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February 14, 2008

VIA E-FILING

The Honorable Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, S W.
Washington, DC 20423-0001

RE: *The Kansas City Southern Railway Company – Abandonment Petition for Exemption – Line in Warren County, MS, Docket No. AB-103 (Sub-No. 21X)*

Dear Acting Secretary Quinlan:

Enclosed please find a reply on behalf of The Kansas City Southern Railway Company (“KCSR”) to the pleading submitted in the above-captioned proceeding by James Riffin titled Update Unauthorized Removal Of Bridge And Track Material and to the letter submitted by Mr. Riffin on February 13, 2008.

If there are any questions about this matter, please contact me directly, either by telephone. (202) 663-7823 or by email: wmullins@bakerandmiller.com.

Respectfully submitted,



William A Mullins

Enclosures

**BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, DC**

**STB DOCKET NO. AB-103
(SUB-NO. 21X)**

**THE KANSAS CITY SOUTHERN RAILWAY COMPANY
- ABANDONMENT PETITION FOR EXEMPTION -
LINE IN WARREN COUNTY, MS**

REPLY

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**Attorneys for The Kansas City
Southern Railway Company**

February 14, 2008

**BEFORE THE
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**STB DOCKET NO. AB-103
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REPLY

On January 25, 2008, Raymond B. English (“Mr. English”) and James Riffin (“Mr. Riffin”),¹ individuals and parties of record in the above-referenced proceeding, requested the Board to establish conditions and compensation under the Board’s offer of financial assistance (“OFA”) provisions at 49 CFR 1152.27(g)-(h) for their proposed acquisition of a rail line extending from milepost 225.6 to milepost 229.85 in Vicksburg, Warren County, MS (the “Line”). The Line is owned by The Kansas City Southern Railway Company (“KCSR”).² - In their Joint Request, Petitioners argue that the Line possesses a negative net liquidation value (“NLV”), and they therefore apparently request that the Board order the conveyance of the entire

¹ Messrs. English and Riffin will be referred to as “Petitioners.”

² Petitioners’ request to establish conditions and compensation filed in this proceeding on January 25, 2008, will be referred to as the “Joint Request.”

Line to Petitioners for \$0.³ KCSR responded to the Joint Request on January 30, 2008, by supplying detailed evidence showing that the Line's NLV is \$504,615.⁴

On February 4, 2008, Petitioners filed a raft of pleadings with the Board, including, among others, a motion to strike portions of KCSR's reply evidence and a supplement to the Joint Request ("Supplement"). By decision served February 6, the Director of the Office of Proceedings struck the majority of the materials submitted by Petitioners and directed KCSR to respond to the issues raised by Petitioners regarding Warren County's actions to remove a bridge at the end of the line.. KCSR responded to the Director's directive on February 8.

On February 11, in another attempt to resubmit the already-rejected information, Petitioners have filed a Petition To Reopen pursuant to 49 CFR 1152.25(e)(4) and a filing that is entitled "Update Unauthorized Removal Of Bridge And Track Material" ("Update"). KCSR responded to the Petition To Reopen on February 13. Mr. Riffin filed another letter on February 13 which replies to comments made by KCSR on February 8 ("Letter"). KCSR hereby responds to the Update and the Letter. As the Director properly did in his February 6 decision, the Board should strike most parts of the Update, particularly page 5, note 1, pages 6-9; the February 9 Verified Statement Of James Riffin, and Exhibit O-1 through O-4 (collectively "Irrelevant Materials.") and the Letter. KCSR has no objection to allowing those portions of the Update regarding the bridge into the record and submits this brief reply.

³ Because of Petitioners' bifurcation argument and their vagueness about exactly what they would pay for the southern 2.35-mile section, it is difficult to tell exactly what Petitioners are asking the Board to set as the value, but at least for purposes hereof, KCSR believes that they are requesting a finding of an NLV of zero.

