

PUBLIC VERSION

**BEFORE THE UNITED STATES
SURFACE TRANSPORTATION BOARD**

DOCKET NO. FD 36849 (Sub - No.1)

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

REPLY TO PETITION FOR EXEMPTION

Weskan Grain LLC (“Weskan”) hereby submits this Reply in opposition to the Petition for Exemption Pursuant to 49 U.S.C. §10502(a) (“Petition”) filed in this docket by the Kansas & Oklahoma Railroad, LLC (“K&O”) on May 4, 2026. In its Petition, K&O is again seeking after-the-fact approval of the exact same terms of an amended railroad line lease with Union Pacific Railroad Company (“UP”) that the Board rejected in Docket No. FD 36489 by denying K&O’s first Petition for Exemption in a decision served March 20, 2026 (“*Denial Decision*”).

I. INTRODUCTION

K&O states it is seeking after-the-fact approval of the exact same lease terms despite the Board’s numerous concerns and admonitions in the *Denial Decision* in part because K&O says UP refused to discuss modifying any of the terms of the lease after the *Denial Decision*. Petition

at 4. Such terms included the extraordinarily high “Asset Use Fee” that UP insisted be inserted into the 2019 Fourth Amendment to the original 1997 Lease.¹ Petition at 4. Originally established by UP as {{ \$ }} per carload, the Asset Use Fee has now increased to over {{ \$ }} per carload by operation of Section 4.03 of the Fourth Supplement.² This per car surcharge is assessed “{{

.}}” *Id.*, Section 4.01. UP and K&O do not dispute that the Asset Use Fee surcharge economically forecloses any grain or other freight traffic originating or terminating on the track covered by the proposed lease being interchanged to the Colorado Pacific Railroad LLC (“CXR”), owner and operator of the line directly connected to the end of the leased track in the vicinity of Towner, Colorado. As stated by K&O, there are 10 customers with facilities connected to the leased track that currently use the leased track or have used the leased track in the last two years.

¹ The pleadings and decisions in Docket No. FD 36849 and Docket No. FD 34030 before it have summarized the factual background of this overall dispute. To briefly summarize again here, the original lease was executed between UP and the Central Kansas Railway, LLC (“CKRL”) in 1997 (“1997 Lease”), and it contained an interchange commitment that restricted interchange to carriers other than UP to {{ }} of traffic transported at all interchanges with other carriers. K&O has maintained that the 1997 Lease intended to include the Towner interchange as being subject to the paper barrier. Docket No. FD 34030, K&O Reply to Weskan’s Supplement, filed February 6, 2025 at 5-6. K&O inherited the 1997 Lease in 2001 when CKRL sold and/or assigned to K&O all of the assets and lease rights in the tracks making up the CKRL’s approximately 900-mile system. Docket No. FD 34030, *Kansas & Oklahoma Railroad, Inc. – Acquisition Exemption – Central Kansas Railway, LLC* (served June 12, 2001). This transaction included in part the 1997 Lease tracks. Relevant to the Petition, UP and K&O amended the 1997 Lease in 2018 (Third Supplement) and again in 2019 (Fourth Supplement). In the Fourth Supplement, K&O amended the language from the original interchange commitment from a penalty based on the percentage of traffic interchanged with UP to the prohibitively high per car Asset Use Fee set at a level unilaterally determined by UP. As stated, the Asset Use Fee has increased to over {{ \$ }} pursuant to an escalation provision in the Fourth Supplement. K&O did not seek the approval of the Board to enter into the Lease as amended by the Third or Fourth Supplements, and now again seeks after-the-fact authority to do so.

² {{

}}

Petition at 6-7. Seven of these actual and potential shippers are located on the leased track between Scott City and Towner, including Weskan's Whitelaw grain loading facility that is being developed along the leased line near Tribune, KS.³

Nor can K&O dispute that the Asset Use Fee was inserted into the Fourth Supplement at UP's insistence shortly after CXR acquired the Towner Line in 2018, and that no grain or other commodities have ever moved westward from origins on the leased track for interchange with CXR, either before or after the 1997 Lease was amended in 2018 and 2019.

Moreover, although K&O cites UP's refusal to discuss modifications of the lease as a reason for asking the Board again to approve the exact same lease terms, K&O has revealed in its renewed Petition that it, too desires the Asset Use Fee paper barrier to continue "for the next several decades" because in exchange for acceding to the Asset Use Fee surcharge and thereby enabling its anticompetitive purpose, K&O pays {{ }}. Petition at 29; Fourth Supplement, Section 2. The Petition therefore constitutes a flawed effort by K&O to preserve – effectively in perpetuity – a clearly anticompetitive lease arrangement that has been in existence in one form or another for nearly 30 years that has benefited UP and K&O to the detriment of Weskan, CXR, other railroads and shippers, and the public interest as a whole. The Board should reject K&O's arguments and attempted justifications for preserving this anticompetitive bargain and again reject the proposed lease agreement as contrary to the public interest, 49 U.S.C. §10502, and the Rail Transportation Policy ("RTP").

³ See Exhibit A; Maps of Weskan's facilities and relevant railroad lines.

II. ARGUMENT

A. The Paper Barrier Fails all of the Factors Discussed in *Review of Rail Access*

The Board considers the propriety of interchange commitments on a case-by-case basis. *Rev. of Rail Access & Competition Issues—Renewed Pet. of the W. Coal Traffic League (Rev. of Rail Access)*, EP 575 et al., slip op. at 7-8 (STB served Oct. 30, 2007). In conducting a case-specific review, “we will examine the particular facts, the competitive conditions before and after the interchange commitment, the nature of the commitment, and its actual or likely effects.” *Id.* at 15. The Board also stated a key factor is the duration of the paper barrier. *See id.* (“we will look at the duration of the restriction” and “[p]arties should expect a higher level of scrutiny on agreements that . . . go on in perpetuity.”). Also, “we will examine the manner in which the interchange commitment discourages interchange with other carriers and the degree to which interchange is effectively foreclosed.” *Id.* The proposed interchange commitment in this proceeding fails every one of these factors.

