

BAKER & MILLER PLLC

ATTORNEYS and COUNSELLORS
2401 PENNSYLVANIA AVENUE, NW
SUITE 300
WASHINGTON, DC 20037
TELEPHONE: (202) 663-7820
FACSIMILE: (202) 663-7849

William A. Mullins

Direct Dial: (202) 663-7823
E-Mail: wmullins@bakerandmiller.com

October 2, 2007

VIA ELECTRONIC FILING

The 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)***

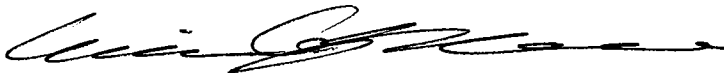
***Vicksburg Southern Railroad, Inc. – Discontinuance of Service Petition for
Exemption – Line in Warren County, MS,
Docket No. AB-1016X***

Dear Secretary Williams:

Enclosed please find the Response To Comments Of Foam Packaging, Inc., submitted on behalf of The Kansas City Southern Railway Company ("KCSR") and the Vicksburg Southern Railroad, Inc. ("VSOR"), petitioners in the above-captioned matters.

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**

STB DOCKET NO. AB-1016X

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

RESPONSE TO COMMENTS OF FOAM PACKAGING, INC.

W. James Wochner
David C. Reeves
THE KANSAS CITY SOUTHERN
RAILWAY COMPANY
427 West 12th Street
P.O. Box 219335
Kansas City, MO 64121-9335

William A. Mullins
Robert A. Wimbish
BAKER & MILLER PLLC
2401 Pennsylvania Ave., N.W.
Suite 300
Washington, DC 20037
Tel. (202) 663-7823
Fax (202) 663-7849

*Attorneys for The Kansas City Southern
Railway Company*

Craig Richey
VICKSBURG SOUTHERN RAILROAD,
INC.
315 W. 3rd Street
Pittsburg, KS 66762
Tel. (620) 231-2230
Fax. (620) 231-0812

*Attorney for Vicksburg Southern
Railroad, Inc.*

Dated: October 2, 2007

**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**

STB DOCKET NO. AB-1016X

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

RESPONSE TO COMMENTS OF FOAM PACKAGING, INC.

By letter dated September 11, 2007, Foam Packaging, Inc. ("Foam") has commented upon the above-captioned petitions for exemption pursuant to which The Kansas City Southern Railway Company ("KCSR") would abandon, and Vicksburg Southern Railroad, Inc. ("VSOR")¹ would discontinue service over, approximately 4.25 miles of rail line in Warren County, MS.² KCSR and VSOR hereby respond to Foam's comments to make 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

¹ Collectively, KCSR and VSOR will be referred to as the "petitioners."

² Petitioners' requests for exemptions, respectively, to abandon and discontinue service over this rail line will be referred to as the "joint petition."

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. Nevertheless, in response to Foam's concerns regarding alternative service should the Board permit the subject abandonment and discontinuance, petitioners provide further information concerning alternative service options for Foam.

Before addressing the substance of Foam's comments, petitioners observe that Foam does not challenge petitioners' economic case which shows that abandonment of the line is warranted. The uncontested evidence of record clearly demonstrates that continued operation of the line by VSOR and ownership of that line by KCSR imposes avoidable and unnecessary economic burdens on both. Moreover, the record, bolstered by statements of support from Lakes Entertainment, Inc. ("Lakes") and the City of Vicksburg, shows that significant public benefits, including increased local employment and tax revenues, would result from the abandonment of the line. Foam does not dispute this evidence. Rather, Foam focuses exclusively on hardships it claims it would suffer and upon certain statements in the joint petition with which it takes issue.

It appears that Foam's comments are prompted in part by frustration that it was not more thoroughly consulted regarding KCSR's and VSOR's strategic plans. Foam says that it was never formally advised about the possible abandonment, and suggests that it has never been approached about alternative service arrangements in and around Vicksburg. Foam's arguments, however, are misplaced and misleading.

