

**Before the
SURFACE TRANSPORTATION BOARD**

STB Docket No. FD 36406

ENTERED
Office of Proceedings
January 22, 2024
Part of
Public Record

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

**MOTION FOR LEAVE TO FILE A REPLY AND REPLY TO THE COMMENTS OF
THE KANSAS CITY SOUTHERN RAILWAY COMPANY**

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Dated: January 22, 2024

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On November 20, 2023, the Board issued a decision directing the Port Authority of Kansas City, Missouri (“Port KC”) to file a verified supplement clarifying its plans to access other entities’ rail lines and tracks as part of its proposed rail line construction.¹ On December 11, 2023, Port KC filed its Verified Supplement as requested by the Board. On January 2, 2023, Union Pacific Railroad Company (“UP”) and the Kansas City Southern Railway Company (“KCSR”) each filed reply comments.

Port KC is seeking leave to file this reply to the KCSR reply comments because KCSR incorporated legal arguments as part of its comments. In its November 20 Decision, the Board did not request, and Port KC did not provide legal arguments. In its January 2 Reply, UP restricted itself to a factual comment. By contrast, KCSR included within its comments a legal argument [citing Board precedent that KCSR thought applicable] that the Port KC Petition for Exemption should remain in abeyance pending completion of any negotiations and discussions with UP and

¹ Port Authority of Kansas City, MO – Construction and Operation Exemption – In Jackson and Clay Counties, MO., STB Financed Docket No. 36406 (served Nov. 20, 2023)(“November 20 Decision”).

KCSR. Therefore, in the interest of compiling a full record, Port KC respectfully requests leave to file this reply to the KCSR comments.²

BACKGROUND

On September 7, 2022, Port KC submitted a Petition for Exemption for construction authority to build and operate (through a contract operator) a line of railroad on the Missouri River Terminal (“MRT”) Project site to develop an intermodal container rail terminal and river port terminal with freight transload capabilities.

Port KC stated in its petition that its “preferred option” is for the Proposed Line to connect to the Kansas City Terminal Railroad (“KCTL”).³ In its Petition, Port KC stated that it “seeks interchange with KCTL for MRT to leverage KCTL’s connections to all of KCTL’s Class I railroad owners, UPRR, BNSF Railway, Inc., Norfolk Southern Railway Company, Canadian Pacific Railway Company, and KCS.”⁴

Port KC further explained that prior to its ownership of the MRT Project property, the steel mill that once occupied the site accessed KCTL via a tunnel. This tunnel in its current configuration is unable to accommodate double stack intermodal containers that Port KC anticipates transporting at MRT.⁵ Since modification of the tunnel is likely cost prohibitive, Port KC explained that to access KCTL, it would need to cross over UP and KCSR track.⁶ Therefore, in its Petition, Port KC asked the Board to issue a Certificate of Public Convenience and Necessity

² *American Rocky Mountaineer, LLC – Petition for Exemption from 49 U.S.C. Subtitle IV*, STB Finance Docket No. 36468, slip op. at 3 n. 3 (served May 28, 2021).

³ Petition for Exemption at 8.

⁴ Petition for Exemption at 12.

⁵ *Id.*

⁶ *Id.* at 13.

for its proposed rail line to allow Port KC to invoke the provisions of 49 USC 10901(d) in the event the parties were unable to reach an agreement.

In its November 20, 2023, decision, the Board requested additional information from Port KC including “the status of any negotiations with UP and KCS” and which portions of the UP / KCSR track Port KC intends to seek access to by filing a crossing petition.⁷ In response to the Board’s request for information, Port KC filed its December 11, 2023 Verified Supplement stating that in lieu of crossing over to KCTL, Port KC could instead access the interstate rail system by interchanging directly with UP and stated that it would withdraw its request for a certificate.⁸ Further, in response to the Board’s request for “the status of any negotiations”, Port KC said that negotiations so far were “limited to the filings by the parties in this docket.”⁹

On December 2, 2023, KCSR submitted its Reply Comments arguing that due to Port KC’s limited response, the Board should hold the Port KC Petition for Exemption in abeyance until KCSR’s conditions have been satisfied. KCSR states, the “Board should hold the Petition in abeyance pending completion of any negotiations and discussions with UP and KCSR.”¹⁰ KCSR continues, “[o]nce those discussions have occurred, Port KC could then submit whatever plans have been developed to the Board and then the Board could move forward with the Petition.”¹¹ KCSR further states that the Port KC Petition should be held in abeyance “until Port KC has come forward with definitive and concrete plans for connecting its proposed lines with the rail networks,

⁷ November 20 Decision, slip op. at 4.

