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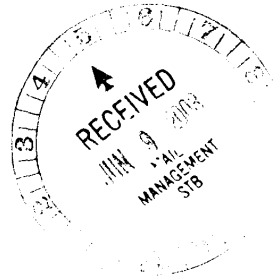
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June 9, 2003

VIA HAND DELIVERY

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, NW
Washington, D.C. 20423



Re: *Kansas City Southern - Control - The Kansas City Southern Railway Company,
Gateway Eastern Railway Company, And The Texas Mexican Railway Company -
Finance Docket No. 34342*

Dear Secretary Williams:

I am enclosing herewith an original and twenty-five copies of a Rebuttal to the Comments filed in reply to Applicant's Petition to Establish Procedural Schedule (KCS-6/TM-6), submitted on behalf of Kansas City Southern, The Kansas City Southern Railway Company, Gateway Eastern Railway Company, and The Texas Mexican Railway Company. A copy is also enclosed on a floppy disk. A copy of this filing has been served on the parties on whom the application is required to be served.

Please acknowledge receipt and filing of the enclosed petition by receipt stamping the eleventh copy thereof enclosed for that purpose and returning it to the person making the filing for return to me.

If there are any questions concerning this filing, please contact me at 202-274-2953.

Sincerely,

William A. Mullins

Enclosures

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 34342

KANSAS CITY SOUTHERN

-- CONTROL --

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

REBUTTAL TO COMMENTS FILED IN REPLY TO APPLICANT'S
PETITION TO ESTABLISH PROCEDURAL SCHEDULE

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 34342

KANSAS CITY SOUTHERN

-- CONTROL --

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

**REBUTTAL TO COMMENTS FILED IN REPLY TO APPLICANT'S
PETITION TO ESTABLISH PROCEDURAL SCHEDULE**

Kansas City Southern ("KCS" or "Applicant"), The Kansas City Southern Railway Company ("KCSR"), Gateway Eastern Railway Company ("Gateway Eastern"), and The Texas Mexican Railway Company ("Tex Mex") hereby submit this Rebuttal to the comments filed with the Surface Transportation Board ("STB" or "Board") in reply to Applicant's Petition to Establish A Procedural Schedule ("Petition"). As an initial matter, over 75 parties have filed comments in support of the Railroad Control Application ("Application") and KCS's request for expedited treatment as a "minor" transaction. This support includes shippers from all commodity groups, including grain, chemicals, intermodal, and paper, shortline railroads, ports, and third party logistics providers. Of the six parties¹ who filed reply comments to the proposed procedural schedule, not one party advocated that the transaction should be specifically treated as

¹ Union Pacific ("UP"), The Burlington Northern and Santa Fe Railway Company ("BNSF"), E.I. du Pont de Nemours and Company ("DuPont"), Canadian National Railway Company ("CN"), the United States Department of Transportation ("DOT"), and The National Industrial Transportation League ("NITL" or "the League").

a "significant" or "major" transaction. Accordingly, the Board should accept the Application as a "minor" transaction.

Moreover, although KCS believes that the procedural schedule that it originally proposed is reasonable and provides all parties with a full and fair opportunity to participate in this end-to-end transaction, several parties have raised legitimate issues with the schedule, and KCS is amenable to modifying the schedule to accommodate these concerns. NITL seeks additional time in order to accommodate its own internal schedule with respect to its rail committee meeting in late July. DOT requests an opportunity to file a reply comment to the other parties' written comments. KCS believes accommodation of NITL's and DOT's requests is justified. Thus, KCS supports giving all parties until August 4, 2003 to submit comments (an additional 21 days from the originally proposed schedule, which accommodates both NITL's and UP's request for additional time to file initial comments). KCS also supports DOT's request that it (and the Department of Justice "DOJ") be allowed to file a reply to any comments on August 25, the same date that KCS's and Tex Mex's rebuttal would be due. KCS would then reserve its right to file a separate rebuttal after the August 25 deadline in order to rebut any comments that might have been filed by DOT or DOJ for the first time on August 25, as suggested by DOT. The final decision would then be issued by October 9, with a five day effective date of October 14.

Several other parties have suggested inappropriate reasons for the elongation of the proposed procedural schedule, and these requests should be denied outright. BNSF and UP, supported by DuPont,² request that the Board require KCS to supplement its Application in order

² Of note, DuPont is the only shipper to request additional time or that the record be supplemented. In contrast, the Application is supported by such large chemical competitors to DuPont, such as Dow Chemical, Atofina Chemicals, Huntsman Corporation, Reagent Chemical

to address the effects of KCS's potential acquisition of TFM S.A. de C.V. ("TFM") and to correspondingly add more time to the procedural schedule. Neither UP, BNSF, nor DuPont have provided adequate reasons to support their requests that the Application be supplemented. CN requests that it be given an unspecified additional amount of time to file comments, but does not provide any justification for its request. KCS should not be required to supplement its Application.

ARGUMENT

I. REBUTTAL IS PROPER IN THESE CIRCUMSTANCES

Notwithstanding the fact that various comments were styled as a "Reply,"³ KCS should be entitled to file this Rebuttal and this filing should not be treated as an impermissible "reply to a reply" in violation of 49 C.F.R. § 1104.13. First, even though UP, BNSF and DuPont have denominated their pleadings as a "reply," all have essentially filed a motion asking the Board to mandate that KCS considerably supplement the record to include the effects of KCS's simultaneous acquisition of TFM. The Board's Rules clearly permit parties to file replies to motions to supplement the record. 49 C.F.R. 1104.13. *See CSX Corporation and CSX Transportation, Inc., et al. - Control and Operating Leases/Agreements - Conrail Inc. and Consolidated Rail Corporation*, STB Finance Docket No.33388, 1999 STB LEXIS 297 (STB served May 20, 1999) (accepting reply to a motion to supplement the record); *Ashley Creek Phosphate Company v. Chevron Pipe Line Company, et al.*, No. 40131 (Sub-No.1), 1991 MCC

& Research, and Savage Services Corporation. Given this large support by the chemical industry, DuPont's request stands alone and should be rejected.

³ DOT denominated its pleading as a "response," but the other parties called their pleadings "replies."

LEXIS 146 (ICC served Sept. 5, 1991) (accepting reply to a motion to supplement the record).

Thus, the Board should accept KCS's Rebuttal as the final pleading in this matter.

Second, BNSF's, UP's and DuPont's replies ask the Board to grant affirmative relief in requiring KCS to supplement its application, and in fact all of the parties that commented on the proposed procedural schedule ask the Board to affirmatively alter the schedule. The Board accepts a "reply to a reply" when the party proffering the "reply" is seeking affirmative relief. *See Union Pacific Corporation, et al. - Control and Merger - Southern Pacific Rail Corporation, et al.*, Finance Docket No. 32760, 1999 STB LEXIS 410 (STB served July 12, 1999) ("Because the NITL-25 reply seeks affirmative relief, the 'reply to a reply' filed June 8, 1999, by UP will be accepted for filing and made part of the record."). Accordingly, KCS's Rebuttal is a proper response to these requests for affirmative relief.

