

**BEFORE THE UNITED STATES
SURFACE TRANSPORTATION BOARD**

308948

ENTERED
Office of Proceedings
November 27, 2024
Part of
Public Record

FINANCE DOCKET NO. FD 34030

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

PETITION TO REOPEN AND PARTIALLY REVOKE EXEMPTION

Weskan Grain LLC (“Weskan”) hereby petitions the Surface Transportation Board (“STB” or “Board”), pursuant to 49 U.S.C. § 10502(d), 49 U.S.C. § 1322(c) and 49 C.F.R. § 1115.4, to reopen this proceeding and partially revoke the exemption authority noticed in the decision served in this Docket on June 12, 2001.¹ The requested relief is justified and necessary because the circumstances surrounding the approved transaction have significantly changed over the past 23 years, resulting in the terms of a lease transaction that received exemption authority in this proceeding creating a highly anticompetitive and inefficient rail situation that is contrary to the public interest as well as the National Rail Transportation Policy (“RTP”). More specifically, as discussed hereinbelow, on information and belief, a lease agreement between the Kansas & Oklahoma Railroad, Inc. (“K&O”) and Union Pacific Railroad Company (“UP”) (the “Lease”) authorized in this Docket contains one or more provisions that constitute an unlawful “interchange commitment” under the Board’s cases and standards. K&O and UP have steadfastly refused to

¹ Docket No. FD 34030, *Kansas & Oklahoma Railroad, Inc.—Acquisition Exemption—Central Kansas Railway, LLC* (served June 12, 2001).

disclose any provision of the Lease to Weskan, its affiliates, or their counsel under any circumstances. However, both railroads acknowledge that there are provisions in the Lease that operate to render economic and/or operationally infeasible the K&O's transportation of grain commodities from Weskan's grain loading facilities in Western Kansas westward to the Colorado-Kansas border for interchange with the Colorado Pacific Railroad LLC ("CXR") for further transportation to points west. These destinations include Weskan's Stockton grain elevator complex near Sheridan, CO that can be served by both UP and the BNSF Railway Company ("BNSF"). Rather, the Lease is structured to induce K&O to transport all grain from shippers located on the tracks leased by K&O eastward for interchange with only UP at Hutchison or Wichita, KS, thereby foreclosing competition between BNSF and UP at the Stockton facility, and depriving Weskan and other grain shippers of utilizing more efficient and varied routings for marketing their grain to the Western U.S. and export terminals.

Any original justification for the interchange commitment has long since disappeared, particularly in these changed circumstances involving an isolated section of the original leased tracks. Reopening this proceeding and revoking the exemption authority as requested herein is authorized by §10502(d) and necessary to carry out numerous components of the RTP.

Because UP and K&O have repeatedly refused to disclose any provisions of the Lease to Weskan or its counsel under any circumstances, Weskan has accompanied this Petition with a motion filed pursuant to 49 C.F.R. §1114.30(d) requesting an order from the STB directing UP and/or K&O to produce to Weskan a true and correct copy of the Lease and all amendments thereto, including but not limited to any agreements between UP and K&O that waive or otherwise modify the lease terms making up the interchange commitment. Weskan has also submitted a draft protective order with the motion as required by §1114.30(d). Weskan asks the Board to

expeditiously grant the motion to enable Weskan to review the Lease and amendments and supplement this Petition as necessary during the 90-day period established by §10502(d) for the Board to commence an appropriate proceeding, which could include allowing a period for discovery of relevant documents and testimony surrounding the Lease and its implementation by UP and K&O.

A. BACKGROUND²

1. Weskan Grain LLC

Weskan is a division of the Soloviev Group, a diverse company that also owns the Colorado Pacific Railroad LLC (CXR) Group, 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.³ As constructed, the Stockton facility has 3.1 million bushels of upright grain storage capacity and 2.2 million bushels of ground storage capacity, but 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 the CXR described in more detail below. The CXR line – historically called the Towner Line - interchanges with the Lease Tracks near MP 747.5 in Towner, Colorado which is at the border of Colorado and Kansas. A Map showing the various rail lines discussed in this Petition is included in the attached Exhibit A.

² The factual assertions in this Petition about Weskan and its affiliates are supported by the attached Verification executed by Will Bramblett, the Chief Executive Officer of Weskan Grain LLC.

³ See Exhibit A; also <https://weskangrain.com/facility/>

As mentioned, the Stockton facility has access to both UP and BNSF, thereby providing grain producers in Colorado and Kansas with the opportunity to ship pursuant to rail rates and service terms set by competition between UP and BNSF, as well as have access to western and port destinations serviced by both railroads. Weskan also has recently 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* Exhibit A.

2. The Lease Tracks

The leased tracks at issue in this proceeding are 81.5-miles of UP-owned railroad line shown on Exhibit A (“Lease Tracks”) that extend eastward from Milepost 747.5 at Towner to Milepost 682.5 at Scott City. At that point, the Lease Tracks turn north and east for approximately 17.5 miles to Healy, Kansas, where the tracks end. 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 Towner Line is also a vestige of this former MoPac main line. UP has not owned or operated the Towner Line since 1998, when UP sold it to the State of Colorado after first seeking authority to abandon it.⁴ The State acquired the line to preserve it for common carrier rail service, eventually conveying it to a short line rail carrier in 2005. CXR acquired the Towner Line from that operator in 2017 when the Board granted CXR’s Feeder Line Application in Docket No. FD

⁴ Finance Docket No. 32760, *Union Pacific Corp, et al – Control and Merger – Southern Pacific Rail Corp, et al* (Decision No. 44), 1 S.T.B. 233 (1996) at 257, 354-57, 494-97, 510-11, and 524-28.