⁴ KCSR has provided a detailed background of this proceeding at pages 3-6 of KCSR's January 30th "Reply to Request to Establish Conditions and Compensation for Financial Assistance," ("KCSR Reply") which KCSR incorporates herein by reference

ARGUMENT

The "Update" Most of the material contained in the Update has nothing to do with updating the Board regarding the removal of portions of the bridge, but rather is an attempt to resubmit, supplement, and reformat the very same material that was properly stricken from the record in the February 6 Director's decision. For example, most of the Irrelevant Material is simply a repeat and expansion of Paragraph 3 of Petitioners' February 4 Motion To Strike dealing with KCSR's dealings with businesses located near the Line. Other parts of the Irrelevant Material are simply personal attacks on this law firm or on KCSR employees, while still other parts are a rehash of arguments that Petitioners made in the underlying merits of the abandonment proceeding.

KCSR is prepared to address the merits of each of the allegations contained in the Irrelevant Materials if the Board so desires; however, at this stage of the proceeding, the Irrelevant Materials are simply that: irrelevant. The Board is currently setting the terms and conditions for a sale of the Line under the OFA process. The Board is not determining whether to grant or deny the abandonment or whether there was a past violation of KCSR's or its predecessor's common carrier obligation.⁵ Those issues are simply not germane at this point in the proceeding. Status Of Bush Universal, Inc., Finance Docket No. 27026, 342 I.C.C. 550 (1973)(granting motion to strike material that was not relevant to the issue at hand), R.D., Timpany, Trustee Of The Central Railroad Co., Of New Jersey – Abandonment Of Operation

⁵ KCSR continues to believe that no request for service sufficient to trigger the common carrier obligation under the Board's recent rulings with respect to duties to quote rates was made. Certainly neither Hancor nor LeTourneau made any filings with the Board in this proceeding concerning KCSR's service on or proposed abandonment of the Line. Foam Packaging is the only business on or near the Line (other than the prospective Lakes casino) to make filings with the Board in this case. Even Mr. Riffin, a Maryland resident, had nothing to say about this issue, *except* in an attempt to use it as leverage to get KCSR to agree to sell the Line to him for less than its value

Between Phillipsburg, N.J. And Hudson, PA, Finance Docket No. 26659, 348 I.C.C. 53
(1973)(granting motion to strike irrelevant material); Cf. Request For An Order Directing The Southern Pacific Transportation Company To Negotiate Trackage Rights With The Great Western Railway Company, Finance Docket. No. 30872, (ICC served Aug. 17, 1987)(denying motion to strike because issues were germane). Because none of the Irrelevant Materials are relevant to the Board's decision to set the terms and conditions, that material should be stricken from the record, consistent with the same reasoning underlying the February 6 decision and for the reasons set forth in KCSR's February 13 Reply to the Petition To Reopen.

With respect to the filed "evidence and argument" regarding the bridge, KCSR does not object to its inclusion in the record at this time, but only if the Board accepts this Reply. At least one fact is not in dispute: Warren County did remove parts of the bridge. Nonetheless, Petitioners are not entitled to compensation for the removal of those components.

Mr. Riffin tries to imply that KCSR consented to the removal of parts of the bridge by his constant reference to KCSR's own statement that a local KCSR representative had "told Warren County that it could take down the bridge if it did so at its own expense." Of course Mr. Riffin conveniently leaves out the part of KCSR's statement from several years ago that said Warren County could take down the bridge at its own expense if the "proper approvals were obtained." The entire sentence in the February 5 letter that Mr. Riffin likes to quote only in part says, "At the time, the KCSR local representative apparently told Warren County that it could take down the bridge if it did so at its own expense and the proper approvals were obtained." (Emphasis added to the part that Mr. Riffin repeatedly ignores.) Warren County's recent actions were taken without the proper approvals having been obtained.

Regardless of how or why Warren County removed parts of the bridge, the only real issue is whether or not Petitioners, as a potential OFA purchaser, are entitled to compensation for the fact that Warren County has removed portions of the bridge. Of course Riffin seeks more than compensation for the removed portions, instead, Riffin requests the Board to require KCSR to restore the bridge to fully operable condition.⁶ Yet, there is nothing in the OFA statute or STB precedent that requires a seller, whose property is being taken, to pay for the cost to rehabilitate tracks, switches, or other track material, including bridges.