Third, the Board has a longstanding policy of allowing the party that bears the burden of proof to close the evidentiary record through a final rebuttal, which DOT actually acknowledges in its response. *See Canadian National Railway Company, et al. - Control - Wisconsin Central Transportation Company*, STB Finance Docket No. 34000, 2001 STB LEXIS 454 (STB served May 9, 2001) ("CN/WC"); *CSX Transportation, Inc. - Abandonment Exemption - In Rocky Mount, Nash County, NC*, STB Docket No. AB-55 (Sub-No. 562X), 1999 STB LEXIS 682 (STB served Dec. 1, 1999); *The Kansas City Southern Railway Company - Adverse Discontinuance Application - A Line of Arkansas and Missouri Railroad Company*, STB Docket No. AB-103 (Sub- No. 14), 1999 STB LEXIS 25 (STB served Jan. 19, 1999). As the party submitting the Application and petitioning to establish the procedural schedule, KCS bears the burden of proof and is thus entitled to submit this Rebuttal to the various parties' responses.

Finally, the Board routinely accepts rebuttals in the interest of compiling a complete record. See, e.g., *The TJX Companies, Inc. - Petition for a Declaratory Order - Certain Rates and Practices of Sweeney Transportation, Inc., and Knickerbocker East-West Inc.*, Docket No. 41192, 2002 STB LEXIS 554 (STB served Sept. 20, 2002); *Maine Central Railroad Company - Abandonment Exemption - In Androscoggin County, ME*, STB Docket No. AB-83 (Sub-No. 16X), 2000 STB LEXIS 532 (STB served Sept. 15, 2000); *Burlington Northern Railroad Company - Abandonment Exemption - In Sedgwick, Harvey and Reno Counties, KS*, Docket No. AB-6 (Sub-No. 358X), 1994 ICC LEXIS 104 (ICC served June 30, 1994). Thus, the Board should accept this Rebuttal as a means of ascertaining all information pertinent to this proceeding.

II. THE BOARD SHOULD NOT REQUIRE KCS TO SUPPLEMENT THE APPLICATION

In an attempt to delay the benefits of this proceeding and to achieve conditions that it is also seeking in Mexico, UP, supported by DuPont and by BNSF, but not by any other shipper, government agency, nor any other party,⁴ have requested this agency to order KCS to supplement the Application to address the various implications of the TFM transaction. This broad (and in UP's case, ambiguous) request is simply an effort to delay the benefits of the KCSR/Tex Mex transaction. Likewise, it is also an effort to bootstrap the TFM transaction, which is subject to numerous approvals from other domestic and foreign parties or governmental entities, into the STB process.⁵ Bringing TFM into the STB proceeding is not only problematic

⁴ CN's, NITL's and DOT's responses to the Petition simply request additional time to file comments. They do not request that the Application be supplemented.

⁵ Besides shareholder approval and the approval of various bond holders, KCS's acquisition of TFM is also subject to the authority of the Mexican Competition Commission, the Mexican Foreign Investment Committee, and the United States Department of Justice. In fact, UP is

and contrary to applicable law, but it also represents bad policy. TFM is not subject to the Board's jurisdiction, and KCS's acquisition of control of TFM, which can be accomplished without STB authority, once all other approvals are in place, will occur regardless of whether or not the Tex Mex transaction is still pending. In fact, due to the current and future separation of the entities and the fact that TFM has never operated in the United States, KCS does not even have access to the TFM documents and traffic tapes, which would be necessary to supplement the application in the manner requested by UP and BNSF. Moreover, UP's and BNSF's concerns about the potential negative implications of the TFM transaction are entirely misplaced. Not only will the merger promote competition and, therefore, serve the public interest, but in the unlikely event that it results in harm to UP's or BNSF's shippers, these parties can then pursue judicial and Board remedies.

A. Policy And Law Dictate That The Board Cannot Review The Effects Of The TFM Transaction

Although both UP and BNSF make vague references to the "significance" of the transactions, neither UP nor BNSF actually dispute that KCS's acquisition of Tex Mex is a "minor transaction" under the statute and the Board's regulations, nor do they claim that KCS failed to submit sufficient information for the Board to evaluate the common control of KCSR, Gateway Eastern, and Tex Mex. Rather, they argue that KCS should supplement the Petition so that the Board can consider the effects of the TFM transaction in tandem with the Tex Mex transaction. In other words, they implicitly admit that the Application that is subject to the Board's jurisdiction is full and complete, but what they don't like is the fact that the STB has no legal role in the TFM transaction. As a result, they want to use the Tex Mex transaction to add

actively participating in all of those forums, and is now simply seeking to get another bite at the apple by trying to bring that transaction into the STB.

another layer of review, complicate the process, and hopefully obtain conditions that they may not be able to obtain in Mexico or through DOJ. This approach should be rejected. Considering the impacts of the TFM transaction within the context of the Tex Mex transaction would violate Board and judicial law and policy, as well as be wasteful and potentially inflammatory, as Mexican agencies and the DOJ are already reviewing the TFM transaction.

1. The TFM Transaction Is Not A Proper
Subject Of The Board's Inquiry

The Board should not require KCS to supplement its application to address the effects of the KCS-TFM transaction because the Board does not have jurisdiction over TFM. The Board is only statutorily authorized to exercise jurisdiction over rail carriers providing "transportation in the United States." 49 U.S.C. § 10501(a)(2). TFM does not own any rail assets in the United States and does not operate trains in the United States, and thus does not provide "transportation in the United States," pursuant to the plain meaning of any Board or federal court interpretation of this language.

In addition, abundant case law clarifies that TFM's various through-rate agreements with U.S. carriers do not mean that TFM provides "transportation in the United States." The Board and federal courts have consistently found that the Board's jurisdiction over the domestic portion of an international through-rate entered into by a foreign carrier and a U.S. carrier does not confer the Board with jurisdiction over the foreign carrier.⁶ To the contrary, the Board "lacks personal jurisdiction over...Mexican railroads and subject matter jurisdiction over the part of the

⁶ See, e.g., *Canada Packers, Ltd. v. Atchinson, Topeka & Santa Fe Railway Co. et al*, 385 U.S. 182 (1966); *Union Pacific Railroad Company v. Surface Transportation Board*, 202 F.3d 337, 342 (D.C. Cir. 2000); *Lawson Concrete Co. v. C&NW Transp. Co.*, 367 I.C.C. 109 (1982); *Western Railroads-Agreement*, 364 I.C.C. 635; 1981 ICC LEXIS 101 (ICC served Jan. 14, 1981); *Citizens Gas & Coke Utility v. Canadian Nat'l Ry.*, 325 I.C.C. 527, 530-531 (1965).

transportation outside of the United States.” *National Insulation Transportation Committee et al. v. Aberdeen and Rockfish Railroad Company, et al.*, 365 I.C.C. 624; 1982 ICC LEXIS 49 (ICC served Apr. 6, 1982). Accordingly, the Board does not address the implications for or impose conditions on foreign railroads contracting with U.S. carriers, because “Obviously, our orders have no force beyond the border. They apply to international commerce only insofar as the transportation takes place in the United States.” *George C. Anspach Company, Ltd., et al. v. Atchinson, Topeka & Santa Fe Railway Company et al.*, 311 I.C.C. 296, 298 (1960) (holding that the Commission could only prescribe new rates for rail lines with domestic destinations even if the railroad was charging unlawful rates abroad).

