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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 TO SUPPLEMENTAL FILINGS OF UNION PACIFIC RAILROAD
COMPANY AND KANSAS & OKLAHOMA RAILROAD, INC.**

Weskan Grain LLC (“Weskan”) hereby submits this Reply to the supplemental filings of Union Pacific Railroad Company (“UP”) and the Kansas & Oklahoma Railroad, Inc. (“K&O”) submitted into the record of this proceeding on December 4, 2025. For the reasons set forth below, the filings by UP and K&O confirm without a doubt that the Petition for Exemption for after-the-fact authority to operate pursuant to a proposed lease transaction should be denied because the lease agreement contains an interchange commitment that is intentionally anti-competitive, discriminatory and contrary to the public interest. This action by the Board is required because K&O, despite being explicitly directed by the Board in a Decision served June 25, 2025 (“*Decision*”) to provide evidence and argument responding to Weskan’s allegations and the Board’s concerns, did not provide any such evidence or argument in its Supplement to Kansas & Oklahoma Railroad, LLC’s Petition for Exemption (“K&O Supplement”). UP also entirely rebuffed the Board’s directive, despite being “strongly encouraged to participate in this briefing.” *Decision* at 3.

Because they have intentionally not provided any evidence or argument in response to Weskan's allegations in its Reply to the Petition for Exemption ("Reply to Petition"), or to the Board's numerous requests in the *Decision*, K&O and UP have offered no defense of the legality of the interchange commitment and that their proposed lease arrangement complies with the requirements of 49 U.S.C. §10502(a). Because they nevertheless refuse to permanently remove the interchange commitment from the proposed lease, the Board must take appropriate action and remove it. K&O's and UP's coordinated argument that the lease agreement should receive after-the-fact authority because UP made a commercial settlement proposal that Weskan did not accept is patently absurd and must be summarily rejected.

I. **BACKGROUND**

As summarized in Weskan's Reply to Petition, this proceeding involves the attempted after-the-fact renewal and amendment of a lease arrangement between UP and K&O that includes an "interchange commitment"¹ in the form of an {{ \$ }} "Asset Use Fee" that K&O is required to pay UP "{{

}}." Reply to Petition at 6. This charge renders economically infeasible the rail movement of any grain originating from locations on the leased premises westward over the Towner Line, a line of railroad in Colorado owned by Colorado Pacific Railroad LLC ("CXR") that abuts the end of the leased line. *Id.* The numerous allegations in Weskan's Reply to Petition summarized in the *Decision* included:

¹ Defined as ". . . a provision or agreement that may limit future interchange with a third-party connecting carrier, whether by outright prohibition, per-car penalty, adjustment in the purchase price or rental, positive economic inducement, or other means ("interchange commitment")." 49 C.F.R. §1180.4(g)(3)(i)

² The leased premises are more fully described in Weskan's Reply to Petition.

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1. The interchange commitment is intentionally anti-competitive;
2. The interchange commitment was imposed by UP for the purpose of preserving its market power over grain in Kansas and to restrict competition by making it economically infeasible for K&O to transport grain from western Kansas to points west of Towner, CO;
3. The interchange commitment was inserted into the lease after CXR acquired the Towner Line in part to preclude BNSF Railway Company (“BNSF”) from competing with UP for the transportation of grain volumes from Weskan’s Stockton Facility located on the Towner Line;
4. The interchange commitment harms the ability of CXR to develop traffic on its line, which was acquired via the Board’s “feeder line” process under 49 U.S.C. §10907, by forcing all grain traffic on the Leased line to move east to UP-served destinations; and
5. The lease transaction cannot meet any of the requirements of §10502(a),

In response to Weskan’s Reply to Petition, the *Decision* instituted a proceeding pursuant to 49 U.S.C. §10502(b) that in part directed K&O to submit “a verified supplement” that would address Weskan’s allegations, respond to comments submitted by other parties invited by the Decision to participate, and provide additional information about the effects of the interchange commitment. In addition, “[a]s the counterparty to the Lease, UP [was] strongly encouraged to participate in this briefing, either by filing its own comment or by filing jointly with K&O.” *Decision* at 3. Specifically, the Board directed K&O to provide verified evidence and argument on the following matters bearing on whether the requested authority should be granted:

1. The supplement should discuss 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).
2. 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.)