1. Competitive Conditions Before and After the Interchange Commitment

The relevant competitive conditions have materially changed since the interchange commitment was initially imposed, to the point that the paper barrier is no longer justified economically or operationally, and it is not in the public interest. Arguably, the 1997 Lease paper barrier was contrary to the public interest at its inception. As first referenced in Weskan’s Petition to Reopen in Docket No. FD 34030, CKRL and UP entered into the 1997 Lease contemporaneous with UP’s attempt to obtain authority from the Board to abandon the former Missouri Pacific

Railroad Company Towner/NA Junction Line as part of the UP/SP merger.⁴ The Towner/NA Junction Line extended from Milepost (“MP”) 747.0 near Towner, CO to MP 869.4 near NA Junction, CO. During the course of the merger proceeding in 1996, as a condition for receiving authority to abandon the Towner/NA Junction Line, UP agreed to sell it to the State of Colorado for its net liquidation value within 12 months after the merger was approved. 1 S.T.B at 340. Soon thereafter, UP entered into the 1997 Lease with CKRL on September 12, 1997, which included MP 747.0 to 747.5 of the Towner/NA Junction line.⁵ In December 1997, UP notified the Board it had discontinued service on the remainder of the Towner/NA Junction Line (MP 747.5 to 869.4 later acquired by CXR, which has been referred to as the Towner Line in these proceedings). *Id.* UP’s sale of the Towner Line to the State of Colorado was not completed until 1998, and the state eventually leased the Towner Line to the Colorado, Kansas & Pacific Railway Company in 2000 to initiate common carrier service over it. *STB Finance Docket No. 33857, Colorado, Kansas & Pacific Railway Company – Lease, Operation, and Future Purchase Exemption – Colorado Department of Transportation* (served April 7, 2000).

Consequently, the Towner Line at MP 747.5 could not have been an interchange subject to 1997 Lease’s paper barrier when the lease went into effect because UP also still owned the remainder of the Towner/NA Junction Line. Had UP retained ownership of both segments, CKRL could have freely interchanged traffic originating or terminating on the 1997 Lease tracks with UP at MP 747.5 without penalty for transport. However, UP’s insertion of the paper barrier into the

⁴ See discussion in 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.

⁵ See Docket No. AB-3 (Sub-No. 130), *Missouri Pacific Railroad Company – Abandonment – Towner-NA Junction Line in Kiowa, Crowley, and Pueblo Counties, Co, et al* (served January 6, 1998) at 2-3 (where UP clarifies the status of the tracks making up the Towner/NA Junction Line).

1997 Lease, and its application to the Towner interchange at MP 747.5 upon the sale to the Colorado Department of Transportation in 2000, substantially undercut the efforts of the State and the Board in the UP/SP merger proceeding to try and keep the Towner Line viable post-merger. The disincentive to interchange with the lessee of the Towner Line no doubt contributed to its decline. As such, Weskan believes a case could be made that had the 1997 Lease and interchange commitment been subject to the criteria later adopted in *Rev. of Rail Access* they might not have been approved.

The competitive conditions after the effective date of the 1997 Lease were also changed significantly by UP's abandonment of many of the tracks covered by the 1997 Lease,⁶ reducing the covered trackage from 270.7 to 165.98 miles. These abandonments resulted in the lease covering geographically separated segments of track, with the 65.0-mile Scott City, KS to Towner segment physically separated from the remainder of UP's system and connected only to CXR on its western terminus.

The competitive conditions were further substantially changed by CXR's acquisition of the Towner Line in 2018 pursuant to the Board's "feeder line" process under 49 U.S.C. §10907, and CXR's subsequent investment of millions of dollars to rehabilitate the track to FRA Class 2 standards and restore the connections to UP and BNSF Railway Company ("BNSF") at NA Junction. This investment by CXR reestablished the historic rail routes to Pueblo, Colorado and

⁶ Throughout three STB abandonment proceedings, UP has abandoned 104.72 miles of line that was covered by the 1997 Lease. Docket No. AB-33 (Sub-No. 147X), Union Pacific Railroad Company-Abandonment Exemption-In Mcpherson and Saline Counties, KS (served May 9, 2000). Docket No. AB-33 (Sub-No. 158X), Union Pacific Railroad Company-Abandonment Exemption-In Mcpherson, Ellsworth and Rice Counties, KS (served February 9, 2001). Docket No. AB-33 (Sub-No. 214X), Union Pacific Railroad Company-Abandonment Exemption-In Lane, Ness and Rush Counties, KS (served October 15, 2004).

points north and west. Weskan (and also its affiliate CXR) continue to maintain that CXR's acquisition of the Towner Line in 2018 and its restoration of efficient access to BNSF and expanded routings west of Kansas was a key reason, if not the reason, why UP insisted the Asset Use Fee in the Fourth Supplement be established at an amount so high it would economically foreclose any K&O interchange with CXR. Even if, as K&O argues, the Asset Use Fee concept was included in the Fourth Supplement to resolve a dispute over a penalty owed by K&O under the 1997 Lease paper barrier formula (Petition at 8, 26), K&O admits it had and has "no visibility" as to why UP chose {{ \$ }} per car as the original Asset Use Fee and insisted that it be escalated pursuant to the formula in the Fourth Amendment. Petition at 27. Weskan and CXR believe UP chose the amount to exclude any opportunity for traffic to move for interchange with CXR.

The competitive conditions were again substantially altered in 2022 by the arrival of Weskan, which beginning in 2022 invested tens of millions of dollars to construct a state-of-the-art grain elevator on 2200 acres of land adjacent to MP 752.5 of the Towner Line at Stockton Siding. As constructed, the Stockton Facility has 3.1 million bushels of upright grain storage capacity and 2.2 million bushels of ground storage capacity, and it can be expanded. Weskan has also invested millions of dollars to acquire, improve, and/or construct multiple grain loading facilities along the leased tracks and the tracks of K&O in Kansas shown on Exhibit A. The presence of Weskan has substantially altered the competitive status quo in central Kansas and Colorado and Weskan's business plans present new opportunities for K&O should it someday choose to seriously explore them.

