

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**

**MOTION TO SUBMIT REPLY TO UNION PACIFIC REPLY
TO PETITION FOR EXEMPTION**

Weskan Grain LLC (“Weskan”) hereby submits this motion requesting the Board to accept for filing in this docket the attached reply to the Reply to Petition for Exemption filed by Union Pacific Railroad Company (“UP”) on June 15, 2026 (“UP Reply”). Weskan asks the Board to waive the application of 49 C.F.R. §1104.13(c) in this instance because UP’s reply to the renewed Petition for Exemption (“Petition”) filed in this docket by the Kansas & Oklahoma Railroad, LLC (“K&O”) on May 4, 2026 is the first time in three proceedings UP has appeared as a party of record and attempted to substantively assert a defense of the previously rejected lease and interchange commitment in dispute. In both Docket No. FD 43030, *Kansas & Oklahoma Railroad, Inc. – Acquisition Exemption – Central Kansas Railway, LLC* and Docket No. FD 36849, *Kansas & Oklahoma Railroad, LLC – Lease and Operation Exemption with Interchange Commitment – Union Pacific Railroad Company*, UP submitted very brief pleadings that provided no substantive

information on UP's positions regarding the formation and purpose of either the proposed lease arrangement for which K&O seeks after-the-fact approval, or the Asset Use Fee that UP insisted be included in the Fourth Supplement at a prohibitively high level K&O admits was selected solely by UP.

Indeed, UP refused to offer a defense of the interchange commitment in Docket No. FD 36849 after the Board directed K&O to provide supplemental information to support its petition for exemption in that proceeding and "strongly encouraged [UP] to participate in this briefing, either by filing its own comment or by filing jointly with K&O." Docket No. FD 36849 (decision served June 25, 2025) at 3. The supplemental information sought from K&O and UP included:

[D]iscuss[ing] the proposed interchange commitment within the framework articulated in Review of Rail Access, EP 575, slip op. at 15 (listing non-exhaustive factors that will inform the Board's case-by-case analysis of interchange commitments). The supplement also should further explain why the proposed transaction, including the amended interchange commitment, satisfies 49 U.S.C. § 10502(a)'s requirements. For example, K&O should elaborate on its assertion that "favorable Board action"—including approval of the proposed interchange commitment—"would not run [sic] thwart any" of the objectives of the rail transportation policy (RTP) set forth at 49 U.S.C. § 10101. (Pet. 8.) K&O will also be directed to provide additional evidence and argument explaining why regulation is not needed to protect shippers from an abuse of market power. See 49 U.S.C. § 10502(a)(2)(B). K&O may also provide additional evidence and argument explaining how the transaction is limited in scope. See 49 U.S.C. § 10502(a)(2)(A).

Id. UP (and K&O) declined to provide the Board with any of the requested supplemental information. Had UP done so, Weskan would have been allowed to prepare a reply. *Id.* In this proceeding, UP has finally attempted to offer a defense of the rejected lease arrangement and interchange commitment in a 78-page filing that includes two lengthy verified statements, one from UP's Vice President of Marketing and Sales Operations, and the other from a Professor of Economics at Georgetown University and a partner in the economic consulting firm of Econic

Partners. Moreover, among the arguments in the UP Reply is “a discussion of the proposed interchange commitment within the framework articulated in” Docket No. EP 575, part of the information UP was strongly encouraged to submit in Docket No. FD 36849. UP Reply at 10-14.

The fact that UP’s filing is a reply filing should not preclude Weskan from responding to it in these circumstances, where the document is tantamount to an opening submission. Moreover, because of UP’s previous silence Weskan could not have anticipated much of the substantive information and testimony submitted by UP in Weskan’s reply to K&O’s petition. Docket No. FD 36714 (Sub-No. 1), *Sunflower State Industrial Railway, LLC – Petition for Declaratory Order* (Served March 28, 2025) at 2, note 3. Fundamental fairness and the interest in assembling a complete record dictate that Weskan should be permitted to respond to UP’s Reply. *City of Alexandria, Va.—Pet. for Declaratory Ord.*, FD 35157, slip op. at 2 (STB served Nov. 6, 2008).¹

Accordingly, Weskan asks the Board to grant this motion and accept for filing in this docket the attached brief reply to the UP Reply and the accompanying verified statement of Daniel L. Fapp and Timothy D. Crowley, Senior Vice President and President, respectively, of the economic consulting firm L.E. Peabody & Associates, Inc. Messrs. Fapp and Crowley focus particularly on responding to the written testimony of Dr. Nathan Miller. They also rebut many of the other assertions made by UP and provide additional confirmation that the Board should not change its prior denial of the lease agreement and interchange commitment, but if the Board accepts the Petition and commences a proceeding under 49 U.S.C. §10502(b) it should establish a procedural schedule that allows for discovery and the submission of supplemental materials.

¹ Prior to filing this Motion, counsel for Weskan contacted counsel for UP to obtain UP’s consent for Weskan to submit a reply under these circumstances. However, UP declined to so consent.

Respectfully submitted,

/s/ Thomas W. Wilcox

Thomas W. Wilcox

Law Office of Thomas W. Wilcox, LLC

1629 K. Street NW, Suite 300

Washington, D.C. 20006

(202) 508-1065

tom@twilcoxlaw.com

Attorney for Weskan Grain LLC

July 6, 2026

ATTACHMENT

**REPLY AND VERIFIED
STATEMENT**

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 UNION PACIFIC RAILROAD COMPANY’S REPLY
TO PETITION FOR EXEMPTION**

Weskan Grain LLC (“Weskan”) hereby submits this reply the Reply to Petition for Exemption filed by Union Pacific Railroad Company (“UP”) June 15, 2026 (“UP Reply”) in response to and support of the Petition for Exemption (“Petition”) filed by Kansas & Oklahoma Railroad, LLC (“K&O”) in this proceeding on May 4, 2026. The Petition seeks after-the-fact exemption authority to enter into the exact same lease arrangement between K&O and UP that the Board declined to approve in Docket No. FD 36849, *Kansas & Oklahoma Railroad, LLC – Lease and Operation Exemption with Interchange Commitment – Union Pacific Railroad Company* (served June 25, 2025).

The UP Reply marks the first time that UP has attempted to make a substantive defense of the interchange commitment that has been the subject of numerous pleadings filed by Weskan and K&O in three Board proceedings, starting with Docket No. FD 34030, *Kansas & Oklahoma*

Railroad, Inc. – Acquisition Exemption – Central Kansas Railway, LLC and continuing into Docket No. FD 36849, and now this proceeding. For the most part, UP parrots many of the arguments asserted by K&O in support of its Petition to which Weskan has previously replied.

These include:

1. UP has unilaterally granted temporary waivers of the Asset Use Fee in its sole discretion. *See, e.g.* UP Reply at 2,9, 20.
2. The interchange commitment allegedly provides UP with “appropriately tailored and fair compensation for K&O’s use of its lines and thus has the incentive to continue leasing the lines.” *Id.* at 2
3. Absent an interchange commitment, UP would allegedly need to charge a significant flat rental fee to K&O. *Id.*
4. The Railroad Industry Agreement (“RIA”) allegedly provides a “backstop” to Weskan and other shippers even though shippers are not part of the process and indeed such waivers are sought and considered without any shipper input. *Id.* at 9, 25-27,
5. UP alleges the interchange commitment is not “perpetual” even though there has been an interchange commitment in the lease for the subject tracks since 1997, and the current amended lease may be extended by the parties for another {{[REDACTED]}} years at K&O’s option, which extensions K&O has endorsed in its Petition. *Id.* at 27.

Weskan incorporates by reference into this Reply its responses in Weskan’s Reply to the Petition to these and other arguments that were also raised by K&O.

The UP Reply also advances several other justifications asserted by UP in defense of the previously rejected lease and interchange commitment and includes verified statements from Daniel McLaughlin, Vice President of Marketing and Sales Operations for UP, and Nathan H. Miller, Professor of Economics of Georgetown University and a partner in the economic consulting firm of Econic Partners. The many flaws in Dr. Miller’s testimony are summarized and discussed in detail in the attached verified statement of Daniel L. Fapp and Timothy D.

Crowley, Senior Vice President and President, respectively, of the economic consulting firm L.E. Peabody & Associates, Inc. (“Fapp/Crowley V.S.”).

Messrs. Fapp and Crowley also address other assertions in UP’s Reply, such as its disclosure in this proceeding that the initial level of the Asset Use Fee was allegedly developed by UP “to reflect the average margin for comparable traffic (i.e., manifest grain traffic originating in the Wichita area) in a calendar year. In other words, the fee was designed to compensate Union Pacific for the contribution it would have earned from covered traffic moving over the leased lines if Union Pacific were operating the line instead of K&O.” UP Reply at 8. Messrs. Fapp and Crowley explain how the Asset Use Fee is *not* a neutral compensation mechanism and does *not* promote competition. Rather, it promotes the control of rail freight traffic by UP to the detriment of Weskan and other rail shippers whose rail transportation options are limited and, in the case of traffic that would interchange with the Colorado Pacific Railroad LLC (“CXR”) at Towner, CO, foreclosed entirely by making such transportation economically infeasible.

