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BEFORE THE
SURFACE TRANSPORTATION BOARD

FD 36849

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

REBUTTAL

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**ATTORNEYS FOR KANSAS &
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Dated: May 2, 2025

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REBUTTAL

On April 16, 2025, Weskan Grain LLC (“Weskan”) tendered its reply (“Reply”) in opposition to the Kansas & Oklahoma Railroad Company, LLC (“K&O”) petition for exemption (“Petition”) for after-the-fact authority to lease and operate under extended and modified terms certain railroad lines (the “Leased Lines”) owned by Union Pacific Railroad Company (“UP”). Objecting to the modified lease agreement’s interchange commitment favoring UP, Weskan has asked the Surface Transportation Board (the “Board”) either to deny the Petition outright or to initiate a proceeding to permit a more searching review of the proposed transaction and the subject interchange commitment.

K&O tenders this Rebuttal along with a concurrently-filed motion for leave to do so. K&O’s Petition is meritorious; Weskan has not provided evidence and argument sufficient for denial. In the discussion to follow, K&O addresses and rebuts Weskan’s erroneous and unsupported allegations, notes UP’s essential role in a formal proceeding (if initiated), and comments upon the uncertainty surrounding the current status of the K&O-UP contractual relationship.

A case of first impression, and applicable agency guidance

Weskan presents a case of first impression. To K&O's knowledge, this agency has never confronted an individual petition for exemption or a class exemption notice covering the lease (or the acquisition) of a line of railroad where an interested party has, in response, formally opposed transaction authorization due to the presence and impact of an interchange commitment. As added complexity, K&O is a longstanding Class III operator of the Leased Lines, having operated them since 2001 pursuant to contemporaneous Board authorization. As such, even if the 2018-2019-era lease modifications lack Board authorization, *K&O remains a federally authorized common carrier on the line*,¹ and would remain so even if its Petition were to be denied, albeit under less-than-clear contractual circumstances now and going forward.

K&O understands from agency guidance that the information it has supplied concerning the subject interchange commitment is to be used to evaluate “the significance and economic impact of the interchange commitment” on a case-by-case basis.² Further, the Board has explained that the interchange commitment disclosure requirements allow the Board to determine at the outset whether a

¹ *Smith v. Hoboken R. Co.*, 328 U.S. 123 (1946) (“*Hoboken R. Co.*”) (once a rail carrier is authorized to lease and operate a line, and does so in accordance with its common carrier authorization, such authorization has no established expiration date, even if the underlying lease were to expire or be terminated).

² *Information Required in Notices and Petitions Containing Interchange Commitments*, EP 714 (STB served Sep. 5, 2013) (“*Interchange Commitments – Final*”), slip op. at 2.

transaction including an interchange commitment is appropriate for the exemption process or raises “competitive issues that require a more detailed examination.” (*id.*).

Interchange Commitments – Final explains that the interchange commitment data enables the Board to more closely examine a proposed transaction’s “competitive issues” (*id.*). Less clear is what happens at the end of such examination. Consider then Vice Chairman Begeman’s remark:

I did not object to the Board’s Notice of Proposed Rulemaking . . . , because I believed the Board could benefit from hearing the views of interested parties on whether changes were needed to improve the Board’s existing rules on interchange commitments. Unfortunately, the record fails to convince me that these new requirements offer meaningful improvements . . . , nor, importantly, that the usefulness of the additional information outweighs the extra reporting burdens being imposed on small businesses here. This is especially true since it remains unclear how the Board will even use the additional information, if at all.³

To be sure, the Board has indicated that it may evaluate an interchange commitment to see whether it is not in the public interest as “unduly restrictive or unwarranted under the circumstances.”⁴ And while the Board has elaborated upon the sort of information that could bear on its public interest analysis (*see, e.g., Disclosure* at __), the agency’s discussion offers little on possible remedial options, particularly where, as here, the petitioner seeks after-the-fact authorization to continue its lease and operation of railroad lines under an arrangement that would replace a pre-existing interchange commitment with a new one.

