

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

WESKAN GRAIN LLC	)	
	)	
Complainant,	)	
	)	
v.	)	Docket No. NOR 42185
	)	
KANSAS & OKLAHOMA RAILROAD, INC	)	
	)	
Defendant	)	
	)	

**REPLY TO MOTION TO REJECT THE COMPLAINT OR,
IN THE ALTERNATIVE, FOR EXPEDITED DETERMINATION
OF JURISDICTION AND BIFURCATION OF THE PROCEEDING**

Weskan Grain LLC (“Weskan”) hereby submits its reply to the Motion to Reject the Complaint or, in the Alternative, for Expedited Determination of Jurisdiction and Bifurcation of the Proceeding (“Motion”) filed by Defendant Kansas & Oklahoma Railroad, LLC (“K&O”). For all the reasons set forth below, the Board should deny the Motion.

I. Introduction and Procedural Background

Weskan is a shipper of grain commodities by railroad with grain loading facilities located on track owned and operated by K&O. K&O is a Class III common carrier railroad with the statutory obligation to provide Weskan service upon reasonable request. 49 U.S.C. §11101. K&O may supply whatever rates and terms for the requested transportation it believes are reasonable in the first instance, but those rates are subject to the Board’s exclusive jurisdiction to determine the maximum reasonable rate that K&O may charge. 49 U.S.C. §11704. For over three years, K&O has refused to provide Weskan with common carrier rates and service terms that are reasonable, in

Weskan's opinion. On December 17, 2025, Weskan filed a Pre-Filing Notice of Complaint pursuant to 49 C.F.R. §1111.1. On January 15, 2026, after a 29-day delay in the Board's appointment of mediators pursuant to 49 C.F.R. §1109.4(b), the Board established a 60-day mediation period ending March 16, 2026. Weskan and K&O then participated in a mediation that was ultimately terminated on March 6, 2026 by mutual agreement of the parties and the mediators, ten days prior to the deadline originally set by the Board.

Soon after the mediation ended, on April 17, 2026, Weskan filed its Amended Petition for Waiver and a proffered Complaint challenging a revised common carrier rate Weskan had requested and received from K&O upon the termination of the mediation.¹ The Amended Petition sought an expedited ruling from the Board excusing Weskan from the requirements of filing another notice of intent to initiate a rate case and also allowing the parties to forego another Board-sponsored mediation, since the first mediation did no more than provide clarification on certain operating parameters and the parties did not come close to a commercial agreement. Amended Petition at 3. In the alternative, Weskan asked the Board, if it was inclined to require a second mediation, to consider reducing the mediation period to substantially less than the 60 days allotted in the Board's rules. *Id.* at 7.

On July 9, 2026, the Board served a decision in this docket that granted the Amended Petition in part (*July 9 Decision*). Specifically, the Board "consider[ed] the Amended Petition, including the draft complaint attached as Exhibit A, as Weskan's pre-filing notice under 49 C.F.R. §1111.1" *July 9 Decision* at 3. The Board also held that this case will proceed under the captioned docket number and that the protective order issued in this case and the Board-appointed liaison will both remain the same. *Id.* Finally, the Board denied Weskan's request that mediation concerning

¹ Weskan also attached a copy of its first discovery requests to K&O.

the newly challenged rate be waived entirely, but it shortened the mediation period to 30 days, “after which Weskan may file its complaint.” *Id.* The *July 9 Decision* was made effective as of its service date.

The *July 9 Decision* made no mention of K&O’s Motion, which had previously been filed on June 17, 2026.

II. ARGUMENT

The Motion should be denied. First, there were no grounds to reject the proffered complaint when the Motion was filed, but the intervening *July 9 Decision* and its statement that Weskan may file its complaint at the conclusion of the 30-day mediation period if no mediated solution occurs has now mooted this entire aspect of the Motion. Second, the section of the Motion asking that the case should be bifurcated should be denied on several grounds: it is extremely premature given the procedural posture of this case after the *July 9 Decision*, but it is also contrary to the Board’s regulations governing Stand-Alone Cost (“SAC”) rate cases, and it is also not supported by applicable precedent. Third, while the Board has held that motions to bifurcate are not the appropriate vehicles to consider the substantive matter of market dominance - and Weskan therefore does not respond in detail to K&O’s substantive arguments - the Motion is nevertheless flawed because it improperly would require the Board to stray far beyond the applicable standards for determining market dominance.