The Board’s rationale for consistently finding that it has no jurisdiction over a foreign carrier that has entered into a through-rate agreement with a U.S. carrier is the Board’s recognition that it “may not lawfully take any punitive action against [foreign] carriers for acts that take place outside U.S. territory.”⁷ Accordingly, if, and only if, it is clearly established that a foreign interest “operates a rail carrier *in the territory of the United States*, [then the rail carrier] must adhere to all Commission regulations.” *Western Railroads - Agreement*, 364 I.C.C. 635; 1981 ICC LEXIS 101 (ICC served Jan. 14, 1981) (emphasis added). The Supreme Court, in fact, has long recognized that U.S. law cannot generally be extended extraterritorially to police competitive impacts in other countries. *See, e.g. American Banana Co. v. U.S. Fruit Company*, 213 U.S. 347 (1909). As this jurisprudence regarding international rate cases clarifies, the Board has no jurisdiction over TFM simply because it has rate agreements with U.S. carriers.

⁷ *Changes in Routing Provisions - Conrail* - July, 1981, 365 I.C.C. 753, 1982 ICC LEXIS 54 (ICC served March 18, 1982). *See also Canadian Pacific Limited v. United States*, 379 F. Supp. 128 (D.C. Dist. 1974) (holding that the Commission did not have jurisdiction over proposed tariff rates when “direct action against a foreign carrier is the logical next step to the Commission’s assertion of jurisdiction.”)

Furthermore, federal courts have repeatedly and consistently recognized a strong presumption against extraterritoriality when ruling on whether a statute authorizes agency jurisdiction over a foreign entity.⁸ As the Supreme Court noted, for a federal agency to have jurisdiction in the “delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed.” *Benz v. Compania Naviera Hidalgo*, 353 U.S. 138, 147 (1957). Finding that ICCTA lacks such an explicit statement, the Board has adopted a conservative approach towards determining that it has jurisdiction over transactions implicating foreign matters.⁹ The judicial and Board policy against assertion of extraterritorial jurisdiction signify that KCS need not submit any supplementary materials addressing the KCS-TFM transaction, over which the Board has jurisdiction.

2. Board Review Of The Effects Of The TFM Transaction
Would Violate Principles Of International Comity

As BNSF and UP are fully aware, the TFM transaction is being fully reviewed by the Mexican Competition Commission, the Mexican Foreign Investment Commission, and DOJ. BNSF and UP can raise concerns in those forums.¹⁰ Yet, in an attempt to “hedge their bets,” BNSF and UP are trying to get the Board involved, even though it has no jurisdiction over the

⁸ *Sandra Jean Smith v. United States*, 507 U.S. 197, 204 (1993); *EEOC v. Arabian Oil Company*, 499 U.S. 244, 248 (1991); *United States v. Gatlin*, 216 F. 3d 207 (2d Cir. NY 2000); *Fen X. Chen v. Street Beat Sportswear, Inc.*, 226 F. Supp. 2d 355 (E.D.N.Y. 2002).

⁹ See *In the Matter of Paul E. Van Blaricom, The Great Northern Pacific & Burlington Northern Lines, Inc. - Merger - Great Northern Railway Finance Docket No. 21478 (Sub-No. 12)*, 6 I.C.C. 2d 919, 6 ICC LEXIS 244 (I.C.C. served Aug. 6, 1990). *General Committee of Adjustment, United Transportation Union E, Burlington Northern, Inc., Great Northern Segment v. Burlington Northern, Inc., Brotherhood of Locomotive Engineers*, 620 F. 2d 161 (8th Cir. 1980).

¹⁰ UP, in fact, has already been an active participant before all three agencies. It has held meetings with, written letters to, and encouraged shippers to contact those agencies. It is aggressively requesting the various Mexican agencies and officials to place conditions on the TFM transaction.

TFM transaction. It would be extremely wasteful and duplicative for UP and BNSF to get “two bites at the apple,” especially when the Board does not even have jurisdiction over the TFM transaction.

STB consideration of the TFM transaction would not only be expensive, complicated, and, given the lack of TFM data, extremely problematic, but could potentially conflict with Mexico’s laws and policies. Federal courts have fastidiously sought to avoid such conflicts by refusing to find extraterritorial jurisdiction, especially when a foreign country has a greater jurisdictional claim over the transaction, such as Mexico does here.¹¹ This refusal to assert jurisdiction over transactions implicating the United States and another country exists in order “to avoid unintended clashes between our laws and those of other nations which could result in international discord.” *Sandra Jean Smith*, 507 U.S. 204, n.5. Thus, even if there is no clear inconsistency between foreign law and U.S. law, courts generally do not find that agencies, like the STB, have jurisdiction over transactions implicating foreign entities, like TFM.

In addition to the significant problems STB consideration of the TFM transaction could impose in light of the fact that the Mexican Competition Commission and the Mexican Foreign Investment Commission are already considering it, STB review may also conflict with DOJ’s consideration of the matter. Review by federal multiple agencies has been problematic in the past. *See, e.g., Sect. of Labor v. Occupational Safety and Health Review Commission, et al.*, 499 U.S. 144 (1990). Accordingly, federal agencies have found that they lack jurisdiction over a transaction when another federal agency is also reviewing the same transaction. *See, e.g., Iroquois Gas Transmission System, L.P., et al.*, Docket No. CP89-634-000, 1990 FERC LEXIS

¹¹ *McCulloch, Chairman, National Relations Board, et al. v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963); *Lauritzen v. Larsen*, 345 U.S. 571, 581 (1963); *Benz v. Compania Naviera Hidalgo*, 353 U.S. 138, 139 (1957).

2169 at *23 (Sept. 11, 1990). At the very least, STB review would be unnecessarily wasteful and duplicative, since DOJ has already begun consideration of the TFM transaction as part of the Hart-Scott-Rodino process. Thus, KCS should not be required to supplement the application to include the effects of the TFM transaction.

3. The “International Significance” Of The TFM Transaction Does Not Confer The Board With Authority To Consider The TFM Transaction

Although neither UP nor BNSF dispute that KCS’s acquisition of Tex Mex is a “minor” transaction, both claim that the Board should consider the cross-over effects of the KCS-TFM transaction because it may have significant international implications. Courts, however, have explicitly rejected the “international significance” argument when ruling on whether the Board has authority over the foreign aspects of a rail merger.¹² Indeed, even when the vast majority of the merger transaction was essentially consummated and approved in the United States and the merged entity chiefly operated in the United States, the Eighth Circuit made clear that the Board does not have jurisdiction to impose conditions on the domestic transaction in order to alleviate impacts that occur in a foreign country.

