

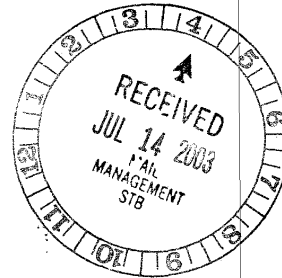
HARKINS CUNNINGHAM LLP

Attorneys at Law

Paul A. Cunningham
202.973-7601
pac@harkinscunningham.com

Suite 600
801 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2615
Telephone 202.973.7600
Facsimile 202.973.7610

July 14, 2003



BY HAND

ENTERED
Office of Proceedings

Mr. Vernon A. Williams, Secretary
Surface Transportation Board
Office of the Secretary
1925 K Street, N.W.
Washington, DC 20423-0001

JUL 14 2003

Part of
Public Record

208371

Re: Kansas City Southern – Control – The Kansas City Southern Railway Company, Gateway Eastern Railway Company, and The Texas Mexican Railway Company (STB Finance Docket No. 34342)

Dear Mr. Williams:

Enclosed for filing in the above-referenced docket please find an original and 25 copies of the Reply of Canadian National Railway Company's Petition to Reopen Decision No. 2 and to Reject the Application (designated as CN-3).

I have also enclosed a diskette containing the text of this pleading in WordPerfect 6/7/8/9/10 format, as required by 49 C.F.R. § 1104.3(b).

Very truly yours,

Paul A. Cunningham /jmg

Paul A. Cunningham

Enclosures

cc: All parties of record

PHILADELPHIA
2800 One Commerce Square
2005 Market Street
Philadelphia, PA 19103-7042
215.851.6700

NEW YORK
One Penn Plaza
25th Floor
New York, NY 10119-2532
212.329.1750

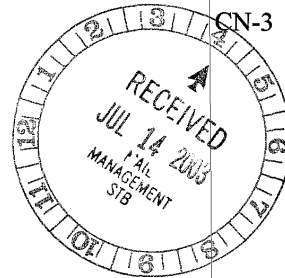
EXPEDITED HANDLING REQUESTED

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

PETITION TO REOPEN DECISION NO. 2
AND TO REJECT THE APPLICATION



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Sean Finn
CANADIAN NATIONAL RAILWAY COMPANY
P.O. Box 8100
Montréal, PQ H3B 2M9
(514) 399-5430

Theodore K. Kalick
CANADIAN NATIONAL RAILWAY COMPANY
Suite 500 North Building
601 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 347-7840

Paul A. Cunningham
Richard B. Herzog
Gerald P. Norton
James M. Guinivan
HARKINS CUNNINGHAM LLP
801 Pennsylvania Avenue, N.W., Suite 600
Washington, D.C. 20004-2664
(202) 973-7600

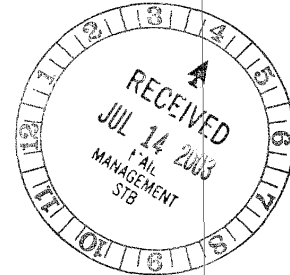
Counsel for Canadian National Railway Company

July 14, 2003

EXPEDITED HANDLING REQUESTED

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

PETITION TO REOPEN DECISION NO. 2
AND TO REJECT THE APPLICATION

Pursuant to 49 C.F.R. §§ 1115.4, Canadian National Railway Company (“CN”) respectfully requests that the Board reopen Decision No. 2 in this proceeding and reject the Railroad Control Application (KCS-3/TM-3, or the “Application”) filed by applicants KCS, KCSR, and GWER¹ (collectively, “Applicants”), as supplemented in Applicants’ Supplement to Application (KCS-10/TM-10, or the “Supplement”), filed June 23, 2003.

The Board recognized in Decision No. 2 that KCS’s proposed acquisition of Tex Mex (the “KCS/Tex Mex transaction”) is integrally related to its acquisition of TFM (the “KCS/TFM transaction”) and can properly be understood only within the context of the changes that would be brought about by the latter. The Board therefore required Applicants to supplement their Application. Applicants, however, have neither completely addressed, nor correctly analyzed, the likely competitive impacts in the U.S. from the KCS/TFM transaction.

¹Unless otherwise indicated, abbreviations and acronyms used herein are defined in the “List of Acronyms Used in Application,” found in KCS-3/TM-3, at 8, except that, consistent with the Board’s practice in Decision No. 2, Grupo TMM, S.A., is referred to as “Grupo TMM” rather than as “TMM.” See Decision No. 2 at 6 n.9.

