

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Docket No. FD 36406

**PORT AUTHORITY OF KANSAS CITY, MISSOURI
– CONSTRUCTION AND OPERATION OF A LINE OF RAILROAD –
IN JACKSON AND CLAY COUNTIES, MO**

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**INITIAL COMMENTS OF
THE KANSAS CITY SOUTHERN RAILWAY COMPANY**

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The Kansas City Southern Railway Company (“KCSR”) submits these Comments in the above-captioned proceeding before the Surface Transportation Board (“STB” or “Board”). On September 7, 2022, the Port Authority of Kansas City, Missouri (“Port KC” or “Petitioner”) petitioned the Board pursuant to 49 U.S.C. §10502 for an exemption from the prior approval requirements of 49 U.S.C. § 10901 for Port KC to construct and operate a new rail line. Via a decision issued on December 22, 2022, the STB instituted a proceeding under 49 U.S.C. § 10502(b) and stated that the issues presented by Port KC’s Petition would be addressed by the Board in a subsequent decision.¹

KCSR does not take a position on the merits of the construction portion of the Petition. However, if Port KC does later file a 49 U.S.C. § 10901(d) petition seeking a forced “crossing” of the tracks of KCSR, which the Petition indicates Port KC may do, KCSR intends to participate in that aspect of proceeding. KCSR would oppose Port KC’s efforts to operate in effect overhead

¹ KCSR would have filed these comments earlier, but since the Petition was filed, KCSR has requested additional detail regarding Port KC’s intended “crossing” of KCSR tracks. It was not until June 14, 2023, that KCSR learned that, while discussions would continue, Port KC would not be providing KCSR with any additional detail about its intent and plans and was referred by Port KC back to its Petition.

trackage rights over approximately 1.5 miles of operationally sensitive mainline trackage under the guise of a “crossing” of KCSR and Union Pacific Railroad Company (“UP”) track.

BACKGROUND

As detailed in its Petition, Port KC seeks to construct approximately 3.0 miles of new rail line in Kansas City, Missouri, and to operate across both this new rail line and approximately 0.3 miles of existing non-common carrier industrial track (together referred to herein as the “Proposed Line”). Port KC represents that the Proposed Line will provide common-carrier freight rail service by connecting a to-be-constructed multimodal inland port, Missouri River Terminal (“MRT”), with the Kansas City Terminal Railway Company (“KCTL”). Port KC further represents that such connection between MRT and KCTL will be made “either over or across” the tracks of KCSR and UP located in Kansas City. In its Petition to the Board, Port KC specifically represented that it was “working to engage KCS[R] to enter into an agreement to access KCTL.” (Pet. 13). While some discussions have since occurred, no agreement has been reached.

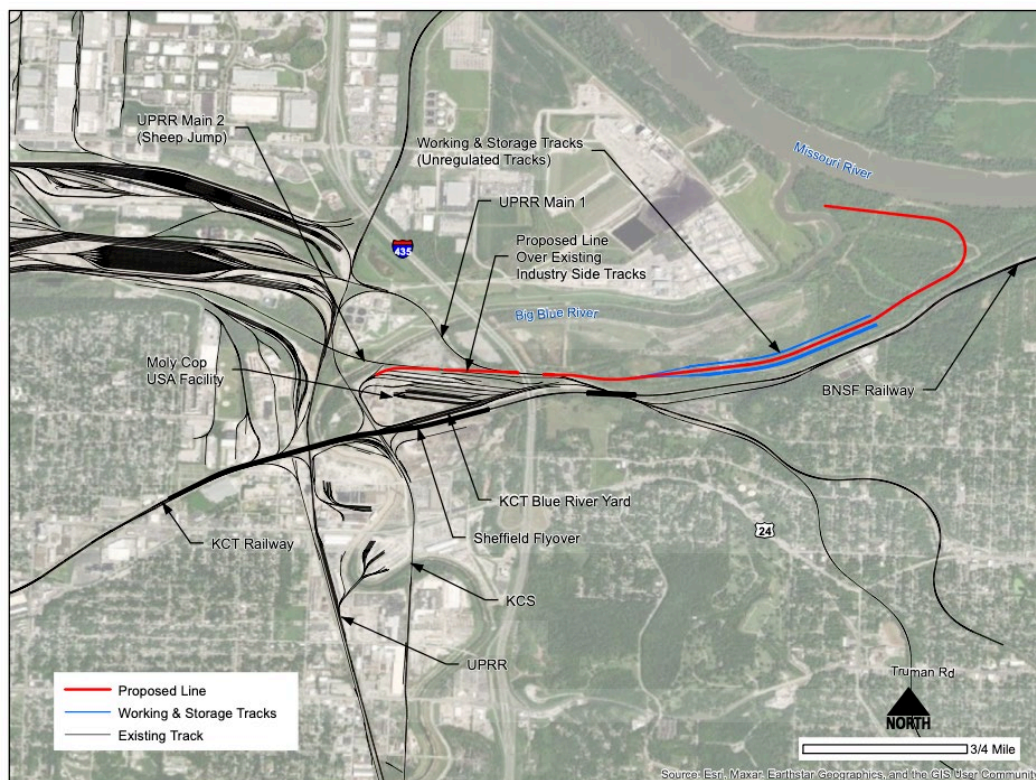
KCSR first learned of Port KC’s intention to traverse “over or across” KCSR’s track by seeing the Petition itself on the Board’s website. It was only *after* the filing of its Petition that Port KC began “working to engage” KCSR on the planned connection between the Proposed Line and KCTL that would directly affect KCSR’s use of its own track and UP track over which KCSR has long operated by trackage rights.

