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**Before the
Surface Transportation Board
Finance Docket No. 35873**

**NORFOLK SOUTHERN RY. CO.
- ACQUISITION AND OPERATION APPLICATION -
CERTAIN LINES OF THE DELAWARE AND HUDSON RY.**

JAMES RIFFIN'S MOTION FOR STAY

1. James Riffin (“**Riffin**”) herewith moves the Surface Transportation Board (“**STB**”) to **stay** the STB’s December 16, 2014 Decision, and **to stay all further proceedings** in this proceeding, and in support hereof states:

2. In Riffin’s **January 9, 2015** Preliminary Comments, see ¶ 3, (posted on the STB’s Web Site on Monday, January 12, 2015), Riffin argued that the STB lost its jurisdiction over this proceeding when Riffin filed his Petition for Review on December 30, 2014, and further argued that “this proceeding has been effectively stayed until further notice from the Third Circuit.”

3. In ¶11 of Riffin’s Preliminary Comments, he stated:

“While Riffin is not expressly asking the STB to stay this proceeding, it would seem to be prudent for the STB to stay the proceeding on its own motion.” The STB only retains the jurisdiction to enforce the December 16, 2014 decision. But there is little to enforce. All proceedings after December 30, 2014, are likely to be held to be a nullity.”

4. Since filing his January 9, 2015 Preliminary Comments, Riffin read the court’s opinion in *Blinco v. Green Tree Servicing, LLC*, 366 F. 3d 1249 (11th Cir. 2004). (In *Blinco*, the District Court denied a motion to compel arbitration.)

5. In *Blinco*, at 1253, the court stated:

“When a litigant files a motion to stay litigation in the district court pending an appeal from the denial of a motion to compel arbitration, the district court **should stay** the litigation so long as the appeal is non-frivolous. If the district court denies the motion to stay, then the appellant may file a motion to stay in this Court. If this Court determines that the appeal is non-frivolous, then this Court **should stay** the litigation in the district court pending the appeal of the denial of the motion to compel arbitration.” Bold added.

6. In *Blinco* the 11th Circuit further stated:

“We too are persuaded by the reasoning of the Seventh Circuit in *Bradford-Scott Data Corp., Inc. v. Physician Computer Network, Inc.*, [128 F. 3d 504 (7th Cir. 1997)] that upon the filing of a non-frivolous appeal under 9 U.S.C. § 16(a), the district court should not exercise control over the aspects of the case involved in the appeal. 128 F.3d at 505-06.. Upon motion, proceedings in the district court, therefore, should be stayed pending resolution of a non-frivolous appeal from the denial of a motion to compel arbitration.” *Blinco* at 1251.

7. In *Blinco*, the 11th Circuit noted:

“The “circuit courts that have considered the issue are split *Compare Bradford-Scott Data Corp., Inc. v. Physician Computer Network, Inc.*, 128 F. 3d 504 (7th Cir. 1997) (holding that, upon motion, a stay of litigation in the district court is proper during the pendency of a non-frivolous appeal of a denial of a motion to compel arbitration) *with Britton v. Co-op Banking Group*, 916 F. 2d 1405 (9th Cir. 1990) (denying a stay of proceedings in the district court during an appeal from a denial of a motion to compel arbitration) *and In re Salomon Inc. Shareholders’ Derivative Litigation*, 68 F. 3d 554 (2d Cir. 1995) (refusing to stay proceedings in the district court while arbitrability issue is pending on appeal, but not providing clear basis for decision).” *Id.* at 1251.

8. Riffin 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.

9. The *Blinco* court, at 1251, explained its rationale:

“The Supreme Court has explained that ‘a federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously. The filing of

a notice of appeal is an event of jurisdictional significance – it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.’ *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58, 103 S. Ct. 400, 401, 74 L. Ed. 2d 225 (1982); ... The only aspect of the case involved in an appeal from an order denying a motion to compel arbitration is whether the case should be litigated at all in the district court. The issue of continued litigation in the district court is not collateral to the question presented by an appeal under §16(a)(1)(A); ‘It is the mirror image of the question presented on appeal.’ *Bradford-Scott Data Corp.*, 128 F. 3d at 505.”

10. This proceeding does not involve the Federal Arbitration Act. So the *Blinco* decision is not directly on point. However, the rationale for a stay is on point: The filing of a notice of appeal divests the lower tribunal of its jurisdiction to proceed on matters that are the subject of the appeal. And, “the underlying reasons for allowing immediate appeal ... are inconsistent with continuation of proceedings in the district court, and a non-frivolous appeal warrants a stay of those proceedings.” *Blinco* at 1252.

11. So the immediate question is:

A. Is Riffin’s Petition for Review ‘frivolous?’ If ‘yes,’ then a stay should be denied. If ‘no,’ then a stay is warranted.

12. “Frivolous” means not ‘fairly debatable;’ totally without any merit.

13. In this proceeding, a number of parties other than Riffin, have questioned the propriety of the STB’s decision not to reject the Application, have questioned the Constitutional legality (Due Process / Unequal protection of the Law) of the STB’s Scheduling Order (Less than the statutory 30 days for comments was provided to protestants / protestants were given only 25 days to comment while the Applicant was given 75 days to rebut protestants’ comments), have questioned the STB’s decision not to include the impact of the D&H’s discontinuance of its trackage rights, have questioned whether the D&H is a “Co-applicant,” have questioned whether the D&H is required to submit detailed “Employee impact” statements, and have questioned the STB’s omission of any time for discovery from its Scheduling Order.

14. All of the above issues will be the subject of Riffin's Petition for Review. He also is likely to include some additional issues.

15. All of the above issues are 'fairly debatable.' So, Riffin's Petition for Review is clearly 'not frivolous.'

16. Consequently, pursuant to the rationale in *Blinco*, the STB **should stay the proceeding pending remand by the Third Circuit.**

17. Since the Scheduling Order is one of the issues to be reviewed, it is one of the "aspects of the case involved in the appeal," and consequently, **the Scheduling Order should be stayed.**

18. If the Scheduling Order is stayed, then the entire proceeding ought to be stayed.

19. The Third Circuit has already indicated that it will quickly decide whether it has the jurisdiction to hear Riffin's Petition for Review. (Are those portions of the order that will be the subject of the petition for review, immediately appealable?)

20. Pending the ruling from the Third Circuit on the issue of whether it has the jurisdiction to hear Riffin's Petition for Review, Riffin would move the STB **to stay all proceedings in FD 35873.**

Respectfully,

/s/ James Riffin
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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of January, 2015, a copy of the foregoing Motion for Stay, was served on the parties noted below, either by E-mail, or by 1st Class Mail.

/s/ James Riffin
James Riffin

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