Instead, under the OFA statute and Fifth Amendment, KCSR is the party entitled to compensation for the property that is taken from it as a result of the OFA purchase. It is the purchaser that has to pay the value of the taken property – whatever the condition of that property. Under these principles, an OFA seller gets the value of the property that was the subject to the OFA and which the Board considered in setting the price. The seller is obligated to transfer the property that was part of that price and generally in the condition on which the price is based.

Under these principles and assuming the Board's decision setting the terms and conditions included a positive net liquidation value for the steel and other components of the bridge, and those components had been removed prior to the Board's setting the terms and conditions (or even after a decision setting the terms and conditions), then Petitioners may, under certain circumstances, be entitled to compensation. Railroad Ventures, Inc. – Abandonment Exemption – Between Youngstown, OH and Darlington, PA, STB Docket No. AB-556 (Sub-No 2X)(STB served Oct. 4, 2000) (circumstances where the rail carrier seeking abandonment authority had sold parts of the rail property essential for operation thereof, as distinguished from

⁶ Riffin posits that it would cost \$1.5 million to rebuild the bridge; however, that is not evidence of the value of what Warren County may have taken

the circumstances in the instant case involving an unapproved taking of part of the property by a third party). Here, Petitioners are not entitled to compensation for the removed portions of the bridge because Petitioners did not place any value on the Glass Road Bridge and were not paying for it.

Not having proposed to pay anything for bridge and given that the STB seldom places a positive value on a bridge or its components parts for which Petitioners would have to pay KCSR, and given that KCSR is not being compensated for the sale of the bridge, the STB cannot award compensation for the removal of assets for which Petitioners would not be paying. Indeed, awarding compensation to Riffin would be inherently saying that the bridge (or its component parts) has value, and if the bridge (or its parts) has value, then KCSR should be compensated for that value when that asset is taken from it in the OFA process. Failure to so compensate KCSR for the “value” of such a taken asset would be a violation of the Fifth Amendment

Perhaps realizing the difficulty of asking for compensation for something that Petitioners have placed no value upon, Mr. Riffin claims that as potential OFA purchasers, Petitioners are somehow entitled to the same rights as the City of Vicksburg has with respect to the Purchase and Sale Agreement (“PSA”) between KCSR and the City of Vicksburg, citing 1411 Corporation – Abandonment Exemption – In Lancaster County, PA, STB Docket No. AB-581X (STB served October 18 and April 12, 2002)(“1411”). Neither the PSA nor the 1411 case support that claim.

The 1411 case does not stand for the proposition that Petitioners are third party beneficiaries to the PSA and are entitled to all of its protections and obligations with respect to all of the assets constituting the Line. Instead, that case stands for the proposition that if the Board, in an OFA proceeding, relies upon an independent purchase and sale agreement to

determine the NLV value of a line and its component parts, then the OFA purchaser should get all of the assets covered by that contract on which the Board relied, and on substantially the same terms as the contract.

Such is not the case here. In this case, unlike the 1411 case where the Board relied upon a contract that covered both the real estate and rail assets to establish the NLV of the line, KCSR has not proffered the PSA to determine the NLV of the entire Line. Instead, here, KCSR relies upon the PSA to determine the value of the real estate underlying the corridor. The PSA included only a value for the real estate, but excluded the value for ties, tracks, switches, or other track materials - including such materials that may be on, or connecting to, any railway bridges. Thus, assuming the Board agrees with KCSR's proffer that the real estate is worth what the PSA establishes as the market value, then an apples to apple comparison with the 1411 case would say that KCSR cannot sell portions of the real estate because Petitioners are entitled to all of the real estate covered by that contract and on which the Board relied upon to establish the NLV of the Line. Petitioners make no such claims that KCSR has sold, or intends to sell, any portion of the real estate, so the 1411 decision is inapposite to Petitioners' claims about the bridge over Glass Road.

The PSA also does not support Petitioners' claim for compensation. Mr. Riffin tries to rely upon the PSA because the contract contains language about the City's right to purchase the "Entire Property" and that KCSR must maintain the "Railway Property" in the same condition as of the date of the contract. Mr. Riffin reads these terms and then leaps to the conclusion that those terms and clauses are also referring to the Glass Road Bridge and its components; i.e., the track and other track materials connecting to the bridge trestles. Accordingly, Mr. Riffin claims that the PSA gives him rights to the removed component parts.

