

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

220385

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

ENTERED
Office of Proceedings

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

OCT - 2 2007

220386

Part of
Public Record

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

**REPLY TO PETITIONER'S REQUEST TO BE EXEMPT FROM 49 U.S.C. §10904
(OFFERS OF FINANCIAL ASSISTANCE)**

1. Raymond B. English ("English"), herewith files this Reply to Petitioner's Request to be Exempt From 49 U.S.C. §10904 (Offers of Financial Assistance), and herewith requests the Board deny Kansas City Southern Railway Company's ("KCSR") request to be exempt from the provisions of 49 U.S.C. §10904, and for reasons states:

1. BACKGROUND INFORMATION

2. On August 24, 2007, Petitioner, 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"). Beginning on page 12 of KCSR's Petition, 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.

2. KCSR's Request to be exempt from the OFA procedures, SHOULD BE DENIED.

4. Granting an exemption from 49 U.S.C. 10904 is an "unusual relief," rarely granted. From 1980 through 1996, the ICC granted an exemption from offers of financial assistance only 5 times. The Board has likewise granted this exemption only rarely. "In the past, the Commission has granted this unusual relief when the right-of-way is needed for a valid public purpose and there is no overriding public need for continued rail service." *Southern Pacific Transportation Company - Discontinuance of Service Exemption - In Los Angeles County, CA*, Docket No. AB-12 (Sub-No. 172X), decided December 1, 1994, ("SP 172X") at page 3.

5. In *Norfolk Southern Railway Company - Abandonment Exemption - In Orange County, NY*, FD No. AB-290 (Sub-No. 283X) ("*Orange County*"), the carrier asked to be exempt from the OFA process. James Riffin filed a Notice of Intent to File an Offer of Financial Assistance to purchase the line, and strongly objected to NS' request to be exempt from the OFA process. In that proceeding, the Board denied the carrier's request to be exempt from the OFA process. The Board justified its decision as follows:

"The OFA provisions - which permit a party genuinely interested in providing continued rail service to acquire a line for that purpose over the objections of the owner - reflect a Congressional intent that rail service be preserved whenever possible. While exemptions from 49 U.S.C. 10904 have been granted from time to time, they have been granted when the right-of-way is needed for an overriding public purpose (footnote 3) or an important private undertaking (footnote 4), and there is no apparent interest in continued rail service (footnote 5). ... Mr Riffin has shown an interest in providing continued rail service, despite the absence of an active shipper on the line for almost 2 years. Accordingly, the Board finds no basis for undercutting the Congressional objective of maintaining rail service, despite the fact that the prospects for a successful OFA are marginal."

6. In the *1411 Corporation* case cited by KCSR, an entity called Shawnee desired to acquire the right-of-way that was the subject of the abandonment proceeding, to be used a rail trail. The carrier, Middletown & Hummelstown Railroad Company, supported Shawnee's desire to exempt the proceeding from the OFA provisions of 49 U.S.C. §10904. Shawnee argued that an overriding public interest [the nearby city of Columbia's Master Plan proposed that the line be converted into a recreational and scenic trail] required the board to set aside the OFA process in that case. In denying the OFA exemption request, the Board stated:

"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. Footnote 14: See 49 CFR 1152.29(d) (trail use is provided for only if "continued rail service does not occur under 49 U.S.C. 10904. ...") See also *Rail Abandonments - Use of Right-of-Way As Trails*, 2 L.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 ..."). Indeed, even under the Trails Act, trail use is interim and always subject to restoration of rail service over the line. 49 CFR 1152.29(a)(3)."

7. In the very few cases where exemption from offers of financial assistance have been granted, the Board and the ICC have enumerated criteria which justify granting this exemption:

A. In *Iowa Northern Railway Co. – Abandonment - In Blackhawk County, IA*, Docket No. AB-284 (Sub-No. 1X), decided March 28, 1988, the line to be abandoned was to be used as the corridor for a new U.S. highway 218. The line had two active shippers. One shipper elected to sell its property to the State of Iowa, then relocate its business. The other shipper had adjacent parallel alternate rail service available. (Its facility was served by two rail lines.) Using the line proposed for abandonment for rail service, would have precluded construction of the highway. No one opposed the abandonment or OFA exemption requests, nor did anyone file a Notice of Intent to File An Offer of Financial Assistance.

