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April 25, 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 in connection with the above-captioned proceeding please find The Kansas City Southern Railway Company's ("KCSR") Motion to Strike April 22 Comments of Raymond B. English and James Riffin.

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

Respectfully submitted,



William A. Mullins

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

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

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

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**MOTION TO STRIKE APRIL 22 COMMENTS OF  
RAYMOND B. ENGLISH AND JAMES RIFFIN**

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**April 25, 2008**

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

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**STB DOCKET NO. AB-103  
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**THE KANSAS CITY SOUTHERN RAILWAY COMPANY  
– ABANDONMENT PETITION FOR EXEMPTION –  
LINE IN WARREN COUNTY, MS**

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**MOTION TO STRIKE APRIL 22 COMMENTS OF  
RAYMOND B. ENGLISH AND JAMES RIFFIN**

The Kansas City Southern Railway Company (“KCSR”) hereby requests that the April 22 filing of Raymond B. English (“Mr. English”) and James Riffin (“Mr. Riffin”)<sup>1</sup> entitled “Comments Regarding KCSR’s Reply to Request for Compensation Due to Increased Costs of Restoring Line to Service Caused by Partial Dismantling of Glass Road Bridge” (the “Rebuttal”) be stricken as a reply to a reply in direct contravention of the Board’s rules at 49 CFR 1104.13(c) and its prior orders in this proceeding. As the record indicates, this is not the first time that E&R have tendered impermissible filings in this proceeding in blatant disregard of the Board’s procedures, nor, as the Rebuttal indicates, does it appear that E&R intend for it to be the last time. In the interest of imposing control over its docket and to restrain overzealous parties (E&R, collectively, and Mr. Riffin, separately) with no regard for the Board’s procedures, the Board must strike the Rebuttal, immediately close the record, and specifically instruct E&R, Mr. Riffin, and any other parties allied to them to desist from filing further evidence or argument.

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<sup>1</sup> Collectively, Mr. English and Mr. Riffin will be referred to as “E&R.”

## **BACKGROUND**

In a decision served on February 22, 2008 (“February 22 Decision”),<sup>2</sup> the Board prescribed terms and conditions associated with the collective effort of E&R to acquire a segment of rail line owned by KCSR extending from milepost 225.6 to milepost 227.5 (the “Segment”), and for Mr. Riffin separately to acquire a contiguous segment of the same rail line extending from milepost 227.5 to milepost 229.85 (the Remainder).<sup>3</sup> Responding to evidence that a railroad bridge on the Remainder – referred to as the “Glass Road Bridge” – had been partially dismantled by Warren County road crews without KCSR’s knowledge or permission, the Board decided that it would – (1) “determine the extent, if any, to which the partial removal of the bridge has increased the cost of returning the Remainder to active rail service;” (2) give Mr. Riffin the opportunity to “file with the Board by March 24, 2008, evidence that his costs to reestablish service on the Remainder have changed because of the partial dismantling of the bridge;” and (3) permit KCSR to “reply by April 14, 2008, to Riffin’s evidence, which may include evidence that the bridge was unusable prior to the actions of [Warren County].” February 22 Decision, slip op. at 4-5; see also *id.* at 11 (ordering paragraph number 4).

Although the Board specifically provided Mr. Riffin with the opportunity to offer additional costing evidence in connection with the Glass Road Bridge, E&R jointly<sup>4</sup> filed such evidence on

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<sup>2</sup> The Board has provided a detailed background of the subject proceeding in the February 22 Decision. Rather than repeat that detailed history of this case, KCSR hereby incorporates by reference the background section of the February 22 Decision.

<sup>3</sup> Together, the Segment and Remainder comprise the rail line (the “Line”) that is the subject of the above-captioned abandonment and offer of financial assistance (“OFA”) proceeding.

<sup>4</sup> Among other things, E&R use the Rebuttal as an opportunity to reshape the terms of both their OFA offer and their acceptance of the STB’s February 22 decision setting the terms and conditions, as clarified by the Board’s March 20 decision. Whereas the Board’s decisions accepting the OFA and setting the terms and conditions established that E&R had the right to acquire the Segment and Mr. Riffin, as an individual, to purchase the Remainder, E&R now propose for the first time to jointly acquire the Line, and they ask that the Board’s terms and conditions be revised accordingly. See Rebuttal at 3, pars. 8 and 9. This is inconsistent with the offer, the acceptance, and the Board’s

March 24, claiming that the increased costs resulting from Warren County's actions were \$237,610, which should be discounted from the Board-prescribed total purchase price of \$504,615 for the Segment and Remainder.<sup>5</sup> KCSR replied to E&R's March 24 filing on April 14, offering evidence to show that Mr. Riffin was entitled to no "compensation," or, if he were, that Mr. Riffin's increased costs would be no more than \$19,277.