The Petition mentions none of these significant changes to the competitive situation since 1997, and even 2019, choosing instead to argue primarily that the 1997 Lease as amended created

a “necessary commercial consideration” whereby CKRL and now K&O can conduct rail operations on the leased track {{ }} at the cost of enabling UP to restrict K&O from interchanging with other carriers, and that this arrangement should continue, in near-perpetuity. K&O claims this arrangement did not and does not create competitive harm because prior to the lease UP was under no legal obligation to interline traffic with competing carriers. Petition at 17-18. This is contrary to the factual discussion about the Towner Line above, where UP forfeited its long-haul routing over the Towner Line. It is also contrary to applicable law, which requires a railroad to interchange with a carrier who has a contract with a shipper to an interchange point. *See, e.g., Rev. of Rail Access* at 8-9. Moreover, the presence of the Asset Use Fee is indeed harmful to such competition because it imposes a surcharge on an overall interline movement that makes it economically infeasible.

**2. Whatever Economic Justification for the Paper Barrier Existed Initially
Has Long Ago Expired**

**a. UP’s and K&O’s 25-Year Bargain to Restrict Competition in Exchange
for {{ }} Must End**

In the prior proceedings, K&O conceded its views on its formation and interpretation of the 1997 Lease are irrelevant because it was not a party to that agreement. Docket No. FD 34030, K&O Reply to Weskan Supplement, filed February 6, 2025, at 4-5 (“Weskan and K&O were not involved in the contract formation in 1997, so Weskan’s and K&O’s respective interpretations of past provisions, if relevant at all, should be considered accordingly.”). K&O also stated it was “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.” Docket No. FD 36849, K&O Rebuttal filed May 2, 2025 at 8. K&O is also not in a position to speak for CKRL, the original lessee. And, as stated, K&O admits it had and has “no visibility” as

to why UP chose {{ \$ }} per car as the original Asset Use Fee and then unilaterally demanded this amount and its accompanying escalator be included in the Fourth Amendment. Petition at 27.

For these reasons, K&O's lengthy discussion of UP's original purpose and intent when entering into the 1997 Lease and choosing the level of the Asset Use Fee in 2019 (Petition at 25 to 27) must be taken with a grain of salt. But in any event, the 1997 Lease is only relevant to the Board's consideration of K&O's present request for after-the-fact authorization because it highlights that there is no public policy supporting the continuation of the anticompetitive interchange commitment associated with the initial commercial arrangement. Whatever initial economic benefit UP obtained for leasing its track to CKRL and then K&O at a heavily discounted rent has long been realized, both in terms of revenues for traffic incentivized to interchange only with UP and from the cost savings to UP from both lessees maintaining the track assets at their expense for nearly 30 years.⁷ Approving the amended lease arrangement to continue to permit UP to restrict competition with other carriers and limit market access to shippers in exchange for K&O paying {{ }} for the use of its tracks for the indefinite future is not consistent with good public policy. The arrangement is well past the point where its original anti-competitive purpose had any justification and a lease arrangement consistent with the RTP should replace it.

On that score, there is no support whatsoever for K&O's fabricated claim that its rent would go from {{ }} to “{{ }}” annually if the Asset Use Fee was eliminated. *See* Petition at 8 ({{ “

⁷ Section 6.01 of the 1997 Lease states that {{ “

”}}. Section 6.01 was modified in the Third Supplement, but UP still had no obligation to perform any maintenance of the Leased Premises.

,”}} which K&O further represents would be “{{ }}”). These statements are not supported by any provisions of either the Third or Fourth Supplements, testimony from K&O or UP, or any other evidence. K&O appears to have instead created a hypothetical {{\$ }} rental from the penalty it owed UP in 2018 under the 1997 Lease interchange commitment terms. *Id.* But this is obviously “apples to oranges.” The amount K&O owed UP in 2018 {{

}}. The amount owed was calculated using a formula in the 1997 Lease, and therefore by definition was variable. Moreover, the payment was punitive, not market-based. K&O’s statement that its rent payments would be “{{ }}” in a new lease that does not include the Asset Use Fee is therefore self-serving speculation. There is no record evidence in any of the proceedings that K&O and UP could not negotiate an appropriate fixed rental amount going forward.

b. The Asset Use Fee is Not a Predictable and Proportionate Compensatory Model

The notion that the Asset Use Fee created a “predictable and proportionate per-car compensatory model” (Petition at 2) is nonsense, except in the sense that the “model” is “predictable” in that it guarantees *zero* traffic will move in interchange with railroads other than UP unless UP solely decides to enable it by reducing or waiving the Asset Use Fee. The Asset Use Fee is also not “compensatory” for movements to and from the Towner Line because UP has never received any compensation from K&O moving traffic west of Towner. And nor would UP receive any compensation from the rail movement because it cannot physically participate in the movement of freight to and from the leased track between Healy KS, Scott City and Towner without forcing K&O to operate as a bridge carrier.

3. The Asset Use Fee is Intended to, and Does Effectively Foreclose Interchange Between CXR and K&O

In *Rev. of Rail Access*, the Board stated “[w]e will examine the manner in which the interchange commitment discourages interchange with other carriers and the degree to which interchange is effectively foreclosed.” *Rev. of Rail Access* at 15. The {{ \$ }} per car Asset Use Fee surcharge K&O must pay UP for the movement of any railcar for interchange with the CXR in Towner is significantly higher than all but a few of the dozens of base rates K&O has published in its Freight Tariff KO 4010-AN.⁸ In practical terms, this means it makes no economic sense for Weskan or any other rail shipper to request service from K&O to transport commodities west to interchange with CXR for further movement to Weskan’s Stockton Facility or NA Junction and beyond, because the per car rate K&O must pay UP will be passed on to the shipper.

By extension, the discouragement of such interchange also forecloses CXR’s ability to add traffic to the Towner Line from shippers in Kansas who might desire service from Towner to NA Junction for interchange with UP or BNSF. Instead, the presence of the Asset Use Fee heavily incentivizes K&O to route *all* traffic originating or terminating on the leased line, or that would originate or terminate on the leased line in the future, to flow over K&O’s interchanges with UP. The location of K&O/UP interchanges results in all traffic flowing east, even if it ultimately moves to/from western locations. The resulting circuitous routing imposes even more unnecessary and unjustified costs on shippers.

