

**BEFORE THE UNITED STATES
SURFACE TRANSPORTATION BOARD**

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FINANCE DOCKET NO. FD 34030

**KANSAS & OKLAHOMA RAILROAD, INC. – ACQUISITION EXEMPTION –
CENTRAL KANSAS RAILWAY, LLC**

**REPLY TO KANSAS & OKLAHOMA RAILROAD, LLC’S
MOTION TO DISMISS**

Pursuant to the Surface Transportation Board’s (“Board” or “STB”) procedural regulations, Weskan Grain LLC (“Weskan”) hereby submits this reply to the “Motion to Dismiss” portion of Kansas & Oklahoma Railroad, LLC’s (“K&O”) Reply to Weskan Grain LLC’s Petition to Reopen and Partially Revoke, and Kansas and Oklahoma Railroad LLC’s Motion to Dismiss (“*Reply and Motion*”). For the reasons set forth hereinbelow, K&O’s motion should be denied.

I. APPLICABLE STANDARDS

In this proceeding, Weskan has petitioned the Board pursuant to 49 U.S.C. §1322, 49 U.S.C. §10502(d), and 49 C.F.R. §1115.4 to reopen and to partially revoke the exemption authority granted to K&O in 2001 to lease certain rail lines from the Union Pacific Railroad Company (“UP”) due to the presence of an unlawful interchange commitment, or “paper barrier.” Under Section §1322 and 49 C.F.R. §1115.4, the STB may reopen this proceeding upon a demonstration that the prior action should be revisited by the Board because of “material error, new evidence, or substantially changed circumstances.” Under §10502(d), “[t]he Board may revoke an exemption,

to the extent it specifies, when it finds that application in whole or in part of a provision of this part to the person, class, or transportation is necessary to carry out the transportation policy of Section 10101 of this title.” The Board has 90 days from the date a petition is filed to decide whether to commence a proceeding to revoke a proceeding, in whole or in part.

These authorities and standards have been applied in other cases challenging the legality of paper barriers. *See, e.g.,* Docket No. FD 33508, *Missouri Central Railroad Co. – Acquisition and Operation Exemption – Lines of Union Pacific Railroad Company* (served February 27, 2013). (“*Missouri Central*”). The Board has also provided further explanation and guidance in Ex Parte No. 575, *Review of Rail Access and Competition Issues – Renewed Petition of the Western Coal Traffic League*; Ex Parte No. 575 (Sub-No.1), *Disclosure of Rail Interchange Commitments* (Served October 30, 2007) at 16. (“*EP 575*”)

While motions to dismiss are typically confined to formal complaint proceedings, the Board has occasionally applied its standards for such motions in proceedings involving petitions. Docket No. FD 32760 (Sub-No. 46), *BNSF Railway Company – Terminal Trackage Rights – Kansas City Southern Railway Company and Union Pacific Railroad Company* (served May 1, 2018). In either context, motions to dismiss are disfavored by the Board. *Cent. Valley Ag Grinding, Inc. v. Modesto & Empire Traction Co.*, NOR 42159, slip op. at 4 (STB served July 25, 2018). When reviewing a motion to dismiss, “all alleged facts are viewed in the light most favorable to the [petitioner].” Docket No. NOR 42142, *Consumers Energy Co. v. CSX Transp., Inc.* (served June 15, 2015) at 1, *citing* Docket No. 42124, *Montana v. BNSF Ry.* (served Feb. 16, 2011) at 3.

II. REPLY TO K&O ARGUMENTS FOR DISMISSAL

Here, Weskan's Petition, despite necessarily lacking certain important facts due to K&O and UP refusing to provide them until directed to by the Board on December 20, 2024 in response to Weskan's Motion for Disclosure, nevertheless by itself raises sufficient facts to demonstrate that this proceeding should be reopened because of significant new evidence and substantially changed circumstances, and that the Board should revoke, in whole or in part, the exemption authority granted to K&O. When the facts presented thus far by Weskan in the Petition are viewed in the light most favorable to Weskan, dismissal is clearly not warranted. Moreover, Weskan stated in the Petition that it anticipated the disclosure of the actual lease language and related documents would reveal additional factual support for the Petition and reinforce the need for discovery and additional evidence presented by the parties. Petition at 12-13. As discussed below this, indeed, has turned out to be the case, which constitutes additional grounds for denying K&O's request to dismiss the Petition.