Mr Riffin's argument ignores that the "Entire Property" and "Railway Property" are defined terms and only included the acreage and real estate. See PSA Exhibit A (attached). The argument further ignores the fact that the contract specifically did not require KCSR to sell the City the rail, ties, or other track materials, defined as "Rail Materials." PSA ¶ 1. KCSR has the option, but not the obligation, to transfer such property to the City. Likewise, KCSR has the option to remove such materials.

The simple fact is that the parts of the Glass Road Bridge that were removed do not constitute "Entire Property" or "Railway Property" that were part of the compensation for which the City was paying under the PSA.⁷ Petitioners cannot therefore rely upon the PSA as the basis for requiring compensation for the removal by a third party of portions of a bridge that KCSR had no obligation to sell under the PSA.⁸ As the STB said in 1411, "[b]ecause the [contract], on which we based the purchase price, did not require the transfer of these grade crossings [materials connecting to a rail bridge] we will not order Applicants to pay to restore them." 1411 at footnote 8.

Even assuming that Petitioners were due some compensation for the removal of the bridge components, which they are not for the reasons cited above, the Board cannot make that finding on this record and award such compensation. It is unclear how much of the bridge was removed, though clearly not all of it was, Petitioners' assertions to the contrary notwithstanding. Indeed, Petitioners' own photos show that the main supports of the bridge and portions of the

⁷ Indeed, if Petitioners were correct in their analysis, and the City believed that the portions of the Glass Road Bridge that were removed were to be included in the PSA, the City might be making a claim against KCSR for breach of the PSA. The City has made no such claim.

⁸ Indeed, given that Petitioners did not offer the same price as the PSA for that portion of the line south of Milepost 227.5, but instead offered \$3,000.00 per acre for only fee simple property (which they did not identify in their request to set terms), and with a cap of \$45,000.00, they are not entitled to claim that their offer parallels the PSA.

steel buttresses remain. Likewise, the Board does not have a record to determine if the NLV of the removed components was positive or negative. If it was negative, then there is no NLV value of those components for which Petitioners should be compensated.

Mr. Riffin's February 13 Letter. Mr. Riffin's letter to the Board filed February 13 should also be ignored, or stricken by the Board on its own motion as in the February 6 decision. The letter is clearly additional argument in support of Mr. Riffin's and Mr. English's valuation request filed January 25. As such, it was due January 25, not 19 days later. Should the Board consider the filing, it should first note that the attached case does in fact indicate what KCSR said – that often the Board values bridges at an NLV of zero. Second, the Board should note that the decision indicates that if the Board accords a bridge a different valuation than zero, it is because the Board is presented with evidence that the abandoning carrier is compelled (or voluntarily chooses) to remove the bridge. No such evidence was presented here. Third, the decision says that if the railroad is compelled to remove the bridge, then the Board will value the bridge at an NLV considering the cost of the salvaged materials and the cost of removal. Here, where Warren County actions indicate that it is ready to remove the bridge entirely at its own cost, the evidence indicates that there would be no cost of removal to KCSR. Thus, the decision included with Mr. Riffin's letter filed February 13 does not warrant any deduction from the \$504,615 NLV shown by KCSR's evidence and simply buttresses KCSR's argument that the bridge has zero value for which Petitioners are due compensation.

Finally, KCSR would encourage the Board to consider sanctioning Mr. Riffin and Mr. English should they make any more filings in this case prior to service of the Board's decision setting terms and conditions. The Director's February 6 decision made abundantly clear that additional filings dealing with the value of the Line are untimely. Mr. Riffin's pattern of making

new filings with the Board every few days (often preceded by a call to KCSR suggesting that KCSR reconsider its refusal to accept an unjustifiably low value for the Line) is inimical to the conduct of the Board's functions in this matter and should not be tolerated further.⁹

CONCLUSION

Despite Mr Riffin's efforts at being both a legal advocate and a witness in the very same pleading, Riffin has not established that Petitioners are entitled to compensation for those portions of the Glass Road Bridge that were removed by Warren County without KCSR's permission. Neither STB precedent nor the PSA support Riffin's arguments. Indeed, most of the material contained in the Update and the Letter has nothing to do with updating the Board but rather is another attempt to resubmit, supplement, and reformat the very same or similar material that was properly stricken from the record in the February 6 Director's decision. It should be stricken again.

