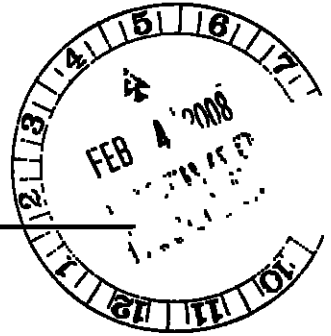


**BEFORE THE
SURFACE TRANSPORTATION BOARD**



221527

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

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

**MOTION TO STRIKE PORTIONS OF
KANSAS CITY SOUTHERN RAILWAY COMPANY'S
REPLY TO REQUEST TO ESTABLISH
CONDITIONS AND COMPENSATION FOR FINANCIAL ASSISTANCE**

1. Raymond B. English and James Riffin ("E&R"), herewith file this Motion to Strike Portions of Kansas City Southern Railway Company's Reply to Request to Establish Conditions and Compensation for Financial Assistance, and for reasons states:

2. On January 30, 2008 Kansas City Southern Railway Company ("KSOR"), filed its Reply to Request to Establish Conditions and Compensation for Financial Assistance ("Reply"). Portions of that Reply contains material that is untruthful, irrelevant, has no probative value, and / or mischaracterizes statements made by E&R, more specifically detailed below. Since this material is untruthful, irrelevant, is without probative value and / or mischaracterizes statements made by E&R, E&R would ask that the Board strike this material.

KCSR'S REPLY

3. On pages 2-3 of its Reply, KCSR makes the untruthful statement that "there have been no shippers or requests for common carrier service for almost two decades," on that portion of the Line from which KCSR's predecessor in title unlawfully removed the track material. On page 12 of its Reply, KCSR stated: "Indeed, during KCSR's ownership of the Line, no shipper has ever located on that segment, requested service over the segment" As English stated in ¶ 16 of "Raymond B. English's Reply to KCSR's Response to October 16 Filings of Raymond English,

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**Part of
Public Record**

... ,” filed on **November 20, 2007**, **Hancor, a shipper located at MP 229.85**, obtained a grant from the State of Mississippi to construct a siding at its facility, had the siding designed, obtained the requisite permits, requested rail service from KCSR and sought permission from KCSR to connect its siding to KCSR’s main line. KCSR refused to provide service, and refused to permit Hancor to connect its siding to KCSR’s main line, citing the cost to replace the rail that had been unlawfully removed by its predecessor in title. In his November 20, 2007 filing, English stated all of this information was contained in a City of Vicksburg file. On Friday, February 1, 2008, English filed a Freedom of Information request with the City of Vicksburg, asking the City to provide English with a copy of this information. English will forward a copy of this information to the Board as soon as the City of Vicksburg provides English with a copy. Since this is an untruthful statement, it should either be stricken, or given no weight.

4. On p. 17 of its Reply, in footnote 20, KCSR stated: “Mr. Davis has explained that there is a robust market for such [relay] rail.” KCSR then references Gene Davis’ Verified Statement at p. 10, and Mr. Davis’ Appendix C at pp. 11-13. On p. 10 of Davis’ Verified Statement, Mr. Davis merely stated he contacted “L.B. Foster to obtain relay material prices.” On pp. 11-13 of Appendix C of Davis’ Verified Statement, Mr. Davis merely describes what relay rail is and offers the opinion that relay rail “is a relative bargain at \$700-800 per ton compared with new rail at over \$1,000 per ton.” On p. 13 of Appendix C of Davis’ Verified Statement, Mr. Davis stated that 115 lb RE rail is in demand, due to civil engineering firms specifying 115 lb RE rail in their construction documents. He then stated there is a scarcity of 115 lb RE rail, which, due to the economics of supply and demand, has caused the price for 115 lb RE rail to escalate. On p. 12 of Appendix C of Davis’ Verified Statement, Mr. Davis stated: “Rail weighing 115 pounds per yard or greater is preferred for replacement.” In Exhibit Three of Mr. Davis’s Verified Statement, he indicates the Line contains only 0.04 mile or **211 feet** of Fitness #2 115 lb RE rail, and only 0.01 mile or **52 feet**, of Fitness #3 115 lb RE rail. Mr. Davis further stated that the majority of the rail on the Line is 112 lb rail, for which, according to Mr. Davis, there is little demand (since it is lighter than the minimum 115 lb rail specified by civil engineers). **No where in Mr. Davis’ Verified Statement does Mr. Davis provide a quote from any person or company offering to buy relay rail at his lofty price of over \$800 per ton, nor does Mr. Davis provide a quote from any person or entity offering to buy scrap metal at the lofty price of \$330**

