

SERVICE DATE - NOVEMBER 20, 2023

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36406

PORT AUTHORITY OF KANSAS CITY, MO.—CONSTRUCTION AND OPERATION
EXEMPTION—IN JACKSON AND CLAY COUNTIES, MO.

Digest:¹ The Board directs the Port Authority of Kansas City, Missouri, to file a verified supplement clarifying its plan to access other entities' rail lines and tracks as part of its proposed rail line construction.

Decided: November 19, 2023

On September 7, 2022, the Port Authority of Kansas City, Missouri (Port KC), a political subdivision of the State of Missouri, filed a petition under 49 U.S.C. § 10502 for exemption from the prior approval requirements of 49 U.S.C. § 10901 for Port KC to construct and operate approximately 3.0 miles of new rail line located on the east side of Kansas City, Mo., and to operate across approximately 0.3 miles of existing non-common carrier industrial track (together, the Line). By decision served on December 6, 2022, the Board instituted a proceeding under 49 U.S.C. § 10502(b).

For the reasons discussed below, the Board directs Port KC to file a verified supplement clarifying aspects of its proposal.

BACKGROUND

In its petition for exemption, Port KC explains that it is developing an inland port known as the Missouri River Terminal (MRT), (Port KC Pet. 2), and that it intends for the Line to serve customers shipping through the MRT, (*id.* at 10).² Port KC's description in its petition for

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Pol'y Statement on Plain Language Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

² Port KC states that it intends to develop the MRT as a public-private partnership. (Port KC Pet. 7.) Specifically, it envisions creating a 50-year agreement that includes the comprehensive design/construction, financing, operations, and maintenance of the MRT. (*Id.*, Joint V.S. Stephens & Grenville 9.) Although Port KC is seeking authority from the Board, it intends its partnership to include an agreement with a Class III rail carrier for rail operations, leaving Port KC with only a residual common carrier obligation. (*Id.*, Joint V.S. Stephens & Grenville 10.) Port KC's petition for exemption includes letters in support from U.S.

exemption is vague in certain respects, particularly regarding its plans to route traffic to and from the MRT. To further understand Port KC's proposal, the Board examined a separate report titled "Alternatives Screening Analysis" (Alternatives Report) that Port KC submitted in the environmental docket. (See Letter from Port KC to Danielle Gosselin, Director, Office of Environmental Analysis, Attach., at 5-7 (Mar. 29, 2022) (Env't Comment EI-32933).)

Port KC states that the Line will run from its connection point with Kansas City Terminal Railroad (KCTL) across lines owned by Union Pacific Railroad Company (UP) and The Kansas City Southern Railway Company (KCS). (Port KC Pet., Joint V.S. Stephens & Grenville 5.) For traffic moving eastbound from MRT, Port KC states that traffic will first need to cross two UP main lines, referred to as Main 1 and Main 2. (Port KC Pet. 13.) According to the Alternatives Report, eastbound traffic would cross UP's Main 1 and Main 2 by using a series of crossover tracks at or near an overpass for Interstate 435. (Alts. Rep. 5-7.) Port KC states that the newly constructed rail line would then connect with an existing non-common carrier industrial track approximately 0.3 miles in length (id. at 2; Alts. Rep. 7), which according to the Alternatives Report, is owned by an entity called Molycop, (Alts. Rep. 4-5). The Molycop track is presumably the track for which Port KC seeks operating authority. For westbound traffic, Port KC states that MRT traffic will need to move over UP Main 1 and a UP wye track, then onto a small segment of KCS line, before finally entering onto KCTL lines. (Port KC Pet. 13.)

Port KC argues that its proposal qualifies for an exemption under 49 U.S.C. § 10502. (Id. at 9-13.) Port KC further states that, in the event it is unable to negotiate crossing agreements with UP and KCS, it intends to file a crossing petition under 49 U.S.C. § 10901(d). Accordingly, Port KC requests that the Board proceed with the exemption proceeding, noting that, if the Board authorizes the exemption, it can revoke the exemption to the extent necessary to enable Port KC to file a crossing petition if the parties are unable to negotiate a crossing agreement. (Id. at 12.)