Respectfully submitted,

**David C. Reeves
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Dated: February 14, 2008

**Attorneys for The Kansas City Southern
Railway Company**

⁹ **See e.g. Petition Of James Riffin For Declaratory Order, Finance Docket No. 34997, December 18, 2007 Reply Of The Maryland Department Of The Environment And County Of Allegany, Maryland To Petition For Expedited Declaratory Order, Tab A (attaching 10/04/07 Order from the U.S. District Court For The District Of Maryland directing the Clerk of the Court to not accept any further filings from Mr. Riffin without leave of the Court)**

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing Reply by mailing copies of the same via prepaid first class mail to all parties of record in these proceedings or by more expeditious means of delivery.

Dated at Washington, D.C. this 14th day of February, 2008.


William A. Mullins

**EXHIBIT A
TO
SALE AGREEMENT**

Legal Description of Entire Property
(Fee Simple Property and Railway Property)

Fee Simple Property

Parcel 1

Part of Lot 21 of the Mattingly-Magnolia Plantation being located in Sections 19, Township 15 North, Range 3 East, Warren County, Mississippi, a plat of which is recorded in Deed Book 69 at Page 92-93 of the Land Records of Warren County, Mississippi, and part of Lot 100 of the J.H. Short's Subdivision of the Laurel and Cedar Hill Subdivision in Sections 19 and 20, Township 15 North, Range 3 East, a plat of which is recorded in Book 69 at page 196 of the Land Records of Warren County, Mississippi, said parcel also being a compilation of those tracts shown as No. 14 and No. 15 of the Yazoo and Mississippi Valley Railroad right-of-way Plat that is shown in Deed Book 774 at Page 532-533 of the Land Records of Warren County, Mississippi, said tracts being further described as follows: Beginning at the Southeast corner of Lot 17 of said Mattingly-Magnolia Plantation, said corner also lying on the western right-of-way of The Kansas City Southern Railroad, thence along the said western right-of-way of railroad, said right-of-way being 50.0 feet west and parallel to the centerline of the mainline tract, S 17-49-58 W, 871.19 feet; thence continuing along the said western right-of-way of railroad, S 17-46-15 W, 1675.65 feet; thence leaving said railroad right-of-way, N 75-01-38 W, 550.66 feet; thence N 75-01-38 W, 2.31 feet to a 5/8 inch iron pipe found; thence N 17-44-56 E, 804.76 feet; thence N 17-44-56 E, 913.34 feet; thence N 18-11-29 E, 427.10 feet; thence N 18-11-29 E, 443.24 feet; thence S 70-26-37 E, 199.63 feet; thence S 70-51-05 E, 348.09 feet to the Point of Beginning, containing 32.52 acres, more or less.