to \$440 / ton, offering to buy used 112 lb tie plates for the unrealistic price of \$7 each, offering to buy 1,400 used 112 lb rail anchors for \$1.50 each (or about \$2,100 per ton), offering to buy **TWO pair of 115 lb joint bars for \$110**, offering to buy **12 pairs of 112 lb joint bars for \$700**. [E&R would argue it is unrealistic to think KCSR would take the trouble to save just 14 pairs of joint bars, and it is unrealistic to think KCSR would dispatch a rail train (at over \$10,000 per day) **just to pick up 250 feet of 115 lb RE rail.**) Mr. English, on the other hand, did provide two quotes from local scrap metal buyers, who made **firm offers** to buy all scrap metal on the Line. E&R would argue, since Mr. Davis' calculations of value are not based on firm quotes, and are speculative in nature, they have no probative value, and should be stricken from the record, or given no weight in determining the net salvage value of the Line's track material.

5. On page 17 of the Reply, in footnote 20, KCSR accuses E&R of double counting the removal costs for relay rail. A careful reading of E&R's removal costs estimates, would reveal E&R stated the cost to remove rail destined to be saved for relay rail purposes, is composed of two costs: The cost of removing rail which is destined to be scraped (which can be torch- or shear-cut, and can be yanked up with a hydraulic excavator), **plus the extra cost** associated with carefully removing all spikes, carefully cutting the rail with a rail saw, then carefully picking the rail up in order to avoid bending or damaging the rail. As E&R accurately pointed out, it is more costly to carefully remove rail, then to just yank it up. Furthermore, unlike Mr. Davis's removal costs, which were not documented with any verifiable sources, E&R's removal costs were based on published cost estimates of the Canadian Pacific Railway Company (which KCSR's law firm, Baker and Miller, found to be reliable enough to form the basis for an OFA in FD No. 156-26X, *Delaware and Hudson Railway Company – Abandonment Exemption – in Albany County, NY*). Since Mr. Davis' statement that E&R double counted the removal costs for relay rail is untruthful, the statement should either be stricken, or given no weight.

6. On p. 17 of its Reply, KCSR stated E&R have no personal knowledge or experience in removing rail. While English has never removed rail, Riffin has. During the summer of 2007, Riffin personally, using his own hands, tools, rail saw, torches, hydraulic excavator, Bob Cat, 80-ton All Terrain Krupp crane, semi-trailers and truck tractor, carefully removed, then transported to his Cockeysville, Maryland MOW facility, more than 6,000 feet of track and three turnouts,

some of which was welded rail, and some of which was jointed rail. Since Mr. Davis' statement is untruthful, the statement should either be stricken, or given no weight.

7. On p. 21 of its Reply, KCSR stated: "If KCSR uses its own crews, engines, and cars to remove and transport such ties, there is no cost to KCSR." "Again transportation is absorbed by KCSR." While using one's own crews, engines and cars may be less expensive than hiring a private contractor, or using another carrier's engines and cars, **it is not free.** In its scrap tie disposal cost estimate, KCSR **failed to account for the cost to transport scrap ties** from the spot where they are pulled up from the ballast, to wherever they are taken to be disposed of. In addition, Mr. Davis failed to provide any documentary evidence or quotes to support the values he ascribed to relay and landscape quality ties. Mr. Davis did acknowledge on p.6 of his Appendix C, that "The cost to sort, handle, transport, and inventory ties is high and in comparison with the wholesale prices they command, generally yield only a low net salvage value." While acknowledging the cost to "sort, handle, transport, and inventory ties is high," Mr. Davis **failed to indicate what the cost would be to "sort, handle, transport, and inventory"** the 3,912 ties he classified as being relay or landscape quality. Mr. Davis also **failed to take into account the Hazardous Waste Generation Fee** Mississippi Code Article 49, §31-25, imposes on those who generate hazardous waste. Since Mr. Davis failed to account for the high cost to "sort, handle, transport, and inventory" ties, the value Mr. Davis ascribes to the relay and landscape quality ties should either be stricken, or given no weight.

VERIFIED STATEMENT OF GENE DAVIS

8. On p. 10-11 of Mr. Davis' Verified Statement, he stated the Vicksburg Southern Railway Company ("VSOR") may want to purchase the relay quality rail that is on the Line. Unfortunately, Mr. Davis did not provide a copy of an offer from VSOR, nor has VSOR given any indication that it has any interest in the rail that is on the Line. Consequently, this undocumented, speculative comment should be stricken from the record, or given no weight.

