

**BEFORE THE UNITED STATES  
SURFACE TRANSPORTATION BOARD**

309474

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**DOCKET NO. FD 36849**

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ENTERED  
Office of Proceedings  
April 16, 2025  
Part of  
Public Record

**KANSAS & OKLAHOMA RAILROAD, INC. – LEASE AND  
OPERATION EXEMPTION WITH INTERCHANGE  
COMMITMENT – UNION PACIFIC RAILROAD COMPANY**

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**REPLY TO PETITION FOR EXEMPTION**

Weskan Grain LLC (“Weskan”) hereby replies in opposition to the Petition for Exemption filed by Kansas & Oklahoma Railroad Company (“K&O”) seeking after-the-fact authority to operate over lines of railroad owned by Union Pacific Railroad Company (“UP”) pursuant to a lease first entered into by UP and the Central Kansas Railway (“CKR”) in 1997 and later assigned to K&O, and then amended and renewed by K&O and UP in 2018, and further amended in 2019 (the “Lease”). The 2019 amendment inserted an interchange commitment for the purpose of making it economically infeasible for K&O to participate in the rail transportation of agricultural products originating in Kansas to points west of Towner, Colorado, which points include, but are not limited to, Weskan’s grain elevator facility.

For the reasons set forth below, the Board should either (1) deny the petition outright because the proposed lease transaction does not comply with the requirements of 49 U.S.C. §10502, or (2) commence a proceeding pursuant to §10502(b) and adopt a procedural schedule that includes discovery and the presentation of additional evidence on the history, nature, and

purpose of the interchange commitment inserted into the Lease and whether it is consistent with the Board's statutes and policies.

**I. BACKGROUND**

**A. Related Proceeding**

The Petition was filed in response to the Board's directive to K&O in Docket No. FD 34030, *Kansas & Oklahoma Railroad, Inc. – Acquisition and Operation Exemption – Central Kansas Railway, LLC*, (Served Feb. 25, 2025) (referred to by K&O as “K&O-Weskan,” which Weskan adopts in this Reply). In pertinent part, the Board ruled that because “K&O and UP completed the [2018 and 2019] lease renewal and amendments without seeking or obtaining the requisite authority from the Board . . . K&O does not currently have Board authority to implement the amended and renewed lease agreement – including the modified interchange commitment that Weskan seeks to challenge.” *K&O-Weskan* at 5. Accordingly, the Board directed K&O “to file a petition for exemption or application to obtain after-the fact authority to renew the lease and implement any amendments thereto by March 27, 2025.” *Id.* at 6. K&O elected to file the Petition instead of an application under 49 U.S.C. §10902.

In response to an unopposed Motion for Disclosure filed by Weskan in this proceeding pursuant to 49 C.F.R. §1114.30(d), K&O confirmed that the terms of the lease transaction for which it seeks authority in this proceeding are unchanged from the lease terms that were at issue in *K&O-Weskan*. As such, much of the factual discussion and arguments of Weskan in that proceeding have application to this proceeding.

**B. Weskan Grain LLC**

Weskan is a division of the Soloviev Group, a diverse company that also owns the Colorado Pacific Railroad LLC (“CXR”), and 50% of KCVN LLC. Weskan owns and operates the state-of-the-art Stockton grain elevator complex completed in 2023 that is located on a 2,200-acre tract of land located near Sheridan Lake, CO, about five (5) miles west of Towner, CO, which is at the border of Colorado and Kansas.<sup>1</sup> As constructed, the Stockton facility has 3.1 million bushels of upright grain storage capacity and 2.2 million bushels of ground storage capacity, and it can be expanded. The facility receives grain grown by Colorado and Kansas farmers that is presently delivered by truck and then loaded into railcars for outbound shipping.

The facility is named Stockton because it is connected to the Stockton Siding located at MP 752.5 of a 122-mile line of railroad owned and operated by CXR. The CXR’s line – historically called the Towner Line - interchanges with a segment of the Lease tracks near MP 747.5 in Towner, CO. See Map at Exhibit A. CXR acquired the Towner Line at the successful conclusion of a “Feeder Line” proceeding before the Board in Docket No. FD 36005, *KCVN, LLC/Colorado Pacific Railroad, LLC – Feeder Line Application – Line of V AND S Railway, LLC, Located in Crowley, Pueblo, Otero, and Kiowa Counties, Colorado*. By Decision served December 18, 2017, the Board directed V AND S Railway, LLC to sell the Towner Line to CXR for \$10,000,000. CXR and its parent company KCVN have since spent at least that amount in capital improvements to restore common carrier rail service on the Towner Line.

The Stockton facility has access to both UP and BNSF Railway Company (“BNSF”), thereby providing grain producers in Colorado and Kansas with the opportunity to ship pursuant

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<sup>1</sup> See Exhibit A; also <https://weskangrain.com/facility/>.

to rail rates and service terms set by competition between UP and BNSF, as well as have access to western and southwestern port destinations serviced by both railroads. Weskan also has acquired several other grain loading and storage facilities in western Kansas that are located along the Lease tracks, most notably two rail-served grain storage facilities near Scott City, KS. See Map at Exhibit A.

### **C. The Proposed Lease Agreement**

As referenced above, the 1997 Lease Agreement and supplements attached to the Highly Confidential version of the Petition are identical to the documents produced to Weskan by K&O in *K&O-Weskan*. Consequently, the assertions and arguments in Section I, A and B of Weskan's Supplement to Petition to Reopen and Partially Revoke filed in *K&O-Weskan* are applicable to this proceeding, and a copy of that filing (without the exhibits) is attached to this Reply as Exhibit B for the Board's convenience. To briefly summarize, the 1997 lease contained a multi-faceted interchange commitment in Section 4, but the provision as written did not, by its terms, apply to the interchange of traffic originating or terminating on the leased track and originating or terminating at Towner, CO. See discussion in Exhibit B, Section I.A. K&O does not dispute this.<sup>2</sup> However, despite not being privy to the negotiations between UP and CKR that preceded the 1997 lease, K&O asserted in *K&O-Weskan* a present belief that UP and CKR intended for the interchange commitments in Section 4 to include the Towner, CO interchange.<sup>3</sup>

No changes to the 1997 Lease were made until after CXR acquired the Towner Line in 2018. In the meantime, between 2000 and 2004 UP formally abandoned approximately 95 miles

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<sup>2</sup> See, *K&O-Weskan*, K&O Reply to Weskan Grain LLC's Supplement to its Petition to Reopen and Partially Revoke (filed Feb. 6, 2025) at 6.

<sup>3</sup> *Id.*

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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 tracks running from Geneseo, KS to Bridgeport, KS.<sup>4</sup> In 2004, UP abandoned another 58.5 miles of the leased tracks running from Healy, KS to McCracken, KS.<sup>5</sup> The abandonments fundamentally altered the original 1997 lease by reducing the leased tracks to two isolated rail segments owned by UP but physically separated from the rest of UP's rail system. The isolated segment that is connected to the CXR at Towner runs approximately 65 miles from Milepost 747.5 at Towner to Milepost 682.5 at Scott City, KS where it connects to tracks owned by K&O. At that point, the leased segment turns north and east for approximately 17.5 miles to Healy, Kansas, where the tracks end. See Map at Exhibit A. As K&O admits in its Petition, the abandonments resulted in CXR being the only third-party railroad with which K&O can physically interchange traffic originating or terminating on the leased track. Petition at 6.

As previously mentioned, after CXR acquired the Towner Line in early 2018 UP and K&O executed the confidential Third Supplement to the Lease Agreement on July 20, 2018 which substantially amended many of its provisions, including the original interchange commitment. See Petition, Exhibit B, PDF pages 105-122. On January 1, 2019, K&O and CXR entered into an Operating Agreement whereby K&O was granted the rights to be the exclusive operator of the Towner Line for traffic that KCVN and CXR endeavored to develop for it. Exhibit C to this Reply. Subsection 6.6 of that agreement stated the parties' intent that K&O would "establish and

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<sup>4</sup> 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).

