

FOAM PACKAGING, INC.

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VICKSBURG, MISSISSIPPI 39181
PHONE (601) 638-4871



October 15, 2007

220446

Honorable Vernon A. Williams
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)*

*Vicksburg Southern Railroad, Inc. - Discontinuance of Service Petition
For Exemption Line in Warren County, MS Docket No AB-1016X*

220447

Dear Secretary Williams:

Enclosed, please find an original and eleven copies motion to strike KCSR'S October 2, 2007. Reply to Reply, Supplemental Comments of Raymond B. English, and Response to KCSR'S Letter Threatening Sanctions.

Respectfully Submitted,

Raymond B. English

Raymond B. English

ENTERED
Office of Proceedings

OCT 16 2007

Part of
Public Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**



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

220446

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

STB DOCKET NO. AB-1016 (Sub- No. 0 X)

220447

**VICKSBURG SOUTHERN RAILROAD, INC
DISCONTINUANCE OF SERVICE PETITION FOR EXEMPTION
LINE IN WARREN COUNTY, MS**

**MOTION TO STRIKE KCSR'S OCTOBER 2, 2007 REPLY TO REPLY and
RETORT TO KCSR'S RESPONSE**

ENTERED
Office of Proceedings
OCT 16 2007
Part of
Public Record

1. Raymond B. English ("English") herewith files this Motion to Strike KCSR's October 2, 2007 Reply to Reply and Retort to KCSR's Response.

1. BACKGROUND INFORMATION

2. On August 24, 2007, The Kansas City Southern Railway Company ("KCSR"), filed an Abandonment Petition for Exemption ("Petition"), to abandon that portion of the Vicksburg Industrial Lead, a.k.a. Redwood Branch, extending from milepost 225.6 to milepost 229.85, a distance of 4.25 miles, all in Warren County, Mississippi ("Line"), and the Vicksburg Southern Railroad, Inc. ("VSOR") simultaneously filed a Discontinuance of Service Petition for Exemption over the Line. KCSR requested the Board exempt this proceeding from the Offer of Financial Assistance ("OFA") provisions of 49 U.S.C. §10904. As justification for its OFA exemption request, KCSR stated:

A. The City of Vicksburg, MS ("City") intends to file a notice of interim trail use (NITU") in order to convert the Line's right-of-way into a recreational trail. If the OFA exemption was to be denied, the City's plans to use the Line for trail purposes, would be thwarted.

B. The City has reached an agreement with Lakes Entertainment, Inc. ("Lakes"), a casino developer, to build a large casino complex adjacent to the Mississippi river. The proposed casino project "would entail the development of land that is bisected by the Line, and hence, cannot be developed as planned without removal of the Line." Petition at 6. (Emphasis added.) "As mentioned, without the abandonment of the Line, the casino project may not move forward." Petition at 13. "Exemption from the public use and OFA provisions is consistent with the public interest." Petition at 13.

C. "Exemption from the OFA provisions is entirely consistent with Board precedent." Petition at 13. The Petitioner cited as authority: *1411 Corporation - Abandonment Exemption - In Lancaster County, PA*, STB Docket No. AB 581X and *Middletown & Hummelstown Railroad Company - Abandonment Exemption - In Lancaster County, PA*, STB Docket No. AB 529X (Jointly served Sept. 6, 2001) ("*1411 Corporation*").

3. On October 2, 2007, English filed his Notice of Intent to Participate as a Party of Record, filed his Comments, and filed a Notice of Intent to File an Offer of Financial Assistance to purchase the Line.

4. On October 2, 2007 Petitioners filed a Response to Comments of Foam Packaging, Inc.

2. MOTION TO STRIKE KCSR'S OCTOBER 2, 2007 REPLY TO REPLY

5. KCSR's and VSOR's (collectively, "Petitioners") October 2, 2007 Response to Comments of Foam Packaging, Inc., ("Response") would constitute a reply to a reply which, per 49 CFR 1104.13 (c), is not permitted. While the Board has on occasion permitted a reply to a reply to be filed, it has done so only when the party filing the reply to a reply, has asked the Board for leave to file the reply to a reply, and has justified its request to have the Board waive 49 CFR 1104.13 (c), by indicating that the Board should permit the reply to a reply in order to present to the Board a more complete record upon which the Board can make its decision.

