

EXPEDITED CONSIDERATION REQUESTED

**BEFORE THE UNITED STATES
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. FD 36849

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

MOTION FOR PROTECTIVE ORDER

Pursuant to 49 C.F.R. §1114.21(c), Weskan Grain LLC (“Weskan”) hereby files this motion seeking an order from the Surface Transportation Board (“STB” or “Board”) establishing protective conditions in response to the belated attempt of Kansas & Oklahoma Railroad, LLC (“K&O”) - a mere 19 days from the firm date for the completion of discovery in this proceeding - to try to obtain discovery from Weskan. For the reasons set forth below, the Board should issue an order either ruling that the discovery not be had (§1114.21(c)(1)) or that any permitted discovery may be had only on specified terms and conditions (§1114.21(c)(2)). Weskan asserts that good cause exists to grant this motion for the following reasons.

RELEVANT FACTS

1. On June 25, 2025 the Board served a Decision in this proceeding “*June 25 Decision*”) that, in pertinent part, directed that “Discovery shall be completed by August 11, 2025.”
2. On July 9, 2025 Weskan served discovery on K&O, and K&O timely served written responses and objections on July 24, 2025. Unfortunately, K&O broadly objected to all of

Weskan's discovery requests and otherwise provided very limited information in response to only a few of the requests.

3. Also on July 9, 2025, Weskan served discovery on the Union Pacific Railroad Company ("UP"), which despite actively participating in this proceeding maintains it is not a party of record. Consequently, the Board's rules and procedures for obtaining discovery from third parties have purportedly applied to UP. These rules and procedures generally allow a third party to agree to voluntarily participate in discovery, subject to the issuance of a formal subpoena by the STB should there be a disagreement on what information and documents the third party will agree to voluntarily produce. *See*, Docket No. NOR 42180, *Evergy, Inc., Evergy Metro, Inc., and Evergy Kansas Central, Inc. v. BNSF Railway* (served September 24, 2024).

4. By decision served August 8, 2025, the Board granted a request by Weskan to extend the procedural schedule in this case because, while efforts were being made to complete discovery in response to Weskan's requests, they could not be completed by the August 11, 2025 deadline. The Board extended the schedule by 58 days, which was shorter than Weskan had requested. The Board explained that this was necessary because of the statutory deadline for completion of this proceeding established by 49 U.S.C. §10502(b). The Board also admonished the parties that "[c]onsidering the statutory deadline for completion of this proceeding, the Board will disfavor, absent extraordinary circumstances, further extensions to the procedural schedule." Decision at 3.

5. Since serving its discovery on July 9, 2025 Weskan has proactively sought to resolve objections and obtain responsive information and documents from K&O and UP to ensure the October 8, 2025 deadline for completion of discovery will be met. This has entailed several "meet and confer" sessions with counsel for both K&O and UP, and letter and email

correspondence with both. It has also entailed Weskan filing a Motion to Compel Discovery from K&O, and a Petition for Expedited Ruling on Motion to Compel when K&O failed to file a reply to the Motion to Compel in the 20 days allotted by the Board's rules.

6. The foregoing motions resulted in a virtual hearing held on September 12, 2025 before the Honorable Administrative Law Judge Jenifer Soulikias, who was appointed by the Board to hear discovery disputes in this proceeding. Judge Soulikias' September 5, 2025 decision ("*ALJ Decision*") scheduling the hearing¹ reiterated the need to complete discovery in this proceeding, stating that "[i]mportantly, the Board's August 8, 2025, Decision states that discovery shall be completed by October 8, 2025. See Decision (Aug. 8, 2025). Thus, this proceeding is nearing the end of its discovery phase, *and discovery shall be completed as the Board ordered.*" *ALJ Decision* at 2 (emphasis supplied).

7. The virtual hearing was attended by K&O and UP counsel, and with Judge Soulikias' guidance, K&O and Weskan resolved many outstanding issues K&O had with Weskan's discovery and received rulings from Judge Soulikias on several issues on which they could not reach agreement. In addition, UP counsel affirmed to Judge Soulikias that UP and Weskan had reached sufficient agreement on UP's voluntary responses to Weskan's request, and confirmed UP would produce the agreed-upon information and documents prior to the October 8, 2025 deadline.