Despite the clear authorities and grounds supporting the Board continuing to evaluate the record and to determine whether and how to commence a more robust evidentiary proceeding, K&O seeks dismissal of the Petition primarily because K&O maintains the legality of the interchange commitment must instead be decided by a "two-track" process that, as posited by K&O, would take multiple years and potentially millions of dollars to pursue to a conclusion. K&O's argument is fundamentally flawed for several reasons, but primarily because it misinterprets the relief sought by the Petition and it also relies on an incorrect interpretation of another Board proceeding that was materially different than this one. More specifically, starting from the flatly incorrect claim that Weskan is seeking a determination that the rates K&O has established for transportation Weskan has requested are unreasonable under 49 U.S.C. §10701,

K&O argues that the process for resolving this dispute requires Weskan to file both a formal complaint and a petition to reopen and revoke, which K&O posits would be processed sequentially. *Reply and Motion* at 8, citing NOR 42104, *Entergy Arkansas, Inc., et al v. Union Pacific Railroad Company et al*; Finance Docket No. 32187, *Missouri & Northern Arkansas Railroad Co., Inc. – Lease, Acquisition, and Operation Exemption – Missouri Pacific Railroad Co. and Burlington Northern Railroad Co.* (Served June 26, 2009) (“*Entergy Arkansas*”).

The short answer is that Weskan is not - at this time - claiming that K&O has violated §10701 or any other statutory provision. This immediately distinguishes this case from *Entergy Arkansas*, where a potential statutory violation of 49 U.S.C. §10705 was the crux of the entire decision.¹ Rather, as the Petition explains, Weskan asserts that the economic “paper barrier” inserted into K&O’s lease with UP is designed and intended to strongly disincentivize, if not prevent, K&O from interchanging grain traffic originating on the leased line with any railroad other than UP, thereby preventing K&O from feasibly transporting Weskan’s grain from facilities in the vicinity of Scott City, KS approximately 60 miles to Towner, CO for interchange with the CXR for final delivery to Weskan’s Stockton grain elevator facility. By forcing K&O to pay UP a substantial and punitive financial penalty for providing the service Weskan has requested, the contractual paper barrier violates the premise that “a *shipper*’s right to adequate service, reasonable

¹ Curiously, while K&O relies exclusively on *Entergy Arkansas* for its “two-track” theory, K&O acknowledges that the primary issue in that proceeding – establishment of a new interchange over the objection of a carrier (UP) that was already serving the shipper – has absolutely no relevance to these facts. *Reply and Motion* at 8, footnote 6 (admitting there are no issues under §10705 in this case). Here, there is only one potential routing for the service Weskan has requested- K&O and the Colorado Pacific Railroad LLC (“CXR”) - and K&O has stipulated that it is “willing to participate in CXR through service.” UP cannot physically be part of the rail movement. It would have the opportunity, in competition with BNSF Railway, to haul grain westward from the Stockton facility.

rates, or any other statutory right . . . cannot be contracted away by an agreement between carriers.” *Entergy Arkansas* at 3, citing *EP 575* at 13, 15 n.38. (emphasis in original). Thus, the Petition focuses on the legality of the contractual provision, not the rates K&O has established.

The remedy sought by Weskan is the removal of the economic paper barrier because it was entered into with anticompetitive intent against the public interest and the Rail Transportation Policy. The Board has ample authority under §10502 and precedent to make that determination, revoke the exemption authority “to the extent it specifies” (§10502(d)), and to fashion and apply an appropriate remedy, *i.e.*, a ruling that the offending lease provisions are void. Weskan believes the removal of the paper barrier will result in the transportation Weskan has requested becoming economically feasible for it (and for K&O) without the parties having to undertake the onerous process of a maximum reasonable rate case.

