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SERVICE DATE - LATE RELEASE SEPTEMBER 23, 2003

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

Decision No. 9

Decided: September 23, 2003

In this decision the Board is taking two actions. First, the Board is announcing that it finds no need to rule on the proposed transfer back to TFM, S.A. de C.V. (TFM), of the 51% interest in Mexrail, Inc. (Mexrail), that Kansas City Southern (KCS) acquired, and placed in a voting trust, on May 9, 2003. Second, the Board is inviting interested parties to advise whether the procedural schedule adopted in Decision No. 2 (served June 9, 2003, and published at 68 FR 35474 on June 13, 2003) should be suspended, pending a resolution of the uncertainties that now surround the KCS/TM application filed on May 14, 2003, which seeks the approval of the Board for the acquisition, by KCS, of control of The Texas Mexican Railway Company (Tex Mex or TM).

BACKGROUND

KCS, Mexrail, Tex Mex, TFM, Grupo TFM, TMM Multimodal, and Grupo TMM.

KCS, a noncarrier, controls two U.S. railroads (The Kansas City Southern Railway Company, a wholly owned direct subsidiary of KCS, and Gateway Eastern Railway Company, a wholly owned indirect subsidiary of KCS). Mexrail, a noncarrier, controls one U.S. railroad (Tex Mex, a wholly owned direct subsidiary of Mexrail). Prior to May 9, 2003, Mexrail itself was a wholly owned direct subsidiary of TFM, a Mexican railroad that is owned by Grupo Transportación Ferroviaria Mexicana, S.A. de C.V. (Grupo TFM, which owns an 80% interest in TFM) and the Mexican Federal Government (which owns a 20% interest in TFM). Ownership of Grupo TFM is divided three ways: KCS owns, through two corporate chains, a 36.9% interest in Grupo TFM; TMM Multimodal, S.A. de C.V. (TMM Multimodal) owns a 38.5% interest in Grupo TFM; and TFM owns a 24.6% interest, with limited voting rights, in Grupo TFM (which, as has been noted, owns an 80% interest in TFM). And TMM Multimodal is a 96.3%-owned indirect subsidiary of Grupo TMM, S.A. (Grupo TMM).

Two Transactions: KCS/TM and KCS/TFM.

On April 21, 2003, KCS and Grupo TMM announced a series of agreements that contemplate a KCS/TM transaction (the acquisition, by KCS, of control of Tex Mex) and a KCS/TFM transaction (the acquisition, by KCS, of control of TFM). The KCS/TM transaction is subject to the jurisdiction of the Board under 49 U.S.C. 11323(a)(5) (“Acquisition of control of a rail carrier by a person that is not a rail carrier but that controls any number of rail carriers.”), and, therefore, the Board’s approval of the KCS/TM transaction was sought by KCS in the KCS/TM application, which the Board accepted for consideration in Decision No. 2. The KCS/TFM transaction is not subject to the jurisdiction of the Board, see Decision No. 2, slip op. at 7 n.15, and, therefore, the Board’s approval of the KCS/TFM transaction was not sought by KCS.

The KCS/TM Transaction; Purchase Price; Voting Trust.

One of the agreements (referred to as the Mexrail Stock Purchase Agreement) announced on April 21st contemplated the acquisition by KCS, from TFM, of 51% of TFM’s 100% interest in Mexrail in exchange for \$32,680,000 in cash. On May 9th, KCS consummated the acquisition (the purchase price was apparently paid on May 9th) and acquired a direct 51% interest in Mexrail (and, therefore, an indirect 51% interest in Tex Mex). KCS has indicated, however, that, to avoid any violation of § 11323 et seq., it immediately placed its Mexrail shares (i.e., KCS’s 51% interest in Mexrail) into an independent irrevocable voting trust (the Mexrail Voting Trust) that was established pursuant to an agreement that KCS claims is consistent with 49 CFR part 1013.

The KCS/TFM Transaction; Purchase Price; Several Contingencies.

Two or more of the agreements announced on April 21st contemplate the acquisition by KCS of control of TFM. The KCS/TFM transaction envisioned by these agreements contemplates that KCS (which would be renamed “NAFTA Rail”) would acquire all of TMM Multimodal’s 38.5% interest in Grupo TFM, which, when combined with KCS’s present 36.9% interest in Grupo TFM, would give KCS a controlling interest in Grupo TFM, and, therefore, a controlling interest in TFM. The KCS/TFM transaction further contemplates that TMM Multimodal would receive 18 million shares of the new NAFTA Rail representing an approximately 22% interest in the new NAFTA Rail, plus \$200 million in cash and a potential incentive payment of between \$100 million and \$180 million. KCS has advised that the KCS/TFM transaction is subject to several contingencies, including (as pertinent for present purposes) the approval of the shareholders of Grupo TMM and the approval of the Mexican Foreign Investment Commission (the Commission).

The Failure Of Two KCS/TFM Contingencies.

