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September 30, 2003



BY HAND

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

ENTERED
Office of Proceedings

SEP 30 2003

Part of
Public Record

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

Dear Secretary Williams:

I have enclosed for filing in the above-captioned proceeding an original and 25 copies of Union Pacific Railroad Company's "Comments in Response to Decision No. 9" (UP-10), as well as a 3.5-inch disk containing the text of the document in a format compatible with WordPerfect 9.0.

I have also enclosed one extra copy of the document, which I would request that you please date-stamp and return to our messenger.

Thank you for your assistance.

Sincerely,

David L. Meyer

Attorney for Union Pacific
Railroad Company

Enclosures

cc: All Parties of Record

ENTERED
Office of Proceedings

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Part of
Public Record

UP-10

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



UNION PACIFIC'S COMMENTS IN RESPONSE TO DECISION NO. 9

In Decision No. 9, the Board invited comments on whether it should suspend the procedural schedule adopted in Decision No. 2 "pending a resolution of the uncertainties that now surround the KCS/TM application." Slip op. at 1, 6. In UP's view, the Board should suspend the procedural schedule unless it is prepared to approve the pending application with the conditions UP requested.

UP would not object were the Board to decide this case in accordance with the procedural schedule established in Decision No. 2. As KCS points out, it is continuing to pursue the acquisition of control of both Tex Mex and TFM, and the Board has authority to proceed to decision even when there is some uncertainty whether the underlying business transaction will be consummated.¹

¹ See KCS-18A/TM-17A, p. 5 & n.3 (suggesting that this proceeding continue "consistent with the timeframes set forth in Decision No. 2"); *Illinois Central Corp. & Illinois Central R.R. - Control - MidSouth Corp., MidSouth Rail Corp., MidLouisiana Rail Corp. & SouthRail Corp.*, ICC Finance Docket No. 31801 (ICC served Feb. 20, 1991), p. 3;

(footnote continued ...)

If the Board does proceed to decide this case, of course, it must analyze the transaction now pending before it. KCS has explained that it now hopes to acquire control of Tex Mex by enforcing its agreement with Grupo TMM to acquire control of TFM, which in turn would give it control of Tex Mex.² Under this proposal, there could be no doubt that the Board has jurisdiction to address the effects of the KCS-TFM transaction in the United States through imposition of conditions.³ The present record in this proceeding would permit the Board to decide this case and impose the conditions UP has proposed. The implementation of those conditions (*i.e.*, the negotiation of agreements to implement KCS's on-the-record commitments) could be deferred pending KCS's consummation of its acquisition of TFM.

On the other hand, UP understands that the Board has significant reservations about going forward at this time. If the Board concludes that it should not render a decision in light of pending uncertainties, it should hold this proceeding in abeyance so that the extensive record that has already been developed can be preserved. In UP's view, a sensible approach would be to suspend the schedule established in Decision No. 2 until such time as there is more certainty about whether, in what manner, and under what circumstances KCS would acquire control of Tex Mex. The Board could require Applicants to notify it (and

(... footnote continued from previous page)

see also Rio Grande Industries, Inc. – Purchase & Related Trackage Rights – Soo Line R.R. Line Between Kansas City, MO & Chicago, IL, 6 I.C.C.2d 854, 876-78 (1990).

² See, *e.g.*, Letter from William A. Mullins to Vernon A. Williams, Sept. 11, 2003, pp. 2-3 (acknowledging that, if TFM reacquires the Mexrail shares, "the means of taking control of Mexrail and Tex Mex is ultimately through KCS's acquisition of control of TFM"). TFM's repurchase of the KCS's Mexrail shares automatically terminated the KCS-Tex Mex Stock Purchase Agreement. See Agreement § 7.1(c) (Application (KCS-3/TM-3), p. 178).

³ See UP-7A at 14-34; UP-8 at 4-7; UP-9.

interested parties) when the present uncertainties have been resolved. The Board could also require Applicants to propose a schedule for completing the proceeding and supplementing the record to reflect the revised transaction to the extent necessary. Other parties could then comment on that proposal.

A third approach would be to terminate this proceeding entirely, requiring KCS to file a new application after the present uncertainties surrounding the transaction are resolved. While the Board might have the discretion to take that course, doing so would not be in the public interest. The Board has developed a substantial record in this case, much of which would likely prove relevant to the agency's consideration of any revised transaction. Requiring a completely new application and compiling an entirely new record would impose substantial burdens and costs on the Board and on other participants in this proceeding.

The Board plainly has authority to suspend the procedural schedule if it concludes that doing so is the best course. The Board's authority to manage its docket enables it to take steps to ensure that it can proceed to a decision efficiently and on a fully developed record, and in the past it has exercised that authority to suspend previously-adopted procedural schedules in light of intervening developments and new uncertainties. For example, in the *BN/Santa Fe* merger case, the ICC suspended the procedural schedule it had adopted when it accepted the application, due to uncertainties created by a competing bid for control of the Santa Fe. The ICC explained that postponing its consideration of the transaction proposed by BN was in the public interest because it would avoid a potentially "great waste of resources if we and the many other interested parties were to proceed with an analysis of this particularly large and significant transaction while negotiations are still pending and a contested shareholder vote is imminent." *Burlington Northern Inc. &*

Burlington Northern R.R. – Control & Merger – Santa Fe Pacific Corp. & Atchison, Topeka & Santa Fe Ry., ICC Finance Docket No. 32549 (ICC decisions served Dec. 15, 1994).