To begin with, Foam cannot profess surprise at the filing of the joint petition. The plans of the City of Vicksburg and Lakes Entertainment, Inc. ("Lakes") to develop the rail line right-of-way as part of a casino complex have been a matter of much public attention and local media

coverage.³ In light of the uneconomic burden of servicing Foam's facility, representatives of KCSR have, on occasion, contacted Foam in an effort to persuade it to relocate its truck transfer facility to an alternative location in Vicksburg. Indeed, KCSR records show that more than two years ago, KCSR contacted Foam about relocating its transload operation, in part due to poor condition of the track where Foam unloaded cars and the fact that Foam did not have an agreement for maintenance of that track.⁴ Transloading at another location was discussed at that time, as well as others.

Comments in the attached April and May 2007 *Vicksburg Post* articles by Foam representatives also show that Foam has been aware for months of plans for alternate use of the right-of-way involved in this proceeding.⁵ Accordingly, it is not correct that no one has "ever contacted [Foam] to discuss alternative methods of shipment," Foam Comments at 2, and Foam cannot seriously contend that it has never been contacted concerning off-line service alternatives or that the proposed abandonment of this line is a surprise.

KCSR believes that alternative transloading arrangements could be developed for Foam if Foam were willing to discuss the matter. However, despite Foam's assertion that it has been "hastily trying to identify any alternative shipment methods," Foam has not contacted KCSR since well before the filing of the joint petition. For whatever reason, Foam is apparently rejecting out of hand feasible alternative rail transportation arrangements in favor of complaining

³ In fact, attached hereto as Exhibit A are downloaded copies of stories published in the Vicksburg Post on April 7, 2007, and May 31, 2007, which clearly indicate that Foam was well aware of plans that would lead to the subject requests for discontinuance and abandonment.

⁴ Although efforts were made to obtain an industry track agreement with Foam, none was ever completed.

⁵ Foam also alleges that KCSR's Chairman Michael Haverty promised not to abandon the line. Mr. Haverty denies making any such promise.

to the Board. In any event, the petitioners have not misrepresented any material facts,⁶ KCSR has in no way been dishonest in its dealings with Foam, and Foam has pointed to no fact or circumstance that would justify denying the joint petition.

Focusing exclusively on the alleged hardships to itself, Foam provides a list of added costs that it says it would incur post-abandonment. None of these costs is quantified, however, or measured against the harms that would result from a denial of the joint petition, and many of these costs appears to be exaggerated or entirely unnecessary in light of the possibility of relocating Foam's transload operations to another rail-served location. Among the unquantified costs are the following:

- **Purchase or lease of a new truck transfer facility.** Foam should incur no new costs here. Foam does not now use a "truck transfer facility," but instead uses portable transload equipment that can pull up beside a railroad car at almost any rail siding, yard track, or other similar locations to unload product. There are several such locations in the portion of Vicksburg where Foam's plant is located which KCSR believes would be a suitable replacement for the service that Foam currently receives, if Foam were interested in continuing its local transload operations.

⁶ At footnote one of the second page of its comments, Foam takes issue with petitioners' assertion that Foam has "opted to transfer inbound polystyrene from railcars to trucks at Jackson, MS, and move such product over the highway from there to Foam's Vicksburg plant." See *id.* at 2 n.1 and joint petition at 10 n.3. Petitioners concede that it is possible that Foam did not make such transportation arrangements itself. But it is nonetheless true that polystyrene destined to Foam at Vicksburg has been transported by rail to KCSR's transload facility at Jackson, MS, transferred at that location to trucks, and transported from there by highway to Foam. KCSR has consulted with L&B Transport, LLC ("L&B"), a regional trucking carrier serving the KCSR transload facility at Jackson, and has confirmed that L&B has delivered polystyrene to Foam at Vicksburg from KCSR's Jackson transload. Although it is possible that a polystyrene manufacturer or a third party designated the mode of transportation used, KCSR has very good reason to believe that some portion of Foam's polystyrene is trucked directly to Foam's Vicksburg plant and is not transported over the subject rail line.