On July 5, 2023, KCS filed a comment. KCS states that it takes no position on the merits of the construction portion of Port KC's petition for exemption. (KCS Comment 1.) However, KCS states that in its discussions with Port KC about its planned crossing, Port KC has indicated that it seeks to operate over more than 1.5 miles of UP and KCS track. (Id. at 3.) KCS argues that, under the Board's decision in HolRail LLC—Construction & Operation Exemption—in Orangeburg & Dorchester Counties, S.C. (HolRail 2007), FD 34421 et al. (STB served Feb. 12, 2007) aff'd sub nom HolRail v. STB, 515 F.3d 1313 (D.C. Cir. 2008), such a proposal would not be a "crossing" within the meaning of 49 U.S.C. § 10901(d). (KCS Comment 6.) KCS states that if Port KC files a crossing petition that seeks "to operate in effect overhead trackage rights over" so much of KCS's line, KCS will oppose the crossing petition. (Id. at 1-2, 6.) Although KCS does not request that the Board take any immediate action, it notes that the Board could

Representatives Sam Graves and Emanuel Cleaver, II; Missouri State Senators Caleb Rowden, Dave Schatz, and Lincoln P. Hough; City of Kansas City, Missouri, City Manager Brian Platt; Economic Development Corporation of Kansas City, Missouri; Mid-America Regional Counsel; American Patriot Container Transport LLC; Coalition to Protect the Missouri River; Custom Truck One Source; Inland Rivers, Ports and Terminals, Inc.; Missouri Fam Bureau; Greater Kansas City Foreign-Trade Zone, Inc.; and The Scarbrough Group. Letters in support were also filed by U.S. Senator Roy Blunt and Missouri State Senator Justin D. Brown.

direct Port KC to file additional information about its plans and crossing proposal—an approach that the Board took in the HolRail proceeding. (Id. at 6 n.2.)

Port KC filed a reply to KCS’s comment on July 25, 2023. Port KC states that the relief KCS actually may be seeking—requiring Port KC to file its crossing petition—is not necessary at this time. (Port KC Reply 1.) Port KC also argues that decisions in the HolRail proceeding do not support KCS’s request that the Board direct Port KC to provide additional information. (Id. at 2-3.)

DISCUSSION AND CONCLUSIONS

As currently described, Port KC’s construction project seemingly depends on its ability to obtain access to the lines and track of other parties. If Port KC is unable to negotiate access to the UP and KCS lines and the Molycop industrial track, it appears that Port KC will not be able to use the Line as it intends. However, as discussed below, Port KC’s plans to obtain this access are unclear. Given these circumstances, the Board will require Port KC to clarify its plans to gain the apparently needed access. See HolRail LLC—Constr. & Operation Exemption—in Orangeburg & Dorchester Cntys., S.C. (HolRail 2004), FD 34421 et al., slip op. at 3 (STB served Oct. 4, 2004) (requiring the petitioner to submit its crossing petition while the petition for a construction exemption was still pending because the petitioner’s “entire case—indeed, even the details of how its construction proposal will look—[was] inextricably bound up with the crossing issue”).³

Two aspects of Port KC’s proposal require clarification. First, Port KC states that its proposed line “requires the at-grade crossing of these [UP] and KCS rail lines and property,” but “if these railroads are unwilling to enter into a voluntary crossing agreement, Port KC will need to file a formal crossing petition with the Board.” (Port KC Pet. 13.) To access the eastbound route, Port KC would need to route traffic over UP’s lines (UP Main 1 and Main 2) and the Molycop track. To access the westbound route, Port KC would need to route traffic over UP’s lines (UP Main 1 and the UP wye track) and KCS’ line. It is unclear from Port KC’s filings the extent to which it would seek authority pursuant to a crossing petition to cross UP’s line for eastbound traffic or UP’s lines and KCS’ line for westbound traffic.