In another case, the Board was vigilant in not asserting jurisdiction over foreign carriers and in not considering the impacts of a transaction with a foreign carrier not providing “transportation in the United States.” For example, when CN and CP incidentally acquired a short distance of trackage located in the United States through their acquisition of the Canadian properties of Conrail, the Board was careful only to exercise jurisdiction over those aspects of the transaction involving transportation in the United States. *Canadian National Railway*

¹² *General Committee of Adjustment*, 620 F. 2d 161; *See also In the Matter of Paul E. Van Blaricom*, 6 ICC LEXIS 244, *supra*.

Company and Canadian Pacific Limited - Acquisition - Interests of Consolidated Rail Corporation in Canada Southern Railway Company and Detroit River Tunnel Company, Finance Docket No. 30387 (ICC served Sept. 4, 1984) ("CNCP Acquisition"). Despite being requested to impose conditions on the Canadian carriers to alleviate the impacts on U.S. rail carriers, the Board specifically refused to require CN and CP to enter into certain agreements with rail carriers in the United States because "the interchange practices of Canadian carriers in Canada are beyond our jurisdiction." CNCP Acquisition, 1984 ICC LEXIS 332 at *21. Therefore, even if the Board considered the impacts of the TFM transaction within the context of the Tex Mex transaction, as requested by UP and BNSF, the Board, even if it wanted to, would have no authority to impose conditions on the Tex Mex transaction to alleviate concerns solely arising out of the TFM transaction. Thus, supplementation of the Application to include the effects of the TFM transaction would not only be duplicative of other agencies, expensive, and otherwise problematic, but ultimately futile as the Board has no authority to impose conditions for effects arising from the TFM transaction.

B. The Effects Of The Transaction Subject To The Board's Jurisdiction Have Been Fully Disclosed And Thus The Application Should Be Accepted Without The Need For Further Supplementation

The "transaction" for which KCS is seeking current approval - indeed the only transaction which now requires Board approval - is KCS's proposed common control of KCSR, Tex Mex and Gateway Eastern. The nature and effects of that transaction have been fully set forth in the Application, and no party, not even BNSF, UP or DuPont, claims that the Application fails to delineate the effects of that transaction, is otherwise deficient, or fails to include all of the information required under 49 C.F.R. § 1180.4 for this Board to evaluate the common control of KCSR, Tex Mex, and Gateway Eastern. Instead, the argument is that the

Application needs to be supplemented to take into account the competitive effects of the TFM transaction, not that the Application is deficient for purposes of considering the Tex Mex transaction. As discussed at greater length below, these arguments are unavailing.

1. Notwithstanding The Jurisdictional Problems, The Fact That The TFM Transaction May Be Related To, But Independent Of, The Tex Mex Transaction Does Not Justify Supplementation Of The Application

As the “transaction” for which the Board has jurisdiction has been fully set forth in the Application, the Application should be accepted as filed without the need for supplementation. Indeed, the Board has a longstanding policy of considering individual transactions independent of other transactions or matters that involve one or more of the same companies. The Board has taken this position notwithstanding that the other concurrent transactions were also domestic transactions that would or could eventually be subject to the Board’s jurisdiction. As the Board noted in a previous case where it held that it would not consider multiple transactions involving UP and other railroads synergistically, “our consistent policy, as approved by the courts, has been to view the competitive impacts of one merger at a time.”¹³ Likewise, in another case specifically on point, which also involved UP, the Board decided to confine consideration and possible approval of a control application to the specific “transaction” subject to its jurisdiction, rather than analyze the transaction in conjunction with UP’s other “proposed coordinations and cooperative ventures” that were either outside of the Board’s jurisdiction or would be later presented to the Board. *Union Pacific Corporation, et al. - Control - Chicago and North*

¹³ *Burlington Northern Inc. and Burlington Northern Railroad Company - Control and Merger - Santa Fe Pacific Corporation and the Atchinson, Topeka and Santa Fe Railway Company*, Finance Docket No. 32549, Decision No. 39, 1995 ICC LEXIS 241 at *18 (ICC served Sept. 21, 1995) (“BN/SF”) (citing *Brotherhood of Maintenance of Way Employees v. United States*, 221 F. Supp. 19 (E.D. Mich. 1963), *aff’d*, 375 U.S. 216 (1963)).

Western Holdings Corp. and Chicago and North Western Transportation Company, Finance Docket No. 32133, 1993 ICC LEXIS 183 at *20, n.4 (ICC served Sept. 28, 1993) (“UP/CNW”). To go beyond the instant transaction to include the effects of a transaction not even subject to the Board’s jurisdiction when all of the required information to review the transaction that is subject to the Board’s jurisdiction has been submitted would be a remarkable reversal of these prior precedents and procedures.¹⁴

Moreover, the Board also has consistently refused to consider transactions that may not occur, such as KCS’s acquisition of TFM. KCS has not consummated its acquisition of TFM, which, as previously noted, depends on various contingencies. In fact, KCS does not even have access to the TFM materials necessary to supplement the application in the manner which BNSF and UP propose. UP and BNSF want the Board to ignore the contingent nature of the TFM transaction and bring its effects into the Tex Mex transaction, citing to some of KCS’s prior arguments regarding cross-over and cumulative effects. However, when KCS argued that the Board should consider the competitive impacts of the BN/Santa Fe merger in conjunction with the then “speculative” UP/SP merger, UP vigorously, and successfully, contended that the Board should not review them together, since the Board’s approval of the UP/SP transaction was “not a foregone conclusion.” *BN/SF*, 1995 ICC LEXIS 241 at *8-9, *supra* (further noting that it also adhered to this principle in rejecting a request to hold the UP/CNW proceeding in abeyance

¹⁴ Although, as UP and BNSF point out, the Board has occasionally required parties to supplement applications in merger cases, in no instance has it ever asked parties to submit anywhere near to the extent of supplementary materials that they are requesting for this minor control application. Apparently, their rationale is that KCS’s acquisition of Tex Mex, a Class III carrier consisting of a mere 157-miles of track and 400 miles of trackage rights, is similar to a major merger because Tex Mex is related to TFM. As was discussed above and will continue to be discussed below, however, law and policy indicate that the Board has no legal authority to review the TFM transaction at all.

pending the outcome of the BN/Santa Fe proceeding). *See also Burlington Northern Railroad Company*, 1988 ICC LEXIS 322 (ICC decided Oct. 4, 1988); *Midwestern Rail Properties, Inc. - Purchase (Portion) - Chicago, Rock Island and Pacific Railroad Company*, Finance Docket No. 29518 (Sub- No. 1), 1983 ICC LEXIS 34 (ICC decided June 16, 1983).

Thus, all previous mergers and control transactions undertaken by UP and BNSF were treated in this fashion. Their transactions were reviewed without the need for complicated analyses and discussions of cross-over and cumulative effects and without having to supplement their applications to take into account transactions that were not being presented to the Board, even though those transactions were domestic transactions implicating the Board's jurisdiction. UP and BNSF now want different rules to apply to KCS. This request is not only legally dubious, but is extremely hypocritical on BNSF's and UP's part.