9. On p. 13 of Mr. Davis' Verified Statement, he stated E&R "propose that the ballast be removed." E&R did not state the ballast must be removed. In ¶14 of E&R's Request to Set

Terms and Conditions, E&R stated the ballast may contain hazardous materials, such as leached out creosote. And if the ballast did contain hazardous materials, the ballast **may** have to be removed. Since Mr. Davis' statement that E&R "propose that the ballast be removed" is untruthful, the statement should either be stricken, or given no weight.

10. On p.5 of Appendix C of Mr. Davis' V.S., he stated Fit #2 relay rail has between 1/8 and 3/16 inch head wear, and Fit #3 relay rail has between 3/16 and 1/4 inch head wear. On page 7 of Appendix C of Mr. Davis' Verified Statement, he stated "liquidation of the property was assumed to yield the following recovery rates, based on the **theoretical weight** of new rail

97 percent of fit rail, remaining three percent as scrap"

11. In Exhibit 3 of Appendix C, Mr. Davis stated the theoretical weight of Fit # 2 and Fit #3 115 lb RE are both 202.4 tons per mile, and the theoretical weight of Fit #2 and Fit #3 112 lb RE are both 197.1 tons per mile. The theoretical weight of **new** (unworn) 115 lb RE would be 202.4 tons per mile, and the theoretical weight of **new** (unworn) 112 lb RE would be 197.1 tons per mile. [115 lb / yard x 1,760 yards / mile x 2 rails = 404,800 lbs or 202.4 tons / mile.] Since Fit #3 has more wear than Fit # 2, the theoretical weight of Fit #3 should be less than Fit #2, and the theoretical weight of Fit #2 should be much less than the theoretical weight of new, unworn rail. No place in Mr. Davis's calculations, did he account for the reduction in weight due to the amount of rail wear. [The value estimates in Mr. Davis's Exhibit 3 are for 97% relay, plus 3% scrap, for a total of 100% of the theoretical new weight.] E&R reduced the tonnage of rails by 15% to account for wear. This 15% reduction would equate to rail whose rail head had been worn down about 3/16th of an inch. (3/16 inch is 15% of 1.25 inches, which is about the height of a rail head. A rail head would have to be 6.25 inches high for 3/16 inch to be 3% of the rail head height.) Since E&R reduced its rail tonnage by 15%, to account for the amount of wear, while Mr. Davis failed to account for any reduction in tonnage due to wear, E&R's estimate of tonnage is more accurate and reliable than KCSR's. Thus KCSR's tonnage estimates should be stricken, or given no weight.

VERIFIED STATEMENT OF CHESTER CULLEY

12. On p. 4 of Chester Culley's Verified Statement ("Culley V.S."), he made the statement: "As KCSR uses its own crews, cars, and transportation, there would be no added costs to KCSR for removing the scrap ties on the Line and transporting them to IP's facility." Any time KCSR uses its own crews, cars, and transportation, there is a cost to KCSR. What Mr. Culley failed to do, was to properly account for that cost. Since Mr. Culley failed to document KCSR's costs to use its own crews, cars and transportation in transporting the scrap ties to the IP facility, KCSR's estimated cost to dispose of the scrap ties from the Line, is less reliable than E&R's estimate of the cost to dispose of the scrap ties.

ENVIRONMENTAL COMPLIANCE REQUIREMENTS

13. Mr. Culley correctly stated on p.6 of his V.S. that "MDEQ regulations do not require water quality mitigation and permits under NPDES unless there is over one acre of land disturbance." What Mr. Culley failed to do, was calculate how much land would be disturbed when the Line's cross ties were removed (some of which, according to Mr. Davis, were not visible, due to silt / stone / asphalt on top of the cross ties).

14. A standard cross tie is 8.5 feet long. Removing this tie will disturb a minimum width of 9 linear feet of silt-laden ballast. A strip of dirt that is 9 feet wide by 1.9 miles long, contains 90,288 SF, or a bit over 2 acres. At a bare minimum, removing the cross ties from the Line will disturb at least 2 acres. Since NPDES permits are required if more than one acre is disturbed, there can be no doubt that a NPDES permit would be required.

