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CPR-5

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 34342

**KANSAS CITY SOUTHERN  
— CONTROL —  
THE KANSAS CITY SOUTHERN RAILWAY COMPANY  
GATEWAY EASTERN RAILWAY COMPANY,  
AND THE TEXAS MEXICAN RAILWAY COMPANY**



**ADDITIONAL COMMENTS OF  
CANADIAN PACIFIC RAILWAY COMPANY**

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Office of Proceedings

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Public Record**

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DATED: September 30, 2004

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**ADDITIONAL COMMENTS OF CANADIAN PACIFIC RAILWAY COMPANY**

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Pursuant to the Board's *Decision No. 11* served in the above-captioned proceeding on August 31, 2004, Canadian Pacific Railway Company and its wholly-owned subsidiaries, Soo Line Railroad Company ("Soo") and Delaware and Hudson Railway Company, Inc. ("D&H") (collectively, "CPR") submit these additional comments concerning the application of Kansas City Southern ("KCS") to acquire control of The Texas Mexican Railway Company ("TexMex").

As indicated in its prior submissions, CPR takes no position as to whether the proposed KCS/TexMex control transaction ought to be approved. *See* CPR-3, Comments filed August 4, 2003 at 1. However, if the Board decides to approve KCS' application to control TexMex, CPR urges the Board to impose a condition requiring Applicants to enter into one or more written agreements that would assure non-Applicant carriers serving the "NAFTA Corridor" future access to the Laredo gateway on commercially reasonable terms. Such a condition is necessary to preserve effective rail competition for traffic moving between points in Canada and the United States, on the one hand, and points in Mexico, on the other hand, in the event that KCS' plan to acquire both TexMex and TFM, S.A. de C.V. ("TFM") is successful.

Applicants acknowledge that the continued growth of NAFTA trade depends upon the availability of competitive transportation alternatives for traffic moving to/from Mexico. *See* KCS-10/TM-10, Supplement to Application at 13. Yet, while Applicants vaguely assert that they would “keep the Laredo gateway open on commercially reasonable terms” (*see, e.g., id.* at 4, 24), they have not committed on the record to any specific measures to assure that result. Instead, Applicants have suggested that carriers interested in access to the Laredo gateway seek to negotiate “a private agreement to ensure that KCS abides by this commitment.” *See* CPR-3, Comments, Attachment 1 (Letter dated July 21, 2003 from Mr. Mullins to Mr. Meyer at 2). The condition proposed by CPR would simply require Applicants to follow through with their own suggestion by entering into a written agreement (or agreements) defining the “commercially reasonable” terms upon which non-Applicant railroads (and the shippers that they serve) will be able to access the Laredo gateway in the event that KCS creates its proposed “NAFTA Rail” system by acquiring both TexMex and TFM.

The reasons why such a condition is both necessary and appropriate are discussed in detail in CPR’s prior submissions. As CPR demonstrated, the Laredo gateway plays an indispensable role in the movement of rail freight to and from Mexico – indeed, nearly 90 percent of all traffic handled by CPR to and from Mexico currently moves via Laredo. *See* CPR-3, Comments at 4; CPR-4, Reply Comments filed September 2, 2003 at 3. The Board has frequently acknowledged that Laredo “occupie[s] a position of separate and surpassing economic significance” among the rail gateways serving the U.S. – Mexico border. *Union Pacific Corporation, et. al. – Control and Merger – Southern Pacific Rail Corporation, et al.* (“UP/SP”), 1 S.T.B. 233, 422 (1996) (emphasis added).<sup>1</sup>

<sup>1</sup> *See also id.* at 565 (Laredo “the premier Eastern Mexico gateway”); *Santa Fe Southern Pacific Corp. – Control – SPT Co.*, 2 I.C.C. 2d 709, 797 (1986) (Laredo “by far the most important” Mexican rail gateway); *id.* at 894-895 (“Laredo historically has been the foremost international rail gateway to Mexico”).

KCS' proposal to acquire both TexMex and TFM would give it control of one of the two U.S. carriers serving the Laredo gateway as well as the only carrier (TFM) providing connecting service to/from points in Mexico. If the "NAFTA Rail" system were to exercise that control in a manner that closed the Laredo gateway commercially to competing railroads (e.g., by refusing to participate in interline routes on reasonable terms), the competing services offered by CPR and others (in conjunction with UP) in the NAFTA Corridor would be severely impaired. The condition requested by CPR is designed to assure the continued viability of those competing rail routes following the creation of a NAFTA Rail system.

