

309197

BEFORE THE
SURFACE TRANSPORTATION BOARD

ENTERED
Office of Proceedings
February 6, 2025
Part of
Public Record

FD 34030

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

**KANASAS & OKLAHOMA RAILROAD, LLC'S REPLY TO
WESKAN GRAIN LLC'S SUPPLEMENT TO ITS
PETITION TO REOPEN AND PARTIALLY REVOKE**

PUBLIC VERSION

Robert A. Wimbish
Stephen J. Foland
Fletcher & Sippel LLC
29 North Wacker Drive, Suite 800
Chicago, Illinois 60606-3208
(312) 252-1500
rwimbish@fletcher-sippel.com
sfoland@fletcher-sippel.com

**ATTORNEYS FOR KANSAS &
OKLAHOMA RAILROAD, LLC**

Dated: February 6, 2025

BEFORE THE
SURFACE TRANSPORTATION BOARD

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 SUPPLEMENT TO ITS
PETITION TO REOPEN AND PARTIALLY REVOKE**

Weskan Grain LLC (“Weskan”) has not presented a case to the Surface Transportation Board (the “Board”) entitling Weskan to partial revocation of Kansas & Oklahoma Railroad, LLC’s (“K&O”) exemption authority to lease and operate a railroad line owned by Union Pacific Railroad Company (“UP”) in order to compel rescission of certain K&O-UP lease terms. In its petition to reopen and partially revoke (the “Petition”), Weskan objected to K&O’s interline rates¹ via the Towner, Colorado interchange; argued that K&O’s rates are not competitive with alternative motor carrier transportation (Petition at 8); and contended that full or partial elimination of the current K&O-UP interchange commitment would facilitate K&O interline service at rates acceptable to Weskan (see *id.* at 12).

Weskan’s recently-filed Supplement to its Petition to Reopen and Partially Revoke

¹ Specifically, K&O interline rates with Colorado Pacific Railroad LLC (“CXR”), an affiliate of Weskan.

(the “Supplement”) does not “further support” (Supplement at 1 and 8) the relief Weskan seeks. Rather, at best, the Supplement offers additional information and context, which, is, in fact, often irrelevant and incorrect, as will be addressed below.

Preliminary issues – relevance and contract interpretation

Pursuant to the terms of a protective order issued by the Surface Transportation Board (the “Board”), K&O supplied Weskan with documentation in K&O’s possession pertinent to the K&O-UP interchange commitment. In turn, Weskan included all of those documents in its Supplement. Weskan deployed those materials to offer a false narrative to suggest, incorrectly, that recent changes to the interchange commitment in favor of UP were designed specifically to impose previously-non-existent restraints on K&O traffic interchange.

It appears that Weskan and K&O could stipulate to the following: The 1997 Lease Agreement (the “1997 Lease”) between UP and Central Kansas Railway LLC (“CKRL”) – subsequently assigned to K&O – contained specific interchange commitment terms. Under a July 18, 2018 “Fourth Supplement” to the 1997 Lease, K&O and UP agreed to change the lease’s interchange commitment terms, which revised terms (from the Fourth Supplement) apply to the UP-K&O lease relationship today. More recently, K&O has sought, and believes it has secured, conditional relief from the Fourth Supplement interchange commitment terms, resulting in K&O’s tender of revised rates responsive to Weskan’s recent interline

rate request.² K&O's request for relief and UP's conditional grant of such relief are set forth in Highly Confidential Exhibits D and E, respectively, to the Supplement.

As K&O sees it, the only relevant considerations here are – (a) the currently-applicable interchange commitment provisions; and (b) and the scope of UP-offered relief from the Fourth Supplement interchange terms bearing on specific Weskan service requests. Weskan's interest in *past* interchange commitment terms and the scope and intent of contract terms overwritten some six years ago are not relevant. Weskan has failed to establish how information on since-overwritten contract terms would be – or could be – relevant to the Board's analysis. Rather, Weskan's version of history seems intended to insert an unwarranted element of scandal and conspiracy into this proceeding where none exists.

