

408817

SIDLEY AUSTIN BROWN & WOOD LLP

BEIJING
BRUSSELS
CHICAGO
DALLAS
GENEVA
HONG KONG
LONDON

1501 K STREET, N.W.
WASHINGTON, D.C. 20005
TELEPHONE 202 736 8000
FACSIMILE 202 736 8711
www.sidley.com
FOUNDED 1866

LOS ANGELES
NEW YORK
SAN FRANCISCO
SHANGHAI
SINGAPORE
TOKYO
WASHINGTON, D.C.

WRITER'S DIRECT NUMBER
(202) 736-8175

WRITER'S E-MAIL ADDRESS
pmoates@sidley.com

September 2, 2003

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



**Re: The 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 Mr. Williams:

Enclosed for filing in the above-referenced docket are an original and 25 copies of "CSX Corporation's and CSX Transportation, Inc.'s Response to Comments and Requests for Conditions." Also enclosed is a diskette containing an electronic copy of the document.

Please date-stamp the two extra copies and return them to the courier. If you have any questions concerning this, please contact one of the undersigned.

Sincerely,

A handwritten signature in black ink, appearing to read "Paul A. Hemmersbaugh".

G. Paul Moates
Paul A. Hemmersbaugh

ENTERED
Office of Proceedings

SEP 02 2003

Part of
Public Report

SIDLEY AUSTIN BROWN & WOOD LLP IS A DELAWARE LIMITED LIABILITY PARTNERSHIP PRACTICING IN AFFILIATION WITH OTHER SIDLEY AUSTIN BROWN & WOOD PARTNERSHIPS

**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**



SEP 02 2003
Part of
Public Record

**CSX CORPORATION'S AND CSX TRANSPORTATION, INC.'S RESPONSE TO
COMMENTS AND REQUESTS FOR CONDITIONS**

CSX Transportation, Inc. ("CSXT") and CSX Corporation (collectively, "CSX") hereby submit their response to other parties' comments and requests for conditions on the Railroad Control Application of Kansas City Southern.¹ As CSX explained in its opening Comments, its primary interest in the proposed combination is that the principal rail gateway between the United States and Mexico – the Laredo Gateway – be kept open on fair, non-discriminatory and commercially reasonable terms in the event that the Board authorizes the combination of Kansas City Southern Railway ("KCS") and The Texas Mexican Railway

¹ CSX Corporation is the parent company of several subsidiaries that provide freight transportation and related services in North America and around the world. The core business unit of CSX is CSXT, which operates the largest rail network in the Eastern United States, covering more than 23,000 miles in 23 states, the District of Columbia and two provinces of Canada. One of CSXT's affiliates, CSX Intermodal, Inc. ("CSXI"), is the nation's only transcontinental intermodal transportation service company, providing, among other things, multimodal movement of containers and highway trailers across the United States and into key markets in Canada and Mexico.

Company (“Tex Mex”), particularly with the possible incorporation of TFM S.A. de C.V. (“TFM”) to the combined “NAFTA Railway” system.² In order to preserve rail freight competition between the United States and Mexico through the critical Laredo Gateway, CSXT renews its request that the Board impose a condition on any approval of the proposed transaction, requiring Applicants to fulfill certain commitments they have made in this proceeding regarding the Laredo Gateway and related matters. *See* Comments of CSX Corporation at 5-7 (August 4, 2003).

Notwithstanding Recent Developments, The Board Should Impose a Condition Requiring Applicants to Honor Their Broader Commitment to Keep the Laredo Gateway Open on Commercially Reasonable Terms.

