

SERVICE DATE – AUGUST 8, 2024

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 continues to hold its environmental review in abeyance until additional information regarding the construction project is provided.

Decided: August 7, 2024

By decision served on November 20, 2023 (November 2023 Decision), the Board directed the Port Authority of Kansas City, Missouri (Port KC), to file a verified supplement addressing certain aspects of its proposed construction of a new rail line located in Kansas City, Mo. The Board stated that the pending environmental review process in this proceeding would be held in abeyance until further order of the Board to allow Port KC to file the requested supplemental information and other interested parties to reply.

On December 11, 2023, Port KC filed a supplement and requested that the Board remove the environmental review from abeyance. The Board finds that certain aspects of Port KC's proposed construction still are not fully defined and therefore will continue to hold the environmental review in abeyance until further information is provided.

BACKGROUND

On September 7, 2022, 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, 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).

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). The specifics of Port KC's construction plan are discussed in Port KC's petition for exemption, the Alternatives Report prepared in the

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).

environmental docket, and the November 2023 Decision.² In short, Port KC's plan is to move MRT traffic over its new rail line to two different connections with the Kansas City Terminal Railroad (KCTL). (Port KC Pet. 8; Alts. Rep. 4-7.) For traffic moving eastbound, Port KC would connect with KCTL at its Blue River Yard. (Alts. Rep. 4-7.) For traffic moving westbound, Port KC would connect with one of KCTL's main lines just to the west of a Kansas City Southern Railway (KCS) diamond crossing. (*Id.*) To reach each of these connection points, however, Port KC would need to access the lines and track of other parties. Specifically, for the eastbound connection, Port KC would need to access two Union Pacific Railroad (UP) main lines and an industrial track owned by a company called Molycop. (Port KC Pet. 13; Alts. Rep. 7.) For the westbound connection, Port KC would need to access a UP main line, a UP wye track, and a KCS main line. (Port KC Pet. 13; Alts. Rep. 7.)

In its petition, Port KC indicates that if it cannot negotiate agreements with UP and KCS to access their rail lines, Port KC would instead seek access by filing a crossing petition pursuant to 49 U.S.C. § 10901(d). (Port KC Pet. 12-13.) In response, KCS filed a comment arguing that Port KC's plan to access its rail line is not actually a "crossing," but rather, forced trackage rights over approximately 1.5 miles of KCS's line. (KCS Comment 1-2, 6.) Port KC filed a reply to KCS's comment in which it neither conceded nor refuted KCS's assertion. (Port KC Reply 1-3, July 25, 2023.)

In the November 2023 Decision, the Board found that because Port KC's project appeared dependent on it obtaining access to the lines and track of other parties, Port KC needed to provide additional information regarding its plans to obtain such access. November 2023 Decision, FD 36406, slip op. at 3-4. The Board specifically directed Port KC to explain what steps it had taken, or would take, to obtain access to reach the westbound and eastbound connections, including the status of its negotiations with other parties. *Id.* at 4. The Board also directed Port KC to state which lines it would seek to access through a crossing petition if negotiations were unsuccessful. *Id.*

In its supplement responding to the November 2023 Decision, Port KC states that if it cannot negotiate access that would allow MRT traffic to reach KCTL, "it could connect at the same point on the UP line as it is Proposing [sic] to cross over to KCTL under the Proposed Line." (Port KC Suppl. 2.) In other words, if Port KC cannot move traffic over the lines and track of other parties, it would hand off the traffic to UP earlier in the route (rather than interchanging traffic with KCTL). Port KC claims that its proposed construction is therefore not dependent on it obtaining access to the lines or track of other parties. (*Id.* at 1.) Regarding the status of negotiations with other parties, Port KC states that UP has expressed concern with Port KC's proposal to cross UP's lines, that discussions with KCS have been limited, and that Port KC would negotiate access to the Molycop industrial track "in the same manner that Port KC is

² Port KC's description in its petition for 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 or Alts. Rep.) 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).)

currently acquiring the property neighboring the MRT Project.” (*Id.* at 2-3.) On the issue of which lines would be included in a future crossing petition, Port KC states that it is “premature” for Port KC to consider this. (*Id.* at 3.)