36005 after the operator allowed the line to fall into disrepair and non-use.⁵ After purchasing the Towner Line CXR and its affiliates made substantial capital investments in the main line track and sidings to bring the entire Towner Line up to FRA Class 2 status. They also reestablished and upgraded previously existing interchange tracks with BNSF and UP at NA Junction, CO on the western end of the Towner Line. The reestablishment of the Towner Line and interchanges at NA Junction has created a more efficient western routing for western Kansas-grown grain that is nearly 200 miles shorter than routings from Western Kansas through Hutchison, KS and Wichita, KS. Moreover, the ability of CXR to interchange with BNSF and UP creates potential routings to western destinations and export facilities served by both carriers.

The Lease Tracks are also a remnant of 170.7 miles of tracks UP first leased in 1997 to the Central Kansas Railway, LLC (“CKR”), a Class III carrier that no longer exists. The leased tracks originally extended from the Towner Line at MP 747.5 to Bridgeport, KS.⁶ In 2001 CKR sold and/or assigned to K&O all of the assets and lease rights in the tracks making up the CKR’s approximately 900-mile system via the Notice of Exemption filed in this proceeding. This transaction included in part the Lease Tracks.⁷ As relevant to this Petition, CKR unconditionally assigned its 1997 lease with UP in its entirety to K&O. Also of relevance to this Petition is that in that transaction K&O received exemption authority to acquire tracks CKR had previously acquired

⁵ Finance Docket No. 36005, *KCVN, LLC and Colorado Pacific Railroad, LLC – Feeder Line Application – Line of V and S Railway, LLC, Located in Crowley, Pueblo, Otero, and Kiowa Counties, Colorado* (Served July 31, 2017).

⁶ STB Finance Docket No. 33470, *Central Kansas Railway, L.L.C.—Lease Exemption—Union Pacific Railroad Company* (October 9, 1997)(UP leased its tracks from MP 747.5 at Towner to MP 491.20 at Bridgeport, KS)(“1997 Lease”).

⁷ By 2001 UP had abandoned the tracks covered by the 1997 Lease from Genesco, KS to Bridgeport, KS, as denoted on Exhibit A.

from the Atchison Topeka and Santa Fe Railroad (“ATSF”)⁸ in 1993. These former ATSF tracks are shown in black on Exhibit A. This Petition does not seek revocation of the exemption authority as it pertains to the ATSF tracks.

In 2005, UP abandoned and removed a 58.5-mile segment of the original 170.7 miles of leased tracks running between MP 664.5, near Healy, to MP 606.0, near McCracken.⁹ This abandonment and removal of the tracks from the Lease resulted in the Lease Tracks becoming physically disconnected from the remainder of the UP-owned tracks covered by the 1997 Lease (from McCracken to Genesco). It also reduced K&O’s options for transporting grain and other commodities originated by shippers in western Kansas to only the Lease Tracks and the K&O’s track, the latter of which interchanged only with UP in Hutchison or Wichita that are east of the Lease Track. On information and belief, K&O operates over these tracks pursuant to a haulage carrier agreement with UP, meaning that shippers transact with UP for rates and service and K&O is not part of the rate.

3. The Interchange Commitment/Paper Barrier

The Board’s rules governing the Notice of Exemption in this Docket pre-dated the Board’s rules promulgated in 2008 that require carriers to disclose interchange commitments in leases when they seek authority pursuant to the Board’s Notice of Exemption procedures. 49 C.F.R. §1180.4(g)(4). Consequently, the existence of the interchange commitment in the 1997 Lease was not disclosed to the Board or affected rail shippers by CKR in 1997, nor was it disclosed by K&O in this proceeding in 2001. Nor have UP or K&O disclosed the interchange commitment in conjunction with any renewals of the Lease or amendments to it after 2001, such as when tracks

⁸ Finance Docket No. 32190, *Central Kansas Railway, Inc. – Acquisition and Operation Exemption – The Atchison, Topeka and Santa Fe Railway Co.*, (ICC served January 8, 1993).

⁹ See Exhibit A.

covered by the Lease have been abandoned. However, in Weskan's, KCVN's and CXR's discussions with K&O and UP about potential scenarios for transportation rates and service over the Lease Tracks dating back seven years, both railroads have confirmed the existence of provisions in the Lease that are intended to restrict the ability of K&O to freely interchange grain cars originating from shippers located on the Lease Tracks with CXR at Towner for transportation west on the Towner Line. On information and belief, based on the parties' interactions and discussions summarized hereinbelow,¹⁰ Weskan surmises that the Lease provisions impose an interchange commitment, or "paper barrier," that discourages or prevents traffic originating on the Lease Tracks from interchanging with CXR by imposing an extremely high, if not punitive cost or charge on K&O should it attempt to engage in this transportation.

