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September 30, 2003



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

Re: *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 Secretary Williams:

Pursuant to Decision No. 9, I am enclosing herewith an original and 27 copies of the .
Comments of Kansas City Southern, The Kansas City Southern Railway Company, and Gateway
Eastern Railway Company. A copy of this document in WordPerfect format is enclosed on each
of the accompanying three diskettes. As can be seen on the Certificate of Service, a copy of this
filing has been served today upon all parties of record to this proceeding.

Please date-stamp the twenty-sixth and twenty-seventh copies of this letter and the
accompanying filing, and return them to the courier for our files.

Sincerely,



William A. Mullins

Enclosure

cc: Parties of Record

209022

KCS-20

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ENTERED
Office of Proceedings

Finance Docket No. 34342

SEP 30 2003
Office of
General Counsel

KANSAS CITY SOUTHERN

- CONTROL -



**THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
GATEWAY EASTERN RAILWAY COMPANY,
And
THE TEXAS MEXICAN RAILWAY COMPANY**

**COMMENTS OF KANSAS CITY SOUTHERN, THE KANSAS CITY SOUTHERN
RAILWAY COMPANY, AND GATEWAY EASTERN RAILWAY COMPANY**

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Company, and Gateway Eastern
Railway Company**

September 30, 2003

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 34342

KANSAS CITY SOUTHERN

- CONTROL -

**THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
GATEWAY EASTERN RAILWAY COMPANY,
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**COMMENTS OF KANSAS CITY SOUTHERN, THE KANSAS CITY SOUTHERN
RAILWAY COMPANY, AND GATEWAY EASTERN RAILWAY COMPANY**

Pursuant to the Surface Transportation Board's ("STB" or "Board") request in *Decision No. 9*¹ soliciting views on whether or not to continue the procedural schedule adopted in this proceeding, Kansas City Southern ("KCS" or "Applicant"), The Kansas City Southern Railway Company ("KCSR"), and Gateway Eastern Railway Company ("Gateway") provide the following comment. KCS believes that the Board should consider going forward with the Application in accordance with the existing procedural schedule. There is substantial precedent for moving forward with consideration of, and ultimate approval of, a merger or control transaction notwithstanding the fact that there are other external factors that may ultimately prevent consummation of the transaction. This Board can follow those precedents. Nonetheless, if the Board is inclined not to move forward at this time, there is also precedent for holding a

¹ *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, Decision No. 9 (STB served Sept. 23, 2003) ("Decision No. 9").

proceeding in abeyance until such time as it is appropriate to move forward. There is no precedent for dismissing or denying a merger or control application simply because there are external factors that may temporarily or permanently prevent the consummation of the proposed transaction.

BACKGROUND

On April 21, 2003, KCS and Grupo TMM, S.A. ("TMM"), along with certain TMM affiliates, reached a series of agreements that would result in KCS obtaining control of TFM, S.A. de C.V. ("TFM") and KCS changing its name to NAFTA Rail (the "KCS/TFM transaction"). The KCS/TFM transaction was subject to the approval of the Mexican Competition Commission ("MCC"), the Mexican Foreign Investment Commission ("FIC"), the U.S. Department of Justice ("DOJ"), and various other conditions. The MCC has approved the transaction and, at KCS's request, recently extended for six months its prior authorization of KCS's purchase of all of the shares of Grupo Transportacion Ferroviaria Mexicana, S.A. de C.V. ("Grupo TFM") controlled by TMM. The DOJ thoroughly reviewed the competitive effects of the transaction, including effects here in the U.S. and allegations of anticompetitive vertical foreclosure, and determined not to further investigate the transaction or challenge its consummation.

On Monday, August 18, TMM announced that its shareholders had voted unanimously against the sale of TMM's interests in TFM, represented by shares of Grupo TFM held by TMM's subsidiary TMM Multimodal, to KCS.² On August 27, Mr. Jose Serrano, in his capacity as Chairman of TFM, informed KCS that TFM was exercising its option under the Mexrail Stock

² In light of this development, the FIC withheld decision pending resolution of matters between TMM and KCS.