The Fapp/Crowley V.S. also rebuts numerous other points made in UP’s Reply about the purpose and effect of the interchange commitment.

UP glosses over the fact that the lease agreement is structured so as to give UP control over the ability of Weskan and other shippers to transport commodities via routes and carriers of their choosing. While UP extolls the virtues of it unilaterally granting waivers to permit certain traffic to move, the fact that it has the ability to cause that traffic to cease (or in Weskan’s case, never start) at its sole discretion by application of the Asset Use Fee is the primary reason the lease is not consistent with the public interest. Accordingly, UP’s statement that “there is no potential for harm resulting from the interchange commitment in the lease amendments; the interchange

commitment neither forecloses interchange nor reduces competitive options available to shippers,” UP Reply at 9-10, is simply untrue. The fact that UP alone can control the flow of interchange traffic originating or terminating on the leased lines through the presence and application of the Asset Use Fee means that there is a constant “potential for harm resulting from the interchange commitment,” and the full application of the fee does in fact “foreclose interchange” between K&O and CXR at Towner, which “reduces competitive options available to” Weskan and other shippers. Messrs. Fapp and Crowley also explain how the limited waivers UP has granted either (1) facilitated movement of traffic to its own network or (2) permitted movement of traffic with no economic value to UP that left shippers on the leased line unprotected and with no recourse through the RIA. Fapp/Crowley V.S. at 14-16.

UP’s assertions about the origin, purpose and intent of the Asset Use Fee also largely parrot K&O’s explanations. Weskan reiterates that even if the Asset Use Fee concept arose in part from a commercial dispute over payment of a penalty owed by K&O under the lease’s prior interchange commitment terms, neither UP nor K&O can dispute that: (1) UP established the {{ \$██████ }} per car Asset Use Fee after CXR acquired the Towner Line in 2018 and began rehabilitating it and the connections to UP and BNSF Railway Company at NA Junction, CO; (2) the Asset Use Fee is in some cases multiples of K&O’s rates for service to its customers in Kansas; and (3) full application of the Asset Use Fee to potential K&O interchange with CXR at Towner economically forecloses that traffic and strongly incentivizes the traffic to move east to a K&O interchange with UP. Moreover, the fact that K&O was temporarily the operator of the Towner Line (although it conducted no discernable operations) does not eliminate the possibility that UP established the {{ \$██████ }} charge at least in part for the purpose of ensuring it maintained veto power over the interchange of traffic with CXR long term. UP Reply at 17.

In summary, UP's Reply for the most part repeats the flawed arguments made by K&O in support of after-the-fact authority for the lease arrangement, and the newer information and arguments it provides only reinforces the anti-competitive purpose and effect of the interchange commitment for all the reasons discussed in the Fapp/Crowley V.S., this Reply, and Weskan's Reply to K&O's Petition. The Board should deny the renewed Petition for the same reasons it denied it the first time, but if it does not deny the Petition and commences a proceeding under 49 U.S.C. §10501(b), the Board should issue a procedural schedule that permits discovery on the factual areas referenced in Weskan's reply to the Petition and allows the parties to submit supplemental information.

Respectfully submitted,

/ss/ Thomas W. Wilcox

Thomas W. Wilcox

Law Office of Thomas W. Wilcox, LLC

1629 K. Street NW, Suite 300

Washington, D.C. 20006

(202) 508-1065

tom@twilcoxlaw.com

Attorney for Weskan Grain LLC

July 6, 2026

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. FD 36849 (Sub-No. 1)

)
)
) **Kansas & Oklahoma Railroad LLC --**
) **Lease and Operating Exemption With**
) **Interchange Commitment – Union Pacific**
) **Railroad Company**
)
)
)

Verified Statement

of

Daniel L. Fapp
Senior Vice President

and

Timothy D. Crowley
President



On Behalf Of

WESKAN GRAIN LLC (WESKAN)

Date: July 6, 2026

<u>TABLE OF CONTENTS</u>	<u>PAGE</u>
I. Introduction.....	1
II. Summary of Findings.....	2
III. The Asset Use Fee is Anticompetitive.....	4
A. The Asset Use Fee Forces Eastern Movements on UP.....	5
B. The Asset Use Fee Limits K&O's Reinvestment and Ability to Generate Traffic.....	7
C. The Asset Use Fee Bolsters UP's Operating Ratio.....	9
D. The Asset Use Fee Distorts K&O's Pricing and Interchange Decisions.....	11
E. The Asset Use Fee Does Not Enhance Competition	14
IV. The Absence of CXR Interchange Traffic	18
V. Relevant Timeline	21
VI. The RIA Waiver Mechanism	24

LIST OF EXHIBITS

Exhibit No.	Exhibit Description
(1)	(2)
1	Daniel L. Fapp Statement of Qualifications
2	Timothy D. Crowley Statement of Qualifications

I. INTRODUCTION

We are Daniel L. Fapp and Timothy D. Crowley, Senior Vice President and President, respectively, of L. E. Peabody & Associates, Inc., an economic consulting firm that specializes in solving economic, transportation, marketing, financial, accounting, and fuel supply problems. We have spent most of our consulting careers of 28 and 24 years, respectively, evaluating railroad revenue, operations, capacity, costs, and profitability and pricing issues for shippers, producers, railroads and government agencies. Our credentials are included as Exhibit Nos. 1 and 2 to this Verified Statement (VS), respectively.

We were requested by Counsel for Weskan to respond to Union Pacific Railroad Company's (UP) Reply to Petition for Exemption filed June 15, 2026 (UP Reply), in the instant proceeding, including specifically responding to the Verified Statement of Dr. Nathan Miller (Miller VS) supporting the UP Reply.

The results of our review and analyses are summarized in the remainder of this VS under the following topical headings:

- II. Summary of Findings
- III. The Asset Use Fee Is Anticompetitive
- IV. The Absence of CXR Interchange Traffic
- V. Proper Timeline
- VI. The RIA Waiver Mechanism

II. SUMMARY OF FINDINGS

Based on our review and analyses of the UP Reply and Dr. Miller's Verified Statement in this proceeding, we have reached the conclusions set forth below:

1. The Asset Use Fee is not a neutral compensation mechanism. It is calibrated to the value of the eastbound routing UP seeks to preserve, using the UP's average margin for grain traffic originating in the area around Wichita as its benchmark.
2. The Asset Use Fee, originally established by UP at {{REDACTED}} per carload in the Fourth Supplement to the 1997 Lease, and currently set at {{REDACTED}} per carload pursuant to Section 4.03 of the Fourth Supplement¹ imposes a high cost on the westbound routing over Colorado Pacific Railroad (CXR), advantaging the UP routing over the CXR routing by over {{REDACTED}} per car through the lease itself rather than through competitive pricing or service quality.
3. The Asset Use Fee was not designed to address competitive diversion. The {{REDACTED}} payment owed by K&O to UP triggered in 2018 resulted from a market-driven reduction in UP traffic volumes, not from any diversion of traffic to a competing network. The {{REDACTED}} lost carloads did not move over another network; they simply did not move.
4. Because K&O must pay UP {{REDACTED}} for each car interchanged with a non-UP carrier, the fee reduces by exactly that amount the contribution K&O can retain from non-UP interchange traffic, directly constraining K&O's capacity to reinvest in the Lines.
5. When first established by UP, the {{REDACTED}} per carload Asset Use Fee was not designed to encourage volume growth and reinvestment but was deployed as part of a broader strategy to ensure that only the most profitable traffic moves on UP's system, consistent with the Class I railroad industry's broader shift to lower Operating Ratios.
6. For K&O to be economically indifferent between routing to UP versus CXR, the rate K&O must charge and receive for the CXR routing must be approximately {{REDACTED}} per car higher than the rate for the UP routing, all else equal. Shippers therefore face a fee-induced rate premium on the CXR routing that is entirely independent of any real difference in K&O's cost of providing service over the two routings.
7. The Asset Use Fee is a classic raising rivals' costs mechanism. A dominant firm increases its market share and profits by raising the costs of rival firms without necessarily eliminating those rivals entirely.
8. UP's repeated characterization of the Asset Use Fee as pro-competitive is unsupported. Total non-exempt interchange traffic fell by {{REDACTED}} carloads in the year immediately

¹ {{REDACTED}}

following the fee's implementation, and K&O paid the full Asset Use Fee on only {{[REDACTED]}} cars interchanged with a non-UP carrier in that first year.