More specifically, when CXR acquired the Towner Line in 2017 it contracted with K&O to be the designated operator of the line.¹¹ During the course of its negotiations and general interaction with K&O regarding the possibility of transporting grain from Kansas west to NA Junction, CXR became aware of the existence of the Lease and that according to K&O it restricted K&O from transporting grain over the Towner Line from shippers located on the Lease Tracks east of Towner. However, the issue was not addressed at that time due to the more immediate need to rehabilitate the dilapidated Towner Line so it could transport any commodities at all. The lack of traffic on the line in Colorado at that time, and K&O's reluctance to explore opportunities to ship grain from Kansas to NA Junction because of the undisclosed lease restrictions, led to the agreement between K&O and CXR expiring and K&O discontinuing its operating rights over the

¹⁰ The factual summary in this Petition would be expanded and supplemented in a proceeding commenced by the Board under §10502(d) in response to this Petition that should include a period for the parties to engage in discovery.

¹¹ See Docket No. FD 36310, *Kan. & Okla. R.R.—Operation Exemption—Colo. Pac. R.R.*, (STB served June 14, 2019)

Towner Line without moving a single rail car of grain, at which point CXR assumed its underlying common carrier obligation to operate the track.¹²

Starting in 2021, KCVN and CXR re-engaged in discussions with UP and K&O to attempt to reach a commercial arrangement by which grain originating in Kansas on the Lease Tracks would be transported west to the Towner Line. Each proposal attempted to obtain UP's and K&O's agreement to minimize, waive, or eliminate the Lease restrictions, which both UP and K&O acknowledged existed but still refused to disclose.¹³ Proposals offered by KCVN and CXR included acquiring the Lease Track from UP and terminating the Lease, CXR obtaining operating rights over the Lease Tracks, the railroads agreeing to waive the lease restrictions or otherwise amend their lease, and other potential solutions. All such proposals were rejected.

Rail service to the Stockton Siding facility began in May of 2023. The presence of the undisclosed paper barrier adversely affected renewed discussions about rates and service terms for grain movements from Kansas origins on the Lease Tracks to interchange with CXR for delivery to Stockton. This is because K&O steadfastly refused to entertain providing rates and terms that would make rail transportation feasible over the use of trucks to move grain to the Stockton facility. For example, in April, 2024 K&O established rates for this transportation well in excess of the rates it was charging to move cars east, claiming that lowering its rates to move cars west "will not be attainable for us given the penalty fee [to UP] that we would be responsible for."¹⁴ In other correspondence, rates and terms offered by K&O that made rail transportation infeasible

¹² Docket No. AB 853 (Sub-No. 4X) *Kansas & Oklahoma Railroad, L.L.C. — Discontinuance of Service Exemption — In Crowley, Pueblo, and Otero Counties, Colo.* (Served July 28, 2022)

¹³ Exhibit B (correspondence in 2021 between UP and KCVN).

¹⁴ Exhibit C (Email Correspondence) April 2, 2024 email from K&O representative to Weskan representative.

referenced the inclusion of a “UP Asset Usage Fee,” which K&O refused to further quantify or disclose.¹⁵

Further acknowledgement of a contractual barrier to such movements was K&O’s admission in August of 2023 that during the parties’ discussions it had submitted to UP a “waiver request for grain originating on the leased portion of K&O and terminating on the Colorado Pacific.”¹⁶ The details of the request were not disclosed to Weskan. Weskan later learned in October 2024 that UP had apparently responded to the “waiver request” when K&O rejected yet another proposal from Weskan that would have entailed K&O using railcars and potentially even locomotives supplied by Weskan in exchange for rate concessions to enable K&O’s service to compete with trucking service. Without submitting a counter proposal, K&O stated its rejection was because “[w]e are contractually bound to the terms of our agreement with [UP] and the terms they have laid out as a result of our submitted traffic waiver request.”¹⁷ K&O refused to disclose the “terms” it was referring to that “bound” it to reject Weskan’s proposal.

On October 30, 2024, Weskan made a final written attempt to obtain rates and terms that would make K&O service from origins in the vicinity of Scott City to the CXR interchange feasible by requesting a rate for grain shipped in K&O railcars. K&O responded by establishing an extraordinarily high base tariff rate of \$1000 to transport railcars supplied by K&O 64 miles from Scott City to Towner. For comparison, this rate was nearly double the tariff rate K&O has

¹⁵ Exhibit C, Email dated May 2, 2024 from K&O representative to Weskan representatives.

¹⁶ Exhibit C, Email dated August 18, 2023 from K&O representative to Weskan representative.

¹⁷ Exhibit C, Email dated October 11, 2024 from K&O representative to Weskan representative.

established to transport the same railcar 230 miles from Scott City to Wichita, on a per mile basis.¹⁸ All of the rates and terms provided by K&O make the requested rail transportation prohibitively expensive and continue to force grain from Kansas to be moved to Weskan’s Stockton facility by truck, if it moves there at all. At the same time, it induces Weskan and other grain shippers on the Lease Track to ship their products by rail over the Lease Track and K&O’s track to the UP interchanges in Wichita and Hutchison.