<sup>5</sup> 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).

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maintain tracks at Towner connecting the Rail Line to [K&O's] line at Milepost 747.5 at Towner of rail terms and condition for interchange that facilitate that encourage development of traffic over the Rail Line.” *Id.* at 5. K&O received the requisite operating authority from the Board by decision served June 14, 2019 in Docket No. FD 36310, *Kansas & Oklahoma Railroad, LLC-Operation Exemption – Colorado Pacific Railroad, LLC*.

Unbeknownst to CXR, five months later, on November 19, 2019, UP and K&O entered into a Fourth Supplement that amended the 1997 Lease in part by deleting Section 4 of the 1997 Agreement and replacing it with a new interchange commitment that is applicable only to the Towner, CO interchange because CXR is the only third-party railroad that can interchange with K&O. Petition, Exhibit B, PDF pages 122-125. Specifically, under new Section 4.01 K&O

\_\_\_\_\_ }.” At { { \_\_\_\_\_ } }, this additional charge to K&O effectively precludes the rail movement of any grain originating at the facilities of Weskan and other shippers on the Leased Premises westward over the Towner Line by making such movements cost prohibitive.<sup>6</sup>

## ARGUMENT

### A. The Proposed Transaction Does not Meet the Criteria of §10502

For the Board to find that a proposed lease transaction passes muster under §10502, it must meet two requirements. First, it must be demonstrated “that application of a provision of Title IV is not necessary carry out the transportation policy of [49 U.S.C. 10101].” Second, the petitioner

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<sup>6</sup> The punitive purpose of the fee is reinforced by the fact that it far exceeds, and in some cases is a multiple of, all but a few of the rates charged by K&O under its tariff. <https://www.watco.com/wp-content/uploads/2024/05/KO-4010-AL-rev1-eff-6.1.24-Grain-Tariff.pdf>.

must make the additional showing that “(A) the transaction . . . is of limited scope; or (B) the application in whole or in part of the provision is not needed to protect shippers from the abuse of market power.” Significantly, K&O, despite being fully aware of Weskan’s opposition from the *K&O-Weskan* proceeding, makes no attempt in the Petition to explain, justify, or defend the presence of the interchange commitment other than to state “{{ [REDACTED] [REDACTED] }}”<sup>7</sup> Petition at 6. Indeed, the Petition’s discussion of the purported application of §10502 to the transaction does not even *mention* the interchange commitment. As set forth below, however, the proposed transaction cannot meet any of the statutory requirements of §10502.

### **1. The Proposed Transaction is Contrary to the Rail Transportation Policy**

Arguably, in today’s highly consolidated railroad industry where only two (2) Class I railroads operate in large regions of the country and serve many customers that do not have railroad transportation alternatives, *any* lease of a line of railroad owned by a Class I railroad to a short line that contains a provision prohibiting or restricting the ability of the lessee to provide rail service to shippers on reasonable request should on its face be contrary to the Rail Transportation Policy (“RTP”). In this case, the interchange commitment inserted in the 2019 Supplement is specifically targeted to economically prohibit K&O from interchanging traffic with one railroad – CXR – and force all traffic to flow east to be interchanged with UP. The proposed transaction would therefore harm not only Weskan and other Kansas shippers by preventing them from shipping Kansas grain west to Stockton, and thereafter to points west using UP or BNSF, it would also harm CXR and its attempts to make the Towner Line economically viable again.

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<sup>7</sup> For the record, Weskan questions K&O’s designation of this statement and other material in its filing as “Highly Confidential.”

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The proposed transaction violates 49 U.S.C. §10101(1) because instead of allowing “to the maximum extent possible, competition for the demand for services to establish reasonable rates for transportation by rail,” it intentionally raises an impediment to competition between UP and BNSF. It also violates §10101(3) because the interchange commitment would impede both CXR and BNSF from earning adequate revenues while incentivizing all revenues from shipments originating or terminating on the leased tracks go to UP, and to a lesser extent K&O.

The proposed transaction also violates §10101(4) because it would discourage CXR’s development of the Towner Line to effectively compete with commercial trucking of grain in western Kansas and Colorado. This is directly contrary to the policies behind the Board’s Feeder Line program, whereby parties like CXR may purchase underutilized lines of railroad and restore common carrier service over them. Similarly, the proposed paper barrier does not “foster sound economic conditions,” and “ensure effective competition” between CXR and commercial trucking of grain to Weskan’s facility. §10101(5).

The proposed transaction also discourages the honest and efficient management of railroads (§10101(9)) by economically foreclosing shorter western routes via CXR and forcing all traffic to move hundreds of miles east to interchanges with UP before they go to western destinations. K&O’s invocation of §10101(9) as support for the transaction only because granting the Petition would allegedly enable K&O to continue to “efficiently” operate over the leased tracks is therefore misplaced.

Finally, by its express terms, the proposed transaction also violates §10101(12) because, by design, it would concentrate market power over the railroad transportation of grain produced in western Kansas in UP, which would give UP the power to discriminate against Weskan and favor other shippers on the leased tracks at the expense of Weskan.

In addition to wrongly asserting that §10101(9) supports the Petition, K&O cites only the RTP provisions favoring expeditious regulatory approvals as supporting its request for after-the-fact authority. Petition at 8, *citing* §§10101(2)(7), and (15). However, it is not the RTP to expeditiously approve lease transactions that create barriers to competition, thwart the ability of carriers to earn adequate revenues, and are not operationally efficient.

For all of the foregoing reasons, the Petition should be denied because the regulation of the transaction under 49 U.S.C. §10902 is necessary to carry out multiple aspects of the Rail Transportation Policy.

## **2. The Transaction is not Limited in Scope**

The proposed transaction cannot meet the requirements of §10502(a)(2) either. First, the transaction is not of limited scope because it is not limited to the 81.5-mile segment of leased track that connects to the Towner Line. The presence of the paper barrier affects the ability of Weskan and other grain shippers in western Kansas from economically reaching new markets using the Towner Line that include ports in the southwest and western U.S. and other western destinations served by BNSF and UP at rates and service terms established by competition. K&O seeks to minimize the larger scope of the transaction in a single paragraph discussing this prong that again ignores the existence of the paper barrier.

## **3. Regulation of the Transaction is Necessary to Protect Shippers from Market Power Abuse**

Regulation of the proposed transaction is clearly needed to protect Weskan and other shippers from market power abuse. There can be no other reasons for the presence of the paper barrier other than to prevent Weskan and other shippers from utilizing BNSF to haul their commodities west, and to give UP market power that it can exercise to the detriment of Weskan, other shippers, and CXR.

There certainly can be no financial justification for the provision. The lease tracks are a vestige of the approximately 800-mile railroad main line running from St. Louis, MO to Pueblo, CO constructed in 1887 and owned and operated by the Missouri Pacific Railroad Company (“MoPac”), a predecessor-in-interest to UP. The initial investment in the line has no doubt long been recovered by UP. Moreover, pursuant to the Lease {{[REDACTED] [REDACTED] }}. See, 1997 Lease Agreement at Section 14; and 2018 Supplement at Section 6. Consequently, for the past 28 years UP has been collecting rent from CKR and K&O and receiving revenues from shippers while {{[REDACTED] [REDACTED] }} the leased tracks. Accordingly, the reason for desiring to keep the interchange commitment in the Lease can only be to preserve UP’s market power and to restrict competition. K&O’s assertion that this prong of §10502(a) is satisfied because K&O possesses “no such market power,” Petition at 9, is therefore completely beside the point.

**B. If the Board Does not Deny the Petition, It Should Commence a Proceeding with a Procedural Schedule That Includes a Period for Discovery**

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For all the reasons set forth above, the Board should deny K&O’s Petition. However, if the Board does not deny the Petition and it commences a proceeding pursuant to §10502(b), Weskan respectfully submits that the proceeding should necessarily entail a review the evidence behind the history and intent of the interchange commitment inserted into the 2019 Fourth Supplement, and that the procedural schedule should therefore include at least ninety (90) days for the parties to conduct discovery on this and other relevant issues.

