

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

VFRC, LLC, an Oregon Limited Liability Company, **VENELL FARMS, INC.**, an Oregon Business Corporation, **ALBANY & EASTERN RAILROAD COMPANY**, an Oregon Business Corporation.

v.

PORTLAND & WESTERN RAILROAD, INC., a New York Corporation, **GENESEE & WYOMING, INC.**, a Delaware Corporation, **UNION PACIFIC RAILROAD COMPANY**, a Delaware Corporation.

STB Docket No. NOR 42187

UNION PACIFIC RAILROAD COMPANY'S MOTION TO STRIKE

Complainants cannot defeat Union Pacific's Motion to Dismiss by using their Reply to plead new facts and new theories that appear nowhere in the Amended Complaint. Union Pacific's Motion showed that the Amended Complaint pleads no viable violation of 49 U.S.C. § 11101(a) against Union Pacific. The Reply does not cure that defect by pointing to pleaded allegations. It instead introduces new facts, exhibits, and liability theories after Union Pacific's opportunity to respond. The Board should strike the Reply to the Motion to Dismiss.

The Board's rules make the complaint the operative pleading that defines the scope of a complainant's claims. A complaint must "set forth . . . the facts upon which it is based," specifically reference the "pertinent statutory provisions and Board regulations," and "advise the Board and the defendant fully in what respects

those provisions or regulations have been violated.” 49 C.F.R. § 1111.2(a). When a motion to dismiss identifies a pleading defect, the complainant may not use a reply brief to supply missing facts or new liability theories. The proper course is an amended complaint, with the corresponding right of the defendant to answer.¹

That limitation is settled. Federal courts routinely hold that “a complaint may not be amended by the briefs in opposition to a motion to dismiss.”² Agency precedent likewise provides that the “complaint process must be defined by the four corners of the complaint,” and that later pleadings cannot expand the proceeding without a formal amendment.³ The rule is particularly important here because the Board’s rules do not permit Union Pacific to file a surreply to answer Complainants’ newly minted theories.⁴

¹ Cf. 49 C.F.R. § 1111.3 (setting forth requirements for amended and supplemental complaints).

² *Al-Saadoon v. Barr*, 973 F.3d 794, 805 (8th Cir. 2020) (cleaned up); *see also Johnson v. Georgetown Univ.*, 827 F. Supp. 3d 133, 164 n.13 (D.D.C. 2026) (A “plaintiff may not supplement her pleadings with factual material through her motion-to-dismiss briefing.”); *Cherokee Nation v. U.S. Dep’t of the Interior*, 643 F. Supp. 3d 90, 107 (D.D.C. 2022) (“a complaint ‘may not be amended by the briefs in opposition to a motion to dismiss,’ and ‘the Court need not consider the merits’ of a legal theory that should have been presented in the complaint but is presented for the first time in such filings.”); *Frett v. Howard Univ.*, 24 F. Supp. 3d 76, 83 (D.D.C. 2014) (“a plaintiff cannot overcome a motion to dismiss by alleging new facts in her responsive pleading”); *Coll. Sports Council v. Gov’t Accountability Off.*, 421 F. Supp. 2d 59, 71 (D.D.C. 2006) (“[T]he plaintiff cannot amend its complaint *de facto* to survive a motion to dismiss by asserting new claims for relief in its responsive pleadings. Therefore, the Court does not, and cannot, consider claims first raised in the plaintiff’s opposition.” (internal citations omitted)).

³ *McCarty Farms, et al. v. Burlington N. Inc.*, 4 I.C.C.2d 262, 266 (1988).

⁴ 49 C.F.R. § 1104.13(c).

Union Pacific's Motion to Dismiss showed that the pleading defect in the Amended Complaint is straightforward: the Amended Complaint concerns the maintenance and operations of a leased line operated by others and pleads no facts tying Union Pacific to a service duty or reasonable request for service for that leased line.

Complainants could have used their Reply to explain how the Amended Complaint states a § 11101(a) claim. They did not. The Reply does not cite the Amended Complaint at all. Instead, it advances four unpleaded theories: that Union Pacific has a residual common-carrier duty to replace the bridge; failed to enforce its lease with PNWR; retains overhead trackage rights; and faces claims by Complainants as asserted creditor beneficiaries under Oregon law.⁵ None of those theories appears in the Amended Complaint, and each depends on factual assertions or exhibits that were not pleaded there.⁶

Those theories are not before the Board on this Motion. Union Pacific has had no opportunity to answer them, move against them, or test the factual assertions on which they depend. Allowing the Reply to expand the case would prejudice Union Pacific and bypass the pleading requirements that define contested matters before the Board.

⁵ Reply to Motion to Dismiss at 6–12.

⁶ *Compare* Amended Complaint at 5–15 *with* Reply to Motion to Dismiss at 6–12.

For these reasons, the Board should strike the Reply in its entirety and decline to consider Complainants' new facts, new exhibits, and new theories of liability.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of August 2026, I served a copy of Union Pacific Railroad Company's Motion to Strike by email on the service list.

/s/ Stephen S. Laudone
Stephen S. Laudone