3. 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).
4. 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).
5. K&O should address Weskan's contention that the proposed transaction discourages the efficient management of railroads "by economically foreclosing shorter western routes via CXR [over the Towner Line] and forcing all traffic to move hundreds of miles east to interchanges with UP before they go to western destinations." (Weskan Opp'n 8.); and
6. K&O may also address other relevant [Rail Transportation Policy] factors.

Id. Remarkably, and fatally to any attempted defense of the interchange commitment, the K&O Supplement is not only unverified,³ it contains no evidence or argument in response to *any* of the issues raised by Weskan in its Reply to Petition, or *any* of the requests for information outlined above. UP's Comment Addressing Information Described in the Board's June 2025 Order ("UP Supplement") also completely rebuffs the Board's invitation.

II. ARGUMENT

A. K&O and UP Have Forfeited Their Respective Rights to Defend the Legality of the Interchange Commitment in this Proceeding

The *Decision* recognized that Weskan had raised valid questions about whether the lease agreement that is the subject of the Petition for Exemption complies with 49 U.S.C. §10502(a) and the Board's policies concerning interchange commitments. The Board accordingly set out numerous specific, detailed requests for information concerning those questions and other issues

³³ K&O's Supplement states in one place (footnote 1) that it unilaterally deemed the directed verification to be unnecessary, but in another that its evidence and argument are "verified." (page 6). In any case, its filing is not verified as the *Decision* directed, meaning none of the factual allegations and statements contained in it are attested to by a K&O business representative.

noted by the Board. It also allowed the parties to engage in discovery. The *Decision* therefore created the ample opportunity for K&O⁴ and UP to try to refute Weskan's claims and respond to the Board's concerns, and to justify the presence of the interchange commitment in the proposed lease. K&O's and UP's respective choices to decline to respond to any of the questions, or to refute any of Weskan's arguments,⁵ means they are foreclosed from submitting any evidence or argument on them in any rebuttal filing they may choose to make pursuant to the schedule established by the Board. Docket No. FD 34943, *Beaufort Railroad Co., Inc.—Modified Rail Certificate*, slip op. at 5 (served July 21, 2009)(rebuttal not permitted when party requesting Board action doesn't include in the opening pleading all arguments supporting the requested action and cannot demonstrate good cause). See also *Duke Energy Corp. v. CSX Transp., Inc.*, Docket No. NOR 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.”)(applying rule in Stand-Alone Cost rate case). It is particularly necessary for a party to submit all supporting evidence and argument in its case-in-chief where the Board has a limited time in which to act, in this case the statutory deadline imposed by §10502(d). See STB Finance Docket No. 34397, *Keokuk Jct. Railway Co. – Alternative Rail Service – Line of Toledo, Peoria and Western Railway Corp.* (served October 31, 2003) at 2, note 3.

⁴ Indeed, the *Decision* provided K&O with a second opportunity to present its case in chief, the first opportunity being the Petition for Exemption

⁵ “K&O's focus here is not to defend the competitive merits of [the interchange] commitment.” K&O Supplement at 11. See also, *id.* at 13, where K&O asserts that the interchange commitment in the original 1997 lease applied to traffic interchanged with CXR at Towner, CO (a contractual point Weskan disagrees with) but makes no attempt to defend the current interchange commitment.

Finally, the Board also specifically admonished K&O and UP that “any rebuttal evidence or argument must be limited to responding to issues and arguments raised in Weskan’s reply.” *Decision* at 3, note 4. Having not provided any evidence or argument in their supplements responding to the *Decision* or otherwise addressing the merits of the interchange commitment to which Weskan could reply,⁶ K&O and UP are foreclosed from attempting to defend the legality of the interchange commitment and whether the lease arrangement meets the requirements of §10502(a) in their respective rebuttal filings permitted by the *Decision*. The Board should therefore preemptively strike, or at a minimum disregard, any attempt by K&O or UP to provide evidence or argument responding to Weskan’s Reply to Petition or on the issues raised in the *Decision* in their rebuttal filings.⁷

B. K&O’s and UP’s Assertion that a Commercial Settlement Proposal Declined by Weskan Provides Grounds for the Board to Approve Their Lease is Patently Absurd

