

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-290 (Sub-No. 311X)

NORFOLK SOUTHERN RAILWAY COMPANY–PETITION FOR EXEMPTION–IN  
BALTIMORE CITY AND BALTIMORE COUNTY, MD

MOTION FOR PROTECTIVE ORDER

Decided: January 29, 2010

On January 5, 2010, James Riffin, Zandra Rudo, Carl Delmont, Lois Lowe, and Eric Strohmeyer (collectively, the Offerors) filed a formal notice of intent to file an offer of financial assistance (OFA), to purchase all of the freight operating rights, freight operating easement(s), any related operating agreements or leases, and all rights the Norfolk Southern Railway Company (NSR) desires to abandon, which pertain to a 13.26-mile dead-end segment of a line of railroad commonly known in recent years as the Cockeysville Industrial Track (CIT). The line is located between railroad milepost UU-1.00 (located just north of Wyman Park Drive, formerly Cedar Avenue) and the end of the CIT line south of the bridge at railroad milepost UU-15.44 in the City of Baltimore and in Baltimore County, MD. On the same date, the Offerors filed comments and opposition to NSR's request for exemption from the OFA procedures.

On the same date, Riffin<sup>1</sup> also filed a motion for a protective order to protect the highly confidential nature of certain documents filed under seal. Riffin argues that the information in these documents includes highly confidential marketing data and should not be disseminated to anyone other than the Board, the outside counsel of NSR, and the outside counsel of the Maryland Transit Administration (MTA). Riffin claims that the parties involved in this case have demonstrated a commitment to preventing freight rail service from being provided on the line as evidenced by the payment of subsidies by MTA to the line's former shippers to ship by motor carrier and would attempt to coerce the potential shippers that Riffin has located to withdraw their support for freight rail service were this information disclosed to MTA personnel. Riffin views MTA as a competitor because of the subsidy payments. Riffin states that NSR has not taken a position regarding the requested protective order and that restricting access to Riffin's highly confidential material to outside counsel for NSR would not be unduly burdensome because NSR used outside counsel in another matter involving the two parties. A proposed protective order and undertaking were included with Riffin's motion.

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<sup>1</sup> Riffin purports to represent all the Offerors and possibly others in this filing. Because Riffin is neither a licensed attorney nor practitioner approved to practice before the Board, he may only represent himself. See 49 CFR 1103.2 and 1103.3.

MTA, a modal administration of the Maryland Department of Transportation (MDOT), filed a reply on January 8, 2010. MTA points out that it 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 (whether in-house or outside) from having full access to any relevant information. MTA explains that it, along with its sister modal administrations of MDOT, are public bodies providing or facilitating public passenger rail transportation and are not private freight operators. MTA disputes Riffin's claim that it is "selling" trucking services by providing subsidies to former shippers on the line to use motor carriage, and states that it simply is exercising its legitimate interest as owner of the property to encourage former shippers to use non-rail transportation rather than relying on a corridor to which Riffin has no rights. Because it has no competitive, commercial interest in the transaction at issue, MTA states that the form of the Order proposed by Riffin is overbroad, and asks that, if a protective order is needed at all, the Board enter the revised draft order attached to its reply.

Due to issues that have arisen with Riffin's prior submissions to the Board in other cases, MTA asks 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. MTA has included language to this effect in its proposed protective order.<sup>2</sup>

NSR filed a reply on January 14, 2010. 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 contends that it should not be forced to incur the expense of hiring outside counsel merely to review the information submitted by Riffin under seal. NSR asks that, if a protective order is needed at all, the Board enter the revised draft order attached to its reply.<sup>3</sup>

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<sup>2</sup> In a footnote, MTA has asked that the Board strike paragraph 4 of Riffin's motion as constituting unverified allegations that are irrelevant to the Board's consideration of his request for a protective order. Because MTA's objections go more to the weight to be afforded that material, it will not be stricken for purposes of this decision.