Purchase Agreement (“Mexrail SPA”) to reacquire the Mexrail shares. On September 3, 2003, consistent with the Mexrail SPA, KCS issued irrevocable instructions to the Trustee to carry out the terms of the Mexrail SPA and Mr. Serrano’s request.³ On September 5, the Trustee requested direction and guidance from this Board with respect to TFM’s and KCS’s requests regarding return of the Mexrail shares. In its *Decision No. 9*, the Board stated that, under the particular circumstances here involved, it did not need to rule on the Trustee’s request. Today, September 30, 2003 at noon, CST, the repurchase closing occurred, making TFM once again the owner of 100% of the shares of Mexrail and thus the indirect owner of Tex Mex.

Despite these occurrences, KCS continues to pursue control of TFM and, through it, control of Mexrail and Tex Mex. As emphasized in the Rebuttal Verified Statement of Michael R. Haverty filed September 2, 2003, KCS believes that the KCS/TFM agreement remains valid, and that KCS is likely to eventually be successful in acquiring control of TFM through use of the dispute resolution provisions of that agreement or by judicial enforcement of the agreement. KCS has already invoked the mandatory 60-day period for negotiation provided by the KCS/TFM agreement. The parties are currently in discussion pursuant to that provision, though the agreement prohibits revealing the content of those discussions. That 60-day period must expire before either party can invoke arbitration under the agreement. KCS has also initiated a court action in Delaware seeking a preliminary injunction to prevent TFM from taking any action contrary to the KCS/TFM agreement.⁴ If KCS is successful, either through arbitration or

³ As the Board is aware, KCS’s Mexrail shares were placed into an independent voting trust pending authority to commonly control KCSR, Gateway Eastern, and The Texas Mexican Railway Company (“Tex Mex”).

⁴ Because of the 60-day negotiation period mandated by the agreement, at KCS’s request the Delaware court has not yet scheduled a hearing on KCS’s motion for preliminary injunction.

litigation, in enforcing its rights to acquire TFM, that acquisition will carry with it control of TFM's wholly-owned subsidiaries, Mexrail and Tex Mex.

DISCUSSION

I. THE BOARD HAS AUTHORITY TO PROCEED TO DECISION IN THIS MATTER.

None of the events that have transpired since August 18 should give this Board any reservations about its ability to proceed to decision on the Application consistent with the timeframes set forth in Decision No. 2.⁵ Board precedent amply supports the position that Board authorization under 49 U.S.C. §11323-11325 is permissive, and that the Board can move forward to decision in cases of this type even when circumstances create some doubt whether an approved transaction will ever be brought to fruition.

As explained in KCS's September 2 filing and its September 11, 2003 letter filed with the Board in this proceeding, KCS continues to have a valid and enforceable agreement with TMM regarding acquisition of TMM's ownership interest in TFM. KCS believes that ultimately it will be successful, either through arbitration or court order, in acquiring control of TFM. That would also mean that KCS would acquire control of Mexrail and Tex Mex.

The timing of when control will be obtained, and even whether such control will ever actually be obtained, does not prevent this agency from deciding this proceeding on the merits. Neither do KCS's current circumstances prevent the Board from reaching such a decision here. There is ample precedent for moving forward with a decision, notwithstanding the various

⁵ Indeed, under the Board's statute, it is possible that the Board might under some circumstances be compelled to issue a decision by Tuesday, November 11, the 45th day after the deadline for conclusion of evidentiary proceedings. *See* 49 U.S.C. §11325(d). However, the Board has the power to exempt this proceeding from the statutory deadline, pursuant to 49 U.S.C. §10502.

uncertainties that may exist. For example, in *Illinois Central Corp. & Illinois Central R.R. Co.-Control-Midsouth Corp., Midsouth Rail Corp., MidLouisiana Rail Corp., and SouthRail Corp.*, Finance Docket No. 31801 (I.C.C. served Feb. 20, 1991), Illinois Central Corporation (“IC”) had submitted an offer to the Board of Directors of MidSouth Rail Corporation (“MidSouth”) to buy the railroad subsidiaries of that company. At the same time, IC began a control proceeding at the ICC by filing a notice of intent to file a control application to acquire MidSouth. The Board of Directors of MidSouth requested that IC’s notice be dismissed, arguing that because they had rejected IC’s offer, there was no control transaction for the ICC to review. The ICC rejected the request to dismiss the proceeding and allowed the proceeding to go forward, notwithstanding that there was no agreement, no concrete transaction, and that one of the two railroads involved in the proceeding did not want the proceeding to move forward. It did not matter that the proposal had been rejected or that the proposed transaction might in fact never occur. Indeed, the Commission specifically stated that “[w]e have jurisdiction to grant approval of a proposed transaction, even if external factors might ultimately prevent consummation of the approved transaction.” *Id.*, slip op at 3. *See also United States v. ICC*, 396 U.S. 491, 526 (1970) (holding that uncertainty about legal title to certain properties proposed to be merged did not prevent the ICC from granting an application under former Section 5(2) because the Commission’s grant was permissive and did not force consummation).