B. In *Chicago and North Western Transportation Company – Abandonment Exemption – In Blackhawk County, IA*, Docket No. AB-1 (Sub-No. 1X), decided July 7, 1989, the railroad asked for abandonment approval so that the right-of-way could be used for another portion of the proposed U.S. highway 218, see *Iowa Northern, supra*. The railroad arranged to provide rail service to the only shipper on the line via other tracks adjacent to the shipper's facility. The shipper also planned to sell its facility to the State of Iowa, then relocate its business. Using the line proposed for abandonment for rail service, would have precluded construction of the highway. No one opposed the abandonment or OFA exemption requests, nor did anyone file a Notice of Intent to File An Offer of Financial Assistance.

C. In *Missouri Pacific Railroad Company – Abandonment – In Harris County, TX*, Docket No. AB-3 (Sub-No. 105X), decided December 16, 1992, the line to be abandoned was to be used as the corridor for an expanded Interstate Highway 10, and as the corridor for future mass transit. The line had a number of shippers. The active shippers either elected to relocate or to use alternate existing rail service. Using the line proposed for abandonment for rail service, would have precluded expansion of I-10. No one opposed the abandonment or OFA exemption requests, nor did anyone file a Notice of Intent to File An Offer of Financial Assistance.

D. In the *SP 172X* case, the only shipper on the line had stopped using the line prior to SP filing its Discontinuance of Service exemption. (The shipper, a bakery, had converted its facility. Previously it had received shipments of grain, which it milled. Several years before the petition was filed, the bakery stopped milling grain into flour. It bought flour, rather than grain. The flour was delivered via truck.) The Los Angeles County Mass Transit Administration ("LACMTA") previously had purchased, without ICC approval, the right-of-

way (see *Southern Pacific, supra*). After finding, in the *Southern Pacific* case, *supra*, that LACMTA was the common carrier, not Southern Pacific, SP filed this Discontinuance of Service exemption. The right-of-way was to be used for mass transit purposes. Using the line proposed for abandonment for rail service, would have precluded using the corridor for mass transit purposes. No one opposed the discontinuance of service or OFA exemption requests, nor did anyone file a Notice of Intent to File An Offer of Financial Assistance.

E. In *Missouri Pacific Railroad Company – Abandonment – In Harris County, TX*, Docket No. AB-3 (Sub-No. 139X), decided December 23, 1996, the railroad wanted to abandon a 0.52 mile segment. There was one shipper on the line, who had two means of rail access. After abandonment, the line was to be sold to the shipper. The shipper would still have rail access via the other line adjacent to its property. The shipper desired to erect a structure on the right-of-way, thereby expanding its existing structure adjacent to the line. The shipper needed to start building its new structure as soon as possible, since its lease of another structure was due to expire. Using the line proposed for abandonment for rail service, would have precluded the shipper from building its warehouse on the corridor. No one opposed the discontinuance of service or OFA exemption requests, nor did anyone file a Notice of Intent to File An Offer of Financial Assistance.

F. In *The Cincinnati, New Orleans & Texas Pacific Railway Co. – Abandonment Exemption – in Cumberland and Roane Counties, TN*, STB Docket No. AB-290 (Sub-No. 208X), decided November 13, 2000, ("*Cincinnati, New Orleans*") the railroad wanted to abandon a 15.4 mile segment of a dead-end branch line that served only one shipper. After abandonment, the shipper intended to purchase the line, then operate the line as a private line. Delaying abandonment while the OFA time period ran its course, would have delayed transfer of ownership of the line to the shipper, which in turn would have delayed the beginning of necessary maintenance and rehabilitation of the line by the shipper. No one opposed the abandonment or OFA exemption requests, nor did anyone file a Notice of Intent to File An Offer of Financial Assistance.

G. In *Central Michigan Railway Company - Abandonment Exemption - in Saginaw County, MI*, STB Docket No. AB-308 (Sub-No. 3X), served October 31, 2003, the Board exempted the abandonment from the OFA process so that an interstate highway could be widened. [The carrier's railroad bridge crossed over the highway. The bridge's abutments

were so close together, the highway could not be widened without removing the bridge and its abutments.] The sole shipper on the line did object, particularly since the shipper had recently invested over \$100,00 in rail infrastructure at its site. That shipper withdrew its objection after the Board ordered the carrier to reimburse the shipper for its \$100,000 rail infrastructure investment, and the carrier offered to subsidize the shipper's extra shipping costs due to the loss of its rail service. The carrier also received \$3 million for abandoning its railroad bridge.

