

August 4, 2003

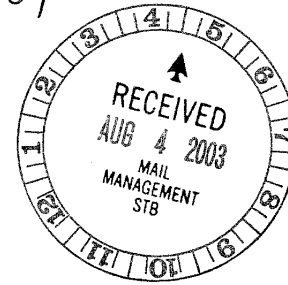
By Messenger

Ho. Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street NW
Washington, DC 20423-0001

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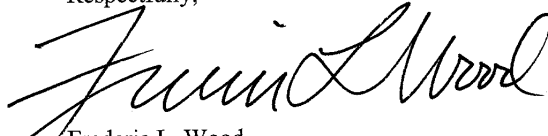
RE: Finance Docket No. 34342, *Kansas City Southern - Control - Kansas City Southern Ry. Co. et al*

Dear Mr. Williams:

Enclosed for filing with the Board, as required by Decision No. 2 in the above proceeding, are an original and 25 copies of the Comments and Statement in Support on behalf of The National Industrial Transportation League, identified as NITL-3. Also enclosed is an IBM-compatible floppy diskette with a copy of the enclosure, including the attachment.

Please note that the agreement in Attachment 1 to NITL-3 is a copy of the agreement with signatures transmitted by telecopy. Because of unexpected delays in receiving the executed originals of the agreement, we were unable to attach a copy of the signed original. We will submit 25 copies of the signed original, and serve copies on all parties of record, as soon as we receive the signed original.

Respectfully,


Frederic L. Wood

Enclosures

cc: (with enclosures)
Parties of Record

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Rick.Wood@ThompsonHine.com Phone 202.263.4114 Fax 202.331.8330

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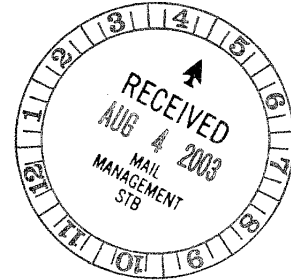
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NITL-3

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 34342

*Kansas City Southern — Control —
The Kansas City Southern Ry. Co. et al*



COMMENTS AND STATEMENT OF SUPPORT

on behalf of

THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

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Nicholas J. DiMichael
Frederic L. Wood
THOMPSON HINE LLP
1920 N Street N.W.
Suite 800
Washington, D.C. 20036-1600

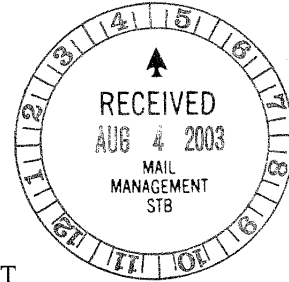
*Attorneys for The National Industrial
Transportation League*

Dated: August 4, 2003

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 34342

*Kansas City Southern — Control —
The Kansas City Southern Ry. Co. et al*



COMMENTS AND STATEMENT OF SUPPORT
on behalf of
THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

The National Industrial Transportation League ("NITL or the "League") submits these comments and statement in support of the approval of the application by Kansas City Southern ("KCS") for common control of Kansas City Southern Ry. Co. ("KCSR") and The Texas Mexican Ry. Co. ("Tex Mex").

IDENTITY AND INTEREST OF THE LEAGUE

The National Industrial Transportation League is an association of companies that conduct industrial and/or commercial enterprises throughout the United States and internationally, and that are concerned with the transportation of goods in domestic and international commerce. The League has approximately 700 separate company members who are involved with all modes of transportation, including rail transportation. The League's members conduct industrial and commercial enterprises throughout the country and internationally and ship all types of goods. NITL members ship substantial volumes of freight via railroad and regularly employ rail carriers. Accordingly, the League has a direct and immediate interest in this proceeding, which affects rail service in the United States and between the United States and the Republic of Mexico.

