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BEFORE THE
SURFACE TRANSPORTATION BOARD

ENTERED
Office of Proceedings
December 20, 2024
Part of
Public Record

FD 34030

KANSAS & OKLAHOMA RAILROAD, LLC
— LEASE EXEMPTION WITH INTERCHANGE COMMITMENT —
CENTRAL KANSAS RAILWAY, LLC

**KANSAS & OKLAHOMA RAILROAD, LLC'S REPLY TO WESKAN
GRAIN LLC'S PETITION TO REOPEN AND PARTIALLY REVOKE, AND
KANSAS & OKLAHOMA RAILROAD LLC'S MOTION TO DISMISS**

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Dated: December 20, 2024

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As discussed below, Weskan Grain LLC (“Weskan”) has not presented a case to the Surface Transportation Board (the “Board”) under which the Board may grant the relief Weskan seeks – partial revocation of Kansas & Oklahoma Railroad, LLC’s (“K&O”) exemption authority to lease and operate a railroad line segment owned by Union Pacific Railroad Company (“UP”) in order to compel rescission of certain K&O-UP lease terms. Weskan offers no actionable basis for partial revocation under applicable precedent, because such Board action requires persuasive evidence of both possession and abuse of market power, which Weskan has neither alleged nor proven. Accordingly, Weskan’s “Petition to Reopen and Partially Revoke Exemption” (the “Petition”) should be dismissed. If the Petition were not to be dismissed, the Board should, at a minimum, defer action on the Petition subject to the development of additional evidence and argument. Additionally, if the Petition were not to be dismissed, K&O urges detailed guidance

from the Board concerning the appropriate process, standards, and evidentiary requirements that Weskan must satisfy to obtain any rate relief. Above all else, however, the Board should use its good offices to promote an amicable private resolution of the dispute among Weskan, K&O and current non-party UP.

BACKGROUND

K&O operates various railroad lines in central and western Kansas and far-eastern Colorado. Among those railroad lines is a segment that K&O leases from UP extending from milepost 664.5 at Healy, Kansas, to milepost 747.5 at Towner, Colorado – the “Towner Segment.” K&O assumed its leasehold interest in the Towner Segment in 2001 by assignment from Central Kansas Railway LLC pursuant to *Kansas & Oklahoma Railroad, Inc. – Acquisition Exemption – Central Kansas Railway, LLC*, FD 34030 (STB served June 12, 2001) (“*K&O – Exemption*”). The Towner Segment connects at Towner with a railroad line operated by Colorado Pacific Railroad LLC (“CXR”), an affiliate of Weskan. As relevant here, CXR serves Weskan’s Stockton grain elevator (the “Stockton Elevator”) near Sheridan, Colorado, located roughly five miles from the Towner interchange. See Petition, Attachment 1 (map).

Weskan (in cooperation with affiliate CXR) has requested terms for K&O’s transportation of grain in non-unit train service (generally, in this case, in blocks of roughly 25 non-railroad-supplied cars) from loading points located on K&O to the Towner interchange. K&O understands that Weskan would utilize connecting CXR train service from Towner to the Stockton Elevator, where the

inbound grain would be unloaded and elevated for subsequent reloading and shipment by rail in interline unit train service – via CXR – to various destinations west of Sheridan. K&O has honored Weskan’s request for transportation rates to the Towner interchange, and is willing to participate in CXR through service.

K&O’s Towner Segment lease terms with UP include an interchange commitment (the “Commitment”). Under that Commitment, if K&O interchanges traffic originating or terminating on the Towner Segment with an interline connection other than UP, then K&O will be responsible to pay UP a contractually-prescribed amount (the “Fee”). Initially, K&O supplied transportation rates incorporating the Fee (without disclosing the amount of the Fee to Weskan). When Weskan objected to K&O’s initial rate offering, K&O explored and obtained from UP a downward adjustment of the Fee. Factoring in UP’s adjusted Fee requirement (the “Adjusted Fee”), K&O offered updated (reduced) rates for transportation to the Towner interchange.

