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SEC

SERVICE DATE – JUNE 11, 2009

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35245

JAMES RIFFIN—PETITION FOR DECLARATORY ORDER

STB Finance Docket No. 35246

JAMES RIFFIN—ACQUISITION AND OPERATION—VENEER SPUR—IN BALTIMORE
COUNTY, MD

MOTION FOR PROTECTIVE ORDER

Decided: June 10, 2009

On May 6, 2009, James Riffin filed an application to acquire and operate, under 49 U.S.C. 10902, approximately 400 feet of track formerly known as the Veneer Mfg. Co. Spur (Veneer Spur) in Cockeysville, Baltimore County, MD, which is currently owned by Mark Downs, Inc. (Mark Downs), a noncarrier.¹ STB Finance Docket No. 35246, James Riffin—Acquisition and Operation—Veneer Spur—In Baltimore County, MD. On the same date, Riffin filed a petition for declaratory order posing the following questions: (1) did Riffin become a common carrier by rail on August 18, 2006;² and (2) would Riffin’s operation of the Veneer Spur constitute operating an additional line of railroad. STB Finance Docket No. 35245, James Riffin—Petition for Declaratory Order.

On the same date, Riffin also filed a motion for a protective order in both dockets to protect the confidential nature of certain documents, including “marketing data” and a copy of Riffin’s lease of the Veneer Spur from Mark Downs. Riffin argues that the information in these documents is highly confidential and should not be disseminated to anyone other than outside counsel to the parties to this proceeding. He states that he views the parties involved in this

¹ By decision served on May 29, 2009, the Board held in abeyance Riffin’s acquisition and operation application pending a final determination of the declaratory order proceeding in STB Finance Docket No. 35245. James Riffin—Acquisition and Operation—Veneer Spur—In Baltimore County, MD, STB Finance Docket No. 35246 (STB served May 29, 2009).

² By decision served on August 18, 2006, the Board permitted Riffin to substitute for his corporate affiliate, WMS, LLC, as the prospective purchaser of an 8.54-mile line of railroad in Allegany County, MD. CSX Transportation, Inc.—Abandonment Exemption—In Allegany County, MD, STB Docket No. AB-55 (Sub-No. 659X) (STB served Aug. 18, 2006).

matter as his competitors and maintains that they have demonstrated a commitment to preventing freight rail service from being provided in Cockeyville. A proposed protective order and undertaking were included with the motion.

The Maryland Transit Administration (MTA), a modal administration of the Maryland Department of Transportation (MDOT), filed a reply on May 26, 2009, arguing that MTA is not a competitor of any commercial freight rail service Riffin would seek to operate, and that there is no valid commercial reason to keep the personnel of MTA, MDOT, other modal administrations of MDOT and their counsel from having access to any relevant information. Because it has no competitive, commercial interest in the transaction at issue, MTA asks that the Board revise Riffin's proposed protective order in the form attached to MTA's reply.

Norfolk Southern Railway Company (NSR) filed a reply on May 27, 2009. NSR objects to the requirement in the draft protective order that NSR must hire outside counsel to have access to the confidential information submitted by Riffin in these proceedings. NSR argues that there is no valid commercial reason to keep the information confidential from anyone at NSR, as Riffin is not a competitor of NSR, and that there is no "competitive environment" among the parties in this case. NSR asks that, if a protective order is needed at all, the Board enter the revised draft order attached to its reply.

Finally, because of issues that have arisen with Riffin's prior submissions to the Board in other cases, both MTA and NSR ask that Riffin be required to submit a certification regarding the confidential or highly confidential nature of all information for which he seeks to claim confidential or highly confidential status.

Riffin's request for a protective order in these proceedings will be granted with modifications. Riffin's arguments that both MTA and NSR are his competitors are unpersuasive, and there is no reason to prohibit their in-house counsel and employees from seeing this information. MTA has explained that it is a public body providing public passenger rail transportation, not a competitor of the commercial freight rail service Riffin would seek to operate. MTA's use of subsidies to encourage businesses on the Cockeyville Industrial Track to use non-rail transportation does not transform it into a competitor of Riffin. NSR has also shown that it would not compete with Riffin's proposed operation and, therefore, that there is no commercial reason to keep the information Riffin has submitted from the parties' in-house counsel or employees. The Board will therefore re-designate the documents that Riffin has labeled "highly confidential" to be "confidential" and modify the proposed protective order accordingly. The modified protective order and undertaking are set out in the appendix to this decision.

