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RICHARD A. ALLEN



September 11, 2003

BY HAND

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

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Re: Kansas City Southern—The Kansas City Southern Ry. Co., Gateway Eastern Ry. Co., and The Texas Mexican Ry. Co., Finance Docket No. 34342

Dear Secretary Williams:

I represent TFM, S.A. de C.V. ("TFM"). Pursuant to Decision No. 7 (served September 8, 2003), I am writing in response to the letter to you ("Sippel Letter") dated September 5, 2003 from William C. Sippel, attorney for Thomas F. Powers, Jr., Trustee of the voting trust ("Voting Trust") established under the Voting Trust Agreement that is Exhibit 2A to the Railroad Control Application filed in this proceeding on May 13, 2003 by Kansas City Southern ("KCS") and the Texas Mexican Railway Company ("Tex Mex"). In his letter, counsel for the Trustee requests that the Board "provide such authority, direction or guidance as the Board deems appropriate" regarding the intended repurchase by TFM of the shares of Mexrail, Inc. ("Mexrail") held in the Voting Trust.

TFM submits that there is no reason why the contemplated repurchase of Mexrail shares by TFM should not proceed promptly and respectfully requests that the Board so inform the Trustee. As discussed below, the repurchase will simply restore the *status quo ante* and presents no regulatory issues that might be of concern to the Board.

Background

As the Board knows, TFM is a party to the Stock Purchase Agreement dated as of April 20, 2003 by and among TFM, KCS, and Grupo TMM, S.A. ("TMM"), which is attached as Exhibit 2 to the Railroad Control Application. The Stock Purchase Agreement contemplates, among other things, a transaction in which TFM would sell to KCS 51% of the shares of Mexrail. Mexrail owns 100% of the shares of Tex Mex and, at the time the Stock Purchase Agreement was executed, was a wholly-owned subsidiary of TFM. It is KCS's

Hon. Vernon Williams

September 11, 2003

Page 2

acquisition of the common control of Tex Mex along with the two other rail carriers KCS already controls, the Kansas City Southern Railway Company and Gateway Eastern Railway Company, that is the subject of this proceeding.

Pursuant to the Stock Purchase Agreement, on May 9, 2003 the parties consummated the sale of 51 % of the shares of Mexrail to KCS, and the shares were deposited in the Voting Trust.

An integral feature of the Stock Purchase Agreement is TFM's retention of the right to repurchase the Mexrail shares sold to KCS. As set forth in Article VII of the Stock Purchase Agreement, TFM's repurchase right is "unconditional and may be exercised in the sole discretion of TFM by written notice to KCS given by the Chairman of TFM and without any other corporate approvals of TFM or [TMM]." Section 7.1(a), which describes the circumstances attendant to the closing of such a repurchase, provides, among other things, that the Repurchase Closing shall take place "[s]ubject to any STB approval requirements," and that at the Repurchase Closing, TFM shall pay the purchase price for the repurchased shares "subject to any STB orders or directions." Further, at the Repurchase Closing KCS is required to "deliver to TFM stock certificates representing the Transferred Shares endorsed in blank or accompanied by duly executed assignment documents" or, if the Transferred Shares are being held in the Voting Trust, "deliver to TFM a certificate certifying that KCS has given the Trustee irrevocable instructions to deliver to TFM stock certificates representing the transferred Shares endorsed in blank or accompanied by duly executed assignment documents."

The Voting Trust Agreement, in turn, requires, in Paragraph 8(a), that the Trustee "take all actions reasonably requested by KCS, including, without limitation, exercising all voting rights in respect of Trust Stock in favor of any proposal to or action necessary or desirable to effect, or consistent with the effectuation of, or with respect to, any proposed sale or other disposition of the whole or any part of the Trust Stock by KCS that is otherwise permitted pursuant to this Paragraph 8 or the Stock Purchase Agreement."

In a letter dated August 27, 2003 from the Chairman of TFM to the Chairman of KCS, TFM notified KCS that TFM was exercising its repurchase right. On the same day, the Chairman of TFM wrote to the Trustee to notify him of the repurchase as well. *See* Sippel Letter, Exh. B.