Although the Board did not provide for it in the February 22 Decision, E&R have attempted to respond to KCSR's April 14 filing by submitting their Rebuttal, admitting that it "may be construed to be a reply to a reply, which is not permitted by the Board's rules." Rebuttal at 1, par. 2.

### **ARGUMENT**

The Board's February 22 Decision was clear. E&R had until March 24 to offer evidence concerning the Glass Road Bridge, and KCSR was allowed to reply to that evidence by April 14. The Board made no provision for E&R to respond to KCSR's April 14 reply. In fact, by its very nature, the Rebuttal is an unsanctioned reply to KCSR's reply proscribed by 49 CFR 1104.13(c), as E&R rather weakly admit. Because E&R's Rebuttal is an impermissible reply to a reply filed in an effort to circumvent the Board's procedures and explicit instructions in its February 22 Decision, and is offered as an attempt to bolster the evidence and argument from March 24, E&R's Rebuttal must be stricken from the record.

E&R's Rebuttal (styled euphemistically as "comments") is entirely unjustified. Although not permitted under the Board's rules, E&R explain that they are offering the Rebuttal "for the

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decisions. Again, this raises questions as to whether or not E&R and Riffin intend to comply with the Board's orders. KCSR intends to sell the Line consistent with the Board's orders and does not acquiesce to E&R's and Riffin's unilateral modifications to those decisions.

<sup>5</sup> E&R have twice supplemented their claim for compensation, insisting that, in addition to the alleged damages of \$237,610, they are entitled to "litigation costs" of \$11,451.50 be included in any award of "damages." KCSR has already pointed out that such a claim is meritless.

purpose of providing the Board with a more complete record.” Id. E&R give no other explanation or justification for the Rebuttal, and thus implicitly acknowledge that they have no valid basis to burden the Board with their 42-page reply to a reply, except for the hope that the Board would at least read the filing and be influenced by it even if ultimately it were to be stricken. E&R’s temerity in filing its Rebuttal is especially inappropriate in light of the limited time left for the Board to address the Glass Road Bridge matter. The 90-day time frame for closing on the Segment and/or Remainder (May 22, 2008) is fast approaching, yet E&R continue to pepper the Board with schemes to discount the Line’s purchase price.

Sadly, E&R’s efforts to submit utterly impermissible filings are nothing new. After E&R had filed on January 25, 2008, their request to set terms and conditions for the sale of the Segment and Remainder and KCSR had filed its reply on January 30, 2008, E&R attempted to submit several filings on February 4, 2008, that were essentially supplemental to E&R’s January 25 terms and conditions request and were intended to rebut KCSR’s January 30 reply evidence and argument. With the exception of evidence relating the Warren County’s recent partial dismantling of the Glass Road Bridge, E&R’s efforts to supplement the record on February 4, 2008, were soundly and swiftly rejected on the Board’s own motion in a decision served on February 6, 2008. In that decision, the Board observed that E&R’s filings entailed a “thinly veiled” and impermissible reply to a reply, and were little more than an attempt to bolster E&R’s terms and conditions request (and therefore contained evidence that should have been presented in E&R’s case-in-chief). Learning nothing from that experience, except perhaps to recognize that the Board would probably see the E&R Rebuttal for what it is (i.e., a reply to a reply), E&R submit to their usual modus operandi – flouting the Board’s rules and procedures in the hopes that nevertheless they may be afforded the last word and an opportunity to shore up the weaknesses in their earlier filings.

To make matters worse, E&R indicate that even now, having already submitted a reply to a reply, they are not finished making filings with the Board. Noting nearby Mississippi River flooding, E&R say they will “reinspect” the bridges on the Line, thereby hinting at the possibility that E&R will use this development to offer more filings to encourage the Board to make deductions from the constitutional minimum value of KCSR’s property. Rebuttal at 7, par. 22. Also, taking exception to an email that KCSR included in its April 14 filing (which KCSR was unable to locate in time to be included with KCSR’s responses to E&R’s first set of discovery to KCSR), the Rebuttal states that, “If and when Riffin obtains a copy of the redacted E-mail, he will make appropriate remarks.” *Id.* at 20, par 58. Such remarks reflect that E&R intend even further filings, and by announcing such filings here, E&R expect that the Board will at the very least implicitly allow for such future filings by not explicitly prohibiting them.

