



**U.S. Department of
Transportation**

Office of the Secretary
of Transportation

GENERAL COUNSEL

400 Seventh St., S.W.
Washington, D.C. 20590

209020

ORIGINAL

September 30, 2003

Vernon A. Williams, Secretary
Surface Transportation Board
Suite 700
1925 K Street, N.W.
Washington, D.C. 20423-0001

Re: Finance Docket No. 34342

Dear Secretary Williams:

Enclosed please find the original and twenty-five copies of the Comments of the United States Department of Transportation on the Procedural Schedule (DOT-5) in the above-referenced proceeding. I have included a computer diskette containing the above document in WordPerfect, and an additional copy that I request be date-stamped and returned to the messenger delivering these materials.

Thank you for your assistance in this matter.

Respectfully submitted,

Paul Samuel Smith
Senior Trial Attorney
(202) 366-9280



ENTERED
Office of Proceedings

SEP 30 2003

Part of
Public Record

Enclosures

cc: Parties of Record

ORIGINAL

Before the
Surface Transportation Board
Washington, D.C.

DOT-5



Kansas City Southern -- Control -- The Kansas City)
Southern Railway Company, Gateway Eastern)
Railway Company, and The Texas Mexican)
Railway Company)

Finance Docket No. 34342

**Comments of the
United States Department of Transportation
On the Procedural Schedule**

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Public Record

Introduction

The Surface Transportation Board ("STB" or "Board") in this proceeding is considering the acquisition of control of the Texas Mexican Railway Company ("Tex Mex") by the Kansas City Southern Railway Company ("KCS").¹ The Board and numerous parties have also expressed an interest in the implications of another transaction, through which KCS would control a major Mexican railroad, TFM, S.A. de C.V. ("TFM").

Neither transaction may now take place since the original seller of the interests KCS wished to purchase -- Grupo TMM -- has taken steps to cancel or reverse the sales. In these circumstances the STB has asked for comment on whether to suspend the procedural schedule herein "pending a resolution of the uncertainties" surrounding the

¹/ Technically, KCS would gain control of Tex Mex through the latter's holding company, Mexrail, Inc.

KCS/Tex Mex transaction. Decision No. 9, served September 23, 2003.

Discussion

The United States Department of Transportation (“DOT” or “Department”) shares the Board’s “serious reservations about going forward” under the circumstances. *Id.* at 6. In the typical case before the STB, applicants have it wholly within their control to effectuate their transaction following regulatory approval. Here, by contrast, neither of the Applicants, individually or collectively, has this power.²

DOT understands that KCS is pursuing litigation against Grupo TMM and/or TFM regarding the acquisition of TFM (which could put KCS in position to acquire Tex Mex), but there can be no certainty about the outcome of any such action. Moreover, even if KCS should prevail in court or otherwise succeed in overcoming the current opposition of the parties with which it originally contracted, federal law places limits on the time allowed the Board to issue a decision in this proceeding. 49 U.S.C. § 11325.

The Department believes that at present the STB should not proceed to a decision on the merits. In judicial parlance, there is apparently no longer an active “case or controversy” that a substantive determination by the Board will resolve.³ Although the Board may be under no Constitutional obligation to consider only such cases, neither is it required to address hypotheticals. Policies of administrative economy and the lack of any

^{2/} There has been no occasion of which DOT is aware when the STB entertained a control application from a carrier that was opposed by the railroad (or owner of the railroad) over which control was sought. The only remotely similar case was Finance Docket No. 33220, in which CSX Transportation Co. and Consolidated Rail Corp. agreed to merge and a third railroad, Norfolk Southern Railway Co., immediately expressed active opposition to the point that the original agreement and proceeding were soon superseded by a very different agreement and proceeding, Finance Docket No. 33388.

^{3/} The question of approval is no longer ripe because, as explained above, it rests upon future contingencies that may not occur. If those contingencies do not occur (*i.e.*, if KCS does not regain the ability to effectuate control of Tex Mex), the case will be completely moot.

meaningful value to what might well be an advisory opinion (if KCS does not prevail elsewhere) also counsel against proceeding to a final decision. On the other hand, the possibility that KCS may ultimately succeed, and the existence of a virtually complete administrative record were that to occur, militate against complete and immediate dismissal.

The Department therefore recommends that the STB suspend the procedural schedule at this time. In the event it was successful in its efforts with Grupo TMM, this would allow KCS the ability to petition the Board to resume the proceeding, at least so long as there remained sufficient time for the Board to issue a final decision within the statutory timeframe. If KCS does not timely seek to reactivate the proceeding (with evidence of some resolution of its differences with Grupo TMM), the application should be dismissed without prejudice at the end of the statutory period.⁴

If the relevant disputes are subsequently resolved in KCS' favor, it would of course always enjoy the opportunity to file a new application. DOT also believes that if KCS can demonstrate a return to the *status quo ante*, to that extent the Board and all the parties should be able to avail themselves of the existing record and thereby greatly accelerate any new proceeding.⁵

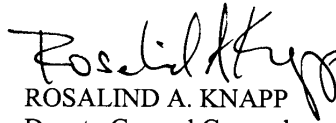
^{4/} The Board should make clear that its decision, whatever it is, is not intended to prejudice the outcome of any KCS litigation on this matter.

^{5/} Obviously, parties should be free to address whether the *status quo ante* had actually been restored, and any meaningful differences in relevant conditions or the terms of a new application would have to be explored.

Conclusion

The application before the Board is subject to contingencies that are beyond the control of the STB, the Applicants, and any of the parties. The Department in these circumstances urges the Board to suspend the procedural schedule. Should KCS secure a return of the *status quo ante* in time to permit the Board to issue a decision within the applicable statutory time frame, the proceeding could continue at that point. 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.

Respectfully submitted,


ROSALIND A. KNAPP
Deputy General Counsel

September 30, 2003

CERTIFICATE OF SERVICE

I hereby certify that on this date I caused a copy of the foregoing Comments of the United States Department of Transportation on the Procedural Schedule (DOT-5) in STB Finance Docket No. 34342 to be served by first class mail, postage prepaid, upon all Parties of Record in this proceeding.



Paul Samuel Smith

September 30, 2003