9. Dr. Miller's {{[REDACTED]}} characterization is tautological. The exemption structure included in the Lease exempts precisely the traffic that flows to UP's own network and imposes the fee on precisely the traffic that would flow to competing carriers. In the relevant market, the Asset Use Fee applies to {{[REDACTED]}} of the traffic, not {{[REDACTED]}}.
10. The precise terms of the interchange commitment in the 1997 lease are mostly irrelevant to this proceeding. Rather, this proceeding is about the new interchange commitment inserted into the 2019 Fourth Supplement by UP. It was added when CXR's competitive potential was already apparent. Applying a 1997 ex ante baseline systematically underestimates the competitive harm from the Asset Use Fee by ignoring the specific competitive routing alternative that existed and was being expanded at the time the Asset Use Fee structure was imposed.
11. The Railroad Industry Agreement (RIA) is of little help to Weskan or other shippers. UP's waiver decisions are made annually based on UP's assessment of current circumstances and may change abruptly and without notice. The RIA waiver process provides no recourse for shippers when UP declines to grant a waiver, and shippers have no party standing in the RIA process.

III. THE ASSET USE FEE IS ANTICOMPETITIVE

Dr. Miller devotes a substantial portion of his Verified Statement to the idea that the Asset Use Fee is a reasonable and pro-competitive compensation mechanism that encourages efficient use of UP's Leased Lines while preserving K&O's operational flexibility. That characterization does not withstand scrutiny when the Asset Use Fee is examined against actual traffic data provided by UP in this proceeding, the history that gave rise to the fee, and the incentives/disincentives the fee creates for K&O's routing and pricing decisions.

There are five primary issues with Dr. Miller's characterization of the Asset Use Fee. First, the fee is not calibrated as a neutral compensation mechanism but is instead calibrated to the value of the eastbound routing UP seeks to preserve. Additionally, the fee exemption structure tracks UP's competitive interests rather than any operational characteristic of the traffic. Second, the fee did not arise in response to a competitive diversion of traffic. It instead arose in response to a market-driven volume decline that had nothing to do with traffic moving to competing carriers, making the opportunity cost framing Dr. Miller employs contradictory to the circumstances that produced the fee. Third, the fee functions as a mechanism to raise the effective cost of the CXR routing relative to the UP routing. This occurs not because the CXR routing is more expensive to K&O in any operational sense, but because the lease imposes a financial burden on the westbound alternative. Fourth, the fee has not generated the pro-competitive outcomes UP claims. Traffic interchanged with UP on the Leased Lines fell in the years following the fee's implementation and has remained well below historical averages. This is contradictory to Dr. Miller's assertion that the fee encourages both parties to grow traffic on the Lines. Fifth, the fee's own exemption structure reveals that even non-competitive traffic requires relief from the fee to move, which is inconsistent with any characterization of the fee as a modest or narrowly targeted compensation mechanism.

We address each of these issues below.

**A. THE ASSET USE FEE
FORCES EASTERN MOVEMENTS ON UP**

The {{[REDACTED]}} per car Asset Use Fee is not a neutral compensation mechanism and is instead calibrated to preserve eastbound routing to UP. UP states it developed the fee based on the average margin for grain traffic originating in the area around Wichita, which is east of the UP lines leased by K&O. Dr. Miller acknowledges that this makes UP "roughly indifferent, on average, to whether traffic encompassed by the scope of the Asset Use Fee were shipped over UP or whether K&O paid the Asset Use Fee for traffic interchanged with other railroads."² The selection of Wichita as the calibration benchmark is not incidental, however. Wichita is precisely the interchange point to which UP seeks to direct K&O's traffic, and the eastbound movement through Wichita is the routing the fee is structured to protect.

The logic of the Asset Use Fee structure and exemptions confirm this. Traffic that moves to destinations at {{[REDACTED]}} pays no fee at all. Traffic that moves to SKOL, a Watco affiliate presenting no competitive threat to UP, pays only {{[REDACTED]}} per car. The full {{[REDACTED]}} per car fee falls exclusively on traffic that could be routed west to CXR, or to the BNSF Railway Company (BNSF) in the east.³ Read together, these provisions describe a structure

² See, Miller VS at page 13.

³ As stated in Weskan's Reply to Petition for Exemption filed June 15, 2026 (Weskan Reply) in this proceeding, "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." In its Petition for Exemption filed May 4, 2026 (Petition), K&O stated {{[REDACTED]}} carloads of Leased Line traffic interchanged with BNSF (See, Petition at p. 23). However, the UP Reply states that only {{[REDACTED]}} "Non-UP" carloads were interchanged with another carrier (presumably BNSF) in 2021 and subject to the Asset Use Fee (See, McLaughlin VS workpaper "2021 Traffic Certification.pdf."). K&O and UP are silent on the terms associated with the other {{[REDACTED]}} interchanged with BNSF in 2021 and why the Asset Use Fee was not applicable to these other carloads. We are unable to address this discrepancy with data currently in the record.

in which the fee is zero where UP already captures the traffic, minimal where no competitive threat exists, and set at its maximum precisely where a competitive alternative does exist. The graduated structure does not reflect varying degrees of asset use by K&O. It reflects varying degrees of competitive threat to UP's eastbound traffic base.

The Wichita proxy compounds this problem. The {{[REDACTED]}} per car figure is derived from traffic moving from a single area and applied uniformly to all non-exempt traffic regardless of actual destination, length of haul, equipment type, or commodity. It does not represent what UP would actually earn on any specific movement subject to the fee. It represents what UP earns on eastbound traffic moving through Wichita, which is an entirely different calculation from the margin UP foregoes on a specific movement diverted to other carriers. By applying a Wichita-derived margin as the cost threshold for alternative movements, UP has set the fee at a level calibrated not to compensate for actual lost contribution on any given movement but to make competitive routing uneconomic for K&O as a matter of design.

Dr. Miller characterizes this as making UP roughly indifferent between receiving traffic and receiving the fee.⁴ But UP's indifference is achieved precisely by making the CXR routing unattractive to K&O and by extension, shippers on the Leased Line. The fee does not leave K&O indifferent between routing options. It imposes a cost on the westbound routing over the CXR that has no counterpart on the eastbound routing over UP. The result is a pricing structure that systematically advantages the UP routing over the CXR routing by an amount equal to {{[REDACTED]}} per car, an advantage embedded in the lease itself rather than earned through competitive pricing or service quality.

⁴ See, Miller VS at page 13.

**B. THE ASSET USE FEE LIMITS K&O'S
REINVESTMENT AND ABILITY TO
GENERATE TRAFFIC**

The interchange commitment's origins reveal that the Asset Use Fee was not designed to address competitive diversion at all. UP concedes that the {{[REDACTED]}} payment triggered in 2018 resulted from a reduction in UP traffic volumes, not from any diversion of traffic to a competing network.⁵ The record makes this clear. In 2015, K&O interchanged {{[REDACTED]}} carloads with UP and {{[REDACTED]}} carloads with a non-UP carrier, with {{[REDACTED]}} of traffic moving over UP.⁶ By 2018, the volume interchanged to UP had fallen by {{[REDACTED]}} carloads to {{[REDACTED]}} cars, while non-UP interchange traffic increased by only {{[REDACTED]}} cars to {{[REDACTED]}}, leaving {{[REDACTED]}} of remaining traffic still moving over UP.⁷ The {{[REDACTED]}}-carload decline was driven by changes in market conditions, not by routing decisions that diverted UP-bound traffic to another carrier. Therefore, the imposition of an “incentive payment” calibrated to compensate UP for lost contribution is nonsensical. The {{[REDACTED]}} lost UP carloads were not routed over another system in 2018.

The financial consequence of that market-driven volume loss was substantial but straightforward. Using UP's own claimed contribution figure of {{[REDACTED]}}⁸ per grain car received in interchange at Wichita, K&O's {{[REDACTED]}} UP-bound carloads in 2015 generated approximately {{[REDACTED]}} in UP contribution. By 2018, {{[REDACTED]}} UP-bound carloads generated only {{[REDACTED]}}, a loss of approximately {{[REDACTED]}} in net contribution attributable entirely to market contraction, not competitive diversion.

A compensation mechanism rationally designed to address competitive diversion would have targeted diverted traffic, that is, traffic that was once routed over UP and was subsequently

⁵ See, UP Reply at page 9.

⁶ See, McLaughlin VS workpaper “2015 Traffic Certification.pdf.”

⁷ See, McLaughlin VS workpaper “2018 Traffic Certification Data File.xlsx.”

