

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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

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**KANSAS CITY SOUTHERN RAILWAY COMPANY  
ABANDONMENT EXEMPTION  
LINE IN WARREN COUNTY, MS**

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**REPLY TO KCSR'S  
REQUEST FOR CLARIFICATION**

1. Now comes Raymond B. English and James Riffin ("E&R"), who herewith file this Reply to KCSR's Request for Clarification, and say:

**BACKGROUND INFORMATION**

2. On March 12, 2008, the Kansas City Southern Railway Company ("KCSR") filed a Request for Clarification ("Request"):

A. Asking the Board to disallow E&R's March 3, 2008 Offeror's Acceptance of Terms and Conditions ("Acceptance"), on the grounds that E&R conditioned their acceptance "in accordance with the Board's precedent as stated in *1411 Corporation – Abandonment Exemption – In Lancaster County, PA*, Docket No. AB 581 (Sub-No. 0X) Served April 12, 2002 ('1411');"

B. Asking the Board to authorize the discontinuance and abandonment of the Line;

C. OR IN THE ALTERNATIVE, asking the Board to rule that KCSR is not required to

sell the Line pursuant to the conditions specified in ¶4 of E&R's Acceptance<sup>1</sup>; and

D. Asking the Board to rule that the sale of the Line would not have to be in conformity with the Board's prior *1411* precedent; and

E. Asking the board to rule that the sale of the Line would not have to be subject to applicable portions of the Purchase and Sale Agreement between KCSR and the City of Vicksburg.

3. In its Request for Clarification, KCSR argued:

A. The Board's February 22, 2008 Decision setting the terms and conditions did not **specifically** state the purchase of the Line would be subject to *1411*;

B. For an acceptance to be valid, it must accept the precise terms and conditions;

C. The Board did not impose any of E&R's ¶4 conditions;

D. Application of *1411* to this proceeding would not be appropriate, for the following reasons:

a. The PSA addressed the sale of two properties: The Railway Property (which was the Line, minus the Track Material) and a Fee Simple Property (which was 100 acres of fee simple property adjacent to the Line); and

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<sup>1</sup> A. E&R desire to acquire the **Entire Property, including "any and all appurtenances thereto, and all improvements located thereon, and any and all easements, right-of-ways and rights of ingress and egress related thereto"** (¶1, PSA), **INCLUDING any rail, ties, or other track materials;**  
B. FREE of all liens and encumbrances (¶8, PSA);  
C. All closing costs are to be divided equally between the parties, except that each party shall be responsible for its own attorney fees; All items customarily apportioned in connection with the sale of property, including, without limitation, property taxes and assessments, shall be pro-rated between E&R and KCSR based on the number of days in the applicable period during which each party held title to the property (¶14, PSA).

- b. The sale of the Railway Property and Fee Simple Property were “integrally related to other transactions going on between the City and KCSR as well. Those other transactions account for some of the provisions of the PSA.” Request at 5.
  - c. “Nowhere in E&R’s request to set terms and conditions did E&R ask the Board to impose all of the conditions of the PSA on the sale. Indeed, E&R, in their request to set terms, specifically rejected application of some of the PSA’s terms while simultaneously seeking to take advantage of others.”
  - d. The provisions of E&R’s ¶4 conflict with the conditions imposed by the Board: “For example, the Board ordered KCSR to convey by quitclaim deed and to provide mortgage releases. E&R in their paragraph ask for more – for release of all liens and encumbrances. Seeking elimination of encumbrances is clearly inconsistent with the Board’s requirement to convey by quitclaim deed. Thus, E&R’s Acceptance is actually seeking to *change* terms specifically imposed by the Board, not accepting those terms.”
  - e. The *1411* case stands for the proposition that if an arms-length contract negotiated outside the OFA context deals with the exact same rights for which the Board is setting the terms and conditions for an OFA sale, then and only then, would the principles contained in the *1411* decision be applicable.
4. On March 13, 2008, the Board issued a Decision wherein it extended the deadline for a Board decision under 49 CFR 1152.27(h)(7) until March 20, 2008.