KCS's proposition to acquire control of Tex Mex by acquiring 51% of the voting stock of Mexrail is a discreet transaction, completely independent of the TFM transaction. Indeed, KCS has already consummated its acquisition of the Mexrail shares, placed those shares in a voting trust, and is now waiting for STB approval. Accordingly, it should be treated no differently than all other previous transactions involving BNSF and UP. As the Board recognized in *UP/CNW*, the "single, readily ascertainable event" constituting a "transaction" is what should be the subject of the Board's approval, nothing more and nothing less. *UP/CNW*, 1993 ICC LEXIS 183 at *20. Thus, KCS's acquisition of Tex Mex is a single transaction and the Board should evaluate it independently of other matters involving KCS.

2. Even If TFM Were Relevant, The Application Is Not Deficient In Its “Competitive” Analysis

KCS firmly rejects the argument raised by UP and BNSF that the Application is deficient in its analysis of competition and needs to be supplemented before the proceeding can continue. The Application contained a thorough analysis of the competitive effects by Dr. Grimm of the KCS/Tex Mex transaction, which is the only transaction subject to the Board’s jurisdictions and for which the merger rules required a competitive analysis. Relevant markets were defined and competitive alternatives available to shippers were compared before and after the consolidation. Dr. Grimm also examined potential reductions in source competition from the transaction.

Importantly, UP and BNSF have found no deficiencies in the Application’s analysis of the impact on competition. Examined closely, the alleged “deficiencies” claimed by UP and BNSF focus not on the impacts on competition of the KCS/Tex Mex transaction, or even the impacts on competition of the TFM transaction, but instead focus upon the impacts on competitors. BNSF urges the Board to require KCS to supplement the Application to address “their plans to cancel any Tex Mex or TFM S.A. de C.V. (“TFM”) agreements or arrangements with other carriers once common control is achieved.” BNSF at 2. BNSF is concerned that “KCS does not commit to the continuation of agreements between Tex Mex and other carriers which do not involve KCSR, such as those between BNSF and Tex Mex with respect to divisions of revenue on the Laredo to Robstown route.” BNSF at 5. BNSF is further concerned that KCSR may prefer alternative interchange points with BNSF following the consolidation, with the effect that BNSF may “short haul itself” or perhaps “even lose traffic” BNSF at 6.

The verified statement of Dr. Reishus (“V.S. Reishus”) echoes these concerns about harms to BNSF as a competitor. He is concerned that the diversion study “does not appear to be consistent with a prospective change in the relationship between Tex Mex and BNSF,” V.S. of

David Reishus at 6, and again confusing impacts on competitors with impacts on competition, would like the application to be supplemented to shed additional light on the consolidation's effects on BNSF's traffic.

Similarly, UP finds the Application deficient because it failed to address potential impacts on UP as a competitor: "Will TFM continue to cooperate with UP via Laredo, or will it favor Tex Mex routings? What operational changes will take place at Laredo as a result of KCS's control of TFM? And how much more traffic do Applicants expect to carry over Tex Mex's lines when TFM has new incentives to steer U.S.-Mexico traffic to KCS and Tex Mex?" UP at 3.

There is nothing in the Board's merger regulations, even if KCS were to be required to analyze the TFM transaction, that would require KCS to present an analysis focused upon the impacts to other carriers. This may have been the practice prior to the Staggers Act, but in the early 1980s, the ICC fundamentally shifted its emphasis from impacts of mergers on competitors to impacts on competition. Since that time, the ICC, and subsequently the STB, have consistently focused on competition; finding that shifts in divisions, routings and interline relationships were not a component of the competitive impacts of a merger.

This view was strongly reaffirmed in two recent cases. In the 1999 CN/IC decision, the Board found that "[f]reezing gateways, rates and routes is anticompetitive and not in the public interest." *Canadian National Railway Company, et al. - Control - Illinois Central Corporation, et al.*, STB Finance Docket No. 33556, 1999 STB LEXIS 305 at *84-85 (STB served May 25, 1999) ("CN/IC"). In the 2001 CN/WC decision, the STB found that conditions to preserve gateways "tend to be anticompetitive." *CN/WC*, 2001 STB LEXIS 711 at *29. "When we allow merged entities flexibility to determine which routes are most efficient, shippers benefit." *Id.*

Nowhere in their respective pleadings do UP and BNSF present any claim or evidence to show that KCS failed to analyze the impact on shippers, which is the proper focus on the Board's rules and analysis with respect to competition. All of the alleged deficiencies focus on the failure to show the impact on UP or BNSF, but there is nothing in the merger rules to require KCS to present such evidence. Certainly, UP and BNSF are free to raise these concerns to the Board, and KCS will respond fully to these arguments, but KCS does not have a burden to analyze and put forth such impacts in the Application. KCS clearly has no responsibility to anticipate and address such concerns in their Application, and failure to do so certainly suggests no deficiency in KCS's competitive analysis.

C. KCS Should Not Be Required To Provide "Full System" Impacts Because The New Merger Rules Are Not Applicable To This Transaction

In reality, the argument advanced by UP and BNSF is not that the Application is insufficient because it does not include the required information pursuant to 49 C.F.R. § 1180.4 for a minor application, nor is it that KCS has not presented enough information for the Board and the public to review the KCSR/Tex Mex transaction. Rather, the legal basis for their requests appears to be the Board's new policy enunciated in the Ex Parte No. 582 (Sub-No. 1) merger rules,¹⁵ which requires that merger applicants who undertake a "major" merger address "full system" impacts of mergers involving U.S. and foreign based carriers, *i.e.* transnational mergers subject to the Board's jurisdiction. There are numerous problems with applying the rules and policy enunciated in Ex Parte No. 582 to the instant transaction.

First and foremost, KCS's common control of KCSR, Tex Mex, and Gateway Eastern is not a "major" merger transaction subject to the Board's Ex Parte No. 582 (Sub-No. 1) rules. The

¹⁵ *Major Rail Consolidation Procedures*, STB Ex Parte No. 582 (Sub-No. 1), 2001 STB LEXIS 546 (STB served June 11, 2001).

only transaction subject to the Board's jurisdiction is the common control of these three carriers which is clearly a minor transaction under the Board's rules. No party has claimed, nor could they, that this is a "major" merger application nor has any party specifically requested that the transaction be treated as a "significant" transaction. As a "minor" transaction, the new merger rules, which only apply to "major" mergers, are not even implicated.

Second, even if KCS's proposed control of Tex Mex and TFM could be considered one transaction, which it is not, and assuming the Board did have jurisdiction to review the TFM portion of the transaction, which it does not, then the Ex Parte No. 582 rules, and their underlying policies still should not apply. KCS is specifically exempted from application of the new rules, and the rules previously in effect apply to KCS. 2001 STB LEXIS at *26-27. Ironically, these are the same rules that applied to UP and BNSF when they undertook their own major mergers, since the new rules that would now apply to them did not become effective until 2001. The Board explained the reason for exempting KCS from the new rules:

[A] potential transaction involving KCS and another Class I carrier would not necessarily raise the same concerns and risks as other potential mergers between Class I railroads...[A] potential merger between it and a Class I carrier would not necessarily have the same impact as other major mergers.

Id. Thus, assuming this was a major transaction involving KCS and TFM and TFM was subject to the Board's jurisdiction, KCS would still not have to provide "full system" information as BNSF and UP erroneously suggest. Rather, KCS is allowed to process its Application under the same merger rules that UP and BNSF proceeded under, and those rules did not have such a "full system" requirement.