Nothing that has occurred since the Board suspended these proceedings in October 2003 obviates the need for such a condition. As Applicants acknowledge, "the differences between the previous transaction and the revised transaction [now before the Board] are minor in nature and do not involve any changes in the substantive areas of concern" that the Board must consider in this proceeding. KCS Status Report filed August 16, 2004 at 3 (emphasis added). *See also Decision No. 11* at 5. While the revised KCS/TMM Stock Purchase Agreement commits KCS to comply with existing protocols regarding "use and operation" of the International Bridge at Laredo (*see* Revised Stock Purchase Agrt., § 5.1), it contains no provision that would require Applicants to preserve the commercial access of competing carriers to the Laredo gateway. Even KCS' limited commitment to observe protocols for operation of the International Bridge would be rendered moot if KCS acquires TFM, which controls the southern half of the bridge. Thus, KCS' revised proposal – like its prior submissions – fails to give substance to its representation that the Laredo gateway will remain open to KCS' competitors on commercially reasonable terms.

Moreover, recent events have made a KCS acquisition of TFM more likely than it was at the time the Board suspended this proceeding in *Decision No. 10*. The Board's action was

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Moreover, recent events have made a KCS acquisition of TFM more likely than it was at the time the Board suspended this proceeding in *Decision No. 10*. The Board's action was

triggered by the decision of the shareholders of Grupo TMM, S.A. ("TMM"), on August 18, 2003, to reject the KCS/TFM Acquisition Agreement, and TFM's subsequent exercise of its right to repurchase from KCS the 51 percent interest in Mexrail upon which KCS' control application was predicated. However, on March 22, 2004, an arbitration panel ruled that shareholder rejection of the KCS/TFM Acquisition Agreement did not authorize TMM to terminate the Agreement.<sup>2</sup> In the wake of that decision, KCS and TMM renewed their negotiations regarding the sale of TFM, and TMM agreed to support KCS' application to the Mexican Foreign Investment Commission ("MFIC") for authority to acquire a controlling interest in TFM.<sup>3</sup>

On September 16, 2004, MFIC gave notice that it was denying KCS' application to acquire TFM. However, in a joint press release, KCS and TMM stated:

"KCS and TMM are actively involved in discussions with the FIC and believe that they are close to an agreement to resolve these matters. KCS and TMM will seek reconsideration of this decision and remain confident that they should ultimately obtain approval of the transaction."<sup>4</sup>

KCS and TMM have also agreed to extend the deadline for closing under the KCS/TFM Acquisition Agreement until June 15, 2005 "to provide additional time to complete the transaction." *Id.*

Thus, it now appears that TMM is actively supporting KCS' efforts to acquire TFM, and that the prospects for completion of the KCS/TFM transaction are considerably better than they were prior to the suspension of these proceedings in *Decision No. 10*. The danger that future rail competition via Laredo might be compromised by a NAFTA Rail system wielding exclusive

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<sup>2</sup> See Attachment 1, "Interim Award in Arbitration Between TMM and KCS" (press release issued by TMM on March 22, 2004).

<sup>3</sup> See Attachment 2, "KCS Clarifies Obligations Under Stipulation Agreement" (press release issued by KCS on April 12, 2004).

<sup>4</sup> See KCS Sixth Status Report, filed September 16, 2004, Attachment, "Kansas City Southern and Grupo TMM To Seek Reconsideration of Mexican Foreign Investment Commission Decision" (joint press release) at 1 (emphasis added).

control over that vital gateway is likewise heightened. So long as KCS continues to pursue an acquisition of TFM, the public interest requires that the Board, in ruling on the KCS/TexMex control application, take into account “the broader transaction, incorporating the related KCS/TFM component,” as contemplated by *Decision No. 2*.

KCS continues to take the position that the Board “has no legal authority” to consider the competitive effects of KCS’ strategy to create a combined KCS/TexMex/TFM system. *See, e.g.,* KCS-10/TM-10 at 3, n.2. Most recently, in refusing to respond to discovery requests inquiring about the status of the KCS/TFM transaction, KCS asserted: “Whether or not KCS acquires control of TFM is irrelevant inasmuch as acquisition of TFM, which operates entirely in Mexico, is a proposed transaction that is beyond the jurisdiction of the STB and is, instead, subject to the jurisdiction of Mexican authorities.” *See* KCS’ Responses and Objections To Union Pacific Railroad Company’s Fourth Set of Discovery Requests to Applicants, filed September 8, 2004 at 4-5. *See also id.* at 6 (objecting to production of documents analyzing possible acquisition of TFM on the grounds that “[t]he requested documents, insofar as they relate to KCS’s interest in acquiring control of TFM, are irrelevant because that matter is outside of the Board’s jurisdiction”).

KCS is wrong. As the Board has correctly observed, KCS’ proposal to acquire TFM, while subject to regulation by Mexican authorities, has “broader potential implications in the U.S.” *Decision No. 2* at 11. Accordingly, “the role played by TFM in the U.S.-Mexico NAFTA corridor cannot be ignored” in considering the merits of the KCS/TexMex proposal. *Id.* at 10. For that reason, the Board instructed Applicants to supplement their application with evidence addressing the potential effects of a KCS/TFM consolidation on rail competition in the United States. *Id.* at 10-11 (emphasis added). More recently, the Board’s order restarting this proceeding expressly extended the requirement (imposed in *Decision No. 10*) that KCS file

periodic status reports “detailing new developments (if any) in its efforts to acquire control of TFM.” *Decision No. 11* at 6.