Between Port KC’s filing of its Petition on September 7 and the Board’s institution of this proceeding, representatives for Port KC and KCSR met for the first time on September 14, 2022, to discuss the particulars of Port KC’s Petition. Ostensibly, Port KC’s stated purpose for this belatedly scheduled meeting was to request KCSR’s consent to a crossing diamond for Port KC to access KCTL from the Proposed Line. When Port KC provided only a vague description of its

planned crossing at this meeting, KCSR advised Port KC that much more information was needed, including engineering drawings of the proposed diamond's location and specifications. Port KC assured KCSR that such information would be forthcoming.

Since that initial meeting, it became clear that there is substantially more to Port KC's plan for the Proposed Line than meets the eye in Exhibit A to Port KC's Petition. That map is reproduced below as Figure 1.

FIGURE 1
PORT KC MAP SUPPLIED AS EXHIBIT A TO ITS PETITION FOR EXEMPTION



When pressed for information about Port KC's actual plan to use KCSR trackage, Port KC's transportation consultant clarified that what Port KC actually seeks is operation over a total of more than a mile and a half of UP and KCSR trackage that is used by KCSR's mainline train operations between Kansas City and points east and south. Figure 2 below is a diagram supplied

by Port KC's consultant depicting the intended route used by trains moving to and from Port KC's proposed new facility. Those trains would use UP's main line (over which KCSR also operates) for approximately one mile to go north across the Big Blue River (the dashed yellow line between Points A and B in Figure 2), and then move onto KCSR's track, traversing approximately one-half mile of KCSR's main line to loop back south across the Big Blue River to a connection with KCTL (the yellow dashed line between Points B and C in Figure 2).