The precedent of *IC-MidSouth* argues forcefully for the Board to render a decision on the merits of this case. While the ICC in *IC-MidSouth* allowed the proceeding to continue despite the fact that it had no agreement of the involved railroads to review, this transaction is premised upon a fully-negotiated agreement to transfer control to KCS. The Board has thus not been asked by KCS to render a decision upon some hypothetical control transaction, but rather upon a

transaction that over several months was committed to a binding contract that was signed by the involved principals.

Likewise, the Board has consistently rejected arguments that control applications must be dismissed notwithstanding that fact that major portions of the proposed transactions were still be negotiated or even changed in the middle of the proceeding.⁶ In *Rio Grande*,⁷ the applicants sought Commission approval of two transactions: the sale of a main line track between Kansas City, MO and Chicago, IL, along with its branch lines; and the grant-back of trackage rights from the buyer to the seller. Applicants also requested authority to operate over property owned and controlled by third parties and forced assignment of such rights if private agreements could not be reached. Applicants later withdrew the request for forced assignment and third party operating rights. Burlington Northern ("BN") and Chicago & North Western Transportation Co. ("CNW") both requested that the application be dismissed because it was materially different from the originally proposed transaction and because the evidence of record no longer conformed to the actual transaction. KCS later joined this dismissal request, arguing that the transaction was now so different that it could not be consummated in the proposed form.

The ICC rejected all of the requests for dismissal of the application. The Commission specifically noted that "it is not unusual in consolidation proceedings for applicants to present proposals, significant elements of which remain to be completed at the time of decision. The

⁶ For example, the Board processed the filings made by Norfolk Southern in connection with its offer to purchase Conrail, *see Norfolk Southern Corporation And Norfolk Southern Railway Company-Control-Conrail Inc. And Consolidated Rail Corporation*, STB Finance Docket No. 33286 (served Nov. 27, 1996), even though CSX was already seeking, under an exclusive agreement with Conrail, to control that carrier.

⁷ *Rio Grande Industries, Inc.,-Purchase And Related Trackage Rights-Soo Line Railroad Company Line Between Kansas City, MO And Chicago, IL*, F.D. No. 31505 (ICC served April 6, 1990).

Commission has consistently held that it has the power to approve an application prospectively.” *Rio Grande*, 1990 WL 287652, * 3 (I.C.C. 1990). The ICC explained that this was their consistent policy because their review merely conferred permissive authority and thus it was not relevant whether or not applicants had done all that they needed to do to actually consummate the transaction. *Id.* (“Since we do not require the parties to exercise the authority we might confer, we need not examine whether they have done all they need to do in order to consummate.”).⁸

Indeed, the Board’s authority even goes so far as to allow the Board to authorize or exempt transactions undertaken by hostile takeover when there is still an outstanding tender offer for the target company’s stock. *See Georgia Pacific Corporation and NM Acquisition Corp.-Control Exemption-Nonconnecting Railroads*, 1989 WL 246954, STB Finance Docket No. 31564 (I.C.C. decided Nov. 1 1989) (ICC refused to revoke a notice of exemption allowing Georgia-Pacific Corporation (“GP”) to acquire control of the rail subsidiaries of Great Northern Nekoosa Corporation (“GNNC”), even though GNNC’s directors had rejected GP’s acquisition offer and GP’s tender offer for GNNC shares had not yet expired). Situations such as these are more fluid and less certain than KCS’s current situation with respect to acquiring control of Tex Mex, yet the ICC was willing to allow GP to proceed under notice of exemption procedures, which involve submission of far less information than has already been presented on the record in this proceeding.

⁸ Of note, as in this transaction, the application was being reviewed under §11344(d) (now §11324(d)) not under the public interest standard of §11324(b & c), and most of the arguments for dismissal and changed circumstances were directed not at the competitive issues but at various financial and other public interest factors. Because the Board’s focus was on competitive issues and the record focused on those issues, which were not changing, the Board rejected the argument that it should dismiss the application or refuse to rule.