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Weskan also submits that it has no objection to UP intervening in this proceeding should it not already be considered a party.

Respectfully submitted,

/ss/ Thomas W. Wilcox

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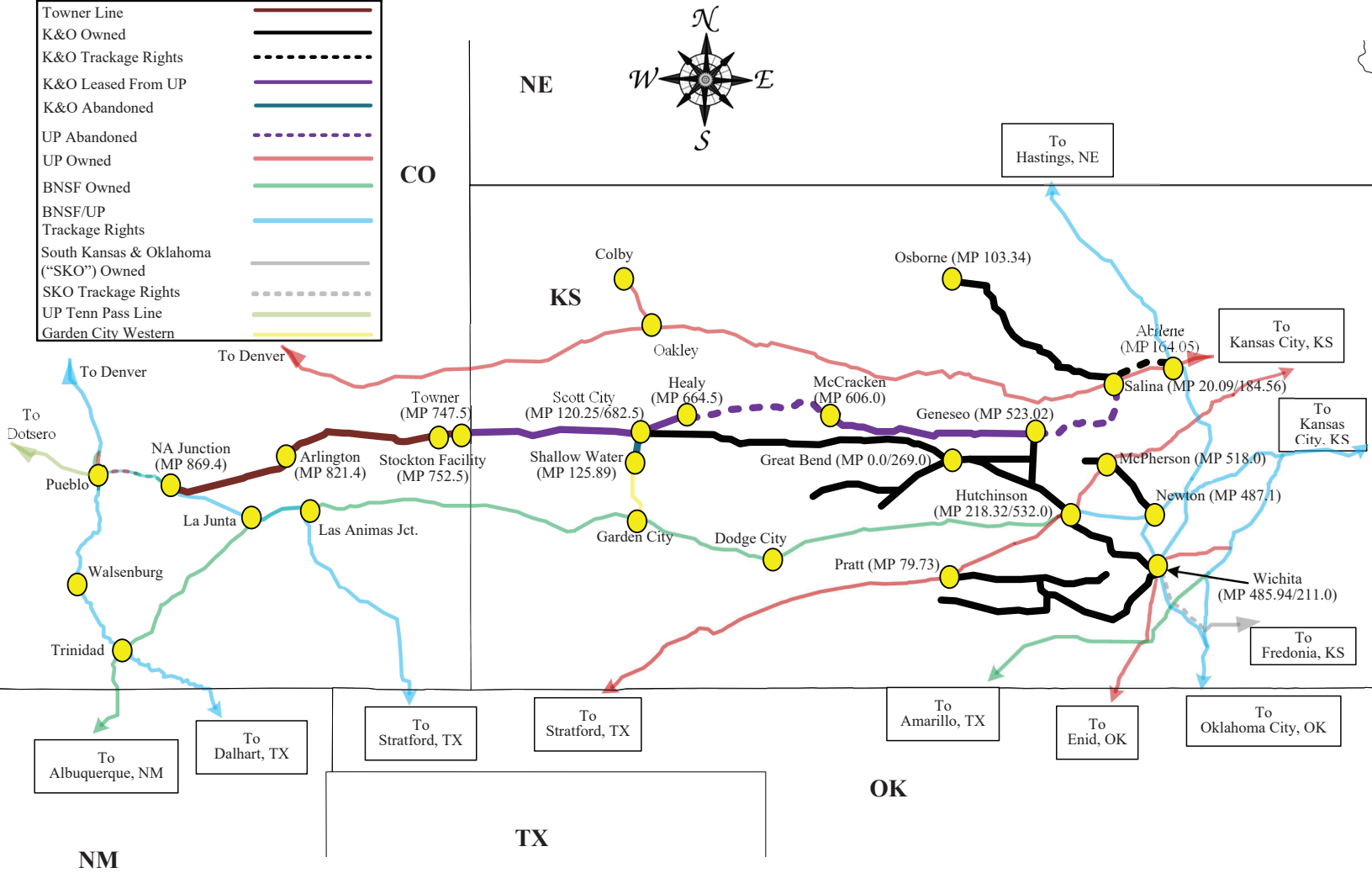
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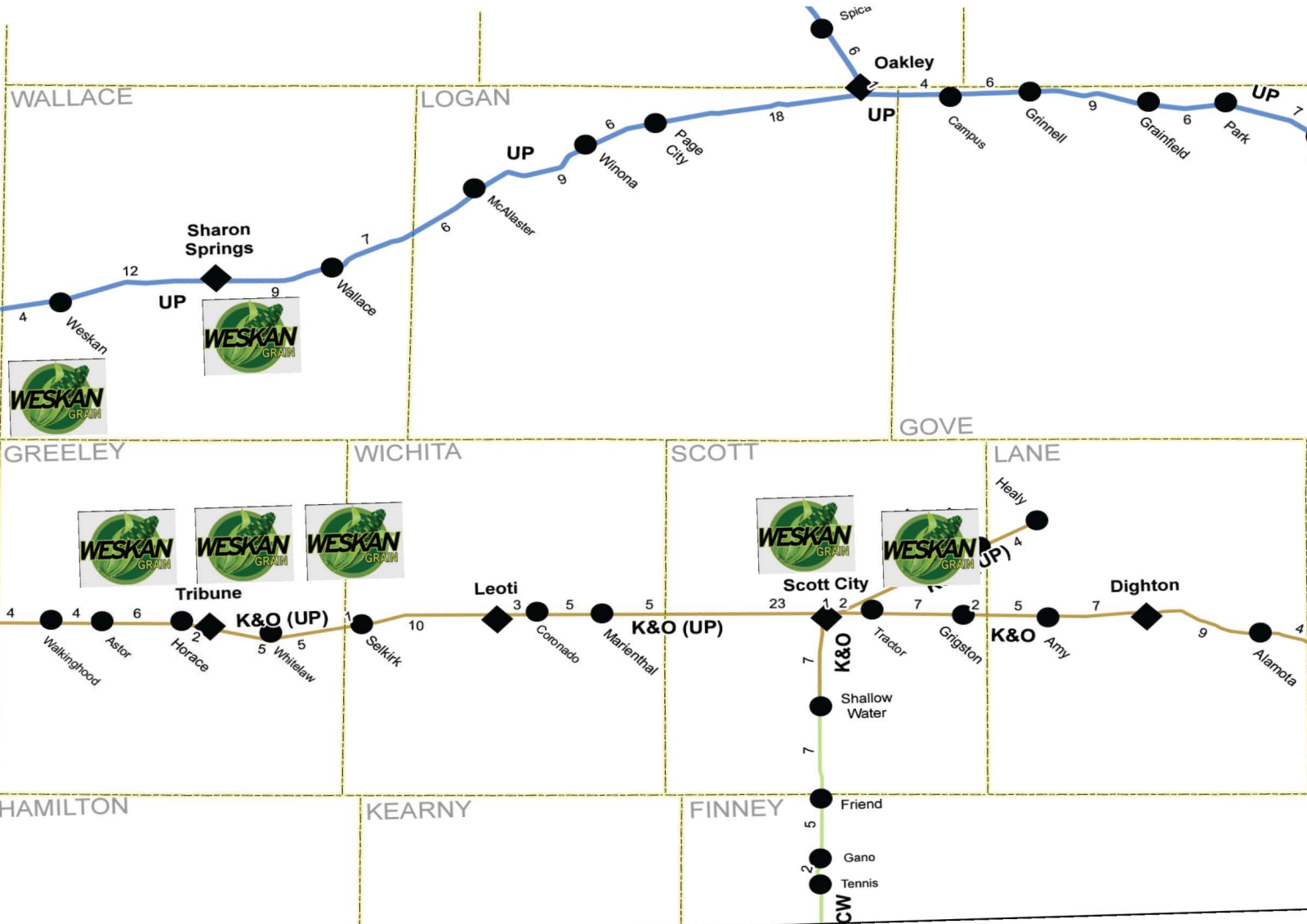
**EXHIBIT A**  
**MAPS**

