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March 12, 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 a Request For Clarification submitted on behalf of The Kansas City Southern Railway Company ("KCSR") 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](mailto:wmullins@bakerandmiller.com).

Respectfully submitted,

  
William A. Mullins

Enclosures

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

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

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

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**REQUEST FOR CLARIFICATION**

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**March 12, 2008**

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

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**STB DOCKET NO. AB-103  
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**THE KANSAS CITY SOUTHERN RAILWAY COMPANY  
– ABANDONMENT PETITION FOR EXEMPTION –  
LINE IN WARREN COUNTY, MS**

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**REQUEST FOR CLARIFICATION**

On March 3, Raymond B. English and James Riffin (“E&R”) submitted a pleading/filing to the Surface Transportation Board (“STB”) entitled “Offerors’ Acceptance Of Terms And Conditions” (“Acceptance”). In the Acceptance at Paragraph 3, E&R state that “E&R herewith agree to accept the Terms and Conditions set by the Board in its February 22, 2008 Decision.” E&R then qualify that acceptance by claiming that the acceptance of the Board’s terms and conditions was “in accordance with the Board’s precedent as stated in 1411 Corporation – Abandonment Exemption – In Lancaster County, PA, Docket No. AB 581 (Sub-No. 0X), Served April 12, 2002.” (“1411”). E&R then go on, in Paragraph 4, to make three statements which condition the E&R acceptance of the Board’s terms and conditions.

Because E&R’s Acceptance was not an unqualified acceptance of the terms and conditions set forth in the February 22 decision (“Decision”), The Kansas City Southern Railway Company (“KCSR”) does not view the March 3 Acceptance as complying with the Board’s Decision. KCSR therefore requests the Board, consistent with Ordering Paragraph 5 of the Decision, to issue a decision, on March 13, vacating the prior decision that postponed the effective date of the December 12, 2007 decision and thereby authorize the discontinuance and abandonment of the Line. Alternatively, if the Board considers the qualified Acceptance as complying with the

Decision, KCSR requests the Board to clarify that KCSR is not required to consent to the three “desires” or “statements” set forth in Paragraph 4 of the Acceptance or with any other pre-conditions that E&R may infer from the 1411 case.

The Board’s Decision at page 11 specifically set forth the “Terms of Sale.” As relevant, those terms included (1) payment by cash or certified check; (2) closing within 90 days; (3) conveyance by quitclaim deed; and (4) releases from any mortgages governing the property. Other than those stated in the Terms of Sale, the Decision adopted no other qualifications or conditions and then gave E&R ten days to “accept the terms and conditions we have established here.” The E&R Acceptance did not accept the terms and conditions which the Board set forth in its Decision. Instead, E&R qualified the Acceptance. That is not the same as an acceptance.<sup>1</sup>

Nowhere in the “Terms of Sale” or in any other decision, or parts of any decision in this matter, did the STB make it a condition to any OFA sale that the forced sale take place in accordance with the 1411 decision, as E&R’s acceptance did, nor did the STB impose any of the three provisions or “desires” as set forth in Paragraph 4 of the Acceptance.<sup>2</sup> Indeed, the Board’s Decision does not even mention or cite the 1411 decision. E&R’s Acceptance, conditioning acceptance on terms of the 1411 order, therefore is not in compliance with the Board’s order. Accordingly, the Board should issue a decision which vacates its prior decision that postponed the

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<sup>1</sup> See The Grand Trunk Western Railroad Company – Abandonment – In Clark, Madison, And Fayette Counties, OH; In The Matter Of A Request To Set Terms And Conditions, Docket No. AB-31 (Sub-No. 29)(ICC served July 27, 1990)(acceptance not valid when it did not accept the precise terms and conditions); Cf. Consolidated Rail Corporation– Abandonment–Between Corry and Meadville, in Erie and Crawford Counties, PA, Docket No. AB-167 (Sub-No. 1139) (ICC served Nov. 7, 1994, and July 18, 1995) (Consolidated Rail Corporation), rev’d on other grounds, Consolidated Rail Corp. v. STB, 93 F.3d 973 (D.C. Cir. 1996)(terms and conditions must be clearly established for acceptance to be valid).