The principle is clear that the Board does not dismiss or refuse to go forward with a proceeding simply because external factors may cause the transaction at issue not to be consummated or to be consummated in a slightly different form. *Accord, Norfolk & Western Railway Co.-Control-Detroit, Toledo & Ironton Railroad Co.*, 360 I.C.C. 498 (1979); *Northeast Wisconsin Railroad Transportation Commission and Escanaba & Lake Superior Railroad Company-Exemption-Acquisition and Operation* (not printed), served Jan. 7, 1986; *Midwestern Rail Properties, Inc.-Purchase-Rock Island*, 366 I.C.C. 915 (1983); and *Iowa Interstate Railroad-Lease and Operation Exemption* (not printed), served Oct. 1, 1984. This proceeding is no different than the transactions that led to the foregoing precedents. TMM's actions of the past six weeks have created uncertainty regarding the timing of when KCS might acquire control of Tex Mex. Nevertheless, the parties still have a contract, which remains in force until December 2004, and are in process under the dispute resolution provisions of that agreement.

The KCS/TFM/Tex Mex situation is no more uncertain than the GP-GNNC situation, where a hostile takeover effort was still in process at the time of the ICC's decision. That takeover occurred in 1990. By contrast, the proposed IC hostile takeover of MidSouth was abandoned by IC, and IC requested the ICC to discontinue the proceeding it had begun. In both instances, the Board processed the cases unless the applicants requested otherwise.⁹ If KCS's transaction with TFM moves forward as KCS ultimately expects, the most that is likely is a limited change in the terms of the transaction which, similar to the change at issue in *Rio Grande*, was not cause for dismissal of the proceeding.

The Board's precedent clearly states that parties to a proposed control or merger transaction need not have completely settled all issues in order for the Board to rule on the

ultimate merits of an application filed regarding the transaction. KCS's current situation is more certain than the situations underlying most of those precedents, as KCS has presented the Board with a fully executed and signed agreement. Thus, the Board clearly has the right and authority to proceed to decision in this matter, in accord with the procedural schedule in Decision No. 2 and the statutory deadlines of Section 11325(d).

II. THE AMPLE RECORD IN THIS MATTER SUPPORTS GRANTING THE APPLICATION.

The record amassed in this proceeding contains a thorough exploration of all issues pertinent to resolving the questions that the Board must answer under the statute and regulations applicable to this case. The record thus is fully sufficient to allow the Board to proceed to a decision granting the Application.

The record in this proceeding is complete, and all relevant issues have been thoroughly briefed. The transaction before the Board, even if the TFM transaction is also considered, must be reviewed under §11324(d). The focus under that statute is on whether or not the transaction will result in the substantial lessening of competition, creation of a monopoly, or restraint of trade in any region of the U.S.¹⁰

The record in this case clearly shows that there will be no anticompetitive effects and that the Application should be approved by the Board. The benefits of KCS's acquisition of control of Tex Mex and the related acquisition of control of TFM have been clearly recognized by the shipping public, as to date over ninety parties have expressed support for the two transactions. Supporters include two of the largest automotive manufacturers in the U.S., Daimler/Chrysler

⁹ In May 1991, IC discontinued its proceeding seeking to control MidSouth.

¹⁰ This is a narrower focus than the broad public interest standard of Section 11324(b & c) that applies to "major" transactions and to the Board's *Major Rail Consolidation Procedures* rules.

and Mazda; numerous grain interests, including the U.S. Department of Agriculture (“USDA”); large intermodal users such as J. B. Hunt Transport; two of the world’s largest chemical companies, Dow Chemical and DuPont; and numerous shortline railroads, receivers, importers, ports, customs brokers, and other transportation providers. Perhaps of most importance, the nation’s largest shipper trade association, the National Industrial Transportation League (“NITL”), which represents over 700 shippers and other transportation interests, supports the two transactions. Meanwhile, other parties who commonly oppose merger transactions, such as the American Chemistry Council, Society of the Plastics Industry, the National Grain and Feed Association, the Western Coal Traffic League, utility companies, the Railroad Commission of Texas, and most importantly, DOJ, expressed no opposition to the KCS/Tex Mex and KCS/TFM transactions.