K&O has also mischaracterized the process in *Entergy Arkansas* by interpreting it to require a shipper challenging a paper barrier to file *both* a formal complaint alleging a statutory violation and a petition to reopen and revoke. But this is clearly not the case. In *EP 575* the Board explained that a shipper can file “*either* (a) a petition under 49 U.S.C. 722(c)², to reopen the proceeding in which the sale or lease was originally authorized or to revoke an exemption under 49 U.S.C. 10502, *or* (b) a complaint alleging that a carrier is violating a statutory obligation under the Interstate Commerce Act due to an interchange commitment.” *EP 575* at 16. (emphasis supplied). *See also, Id.* at 15 (“Shippers may also move, under 49 U.S.C. [1322(c)] to reopen a proceeding authorizing a prior transaction or to partially revoke an exemption granted under 49 U.S.C. §10502”).

² Now Section §1322(c)

Accordingly, in *Entergy Arkansas*, the shipper submitted a complaint and a petition as expressly alternative ways the Board could resolve its particular issues, which included initially a claim of violations of 49 U.S.C. §§10702, 10704, and 11701.³ This was also true in *Missouri Central*, where the shipper presented alternative paths for the Board. *See, Missouri Central* at 1 (where shipper “filed a complaint, and alternative petition to partially revoke exemption”). Here, Weskan has not alleged a specific statutory violation of §§10702, 10701 or other statute, and so it need not file a formal complaint.

K&O’s “two-track” process also makes no sense. Specifically, K&O advocates for two successive adjudicatory proceedings – a rate reasonableness case under §10701, and a separate “partial revocation” proceeding requiring Weskan to prove “market power abuse.” *Reply and Motion* at 9. Under K&O’s theory, the rate case would be litigated first, and if that case demonstrated K&O’s rates were unreasonable, K&O posits “*it may be* that Weskan could point... to the Adjusted Fee as the proximate cause of such rate unreasonableness.” *Id.* at 8 (emphasis supplied). But to restate this in real-world terms, K&O posits a multi-year process involving the initial expenditure of up to \$4,000,000,⁴ at the conclusion of which Weskan would then commence a new proceeding to ask the Board to partially revoke the exemption and fashion a remedy, but only if Weskan could demonstrate “market abuse.” *Id.* at 9. Setting aside that the “process” K&O

³ See, *Verified Complaint or in the Alternative Petition to Revoke in Part*, filed in Docket No. NOR 42104 and Finance Docket No. 32187 on February 19, 2008.

⁴ Under Board procedures, Class II Class III short lines like the K&O are exempt from the Three Benchmark Methodology rate rules. Ex Parte No. 646 (Sub-No. 1), *Simplified Standards for Rail Rate Cases* (served September 5, 2007) at 102. Accordingly, the only “simplified” rate rules applicable to a maximum reasonable rate determination of K&O’s rates would be the Simplified Stand-Alone Cost (“SSAC”) methodology. In 2014, the STB estimated the costs to litigate a SSAC case to be “about \$3.73 million,” but it “round[ed] that estimate up to \$4 million” in 2014 dollars. Docket No. EP 715, *Rate Regulation Reforms* (served December 3, 2014), at 2.

advances would take multiple years and millions of dollars to pursue, there is zero precedent for it.

Moreover, K&O cites no authority or regulation for its notion that a maximum reasonable rate determination under the Board's rules includes interchange commitment charges in the calculation of costs justifying a maximum reasonable rate. Rather, whatever maximum reasonable rate was determined would exist separate from the contractual interchange commitment fee, and K&O would be prohibited from charging Weskan anything more than the maximum reasonable rate. Under that outcome, K&O would be required to provide service at the maximum reasonable rate and would absorb the interchange commitment fee, even it resulted in the transportation being provided at a loss. Docket No. NOR 42143, *Sherwin Alumina Company, LLC v. Union Pacific Railroad Company* (Served September 29, 2015)(“Courts and the Board have made clear when evaluating railroad rules and practices that a railroad may not refuse to provide service simply because it may be inconvenient or unprofitable.”).

The more administratively efficient way of resolving this relatively straightforward question is for the Board to first examine whether the interchange commitment is lawful and in the public interest. If the Board determines it is not, then the exemption authority should be completely or partially revoked and an appropriate remedy fashioned. If, after this step, Weskan believes the rates established for the service it has requested are unreasonably high, then an appropriate process could be to pursue a maximum reasonable rate determination through the Board's formal complaint processes.

