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**SURFACE
TRANSPORTATION BOARD**

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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



FILED

FEB 11 2008

**SURFACE
TRANSPORTATION BOARD**

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

221582

PETITION TO REOPEN

1. Now comes your Petitioners, Raymond B. English and James Riffin ("E&R") who herewith, pursuant to 49 CFR 1152.25 (e)(4), file this Petition to Reopen, asking the Board to Reopen then Reconsider its February 6, 2008 Decision in the above entitled case, and for reasons states:

2. In its February 6, 2008 Decision ("Decision"), David M. Konschnik, Director, Office of Proceedings, rejected E&R's February 4, 2008: **Errata** with regard to the acreage and value of the real estate associated with the Line that is the subject of the above entitled proceeding; **Errata** with regard to a Verified Statement of James Riffin that was inadvertently omitted from E&R's Request to Set Terms and Conditions; **Motion to Strike** in its entirety.

3. When Riffin was typing the Request to Set Terms and Conditions, in ¶6A he correctly calculated the area of the Segment portion of the Line to be 23 acres, and in ¶7A he correctly calculated the area of the Remainder portion of the Line to be 28.5 acres. In ¶8. he **incorrectly** indicated the total area was 55.1 acres, rather than 51.51 acres. He then incorrectly multiplied \$4,500 per acre times 55.1 acres, the product of which is \$247,500. He then **incorrectly** stated the value of the real estate per the Purchase and Sale Agreement ("PSA") between KCSR and the City of Vicksburg, was \$247,500. When Riffin read KCSR's reply, he noted KCSR valued the real estate at \$231,795. When he tried to reconcile the two different values, he noted he had omitted the "1" that should have been typed between the two "5's." Rather than typing 51.51, he typed 55.1. With this in mind, he attempted to correct this typographical error. The Office of

Proceedings apparently concluded E&R were attempting to revalue the real estate, when in fact they were merely attempting to correct a typographical error. The correct value for the real estate per the PSA, is **\$231,795**, which is the same value KCSR espouses. E&R would ask that the Board reopen then reconsider its February 6, 2008 Decision, then permit E&R to correct this typographical error, which appears in ¶8 of their Request to Set Terms and Conditions. Permitting this correction, will provide the Board with a more accurate record.

4. James Riffin ("Riffin") timely prepared a Verified Statement on January 23, 2008, two days prior to the January 25, 2008 date E&R were required to file a Request to Set Terms and Conditions. As explained in E&R's Errata, Riffin inadvertently failed to append the Verified Statement to E&R's Request to Set Terms and Conditions. (Riffin finished typing the Request to Set Terms and Conditions at 4 am on January 25, 2008. After only a few hours of rest, he began the arduous task of duplicating the Request to Set Terms and Conditions. He inadvertently failed to duplicate the Verified Statement, then append it to the Request to Set Terms and Conditions.) Riffin will agree, 49 CFR 1152.27(h)(3) stipulates that a party requesting the Board Set Terms and Conditions, is required to submit its case-in-chief at the time the Request is filed. Riffin will also agree, the Board's regulations require the Board to render a decision in a highly abbreviated period of time. So while Riffin did not have the right to late-file his Verified Statement, he would ask that the Board reconsider its Decision rejecting his Verified Statement, then admit the Verified Statement, in order to have a more complete record. E&R would point out that admitting the Verified Statement would not delay this proceeding, since the salient points in the Verified Statement were discussed in E&R's Request to Set Terms and Conditions, and were addressed by KCSR in its Reply. Consequently, admitting Riffin's Verified Statement would not delay this proceeding.

5. On February 4, 2008, E&R filed a Motion to Strike Portions of KCSR's Reply to E&R's Request to Set Terms and Conditions. The Office of Proceedings rejected the Motion to Strike, stating:

"Offerors' motion to strike is nothing but a thinly veiled reply to KCSR's reply. They dispute the qualifications of the railroad's witnesses, the evaluations made by those witnesses, and the arguments made by KCSR based on the evidence submitted by its

witnesses. In its reply to the Request, KCSR has kept within the parameters of the case that Offerors filed in asking the Board to set the terms and conditions for the forced sale of the Line. It has submitted nothing that ought to be stricken. Rather, Offerors' motion must be rejected, not only as an impermissible reply to a reply but because it is an attempt to circumvent a statutory scheme designed to produce a decision on a complex issue in a highly abbreviated period of time."

6. 49 CFR 1104.8 Objectionable matter. states:

"The Board may order that any redundant, irrelevant, immaterial, impertinent, or scandalous matter be stricken from any document.

7. 49 CFR 1152.27 (h)(4) states:

"The offeror must submit all evidence and information supporting the terms it seeks within 30 days after the offer is made. The carrier's reply to this evidence and support for the terms it seeks are due within 35 days after the offer is made. No rebuttal evidence will be permitted and evidence and information submitted after these dates will be rejected."