This failure, among others, has denied interested parties and the Board sufficient information to test such impacts, and has effectively and improperly shifted the time and expense burden of such an analysis from the Applicants to the interested parties. In light of Applicants' failure to carry out the Board's instructions, the Board should require Applicants to submit a new application before it proceeds to consider the transaction.

In view of the upcoming deadline for the filing of comments, evidence, and argument (August 4, 2003), CN requests that the Board suspend the procedural schedule pending a decision on this petition. A suspension would minimize the burden on parties of preparing comments, evidence, and argument should the Board rule favorably on this petition. CN sees no reason why Board action suspending the procedural schedule or granting this petition should delay the hearing in this proceeding currently scheduled for July 31, 2003.

DISCUSSION

I. THE KCS/TM APPLICATION, AS SUPPLEMENTED, DOES NOT SATISFY THE BOARD'S RULES AND DIRECTIVES IN THIS PROCEEDING.

Under 49 C.F.R. § 1115.3, an administratively final decision of the Board may be reopened upon a showing that the action "involves material error, new evidence, or substantially changed circumstances." In Decision No. 2, the Board formally accepted the Application, but directed Applicants to supplement it to provide information about KCS's acquisition of TFM and the effects of that acquisition, on the ground that the acquisitions of Tex Mex and of TFM "in reality . . . are two components of a single, larger transaction [*i.e.*, the acquisition of all Grupo TMM's North American railroad interests] with broader potential implications in the U.S." Decision No. 2 at 11. At the time Decision No. 2 was issued, there was no reason to doubt that Applicants would carry out the Board's instructions. Now that Applicants have filed their

Supplement, it has become apparent that they are providing inadequate information to the Board and other parties regarding the TFM transaction. While the Supplement purports to satisfy the Board's directive, it fails to provide the "'full system' competitive analyses and operating plans" called for by 49 C.F.R. § 1180.1(k)(1) and made applicable to this proceeding by Decision No. 2.

Applicants' failure to fulfill the Board's directive could not reasonably have been foreseen and thus constitutes "substantially changed circumstances" calling for action by the Board. On that basis, the Board should reopen Decision No. 2, vacate its acceptance of the Application, and reject the Application, as supplemented, as inadequate under the Board's rules and decisions to provide a basis for continuing this proceeding.

- A. The Board has Properly Recognized that the KCS/Tex Mex Transaction Is Part of a Larger Transaction Involving the Applicants that Would Create a Single KCS/Tex Mex/TFM System, and that Information on That Larger Transaction Is Necessary for the Board's Evaluation of the Application.

Although the KCS/TFM transaction may be formally outside the Board's regulatory authority for control transactions, and although the Board might have no occasion to consider that transaction if it stood alone, it is obvious that the KCS/TFM transaction is integrally related to the KCS/Tex Mex transaction. The KCS/TFM acquisition and the KCS/Tex Mex acquisition are effectively a single, two-step transaction by which Grupo TMM proposes to transfer to KCS all its interests in railroads operating in the U.S. and Mexico.² KCS and Grupo

²Two indicators of the close relationship between the two transactions are the system map included as Map A-1 of the Environmental Appendix, a map of the "KCSR, Tex Mex and TFM System," KCS-13/TM-13, Exhibit A, and the Stock Purchase Agreement under which KCS has acquired shares representing 51% of TFM's voting interest in Mexrail (and thus indirectly in Tex Mex) and has the option of acquiring TFM's remaining 49% interest. That agreement gives TFM the option to buy back all of its transferred interest in Mexrail from KCS at any time up to two years from the date of the agreement, by refunding the purchase price paid by KCS. The option would be meaningful only if TFM were not itself acquired by KCS. Thus, the Board reasonably could proceed on the assumptions that (a) that the KCS/Tex Mex transaction will be

TMM could have accomplished the same outcome in a single agreement.

To treat the two acquisitions in isolation from one another would be to elevate form over substance. Yet that is exactly what Applicants sought to do here. Their Application omitted any substantive discussion of the KCS/TFM transaction, beyond stating that an agreement had been reached for KCS to acquire of all Grupo TMM's interest in TFM, and describing the relationships of ownership among the various corporate entities after the consummation of both transactions.

The Board understandably declined Applicants' invitation to view the KCS/Tex Mex transaction in isolation, and instead found that KCS's acquisition of Tex Mex and TFM constituted "two components of a single, larger transaction with broader potential implications in the U.S." Decision No. 2 at 11. That transaction, moreover, is one that would be classified as "major" under the Board's rules if TFM were a U.S. rail carrier, as its operating revenues of \$667 million in 2001³ exceed the threshold for classification as a Class I railroad.⁴ While the

consummated only if the KCS/TFM transaction is consummated and (b) KCS would not take any significant permanent steps (such as infrastructure investment) to enhance Tex Mex's competitiveness and efficiency until it had assurance that the KCS/TFM transaction would be consummated.