These rulings leave no doubt that the Board can – and should – consider the potential effects of KCS acquiring control of TFM in deciding whether to approve the KCS/TexMex transaction. The Board should likewise exercise its conditioning authority in this case to assure that a prospective “NAFTA Rail” system could not undermine future rail competition at the Laredo gateway. Indeed, this proceeding presents the only opportunity for the Board to do so, because KCS will not be required to return to the Board for authority to acquire TFM. (A condition imposed by the Board now, but made contingent upon KCS succeeding in acquiring TFM, would not impose any burden on Applicants if KCS abandoned its pursuit of TFM.)

As CPR has previously shown (CPR-4, Reply Comments at 2-3), Applicants’ settlement arrangement with the National Industrial Transportation League (“NITL”) – which Applicants have asked the Board to impose as a condition – does not mitigate the potential for competitive harm in the event that a combined “NAFTA Rail” system gains control of the Laredo gateway. Both Applicants and NITL frankly acknowledge that “[t]he NITL-KCS Agreement will not require NAFTA Rail to establish and maintain commercially reasonable contract or common carrier rates and charges with respect to traffic interchanged between UP and TFM at the Laredo Gateway.” See NITL-4/KCS-17, Letter to Mr. Meyer dated August 18, 2003 at 1. The KCS-NITL settlement applies only to U.S-Mexico cross-border movements in which KCS and/or TexMex are the participating carriers, and preserves interline competition only at interchange points other than Laredo. The KCS-NITL Agreement does not address the ability of non-Applicant railroads to access the Laredo gateway on commercially reasonable terms following the creation of a “NAFTA Rail” system, and therefore does not respond to the competitive concerns identified in CPR’s comments.

The Board's prior decisions demonstrate a strong commitment to ensuring that railroad mergers do not undermine the goals of NAFTA. *See, e.g., UP/SP*, 1 S.T.B. at 421-426 (imposing trackage rights condition to preserve TexMex's ability to compete for U.S.-Mexico rail traffic via Laredo); *Canadian National Ry. Co., et al. – Control – Illinois Central Corporation, et al.* (served May 21, 1999) (“*CN/IC*”) at 35-36 (condition imposed to prevent interference with rail tunnel serving US/Canada gateway at Detroit). The Board also routinely requires applicant carriers to abide by any representations they make on the record. *See, e.g., Canadian National Ry. Co. et al. – Control – Wisconsin Central Transportation Corp., et al.*, (decision served September 5, 2001) (“*CN/WC*”) at 12-14 (condition holding applicants to representations regarding preservation of rail gateways); *CN/IC* at 7, n. 21 (1999) (condition holding applicants to all representations made in writing and at oral argument); *CSX Corporation, et al. and Norfolk Southern Corporation, et al. – Control and Operating Leases – Conrail, Inc. et al.*, 3 S.T.B. 196, 387 (1998) (applicants required to adhere to all representations made during proceeding).

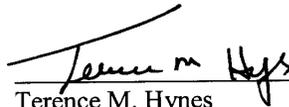
It is equally appropriate for the Board to exercise its conditioning authority in this case to compel Applicants to adhere to their promise to keep the Laredo gateway open on “commercially reasonable terms” by requiring them to enter into binding written agreement(s) setting forth the terms upon which competing carriers will be able to access Laredo in the event that KCS acquires control of both TexMex and TFM. Such agreement(s) should apply to all rail routings via Laredo, including the TFM-UP routes excluded from the scope of the KCS-NITL Agreement. The specific terms of such an arrangement can be left, in the first instance, to negotiation between Applicants and other carriers serving the NAFTA Corridor. If the parties fail to reach agreement, the Board could then act as needed to define such terms.

CPR's proposed condition is necessary to preserve effective competition for rail traffic to/from Mexico in the event that TexMex and TFM come under the common control of KCS. Given the unique importance of the Laredo gateway to NAFTA trade, the Board should act in this proceeding to assure that a KCS-TFM consolidation does not compromise the competitive rail system serving the NAFTA Corridor.

**CONCLUSION**

For all of the foregoing reasons, and those set forth in CPR's Comments (CPR-3) and Reply Comments (CPR-4), CPR respectfully requests that the Board condition its approval of the proposed transaction by requiring Applicants to enter into binding written agreement(s) specifying commercially reasonable terms upon which competing railroads (including CPR) can route traffic to or from Mexico via the Laredo gateway in the event that KCS acquires control of both TexMex and TFM.

Respectfully submitted,



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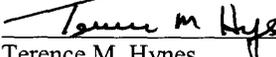
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*Counsel for Canadian Pacific Railway Company*

DATED: September 30, 2004

**CERTIFICATE OF SERVICE**

I hereby certify on this 30th day of September 2004, that I caused copies of the foregoing Additional Comments of Canadian Pacific Railway Company to be served, by hand-delivery on Applicants' counsel, and by first-class mail, postage prepaid, on all other Parties of Record.

  
Terence M. Hynes