⁸ Port KC Verified Supplement at 3-4.

⁹ *Id.* at 2.

¹⁰ KCSR Comment at 3 n.2.

¹¹ *Id.*

including any agreements with third parties or identified any concrete proposals for imposing such arrangements using the Board’s regulatory authority.”¹²

KCSR also commented in support of the potential value of the MRT Project. “KCSR continues to believe that the MRT Project can be beneficial to the broader Kansas City community.”¹³ But, KCSR states that to realize these benefits requires “cooperation” from everyone and “KCSR wants to be part of that process.”¹⁴

In its critique of the Port KC Verified Supplement, KCSR provides a Verified Statement to criticize Port KC’s response to the Board’s inquiry about the status of negotiations. KCSR provides a detailed list of contacts between the parties. Port KC appreciates that KCSR sees this point differently. But for the Board to understand, Port KC does not believe that it misrepresented the status of “negotiations” to the Board. Port KC does not disagree that “conversations” took place. However, despite these discussions, Port KC did not believe that the parties were progressing toward any sort of solution or engaging in any true “negotiations.”

Illustrative of this point is a June 14, 2023, email from Port KC’s counsel to KCSR stating that the “conversation with CPKC is only at the beginning.” This email is included in the KCSR Comment, where KCSR quotes Port KC’s counsel from an email as responding to CPKC, stating “Port KC’s ‘proposal as provided to the STB provides the greatest opportunity for the success of the project.’”¹⁵ Whereas, KCSR frames the conversations between the parties as a negotiation, Port KC did not view the parties to yet be in a negotiation. The entirety of Port KC’s email is enclosed as Exhibit A and the full paragraph cited by KCSR is as follows:

¹² *Id.* at 1-2.

¹³ *Id.* at 2.

¹⁴ *Id.*

¹⁵ CPKC Comment, Verified Statement at para 10.

We think our proposal as provided to the STB provides the greatest opportunity for the success of the project. As we stated in our petition to the STB, we are hoping to work with both CPKCS and UP to enter into an agreement for Port KC to access KCTL. We feel that our conversation with CPKC is only at the beginning. It is not our intention to file a crossing petition until we have had a comprehensive conversation with you to discuss rail access to the site. At this time we intend stay the course on our petition and we hope that we can reach a commercial agreement with you. [emphasis added].

Port KC provides the entire contents of this email not to dispute the KCSR recitation of the facts, but simply to explain that, from the Port KC perspective, the negotiations had not in fact started yet.

ARGUMENT

I. Legal Standards

The applicable legal standard for the Board to consider the KCSR request to keep the Port KC Petition for Exemption in abeyance pending “completion of any negotiations and discussions with UP and KCSR”¹⁶ is for the Board’s determination within its discretion according to the facts and circumstances of the situation.¹⁷ In considering the facts and circumstances in a construction proceeding, the Board should consider that the Board’s construction authority is permissive and a party is permitted to seek an exemption from the Board before all outstanding issues have been resolved.

The Board’s construction case law provides, “[t]he Board’s grant of authority to construct a line (whether under § 10901 or by exemption under § 10502) is permissive, not mandatory.”¹⁸

¹⁶ KCSR Comment at 3 n.2.

¹⁷ *Petition of the National Railroad Passenger Corporation for Relief Pursuant to 49 U.S.C. § 24905*, STB Finance Docket No. 36048, slip op. at 3 (Oct. 3, 2016).

¹⁸ *California High-Speed Rail Authority – Construction Exemption – in Fresno, Kings, Tulare, and Kern Counties, Cal.* STB Finance Docket No. 35724 (Sub-No. 1), slip op at 11 (served Aug. 12, 2014).

A petitioner may still seek and the Board may still grant exemption authority for a rail construction project even when outstanding issues have yet to be resolved, such as entering into agreements with affected railroads¹⁹, acquiring right-of-way²⁰, and securing necessary financing.²¹

II. The KCSR position that the Port KC Petition for Exemption should remain in abeyance pending completion of any negotiations and discussions is not supported by Board precedent.