³ *Id.* at 10 (Vice Chairman Begeman, dissenting).

⁴ *Disclosure of Rail Interchange Commitments*, EP 575 (STB served October 30, 2007), *et al.* (“*Disclosure*”), slip op. at 2.

What seems certain, however, is that, if the Board were to engage in a more thorough assessment of the proposed interchange commitment, UP's participation, and its explanation for the new interchange commitment (of its own design and intended for its own purposes), would be essential.

Weskan's plea for denial of the Petition fails in view of the various mistaken and unsupported factual and legal claims it has advanced in its Reply.

Weskan advances various factual and legal assertions that are incorrect. K&O previously has explained that the interchange-restricting terms of the 1997 Lease were intended to limit (and, indeed, do limit) the interchange of traffic originating or terminating on the K&O-leased lines with third parties at *any* location, including at Towner. See FD 34030, K&O Reply to Weskan Supplement (filed February 6, 2025) at 5. Weskan has this entirely backwards in claiming the opposite (Reply at 4). K&O has, and does, dispute Weskan's contractual allegation.

Second, Weskan misunderstands, and has entirely misconstrued, the Petition's interchange data. Reply at 5. The Petition accurately states that *the Leased Lines* connect with only one railroad (aside from other K&O lines) – Colorado Pacific Railroad LLC ("CXR") at Towner, Colorado. K&O complied with the letter of the informational requirement of 49 C.F.R. § 1150.43(h)(1)(vi), correctly identifying CXR as the only third-party railroad[s] that could physically interchange with the Leased Lines. But, contrary to CXR's misguided claim, K&O can physically interchange traffic originating or terminating on the Leased Lines with third-party railroads at more distant interchange points on the K&O system, as the map appended to the Petition and the map the Weskan offered as Exhibit A

to the Reply each indicate. The previous abandonment of the Healy – McCracken line segment does not in any way physically preclude the flow of traffic to various K&O interchanges east of the Leased Lines.

Third, Weskan errs substantially in asserting that the interchange restrictions set forth in the Fourth Supplement to the Lease (nominally effective as of July 20, 2018, but executed as of November 21, 2019) apply “only to the Towner, CO interchange . . .” Reply at 6. Rather, K&O understands – and has understood – the Fourth Supplement’s interchange commitment provision as – (a) replacing the corresponding, universal provision in the original 1997 Lease; and (b) applying to all non-UP interchanges on the K&O system.

Fourth, Weskan’s claim that the Fourth Supplement’s interchange commitment impedes “competition between UP and BNSF” (Reply at 8) is unsupported and dubious. The map at Reply Exhibit A shows that K&O’s east-west-oriented Leased Lines run parallel, and proximate to – (1) an UP-owned and operated route (extending, generally, between Kansas City and Denver) located to the north of the Leased Lines, and (2) a railroad line owned and operated by BNSF Railway Company (“BNSF”), running, generally, between Kansas City and Pueblo, Colorado, to the south. K&O believes that BNSF and UP can and do compete for grain traffic from K&O’s general service area to western destinations from their respective parallel-running lines through Kansas and Colorado. K&O questions whether Weskan’s play for reduced rates is more about protecting a competitor

(Weskan) than it is about protecting competition (the flow of west Kansas grain to consumers in the western U.S., and to export markets via Pacific ports).

Fifth, Weskan contends without support that CXR is entitled to lower K&O interline rates, since CXR acquired its line via the Board's feeder line development procedures. Reply at 8. CXR is not entitled to comparatively more favorable interline transportation terms because of its feeder line origins, and Weskan offers no precedent to support this naked assertion.

Finally, as part of its kitchen sink strategy, Weskan contends that the continued lease (by an existing Class III railroad) of some 81 miles of railroad line is not of limited scope. Weskan offers no precedent to support its claim, and K&O respectfully submits that Weskan has no such precedent upon which it could rely. Such an invented claim undercuts Weskan's credibility.

In the event of a formal proceeding, UP would be an essential party.

