

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. FD 36849

ENTERED
Office of Chief Counsel
January 26, 2026
Part of
Public Record

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

MOTION FOR PERMISSION TO FILE SUR-REBUTTAL

Weskan Grain LLC (“Weskan”) hereby moves the Surface Transportation Board (“Board”) to permit Weskan to submit into the record of this proceeding the attached brief Sur-Rebuttal to “Union Pacific’s Response to Weskan’s Reply” filed January 20, 2026 (“Rebuttal”). Weskan acknowledges that the proffered Sur-Rebuttal is a reply to a reply that is otherwise prohibited by 49 C.F.R. §1104.13(c). The Board should nevertheless grant this motion because the Rebuttal includes new and inconsistent representations regarding UP’s “waiver” proposal on which its “Comment Addressing Information Described in the Board’s June 2025 Order filed December 4, 2025” (“Supplement”) primarily relied.

UP also has belatedly included arguments in its Rebuttal attempting to defend the interchange commitment at issue in this proceeding that it was “strongly encouraged” to raise in its Supplement but intentionally did not. Decision served June 26, 2025 at 3. Waiting to insert such arguments into its Rebuttal was contrary to the rules and practices of the Board, unfair to Weskan, and contrary to the Board’s clear admonition to UP in this case to limit its Rebuttal to responding to the arguments and evidence cited by Weskan in its Reply filing. *See* Weskan Reply to Supplemental Filings of Union Pacific Railroad Company and Kansas & Oklahoma Railroad, LLC (“Reply”) at 5-6; Decision at 3, note 4.

Weskan should be granted the right to briefly respond to these aspects of UP's Rebuttal. This is not a situation where Weskan could have included the information in its Sur-Rebuttal in its Reply, Docket No. FD 36714 (Sub-No. 1), *Sunflower State Industrial Railway, LLC – Petition for Declaratory Order* (Served March 28, 2025) at 2, note 3, as this is new information and arguments from UP that it could have and should have included in its Supplement. Accordingly, the Board should accept Weskan's Sur-Rebuttal in the interests of the Board having a complete record before it. *See City of Alexandria, Va.—Pet. for Declaratory Ord.*, FD 35157, slip op. at 2 (STB served Nov. 6, 2008).

In conclusion, Weskan respectfully requests the Board to grant this motion and to accept the attached Sur-Rebuttal into the record of this proceeding.

Respectfully submitted,

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January 26, 2026

ATTACHMENT A

**BEFORE THE
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**KANSAS & OKLAHOMA RAILROAD, LLC – LEASE AND OPERATION
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**SUR-REBUTTAL TO UNION PACIFIC’S
RESPONSE TO WESKAN’S REPLY**

Weskan Grain LLC (“Weskan”) hereby files this brief Sur-Rebuttal to several aspects of “Union Pacific’s Response to Weskan’s Reply.” (“Rebuttal”).

First, the Rebuttal contains a new, updated position of Union Pacific Railroad Company (“UP”) that it “has waived” the Asset Use Fee for the “remainder of the lease.” Rebuttal at 4 and 2. This is different than UP’s and the Kansas & Oklahoma Railroad, LLC’s (“K&O”) previous positions. Specifically, as recounted in detail in Weskan’s Reply to Supplemental Filings of Union Pacific Railroad Company and Kansas & Oklahoma Railroad, LLC (“Weskan Reply”), UP and K&O declined to respond to either (1) the arguments and evidence submitted by Weskan in its Reply to the Petition for Exemption; or (2) the numerous, specific questions posed by the Board in its June 25, 2025 Decision. Rather, they both relied almost entirely upon an allegation that UP had proposed in the parties’ settlement discussions to waive the Asset Use Fee at issue in this case for the remainder of the current term. Specifically, UP stated “Union Pacific informed Weskan that it *would* waive its right to the asset use fee when K&O interchanges Weskan’s traffic with another carrier for the duration of the current lease.” Union Pacific’s Comment Addressing Information Described in the Board’s June 2025 Order (“UP Supplement”) at 3 (emphasis added).

For its part, K&O stated “[UP] has *proposed* to waive the Fourth Supplement’s Asset Use Fee for all K&O-CXR interchange traffic¹ for the balance of the current lease term (hereinafter, “UP’s *Offer*”).² Supplement to Kansas & Oklahoma Railroad, LLC’s Petition for Exemption (“K&O Supplement) at 1 (emphasis added). Throughout K&O’s supplemental filing it exclusively refers to the waiver as a proposal or offer.

In UP’s Rebuttal, however, UP has recharacterized the purported waiver from being a proposal to a binding concession UP has unilaterally adopted. See Rebuttal at 2 (“Union Pacific removed the asset use fee issue from this case *by waiving its right* to collect the fee for Weskan traffic for the remainder of the lease”)(emphasis added). See *id.* at 3 (the asset use fee is “*now waived*”)(emphasis added); *id.*, (“the fee *before Union Pacific waived it*”)(emphasis added); *id.*, (Union Pacific has made a significant concession *by waiving* its right to collect its asset use fee” (emphasis added); and *id.* at 4 (“Union Pacific *has waived* the fee that formed the basis of Weskan’s challenge”)(emphasis added).

UP’s updated position in its Rebuttal that it has unilaterally waived the right to assess the Asset Use Fee for the remainder of the lease (in the event the lease is approved in this proceeding) was previously unknown to Weskan. There is no other written document memorializing this position, as between Weskan and UP. Nor is Weskan aware of such a document between UP and K&O memorializing this position. Consequently, UP’s new representations to the Board that its waiver proposal has been elevated to a waiver “concession” should be memorialized in the decision the Board issues at the conclusion of this proceeding, in addition to a Board determination that the interchange

¹ Colorado Pacific Railroad LLC.