Finally, there are legitimate and significant policy reasons for requiring parties to submit information regarding the "full system" impacts in major merger transactions involving domestic and foreign carriers that are simply not applicable to the KCS/TFM transaction. Although the

Board indicated that it would require CN and CP, Class I railroads based in Canada, to follow the major merger rules, including submission of materials related to the “full system” impacts, if either acquired another Class I railroad, TFM is clearly distinguishable from these other carriers.

Both CN and CP currently operate in the United States, and have done so for more than a century.¹⁶ Each of these carriers files reports with the STB, follows STB accounting and waybill requirements, and otherwise complies with all U.S. rules and regulations. In addition, both of these Canadian carriers have had numerous transactions approved by the STB, and have long been subject to the Board’s jurisdiction. Indeed, CN and CP were extremely active participants in the Board’s rulemaking process, which resulted in the new major rail consolidation procedures. 2001 STB LEXIS at *285-*337.

TFM, on the other hand, has never operated in the United States and has never been subject to STB jurisdiction. Moreover, TFM doesn’t file reports with the Board and does not even file financial information in the United States. It would be close to impossible to require KCS to submit data regarding the TFM transaction when such data is unavailable to KCS. Thus, unlike CN and CP, TFM is not a Class I carrier subject to the Board’s jurisdiction and the “full system competitive analysis” requirement does not apply to it. Accordingly, BNSF and UP’s proposal that KCS be required to supplement the Petition to include information about the full system impacts of the TFM transaction is unmerited.

D. Even If The Board Could Legally Consider The Effects Of The TFM Transaction, The Nature Of That Transaction Would Not Warrant Conditions Or Supplementation Of The Application

¹⁶ As CN noted in its Comments, filed on May 16, 2000 in conjunction with Ex Parte No. 582 (Sub-No. 1), “CP has long owned Soo (a Class I Railroad) and has more recently acquired an ownership interest in IMRL, which operates in Illinois, Iowa, Missouri and Minnesota. Long before acquiring control of IC, CN owned Grand Trunk Western (also a Class I railroad), the Samia Tunnel and a 50% interest (with CP) in the partnership that owns the St. Clair Tunnel.”

As previously indicated, neither BNSF nor UP have simply “replied” to KCS’s Petition. Rather, both parties address much more than KCS’s proposed procedural schedule, raising such substantive matters as the importance of the bridge at Laredo, the competitive effects of KCS’s plans for NAFTA Rail, and the potential cancellation of agreements between Tex Mex and other parties. Indeed, to the extent these issues can be legally addressed within the context of the Tex Mex transaction, discussion of these issues now is premature, and they should be raised during the comment period after discovery is completed.¹⁷

Notwithstanding the fact that these arguments are improperly invoked and prematurely raised, KCS will briefly address these issues to show that BNSF’s and UP’s concerns are unwarranted. Instead, the TFM transaction will promote competition and serve the public interest. Trade between the United States and Mexico is the fastest growing relationship in the world and future economic growth for both countries relies on competitive transportation alternatives. BNSF and especially UP are currently the dominant rail carriers in U.S./Mexico rail traffic and shippers need an effective competitor at Laredo; NAFTA Rail aspires to be this effective competitor. Nevertheless, NAFTA Rail must continue to cooperate with UP, BNSF and other rail carriers on interline services. Indeed, such cooperation is a business necessity.

1. KCS/Tex Mex/TFM Will Continue To
Cooperate With UP And BNSF

As KCS pointed out in the Application, the TFM transaction will not alter the basic structure or operations of TFM. TFM will remain a separate subsidiary with independent

¹⁷ At any rate, in light of the fact that these parties have already substantially raised and discussed their concerns over the TFM transaction in their so-called replies, their suggestion that further supplementation is necessary for them to properly address the effects of that transaction is indicative of their true purpose for participating herein: to cause unnecessary delay and expense for KCS.

officers and an independent Board of Directors, albeit with KCS as the parent company. Under this structure, TFM will continue to cooperate with UP and BNSF regarding pre-blocking rail cars, automated customs pre-clearance procedures, supplying cars, accommodating run-through train service, and promptly providing rate quotes for UP and BNSF customers.

TFM needs UP and BNSF traffic to provide it with adequate revenues. UP serves six gateways and BNSF serves three gateways. KCS/Tex Mex serve only one. Furthermore, there is pervasive truck and barge competition for the U.S./Mexico trade. TFM does not want to see its traffic base switch to its competitors in Mexico, such as Ferromex, which is owned 26% by UP, nor does TFM want to see this traffic switch to pervasive barge and truck routings. Indeed, given UP's overwhelming marketing dominance for U.S.- Mexico traffic at Laredo,¹⁸ NAFTA Rail will have every incentive to preserve other carriers' access to and efficient operation of TFM, as UP has itself repeatedly acknowledged. For instance, UP's Chairman, Mr. Dick Davidson said during a first quarter earnings conference call to financial analysts, occurring shortly after KCS announced its plans to develop NAFTA Rail, that "TFM has got to have a strong traffic flow to and from Union Pacific to make money... We became quite good business partners down there and I would anticipate that would continue." KCS couldn't agree more. UP has and will retain enormous market power after KCS acquires TFM, and UP can and will exercise that market power if KCS attempts to place a "chokehold" on UP.

¹⁸ Today, UP dominates rail traffic to and from Mexico. At the Laredo-Texas Gateway, UP controls 91% of the market share for northbound traffic and 71% of the market share for southbound traffic. From Chicago to Laredo, UP controls 98% of the rail traffic. From St. Louis to Laredo, UP controls 98% of the rail traffic. From Houston to Laredo, UP controls 85% of the rail traffic. In fact, UP serves five other gateways to Mexico with little or no rail competition.

UP's ability to exercise its market power to counter any unlawful actions by a combined KCS/TFM has been recognized by UP itself. For example, at the Railtec Conference, Mr. Davidson told customers:

Union Pacific interchanges a substantial portion of our Mexican traffic with the TFM. Their coverage of the major automotive manufacturing plants in Mexico is a hand-in-glove fit with Union Pacific's extensive auto network north of its border. Similarly, the TFM has a strong and efficient Intermodal network that aligns with the Union Pacific franchise and allows us to offer customers the fastest, most direct routing throughout most of North America.

The same analysis applies to BNSF. These two carriers control 90% of the rail traffic in the entire Western United States and have much more extensive coverage than KCS. Thus, KCS has no intention, nor incentive, to change the way TFM is operated so as to drive away UP and BNSF interchange business. It would be against KCS's economic incentive to do so and for UP to now suggest otherwise is preposterous.

2. NAFTA Rail Will Honor The Terms
Of Existing TFM Agreements

As KCS stated in its Application, it fully intends to honor the terms of all marketing and pricing agreements involving Tex Mex and TFM. KCS will allow such agreements to continue to their full term and will not seek to cancel them early, even if KCS has the legal right to do so. Indeed, NAFTA Rail will have every incentive to cooperate with both carriers on interline service in order to maintain a positive business relationship, since NAFTA Rail's financial success will be dependent on their continued flow of traffic at the Laredo Gateway. However, when an existing agreement expires, KCS is not willing to simply renew such an agreement under the old terms without undertaking a good faith negotiation; nor would KCS expect UP and BNSF to simply renew expired agreements without new negotiations.

