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SERVICE DATE - OCTOBER 8, 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. 10

Decided: October 7, 2003

The Board is suspending the procedural schedule adopted in Decision No. 2 (served June 9, 2003, and published at 68 FR 35474 on June 13, 2003), pending a resolution of the uncertainties that now surround the efforts of Kansas City Southern (KCS) to acquire control of The Texas Mexican Railway Company (Tex Mex or TM).

BACKGROUND

In Decision No. 9 (served September 23, 2003), the Board directed interested parties to submit, by no later than 5:00 p.m. on Tuesday, September 30, 2003, comments on whether or not to continue the procedural schedule adopted in Decision No. 2. Comments have been filed by KCS,¹ Union Pacific Railroad Company (UP), The Burlington Northern and Santa Fe Railway Company (BNSF), The National Industrial Transportation League (NITL), and the U.S. Department of Transportation (DOT).

KCS contends that the record compiled to date is complete, and that this record justifies the approval without conditions of the KCS/TM application filed on May 14, 2003. There is, KCS argues, substantial precedent for moving forward with consideration of, and ultimate approval of, a merger or control transaction notwithstanding the fact that external factors may ultimately prevent consummation of the transaction. KCS concedes, however, that there is also precedent for holding this proceeding in abeyance until such time as there is further clarification respecting the terms under which KCS will acquire control of Tex Mex. But, KCS maintains that there is no precedent for dismissing or denying a merger or control application simply

¹ KCS and the two railroads it controls (The Kansas City Southern Railway Company and Gateway Eastern Railway Company) filed jointly.

because external factors may prevent, temporarily or even permanently, the consummation of the proposed transaction.

UP contends that the procedural schedule should be suspended, unless the Board is prepared to approve the KCS/TM application with the conditions UP has requested. UP adds that it would not be in the public interest to terminate this proceeding entirely and to require KCS to file a new application after the present uncertainties are resolved.

BNSF takes no position on whether the Board should suspend the procedural schedule. If KCS and Grupo TMM, S.A. (Grupo TMM), reach an agreement that results in a change or modification of the terms and conditions governing their transaction, BNSF asks the Board to provide an opportunity for comment.

NITL contends that the procedural schedule should be suspended until the present uncertainties have been resolved. NITL adds that it believes that, if and when the present uncertainties are resolved, the way will be clear for the implementation of the NITL/KCS Agreement that was entered into on August 1, 2003.

DOT contends that the procedural schedule should be suspended because the KCS/TM application is subject to contingencies that are beyond the control of the Board, the applicants, and any of the parties. DOT further contends that, should KCS secure a return of the status quo ante in time to permit the Board to issue a decision within the original statutory time frame, the proceeding could go forward. And, DOT adds, should circumstances change or KCS prevail only subsequently, a new proceeding would be appropriate, using as much of the record compiled to date as would be proper.

DISCUSSION AND CONCLUSIONS

The evidence indicates and the parties concur that the KCS/TM transaction as originally contemplated is no longer a present possibility.² However, KCS is still seeking to acquire control of Tex Mex, and, therefore, a KCS/TM transaction is still possible. The Board is therefore

² The Mexrail Stock Purchase Agreement — the agreement pursuant to which, on May 9th of this year, KCS acquired from TFM, S.A. de C.V. (TFM), a 51% interest in Mexrail, Inc. (Mexrail, which then held, and which continues to hold, a 100% interest in Tex Mex) — provides, at § 7.1(c), that, upon the repurchase by TFM of that 51% interest, “this Agreement shall automatically terminate and be of no further force or effect.” KCS-3 at 178. Because TFM has exercised its right to repurchase the 51% interest, and the 51% interest was transferred back to TFM on September 30, 2003, the Mexrail Stock Purchase Agreement has automatically terminated and is of no further force or effect.

suspending the procedural schedule adopted in Decision No. 2, pending a resolution of the uncertainties that now surround KCS's efforts to acquire control of Tex Mex. The Board will reinstate the procedural schedule at such time as KCS demonstrates that there is a reasonable likelihood that it will be able to acquire control of Tex Mex. To keep the Board and interested parties informed respecting KCS's efforts to resolve these uncertainties, the Board is directing KCS to file a status report detailing new developments (if any) in its efforts to acquire control of TFM and Tex Mex on the first business day of November 2003, and then as events warrant, but in no event later than the first business day of every third month thereafter.³

Suspension of the procedural schedule adopted in Decision No. 2 does not imply any decision on the merits of the KCS/TM application, does not favor any outcome in the arbitration and/or litigation now underway between KCS and Grupo TMM, is not intended to affect enforcement of the agreement(s) heretofore entered into by KCS and Grupo TMM, and is not intended to "influence the Mexican government," inadvertently or otherwise. See KCS-20 at 18. If and when the uncertainties that now surround KCS's efforts to acquire control of Tex Mex are resolved, the Board will, if appropriate, rule on the merits of the KCS/TM application.

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

It is ordered:

1. The procedural schedule adopted in Decision No. 2 is suspended, pending a resolution of the uncertainties that now surround KCS's efforts to acquire control of Tex Mex.
2. KCS must file a status report detailing new developments (if any) in its efforts to acquire control of TFM and Tex Mex on the first business day of November 2003, and then as events warrant, but in no case later than the first business day of every third month thereafter.

³ The Board understands that the details respecting certain of KCS's efforts to acquire control of TFM and Tex Mex are protected by a confidentiality provision of some sort. See KCS-20 at 5. The Board assumes that this confidentiality provision will not preclude KCS from describing in its status reports, at least in a general way, new developments (if any) in its efforts to acquire control of TFM and Tex Mex.

3. This decision is effective on the service date.

By the Board, Chairman Nober.

Vernon A. Williams
Secretary