- **Costs associated with a right-of-way over the new truck transfer property.**

Again, if Foam were interested in continuing to transload locally, some of the tracks available are accessible via KCSR property and would not require a new right-of-way acquisition. There may be other locations available as well (KCSR has been told that others have discussed alternative transload sites with Foam where transloading would occur off of KCSR property).

- **Increased labor costs for transporting polystyrene a longer distance, including the possibility of having to hire additional truck drivers.** KCSR estimates that, based on alternative possible transloading sites, Foam would face an increased round-trip truck haul of roughly 10-12 miles. The additional costs flowing from this modest increase in trucking distance are debatable. It is unlikely, however, that Foam would need to hire additional truck drivers as a result. Foam receives an average of less than 60 inbound carloads per year. Moreover, Foam's website indicates that Foam operates a significant truck fleet, stating, "Foam Packaging owns and operates a fleet of trucks so that our customer's needs are met on a timely basis. Day or night, we deliver seven days a week."⁷ Given the low volumes transloaded, the apparently significant truck operations already conducted by Foam, and the short distances that truck transport would entail if Foam moved its transload site to another location, KCSR sees no reason why Foam's existing truck drivers would be insufficient.
- **Increased liability insurance costs.** Foam already traverses KCSR property along the KCSR-owned spur track under its current truck transfer operations. While Foam would make more use of public highways than it had before, there is no evidence that

⁷ <http://www.foam-packaging.com/services.htm>

any incremental liability cost increase associated with the relocation of its truck transfer operations would be a significant factor in Foam's overall transportation or manufacturing costs, particularly considering its current fleet operations referenced on its website.

- **The cost of an additional bulk truck and tanker.** As with Foam's other cost allegations, it is impossible to know the assumptions underlying Foam's claims of increased cost because they are not supported by any evidence, witness statement, or other verifiable facts. Regardless, an increase of only 10-12 miles round trip for Foam's transloading equipment does not support Foam's claims. Foam's existing trucking fleet is more than sufficient to support a change in its rail loading location, especially for a shipper that averages roughly one truckload of inbound polystyrene per day.⁸

Although it is possible that Foam may incur some additional costs as a result of the loss of service on the line in question, there is no evidence that such costs would be so significant as to require KCSR and VSOR to continue serving Foam at the existing location at an economic loss and thereby prevent redevelopment of the property as envisioned by the City. Any abandonment case involves a balancing of the harms and benefits to the shipper, the community, and the railroad. Clearly in applying such a balancing test here, Foam has not shown that any theoretical increased costs that it may incur outweigh the harms to KCSR, VSOR, or the community, especially when Foam has alternatives available to it. Indeed, Foam indicated in its

⁸ Petitioners' evidence shows that Foam receives less than 60 carloads of polystyrene per year. Even assuming that Foam would receive 60 carloads of inbound traffic in a year, Foam would generate less than 0.2 carloads of traffic per day ($60 \text{ carloads} / 365 \text{ days} = 0.164 \text{ carloads/day}$). This daily carload average, combined with the assumption that a single carload of polystyrene equates to an average of as much as four to five truckloads, results in a daily truckload estimate of less than one truckload of inbound polystyrene per day.

September 11 letter a willingness to explore service options not involving the subject line, confirming that Foam could continue in business without service on the line at issue by using alternative transportation. In short, Foam has articulated no reason for the Board to reject the joint petition or to find, on balance, that the alleged harms to Foam would outweigh the burden of continued operation of the line on VSOR and KCSR or the harms to the local community.