Weskan once again found K&O’s reduced rate offering to be unacceptable. Weskan perceived (correctly) that the Commitment (per the Adjusted Fee) had been factored into K&O’s latest Towner interchange rates that Weskan finds are unacceptable to it,¹ and so it filed the Petition seeking – (1) a Board

¹ “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.” Petition at 10. Weskan vaguely alludes in the above quote (and elsewhere in the Petition, such as at page 8) to objectionable K&O service “terms,” but the Petition does not identify any objectionable service term, aside from the K&O-proffered rates. K&O

declaration that the K&O-UP Commitment is void; and, in turn, (2) a Board order partially revoking K&O's operation exemption and directing UP and K&O to modify the terms of the lease "to eliminate all provisions that embody the interchange commitment restrictions." Petition at 13.

The Petition reads, ultimately, as a plea for rate relief by way of Board intervention into the interchange commitment terms of the K&O-UP Towner Segment lease. But it is an unfocused plea at best, with Weskan alleging multiple novel theories for relief from K&O-supplied rates: (1) unreasonable contractual interference with K&O's common carrier obligations (presumably, without explicit reference, a violation of 49 U.S.C. § 11101) (Petition at 11); (2) an "unjustified" continuation of an interchange commitment (*id.* at 12); and (3) a violation of the rail transportation policy ("RTP") at 49 U.S.C. § 10101 (a concept without precedential support). Weskan's Petition appears to rely upon a foundational premise that the interchange commitment at issue is "unlawful" (Petition at 1), but that claim is untethered to any statutory provision – whether 49 U.S.C. § 11101, § 10701, § 10702, or § 10705, for example – that K&O or UP allegedly has violated.

K&O remains open to additional discussion with UP and Weskan to explore amicable resolution of the present dispute. K&O is mindful of its contractual commitments to UP, and it wishes to maintain its longstanding, constructive relationship with UP (K&O's largest interline partner by annual traffic

denies that it has ever offered any "terms" for transportation that violate 49 U.S.C. §§ 10701 or 10702.

volume). Similarly, K&O, like most short lines, desires to avoid interline disputes, shipper discontent, and Board intervention where each can reasonably be accomplished, all while pursuing traffic growth. For that reason, if all other necessary parties were amenable, K&O would support a multi-party dialogue to resolve the dispute without the need for further Board action.

PROCEDURAL ISSUES

The Petition seeks relief from a contractual provision – the Commitment discussed above – contained in the applicable K&O-UP lease agreement, a provision that K&O understands is intended to protect UP’s commercial interests. Although UP clearly is essential to Weskan’s case, UP is not a party to this proceeding. For this reason and others, K&O submits that Weskan’s Petition, lacking an essential party from whom the requested relief is sought, is procedurally and substantively defective.²

Weskan seeks access to the at-issue Commitment terms via an unopposed motion for disclosure filed simultaneously with the Petition. Beyond access to the Commitment provisions, however, Weskan urges the Board to institute a proceeding under 49 U.S.C. § 10502(d) “which *could* include a period for discovery of relevant documents.” Petition at 3 (emphasis added). Weskan makes this request without offering a procedural schedule for the Board’s consideration. Although Weskan has not articulated (and may never be able to articulate) a

² Cf., e.g., *Entergy Arkansas, Inc., et al. v. Union Pacific Railroad Company, et al.*, NOR 42104 (STB served June 26, 2009) (“*Entergy Arkansas*”).

legally-supported basis for partial rescission of the Towner Segment lease, Weskan should have, at a minimum, supplied a proposed procedural schedule accounting for discovery in both directions. If the Board were to allow a fact-intensive proceeding for partial contract rescission to move ahead, K&O agrees that such a proceeding will require far more evidence than the present record contains.

ARGUMENT

Weskan's attempt at a more favorable rate bypasses applicable Section 10701 rate relief processes, warranting dismissal of the Petition.