6. In their Response, Petitioners failed to ask the Board for leave to file their reply to a reply, and failed to justify why the Board should waive 49 CFR 1104.13 (c). In addition, Petitioners failed to attach to their Response the Exhibit A that they referenced in their Response. Permitting

Petitioners to file their response would set an undesirable precedent, which English would suggest would be undesirable. For this reason, English would ask that the Board **strike Petitioners' Response.**

7. While English has asked the Board to strike Petitioners' Response, his objection to the Response is somewhat muted. In the interest of developing a more complete record, English would not strenuously object if the Board admitted the Response, **providing English is permitted to file a few comments addressing some of the misinformation contained in the Response.** (Which would constitute a reply to a reply to a reply, which the Board has on occasion permitted, in order to develop a more complete record.)

3. English's Retort to KCSR's Response.

8. In the event the Board does permit the Response and does permit English to reply to the Response, English herewith would proffer the following retort:

9. In their Response, Petitioners attempt to justify filing their Response by stating Petitioners wanted to make it clear that:

- "(1) petitioners have not misrepresented facts concerning Foam or any other aspect of the proposed abandonment / discontinuance;**
- (2) the evidence and argument that petitioners have already offered in support of their respective petitions is more than adequate, notwithstanding Foam's comments, to approve the abandonment of the line in question; and**
- (3) Foam has provided no basis for a denial of petitioners' public use and offer of financial assistance ("OFA") exemption requests."**

10. **(2):** English would admit that the evidence and argument that Petitioners have offered in support of their respective petitions to approve the abandonment of the Line, has sufficient probable value to permit the Board to grant the Petitioners' respective requests to abandon, and to discontinue service over, the Line. English wants it to be clear that English does not oppose KCSR's desire to abandon the Line, nor does English oppose VSOR's desire to discontinue providing service on the Line. What English **strongly opposes** is the loss of freight rail service to English's (Foam Packaging's) facility. Were English to acquire the Line via the OFA process, this would accomplish all parties' respective goals: KCSR would no longer have the expense of maintaining the Line; VSOR no longer would be providing freight service at a financial loss;

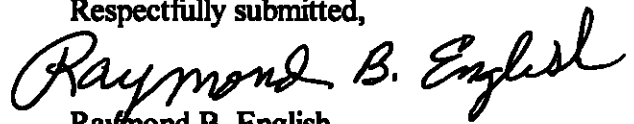
and English would continue to have access to freight rail service.

11. (3): At the time Petitioners were preparing their Response, they were not aware that English was in the process of providing the Board with a basis for denial of Petitioner's public use and OFA exemption requests. Now that English has provided the Board with a basis for denying Petitioner's Request to be Exempt from the OFA Process, Petitioner's statement no longer would be correct, and thus should be disregarded.

12. (1): English would strongly disagree with Petitioners' position that Petitioners have not misrepresented material facts in their Petitioners. These material misrepresentations will become evident after the Board reads the Supplemental Comments of Raymond B. English ("Supplemental Comments"), which Supplemental Comments are being filed at the same time as this Motion to Strike, and are enclosed in the same shipping envelope, as English's Motion to Strike, merely for English's administrative convenience and efficiency, and which are intended to be a totally separate filing.

WHEREFORE, English would pray the Board EITHER strike the Petitioners' Response, or in the alternative, permit English to submit his Retort to KCSR's Response.

Respectfully submitted,


Raymond B. English

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of October, 2007, a copy of the foregoing Motion to Strike KCSR's October 2, 2007 Reply to Reply and Retort to KCSR's Response, was served by first class mail, postage prepaid, upon 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 served by first class mail, postage prepaid, upon Craig Richey, 315 W. 3rd Street, Pittsburg, KS 66762, attorney for Vicksburg Southern Railroad, Inc.