³ASSOCIATION OF AMERICAN RAILROADS, POLICY AND ECONOMICS DEPARTMENT, 2002 RAILROAD FACTS 81 ("*2002 Railroad Facts*").

⁴As amended in 2001, the Board's Railroad Consolidation Procedures observe:

Because there are so few remaining Class I carriers and the railroad industry constitutes a network of competing and complementary components, the Board cannot evaluate the merits of a major transaction in isolation. The Board must also consider the cumulative impacts and crossover effects likely to occur as rival carriers react to the proposed combination. The Board expects applicants to explain how additional Class I mergers would affect the eventual structure of the industry and the public interest.

49 C.F.R. § 1180.1(i). In this case, the Board did not ask Applicants to speculate about large

proposed KCS/Tex Mex/TFM combination is not formally a “major” transaction, it was reasonable for the Board to treat the transaction as one with the potential for significant impacts in the U.S. and to require certain of the analyses that would be required of a “major” transaction.

- B. Contrary to Decision No. 2, Applicants Have Not Provided the Board with a Proper Analysis of Competitive Effects of the KCS/TFM Transaction or a Full System Operating Plan on which Such an Analysis Might Be Based.

In Decision No. 2, the Board recognized the deficiency of the Application with respect to the KCS/TFM transaction. The Board could not evaluate the effects of KCS’s acquisition of control of Tex Mex except in light of the effects of the integrally related KCS/TFM transaction and required Applicants to supplement the Application “to reflect the implications of the broader transaction [*i.e.* the acquisition of TFM by KCS] for competition within the U.S.” Decision No. 2 at 11. It specifically directed Applicants to include the information specified in 49 C.F.R. §§ 1180.1(k)(1) and 1180.11,⁵ including “‘full system’ competitive analyses and operating plans.” In this context, “full system” referred to the entire

hypothetical transactions that other parties might pursue in the wake of the KCS/Tex Mex transaction, but rather to report on the effects of a concrete, imminent transaction that they themselves were committed to undertake and were uniquely qualified to discuss. This is consistent with KCS’s request, during the Board’s proceeding to revise its merger rules, that the rules state that “the Board expects applicants to address all other rail mergers which have been announced” Reply Comments of Kansas City Southern Railway Company at 19 (insertion marks omitted), *Major Rail Consolidation Procedures*, STB Ex Parte No. 582 (Sub-No. 1) (filed Dec. 18, 2000), a request that seems especially warranted when the applicant is party to another announced merger transaction of “major” dimensions, even if the jurisdictional merger is “minor.”

⁵These provisions, which were made applicable to the KCS/Tex Mex transaction by Decision No. 2, call for the application to include “‘full system’ competitive analyses and operating plans”; to describe how cooperation with the Federal Railroad Administration (“FRA”) would be maintained in order to address potential impacts on operations in the U.S. of operations or events elsewhere on the system; to include information on restrictions or preferences under foreign or domestic law and policies that could affect applicants’ commercial decisions; and to state how any ownership restrictions might affect the Board’s public interest assessment.

proposed “NAFTA Rail” system, including KCSR, GWER, Tex Mex, and TFM.

Despite these clear instructions from the Board, the Application remains incomplete. Even as supplemented, it does not describe adequately the impacts on U.S. rail operations and on U.S. markets from KCS control of Tex Mex and TFM or provide the kind of information that the Board called for and that the Board and other parties had a right to expect.

1. The Supplement did not provide a “full system” operating plan describing operations of the combined KCS/Tex Mex/TFM system in Mexico, as directed by the Board.

Decision No. 2 requires submission of a “‘full system’ . . . operating plan[.]”

Applicants, however, have not described any traffic effects, or any changes in U.S. rail operations that would result from KCS’s acquisition of TFM. Applicants say that “some of the types of changes which might occur in a CN-IC merger or a CN-BNSF merger . . . are simply not relevant here” (KCS-10/TM-10 at 7). But they have failed to identify and describe either those changes that are relevant and that could be expected as a result of a KCS/TFM transaction or those that they believe are not relevant (so that the Board might decide).

