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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

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

**ENTERED
Office of Proceedings
MAY 28 2008
Part of
Public Record**

**COMMENTS REGARDING THE EFFECT
OF ENGLISH'S MOTION TO WITHDRAW OFA**

1. On the morning of May 21, 2008, Raymond B. English ("English") filed his "Raymond B English Withdrawal of Offer to Purchase ("Motion to Withdraw") Later that same day, the Board issued a Decision staying until further order of the Board, the date by which English and Riffin were to close on their purchase of the line which is the subject of this proceeding, in order to allow the Board time to consider the effect of English's Motion to Withdraw. The Board's May 21, 2008 Decision permitted the parties to file, by May 28, 2008, pleadings addressing the effect of English's Motion to Withdraw.

2. James Riffin ("Riffin"), herewith files his Comments Regarding the Effect of English's Motion to Withdraw his Offer of Financial Assistance to purchase the Segment portion of the Line which is the subject of this proceeding

3. The afternoon of Tuesday, May 20, 2008, Riffin received an e-mail copy of English's Motion to Withdraw. Riffin's May 20, 2008 attempts to make telephone contact with Mr English, were unsuccessful.

4. On May 20, 2008, Riffin e-mailed to Mr English a 3-page document wherein Riffin attempted to identify the various consequences that could result from Mr. English's untimely withdrawal of his offer to purchase the Segment portion of the Line

5. At 9.34 a m EST, on May 21, 2008, Mr. English called Riffin. During this telephone conversation, Riffin indicated to Mr. English that federal law did not prohibit transfer of title to the Line to a corporate affiliate, such as Foam Packaging, Inc Riffin discussed the various consequences that could occur, due to his untimely Motion to Withdraw, and pointed out that his Motion to Withdraw was 50 days late. In spite of Riffin's efforts to persuade Mr. English to change his mind, Mr. English stated that he had made his mind up, and was not going to change his mind He indicated he had overnighted his Motion to Withdraw to the Board on May 20, 2008, had faxed and mailed a copy to William Mullins, outside counsel for KCSR, and had mailed a copy to Craig Richey, counsel for Vicksburg Southern Railroad

6. At 10 a m on May 21, 2008, Riffin telephoned David Reeves, Assistant General Counsel for the Kansas City Southern Railway Company ("KCSR"). During that telephone conversation, Riffin advised Mr Reeves of the contents of English's Motion to Withdraw. (Mr. Reeves was unaware of English's Motion to Withdraw.) Riffin and Mr. Reeves had a candid, off-the-record conversation regarding what options were available. Over the course of the day, Riffin and Mr. Reeves had additional telephone conversations.

7. At 6 pm on May 21, 2008, Mr. Konschnik, called Riffin to let him know the Board had served a decision staying the closing date. Mr. Konschnik stated he had already called Mr Mullins and Mr. English. Since Mr. Konschnik had not called Mr. Reeves, Riffin called Mr. Reeves.

OPTIONS AVAILABLE

8. It would appear the following options are available

A. Riffin could also file a Motion to Withdraw his OFA to purchase the Line, which, if accepted by the Board, would permit KCSR to abandon the Line.

B The Board could order, either on its own motion, or pursuant to a KCSR Motion, Riffin and English to purchase the Line.

C. Riffin could offer to purchase both the Segment and Remainder individually

WITHDRAWAL OF OFA

9. Under the circumstances, the least complicated way to resolve this dilemma, would be for the Board to permit English and Riffin to withdraw their offers to purchase the Line. Riffin has indicated to KCSR that he would be willing to withdraw his offer to purchase the Line, and would dismiss the Petition for Review he filed in the D.C. Court of Appeals, if KCSR were willing to waive any claims it may have against Riffin and English. Mr. Reeves has indicated that KCSR's management is reviewing this offer. If the City of Vicksburg still has an interest in purchasing the real estate pursuant to the Purchase and Sale Agreement ("PSA") between KCSR and the City, this may make KCSR whole. (KCSR would be out its litigation expenses, but would avoid the Glass Road bridge restoration costs.)

10. If the City of Vicksburg no longer has a desire to purchase the real estate, KCSR could still realize the salvage value of the track material. It may, or may not, find buyers for the real estate. If no buyers could be found, then KCSR would not realize the \$231,795 it had anticipated from the sale of the real estate. While at first blush, this would appear to penalize KCSR, Riffin would argue, the PSA was specifically contingent upon KCSR obtaining authority to abandon the Line, which was never a certainty. Riffin would also draw attention to paragraph 11a of the PSA, which stated that if KCSR had not received authority to abandon the Line by October 31, 2007, the City would be released from its obligation to purchase the Line, and which further stated that the City's right to purchase the real estate would terminate on December 31, 2007, if not purchased by that date.