⁸ The fee was {{[REDACTED]}} per car when calibrated and implemented in 2019.

redirected to another carrier. That is not what happened here. The {{[REDACTED]}} missing carloads did not move over another network; they simply did not move. Calibrating an incentive payment to recover contribution from traffic that was never diverted is therefore economically incoherent as a compensation mechanism.

More importantly, UP's chosen remedy points in precisely the wrong direction. Rather than implementing a pricing structure designed to encourage the return of lost UP-bound volume, including, if necessary, offering line-haul rates generating less than {{[REDACTED]}} per carload in contribution in 2019, UP imposed a per-car fee on interchange traffic that never moved over its network. The practical effect is to interfere with K&O growing its non-UP interchange business, which is the very business that could generate the operating contribution K&O needs for reinvestment in the Leased Lines. The mechanics of the Asset Use Fee make this consequence unavoidable: because K&O must currently pay UP {{[REDACTED]}} for each car interchanged with a non-UP carrier, the fee reduces by exactly that amount the contribution K&O can retain from non-UP interchange traffic, directly constraining K&O's capacity to reinvest in the Lines.

Dr. Miller's characterization of the Asset Use Fee as having "provided a straightforward fee structure with payments related to the opportunity cost of lost traffic"⁹ is factually correct, but distorts the issue. The 2019 payment was triggered by market-driven volume loss, not by competitive diversion. A fee calibrated to recover the opportunity cost of traffic that was never diverted does not compensate for a competitive opportunity cost. It imposes a penalty on traffic that UP never carried.

⁹ See, Miller VS at pages 2-3.

**C. THE ASSET USE FEE
BOLSTERS UP'S OPERATING RATIO**

UP claims entitlement to {{[REDACTED]}} in contribution per carload on interline traffic that it does not originate or terminate. The contribution would be less if UP conducted the terminal switching operations, because UP would then incur the costs associated with branch line local operations and maintenance. UP's decision to lease the line to K&O was driven in part by its desire to reduce its operating expenses (op ex) and increase its contribution per unit.

As stated by Dr. Miller:

Over the next decades, many tens of thousands of Class I railroads' unprofitable or marginal rail routes were abandoned, or sold (or leased) to short line railroads to operate. The rationalization of the Class I rail networks through abandonment and transfer of operations to short lines was a major contributor to the revitalization of the railroad industry.¹⁰

It has been well documented at the Board, and throughout the industry, that the Class I railroads' lowering their operating ratios (OR) have attracted investors, who have in turn exerted pressure on management to lower OR even more.¹¹ This creates a cycle in which operating expenses are reduced by deploying lean equipment and labor pools, and maintaining tight schedules for intercity line-haul manifest and intermodal services (the Precision Scheduled Railroading (PSR) model).¹² This has inevitably led to cascading delays when service disruptions occur, because the railroads' resources are already spread thin to protect the bottom line. In addition, it has led to a paradigm shift in the railroads' approach to pricing.

¹⁰ See, Miller VS at pages 5-6 (footnote omitted).

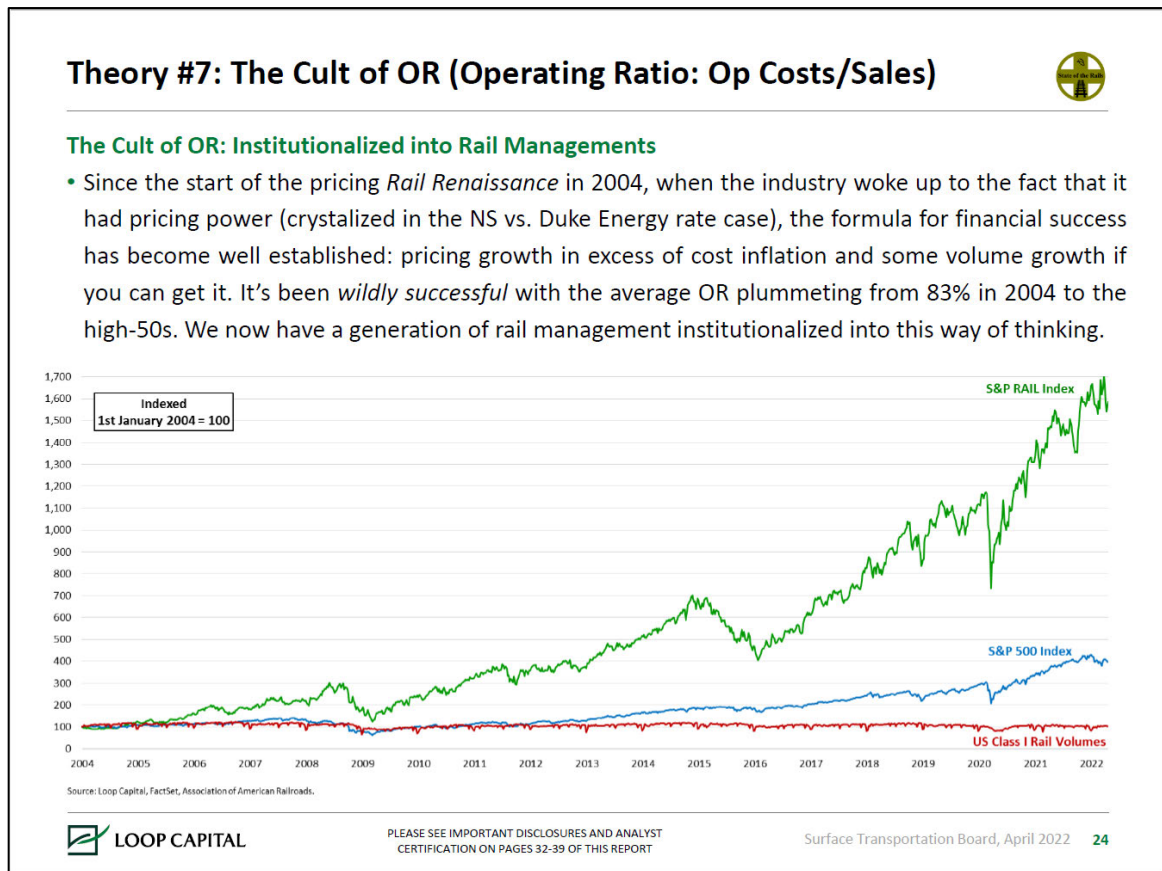
¹¹ According to Matt Rose, former Executive Chairman of BNSF "We have allowed short-term investment thinking to creep into this industry like I have never seen it. [We have] allowed this thinking to come in that ... operating ratio is our guiding light." See, "Matt Rose's 75% Solution" Railway Age, June 8, 2026 available at <https://www.railwayage.com/news/matt-roses-75-solution/>.

¹² See, April 26, 2022 Testimony in EP 770, Urgent Issues in Freight Rail Service.

The pressures on railroad management were succinctly explained by Rick Patterson, a rail analyst, during the 2022 Ex Parte 770 hearings before the Board:

[T]he cult of OR. Since the start of the pricing rail Renaissance in 2004 when the industry woke up to the fact that it had pricing power the formula for financial success has become well-established. Pricing growth [in excess of cost inflation and some] volume growth if you can get it. It's been [wildly] successful with the average [operating] ratio plummeting from 83 percent in 2004 to the high 50's. We now have a generation of our management's institutionalized into this way of thinking. You can see how successful it's been in the chart. In blue you see the performance of the S&P 500, the index that almost no portfolio manager can consistently beat. The railroads are being hit by a factor of four to one since 2004. As an aside I'll draw your attention to sad red line at the bottom. That's U.S. Class I volume growth which is at exactly 0.6 percent since January 2004.... that's .6 total.¹³

¹³ See, STB Docket Ex Parte No. 770, Urgent Issues In Freight Rail Service, Public Hearing Transcript, witness Rick Patterson (Rick Patterson EP 770), April 26, 2022, hearing at pp. 205-206.



14

Like other Class I railroads, UP's business model seeks to increase margins through leaner operations and more aggressive pricing while allowing volumes to stagnate. The {{[REDACTED]}} per carload Asset Use Fee therefore was not designed to encourage volume growth and reinvestment but deployed as part of a broader strategy to ensure that only the most profitable traffic moves, and that there is room for UP's preferred traffic on its mainlines.