BACKGROUND

On May 14, 2003, Kansas City Southern (“KCS”) filed an application with the Board for approval under 49 U.S.C.A. §§ 11323 – 11325 of its proposed acquisition of control of The Texas Mexican Ry. Co. (“Tex Mex”). In a related transaction not subject to approval by the Board, KCS is also seeking to acquire control of TFM, S.A. de C.V., a rail carrier with extensive operations within Mexico. TFM and Tex Mex operate over rail facilities located on their respective sides of the international border crossing located at Laredo, TX, including the rail bridge that crosses the international border.

In Decision No. 2, the Board accepted the application, and found that the KCS acquisition of Tex Mex should be treated as a “minor transaction” under 49 C.F.R. § 1180.2(c). However, the Board noted the “broader transaction” included the TFM acquisition. Therefore, it required the Applicants to supplement their application “to reflect the implications of the broader transaction for competition within the U.S.” and to include the information specified in 49 C.F.R. § 1180.1(k)(1) and § 1180.11.¹

Since the proposed acquisition of control of Tex Mex and the related transaction with TFM were announced, KCS and the League have engaged in discussions regarding the terms of possible NITL support for the Tex Mex transaction and its approval by the Board. The League is pleased to advise the Board that, as a result of those discussions, it has been able to enter into an agreement with KCS in which, in return for the League’s support, KCS has agreed to provide certain protections for League members and other rail shippers. The agreement is attached to this statement for incorporation into the record of this proceeding. *See* Attachment 1. The League is requesting that the agreement be imposed as a condition on the Board’s approval of the

¹ Ordinarily, those requirements are only applicable to “major transactions” between two or more Class I rail carriers.

transaction. The commitments made by the Applicants in this agreement provide additional reasons for its approval by the Board.

**THE TRANSACTION SHOULD BE APPROVED
WITH THE NITL-KCS AGREEMENT IMPOSED AS A CONDITION**

In their application, KCS and Tex Mex state that the transaction should be considered a “minor transaction” within the meaning of the Board’s Railroad Consolidation Procedures. Although KCS is considered a Class I rail carrier, Tex Mex is not. Therefore, this transaction cannot be considered a “major transaction” within the meaning of 49 U.S.C.A. § 11324(b) and 11325(a)(1) and 49 C.F.R. § 1180.2(a). Under the provisions of 49 U.S.C.A. § 11324(d), an application for approval of minor control transaction such as this one must be granted unless the Board finds that: (1) as a result of the transaction, there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States; and (2) the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs. *Canadian National Ry. Co. et al. — Control — Wisconsin Central Transportation Corp., et al.* __ S.T.B. __ (Fin. Docket No. 34000, served Sept. 7, 2001), slip op. at 10 (“*CN/WC*”).

In Decision No. 2, the Board has accepted the application as one for approval of a minor transaction. The additional requirements in Decision No. 2 for supplementing the application do not change its status.² On the basis of all of the facts and circumstances of record, including the agreement between KCS and the League, which addresses areas that might raise competitive concerns, the League concurs in the characterization by the Applicants of their transaction as a minor transaction, and urges the Board to continue to treat the Application on that basis.

**ANY ANTI-COMPETITIVE EFFECTS OF THE TRANSACTION
WILL BE MITIGATED BY THE AGREEMENT WITH THE LEAGUE**

The agreement between KCS and the League contains provisions that will protect League members and other rail shippers from anti-competitive effects, if any should arise as a result of this transaction. Specifically, the agreement provides for protection of rates and services through existing Tex Mex interchanges with any rail carrier. The agreement also addresses some of the transnational effects of the broader transaction that were raised in Decision No. 2. It provides for a means of monitoring the service levels over the important link between the KCS and Tex Mex systems between Beaumont and Laredo, TX. The agreement also provides for prompt resolution of any disputes with respect to the terms of the agreement by arbitration or similar process. These provisions offer significant contributions to the public interest by meeting major concerns of the rail customers that might be affected by the transaction. With the commitments from KCS in the agreement, the League is pleased to support approval of the proposed transaction by the Board.