A. There are No Grounds to Reject the Complaint

Stripped of its baseless hyperbole, accusations, conspiracy theories, and reckless *ad hominem* attacks,² the Motion asks the Board to reject Weskan’s proffered complaint because

² At page 32 of the Motion, K&O implies that Weskan’s outside counsel and expert consulting firm, with 36 and 70 years, respectfully, of experience appearing before this Board and the Interstate Commerce Commission before it, engaged in unethical discovery practices and violated the Board’s

Weskan has sought a determination of the maximum reasonable rate K&O can charge for Weskan's transportation using the SAC methodology, which K&O alleges Weskan selected for nefarious purposes:

Weskan's Rate Reasonableness Complaint is not a *bona fide* quest for regulatory relief. It is, rather, a tactical abuse of the Board's processes designed to achieve an ulterior objective. By seeking an immediate leap into full SAC litigation over an unprecedented short-haul route with practically zero traffic history, Weskan seeks to exploit the complexity of regulatory litigation to subvert the Board's processes and manufacture leverage for a forced corporate acquisition where K&O has already advised Weskan's parent that K&O is not for sale.

Motion at 37. K&O goes on to complain that "the Board should not permit a well-capitalized shipper to engineer a transportation bottleneck and then weaponize the Board's regulatory processes—meant for truly captive shippers—to force a short line into a submissive partnership. its desire for an immediate plunge into a sprawling and costly SAC discovery assault is a calculated harassment and leverage tactic." *Id.* at 5.

These and other similar claims and charges in the Motion as to Weskan's motives are all baseless and they have been appropriately mooted by the *July 9 Decision*. The Board's statement that should there be no commercially negotiated solution at the end of the new 30-day mediation period, "Weskan may file its complaint" rightfully ignores this unfortunate aspect of K&O's motion. Weskan adds that it has every intention of again attempting in good faith to try and reach a mutually acceptable commercial resolution of this dispute before filing its complaint.

This all being said, Weskan briefly responds to K&O's allegations. Stated simply, as much as Weskan would have preferred to have been able to utilize a methodology other than SAC to obtain a maximum reasonable rate, the fact is there are presently no other viable options for a

protective order terms. This type of reckless and defamatory advocacy has no place in Board proceedings, and Weskan will not dignify it with a further response.

shipper to formally challenge the common carrier rate of a Class III railroad. More specifically, there are only three current ways a shipper may try to demonstrate that a common carrier railroad rate is unreasonable: SAC; the Simplified Stand-Alone Cost Methodology (“SSAC”); and the Three-Benchmark Methodology. However, the Board long ago determined that Three-Benchmark Methodology – the least burdensome current methodology - may not be used to challenge the rates of a Class III railroad. STB Ex Parte No. 646 (Sub-No. 1), *Simplified Standards for Rail Rate Cases* (Served March 19, 2008).³

The SSAC methodology – which is purportedly only slightly less burdensome and costly than a SAC case, has never been fully tested, since there has only been one complaint filed by a shipper and the case was settled and the complaint voluntarily dismissed prior to the start of the evidentiary phase. *See*, STB Docket No. NOR 42115, *U.S. Magnesium, L.L.C v. Union Pacific Railroad Company* (served April 2, 2010).

The Revenue Adequacy Methodology from *Coal Rate Guidelines, Nationwide*, 1 I.C.C.2d 520 (1985). has never been utilized to determine a maximum reasonable railroad rate, and there are currently no established standards for pursuing such a case in any event. Notably, the Motion does not assert that there is another, more efficient methodology Weskan should utilize to challenge K&O’s rate that is less burdensome on the parties.