4. UP’s Selective Application of the Asset Usage Fee Confirms Its Purpose is to Permit UP to Control the Market and Restrict Competition

⁸ <https://www.watco.com/wp-content/uploads/2026/04/KO-4010-AN-eff-6.1.26-Grain-Tariff-2026.pdf>.

In the *Denial Decision* the Board noted K&O had produced no evidence in support of its first petition for exemption that it has interchanged with railroads other than UP, noting BNSF, South Kansas & Oklahoma Railroad, LLC (“SKOL”), and Wichita Terminal Association (“WTA”). *Denial Decision* at 9. In response, K&O offers inconclusive and incomplete information in its renewed Petition. First, while K&O quantifies movements interchanged with WTA and SKOL, it confirms that the Asset Use Fee is either waived (for WTA) or reduced to {{ \$ }} per car (for SKOL) on those shipments. Petition at 23-24 and 31, citing Section 4.02, of the Fourth Supplement. Per the terms of Section 4.02, K&O does not pay an asset use fee for “{{
}}.”

However, although the Petition states K&O has interchanged cars with BNSF, the Petition is silent on the terms and conditions for such interchange, including whether BNSF terminated the traffic at one of the three locations exempted from the Asset Use Fee under Section 4.02. There are no provisions in the proposed lease covering interchange with BNSF in any respect. Also, the Asset Use Fee exemptions/reductions apply to traffic terminating at or near the interchange locations, so there is no significant line-haul segment beyond K&O’s network, and therefore no competitive pressure from BNSF. Hence, application of the full inflated Asset Use Fee to bar the traffic is not needed because there is no line-haul traffic to be funneled to UP.

5. K&O’s “Revenues for Investment” Argument Fails

K&O also tries to justify the continuation of its lease arrangement with UP by claiming that the interchange commitment and Asset Use Fee are part of an economic structure that “ensure[s] that K&O can generate the revenues necessary to continually reinvest in the Lines,

while simultaneously providing UP with commercial incentives to keep the infrastructure in the hands of a localized customer-focused short line operator.” Petition at 16. The initial flaw in this argument is that the “economic structure” has the effect of restricting the revenues K&O can generate from traffic originating or terminating on the leased lines. The Asset Use Fee actually reduces K&O revenues in two ways. First, it precludes and/or restricts K&O from earning revenues by moving traffic through interchanges with other railroads, thereby restricting competition and foreclosing markets to non-UP served destinations. Second, it ensures that UP will retain leverage when establishing revenue divisions on all shipments the Asset Use Fee forces over its network, putting downward pressure on K&O’s share of revenue per unit. It is a significant understatement that this structure provides UP with “commercial incentives to keep the infrastructure in the hands of” K&O. Petition at 16.

More significantly, K&O’s claim that the economic structure ensures K&O has revenues to invest in the leased track falls apart quickly under scrutiny. In the first place, because the Asset Use Fee forecloses K&O from growing its traffic base to include movements it could interchange with CXR or railroads other than UP, K&O’s overall revenues are, by definition, less than they would be if the Asset Use Fee did not exist. This may have not been an issue prior to 2018 because little or no revenue opportunities existed west of Towner, that is no longer the case.

Second, to the extent K&O has in fact reinvested revenues received from traffic interchanged with UP in the leased track, such investment has been in a manner that advances the lease’s anti-competitive purpose. As an initial observation, K&O characterizes the lease track as “light-density agricultural lines” when UP first leased them to CKRL in 1997, Petition at 9, 13, 16, and 28, but K&O offers no actual evidence that this was the case. Since K&O did not acquire the lines until 2001, its statements are speculative. In fact, the 1997 Lease indicates otherwise.

Specifically, Section 6.01 of the 1997 Lease required CKRL to maintain the track to Federal Railroad Administration (“FRA”) {{ }}, which means capable of operating speeds to of a least {{ }} mph. Such a {{ }} is not typically applied to so-called light density lines. K&O inherited that maintenance responsibility in 2001 and was responsible for meeting it for the next 17 years. The standard was reduced to {{ }} by the Third Supplement executed in 2018, and it remains the contractual standard K&O must meet for all the leased track.

However, on information and belief from interactions and discussions with K&O and other sources, Weskan understands that the 65.0-mile segment of leased track running between Scott City and Towner – more than one third of the track under the lease - has been allowed by K&O and UP to deteriorate to FRA “excepted track” status, which is no more than 10 mph, the lowest track classification recognized by the FRA. To Weskan’s knowledge the leased track from Scott City to Towner has been in this deteriorated condition since at least 2020, and possibly longer. While K&O states (without any evidence, back up data, or verified testimony) that it has invested over {{ \$ }} million in the “leased lines” between 2012 and 2021, K&O does not state *where* such investment was expended. Given the “excepted track” status of the tracks from Scott City to Towner, it appears that the bulk of these capital funds were expended on the other 100.98 miles of Leased track that K&O uses to originate/terminate shipments for interchange with UP.

Accordingly, K&O has not demonstrated that any investment it may have made in the remaining tracks covered by the lease was expended on the Scott City to Towner segment. Notwithstanding the fact that this is a breach of the lease’s maintenance provisions, the poor state of the track between Scott City and Towner should not be surprising to the Board for at least two reasons. First, because the Asset Use Fee economically forecloses any traffic originating on the

leased track from moving westward from Scott City for interchange with CXR, K&O cannot generate revenues to support investment in this segment. It is instead incentivized to invest in the other segments of the leased tracks K&O uses to move traffic for interchange with UP. These disincentives to invest in the segment from Scott City to Towner reinforce the lease's overall anti-competitive purpose – to force all line-haul interchange traffic over UP's network.

Second, it should also not be surprising that there is no evidence that UP has objected to K&O's ongoing breach of its contractual obligation to maintain UP's railroad asset to FRA {{ }} standards. This is because the poor track condition and slow 10 mph speed between Scott City and Towner creates a physical impediment to efficient and cost-effective service by K&O to the CXR interchange. This is also consistent with UP's overall anti-competitive intent to favor its own interchanges with K&O, and to discourage or foreclose any traffic from moving west to the Towner Line. Moreover, the physical impediment posed by the poor track condition not only applies to traffic originating or terminating on the leased tracks, but it also adversely affects traffic moving west from locations on K&O owned and operated track, such as Weskan's grain that originates from Weskan's Scott City East and Scott City Kirk facilities. Specifically, the poor condition of the track from Scott City to Towner makes such movements inefficient and more costly than if the tracks were maintained to {{ }} standard as the lease requires, much less the original {{ }} standard.