Applicants assert that “it is difficult to apply the Board’s regulations” (KCS-10/TM-10 at 7). This is not a legitimate reason for failure to comply with the Board’s order. A “full system” plan should at least enable the Board to assess operational changes on U.S. lines resulting from the acquisition of TFM and Tex Mex, as well as operational changes in Mexico that could have competitive implications for traffic to and from the U.S. or environmental impacts in the U.S. Applicants have offered no reason why this requirement should be more difficult to satisfy where a substantial Mexican carrier is being acquired by a holding company that owns two U.S. carriers.

Applicants claim that the Board’s rules cited in Decision No. 2 were “specifically

geared towards major Canadian carriers seeking to acquire or merge with major U.S. railroads.” KCS-10/TM-10 at 5. This claim is beside the point now that the Board has specifically ordered the application of those rules in this proceeding. Moreover, the Board had no intention of limiting the application of those rules to the acquisition of U.S. lines or railroads by Canadian carriers.⁶

2. The Application does not meet the Board’s directive that Applicants properly describe the competitive impacts of the KCS/TFM transaction.

The basic premise of the Application is that “NAFTA Rail can only become an effective competitor by increasing efficiencies and providing efficient single-line type service from origins in the U.S. to destinations in Mexico and vice-a-versa.” KCS-10/TM-10 at 14. Applicants imply that KCS’s acquisition of TFM will enable them to increase those efficiencies and provide more efficient service. Yet neither the initial Application nor the Supplement explains those efficiencies or quantifies their effects on traffic in the U.S. Instead, Applicants used a “static model” that assumed no change in the existing [rate of growth for] traffic interchanged between KCSR or TM and TFM (KCS-10/TM-10 at 9). KCS “did not rely upon

⁶In 49 C.F.R. § 1180.1(k), made applicable to this proceeding by Decision No. 2, the Board made clear that the “full system” operating plan contemplated therein must “incorporat[e] any operations in Canada *or Mexico*” (emphasis added). 49 C.F.R. § 1180.11(a), also made applicable to this proceeding by Decision No. 2, requires “applicants whose systems include operations in Canada *or Mexico*” (emphasis added) to explain how they would cooperate with the Federal Railroad Administration to address impacts in the U.S. of operations elsewhere on their rail system.

In the Notice of Proposed Rulemaking that led to adoption of those provisions, the Board stated that “[f]uture mergers are likely to raise novel transnational issues, possibly implicating the North American Free Trade Agreement and requiring substantial cooperation with Canadian or Mexican regulatory authorities.” The rule was proposed “to enable the Board to gather the information needed to assess fully and properly merger proposals involving major Canadian *and Mexican* railroads.” *Major Rail Consolidation Procedures*, STB Ex Parte No. 582 (Sub-No. 1), slip op. at 21-22 (STB served Oct. 3, 2000) (emphasis added).

traffic diversion studies, strategic studies, market analyses, or any other similar studies when it decided to move forward” with acquiring control of TFM. *Id.*, Davies V.S. at 5.

In a transaction of this scope, it is fair to assume that KCS made assumptions about expected traffic growth.⁷ But the Supplement contains no concrete information about those assumptions, as required to satisfy the Board’s directive. And Applicants’ use of a static model is not an analysis of traffic impacts. It is a means to avoid such analysis, contrary to the Board’s mandate in Decision No. 2.

Most important, Applicants’ Supplement does not meet the Board’s directive to include a proper analysis of the competitive impacts in the U.S. resulting from KCS’s acquisition of TFM. Applicants assert that control of TFM by KCS would enhance competition. The assertion, however, rests on little other than the claim that KCS “will coordinate, not consolidate, operations with TFM” (KCS-10/TM-10 at 7), without identifying or detailing the nature of such coordination. These unsubstantiated statements provide no real information about the KCS/TFM transaction and do not satisfy the Board’s requirement that Applicants detail the competitive impacts of that transaction.

Applicants’ failure to provide the required information is illustrated by their approach to assessing possible anticompetitive effects from reductions in geographic, or “source,” competition. In their Application, Applicants claimed that source competition could

⁷ Absent other evidence, it might be reasonable to surmise that KCS’s acquisition of control of TFM would lead to traffic increases on the combined system proportional to those resulting from KCS’s acquisition of Tex Mex alone. Thus, since TFM has revenues over 10 times greater than Tex Mex’s (*see 2002 Railroad Facts* 81 (reporting TFM revenue of \$667.8 in 2001); Texas Mexican Railway Facts, www.kcsi.com/trm_f.html (visited Sept. 16, 2001) (attached as Exhibit A; reporting Tex Mex revenue of \$50.5 million in 1999)), one might expect that the traffic impact from the TFM transaction could be considerably greater than the traffic impact of the Tex Mex transaction alone.

be an issue only if there were “a point or location where KCSR and Tex Mex both serve, albeit to or from different geographic regions.” KCS-3/TM-3 at 81 (V.S. Grimm). They argued, in essence, that, because KCSR and Tex Mex connect only via Tex Mex’s trackage rights at Beaumont, TX, there would be no reduction in source competition at that point, and, in turn, no issue of source competition with respect to the KCS/Tex Mex transaction at all. *Id.* at 81-82.