Thus, until the Board promulgates new or revised regulations that enable shippers to more efficiently challenge the rates of Class II and Class III railroads, shippers like Weskan who want the Board to determine the maximum reasonable rate for their transportation are regrettably limited to

³ *See id.* at 10 (“But in any event, we have searched in vain for any viable way to apply the Three-Benchmark method to assess the reasonableness of a rate for a local movement on a shortline. We believe that shippers seeking to challenge the rates of local movements on shortlines are better served by devising ways to reduce the litigation costs of a Simplified-SAC presentation.) This of course, never happened.

SAC. Weskan is fully aware that pursuing a maximum reasonable rate via a SAC case is costly and burdensome for both parties, and even the Board. Weskan and its principals and affiliates would also prefer to focus on their core mission of providing low-cost transportation and market options for grain producers in eastern Colorado and western Kansas.⁴ But Weskan believes K&O has given it has no choice but to pursue formal relief from the Board if Weskan wants to finally obtain a reasonable rate from K&O, since K&O has obstinately refused to provide one in commercial negotiations. And unfortunately, SAC is currently the only viable methodology for such a challenge.

Finally, by asking the Board to reject the complaint because of alleged litigation burdens it would bear from defending a case that is being lawfully commenced pursuant to the Board's rules, K&O is essentially saying those alleged burdens should deprive Weskan of a remedy that the Board's regulations potentially provide and it is willing to expend the resources (and endure the heavy burdens) to explore. According to K&O, because it believes it will be unduly burdened, Weskan should not even be allowed to make the difficult choice to seek relief. Extending this logic to all other customers of K&O would afford K&O *carte blanche* to set rates at whatever level it

⁴ Weskan urges the Board to review the 2023 *Kiowa County Independent* article attached as Exhibit M to the Motion. It encapsulates the efforts that Weskan and its parent company Soloviev Group have made to re-establish and expand the national rail transportation system in Colorado and to create market opportunities for grain producers in Colorado and Kansas. As the owner of Soloviev Group relates when discussing his successful effort to acquire the 122-mile Towner Line in Colorado through the feeder line proceeding before the Board in Docket No. FD 36005, "I've faced 18 years of hurdles in trying to get the best price I can for not only my products but also for local producers in Kiowa, Prowers, Cheyenne County and western Kansas. I keep trying to cut out the middleman. It was us against the world." Motion at PDF page 319. *See also Id.* at PDF page 320, quoting Will Bramblett, CEO of Weskan Grain: "'The sole purpose at Weskan Grain is to offer our services and time to area producers. We are driven to provide a more competitive price, give producers more advantages, and outstanding service.' Will Bramblett says he wants producers to call him. 'I don't want to just say we're open for business, I want to talk to producers and explain how we can give them a competitive edge. I will answer texts and phone calls so do contact me at [phone number redacted].'"

desired without penalty until the Board promulgated new regulations that made cases less burdensome for K&O to defend.

In summary, the section of the Motion seeking rejection of the complaint has been mooted by the *January 9 Decision*, but all the arguments asserted by K&O in support of its request are baseless in any event.

B. There are no Grounds for the Case to be Bifurcated

1. Bifurcation Would Result in Even More Delay

The Board has very seldom bifurcated SAC rate cases. As the Board has explained, “[t]he default procedural schedule in SAC proceedings—as well as the modified procedural schedule that currently governs this proceeding—provides for evidence on market dominance and rate reasonableness to be submitted simultaneously.” STB Docket No. NOR 42121 *Total Petrochemicals USA, Inc. v. CSX Transp., Inc.*, (STB served April 5, 2011) at 4 (“*Total*”) (citing *Expedited Procedures for Processing Rail Rate Reasonableness, Exemption and Revocation Proceedings*, 1 S.T.B. 754, 760 (1996)).

The Board has also long recognized that “bifurcation of the market power and rate reasonableness phases can unnecessarily prolong a proceeding.” STB Docket No. 41685 *CF Industries, Inc v. Koch Pipeline Company, L.P* (served May 14, 1997) at 5. It also recognizes that “[t]he current dual-track procedural schedule has the benefit of faster completion of the record in most instances,” albeit noting parties incur the cost of preparing rate reasonableness evidence despite not knowing the determination of market dominance. *Total* at 5. Granting K&O’s motion would add substantial delay to this already-delayed proceeding, and K&O’s proposed procedural schedule outlines a much longer bifurcated maximum rate proceeding involving two phases consisting of 150 days and 210 days which (1) leaves out certain key aspects of the schedule at 49

C.F.R. §1111.9, such as K&O answering the complaint and the parties filing final briefs; (2) shortens the time intervals for key aspects of the evidentiary submissions; and (3) does not account for the time associated with the Board issuing two separate decisions on market dominance and rate reasonableness. Motion at 41-42.