<sup>2</sup> Those “desires” or “statements” mimic some, but not all, of the provisions of the Purchase and Sales Agreement (“PSA”) between the City of Vicksburg and KCSR.

effective date of the December 12, 2007 decision and thereby authorize the discontinuance and abandonment of the Line.<sup>3</sup>

To the extent the Board considers the qualified Acceptance as an attempt to comply with the Decision, KCSR requests the Board to clarify that KCSR is not required to consent to the three “desires” or “statements” set forth in Paragraph 4 of the Acceptance or with any other pre-conditions that E&R may infer from the 1411 case. Application of 1411 or parts of the PSA would not be appropriate. The Board’s order did not impose compliance with the conditions of the PSA between KCSR and the City of Vicksburg as a condition, as E&R seem to be seeking. Nor would it have been appropriate for the Board to do so, as that agreement involved not just the planned sale of the right of way, but was integrally related to other transactions going on between the City and KCSR as well. Those other transactions account for some of the provisions of the PSA. In fact, imposition of the PSA in the context of this OFA would have significantly complicated the Board’s valuation process. Indeed, if the Board seeks to impose some provisions of the PSA but not others, as suggested by E&R, this will require a readjustment of the price and others terms and conditions. This is not a process that the Board should seek to do at this stage of the proceeding.

It is also not appropriate to impose parts of the PSA at this stage because nowhere in E&R’s request to set terms and conditions did E&R ask the Board to impose all of the conditions of the PSA on the sale. Indeed, E&R, in their request to set terms, specifically rejected application of some of the PSA’s terms while simultaneously seeking to take advantage of others. Now, notwithstanding the Board’s decision that set the terms and conditions without imposing any of the terms of the PSA, E&R seeks to pick and choose which provisions of the PSA it wants to accept

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<sup>3</sup> To the extent E&R’s attempted acceptance can be considered an “offer” by E&R to alter the Board’s terms, which the Board’s decision allows the parties to do by mutual consent, KCSR hereby rejects that offer. KCSR does not agree to application of the 1411 decision or to the engrafting of certain provisions of the PSA onto the OFA process.

and in so doing change the Board's terms and conditions. It is too late for E&R to try to engraft provisions of the PSA onto the Board's order by qualifying their acceptance.

In fact, some of the conditions that E&R ask in their Paragraph 4 conflict with the very same conditions imposed by the Board. For example, the Board ordered KCSR to convey by quitclaim deed and to provide mortgage releases. E&R in their Paragraph 4 ask for more – for release of all liens and encumbrances. Seeking elimination of encumbrances is clearly inconsistent with the Board's requirement to convey by quitclaim deed.<sup>4</sup> Thus, E&R's Acceptance is actually seeking to *change* terms specifically imposed by the Board, not accepting those terms.<sup>5</sup>

Nor would it be appropriate for the Board to impose the principles of the 1411 case at this stage of the proceeding. 1411 stands for the proposition that it may be appropriate for the Board to impose, in the context of an OFA proceeding, provisions of an arms-length contract negotiated outside the OFA context if that contract dealt with the exact same rights for which the Board is setting the terms and conditions for an OFA sale. Here, the PSA only governed the sale of the real estate right-of-way, not the track, ties, bridges, switches, or other track materials. The Board (and E&R) only relied upon the PSA to develop part of the price, not the entire price, as was done in 1411. Moreover, as noted, the PSA dealt with issues beyond the rights which E&R seek to acquire and was integrally related to several other transactions between the City and KCSR. Thus, unlike in 1411, the terms of the PSA are not squarely applicable to E&R's proposed acquisition. If the PSA was intended to cover only the sale of the entire line for purposes of operating a railroad, which is the sole purpose of an OFA, the PSA's terms, including the compensation, would have been

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<sup>4</sup> KCSR is not presently aware of liens on the property other than its mortgages, but if such other liens exist (assuming they were not created by KCSR deliberately after Mr. English's first filing expressing an intent to offer financial assistance), KCSR does not believe that the Board's order obliges it to release them either.

<sup>5</sup> Changing the terms as requested by E&R would also raise an issue of the timeliness under Section 10904(f) of such change.

different. The Board cannot therefore impose provisions of the PSA that were not intended to cover, or negotiated solely with, a sale of an operating railroad in mind. The Board should reject E&R's attempts to engraft those provisions onto the terms set by the Board.<sup>6</sup>

Respectfully submitted,

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Attorneys for The Kansas City Southern  
Railway Company

Dated: March 12, 2008

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<sup>6</sup> For the record, KCSR strongly objects to any notion that KCSR is financially responsible to E&R for portions of the Glass Road bridge that were removed by Warren County without KCSR's knowledge or permission. However, until there has been a full acceptance by E&R, that issue is not yet ripe.

## **CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a copy of the foregoing Request For Clarification 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 12<sup>th</sup> day of March, 2008.



William A. Mullins