E&R’s Rebuttal is quite substantive, and its only purposes, without question, are – (1) to rebut the even more substantive and detailed evidence and argument that KCSR quite properly submitted according to the Board’s procedural schedule in reply to E&R’s March 24 filing, and (2) to attempt to shore up the shortcomings of E&R’s March 24 filing that KCSR has highlighted. Neither purpose is justified or justifiable. The Board’s February 22 Decision allowed KCSR to offer the final evidentiary submission, consistent with the OFA terms and conditions process itself, but E&R have attempted unilaterally to change that process merely by alleging that it is interest of “a more complete record” to do so. E&R’s Rebuttal should be stricken in its entirety, not only as a matter of proper procedure, but also because of the burden it places on the Board and because of the prejudice to KCSR.

KCSR will not validate E&R’s admitted reply to a reply by submitting substantive responses to the content of the Rebuttal at this time, even though E&R’s filing is laden with mistaken assumptions about the OFA process and inaccurate and/or misleading information regarding the

Glass Road Bridge and KCSR's expert testimony on the subject. Indeed, such a responsive filing is wholly unnecessary if the Board rejects the Rebuttal as it should. If, however, the Board accepts any of E&R's Rebuttal, then procedural due process and the "interest of a complete record" mandate that KCSR be granted leave to respond substantively.<sup>6</sup> Therefore, should the Board accept any portion of E&R's Rebuttal, KCSR hereby requests that it be so informed as quickly as possible and be granted leave to file a substantive response.

### CONCLUSION

It is well past time that the Board put an end to Mr. Riffin's and E&R's collective practice of submitting unsanctioned, impermissible "supplemental" filings. Such filings by E&R and/or Mr. Riffin flout the Board's processes, undermine the orderly and timely processing of this proceeding, and consume the resources of both the Board and KCSR in responding to them. The record should be held to have closed with KCSR's reply to E&R's March 24 filing, so that the Board may address any issues that remain to be resolved pending the approach of the 90-day closing deadline under the OFA rules. Because E&R perceive that the Board has left open the opportunity to argue for further "discounts" to the Board-prescribed purchase price for the Line, E&R will quite clearly pursue such an opportunity to the hilt.

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<sup>6</sup> Cf. JP Rail, Inc. – Lease and operation Exemption – NAT Industries, Inc., STB Finance Docket No. 35090 (STB served Jan. 18, 2008) (accepting a reply to a reply and rebuttal thereto "in the interest of compiling a complete record"); City of Peoria and the Village of Peoria Heights, IL – Adverse Discontinuance, Pioneer Industrial Railway, STB Docket No. AB-878 (STB served Nov. 19, 2007) (same); Fox Valley & Western Ltd. – Exemption Acquisition and Operation – Certain Lines of Green Bay and Western Railroad Company, Fox River Valley Railroad Corporation, and The Anhapec & Western Railway Company – Arbitration Review, Finance Docket No. 32035 (Sub-No. 1) (ICC served Dec. 19, 1994), 1994 ICC LEXIS 266, \*1, n. 1 (due process warrants filing of a response to information filed as a supplement to a reply); City of Colorado Springs and Metex Metropolitan District – Petition for Declaratory Order – Abandonment Determination, et al., Finance Docket No. 31271 (ICC decided Mar. 22, 1989), 1989 ICC LEXIS 78, \*27-\*28 (where a party to a proceeding raises new issues in response to a prior filing, due process may entitle an opposing party to respond substantively thereto).

The Board has serious and important work left to do, which will bear on the Fifth Amendment rights of KCSR.<sup>7</sup> It is time for the Board to conclude this undertaking without the incessant and undisciplined stream of filings from Mr. Riffin and E&R. Accordingly, the Board must strike E&R's Rebuttal as thoroughly unjustified and filed in defiance of the Board's processes. Moreover, KCSR respectfully requests that it be very clear that the record in this proceeding is closed and that the Board will accept additional evidence from the parties only if the Board specifically so requests it. Finally, KCSR would be prejudiced by the Board's acceptance of the Rebuttal absent a full and fair opportunity to reply, and, so, in the interest of procedural due process, KCSR hereby petitions for leave to respond substantively to the Rebuttal if the Board accepts any part of E&R's April 22 filing.

Respectfully submitted,

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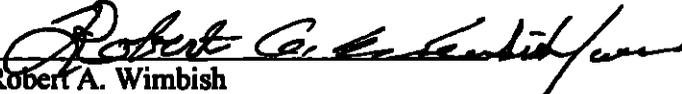
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<sup>7</sup> KCSR's research indicates that the costs it has incurred in protecting its rights in a Board-mandated taking of KCSR's property may also be compensable under the Fifth Amendment. It may therefore be appropriate for the Board to factor such costs into the purchase-price or separately to account for the Board's obligation to reimburse KCSR for its costs.

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a copy of the foregoing Motion to Strike April 22 Comments of Raymond B. English and James Riffin 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 25<sup>th</sup> day of April, 2008.

  
Robert A. Wimbish