

as NAFTA Rail #2)¹⁰—will control, directly or through one or more corporate intermediaries, four railroads (KCSR, GWER, Tex Mex, and TFM), all of which will be operated as separate subsidiaries under common control.

The KCS/TM Transaction; Purchase Price; Voting Trust. One of the agreements announced on April 21, 2003 (referred to as the KCS/TM Stock Purchase Agreement) contemplated the acquisition by KCS, from TFM, of 51% of TFM's 100% interest in Mexrail, in exchange for approximately \$32.7 million in cash. On May 9, 2003, KCS consummated the acquisition (the purchase price was apparently paid on May 9th) and acquired a 51% interest in Mexrail.¹¹ KCS advises that, to avoid any violation of 49 U.S.C. 11323 *et seq.*, it immediately placed the shares of Mexrail and Tex Mex (*i.e.*, KCS's 51% interest in Mexrail, and Mexrail's 100% interest in Tex Mex), *see* KCS-3 at 19 n.12, into an independent irrevocable voting trust that was established pursuant to an agreement (referred to as the KCS/TM Voting Trust Agreement) that, KCS claims, is consistent with 49 CFR part 1013. KCS advises that, if and when the Board approves the acquisition by KCS of control of Tex Mex, the voting trust will be dissolved, KCS will take full ownership of its 51% interest in Mexrail, and Mexrail will reassume full ownership of its 100% interest in Tex Mex.¹²

The KCS/TM Transaction; Purchase Price; Several Contingencies. Two or more of the agreements announced on April 21, 2003, contemplate the acquisition by KCS of control of TFM. The KCS/TM transaction envisioned by these agreements contemplates that Kansas City Southern will be renamed "NAFTA Rail" (referred to as NAFTA Rail #2); that NAFTA Rail #2 will acquire TMM Multimodal's 38.5% interest in Grupo TFM, which, when combined with NAFTA Rail #2's (*i.e.*, KCS's) present 36.9% interest, will give NAFTA Rail #2 a controlling interest in Grupo TFM, and, therefore, a

controlling interest in TFM;¹³ and that TMM Multimodal will receive 18 million shares of NAFTA Rail #2 representing an approximately 22% (20% voting, 2% subject to voting restrictions) interest in NAFTA Rail #2, plus \$200 million in cash and a potential incentive payment of between \$100 million and \$180 million based on the resolution of certain contingencies.¹⁴ The KCS/TFM transaction, including the change of name from Kansas City Southern to NAFTA Rail, is contingent upon obtaining adequate financing, the approval of the shareholders of KCS, the approval of the shareholders of Grupo TMM, the Hart-Scott-Rodino process at the U.S. Department of Justice (DOJ), the approval of the Mexican Competition Commission, and the approval of the Mexican Foreign Investment Commission.¹⁵

The KCS/TM Transaction: Public Interest Considerations. Applicants contend that bringing the KCSR/GWER and Tex Mex systems under common control represents one more step in KCS's efforts to develop a "NAFTA Railroad" that will connect Canada, the U.S., and Mexico and provide seamless, efficient, and competitive rail service in all of North America.¹⁶ Common control of KCSR/GWER and Tex Mex, applicants argue, will provide more efficient routing and service options to shippers; it will make possible better coordination of marketing, improved customer service, and improved single-line service; it will allow KCSR/GWER

and Tex Mex to reduce expenses and rationalize operations; it will make possible full integration of KCS's Management Control System (MCS),¹⁷ improved freight car utilization, improved performance of the locomotive fleet, reduced time-keeping and payroll-processing costs, and consolidation of general and administrative functions; it will provide financial stability to Tex Mex, which (applicants note) has from time to time in recent years found itself hard pressed to keep pace with the increasing traffic volumes available; and, finally, it will help position KCSR to remain a competitive, independent, and viable carrier. Applicants argue that the combined KCSR/GWER-Tex Mex system will be stronger, financially and operationally, than either system could be separately. Applicants assert that they will be in a better position to provide an effective competitive alternative at Laredo, and better able to compete with other railroads, motor carriers, and barges in providing effective and efficient service to the shipping public.¹⁸

Applicants further contend that common control of KCSR/GWER and Tex Mex will not result in any loss of competitive rail options for any shipper or any receiver. There are, applicants argue, no shippers or receivers receiving rail service from KCSR/GWER and Tex Mex for which common control would reduce the number of independent railroads serving them from three to two or from two to one. Applicants advise that KCSR/GWER and Tex Mex share only one common connection (at Beaumont, TX). The KCS/TM transaction, applicants maintain, involves an end-to-end connection whereby two carriers that already share common ownership and operating practices will finally be combined under a unified management team. Applicants contend that common control of KCSR/GWER and Tex Mex will not result in a substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in

¹⁰ The new "NAFTA Rail" (*i.e.*, the renamed Kansas City Southern referred to as NAFTA Rail #2) should be distinguished from the old "NAFTA Rail" ("NAFTA Rail, S.A. de C.V.") the wholly owned indirect subsidiary of KCS that is referred to as NAFTA Rail #1).

¹¹ Although KCS has already purchased 51% of TFM's 100% interest in Mexrail, KCS also has a call on the remaining 49% of TFM's 100% interest in Mexrail. This call apparently allows KCS to purchase the remaining 49% interest. *See* KCS-3 at 14.

¹² The KCS/TM transaction (*i.e.*, the acquisition, by KCS, of a 51% interest in Tex Mex) is subject to the jurisdiction of the Board under § 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.").

¹³ The KCS/TM application does not appear to state explicitly that NAFTA Rail #2 will acquire all of TMM Multimodal's 38.5% interest in Grupo TFM. The context, however, suggests that NAFTA Rail #2 will indeed acquire all of TMM Multimodal's 38.5% interest.

¹⁴ Applicants indicate that the contingencies mainly involve a value added tax dispute in Mexico. *See* KCS-3 at 54.

¹⁵ Although section 11323(a)(5) ("Acquisition of control of a rail carrier [TFM] by a person that is not a rail carrier [KCS] but that controls any number of rail carriers [KCSR and GWER, and, after the termination of the voting trust, Tex Mex]) might suggest the applicability of this provision to acquisition of control of TFM by KCS, this provision is not applicable in this context because the Board has no jurisdiction over the acquisition of control of a rail carrier—like TFM—that is located entirely outside the United States. Similarly, although § 11323(a)(4) ("Acquisition of control of at least 2 rail carriers [KCSR, GWER, and, after the termination of the voting trust, Tex Mex] by a person that is not a rail carrier [Grupo TMM]) might conceivably be applicable to the acquisition of a 20% (or 22%) interest in KCS by Grupo TMM, it has long been understood that acquisition of control by a noncarrier of any number of carriers operating as a "single established system" is not subject to § 11323(a)(4). *Fox Valley & Western Ltd.—Exempt., Acq. and Oper.*, 9 I.C.C.2d 209, 217–18 (1992) (citing cases).

¹⁶ The North American Free Trade Agreement is referred to as NAFTA.

¹⁷ MCS is a computerized shipment and billing management system.

¹⁸ Applicants anticipate that, as a result of common control of KCSR/GWER and Tex Mex, approximately 6,313 carloads of traffic will be diverted to the combined KCSR/GWER-Tex Mex system annually (by the end of the third year following the consummation of common control), generating additional annual revenues of approximately \$14.3 million. Applicants predict that much of the diverted traffic will be interchanged with eastern carriers CSX Transportation, Inc. and Norfolk Southern Railway Company (NS). *See* KCS-3 at 221. Applicants further anticipate that common control will result in net operating-expense savings of approximately \$3.3 million annually.