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**BEFORE THE UNITED STATES
SURFACE TRANSPORTATION BOARD**

DOCKET NO. FD 36849

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

**REPLY IN OPPOSITION TO MOTION FOR LEAVE TO FILE A REBUTTAL
AND TO PROFFERED REBUTTAL**

Pursuant to the regulations of the Surface Transportation Board (“Board” or “STB”), Weskan Grain respectfully files this Reply in opposition to the Kansas & Oklahoma Railroad, Inc.’s Motion for Leave to File a Rebuttal (“Motion”). K&O’s Motion should be summarily denied because it and the accompanying “Rebuttal” proffered in violation of the Board’s practices (“Proffered Rebuttal”)¹ constitute a “reply to a reply” that is clearly prohibited by both 49 C.F.R. § 1104.13(c) and Board precedent. The Motion and Proffered Rebuttal are an egregious example of a party violating the Board’s regulations and precedent by withholding factual allegations and argument in an opening filing in order to avoid scrutiny and to get in the last word. K&O’s filings present an ideal opportunity for this Board to resume holding litigants to account for misusing prohibited “replies to replies,” and to require parties to adhere to the well-established rules that petitions to the Board must present all the facts and arguments in support of the relief requested,

¹ Even though K&O filed a motion for leave to file its rebuttal, it took the improper step of separately filing its proffered “Rebuttal” in this docket instead of attaching it to its Motion. The denial of K&O’s motion should be accompanied by the Board rejecting the “Rebuttal” filing and removing it from the docket.

and not hold back factual allegations and argument and attempt to advance them in an improper “rebuttal” after the other party has replied.

I. Argument

A. K&O’s Strategy to “Sandbag” Weskan Should Not be Countenanced

The Board’s regulations at §1104.13(c) specifically prohibit replies to replies.² Among other things, such filings impede and delay Board action. They are also inherently prejudicial, since a petitioning party has the responsibility to include in its petition “all arguments supporting the requested action,”³ and to not withhold evidence and argument and/or rehash its opening submittal after another party submits its reply. Parties may not “eras[e] the distinction between a case-in-chief and rebuttal” by, for instance, submitting evidence that “contains factual information which could and should have been included in the. . . application itself.”⁴

Yet, that is exactly what K&O has done here. Its Petition for Exemption in this proceeding was filed in response to the Board’s directive in Docket No. Docket No. FD 34030, *Kansas & Oklahoma Railroad, Inc. – Acquisition Exemption – Central Kansas Railway, LLC* (served January 25, 2025)(“*K&O-Weskan*”). That proceeding involved the same factual backdrop, lease documents and interchange commitments at issue in this proceeding. Weskan’s opposition to the

² See 49 CFR 1104.13(c) (a “reply to a reply is not permitted”).

³ FD No. 34943, *Beaufort Railroad Co., Inc.—Modified Rail Certificate*, slip op. at 5 (served July 21, 2009).

⁴ *Union Pac. Corp.—Control—Chi. & N.W. Transp. Co.*, FD 32133, 1994 ICC LEXIS 168 *4, **39-40 (ICC served Sept. 12, 1994). See also *Duke Energy Corp. v. CSX Transp., Inc.*, FD 42070, slip op. at 4 (STB service Mar. 25, 2003) (“[r]ebuttal may not be used . . . as an opportunity to introduce new evidence that could and should have been submitted in the party’s case-in-chief.”).

paper barrier in the Fourth Supplement to the Lease⁵ and the reasons for Weskan's opposition were all made plain to K&O in that proceeding, and K&O filed responses disputing Weskan's claims. In short, K&O was certainly aware of, and should have anticipated, Weskan's opposition to K&O's Petition in this proceeding. As a result, and given that it had no right to submit a reply to Weskan's Reply, K&O should have included in its Petition the facts and arguments it now attempts to raise in its Proffered Rebuttal in support of its Petition, to which Weskan would have replied and refuted. Examples include its discussion of "applicable agency guidance" at pages 3-4, its allegations about the interpretation of the proposed Lease's language at pages 5-6, and its discussion of the impact of the *K&O-Weskan* decision on its current relationship with Union Pacific Railroad Company ("UP") at pages 8-9.

Instead, K&O chose a strategy that entailed filing a relatively spare Petition that contained no discussion whatsoever of the interchange commitment, its history, and how the proposed transaction met the statutory requirements of 49 U.S.C. §10502(a) despite presence of an admittedly anti-competitive interchange commitment that Weskan was already on record opposing. Reply to Petition at 7. K&O's strategic decision to try to sandbag Weskan in a "rebuttal" filing after Weskan presented its opposition should not be countenanced. Its Motion should be denied and the Proffered Rebuttal should be rejected.