FIGURE 2
MAP SHOWING PROPOSED OPERATION OVER TRACKAGE OWNED OR USED BY KCSR

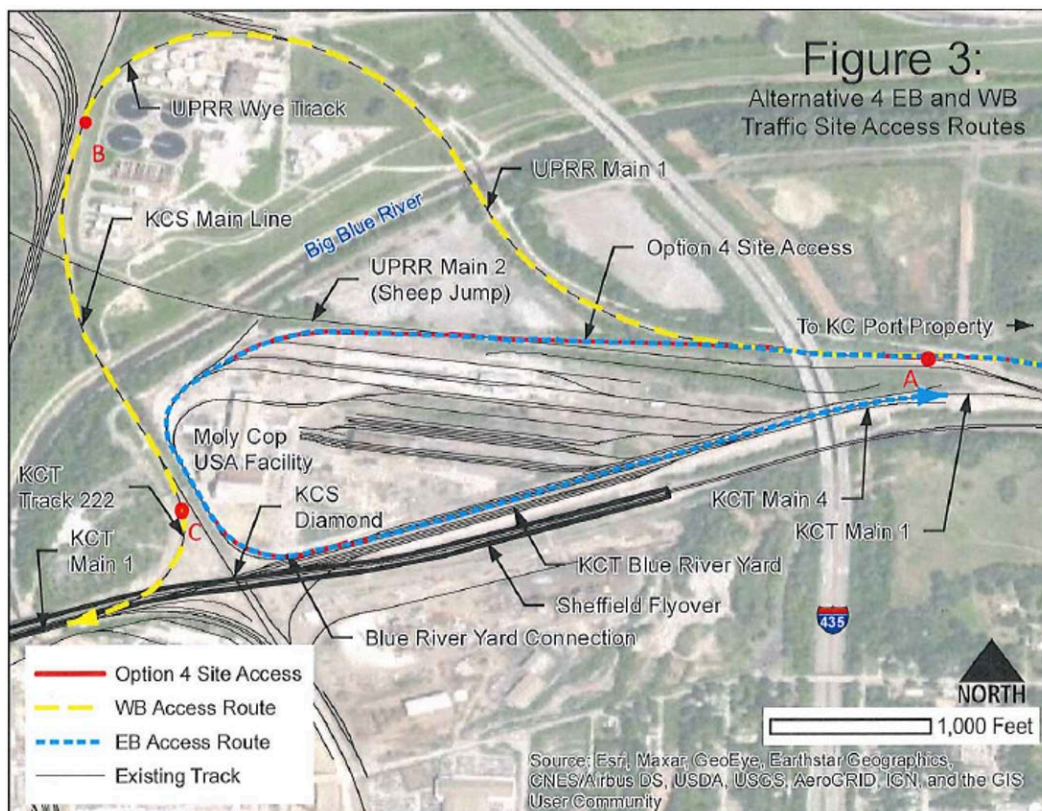
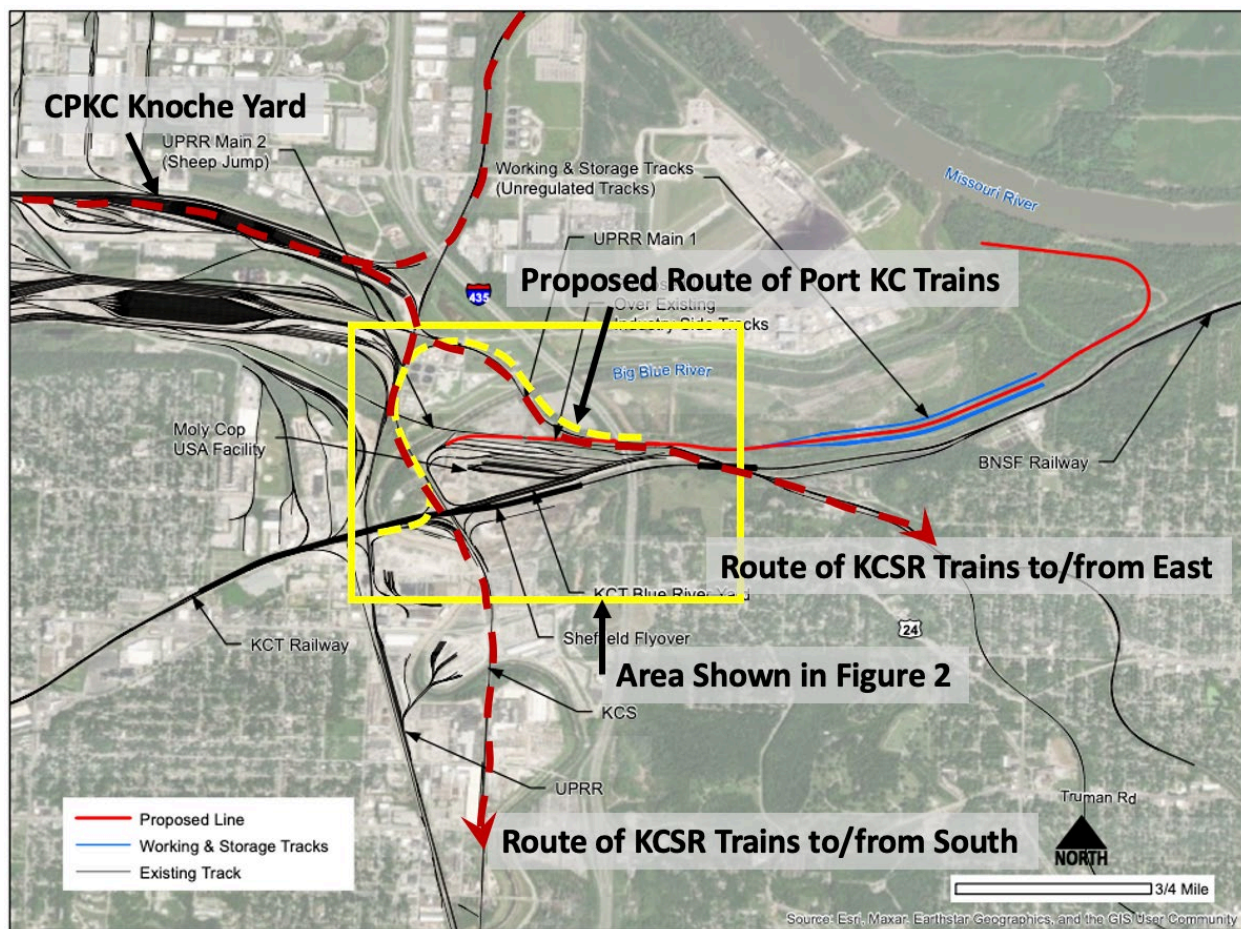


