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May 28, 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 please find the Initial Statement of The Kansas City Southern Railway Company Pursuant to Stay Order Served May 21, 2008 in the above-captioned proceeding. If there are any questions about this matter, please contact me directly, either by telephone: (202) 663-7823 or by email: wmullins@bakerandmiller.com.

Respectfully submitted,



William A. Mullins

Enclosures

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

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

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

**INITIAL STATEMENT OF THE KANSAS CITY SOUTHERN RAILWAY COMPANY
PURSUANT TO STAY ORDER SERVED MAY 21, 2008**

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May 28, 2008

**BEFORE THE
SURFACE TRANSPORTATION BOARD
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**STB DOCKET NO. AB-103
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**INITIAL STATEMENT OF THE KANSAS CITY SOUTHERN RAILWAY COMPANY
PURSUANT TO STAY ORDER SERVED MAY 21, 2008**

On May 20, Raymond B. English faxed to the Surface Transportation Board ("STB") a pleading entitled "Raymond B. English Withdrawal of Offer to Purchase" ("English Withdrawal"). The pleading states that it withdraws Mr. English's "offer" to purchase for \$376,320 MP 225.6 to MP 227.5 (labeled by Messrs. English and Riffin as the "Segment") of the line that The Kansas City Southern Railway Company ("KCSR") was seeking an exemption in this proceeding to abandon.

Characterizing the English Withdrawal as a "motion to withdraw," Chairman Nottingham issued an indefinite "housekeeping stay" of the May 22 closing date previously ordered by the Board, and offered parties the opportunity to submit initial and reply filings on May 28 and June 2 addressing the effect of the English Withdrawal. This pleading constitutes KCSR's initial submission in response to the Chairman's order served May 21 ("May 21 Order").

SUMMARY

The current stay of the closing deadline in this matter should be lifted immediately, with direction that the parties close no later than June 13. If the offerors do not close by that deadline, KCSR should be free to return to the Board for immediate reinstatement of its abandonment

exemption, consistent with 49 U.S.C. §10904, and issuance of a notice of interim trail use. The May 21 Order's attempt to characterize Mr. English's repudiation of his statutory responsibilities as a "motion to withdraw" an "offer to purchase" is contrary to fact and law, and threatens KCSR with increased damages.

DISCUSSION

The May 21 Order characterizes Mr. English's filing by labeling it a motion to withdraw an offer. In fact, however, the English Withdrawal is a repudiation of Mr. English's obligation to purchase the Segment.

First, the filing is not a motion. Mr. English does not seek the Board's permission to withdraw his "offer." Rather, he states, "Raymond B. English ("English") *withdraws* his offer to purchase this portion of the line (segment) . . ." (Emphasis added.) Mr. English is not seeking the Board's permission to discontinue his participation in this proceeding; instead, he believes he has the unilateral right to withdraw his "offer," notwithstanding his previous acceptance of the Board's order and the fact that the statutory timeframe for withdrawing his offer has lapsed.

Second, the English Withdrawal is not withdrawal of an "offer," but is instead a breach of his statutory duties and the contract formed by virtue of the statute. The contract was formed under 49 U.S.C. §10904 by Mr. English's and Mr. Riffin's requests for the Board to set terms and conditions, the Board's order setting terms and conditions as requested, and Messrs. English's and Riffin's failure to timely withdraw their offers.¹

¹ Indeed, in their March 17, 2008 Reply to KCSR's Request for Clarification, Messrs. Riffin and English themselves stated "Given that E&R did not affirmatively withdraw their offer to purchase the Line at issue, and given that the 6th 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."

Section 10904 is clear - once the Board, at the offerors' request, sets the terms and conditions of sale under Section 10904(f) "The decision of the Board shall be binding on both parties, except that the person who has offered to subsidize or purchase the line may withdraw his offer within 10 days of the Board's decision." 49 U.S.C. §10904(f)(2) (emphasis added). Or, to quote case law cited by Messrs. English and Riffin in their March 17 Reply to KCSR's Request for Clarification,

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, Inc. v. STB, 299 F.3d 523, 549 (6th Cir. 2002) (emphasis added).