Even if UP's and BNSF's concerns were warranted, which they are not, there is nothing in the Board's rules or regulations that would require a merger applicant to discuss these agreements and their effects on any potential merger or control transaction. As such, KCS should not be required to supplement its Application because it has not set forth evidence of its future intentions with respect to an agreement that may or may not expire for years. Indeed, if UP and BNSF have concerns regarding these agreements, they can either raise those concerns in this proceeding, or more appropriately, pursue their legal remedies under the negotiated terms of these agreements. As the Board has emphasized in numerous cases, the Board has no jurisdiction to enforce private contracts. *See, e.g., S.D. Warren Company D/B/A/ Sappi Fine Paper North America - Acquisition and Operation Exemption - Maine Central Railroad Company and The Springfield Terminal Railway Company*, STB Finance Docket No. 34133, 2002 STB LEXIS 574 (STB served Sept. 30, 2002); *Dakota, Minnesota & Eastern Railroad Corporation and Cedar American Rail Holdings, Inc. - Control - Iowa, Chicago & Eastern Railroad Corporation*, Finance Docket No. 34178, (STB served Sept. 26, 2002) ("DM&E/IC&E"). Accordingly, UP and BNSF have adequate legal remedies available to them under the numerous existing agreements and any concerns they have should be addressed and appropriately dealt with under those agreements, rather than attempt to bring this Board into what is essentially a private transaction.

3. All Carriers Will Be Treated Fairly At The Laredo Bridge

One of the main reasons put forth by both UP and BNSF for the notion that the Board should require KCS to supplement the record to address the effects of the TFM transaction is premised on the fact that KCS will acquire control of an international crossing point, the bridge

at Laredo.¹⁹ However, the Board has never before required parties to supplement a application for control of a rail carrier merely because the merger involved an international crossing point. *See Canadian National Railway Company, Grand Trunk Corporation, and WC Merger Sub, Inc. - Control - Wisconsin Central Transportation Corporation, Wisconsin Central Ltd., Fox Valley & Western Ltd., Sault Ste. Marie Bridge Company, and Wisconsin Chicago Link Ltd.*, STB Finance Docket No. 34000, Decision No. 9 (STB served Aug. 2, 2001). Nor, has it upgraded a “minor” transaction to a “significant” or “major” transaction merely because control of an international crossing point changed hands, as UP also seems to suggest. *Id.* In fact, the Board has even gone so far as to exempt altogether “transactions that affect the ownership interests of two international crossing points,” including a bridge and tunnel, from its prior approval requirements. *Borealis Infrastructure Trust Management Inc., Sole Trustee of the Borealis Transportation Infrastructure Trust - Acquisition Exemption - Detroit River Tunnel Company*, STB Finance Docket No. 33984, 2001 STB LEXIS 922 at *1 (STB served Dec. 19, 2001). Thus, the fact that KCS will acquire control over an international crossing point does not justify a Board requirement that KCS submit additional supplementary materials.

¹⁹ Because Mexrail is a non-carrier, its acquisition by KCS could be accomplished without STB authority, as a non-carrier (KCS) would be acquiring another non-carrier (Mexrail), subject of course to the prior requirement that Mexrail place its Tex Mex shares into a voting trust. Indeed, KCS could have placed only the shares of Tex Mex into the voting trust and taken immediate ownership of Mexrail; thereby taking over the operations of the bridge. It is important to note that the only transaction in front of the Board is the common control of KCSR, Tex Mex, and Gateway Eastern. KCS does not need authority, and is not seeking authority, to acquire control of Mexrail’s other asset, *i.e.* the northern half of the International Bridge. The fact that KCS has not exercised its legal right to do so was done so as to provide BNSF and UP with an opportunity to discuss any concerns with KCS before KCS acquired control of the bridge. Because those discussion have been taking place, it is unfortunate that UP and BNSF have made their concerns public. It may eventually be in KCS’s interests to exercise its right to acquire control of the bridge without waiting for STB approval of its application to acquire control of Tex Mex.

Concerns over the fact that KCS will acquire control over the International Bridge at Laredo are altogether misplaced. KCS has no plans to operate TFM or Mexrail, a non-carrier holding company that owns the bridge, any differently. There are numerous contracts and agreements going back for over a half of century governing those operations, and Tex Mex and TFM will be continue to be bound by those agreements. Furthermore, as previously explained, UP's ability to switch gateways and its ownership of TFM's main competitor give KCS a strong incentive to continue to work with UP to funnel traffic over the Laredo Gateway. KCS has no plans to institute a "new chokehold" over the Laredo gateway as UP wrongly accuses. UP Reply at 8. Indeed, it is UP who has the "chokehold" over KCS and Tex Mex, as UP completely controls the infrastructure used by KCSR and Tex Mex to even access the International Bridge.²⁰

At any rate, UP and BNSF are not addressing their concerns over the bridge in the appropriate forum. KCS's control of the bridge is not conditioned on Board approval, because the bridge is governed by a series of private contracts and agreements, which, as the Board has emphasized in previous cases, preclude Board control. *See, e.g., S.D. Warren*, 2002 STB LEXIS 574, *supra*; *DM&E/IC&E*, *supra*. The contracts and agreements concerning the bridge at Laredo provide remedies that aggrieved parties may pursue in court.

In summary, the NAFTA Rail transaction serves the public interest by strengthening cross-border competition. North American shippers will benefit from NAFTA Rail's seamless, efficient and competitive rail service to and from Mexico via the Laredo Gateway. In addition, they will profit from NAFTA Rail's enhanced ability to invest in infrastructure, equipment and

²⁰ UP has failed to abide by its obligations to invest in the infrastructure utilized by Tex Mex via its trackage rights, creating substantial congestion, which in turn has a disproportionate effect on KCSR and Tex Mex. UP also unfairly dispatches Tex Mex trains over that infrastructure. Thus, KCS and Tex Mex are reviewing what legal action they may take to require UP to abide by its obligations and to eliminate its "chokehold" over Tex Mex.

technology at the bridge and along the entire NAFTA Rail line. The nature of the TFM transaction, even if subject to this Board's conditioning power, would not warrant even a single condition, as competition is not being harmed, but is being enhanced.

KCS suggests that if BNSF and UP, nonetheless, continue to have concerns about the TFM transaction, they should raise them in the appropriate forums. If they want to raise them in the STB proceeding, KCS cannot stop them. However, there is nothing in the statute or the Board's rules, regulations, or policies which required KCS to present this information in its Application and it should not be required to do so now.

