

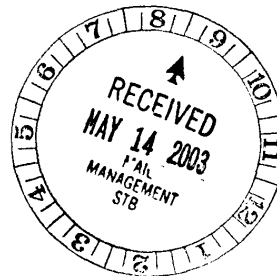
BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C.

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MAY 14 2003

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STB Finance Docket No. 34342



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KANSAS CITY SOUTHERN
-- CONTROL --

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
GATEWAY EASTERN RAILWAY COMPANY,
and
THE TEXAS MEXICAN RAILWAY COMPANY

PETITION TO ESTABLISH PROCEDURAL SCHEDULE

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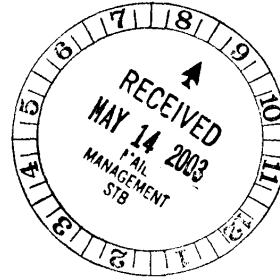
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May 13, 2003

**SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C.**

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PETITION TO ESTABLISH PROCEDURAL SCHEDULE

Kansas City Southern ("KCS" or "Applicant"), The Kansas City Southern Railway Company ("KCSR"), Gateway Eastern Railway Company ("Gateway"), and The Texas Mexican Railway Company ("Tex Mex") hereby request that the Surface Transportation Board ("STB" or "Board") adopt the procedural schedule outlined in Appendix A hereto to govern disposition of this proceeding. The proposed schedule provides for issuance of a final Board decision by September 18, 2003, 128 days after the application is filed. While this is fifty-two days less than the 180-day maximum set by 49 U.S.C. § 11325(d), the schedule provides parties sixty days to analyze, prepare, and file comments and thus would not deprive any party of a fair opportunity to comment. Indeed, because this transaction is a "minor" transaction and will have no anticompetitive effects, the proposed schedule is more than adequate to provide the public and this Board with an opportunity to fully analyze the impacts of the proposed transaction. Accordingly, because the Applicant's proposed procedural schedule accurately reflects the minor

nature and limited effects of the proposed transaction and provides a fair opportunity for hearing of issues, the Board should adopt the schedule proposed in Appendix A.

I. THE PROPOSED PROCEDURAL SCHEDULE SHOULD BE ADOPTED

A. The Schedule Is Consistent With The Minor Nature Of This Transaction

In this proceeding, KCS proposes to acquire control of Tex Mex by acquiring 51% of the stock of its parent, Mexrail, Inc. ("Mexrail"). Thus, the transaction before the Board is the common control by KCS of three rail carriers: KCSR, Gateway, and Tex Mex. As also discussed in the concurrently filed Railroad Control Application, this transaction fits the definition of a minor transaction, found at 49 C.F.R. § 1180.2(c) (2001). Because of the minor nature of this transaction, the proposed procedural schedule provides more than enough opportunity for parties to provide comment, yet balances the need to avoid having Tex Mex remain in a voting trust longer than necessary.

As noted in the Application, the transaction is similar to other similarly classified minor transactions and but for the lack of existing common control authority, the transaction would otherwise qualify for a corporate family exemption or fall outside of the Board's jurisdiction pursuant to the single-system doctrine. In addition, there is little concern that the transaction will result in reduced competition because of the end-to-end relationship of Tex Mex and KCSR; KCS's existing ownership interest in Tex Mex; the existing close working relationship of KCSR and Tex Mex; and the fact that other carriers have commercial agreements with KCSR and Tex Mex which protect their interests. This combination of factors serves to assure the Board that the transaction will not have anticompetitive effects.

Indeed, the proposed transaction promises public benefits from improved efficiencies that will foster competition. The proposed transaction will solidify competition by giving Tex Mex

increased access to capital and other resources and a consistent vision and direction for growth. In short, this transaction not only will not harm competition, it will foster competition. The public will benefit from solidifying this important NAFTA link.

Clearly, the minor nature of this transaction supports the proposed procedural schedule addressed below. It will provide time for parties to comment, but also benefit the continued viability of Tex Mex in that the proposed schedule seeks to release Tex Mex from its current status of being in a voting trust at the most expedient time possible. Minimizing the time a carrier is in a voting trust is a noble goal particularly where, as here, there are no anti-competitive issues. Indeed, promptly permitting Tex Mex to be removed from the voting trust in this minor transaction will allow the commonly controlled systems to fully integrate their marketing, financial, and operating plans so as to strengthen the NAFTA Railway.