⁶ Although it should not be necessary under these circumstances, in order to dispel any doubts the Board might have about the anti-competitive purpose and effect of the interchange commitment, Weskan has included in Exhibit A to this Reply documents produced by UP in discovery that provide just one illustration of UP’s anti-competitive use of the interchange commitment. Specifically, UP utilized the interchange commitment {{

}}. UP accomplished this goal by significantly delaying the “waiver” process described in Weskan’s Reply to Petition, Exhibit B, at pdf pages 21-22, demanding restrictive conditions on UP’s consent to that request, and then apparently by withholding final approval of the request altogether. *Id.* The emails in Exhibit A were contemporaneous with that process and provide one example of how UP utilized the interchange commitment to exercise market power and control over the movement of grain in this region.

⁷ Because the Board concluded that “K&O will have ample opportunity to address the proposed interchange commitment and respond to comments filed in this proceeding,” the *Decision* denied a motion by K&O to submit a rebuttal to Weskan’s Reply to Petition, and it rejected K&O’s proffered rebuttal filing. *Decision* at 4. Consequently, the only filings of record in this proceeding prior to the K&O and UP supplements (other than filings related to discovery) were the Petition and Weskan’s Reply to Petition, and Comments filed by CXR that further support Weskan’s allegations.

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In addition to the remarkable action of directly defying a directive from the Board to provide evidence and argument on the merits of the Petition, K&O and UP take the arguably more remarkable approach of claiming their proposed lease arrangement should nevertheless be approved “as is” because – even though they do not contest in any way that it is anti-competitive and the arrangement violates §10502(a) - UP made an offer to Weskan in the parties’ settlement discussions that was not accepted by Weskan, which chose instead to continue its course of presenting this matter to the Board for a final decision. This argument is absurd on its face. It also mischaracterizes the applicable facts.

As a threshold issue, Weskan believes there should be serious questions asked by the Board of K&O and UP about their disclosure of details of settlement discussions between the parties. While the Board is not bound by the Federal Rules of Evidence (“FRE”), it has generally recognized the salient policy of Rule 408 of the FRE, which renders inadmissible statements or proposals made by parties related to good faith efforts to reach a commercial settlement. *See, e.g.*, 49 C.F.R. §1109.3 (confidentiality of Board mediation), and STB Finance Docket No. 35524, *Canexus Chemicals Canada L.P. v. BNSF Railway Company – Emergency Service Order* (Served November 1, 2011). Arguably, since both supplements rely entirely upon representations regarding the parties’ settlement discussions (and in K&O’s case its speculation about the content of discussions between UP and Weskan)⁸ there is justification for both supplements to be stricken in their entirety.⁹

⁸ K&O Supplement at 10-11.

⁹ The Board has not dealt with many FRE Rule 408 issues, and so there is not a defined set of rules for its application to Board proceedings. *See, e.g.*, Docket No. FD 35504, *Union Pacific*

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Be that as it may, K&O and UP have put Weskan in the unenviable position of replying to allegations about settlement discussions by disclosing additional details about the settlement discussions, which Weskan will limit to the UP settlement “proposal” mentioned in the supplements.¹⁰ As K&O states, UP’s proposal was not to permanently remove the anti-competitive Asset Use Fee provision from the proposed lease, but instead to merely “waive the . . . Asset Use Fee for all K&O-CXR interchange traffic *for the balance of the current lease term*,” (K&O Supplement at 1 (emphasis added)). Later in its Supplement, K&O discloses that the current lease term ends on September 12, 2027, less than two years from now. *Id.* at 8.¹¹ UP’s Supplement attempts to muddle the duration of UP’s “waiver” proposal by saying it covers “the duration of the current lease” without disclosing an end date. UP Supplement at 3.

Not only would UP’s proposal be limited to less than two years, the terms of the Third Supplement that contains the proposed lease term provisions allow the lease term to be extended for {{ }} additional {{ }} terms merely by K&O {{ }}
{{ }}. *See*, Exhibit B. There is therefore the potential for the Asset Use Fee to be left in place {{ }} if it is not permanently removed from the lease terms. However, UP rejected a counteroffer by Weskan that in part would have entailed the offered “waiver” of the Asset Use Fee for the remaining current term, but then completely eliminated it thereafter. UP’s

Railroad Company – Petition for Declaratory Order (Served April 30, 2013), note 3 (motion to strike based on Rule 408 denied because the Board did not rely on the materials and did not find them to be probative); STB Ex Parte No. 561, *Rail General Exemption Authority – Nonferrous Recyclables* (served May 5, 1997) at 13.