Raymond B. English

**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**

STB DOCKET NO. AB-1016 (Sub- No. 0 X)

**VICKSBURG SOUTHERN RAILROAD, INC
DISCONTINUANCE OF SERVICE PETITION FOR EXEMPTION
LINE IN WARREN COUNTY, MS**

SUPPLEMENTAL COMMENTS OF RAYMOND B. ENGLISH

1. Raymond B. English ("English") herewith files his Supplemental Comments of Raymond B. English.

1. BACKGROUND INFORMATION

2. On August 24, 2007, The Kansas City Southern Railway Company ("KCSR"), filed an Abandonment Petition for Exemption ("Petition"), to abandon that portion of the Vicksburg Industrial Lead, a.k.a. Redwood Branch, extending from milepost 225.6 to milepost 229.85, a distance of 4.25 miles, all in Warren County, Mississippi ("Line"), and the Vicksburg Southern Railroad, Inc. ("VSOR") simultaneously filed a Discontinuance of Service Petition for Exemption over the Line.

3. On October 2, 2007, English filed his initial Comments. At the time English filed his initial comments, he did not have the photographs attached hereto as his **Exhibit A**. Since the photographs depict portions of the Line as it presently exists, and since the photographs directly

address material issues which will have an impact on the Board's decision in this proceeding, English would request leave from the Board to file these Supplemental Comments, in order to provide the Board with a more complete record.

4. In their Petitions, KCSR and VSOR (collectively, "Petitioners"), indicated that they desired to abandon, and to discontinue service over, **4.25 miles** of the Vicksburg Industrial Lead, between mileposts 225.6 and 229.85. From this statement, one would reasonably conclude that there were in fact 4.25 miles of rail on the ground, and that the Petitioners had the present capability of providing service over the entire 4.25 miles of Line, particularly since no previous discontinuance-of-service or abandonment requests had been filed with the Board. Unfortunately, this conclusion would be erroneous, for sometime prior to the present filing, the Petitioners removed the rails between mileposts 227.5 (where Foam Packaging, the only shipper on the Line, transloads polystyrene pellets from rail cars to its truck), and milepost 229.85, the endpoint of the Line referenced in Petitioners' filings. Presently, there are **only 1.9 miles of rails left on the right-of-way**, which rails are between mileposts 225.6 and 227.5. See English's **Exhibit A**, which are photographs depicting where the rails end at milepost 227.5, and the photographs which depict the absence of rails at milepost 229.85.

5. In their Petitions, the Petitioners indicated that the Line **bisects** property Lakes Entertainment, Inc. ("Lakes") owns, and upon which Lakes proposes to build a casino. The Petitioners further represented that the construction of this casino would be thwarted if the Line was not abandoned. English's **Exhibit B** is a copy of the casino's proposed site plan. As this exhibit clearly indicates, the casino's property lies to the west of the Line. The only portion of the casino's property that crosses the Line, is that portion the casino proposes to use as a road access from the nearby highway 61, to the casino complex. And as the Board stated in *BNSF Railway Company - Abandonment Exemption - In Oklahoma County, OK*, Docket No. AB 6 (Sub No. 430X), Served November 10, 2005:

"However, SEA notes that the Oklahoma Corporation Commission and the Federal Railroad Administration have specific safety regulations in place for at-grade crossings that would mitigate the potential safety impacts of such diversion of traffic. Accordingly, SEA does not recommend that the Board impose any conditions in this area and none will be imposed."