Likewise, Foam has failed to present any evidence consistent with the statute that supports a denial of the petition for exemption filed in this proceeding. Under 49 U.S.C. 10502, the Board must exempt this transaction from regulation when it finds that: (1) continued regulation is not necessary to carry out the rail transportation policy (“RTP”) of 49 U.S.C. 10101; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power. Here, granting the petition for exemption is fully consistent with the RTP as it minimizes the expense of an abandonment application and reduces the regulatory barriers to exit [49 U.S.C. 10101(7)]. An exemption will also foster sound economic conditions and encourage efficient rail management by relieving KCSR and VSOR from the expense of retaining and maintaining a line that generates very little traffic and is not profitable; thereby allowing KCSR and VSOR to apply their assets more productively elsewhere on their rail systems [49 U.S.C. 10101(5) and (9)]. Additionally, the transaction is limited in scope. The line is less than five miles in length, is stub-ended, and has little or no potential for additional traffic. Regulation is also not necessary to protect Foam from an abuse of market power. Foam obviously can and does use trucks to ship its products. As a result, there is no statutory basis to deny the petition for exemption and to subject the transaction to regulation, requiring KCSR and VSOR to file an application.

Finally, Foam's comments request that "no exemption from the rules and requirements relating to offers of financial assistance and public use conditions be afforded [KCSR] and/or [VSOR]." Id. at 1 (emphasis original). Foam offers no explanation for its opposition to the petitioners' OFA and public use exemption requests, both of which are supported by the City of Vicksburg and Lakes. Considering that the line is already operated by an economical short line operator – VSOR – and still loses money, there is no evidence that continued operation of the line under an OFA would be practical. Moreover, given Foam's complaints about potential costs of hiring a truck driver or purchasing a new truck, there is no reason to believe that Foam would expend the hundreds of thousands of dollars required to compensate KCSR for its inability to sell the right-of-way and to salvage the track or to subsidize VSOR's operations. Indeed, Foam has not stated an intention to utilize the OFA process. Neither has Foam given any reason why it or another entity should be permitted to invoke the public use condition provisions to delay or thwart a significant local redevelopment project that is clearly in the greater public interest.⁹ Accordingly, Foam's unsubstantiated request for a denial of petitioners' request for an exemption from the OFA and public use provisions should be denied.

As shown above, petitioners have not been misleading or untruthful about their joint petition or their respective efforts preceding and leading up to the decision to seek abandonment of this rail line. Furthermore, Foam has not quantified its exaggerated claims of harms that it might suffer in the event of abandonment, does not refute petitioners' economic case for abandonment, and does not demonstrate that the joint petition should be denied. Finally, Foam has given no reason for the denial of petitioners' requests for an exemption from the OFA and

⁹ Foam has stated no intention to request a public use condition, and no other entity has come forward to oppose the OFA and public use condition exemption requests contained at pages 12-13 of the joint petition.

public use condition provisions. For these reasons, the joint petition should be granted in its entirety in the furtherance of community land use objectives.

Respectfully submitted,

W. James Wochner
David C. Reeves
THE KANSAS CITY SOUTHERN
RAILWAY COMPANY
Cathedral Square
427 West 12th Street
P.O. Box 219335
Kansas City, MO 64121-9335

Craig Richey
VICKSBURG SOUTHERN RAILROAD,
INC.
315 W. 3rd Street
Pittsburg, KS 66762
Tel.: (620) 231-2230
Fax: (620) 231-0812

*Attorney for Vicksburg Southern
Railroad, Inc.*



William A. Mullins
Robert A. Wimbish
BAKER & MILLER PLLC
2401 Pennsylvania Ave, N.W.
Suite 300
Washington, DC 20037
Tel.: (202) 663-7823
Fax: (202) 663-7849

*Attorneys for The Kansas City Southern
Railway Company*

Dated: October 2, 2007

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing Response to Comments of Foam Packaging, Inc., by mailing copies of the same via prepaid first class mail to all parties of record in these proceedings.

Dated at Washington, D.C. this 2nd day of October, 2007.



Robert A. Wimbish