¹⁰ It is simply untrue for K&O to assert that Weskan presented no counteroffers to K&O’s proposals. K&O Supplement at 9.

¹¹ The expiration date of the proposed lease was initially designated Highly Confidential by K&O, but it has apparently been redesignated by K&O as Public.

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refusal of Weskan's counter means that in less than two years, upon renewal of the lease for an additional {{ }} term the Asset Use Fee would spring to life and apply in full to all covered traffic thereafter.

Based on the foregoing, K&O's assertion that UP's proposal "constitutes a material change in circumstances, rendering all tendered opposition to the proposed lease transaction moot and warranting prompt approval" (K&O Supplement at 8) is simply absurd. It is not clear what this statement even truly means, but it seems to be that, because K&O believes Weskan should have accepted UP's settlement offer and did not, Weskan somehow forfeited its rights to continue to pursue the relief it seeks in this proceeding, which is the permanent elimination of the interchange commitment from the lease agreement between K&O and UP. Not surprisingly, K&O cites no authority for this bizarre, blatantly self-serving argument, and neither does UP in its supplemental filing.

Indeed, as shown by the map attached as Exhibit C, Weskan continues to acquire and develop grain handling properties on the leased line. Its goal remains to increase the ability of Kansas farmers to ship their commodities west to the Stockton Facility on the Towner Line for movement further west and to ports utilizing either UP or BNSF in competition with each other. It would therefore make no sense for Weskan to accept a situation where such development and the related capital investment were made over the next two years based on one economic paradigm, only to have all movement of traffic developed at origins on the leased line instantly be made uneconomic by reinstitution of the Asset Use Fee in full when UP and K&O renewed their lease for a {{ }} term (and perhaps {{

}}). Thus, contrary to the implication in UP's Supplement that the proposed "waiver" was permanent, UP only agreed to

“remove[] the interchange commitment from consideration” (UP Supplement at 3) for a very limited time, while reserving the right to reinstate it in full when the lease was renewed.

The proper action by the Board in this proceeding is to rule that the proposed lease transaction cannot be approved with the interchange commitment provision in the lease. This ruling should apply to the current lease term and any future renewals of the lease pursuant to its terms, since just limiting the ruling to the current term would not provide sustainable relief to Weskan (and other affected shippers) going forward. Limiting the Board’s ruling to the current lease term would also raise the possibility of UP and K&O attempting to resurrect the arguments they had a full and fair opportunity to raise in this proceeding upon its renewal but did not do so. This would be unfair, prejudicial to Weskan, and administratively inefficient.

C. Other Issues

1. The Scope and Application of the Interchange Commitment to Weskan’s Traffic

In their supplements, K&O and UP confirm that the Asset Use Fee does not apply to grain loaded at Weskan’s Scott City East and Scott City Kirk facilities. *See* Exhibit C. This is because these two facilities are connected to tracks owned and operated by K&O as opposed to the leased line. However, the Asset Use Fee would apply to grain loaded at other facilities owned by Weskan (and other shippers) that are connected to the leased line. This critical distinction, which is easily discerned from the language of the lease documents and other materials, was obscured from Weskan and obfuscated by UP and K&O for several years.¹²

¹² For example, after a K&O representative confirmed this demarcation to a representative of CXR in 2021, K&O represented to Weskan in response to a request for rates in early 2024 that the Asset Use Fee applied to transportation of grain from the Scott City East facility. Weskan later learned that in 2023 UP and/or K&O determined a waiver of the Asset Use Fee was required for

In any event, on December 17, 2025, Weskan filed a Pre-Filing Notice of Complaint in STB Docket No. NOR 42185 to commence a rate case against K&O challenging the reasonableness of rates and terms that K&O recently provided Weskan for the shipment of grain products from the Scott City East and Scott City Kirk loading facilities to Weskan's Stockton Facility on the Towner Line. Weskan believes that K&O has established unreasonably high rates for this transportation as part of a greater effort by K&O – along with UP – to favor its existing customers over pursuing new grain traffic offered by Weskan. This preference is alluded to in K&O's Supplement, where K&O expresses concern that Weskan's business goals are to "procur[e] western Kansas grain volumes from K&O-served sources at below market railroad transportation rates." In other words, to procure grain volumes that would otherwise be transported by K&O and UP. Tellingly, nowhere in K&O's filing does it express any interest, desire or willingness to transport Kansas grain for Weskan at what K&O would consider "market" transportation rates.