<sup>3</sup> On the same date, NSR filed a motion to strike the following four filings submitted to the Board by the Offerors: each Notice of Intent to Participate as a Party of Record; Notice of Intent to File an Offer of Financial Assistance; Motion for a Protective Order Pursuant to 49 CFR 1104.14; and Comments and Opposition to Request for Exemption from the Offer of Financial Assistance Procedures. NSR primarily bases its motion to strike the protective order on the grounds that Riffin may not represent other "Offerors" in this proceeding. In its January 25, 2010 reply in support of NSR's petition for exemption, MTA also joins in NSR's motion to strike. Riffin's ability to represent others before the Board is addressed in note 1 to this decision and does not require striking the motion for a protective order as to Riffin.

NSR, in the alternative, has asked the Board to strike paragraphs 3, 4, 5, and 6, again citing the representation matter, and challenging the relevancy of those paragraphs. NSR also requests that the sentence in paragraph 8 stating that NSR had not taken a position on the request

(continued . . . )

Riffin's request for a protective order in these proceedings will be granted with modifications. Riffin's arguments that MTA and, inferentially, 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 Cockeysville 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. Riffin made similar arguments that were rejected in James Riffin–Petition for Declaratory Order et al., STB Docket No. 35245 (STB served June 11, 2009) (Veneer Spur). The Board will therefore re-designate the documents that Riffin has labeled "highly confidential" to be "confidential" and modify the proposed protective order accordingly.<sup>4</sup> The modified protective order and undertaking are set out in the appendix to this decision, and are substantially the same as those entered in Veneer Spur.

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.

MTA'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. If there is a dispute about the designation of a particular document, the parties may ask the Board to decide the issue.

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( . . . continued)

for a protective order be stricken as false and misleading. These provisions need not be stricken because this decision addresses the representation matter, the relevancy challenge goes to the weight of the evidence, and NSR has had ample opportunity to state its position regarding the protective order requested by Riffin. In the interest of administrative efficiency, a protective order, substantially as sought by NSR as a further alternative, will be adopted now, as discussed below, for use as needed during this proceeding.

Accordingly, NSR's motion to strike the request for a protective order will be denied. The remainder of NSR's motion to strike will be dealt with in a separate decision.

<sup>4</sup> In these materials, Riffin states that he has presented the document entitled "Comments by James Riffin Regarding the Proposed Harford County Incinerator" to various Harford and Baltimore County personnel and to residents who have attended various public meetings regarding the new incinerator. The document is therefore public information and will not be classified as confidential. An attached newspaper article is public information as well.

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, Joseph H. Dettmar, Acting Director, Office of Proceedings.

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) “Other Party” means a Party to the Proceeding other than MDOT, MTA or NSR.
  - (h) “Proceeding” or “Proceedings” means the proceeding or proceedings before the Surface Transportation Board (“the Board”) concerning, related to or covered by STB Docket No. AB-290 (Sub-No. 311X), and any related proceedings before the Board, and any judicial review proceedings arising from the same or from any related proceedings before the Board.
  - (i) “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 any Other Party determines that any part of a document he or she submits, discovery request he or she propounds, discovery response he or she produces, transcript of a deposition or hearing in which he or she participates, or pleading or other paper to be submitted, filed or served in these Proceedings contains Confidential information or consists of Confidential Documents, then said Other 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.
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 or attorney of NSR (or successor NSR in-house attorney who shall be bound by this Protective Order and Undertaking) 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 or attorney of NSR (or successor NSR in-house attorney who shall be bound by this Protective Order and Undertaking) 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. If 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 originated 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 January 29, 2010, governing the production and use of Confidential Information and Confidential Documents in STB Docket No. AB-290 (Sub-No. 311X), 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 No. AB-290 (Sub-No. 311X), before the Surface Transportation Board (“Board”), and/or any judicial review proceedings in connection with STB Docket No. AB-290 (Sub-No. 311X). 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 or 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: \_\_\_\_\_