

any region of the United States. And, applicants add, in view of the fact that the KCS/TM transaction occurs in a market in which motor carriers are the dominant mode of transportation, this transaction cannot have an adverse impact on competition.¹⁹

Applicants also contend that the KCS/TM transaction is not anticompetitive because it does not call for cancellation of any cooperative agreements with other carriers. These agreements include a 1997 NS-KCSR-Tex Mex marketing agreement (renewed in 2000 for 3 years) for traffic moving into Texas and Mexico, the KCSR-CN/IC Alliance,²⁰ and a 2002 BNSF-KCSR marketing agreement. Applicants add that these agreements provide valuable carloads to the KCSR and Tex Mex systems and form the backbone of the competitive alternative currently provided by KCSR and Tex Mex for NAFTA traffic. They further contend that, because of these agreements, shippers have a choice and do not have to depend solely upon UP or the trucking industry for shipment of their NAFTA traffic. Applicants state that, to improve Tex Mex's financial stability, KCSR intends to work with all of its connecting carriers to increase the amount of traffic flowing over Tex Mex. Applicants acknowledge that, although they will honor all Tex Mex agreements pursuant to the terms, any agreement that does not provide adequate revenues will be reviewed, and, upon expiration, will be renegotiated or not renewed. See KCS-3 at 60 n.3.

Labor Protection. Applicants acknowledge that the applicable level of labor protection for the proposed KCS/TM transaction is that set forth in *New York Dock Ry.—Control—Brooklyn Eastern Dist.*, 360 I.C.C. 60, 84–90 (1979). Applicants state that the existing collective bargaining agreements for KCSR and Tex Mex will remain in force. They explain that the implementation of KCSR's MCS on Tex Mex will result in the elimination of a limited number of employee positions and that other anticipated operating economies will result in the elimination of a limited number of positions in marketing management, time-keeping and payroll processing, and a limited number of

positions involved with car and locomotive pool. The applicants further acknowledge the possibility that significant changes may occur as they gain experience in the course of implementing common control of KCS and TM. See KCS-3 at 158.

KCS/TM Application Accepted. The Board agrees with applicants that the KCS/TM common control transaction may be considered as a “minor transaction” under 49 CFR 1180.2(c), and the Board accepts the KCS/TM application for consideration because it is in substantial compliance with the applicable regulations governing minor transactions. See 49 U.S.C. 11321–26; 49 CFR part 1180.²¹

But while the KCS/TM transaction may be designated as “minor” from a regulatory standpoint, the broader transaction, incorporating the related KCS/TFM component, could be very significant. Indeed, if the KCS/TFM transaction were subject to the jurisdiction of the Board—which it is not—it would be categorized as a “major” transaction because TFM's size would make it a Class I railroad if it were in the U.S. Moreover, the significance of the role played by TFM in the U.S.-Mexico NAFTA corridor cannot be ignored.

Thus, UP has asked that applicants nevertheless be required to supplement their application to address the implications of the KCS/TFM transaction on the KCS/TM transaction (UP-1 pleading, filed May 27, 2003).²² UP expressed concern that TFM will not remain an independent and neutral connection at Laredo. UP argues that the KCS/TFM transaction must be evaluated on a record that includes the effect of the KCS/TFM transaction on the KCS/TM transaction and on competition within the U.S.

Notwithstanding that the two transactions nominally are separate and independent of each other, in reality they are two components of a single, larger transaction with broader potential implications in the U.S. Thus, as UP has pointed out, the Board should be prepared to address these effects. Accordingly, the Board will require that, by June 23, 2003, applicants must supplement the KCS/TM application to reflect the implications of the broader

transaction for competition within the U.S. In particular, applicants should submit the information specified in 49 CFR 1180.1(k)(1) and 1180.11. Because the applicants likely have already prepared much, if not all, of this information for other purposes or after receiving UP's filing, they should be able to submit the necessary supplemental information by that date.²³

Public Inspection. The KCS/TM application is available for inspection in the Docket File Reading Room (Room 755) at the offices of the Surface Transportation Board, 1925 K Street, NW., in Washington, DC. In addition, it may be obtained from applicants' representatives (Mr. Mullins, for KCS, KCSR, and GWER; Mr. Streeter, for Tex Mex and Mexrail) at the addresses indicated above.

Procedural Schedule. Applicants have indicated that they would like to release Tex Mex from the voting trust as soon as possible. They have therefore proposed a 128-day procedural schedule that provides for issuance of a decision by the Board on September 19, 2003, with an effective date of September 24, 2003.²⁴

The Board is adopting a 156-day procedural schedule²⁵ that, although 28 days longer than applicants suggest, still provides for less total time than the 180-day procedural schedule (30 days + 105 days + 45 days) established by the deadlines set forth at 49 U.S.C. 11325(a), (d)(2).²⁶ Applicants' suggested

²³ Should applicants need additional time to prepare the necessary supplemental information, they may request appropriate revisions to this schedule.

²⁴ Applicants contend that, because Tex Mex is now operating under a voting trust arrangement, the KCS/TM application should be approved and made effective on as expeditious a schedule as is possible.

²⁵ The schedule adopted here is similar, in key respects, to the schedule proposed by UP (in its UP-1 pleading, filed May 27, 2003), which is endorsed by DuPont (in its pleading filed June 2, 2003). Likewise, the schedule is also similar to that proposed by The National Industrial Transportation League (in its NITL-2 pleading, filed June 3, 2003). The adopted schedule should afford all non-applicant parties sufficient time to seek discovery regarding all relevant impacts of the Tex Mex transaction and to prepare and submit comments on the impacts of the transactions as requested by CN (in its CN-2 pleading, filed June 3, 2003). The Board realizes that, although the adopted schedule does not give non-applicant parties the 45 days one of them seeks for filing comments after the applicants' submission of supplemental information (see BNSF-1 at 13, filed June 3, 2003), in affording them 42 days, it has essentially accommodated that request.

²⁶ The Board expects that applicants have adhered to their promise to provide copies of the KCS/TM application to certain parties that had previously requested copies of the application and to all parties required by regulation. The Board further expects that applicants have also adhered

¹⁹ Applicants also maintain that KCSR/GWER-Tex Mex common control will not adversely impact the essential services provided by any rail carrier. Applicants estimate that common control will result in losses of 4,123 cars a year to UP (allegedly representing 1.7% of all cars delivered or picked up by UP at Laredo, TX) and 1,692 cars a year to BNSF (allegedly representing 17% of all cars delivered or picked up by BNSF at Brownsville, TX). See KCS-3 at 122.

²⁰ Canadian National Railway Company is referred to as CN. Illinois Central Railroad Company is referred to as IC.

²¹ The Board reserves the right to require the filing of supplemental information from applicants or any other party or individual, if necessary to complete the record in this matter.

²² UP's request that applicants be required to supplement the KCS/TM application has been endorsed by E.I. du Pont de Nemours and Company (DuPont) in a pleading filed June 2, 2003. BNSF has also requested supplementation. See BNSF-1 (filed June 3, 2003) at 2–10.