Weskan also believes K&O is manifesting its lack of interest in transporting Weskan's grain from Kansas into Colorado using the leased line by raising impediments to the interchange of such traffic with CXR. As CXR noted in its Comments, under the parties' original relationship K&O readily agreed to service shippers on the Towner Line by operating over it. CXR Comments at 5-6. Now, despite the potential additional volumes offered by the Stockton Facility (or as

transportation from the Scott City East facility and they engaged in the "waiver" process later revealed to Weskan in 2024 that is discussed in footnote 6 above. *See also* Exhibit A. According to UP's and K&O's current joint position in their respective supplements – which comports with the lease terms and physical location of the Scott City facilities - that exercise, which took many months and was ultimately unsuccessful, was completely unnecessary because the Asset Use Fee actually never applied to those carloads. Weskan finally obtained this confirmation from both UP and K&O over the course of the aforementioned settlement discussions.

Weskan believes, because of them), K&O has proposed very different interchange terms that so far have prevented CXR and K&O from reaching a mutually acceptable interchange arrangement.

Weskan reserves all rights to seek redress for the actions of K&O and UP regarding rates and service from all of Weskan's locations in Kansas. However, in regard to the interchange commitment, UP is flatly wrong in saying that it does not economically prohibit the interchange of other Weskan traffic with CXR. UP Supplement at 2. If not removed from the proposed lease agreement, the Asset Use Fee would apply to (and economically prohibit) all shipments of grain transported for interchange with CXR that originate from Weskan's other facilities now located on the leased line, such as its Whitelaw Facility near Tribune, KS shown on Exhibit C, and any additional facilities or origins later constructed by Weskan that are located on the leased line. UP's claim that this proceeding is only about rates is therefore incorrect.

2. Appropriate Relief

For the foregoing reasons, because K&O and UP have offered no defense to Weskan's allegations (or responded in any way to the Board's inquiries) that the interchange commitment is anti-competitive and that their proposed renewed lease agreement cannot meet the requirements of §10502(a), the only task left for the Board in this proceeding is to fashion the appropriate remedy. Since the lease agreement cannot be approved with the interchange commitment as part of its terms, the remedy should either be to deny the Petition for Exemption in its entirety¹³ or grant the exemption authority sought on the condition that K&O and UP permanently delete the

¹³ Weskan notes that the former action – denial of the Petition for Exemption in its entirety – would continue the current *status quo* of the 1997 Lease terms applying to K&O's operations. If this is the outcome, then Weskan notes that it would renew its Petition to Reopen and Partially Revoke Exemption filed in STB Docket No. FD 34030.

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interchange commitment from the current lease, and any extensions of it pursuant to its terms. The fact that UP has attempted to position itself as not being a party of record of this proceeding while nevertheless participating in every aspect of it, including discovery, should not prevent the Board from directing UP and K&O to eliminate the paper barrier from the lease.

K&O defers to the Board to fashion any other remedy it deems appropriate under these facts and circumstances, which could include granting the requested after-the-fact authority but permanently enjoining UP and K&O from enforcing the interchange commitment provision for the duration of the current term and any extensions.

III. CONCLUSION

In conclusion, despite being provided a clear and ample opportunity to meet their burden of demonstrating that the proposed amended and renewed lease agreement meets the requirements of 49 U.S.C §10502(a), and that the interchange commitment inserted into the lease in the Fourth Supplement to the Lease Agreement is not unlawful, K&O and UP intentionally chose to make no such effort, thereby conceding that this burden cannot be met. Their attempt to argue that after-the-fact authority should nevertheless be granted because Weskan reasonably declined an unacceptable offer of commercial settlement is absurd and must be rejected by the Board. The

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Board should grant the relief sought by Weskan in its Reply to Petition and this Reply.