B. ARGUMENT

Under 49 U.S.C. §10501(d), “The Board may revoke an exemption, to the extent it specifies, when it finds that application in whole or in part of a provision of this part to the person, class, or transportation is necessary to carry out the transportation policy of section 10101 of this title.” Docket No. FD 35068, *Soo Line Railroad Co. d/b/a Canadian Pacific Railway – Acquisition and Operation Exemption – BNSF Railway Co.* (served December 29, 2020)(“*Soo Line*”) at 4. Moreover, under 49 U.S.C. § 1322(c) and 49 C.F.R. § 1115.4, the Board may reopen a proceeding because of “material error, new evidence, or substantially changed circumstances.” The alleged grounds must be sufficient to convince the Board that its prior decision in the case would be materially affected for reopening to be granted. *See Montezuma Grain Co. v. STB*, 339 F.3d 535, 541-42 (7th Cir. 2003); *Canadian Nat’l Ry.—Control—EJ&E W. Co.*, FD 35087 (Sub-No. 8), slip op. at 4 (STB served Dec. 21, 2018). When, “as in this proceeding, an exemption has become effective, a revocation request is treated as a petition to reopen and revoke and will be granted only if the petition presents new evidence, substantially changed circumstances, or

¹⁸ \$1000 divided by 64 is \$15.62 per mile; K&O’s tariff rate of \$1651 for the 230 miles from Scott City to Wichita is \$7.17 a mile. <https://www.watco.com/wp-content/uploads/2024/05/KO-4010-AL-rev1-eff-6.1.24-Grain-Tariff.pdf>.

material error in the decision being challenged. 49 U.S.C. § 1322(c); 49 C.F.R. § 1115.3(b).” *Soo Line* at 4.

In addition, while the Board encourages privately negotiated agreements, any contractual restrictions that unreasonably interfere with common carrier operations are deemed void as contrary to public policy. See *Hanson Natural Resources Company — Non-Common Carrier Status — Petition for a Declaratory Order*, Finance Docket No. 32248, slip op. at 3 (ICC served Dec. 5, 1994). See also, *United States v. Baltimore & O. R. R.*, 333 U.S. 169, 177-78 (1948).

In this case, the abandonment of UP tracks originally covered by the 1997 Lease to create the isolated Lease Tracks, the intervening presence of CXR and the refurbished Towner Line as a viable alternative competitive and more efficient routing for Kansas grain producers, the construction of the Stockton facility along the Towner Line, and the intervening presence of Weskan and other grain shippers along the Lease Tracks, are all substantially changed circumstances that affect the original authority granted to K&O and whatever the intent and purpose of the interchange commitment was when the lease was first entered into in 1997. Given that in 1997 UP was in the process of divesting itself of ownership of the Towner Line, it is logical to conclude that UP inserted provisions in the 1997 Lease that discouraged or even prohibited CKR from entering into joint line movements with the new carrier the State of Colorado planned to install on the Towner Line for movements west to possible interchange with BNSF at NA Junction. Rather, UP sought to ensure that all the grain from shippers located on the Lease Track and the rest of the track covered by the Lease in 1997 would be transported east to be interchanged with UP exclusively. These provisions and restrictions would all have been assigned to K&O in 2001.

Expediently granting Weskan’s motion for disclosure of the Lease will enable Weskan to refine its arguments after reviewing the Lease and any amendments to it, including UP’s

response to K&O's "waiver request," which apparently modified but did not eliminate (and may have reinforced) the paper barrier. Regardless of the specific language of the lease provisions, any economic justification for the paper barrier has long since evaporated given the passage of time and that much of the track covered by the lease has been abandoned. For example, a claim by UP that it is justified in continuing to prohibit K&O from interchanging with other carriers because the track was originally leased to CKR at a discounted rental in 1997 is simply not tenable after 27 years of operations and lease renewals.¹⁹ Likewise, in today's concentrated rail industry there is absolutely no justification for leaving any lease provisions in place dating back to 1997 that are intended to prevent UP and BNSF from competing for grain movements in western Kansas and Colorado over the Towner Line, which has been fully restored to encourage such competition and access to multiple western routings. The interchange commitment is also preventing Weskan and other shippers from utilizing more efficient routings for their commodities.²⁰

Moreover, reopening and partial revocation is also warranted because permitting a paper barrier to remain in the Lease would be contrary to the RTP, including but not limited to §10101(1) ("to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail"); §10101(4) "to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes"); §10101 (5) "to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes"); and §10101 (14) to encourage and promote energy conservation.").

¹⁹ STB EP No. 575, *Review of Rail Access and Competition Issues – Renewed Petition of the Western Coal Traffic League* and STB EP No. 575 (Sub-No. 1), *Disclosure of Rail Interchange Commitments* (Served October 30, 2007) at 4.

²⁰ *Id.* at 15.

C. CONCLUSION

For the reasons set forth in this Petition the Board should (1) expeditiously grant Weskan's motion seeking disclosure of the Lease and relevant amendments, including those entered into from "waiver requests" so that Weskan may review the actual documents and supplement this Petition as necessary; (2) reopen this proceeding and, (3) after taking additional evidence from the parties after a reasonable discovery period, rule that the substantial changes to the circumstances surrounding the Lease, along with other public interest and RTP considerations, warrant partially revoking the exemption described herein above by declaring the provisions in the Lease creating the interchange commitment void and directing UP and K&O to modify the Lease to eliminate all provisions that embody the interchange commitment restrictions.