H. In *CSX Transportation, Inc. - Abandonment - in Barbour, Randolph, Pocahontas, and Webster Counties, WV*, STB Docket No. AB-55 (Sub-No. 500) served January 9, 1997, the Board had been ordered by the D.C. Circuit Court of Appeals, to grant the abandonment petition. The State of W. Virginia offered to purchase the line, to preserve it as a rail corridor (a commendable public-use). The Board exempted the abandonment from the OFA process, since it had been ordered to grant abandonment authority, and since the line was to be preserved as a rail corridor.

8. In those few cases where the Board has granted a request to be exempt from the OFA process, no one has filed a notice indicating they had a desire to purchase the line via the OFA process (or if an OFA was filed, it was subsequently withdrawn due to the offeror receiving substantial financial incentives to withdraw the OFA.). In addition, the public-use project was so massive, the right-of-way was too small to accommodate both the public-use project (typically a highway), and a line of railroad.

9. The following common criteria existed in the cases where exemption from the OFA regulations was granted:

- A. After abandonment, the shippers still had access to rail service via an adjacent line.
- B. No one opposed the abandonment or OFA exemption requests.
- C. No one filed a Notice of Intent to File An Offer of Financial Assistance.
- D. Delaying approval of the abandonment petition, while the statutory period for filing an OFA lapsed, would have delayed an important public or private undertaking.
- E. Continuing to use the line proposed for abandonment, for freight rail service, would have precluded using the line for an important public or private undertaking.

10. In the instant case, **none** of the criteria enumerated in the cases that granted exemption from the OFA regulations, exists.”

11. In the instant case, English has demonstrated that he has a desire to purchase the Line, so that he can retain his freight rail service.

3. RETAINING THE LINE WILL NOT PRECLUDE BUILDING THE CASINO

12. In its Petition, KCSR stated the line bisected the 240 acres Lakes Entertainment proposed to build its casino on, and further stated that if the Line was not removed, the casino project would no longer be viable. KCSR also stated the casino was to be built adjacent to the Mississippi river.

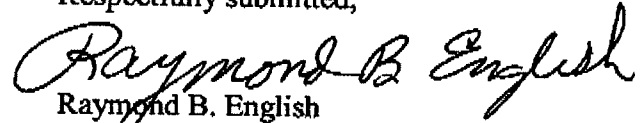
13. Attached to KCSR's Environmental and Historic Report, as Exhibit 1, was a Location Map. Lakes' property is near the town of Warrinton. The scale at the bottom of the Map indicates the map is at a scale of 8 mm = one mile. At Warrinton, the tracks are approximately 17 mm east of the river, which would indicate the river at Warrinton is approximately 2 miles west of the tracks. If Lakes' property had 4,000 feet of river frontage, its property would be approximately 2,600 feet deep, or about ½ mile from the edge of the river. From this cursory review, it is rather obvious **either the right-of-way does not BISECT** (to cut in half) Lakes' property, or Lakes' property is not located adjacent to the river, or Lakes' property is very long and skinny, and has very little river frontage. (To bisect Lakes' property, Lakes' property would have to be 4 miles in length. A 240-acre parcel 4 miles long would be less than 500 feet wide.) From this one could reasonable conclude that Lakes' property is probably located adjacent to the river, and that to get to the property from the nearest highway, U.S. 61, one would have to cross over the right-of-way. Were the Line to remain, the necessity of building a grade crossing over the Line to access Lakes' casino hardly would be “deal breaking,” particularly since English only gets one rail car ever week or so. [If you blinked, you would not have seen English' train (a locomotive and one rail car) going through the grade crossing.]

3. CONCLUSION

14. There is strong Congressional intent to preserve rail service wherever possible. Offers of financial assistance to acquire rail lines under section 10904 take priority over both interim trail

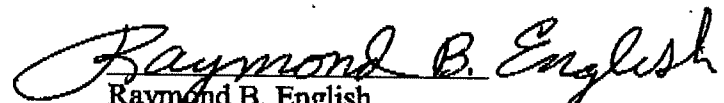
use and public use conditions because retention of existing rail service is mandatory under section 10904. Not abandoning the Line would not preclude Lakes from pursuing its casino development plans. Therefore, for the foregoing reasons, English would ask that the Board **deny** KCSR's request to be exempt from the OFA process.

Respectfully submitted,


Raymond B. English

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of October, 2007, a copy of the foregoing Reply to Petitioner's Request to be Exempt From 49 U.S.C. §10904, 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