B. Weskan's Responses to the Proffered Rebuttal

If the Board nevertheless grants the Motion and accepts the Proffered Rebuttal, Weskan submits the following brief responses. Generally, the Proffered Rebuttal is an unfocused, rambling collection of irrelevant and unsupported factual assertions and arguments, many of which do not

⁵ For consistency, this Reply uses the same abbreviations as its Reply to the Petition for Exemption.

even rebut Weskan's Reply but rather rehash arguments K&O has already made in Docket No. 36849 and should have included in its Petition. Moreover, while K&O accuses Weskan of making "mistaken," "incorrect," and "unsupported" factual and legal assertions, and further alleges Weskan "misunderstands" and "has entirely misconstrued" certain facts, Proffered Rebuttal at 5, these accusations merely confirm that Weskan and K&O disagree as to the relevant facts and contractual language at issue. The "correct" factual conclusions and interpretations of the relevant contractual language will be determined by the Board at the at the conclusion of the evidentiary proceeding proposed by Weskan in its Reply.

Responses to some of the specific points in the Proffered Rebuttal are as follows:

1. Other Interchanges

In response to the undisputed fact that the Colorado Pacific Railroad LLC ("CXR") is the only other railroad that can physically interchange with K&O over the tracks covered by the proposed lease, K&O offers the vague assertion, without citing any contractual language or specific factual backup, that K&O can interchange traffic with third-party railroads connected to tracks owned by K&O at interchanges that are located *beyond* the Leased Tracks. Even if true, this is utterly irrelevant. Proffered Rebuttal at 5.

2. Harm to Competition Between BNSF and UP

K&O's arguments in support of its claim that it is "dubious" the interchange commitment stifles competition between BNSF and UP for grain traffic shipped west from Kansas over the Leased Track and CXR's track border on disingenuous. As stated in Weskan's Petition to Reopen and to Partially Revoke Exemption in *KO-Weskan* ("Petition to Reopen"), the destinations for such grain "include Weskan's Stockton grain elevator complex near Sheridan, CO *that can be served*

by both UP and the BNSF Railway Company (“BNSF”).” Petition to Reopen at 2 (emphasis added).⁶ Outside of these statements in Weskan’s filings, K&O is well aware of the fact that BNSF has direct access to the Stockton facility via CXR. Accordingly, the discussion in its Proffered Rebuttal about other, “parallel” lines of BNSF and UP and theoretical competition in “K&O’s general service area” is perplexing and again utterly irrelevant, and K&O doesn’t even rebut the assertion made in Weskan’s Reply to the Petition that the paper barrier is designed and intended to prevent competition between UP and BNSF *at the Stockton facility*.

3. CXR’s Acquisition of the Towner Line

K&O also makes the head scratching claim that Weskan believes CXR is “entitled” to lower rates because CXR acquired the Towner Line through the Board’s feeder line development procedures. Proffered Rebuttal at 7. Weskan said no such thing. Weskan’s point is that the policy underlying the feeder line process is for financially responsible parties to acquire lines of railroad that require capital investment in order to return the tracks to common carrier service. Paper barriers that restrict the ability of the acquiring railroad to develop traffic to support such investment are therefore *ipso facto* directly contrary to that policy and that is an additional reason for them to be rejected. Reply to Petition at 8. K&O fully admits the paper barrier would harm CXR. *See* Proffered Rebuttal at 7 (“if the interchange restrictions prescribed by the Fourth Supplement were to be applied, they could serve to preclude K&O-CXR interline grain traffic shipments to Weskan’s Stockton Elevator.”).

⁶ *See, Id.*, “Rather, the Lease is structured to induce K&O to transport all grain from shippers located on the tracks leased by K&O eastward for interchange with only UP at Hutchison or Wichita, KS, thereby foreclosing competition between BNSF and UP *at the Stockton facility*, and depriving Weskan and other grain shippers of utilizing more efficient and varied routings for marketing their grain to the Western U.S. and export terminals.” (emphasis added).

4. UP as an Essential Party

While the Board may decide the issues before it without UP's participation, Weskan has already stated it has no objection to UP intervening to protect its rights. Reply to Petition at 11. Indeed, it is plainly evident that UP is attempting to influence from the sidelines the Board's and K&O's behavior, as well as the relationship between Weskan and K&O.

First, K&O intimates that, if the Board denies K&O's petition and/or decides the interchange commitment is unlawful, UP has threatened to terminate the lease arrangement and "divest K&O of its leasehold interest going forward – evidently to resume UP operations." Proffered Rebuttal at 8. This ominous assertion is not supported in the Proffered Rebuttal by any documentation or testimony. To the extent this is a potential outcome of this proceeding, the Board would benefit from evidence and argument from UP as to the merits of such a solution, as opposed to the solution of K&O continuing to be the operator of the leased tracks without a paper barrier in place.