# **Schematic of K&O Rail Line and Towner Line -- Ownership** (Colorado and Kansas)

Attachment No. 1  
Page 1 of 1

| Legend                                |  |
|---------------------------------------|--|
| Towner Line                           |  |
| K&O Owned                             |  |
| K&O Trackage Rights                   |  |
| K&O Leased From UP                    |  |
| K&O Abandoned                         |  |
| UP Abandoned                          |  |
| UP Owned                              |  |
| BNSF Owned                            |  |
| BNSF/UP Trackage Rights               |  |
| South Kansas & Oklahoma ("SKO") Owned |  |
| SKO Trackage Rights                   |  |
| UP Tenn Pass Line                     |  |
| Garden City Western                   |  |





## **EXHIBIT B**

**BEFORE THE UNITED STATES  
SURFACE TRANSPORTATION BOARD**

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**FINANCE DOCKET NO. FD 34030**

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

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**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 Lease<sup>1</sup> 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 (“CRX”) 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 CRX 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] }}

<sup>1</sup> 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]

Be that as it may, the 1997 Lease {{[REDACTED]}}

[REDACTED]

[REDACTED]}}.

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.<sup>2</sup> In 2004, UP abandoned another 58.5 miles of the Leased Premises running from Healy, KS to McCracken, KS.<sup>3</sup> 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]"<sup>4</sup> 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

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<sup>2</sup> 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).

<sup>3</sup> 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).

<sup>4</sup> 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 CRX 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 CRX. 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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*Attorney for Weskan Grain LLC*

January 17, 2025

## **EXHIBIT C**

## OPERATING AGREEMENT

(Colorado Pacific Railroad—Kansas & Oklahoma Railroad)

### PARTIES

THIS OPERATING AGREEMENT ("Agreement") dated as of January 1, 2019 ("Effective Date"), by and between the COLORADO PACIFIC Railroad, LLC, a Delaware limited liability company, being a subsidiary of KCVN, LLC, a Delaware limited liability company ("CPR") and KANSAS & OKLAHOMA RAILROAD, LLC., a Kansas limited liability company ("RAILROAD").

### RECITALS

A. CPR has acquired a certain line of railroad and related right-of-way and railroad assets, (the "Rail Line"), as more particularly described in Section 1.1 below, and it desires RAILROAD to use, manage, and provide freight operations over the Rail Line under the terms and conditions outlined herein.

B. RAILROAD desires to use, manage and to provide freight rail operations over the Rail Line in accordance with the terms and conditions of this Agreement.

C. In consideration of the foregoing and other good and valuable consideration, intending to be legally bound, the parties hereto enter into this Agreement setting forth the terms and conditions for RAILROAD's use, management, and operation of the aforesaid Rail Line.

### SECTION ONE

#### PROPERTY COVERED BY THIS AGREEMENT

Section 1.1. The rail properties subject to this Agreement on the Effective Date shall consist of (1) the 121.9 mile line of railroad historically known as the Towner Line, extending between milepost 747.5 near Towner, Colorado and milepost 869.4 near NA Junction, Colorado (the "Rail Line") and (2) the underlying railroad right-of-way, and other associated railroad assets, all located in Pueblo, Crowley, Kiowa, and Otero Counties, Colorado (together with the Rail Line, collectively referred to as the "Premises"). The Premises were acquired by CPR by (i) orders of the Surface Transportation Board in STB Docket No. FD 36005, a copy of which is attached hereto as Exhibit A (the "STB Order"), and (ii) a Bill of Sale between CPR and the V&S Railway, LLC ("V&S") dated January 5, 2018, a copy of which is attached hereto as Exhibit B (the "Bill of Sale") and (iii) an Agreement for Assignment and Assumption of Contracts between CPR and V&S dated January 5, 2018 (the "Assignment Agreement"), a copy of which is attached as Exhibit C; and (iv) a Quitclaim Deed between CPR and V&S, a copy of which is attached hereto as Exhibit D (the "Quitclaim Deed"). All rights granted to Railroad pursuant to this Agreement are made expressly subject to the provisions of the Bill of Sale, Assignment Agreement, and the terms of each of the Quitclaim Deeds conveying the Premises to CPR filed in the land records of Crowley, Kiowa, Pueblo, and Otero Counties, Colorado.

Section 1.2. The Premises shall also include rail tracks and other railroad facilities or other improvements that have been constructed and/or installed on the Premises between January 5, 2018 and the Effective Date, and those tracks, facilities and other improvements that may be added, from time to time, over the term of this Agreement after the Effective Date.

## **SECTION TWO**

### **TERM OF AGREEMENT**

Section 2.1. Unless terminated earlier in accordance with Section 15 hereof, this Agreement shall remain in effect for a term beginning on the Effective Date hereof and extending through December 31, 2021 ("Term").

Section 2.2. The Term of this Agreement may be extended, and the terms and conditions of the extended Agreement modified, by mutual agreement of CPR and Railroad, provided each party notifies the other of its desire to extend the agreement not less than nine (9) months prior to the end of the Term.

## **SECTION THREE**

### **ACCESS TO AND USE OF THE PREMISES**

Section 3.1. Subject to the limited exception set forth below in Subsection 3.2, CPR agrees to provide RAILROAD with exclusive access to the Premises as identified above for the provision of Railroad Services, as defined in Section 6, subject to the terms and conditions set out in this Agreement, and RAILROAD agrees to exclusively use the Premises in accordance with those terms and conditions.

Section 3.2. During the Term of this Agreement, and any extensions thereof, CPR shall not grant freight rail operating rights of any kind or nature on the Premises to any other party, *provided however*, that in an event of default as defined in Section 14.1 of this agreement, where termination is a right or remedy available to CPR, and such termination right or remedy is exercised by CPR, RAILROAD shall cooperate with CPR to enable an alternative railroad operations provider to provide freight rail service over the Premises from and after the date of termination.

## **SECTION FOUR**

### **COMPENSATION FOR USE OF THE PREMISES**

Section 4.1. The term "Freight Revenues" as used in this Agreement shall mean payments received by RAILROAD after the Effective Date for providing the Railroad Services described in Section 6, and shall include the following: line haul freight rates, switching fees, demurrage charges, storage charges, and similar charges assessed by RAILROAD to its customers pursuant to RAILROAD'S tariffs and/or railroad industry rules and practices, *provided however*, that revenues from fuel surcharges shall not be included within Freight Revenues, and *provided further* that real estate revenue, easement fees, licenses, utility usage revenues (pipeline, fiber optic lines, overhead electrical lines, etc.) shall be exclusive revenues to CPR and shall not be included within Freight Revenues.

Section 4.2. Solely for purposes of determining the line haul rate portion of Freight Revenues for Rail Services over the Rail Line and the Premises since CPR is a non-carrier and therefore has no intention of holding out to provide common carrier railroad service to any rail shippers, RAILROAD and CPR have agreed upon "CPR freight rates" for grain traffic originating on the Towner Line and delivered by RAILROAD for interchange at Towner, CO, which are attached as Exhibit E. The "rates" assigned to each CPR "station" shall be absorbed under the WTS Freight Tariffs. The "CPR freight rates" shall not be decreased over the Term, and shall be increased over the Term at the same level RAILROAD's rates are increased, unless otherwise mutually agreed by the parties. It is understood by the parties that the rates outlined on Exhibit C, are for movement of railcars in blocks of at least twenty-five (25) railcars.

Section 4.3. Upon the reopening of NA Junction on the western end of the Towner Line CPR and RAILROAD shall meet and confer to establish freight rates for traffic delivered to and received from such interchange point, and other applicable terms and conditions for such service.

Section 4.4. RAILROAD shall be entitled to collect all Freight Revenues from providing Rail Services, subject to the requirements of Section 4.5 and Section 6.