This approach, however, is inconsistent with the logic of source competition previously set forth in the decisions of the Board and the ICC. “Geographic competition is a restraint on rail pricing stemming from a shipper’s or receiver’s ability to get the product to which the rate applies from another source, or ship it to another destination.” *Market Dominance Determinations and Consideration of Product Competition*, 365 I.C.C. 118, 128 (1981). Thus, a shipper or receiver may be the beneficiaries of source competition whether or not it is served directly by the two competing railroads.⁸

Because Applicants only considered source competition issues where the originating railroads deliver a commodity to a commonly served destination, they excluded any analysis of potential source competition between KCS and Tex Mex that might exist if there

⁸ Thus, in the *UP/SP* control proceeding, the applicants began their source competition analysis by identifying certain products for which UP and SP each originated at least 10%, and together accounted for 50%, of all rail traffic of that product to destinations anywhere in the U.S. V.S. Barber, 2 Railroad Control Application (UP/SP-23) at 482 (filed Nov. 30, 1995), *Union Pac. Corp. – Control & Merger – Southern Pac. Transp. Co.*, Finance Docket No. 32760. This initial screen was intended to flag traffic for which shippers, even those not served directly by UP or SP, might in fact benefit from source competition between those railroads.

In the *CN/WC* control proceeding, CN introduced evidence of its analysis of geographic source competition, which flagged for further analysis many flows of traffic to destinations served by neither CN nor WC, but in which CN and WC participated as originating, terminating, or bridge carrier. See V.S. Velturo, Railroad Control Application (CN/WC-2) at 280B-281 (filed Apr. 9, 2001), *Canadian Nat’l Ry. – Control – Wisconsin Cent. Transp. Corp.*, STB Finance Docket No. 34000.

were origins for a particular commodity (or readily substitutable commodities) on both KCS and Tex Mex and receivers anywhere in the United States who could choose between those origins. Applicants' failure initially to apply the correct source competition test, which looked at the effects of the KCS/Tex Mex transaction taken in isolation, was replicated in the Supplement. Applicants simply have not addressed the potential for reduction of source competition in situations where a receiver at any location in the U.S. might receive a product that can originate on both KCS and Tex Mex, much less on both the combined KCS/Tex Mex and on TFM. As a result, Applicants' have not supported their claim that there would be no reduction in such competition as a result of either the KCS/Tex Mex or the KCS/TFM transaction.⁹

Applicants, not other interested parties, were instructed to present evidence addressing the impacts of their transaction on competition. Applicants have not complied with those instructions. They have sought instead to shift the burden of the time and expense of geographic competition analyses from themselves to the interested parties, or to the Board. The Board should not countenance that attempt and should insist that Applicants substantiate their claims with evidence that properly defines the potential competitive issues.

⁹CN has not conducted the analysis that Applicants should have conducted and thus takes no position at this time as to whether the proposed transactions present source competition issues. We note that the presence of an issue might not indicate the presence of a problem. In the CN/WC control transaction, CN identified more than 32,000 carloads of traffic for which source competition might be an issue, then examined each movement more closely and concluded, on the basis of that closer examination, that in fact there would not be a reduction in source competition likely to lead to competitive harm. *CN/WC Application* at 195-232, 238-53. The Board agreed with that conclusion. *Canadian Nat'l Ry. – Control – Illinois Cent. Corp.*, STB Finance Docket No. 33556, slip op. at 23 (STB served May 25, 1999)

C. Requiring Applicants to Re-file Their Application with the Information the Board Needs to Meet its Obligations under NEPA Would Reduce the Risk That the TFM and Tex Mex Transactions Would Be Delayed by Environmental Litigation.

Since the beginning of this proceeding, CN's principal interest has been in gaining a full understanding of the proposed transactions and how they might impact CN's efforts to develop its business in NAFTA markets. Thus, CN has no direct interest in whether KCS has provided adequate information to permit the Board to meet its duties under the National Environmental Policy Act of 1969 ("NEPA"). CN is concerned, however, based on its assumption that the transactions can ultimately be determined, or conditioned, to not impair competition unreasonably in the markets served by CN, that the transactions be promptly concluded. CN would be adversely affected were litigation delays to occur because KCS had not provided the Board with sufficient information to meet the requirements of NEPA.