Respectfully submitted,

/ss/ Thomas W. Wilcox

Thomas W. Wilcox

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tom@twilcoxlaw.com

Attorney for Weskan Grain LLC

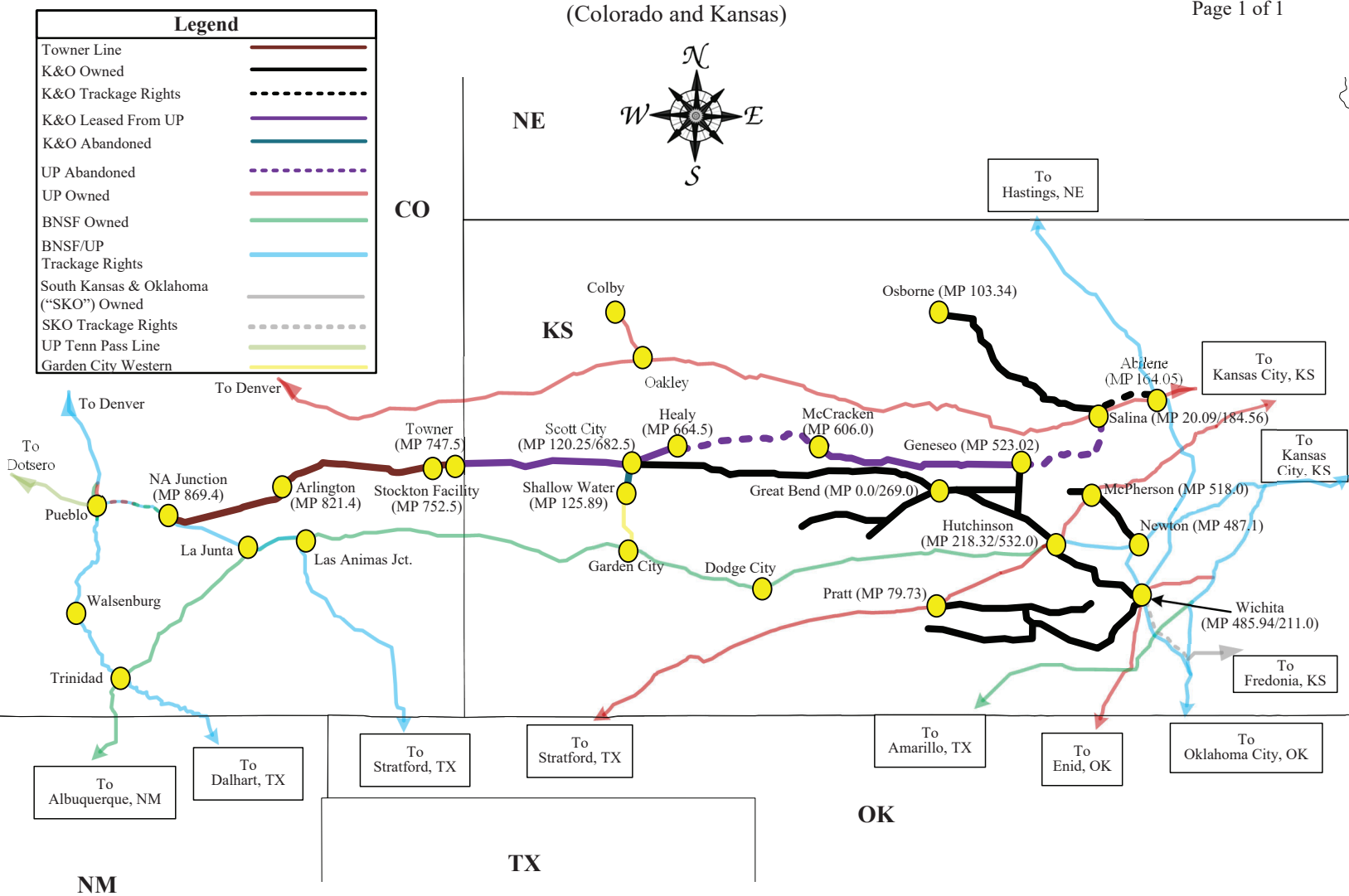
November 27, 2024

EXHIBIT A
MAPS

(Colorado and Kansas)