Respectfully submitted,

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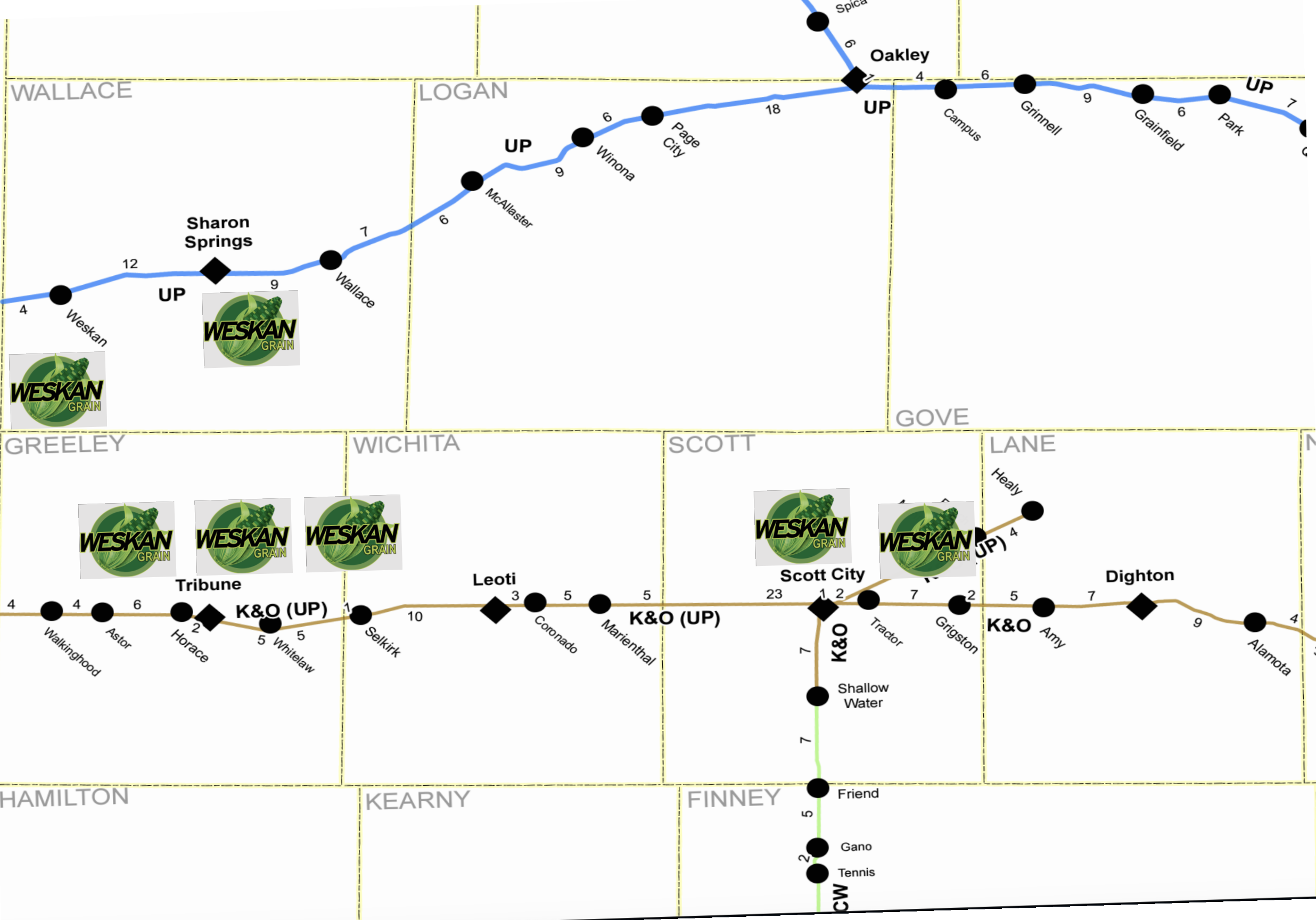
Attorney for Weskan Grain LLC

January 5, 2026

EXHIBIT A

EXHIBIT B

EXHIBIT C



CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of January, 2026, copies of the foregoing Reply to Supplemental Filings 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