6. In its Petition, KCSR indicated that it would be receptive to deeding the right-of-way to

the City of Vicksburg, pursuant to the Board's Notice of Interim Trail Use ("NITU") provisions [See: 49 CFR 1152.29 and 16 USC 1247(d)]. The NITU provisions specifically state any taking of the right-of-way under the NITU provisions would be subject to possible future reconstruction and reactivation of the right-of-way for rail service. KCSR's statement that if KCSR is barred from removing the rails, the casino project would be thwarted, does not comport with the NITU provisions, which specifically state that at some future time, the line could be reconstructed and reactivated. So, if the right-of-way were to be converted into a trail per the NITU provisions, the casino would still be ill-advised to put any type of permanent structure on the right-of-way, for at some later time, the casino could be ordered to remove the structure from the right-of-way, so that the Line could be reactivated.

7. KCSR has indicated that if the Line were to be subject to the OFA procedures, the cost to acquire the Line would be prohibitive, and would be beyond English's means. This statement on behalf of KCSR, is not supported by the facts before the Board. English and Foam Packaging have not indicated what their financial resources might be. Since Foam Packaging employs 130 individuals, and has been in business for nearly 30 years, one could reasonably assume that Foam Packaging and / or English, would have sufficient assets to acquire the Line. KCSR failed to indicate the nature of its title in the Line (fee simple or reversionary). If KCSR's title in the Line was reversionary, then the real estate would have no value. Since there are only 1.9 miles of rail left on the Line, the Net Liquidation Value of this small amount of metal would be rather nominal. [With 90-pound rail, 1.9 miles of line would weigh approximately 269 long tons. Adding 10 % for spikes, tie plates and splice bars, would bring the net weight to about 296 long tons. Deducting 50% to compensate for the cost of removing the metal and ties, for disposing of the worthless ties, and for transporting the metal to a scrap dealer, would leave approximately 148 long tons at \$175 per long ton, or about \$26,000.00.] So, if KCSR's title were reversionary, the Net Liquidation Value of the Line may be in the order of \$26,000.00, or the price of a modest automobile. If KCSR's title was in fee simple, the Line may contain approximately 51.5 acres. [A 100' wide right-of-way 4.25 miles long would contain 51.5 acres.] Some of this acreage would traverse wetlands, and so would have no fair market economic value. The vast majority of the Line traverses agriculturally zoned land, and so would have a modest economic value, perhaps \$3,000 per acre. If the land had an average value of \$5,000 an acre, 51 acres would fetch about \$250,000. But since the Line is a long, skinny piece of dirt, which few purchasers have an interest in acquiring, it likely would have a fair market value significantly less than \$250,000. Were KCSR to disclose how much Lakes offered to purchase the adjacent 240 acres, that would

provide a basis for determining the value of a piece of real estate whose dimensions made it easily usable.

8. The Petitioners failed to disclose in their Petitions that at the end of the Line, there is a shipper who has expressed an interest in receiving freight rail service. When this shipper asked for freight rail service, the Petitioners told this shipper that the Line had been abandoned, there no longer were any rails on the Line, and consequently, they would not be willing to provide this shipper with freight rail service. English would argue, the fact that this shipper requested rail service, would suggest Petitioners' statement that there was little or no potential for additional traffic, was misleading at best.

9. English would further argue that Petitioners' statement that there would be significant public benefits if the Line were to be abandoned, is pretty far fetched at best, and may be construed to be misleading or false, specifically:

A. The Petitioners have stated that unless the Line is abandoned and the rails are removed, the Lakes' "casino project may not move forward." Petition at 13. As discussed in ¶5, *supra*, Exhibit B, a copy of the casino's proposed site plan, clearly indicates Lakes proposes to build the casino's complex some distance to the west of the right-of-way.

B. While removal of the right-of-way "would eliminate five at-grade crossings," (Petition at 13), English would argue the elimination of those five grade crossings would have no significant impact on traffic flow or on public safety (Petition at 13), since the amount of rail traffic is so minimal (one train per week; one rail car per train). To argue that one train per week, consisting of one locomotive and one rail car, would have any impact on traffic flow or on public safety, is rather ludicrous. In addition, as the Board stated in the *BNSF* case cited in ¶5, *supra*, "the Federal Railroad Administration [has] specific safety regulations in place for at-grade crossings that would mitigate the potential safety impacts."