Attachment No. 1

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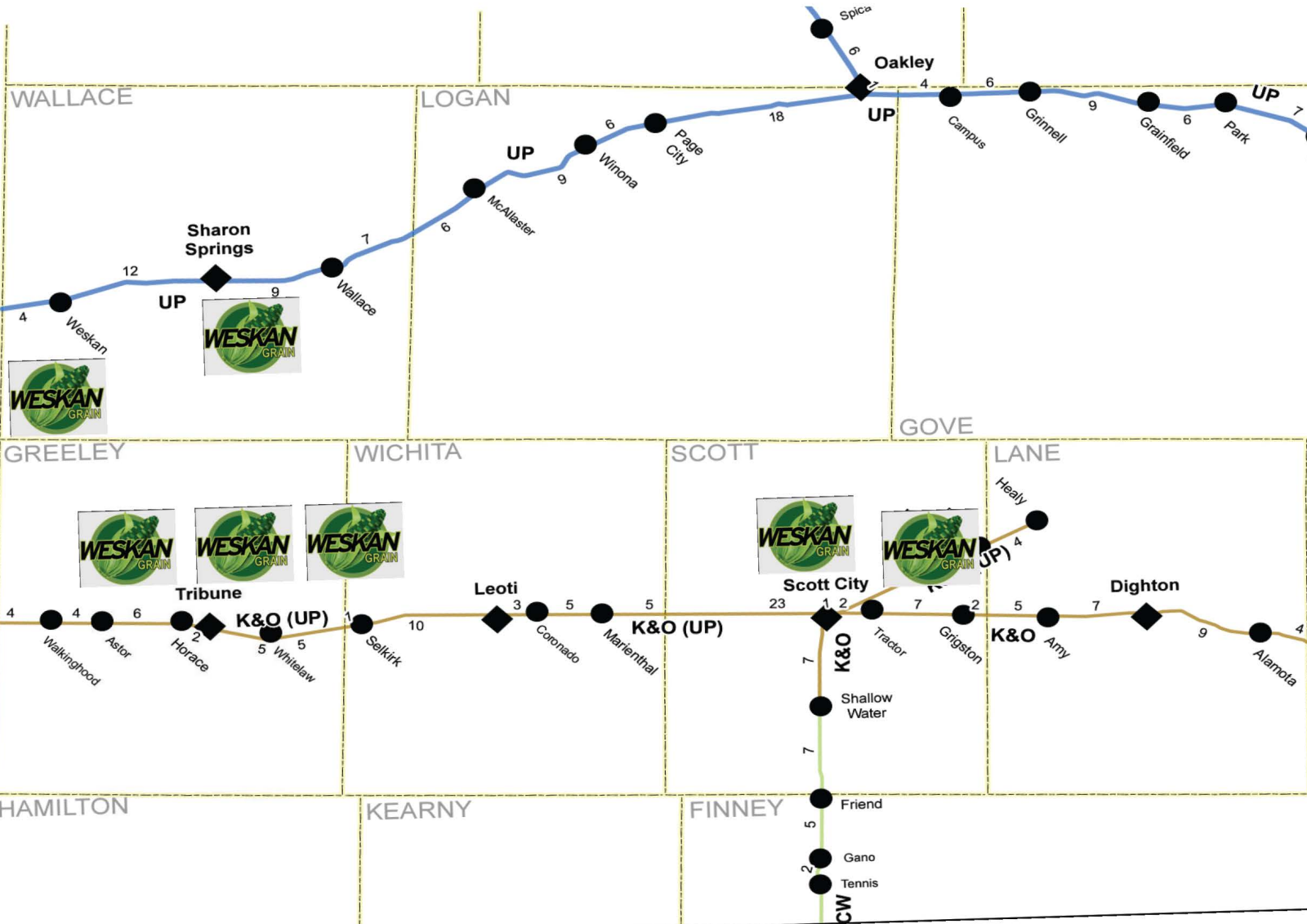


EXHIBIT B
CORRESPONDENCE WITH UP

LAW OFFICE OF THOMAS W. WILCOX, LLC
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WASHINGTON, DC 20006
(202) 508-1065
TOM@TWILCOXLAW.COM
WWW.TWILCOXLAW.COM

May 5, 2021

Via Email

Jeremy Berman, Esq.
Senior General Attorney
Union Pacific Railroad Company
1400 Douglas Street, 15th Floor
Omaha, Nebraska 68179

Re: Interchange Commitment in Lease Between Kansas & Oklahoma Railroad
and Union Pacific Railroad Company

Dear Jeremy:

This letter follows up on our phone conversation of April 27 which was in part about the existence of a restrictive interchange commitment in the current lease between Union Pacific Railroad Company ("UP") and the Kansas & Oklahoma Railroad ("K&O") covering lines of railroad in central and western Kansas. As understood by KCVN, LLC ("KCVN") and the Colorado Pacific Railroad, LLC ("Colorado Pacific") this paper barrier effectively prohibits K&O from transporting any commodities from origins in Kansas over the Colorado Pacific's line from Towner, CO to NA Junction, CO ("Towner Line") for interchange with BNSF Railway. You stated on our call that you were unaware of this issue and asked me to provide a general summary of it in advance of possible discussions between KCVN and UP about how to resolve this issue commercially.

This letter provides the requested summary based on a review of relevant filings at the Surface Transportation Board ("STB"), our knowledge of UP's general approach regarding interchange commitments during the relevant time period, and discussions with K&O. As I mentioned on our call, K&O has declined KCVN's request for a copy of the lease or the interchange commitment provision. KCVN hereby makes this same request to UP. I do not represent that this summary is 100% factually accurate, but it should provide you with the information you need to understand this issue from KCVN's standpoint.

Law Office of Thomas W. Wilcox, LLC

Letter to Jeremy Berman, Esq
May 5, 2021
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As a general historical overview, the tracks at issue were included within 270.9 miles of track UP leased in 1997 to the Central Kansas Railway, LLC (“CKR”), a Class III carrier that no longer exists. The track covered by the original lease to CKR covered two rail lines: (1) between milepost 747.5, at Towner, CO, and milepost 491.20, at Bridgeport, KS; and (2) between milepost 530.6, at Lindsborg, KS, and milepost 545.0, at Sid, KS.¹ CKR conducted operations over the leased tracks between 1997 and 2001, over which time UP abandoned a section of the tracks from Salina to Geneseo, reducing the tracks covered by the lease to approximately 225 miles. In 2001, CKR sold and/or assigned to K&O all of its rights in the 678 miles of track then making up the CKR system, which included the remaining leased UP tracks. As relevant to this issue, as part of the transaction CKR unconditionally assigned its lease with UP in its entirety to K&O.

In 2005, UP abandoned the 58.5-mile segment of the leased track running between MP 664.5, near Healy, KS to MP 606.0, near McCracken, KS. This abandonment further reduced the miles of leased UP track and created a “stranded” 80-mile segment owned by UP and operated by K&O between Healy and MP 747.5 at Towner, CO, which is the interchange with the Towner Line. As you know, UP sold the Towner Line to the State of Colorado in 1998 after attempting to formally abandon it in 1996. Although it remained a line of railroad, the Towner Line was not used for any measurable freight rail service after 1998 and had fallen into significant disrepair when Colorado Pacific acquired it in 2017 through a feeder line proceeding at the Surface Transportation Board. Since acquiring the Towner Line Colorado Pacific has invested \$3.5 million restoring it to FRA Class II standards. Colorado Pacific has also invested \$4.5 million to re-establish the interchange tracks with UP and BNSF at NA Junction.