It appears that Board action on K&O's Petition may turn upon public interest considerations associated with the Fourth Supplement's interchange commitment – a contractual provision embedded in the lease arrangement as a successor provision to the interchange restrictions included in the 1997 Lease (predating, but continuing into, K&O's tenure on the Leased Lines). K&O acknowledges that if the interchange restrictions prescribed by the Fourth Supplement were to be applied, they could serve to preclude K&O-CXR interline grain traffic shipments to Weskan's Stockton Elevator. But, of course, UP has indicated a willingness to provide, and has offered, case-by-case relief from the

Fourth Supplement interchange commitment provisions for K&O-CXR interline grain traffic under UP's Railroad Industry Agreement waiver processes. This is a potentially salient point upon which UP is much better situated to elaborate.

Ultimately, if the Board were to conclude that a public interest analysis is warranted, that analysis likely would focus upon – (a) the benefits of short line operation of lower-density lines such as the Leased Lines; (b) how interchange commitments have facilitated short line creation like K&O; (c) the function and duration of UP's interchange commitment here; and (d) other public interest factors discussed in *Disclosure and Interchange Commitments – Final*. And if the Board were to undertake such an involved public interest analysis, then K&O submits that UP would be an essential party to such an undertaking. K&O is in no position to speak for UP in connection with the purpose, objectives, continued utility, or benefit of an interchange commitment of UP's own devising as part of the overall lease arrangement. (K&O understands that the interchange commitment is and was a mandatory condition to the lease arrangement, and that, without it, UP claims a right to terminate the lease arrangement and, in turn, to divest K&O of its leasehold interest going forward – evidently to resume UP operations.)

K&O's common carrier status remains, but what are its current contractual obligations to UP when it comes to third-party interchange?

K&O understands the Board's recent order in *Kansas & Oklahoma Railroad, Inc. – Acquisition Exemption – Central Kansas Railway, LLC*, FD 34030 (STB served Feb. 25, 2025) (“*K&O – Weskan*”) as holding that the Fourth Supplement (amending the 1997 Lease Agreement to, among other things, modify

the lease's interchange commitment terms) has not been federally "authorized."

K&O – Weskan at 5. Accordingly, K&O also understands that, as a matter of federal law, K&O may not account for the Fourth Supplement's interchange commitment when responding to rate and service requests involving non-UP interchange traffic during the pendency of this proceeding (and, for that matter, also if the Petition were to be denied).

K&O remains the federally-authorized common carrier operator in keeping with *Hoboken R. Co.* It has no plans to renounce its short line status on the Leased Lines. Yet its contractual relationship with, and obligations to, UP are uncertain, considering that the non-STB-authorized lease modifications of 2018-2019 also worked to avoid nominal expiration of the original 1997 K&O-UP lease arrangement. Suffice to observe that the contractual backstop here, so to speak, would be resort to the pre-Fourth Supplement lease terms. Here, in the absence of agency guidance, K&O will work with UP to determine how best to address non-UP interline rate and service requests during the pendency of this proceeding.⁵

⁵ As information, and for purposes of additional context, counsel for UP recently has advised K&O in writing that UP believes that the Third and Fourth Supplements to the 1997 Lease remain legally binding upon the parties, the Board's February 25 ruling in FD 34030 notwithstanding. If UP's position is correct, then K&O would have to account for the Fourth Supplement interchange commitment terms when responding to rate and service requests for K&O traffic that would move over non-UP interchanges.

Conclusion

For the foregoing reasons, K&O's Petition should not be denied. K&O sees no need for a formal proceeding to assess the merits of the Petition, but if the Board nevertheless were to initiate a formal proceeding in keeping with Weskan's alternative request, then, in the interest of a properly-developed record, K&O urges the Board to designate UP as an essential party to that proceeding.

Respectfully submitted,

/s/ *R. A. Wimbish*

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

Dated: May 2, 2025

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of May, 2025, a copy of the foregoing **Rebuttal** was served upon all parties of record.

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