D. THE ASSET USE FEE DISTORTS K&O'S PRICING AND INTERCHANGE DECISIONS

Dr. Miller characterizes UP as "roughly indifferent" as to whether interline Leased Line traffic moves via UP or another line-haul carrier because the fee is set at UP's average per-car

14 See, STB Docket Ex Parte No. 770, Urgent Issues In Freight Rail Service, Loop Capital Markets Exhibits (Loop Capital Markets EP 770), April 26, 2022, at page24.

margin. This framing, while accurate from UP's perspective for certain shipments, ignores the competitive harm imposed on K&O and prospective shippers. The relevant indifference condition from a competition standpoint is that K&O is indifferent between the UP routing and the CXR or BNSF routing only if the total net transportation revenue on the CXR or BNSF routing (after paying the {{[REDACTED]}} per car fee) equals the total net transportation revenue on the UP routing (after receiving UP's participation rate). Because K&O pays the fee only on certain non-UP routings, the fee creates a price floor well above K&O's effective cost of providing the CXR or BNSF routing that does not exist for the UP routing. In other words, for K&O to be economically indifferent between routing to UP vs. CXR/BNSF, the rate K&O must charge for the CXR routing must be approximately {{[REDACTED]}} per car higher than the rate for the UP routing (all else equal). Shippers are therefore facing a fee-induced rate premium on the CXR or BNSF routing which is entirely independent of any real difference in K&O's cost of providing the two routings.

The Asset Use Fees application in this way is simply a mechanism to raise the cost of a rival routing option. This is a classic example of raising a rival's costs in order to maintain or increase market share and profits. This concept was explored by Dr. Steven Salop and Dr. David Scheffman (Salop/Scheffman) in their 1983 paper in the American Economic Review, where Salop/Scheffman demonstrated that a dominant firm can profitably increase its market share and profits by raising the costs of rival firms, without necessarily eliminating those rivals entirely.¹⁵

In this instance, the Asset Use Fee operates as a mechanism to raise a rival's cost by imposing a per-carload financial burden on K&O for any traffic routed to certain other railroads instead of UP. Specifically:

¹⁵ See, Salop, S.C. & Scheffman, D.T. (1983). "Raising Rivals' Costs." American Economic Review, 73(2).

- When K&O interchanges traffic with UP, K&O pays nothing additional to UP (UP earns its margin on the long-haul movement).
- When K&O interchanges traffic with CXR or BNSF, K&O must pay UP a per-carload fee currently calibrated at approximately [REDACTED] [REDACTED] } }.

This asymmetric cost structure does not require K&O to pay the fee out of pocket for most traffic. Instead, it makes the CXR or BNSF routing more expensive to K&O, which K&O must then either absorb as a margin reduction or pass through to shippers as a higher rate for the CXR/BNSF routing. Either outcome reduces the attractiveness of the CXR/BNSF alternative relative to the UP routing.¹⁶

UP's workpapers demonstrate that volumes of both UP-interchange traffic and non-UP interchange traffic to which the fee applies have stagnated since the Asset Use Fee was imposed. Thus, UP's indifference is not between the traffic moving on UP or another carrier, it is between the traffic moving on UP or not at all.

Dr. Miller's assertion that the interchange fee "provided appropriate economic incentives to K&O for moving traffic to and from UP's Leased Lines,"¹⁷ is not supported by the traffic data filed in support of UP's Reply. According to documents filed in support of UP's filing, K&O Leased Line traffic interchanged to UP decreased to a record low in the year after the fee was imposed and remained at levels far below historical averages after the fee was imposed, as shown in Table 1 below.

¹⁶ There is also a potential third option where the competitive interline partner (CXR or BNSF) reduces its division to win the business allowing relief to K&O on the Asset Use Fee obligation to UP). This effectively reduces the partner's contribution on the moves, which is the same impact of raising the partner's costs. In this way increased cost is passed on to the partner, but the effect is the same – reducing the attractiveness of the movement.

¹⁷ See, Miller VS at page 3.

Table 1
K&O Leased Line Railcars Interchanged with UP

<u>Year</u> (1)	<u>Annual Railcars Interchanged with UP</u> (2)	<u>Annual Railcars as a Percentage of 2015 Volume</u> (3)
2015	{{[REDACTED]}}	{{[REDACTED]}}
2016	{{[REDACTED]}}	{{[REDACTED]}}
2017	{{[REDACTED]}}	{{[REDACTED]}}
2018	{{[REDACTED]}}	{{[REDACTED]}}
2019	{{[REDACTED]}}	{{[REDACTED]}}
2020	{{[REDACTED]}}	{{[REDACTED]}}
2021	{{[REDACTED]}}	{{[REDACTED]}}

Source: McLaughlin VS workpapers “2015 Traffic Certification.pdf,” “2016 Traffic Certification.pdf,” “2017 Traffic Certification.pdf,” “2018 Traffic Certification Data File.xlsx,” “2019 Traffic Certification.pdf,” “2020 Traffic Certification.pdf,” and “2021 Traffic Certification.pdf.”

The critical insight is that UP does not need to eliminate CXR or BNSF as a competitor. It suffices that the {{[REDACTED]}} per car fee raises the effective cost of the CXR or BNSF routing to K&O sufficiently that K&O is less likely to: (a) actively market and develop westbound CXR-routed or eastbound BNSF-routed traffic; (b) price that traffic competitively; and (c) invest in the operational capabilities needed to handle significant westbound CXR or eastbound BNSF volume. This is precisely the effect Dr. Miller’s analysis ignores. As a result, Dr. Miller’s statement that, “In general, these commitments provide incentives for both parties to grow traffic on the lines,”¹⁸ is clearly not applicable to the 2019 Fourth Supplement.

E. THE ASSET USE FEE DOES NOT ENHANCE COMPETITION

UP and its witnesses, including Dr. Miller, repeatedly characterizes the Lease, including the Asset Use Fee, as pro-competitive. Its filings make this claim in multiple places:

¹⁸ See, Miller VS at page 9.

- UP Reply at 1: “The lease modifications at issue... will not... reduce competitive options for shippers.”
- UP Reply at 3: “Union Pacific’s reply comments provide still more evidence to explain the benefits of the lease amendments and the lack of competitive harm from the interchange commitment.”
- UP Reply at 3: “the specific interchange commitment at issue in this proceeding is “a pro-competitive contractual mechanism”
- UP Reply at 30: “the interchange commitment does not reduce competitive options”
- Miller at 2: “The interchange commitments between UP and K&O are an integral part of pro-competitive arrangement”
- Miller at 15: “it is a pro-competitive contractual mechanism to permit an efficient, lower-cost short line to operate a railroad over assets owned by UP”
- Miller at 17: “The RIA process provides K&O and UP with additional flexibility to make pro-competitive adaptations of the existing contract terms to changing market conditions.”

These assertions are unsupported. UP never explains the mechanism by which the Asset Use Fee enhances competition or demonstrates that it has done so in practice. The traffic data UP itself submitted tells a different story.

If the Asset Use Fee genuinely promoted competitive interchange, one would expect the volume of non-exempt Leased Line interchange shipments to have grown after the fee was implemented in 2019. Instead, the data show the opposite. As Table 2 below shows, total non-exempt interchange traffic fell by {{[REDACTED]}} carloads in the year immediately following implementation from {{[REDACTED]}} cars in 2019 to {{[REDACTED]}} cars in 2020 with K&O paying the fee on only {{[REDACTED]}} cars interchanged with a non-UP carrier.

Table 2
Non-exempt K&O Leased Line Interchange Traffic

<u>Year</u> (1)	<u>UP Cars</u> (2)	<u>Non-UP Cars</u> (3)	<u>Total Cars</u> (4)
2019	{{[REDACTED]}}	{{[REDACTED]}}	{{[REDACTED]}}
2020	{{[REDACTED]}}	{{[REDACTED]}}	{{[REDACTED]}}

Source: "2019 Traffic Certification.pdf" and "2020 Traffic Certification.pdf."

As shown in Table 2 above, K&O paid the fee on only {{[REDACTED]}} cars interchanged with a non-UP carrier in the year after the fee was implemented. However, Dr. Miller claims that:

The Asset Use Fee has not precluded large portions of the traffic on the Leased Lines from interchanging with other railroads. K&O reports that for the last five years, 2021 through 2025, an average of over {{[REDACTED]}} carloads of Leased Lines' traffic interchanged with non-K&O-affiliated, non-UP railroads.¹⁹

The cited carloads were exempt from the fee. UP has "provided exemptions that have allowed large volumes of traffic to interchange with other railroads."²⁰ So UP's argument seems to be that because traffic moves when the fee is waived, the fee must not be an impediment to competition.

This argument concedes the very point it seeks to refute. The traffic Dr. Miller cites moved precisely because the fee was waived and not because the fee is competitively benign. More telling still is the nature of the traffic receiving those exemptions. The provided exemptions apply only to traffic that moves to locations that are relatively close to K&O's rail system, for which there is no potential downstream line-haul segment to generate revenue for UP, and thus no threat of

¹⁹ See, Miller VS at pages 14-15.

²⁰ Id. at pages 2-3.

competition from UP's perspective. Therefore, the Asset Use Fee not only limits growth in otherwise competitive lanes, it requires exemptions for *any* traffic to move. In other words, UP waives the fee only where the traffic poses no competitive risk to UP and imposes it wherever a genuine competitive routing alternative exists.