11. A second amendment to the PSA, dated August 6, 2007, changed the date the City could terminate the Agreement, from October 31, 2007 to April 15, 2008. This Second Amendment also changed the date the PSA would become void, from December 31, 2007 to May 31, 2008, "unless otherwise agreed to by the parties hereto." If no additional amendments were executed, then at this point in time, the City would have the right to terminate the PSA, if it so desired. The PSA would not become void, until May 31, 2008, or in about a week. Given the tortuous course of these proceedings, it would have been prudent for KCSR to have at least attempted to

execute an additional amendment to the PSA, moving the dates for performance back a few more months. If KCSR failed to attempt to execute an additional amendment to the PSA, then KCSR should not be heard to complain that the City no longer desires to purchase the real estate. If, on the other hand, KCSR asked the City to execute a third amendment, but the City refused to execute a third amendment, then KCSR may have an argument

12. While at first blush, the City's failure to purchase the real estate may appear to lessen the revenue KCSR anticipated when it proposed to abandon the Line, this loss of potential revenue, would be offset by the avoided cost of compensating Riffin for the costs of restoring the Glass Road bridge. In addition, KCSR could sue Warren County for damages. The damages KCSR may collect from Warren County, when summed with the avoided costs of restoring the Glass Road bridge, may well equal, and might exceed, the \$231,795 KCSR would not receive from the City. In addition, KCSR would still own the real estate, which it could sell at a later date

ORDER COMPELLING SPECIFIC PERFORMANCE

13. 49 U.S.C. §10904(f)(2) is quite specific: If, after the Board sets the terms and conditions for sale of the Line, the offerors do not, within 10 days (by March 31, 2008), affirmatively withdraw their offer to purchase, then the offerors are bound to purchase the Line. In this case, the offerors did not affirmatively withdraw their offer to purchase the line by the March 31, 2008 deadline. Consequently, Riffin and English could **potentially** be compelled to purchase the Line

14 Riffin uses the word, "potentially," for the following reasons:

A. The Board has the authority to exempt a party from any of the requirements of the ICCTA. So while the Board may have the authority to compel specific performance, the Board is not mandated to exercise that authority

B Riffin timely filed a Petition for Review of the Board's February 22, 2008 and March 20, 2008 decisions In that Petition for Review, Riffin asked the court to review the Board's

decision to modify English's and Riffin's offer to purchase (eliminating some of Riffin's conditions, and conditioning Riffin's purchase of the Remainder portion on English's and Riffin's purchase of the Segment portion). If the appeals court reverses the Board's decisions, then the withdrawal-clock would be reset. In addition, if the court were to hold Riffin's conditions must be a part of the bargain, and / or the environmental costs associated with abandonment of the Line must be factored in, this would significantly increase KCSR's costs.

C. If KCSR is unwilling to waive all claims against English and Riffin, then Riffin will file a supplement to his Petition for Review, asking the court to review the Board's May 20, 2008 decision limiting KCSR's liability for the partial demolition of the Glass Road bridge to \$19,277, plus some used timbers. Riffin will also file a Motion to Stay with the Court, if the Board lifts its stay. If Riffin is successful in convincing the court that the Glass Road bridge could not be restored for \$19,277, then KCSR's liability could increase to \$249,000 or so. KCSR would presumably intervene, and if it did, KCSR would incur additional litigation expenses.

D. If the DC court were to adopt the 6th Circuit's holding in *Railroad Ventures*, which held neither the Board nor the rail carrier may alter, amend or limit what the offeror desires to acquire, then Riffin could purchase the Remainder, and not purchase the Segment. If Riffin were to purchase the Remainder, KCSR could not abandon the Segment, since doing so would leave a stranded segment.

RIFFIN COULD PURCHASE THE ENTIRE LINE

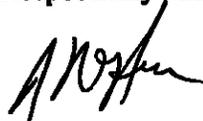
15. Riffin potentially could offer to purchase the entire Line. If he were to make this offer, that would raise the legal question of whether he could purchase the Segment portion individually, since the Board granted English and Riffin authority to jointly purchase the Segment. Riffin would argue that he would have the authority to purchase the entire Line, especially if KCSR insisted on specific performance.

16. The reality is, Riffin had not anticipated purchasing the entire Line. Consequently, it could be a challenge obtaining \$505,000 in cash in the next ten days or so. Not impossible, but a

challenge. Riffin might also have to amend his plans for other capital expenditures. Riffin's solution to this problem would be to ask the appeals court to stay the proceeding, until the court rendered its decision. If the court granted a stay, that would give Riffin sufficient time to convert non-liquid assets into liquid assets. In addition, the price may be reduced by the court

17. Riffin continues to believe the Line has economic viability. He had anticipated having a financial partner. English's unanticipated withdrawal just two days before closing, was a surprise, to say the least. Moving forward without a financial partner, would be a complication Riffin had not anticipated, and would consume time, resources and capital that had been earmarked for other projects. For Riffin, the decision is which project is more important: Vicksburg or Riffin's other projects? On May 21, 2008, Riffin made the decision that his other projects were more important, which is why he decided to withdraw his offer to purchase the Vicksburg line, providing KCSR waived all claims against Riffin and English. This was not an easy decision to make, since Riffin was looking forward to litigating in the appeals court the many issues this proceeding created. But he made the decision, and the offer still stands. If the offer is rejected, then Riffin will pursue his remedies in the court of appeals.

Respectfully submitted,



James Riffin

CERTIFICATE OF SERVICE

I hereby certify that on this 23th day of May, 2008, a copy of the foregoing Comments Regarding the Effect of English's Motion to Withdraw, was e-mailed and 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 was mailed via first class mail to Craig Richey, 315 W. 3rd Street, Pittsburg, KS 66762, attorney for Vicksburg Southern Railroad, Inc



James Riffin