III. KCS SUPPORTS SOME MODIFICATIONS TO THE PROPOSED SCHEDULE TO ACCOMMODATE THE REQUESTS OF VARIOUS PARTIES

KCS's Proposed Schedule set forth in the Petition is completely conformant with the Board's regulations governing minor acquisitions. Nevertheless, in deference to the wishes of NITL and DOT, which have legitimate reasons for requesting that the Board modify the schedule, KCS now supports giving all parties until August 4, 2003, an additional 21 days, to file comments. KCS also believes that DOT has raised a legitimate concern and that it should have the right to file a reply to comments filed by other parties on August 25, 2003, the same date that KCS/Tex Mex's rebuttal would be due. As suggested by DOT, KCS and Tex Mex would then have the right to file a rebuttal to any reply comments filed by DOT on that date. Accordingly, the entire procedural schedule should be adjusted to reflect these changes.

A. KCS's Proposed Schedule Fully Conforms With Law, Regulations And Precedent

The statute governing the procedure applicable to a "transaction other than the merger or control of at least two Class I railroads" unequivocally provides that "Written comments about an application...may be filed within 30 days after notice of the application is published" and

such notice is required to be published 30 days after the filing of the Application. 49 U.S.C. § 11325(c). Adding these two periods together means that parties have 60 days after the filing of the Application to file comments. KCS's suggested timeframe is entirely consistent with this structure.

This 60 day period is the same regardless of whether the transaction is "significant" or "minor." Thus, even if UP's repeated misclassification of this "minor" transaction as "significant" and BNSF's similar suggestions were accurate, the timeframe proposed by KCS would still be applicable under the terms of the statute because "minor" and "significant" transactions are treated the same. It is only in "major" mergers where the statute grants parties a minimum of 45 days to file comments.

KCS's proposed schedule for the initial comment period is entirely consistent with prior precedent for both minor and significant transactions. The Board has consistently granted parties 30 days from publication of a minor application in the *Federal Register* (and 60 days from the filing date) to submit written comments. *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); *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); and *CSX Corporation, et al. - Control - Transkentucky Transportation Railroad, Inc.*, 1992 ICC LEXIS 70 (April 9, 1992).

UP and BNSF would have the Board ignore this precedent based upon two previous cases. Although these parties are correct in stating that the Board has twice strayed from the statutorily prescribed timeframe and granted parties additional time to file written comments regarding "minor" applications, those two instances involved significantly larger transactions than KCS's acquisition of control of Tex Mex. In both *CN/WC* and *DM&E/IC&E* 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. In addition, neither CN nor DM&E owned any part of the entities they were acquiring prior to the transaction. Here, on the other hand, KCS has owned a significant interest in Tex Mex since 1995 and has integrated significant aspects of its operations with Tex Mex. Thus, KCS's proposed 30 day timeframe for parties to submit comments is not only entirely consistent with Section 11325 (c), but also remains consistent with the Board's practice in transactions of this size.

UP, BNSF, CN and DuPont have provided no justification for the Board to ignore the timeframes laid out in Section 11325 (c). If KCS had presented an incomplete application or were "stonewalling" the parties' discovery efforts, there may in fact be a justification for granting these parties additional time, but KCS is doing neither. The Application did comply with the procedural requirements for a minor transaction, a fact that not one party disputes. KCS is also fully cooperating with the parties' discovery requests. Indeed, KCS has been completely cooperative and efficient in responding to various requests by UP and BNSF. For example, KCS immediately provided UP with traffic tapes when it requested them on May 21, 2003 and offered

the same to BNSF immediately upon request.²¹ KCS and Tex Mex have produced thousands of pages of documents, established a document depository, and are fully cooperating with any discovery requests. As a result, UP, DuPont, BNSF and CN have simply not shown any reason why the Board should grant it more time than the 60 days allowed in the statute for filing its initial written comments.

B. Due To NITL's And DOT's Concerns, KCS Supports
Giving All Parties Additional Time To File Comments

Although UP, BNSF, Dupont and CN fail to provide any specific defects in the Application or specific issues which would establish why they cannot adequately respond to and comment on KCS's acquisition of Tex Mex by July 14, 2003, 61 days after the Application was filed, KCS nonetheless proposes that its Petition be modified to provide all parties until August 4, 2003 to submit comments. KCS understands NITL's desire to postpone submission of comments until after the Railroad Transportation Committee has met in late July and therefore supports NITL's request that it be given until August 4, 2003, to file comments. Accordingly, KCS proposes other parties similarly be given the additional 21 days, which likewise grants UP its request for an additional 21 days.

In addition, KCS appreciates DOT's desire to have 21 days after the initial filings of the other parties to submit a reply to any comments filed on August 4. Accordingly, given the unique perspective that DOT and DOJ bring to merger review, KCS will not object to DOT and DOJ having the right to review the comments of other parties filed on August 4 and to file replies to those comments on August 25. KCS will also file its rebuttal to any comments filed on

²¹ Curiously, despite requesting access to the traffic tapes on May 16, 2003 and despite KCS's immediate grant of that access, BNSF has yet to actually request the tapes for its use. In contrast, upon granting UP access, UP immediately requested that the tapes be sent to them, which they were.

August 4 on August 25, but as suggested by DOT, KCS will reserve its right to file rebuttal to any comments filed by DOT or DOJ, if necessary.

The Petition, as modified to allow parties an additional 21 days to file comments and to allow DOT 21 days to file a reply comment, the same time as KCS to file its rebuttal, should alleviate any of the concerns expressed by the parties about not having adequate time to file comments. It should be noted that this additional time, 81 days from the date when KCS filed the Application, far exceeds the 60 days afforded by the regulations governing this case. 49 U.S.C. § 11325(c). This additional time also surpasses the Board's allotted time for parties to file comments in *CN/WC* and *DM&E/IC&E*, the two cases where the Board granted an exception to Section 11325 (c). In fact, this additional time also exceeds the time allotted to parties in major merger cases.

CONCLUSION

The Board should accept KCS's Application as a "minor" transaction without requiring any further supplementation. The effects of the transaction subject to the Board's jurisdiction have been fully disclosed, and a substantial body of law and policy dictate that the Board should not go beyond the instant transaction to consider the potential TFM transaction. The Board should, however, modify the Procedural Schedule to accommodate some of the parties' concerns. Implementing the proposed procedural schedule will allow the benefits of the transaction to soon begin accruing to shippers, and simultaneously provide parties and government agencies with enough time to analyze the transaction and provide comment.

WHEREFORE, Applicant respectfully requests that the Board accept this Application for consideration and authorize the control transaction proposed herein.

Respectfully submitted,



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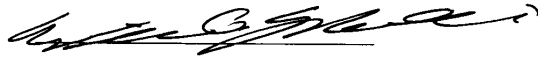
Attorneys for Kansas City Southern,
The Kansas City Southern Railway
Company, and Gateway Eastern
Railway Company

June 9, 2003

CERTIFICATE OF SERVICE

I have this day served a copy of the foregoing Rebuttal upon all other parties of record by depositing a copy in the U.S. mail in a properly addressed envelope with adequate first-class postage thereon prepaid or by other expeditious means.

Dated: June 9, 2003.

A handwritten signature in black ink, appearing to read "William A. Mullins", written over a horizontal line.

William A. Mullins
Attorney for Kansas City Southern,
The Kansas City Southern Railway
Company, and the Gateway Eastern
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