The economic significance of this pattern cannot be overstated. Basic economic principles dictate that non-competitive traffic has lower demand elasticity than competitive traffic, because there is a readily available alternative for competitive traffic as prices increase.²¹ Shippers facing a fee on competitive traffic have the option to avoid it by routing through UP; shippers on non-competitive movements have no such alternative. If the Asset Use Fee were merely a neutral compensation mechanism rather than a competitive deterrent, one would expect it to have a greater chilling effect on the inelastic, non-competitive traffic than on the elastic, competitive traffic. Yet UP found it necessary to grant exemptions even for the non-competitive movements in order for that traffic to move at all.

The record shows that the immediate impact of the fee on competitive traffic was a net {{ [REDACTED] }} in the year after it was implemented, and that relief from the fee was needed even for the non-competitive traffic with less elastic demand to move. A mechanism that suppresses competitive traffic and requires waivers for non-competitive traffic to flow is not pro-competitive. It is, in fact, a barrier to interchange that operates regardless of whether a competitive threat to UP is present.

²¹ See, MacDonald, J.M. (1987), "Competition and Rail Rates for the Shipment of Corn, Soybeans, and Wheat." The RAND Journal of Economics, Vol. 18, No. 1 (Spring, 1987), pp. 151-163 at page 153.

IV. THE ABSENCE OF CXR INTERCHANGE TRAFFIC

Dr. Miller reports that in 2021, only {{[REDACTED]}} out of {{[REDACTED]}} carloads on the Leased Lines (approximately {{[REDACTED]}}) were subject to the Asset Use Fee.²² He presents this as evidence that the fee is narrow in scope and does not substantially foreclose interchange. This characterization is misleading because the exemption categories are not arbitrary. They are in fact structured to exempt precisely the traffic that flows to UP's own network and to impose the fee on precisely the traffic that would flow to competing carriers.

The exemption structure tracks the routing preferences of UP, not the operational characteristics of the traffic:

- Traffic to {{[REDACTED]}} is exempted because that traffic feeds grain shuttle trains on UP's mainline network. This traffic therefore compensates UP through UP's own line-haul revenues. The exemption is granted because UP is already capturing the economic value it seeks from this traffic.
- SKOL traffic is exempted because SKOL is a Watco affiliate and a corporate sibling to K&O. This is traffic flowing within the same corporate family, presenting no threat to UP's competitive position.
- Bridge traffic (overhead movements) is exempted because UP has no origination/termination revenue interest in overhead traffic.

The Asset Use Fee is imposed exclusively on carloads originating or terminating on the Leased Lines that are interchanged with a carrier that could facilitate competition with UP for the long-haul. This is precisely the traffic that CXR would handle on a westbound routing. The {{[REDACTED]}} characterization is therefore tautological. Traffic that goes to UP or its functional equivalents is exempt, but traffic that could go to CXR is subject to the fee. The fee's narrow application does not reflect limited competitive harm but instead reflects precise competitive targeting.

²² See, Miller VS at page 14.

Dr. Miller's characterization of the Asset Use Fee as applying to only {{[REDACTED]}} of K&O leased line traffic reflects a fundamental error in identifying the universe of traffic relevant to the competitive harm analysis. The appropriate frame of reference is not all traffic on the leased lines across all shippers and all destinations. It is the traffic for which the Asset Use Fee actually operates as a competitive constraint. In other words, it is the traffic for which CXR offers a viable routing alternative to UP.

The STB's competitive harm inquiry focuses on whether the conduct at issue restricts the competitive options available to affected shippers, not on the ratio of affected traffic to total traffic across all movements and all customers. For shippers with westbound destinations, the choice is between an eastbound routing over UP or BNSF and a westbound routing over CXR. That is the market in which the competitive harm occurs, and that is the market against which the fee's effect must be measured. In that market, the Asset Use Fee applies to {{[REDACTED]}} of the traffic, not {{[REDACTED]}}.

Dr. Miller's {{[REDACTED]}} figure is therefore tautological rather than probative. It is low precisely because the exemption structure is designed to exclude the traffic that poses no competitive threat to UP and to impose the fee on the traffic that does. Measuring the fee's competitive significance against the full universe of leased line traffic, including all the traffic UP has already exempted, is the analytical equivalent of measuring the effect of a bridge toll on cross-river traffic by including all the traffic that never needed to cross the river in the first place.

Moreover, a core problem with relying on observed traffic patterns to establish no competitive harm is the “missing markets” problem identified in general equilibrium theory. When a price (or, here, an added cost) makes a transaction unattractive, the absence of observed transactions reflects the cost burden, not the absence of underlying demand. This was explained

by Nobel Laureate Kenneth J. Arrow, who observed that sufficiently high transaction costs can block market formation entirely, even though underlying value to potential traders may remain.²³ Where markets for externalities fail to form, Arrow noted that shadow prices for affected parties still exist, meaning that the absence of observed transactions does not imply the absence of economic value.

Applied here, the absence of CXR interchange traffic on the K&O leased lines does not establish that westbound demand does not exist. It instead reflects that the {{ [REDACTED] }} per car fee makes the CXR routing uneconomic for K&O (and downstream interline partners) and thus for shippers or that the absence of a K&O-CXR interchange agreement until April 2026 eliminated the operational mechanism for CXR routing. Dr. Miller's reliance on the absence of observed CXR interchange traffic as evidence of absent competitive harm reflects a fundamental methodological error. He treats the predicted outcome of the fee's operation (i.e., suppressed CXR routing) as evidence that no demand for that routing exists, without accounting for the structural barriers that independently explain the absence of observed transactions.

²³ See, Arrow, K.J. (1969). "The Organization of Economic Activity: Issues Pertinent to the Choice of Market versus Non-Market Allocation." *The Analysis and Evaluation of Public Expenditure*, Joint Economic Committee, 91st Congress at pages 11-12.

V. RELEVANT TIMELINE

The STB indicated in its decisions in Ex Parte No. 575 (Sub-No. 1), *Disclosure of Rail Interchange Commitments*, served October 30, 2007 (*EP 575-1*) that one factor it would consider in reviewing interchange commitments is competition before and after the proposed commitment.²⁴ In other words, it would perform both an *ex post* and *ex ante* analysis. Dr. Miller applies his discussions based on the circumstances surrounding the 1997 lease, but the current proceeding is about the 2019 Fourth Supplement, which materially restructured the interchange commitment from a contingent rent provision to a per-carload Asset Use Fee. That should be the focus of the analysis. The correct *ex ante* baseline for evaluating the competitive effects of the amended lease is the competitive environment as it existed when the lease amendment was negotiated in 2019. Applying a 1997 *ex ante* baseline to the 2019 Fourth Supplement, as Dr. Miller's framework effectively does, systematically underestimates the competitive harm from the Asset Use Fee by ignoring the specific competitive routing alternative that existed at the time the fee structure was negotiated.

Prior to the CXR acquisition of the Towner Line in 2018, K&O shippers had no economic alternative to the eastbound UP routing for traffic originating on the leased lines. In this pre-CXR environment, UP's market power over westbound movements was nearly absolute as there was no competing carrier capable of handling such traffic directly westbound from the Leased Line.²⁵ The original 1997 lease's interchange commitment therefore had limited competitive effect on traffic

²⁴ See, *EP 575-1* at page 15, "Under our 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."

²⁵ Prior to the reopening of the Towner Line as the CXR, westbound traffic had to move east to the UP or BNSF prior to moving west. The 1997 Lease limited the number of carloads that could be economically interchanged with the BNSF.

moving directly west from the Leased Lines as it could not foreclose a competitive option that did not exist.

The emergence of CXR as a viable competitor with its own line connecting K&O's leased lines at Towner to the BNSF and UP interchange at NA Junction in Colorado changed this calculus fundamentally. The Asset Use Fee, adopted in 2019 when CXR became a competitive option, operates in a market where efficient competitive routing exists and the fee is structured in a way that imposes a cost on K&O for using that routing.

The empirical literature on railroad competition and agricultural shipper welfare provides strong support for the proposition that even incremental restrictions on competing rail alternatives have significant welfare effects for grain shippers. MacDonald (1989) found that competition between railroads (in his terms, intra-rail competition) reduces grain transportation rates, and that shippers without competitive rail alternatives pay higher rates.²⁶ Prater et al. (2010) found that in areas where rail competition declined between 1985 and 2007, grain and oilseed transportation rates increased.²⁷ The U.S. International Trade Commission's 2021 study of rail prices and agricultural exports also noted that the availability of competing transportation modes (including competing rail carriers) constrains rail pricing for agricultural commodities.²⁸

UP now states that it must maintain the terms of a lease that was developed in a different competitive environment. As UP states in its filing,

“The Board noted that interchange commitments were merely one way for line owners considering the sale or lease of lines **with traffic that makes a revenue contribution to preserve the value of their revenue stream and thus receive**

²⁶ See, MacDonald, J.M. (1989). “Railroad Deregulation, Innovation, and Competition: Effects of the Staggers Act on Grain Transportation.” *Journal of Law & Economics*, 32(1), 63-95 at pages 87-88.