KCSR cites no authority requiring a petitioner seeking construction authority to enter into agreements with affected third-party railroads prior to obtaining construction authority.²²

KCSR's sole citation in support of its argument to keep the Port KC petition in abeyance is a case that only demonstrates that the Board has the power to put a matter in abeyance, but not that it is justified in this situation.²³ In Savannah Industrial Logistics, the Board held a lease and operation exemption in abeyance while the petitioner sought after-the-fact construction authority

¹⁹ *California High-Speed Rail Authority – Construction Exemption – in Merced, Madera and Fresno Counties, Cal.* STB Finance Docket No. 35724, n. 104, slip op. at 20 (served June 13, 2013)(“Certain commenters...point out that the Authority has not yet resolved all outstanding issues related to the proposed construction, including compliance with FRA grant agreement terms (specifically, reaching agreements with affected railroads) and pending state court litigation. But just as with private construction projects, which are not always ready for immediate implementation upon authorization, because the Board’s construction authority is permissive a public authority may seek an exemption prior to resolving these types of issues.”)

²⁰ *Dakota, Minnesota & Eastern Railroad Corporation Construction into the Powder River Basin*, STB Finance Docket No. 33407, slip op. at 18 (served Feb. 15, 2006)(“The authority that we grant to DM&E here to construct this line is permissive. DM&E is not required to build the line. It will have to acquire the necessary rights-of-way, secure financing, and obtain approvals from certain cooperating agencies before it can construct the new line.”)

²¹ *Ken Tenn Regional Rail Partners, Inc. – Construction & Operation Exemption – In Fulton County, KY. And Obion County, Tenn.*, STB Finance Docket 36328, slip op. at 8 (served July 23, 2021).

²² See *Supra* n. 19 and *Townline Rail Terminal, LLC – Construction and Operation Exemption – In Suffolk County, N.Y.* STB Finance Docket No. 36575, slip op. at 5 (served Nov. 15, 2023).

²³ KCSR at 3 n.2 citing *Savannah Industrial Logistics, LLC – Construction Exemption – In Effingham County, GA*, FD 36723; *Savannah Industrial Transportation, LLC – Lease & Operation Exemption – Line of Savannah Industrial Logistics, LLC In Effingham County, GA*, FD 36723 (Sub-No. 1) (STB served Dec. 27, 2023)(“Savannah Industrial Logistics”).

for the construction of a rail line where the applicant had failed to seek or obtain Board construction authority to allow for “issues that require consideration by the Board, and an environmental and historic review.” Here, Port KC is not seeking after-the-fact authority to construct a rail line; Port KC is properly following the Board’s procedures for acquiring construction and operating authority.

KCSR is advocating that the Board should keep the Port KC Petition for Exemption in abeyance pending “completion of any negotiations and discussions with UP and KCSR.”²⁴ KCSR goes on to say, “[o]nce those discussions have occurred, Port KC could then submit whatever plans have been developed to the Board and then the Board could move forward with the Petition.”²⁵ KCSR further states that the Port KC Petition should be held in abeyance “until Port KC has come forward with definitive and concrete plans for connecting its proposed lines with the rail networks, including any agreements with third parties or identified any concrete proposals for imposing such arrangements using the Board’s regulatory authority.”²⁶

First, the Board’s construction precedent does not require negotiations with connecting railroads to be complete in order for the Board to consider a petition for exemption. In fact, it is just the opposite, the Board has acknowledged that numerous issues could be outstanding as it considers a construction petition including entering agreements with other railroads, acquisition of property, project financing, state court litigation, other agency approvals. There is no basis for KCSR’s request to require that Port KC complete negotiations with connecting railroads before the Board would remove this proceeding from abeyance.

²⁴ KCSR Comment at 3 n.2.

²⁵ *Id.*

²⁶ *Id.* at 1-2.

Second, the KCSR suggestion that “completion of any negotiations and discussions with UP and KCSR” as a condition to removing this proceeding from abeyance would make KCSR the gatekeeper for the MRT Project to move forward. Hypothetically, KCSR could determine that no amount of information Port KC provides or no number of concessions to KCSR’s demands would be satisfactory for KCSR to remove the petition from abeyance.