As permitted by Section 1 of the agreement, the League also requests the Board to exercise its authority under 49 U.S.C.A. § 11324(c) to impose the agreement as a condition of its approval of the transaction. The League recognizes that in similar circumstances in *CN/WC*, the Board declined to impose an agreement between CN and the League as a condition, stating that “[t]here is no evidence that the terms of the NITL/CN agreement must be imposed as a condition to remedy adverse consequences of the control transaction. Consequently, we will not impose the terms as a condition.” *CN/WC* at 12. In this proceeding, as indicated by the additional requirements imposed by Decision No. 2, there may well be issues raised about the competitive

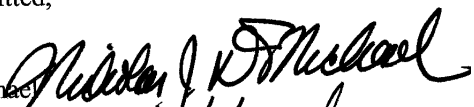
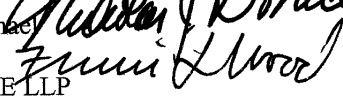
² Pending before the Board since July 14, 2003, is a petition by Canadian National Ry. Co. (“CN”) to reopen Decision No. 2 and to reject the application on the grounds that the Applicants have not complied with that Decision’s requirements. The Board has not yet acted on the CN petition.

effects of the broader transaction. The terms of the NITL-KCS agreement may address some of these issues, and would thus be appropriate for imposition as a condition. However, if the agreement is not imposed as a condition, it is binding on the parties to the agreement and its beneficiaries and can be enforced accordingly.

CONCLUSION

For all of the above reasons, the League respectfully urges the Board to find that the application should be approved, subject to the condition that the agreement between the League and KCS be imposed.

Respectfully submitted,

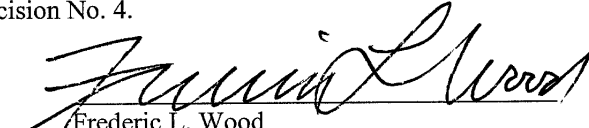

Nicholas J. DiMichael

Frederic L. Wood
THOMPSON HINE LLP
1920 N Street N.W.
Suite 800
Washington, D.C. 20036-1600

*Attorneys for The National Industrial
Transportation League*

Dated: August 4, 2003

CERTIFICATE OF SERVICE

I hereby certify that I have on this 4th day of August, 2003, served a copy of the foregoing COMMENTS AND STATEMENT OF SUPPORT ON BEHALF OF THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE on all parties of record, by first class mail, postage pre-paid, in accordance with the Rules of Practice and Decision No. 4.


Frederic L. Wood

ATTACHMENT 1

Agreement between The National Industrial Transportation League
And
Kansas City Southern

This Agreement is made this 1st day of August 2003 between The National Industrial Transportation League ("League"), and Kansas City Southern and its affiliated rail carriers ("KCS").

Whereas,

KCS and The Texas Mexican Railway Company ("Tex Mex") (together, "Rail Carriers"), have filed an Application before the Surface Transportation Board ("STB") seeking the STB's approval of the acquisition of control of Tex Mex by KCS ("Transaction");

KCS has agreed, subject to various governmental and shareholder approvals, to acquire control of TFM, S.A. de C.V. ("TFM"), a rail carrier operating entirely in Mexico, and upon such approval, KCS will change its name to NAFTA Rail;

The League and KCS desire to record the terms on which the League, having reviewed the Application, has agreed to support the Transaction, and

The League and KCS desire to record the promises given by KCS to the League for the benefit of the members of the shipping public in exchange for the League's support,

Now, therefore, in consideration of the mutual covenants contained herein, KCS and the League agree as follows

1) **League Support.** The League agrees to support STB approval of the Transaction. Within a reasonable time after the execution of this Agreement and no later than August 4, 2003, the League will submit a statement to the STB supporting approval of the Transaction by the STB. Either the Rail Carriers or the League may request to have this Agreement made a condition of the Transaction. The League will neither support nor oppose the imposition of any other conditions