B. The Proposed Schedule Is Consistent With Prior Minor Transactions

The proposed schedule is similar to that set for other proceedings of similar scope. For example, it is approximately a week longer than the deadline that the Board set for itself in the BNSF-Washington Central matter. *See Burlington Northern Santa Fe Corporation, et al.-Control - Washington Central Railroad Company*, 1996 STB LEXIS 201 at *1-*2. It is also 10 days longer than the 118-day time frame in which the ICC resolved the CSX-Transkentucky transaction. *CSX Corporation, CSX Transportation, Inc. and The Carrollton Railroad--Control-Transkentucky Transportation Railroad, Inc.*, 1992 ICC LEXIS 70 (April 9, 1992). It allows the Board approximately three weeks longer than the Board allotted itself for the KCS-Gateway control application, *see Kansas City Southern Industries, Inc., et al.-Control -Gateway Western Railway Company, et al.*, 62 Fed. Reg. 6832 (Feb. 13, 1997)(“KCS/Gateway”), and more than three weeks longer than the Board needed to resolve the IC-CCP case. *See Illinois Central*

Corporation et al.--Control--CCP Holdings, Inc., et al., STB Finance Docket No. 32858, 1996 STB LEXIS 157 (served May 14, 1996).¹

The procedural schedule proposed by Applicant is approximately three weeks shorter than the procedural schedules set in the recent minor applications of *Canadian National Railway Co. et al.--Control--Wisconsin Central Transportation et al.*, STB Finance Docket No. 34000 (STB served May 9, 2001) (“CN/WC”) and *Dakota, Minnesota & Eastern Railroad Corp. et al.--Control--Iowa, Chicago & Eastern Railroad Corp.*, STB Finance Docket No. 34178 (STB served Sept. 26, 2002) (“DME/ICE”). However, in both CN/WC and DME/ICE the entity being acquired was much larger than Tex Mex. WC for example, had 2,760 route miles and ICE/IMRL, had 1400 route miles. Tex Mex by comparison has only 157-miles of track and 400 miles of trackage rights. KCS’s acquisition of Tex Mex is even smaller than KCS’s acquisition of Gateway, yet Applicant has added almost three weeks to its procedural schedule compared to the procedural schedule issued by the Board in *KCS/Gateway*.² Most importantly, in all three of these cases, CN/WC, DME/ICE, and *KCS/Gateway*, the acquiring entity did not own any part of the entity it was acquiring prior to the transaction. Here it is widely known that KCS has owned

¹ See also *Natchez Trace Railroad – Purchase and Lease – CSX Transportation, Inc. Lines Between Wellington and Anniston, AL and Talladega and Gantt’s Jct., AL*, Finance Docket No. 31487, 1989 ICC LEXIS 318 (Nov. 2, 1989) (opinion issued 113 days after application filing date); *CSX Corporation, et al.--Control--The Indiana Rail Road Company*, STB Finance Docket No. 32892, 1996 STB LEXIS 280 (served Nov. 7, 1996) (decision issued 127 days after application filing date); *Canadian Pacific Limited, et al. – Control – Davenport, Rock Island and North Western Railway Company*, Finance Docket No. 32579, 1995 ICC LEXIS 19 (served Feb. 8, 1995) (opinion issued 132 days after application filing date).

² KCS believes that this proceeding should be decided on the same schedule as the *KCS/Gateway* proceeding. Nevertheless, KCS has added three weeks to the *KCS/Gateway* procedural schedule to arrive at this procedural schedule in order to accommodate the more recently developed practice of the Board to establish a deadline for parties to file a notice of intent to participate and then for KCS to serve its Safety Integration Plan (“SIP”) on all official parties of record with a subsequent 20 day period for the parties to comment on the SIP.

a significant interest in Tex Mex since 1995 and has integrated the operations of KCSR with Tex Mex to the extent practical without violating this Board's common control provisions. Furthermore, at no time has a shipper or receiver raised any competitive issues with the KCSR/Tex Mex relationship. Thus, the requested procedural schedule is in keeping with scheduling in other, similar minor matters.

C. The Proposed Schedule Is Consistent With The Public Interest

Applicant's proposed schedule protects the public interest by allowing the full statutory time periods for: (1) the Board's acceptance of the Application pursuant to 49 U.S.C. § 11323(a); and (2) the submission of comments by interested parties,³ including the Attorney General and Secretary of Transportation, pursuant to 49 U.S.C. § 11325(d)(1). Further, the proposed procedural schedule provides the Board with the full statutory maximum period to render its decision. To accomplish this, yet still provide for an expeditious proceeding, Applicant has shortened its rebuttal time and made other adjustments to other parts of the schedule.⁴ In other

³ To facilitate interested parties' ability to comment, Applicant will be providing copies of its Application to certain parties today that have previously requested copies of KCS's Application when it was filed and to all parties required by regulation, and Applicant will provide copies of its Application to any other party promptly upon request, subject to the compliance with the Protective Order.