Section 4.5. RAILROAD shall compensate CPR for the use of the Premises by paying, without notice or demand, and without abatement, deduction, offset or set off, an amount calculated pursuant to the schedule below, which shall be CPR's share of all of the Freight Revenues received by RAILROAD in each calendar year after the Effective Date ("Annual Freight Revenue"):

4.5.1 For the first \$1 to \$400,000 Annual Freight Revenue the Revenue Share will be as follows:

- a. Revenue Share
  - i. CPR: 0%
  - ii. RAILROAD: 100%

4.5.2 For any portion of Annual Freight Revenue above \$400,001

- b. Revenue Share
  - i. CPR: 60%
  - ii. RAILROAD: 40%

Section 4.6. The applicable payment to CPR of a share of Annual Freight Revenue, if any, shall be paid by RAILROAD to CPR within sixty (60) days after January 1 of each year following the Effective Date. CPR's share of Freight Revenues received by RAILROAD for Rail Services provided in the final year of the Term shall be paid to CPR within sixty (60) days of the termination date of this Agreement.

## **SECTION FIVE**

### **SECTION 45G TAX CREDITS**

Section 5.1. CPR and RAILROAD acknowledge that:

5.1.1 RAILROAD will operate 121.9 miles of the Rail Line.

5.1.2 Subject to Subsections 3.2 and 5.1 RAILROAD shall be the exclusive freight railroad with rights to operate on the Rail Line and shall be the only freight railroad operating upon the Rail Line.

- 5.1.3 RAILROAD shall claim eligible rail miles as outlined and provided for in this Agreement for the entire term of this Agreement to the extent that such 45G tax credits are available.
- 5.1.4 CPR shall not claim such miles or tax credit under Section 45G.
- 5.1.5 RAILROAD shall pay CPR Ninety Percent (90%) of the net proceeds actually received by Railroad resulting from assignment of tax credits, within sixty (60) days of such receipt. CPR shall indemnify and reimburse RAILROAD for 90% of any amount RAILROAD is determined to be liable to pay and/or refund pursuant to any agreement it makes to assign the tax credits.
- 5.1.6 Any consideration to be paid by RAILROAD to CPR as a result of RAILROAD being eligible to claim the subject 45G tax credit shall be contingent upon RAILROAD successfully "assigning" such tax credit on terms acceptable to RAILROAD.
- 5.1.7 As of the date of this Agreement Congress authorized the extension of 45G railroad tax credits for calendar years 2016 and 2017. The Parties assume the 45G railroad tax credit will be extended throughout the initial term of the Operating Agreement. The payment of proceeds to CPR resulting from the assignment of tax credits is based on this key assumption.

## **SECTION SIX**

### **RAIL SERVICES**

Section 6.1. Subject to the other subsections of this Section 6 and other provisions of this Agreement, over the Term of this Agreement, RAILROAD shall provide rail freight service over the Rail Line and the remainder of the Premises as necessary to accommodate the reasonable needs of rail shippers now or hereafter located along the Rail Line consistent with the physical state of the Rail Line, RAILROAD's obligations as a common carrier railroad and prudent business practices in the railroad industry. Such services shall include, but not be limited to (1) line haul transportation; (2) switching; (3) car storage, and other ancillary services performed in RAILROAD'S discretion ("Rail Services"). RAILROAD shall provide all Rail Services with its own employees, and with its own or leased locomotives and other equipment, unless otherwise agreed to in writing by CPR. RAILROAD shall allow one locomotive, which is commonly used on the line, to be painted in a paint scheme and design selected by CPR, with its company name to be on the locomotive, at the expense of CPR.

Section 6.2. RAILROAD shall favorably consider reasonable requests for Rail Services from KCVN LLC.

Section 6.3. Intentionally Omitted.

Section 6.4. CPR shall not limit RAILROAD's lawful access to the Premises, or interfere with RAILROAD's operations, or its ability to fulfill its common carrier and/or contractual obligations.

Section 6.5. The parties acknowledge, and RAILROAD accepts, that on the Effective Date the Rail Line may only be physically capable of supporting railroad freight service to and from Milepost 785.8 at Eads, Colorado and the interchange between CPR and RAILROAD at milepost 747.5 at Towner, Colorado, and that therefore Rail Services over the Rail Line over all or part of the Term may be limited to that segment of the Rail Line until the remainder of the Rail Line and related track facilities are rehabilitated to the point

they can support freight rail operations; *provided however*, that this Section 6.5 does not apply to limit equipment storage services on the Premises.

Section 6.6. It is the intent of the parties hereto that RAILROAD shall exercise its best efforts to provide competitive interline rail freight service on the Rail Line. In that regard, RAILROAD agrees to (1) establish appropriate tariff and service arrangements applicable to all customers and commodities via any and all connecting carriers; and (2) establish and maintain interchange tracks at Towner connecting the Rail Line to RAILROAD's line at Milepost 747.5 at Towner of rail and terms and conditions for interchange that facilitate and encourage development of traffic over the Rail Line.

Section 6.7 RAILROAD and CPR shall work cooperatively to develop and manage interchange agreements between RAILROAD and connecting railroads.

## **SECTION SEVEN**

### **RIGHTS OF RAILROAD**

Section 7.1. Subject to compliance with the terms and conditions of this Agreement RAILROAD hereby acquires the right to exclusive access to the Premises for the purpose of providing common carrier rail freight service over the Rail Line and related track assets on the Premises, except that CPR may have reasonable access for line maintenance purposes, subject to CPR's obligation to comply with all applicable laws, rules and regulations, and RAILROAD's safety rules and procedures.

Section 7.2. Upon the commencement of rail freight service, RAILROAD hereby acquires the exclusive right to provide common carrier freight Rail Services on the Premises subject to the Provisions of this Agreement, and to do so in a prudent, fair, equitable and businesslike manner, considering the interests of both parties and the public interest.

Section 7.3. RAILROAD shall also acquire the exclusive right to market the provision of Rail Services to existing rail shippers located on the Rail Line and to potential new shippers located or who could locate along the Rail Line, as well as interline freight service to shippers located on other rail lines, except that CPR may promote use of the line to potential shippers, with terms of service and tariff rates to be thereafter negotiated exclusively by Railroad

Section 7.4. RAILROAD shall also acquire the exclusive right to manage and oversee the construction of new industry tracks, connections, switches, and other railroad facilities to facilitate existing and new freight railroad operations, consistent with the provisions of this Agreement.

## **SECTION EIGHT**

### **MAINTENANCE AND IMPROVEMENTS**

Section 8.1. Prior to the Effective Date, the parties shall jointly perform an inspection of the Premises and establish a baseline condition for the Rail Line and other tracks. On or before the Effective Date, or as soon as possible thereafter, CPR shall upgrade the Rail Line and other tracks on the Premises from milepost 785.8 at Eads to milepost 747.5 at Towner to Federal Railroad Administration ("FRA") Class I

standards. However, the failure to complete such initial upgrade by the Effective Date shall not excuse RAILROAD from performing Rail Services pursuant to this Agreement if the tracks meet the standards for "Excepted Track" under FRA rules.

Section 8.2. CPR shall endeavor to upgrade the remainder of the Rail Line and other tracks on the Premises from milepost 785.8 at Eads to milepost 869.4 near NA Junction to FRA Class I standards within the Term.

Section 8.3. Once a segment of track and its signaling and road crossing devices have been upgraded by CPR to FRA Class I standards, CPR shall, during the Term, and at its sole cost and expense, maintain the Rail Line and other tracks on the Premises used for Rail Services, and signaling and road crossing devices at FRA Class I standards, and provide routine maintenance to control weeds and make minor repairs, and shall have reasonable access to allow same. RAILROAD will notify CPR of any maintenance needs which RAILROAD observes or recommends

Section 8.4. CPR shall, at its sole cost and expense, maintain the tracks and facilities making up the interchange tracks between CPR and RAILROAD at Towner, Colorado.