### **E&R’S REPLY**

5. It would appear the Board has not had time to bring 49 CFR 1152.27(h)(7) into conformity with the 6<sup>th</sup> Circuit’s ruling in *Railroad Ventures, Inc. v. Surface Transp. Bd.*, 299 F.3d 523 (6<sup>th</sup> Cir. 2002) (“*Railroad Ventures*”), for in that decision, the 6<sup>th</sup> Circuit held:

“Here, we conclude that 49 C.F.R. §1152.(h)(7) must give way to 49 U.S.C. §10904

(f)(2) because the regulation is “manifestly contrary to the statute.” *Ragsdale*, 122 S.Ct. at 1160. Under the clear terms of §10904(f)(2), **the offeror need not file an acceptance of the STB’s decision setting the terms of the sale.** Rather, an offeror needs to respond to the STB’s decision only in the event that it wants to withdraw its offer to purchase the line. Thus, once an offeror has made an offer to purchase a line being abandoned, and the STB has made a decision setting the terms of the sale, then the sale of the rail line is binding upon both the rail carrier selling the line and the offeror, unless the offeror withdraws its offer within ten days of the STB’s decision setting the terms of the sale.” *Railroad Ventures* at 549. (Emphasis added.)

6. Given that E&R did not affirmatively withdraw their offer to purchase the Line at issue, and given that the 6<sup>th</sup> Circuit has held an OFA offeror need not affirmatively accept the Board’s Terms and Conditions, **KCSR’s request to have the Board disallow E&R’s Acceptance must be denied.**

7. In *Railroad Ventures* at 552, the 6<sup>th</sup> Circuit went on to hold:

“Thus, while a railroad may ‘abandon any part of its railroad lines’ under 49 U.S.C. §10903(a)(1)(A), the STB is permitted to authorize a prospective buyer under the OFA provisions to purchase ‘that part of the railroad line to be abandoned’ under 49 U.S.C. §10904(d). The line owner can seek authority to abandon all or a part of its rail line, but if it does so, then, pursuant to §10904(f)(1)(B), a qualified OFA purchaser is entitled to determine how much of the line it wishes to acquire. Fn 13. Once the offeror seeks to purchase the entire rail line or a portion thereof as described in the abandonment petition, 49 U.S.C. §10904(c), the STB is then statutorily obligated to render a decisions setting price and other sale terms as to what the offeror seeks to buy, within thirty days of a request to set conditions. 49 U.S.C. §10904 (f)(1)(A). Under this statutory provision, then, it necessarily follows that **neither the abandoning rail carrier nor the STB can alter or amend what the OFA buyer has offered to buy; rather, the STB can only set the terms on what the offeror has proposed to purchase.**

In short, once the owner of a rail line submits a petition seeking the STB’s authority to abandon the line, it must allow a prospective OFA purchaser the opportunity to determine how much of the line to acquire, **as the line is described in the abandonment petition.** Thus, at the point of filing the abandonment petition the abandoning rail line owner cannot reduce or diminish the rail line or the nature of the property interests associated with the line. Because a rail line owner is subject to the STB’s jurisdiction until such time that the line has been properly abandoned or sold, it therefore must maintain the status quo with respect to its property interests in the rail line as described in its abandonment petition.” (Emphasis added.)

8. Since the 6<sup>th</sup> Circuit has held “that **neither the abandoning rail carrier nor the STB**

can alter or amend what the OFA buyer has offered to buy; rather, the STB can only set the terms on what the offeror has proposed to purchase,” KCSR’s request asking the Board to disallow E&R’s offer to purchase the Line pursuant to the conditions specified in ¶4 of E&R’s Acceptance, and in conformity with the Board’s prior *1411* precedent, **must be denied**. E&R have the absolute exclusive right to determine how much of the Line they wish to acquire, how much of the Line is needed “to keep viable lines in operation,” *Iowa Terminal*, 853 F.2d at 965, and to determine the conditions under which E&R are willing to acquire the Line. Once an OFA offeror has made an offer and has asked the Board to set the terms and conditions, the only thing the Board is allowed to do, is to determine what the Fair Market Value is for what the OFA offeror has offered to purchase.

9. In the instant case, E&R made it quite clear in their March 3, 2008 Acceptance that E&R offered to acquire all of the Line:

- A. Including “**any and all appurtenances thereto, and all improvements located thereon, and any and all easements, right-of-ways and rights of ingress and egress related thereto**” (¶1, PSA), **INCLUDING any rail, ties, or other track materials;**
- B. FREE of all liens and encumbrances (¶8, PSA);
- C. All closing costs are to be divided equally between the parties, except that each party shall be responsible for its own attorney fees; All items customarily apportioned in connection with the sale of property, including, without limitation, property taxes and assessments, shall be pro-rated between E&R and KCSR based on the number of days in the applicable period during which each party held title to the property (¶14, PSA).