It is the Board’s role to determine whether this proceeding should be placed into or removed from abeyance and not KCSR’s. Port KC respectfully requests that the Board remove this proceeding from abeyance. The Board’s construction petition case law does not require Port KC to enter into any agreements with connecting railroads prior to or during the Board’s consideration of a petition for exemption. Indeed, Section 10901(d) specifically provides (in Section (d)(2)) procedures to apply where parties are unable to agree on crossing terms “after a certificate has been issued.” Further, while Port KC would still prefer to access KCTL, Port KC’s MRT Project can still succeed by simply connecting to UP. Although this scenario is not the preferred option offered for environmental review, the footprint of the project does not change if Port KC simply interchanges with UP instead of using the UP tracks to cross over to KCTL.

III. Despite this disagreement with KCSR over its assertion that the Port KC Petition for Exemption should remain in abeyance until an agreement is reached, Port KC looks forward to meeting with KCSR to discuss the MRT Project.

Port KC is pleased that KCSR believes “that the MRT Project can be beneficial to the broader Kansas City community.”²⁷ Port KC is also encouraged that KCSR wants to be part of the process.²⁸ While Port KC does not agree that KCSR’s willingness to be part of the process

²⁷ KCSR Comment at 2.

²⁸ *Id.*

should allow it to play the role of gatekeeper for determining whether this project is considered by the Board, Port KC is looking forward to productive conversations with KCSR. Port KC and KCSR had a meeting scheduled for January 12 to discuss the MRT Project, but that meeting had to be rescheduled due to inclement weather. Port KC looks forward to those discussions for and for any suggestions that KCSR might have that will ensure that Port KC's vision for the MRT Project is fulfilled.

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CONCLUSION

In conclusion, Port KC respectfully requests that the Board remove this proceeding from abeyance so that OEA may finish drafting the Draft Environmental Analysis and consideration of the petition can continue. The Board has the discretion to do so and removing this proceeding from abeyance is appropriate because the Board's permissive licensing authority allows for the consideration of a petition for construction authority despite open issues, such as agreements with connecting railroads.

Respectfully submitted,



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Missouri*

Dated: January 22, 2024

EXHIBIT A

Mark R. Coulter

From: Mark R. Coulter
Sent: Wednesday, June 14, 2023 6:19 PM
To: Warren Erdman
Cc: Jon Stephens; Brian Rabineau
Subject: RE: Follow up on brief conversation after Chamber Wrap-up luncheon about Blue Valley project design

Hi Warren –

Apologies for the delay in responding. As you know, infrastructure planning requires balancing many stakeholders and working with many parties to ensure as many interests and concerns can be addressed as possible.

We are aware of the concerns expressed by both CPKC and UP, and we have worked with our engineering team to make sure our application addresses as many concerns as possible without becoming so cost prohibitive it kills the project. To that point, we also recognize the project is not on any Class I railroad priority list, and in reading between the lines (or what has been said directly to us) we understand there are some who do not want the project to happen at all, which we find unfortunate. We think we have worked very hard to be as inclusive and cooperative as possible while not allowing the project to be held hostage by any individual interest. This is why the legislature and the Governor have been so supportive of the project, and why we are able to move forward to connect the site to the roadway and get us one step closer to a scalable, three-mode facility. This type of intermodal infrastructure is extremely common all over the world, but for some reason falls into the “we’ve never done it this way” category in Kansas City. It is why we began working with the terminal rail over two years ago, and why we have continued to work with our Class I partners.

We think our proposal as provided to the STB provides the greatest opportunity for the success of the project. As we stated in our petition to the STB, we are hoping to work with both CPKCS and UP to enter into an agreement for Port KC to access KCTL. We feel that our conversation with CPKC is only at the beginning. It is not our intention to file a crossing petition until we have had a comprehensive conversation with you to discuss rail access to the site. At this time we intend stay the course on our petition and we hope that we can reach a commercial agreement with you.

As a Port Authority in the state of Missouri our statutory mandate is to increase the volume of commerce within our port district not to the detriment of any particular mode, but for the benefit of all modes. Repurposing this site to handle all modes of traffic (as it did for almost 100 years as a steel facility) is a priority for us in our role as a port authority, and we hope as we move the project forward all parties will come to understand and appreciate our altruistic approach to performing our statutory mission.

We look forward to continuing the discussion to find a way to reach a feasible solution which results in a mutually beneficial commercial solution.

Thanks,

Mark

Mark R. Coulter
Attorney

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CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing to be served electronically on all parties of record.

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Dated: January 22, 2024



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