In summary, Weskan's efforts to obtain a formal determination of the maximum reasonable rate for the transportation of grain from its Scott City East grain facility to its grain elevator facility located at Stockton Siding, Colorado began in December 2025, and the complaint has yet to be accepted into this docket and the schedule commenced. The bifurcation of the case into market dominance and rate reasonableness phases would introduce even more delay into the process, to the detriment of Weskan.

2. The Motion Should be Denied Because it is Premature

In addition to the undue delay bifurcation would case, a threshold reason for denying the motion is that is unduly premature in several respects. First, the *July 9 Decision* has directed the parties to engage in a 30-day mediation period before the complaint may be filed and the proceeding commenced. There is therefore no need for the Board to entertain a motion to bifurcate until that process has completed and a commercial solution is ruled out. Second, and more significantly, the Motion is also premature because there has been no discovery on market dominance, or any other issues for that matter. In all prior cases where bifurcation was considered, the discovery phase of the case had either been completed or was well underway prior to bifurcation being raised. In *Total*, for example, the motion to bifurcate was filed five months after the complaint was filed, and after the parties had engaged in discovery that bore on the market dominance issues. *Total* at 2 ("In support of its motion, CSXT has proffered information produced by TPI during the discovery process that indicates TPI's use of truck and rail-truck transloading to transport significant amounts

of the issue commodities to its customers.”). The motion to bifurcate in *M&G* was filed seven months after the complaint was filed and presumably after discovery had been completed. In *Sierra Pac. Power Co. v. Union Pac. R.R.*, NOR 42012 (STB served Jan. 26, 1998)(*Sierra Pacific*), the decision to bifurcate the case was a *sua sponte* decision by the Board in response to a motion to dismiss the complaint that was filed by UP three months after the complaint was filed and while the parties were actively engaged in discovery. *Sierra Pacific* at 4-5.

In this case, discovery has not even begun, which is why the Motion does not contain any actual data or evidence attempting to raise “considerable doubts” about K&O’s market dominance over the transportation covered by the rate, as explained below. Rather, is based almost entirely upon speculation, K&O’s expert’s musings about the grain industry, and discussion of various untested economic theories. There is no precedent for the Board entertaining a motion to bifurcate this case when discovery phase has not yet begun.

3. The Motion Does not Contain Any Evidence That Raises “Considerable Doubts”

Because of the unavoidable delay in processing a SAC case caused by bifurcating it into market dominance and rate reasonableness phases, the bar to grant such extraordinary relief is justifiably set high. Specifically, “[a] motion to bifurcate a SAC case requires that the defendant railroad provide evidence raising considerable doubts as to the shipper’s ability to satisfy the Board’s market dominance standard.” *Total* at 4 (citing *Sierra Pacific* at 4). K&O does not meet this heavy burden.⁵ Moreover, the Board has only made determinations of “considerable doubts” in

⁵ K&O also implies that a requirement to bifurcate a rate case into market dominance and rate reasonableness phases is found in the statutory language of 49 U.S.C. §10707. *See* Motion at 30 (“In the post-*Loper Bright* era, the Board’s jurisdictional inquiry must adhere strictly to the plain text of the statute. Because Section 10707 demands a real-world assessment of effective competition, K&O is entitled to the bifurcated Market Dominance discovery period proposed below

two cases,⁶ both of which are readily distinguishable from the facts of this case. In *Sierra Pacific*, the genesis of the “considerable doubt” standard, the Board found such doubt from the evidence and findings in the UP/SP Merger Proceeding⁷ concerning the access by BNSF Railway Company and UP at Sierra Pacific Power Company’s North Valmy Power Station. *Sierra Pacific* at 3-5. To the Board, the merger findings and evidence presented by Union Pacific Railroad Company and Sierra Pacific raised “considerable doubt” as to whether Union Pacific possessed market dominance over the transportation at issue, and the Board broke from the default dual-track process and bifurcated the case. The unique facts of *Sierra Pacific* provide no basis for bifurcation in this case, primarily because there is no other rail carrier that can provide the transportation at issue in Weskan’s complaint.