10. In ¶¶ 2 and 3 of English’s December 20, 2007, Offer of Financial Assistance, English declared:

- “2. The portion of the Line that English offers to buy, extends **from MP 225.6 to approximately MP 227.5**, a distance of approximately **1.9 miles**, or to the end of the track that is presently on the ground, which track ends a few hundred feet past a spur track which Foam Packaging, Inc. uses to offload inbound cars containing polystyrene.
- 3. For this portion of the Line, the underlying right-of-way, which consists of about 23 acres (1.9 miles = 10,032 linear feet; at 100 feet wide = 100,320 SF or approximately

23 acres), all the track material, bridges, and any and all other items on, appurtenant to, or associated with, the Line, including any and all interests, legal or equitable, that KCSR may have in, or which is associated with, the Line, including all licensing and any other agreements associated with the Line, free of all liens and encumbrances, settlement costs to be split, English offers \$51,000.00.”

11. In ¶3 of English’s December 21, 2007 Supplement to English’s Offer of Financial Assistance, English declared:

“3. Add the following new paragraphs:

21. English and Riffin further offer to purchase that portion of the Line that extends **from MP 227.5 to MP 229.85**, a distance of approximately **2.35 miles**, or to the end of the Line that is the subject of the above entitled proceeding. For this portion of the Line, the underlying right-of-way, which consists of about 28.5 acres, all the track material, bridges, and any and all other items on, appurtenant to, or associated with, the Line, including any and all interests, legal or equitable, that KCSR may have in, or which is associated with, the Line, including all licensing and any other agreements associated with the Line, free of all liens and encumbrances, settlement costs to be split, English offers approximately **\$ 45,000.00.**”

12. In ¶6B of E&R’s January 25, 2008 Request to Establish Conditions and Compensation for Financial Assistance, E&R stated, and KCSR did not file an objection to, the following, under the heading of Points of Agreement:

“**B. Real estate value:** KCSR and the City of Vicksburg have a contract which states the City of Vicksburg is willing to pay **\$4,500.00 per acre** for the right-of-way, whether title to the real estate is held in fee simple or is reversionary (¶ 2). The contract further stipulates KCSR and the City agree to split transfer costs (¶ 14); to pro rate annualized expenses, such as property taxes, etc. (¶ 14); the property is to be transferred free of all liens and encumbrances (¶ 8); title to include all the bridges, and any and all other items on, appurtenant to, or associated with, the Line, excepting the Rail Materials, including any and all interests, legal or equitable, that KCSR may have in, or which is associated with, the Line, including all licensing and any other agreements associated with the Line (¶1). The Contract further stipulates that **any rail materials remaining on the right-of-way more than 90 days after the Railway Property Closing Date shall become the sole property of the City of Vicksburg** (¶ 1).”

13. In ¶¶ 26 - 28 of E&R’s January 25, 2008 Request to Establish Conditions and Compensation for Financial Assistance, E&R stated:

“26. The City of Vicksburg, MS and KCSR entered into a Purchase and Sale Agreement

("PSA"), dated April 5, 2007, wherein the City of Vicksburg offered to purchase the Line for \$4,500.00 per acre (see ¶2 PSA), whether KCSR's interest was reversionary or fee simple. Paragraph 1 of the PSA further stated "The conveyance of the Entire Property from Seller to Buyer shall include any and all appurtenances thereto, any and all improvements located thereon, and any and all easements, right-of-ways and rights of ingress and egress related thereto, with the exception of any rail, ties, or other track material." Paragraph 8 of the PSA stated at or prior to closing, "Seller, at its sole cost and expense, shall (i) pay all prior year(s) ad valorem taxes (including any interest and penalties) assessed upon the Entire property, and (ii) ... cause the satisfaction, cancellation and termination of record of any monetary liens or encumbrances affecting the Entire Property" including any "non-permitted encumbrances." Paragraph 14 of the PSA stated "all closing costs associated with this transaction shall be divided equally between Buyer and Seller," and further stated that "All other items customarily apportioned in connection with the sale of similar properties similarly located ... shall be prorated."