Section 8.5. If CPR and RAILROAD disagree concerning the condition of the Track or any determination by CPR of the appropriate level of maintenance, it is agreed by and between the parties that the dispute shall be resolved using the procedures in Section 13 of this Agreement.

Section 8.6. Railroad shall, upon reasonable request by CPR, allow CPR representatives locomotive cab rides, or use a hi-rail vehicle, for the purpose of visually inspecting the Rail Line. The parties shall, at least once annually, jointly inspect the Track to determine whether they have been maintained in accordance with this Agreement. This joint inspection may be waived if agreed to by the parties.

Section 8.7. Nothing herein shall preclude CPR, at its sole cost and expense, from maintaining the tracks on the Premises to a standard higher than FRA Class I standards.

## **SECTION NINE**

### **INDUSTRIAL SPUR CONSTRUCTION AND MAINTENANCE**

Section 9.1. Subject to the provisions of Section 9.2 hereof, the costs of materials and construction for new industrial spurs shall be borne by the industry or industries involved or CPR. That portion of any such spur which is located upon the Premises shall become the property of CPR. Plans and specifications for any new industrial spur shall be subject to the prior approval of CPR, which approval shall not be unreasonably withheld.

Section 9.2. At RAILROAD's option, an industry may recover its material and construction costs for that portion of a spur located upon the Premises pursuant to an Agreement with RAILROAD providing for such cost recovery based upon a rebate of a reasonable percentage of rail freight charges over a period not to exceed three (3) years. Any amount rebated shall not be deducted from RAILROAD's Freight Revenue for the year(s) in which rebates are provided.

## **SECTION TEN**

### **CONTROL OF RAIL OPERATIONS**

Section 10.1. RAILROAD shall have exclusive management and control of freight rail operations on the Premises and shall therefore control the admission and exit of locomotives, trains, railcars, and the movement of the same thereover. RAILROAD locomotives, cars, trains and employees, while on the Premises, shall be subject to the rules, timetables, regulations, and orders of RAILROAD then in effect. All operating personnel of RAILROAD, prior to operating any locomotive or other track mounted equipment, shall be qualified in accordance with applicable FRA rules and regulations.

Section 10.2. All rules, timetables, regulations and orders governing operations on and along the Premises shall be promulgated by RAILROAD from time to time, and shall be fair, reasonable, uniform and in compliance with all Federal and State laws, rules and regulations. A copy of the most current version of all such rules, timetables, regulations and orders shall be provided to CPR prior to the Effective Date and anytime thereafter during the Term of the Agreement when any changes are made. Rates, tariffs and other commercial arrangements shall be subject only to such Federal or State regulations as may exist covering railroads generally, there being no intent by this Agreement to create any unique regulations.

Section 10.3. CPR shall, within 15 days after the Effective Date, provide RAILROAD with copies of all track and signal maps; structural, bridge and other drawings and plans; files related to maintenance history; customer data and any other data related to the continued operation of the Premises that are in CPR's or its affiliates' possession.

## **SECTION ELEVEN**

### **INSURANCE AND INDEMNIFICATION**

Section 11.1. RAILROAD shall secure and maintain in effect at all times during the Term of this Agreement an insurance policy or policies which shall provide commercial liability coverage (or its equivalent) in an amount not less than \$25,000,000. Additionally, such policy or policies may contain deductible provisions no greater than \$10,000,000 for any single accident (or occurrence). Such policy or policies shall be issued by a reputable insurance company authorized to do business in the State of Colorado or authorized to issue policies effective in the State of Colorado or shall be issued through Lloyd's of London. CPR shall be named as an additional insured under all such policies. Certificates of insurance shall be delivered to CPR as proof of compliance with this paragraph. RAILROAD shall endeavor to provide that policies purchased pursuant to this paragraph shall not be terminated, canceled or materially modified without thirty (30) days' written notice to CPR. CPR shall secure and maintain in effect at all times during the Term of this Agreement an insurance policy or policies which shall provide commercial liability coverage (or its equivalent) in an amount not less than \$25,000,000. Additionally, such policy or policies may contain deductible provisions no greater than \$10,000,000 for any single accident (or occurrence). Such policy or policies shall be issued by a reputable insurance company authorized to do business in the State of Colorado or authorized to issue policies effective in the State of Colorado or shall be issued through Lloyd's of London. RAILROAD shall be named as an additional insured under all such policies. Certificates of insurance shall be delivered to RAILROAD as proof of compliance with this

paragraph. CPR shall endeavor to provide that policies purchased pursuant to this paragraph shall not be terminated, canceled or materially modified without thirty (30) days' written notice to RAILROAD.

Section 11.2. RAILROAD agrees to require all persons entering upon or performing work on the Premises under any agreement with RAILROAD ("Contractors") to agree to hold harmless and indemnify CPR, its officers, agents, and employees, and contractors from and against any liability, loss, claim or expense for bodily injury or death to any persons or damage to any property (including property of or under the control of CPR) arising out of any act of omission of RAILROAD or its employees or agents, and such Contractor on or in connection with the CPR Properties, irrespective of the fault, failure or negligence (other than sole negligence) of CPR. RAILROAD shall also require any such person to secure and maintain in effect at all times during the performance of such work on the CPR Properties a contractual liability insurance policy insuring such person against liability under this Section 11.2. RAILROAD shall provide to CPR a copy of all such certificates of such insurance upon request. CPR agrees to require all persons entering upon or performing work on the Premises under any agreement with CPR ("Contractors") to agree to hold harmless and indemnify RAILROAD, its officers, agents, and employees, and contractors from and against any liability, loss, claim or expense for bodily injury or death to any persons or damage to any property (including property of or under the control of RAILROAD) arising out of any act of omission of CPR or its employees or agents, and such Contractor on or in connection with the CPR Properties, irrespective of the fault, failure or negligence (other than sole negligence) of RAILROAD. CPR shall also require any such person to secure and maintain in effect at all times during the performance of such work on the CPR Properties a contractual liability insurance policy insuring such person against liability under this Section 11.2. CPR shall provide to RAILROAD a copy of all such certificates of such insurance upon request.

Section 11.3. RAILROAD, its officers, agents, contractors and employees shall hold harmless and indemnify CPR, its officers, agents, contractors and employees, against any liability, loss, claim or expense for damage to property (including property of or under control of RAILROAD or CPR) or for personal injury or death or release of hazardous substance or waste, to the extent such property damage, personal injury or death or release shall arise out of any act of omission of RAILROAD in its performance of its rights, responsibilities and duties under this Agreement except to the extent of the fault, failure or negligence of CPR in the performance of its rights, responsibilities and duties under this Agreement. CPR, its officers, agents, contractors and employees shall hold harmless and indemnify RAILROAD, its officers, agents, contractors and employees, against any liability, loss, claim or expense for damage to property (including property of or under control of RAILROAD or CPR) or for personal injury or death or release of hazardous substance or waste, to the extent such property damage, personal injury or death or release shall arise out of any act of omission of CPR in its performance of its rights, responsibilities and duties under this Agreement except to the extent of the fault, failure or negligence of RAILROAD in the performance of its rights, responsibilities and duties under this Agreement.

Section 11.4. To the extent of a dispute between the parties, the matter will be handled pursuant to the dispute resolution procedures outlined in Section 13.

**SECTION TWELVE**  
**EASEMENTS, LEASES AND LICENSES**

Section 12.1 Unless otherwise agreed by the parties, CPR shall remain responsible for administration and granting of existing and future easements, leases and licenses, private or public grade crossing agreements over, under, along or across the Premises, or agreements related to other encroachments on the Premises ("Premises Agreements") and CPR shall be entitled to the collection of any revenue related thereto. CPR agrees that any Premises Agreements entered into after the Effective Date of this Agreement shall require insurance from persons or entities granted permission to use the Premises which shall name the RAILROAD as an Additional Insured.

