

**BEFORE THE UNITED STATES
SURFACE TRANSPORTATION BOARD**

ENTERED
Office of Proceedings
January 17, 2025
Part of
Public Record

FINANCE DOCKET NO. FD 34030

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

SUPPLEMENT TO PETITION TO REOPEN AND PARTIALLY REVOKE

Weskan Grain LLC (“Weskan”) hereby submits this supplemental pleading which provides the Surface Transportation Board (“Board” or “STB”) with additional factual background relevant to Weskan’s Petition to Reopen and Partially Revoke (“Petition”). The additional factual information provided herewith is contained in documents produced to Weskan’s counsel by the Kansas & Oklahoma Railroad, Inc. (“K&O”) in response to an order issued by the Board on December 20, 2024. The documents were produced between January 2 and January 6, 2025. The documents provide clarification of certain allegations that Weskan was forced to speculate about in its Petition. They also lend further support to the Board granting the relief requested by the Petition.

I. SUMMARY OF ADDITIONAL FACTUAL INFORMATION

Until directed to do so by the Board, K&O refused to disclose to Weskan the terms of the interchange commitment K&O and Union Pacific Railroad Company (“UP”) both admit exists. Accordingly, Weskan was forced to base its Petition in part on informed speculation about the history and type of “paper barrier” that UP and K&O have erected. This informed speculation was

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based on filings made by K&O and UP in various dockets before the Board, coupled with certain statements by the railroads during the parties' negotiations the past several years. An example of the latter was K&O's disclosure of the presence of an "Asset Usage Fee" in May 2024 correspondence with Weskan. Petition, Exhibit C. Prior to seeing the actual lease documents, Weskan surmised that in 2001 when K&O was assigned a 1997 Lease¹ between UP and the Central Kansas Railway ("CKR") and received exemption authority in this docket, K&O inherited an existing paper barrier contained in the 1997 Lease that applied either as originally drafted or amended by UP and K&O.

However, the documents produced by K&O reveal (1) {{[REDACTED]}}

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }}, and (2) immediately after the Colorado Pacific Railroad LLC (“CXR”) acquired the Towner Line in 2018 the 1997 Lease was materially amended by UP and K&O in part to {{[REDACTED]}}

[REDACTED] –}} which Weskan alleges was specifically inserted to prevent the potential movement of grain by K&O west to the Towner, CO interchange with CXR for further movement west.

A discussion of the relevant documents, relevant portions of which are attached to this Supplement, follows.

A. The 1997 Lease's Interchange Commitment {{ [REDACTED] }}
 [REDACTED] }}

¹ The 1997 Lease is entitled “Lease Agreement by and Between Union Pacific Railroad Company and Central Kansas Railway,” and was dated as of September 12, 1997. Copies of relevant portions of the 1997 Lease are attached hereto as Exhibit A

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The interchange commitment in the 1997 Lease read as follows:

{{ [REDACTED] [REDACTED]
[REDACTED]
[REDACTED] [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] }}

This {{ [REDACTED] }} was a relatively common interchange commitment imposed by UP on its leases with short lines during that timeframe. *See* STB Ex Parte No. 575, *Review of Rail Access and Competition Issues – Renewed Petition of the Western Coal Traffic League* (served October 30, 2007) at 5, note 11. Pursuant to this and other provisions in the 1997 Lease, {{ [REDACTED]

[REDACTED]
[REDACTED] [REDACTED]
[REDACTED]
[REDACTED] }}. Exhibit A, Section 4.

As written, the {{ [REDACTED] }} and related provisions of the 1997 Lease {{ [REDACTED]

[REDACTED]
[REDACTED] }}. On the contrary, {{ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] [REDACTED]
[REDACTED]
[REDACTED] [REDACTED]

$$\left. \begin{array}{l} \text{[REDACTED]} \\ \text{[REDACTED]} \end{array} \right\} \left. \begin{array}{l} \text{[REDACTED]} \\ \text{[REDACTED]} \end{array} \right\}.$$

As explained in the Petition, there appears to be a relatively straightforward reason for the 1997 Lease {{[REDACTED]}}: In 1996, UP received authority from the Board to abandon the Towner Line. As explained, UP did not abandon the Towner Line but instead sold it to the State of Colorado in 1998, which in turn sold it to a short line railroad company in 2005. Petition at 4. Accordingly, it is logical to conclude that UP {{[REDACTED]}} because in 1997 neither UP nor CKR envisioned any traffic that originated or terminated on the Leased Premises would originate or terminate on the Towner Line, or points west.