In this regard, we note that the impacts of the TFM acquisition and the resulting "KCSR, Tex Mex and TFM System" are relevant to the Board's NEPA responsibilities. NEPA requires the Board to examine the environmental effects of any major federal action (including approval of rail mergers) that may have significant effects on the environment. Under regulations implementing NEPA that have been issued by the Council on Environmental Quality ("CEQ"), agencies must examine "cumulative impacts," defined as impacts "which result[] from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions." 40 C.F.R. § 1508.7. This requirement is necessary because "[c]umulative impacts can result from individually minor but collectively significant actions taking place over a period of time." *Id.*

Thus, even if KCS's acquisition of Tex Mex would not itself lead to traffic increases that would exceed the Board's thresholds for environmental analysis, as the

Application asserts, KCS-3/TM-3 at 30-42, the acquisition of both TFM and Tex Mex might cause cumulative traffic impacts that would require environmental scrutiny.¹⁰ Applicants, however, ignored this possibility in both the Application and in the Environmental Appendix (KCS-13/TM-13) served on July 1, 2003. Neither document accounted for any traffic changes that might result from the KCS/TFM transaction.¹¹ (Nor does Applicants' Safety Integration Plan, submitted as part of the Environmental Appendix, discuss any potential effects of the KCS/TFM transaction on safety on U.S. rail lines.) While the combined traffic gains from the KCS/Tex Mex and KCS/TFM transactions might not exceed any of the Board's thresholds for environmental analysis, the Board cannot so conclude in the absence of evidence quantifying those combined effects. The Board may want to take this lack of information into account in determining whether to reject the Application.

¹⁰The Board's environmental regulations create a presumption that an environmental assessment will be prepared in the case of a "consolidation, merger or acquisition of control under 49 U.S.C. [§ 11323]" that results an increase in rail traffic of at least eight trains a day (three trains in non-attainment areas under the Clean Air Act) or 100% in traffic volume (50% in non-attainment areas), measured in gross ton-miles per year, an increase in yard activity of at least 100% (20% in non-attainment areas), measured by carload activity, or an increase in truck traffic of 50 vehicles per day, or 10% of the average daily volume, on any affected road segment. 49 C.F.R. § 1105.6(b)(4)(I), 1105.7(e)(5).

¹¹The KCS/Tex Mex transaction proposed in the Application would raise KCS's interest in Tex Mex from a 49% voting stake to 100%. The Application projects that this increase, which would give KCS control of Tex Mex, would result in some modest diversions of traffic to the combined system. KCS-3/TM-3 at 122-28, 150-53. The KCS/TFM transaction, if consummated, would similarly raise KCS's voting interest in TFM from 49% to 100%. It is thus reasonable to conclude that the KCS/TFM transaction would also result in traffic diversions to the combined "NAFTA Rail" system that, given the much larger size of TFM, would likely be considerably greater than those from the KCS/Tex Mex transaction alone.

II. THE BOARD SHOULD REJECT THE APPLICATION AND NOT MERELY REQUIRE FURTHER SUPPLEMENTATION THAT MAY OR MAY NOT COMPLY WITH THE BOARD'S RULES AND THE MANDATE OF DECISION NO. 2.

Applicants' failure, in either their Application or their Supplement, to include information required by the Board's rules and by Decision No. 2 goes to the heart of Applicants' obligation to provide information sufficient for the parties and, in turn, the Board to evaluate the effects of KCS's acquisition of Tex Mex in light of the related acquisition of TFM. Without that information, the Board does not have sufficient basis for determining whether the KCS/Tex Mex transaction is "consistent with the public interest," as required by 49 U.S.C. § 11324(c)). Accordingly, the Board should reopen Decision No. 2, vacate its acceptance of the Application, and reject that Application, even as supplemented, without prejudice to Applicants' right to resubmit a properly revised and supplemented application that would make such a determination possible.