When Messrs. English and Riffin did not withdraw their purchase offer for the Segment by March 31, Mr. English and Mr. Riffin became jointly bound by statute to comply with the Board's order to purchase the Segment for \$376,320 by May 22, 2008. As the Board's order served March 20 stated, "The Offerors will have an additional 10 days from the date this decision is served (until March 31, 2008) to notify the Board if they wish to withdraw their offer to purchase the Line. If they do not withdraw their offer, closing is to occur within 90 days of our February 22 decision." Therefore, Mr. English's proposal to purchase the Segment had been accepted by virtue of the Board's order, Section 10904(f), and the offerors' failure to withdraw their offer by March 31. Having been accepted, Mr. English's proposal to purchase the Segment was no longer a mere offer, but instead was a contract and statutory obligation which cannot be withdrawn, only breached.

For the record, KCSR was poised to close the sale on May 22. KCSR had, to its understanding, reached agreement with Messrs. English (who acted through his agent Eric

Strohmeyer²) and Riffin on the language of the deed, bill of sale, and assignment of agreements for the transfers of both the Segment and the so-called Remainder, which Mr. Riffin could purchase if and only if he and Mr. English together purchased the Segment.³ KCSR had provided wire transfer instructions to Messrs. English (again, via Mr. Strohmeyer) and Riffin and had delivered executed deeds, bills of sale and assignment agreements to a local attorney in Vicksburg to release to Messrs. English and Riffin upon KCSR's confirmation of receipt of funds from the purchasers. KCSR remains able today to close this transaction immediately.

KCSR has been severely damaged by Mr. English's breach of his obligation to purchase the Segment. Through his and Mr. Riffin's OFA and acceptance in this proceeding, Mr. English prolonged this matter until City of Vicksburg's obligation to purchase the right of way lapsed on April 15. That April 15 deadline was stated in a contract that Messrs. English and Riffin used and often cited in their OFA submissions, and was therefore known to them. With that deadline having lapsed, and on the day that the Board's order about the Glass Road trestle⁴ showed that Messrs. English and Riffin would have to pay for the Segment the full value set by the Board and accepted by English and Riffin, Mr. English filed his attempted withdrawal. In doing so, he

² As stated on the first page of narrative in Mr. Strohmeyer's April 17 Request for an Extension of Time, filed with the Board in STB Ex Parte No. 677, Common Carrier Obligation of Railroads, "As the Board may (or may not be) aware, CNJ Rail Corporation has been heavily involved 'behind the scenes' with regards to a matter currently before the Board (see AB 103 21 X – Kansas City Southern Railway – Abandonment Exemption – Warren County MS.) . . . In addition, CNJ has been working with our customer in Mississippi, Foam Packaging, to secure its building . . ." KCSR also has several e-mails confirming CNJ's or Mr. Strohmeyer's status as Mr. English's agent.

³ As stated in the Board's order served February 22 in this matter, "Riffin may not purchase the Remainder without the Segment."

⁴ KCSR renews its objection to the Board's conclusion that KCSR is financially responsible to Mr. Riffin for damage done to the trestle over Glass Road by Warren County without KCSR's knowledge or permission. Should this matter lead to Mr. Riffin purchasing the Remainder, KCSR reserves its right to further pursue said objection.

knew, or at least was in a position to know, that the City of Vicksburg was no longer obligated to purchase and rail bank the right of way, and that his breach of his obligations, if allowed to stand, would leave KCSR without a contract to sell the property. By his breach of contract and the statute, Mr. English has cost KCSR at least the value of its contract to sell the right of way to the City.⁵

Moreover, Mr. English's and Mr. Riffin's actions in filing numerous unscheduled pleadings after issuance of the Board's order setting the terms and conditions and their subsequent failure to withdraw their offer has cost KCSR substantial attorneys fees and expert witness fees that it would not have been incurred but for that acceptance. The Board's February 22 order setting terms and conditions specified that only if the offerors accepted the terms (or failed to withdraw their offer) would the Board consider whether damages were due to one or both offerors because of Warren County's unauthorized partial dismantling of the trestle over Glass Road. Because Mr. English refused to withdraw his offer and indeed affirmatively accepted the Board's terms for his joint purchase of the Segment with Mr. Riffin, KCSR incurred substantial additional attorney and expert witness fees in responding to the Glass Road trestle issue. KCSR estimates those fees to have been approximately \$51,000. Those fees were a direct result of KCSR having to respond to the numerous pleadings, discovery, and Board orders caused by Mr. English's now repudiated commitment to purchase the Segment. At a bare

