

SERVICE DATE – FEBRUARY 25, 2025

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 34030

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

Digest:¹ This decision denies Weskan Grain LLC’s petition to reopen and partially revoke the acquisition exemption previously noticed in this proceeding and directs Kansas & Oklahoma Railroad, LLC, to file a petition for exemption or application to obtain after-the-fact lease renewal authority by March 27, 2025.

Decided: February 25, 2025

On November 27, 2024, Weskan Grain LLC (Weskan) filed a petition to reopen and partially revoke the 2001 acquisition exemption authority noticed in this proceeding. Weskan requests that the Board partially revoke the exemption by declaring void an interchange commitment in a lease agreement between the Kansas & Oklahoma Railroad, Inc. (K&O)² and Union Pacific Railroad Company (UP) governing K&O’s possession and use of UP’s tracks from milepost 747.5 at Towner, Colo., to milepost 664.5 near Healy, Kan., and certain other UP-owned tracks in Kansas (the Lease). For the reasons discussed below, Weskan’s petition will be denied, and K&O will be directed to file a petition for exemption or application to obtain after-the-fact authority to renew the Lease and implement any amendments thereto.

BACKGROUND

On May 25, 2001, K&O filed a verified notice of exemption under 49 C.F.R. § 1150.31 to, among other things, acquire the Lease by assignment from the Central Kansas Railway, L.L.C. (CKR). Notice of the exemption was served and published in the Federal Register on June 12, 2001 (66 Fed. Reg. 31,751).

On November 27, 2024, Weskan filed its petition to reopen and partially revoke the 2001 exemption pursuant to 49 U.S.C. §§ 10502(d), 1322(c), and 49 C.F.R. § 1115.4. Weskan’s

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Pol’y Statement on Plain Language Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

² Kansas & Oklahoma Railroad, Inc., the entity that filed the verified notice of exemption in this proceeding in 2001, is now known as Kansas & Oklahoma Railroad, LLC. (See Weskan Letter, Dec. 2, 2024.)

petition asserts, on information and belief,³ that the Lease contains an “unlawful” interchange commitment⁴ that “render[s] economic [sic] and/or operationally infeasible” K&O’s transportation of grain from Weskan’s grain loading facilities in western Kansas westward for interchange with the Colorado Pacific Railroad LLC (CXR) for further transportation to points west. (Pet. 1-2.) Weskan states that these destinations include its recently constructed grain elevator complex near Sheridan, Colo. (Stockton Facility), which currently receives grain by truck, which is then loaded into railcars for outbound shipping.⁵ (*Id.* at 2-3.) Weskan further claims that the interchange commitment induces K&O to transport grain eastward for interchange with only UP at Hutchison or Wichita, Kan. (*Id.* at 2.) Weskan argues that competition between BNSF and UP to serve the Stockton Facility is therefore foreclosed and that Weskan and other grain shippers are deprived of utilizing more efficient and varied routings for marketing grain to western locations and export terminals. (*Id.* at 2, 4, 11-12.) According to Weskan, it is appropriate to reopen the proceeding because the circumstances surrounding the approved transaction have significantly changed since 2001 and have resulted in a “highly anticompetitive and inefficient rail situation that is contrary to the public interest as well as the National Rail Transportation Policy” (RTP). (*Id.* at 1; *see also id.* at 11-12.) Weskan requests that the Board reopen the proceeding, permit “a reasonable discovery period,” and take additional evidence from the parties. (*Id.* at 13.) Weskan further requests that the Board partially revoke the exemption by declaring the interchange commitment void and direct UP and K&O to modify the Lease to eliminate the interchange commitment. (*Id.*)

K&O filed a reply and motion to dismiss the petition on December 20, 2024.⁶ K&O argues that the petition should be dismissed because Weskan fails to offer any actionable basis for its requested relief. (K&O Reply 1, Dec. 20, 2024.) K&O asserts that Weskan’s allegation about the “unlawful[ness]” of the interchange commitment is untethered to any statutory

³ Weskan did not possess a copy of the Lease when it filed the petition. Accordingly, concurrent with the petition, Weskan filed a motion pursuant to 49 C.F.R. § 1114.30(d) seeking disclosure of the Lease and certain related documents. Weskan also requested the issuance of a protective order. By decision served on December 20, 2024 (December Decision), the motion for disclosure and request for protective order was granted.