15. Mr. Culley speculated that MDEQ would not require KCSR obtain a NPDES permit prior to removing the cross ties and track material. His supposition was based on the fact that MDEQ did not file a response to KCSR's letter to MDEQ. The letter KCSR sent to MDEQ was devoid of any details about KCSR's proposed abandonment activities. The letter merely stated KCSR intended to abandon the Line. Attached to the letter was a copy of KCSR's Environmental report. On p. 8 of that Environmental Report, KCSR stated:

“No debris will be discarded along the right of way nor placed or left in streams or wetlands, or along the banks of such waterways. Any work along the right-of-way will be subject to appropriate measures to prevent or control spills from fuels, lubricants or any other pollutant materials. Accordingly, KCSR does not believe that a permit under Section 402 of the Clean Water Act will be required.”

16. KCSR stated it would implement appropriate measures to control pollutant materials. (Silt and soil are considered pollutants when allowed to enter a waterway.) Silt fences, construction entrances, and stabilization with seed and mulch following land disturbing activities, would constitute “appropriate measures” to control pollutants from land disturbing activities. And just because MDEQ failed to send a response specifically telling KCSR that it would need to obtain a NPDES permit prior to beginning abandonment activities, **does not mean** no NPDES permit would be required. E&R’s Exhibit D-1 clearly stated, a local governmental entity did a linear land disturbing activity without first obtaining a NPDES permit from the State, and was given a “mid-five figure fine” for failing to obtain the necessary NPDES permit.

17. Mr. Culley **is not** a Mississippi-licensed environmental-compliance specialist. Mr. Montgomery and Mr. Carpenter **are** Mississippi-licensed professional engineers **who are** intimately familiar with Mississippi’s and the City of Vicksburg’s environmental regulations. Both of these professional engineers stated in their quotes that a Storm Water Pollution Prevention Plan (“SWPPP”) would have to be prepared, a NPDES permit would have to be obtained, a Vicksburg Land Disturbance Plan would have to be prepared to comply with Vicksburg’s Stormwater Runoff Management Ordinance, and construction entrances would have to be constructed. See E&R’s Exhibits F and G.

18. Since Mr. Culley **is not** a Mississippi-licensed environmental specialist, since E&R’s expert witnesses **are** Mississippi-licensed professional engineers with intimate knowledge of Mississippi’s and the City of Vicksburg’s environmental permitting regulations, E&R’s statement that NPDES permits would be required, that a SWPPP would have to be created and implemented, appropriate sediment controls would have to be installed, then removed, and the site would have to be stabilized with seed and mulch after the track material and ties had been removed, **are more credible than KCSR’s unsupported assumption** that the lack of a response

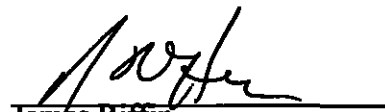
by MDEQ to KCSR's fact-deficient letter means no NPDES permit or City of Vicksburg permit would be required, no sediment controls would have to be installed, and the site would not have to be stabilized after KCSR's land disturbing activities had concluded.

19. E&R provided the Board with a copy of MDEQ's regulations. The regulations are quite clear: A NPDES permit and SWPPP are required if more than one acre is disturbed. Removing the cross ties will disturb a bare minimum of two acres. Consequently, **at a bare minimum**, sediment controls would have to be installed, then removed, and the site would have to be stabilized with seed and mulch. E&R's expert witnesses have stated the cost to comply with these environmental regulations will be in excess of \$300,000, which is more than the net salvage value of the track material as computed by Mr. Davis.

20. Since KCSR has the option of leaving the track material in place, which option would relieve KCSR of any environmental compliance costs, and since KCSR stated in its Reply that it would leave the track material in place (see fn 14 on p. 10 of its Reply), if the cost to salvage the track material was greater than the net revenue that would be realized were the track material to be salvaged, and since the cost to remove the track material will in fact be greater than the net revenue generated from selling the track material, the Net Liquidation Value for the Line, would be the **\$4,500 per acre** offered by the City of Vicksburg, subject to an appropriate reduction to account for the **January 30, 2008 unlawful removal of the railroad bridge at MP 229.80.**

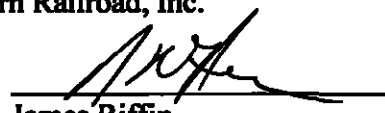
Respectfully submitted,


Raymond B. English


James Riffin

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of February, 2008, a copy of the foregoing Motion to Strike 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. 3rd Street, Pittsburg, KS 66762**, attorney for Vicksburg Southern Railroad, Inc.


James Riffin