Figure 3 below puts this proposed operation in context. It shows Port KC's proposed operation over trackage used by KCSR on the map that Port KC submitted to the Board with its Petition for Exemption, which omitted this information. As Figure 3 shows, Port KC's operation would be

superimposed on critical rail infrastructure used by KCSR and UP trains on the east side of the Kansas City terminal, lines which are key to the smooth transition of both through and local freight.

FIGURE 3
ANNOTATED VERSION OF PORT KC'S EXHIBIT A SHOWING
ACTUAL PROPOSED USE OF TRACKAGE USED BY KCSR



Having learned of the particulars of such a proposed “crossing,” having not been provided any further details, and not having an agreement, KCSR believed it was important to file these comments at this time.

COMMENTS

Port KC indicated in its Petition that it intended “to pursue a crossing petition under 49 U.S.C. §10901(d) if Port KC is unable to negotiate crossing agreements with UP[] and KCS[R].”

(Pet. 12). Indeed, since the first September meeting between KCSR and Port KC, the parties have been in sporadic contact regarding the scope and operational impacts of Port KC's plans. Those discussions have failed to reach a consensus, let alone an actual agreement. KCSR is willing to participate in good faith discussions to seek a mutually acceptable agreement. With the right combination of infrastructure improvements or operational adjustments that would avoid adverse operational impacts on UP and KCSR's tracks, an agreement can be reached. However, if Port KC continues to insist on the *currently requested* route for its proposed operation as described above (and was not fully disclosed in the Petition) and files a petition under §10901(d) seeking imposition of the above-described "crossing," KCSR will vigorously oppose such a crossing petition. Such a proposal will "cease to be a crossing within the meaning of the crossing statute and will instead become an issue of operational trackage rights or simply an appropriation of another carrier's right-of-way." HolRail LLC—Construction and Operation Exemption—In Orangeburg and Dorchester Counties, SC, FD 34421 (Sub-No.1), slip op. at 6 (STB served Feb. 9, 2007) ("HolRail"), aff'd, HolRail, LLC v. Surface Transp. Bd., 515 F.3d 1313 (D.C. Cir. 2008) ("HolRail v. STB").

In HolRail, a manufacturer of cement products sought to bypass the one Class I railroad that served its facility, CSXT, by constructing a 2-mile rail line that would connect to a different Class I. (HolRail at 1). Because the construction petition was "inextricably bound up with the crossing issue" the Board required HolRail to file detailed information about its crossing petition so that "all components of HolRail's proposal, including the anticipated crossing petition, [we]re before [the Board]" when the Board ruled.² Id. at 2.

² The Board likewise could consider a similar approach here. There is nothing in the statute that requires the Board to first rule on Port KC's section 10502(a) exemption Petition before addressing the crossing issue. As the U.S. Court of Appeals for the D.C. Circuit said:

Upon receipt of HolRail's "more detailed plan for how it would construct its preferred route," the Board ascertained that approximately 1.7 miles of the 2-mile proposed line for HolRail would be constructed within CSXT's right-of-way. (Id. at 2-3). Calling HolRail's request "unprecedented in character," the Board delved into "the intended nature and purpose of the crossing provision of the statute[:]"

In our view, in enacting the crossing statute, Congress contemplated the sort of modest access that has been common in the rail industry, which consists of criss-crossing private rail networks. We do not believe that Congress envisioned or meant to mandate arrangements of the sort presented here, where the proponent of a new line seeks to use section 10901(d) as a substitute for obtaining its own right-of-way for a significant amount of the property that it would need.