In response to earlier complaints about the sufficiency of the Application, the Board could have rejected the Application as incomplete. When the Board issued Decision No. 2, however, it reasonably assumed that Applicants would carry out the directives of that Decision.¹² Now that Applicants have not done so, the Board should reject the Application, making clear that it will consider the Application anew only when the Applicants have met the Board's requirements. Rejection will provide the incentive that seems required for Applicants to comply fully with the Board's rules and orders and properly put the risks and burdens of

¹²The other parties also could not have presumed that Applicants would fail to supplement their Application adequately, and on that basis to have filed a petition for reconsideration of Decision No. 2 within the time frame of 49 C.F.R. § 1115.3(e).

insufficient compliance on them, not on the Board, interested parties, or the public.¹³

The Board might understandably consider that an alternative remedy here would be to give Applicants a third bite at the apple, and to stay the procedural schedule established in Decision No. 2 to provide further supplementation. And CN might normally be inclined to concur. However, in this instance, given Applicants' unforthcoming approach to the Board's rules and orders and the burden that would be borne by CN and other interested parties if the Applicants were again to seek to require others to do their work for them, CN urges the Board not to permit this approach. The Board should reject the Application and discontinue the proceeding until Applicants have filed a properly completed application that (1) sets forth a realistic full-system operating plan and not merely vague assertions that the parties will "coordinate, not consolidate, operations" (*see* KCS-10/TM-10 at 7), (2) describes impacts on competition based on a proper assessment of potential impacts and a full explanation of claimed pro-competitive benefits, and (3), in the interest of avoiding prolonged uncertainty concerning the ultimate outcome of this proceeding, properly meets the requirements for a "full system" environmental analysis.

¹³Under 49 C.F.R. § 1180.4(c)(7)(ii), following such a rejection, the procedural deadlines set forth in 49 U.S.C. § 11325(d) would not begin to run until the Board accepted the revised application.

CONCLUSION

For the reasons set forth above, the Board should reopen Decision No. 2 and reject the Railroad Control Application, as heretofore supplemented.

Respectfully submitted,

Sean Finn
CANADIAN NATIONAL RAILWAY COMPANY
P.O. Box 8100
Montréal, PQ H3B 2M9
(514) 399-5430

Theodore K. Kalick
CANADIAN NATIONAL RAILWAY COMPANY
Suite 500 North Building
601 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 347-7840


Paul A. Cunningham
Richard B. Herzog
Gerald P. Norton
James M. Guinivan
HARKINS CUNNINGHAM LLP
801 Pennsylvania Avenue, N.W., Suite 600
Washington, D.C. 20004-2664
(202) 973-7600

Counsel for Canadian National Railway Company

July 14, 2003

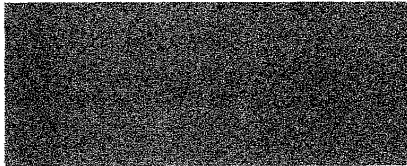
EXHIBIT A

NAFTA RAILWAY 

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Texas Mexican Railway

Facts About Tex Mex

General Description:	A regional bridge carrier operating Texas between Laredo and Corpus Christi with trackage rights through Houston and Beaumont.
Company Headquarters:	1200 Washington Laredo, TX 78040 956-728-6700
Employees:	271
Labor Status:	Represented by 7 rail labor unions under collective bargaining agreements
Route Miles:	157 miles, 557 miles including trackage rights
Equipment Fleet:	38 locomotives 905 freight cars
Carloadings:	1999 - 80,966 1998 - 73,699 1997 - 52,000 1996 - 34,000
Revenues:	1999 - \$50.5 million 1998 - \$49.2 million 1997 - \$28.4 million 1996 - \$15.5 million
Operating Ratio:	1999 - 96.8% 1998 - 107.5% 1997 - 97.4% 1996 - 95%
Ownership:	49% - KCSI through indirect subsidiary 51% - TMM/Grupo Servia

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 Kansas City Southern Railway / 114 West 11th Street / Kansas City MO 64105-1804 / 816-983-

CERTIFICATE OF SERVICE

I hereby certify that I have, this 14th day of July, 2003, caused the foregoing
Petition to Reopen Decision No. 2 and to Reject the Application (CN-3) to be served by causing
copies to be delivered to the following:

BY HAND:

William A. Mullins
David C. Reeves
Sandra L. Brown
Elizabeth A. Martin
Troutman Sanders LLP
401 Ninth Street, N.W., Suite 1000
Washington, DC 20004-2134

Richard H. Streeter
Barnes & Thornburg
750 17th Street, N.W.
Washington, DC 20004-2134

BY FEDERAL EXPRESS:

W. James Wochner
Thomas J. Healey
Kansas City Southern
427 West 12th Street
Kansas City, MO 64105

Allan Van Fleet, Esq.
Vinson & Elkins
2300 First City Tower
1001 Fannin
Houston, TX 77002

and BY FIRST CLASS MAIL, OR A MORE EXPEDITIOUS MEANS OF DELIVERY, to:

The Honorable Norman Y. Mineta
Secretary of Transportation
400 Seventh Street, S.W.
Washington, DC 20590

