

BEFORE THE
SURFACE TRANSPORTATION BOARD

FD 36849

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

**KANSAS & OKLAHOMA RAILROAD, LLC'S REBUTTAL IN SUPPORT OF ITS
INDIVIDUAL PETITION FOR EXEMPTION**

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INTRODUCTION

Pursuant to Surface Transportation Board (“Board”) order served in the above-referenced proceeding on November 14, 2025,¹ Kansas & Oklahoma Railroad, L.L.C. (“K&O”) files this Rebuttal to the January 5, 2026 Reply of Weskan Grain, LLC (“Weskan”).

This proceeding concerns K&O’s petition (the “Petition”) for after-the-fact Board authorization of K&O’s continued lease of certain railroad lines (generally referred to in the proceeding as the “Leased Lines”) owned by Union Pacific Railroad Company (“UP”). Weskan intervened in this docket to oppose the Petition, arguing that a specific provision in the lease added in 2019 – the “Asset

¹ The subject November 14th order issued by the Acting Chief of the Board’s Office of Chief Counsel specifically provided that K&O could file this Rebuttal “by January 19, 2026” (November 14th Order – Decision No. 52773, slip op. at 1), likely having overlooked that January 19, 2026 is the federal government’s observance of the Birthday of Martin Luther King, Jr. Accordingly, K&O submits this Rebuttal in accordance with the Board’s rules of practice at 49 C.F.R. § 1104.7(a).

Use Fee” (a form of interchange commitment) – unlawfully impeded K&O’s interline service in interchange with the Colorado Pacific Railroad (“CXR” – a Weskan affiliate) via Towner, Colorado, due to the resulting rates that K&O proposed to charge in light of the Asset Use Fee.

That specific controversy effectively ended on December 4, 2025, when UP filed its supplement unilaterally waiving the Asset Use Fee for the duration of the lease term with K&O. With that waiver, the application of the lease term to the Towner Gateway – the exclusive focus of Weskan’s complaint – has been rendered inoperative, removing the impetus for the current formal proceeding.²

Faced with the removal of the interchange commitment on Towner interline traffic originating or terminating on the Leased Lines, Weskan’s Reply reveals that its dissatisfaction is no longer with the operational reality of the current lease, but rather is with K&O’s underlying rates and the potential terms of future K&O-UP lease renewals that have not yet been negotiated. Weskan effectively asks the Board to keep this docket open to police a fee that is no longer being assessed and to issue a perpetual ban on future contract terms that do not currently exist.

² Weskan seems to argue that UP’s application or enforcement of the Asset Use Fee would hinder traffic from other K&O facilities, such as its proposed Whitelaw loading facility. But UP’s waiver removes that concern. The waiver applies to the interchange at Towner generally; it does not discriminate by any origin point on the Leased Lines (the only origin or destination locations that otherwise would be affected by the at-issue interchange commitment). Under UP’s waiver offer, any traffic Weskan seeks to route via Towner is free of the Asset Use Fee regardless of whether or not the K&O origin or destination is located on the Leased Lines.

Weskan's persistence in this litigation, despite the removal of the specific barrier it challenged, exposes its true objective. As K&O noted in its December 4 Supplement, Weskan is no longer litigating to remove an interline service impediment. It is instead attempting to leverage the continuation of this proceeding to extract concessions that go far beyond the scope of this docket – including K&O service rate reductions and, potentially, the granting of operating rights over the Leased Lines or a forced termination of K&O's lease in favor of Weskan's affiliate, CXR. See K&O Supplement at 10. This proceeding is not a forum for hostile franchise acquisition by other means, and the Board should not permit its processes to be used as leverage for commercial or operational demands unrelated to the lease authority at issue.

K&O endorses the pragmatic resolution offered by UP. The Asset Use Fee waiver renders Weskan's objections to the Petition moot. Accordingly, there are no grounds remaining for the Board to withhold or condition the requested lease authorization based on a no-longer-operative interchange commitment at the Towner connection.

ARGUMENT

UP's waiver removes the interchange commitment at Towner facilitative of K&O-CXR interline traffic flows and moots Weskan's challenge of the interchange commitment's lawfulness.

Weskan's primary argument – that the lease authority should still be scrutinized despite the waiver – is factually and legally incorrect. UP has waived

the fee for the balance of the current lease term. K&O is free to interchange Leased Line traffic with CXR at Towner without financial penalty in doing so.