2) **Interchange Protection**

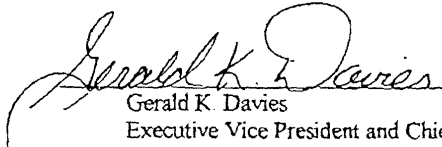
a) Subject to the provisions of this Section 2, at the request of a shipper or connecting railroad on behalf of a shipper, KCS and/or Tex Mex will establish and maintain commercially reasonable contract or common carrier rates and charges over any existing interchange with that railroad. Such rates and charges shall be either through rates and charges or, if requested by a shipper or connecting railroad on behalf of a shipper to support the commercial terms of trade where the title to the goods being shipped transfers at the border, rates and charges for service within the U.S. to or from the international border

between Mexico and the U S or within Mexico to or from the international border between Mexico and the U S.

- b) Where rates or rate factors exist in agreements between KCS or Tex Mex on the one hand and other U S. carriers on the other, those agreements will be honored to their normal expiration date, and when they expire, if requested by the involved railroad, KCS or NAFTA Rail will negotiate in good faith to establish commercially reasonable rates going forward.
- c) Any dispute regarding rates and charges described in paragraph (a) or (b) will be resolved by arbitration promptly following the selection of an arbitrator under the arbitration procedure established in Section 6 of this agreement. In no event will the time for completing arbitration of any dispute under this section exceed 90 days after selection of the arbitrator. Such arbitration procedures shall only apply to disputes regarding rates and charges applicable in whole or in part within the U S.
- 3) **Confidentiality of Shipper Information.** If control over TFM is achieved by KCS, NAFTA Rail will ensure that any confidential commercial information about a shipper's move, including transportation services and rates, will not be disclosed to other U.S. railroads not within the NAFTA Rail corporate family.
- 4) **Service Measurements.** KCS and NAFTA Rail will maintain and strive to improve the service levels between Beaumont and Laredo, TX. With the understanding that about 70% of that route involves the use of trackage rights over the Union Pacific Railroad Company ("UP"), KCS and NAFTA Rail will report, based upon agreed specific service measurements, to the Surface Transportation Board ("STB") on the service level provided for each quarter for the past two years and for each quarter for a period of three years from the effective date of the Transaction. If service falls below the levels in existence at the time of this agreement, KCS and NAFTA Rail will provide the STB with a corrective action plan which may include a request for assistance if it were determined that the UP was responsible for the service problems.
- 5) **Applicability of this Agreement** This Agreement was negotiated on the expectation that KCS will consummate the acquisition of control of Tex Mex and TFM. Other than each party's obligations under Section 1 hereof, the rights and obligations set forth in this Agreement are contingent upon and will become effective only on the date of such consummation. This Agreement will have no continuing force or effect if the STB does not authorize or KCS does not consummate the Transaction. If KCS does not consummate the acquisition of TFM, then any provisions of this Agreement relating to TFM will not go into effect. However, if KCS does consummate the Transaction, then any individual Shipper that uses the Rail Carriers and/or any NAFTA Rail carrier affected by any of the provisions of this Agreement shall be a third-party beneficiary of this Agreement. No party other than such a Shipper, the League, or the Rail Carriers shall be a beneficiary of this Agreement.

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- 6) **Dispute Resolution.** If a dispute arises under this Agreement, the exclusive means by which any party to or beneficiary of this Agreement may seek to enforce the terms of this Agreement shall be through arbitration as provided in any agreement between a Shipper and the Rail Carriers or, if no such provision has been made, under the Commercial Arbitration Rules administered by the American Arbitration Association. Any disputes arising under this Agreement with respect to matters within Mexico, including disputes involving rates or rate factors in Mexico, will be resolved in accordance with the requirements established by the Government of Mexico.
- 7) **Governing Law.** This agreement will be governed by the law of the District of Columbia, without regard to rules pertaining to choice of law.


Gerald K. Davies
Executive Vice President and Chief
Operating Officer
Kansas City Southern


Peter Gatti,
Acting President
The National Industrial
Transportation League