C. The Petitioners have presented no evidence that would even remotely suggest that failure to abandon the Line would result in any harm to the community. No one would lose their job if the Line was not abandoned. Traffic flow and public safety are not likely to be better if the Line is not abandoned. Lakes' decision to build, or to not build its proposed casino, will not be based on the existence, or non-existence, of the Line. And the City of Vicksburg's desire to use

the right-of-way as a recreational trail, must give way to efforts to preserve rail service, for as the Board stated in the *1411 Corporation* case cited by the Petitioners (Petition at 13):

“But it is well settled that an OFA should take priority over a trail use proposal because of the strong Congressional intent to preserve rail service wherever possible.

With regard to using the Line for public use purposes, the Interstate Commerce Commission stated in *Rail Abandonments - Use of Rights-of-Way As Trails*, 2 I.C.C. 2d 591, 608 (1986):

“Offers of financial assistance to acquire rail lines or subsidize rail operations under section 10905 [now 10904] take priority over both interim trail use and public use conditions because retention of existing rail service is mandatory under section 10905”

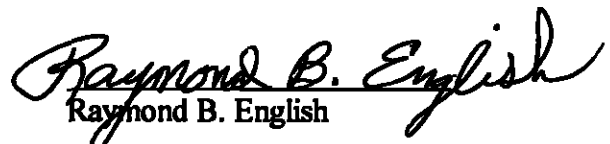
WHEREFORE, English would request leave from the Board to file these Supplemental Comments.

Respectfully submitted,


Raymond B. English

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of October, 2007, a copy of the foregoing Supplemental Comments of Raymond B. English, was served by first class mail, postage prepaid, upon William A. Mullins, Baker & Miller PLLC, Ste 300, 2401 Pennsylvania Ave, N.W., Washington, DC 20037, attorney for Kansas City Southern Railway Company, and upon Craig Richey, 315 W. 3rd Street, Pittsburg, KS 66762, attorney for Vicksburg Southern Railroad, Inc.


Raymond B. English

**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**

STB DOCKET NO. AB-1016 (Sub- No. 0 X)

**VICKSBURG SOUTHERN RAILROAD, INC
DISCONTINUANCE OF SERVICE PETITION FOR EXEMPTION
LINE IN WARREN COUNTY, MS**

**RAYMOND B. ENGLISH'S RESPONSE
TO KCSR'S LETTER THREATENING SANCTIONS**

1. Raymond B. English ("English") herewith files Raymond B. English's Response to KCSR's October 4, 2007 Letter Threatening Sanctions.

1. BACKGROUND INFORMATION

2 On August 24, 2007, The Kansas City Southern Railway Company ("KCSR"), filed an Abandonment Petition for Exemption ("Petition"), to abandon that portion of the Vicksburg Industrial Lead, a.k.a. Redwood Branch, extending from milepost 225.6 to milepost 229.85, a distance of 4.25 miles, all in Warren County, Mississippi ("Line"), and the Vicksburg Southern Railroad, Inc. ("VSOR") simultaneously filed a Discontinuance of Service Petition for Exemption over the Line.

3. On September 11, 2007, English sent a letter to the Board, stating he protested the abandonment of the Line, and further stating that he objected to KCSR's request to exempt the proceeding from the Board's Offer of Financial Assistance ("OFA") procedures. On page 2 of that September 11, 2007 letter, English made the following statement ("September 11 Statement"):

"Mr. J.B. Davenport, Treasurer of Foam Packaging, Inc., visited in person and conversed by phone with Mr. Mike Haverty on several occasions in the past. Mr. Haverty is the Chairman and CEO of Kansas City Southern Railway Company. Mr. Haverty assured Mr. Davenport that the line serving the spur utilized by Foam Packaging would not be abandoned by Kansas City Southern Railway company."

4. On October 2, 2007, English filed his Notice to Participate as a Party, his initial Comments, a Notice of Intent to File an Offer of Financial Assistance, and English's Reply to Petitioner's Request to be Exempt From 49 U.S.C. §10904 (Offers of Financial Assistance).