KCS and UP each replied to Port KC’s supplement. KCS argues that Port KC provided nonresponsive answers to the Board’s questions. (KCS Reply to Suppl. 2.) KCS states that the only new information provided is the fact that Port KC may decide to interchange traffic with UP rather than cross over UP’s and KCS’s lines. (*Id.* at 2-3.) According to KCS, this differs from Port KC’s statements in its petition for exemption that a connection to KCTL was a necessary part of the proposal. (*Id.* at 4.) KCS also notes that Port KC did not address the Board’s question regarding which lines might be the subject of a future crossing petition. (*Id.* at 6.) For these reasons, KCS requests that the Board hold the proceeding in abeyance until Port KC presents more definitive and concrete plans.³ (*Id.* at 1, 7.) KCS notes, however, that it continues to believe the MRT project could be beneficial and, therefore, it does not oppose the MRT project itself. (*Id.* at 2.) UP states that it has also expressed concern about the project to Port KC and that its supplement does not clarify matters. (UP Reply 1.) But like KCS, UP notes that it remains willing to support the project if it is not disruptive to UP’s operations. (*Id.* at 2.)

Port KC filed a motion for leave to file a reply to KCS’s reply on January 22, 2024, along with its reply. Port KC argues that because construction authority is permissive, parties are permitted to seek such authority before all outstanding issues have been resolved. (Port KC Surreply 6.) In support of its argument, Port KC cites past Board decisions where construction authority was granted despite unresolved matters. (*Id.* at 7.) Port KC states that, in contrast, KCS cites no precedent in which the Board has required an applicant to first enter into third-party agreements before obtaining construction authority. (*Id.*) Port KC also asserts that even if it cannot move traffic to reach KCTL, its project can still succeed simply by connecting with UP. (*Id.* at 8.)

KCS filed a reply to Port KC’s surreply on January 30, 2024.⁴ KCS argues that because Port KC’s plans are still undetermined, the Board will not be able to assess either the operational or environmental impacts of the project based on the information that is currently available. (KCS Surrebuttal 1.) It notes that whether Port KC would operate over UP’s and KCS’s lines or simply interchange with UP could change the construction petition and alignments that the Board is being asked to approve. (*Id.* at 2.) KCS also questions how the competitive benefits of the project would be affected if Port KC is not able to connect with KCTL. (*Id.*) KCS “requests that

³ In a footnote, KCS is more specific, stating that the Board should hold the proceeding in abeyance “pending completion of any negotiations and discussions with UP and KCSR[]” and that “[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 [proceeding].” (KCS Reply to Suppl. 3 n.2.)

⁴ KCS states that it does not object to Port KC’s filing so long as the Board accepts KCS’s reply. In the interest of compiling a complete record, the Board will accept these documents (Port KC Surreply and KCS Surrebuttal) into the record. See City of Alexandria, Va.—Pet. for Declaratory Ord., FD 35157, slip op. at 2 (STB served Nov. 6, 2008) (allowing a reply to a reply “[i]n the interest of compiling a full record”).

Port KC engage in a meaningful dialogue” before the Board rules on its petition for exemption. (Id.)

DISCUSSION AND CONCLUSIONS

The Board finds that the record lacks information needed for its Office of Environmental Analysis (OEA) to move forward with a meaningful environmental review. In its supplement, Port KC provides little information in response to the questions raised by the Board in the November 2023 Decision. (Port KC Suppl. 2.) Specifically, Port KC has not sufficiently responded to the Board’s questions regarding the details of the project, including which portions of the other parties’ lines it would seek access to through a negotiated resolution or a crossing petition. And while Port KC now asserts that it could interchange with UP in lieu of obtaining access over other parties’ lines or track, Port KC has provided no detail about this newly proposed alternative interchange.⁵

Given the uncertainty of Port KC’s plans, the Board cannot conduct a meaningful environmental review at this time. Accordingly, the Board will continue to hold the environmental review in abeyance until Port KC’s plans are more fully developed, and it has provided information on those plans to the Board.