6. The Duration of the Interchange Commitment is Disqualifying

In *Rev. of Rail Access* the Board emphasized that it would examine the duration of interchange commitments, and that “[p]arties should expect a higher level of scrutiny on agreements that . . . go on in perpetuity.” *Rev. of Rail Access* at 15. The interchange commitment in the proposed lease arrangement, which K&O desires to keep in place effectively in perpetuity,

cannot withstand such scrutiny. An interchange commitment has now been in place and has heavily discouraged, if not foreclosed altogether, competition between railroads and the expansion of rail shipping opportunities at K&O interchanges, including Towner, for nearly 30 years. As summarized above, the imposition of the interchange commitment by UP in the 1997 Lease was arguably contrary to public policy because it prevented the development of rail traffic on the Towner Line after the UP/SP merger immediately after UP pledged to sell the line to the State of Colorado purportedly so service on it could be restored. Instead, after the merger the use of the Towner Line diminished to the point it was on the verge of being abandoned and physically scrapped when CXR acquired it through the Board's "feeder line" process under 49 U.S.C. §10907. Be that as it may, K&O and UP perpetuated and solidified the barrier established in 1997 with the introduction of the Asset Use Fee in 2019. This increasing surcharge simultaneously discourages K&O from growing its traffic base while ensuring that UP will retain monopoly pricing power on existing shippers.

The proposed lease is also subject to five 10-year extensions beginning in September 2027. Despite the economic barrier at Towner appearing to be against K&O's interests because it forecloses new opportunities for traffic, K&O has in its Petition enthusiastically embraced the prospect of using all the 10-year extensions and then some, coveting the benefits to it personally from paying {{ }} to UP while continuing to defer maintenance.. Petition at 29. However, Weskan has demonstrated that K&O's {{ t }} arrangement perpetuates the anti-competitive purpose of the lease because the revenues K&O receives are spent to further its movement of traffic to UP interchanges, primarily to the detriment of Weskan and other shippers desiring access to competitive transportation options that are physically available, and also to the detriment of CXR, the conduit to that competitive marketplace. K&O acknowledges that its {{ }} rent

arrangement comes at the cost of the greater public interest in encouraging rail competition and efficient rail service systemwide (such tradeoff euphemistically called “UP’s corresponding commercial protection”). *Id.* The Board should end this arrangement.

In the *Denial Decision* the Board stated:

The Board’s public interest inquiry is not limited to the impact of the transaction on a complaining shipper but rather concerns the impact on rail transportation as a whole. *See Rev. of Rail Access*, EP 575 et al., slip op. at 8 (explaining factors that the Board will consider when assessing whether an interchange commitment is in the public interest).

Denial Decision at 10. In its Petition, K&O has revealed it does not care about the impact of the transaction on transportation as a whole (it certainly does not care about the impact on Weskan), and that it instead expects to enjoy the personal benefits of its {{ }} lease arrangement with UP “for the next several decades.” Petition at 29. In short, unless this lease arrangement is modified or nullified by the Board, K&O and presumably UP have the incentives and mutual desire for it to continue in near perpetuity. When analyzed under the heightened level of scrutiny that is justifiably reserved for paper barriers that are intended by both lessor and lessee to “go on in perpetuity,” combined with all the other detriments to this lease transaction, approving the lease with the paper barrier at issue in this proceeding cannot and will not advance “rail transportation as a whole.”

B. The RIA is Not a “Safety Valve” for Weskan and Other Shippers

The Petition attempts to mitigate the clear harm of the interchange commitment by raising for the first time an argument that the Railroad Industry Agreement (“RIA”) provides a “safety valve” to Weskan and other shippers to the interchange commitment in the lease and UP anticompetitive behavior. Petition at 32-33. This new argument fails for numerous reasons. First

and foremost, rail shippers cannot directly seek any relief directly pursuant to the terms of the RIA. The RIA is a limited agreement entered into in 1998 between the Association of American Railroads (“AAR”) and the American Short Line and Regional Railroad Association (“ASLRRA”). The two railroad associations entered into the RIA to voluntarily address various matters between Class I and Class II/III short lines, including certain disputes between railroads over paper barriers and other issues in certain circumstances. *Rev. of Rail Access* at 5.

The AAR and ASLRRA did not seek the Board’s approval of the RIA’s provisions dealing with paper barriers, *Id.* at 5, and it remains a voluntary arrangement between railroads. Since its inception, the RIA has been criticized by shippers as not being useful to them or effective at addressing paper barriers. *Id.* at 6-7 . Recognizing these deficiencies, the Board has long held that that “[t]he existence of the RIA, the private industry agreement between Class I railroads and short line railroads, does not preclude or otherwise affect the ability of shippers to seek relief from the Board.” *Id.* at 15. Moreover, there are very few mentions of the RIA in Board decisions, further demonstrating its irrelevance to the resolution of disputes between shippers and railroads over interchange commitments.

Moreover, there is no effective way for a shipper to directly seek relief under the terms of the RIA. Instead, shippers must try to enforce the terms of the RIA against a Class I railroad through a participating Class II or Class III carrier which may be reluctant to commence such an action. In this case that is K&O, which has conceded in the Petition that it is not willing or able to convince UP to modify the lease terms to permanently eliminate the Asset Use Fee, and in fact would be satisfied if it remained in place for decades to come. This explains why K&O has never produced any evidence of its use of any of the options available to it under the RIA to try to eliminate the surcharge. Nor has K&O at any time prior to the Petition mentioned the RIA as a

potential “safety valve” for Weskan. K&O also fails to provide any examples of K&O successfully invoking the terms of the RIA against UP or any other Class I railroad in any other contexts to seek relief from an interchange commitment on behalf of one of K&O’s customers.