Weskan's Petition for partial contract rescission (via exemption revocation) turns upon a claim that K&O's proffered grain transportation rates are – in Weskan's opinion – unacceptably high.³ Among other things, the Petition overlooks K&O's entitlement to charge any rate for the transportation of grain to the Towner interchange – *with or without the Adjusted Fee* – unless the rate were to be proven to be unreasonable under Section 10701. Weskan nowhere alleges that the K&O-proffered rates are “unreasonable,” although it is difficult to understand how those rates would be “unlawful” (Petition at 1) absent a violation of the relevant provision of the Interstate Commerce Act (“ICA”), Section 10701. Weskan appears to accept that K&O may engage in differential pricing of its services. And Weskan offers no precedent supporting the proposition that a given transportation

³ The Petition does not profess to encompass Weskan's case-in-chief, acknowledges Weskan's lack of access to documents that Weskan considers essential to its case (hence, the concurrently-filed motion for disclosure), and suggests that further discovery (beyond the scope of the motion for disclosure) may be necessary to sharpen and adjust Weskan's relief request.

rate a shipper may find unacceptable (or, for that matter, is higher than alternative transportation options, or is higher than comparable service to other destinations) is *ipso facto* “unlawful” (Petition at 1).

Weskan seems to argue as a basis for relief, among other things, that the Commitment violates the Rail Transportation Policy (“RTP”) of 49 U.S.C. § 10101. See Petition at 12 (“permitting a paper barrier to remain in the Lease would be contrary to the RTP”). Such a line of argument is entirely unavailing, of course, as the Board long has recognized that the RTP does not, of itself, create a basis for a cause of action or remedial Board action.⁴

In any event, the Petition does not present a truly novel case. The facts and circumstances are closely analogous to those in *Entergy Arkansas*, a proceeding that should be controlling here. That proceeding – one that, incidentally, was contemporaneous to the agency’s interchange commitment

⁴ See, e.g., *Alonzo Benton v. CSX Transportation, Inc.*, NOR 42166 (STB served Jan. 7, 2020), slip op. at 3 (footnote omitted) (“Viewing the allegations of the complaint in the light most favorable to [the complainant], the Board finds that the complaint does not state reasonable grounds for investigation or action. [The complainant] attempts to state a claim based upon CSXT’s alleged violation of § 10101(8) of the RTP. However, ‘the RTP does not create an independent basis for Board action in the absence of a violation of a substantive provision in the Interstate Commerce Act.’ *CSX Transp., Inc. – Aban. Exemption – in LaPorte, Porter, & Starke Ctys., Ind.*, AB 55 (Sub-No. 643X) *et al.*, slip op. at 6 (STB served May 31, 2017) (citing *Chesapeake & Ohio Ry. v. United States*, 704 F.2d 373, 376 (7th Cir. 1983); *Louisville & Jefferson Cty. Riverport Auth. & CSX Transp., Inc. – Constr. & Operation Exemption – in Jefferson Cty., Ky.*, 4 I.C.C.2d 749, 754 (1988); H.R. Conf. Rep. No. 1430, 96th Cong. 2d Sess. 80 (1980)).”); and see also *PCI Transportation, Inc. – Fort Worth & Western Railroad Company*, NOR 42094 (Sub-No. 1) (STB served Apr. 25, 2008), slip op. at 5.

disclosure rulemaking proceedings⁵ – ultimately turned upon whether the complained-of interchange commitment was unlawful in violation of a specific provision (or provisions) of the ICA, albeit, in that case, Section 10705, rather than Section 10701 (as relevant here). In *Entergy Arkansas*, the agency adjudicated the interchange commitment dispute under a “two-track” process, with an “NOR” complaint proceeding linked to a request for revocation relief that could have proven relevant if the complainant could establish a Section 10705 violation.

For this reason, K&O respectfully submits that an essential prerequisite for any potential partial-contract-rescission-via-partial-revocation as Weskan seeks would be a complaint proceeding demonstrating that K&O’s proffered rates are unreasonable in violation of Section 10701.⁶ *Entergy Arkansas* supports the proposition that Weskan’s rate challenge (and associated request for interchange commitment relief) must show that the rates in question are not just unacceptable to Weskan (or “inefficient” – Petition at 1) – it must show that those rates are unreasonable as a matter of law. If Weskan were to show that the complained-of rates were unreasonable, then it may be that Weskan could point, as it seems to do, to the Adjusted Fee (or the interchange commitment, generally) as the proximate cause of such rate unreasonableness. And, in turn, the Board could

⁵ *Disclosure of Rail Interchange Commitments*, EP 575 (Sub-No. 1) (“*Disclosure – Interchange Commitments*”).