⁴ An interchange commitment (sometimes referred to in the pleadings as a “paper barrier”) is a provision in a “sale or lease agreement that serve[s] to induce a party to the agreement to interchange traffic with another party to the agreement, rather than with a third-party connecting carrier, whether by outright prohibition, per-car penalty, adjustment in the purchase price or rental, positive economic inducement, or other means.” 49 C.F.R. § 1150.31.

⁵ The Stockton Facility is connected to the Stockton siding located at MP 752.5 of a 122-mile rail line owned and operated by CXR (the Towner Line). (*Id.* at 3.) Weskan asserts that CXR purchased the Towner Line in 2017 after the previous operator “allowed the line to fall into disrepair and non-use,” and that CXR has invested substantial capital in restoring the entirety of the line and reestablishing the previously existing interchange tracks with BNSF and UP on the western end of the line at NA Junction, Colo. (*Id.* at 5.) The eastern end of the Towner Line interchanges with the leased tracks near MP 747.5 in Towner, Colo. (*Id.*)

⁶ The parties agreed that the deadline to respond would be calculated from December 2, 2024, the date K&O agreed to accept service of the petition. (K&O Letter, Dec. 2, 2024.)

provision that K&O or UP has allegedly violated, and further contends that the petition is essentially a plea for rate relief that seeks to bypass the procedures under 49 U.S.C. § 10701. (*Id.* at 4 (quoting Pet. 1); *see id.* at 6-9.) K&O claims that Weskan should have initiated a “two-track” process before the Board, beginning with a rate reasonableness complaint. (*Id.* at 8.) According to K&O, if Weskan were to establish that K&O’s proffered rates are unreasonable, the Board could then consider whether partial revocation is appropriate under § 10502 to remedy any potential market power abuse. (*Id.* at 8-9.) K&O further argues, among other things, that even if Weskan’s petition presented an appropriate pathway to obtain the relief sought, the petition is nevertheless insufficient because it does not “demonstrate by persuasive evidence the *presence* of substantial market power *and* the concomitant *abuse* of that market power.” (*Id.* at 11.) K&O suggests that if the proceeding is reopened, the parties should have the opportunity to take discovery “in both directions.” (*Id.* at 6.) K&O separately suggests that it would be amenable to settlement discussions with Weskan, CXR, and UP, stating that it believes “the parties could reach an accord obviating the need for any formal proceeding to address the lawfulness of the K&O rate offering and interchange commitment at issue here.” (*Id.* at 13.)

On December 23, 2024, UP replied to Weskan’s petition to reopen and partially revoke the exemption. UP argues that the petition should be denied because the Board cannot grant the requested relief. (UP Reply 2, Dec. 23, 2024.) UP claims that, even if the Board were to revoke its authorization of the Lease, UP could not then be required to seek approval of a lease without an interchange commitment; UP could simply choose not to lease the line to K&O. (*Id.*) UP also argues that the petition should be denied because Weskan can more directly bring its challenge through a rate reasonableness case. (*Id.*)

On January 10, 2025, Weskan filed a reply to K&O’s motion to dismiss. Weskan acknowledges that it “is not – at this time – claiming that K&O has violated § 10701 or any other statutory provision.” (Weskan Reply 4, Jan. 10, 2025.) Rather, Weskan argues that the interchange commitment “violates the premise that ‘a *shipper’s* right to adequate service, reasonable rates, or any other statutory right . . . cannot be contracted away by an agreement between *carriers*.’” (*Id.* at 4-5 (quoting *Entergy Arkansas, Inc. v. Union Pac. R.R.*, NOR 42104, slip op. at 3 (STB served June 26, 2009)) (ellipsis in original).) Weskan challenges K&O’s contention about the necessity of a “two-track” process, arguing that the Board has contemplated a shipper’s ability to challenge an interchange commitment through a petition to reopen a proceeding in which a lease was authorized or to revoke an exemption under § 10502. (*Id.* at 5 (citing *Review of Rail Access & Competition Issues—Renewed Pet. of the W. Coal Traffic League* (*Review of Rail Access*), EP 575, slip op. at 16 (STB served Oct. 30, 2007)).)