⁵ In an effort to mitigate its damages, KCSR has approached the City about extending the term of its obligation to purchase the property. While those discussions continue, KCSR unfortunately cannot now say that the City has agreed to such an extension. Should the City agree to extend its obligation to acquire the right of way, it would be necessary for all parties of record opposing the relief KCSR requested in this proceeding - Messrs. English and Riffin, J.B. Davenport, Debra Isaac - and CNJ Rail Corporation (which planned to operate the Segment), to waive any and all rights to appeal any of the decisions in this proceeding, and to immediately dismiss pending appeals, in order to allow KCSR the necessary certainty to close with the City in a timely fashion.

minimum, Mr. English and Mr. Riffin should be required to pay those costs, plus any other damages that KCSR has incurred if the sale does not close.

Finally, the Board should immediately lift the housekeeping stay. KCSR respectfully submits that there is no basis in the Board's regulations or general principles of administrative law for a housekeeping stay. The order does not meet the requirements for issuance of a stay of the effective date of an already issued decision. Hilton v. Braunskill, 481 U.S. 770, 776 (1987); Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977); Virginia Petroleum Jobbers Ass'n v. Fed. Power Comm'n, 259 F.2d 921, 925 (D.C. Cir. 1958). As such, KCSR believes that in this instance the housekeeping stay was legally improper.

Present circumstances call for immediate lifting of the housekeeping stay issued in these proceedings. When an offeror does not accept the terms set by the Board or withdraws its offer, "*the abandonment or discontinuance may be carried out immediately, unless other offers are being considered pursuant to paragraph (3) of this subsection.*"⁶ 49 U.S.C. §10904(f)(2) (emphasis added).

By delaying matters, the May 21 Order is increasing the damages that KCSR will suffer from Mr. English's breach by reducing the chances of completing a sale to the City. Moreover, there has been one motor vehicle accident in close proximity to the Glass Road trestle in recent weeks. If that trestle is ultimately going to be removed through the City's conversion of the right

⁶ Because, as the Board has correctly concluded, Messrs. Riffin and English joined in a single offer to purchase the Segment, the provisions of 49 U.S.C. §10904(f)(3) do not apply. Similarly, Mr. Riffin may not now proceed without Mr. English's participation inasmuch as allowing him to do so would violate the timeframes of Section 10904 by allowing the untimely submission of an OFA solely by Mr. Riffin. Mr. Riffin had the option to submit his own timely individual OFA for the Segment by December 21, 2007, but chose not to do so. Accordingly, Section 10904(f)(3) does not apply as it says, in pertinent part, "If the Board has established the conditions and amount of compensation, and the original offer has been withdrawn, any other offeror *whose offer was made within the 4-month period described in subsection (c)* may accept .

.. "

of way into a trail, the sooner the Board allows that action to go forward, the less the chance that there will be a motor vehicle collision with the remaining portion of the trestle.

CONCLUSION

Mr. English's May 20 filing with the Board is not a motion to withdraw an offer but is, rather, a breach of an agreement and a statutory obligation to purchase the Segment for \$376,320. KCSR has been substantially damaged by Mr. English's repudiation of that obligation. The Board should promptly terminate the so-called housekeeping stay, order the offerors to close on the purchase no later than June 13, and grant KCSR immediate reinstatement of its abandonment authority and a notice of interim trail use if the offerors do not close on that date.

Respectfully submitted,

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Attorneys for The Kansas City Southern
Railway Company

Dated: May 28, 2008

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing Initial Statement of The Kansas City Southern Railway Company Pursuant to Stay Order Served May 21, 2008 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 28th day of May, 2008.



William A. Mullins