Weskan's claim that K&O "forfeited" its defense by not answering the Board's questions regarding market power (Weskan Reply at 6-7) is a procedural fallacy. Forfeiture implies the loss of a right to defend a live controversy. But because the controversy regarding the Asset Use Fee, and the impetus behind the Board's initiation of a proceeding here, has been resolved unilaterally in Weskan's favor, there is nothing left to forfeit. K&O did not answer those questions because the waiver rendered the Board's inquiry moot. K&O Supplement at 11. Submitting economic evidence and argument on the absence (or presence) of market power abuse directed to a no-longer applicable interchange commitment would have been a curious expenditure of K&O time and a corresponding waste of the Board's resources, burdening the record with what is now a hypothetical fact pattern. There is no regulatory purpose in analyzing the market power behind or the "reasonableness" of a lease term that is inoperative for the traffic in question, and that will remain so for the balance of the lease term.

Weskan's persistence in the presence of the waiver confirms that this is really a commercial dispute and an opportunistic grab, and not a genuine debate over the merits of the proposed transaction.

Faced with elimination of the Asset Use Fee's application to K&O-CXR interline traffic originating or terminating on the Leased Lines, Weskan's continued opposition to the Petition reveals that its dissatisfaction is not with the lease terms, but with K&O's status as the operator of the Leased Lines, and with the rates that

K&O has proposed to charge absent the application of the interchange commitment for Weskan traffic destined to Weskan's Stockton Elevator.

Notably, in its December 4 Supplement, K&O explicitly argued that Weskan's objective appeared to be the extraction of commercial concessions – including rate reductions and the potential displacement of K&O in favor of Weskan's affiliate – rather than legitimate regulatory relief. K&O Supplement at 10. Weskan's Reply nowhere disputes or rebuts this assertion. Weskan's silence on this point is telling.

By continuing to oppose the lease transaction even after the Asset Use Fee waiver, and by failing to deny its broader commercial objectives, Weskan effectively admits that its goal is not merely the removal of the interchange commitment. It is relevant to the Board's analysis that Weskan is not merely a shipper. It is a CXR affiliate, each controlled by the Soloviev Group – a well-capitalized entity with a known history of seeking to acquire rail lines through regulatory intervention. As such, Weskan seeks (as part of a larger Soloviev Group strategy) to use this proceeding to extract extra-regulatory concessions, ranging from rate reductions to the granting of operating rights or even the displacement of K&O in favor of CXR.

Disputes regarding rates belong in a rate case. Ambitions regarding operating rights or franchise acquisition belong in commercial negotiations dictated by market forces and not federal agency intervention. Weskan's attempt to keep this docket alive is a transparent effort to create leverage for these broader

objectives. The Board should not allow a lease proceeding to be repurposed as a vehicle for extracting rate concessions or forcing a change in operator.

Weskan's conspiracy theories are unsupported by discovery.

Lacking evidence of current harm in the aftermath of UP's waiver, Weskan pivots to two unsupported conspiracy theories as follows: (1) the 2018 and 2019 lease modifications were secretly designed by UP and K&O to block traffic flows with CXR via Towner; and (2) K&O harbors a specific animus against CXR that motivates it to suppress interline service. See Weskan Reply at 3.

Weskan fought aggressively for sweeping discovery into K&O's internal communications seeking information that might prove these theories, a process K&O characterized as "extensive and dubious." K&O Supplement at 5. Yet, in its Reply, Weskan repeats these naked assertions *without citing a single document, email, or data point from the thousands of pages of discovery it reviewed to substantiate its allegations.*

The silence is evidentiary. The fact that Weskan cannot produce a single piece of evidence to support its "secret blockade" or "CXR animus" theories after such an exhaustive search confirms that K&O's far-west-end rates are driven by legitimate commercial realities – specifically, the significantly higher unit costs associated with handling modest traffic flows on the western end of the line (where traffic densities are lowest) – rather than an anticompetitive conspiracy as Weskan cynically, and baselessly, has imagined. The Board should view this evidentiary

void not merely as a lack of proof, but as confirmation that the conspiracy exists only in Weskan's commercial strategy, not in K&O's operations and charges.

The “springing fee” argument asks the Board to regulate ghosts.