In *Total*, the Board’s decision to bifurcate was heavily influenced by the complaint covering 104 origin and destination pairs.⁸ For that reason, initial consideration of market dominance issues was not for the purpose of potentially dismissing the case entirely, but to enable the Board to more efficiently process the case by paring down the routes for which maximum reasonable rates would be determined. See *Total* at 1 (“We take this unusual step because CSXT has presented evidence that raises considerable doubts as to whether it has market dominance over a number of the

in Section V, below.”). However, there is no language in §10707 creating this statutory right and K&O does not offer a more cogent explanation of its position that Weskan can reply to

⁶ In *M&G Polymers USA, LLC v. CSX Transportation, Inc.*, (served May 6, 2011) (*M&G*) the complainant did not oppose the railroad defendant’s motion to bifurcate, and so the Board did not determine whether “considerable doubts” of market dominance were present in deciding to bifurcate the proceeding.

⁷ Docket No. FD 32760, *Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company – Control and Merger – Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp. and the Denver and Rio Grande Western Railroad Company*.

⁸ *Total* at 1.

challenged movements”). These considerations and desire for administrative efficiency were further influenced by the fact that both *Total* and *M&G* cases were pending before the Board at the same time.⁹ Here, the complaint covers a single, 78-mile shuttle train movement and the Board has no other SAC cases on its docket.

In *Total*, the Board decided to bifurcate the case because “CSXT has proffered information produced by TPI during the discovery process that indicates TPI’s use of truck and rail-truck transloading to transport significant amounts of the issue commodities to its customers.” *Total* at 2. CSXT also produced evidence produced by Total demonstrating that “TPI has utilized truck transportation for some of the commodities at issue and can utilize trucks for some issue traffic, which increases the likelihood that CSXT faces effective competition for that traffic.” *Id.* at 6.

In contrast to the evidence produced in *Total* after the parties had engaged in discovery, the Motion relies almost exclusively on K&O’s expert’s view of industry conditions and untested economic theories, and it contains zero actual evidence that raises “considerable doubts” that K&O has market dominance over the transportation of grain from Weskan’s Scott City East facility to its Stockton grain elevator facility. While the Motion points out from publicly available documents that Weskan is capable of receiving grain by truck at the Stockton facility, it makes no specific, evidence-backed argument that would raise “considerable doubts” that trucking grain from the Scott City East facility is not an effective competitor to K&O for the transportations of similar volumes of grain by rail. Motion at 18, 21. Consequently, there are no substantive grounds for bifurcating this proceeding.

4. Denying the Request for Bifurcation will Not Harm K&O

Weskan adds that the Motion should also be denied because K&O’s complaints about

⁹ The *Total* complaint was filed May 3, 2010, and *M&G* complaint was filed June 18, 2010.

potential discovery burdens are overblown and its alleged concerns about a “discovery avalanche” (Motion at 9) have been mooted by the *July 9 Decision* in any event. Such concerns were unfounded even before that ruling because in addition to the knowledge and clarity both parties gleaned from the first mediation session, K&O has now had Weskan’s first discovery requests since April 17, 2026. Weskan could have withheld serving this discovery on K&O until the complaint is actually filed in accordance with 49 C.F.R. §1111.2(f), but Weskan chose not to and consequently, K&O has had three months to review and study the requests. K&O also could have begun discussions with Weskan counsel (with or without the Board’s liaison assigned to this case) about any concerns or questions about the scope and/or content of the requests. K&O cannot be heard to complain about Weskan’s discovery requests when it knows what those requests are and has had three months (and counting) to formulate a strategy to respond to them.