The National Industrial Transportation League (“NITL”) announced in its comments that it had reached an agreement with Applicants that addressed its concerns regarding the proposed combination, and allowed the NITL to support the Application. *See Comments and Statement of Support of The National Industrial Transportation League*, NITL-3 (Aug. 4, 2003). CSX commends the Applicants and the NITL on their successful negotiations, and the resulting agreement. Based on CSX’s review of the NITL-KCS Agreement (“Agreement”) and subsequent correspondence between the parties, however, CSX has determined that the Agreement does not fully address the potential effect of the proposed transaction (particularly the full “NAFTA Rail” transaction, whereby the new entity would control KCS, Tex Mex, and TFM) on competition for rail traffic to and from Mexico through the Laredo Gateway. *See, e.g.*, Letter from Nicholas J. DeMichael and William A. Mullins to David L. Meyer (August 18, 2003), NITL-4/KCS-17 (indicating, *inter alia*, that the Agreement would not require NAFTA

² *See* Comments of CSX Corporation and CSX Transportation, Inc. (Aug. 4, 2003) (CSX-2), STB Finance Docket No. 34342.

Rail to maintain commercially reasonable rates for traffic interchanged between TFM and UP at the Laredo Gateway). Nor does the NITL Agreement address all of the commitments Applicants have made in this proceeding concerning the Laredo Gateway. Therefore, CSX renews its request that, if the Board approves this transaction, it impose an express condition requiring Applicants to fulfill their broader commitments regarding the Laredo Gateway. Such a condition, in combination with adequate compliance monitoring and oversight, would help to ensure the maintenance of vigorous competition for rail freight traffic between the United States and important commercial locations in Mexico.

CSXT is aware that recent actions in Mexico have created some doubt as to whether Applicants will succeed in acquiring control of TFM, and perhaps even whether KCS will ultimately retain its controlling interest in Tex Mex. *See, e.g.*, KCS Press Release (August 21, 2003) (describing Grupo TMM shareholders' vote disapproving sale of TFM to KCS). Applicant KCS, however, has clearly and repeatedly expressed its continuing commitment to completing the full proposed transaction, including the acquisition of a controlling interest in TFM. *See id.* at 1 ("KCS remains committed to this transaction as it was agreed to under the acquisition agreements . . . KCS has notified TMM of its intent to move forward with the acquisition agreement and advised them of its intent to exercise all legal and administrative means available to protect its rights under the acquisition agreements. We believe the transaction agreements as agreed to by both parties are still in force and still binding upon the parties.").

As KCS' statements suggest, whether or not it will ultimately obtain control of TFM remains to be determined, just as it was when KCS filed its Application. Equally important, Applicants have not modified or amended their Application following the TMM

shareholder vote, and the full Application (including the proposed acquisition of control of TFM and control of the Laredo Bridge and Laredo Gateway) remains before the Board for its consideration. Because KCS is committed to pursuing the full NAFTA Rail transaction, and has not modified its Application to exclude TFM, it is essential that the Board address the entire set of transactions proposed in the Application.³

As CSXT noted in its Opening Comments, KCS has candidly recognized the importance of maintaining effective rail transportation competition through the Laredo Gateway, and has undertaken commitments designed to protect and preserve such competition. Acknowledging that “all affected parties are interested in keeping the Laredo Gateway open on commercially reasonable terms,” KCS has committed that, if the Board approves the proposed control transaction, the new combined entity will maintain such an open gateway at Laredo. *See* William Mullins Letter to David Meyer at 2 (July 21, 2003) (“Keeping the Laredo Gateway Open”); V.S. Gerald Davies at 15, KCS Supplement to Application (June 23, 2003) (“To alleviate any concerns by shippers that KCS intends to quote rates to the Laredo gateway or provide service only to or from the Laredo gateway, KCS commits that it will keep the Laredo gateway open on commercially reasonable terms.”). KCS has further committed to “continue to work with UP and BNSF” to provide reasonable interchange conditions (including cooperation on pre-blocking rail cars, improving automated customs pre-clearance procedures, supplying cars for shipments, accommodating run-through service, and promptly quoting rates) with both carriers for rail traffic travelling to and from Mexico. *See* V.S. Gerald Davies, *id.* at 14-16. KCS has also committed that it will honor all existing marketing and pricing agreements involving

³ If the Board approves the full NAFTA Rail transaction, that approval is merely permissive, not mandatory. Thus, if the Board approves the proposed combination, Applicants would retain the discretion not to consummate the transaction.