²⁷ See, Prater, M., Bahizi, P., Parsons, B., and Wilson, W. (2010). “Rail Competition Changes for Grain and Oilseeds, 1985–2007.” *Agribusiness*, 26(1), 111-134 at page 126.

²⁸ See, U.S. International Trade Commission. (2021). *The Effects of Rail Prices on U.S. Agricultural Exports*, Working Paper 2021-07-A, at page 10.

compensation for the sale or lease of the line.”²⁹

The terms of the 1997 lease indicate that both parties (as rational actors) assumed that the leased lines would generate enough interline traffic such that K&O’s predecessor would meet its interchange obligations (or it would not have agreed to the terms), and UP would earn sufficient margin on the traffic base to justify foregoing supplemental rent payments (or it would not have agreed to the terms). Thus, when the lease was signed, the parties’ risk perception did not align with Dr. Miller’s framing, which is based on 20/20 hindsight. Specifically, Dr. Miller claims that the 1997 “interchange commitment created significant financial risk to K&O.”³⁰ When the terms were being renegotiated in 2019, UP held all of the leverage. UP knew that its feeder line traffic base had disappeared (as discussed above) but had grown accustomed to its annual contribution from K&O traffic. Because it could no longer earn that margin through its line-haul rates, it had to find another way to extract rent from K&O. K&O therefore agreed to a different lease mechanism that would maintain its operating rights and keep its operating costs relatively low – the tradeoff for limiting its ability to grow competitive traffic options.

²⁹ See, UP Reply at page 11 (emphasis added).

³⁰ See, Miller VS at pages 2-3.

VI. THE RIA WAIVER MECHANISM

Dr. Miller states that the Railroad Industry Agreement (RIA) provides carriers flexibility to make pro-competitive adoptions of existing contract terms to changing market conditions, including issuing new traffic waivers.³¹ Dr. Miller concludes that the alleged prior issuance of these RIA waivers to K&O is evidence of UP's willingness to adopt existing interchange commitments to changing market conditions.³²

Dr. Miller's argument confuses alleged historical behavior³³ with legal obligation. When assessing Dr. Miller's claims, one must keep the following facts in mind:

- UP's RIA waiver decisions are made annually, based on UP's assessment of current circumstances.³⁴ UP's assessments may change abruptly and without notice.
- The specific Weskan/CXR waiver expires in September 2027 coinciding with the end of the current lease extension. Competitive access beyond 2027 depends on lease renewal negotiations and future waiver decisions.
- The RIA waiver process does not provide any recourse for shippers (as opposed to K&O) when UP declines to grant a waiver. In other words, shippers have no party standing in the RIA process.³⁵
- UP's practice of granting waivers only on an annual basis (with the Weskan situation being a rare two-year exception) creates a rolling uncertainty that any rational investor in new loading facilities must price into its capital planning.

The economic literature on repeated games shows that cooperative behavior in repeated interactions, such as UP's apparent practice of granting RIA waivers, is sustained by the prospect

³¹ See, Miller VS at pages 16-17.

³² *Id.*

³³ Agreements made under the terms of the RIA are not publicly available, and as such, we have no method to determine whether UP's claim of { [REDACTED] } approval rate is accurate.

³⁴ See, UP Reply at page 26.

³⁵ The issue of recourse under the RIA is not limited to shippers but to short line railroads as well. The American Short Line and Regional Railroad Association (ASLRRA) has noted that short line railroads have no effective way to resolve issues under the RIA short of short of a filing with the STB. See, "A Practical Guide to the Railroad Industry Agreement," March 3, 2022 as presented at the 2022 ASLRRA Annual Conference and Exhibition.

of future interaction and reputation effects.³⁶ But this equilibrium can break down when the parties' interests change substantially.³⁷ For example, if K&O traffic volumes interchanged with CXR under an RIA waiver grow large enough that the competitive loss to UP becomes significant, UP will have no incentive to remain cooperative and grant further waivers, and will instead be incentivized to reinstitute the Asset Use Fee to recapture the lost volumes.

The STB's March 2026 Decision in this proceeding explicitly found that UP's offer to waive the interchange commitment solely for Weskan did not resolve the Board's concerns.³⁸ This is likely because UP's offer to waive the fee applied to only one shipper, left all other shippers on the Leased Lines unprotected, and did not address the fee's continuation beyond the current lease term, which remained entirely within UP's discretion

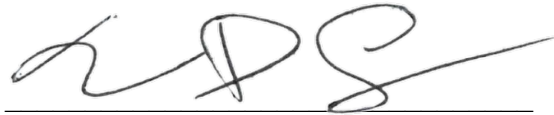
³⁶ See, Fudenberg, D. & Maskin, E. (1986). "The Folk Theorem in Repeated Games with Discounting or with Incomplete Information." *Econometrica*, 54(3), 533-554, and page 533, and Kreps, D.M. & Wilson, R. (1982). "Reputation and Imperfect Information." *Journal of Economic Theory*, 27(2), 253-279, at page 275.

³⁷ See, Dal Bó, P. (2005). "Cooperation under the Shadow of the Future: Experimental Evidence from Infinitely Repeated Games." *American Economic Review*, 95(5), 1591-1604, at page 1597. Dal Bo states that "New equilibria appear as the discount factor increases, allowing the subjects higher levels of cooperation and payoffs, in principle." The converse logic that when the discount factor decreases, cooperative equilibria disappear is also true. In other words, cooperative behavior breaks down when the parties' interests change

³⁸ See, March 20, 2026 Decision at pages 9-10.

VERIFICATIONS

I, Timothy D. Crowley, verify under penalty of perjury that I have read this Verified Statement on behalf of Weskan, that I know the contents thereof, and that the same are true and correct. Further, I certify that I am qualified and authorized to file this statement.

A handwritten signature in black ink, appearing to read 'TDC', is written above a horizontal line.

Timothy D. Crowley

Executed on 7/6/26

* * *

I, Daniel L. Fapp, verify under penalty of perjury that I have read this Verified Statement on behalf of Weskan, that I know the contents thereof, and that the same are true and correct. Further, I certify that I am qualified and authorized to file this statement.

A handwritten signature in black ink, appearing to read 'Daniel L. Fapp', is written above a horizontal line.

Daniel L. Fapp

Executed on 7/6/26

LIST OF EXHIBITS

Exhibit No.	Exhibit Description
(1)	(2)
1	Daniel L. Fapp Statement of Qualifications
2	Timothy D. Crowley Statement of Qualifications

DANIEL L. FAPP
STATEMENT OF QUALIFICATIONS

My name is Daniel L. Fapp. I am a Senior Vice President of the economic consulting firm of L. E. Peabody & Associates, Inc. The Firm's offices are located at 901 N. Stuart Street, Suite 1120, Arlington, Virginia 22203; and 760 E. Pusch View Lane, Suite 150, Tucson, Arizona 85737.

I received a Bachelor of Science degree in Business Administration with an option in Marketing (cum laude) from the California State University, Northridge in 1987, and a Master of Business Administration degree from the University of Arizona's Eller College of Management in 1993, specializing in finance and operations management. I am also a member of Beta Gamma Sigma, the national honor society for collegiate schools of business.

I have been employed by L. E. Peabody & Associates, Inc. since December 1997. Prior to joining L. E. Peabody & Associates, Inc., I was employed by BHP Copper Inc. in the role of Transportation Manager - Finance and Administration, and where I also served as an officer and treasurer of the three BHP Copper Inc. subsidiary common carrier railroads, The San Manuel Arizona Railroad, the Magma Arizona Railroad (also known as the BHP Arizona Railroad) and the BHP Nevada Railroad. I have also held operations management positions with Arizona Lithographers in Tucson, AZ and MCA-Universal Studios in Universal City, CA.

While at BHP Copper Inc., I was responsible for all financial and administrative functions of the company's transportation group. I also directed the BHP Copper Inc. subsidiary railroads' cost and revenue accounting staff and managed the San Manuel Arizona Railroad's and BHP Arizona Railroad's dispatchers and the railroad dispatching functions. I served on the company's Commercial and Transportation Management Team and the company's Railroad Acquisition Team where I was responsible for evaluating the acquisition of new railroads, including developing financial and economic assessment models.