MTA and NSR's request that Riffin be required to submit a certification regarding the confidential nature of all information he seeks to designate as confidential will be denied. Issuance of the attached protective order will ensure that the material will be used only in connection with this proceeding and not for any other business or commercial purpose. The motion conforms with the Board's rules at 49 CFR 1104.14 governing requests for protective orders to maintain the confidentiality of materials submitted to the Board. We note, however, that certain documents Riffin has designated as "highly confidential" were previously submitted as part of public dockets in other proceedings. Those documents may not be classified as

“confidential” in this case.³ If there is a dispute about the designation of a particular document, the parties may ask the Board to decide the issue.

It is ordered:

1. Riffin’s motion for a protective order is granted, with the modifications described above, and the protective order and undertaking in the appendix to this decision are adopted.
2. The parties are directed to comply with the protective order and undertaking in the appendix to this decision.
3. This decision is effective on its service date.

By the Board, Anne K. Quinlan, Acting Secretary.

Anne K. Quinlan
Acting Secretary

³ The documents include letters from Packard Fence Company, SealMaster Pavement Products & Equipment, Buschemi Stone Masonry, Inc., and European Landscapes and Design, all of which were submitted by Riffin on May 11, 2007, in STB Finance Docket No. 24975, Maryland Transit Administration—Petition for Declaratory Order. Riffin also includes a letter from Mark Downs Office Furniture, which was previously submitted on February 24, 2006, in STB Docket No. AB-290 (Sub-No. 237X), Norfolk Southern Railway Company—Abandonment Exemption—In Baltimore County, MD.

APPENDIX

PROTECTIVE ORDER

1. For purposes of this Protective Order:
 - (a) “Confidential Documents” means documents and other tangible materials containing or reflecting Confidential Information.
 - (b) “Confidential Information” means traffic data (including but not limited to waybills, abstracts, study movement sheets, and any documents or computer tapes containing data derived from waybills, abstracts, study movement sheets, or other data bases, and cost work papers), the identification of shippers and receivers in conjunction with shipper-specific or other traffic data, the confidential terms of contracts, confidential financial and cost data, and other confidential or proprietary business or personal information.
 - (c) “Designated Material” means any documents designated or stamped as “CONFIDENTIAL” in accordance with paragraph 2 or 3 of this Protective Order, and any Confidential Information contained in such materials.
 - (d) “MDOT” means the Maryland Department of Transportation.
 - (e) “MTA” means the Maryland Transit Administration.
 - (f) “NSR” means Norfolk Southern Railway Company.
 - (g) “Proceedings” means those before the Surface Transportation Board (“the Board”) concerning any directly related proceedings covered by STB Finance Docket Nos. 35245 or 35246, and any related proceedings before the Board, and any judicial review proceedings arising from the same or from any related proceedings before the Board.
 - (h) “STB” means the U.S. Surface Transportation Board.
2. If NSR or the MTA, MDOT, or any of MDOT’s modal administrations as a party to these Proceedings determines that any part of a document it submits, discovery request it propounds, discovery response it produces, transcript of a deposition or hearing in which it participates, or pleading or other paper to be submitted, filed, or served in these Proceedings contains Confidential Information or consists of Confidential Documents, then that party may designate and stamp such Confidential Information and Confidential Documents as “CONFIDENTIAL.” Any information or documents so designated or stamped as “CONFIDENTIAL” shall be handled as provided for hereinafter.