The Trustee responded to TFM's letter in a letter dated August 29, 2003, indicating that he was "prepared to take all such actions as are required of the Trustee under [Paragraph 8(a) of the Voting Trust Agreement] and permitted by law," but that, to date, the Trustee had not received any request from KCS to take any action. Further, the Trustee said that, in light of certain advice of counsel, even if the Trustee received such a request from KCS he would

Hon. Vernon Williams

September 11, 2003

Page 3

“take no action to facilitate any such divestiture or disposition of Trust Stock until TFM or KCS obtained from the STB such authority, direction or guidance as the STB deems appropriate pursuant to its asserted oversight authority.” Sippel Letter, Exh. C.

In its filing with the Board on September 2, 2003, KCS-18A/TM-17A at 4-5, KCS described TFM’s exercise of its right to repurchase the Mexrail shares and stated that KCS “will comply with the TFM notice in accordance with the terms of the Mexrail Stock Purchase Agreement.” In a letter dated September 3, 2003 from KCS’s Executive Vice President and Chief Financial Officer, Ronald G. Russ, to the Trustee, KCS similarly advised the Trustee that “KCS intends to fully comply with the terms of the Mexrail Stock Purchase Agreement,” and, accordingly, KCS directed the Trustee “following receipt of an appropriate STB order (if required) and receipt of funds called for under the [Stock Purchase Agreement] . . . to deliver to TFM at the Repurchase Closing stock certificates representing the Transferred Shares endorsed in blank or accompanied by duly executed assignment documents. These instructions are irrevocable.” Sippel Letter, Exh. D.

Thereafter, on September 5, 2003, counsel for the Trustee wrote you the letter to which TFM responds here, seeking the Board’s guidance regarding the repurchase.

Discussion

TFM believes that, under the circumstances of this case, there is no basis for the Board to prevent the consummation of TFM’s repurchase of Mexrail shares pursuant to the plain terms of a contract agreed to by TFM and KCS, with which KCS has unequivocally stated its intention to comply.

Although in other cases the Board and its predecessor, the ICC, have asserted the right to oversee the divestiture of railroad stock held in voting trusts, even when (as in this case) the person acquiring the stock would not otherwise require Board authority for the acquisition, this case presents circumstances significantly different from those other cases. Most importantly, in all of those other cases, the purchaser of the trust stock could have been chosen by the owner of the trust stock or by the trustee; in none of them did the original owner of the stock have the contractual right to simply undo the sale and return the stock’s ownership to the *status quo ante*. In *Santa Fe Southern Pac. Corp.—Control—Southern Pac. Transp. Co.*, 2 I.C.C.2d 709 (1986), for example, the ICC concluded that its oversight of the divestiture of stock of the Southern Pacific Transportation Company, which had been held in a voting trust for two and a half years, was needed because both the owner of the stock and the trustee had discretion to choose the purchaser of the trust stock. See 2 I.C.C.2d at 834. In those circumstances, the ICC evidently concluded that the ability of the owner of the stock or the trustee to select the buyer of it presented regulatory concerns that would warrant agency oversight even if the selected purchaser’s acquisition would not otherwise require agency

Hon. Vernon Williams

September 11, 2003

Page 4

approval under the statute. Furthermore, in that case, the trust stock previously had been publicly owned and then held for a protracted period in the voting trust; accordingly, there was no way its subsequent divestiture could restore the *status quo ante*. See also *Union Pacific Corp., et al.—Request for Informal Opinion—Voting Trust Agreement*, Finance Docket No. 32619 (ICC, served Dec. 20, 1994).

Here, in contrast, as the Board recognized in Decision No. 7, the divestiture is a contractually agreed-to return to the *status quo ante*, and it permits no discretion on the part of the Trustee or KCS. TFM and TMM deliberately negotiated that repurchase right, to be exercisable unconditionally and at TFM's sole discretion. It was an essential element of TFM's agreement to sell the Mexrail shares to KCS in the first place, and it has been part of that agreement from the outset of this proceeding. There is no regulatory or other reason for preventing the repurchase from occurring and thereby depriving TFM of an essential benefit of its bargain with KCS.