III. PROCEDURAL ISSUES

K&O argues that the Petition is procedurally defective because UP is allegedly not a party to this proceeding. However, UP is a party. More specifically, on Thursday, December 19, 2024,

counsel for UP in this proceeding emailed counsel for K&O and Weskan to ask “Can I represent that your clients do not object to Union Pacific’s intervention in FD 34030? We may or may not file something on Monday in response to Weskan’s petition.” Both K&O and Weskan, through counsel, responded that they had no objection to UP’s intervention. On Monday, December 23, 2024 UP filed a formal Reply to Weskan’s Petition. UP also previously responded to Weskan’s Motion for Disclosure. Both of these pleadings were accompanied by a certificate of service in accordance with Board rules. UP is also designated as a “Party of Record” on the official service list for this proceeding. Accordingly, through its actions UP, coupled with the lack of objection by K&O and Weskan to UP’s participation, should be deemed to have intervened in this proceeding and to be a party of record.

If the Board concludes that UP did not become a party to this proceeding through these actions, then it should issue an order giving UP a reasonable period of time to choose whether to formally intervene to protect its interests. While Weskan reiterates it has no objection to UP’s intervention, Weskan disagrees with K&O that the issues presented to the Board by the Petition require UP’s participation as a formal party, since the Board can rule that provisions of the lease are void even if UP waives or declines to exercise its right to protect its interests despite having an unobstructed path to do so. Also, discovery from UP may be obtained through third party discovery methods and procedures.

As an additional procedural point weighing against dismissal, as stated above Weskan anticipated supplementing its Petition once K&O was ordered to disclose the actual lease language and related material. In response to the Board’s December 20, 2024 order K&O eventually produced relevant documents to Weskan starting on January 2, 2025, with the last material being produced late in the day on January 6, 2025. All produced documents were designated “Highly

Confidential” pursuant to the Protective Order in effect in this proceeding, thereby preventing counsel from sharing any of the documents with Weskan business representatives. The review of this material by Weskan’s counsel and consultants continues and will be the subject of a supplement to the Petition to be made shortly. However, to briefly summarize for purposes of this reply to K&O’s motion to dismiss, the materials produced reveal that the original lease signed by UP and K&O’s predecessor in 1997 remained largely unchanged and ignored by K&O and UP until 2018, when CXR acquired the Towner Line. At that point, the original lease terms were materially altered by UP and K&O, including the original paper barrier, which was replaced with a different economic paper barrier. Notably, K&O did not notify the Board of the renewal and material modification of the 1997 lease and the existence of the newer interchange commitment.⁵ Such disclosure would have provided an opportunity for the Board and affected parties to review and assess the lawfulness of the renewed lease transaction. The documents produced in response to the December 20 order have raised new and serious questions about the motivation and intentions of UP and K&O in revising the 1997 lease. The production has also reinforced the need for discovery of additional relevant facts and the presentation of additional evidence and argument to resolve this dispute, a point which K&O is in agreement with Weskan.⁶ Accordingly, the information disclosed by K&O in response to the Board’s order provides additional grounds for denying K&O’s motion to dismiss the Petition.

IV. CONCLUSION

For all the foregoing reasons K&O’s motion to dismiss should be denied.

⁵ 49 C.F.R. §1150.43(h). *See, e.g.*, Docket No. FD 35729 (Sub-No. 1) *Ann Arbor Railroad, Inc. – Lease Renewal and Operating Exemption with Interchange Commitment – Norfolk Southern Railway Company* (served April 5, 2024)(where Board was notified of lease renewal that contained an interchange commitment).

⁶ *Reply and Motion* at 6, 12, and 14.

Respectfully submitted,

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January 9, 2025

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of January, 2025, a copy of the foregoing Reply to Reply to Weskan Grain LLC's Petition to Reopen and Partially Revoke, and Kansas and Oklahoma Railroad LLC's Motion to Dismiss was served by electronic mail on all Parties of Record on the official service list for this proceeding.

/ss/ Thomas W. Wilcox
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