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May 23, 2025

VIA ELECTRONIC FILING

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W., Room 1034
Washington, DC 20024

Re: *Kansas & Oklahoma Railroad, LLC – Lease and Operation Exemption with Interchange Commitment – Union Pacific Railroad Company, FD 36849*

Reply to Weskan Grain LLC's May 15, 2025 Motion to Strike, and Motion to Strike Weskan Grain LLC's May 15, 2025 Sur-Reply

Kansas & Oklahoma Railroad, LLC ("K&O") hereby responds to Weskan Grain LLC's ("Weskan") motion to strike (the "Motion to Strike" – creatively and misleadingly entitled as a "Reply in Opposition") K&O's May 2, 2025 Rebuttal filing in this docket. K&O also hereby moves to strike Weskan's May 15, 2025 Sur-rebuttal – specifically, the portion of Weskan's May 15th filing beginning at numbered page 3 (from the heading "Weskan's Responses to the Proffered Rebuttal") to the end of the document. Either – (1) K&O's Rebuttal is a permitted closing of the record at this phase of the proceeding, in which case, Weskan's Sur-rebuttal violates agency procedure and should be stricken accordingly; or (2) the Rebuttal seeks impermissibly to close the record in support of K&O's petition for exemption (the "Petition"), in which case all filings after Weskan's April 16, 2025 Reply, including the Rebuttal and Weskan's Sur-rebuttal, should be summarily rejected. Regardless, Weskan's Sur-rebuttal has no place in this docket.

Although not so entitled, the first two-and-a-half pages of Weskan's May 15th pleading constitute, and function as, a motion to strike (entirely or in large part) K&O's Rebuttal. In seeking to strike K&O's Rebuttal, Weskan relies exclusively on 49 C.F.R. §

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1104.13(c), ignoring agency common law K&O cited in support of its Rebuttal.¹ K&O continues to rely on that line of agency precedent (and the concept embodied therein) as discussed at pages 1-2 of its May 2nd motion for leave to file the Rebuttal.

If K&O's Rebuttal permissively closes the record at this phase as K&O argued in its motion,² then Weskan's Sur-rebuttal is procedurally inadmissible. Specifically, if the agency precedent upon which K&O had relied in tendering a Rebuttal is controlling (rather than Section 1104.13(c)), then that same precedent bars Weskan's Sur-rebuttal, which should be stricken from the record accordingly.

If, on the other hand (and despite cited precedent endorsing K&O's submission of a Rebuttal to close the record), the Board were to hold that Section 1104.13(c) alone is controlling, then K&O had basis to file its Rebuttal. Further, if Section 1104.13(c) alone controls, then the Board may enforce its rules of procedure and disregard the Rebuttal entirely. But, if the Rebuttal was impermissibly filed per Section 1104.13(c), and it were to be stricken from the record, then Weskan's Sur-rebuttal must also be stricken, if for no other reason than that Weskan's argument for Sur-rebuttal acceptance would rest solely on the proposition that two procedural wrongs somehow make a right.

Finally, tacitly recognizing that naked reliance upon Section 1104.13(c) may be insufficient basis to bar K&O's Rebuttal, Weskan seems to argue in the alternative that *portions* of the Rebuttal should be stricken nevertheless. See Motion to Strike at 3 (offering "Examples" of Rebuttal discussion that Weskan argues are inappropriate, assuming a rebuttal were otherwise permissible).

¹ K&O decidedly did **not** resort to a request for leave to file a Rebuttal "in the interests of a complete record," as Weskan seems to allege at page 8 (and footnote 7) of its May 15 pleading. K&O acknowledges that such a basis for filing a Rebuttal – had it been what K&O had argued – would be flimsy justification, considering the Chairman's recent admonition (under a very purposeful separate expression) at the end of the Board's order served in *Norfolk Southern Corporation, et al. – Acquisition of Control – Norfolk & Portsmouth Belt Line Railroad Company*, FD 36836 (Decision No. 2) (STB served Mar. 14, 2025) (Chairman Fuchs concurrence), slip op. at 10.

² If indeed a petitioner in an individual petition for exemption proceeding may file a rebuttal responsive to timely-filed replies and comments, as K&O's motion for leave to file its Rebuttal argues, then the Board may consider revising 49 C.F.R. § 1121.4 specifically to so provide.

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But K&O's Rebuttal (if permitted) is responsive to Weskan's April 16 Reply filing. In fact, K&O questions (for all of the Motion to Strike's vitriol) why, if it is entitled to file a Rebuttal, it would be prejudicial³ "sandbagging" (Motion to Strike at 2) to – (a) acknowledge that Weskan's April 16 Reply triggers an unprecedented Board analysis of an interchange commitment; (b) address Weskan's mistaken and unsupported factual and legal claims; (c) urge UP's involvement as an essential party in the event of a proceeding; and (d) seek agency guidance as to the ongoing contractual relationship between K&O and Union Pacific Railroad Company in light of the recent order in *Kansas & Oklahoma Railroad, Inc. – Acquisition Exemption – Central Kansas Railway, LLC*, FD 34030 (STB served Feb. 25, 2025). Such topics are quintessentially suitable for this Rebuttal.

Putting aside Weskan's perplexing reliance on derogatory rhetoric, its combined Motion to Strike and Sur-reply (consolidated into a single May 15 pleading) should be denied and stricken, respectively. Agency precedent supports acceptance of K&O's Rebuttal. Moreover, the substance of the Rebuttal is responsive to Weskan's Reply filing, and raises considerations that the Board may wish to address if it were to initiate a proceeding. Finally, whether K&O's Rebuttal is disregarded as impermissible under Section 1104.13(c) or it is permitted in keeping with K&O-cited agency precedent, Weskan's Sur-reply (from the bottom of page 3 of its recent pleading to the end of the document) should be stricken.

Respectfully submitted,

/s/ *R. A. Wimbish*

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cc: All parties of record

³ Speaking of prejudice, however, Weskan uses its May 15th filing to accuse K&O of violating 49 C.F.R. § 1300.3, alleging a failure to quote interline rates. The issue is only tangentially related to the Rebuttal's substance (at best), and, in any event, Weskan is mistaken. K&O supplied common carrier rates to Weskan in November of 2024. K&O's rate offering was not rescinded, and it applies to Weskan's April 21, 2025 inquiry. K&O recently has confirmed this in writing to Weskan (who seemed to assume otherwise). In so doing, K&O pointed out that, despite occasional past discussions and an exchange of agreement drafts, K&O has no interchange agreement with Colorado Pacific Railroad ("CXR" – Weskan's affiliate), and K&O is unsure where K&O-CXR interchange might occur proximate to Towner.