With respect to the KCS/Tex Mex transaction, no party has challenged the pro-competitive benefits of bringing Tex Mex fully within the KCS corporate family. Evidence presented in support of the Application with respect to the new single-line efficiencies to be gained, the reduced costs, and the improved financial stability of Tex Mex has gone unchallenged. Likewise, despite the pre-August 4, 2003 posturing of certain parties, no party challenged the adequacy of the environmental report or the conclusion that the transaction is categorically exempt under those rules. Indeed, not one party in this entire transaction has requested that KCS’s acquisition of control of Tex Mex be disapproved. Although parties opposing the transaction bear the burden of proving that the transaction will have anticompetitive effects, none have done so, as KCS, the U.S. Department of Transportation (“DOT”) and others have shown. Thus, the overall record clearly shows that the Application should be granted unconditionally.

Even if the manner in which KCS acquires control of Tex Mex changes, the facts pertaining to the issues relevant to the Board's decision are unlikely to change. Depending upon the means by which KCS ultimately takes control of Tex Mex, there may be changes with respect to the compensation paid for TFM and Tex Mex, the financing arrangements, the amount of stock exchanged versus cash, or even changes with respect to who sits on the various boards of directors and who has authority over which subsidiary. None of these changes, however, will impact the facts that are the proper focus of this proceeding and the existing record. The record focuses on the competitive effects of the transactions, not on the "public interest" factors, such as fixed charges or the financing of the transaction, such as could be at issue in a "major" merger. That focus on competitive effects is entirely correct under the statute and the Board's applicable regulations and the relevance of these issues will not change if there are changes in the financing or management structures of the type noted above. *Accord Rio Grande*. Accordingly, the record necessary for the Board to perform the analysis required by the statute is complete, and the Board should rule.

The record in this matter establishes that KCS's gaining control of Tex Mex will have no anticompetitive effects, even if the TFM transaction is also considered. Board precedent on end-to-end mergers and the "one lump" theory support this conclusion, as DOT has testified. Indeed, rather than being anticompetitive, KCS control of Tex Mex will result in infrastructure improvements, greater financial soundness for Tex Mex, increased efficiencies and reduced costs, creating stronger competition for traffic moving over Laredo. These conclusions are not changed by considering the effect of KCS also acquiring control of TFM. Accordingly, the record is complete, and fully supports granting the Application without conditions.

III. IF THE BOARD CHOOSES, IT COULD HOLD THIS MATTER IN ABEYANCE.

Because the record in this proceeding is complete with respect to all relevant issues and because Board precedent sanctions moving forward even when some details of a prospective transaction are unclear, the Board is in a position to rule on this case. As the Board's focus must be on the competitive analysis and that analysis is complete and will not change, there is nothing to be gained by waiting to rule, and certainly nothing to gain from dismissing the proceeding. Nevertheless, in light of the Board's apparent concern with moving forward, the Board could decide to hold this matter in abeyance until the terms under which KCS will acquire control of Tex Mex become clearer. While KCS believes that the Board has ample precedent and should rule on the exhaustively-documented record before it, if the Board is not inclined to so rule, KCS would rather see the Board hold this matter in abeyance, as opposed to dismissing the application outright, so long as postponing any decision does not lead to effectively re-trying the entire case once that issue clarifies.

Parties opposing this transaction have had months to present testimony of economic experts and businessmen to persuade the Board that the transaction before it will harm competition. They have failed to do so. The best they have been able to muster has been economic theories that, without saying so, toss out 20 years of applicable Board precedent or that depend upon "facts" that are at odds with reality, such as the idea that KCS is directly competitive with UP for the vast majority of U.S.-Mexico traffic. These arguments have been thoroughly analyzed on the record, and are ripe for decision, as stated above.

KCS recognizes that the Board believes that this proceeding, in conjunction with KCS's potential control of TFM, has the potential to significantly impact U.S.-Mexico trade. Indeed, KCS agrees with the Board that this transaction has the potential to affect U.S.-Mexico trade.

Inasmuch as the transaction holds the prospect for enhanced service offerings through improved coordination between KCS and Tex Mex and solidifying the Tex Mex financial and track structure, this transaction will foster competition that will challenge UP's dominance of the U.S.-Mexico market. Because of this potential, the Board has proceeded cautiously, including asking KCS to file evidence and argument with respect to the competitive effects of the KCS/TFM transaction. KCS complied with that request notwithstanding the fact that the Board has recognized that it does not have jurisdiction over the KCS/TFM transaction.