Parcel 2

Part of Lot 21 of the Mattingly-Magnolia Plantation being located in Sections 19, Township 15 North, Range 3 East, Warren County, Mississippi, a plat of which is recorded in Deed Book 69 at Page 92-93 of the Land Records of Warren County, Mississippi, and part of Lot 100 of the J. H. Short's Subdivision of the Laurel and Cedar Hill Subdivision in Sections 19 and 20, Township 15 North, Range 3 East, a plat of which is recorded in Book 69 at page 196 of the Land Records of Warren County, Mississippi, said parcel also being a compilation of those tracts shown as No. 16, No. 17, No. 18, and No. 19 of the Yazoo and Mississippi Valley Railroad right-of-way Plat that is shown in Deed Book 774 at Page 532-533 of the Land Records of Warren County, Mississippi, said tracts being further described as follows: Commencing at the Southeast corner of Lot 17 of said Mattingly-Magnolia Plantation, said corner also lying on the western right-of-way of The Kansas City Southern Railroad, thence along the said western right-of-way of railroad, said right-of-way being 50.0 feet west and parallel to the centerline of the mainline tract, S 17-49-58 W, 871.19 feet; thence continuing along the said western right-of-way of railroad, S 17-46-15 W, 1675.65 feet to the Point of Beginning; thence continuing along the said western right-of-way of railroad, S 17-46-57 W, 4246.60 feet; thence continuing along the said western right-of-way of railroad and along a curve to the right having a chord of S 19-10-03 W, 652.87 feet, a radius of 11393.91 feet and a length of 652.96 feet to the centerline of Little Bayou; thence along the said centerline of said Little Bayou the following courses and distances: N 78-18-13 W, 37.94 feet, N 86-47-58 W, 95.83 feet, S 85-52-17 W, 44.59 feet, S 81-10-43 W, 100.41 feet, S 79-17-07 W, 60.17 feet, S 72-42-20 W, 255.12 feet, S 83-48-28 W, 48.15 feet to a line that is parallel and 550 feet west of the western right-of-way of said railroad,

thence leaving said centerline of Little Bayou and along a line that is parallel to and 550 feet west of the western right-of-way of said railroad, N 21-05-59 E, 247.99 feet; thence continuing along a line that is parallel to and 550 feet west of the western right-of-way of said railroad, and being along a curve to the left having a chord of N 19-20-32 E, 687.54 feet, a radius of 10843.91 feet and a length of 687.65 feet; thence continuing along a line that is parallel to and 550 feet west of the western , right-of-way of said railroad, N 17-46-57 E, 4222.07 feet; thence leaving said line that is parallel to and 550 feet west of the western right-of-way of said railroad, S 75-01-38 E, 550.66 feet to the point of beginning, containing 63.16 acres, more or less.

Parcel 3

Beginning at the intersection of the western right-of-way of aforementioned railroad and the centerline of Little Bayou; thence continuing along the said western right-of-way of railroad and along a curve to the right having a chord of S 20-59-03 W, 69.57 feet, a radius of 11393.91 feet and a length of 69.57 feet; thence continuing along the said western right-of-way of railroad, S 21-05-59 W, 318.39 feet to the northern right-of-way of Warrenton Lane; thence continuing along the said northern right-of-way of Warrenton Lane, N 72-31-44 W, 884.91 feet to a point where the northern line of Warrenton Lane intersects the centerline of Little Bayou; thence along the centerline of Little Bayou the following courses and distances: S 89-17-58 E, 140.45 feet; N 89-55-13 E, 216.09 feet; N 83-48-28 E, 48.15 feet, N 72-42-20 E, 255.12 feet; N 79-17-07 E, 60.17 feet; N 81-10-43 E, 100.41 feet; N 85-52-17 E, 44.59 feet, S 86-47-58 E, 95.83 feet; S 78-18-13 E, 37.94 feet to the point of beginning, containing 3.84 acres, more or less.

Parcel 4

All of Lots 1- 13 of the Jacobs Subdivision, a plat of which is recorded in Plat Book 69 at Page 139 of the Land Records of Warren County, Mississippi, said parcel also being a compilation of those tracts shown as No. 13, Nos. 21-31 of the Yazoo and Mississippi Valley Railroad right-of-way Plat that is shown in Deed Book 774 at Page 532-533 of the Land Records of Warren County, Mississippi, containing 4.69 acres, more or less.

LESS AND EXCEPT that part of Lots 1-8 of said Jacobs Subdivision being more particularly described herein. Beginning at the southeast corner of Lot 8 of said Jacobs Subdivision; thence N 72-31-44 W, 49.43 feet; thence N 21-05-59, 781.08 feet; thence S 17-28-16 W, 779.52 feet to the point of beginning, containing 0.44 acres, more or less.

Railway Property

Parcel 5

All of that certain property and/or right-of-way owned by The Kansas City Southern Railway Company and being 50.0 feet perpendicular, and lying easterly and westerly of the mainline railroad track Beginning at mile post 225.60 and continuing southerly to mile post 229.85. Said parcel containing 51.51 acres, more or less