DANIEL L. FAPP
STATEMENT OF QUALIFICATIONS

I have directed and managed sourcing and core carrier engagements as both a consultant and as an industry practitioner. These engagements have involved the selection of primary and secondary rail, truckload, less-than-truck load, air express and parcel carriers. I have participated in and managed consortium sourcing projects in the small package express and fleet management fields. I have served on the management team overseeing the implementation of a core carrier program and have been involved in and directed negotiations with regional and national truckload carriers.

In my tenure at L. E. Peabody & Associates, Inc., I have been actively involved in negotiating transportation contracts on behalf of shippers. Specifically, I have advised shippers concerning transportation rates based on market conditions and carrier competition, movement specific service commitments, volume commitments, contract reopeners that recognize changes in productivity and cost-based ancillary charges.

As part of my work for L. E. Peabody & Associates, Inc., I have performed and directed numerous projects and analyses undertaken on behalf of utility companies, short line railroads, bulk shippers, and industry and trade associations. Examples of studies which I have participated in organizing and directing include, traffic, operational and cost analyses in connection with the rail movement of coal, metallic ores, pulp and paper products, and other commodities. I have also analyzed multiple car movements, unit train operations, divisions of through rail rates and switching operations throughout the United States. The nature of these studies enabled me to become familiar with the operating procedures utilized by railroads in the normal course of business.



DANIEL L. FAPP
STATEMENT OF QUALIFICATIONS

Since 1997, I have participated in the development of cost of service analyses for the movement of bulk and non-bulk commodities over all the major U.S. railroads. I have conducted on-site studies of switching, detention and line-haul activities relating to the handling of coal and chemicals. I have also participated in and managed projects assisting short-line railroads. In these engagements, I assisted short-line railroads in their negotiations with connecting Class I carriers, performed railroad property and business evaluations, and worked on rail line abandonment projects.

I have developed numerous variable cost calculations utilizing the various formulas used by the Surface Transportation Board (“STB”) for the development of variable costs for common carriers, with particular emphasis on the basis and use of the Uniform Railroad Costing System (“URCS”). I have submitted testimony on the behalf of complaining shippers before the STB which developed stand-alone costs, traffic forecasts, revenue and contract forecasts, and fuel surcharge forecasts.

I have been frequently called upon to perform financial and economic analyses and assessments of railroad and other transportation companies. I have determined the Going Concern Value of privately held freight and passenger railroads, including developing company specific costs of debt and equity for use in discounting future company cash flows. My consulting assignments regularly involve working with and determining various facets of financial issues, including cost of capital determinations. In these assignments, I have calculated capital structures, market values, cost of debt, cost of preferred equity and common equity. I am also well acquainted with and have used financial industry accepted models for determining a firm's cost of equity,



DANIEL L. FAPP
STATEMENT OF QUALIFICATIONS

including Discounted Cash Flow Model ("DCF") models, Capital Asset Pricing Model ("CAPM"), Cost Build-Up models and Arbitrage Pricing Models.

I have also lectured in graduate level finance, economic and supply chain classes and am a member of the Professional Advisory Council for the Eller School of Management Finance Department at the University of Arizona.

I have developed different economic analyses for numerous electric utility companies, manufacturing companies, railroad companies and government agencies located in all parts of the United States, and for major associations, including the American Chemistry Council, the Chlorine Institute, the Fertilizer Institute, Mail Order Association of America, National Coal Association, National Grain and Feed Association, National Industrial Transportation League, North America Freight Car Association and Western Coal Traffic League. In addition, I have assisted numerous government agencies major industries companies in solving various transportation-related problems.

In my tenure with L. E. Peabody & Associates, Inc., I have presented evidence in numerous proceedings before the STB and have presented evidence and testified and presented expert reports before state and Federal courts and in private arbitrations. In conjunction with other L. E. Peabody & Associates, Inc. officers, I have worked on and directed expert reports in a number of court and arbitration proceedings concerning the level of rates, rate adjustment procedures, service, capacity, costing, operating procedures and other economic components of specific contracts.



TIMOTHY D. CROWLEY
STATEMENT OF QUALIFICATIONS

My name is Timothy D. Crowley. I am the President of the economic consulting firm of L. E. Peabody & Associates, Inc. The firm's offices are located at 901 N. Stuart St., Suite 1120, Arlington, Virginia 22203, and 760 E. Pusch View Lane, Suite 150, Tucson, Arizona 85737.

I received a Bachelor of Science degree in Management with a concentration in Finance from Boston College in 2001 and graduated cum laude. I have been employed by L. E. Peabody & Associates, Inc. since 2002.

I am a member of the American Economic Association (“AEA”) and the American Railway Engineering and Maintenance-of-Way Association (“AREMA”).

I have extensive experience with the various formulas employed by the Surface Transportation Board (“STB”), including the Uniform Railroad Costing System (“URCS”), which is the STB’s general purpose costing system that estimates unit costs and total variable costs for U.S. Class I railroads. I have reviewed and submitted evidence in numerous proceedings before the STB regarding the implementation and update to various components of the URCS process. I was instrumental in the development of L. E. Peabody & Associates, Inc.’s proprietary URCS program. I have utilized the URCS program to develop countless variable cost calculations for rail shipments across North America, including Canada on all class I railroads and various shortline railroads.

I have sponsored evidence for and participated in numerous maximum rate case proceedings at the STB. The evidence that I sponsored in these proceedings included, but was not limited to: qualitative and quantitative market dominance determinations, which utilizes the STB’s URCS Phase III costing program; review of traffic and revenues; development of the rail network and operating plan; development of operating expenses and road property investment; and



TIMOTHY D. CROWLEY
STATEMENT OF QUALIFICATIONS

analyzing results of these analyses in a discounted cash flow model. I have also assisted in developing the return on road property investment realized by major western railroads for specific sections of rail. These studies were used in variable, avoidable, and stand-alone cost analyses.

I have experience with the STB's *Simplified Standards For Rail Rate Cases* issued in Ex Parte 646 (Sub No. 1). I have performed extensive work with the revised guidelines for non-coal proceedings, which incorporates a three-benchmark methodology. The three-benchmark methodology includes calculations using revenue shortfall allocation method ("RSAM"), in which I was trained by members of the STB.

I have been involved and am familiar with procedures used in developing support for Anti-Trust litigation.

I have been involved with Feeder Line Applications presented to the STB, which included evaluating the net liquidation value ("NLV") and going concern value ("GCV") of the subject rail line. I have also conducted numerous NLV and GCV calculations on behalf of our clients for use in the sale or discontinuance of a rail line.

I have been actively involved in negotiating transportation contracts on behalf of shippers. Specifically, I have advised shippers concerning transportation rates based on market conditions and carrier competition, movement specific service commitments, volume commitments, contract reopeners that recognize changes in productivity and cost-based ancillary charges. I have forecasted transportation revenues included in transportation contracts entered into by major companies, taking into account the escalation factors used in specific contracts. Additionally, I have reviewed virtually all major transportation coal contracts between eastern and western railroads and the major consumers of coal in the United States.



TIMOTHY D. CROWLEY
STATEMENT OF QUALIFICATIONS

I have experience evaluating numerous requests for proposal (“RFP”) from both Class I and shortline railroads for the transportation of various commodities via rail, i.e. coal, chemicals, etc. These RFP evaluations included economic, operational, and contractual obligations of the railroads with the goal of obtaining the best and fairest overall transportation package for our clients.

I analyzed and developed cost based rate/price adjustment mechanisms used in long term and short term supply and transportation contracts. I have extensive knowledge of the various rate escalation procedures developed for and employed in transportation and supply contracts. My review of rate escalation procedures demonstrates that application of 100 percent of the change in a price index to existing rate/price levels overcompensates carriers/suppliers for changes in costs.

I have conducted numerous rail transportation marketplace studies to determine the differential between captive and competitive rail shipments for various commodities across all major class I railroads and shortlines.

I have designed and continually monitor economic models which forecast the change in inflation, prices and costs. These economic models forecast general economic indices, certain transportation related indices, certain coal production indices, railroads’ cost of providing service and producers’ cost of mining coal.

I have managed and assisted in the development of rail car tracking software that is utilized to track the location and status of a client’s railcars in real time. This information can be utilized in pursuing service issues with a rail carrier, maintenance costs associated with use of the railcar, and to calculate various transportation statistics including on-time performance.



TIMOTHY D. CROWLEY
STATEMENT OF QUALIFICATIONS

I have established and managed many large databases used to monitor and track railroad related data, including railroad infrastructure, railroad car and train movements and railroad costs and revenues.

I have provided analytical support for both market place and litigation projects sponsored by L. E. Peabody & Associates, Inc. The analytical support included the gathering, review and manipulation of data from the major Class I railroads, the STB and various other government and public sources. Specifically, the analyses that I have conducted include the development of the transportation costs associated with the movement of chemicals, coal and other products to different destinations located throughout the country.



CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of July, 2026, a copy of the foregoing Motion and proffered 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