Indeed, Congress never indicated that the crossing statute should be applied without limits. There is no indication that by enacting the crossing statute Congress meant to provide a means by which a new carrier could avail itself of a significant portion of an incumbent carrier's right-of-way in lieu of obtaining its own right-of-way, regardless of the difficulties it would otherwise face. Had Congress meant to provide for a new competitor to access the private property of an incumbent rail carrier to that degree, it presumably would have discussed such a significant change. There was no such discussion. Accordingly, we conclude that HolRail's attempt to essentially take CSXT's right-of-way for its own is tantamount to a confiscation, not a "crossing" within the purview of section 10901(d).

(Id. at 4, 5).

Port KC's proposal here is even further from a simple "criss-cross" than was HolRail's proposal to build its track on CSXT right-of-way because Port KC is seeking not only to use KCSR

HolRail contends that the Board may consider a crossing petition only after it has issued a certificate of public convenience and necessity pursuant to section 10901(c). We disagree. Although section 10901(d) certainly requires the Board to consider a crossing petition once it has issued a certificate of public convenience and necessity, nothing in that section or anything else in the statute bars the Board from proceeding first with the crossing issue where, as here--and as HolRail's counsel conceded at oral argument--HolRail has no way of proceeding with its preferred route without obtaining crossing authority.

HolRail v. STB, 515 F.3d at 1318 (D.C. Cir. 2008) (internal citations omitted).

and UP property; rather, it seeks to operate its trains for a mile-and-a-half *over the main lines* of two Class I railroads in the United States’ second largest rail hub. Moreover, not only is Port KC proposing to operate what is essentially forced trackage rights over UP’s and KCSR’s tracks, but the particular track it seeks to access serves as the entry and exit from two major yards, including Knoche Yard where KCSR and Canadian Pacific Railway’s (“CP”) U.S. operations have joined for many years. These tracks serve as both KCSR’s connection to its Pittsburg Subdivision main line south from Kansas City and KCSR’s Mexico Subdivision main line east toward East St. Louis, as depicted in “Figure 3” above. Further, as the Board is aware, Canadian Pacific Kansas City (CPKC) anticipates that the number of trains it operates to, from, and past Knoche Yard on KCSR’s Pittsburg Subdivision main line will approximately double in the next 3 years, growing by approximately 15 trains per day with both organic and merger-related growth.³ Thus, Port KC’s proposed “crossing” stands to significantly impact both local and through freight-service. Such an intrusion by Port KC would be “tantamount to a confiscation,” not a “crossing.” (*Id.* at 5).

As the Board noted in HolRail, “[t]he facts and circumstances of each case must be taken into account to determine when a proposed crossing would become so extensive a use of an incumbent’s right-of-way [or track] that it is not a mere crossing within the meaning of the statute.” (HolRail, 6). Until Port KC files its actual crossing petition and/or additional information regarding its crossing proposal, neither the Board nor KCSR can analyze or comment on the particular “facts and circumstances” of Port KC’s crossing proposal. It is for this reason that KCSR intends to

³ See Applicants’ Amended Operating Plan (CP-47/KCS-34), Appendix T, pg. 6 in Canadian Pacific Railway Limited; Canadian Pacific Railway Company; Soo Line Railroad Company; Central Maine & Quebec Railway US Inc.; Dakota, Minnesota, & Eastern Railroad Corporation; and Delaware & Hudson Railway Company, Inc. – Control – Kansas City Southern, The Kansas City Southern Railway Company, Gateway Eastern Railway Company, and The Texas Mexican Railway Company, STB FD 36500 (filed May 13, 2022).

continue good faith discussions with Port KC regarding its proposal. However, if that crossing petition seeks to impose forced operating rights over operationally sensitive tracks used by KCSR without KCSR's consent, KCSR will oppose such efforts.

CONCLUSION

To be clear, KCSR does not oppose Port KC's overall proposal. Such a proposal, if carefully coordinated with all stakeholders, including UP and KCSR, could indeed be good for Kansas City and the economy of the region. Accordingly, at this time KCSR remains open to continued discussions with Port KC to develop a proposal that works for all stakeholders. What KCSR would vigorously oppose is any attempt by Port KC or its operator to conduct what is in effect overhead trackage rights operations over KCSR's or UP's tracks without KCSR's consent and pursuant to STB imposed "crossing" rights.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, William A. Mullins, certify that I have this 5th day of July 2023 served copies of the foregoing upon all parties of record in this proceeding by electronic mail or by other means acceptable to the party served.

/s/ William A. Mullins

William A. Mullins