Two of the approvals on which the KCS/TFM transaction was said to be contingent have not yet been secured. (1) On August 18, 2003, Grupo TMM announced that its “shareholders, unanimously, did not approve” the sale, to KCS, of Grupo TMM’s interests in Grupo TFM. (2) On August 25th, Grupo TMM announced that the Commission had been formally notified by Grupo TFM of the termination of the application that Grupo TFM had submitted to the Commission to permit KCS’s participation in more than 49% of Grupo TFM’s equity. On August 27th, KCS announced that it had been advised that the Commission had deferred decision on KCS’s proposal to acquire control of Grupo TFM until after resolution of the dispute between KCS and Grupo TMM over the continued effectiveness of the KCS/TFM transaction agreement. On August 28th, Grupo TMM announced that Grupo TFM had been advised of the Commission’s resolution to close the administrative process that had been initiated before the Commission.

TFM’s Exercise Of Right To Repurchase The 51% Interest In Mexrail That KCS Acquired On May 9th.

The Mexrail Stock Purchase Agreement provides, in pertinent part, that “TFM shall retain the right to repurchase all of the Transferred Shares from KCS at any time [within two years of April 20, 2003] for an amount equal to the Purchase Price. Such right shall be 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 [Grupo TMM].” KCS-3 at 177. On August 27th, the Chairman of TFM gave written notice to KCS that TFM was exercising its right to repurchase the 51% interest in Mexrail that KCS acquired on May 9th. On September 3rd, KCS gave the Trustee of the Mexrail Voting Trust an “irrevocable” direction, “following receipt of an appropriate STB order (if required) and receipt of funds called for under the Mexrail Stock Purchase Agreement (the repurchase price shall be for the sum of US\$32,680,000.00) to deliver to TFM at the Repurchase Closing stock certificates representing the Transferred Shares endorsed in blank or accompanied by duly executed assignment documents.”

KCS’s Intention To Achieve The KCS/TFM And KCS/TM Transactions.

KCS has advised that, despite the failure of the two KCS/TFM contingencies, KCS believes that the KCS/TFM agreements are still valid and binding, KCS is committed to consummating the KCS/TFM transaction, KCS intends to pursue all commercial and legal alternatives to complete that transaction, and KCS believes that it is likely that KCS will eventually succeed in acquiring control of TFM. KCS has also advised that, despite TFM’s exercise of its right to repurchase the 51% interest in Mexrail that KCS acquired on May 9th, KCS believes that it is likely that KCS will eventually succeed in acquiring control of Mexrail

and Tex Mex (which, KCS has pointed out, will occur at such time as KCS succeeds in acquiring control of TFM). KCS has further advised that, given these circumstances and consistent with precedent that makes Board approval of § 11323 control transactions permissive and not mandatory, KCS is not withdrawing the KCS/TM application. KCS expresses its belief that the application proceeding should continue. See KCS-18A at 3-5.

Trustee's Request For Authority, Direction, Or Guidance.

By letter dated September 5, 2003, the Trustee of the Mexrail Voting Trust (Thomas F. Power, Jr.) has asked "that the Board provide such authority, direction or guidance as the Board deems appropriate" with respect to the proposed repurchase of the 51% interest in Mexrail that KCS acquired, and placed in the Mexrail Voting Trust, on May 9th.

Comments Respecting The Trustee's Request.

Comments respecting the Trustee's request have been filed by KCS, TFM, Union Pacific Railroad Company (UP), The Burlington Northern and Santa Fe Railway Company (BNSF), The National Industrial Transportation League (NITL), and Bartlett Grain Company, L.P. (Bartlett). (1) KCS advises that, if the Board finds that the divestiture plan as contained in the Mexrail Stock Purchase Agreement is consistent with the public interest, the Mexrail stock now held in the Mexrail Voting Trust will be transferred back to TFM. KCS adds that, because it still intends to acquire control of Tex Mex, the Board should proceed with its review of the KCS/TM application. (2) TFM contends that, although the Board's authority to oversee the divestiture of the Mexrail stock is open to question, there is no reason why the contemplated divestiture should not proceed promptly, and, therefore, the Board should inform the Trustee that there is no reason for the Trustee not to transfer the Mexrail stock back to TFM. And, TFM adds, there is no basis for the concern that TFM's reacquisition of the Mexrail stock may violate covenants in certain of TFM's loan agreements. (3) UP advises that it takes no position on the Trustee's request. UP further advises, however, that TFM's reacquisition of the Mexrail stock will confirm that the Board, in reviewing the KCS/TM application, must consider the effects in the U.S. of the acquisition of common control of Tex Mex and TFM. (4) BNSF contends that, if it is to remain competitive for traffic moving from/to Mexico via Laredo, Tex Mex must continue to provide commercially reasonable rates and charges, and competitive interline service, for BNSF traffic moving over Tex Mex between Robstown/Corpus Christi and Laredo, and access to the International Bridge at Laredo for BNSF traffic moving over Tex Mex must be undiminished and must be provided on a neutral, non-discriminatory basis. BNSF therefore asks that the Board, if it approves the repurchase of the Mexrail stock, make clear that, under TFM's ownership, Tex Mex and Mexrail must continue to provide such rates and charges and service for BNSF's interline traffic across Tex Mex and to the International Bridge on an undiminished basis. (5) NITL advises that it takes no position on the Trustee's request. NITL adds that the Board should thoroughly consider whether the proposed divestiture can be accomplished with the least

possible disruption of the market and in a manner wholly consistent with the public interest. (6) Bartlett contends that the Board should hold an evidentiary hearing or take other actions to develop a record that will allow the Board to evaluate whether the proposed divestiture is in the public interest.