Furthermore, this is not a situation in which Board oversight is needed because the divestiture might result in the sale of the Trust Stock to an entity that would require Board authority under 49 U.S.C. §11323 to acquire control of Tex Mex. As KCS itself has acknowledged (see KCS-3/TM-3 at 22, n.15), TFM owns no U.S. property and does not operate in the United States. Thus, TFM's re-acquisition of control of Tex Mex (through re-acquisition of the Mexrail stock in the Voting Trust) would not, on its own, be subject to STB approval or oversight. See 49 U.S.C. § 11323. Even assuming that the Board has jurisdiction to oversee a divestiture involving a transaction outside the scope of § 11323,¹ the fact that the resulting transaction would otherwise be non-jurisdictional means that it does not implicate the same regulatory concerns that would arise from a transaction that Congress chose to subject to STB jurisdiction under § 11323.

Finally, the Board in Decision No. 7 is correct that TFM's repurchase of the Mexrail stock would leave the parties in "exactly the same positions they were in prior to KCS's acquisition of a 51% interest in Mexrail." Indeed, that was the very purpose of the repurchase right for which TFM and TMM bargained — to permit TFM, at its option, to

¹ TFM respectfully submits that the Board's authority to oversee the divestiture of voting trust stock under the present circumstances is open to question. In Decision No. 7, the Board cites its decisions in the *Santa Fe Southern Pacific* and *Union Pacific* cases in support of its authority, but in those cases, as noted earlier, the owners of the trust stock and the trustees had discretion in selecting the buyer and there was also the potential that divestiture might have involved a transaction requiring approval under 49 U.S.C. § 11323. Where, as here, the divestiture certainly will not involve a transaction requiring approval under § 11323, involves no discretion on the part of the owner of the stock or the trustee and merely returns matters to the *status quo ante*, it is difficult to see the regulatory basis for Board oversight.

Hon. Vernon Williams

September 11, 2003

Page 5

restore the *status quo ante* with respect to ownership of Mexrail. As the Board also correctly noted, nothing has happened in the brief time that 51% of Mexrail's stock has been in the Voting Trust that would make restoration of the *status quo ante* a physical impossibility or that has significantly altered the pre-May 9, 2003 relative economic positions of KCS, TFM and Tex Mex. Nor would the restoration of the *status quo ante* significantly disrupt the market.² In sum, there is no operational or financial reason for the Board to take what would be the extraordinary step of nullifying TFM's bargained-for contractual right to repurchase the Mexrail stock.

In this regard, there is no warrant for the suggestion of the counsel for E.I. du Pont de Nemours and Company in a letter submitted to the Board yesterday that the Board should delay this matter, purportedly to give other parties more time to respond. DuPont's counsel states that "there is a dispute between KCS and Grupo TMM, S.A. over the carrying out of the agreements related to the larger transaction whereby KCS would acquire control of TFM," and suggests that the Board should give parties more time "to permit a proper evaluation of the requested divestiture of the Mexrail stock by the Trustee from the Voting Trust." There is no basis for this suggestion. Whatever dispute KCS may have with TMM regarding the shareholder rejection of the proposed KCS acquisition of TFM has no bearing on TFM's repurchase of the Mexrail shares. KCS has never disputed TFM's right to repurchase those shares; on the contrary, as noted above, it has expressly acknowledged that right. Furthermore, KCS has consistently stated in its filings in this proceeding that its proposed acquisition of TFM is a separate transaction from its acquisition of control of Mexrail and Tex Mex and that the Board has no jurisdiction to consider the KCS-TFM transaction. See, e.g., KCS-3/TM-3 at pp. 10, 21-22 and n.15, and 54 (Verified Statement of Michael R. Haverty); KCS-6/TM-6 at 7-14; KCS-10/TM-10 at 3 n.2.

² In this regard, KCS has very recently expressed concern to TFM that its repurchase of the Mexrail shares may violate covenants in certain of TFM's loan agreements. TFM intends to respond directly to KCS shortly, but simply notes here that there is no basis for those concerns.

ZUCKERT SCOUTT & RASENBERGER, L.L.P.

Hon. Vernon Williams
September 11, 2003
Page 6

For the foregoing reasons, TFM respectfully requests that the Board inform the Trustee that there is no reason for the Trustee not to transfer the Trust Stock to TFM, as KCS has directed him to do.

Sincerely,


Richard A. Allen

cc:
William C. Sippel, Esq.
William A. Mullins, Esq.
All parties of record in Finance Docket 34342