Section 12.2 Any permission granted after the Effective Date of this Agreement by CPR to a third party other than a FRA inspector to enter upon the Premises shall include provisions for the third party to reimburse the RAILROAD for flagging and any other related expenses, including customary additives when, in the opinion of the RAILROAD such services are needed.

Section 12.3 Any party or licensee granted an easement, lease, or license by CPR after the Effective Date of this Agreement shall in addition to providing insurance agree to release, defend, indemnify, and hold the RAILROAD, its parent and affiliates, employees, successors, assigns, legal representatives, and agents (collectively, the "Railroad Indemnitees") harmless for any injuries, damages, and losses including legal fees sustained by RAILROAD from and against all claims, liabilities, fines, penalties, costs, damages, losses, liens, causes of action, suits, demands, judgments and expenses (including, without limitation, court costs, attorneys' fees and costs of investigation, removal and remediation and governmental oversight costs) (collectively, "Liabilities") arising out of or related to such easements, leases, or licenses.

Section 12.4 In granting easements, leases and licenses, crossing agreements, or other encroachments upon the Premises, CPR will not unreasonably limit RAILROAD's lawful access to the Premises, or unreasonably interfere with its operations, or its ability to fulfill its common carrier and/or contractual obligations.

**SECTION THIRTEEN**  
**DISPUTE RESOLUTION**

Section 13.1. Any dispute or difference of opinion arising between the parties hereto, or the failure of the parties hereto to agree as to matters arising out of this Agreement shall first, at the request of either party, be discussed by a representative of either party having authority to resolve the dispute. This discussion may be in person, at a place mutually agreed to by the parties, or by telephone. If the representatives are able to resolve the matter, then such decision will be binding on the parties.

Section 13.2. To the extent the dispute is not resolved under the provision above, the matter will be handled in Denver, Colorado, under procedures of mediation and conciliation under the auspices of a mediator having at least 10 years of railroad management experience selected by agreement of the parties. If the parties hereto are unable to agree upon the person to be appointed as mediator within thirty (30) days of a request for mediation by either party, said parties shall request the appointment of a mediator by the American Arbitration Association in Denver, Colorado. Each party hereto shall bear its own legal fees, costs and expenses, including without limitations, the cost of its expert witnesses. The fees

and expenses of any mediator incurred in performing the duties hereunder shall be shared equally by said parties.

Section 13.3. If the parties are unable to resolve the dispute through mediation, then the parties will be entitled to move forward through other legal or equitable means.

## **SECTION FOURTEEN**

### **EVENTS OF DEFAULT**

Section 14.1. The following shall be Events of Default:

- 14.1.1 Failure by RAILROAD to make payments of Freight Revenues to CPR when due, and such failure continues for thirty (30) days following written demand therefor;
- 14.1.2 The filing of a petition for bankruptcy, reorganization or arrangement of RAILROAD pursuant to the Bankruptcy Reform Act or any similar proceeding, and such petition is not dismissed within thirty (30) days; or
- 14.1.3 Either party breaches any material provision of this Agreement and fails to act to cure such breach within ninety (90) days after written notice of such breach from the other party.

## **SECTION FIFTEEN**

### **TERMINATION**

Section 15.1. This Agreement shall terminate upon the occurrence of the following:

- 15.1.1 Upon the expiration of ten (10) days after written notice is given by the non-defaulting party upon any Event of Default as provided for in Section 14 hereof; or
- 15.1.2 Upon the expiration of ninety (90) days' written notice that either party has been prevented from fulfilling its obligations under this Agreement as a result of legislative, judicial or other governmental action; or
- 15.1.3 At any time by written mutual agreement of RAILROAD and CPR.

Section 15.2. In the event of termination as provided in Section 15.1, RAILROAD shall continue to share revenue on Freight Revenues earned through the date of termination, with the final payment due within sixty (60) days after the termination date. RAILROAD shall not be entitled to recover any revenue paid prior to such termination; provided, however, the RAILROAD shall be entitled to recover any overpayment of revenue which is supported by a final accounting report.

Section 15.3. In the event of any termination of this Agreement other than by an Event of Default, RAILROAD shall vacate the CPR Properties in an orderly manner, and shall deliver to CPR all occupation agreements, track and signal maps, structural, bridges, and other drawings and plans, files related to

customer data and any other data related to the continued operation of the CPR Properties. Upon any termination resulting from an Event of Default by RAILROAD, CPR at any time thereafter may re-enter and take possession of the Premises by affording written notice to RAILROAD specifying such Event of Default and that this Agreement has terminated. RAILROAD hereby expressly waives, so far as permitted by law, the service of any notice of intention to enter or re-enter provided for in any statute, or of the institution of legal proceedings to that end, and RAILROAD hereby waives any and all rights of redemption or re-entry or repossession there may be under law which arises out of this Agreement and the enforcement of the provisions hereof by CPR. The terms "enter," "re-enter," and "re-entry" as used in the Agreement are not restricted to their technical legal meanings.

Section 15.4. In the event of any termination of this Agreement RAILROAD, at its sole cost and expense, shall promptly seek any necessary authority to discontinue rail service from the Surface Transportation Board or other government authority. If RAILROAD fails to do so, CPR may seek such authority on behalf of RAILROAD, and RAILROAD shall reimburse CPR for all costs (including filing fees and attorneys' fees) incurred by CPR. RAILROAD shall not oppose the efforts of any rail carrier designated by CPR to operate the Premises to obtain authority from the STB or other government authority to provide service over the CPR Premises.

Section 15.5. All accrued obligations shall survive the termination of this Agreement. Further, the indemnifications set forth in Section 11 shall survive termination of this Agreement.

## **SECTION SIXTEEN**

### **AUDITS AND ANNUAL REPORTS**

Section 16.1. RAILROAD understands and agrees that its financial and other records pertaining to RAILROAD's access, use, and management of the Premises are subject to State and/or Federal audit and that all such records are to be prepared in accordance with generally accepted accounting principles and maintained in auditable condition for a period of not less than three (3) years after preparation of the records. RAILROAD warrants and agrees to make all such records available to CPR for review and copying, at CPR's expense, at the offices of RAILROAD within fifteen (15) days after RAILROAD's receipt of CPR's request to audit (and perhaps copy) such records. CPR's right to audit and copy RAILROAD's records shall survive termination of the Agreement for a period of one (1) year.

Section 16.2. On or before April 1 of each year after the first year of this Agreement RAILROAD shall provide CPR with an Annual Report, with an update of annual carload volumes, and an accounting of (1) each category of revenues making up the Annual Freight Revenues and (2) RAILROAD's operating expenses, by category of expense, for Rail Services provided by RAILROAD on the Premises in the preceding calendar year. Such report shall be delivered by personal presentation from a RAILROAD employee in CPR's headquarters office in New York City, New York or other mutually agreed location.

## **SECTION SEVENTEEN**

### **TAXES**

Section 17.1. Nothing herein shall be construed to relieve RAILROAD from any liability to pay taxes assessed against its motive power, rolling stock or other equipment, or any other personal property owned by RAILROAD, or from CPR to pay taxes assessed against the CPR Properties, its equipment, or any other personal property owned by CPR.

## **SECTION EIGHTEEN**

### **COMPLIANCE WITH LAW**

Section 18.1. RAILROAD agrees to secure and maintain all necessary governmental authority (including at the town, county, state and federal levels) for its operation on the Premises. RAILROAD will provide copies of all filings to CPR for review and comment and will coordinate all filings with any filings to be made by CPR. Without waiving the generality of the above, RAILROAD shall acquire the right to conduct rail freight service over the Rail Line from the Surface Transportation Board, and shall obtain such judicial, administrative agency or other regulatory approvals, authorizations or exemptions as may be necessary to enable it to undertake its obligations hereunder.

#### Section 18.2.

Section 18.3. Both parties agree to comply with all provisions of law and regulations applicable to it and to the CPR Properties, including without limitation regulations promulgated by the FRA, and neither party will not knowingly do, or permit to be done, upon or about the Premises, anything forbidden by such law or regulations.