Second, K&O has disclosed in its Proffered Rebuttal that UP is acting contrary to the Board's holding in *K&O-Weskan*. Specifically, K&O acknowledges on the one hand "that, as a matter of federal law, K&O may not account for the Fourth Supplement's interchange commitment when responding to rate and service requests involving non-interchange traffic during the pendency of this proceeding (and for that matter, if the Petition were to be denied)." Proffered Rebuttal at 9. On the *same page*, however, K&O has revealed (albeit again without attaching any documentation) that "counsel for UP recently has advised" K&O that, notwithstanding the Board's unambiguous holding in *K&O-Weskan* that "K&O does not currently have Board authority to implement the amended and renewed lease agreement—including the modified interchange commitment that Weskan seeks to challenge," *K&O-Weskan* at 5, UP has taken the position that

the interchange commitment is nevertheless “legally binding” on K&O, thus placing K&O in an untenable position. Proffered Rebuttal at 9. If this is a correct statement of UP’s position, UP should be required to explain its justification for it, and why it is not simply UP exerting its market power, which would undercut K&O’s claim in the Petition that regulation of the proposed lease transaction is not needed to protect shippers from market power. 49 U.S.C. §10502(a)(2)(B).

Indeed, despite its foregoing acknowledgement about the obligation to respond to rate and service requests, K&O has refused to respond to a formal request from Weskan for rates and service to the Towner interchange that was submitted to K&O on April 21, 2025, 11 days prior to the filing date of K&O’s Motion. Attachment A. K&O did not provide the requested rates or service terms, nor did it ask for any additional information, within the timelines established in 49 C.F.R. §1300.3. In fact, K&O has not engaged *at all* with Weskan about the request in violation of those regulations. Weskan intends to address this violation in an appropriate separate filing.

Finally, as to K&O’s purported current angst about issues surrounding a proposed paper barrier arising in a proceeding to obtain after-the-fact operating authority, and the terms and conditions that will govern its service over the leased tracks going forward, Proffered Rebuttal at 3-4, 8-9, K&O glosses over the fact that these issues have arisen now solely because K&O and UP did not comply with the Board’s regulations in 2018 and 2019 and seek approval of their amendments to the 1997 Lease. As a consequence, UP and K&O were able to reap the benefits of an unlawful paper barrier for the past six years.

II. Conclusion

In conclusion, the Board should not follow its practice in recent cases and simply grant the Motion and accept the Proffered Rebuttal “in the interests of a complete record.”⁷ Instead, for all the reasons set forth in this Reply, the Board should deny K&O’s Motion and reject the separately filed Proffered Rebuttal. If it accepts the Proffered Rebuttal, it must also accept the responses to it included in this filing.

Respectfully submitted,

/ss/ Thomas W. Wilcox

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May 15, 2025

⁷ Docket No. AB 1329X, *Elkhart & Western Railroad Co. LLC – Discontinuance of Trackage Rights Exemption – In Marshall and Fulton Counties, Ind.*, (served July 10, 2023) at 2, note 3, *citing* Docket No. 35157, *City of Alexandria, Va.—Pet. for Declaratory Ord.*, (served Nov. 6, 2008) at 2.

ATTACHMENT A



Weskan Grain, LLC
72225 Highway 96
Sheridan Lake, CO 81071

April 21, 2025

VIA EMAIL

Re: Request for Rates, Charges and Service Terms

Dear Mr. Harbour:

Pursuant to 49 C.F.R. 1300.2, Weskan Grain LLC hereby formally requests from the Kansas & Oklahoma Railroad, LLC (K&O), the existing rate(s) (or the basis for calculating the rate(s)), as well as all charges and service terms, that would apply to the following transportation requested by Weskan Grain:

The movement of between 125 and 250 railcar loads of sorghum or wheat from Weskan's siding located at 202 N Main St. in Scott City, Kansas to the existing interchange between K&O and the Colorado Pacific Railroad LLC (CXR) at Towner, Colorado, for further movement by CXR to Weskan's Stockton grain elevator facility.

The requested transportation would be in open hopper cars supplied by K&O.

In addition to the foregoing information, Weskan requests notification of any future increases in the rate(s) involved or changes in pertinent service terms.

In the event K&O does not have existing rates, charges and service terms for the requested transportation, Weskan asks K&O to establish such rates, charges and service terms within the time frames established by 49 C.F.R. §1300.3 and provide them to Weskan.

Weskan's understanding is that pursuant to the decision of the Surface Transportation Board served February 25, 2025 in Docket No. FD 34030, K&O is not required to pay Union Pacific Railroad an Asset Use Fee associated with the requested transportation, and that the rates will therefore not reflect the payment by K&O of such a charge. Please confirm in your response that this is correct.

Weskan requests and agrees that K&O may supply the requested information to me electronically at the email address below.

We look forward to your response, and please call if you have any questions.

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of May, 2025, copies of the foregoing Reply in Opposition to Motion for Leave to File a Rebuttal and to Proffered Rebuttal were served by electronic mail on representatives of Union Pacific Railroad Company and the Kansas & Oklahoma Railroad Company, Inc.

/ss/ Thomas W. Wilcox
Thomas W. Wilcox