² K&O’s statement that UP’s offer applied to “all K&O/CXR interchange traffic” is facially more expansive than UP’s limit of its proposal to “Weskan’s traffic.” However, it is consistent with Weskan’s position that the interchange commitment should be “waived,” or removed from the lease for all traffic originating or terminating on the leased tracks.

commitment should be removed for all traffic interchanged by CXR and K&O. Moreover, UP's characterization of the waiver extending "for the remainder of the lease" is more expansive than UP's prior position that any waiver would extend only to the end of the current term. Weskan Reply at 8. This is consistent with Weskan's argument that the remedy in this case should include prohibiting UP and K&O from reinstating the Asset Use Fee provision in any renewal of the lease pursuant to Section 2 of the Third Supplement to the Lease Agreement. Weskan Reply at 8, and Exhibit B.

Second, UP's attempt to present new arguments in support of the interchange commitment in its Rebuttal filing after intentionally excluding any such arguments from the UP Supplement should be ignored or stricken from the record. Weskan Reply at 5-6. To the extent the Board allows such arguments to be considered, Weskan provides the following responses:³

Initially, most of UP's out-of-time arguments aren't even about the legality of the Asset Use Fee and lease in dispute in this proceeding. Rather, the Rebuttal makes general unsupported statements about UP's views on "asset use fees" in general. Rebuttal at 2. To the extent UP is attempting to argue that the Asset Use Fee interchange commitment at issue in this proceeding is somehow pro-competitive, this is flatly contrary to the undisputed facts. For example, UP attempts to characterize the Asset Use Fee as merely "compensation when K&O uses Union Pacific's line to interchange with another carrier." Rebuttal at 2. However, unrebutted evidence and arguments in the record demonstrate that the Asset Use Fee is so high that *zero* interchanges of westbound Weskan grain cars (or any other commodity) have occurred with CXR. *See e.g.*, Weskan Reply to

³ In its Rebuttal UP once again attempts to characterize Weskan's opposition to the lease proposal as being about rail rates. Rebuttal at 1. Weskan will not address this flawed argument further in this Sur-Rebuttal because it has refuted this allegation in its Weskan Reply (at page 12) and has otherwise demonstrated that the issue in this proceeding is that the Asset Use Fee renders any traffic it applies to economically infeasible, regardless of the rates. Any differences over the rate levels for traffic not subject to the Asset Use Fee may be resolved through available commercial and regulatory avenues.

Petition for Exemption at 6 (the Asset Use Fee “far exceeds, and in some cases is a multiple of, all but a few of the rates charged by K&O under its tariff.”); Comments of CXR at 8-9.

UP has therefore never received any compensation from K&O via the Asset Use Fee, proving that its primary purpose is not compensation, but rather to “limit future interchange with a third-party connecting carrier . . . by per-car penalty . . . or other means.” 49 C.F.R. §1180.4(g)(3)(i). The fact that the proposed lease does not expressly prohibit K&O from interchanging with CXR is not relevant or determinative. *See, id.* (limiting interchange by “outright prohibition” is only one of numerous interchange commitments).

Similarly, to the extent UP is trying to apply to the facts of this proceeding UP’s general (and also unsupported) questionable assertion that “asset use fees are pro-competitive” because “they allow short lines to provide shippers with the competitive benefit of their services without paying full rent, while retaining full ability to interchange with other carriers,” this is also wrong in these circumstances. Again, in this case the Asset Use Fee is so high that it makes no economic sense for Weskan to utilize K&O’s services to transport grain west to the Stockton facility via interchange with CXR. K&O is severely disincentivized from providing such services, which could lead to grain grown in Kansas being shipped on the BNSF Railway Company instead of UP – something UP desires to prevent.⁴

But in any event, all of UP’s vague and unsupported arguments in its Rebuttal filing are untimely and should be at a minimum disregarded. UP made no attempt whatsoever to defend the legality of the Asset Use Fee in any of its prior pleadings. It cannot be allowed to try to do so in its

⁴ Also strained is the notion that the Asset Use Fee was “the product of negotiation between commercial partners,” Rebuttal at 3, implying UP and K&O were negotiating as equals. K&O itself states that UP insisted upon the Asset Use Fee being in the lease, and that “K&O accepted the at-issue interchange commitment as a necessary precondition to pursuing the short line business opportunity.” K&O Supplement at 11. In its rebuttal filing K&O complains of UP’s heavy-handed exercise of its market power, stating “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.” K&O Rebuttal at 12.

Rebuttal filing.

Finally, UP concludes its Rebuttal by stating “the record fully supports granting K&O’s petition for exemption.” Rebuttal at 4. Weskan strongly disagrees. However, UP’s statement is contrary to its own updated position, by which it has represented to the parties and the Board that it “has waived” its right to collect the Asset Use Fee “for the remainder of the lease.” Consequently, the record before the Board does *not* support granting K&O’s petition unless that grant entails an order conditioning any such approval with the directive that the Asset Use Fee cannot be assessed for the remainder of the current lease term and any extensions thereof, on Weskan’s traffic and all other traffic interchanged by K&O and CXR.

Respectfully submitted,

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January 26, 2026

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of January, 2026, copies of the foregoing Motion 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