Be that as it may, the 1997 Lease { }

B. K&O and UP Amended the 1997 Lease to Create a New Interchange Commitment That Precluded Interchange with Colorado Pacific Railroad LLC at Towner, CO

K&O received exemption authority to be assigned the 1997 Lease in this proceeding in 2001, but the transaction appears to have been largely ignored by K&O and UP for the next 17 years. Indeed, over that period UP did not actually formally assign the lease to K&O despite it commencing operations. Moreover, between 2000 and 2004 UP formally abandoned approximately 95 miles of the original 170 miles of UP tracks covered by the 1997 Lease. Specifically, in 2000 and 2001 UP abandoned approximately 36 miles of the Leased Premises

running from Genesco, KS to Bridgeport KS.² In 2004, UP abandoned another 58.5 miles of the Leased Premises running from Healy, KS to McCracken, KS.³ The abandonments fundamentally altered the Leased Premises by reducing them to two isolated segments physically separated from the rest of UP's system. Notably UP's abandonment of its tracks east of Genesco resulted in the only connection to the Leased Premises being to a rail line owned by K&O. There is no interchange to UP or any other railroad. No amendments were made to the 1997 Lease to reflect these reductions when they occurred.

Upon CXR acquiring the Towner Line on January 5, 2018, however, UP and K&O took a renewed interest in the 1997 Lease. In a "Third Supplement to the Lease Agreement Between [UP] and [K&O]"⁴ dated July 18, 2018 (attached as Exhibit B), the railroads acknowledged the prior abandonments and amended the 1997 Lease accordingly. They also {{[REDACTED]}}
[REDACTED]
[REDACTED]
[REDACTED]."} } Id. at 3. The Third Supplement made other substantive changes to the 1997 Lease but {{[REDACTED]}}
[REDACTED] } }.

In November 2019, however, at the conclusion of a dispute over {{[REDACTED]}}
[REDACTED] } }, UP and K&O executed a "Fourth Supplement to the Lease Agreement Between [UP] and

² STB Docket No. AB-33 (Sub-No. 147X), *Union Pacific Railroad Company--Abandonment Exemption--in McPherson and Saline Counties* (served March 17, 2000) and STB Docket No. AB-33 (Sub-No. 158X), *Union Pacific Railroad Company – Abandonment Exemption – In McPherson, Ellsworth and Rice Counties, KS* (Served February 1, 2001).

³ STB Docket No. AB-33 (Sub-No. 214X), *Union Pacific Railroad Company – Abandonment Exemption – In Lane, Ness and Rush Counties, KS* (served October 15, 2004).

⁴ The first two "Supplements" were entered into between CKR and UP prior to the 1997 Lease being assigned to K&O and covered relatively minor terms and conditions that are not relevant to the issues raised by the Petition.

[K&O]" (Attached as Exhibit C). The Fourth Supplement, {{[REDACTED]}}

[REDACTED] }}, amended the 1997 Lease to {{[REDACTED]}}

[REDACTED]

[REDACTED]

[REDACTED].” As drafted, the Asset Use Fee would apply to any carload K&O considered interchanging with CXR at Towner, CO. At {{[REDACTED]}} per car, this fee precluded the movement of any grain from shippers on the Leased Premises westward over the Towner Line by making such movements cost prohibitive.

C. UP's "Waiver" of the Asset Use Fee Was Illusory

As discussed by Weskan in its Petition, and acknowledged by K&O in its reply to the Petition, the Asset Use Fee was apparently reduced by UP in 2023 upon application by K&O. (K&O's application is included as Exhibit D). However, this reduction, assuming the application was actually approved by UP, was very narrowly tailored and inapplicable to the service requested by Weskan in the Fall of 2024. Specifically, prior to the Fall of 2024 the parties had engaged in discussions about the possibility of K&O using railcars supplied by Weskan or CXR. Consequently, K&O's July 18, 2023 "Traffic Waiver Request" to UP to lower the Asset Use Fee was for service in {{ "[REDACTED]". }}. (Exhibit D). However, Weskan's request to K&O in the Fall of 2024 was for rates to transport Weskan's grain in hopper cars supplied by K&O west from Scott City, KS to Towner, CO for interchange with CXR. There is therefore a question of whether the "waiver" request and UP's alleged grant of the request applied to the transportation requested by Weskan for which K&O supplied rates.