K&O’s discussion of UP’s “adherence to RIA principles” is entirely in the context of UP’s occasional voluntary actions to waive or reduce the Asset Use Fee for its own purposes. Petition at 32-33. There is thus no support for the general statement that “K&O’s presence as a short line operator preserves the RIA safety valve for shippers than UP cannot practically compete for a routing.” Petition at 15. K&O grossly overstates the extent to which the RIA contains “competitive levers” available to Weskan and other shippers on the leased lines that they would “lose access to” should UP’s refusal to change any of the lease terms result in UP resuming service over the tracks.

C. The Transaction Still Does not Meet the Requirements of 49 U.S.C. §

1. The Proposed Transaction is Contrary to the Rail Transportation Policy

The Board’s conclusions in the *Denial Decision* that there was “an insufficient record to permit the Board to find that regulation is not necessary to carry out the policy of the RTP,” *Denial Decision* at 7-8, should not be changed by the Petition. If anything, the Petition reinforces the Board’s prior conclusion. Weskan repeats its assertion in response to K&O’s first Petition for Exemption in Docket No. FD 36489⁹ that, in today’s highly consolidated railroad industry where only two Class I railroads operate in large regions of the country and serve many customers that do not have railroad transportation alternatives, *any* lease of a line of railroad owned by a Class I railroad to a short line that contains a provision prohibiting or restricting the ability of the lessee

⁹ Weskan Reply to Petition for Exemption, filed January 17, 2025.

to provide rail service to shippers on reasonable request should on its face be contrary to the RTP. This policy consideration has become more prevalent over the course of this dispute with the proposal of UP and Norfolk Southern Railway to merge in Docket No. FD 36873, *Union Pacific Corporation and Union Pacific Railroad Company – Control – Norfolk Southern Corporation and Norfolk Southern Railway Company Corporation*.

In this case, the interchange commitment has been in place for nearly 30 years and UP and K&O seek after-the-fact authority from the Board to permit them to amend the original interchange commitment to make it more restrictive, and to permit it to be renewed in near-perpetuity. The Asset Use Fee inserted in the Fourth Supplement on its face economically prohibits K&O from interchanging traffic with CXR and continues the 1997 Lease’s original intent and effect of strongly incentivizing all traffic to flow east to be interchanged with UP. The proposed transaction would therefore harm not only Weskan by continuing to keep it from shipping grain west by rail to its Stockton Facility from the Whitelaw and other facilities Weskan might acquire or develop on the leased tracks, it would continue to harm other Kansas shippers by preventing them from shipping commodities west over the CXR’s track to NA Junction and points beyond. Finally, continuation of the paper barrier would continue to prevent CXR from developing the Towner Line and keeping it viable.

K&O’s arguments for why continuing the lease transaction and paper barrier are consistent with the Rail Transportation Policy all require the Board to first affirm the continuation of the bargain between UP and its two lessees to restrict competition and market opportunities in exchange for discounted {{ }} rent. *See* Petition at 12 (characterizing this proceeding as “the routine renewal of a 25-year old lease” and asking the Board to simply maintain “an operational *status quo*”). However, Weskan maintains for the reasons set forth above and raised in the other

proceedings involving this matter that continuation of a lease that restricts competition and rail options for shippers in exchange for K&O paying no rent is directly contrary to the RTP. It is contrary to 49 U.S.C. §10101(1) because instead of allowing “to the maximum extent possible, competition for the demand for services to establish reasonable rates for transportation by rail,” it intentionally raises an impediment to competition between UP and BNSF, and CXR’s ability to compete for business originating or terminating in Kansas. It also violates §10101(3) because the interchange commitment would impede both CXR and BNSF from earning adequate revenues.

The proposed transaction also violates §10101(4) and (5) because it would discourage CXR’s development of the Towner Line to effectively compete with commercial trucking of grain in western Kansas and Colorado. This is directly contrary to the policies behind the Board’s Feeder Line program, whereby parties like CXR may purchase underutilized lines of railroad and restore common carrier service over them.

The proposed transaction also discourages the honest and efficient management of railroads (§10101(9)) by economically foreclosing shorter western routes via CXR and forcing all traffic to move hundreds of miles east to interchanges with UP before they go to western destinations. As discussed above, K&O’s claim that the transaction is consistent with §10101(9) because the lease structure provides it with revenues to maintain the leased tracks is belied by the fact that K&O has not maintained the Scott City to Towner Line to the standards required in the lease, to the detriment of Weskan, other shippers, and CXR.

Further, by its express terms, the proposed transaction also violates §10101(12) because, by design, it would continue to concentrate market power over the railroad transportation of grain produced in western Kansas in UP and K&O, which would continue to provide UP and K&O the

power to discriminate against Weskan and favor other shippers on the leased tracks at the expense of Weskan.

Finally, Weskan reiterates that the proposal is inconsistent with §§10101(2)(7), and (15), because it should not be the RTP to expeditiously approve lease transactions that create (or in this case continue) barriers to competition, thwart the ability of other carriers to earn adequate revenues, and are not operationally efficient. *See* Docket No. FD 36849, Weskan Reply to Petition for Exemption at 9.

For all of the foregoing reasons, the Petition should be denied because the regulation of the transaction under 49 U.S.C. §10902 is necessary to carry out multiple aspects of the Rail Transportation Policy.

2. The Transaction is not Limited in Scope

Because the Board based its denial of the Petition on the lack of an evidentiary record on the RTP issues, it did not reach the second prong of §10502(a)(2), i.e., that “(A) the transaction . . . is of limited scope; or (B) the application in whole or in part of the provision is not needed to protect shippers from the abuse of market power.” Weskan reiterates that the proposed transaction fails both of these requirements. First, Weskan continues to maintain that the transaction is not of limited scope because it is not limited to the 81.5-mile segment of leased track that connects to the Towner Line. The presence of the paper barrier affects the ability of Weskan and other grain shippers in western Kansas from economically reaching new markets using the Towner Line that include ports in the southwest and western U.S. and other western destinations served by BNSF

and UP at rates and service terms established by competition. The Petition's attempt to again characterize this transaction as limited to the leased tracks and the single state of Kansas is wrong.¹⁰

3. Regulation of the Transaction is Necessary to Protect Shippers from Market Power Abuse

Regulation of the proposed transaction is clearly needed to protect Weskan, other shippers and CXR from market power abuse. There can be no other reasons for the presence of the paper barrier other than to continue to maintain UP's and K&O's control over the markets for grain and other transportation in this region of Kansas, Colorado. The continuation of the paper barrier will also continue to effectively foreclose opportunities for Weskan and other shippers from utilizing BNSF to haul their commodities to destinations beyond N/A Junction., and for CXR to develop traffic on the Towner Line. The Board correctly concluded that the fact that UP may choose to waive or reduce the Asset Use Fee at its discretion does not moot any of the Board's concerns or change the public interest analysis. *Denial Decision* at 10. The corresponding fact that UP could reinstate the full amount of the surcharge at its discretion and restrict competition is what makes the arrangement unacceptable.