5. On October 4, 2007, KCSR's counsel, William Mullins, sent a letter to English, threatening to ask the Board to impose sanctions upon English, if English failed to send a note to the Board, asking leave from the Board to withdraw the September 11 Statement reproduced above. See Exhibit C, attached hereto. In this threatening letter, Mr. Mullins stated that KCSR personnel had consulted the personal calendar of Mr. Haverty, and other KCSR logs that noted Mr. Haverty's schedule, and persons Mr. Haverty had spoken with. Mr. Mullins stated that none of these internal KCSR records made mention of any contact between Mr. Haverty and Mr. Davenport.

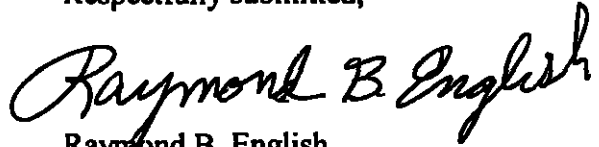
6. For the record, Mr. Haverty and Mr. Davenport had a conversation while at a restaurant. During that restaurant conversation, Mr. Haverty made the statement that KCSR would not abandon the Line that serviced Foam Packaging, Inc. While KCSR's internal records may not note this encounter, and may not record verbatim the conversation between Mr. Haverty and Mr. Davenport, it did occur. English would suggest that as Chairman and CEO of KCSR, his every move and every conversation were not subject to prior approval by underlings at KCSR, nor were they observed by, nor recorded by, KCSR personnel shadowing his every waking moment.

7. On October 9, 2007, contemporaneously with the filing of this Raymond B. English's Response to KCSR's October 4, 2007 Letter Threatening Sanctions, English filed a Motion to

Strike and his Retort to KCSR's October 2, 2007 Response to English's September 11, 2007 letter ("Retort"). In ¶ 10 of English's Retort, English stated that he admitted that the evidence and argument that KCSR has offered in support of its petition to abandon the Line, would have sufficient probable value to permit the Board to grant KCSR's request to abandon the Line. In his Retort, English has indicated that he no longer opposes KCSR's Petition to Abandon the Line, and he no longer opposes VSOR's Petition to Discontinue Service over the Line, **providing that English is permitted to file an OFA to purchase the Line.** Having withdrawn his opposition to the abandonment and discontinuance-of-service Petitions, the only issue the Board need address, is whether KCSR should be permitted to exempt this proceeding from the OFA provisions.

8. Since the only issue before the Board is the OFA exemption request, Mr. Haverty's statement regarding abandonment of the Line would no longer be materially relevant to the issue English is asking the Board to address. Consequently, in an effort to remove this tangential issue from center stage, English will ask that the Board strike the September 11 Statement reproduced in ¶ 3, *supra*

Respectfully submitted,


Raymond B. English

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of October, 2007, a copy of the foregoing Raymond B. English's Response to KCSR's October 4, 2007 Letter Threatening Sanctions, was served by first class mail, postage prepaid, upon 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 served by first class mail, postage prepaid, upon Craig Richey, 315 W. 3rd Street, Pittsburg, KS 66762, attorney for Vicksburg Southern Railroad, Inc.

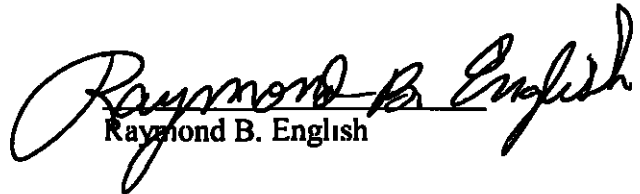

Raymond B. English

Exhibit A
End of Rail
Mile Post 227.5
R.B.E.



Exhibit A
End of Rail
Mile Post 227.5
R.B.E.



Exhibit A
Warrenton Road
R.B.E.



Exhibit A
Glass Road
R.B.E.



EXHIBIT B