Weskan argues that the Board must intervene now because the interchange commitment central to this proceeding could “spring back to life” (Weskan Reply at 9) when the current lease term expires in September 2027. This argument asks the Board to police a future transaction that has not yet occurred and may never occur.

In so arguing, Weskan ignores the existing regulatory framework. Any future lease extension or renewal involving an interchange commitment would trigger its own regulatory requirements and fresh scrutiny. Pursuant to FD 34030, if UP seeks to reinstate the Asset Use Fee or any other interchange commitment terms after the current contract term ends in 2027, the Board will have the opportunity to review that transaction then under a new lease authorization filing. There is no “regulatory gap” that requires the Board to condition the current authority based on hypothetical future terms.

Weskan’s demand for a perpetual ban is legally unsupported.

Implicit in Weskan’s objection is a demand that the Board condition the current authority on a permanent injunction against UP *ever* negotiating an interchange commitment applicable to the Leased Lines. Unless the Board were to declare interchange commitments like this one *per se* unlawful (which it has repeatedly declined to do), it cannot strip a property owner of the right to negotiate

future commercial terms that have not yet been drafted. Weskan is effectively asking the Board to confiscate UP's future contracting rights—a “super-remedy” that exceeds the scope of a lease review. Moreover, any unfortunate attempt to reinstate such an interchange commitment in a future lease renewal would trigger a new filing requirement under 49 C.F.R. part 1150, subpart E, providing Weskan a fresh opportunity to object at that time.

Weskan's evidentiary objection defies the Board's preference for private resolution, and seeks to impede administrative efficiency.

Weskan asks the Board to strike evidence of the UP waiver under Federal Rule of Evidence 408 (“FRE 408”). This objection is unfounded and fundamentally misapplies the rule. As an initial matter, the Board is not an Article III court strictly bound by the Federal Rules of Evidence;³ rather, the Board has acknowledged the FRE are merely of guidance to the agency.⁴ Practically speaking, strict adherence to FRE 408 in this instance would directly impede the Board's

³ Weskan cites to the Board's mediation rules (49 C.F.R. § 1109.3) and to a formal complaint case (*Canexus Chemicals Canada L.P. v. BNSF Railway Company*, NOR 42131) involving alleged statutory violations by a defendant (e.g., failure to quote rates) and direct application of Section 1109.3. Those supposed precedents are inapposite. This is a transaction *authorization* proceeding to which Section 1109.3 is expressly inapplicable (*see* 49 C.F.R. § 1109.1), not a formal complaint proceeding, and the parties have not otherwise participated in mediation.

⁴ *Expedited Procedures for Processing Rail Rate Unreasonableness, Exemption and Revocation Proceedings*, EP 527 (STB served July 27, 1996) 1996 WL 406655 (S.T.B.) at *6 (The Board's rules of practice “recognize . . . that the Federal rules are merely a general guide, and that they will not be followed where they would frustrate our processes.”).

statutory duty under 49 U.S.C. § 10502 by blinding the agency to a central fact central to demonstrating that the exemption criteria have been satisfied.

Specifically, the Board's exemption analysis depends on the actual scope of the transaction presented. The agency is not dealing with conflicting settlement offers, but rather a single lease proposal that has effectively evolved: UP has unilaterally waived the interchange commitment as applied to the Towner connection. To exclude evidence of this waiver is to force the Board to evaluate a theoretical version of the lease that no longer exists – one containing a restriction that the lessor has expressly abandoned. A regulatory body cannot properly adjudicate a petition for exemption if procedural rules are weaponized to conceal the material reality that the alleged market restraint has been removed.

Even if the Board were strictly bound by the FRE, Weskan's objection and its efforts to strike the UP offer fail for four reasons:

Permissible Purpose (Mootness): FRE 408 prohibits settlement evidence only when offered to prove the “validity or amount” of a disputed claim. It explicitly permits such evidence for “another purpose,” such as proving that a controversy has been rendered moot. *See 360Heros, Inc. v. Mainstreet Am. Assurance Co.*, 816 F. App'x 555, 557 (2d Cir. 2020) (summary order) (holding that settlement evidence was admissible not to prove liability, but to show that a party “no longer had a stake in the litigation”); *Center for Auto Safety v. Department of Justice*, 576 F. Supp. 739, 749 (D.D.C. 1983) (FRE 408 “limits a document's relevance at trial, not its disclosure for other purposes”); *Rail General Exemption*

Authority – Nonferrous Recyclables, EP 561 (STB served May 5, 1997) (Rule 408 prohibits evidence addressing “liability for or invalidity of the claim”). Here, the waiver is offered solely to demonstrate that the interchange controversy no longer exists – a distinct and permissible purpose.