As mentioned, apart from the question of whether the “waiver” sought was applicable to the service requested by Weskan in the Fall of 2024, the documents produced by K&O raise the

additional issue of whether the “waiver” request was even approved by UP. While UP issued a draft letter approving the request on August 15, 2023, it had not been finalized by {{[REDACTED]}}. (Exhibit E). No documentation was produced by K&O demonstrating that final approval of the draft letter was ever given by UP.

Finally, assuming for the sake of argument that UP granted the K&O’s “waiver” request, it was nevertheless also illusory because UP exerted additional control over the K&O’s service by {{[REDACTED]}}. Reserving the right to {{[REDACTED]}} is the equivalent of a water spicket that UP can simply turn on and off at its whim. It could also do it to restrict competition, such as if UP deemed too much of Weskan’s grain from Kansas was being shipped from the Stockton facility in BNSF shuttle trains over the {{[REDACTED]}} period. At a minimum, UP’s “waiver” process gives UP the power to economically control the flow of grain traffic that it physically can’t participate in.

In summary, the “waiver” process UP required K&O to engage in does nothing to eliminate the unlawfulness of the paper barrier inserted into the 1997 Lease by the Fourth Supplement.

II. THE NEED FOR DISCOVERY AND FURTHER EVIDENCE

The production by K&O in response to the December 20, 2024 order has reinforced the need for discovery to obtain additional relevant facts and for the presentation of additional evidence and argument to resolve this dispute. Unless K&O and UP disagree with Weskan’s conclusion that the interchange commitment in the original 1997 Lease {{[REDACTED]}} discovery would focus on (but not be limited to) the circumstances surrounding the drafting and negotiations of the Third and Fourth Supplements to the 1997 Lease, and the purpose(s) for which

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the Asset Use Fee was imposed. As noted above, due to the abandonment of much of the Leased Premises between 2001 and 2004, the only interchange with the Leased Premises and a railroad other than UP in 2018 was with the CXR at Towner, CO. Such discovery would also seek relevant information about the other interactions between K&O and UP (and their respective internal discussions) regarding the potential movement of grain from Western Kansas westward over the Towner Line, including but not limited to the development and execution of the “waiver” process described above.

In terms of a proposed procedural schedule, Weskan submits that the following schedule would be consistent with prior Board proceedings, where “D” is the service date of the decision accepting the Petition and commencing a proceeding:

D + 90	Discovery Period
D + 120	Weskan Opening Statement
D + 165	Reply Statements of K&O and UP
D + 195	Weskan Rebuttal Statement

III. CONCLUSION

In summary, Weskan Grain submits that the information provided by K&O further demonstrates that there are ample grounds to reopen this proceeding due to new evidence and substantially changed circumstances. 49 U.S.C. §1322(c) and 49 C.F.R. §1115.4. The information also lends further support for the Board, after a period for discovery and additional submissions by the parties, to revoke the exemption authority granted to K&O in 2001 for the purpose of voiding the interchange commitment inserted into the 1997 Lease by K&O and UP in 2019.

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Respectfully submitted,

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EXHIBIT A

REDACTED - HIGHLY CONFIDENTIAL MATERIAL

EXHIBIT B

REDACTED - HIGHLY CONFIDENTIAL MATERIAL

EXHIBIT C

REDACTED - HIGHLY CONFIDENTIAL MATERIAL

EXHIBIT D

REDACTED - HIGHLY CONFIDENTIAL MATERIAL

EXHIBIT E

REDACTED - HIGHLY CONFIDENTIAL MATERIAL

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of January, 2025, a copy of the foregoing Supplement to Weskan Grain LLC's Petition to Reopen and Partially Revoke was served by electronic mail on all Parties of Record on the official service list for this proceeding.

/ss/ Thomas W. Wilcox
Thomas W. Wilcox