⁶ The record reflects that K&O is amenable to cooperating in through traffic movements with CXR via the Towner Interchange, obviating any basis for a Section 10705 violation here as was explored in *Entergy Arkansas*.

then consider partial revocation, as necessary and as provided under Section 10502, to remedy as-yet-unproven (and potentially unprovable) market power abuse.

For these reasons, K&O hereby moves for dismissal of the Petition.

If the Board were to entertain a stand-alone partial revocation proceeding, the Petition nevertheless is substantively and foundationally deficient.

While *Entergy Arkansas* turned upon whether the complainant could gain interchange commitment relief upon proof of an ICA violation (such as of Section 11101, 10701, 10702 or 10705), the Board did not conclusively rule out stand-alone revocation proceedings as a potential means for relief. *See Entergy Arkansas* at 11-13. Similarly, *Disclosure of Rail Interchange Commitments*, EP 575 (Sub-No. 1) (“*Disclosure – Interchange Commitments*”) broadly touches upon potentially available relief from an interchange commitment that a shipper may consider to be generically objectionable. To be sure, *Disclosure – Interchange Commitments* focuses on the limited issue of case-by-case **access** to interchange commitment data;⁷ it does not elaborate upon post-disclosure remedial processes.

Disclosure – Interchange Commitments, like *Entergy Arkansas*, points to a Section 10701 proceeding as a clearly acceptable path to potential interchange commitment relief, stating that, “shippers may, on a case-by-case basis, attempt to show that a particular interchange commitment is causing, or would cause, a

⁷ *Disclosure – Interchange Commitments* leaves off on supplying any precise instruction on remedial processes. Section 1114.30(d) – a product of *Disclosure – Interchange Commitments* – vaguely contemplates a “proceeding involving [an interchange commitment’s] reasonableness,” adding that a request for interchange commitment access “may be filed at any time after the initial complaint or petition.”

violation of the [ICA] . . . For example, a shipper may allege that a particular interchange commitment precludes, or would preclude, the provision of adequate, efficient through service at reasonable rates.”⁸ But *Disclosure – Interchange Commitments* also might be read as suggesting an alternative pathway via a stand-alone revocation proceeding – as momentous as such a proceeding would be in its own right⁹ – stating that, “Shippers may *also* move, under 49 U.S.C. [§] 722(c), to reopen a proceeding authorizing a prior transaction or to partially revoke an exemption granted under 49 U.S.C. [§] 10502.”¹⁰

But even if there were a possible alternative path to challenge an interchange commitment, the relevant merits analysis would not be substantively distinct from a rate reasonableness proceeding. Specifically, concerning the sort of revocation that Weskan seeks here, *Entergy Arkansas* states:

Where a lease or sale was authorized by this agency by exemption, any person may seek revocation of the exemption under 49 U.S.C. [§] 10502(d). An exemption may be revoked, in whole or in part, when the application of the Board's regulation to a person, class or transportation is necessary to carry out the rail transportation policy set forth in 49 U.S.C. [§] 10101. In deciding whether to revoke an exemption, the Board assesses whether the carrier possesses substantial market power, whether regulation is necessary to protect against abuses of that market power, and whether regulation

⁸ *Disclosure – Interchange Commitments*, FD 575 (Sub-No. 1) (notice of proposed rulemaking) (STB served October 30, 2009) at 15 (citing to 49 U.S.C. §§ 10703, 10705, 10742, and 11101(a)).

⁹ “[W]hile the ability to revisit consummated transactions is a powerful tool, it is one that the Board must wield wisely and with great care.” *Entergy Arkansas* at 12 (footnote omitted).

¹⁰ *Disclosure – Interchange Commitments* at 15 (emphasis added). The passage’s use of the word “also” is ambiguous. It could be meant in the context of “*in addition to* a formal complaint proceeding,” or it could be used to signify “*as an alternative to* a formal complaint proceeding.”

would better advance the objectives of the rail transportation policy and the public interest . . . We exercise our revocation authority to correct any market abuses after the transaction is authorized.¹¹

For Weskan to successfully petition for partial revocation of K&O's exemption authority, it must – as *Entergy Arkansas* and other precedent instruct¹² – demonstrate by persuasive evidence the *presence* of substantial market power *and* concomitant *abuse* of that market power, just as would be done in a formal rate reasonableness case under Section 10701.¹³ But Weskan has offered no allegation

¹¹ *Entergy Arkansas* at 12 (footnotes omitted).