DISCUSSION AND CONCLUSIONS

Under The Circumstances Described Here, The Board Finds No Need To Rule On The Proposed Transfer Back To TFM Of The 51% Interest In Mexrail That KCS Acquired On May 9th.

Although the acquisition by TFM of the 51% interest in Mexrail now held in the Mexrail Voting Trust will give TFM “control” of a U.S. railroad (Tex Mex), that acquisition of control would not ordinarily be subject to the Board’s 49 U.S.C. 11323 “control” jurisdiction. That jurisdiction, by its terms, applies only to control transactions that bring two or more U.S. railroads under common control. All indications are that, once the acquisition has taken place, Tex Mex will be the only U.S. railroad in which TFM will have a controlling interest.

When, however, a controlling interest in a U.S. railroad has been placed in a voting trust pending action by the Board on a § 11323 control application, the Board has the authority to approve both a plan of divestiture and the sale (or other disposition) of the controlling interest held in the voting trust, even when the person acquiring the controlling interest would not otherwise require authority under § 11323 to consummate such acquisition. See Santa Fe Southern Pacific Corp. — Control — SPT Co., 2 I.C.C.2d 709, 834 (1986) (the jurisdiction of the ICC “to oversee the orderly divestiture” of stock held in a voting trust is “inherently within [the ICC’s] authority to approve consolidations and acquisitions of control.”). See also Union Pacific Corporation, et al. — Request For Informal Opinion — Voting Trust Agreement, Finance Docket No. 32619 (ICC served Dec. 20, 1994), slip op. at 6 (the party setting up the voting trust was required “to specify in the voting trust agreement that the [ICC] will have authority to approve both a plan of divestiture and the sale (or other disposition) of the trust stock, whether or not the purchaser requires section 11343 authority from us to acquire that stock and whenever such divestiture and sale take place.”).

The “plan of divestiture” with respect to which the Trustee now seeks authority, direction, or guidance would appear to restore the status quo ante that existed prior to May 9th, and would seem to leave KCS, TFM, and Tex Mex (and all other persons) in exactly the same positions they were in prior to KCS’s acquisition of a 51% interest in Mexrail. All indications are that the transfer back to TFM of a controlling interest in Tex Mex can be accomplished without any disruption of any kind, and there is no reason to believe that anything that has happened in the past four months has made restoration of the status quo ante an impossibility. See SF/SP, 2 I.C.C.2d at 834-35 (the divestiture of stock held in a voting trust “should be accomplished with

the least possible disruption of the market and in a manner wholly consistent with the public interest,” and the “financial condition at the time of divestiture [of the railroad whose stock has been held in the voting trust should] be at least as sound as it was prior to its being placed in trust”).

The Mexrail Stock Purchase Agreement provides for handling developments such as those that have occurred here, and, under the circumstances, the Board has no regulatory interest in ruling on the terms or execution of that agreement. In particular, the Board finds no need to rule on the proposed transfer back to TFM of the 51% interest in Mexrail that KCS acquired on May 9th.¹

The Board also sees no need to act on BNSF’s request that the Board order that, under TFM’s ownership, Tex Mex and Mexrail must continue to provide, on an undiminished basis, competitive and commercially reasonable rates, charges, and service for BNSF traffic moving from/to Laredo via Tex Mex and the International Bridge. The transfer back to TFM of the 51% interest in Mexrail that KCS acquired on May 9th will restore the status quo ante.

The Board Invites Interested Parties To Comment On Whether Or Not To Continue The Procedural Schedule Adopted In Decision No. 2 For Consideration Of The KCS/TM Application.

In light of the recent developments, the Board has serious reservations about going forward with consideration of the application at this time. The Board therefore seeks the parties’ views on that question. Comments respecting this matter should be submitted no later than 5:00 p.m. on Tuesday, September 30, 2003.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The Board finds no need to rule on the proposed transfer back to TFM of the 51% interest in Mexrail that KCS acquired on May 9th.

¹ Contrary to Bartlett’s suggestion of a need to develop the record further, the Board finds that the present record is sufficient for issuance of this decision regarding the proposed return to the status quo ante.

2. Interested parties may submit, by no later than 5:00 p.m. on Tuesday, September 30, 2003, comments respecting the question whether or not to continue the procedural schedule adopted in Decision No. 2.

3. This decision is effective on the service date.

By the Board, Chairman Nober.

Vernon A. Williams
Secretary