8. K&O served no discovery on Weskan during the nearly three months after the *June 25 Decision*, despite the clear admonitions from the Board and Judge Soulikias about the need to complete discovery by October 8, 2025, and despite all the activity surrounding Weskan's discovery requests. Moreover, K&O counsel never mentioned K&O might seek discovery from

¹ The decision also directed the parties to hold a "meet and confer" session on Wednesday, September 10, 2025.

Weskan, and no mention of coming discovery requests was made before Judge Soulikias during the virtual hearing. Then, on September 19, 2025, K&O served numerous onerous Requests for Admission, Interrogatories, and Document Requests on Weskan. Under the Board's discovery rules, Weskan's written objections and responses to the requests are due October 6, 2025, a mere two days before the deadline set to complete discovery.

ARGUMENT

Pursuant to 49 C.F.R. §1114.21(c), for good cause shown, the Board can impose protective conditions on discovery that protects a party from “annoyance,” “oppression,” “undue burden and expense,” and “to prevent the raising of issues untimely or inappropriate to the proceeding,” among other reasons. §1114.21(c)(1). The relief granted can include (but not be limited to) “(1) That the discovery cannot be had; and “(2) That the discovery may be had only on specified terms and conditions, including a designation of the time and place.” *Id.*

Under the circumstances of this proceeding summarized above, the Board should rule that K&O's discovery to Weskan is untimely and cannot be had. For whatever reason, K&O slept on its rights to seek discovery from Weskan in a timely manner despite specific rulings and strong admonitions from the Board and Judge Soulikias unambiguously setting October 8, 2025 as the date for completion of discovery. As to how the term “completion” is to be defined, Weskan's understanding from the parties' “meet and confer” sessions (with both UP and K&O) and the hearing before Judge Soulikias, is that all production either agreed to by UP and K&O or directed by Judge Soulikias would be produced on or before the deadline, subject to Weskan's right to follow up concerning the documents produced.

In contrast, by waiting until past the 11th hour to serve its discovery, K&O has, for all practical purposes, attempted to *commence* discovery from Weskan at the deadline, not *complete* it. K&O has waited too long, and its extremely belated attempt to seek discovery from Weskan should be denied through issuance of an appropriate protective order.

Nor are there any grounds to further extend the procedural schedule in this case to try to accommodate K&O's untimeliness. The conscious decision to refrain from seeking any discovery following the *June 25 Decision* until September 19, 2025 in no way falls into the category of "extraordinary circumstances" that the Board established the high bar for a further extension of the schedule. Moreover, extending the schedule to permit K&O to obtain discovery from Weskan will further compress the time for the parties to prepare and submit evidence to the Board in light of the statutory deadline. Finally, K&O would not be prejudiced by not obtaining discovery from Weskan. This case is about the intent and objectives of K&O and UP in establishing an anti-competitive paper barrier. The answers to those questions are in the files of K&O and UP, not Weskan's. K&O presumably already has all the documentation it needs to attempt to defend the lease terms and its actions.

For all the foregoing reasons, good cause exists for the Board to issue a decision pursuant to §1114.21(c)(1) ruling that the discovery served on Weskan by K&O is untimely and therefore the discovery sought may not be had. Weskan asks for this ruling on an expedited basis, since its written responses and objections are presently due on October 6, 2025.² Moreover, pending

² While Weskan believes that no discovery at all should be had in these circumstances, it acknowledges that its responses to Interrogatories and Requests for Admissions would be submitted prior to the October 8 deadline. However, this is not the case for document production, which would essentially start on October 6, and should therefore be prohibited. See §1114.21(c)(2).

the Board's ruling Weskan will be forced to undertake the burden of reviewing files and other materials for information responsive to K&O's requests, a burden Weskan believes it should not have to bear.³

Respectfully submitted,

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³ The last sentence of §1114.21(c) is somewhat unclear, but Weskan asserts its request complies with it in these circumstances. Further to the extent the sentence requires a motion to compel to be pending before protection can be sought, that would make no sense in these circumstances since such a motion would be filed well after the discovery deadline, and the Board should therefore waive any such requirement here.

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of September, 2025, copies of the foregoing Motion for Protective Order were served by electronic mail on representatives of Union Pacific Railroad Company and the Kansas & Oklahoma Railroad, LLC, and a copy was also provided via electronic mail to Administrative Law Judge Jenifer Soulikias.

/ss/ Thomas W. Wilcox

Thomas W. Wilcox