Riffin's Motion for Stay and Motion for a Protective Order" (NS-12) in STB Finance Docket No. 35873, by first class mail, properly addressed with postage prepaid, or via more expeditious means of delivery, upon all persons required to be served as set forth in 49 C.F.R. § 1180.4(c)(5) and all parties of record.


William A. Mullins
Attorney for Norfolk Southern Railway Company

January 20, 2015