¹² “Even though it is not mentioned in the exemption-revocation statute, the agency has treated market power as an important issue in some of its past exemption revocation decisions. *See, e.g., WTL Rail Corp. Pet. for Declaratory Order & Interim Relief*, NOR 42092 *et al.*, slip op. at 3 (STB served Feb. 17, 2006) ([W]e have held that the extent of railroad market power is an essential issue in exemption revocation proceedings.’”. *Exclusion of Demurrage Regulation from Certain Class Exemptions*, EP 760 (STB served Feb. 28, 2020), slip op. at 6 (footnote citing also to *Mr. Sprout, Inc. v. United States*, 8 F.3d 118, 122-23 (2d Cir. 1993) omitted); *and see also, e.g., Northwestern Pacific Railroad Company – Change in Operators Exemption – Northcoast Railroad Authority, et al.*, FD 35073 (STB served Feb. 1, 2008), slip op. at 2.

¹³ *See FMC Wyoming Corporation, et al. v. Union Pacific Railroad Company*, NOR 42022 (STB served Aug. 31, 1998), slip op. at 3-4 (“We recognize that the market power review for revocation petitions is not necessarily the same as the market dominance test in a rate complaint, but the entire evidentiary package in the complaint with respect to coke movements will be more than adequate to render a decision on whether to revoke the exemption for the particular coke traffic at issue. In other words, if the evidence shows that UP is market dominant and its rates unreasonable with respect to FMC’s coke traffic, that same evidence will provide a basis for revoking the exemption as it applies to that traffic. On the other hand, if the evidence does not support FMC’s request for regulatory relief in the complaint case, then it is unlikely that there will be a need to revoke the exemption for FMC’s coke traffic.”) (footnote omitted).

or evidence of market power, much less to show abuse of the same. Accordingly, the Board should deny the Petition's request for a formal revocation proceeding.

If the Board were to sanction a stand-alone partial revocation proceeding despite the foregoing discussion, the Board should provide detailed guidance on the applicable evidentiary standards and evaluation of relief.

If the Board were to allow this matter to proceed as a stand-alone revocation proceeding, K&O urges further guidance on the appropriate process and standards applicable to Weskan's rate challenge, including on – (a) the development and presentation of evidence; (b) the standards by which the Board will determine in this case whether any revocation relief is warranted; and, (c) if the Board were to find that relief is warranted, how the Board would evaluate the propriety of the specific relief that may be (but has not yet been) requested definitively.

CONCLUSION

Weskan has failed to set forth a case under which relief from the subject interchange commitment could be awarded. It has not addressed, much less offered evidence intended to satisfy, the applicable revocation standards, nor has Weskan proven, or stated that it intends to prove, a violation of any section of 49 U.S.C. Subtitle IV stemming from K&O's rate offerings. Dismissal of the Petition is accordingly warranted.

If the Board nevertheless were to hold that Weskan's Petition could be adjudicated as a stand-alone partial revocation proceeding (in the absence of a rate reasonableness complaint), applicable precedent establishes that Weskan's request lacks evidence and argument to support the Board's initiation of a formal revocation

proceeding. At the very least, if the Board were to initiate a formal proceeding, the Board should offer guidance on – (a) the development and presentation of evidence; (b) the standards governing whether any revocation relief is warranted; and, (c) if any relief were warranted, (c) how the Board would evaluate the propriety of any specific relief Weskan definitively were to request.

It is unfortunate that collaborative efforts among Weskan, CXR, K&O and UP have not averted Weskan's resort to Board intervention. K&O remains confident that 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. K&O believes that the relevant parties would agree that a negotiated resolution would be preferable to potentially drawn-out and evidence-intensive litigation. As such, K&O would urge, at a minimum, that the Board foster settlement efforts preliminary to the presentation of any further evidence and argument in any rate complaint or stand-alone revocation proceeding.

Respectfully submitted,

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Dated: December 20, 2024

CERTIFICATE OF SERVICE

I hereby certify that I have on this day served a copy of the foregoing filing via electronic mail upon the following parties of record in this proceeding (as set forth in the Surface Transportation Board's online service list):

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