Compliance with Board Guidance: In FD 34030, the Board explicitly urged the parties to negotiate a resolution of the interchange commitment issue. *See Kan. & Okla. R.R., L.L.C.—Acquis. Exemption—Cent. Kan. Ry., L.L.C.*, FD 34030 (STB served Feb. 25, 2025), slip op. at 6. K&O and UP heeded that call. It would be perverse to exclude evidence of the very commercial solution (the waiver) that the Board encouraged the parties to reach.

Offeror’s Prerogative: The protections of FRE 408 belong to the offeror (UP) to prevent its concessions from being used against it. *See In re Groggel*, 333 B.R. 261, 297 (2005). Weskan has no standing to invoke the rule to silence UP or prevent it from intentionally informing the regulator of its own voluntary action. *See NAACP Legal Defense and Educ. Fund v. Department of Justice*, 612 F. Supp. 1143, 1146 (D.D.C. 1985) (the intent of FRE 408 is to foster settlement, not to block disclosure for purposes other than proving liability).

Sword and Shield: Weskan cannot attack the lease based on a “paper barrier” (the sword) while utilizing evidentiary rules to conceal the fact that the barrier has been removed (the shield). *See Bank Brussels Lambert v. Chase Manhattan Bank, N.A.*, 1996 WL 71507, at *2 (S.D.N.Y. Feb. 20, 1996) (Rule 408 is

not a total bar and allows admission for showing bias, prejudice, or other purposes). This objection is a transparent attempt to conceal material facts from the Board.⁵

The Scott City argument is a distraction.

Finally, Weskan devotes significant space to alleged “obfuscation” regarding the applicability of the Asset Use Fee to Weskan’s K&O-served Scott City loading facilities. Weskan Reply at 7. This is a red herring, serving only as a platform for Weskan’s taste for hyperbole and posturing.

Weskan and K&O agree that Weskan’s existing facilities at and east of Scott City are not on the Leased Lines and thus, by definition, were never subject to an interchange commitment. See K&O Supplement at 5, n.4. Therefore, the Asset Use Fee does not apply – and never did apply – to those facilities. While there may have been past confusion among K&O personnel regarding the scope of the interchange commitment, to be clear, K&O service to and from Weskan’s existing facilities at and east of Scott City are not covered by the 1997 or 2019 versions of the UP-K&O interchange commitment.

CONCLUSION

The complained-of K&O-CXR interchange commitment at Towner has been waived and will remain inapplicable to K&O-CXR traffic to and from

⁵ FRE 408 is designed to foster the compromise of “disputed claims,” not to shield an objector from the disclosure of facts showing that its opposition to a particular federal authorization request has become moot. Adopting Weskan’s exclusionary reading of FRE 408 would not encourage settlement; it would facilitate abuse by allowing a party to deploy a regulatory challenge as leverage unrelated to the statutory criteria for an exemption.

destinations and origins on the Leased Lines. The Asset Use Fee never applied to Weskan's existing Scott City facilities (or to any other K&O origin or destination point east of the Leased Lines). Weskan's (unsupported) conspiracy and leverage-driven objections concerning K&O's pricing (free of any interchange commitment) may belong in a rate case, if anywhere, but not this lease proceeding.

Ultimately, the Board must view Weskan's continued objection to the Petition through the lens of commercial reality. K&O is a short line railroad that accepted the only lease terms available to continue its service on this line. It should not be penalized for the disparity in leverage between itself and a Class I lessor, nor, for that matter, should it be squeezed by the aggressive commercial tactics of a heavily-capitalized grain market aspirant in the Soloviev Group (through Weskan and CXR holdings, each operating in a strategic common interest).

Under the circumstances, K&O respectfully requests that the Board grant the subject Petition.

Respectfully submitted,

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Dated: January 20, 2026

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of January, 2026, a copy of the foregoing Rebuttal was served upon all parties of record and upon Administrative Law Judge Jenifer Soulikias.

/s/ *R. A. Wimbish*
Robert A. Wimbish