D. The Need for Limited Discovery

As noted in this Reply the Petition contains numerous factual allegations K&O cites in support of its arguments for after-the-fact approval that have no evidentiary support and are incomplete in any event. The Petition is not verified, and nor does it include any exhibits backing

¹⁰ K&O's assertion that the *Denial Decision* did not "identify any deficiencies in K&O's prior demonstration that this transaction is limited in scope" is wrong. Petition at 35. In fact, the *Denial Decision* summarizes how the Board was not satisfied with K&O's discussion of this issue in the first petition for exemption and invited K&O to provide additional evidence and argument explaining how the transaction is limited in scope. *Denial Decision* at 4. The *Denial Decision* noted that K&O declined the Board's invitation. K&O has never substantively refuted Weskan's assertions that the impacts of the transaction are far broader than simply the leased tracks.

up the data and numbers cited by K&O to support its arguments. For example, while K&O asserts repeatedly that its commercial arrangement with UP provides K&O with revenues to invest in “the leased Lines,” the Petition contains no support for or breakdown by track segment of its claim K&O expended {{ \$ }} million “on the leased Lines” between 2012 and 2021. Moreover, this time period includes years when the leased track was supposed to be maintained to {{ }} standards which was reduced to {{ }} standards in 2018, and subsequently fell into excepted track status around 2020 (on information and belief). Additionally, K&O has not provided any information on investments made to the leased lines after 2021, which corresponds to the condition of the track from Scott City to Towner falling to excepted track status in what appears to be a clear breach of the lease agreement. Details of the investment K&O has asserted in its arguments for preserving the *status quo* are critical to the Board’s analysis of the pros and cons of the interchange commitment.

Moreover, as discussed above, K&O has provided incomplete statements and no supporting data or contextual information regarding the interchanged traffic it quantified in its Petition.

The unverified and unsupported factual allegations in the Petition should not be taken at face value. Weskan believes that the Petition should be denied again. However, should the Board accept the Petition and commence a proceeding under 49 U.S.C. §10502, Weskan respectfully requests the Board to issue a procedural schedule that allows for a brief discovery period on these and other relevant factual issues raised by the Petition and allows for supplemental filings by the parties.

E. Conclusion

In summary, K&O seeks the Board's approval of a lease arrangement that, by design, insulates UP from any competition from other railroads for the transportation of Weskan's grain and other shipper's commodities that originate or terminate on the tracks covered by the lease. The arrangement would preserve a nearly 30-year barrier to such service, which K&O desires to extend in perpetuity because it benefits K&O individually. However, the benefits to UP and K&O are accrued at the expense of Weskan, other rail shippers, CXR, BNSF, and other railroads that could interchange with K&O without the lease restrictions. The harms of preserving the *status quo* into the indefinite future far outweigh the commercial benefits accruing to K&O and UP.

Accordingly, the Board should once again deny K&O's petition for approval of the lease including the Asset Use Fee. If the Board accepts the petition and commences a proceeding, Weskan requests that the Board institute a procedural schedule that allows a period for discovery on relevant factual issues.