The Honorable John Ashcroft
Attorney General of the United States
c/o Assistant Attorney General
Antitrust Division
United States Department of Justice
950 Pennsylvania Avenue, N.W., Room 3645
Washington, DC 20530

Daniel R. Elliott, III
Assistant General Secretary
United Transportation Union
14600 Detroit Avenue
Cleveland, OH 44107

Richard J. Schiefelbein
Woodharbor Associates
7801 Woodharbor Drive
Fort Worth, TX 76179-3047

E.C. Wright
Rail Transportation Procurement Manager
DuPont Logistics
E.I. Du Pont de Nemours and Company
D-3100
1007 Market Street
Wilmington, DE 19898

Frederic L. Wood
Thompson Hine LLP
1920 N Street, N.W., Suite 800
Washington, DC 20036-1600

Richard E. Weicher
Michael E. Roper
The Burlington Northern and Santa Fe Railway Company
2500 Lou Menk Drive, 3rd Floor
Fort Worth, TX 76131-0039

Donald F. Griffin
Brotherhood of Maintenance of Way Employees
10 G Street, N.E.
Suite 460
Washington, D.C. 20002

Marc A. Fleming
President, Brotherhood of Maintenance of Way Employees
26555 Evergreen Rd. Suite 200
Southfield, MI 48076

Gordon P. MacDougall
1025 Connecticut Ave., N.W.
Washington, D.C. 20036

James W. Lowe
Nicole T. Berry
Wilmer, Cutler & Pickering
2445 M Street, N.W.
Washington, D.C. 20037

William W. Whitehurst, Jr.
W.W. Whitehurst & Associates, Inc.
12421 Happy Hollow Rd.
Cockeysville, MD 21030

John Jay Rosacker
Assistant Bureau Chief, Transportation Planning
Kansas Department of Transportation
Attorney at Law
217 SE 4th St.
Topeka, KS 66603

Peter J. Shudtz
CSX Corporation
1331 Pennsylvania Ave., N.W.
Suite 560
Washington, D.C. 20004

Paul R. Hitchcock
Mark S. Hoffman
Ellen M. Fitzsimmons
CSX Transportation, Inc.
500 Water Street
Jacksonville, FL 32202

G. Paul Moates
Paul A. Hemmersbaugh
Sidley Austin Brown & Wood LLP
1501 K Street, N.W.
Washington, D.C. 20005

Marcella Szel
Paul Guthrie
Canadian Pacific Railway Co.
401 9th Ave., S.W.
Gulf Canada Square, Suite 500
Calgary, Alberta T2P 4Z4 Canada

Terence M. Hynes
Gabriel S. Meyer
Sidley Austin Brown & Wood LLP
1501 K Street, N.W.
Washington, D.C. 20005

Thomas E. Schick
Counsel, Distribution Team
American Chemistry Council
Commonwealth Tower
1300 Wilson Boulevard
Arlington, VA 22209

Scott N. Stone
Patton Boggs LLP
2550 M Street, N.W.
Washington, D.C. 20037

Peter Gatti
The National Industrial Transportation League
1700 North Moore St.
Suite 1900
Arlington, VA 22209

Nicholas J. DiMichael
Thompson Hine LLP
1920 N Street, N.W.
Suite 800
Washington, D.C. 20036

James A. Squires
George A. Aspatore
John E. Edwards
Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510

Paul Samuel Smith
U.S. Department of Transportation
Room 4102 C-30
400 Seventh St., S.W.
Washington, D.C. 20590

Joseph R. Pomponio
Federal Railroad Administration
RCC-20
400 Seventh St., S.W.
Washington, D.C. 20590

Barbara C. Robinson
Deputy Administrator, Transportation and Marketing
Agricultural Marketing Service
U.S. Department of Agriculture
1400 Independence Ave., S.W.
Room 2510 South Building
Washington, D.C. 20250

Adrian L. Steel, Jr.
Jeffrey Moreland
Richard E. Weicher
Erika Z. Jones
Robert M. Jenkins III
Sidney L. Strickland, Jr.
Mayer, Brown, Rowe & Maw
1909 K Street, N.W.
Washington, DC 20006

J. Michael Hemmer
Lawrence E. Wzorek
Louise A. Rinn
Law Department
Union Pacific Railroad Company
1416 Dodge Street
Omaha, NE 68179

Carolyn F. Corwin
David L. Meyer
Michael L. Rosenthal
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, DC 20004-2401

Mitchell M. Kraus, General Counsel
Christopher Tully, Assistant General Counsel
Transportation Communications International Union
3 Research Place
Rockville, MD 20850

Sarah K. Watson