Weskan also notes that K&O recently produced a copy of the Lease and other documents to Weskan pursuant to the protective order issued in the *December Decision*. (Weskan Reply 8, Jan. 10, 2025.) Weskan states that certain details have been “reveal[ed]” from that disclosure, including that the Lease, which was executed by UP and CKR in 1997 and assigned to K&O in 2001, “remained largely unchanged and ignored by K&O and UP until 2018, when CXR acquired the Towner Line,” after which “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.” (*Id.* at 9.) Notably, Weskan observes that K&O did not notify the Board of its renewal and modification of the Lease. (*See id.*)

On January 17, 2025, Weskan filed a supplement to its petition to reopen and partially revoke. The supplement describes the interchange commitment included in the original version of the Lease between CKR and UP (dated as of September 12, 1997). (Suppl. Pet. 2-4.) Weskan also asserts that after the Lease was assigned to K&O in 2001, K&O and UP renewed and amended the Lease by executing a “Third Supplement” and “Fourth Supplement” to the Lease in 2018 and 2019, respectively.⁷ (*Id.* at 4-6.) Weskan states that the Third Supplement reflected several substantive changes to the Lease, including an amendment to the description of the leased premises to acknowledge that UP had abandoned certain segments in the early 2000s. (*Id.* at 5.) Weskan further states that the Fourth Supplement amended the interchange commitment. (*Id.* at 4, 5-6.) Weskan alleges that the amended interchange commitment provision was “specifically inserted to prevent the potential movement of grain by K&O west to the Towner, [Colo.] interchange with CXR for further movement west.” (*Id.* at 2.) Weskan also discusses certain “waiver” requests that K&O purportedly sought from UP on behalf of Weskan and argues that any “waiver” that UP may have agreed to was “illusory.” (*Id.* at 6-7.)⁸

On February 6, 2025, K&O replied to Weskan’s supplement to the petition. K&O acknowledges that the original Lease “contained specific interchange commitment terms” and that K&O and UP “agreed to change the lease’s interchange commitment terms” when they executed the Fourth Supplement to the Lease. (K&O Reply 3, Feb. 6, 2025.) K&O disputes, however, that the amended interchange commitment was designed to impose previously nonexistent restraints on K&O traffic interchange. (*Id.*) K&O also disputes that the amended interchange commitment terms were “prompted by CXR’s Towner line purchase.” (*Id.* at 6.) Additionally, K&O states that it “has sought, and believes it has secured, conditional relief from the Fourth Supplement interchange commitment terms” in response to Weskan’s current service request. (*Id.* at 3-4.)

UP also filed a reply to Weskan’s supplement to the petition on February 6, 2025. UP reiterates its prior argument that Weskan should pursue a rate reasonableness challenge if it believes the K&O-supplied rates are unreasonable. (UP Reply 2, Feb. 6, 2025.) UP further suggests that it would be willing to grant K&O another “waiver” of the interchange commitment to the extent UP “misunderstood K&O’s [prior] waiver request, or if Weskan is now seeking transportation under different terms.” (*Id.* at 2 n.2.)

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. § 1322(c), the Board may grant a petition to reopen upon a showing of material error, new evidence, or substantially changed circumstances. The alleged grounds for reopening “must be sufficient to lead the Board to materially alter its prior decision.” Canadian Nat’l Ry.—Control—EJ&E W. Co., FD 35087 (Sub-No. 8), slip op. at 4 (STB served Aug. 30,

⁷ Weskan asserts that the first two “Supplements” were executed by CKR and UP before the Lease was assigned to K&O. (Suppl. Pet. 5 n.4.) Those supplements, according to Weskan, “covered relatively minor terms and conditions that are not relevant to the issues raised” by Weskan’s petition to reopen and revoke. (*Id.*)

⁸ The supplement also includes a proposed procedural schedule accounting for a 90-day discovery period. (Suppl. Pet. 8.)

2019) (quoting Vill. of Barrington v. STB, 892 F.3d 252, 267 (7th Cir. 2018)); see Montezuma Grain Co. v. STB, 339 F.3d 535, 541-42 (7th Cir. 2003). If a party has not presented material error, new evidence, or substantially changed circumstances that “would mandate a different result,” the Board will decline to reopen. Canadian Nat’l Ry.—Control—EJ&E W. Co., FD 35087 (Sub-No. 8), slip op. at 4 (STB served Dec. 21, 2018). Weskan argues that the Board should reopen and partially revoke the 2001 exemption based on changed circumstances and new evidence, by declaring the interchange commitment in the Lease void. As discussed below, because the interchange commitment at issue was not authorized by the 2001 exemption, the Board will deny Weskan’s petition.