If, despite the complete record before it, the Board believes that it is inappropriate to proceed to a decision in light of current circumstances, KCS submits that the Board could hold this matter in abeyance, rather than dismissing or denying the application. There is precedent for holding cases in abeyance in circumstances similar to these. In fact, that is precisely what the Board did with respect to KCS's request for authority to build a rail line into the Geismar industrial park.¹¹ In that case, the parties had spent almost three years building a record and a draft environmental impact statement had been issued. Due to an agreement reached between KCS and Canadian National/IC that provided KCS with haulage rights to serve certain shippers in the Geismar complex, the Board issued a decision holding the build-in proceeding in abeyance until such time as KCS determined the need to renew its request to build the line, rather than serve the shippers via haulage rights.¹² Of note, the Board did not dismiss the build-in

¹¹ *Kansas City Southern Railway Company-Construction And Operation Exemption-Geismar Industrial Area Near Gonzales And Sorrento, LA*, Finance Docket No. 32530.

¹² *Kansas City Southern Railway Company-Construction And Operation Exemption-Geismar Industrial Area Near Gonzales And Sorrento, LA*, Finance Docket No. 32530 (STB served Aug. 27, 1998).

proceeding outright, but left the proceeding open, thereby giving KCS the option to renew its request at any time. A similar approach could be used here.

This proceeding is, in some respects, also similar to the proceeding involving establishment of lease compensation for Norfolk Southern Railway Company's use of the North Carolina Railroad Company line.¹³ In that proceeding, the Board granted the State of North Carolina's request to hold the proceeding in abeyance so that disputes with minority shareholders, which forced an impasse on the compensation issue, could be resolved before the matter proceeded further at the Board. Here, similarly, the pending issue of disagreement between TMM and KCS regarding control of Tex Mex is being resolved between those parties directly at the moment and the Board could hold off ruling until there is a clearer understanding of how the parties' differences will be resolved.

There are other instances as well where the Board has held a proceeding in abeyance when it believed that the time for making a decision was not yet ripe. *See, e.g., Consolidated Grain and Barge Company-Control Exemption-River Bend Transport Company and River Terminals Transport, Inc., MG Rail, Inc., and Garden Sport and Northern Corporation*, Finance Docket No. 32079 (served Oct. 28, 1992) (allowing applicant to submit additional support for its application); *Kansas City Terminal Railway Company and The Atchison, Topeka and Santa Fe Railway Company-Contract to Operate Exemption-In Kansas City, MO*, STB Finance Docket No. 32896 (served Nov. 20, 1996) (granting KCS's request to hold proceeding in abeyance until parties or a court could establish whether the contemplated transaction violated an existing

¹³ *North Carolina Railroad Company-Petition to Set Trackage Compensation and Other Terms and Conditions-Norfolk Southern Railway Company, Norfolk & Western Railway Company, and Atlantic and East Carolina Railway Company*, STB Finance Docket No. 33134 (served May 29, 1997).

contract); and *The Toledo Edison Company v. Norfolk and Western Railway Company*, 367 I.C.C. 869 (1983) (holding proceeding in abeyance for defendant to establish critical element of its case).

In direct contrast to the above-cited proceedings, there is no precedent for dismissing or denying a control or merger application simply because there are yet-to-be-fulfilled contingencies that may prevent the ultimate consummation of the transaction. Should any party seek dismissal of this docket, KCS urges the Board to fully consider these precedents when deciding on whether or not to dismiss this docket.

KCS believes that the record in this matter is complete on the issues that are relevant under the statute, and that the Board has both the authority and the information necessary to render a decision in this matter approving the Application. Nevertheless, if the Board concludes that it cannot move forward to resolution of this proceeding despite the breadth and depth of the record, the Board could hold the proceeding in abeyance until such time as there is further clarification on when KCS will be able to actually take control of Tex Mex.