27. In *1411 Corporation – Abandonment Exemption – In Lancaster County, PA*, STB FD No. AB 581 (Sub-No. X), Served April 12, 2002, the Board stated, on p. 4:

"... the parties will be directed to proceed with the sale of the line under terms and conditions comparable to those terms and conditions stipulated in the Shawnee / Colonial Purchase Contract, except where a provision in the Shawnee / Colonial Purchase Contract plainly is inapplicable."

28. Since the PSA stipulated KCSR was willing to sell the Line to the City of Vicksburg for \$4,500.00 per acre, whether reversionary or fee simple, and since the Board has previously stated the sell of a line via the OFA process will be under the same conditions as are found in a Purchase Agreement, English & Riffin will offer to purchase the 23 acres of the Line between MP 225.6 and MP 227.5 for **\$103,500.00**. [23 acres at \$4,500 / acre = \$103,500.]

14. In ¶ 43 of E&R's January 25, 2008 Request to Establish Conditions and Compensation for Financial Assistance, E&R stated:

"43. English and Riffin further offer to purchase that portion of the Line that extends **from MP 227.5 to MP 229.85**, a distance of approximately **2.35 miles**, or to the end of the Line that is the subject of the above entitled proceeding ("**Remainder**"). For this portion of the Line, the underlying right-of-way, which consists of about 28.5 acres, all the track material, bridges, and any and all other items on, appurtenant to, or associated with, the Line, including any and all interests, legal or equitable, that KCSR may have in, or which is associated with, the Line, including all licensing and any other agreements associated with the Line, free of all liens and encumbrances, settlement costs to be split, English offers approximately **\$ 45,000.00**.

15. From the above, it is clear E&R asked the Board to set the terms and conditions for their acquisition of: The Line, “the underlying right-of-way, which consists of about [51.51] acres, all the track material, bridges, and any and all other items on, appurtenant to, or associated with, the Line, including any and all interests, legal or equitable, that KCSR may have in, or which is associated with, the Line, including all licensing and any other agreements associated with the Line, free of all liens and encumbrances, settlement costs to be split.” The Board, after much deliberation, determined the Fair Market Value of the property interests E&R offered to purchase, was **\$504,615.00**. **As the 6<sup>th</sup> Circuit stated, the STB cannot “alter or amend what the OFA buyer has offered to buy; rather, the STB can only set the terms on what the offeror has proposed to purchase.”** *Railroad Ventures* at 552. E&R would argue, the Board has done all that it was required to do, and all that it was permitted to do. The only thing the Board may do at this time, is the ministerial task of ordering KCSR to sell the Line to E&R pursuant to E&R’s Offer.

#### ***1411 CORPORATION IS APPLICABLE***

16. KCSR has argued the sale of the Line should not be in accordance with the Board’s precedent as stated in *1411*. In *New York Cross Harbor R.R. v. Surface Transp. BD.*, 374 F.3d 1177, 1181 (D.C. Cir. 2004), the court stated: “An agency acts arbitrarily and capriciously if it “reverse[s] its position in the face of a precedent it has not persuasively distinguished,” citing *Louisiana Pub. Serv. Comm’n v. FERC*, 184 F.3d 892, 897 (D.C. Cir. 1999).” For the Board to rule the sale of the Line was not to be in conformity of *1411*, the Board would have had to “persuasively distinguish” this case from *1411*. The Board has not done this, nor is there any reason to do this.

17. KCSR argued application of *1411* to this proceeding would not be appropriate, since the PSA “involved not just the planned sale of the right of way, but was integrally related to other transactions going on between the City and KCSR as well.” Request at p.5. The PSA states otherwise:

“9. **Fee Simple Property closing.** ... The Fee Simple Property Closing may take place independently of the Railway Property Closing, and neither closing is dependent upon the other.”

18. KCSR argued: “Indeed, E&R, in their request to set terms, specifically rejected application of some of the PSA’s terms while simultaneously seeking to take advantage of others.” Request at 5. In making this argument, KCSR failed to identify which of the terms of the PSA E&R rejected, that KCSR believes the sale of the Line should be subject to. Even if there are certain terms of the PSA that E&R rejected, which KCSR believes should have been accepted by E&R, as previously stated, the 6<sup>th</sup> Circuit held: “pursuant to §10904(f)(1)(B), a qualified OFA purchaser is entitled to determine how much of the line it wishes to acquire,” and “neither the abandoning rail carrier nor the STB can alter or amend what the OFA buyer has offered to buy.” *Railroad Ventures* at 552. From this E&R would conclude, an OFA offeror may pick and chose whatever portions of the Line it determines are required “to keep viable lines in operation,” *Iowa Terminal*, 853 F.2d at 965, and may set the terms and conditions under which it chooses to acquire the portions of the Line it seeks to acquire.