Section 18.4. In the event of any order from a federal or state agency requiring a new installation of, or upgrade to, any facility of the Premises, such as, but not limited to, highway grade crossing protection or wayside fencing, CPR shall be responsible for compliance with any such order. All cost of installation, operation and maintenance of any such facility shall be born solely by the CPR.

## **SECTION NINETEEN**

### **FORCE MAJEURE**

Section 19.1. RAILROAD shall have no obligation to operate over any portion of the Premises during any period when it is prevented or hindered from operating by acts of God, public authority, strikes, riots, labor disputes, or any other cause beyond its control ("Force Majeure Event").

Section 19.2 Upon the occurrence of a Force Majeure Event, RAILROAD shall diligently attempt to remove the source of the Force Majeure Event and resume operations at the earliest opportunity.

## **SECTION TWENTY**

### **DEFEASANCE**

Section 20.1. RAILROAD shall not make any use of the Premises inconsistent with CPR's right, title and interest therein and which may cause the right to use and occupy the Premises to revert to any party

other than the CPR. So long as the Premises are sufficient to permit RAILROAD to operate a continuous line of railroad between the termini described in Section 1.1, this Agreement shall not be affected by any determination, whether by judicial order, decree or otherwise, that ownership of any portion of CPR Properties is vested in a person other than CPR. CPR shall remain free to grant easements or usage licenses along or under or over the rail tracks on the Premises so long as federal safety clearance rules for RAILROAD's operations are observed.

## **SECTION TWENTY-ONE**

### **REPRESENTATIONS AND WARRANTIES**

Section 21.1. CPR represents and warrants that:

- 21.1.1 It has full power and authority to enter into this Agreement and to carry out the obligations of CPR hereunder.
- 21.1.2 Its execution of and performance under this Agreement does not knowingly violate any statute, rule, regulation, order, writ, injunction or decree of any court, administrative agency or governmental body.

Section 21.2. RAILROAD represents and warrants that:

- 21.2.1 It is a corporation duly organized, validly existing, and in good standing under the laws of the Colorado.
- 21.2.2 It has full power and authority to enter into the Agreement and to carry out its obligations hereunder.
- 21.2.3 Its execution of and performance under this Agreement does not knowingly violate any statute, rule, regulation, order, write, injunction or decree of any court, administrative agency or governmental body.

## **SECTION TWENTY TWO**

### **MISCELLANEOUS PROVISIONS**

Section 22.1. Entire Agreement. This Agreement expresses the entire agreement between the parties and supersedes all prior oral or written agreements, commitments, or understandings with respect to the matters provided for herein, and no modification of the Agreement shall be binding upon the party affected unless set forth in writing and duly executed by the affected party.

Section 22.2. Notices. All notices, demands, requests or other communications which may be or are required to be given, served or sent by either party to the other pursuant to this Agreement shall be in writing and shall be deemed to have been properly given or sent:

- 22.2.1 If intended for CPR, by emailing, or mailing registered or certified mail, return receipt requested, with postage prepared, addressed to CPR at:

Colorado Pacific Railroad, LLC  
515 Congress, Suite 2450  
Austin, TX 78701  
william@texasenergylaw.com

22.2.2 If intended for RAILROAD, by emailing, or mailing registered or certified mail, return receipt requested, with postage prepared, addressed to RAILROAD at:

Craig Richey  
Kansas & Oklahoma Railroad, L.L.C.  
315 W 3<sup>rd</sup> Street  
Pittsburg, KS 66762  
crichey@watcocompanies.com

Section 22.3 Each Notice, demand, request or communication which shall be mailed by registered or certified mail to either party in the manner aforesaid shall be deemed sufficiently given, served or sent for all purposes at the time such notice, demand, request or communication shall be either received by the addressee or refused by the addressee upon presentation.

Section 22.4. Binding Effect and Assignment. This Agreement shall be binding upon the inure to the benefit of CPR and RAILROAD, shall be binding upon the successors and assigns of CPR and RAILROAD, subject to the limitations hereinafter set forth. RAILROAD may not assign its rights under this Agreement or any interest therein, or attempt to have any other person, firm or corporation assume its rights or obligations under this Agreement, without the prior written consent of CPR.

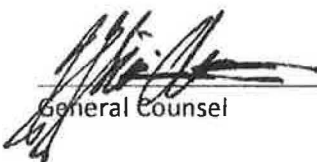
Section 22.4. Severability. If any provision, clause or paragraph of this Agreement or any document incorporated by reference shall be determined invalid by a court of competent jurisdiction, such determination shall not affect the other provisions, clauses or paragraphs of the Agreement which are not affected by the determination. The provisions, clauses or paragraphs of this Agreement and any documents incorporated by reference are declared severable.

Section 22.5. Governing Law. This Agreement shall be governed and construed in accordance with the laws of Colorado. RAILROAD's operations under this Agreement shall also comply with the applicable provisions of Federal law and the applicable rules, regulations and policies of any agency thereof.

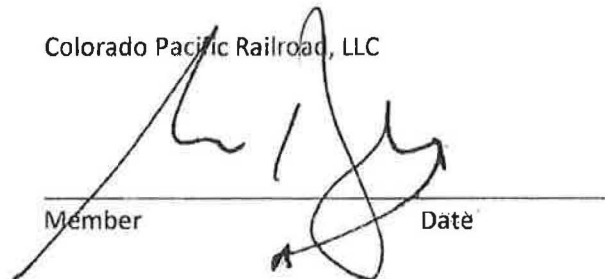
IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed on their behalf, as of the 1st day of January, 2019.

APPROVED AS TO FORM

Colorado Pacific Railroad, LLC

  
General Counsel

1.7.2019  
Date

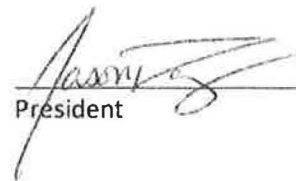
  
Member Date

WITNESS:



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Kansas & Oklahoma Railroad, L.L.C.



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President

## **EXHIBIT A**

**STB Order**

## **EXHIBIT B**

**Bill of Sale**

## **EXHIBIT C**

**Assignment Agreement**

## **EXHIBIT D**

**Quitclaim Deed**

## **EXHIBIT E**

**CPR Grain and Grain Product Freight Rates**

**For Blocks of At Least Twenty-Five (25) Railcars**

| <b>CPR Station</b>   | <b>St</b> | <b>Towner<br/>Interchange</b> |
|----------------------|-----------|-------------------------------|
| <b>Stuart</b>        | <b>CO</b> | <b>\$250</b>                  |
| <b>Sheridan Lake</b> | <b>CO</b> | <b>\$250</b>                  |
| <b>Brandon</b>       | <b>CO</b> | <b>\$275</b>                  |
| <b>Chivington</b>    | <b>CO</b> | <b>\$325</b>                  |
| <b>Eads</b>          | <b>CO</b> | <b>\$375</b>                  |
| <b>Galatea</b>       | <b>CO</b> | <b>\$425</b>                  |
| <b>Haswell</b>       | <b>CO</b> | <b>\$450</b>                  |
| <b>Arlington</b>     | <b>CO</b> | <b>\$500</b>                  |
| <b>Sugar City</b>    | <b>CO</b> | <b>\$550</b>                  |
| <b>Ordway</b>        | <b>CO</b> | <b>\$575</b>                  |
| <b>Olney Springs</b> | <b>CO</b> | <b>\$625</b>                  |
| <b>Pulney</b>        | <b>CO</b> | <b>\$700</b>                  |
| <b>NA Junction</b>   | <b>CO</b> | <b>\$800</b>                  |

### **CERTIFICATE OF SERVICE**

I hereby certify that on this 16<sup>th</sup> day of April 25, 2025, copies of the foregoing Reply to Petition for Exemption were served by electronic mail on representatives of Union Pacific Railroad Company and the Kansas & Oklahoma Railroad Company.

/ss/ Thomas W. Wilcox  
Thomas W. Wilcox