K&O’s disclosure of documents pursuant to the December Decision revealed certain facts that were unknown to Weskan when it filed its petition to reopen—including, most notably for purposes of this decision, that the Lease was renewed and amended in 2018, that an amended interchange commitment was added to the Lease in 2019, and that “K&O did not notify the Board of the renewal and material modification of the [Lease] and the existence of the newer interchange commitment” when those changes were made. (Weskan Reply 9, Jan. 10, 2025; see also Suppl. Pet. 4-6 (describing the Third and Fourth Supplements to the Lease executed in 2018 and 2019, respectively).) Since K&O’s disclosure, Weskan has largely shifted its focus away from the lease transaction approved in the 2001 exemption and toward the 2019 amendment that inserted the new interchange commitment into the Lease. Indeed, Weskan has now clarified that it seeks 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.*” (Suppl. Pet. 8 (emphasis added).) Reopening and revoking the 2001 exemption, however, would not address concerns arising from unauthorized lease amendments made after that date.

Renewing a previously authorized lease constitutes a transaction that requires Board authority, even where “only an extension in time is involved.” 49 C.F.R. § 1180.2(d)(4); see, e.g., C&NC R.R.—Lease Renewal Exemption—Norfolk S. Ry., FD 35529, slip op. at 1 n.1 (STB served June 28, 2011) (noting that 49 C.F.R. § 1180.2(d)(4) applies to lease renewals “where the Board has previously authorized the transaction and only an extension of time is involved” and determining that 49 C.F.R. § 1150.41 applied where a renewed lease by a Class III carrier included a new credit provision and milepost adjustments); N. Plains R.R.—Lease Exemption—Soo Line R.R., FD 35382, slip op. at 2 n.2 (STB served Aug. 6, 2010) (same). Here, it appears that K&O and UP completed the lease renewal and amendments without seeking or obtaining the requisite authority from the Board.⁹ Consequently, while K&O remains a licensed operator under the 2001 operation exemption, 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.¹⁰ Because K&O did not obtain authority to enter into the modified lease agreement from which Weskan seeks relief, and given the requirement discussed below for K&O to address this issue, Weskan’s petition is moot (as is

⁹ K&O and UP have not disputed Weskan’s assertion that the renewal and amendments were executed without prior Board authorization. (See generally K&O Reply, Feb. 6, 2025; UP Reply, Feb. 6, 2025.)

¹⁰ To be clear, this decision does not opine on the validity or enforceability of the Lease as a contractual matter.

K&O's motion to dismiss the petition). Reopening the 2001 proceeding and revoking the exemption is not needed to address Weskan's concerns, as Weskan will have an opportunity to comment on any lease renewal or modification requested by K&O. For all of these reasons, the Board declines to institute a proceeding under 49 U.S.C. § 10502(d).

K&O will be directed 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, 2025.¹¹ If K&O seeks authority to renew a version of the Lease that contains an interchange commitment, K&O must disclose the existence of that provision and provide additional related information. See 49 C.F.R. § 1121.3(d); Review of Rail Access, EP 575, slip op. at 16 n.39 (STB served Oct. 30, 2007); see also Disclosure of Rail Interchange Commitments, EP 575 (Sub-No. 1), slip op. at 2 (STB served May 21, 2008) (noting that the disclosure requirements are intended "[t]o facilitate a more informed case-by-case analysis of interchange commitments").

Finally, the Board encourages the parties to discuss potential avenues for a negotiated resolution to address the concerns raised in the petition. See Lake Providence Port Comm'n—Feeder Line Appl.—Line of Delta S. R.R. Located in E. Carroll & Madison Pars., La., FD 36447 et al., slip op. at 2 (STB served Oct. 14, 2022) (noting the Board's "preference for privately negotiated solutions where possible") (citing U.S. Dep't of Energy v. Balt. & Ohio R.R., NOR 38302S et al., slip op. at 5 (STB served June 28, 2017) ("Wherever possible, the Board's longstanding policy is to encourage the private resolution of disputes through voluntary negotiations among all interested parties.")).

It is ordered:

1. The petition to reopen and partially revoke is denied.
2. K&O's motion to dismiss the petition is denied as moot.
3. K&O is directed to seek after-the-fact authority for its prior renewal of the Lease as described above by March 27, 2025.
4. This decision is effective on its service date.

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

¹¹ Because a significant amount of time has passed since the parties executed the Third and Fourth Supplements to the Lease and those transactions may raise questions requiring further Board consideration, the Board directs K&O to file a petition for exemption or application rather than a notice of exemption. See Great Lakes Terminal R.R.—Acquis. & Operation Exemption—Norfolk S. Ry., FD 36764, slip op. at 2-3 (STB served Apr. 26, 2024).