Colorado Pacific learned of the possible existence of a paper barrier in K&O’s lease with UP when it retained K&O to be the Towner Line’s operator in 2017. During that process, K&O representatives made vague references to being unable to haul grain or other commodities from Kansas over the Towner Line due to the terms of its lease with UP. However, Colorado Pacific was focused solely on the huge task of rehabilitating the Towner Line, reestablishing the NA Junction interchange, and developing freight traffic on the line and did not explore the issue in depth at that time. More recently, however, Colorado Pacific has been exploring opportunities for commodities originating from shippers on the Towner to Healy segment being transported west over the Towner Line to NA Junction for interchange with UP or BNSF for transport to further points west and southwest. This has led to KCVN and Colorado Pacific focusing more on understanding the interchange commitment and its potential adverse effect on such plans.

Although again, we have not seen the UP/K&O lease, it is our understanding and belief that it contains a version of the interchange commitment UP has historically inserted in rental provisions of its leases with short line railroads. Under this provision, UP charges little or no rent for the leased track as long as the short line interchanges 95% or more of the traffic originating on the line with UP. However, prohibitively high rental amounts are triggered if more than 5% of

¹ In connection with the lease of the line, CKR also acquired incidental overhead trackage rights over UP’s 6.30-mile rail line between MP 545.0, at Sid, KS, and MP 551.30, at Salina, KS.

Law Office of Thomas W. Wilcox, LLC

Letter to Jeremy Berman, Esq

May 5, 2021

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the traffic is interchanged with railroads other than UP. On information and belief, KCVN surmises that the original lease with CKR contained such a provision, and it remained in the lease when it was unconditionally assigned to K&O in 2000. In 2020, K&O representatives informed Colorado Pacific that the lease had been renewed in 2019, and we presume from those discussions that the original interchange commitment, or some version of it, remains in the agreement.

If the foregoing summarizes the current situation with reasonable accuracy, then this would mean that the current version of the lease effectively prohibits K&O from transporting any commodities originating from shippers in Kansas over the Towner to Healy segment for interchange with BNSF at NA Junction. KCVN and Colorado Pacific believe that there is no basis for such an anticompetitive restriction to continue to exist given the long history of the tracks at issue and the current configuration of the lines of railroad in this area of Kansas and Colorado. Accordingly, KCVN's goal is to find a commercially acceptable means to eliminate this paper barrier and to provide shippers along the Towner to Healy line with the opportunity to enter into joint through rates with K&O and either BNSF or UP. One potential solution we have already raised is for UP to sell the Towner to Healy segment to Colorado Pacific, with K&O remaining as the operator of this track. Under this scenario, paper barrier would be eliminated through termination of the lease as to this segment.

Shipments over the Towner Line are expected to commence this year. KCVN and other grain shippers also own rail-served elevators along the Towner to Healy segment that could move to western destinations via the Towner Line. We therefore desire to meet with the appropriate UP representatives at the earliest opportunity to try to resolve this issue to our mutual satisfaction.

Please do not hesitate to call me if you have any questions or desire additional information.

Sincerely,

A handwritten signature in blue ink, appearing to read "Tom Wilcox", is written over the printed name.

Thomas W. Wilcox

Cc: William Osborn, Esq.

Tom Wilcox

From: Jeremy M. Berman <jmberman@up.com>
Sent: Wednesday, June 2, 2021 3:59 PM
To: Tom Wilcox
Cc: William Osborn
Subject: Re: Interchange Commitment Letter
Attachments: RIA_2005_Amended_Version.pdf

Tom, my apologies for the delay getting back to you. As I said last week, it took more time than I anticipated to get our team together to look at this issue.

Based on the concerns expressed in your letter, we think the most appropriate course of action is for your client to work with KO to have KO submit a request for waiver of the applicable interchange commitment ("paper barrier") for this traffic under the Railroad Industry Agreement. A copy of the agreement is attached for your reference. This is an established process that we have used with other short lines in similar situations, which helps facilitate our evaluation and response.

KO's short line representative is going to mention this issue next time he speaks to KO as well.

Please let me know if you have any questions or need further guidance on how to proceed with the waiver request.

Jeremy M. Berman
Senior General Attorney
Union Pacific Railroad
402-544-4735
jmberman@up.com

From: "Tom Wilcox" <tom@twilcoxlaw.com>
To: "Jeremy Berman" <jmberman@up.com>
Cc: "William Osborn" <william@texasenergylaw.com>
Date: 05/05/2021 08:52 AM
Subject: Interchange Commitment Letter

*** PROCEED WITH CAUTION - This email was sent from outside the Company ***

Jeremy – Per our discussion and your request here is a letter discussing the interchange commitment issue we spoke about. We look forward to UP's response.

Regards,
Tom



BUILDING AMERICA®

October 15, 2021

Michael Hershman
Chief Executive Officer
The Soloviev Group / KCVN, LLC
9 West 57th Street
New York, NY 10019

Dear Mr. Hershman:

I am writing in response to your letter addressed to Lance Fritz in which Colorado Pacific offered to purchase Union Pacific's rail line between Towner, Colorado and Healy, Kansas. Union Pacific declines this offer. As I explained during our meeting on September 17, Union Pacific attributes significant value to this line. This value includes not only the land and physical assets but also the revenue that Union Pacific receives from rail traffic on the line and value for the line's future growth potential. Your offer is far below this value and we are not interested in pursuing a sale at this time.