3. If James Riffin as a party to these Proceedings determines that any part of a document he submits, discovery request he propounds, discovery response he produces, transcript of a deposition or hearing in which he participates, or pleading or other paper to be submitted, filed or served in these Proceedings contains Confidential Information or consists of Confidential Documents, then Mr. Riffin may designate and stamp such Confidential Information and Confidential Documents as “CONFIDENTIAL.” Any information or documents so designated or stamped as “CONFIDENTIAL” shall be handled as provided for hereinafter.
4. Information and documents designated or stamped as “CONFIDENTIAL” may not be disclosed in any way, directly or indirectly, to any person or entity except to an employee, counsel, consultant, or agent of a party to these Proceedings, or an employee of such counsel, consultant, or agent, who, before receiving access to such information or documents, has been given and has read a copy of this Protective Order and has agreed to be bound by its terms by signing a confidentiality undertaking substantially in the form set forth in the Appendix to this Order.
5. Any party to these Proceedings may challenge the designation by any other party of information or documents as “CONFIDENTIAL” by filing a motion with the STB to adjudicate such challenges.
6. Designated Material must be kept either in the office of the senior general attorney of NSR (or successor NSR in-house attorney who shall be bound by this Protective Order and Undertakings) or its outside counsel or in the outside counsel of or in the office of the Counsel of MTA, may not be copied, and may not be used for any purposes, including without limitation any business, commercial, or competitive purposes, other than the preparation and presentation of evidence and argument in the Proceedings, and/or any judicial review proceedings in connection with the Proceedings and/or with any related proceedings.
7. Any party who receives Designated Material in discovery shall return or destroy such materials and any notes or documents reflecting such materials (other than file copies of pleadings or other documents filed with the STB and retained by the senior general attorney of NSR (or successor NSR in-house attorney who shall be bound by this Protective Order and Undertakings) or the outside counsel for a party to these Proceedings) at the earlier of (1) such time as the party receiving the materials withdraws from these Proceedings, or (2) the completion of these Proceedings, including any petitions for reconsideration, appeals, or remands.
8. No party may include Designated Material in any pleading, brief, discovery request or response, or other document submitted to the STB unless the pleading or other document is submitted under seal pursuant to the rules of this Board.
9. No party may present or otherwise use any Designated Material at a hearing in these Proceedings, unless that party has previously submitted, under seal, all proposed exhibits and other documents containing or reflecting such Designated Material to the STB to

whom relevant authority has been lawfully delegated by the STB, and has accompanied such submission with a written request that the STB: (a) restrict attendance at the hearing during any discussion of such Designated Material, and (b) restrict access to any portion of the record or briefs reflecting discussion of such Designated Material in accordance with this Protective Order.

10. In any party intends to use any Designated Material in the course of any deposition in these Proceedings, that party shall so advise counsel for the party producing the Designated Material, counsel for the deponent, and all other counsel attending the deposition. Attendance at any portion of the deposition at which any Designated Material is used or discussed shall be restricted to persons who may review that material under the terms of this Protective Order. All portions of deposition transcripts or exhibits that consist of, refer to, or otherwise disclose Designated Material shall be filed under seal and be otherwise handled as provided in this Protective Order.
11. To the extent that materials reflecting Confidential Information are produced by a party in these Proceedings, and are held and/or used by the receiving person in compliance with paragraphs 1, 2, or 3 above, such production, disclosure, holding, and use of the materials and of the data that the materials contain are deemed essential for the disposition of this and any related proceedings and will not be deemed a violation of 49 U.S.C. 11904 or of any other relevant provision of the ICC Termination Act of 1995.
12. All parties must comply with all provisions of this Protective Order unless the STB determines that good cause has been shown warranting suspension of any of the provisions herein.
13. Nothing in this Protective Order restricts the right of any party to disclose voluntarily any Confidential Information originate by that party, or to disclose voluntarily any Confidential Documents originated by that party, if such Confidential Information or Confidential Documents do not contain or reflect any Confidential Information originated by any other party.
14. Any party filing with the Board a “CONFIDENTIAL” pleading in these Proceedings should simultaneously file a public version of the pleading.

UNDERTAKING
CONFIDENTIAL MATERIAL

I, _____, have read the Protective Order served on June 11, 2009, governing the production and use of Confidential Information and Confidential Documents in STB Finance Docket Nos. 35245 and 35246, understand the same, and agree to be bound by its terms. I agree not to use or permit the use of any Confidential Information or Confidential Documents obtained pursuant to that Protective Order, or to use or to permit the use of any methodologies or techniques disclosed or information learned as a result of receiving such data or information, for any purposes other than the preparation and presentation of evidence and argument in STB Docket Nos. 35245 or 35246, before the Surface Transportation Board (“Board”), and/or any judicial review proceedings in connection with STB Finance Docket Nos. 35245 or 35246. I further agree not to disclose any Confidential Information, Confidential Documents, methodologies, techniques, or data obtained pursuant to the Protective Order except to persons who are also bound by the terms of the Order and who have executed Undertakings in the form hereof, and that, at the conclusion of this Proceeding (including any proceeding on administrative review, judicial review, or remand), I will promptly destroy any documents containing or reflecting materials designated or stamped as “CONFIDENTIAL,” other than file copies, kept by outside counsel or the senior general attorney of Norfolk Southern Railway Company (or successor NSR in-house attorney who shall be bound by this Undertaking), of pleadings and other documents filed with the Board.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that a party which asserts the confidential interest shall be entitled to specific performance and injunctive and/or other equitable relief as a remedy for any such breach. I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking, but shall be in addition to all remedies available at law or equity.

Signed: _____

Print: _____

Title: _____

Affiliation: _____

Date: _____