8. Normally, one would **not** expect a carrier's reply to contain "redundant, irrelevant, immaterial, impertinent, or scandalous matter." But if it does, then E&R would argue 49 CFR 1104.8 takes precedence over 49 CFR 1152.27(h)(4), and that a Motion to Strike "redundant, irrelevant, immaterial, impertinent, or scandalous matter," should not be summarily rejected without addressing the issues raised in the Motion to Strike.

9. E&R would argue, untruthful representations would be considered to be "scandalous, irrelevant and immaterial," and as such, such be stricken from the record. On pages 1-2, then again on p. 12 of its Reply, KCSR untruthfully represented to the Board that "there has been no demand for service for at least 15 years" on that portion of the Line from which KCSR's predecessor-in-title unlawfully removed the track material. In ¶3 of E&R's Motion to Strike, E&R asked the Board to strike this untruthful representation. E&R would ask that the Board reopen its February 6, 2008 Decision, then strike this untruthful representation from the record.

10. On page 17 of its Reply, KCSR opined that E&R had no personal knowledge or experience in removing rail. E&R argued this unsupported opinion should be stricken because it

is “scandalous,” [untruthful], and because it had nothing to do with helping the Board determine the value of the track material.

11. The Office of Proceedings incorrectly concluded E&R disputed “the qualifications of the railroad’s witnesses, the evaluations made by those witnesses, and the arguments made by KCSR based on the evidence submitted by its witnesses.”

12. No place in E&R’s Motion to Strike did E&R dispute “the qualifications of the railroad’s witnesses.” KCSR’s witness Gene Davis, P.E., appears to be qualified to render opinions **based on verifiable evidence** regarding the salvage value of track material. Had Mr. Davis based his opinions on quotes from persons or companies offering to buy relay rail, reroll rail, or scrap metal buyers, his opinions would have been relevant and material. Unfortunately, Mr. Davis did not offer into evidence any quotes, or offers to buy, from any person or company, offering to buy relay rail, reroll rail, or scrap metal for the prices that he was using in his calculations.

13. Mr. Davis correctly acknowledged the costs to “sort, handle, transport, and inventory [cross ties] is high,” then failed to identify what these costs might be. Since the values he ascribed to relay or landscape quality cross ties were bereft of the costs to “sort, handle, transport, and inventory” cross ties destined to be reused as relay or landscape ties, his values were unsupported by competent evidence, would be “irrelevant or immaterial,” and thus should be stricken from the record.

14. Mr. Davis correctly described what constitutes Fit #2 and Fit #3 relay rail, then failed to account for the loss in weight associated with Fit #2 and Fit #3 relay rail. Since he failed to factor into his calculations the loss in weight associated with Fit #2 and Fit #3 relay rail, his calculations lack any evidentiary underpinning [he failed to lay a proper foundation], and thus should be stricken as being “immaterial and irrelevant.”

15. Mr. Chester Culley stated he had a good understanding of environmental compliance laws in general, but did not offer any evidence indicating he was intimately familiar with Mississippi’s environmental laws. Since he failed to demonstrate any expertise with regard to

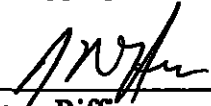
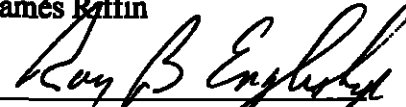
the City of Vicksburg's, or of Mississippi's, environmental laws, his testimony with regard to Environmental Compliance requirements in Mississippi, or in the City of Vicksburg, should be stricken as not that of an expert.

16. The Office of Proceedings rejected E&R's Motion to Strike on the grounds that E&R disputed "the evaluations made by those witnesses." Expert opinions should be challenged, then struck, when they are demonstrably incorrect, or when they are unsupported by any verifiable collaborative evidence. E&R have demonstrated that portions of Mr. Davis' and Mr. Culley's testimony are demonstrably incorrect and /or are unsupported by any verifiable collaborative evidence, and thus should be struck from the record as being "immaterial or irrelevant."

17. WHEREFORE, for the foregoing reasons, E&R would respectfully request that the Board:

- A. Reopen, then reconsider its February 6, 2008 Decision;
- B. Reinstate E&R's Motion to Strike;
- C. Grant or Deny E&R's request to strike the challenged portions of KCSR's Reply;
- D. And for such other relief as would be just and appropriate.

Respectfully submitted,


James Riffin

Raymond B. English

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of February, 2008, a copy of the foregoing Petition to Reopen, was e-mailed and was mailed, 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, postage prepaid, to **Craig Richey**, 315 W. 3rd Street, Pittsburg, KS 66762, attorney for Vicksburg Southern Railroad, Inc.


James Riffin