Port KC’s statements that it would need an agreement not just with UP, but also with KCS, suggest that Port KC does intend to route traffic westbound by obtaining access to KCS’s line through a crossing petition if necessary. KCS claims that Port KC’s intent is to force access over approximately 1.5 miles of KCS’ line for its westbound traffic through a crossing petition and argues that such a request would not be appropriate. On reply, Port KC does not directly concede or refute the assertion that it will seek access to the KCS line for westbound traffic through a crossing petition, nor does it identify the extent of access over KCS’ line it would

³ Unlike HolRail 2004, the Board is not requiring Port KC to file any crossing petition at this time given the lack of clarity regarding what crossing authority Port KC might seek, ongoing discussions between the parties pertaining to access, and the fact that neither UP nor Molycop have expressed any concerns to the Board regarding Port KC’s proposed plans.

seek.⁴ Accordingly, it appears—though it is not certain—that Port KC is proposing to access a portion of KCS’ line for its westbound traffic through a crossing petition if necessary.

Second, Port KC states that MRT traffic moving eastbound will need to move over an existing industrial track (the Molycop track), but Port KC has not explained if it has an agreement with Molycop and, if not, what Port KC’s plans are to obtain such access.

The Board will therefore direct Port KC to provide additional information on the following issues:

- 1) Port KC’s plans (if any) for obtaining access over UP Main 1, the UP wye track, and the KCS line to route westbound traffic (i.e., the UP-KCS Route), including the status of any negotiations with UP and KCS;
- 2) Port KC’s plans (if any) for obtaining access over UP Main 1, UP Main 2, and the the Molycop industrial track to route eastbound traffic (i.e, the UP-Molycop Route), including the status of any negotiations with UP and Molycop; and
- 3) If Port KC cannot reach agreement with UP and/or KCS to access the UP-KCS Route, or with UP and/or Molycop to access the UP-Molycop Route, which portions of these routes Port KC intends to seek access to by filing a crossing petition under 49 U.S.C. § 10901(d).

The Board notes that when it considers a crossing petition, it assesses “the facts and circumstances of each case . . . to determine when a proposed crossing would become so extensive a use of an incumbent’s right-of-way that it is not a mere crossing within the meaning of [§ 10901(d)].” HolRail 2007, FD 34421 et al., slip op. at 6. Because Port KC has not filed a crossing petition or specified what such a petition might encompass, it would be premature for the Board to address at this time KCS’s assertion that Port KC’s proposal to move traffic westbound over the UP-KCS Route does not constitute a “crossing” under 49 U.S.C. § 10901(d). However, if Port KC intends to seek authority for the UP-KCS Route (or the UP-Molycop Route) pursuant to a crossing petition, it would need to demonstrate that its proposal would constitute a crossing under § 10901(d) in light of existing precedent. See HolRail 2007, FD 34421 et al., slip op. at 6.

To ensure that relevant parties are informed, Port KC will be directed to serve a copy of this decision and its verified supplement on UP and Molycop within 20 days.⁵ KCS, UP, and Molycop may file replies within 20 days of Port KC’s submission.

⁴ Port KC has proposed alternative routing options for consideration as part of the ongoing environmental review process, including an option to tunnel under UP Main 1 and Main 2 instead of crossing these lines using crossovers. (See Alts. Rep. 8.) However, all of the alternatives that have been presented would seem to require Port KC to use the UP-KCS Route and the Molycop industrial track.

⁵ KCS is already a party of record in this proceeding and therefore must be served.

The Board, through its Office of Environmental Analysis, has been preparing an Environmental Assessment of Port KC's proposal under the National Environmental Policy Act and related environmental laws. Without a better understanding of Port KC's proposal, it is not efficient to move forward with the environmental review process. Accordingly, the environmental review process will be held in abeyance until further order of the Board to allow the provision of the supplemental information discussed above.

It is ordered:

1. Port KC is directed to file a verified supplement addressing the information described above by December 11, 2023, and to serve a copy of the verified supplement and this decision on UP and Molycop.
2. KCS, UP, and Molycop may file replies to Port KC's verified supplement within 20 days from the filing of Port KC's verified supplement.
3. The environmental review in this proceeding is held in abeyance pending further order of the Board.
4. This decision is effective on its date of service.

By the Board, Board Members Fuchs, Hedlund, Oberman, Primus, and Schultz.