The supplemented lease agreement constitutes a bilateral contract accounting for the mutual intent of the parties. K&O's interpretation of the contract, of course, is its own. K&O cannot, and does not, speak for UP (or CKRL, for that matter) on of the contract issues – relevant or otherwise – that Weskan has attempted to raise. Weskan and K&O were not involved in the contract formation

² Weskan takes issue with K&O's rate quote, alleging, evidently, that K&O's proffered rate failed properly to account for car supply. *Id.* at 6. K&O endeavors at all times to provide responsive rates to customers. If K&O did not supply rates to Weskan under Weskan's requested service parameters (or address its interchange commitment waiver request to UP accurately, for that matter), K&O can promptly address any such mistake. Weskan knows who to contact to address any oversight if Weskan seeks a revised rate quote, and K&O stands ready to resolve the matter.

in 1997, so Weskan’s and K&O’s respective interpretations of past provisions, if relevant at all, should be considered accordingly.³

Nevertheless, K&O disputes Weskan’s claim that the 1997 Lease’s original interchange commitment terms intended by silence to permit CKRL’s (and, later, K&O’s) potential interchange of grain traffic with a third party at Towner without penalty. K&O believes the original 1997 Lease interchange commitment terms were intended to apply to all third-party interline movements, and thus would have been enforced against interchange at Towner had such interline opportunities then been foreseeable. As Weskan notes, “in 1997 neither UP nor [CKRL] envisioned any traffic that originated or terminated on the Leased Premises would originate or terminate on the Towner Line, or points west.” Supplement at 4. If Towner had existed as a third-party interchange in 1997, the original lease probably would have been more explicit about restricting traffic flows via the

³ See, e.g., *Wisconsin Central, Ltd. – Petition for Declaratory Order – Interchange with Soo Line Railroad Company*, FD 36397 (STB served Jan. 29, 2024) slip op. at 6 (“that is an issue of contract interpretation, and a court is typically the more appropriate forum for interpreting an operating agreement or other contract.”) (citing *Ballard Term. R.R. Co.—Pet. for Declaratory Order*, FD 36261, slip op. at 4 (STB served June 27, 2019); and *Ohio Valley Railroad Company – Petition to Restore Switch Connection and Other Relief*, FD 34608 (STB served Feb. 23, 2005), slip op. at 6 (“Petitioners have also requested that we confirm OVR’s contractual right to a direct interchange with CSXT. We usually defer to the courts in matters of contract interpretation.” (citing *The Township of Woodbridge, NJ, et al. v. Consolidated Rail Corporation, Inc.*, NOR 42053, slip op. at 5 (STB served Dec. 1, 2000); *Kansas City Terminal Railway Company and the Atchison, Topeka and Santa Fe Railway Company – Contract to Operate Exemption – In Kansas City, MO*, FD 32896, slip op. at 3-4 (STB served Nov. 20, 1996)).

interchange, but, regardless, K&O believes that the original terms reflected a mutual intent to restrict K&O interchange with any third-party at any location.

Alleged “facts” Weskan gets wrong

The Weskan-centric version of the world contained in the Supplement teases at conspiracy that is nowhere proven and does not exist. Weskan, for example, draws a causal connection between CXR’s acquisition of the Towner Line in early 2018 and K&O’s and UP’s collective “renewed interest in the 1997 Lease.” Id. 5. Yet, while the Fourth Supplement’s recitals set forth motivations for lease modification, those recitals never touch upon the Towner line’s status or potential traffic flows. Instead, the Supplement negotiations concerning rent due to UP arising from K&O’s interchange with third-party carriers above the then-permitted threshold, and it alludes to K&O’s preference for an alternative interchange commitment arrangement. Id., Exhibit C at 1-2. The Fourth Supplement’s changes to the 1997 interchange commitment terms were not prompted by CXR’s Towner line purchase, and it would have been counter-intuitive for K&O to have advocated for, much less to have agreed to, interchange commitment terms that (as Weskan mistakenly assumes) would have been more restrictive in scope than before.