Finally, if the Board does choose to hold this proceeding in abeyance, it is important that the Board explicitly state that such a decision does not imply any decision on the merits of the Application or favor any outcome in the arbitration or litigation between KCS and TMM. The reason for this can be found in the twisted treatment by the Mexican press of the Board's *Decision No. 9*. A September 26 article in the *Reforma* newspaper, authored by a writer with close ties to TMM, reported that TMM's position that it could cancel the TFM transaction "was favored by an American agency directly affiliated to the Department of Transportation of the government of George W. Bush. We are talking about the Surface Transportation Board headed by Roger Nober." Further, that paper reported that the Board's *Decision No. 9* "is also important

because it undermines the position of the KCS just days before initiating the arbitration.” (A translation of that article is attached hereto as Exhibit A).

If the Board chooses to hold this case in abeyance, it is important that the Board specify that its action carries no implication about the merits of the Application. Otherwise, holding the proceeding in abeyance may be seen by some and argued by others as support for the TMM position both here and in Mexico, just as Decision No. 9 has been argued to do. KCS believes that it will ultimately prevail in enforcing the KCS/TFM transaction, but there are additional steps to be taken before that position can prevail. Lest holding the matter in abeyance actually affect enforcement of the KCS-TMM agreement or inadvertently influence the Mexican government, the Board should be crystal clear, if it orders this case held in abeyance, that the order carries no implication that it is favoring one side or the other or that the Board will not eventually rule on the merits upon resumption of the proceeding.

CONCLUSION

The record in this matter is extensive. It clearly demonstrates that the parties opposing this transaction cannot show that substantial anticompetitive effects of this transaction are likely. In addition, the public benefits demonstrated by KCS and its affiliates are substantial and warrant granting the Application. Should the Board nevertheless believe that some facet of the ongoing negotiations between KCS and TMM is likely to be relevant to these issues; the Board could hold this matter in abeyance pending submission of further information on that facet of the

negotiations. Following receipt of that information, the Board should proceed rapidly to conclusion of this case, and should grant the Application unconditionally.

Respectfully submitted,



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Attorneys for Kansas City Southern,
The Kansas City Southern Railway
Company, and Gateway Eastern
Railway Company

September 30, 2003

CERTIFICATE OF SERVICE

I have this day served a copy of the foregoing Comments of Kansas City Southern, The Kansas City Southern Railway Company and Gateway Eastern Railway Company upon all other parties of record by depositing a copy in the U.S. mail in a properly addressed envelope with adequate first-class postage thereon prepaid or by other expeditious means.

Dated: September 30, 2003



William A. Mullins
Attorney for Kansas City Southern,
The Kansas City Southern Railway
Company, and Gateway Eastern Railway
Company

EXHIBIT A

SEPTEMBER 26, 2003 ARTICLE IN REFORMA NEWSPAPER IN MEXICO

By Dario Celis
Reforma

KCS and TMM have agreed not to wait until October 29 for the legal deadline they had to initiate the arbitration in the US. The arbitrators for this case would be already selected by next week. As in any other arbitration process, both KCS and TMM would designate their own arbitrators and the two selected persons would designate a third arbitrator.

It is believed that the arbitration wouldn't take too long because the only controversial issue is whether or not the decision by TMM's shareholders to cancel the TFM transaction was legal. But, as we mentioned yesterday, TMM was favored by an American agency directly affiliated to the Department of Transportation of the government of George W. Bush. We are talking about the Surface Transportation Board headed by Roger Nober.

After its shareholders' decision, TMM asked KCS to return the TexMex stock that was being held in a trust in the US. KCS opposed immediately saying that the cancelation of the transaction by TMM was not legal and the case was sent to the STB for resolution. This agency issued a resolution saying that there were no elements to deny TMM's petition. This way, Serrano and his team should be regaining control of the TexMex stock in the next couple of days after returning around US 32.6 million that was initially paid by KCS.

The TexMex operates approximately 900 kilometers of railroad between Laredo, Houston and Beaumont, Texas. The section between Laredo and Corpus Christi is operated through 251 kilometers of railroad owned by TexMex. The section that goes from Corpus Christi to Beaumont is operated through 650 kilometers subject to the payment of circulation rights. TexMex and Union Pacific are the only railway companies that connect in Laredo with TFM, serving the wide North American market.

The TexMex connects with the main railway companies of the US, like Burlington Northern Santa Fe, Canadian National and KCS. The TexMex has a connection with an important strategic value since it links the US to Mexico via the TFM.

That's why the recovery of TexMex by TMM is so important, given the permission obtained by the STB. The resolution of this agency is also important because it undermines the position of the KCS just days before initiating the arbitration.