⁴ For example, the proposed procedural schedule provides for the Board's approval of the transaction to become effective five days after issuance of the order. This is consistent with the Board's practice in minor transactions of shortening the 30-day period between issuance of the order and its effective date. *See, e.g., CSX Corporation, et al.--Control--The Indiana Rail Road Company*, STB Finance Docket No. 32892, 1996 STB LEXIS 254 (served Aug. 2, 1996); *Consolidated Rail Corporation and CSX Transportation, Inc.--Acquisition and Operation--Nicholas, Fayette and Greenbrier Railroad Company*, STB Finance Docket No. 32845, 1996 STB LEXIS 332 (served June 20, 1996), and *Canadian Pacific Limited, et al. - Control - Davenport, Rock Island and North Western Railway Company*, Finance Docket No. 32579, 1995 ICC LEXIS 19 (served Feb. 8, 1995) (decisions effective when served); *Kansas City Southern Industries, Inc., et al.-Control -Gateway Western Railway Company, et al.*, 1997 STB LEXIS 92 (served May 1, 1997) (decision effective 4 days after service); *Burlington Northern Santa Fe Corporation, et al. - Control - Washington Central Railroad Company*, Finance Docket No. 32974, 1996 STB LEXIS 276 (served Oct. 25, 1996) (decision effective 5 days after service);

words, the principal burden of the shortened schedule falls upon the Applicant. In light of Applicant's willingness to absorb this shortening of the schedule largely out of its time, without shortening the period for filing of public comments, Applicant submits that the proposed schedule is fair to all affected persons, and should be established by the Board for this case.⁵

D The Proposed Schedule Complies With The Board's New Regulation Regarding Safety Integration Plans

As stated in the contemporaneously filed Railroad Control Application and consistent with the Board's new regulations, KCS plans to file its SIP no later than 30 days after the Application is filed. KCS proposes that the distribution of the SIP to the parties of record will occur on June 23, 2003. Comments on the SIP would then be due on July 14, 2003. This proposed schedule is consistent with the Board's new rules regarding SIP's.⁶ It provides both the Federal Railroad Administration ("FRA") and the public ample opportunity to comment on the SIP and KCS will consult with FRA prior to filing the SIP. Under the proposal, the SIP that will be distributed to the parties of record will incorporate FRA's comments. Applicant recognizes that FRA will monitor KCS's implementation of the SIP and that the SIP will be subject to modification by FRA, or the Applicant upon approval of FRA, during the implementation period. KCS commits to working with FRA throughout the completion of the integration.

and *CSX Corporation, et al.--Control--Transkentucky Transportation Railroad, Inc.*, 1992 ICC LEXIS 70 (April 9, 1992) (decision effective 6 days after service)

⁵ In the event Applicant is served with discovery, Applicant proposes that the affected parties jointly agree upon discovery guidelines tailored to the scope of this minor transaction, with any provisions that cannot be mutually agreed upon being resolved by the Board or by an Administrative Law Judge appointed by the Board to preside over discovery issues.

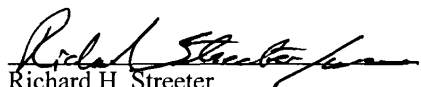
⁶ The final Board regulations on SIPs specifically acknowledge that if a SIP is required in a transaction that is not subject to environmental review the Board will develop case specific SIP procedures based on the facts and circumstances presented in the proceeding. See 49 C.F.R. § 1106.4(c). The specific facts and circumstances of this proceeding fully support KCS's proposed handling of the SIP.

CONCLUSION

For the reasons set forth in the Application, the transaction will have no anticompetitive effects. Indeed, as a result of the transaction, shippers will benefit from better equipment utilization, improved car supply, improved plant maintenance, and the heightened coordination available with single-line service. Adopting the proposed procedural schedule will allow these benefits to begin accruing immediately, while at the same time provide parties and government agencies with the full sixty-day period to analyze the transaction and provide comment.

WHEREFORE, Applicant respectfully requests that the Board adopt the proposed procedural schedule set out in Appendix A hereto to govern disposition of this proceeding.

Respectfully submitted,



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May 13, 2003

Appendix A
Proposed Schedule

(Filing + 0)	Tuesday, May 13, 2003	Application and Petition for Procedural Schedule filed
(Filing + 30)	Thursday, June 12, 2003	Application accepted and notice published in the <u>Federal Register</u>
(Filing + 30)	Thursday, June 12, 2003	Safety Integration Plan ("SIP") filed
(Filing + 37)	Thursday, June 19, 2003	Notice of Intent to Participate due
(Filing + 41)	Monday, June 23, 2003	Applicant distributes SIP to parties of record
(Filing + 62)	Monday, July 14, 2003	All Comments Due, including filings of the U.S. Department of Justice and the U.S. Department of Transportation
(Filing + 62)	Monday, July 14, 2003	Comments on SIP due
(Filing + 83)	Monday, August 4, 2003	Rebuttal due (close of record)
(Filing + 128)	Thursday, September 18, 2003	Final decision to be served
(Filing + 133)	Tuesday, September 23, 2003	Decision becomes effective

CERTIFICATE OF SERVICE

I, Sandra L. Brown, hereby certify that on this 13th day of May, 2003, I have served a copy of the foregoing Petition to Establish Procedural Schedule upon all entities required under 49 C.F.R. Section 1180.4(c)(5) to be served with a copy of an application filed under Part 1180, and any other party that has requested to receive Applicant's filings in this proceeding, by first class mail, postage prepaid or more expedient means.


Sandra L. Brown