Additionally, Weskan’s claim that UP’s interchange commitment relief offer is not real (“illusory” – id. at 6) is unsupported. K&O has relied upon UP’s waiver in endeavoring to offer Weskan responsive rates, and K&O understands that UP intended to be wholly bound to its relief offer. The {{ }} nature of UP’s relief offer does not make it somehow less real. Also, Weskan brazenly alleges

without the slightest evidence that UP's waiver processes reflect UP's possession of market power sufficient "to economically control the flow of grain traffic that it physically can't participate in." Id. at 7.

If there is to be discovery, the Board must set substantive case parameters

It is unclear at this juncture whether any discovery would be appropriate. K&O moved for dismissal of the Petition on December 20, 2024, and that motion remains pending. And even if the Petition were not to be dismissed, the Board may yet direct Weskan to more clearly articulate its basis for alleging unlawful conduct, and it should provide clear guidance on the applicable standard for obtaining the sort of relief that Weskan seeks. Since Weskan's revocation request is rooted in K&O-supplied rates that Weskan finds objectionable, then, as K&O earlier has pointed out, precedent indicates that Weskan should initiate an unreasonable rate proceeding. But if, as K&O discussed in its December 20th filing (at 12), Weskan may somehow permissibly bypass the Board's rate complaint processes to secure rate relief, then the Board should advise the parties as to the legal standards and factual considerations that would be relevant to the agency's assessment of whether to revoke K&O's exemption authority and, in the process, to undertake and enforce binding (partial) contract rescission (if such relief is feasible).

All to say that, while Weskan is intent on undertaking discovery, it is unclear whether Weskan's intended focus – for example, "the circumstances surrounding the drafting and negotiations of the Third and Fourth Supplements to the 1997 Lease, and the purpose(s) for which the Asset Use Fee was imposed"

(Supplement at 7-8) – or K&O’s (to the extent it has begun formulating potential discovery) would yield genuinely relevant data. So, if the Board were to agree to initiate a proceeding providing for discovery, the Board must enunciate governing standards and evidentiary criteria to impose parameters around that discovery.⁴

WHEREFORE, the Board should act favorably on K&O’s pending motion to dismiss. If, however, the Board were to initiate a proceeding based upon the allegations set forth in the Petition and Supplement, the Board must set forth the applicable legal standards and evidentiary criteria that it would apply in assessing the merits of Weskan’s Petition and in evaluating the potential interchange commitment (rate) relief that the Board might consider (if any).

Respectfully submitted,

/s/ *R. A. Wimbish*

Robert A. Wimbish

Stephen J. Foland

Fletcher & Sippel LLC

29 North Wacker Drive, Suite 800

Chicago, Illinois 60606-3208

(312) 252-1500

rwimbish@fletcher-sippel.com

sfoland@fletcher-sippel.com

**ATTORNEYS FOR KANSAS &
OKLAHOMA RAILROAD, LLC**

Dated: February 6, 2025

⁴ “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, if any relief were warranted, (c) how the Board would evaluate the propriety of any specific relief Weskan definitively were to request.” K&O Reply at 12.

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):

Randall A. Pentiuk
2915 Biddle Avenue
Edelson Building Suite 200
Wyandotte, MI 48192
Firm@Pck-Law.Com

Michael L. Rosenthal
Covington & Burling LLP
One CityCenter
850 Tenth Street, N.W.
Washington, DC 20001
Mrosenthan@Cov.Com

Thomas W Wilcox
1629 K Street NW, Suite 300
Washington, DC 20006
tom@twilcoxlaw.com

/s/ *R. A. Wimbish*
Robert A. Wimbish

Dated: February 6, 2025