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SERVICE DATE – SEPTEMBER 30, 2025

SURFACE TRANSPORTATION BOARD

ORDER COMPELLING PRODUCTION OF DOCUMENTS REVIEWED IN CAMERA AND
IN RESPONSE TO WESKAN’S REQUEST FOR PRODUCTION NUMBER 15

Docket No. FD 36849

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

Decided: September 30, 2025

This discovery matter is before the undersigned pursuant to a ruling by the Surface Transportation Board, see Decision (Aug. 8, 2025).

Kansas & Oklahoma Railroad, LLC (K&O), a Class III rail carrier, filed a petition under 49 U.S.C. § 10502 seeking an exemption from the provisions of 49 U.S.C. § 10902 for after-the-fact authority to renew and amend a lease agreement between K&O and Union Pacific Railroad Company (UP) governing K&O’s possession and use of approximately 165.98 route miles of UP-owned railroad line in western Kansas (the Lease). The leased lines consist of two segments of rail line, which extend (1) between milepost 523.02 at Geneseo, Kan., and milepost 606.0 at McCracken, Kan., and (2) between milepost 664.5 at Healy, Kan., and milepost 747.5 at Towner, Colo. (the Lines).

On April 16, 2025, Weskan Grain LLC (Weskan) filed a reply in opposition to the petition for exemption, arguing that the interchange commitment is anticompetitive. Weskan contends that the proposed interchange commitment is intended to “preserve UP’s market power and to restrict competition,” (Weskan Opp’n 10), by making it “economically infeasible for K&O” to transport agricultural products originating in Kansas to points west of the CXR interchange at Towner, (*id.* at 1).

The Surface Transportation Board regulations provide for broad discovery. These regulations provide that “[p]arties may obtain discovery under this subpart regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding.” 49 C.F.R. § 1114.21(a)(1). The Board has recognized that this regulation allows for broad discovery. See Canadian Pac. Ry.—Control—Kan. City S. (Decision No. 7), FD 36500, slip op. at 4 (Aug. 2, 2021) (acknowledging authority to seek material relevant to subject matter of proceeding under 49 C.F.R. § 1114.21 and interpreting scope of relevance in discovery “[b]roadly”); CSX Transp. & Del. & Hudson Ry.—Joint Use Agreement, FD 35348, slip op. at 3 (STB served Aug. 16, 2010) (parties are entitled to discovery regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding and relevance means that information might be able to affect the outcome of a proceeding) (citing 49 C.F.R. § 1114.21).

Despite this broad language, the Board has slightly restricted discovery where it seeks extraordinarily sensitive commercial, competitive, or confidential materials. The Board has held that the “[d]isclosure of extraordinarily sensitive information should not be required without a careful balancing of the seeking party’s need for the information, and its ability to generate comparable information from other sources, against the likelihood of harm to the disclosing party.” CSX Corp.—Control & Operating Leases/Agreements—Conrail Inc., FD 33388, slip op. at 3 (STB served Nov. 10, 1997).

On August 4, 2025, Weskan filed a Motion to Compel Discovery against K&O. On August 25, 2025, K&O submitted a letter to address Weskan’s Motion to Compel. On August 26, 2025, Weskan filed a Petition for Expedited Ruling on Motion to Compel, which requested that K&O file any response by August 29, 2025. On August 27, 2025, K&O filed discovery response letter with the Board, with a courtesy copy to the undersigned that contained the subject matter “August 8, 2025 Meet and Confer.” I granted in part Weskan’s request for expedited ruling on the motion to compel and ordered Weskan and K&O to meet and confer a second time by order served September 5, 2025. Decision at 2 (Sep. 5, 2025). If they did not resolve Weskan’s Motion to Compel, in full, I scheduled a status conference for September 12, 2025. Id.

At the status conference, I heard argument on the unresolved portions of Weskan’s Motion to Compel. Thereafter, I entered a written order on Weskan’s Motion to Compel. See Order Granting in Part Weskan’s Motion to Compel (Sept. 17, 2025).

Relevant here is Request for Production Number 15 (“RFP #15”), which was granted in part. The original request was overly broad. However, Weskan agreed to narrow that request significantly to the lines at issue in this proceeding, 2022 and later, and only to grain. Id. at 3.

K&O argued that it should not be required to produce this discovery, because it is about highly confidential sensitive information. Id. A protective order has been entered in this proceeding to alleviate this concern. Id. (citing Kan. & Okla., LLC—Lease & Operation Exemption with Interchange Commitment—Union Pac. R.R., FD 36849 (STB served April 8, 2025)).

After the order on the motion to compel was entered, K&O submitted an email Discovery Response Status Update, advising that for RFP #15, K&O’s customers objected to the disclosure of this information, and seeking ALJ guidance on how to proceed, and requesting an in camera inspection of these documents. In a responsive email, the parties were advised that I would review the documents in camera. K&O supplied the documents for me to review in camera.

I have reviewed the documents. The documents are responsive to the narrowed RFP #15, Order Granting in Part Weskan’s Motion to Compel. See Order Granting in Part Weskan’s Motion to Compel at 3 (Sept. 17, 2025). These documents are relevant to the subject matter of this proceeding, see 49 C.F.R. § 1114.21(a)(1), and specifically Weskan’s opposition to K&O’s petition for exemption.

There has been no suggestion that Weskan can obtain this information from another source. Weskan could subpoena the non-party grain suppliers, but that would just draw the same objections as here and would be more burdensome to both Weskan and the non-parties. Without disclosure, Weskan is left with its unsupported allegations—despite having requested the supporting documents during discovery.¹

These documents contain confidential or highly confidential information. Under either designation, they are subject to the protective order that is effective in this case. There has been argument that disclosure of this information would be harmful to Weskan's competitors. The mere disclosure of the documents themselves would render the protective order superfluous and meaningless. That is not legally or factually correct. I cannot just assume that Weskan's attorneys and/or consultants will breach the protective order. The Board's protective order must be followed. If its terms are violated, then that is a different matter.

Upon balance, disclosure of the documents reviewed in camera is warranted (and was warranted as I compelled in my earlier order). The protective order mandates that confidential and highly confidential documents are subject to the protections of the protective order, whereas Weskan should not be left empty handed based upon allegations of supposed harm for the disclosure of these documents that Weskan properly requested in discovery to support Weskan's challenge to K&O's petition for exemption.

For these reasons, I am compelling the production of documents that were reviewed in camera in response to RFP #15. Again, **the protective order must be followed.**

It is ordered:

1. The documents reviewed in camera in response to Weskan's RFP #15 must be produced by K&O to Weskan the next business day.
2. This decision is effective on the date of service.

By the Board, Jenifer J. Soulikias, Administrative Law Judge.

¹ To be clear, I am not making any assessment about the content of the documents other than that they are relevant to RFP #15 and Weskan's position in this proceeding. I am not stating the documents ultimately support Weskan's position—that is for the Board to assess. I am only weighing whether Weskan requires production of these the documents to support its position. See CSX Corp.—Control & Operating Leases/Agreements—Conrail Inc., FD 33388, slip op. at 3 (“[d]isclosure of extraordinarily sensitive information should not be required without a careful balancing of the seeking party's need for the information, and its ability to generate comparable information from other sources, against the likelihood of harm to the disclosing party.”).