Similarly, in the *UP/CNW – Control* case, the ICC suspended the proceeding for several months (at the request of several parties, including KCS) in light of uncertainty “as to what events, if any, would put UPC in control of CNW,” and to allow time for a threshold evaluation of whether the Application presented a “transaction” properly before the ICC for consideration. *Union Pacific Corp., Union Pacific R.R., & Missouri Pacific R.R. – Control – Chicago & North Western Holdings Corp. & Chicago & North Western Transportation Co.*, 9 I.C.C.2d 939, 940, 946 (1993).⁴ When the ICC restarted the case it established a revised procedural schedule and required that applicants “supplement their application with evidence that will conform to the actual transaction we will be scrutinizing.” 9 I.C.C.2d at 953. Other cases are to the same effect.⁵

⁴ The decision suspending the procedural schedule was served May 28, 1993 in Finance Docket No. 32133.

⁵ For example, in *Kansas City Terminal Ry. & Atchison, Topeka & Santa Fe Ry. – Contract to Operate Exemption – In Kansas City, MO*, STB Finance Docket No. 32896 (STB served Nov. 20, 1996), the Board concluded that the “best course of action” was to hold the proceeding in abeyance pending the outcome of a court action in which KCS contended that the transaction could not proceed.

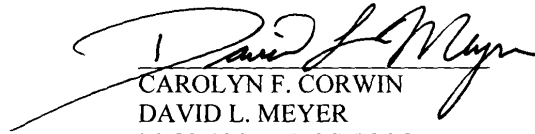
In the *Conrail* proceeding, where the Board established procedural schedules despite two competing bids for control of Conrail, it underscored that it would “continue to have the power to revise our handling of this matter as necessitated by changes in . . . circumstances.” *Norfolk Southern Corp. & Norfolk Southern Ry. – Control – Conrail Inc. & Consolidated Rail Corp.*, STB Finance Docket No. 33286 (STB served Jan. 30, 1997), p. 3; *CSX Corp. & CSX Transportation, Inc. – Control & Merger – Conrail Inc. & Consolidated Rail Corp.*, STB Finance Docket No. 33220 (STB served Jan. 30, 1997), p. 3.

Suspending the schedule here would not run afoul of the statutory deadline set forth in 49 U.S.C. § 11325(c), for at least two reasons. First, the Board's judgment that a suspension is necessary to permit it to conduct an orderly proceeding, to "compile a fully developed record and to render a thoroughly reasoned decision" would provide a sufficient basis for exempting this transaction from the statutory deadline under 49 U.S.C. § 10502, as the Board has done in prior cases, *see, e.g., Western Fuels Service Corp. v. Burlington Northern & Santa Fe Ry.*, STB Docket No. 41987 (STB served Feb. 11, 1997); *id.* (STB served July 28, 1997) ("on our own motion, we now extend the deadline indefinitely, reflecting the parties' earlier request for an exemption from the statutory deadline for resolution of this proceeding"); *Arbitration of Certain Disputes Subject to the Statutory Jurisdiction of the Surface Transportation Board*, STB Ex Parte No. 560 (STB served Sept. 2, 1997) ("issuing a blanket exemption from statutory deadlines for matters handled under arbitration ..., pursuant to our authority under 49 U.S.C. 10502").

Second, as the D.C. Circuit has observed, a long line of cases supports the Board's discretion to "defer actions mandated by statute ... where doing so is administratively necessary in order to realize the broader goals of the same statute." *Western Coal Traffic League v. STB*, 216 F.3d 1168, 1173 (D.C. Cir. 2000). Here, a suspension is a far preferable way to achieve the objective of the statute – prompt consideration of transactions properly presented for the Board's review – than the alternative of dismissing the application and requiring that an entirely new proceeding be commenced at a later time.

Respectfully submitted,

J. MICHAEL HEMMER
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A handwritten signature in dark ink, appearing to read "David L. Meyer", is written over the printed name of David L. Meyer.

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*Attorneys for Union Pacific Railroad
Company*

September 30, 2003

CERTIFICATE OF SERVICE

I, Ronald J. Baumgarten, Jr., hereby certify that on this 30th day of September, 2003, I served a copy of Union Pacific's Comments in Response to Decision No. 9 by hand on:

William A. Mullins
David C. Reeves
Baker & Miller PLLC
915 Fifteenth Street, NW
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Washington, DC 20005-2318

Richard H. Streeter
Barnes & Thornburg
750 Seventeenth Street, NW
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and by overnight mail on:

W. James Wochner
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and by first-class mail, postage prepaid, or by a more expeditious manner of delivery on all other parties of record in Finance Docket No. 34342.



Ronald J. Baumgarten, Jr.