As I also explained during our meeting, Union Pacific is in the business of moving freight and we are open to discussing opportunities to increase freight traffic. We would be happy to work with you on developing such opportunities or any ideas for the line that do not involve a sale by Union Pacific.

With respect to the Towner Line, Union Pacific stands ready to receive traffic from Colorado Pacific at NA Junction. Although, as previously communicated, we still must qualify train crews on that route so we would appreciate as much advance notice as possible if you anticipate traffic being ready to move.

Finally, Union Pacific disagrees that any provision of the lease between Union Pacific and K&O is unlawful. If you believe that the provisions of that lease are preventing freight traffic from moving then I would encourage you to work through the established processes with K&O and Union Pacific to address these concerns. To date, Union Pacific has not been made aware of any specific traffic that is unable to move.

Thank you again for meeting with us in September and for your interest in this line. Outside of a sale of the property Union Pacific remains open to discussing any opportunities you may see that would increase freight traffic on this line.

Sincerely,

David Hughes

EXHIBIT C

Email Correspondence

From: Zachary G. Boehme <Zachary.Boehme@Watco.com>
Date: Tuesday, April 2, 2024 at 2:35 PM
To: William Osborn <william@texasenergylaw.com>
Cc: Jimmy D. Patterson JR <jpatterson@watco.com>
Subject: FW: Follow Up

Hello William,

Trust that you are well. Jimmy passed along the email below and I was able to catch up with him regarding the rate structure and surrounding questions. Thank you very much for the additional color and your willingness to supply equipment to support the potential move. That does change our cost structure significantly. We are happy to rework our costing to develop a new rate. However, the target rate of \$418 per car will not be attainable for us given the penalty fee that we would be responsible for. Please let me know if you would like us to proceed with reworking a rate knowing that we will still be significantly north of \$418 per car.

Thank you,

Zach Boehme
Senior Vice President, Sales
Watco
(217) 816-0277 (C)
zachary.boehme@watco.com



2023 Newsweek Top 100 Most Loved Workplaces®

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From: Casey W. Harbour III <charbour@watco.com>
Sent: Thursday, May 2, 2024 2:31 PM
To: William Osborn <william@texasenergyllaw.com>; Pat Thompson (patrick@columbiascg.com)
<patrick@columbiascg.com>
Cc: Brett C. Jensen <Brett.Jensen@Watco.com>
Subject: Weskan - KO Rates

Good Afternoon Gentlemen,

Based on the information that William provided Jimmy, we have reworked the rate for carloads out of your Scott City East Facility.

Rate: \$815 per car

Assumptions:

- Origin: Weskan's Scott City East Facility
- Destination: Colorado Pacific Railroad
- Locomotives: Colorado Pacific Railroad
- Railcars: Weskan Grain/Colorado Pacific Railroad
- Manpower: KO Team Members
- Minimum of 25 car blocks
- No Horse Power Hour fees or any other fees associated with using Colorado Pacific Locomotives
- UP Asset Usage Fee included in the rate

Let us know if you have any questions upon your review.

Thanks,

Casey Harbour

Sales Director

Watco

(316) 261-6135 (O) | (913) 669-6357 (C)

charbour@watco.com



From: Zachary G. Boehme <Zachary.Boehme@Watco.com>

Date: Friday, August 18, 2023 at 12:09 PM

To: William Osborn <william@texasenergylaw.com>

Cc: Casey W. Harbour III <charbour@watco.com>, Jimmy D. Patterson JR
<jpatterson@watco.com>

Subject: UP-KO Waiver

Hi William,

Hope that you are well. Wanted to follow up and let you know that we've pinged the UP this week for a status update on our waiver request for grain originating on the leased portion of KO and terminating on the Colorado Pacific.

If we don't hear back from them next week, it may be beneficial for you guys to give them a nudge to push it along.

Will keep you posted.

Thank you,

Zach Boehme

From: Casey W. Harbour III <charbour@watco.com>
Sent: Friday, October 11, 2024 10:02 AM
To: Will Bramblett <wbramblett@weskanrain.com>
Cc: Brett C. Jensen <Brett.Jensen@Watco.com>
Subject: RE: Rate Request

Good Morning Will,

After reviewing your Rail Transportation Proposal, the KO Railroad is not in position to agree to the proposed terms. We are contractually bound to the terms of our agreement with the Union Pacific Railroad and the terms they have laid out as a result of our submitted traffic waiver request.

Thank you for your continued interest in moving carloads off the KO.

Casey Harbour

Sales Director

Watco

(316) 261-6135 (O) | (913) 669-6357 (C)

charbour@watco.com



VERIFICATION

I, Will Bramblett, Chief Executive Officer of Weskan Grain LLC state, under penalty of perjury, that the facts set forth in the foregoing Petition to Reopen and Partially Revoke Exemption are true and correct to the best of my knowledge.

Executed: November 27, 2024

A handwritten signature, appearing to be 'W. Bramblett', is written over a horizontal line.

Will Bramblett

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of November 2024, copies of the foregoing Petition to Reopen and Partially Revoke Exemption were served by electronic mail on representatives of Union Pacific Railroad Company and the Kansas & Oklahoma Railroad, Inc.

/ss/ Thomas W. Wilcox
Thomas W. Wilcox