Port KC argues that construction authority is permissive and notes that the Board has granted such authority in other instances despite the existence of unresolved issues, including lack of agreements with other carriers. (Port KC Surreply 6-7 & nn.18-21.) However, the decisions cited by Port KC are easily distinguishable. In California High-Speed Rail Authority—Construction Exemption—in Merced, Madera and Fresno Counties, Cal., FD 35724, slip op. at 20 n.104 (STB served June 13, 2013), and Townline Rail Terminal, LLC—Construction & Operation Exemption—in Suffolk County, N.Y., FD 6575, slip op. at 5 (STB served Nov. 15, 2023), the Board specifically noted a lack of opposition to the proposed agreements from the other rail carriers. In contrast, here, UP and KCS have both indicated that Port KC’s suggested interchanges or “crossings” could be disruptive to their operations, thus adding to the uncertainty of whether any interchange or crossing would be viable and where and how that interchange or crossing would take place. (UP Reply 1; KCS Comment 6.) Moreover, Port KC has not argued that the project could proceed without some type of interchange or crossing. (See Port KC Reply 2, July 25, 2023 (noting that the construction alternative that uses a tunnel to connect to KCTL would be cost-prohibitive).) And in California High-Speed Rail Authority—Construction Exemption—in Fresno, Kings, Tulare, and Kern Counties, Cal. (Cal. High-Speed 2014), FD 35724 (Sub-No. 1), slip op. at 11 (STB served Aug. 12, 2014), OEA participated in the environmental review as a cooperating agency, and, as the Board noted in its decision, the potential crossings with the freight carrier’s line had been considered as part of that environmental review. Id. Here, by contrast, Port KC did not provide the information requested in the Board’s November 2023 Decision about the proposed route and how Port KC planned to access the lines of other carriers. Thus, it would be inefficient and inappropriate to continue with the environmental review of the project at this time.

⁵ The Board notes that this possibility was not raised by Port KC in its petition for exemption or Alternatives Report prepared as part of the environmental review process.

Indeed, none of the decisions Port KC relies upon had outstanding issues that affected the Board's ability to conduct a thorough environmental review, in contrast to the circumstances here. Citing Dakota, Minnesota & Eastern Railroad Corp. Construction into the Powder River Basin (DM&E), FD 33407, slip op. at 18 (STB served Feb. 15, 2006), Port KC argues that the Board can grant construction authority when the applicant has not yet acquired the necessary rights-of-way. (See Port KC Reply 7 & n.20.) Additionally, Port KC cites Ken Tenn Regional Rail Partners, Inc.—Construction & Operation Exemption—in Fulton County, Ky., FD 36328, slip op. at 8 (STB served July 23, 2021), which states that the Board may grant authority for a rail construction project before financing has been secured. (See Port KC Reply 7 n.21.) But uncertainty regarding whether necessary rights-of-way will be acquired or how a project will be financed do not affect the Board's ability to conduct a meaningful environmental review in the way that the uncertainty here does, where there are unresolved questions regarding the proposed route and how Port KC would access the lines of other carriers.

Rather, this case is similar to those in which the Board has used its discretion to hold proceedings in abeyance. See Oakland Glob. Rail Enter.—Operation Exemption—in Oakland, Cal., FD 36312, slip op. at 3-4 (STB served May 5, 2022) (holding a petition for exemption to operate in abeyance while the parties engaged in settlement negotiations); cf. HolRail LLC—Constr. & Operation Exemption—in Orangeburg & Dorchester Cntys., S.C., FD 34421 et al., slip op. at 3 (STB served Oct. 20, 2004) (declining to “rule on the exemption petition” to construct and operate a rail line where a crossing petition was anticipated but had not yet been filed, as the applicant’s “entire case — indeed, even the details of how its construction proposal will look — is inextricably bound up with the crossing issue”), aff’d sub nom. HolRail v. STB, 515 F.3d 1313, 1318 (D.C. Cir. 2008) (affirming the Board’s discretion to defer judgment on request for construction authority pending resolution of the crossing issue). In this case, it would be inefficient and inappropriate for OEA to continue with its environmental review without the information regarding Port KC’s proposed operations requested by the Board in its November 2023 Decision. Those information requests are:

- 1) Port KC’s plans (if any) for obtaining access over UP Main 1,⁶ 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 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).

November 2023 Decision, FD 36406, slip op. at 4.

⁶ Port KC refers to two UP main lines as UP Main 1 and UP Main 2 in its petition. (See Port KC Pet. 13.)

For these reasons, the Board will continue to hold the environmental review in abeyance.

It is ordered:

1. The environmental review in this proceeding is held in abeyance pending further order of the Board.
2. This decision is effective on its date of service.

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