Respectfully submitted,

/ss/ Thomas W. Wilcox

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June 15, 2026

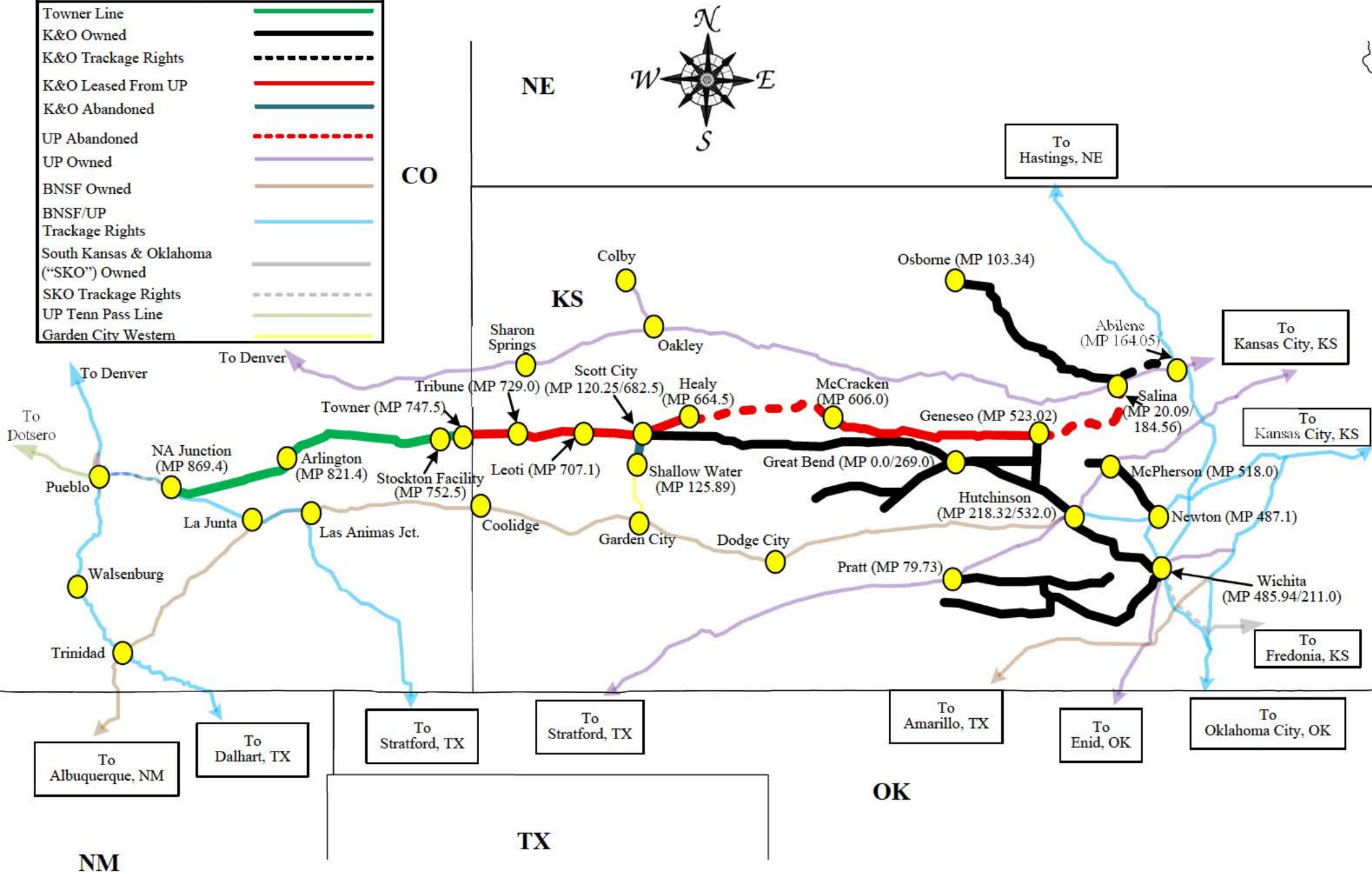
Exhibit A

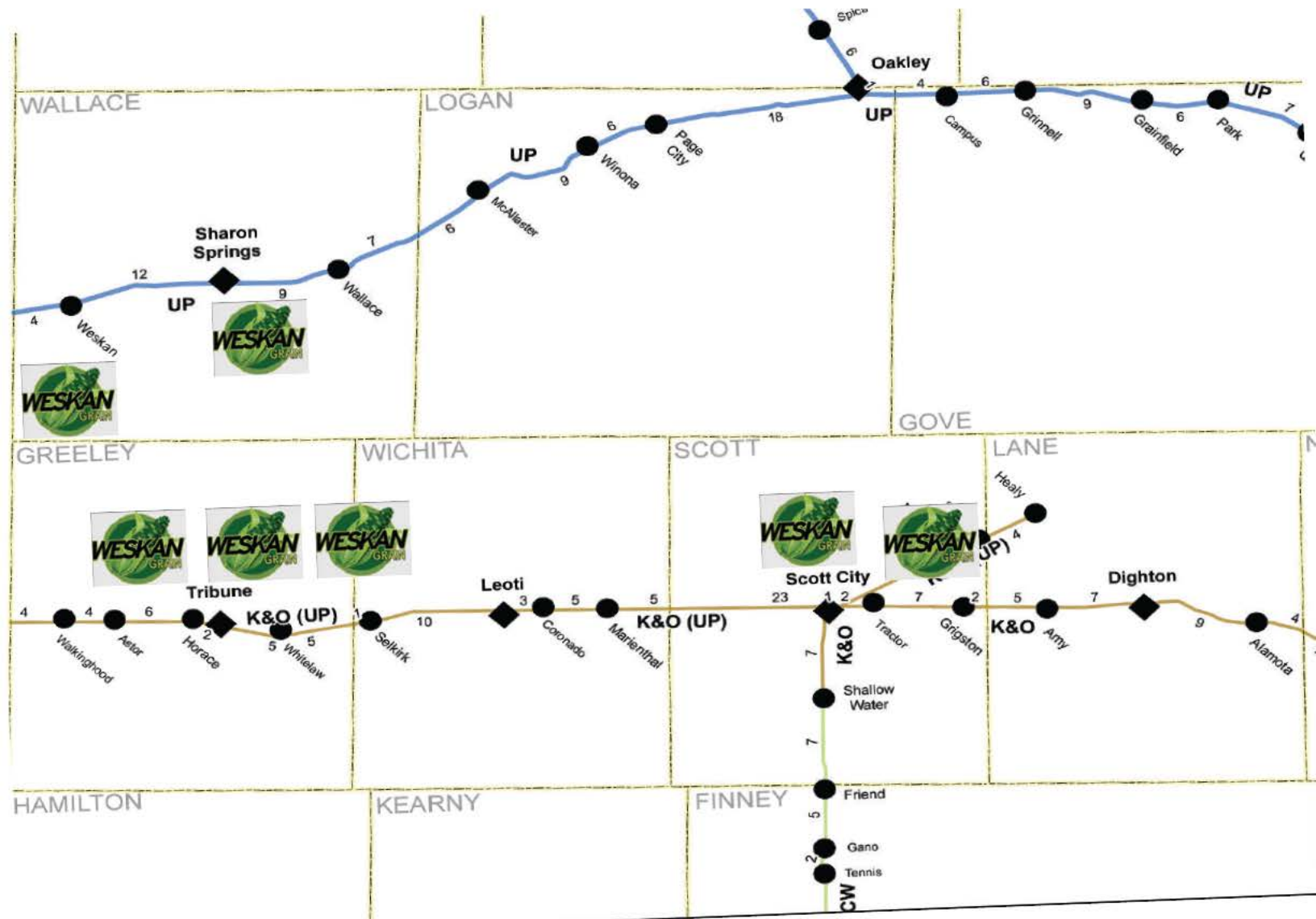
Maps

Schematic of K&O Rail Line and Towner Line -- Ownership (Colorado and Kansas)

Exhibit A
Page 1 of 2

Legend	
Towner Line	
K&O Owned	
K&O Trackage Rights	
K&O Leased From UP	
K&O Abandoned	
UP Abandoned	
UP Owned	
BNSF Owned	
BNSF/UP Trackage Rights	
South Kansas & Oklahoma ("SKO") Owned	
SKO Trackage Rights	
UP Tenn Pass Line	
Garden City Western	





CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of June, 2026, a copy of the foregoing Reply was served by electronic mail on representatives of the Kansas & Oklahoma Railroad, LLC and Union Pacific Railroad Company.

/ss/ Thomas W. Wilcox
Thomas W. Wilcox