#### **RELEASE OF ALL LIENS AND ENCUMBRANCES AND QUITCLAIM DEEDS ARE COMPATIBLE**

19. KCSR argued seeking the release of all liens and encumbrances is incompatible with transferring title via quitclaim deed. E&R would disagree. It should be noted, at no time in this proceeding prior to March 12, 2008, has KCSR mentioned, well alone objected to, E&R’s offer to purchase the Line free of all liens and encumbrances. Had KCSR objected to this condition, KCSR should have made their objection known in KCSR’s January 30, 2008 Reply to Request to Establish Conditions and Compensation for Financial Assistance. **KCSR raised no objection.** E&R would argue, KCSR’s March 12, 2008 objection to transferring title free of all liens and encumbrances, comes too late. Furthermore, as stated previously, the 6<sup>th</sup> Circuit has declared neither the rail carrier nor the Board may alter or amend the OFA offeror’s offer. E&R made their offer, which clearly stated they offered to purchase the Line free of all liens and encumbrances. The Board determined the Fair Market Value of the assets E&R offered to purchase. At this stage, there is nothing left to do but the ministerial task of effecting the transfer of the Line to E&R, pursuant to the terms and conditions expressed in E&R’s Offer, for the Fair Market Value of \$504,615, subject to E&R’s right to request compensation for the unlawful removal of portions of the Glass Road bridge. The Board granted KCSR 90 days within which to obtain releases from any mortgages applicable to the Line. KCSR has not argued that it would

not be able to obtain releases from all liens and encumbrances during this period of time. Once KCSR had obtained releases of all liens and encumbrances, it then could execute a quitclaim deed, transferring to E&R whatever interests KCSR had in the Line, thereby transferring to E&R all of its current property interests, free of liens and encumbrances.

20. E&R did not specifically specify the type of deed it desired. Given the fact that E&R did not condition its offer on a specific type of deed, E&R will consent to transfer of title via a quitclaim deed, providing KCSR obtains releases from all liens and encumbrances prior to executing a quitclaim deed.

### ESCROWING OF FUNDS

21. In *Railroad Ventures*, the Board ordered the creation of an escrow account because the carrier had authorized state workers to pave over parts of the track and damage signals during its ownership of the line. The record in that case showed the carrier had acknowledged that it would be responsible for any repair costs. The record in this case is similar. A KCSR representative told Warren County the County could remove the Glass Road bridge, providing it did so at its own expense. KCSR, in its February 5, 2008 letter to Mel Clemens, stated:

“Likewise, KCSR stands willing and able to provide common carrier service over the bridge in accordance with STB precedent, **even if that means restoring tracks or replacing parts of the bridge.**” P.2.

### CONCLUSION

WHEREFORE, for the foregoing reasons:

22. E&R would ask that the Board order KCSR to transfer the Line to E&R, free of all liens and encumbrances, within 90 days of the Board’s February 22, 2008 Decision, on the condition that E&R remit to KCSR \$504,615, either in the form of a cashier’s check, or wired funds. [E&R would suggest wired funds would be the most expedient way to transfer the funds to KCSR.]

23. Since the Board has stated E&R have the right to request compensation for the unlawful

removal of the Glass Road bridge, E&R would ask that the Board grant E&R permission to place the purchase funds in an escrow account, pending the outcome of E&R's request for compensation.

Respectfully submitted,

Raymond B. English /s/

*James Riffin*

/s/

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Raymond B. English

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James Riffin

**CERTIFICATE OF SERVICE**

I hereby certify that on this 17<sup>th</sup> day of March, 2008, a copy of the foregoing Reply to KCSR's Request for Clarification, was e-mailed, and was mailed via first class mail, postage prepaid, to **William A. Mullins**, Baker & Miller PLLC, Ste 300, 2401 Pennsylvania Ave, N.W., Washington, DC 20037, attorney for Kansas City Southern Railway Company, and to **Craig Richey**, 315 W. 3<sup>rd</sup> Street, Pittsburg, KS 66762, attorney for Vicksburg Southern Railroad, Inc.

*James Riffin* /s/

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James Riffin