C. The Motion Improperly Defines the Scope of Market Dominance

Finally, a motion to bifurcate “is not the appropriate vehicle to consider the substantive matter of market dominance.” *Total*. at 6. Nor would such consideration at this early stage be appropriate or in compliance with the Board’s procedural rules for SAC cases, which explicitly call for the complainant to submit - after the completion of discovery – its “opening evidence on absence of intermodal competition, variable cost, and stand-alone cost issues.” 49 C.F.R. §1111.9(a). The defendant railroad is then afforded the opportunity to reply to complainant’s opening submission, and the complainant is afforded the right to submit evidence rebutting the railroad’s reply evidence. *Id.*

Accordingly, other than to demonstrate K&O has not cleared the high bar of raising “considerable doubts” that it has market dominance over the traffic at issue, there is no requirement that Weskan respond to the Motion’s substantive claims of the lack of market dominance in this

reply. Weskan reserves all rights to present its evidence of market dominance and rebuttal to any positions K&O may choose to take in the reply phase of the evidentiary process. This being said, Weskan notes that the Motion ventures far beyond the well-established boundaries for a qualitative market determination, which is “whether there are any feasible transportation alternatives that could be used for the issue traffic, considering both intramodal (from other railroads) and intermodal (from other modes of transportation such as trucks, transload arrangements, barges or pipelines) competition.” *Total* at 4, citing *E.I. du Pont de Nemours & Co. v. CSX Transp., Inc.*, NOR 42099, slip op. at 2 (STB served June 30, 2008).

Instead of addressing other modes of transportation that “could be used for the issue traffic” (which in this case could only be commercial trucks operating between the Scott City East facility and the Stockton facility) K&O would have the Board determine market dominance by looking at competition between other railroads, competition among other elevators, competition tied to commodity sourcing decisions, and others. That is precisely the type of product and geographic competition evidence the STB excluded from the market dominance inquiry in *Ex Parte* No. 627, *Market Dominance Determinations – Product and Geographic Competition*, served December 21, 1998 (*EP 627*). There, the Board eliminated consideration of geographic and product competition from the market dominance inquiry because it rightfully concluded that the burdens of litigating those issues could deny captive shippers meaningful access to Board rate relief. *See, EP 627* at 13. The Motion relies overwhelmingly on these previously rejected arguments. Should K&O raise such arguments in its aforementioned reply submittal, Weskan intends to demonstrate:

- (1) K&O’s argument regarding the proliferation of high-capacity shuttle facilities which it claims has expanded motor carrier draw radii,¹⁰ is a product competition argument, not a transportation alternatives argument.

¹⁰ Motion at 16-17.

- (2) K&O's argument that Stockton Siding's outbound access to both BNSF and Union Pacific creates a line haul bidding war that lets Weskan extract cost savings unavailable to single served elevators¹¹ is related to downstream geographic competition among rail carriers at a different link in the supply chain.
- (3) K&O's argument that the market dominance inquiry should begin at the farm rather than at Weskan's Scott City elevator (so-called load out competition)¹² is a product and geographic competition argument in substance.
- (4) K&O's argument that because the 78-mile movement from Scott City to Stockton falls within the Board's 500 highway mile streamlined approach threshold and western Kansas grain producers fall within an exemption under the Moving Ahead for Progress in the 21st Century Act (MAP-21) allowing farmer-owned trucks to operate within a 150-air mile radius without a commercial driver's license or Hours of Service compliance¹³ substitutes regulatory eligibility for economic proof of competition.

III. Conclusion

For all the reasons set forth hereinabove the Motion should be denied and this case processed under the Board's regulations at 49 C.F.R. §1111.9.

Respectfully submitted,

/s/ Thomas W. Wilcox
Thomas W. Wilcox
LAW OFFICE OF THOMAS W. WILCOX, LLC
1629 K. Street NW, Suite 300
Washington, D.C. 20006
(202) 508-1065
tom@twilcoxlaw.com

Attorney for Complainant Weskan Grain LLC

July 15, 2026

¹¹ *Id.*

¹² *Id.* at 20-21.

¹³ *Id.* at 22-23.

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of July, 2026, a copy of the foregoing Reply was served by electronic mail on representatives of Kansas & Oklahoma Railroad, LLC.

/ss/ Thomas W. Wilcox
Thomas W. Wilcox