Tex Mex and TFM. *Id.* at 15. Finally, KCS has promised that “all carriers will be treated fairly at the Laredo Bridge,” with respect to dispatching and operating practices. *Id.* at 15-16.

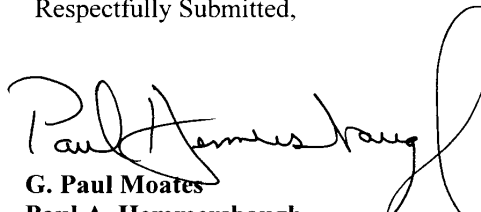
CSXT continues to believe that, if the foregoing commitments are objectively implemented and honored in good faith, they should go a long way toward preserving competition for rail traffic to and from Mexico through the Laredo Gateway. There remain, however, significant incentives for Applicants to disregard or fail to fulfill some of these commitments fully – and thereby diminish competition – after the consummation of the proposed transactions. Therefore, in order to ensure that Applicants adhere to those commitments and preserve adequate rail competition, CSX reiterates and renews its request that the Board impose a condition requiring Applicants to meet the commitments undertaken in this proceeding.

Specifically, CSX requests that the Board impose a condition that would expressly require Applicants to meet the commitments they have undertaken with respect to the Laredo Gateway (*see* V.S. Davies at 14-16, KCS Supplement; Mullins Letter to Meyer (July 21, 2003) (reiterating those commitments)).⁴ In addition, CSX requests that the Board impose oversight and monitoring of Applicants’ compliance for an appropriate period. Such a condition would be consistent with the Board’s recent practice of holding control applicants to their commitments by

⁴ In summary, using KCS’ own language, the four principal commitments (each of whose implementation would obviously require a number of related actions by Applicants) are: (i) to “Keep the Laredo Gateway open on commercially reasonable terms”; (ii) to “Treat[]” all carriers “fairly at the Laredo Bridge”; (iii) to “Continue to Work with UP and BNSF . . . to provide reasonable interchange and operating conditions” for those carriers; and (iv) to “Honor all existing Tex Mex and TFM agreements” for their full term. *See* Supplement, V.S. Grimm at 14-16.

imposing them as a condition of the Board's approval, and requiring a reasonable period of monitoring and oversight to ensure Applicants' compliance with the conditions.⁵

Respectfully Submitted,



Peter J. Shultz
CSX Corporation
1331 Pennsylvania Avenue, NW
Suite 560
Washington, D.C 20004

G. Paul Moates
Paul A. Hemmersbaugh
SIDLEY AUSTIN BROWN & WOOD, LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Mark S. Hoffmann
Paul R. Hitchcock
CSX Transportation, Inc.
500 Water Street
Jacksonville, Florida 32202
(904) 359-1192

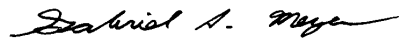
Counsel to CSX Corporation and CSX Transportation, Inc.

Dated: September 2, 2003

⁵ See, e.g., Decision No. 37, Slip Op. at 39-40, *Canadian National Railway Company et al – Control – Illinois Central Railroad Company, et al*, STB F.D. No. 33556 (served May 25, 1999) (requiring applicants to adhere to representations and commitments made during the control proceeding and imposing five-year oversight period); see also, Decision No. 10, Slip Op. at 19-21, *Canadian National Railway Company et al – Control – Wisconsin Central Transportation Co. et al*, STB F.D. No. 34000 (served Sept. 7, 2001) (requiring monitoring of operations and applicants' fulfillment of commitments in a minor transaction).

CERTIFICATE OF SERVICE

I hereby certify that, on this 2nd day of September, 2003, I caused the foregoing “CSX Corporation’s and CSX Transportation, Inc.’s Response to Comments and Requests for Conditions,” to be served by first class mail, or more expeditious method, upon all parties of record.

A handwritten signature in cursive script, reading "Gabriel S. Meyer", is written above a horizontal line.

Gabriel S. Meyer