

Martin E. Hansen, OSB #800526
FRANCIS HANSEN & MARTIN LLP
 1148 NW Hill Street
 Bend, OR 97703
 Ph: (541) 389-5010
 meh@francishansen.com
 Counsel for Complainants

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**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,

Complainants,

v.

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

Defendants.

Docket No. NOR 42187

**COMPLAINANTS' REPLY TO UNION
 PACIFIC RAILROAD COMPANY'S
 MOTION TO STRIKE**

Pursuant to 49 C.F.R. § 1104.13(a), Complainants hereby submit this Reply to Union Pacific Railroad Company's ("UP") Motion to Strike, which was filed with the Surface Transportation Board (the "Board") on August 13, 2026.

I. SUMMARY OF REPLY

In its Motion, UP moved to strike Complainants' Reply to UP's Motion to Dismiss on its claimed "basis" that Complainants' Reply included "newly minted theories" which were not pleaded in their Amended Complaint. This is entirely unfounded, as all the arguments raised by Complainants in their Reply flow directly from facts and theories pleaded in their Amended

Complaint, and which UP has had notice of since the start of the case. Accordingly, UP's Motion to Strike must be denied by the Board.

II. POINTS AND AUTHORITIES

A. Complainants' Reply to UP's Motion to Dismiss pleaded facts and theories which were included in Complainants' Amended Answer.

UP falsely accuses Complainants of advancing "unpleaded theories" that are "not before the Board" in their Reply to UP's Motion to Dismiss. However, Complainants' Amended Complaint alleged each of the following:

- "UP is a common carrier by rail subject to the jurisdiction of the Surface Transportation Board."¹
- "UP is the owner of the Marys River Bridge"²
- "[The] bridge has been owned by UP since 1996"³
- "In or around 1992, Southern Pacific contracted with PNWR (formerly Willamette & Pacific Railroad ("WPRR")) to operate the line, including the Marys River Bridge. This lease was recently extended in 2025. This arrangement remains in effect today. Thus, the obligation to operate, maintain, and repair the bridge and line lies with PNWR and UP."⁴
- "UP [retained] overhead trackage rights on the line."⁵

Despite these allegations contained in the Amended Complaint, UP attempts to argue that Complainants' "unpleaded theories" are: "that UP has a residual common-carrier duty to replace the bridge; failed to enforce its lease with PNWR, retains overhead trackage rights, and faced claims by Complainants as asserted creditor beneficiaries [of the lease] under Oregon law."⁶

¹ Amended Complaint, at 3.

² *Id.*

³ *Id.* at 4.

⁴ *Id.*

⁵ *Id.* at 6.

⁶ UP's Motion to Strike, at 3.

Each of these theories were properly pleaded before the Board and are discussed in greater detail below.

1. UP has a residual common-carrier duty to replace the bridge.

The Amended Complaint specifically alleged that (1) UP is a common carrier, (2) has owned the Marys River Bridge since 1996, and (3) leases the track to PNWR. In its Motion to Dismiss, UP responded by admitting that as owner and lessor, it holds a residual common carrier obligation over the line and bridge.⁷ As Board precedent shows, the “residual common carrier obligation “engages only if the primary freight carrier fails to perform.”⁸ The Amended Complaint contains numerous allegations of the failure of the primary freight carrier, PNWR, to perform:

- “This structural failure was caused by Defendants’ oversight. Had the bridge been properly repaired/rebuilt following the fire in 2022, the bridge would not have collapsed in 2025.”⁹
- “Since its collapse on January 4, 2025, Defendants have yet to repair the bridge or provide a timeline on resuming service.”¹⁰
- “This has caused the cessation of interchange services between Complainants and the PNWR-operated railroad, resulting in the complete disruption of rail service....”¹¹
- “PNWR neglected its duty as a common carrier for 17 months after the bridge collapsed and has now decided to embargo the line with ‘no immediate plans to resume service.’”¹²
- “By failing to take any action regarding the collapsed Marys River Bridge for

⁷ UP’s Motion to Dismiss, at 2.

⁸ *Mass. Dept’t of Transp.—Acquisition Exemption—Certain Assets of CSX Transp., Inc.*, Docket No. FD 35312, at 11 (STB served May 3, 2010); *see also Wash. State Dep’t of Transp.—Acquisition Exemption—Palouse River & Coulee City R.R.*, Docket No. FD 35024, at 2-3 (STB served May 25, 2007) (“WSDOT will not operate the lines, but will retain the residual common carrier obligation should the operators prove unable to perform.”).

⁹ Amended Complaint, at 8.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 11.

nearly 17 months, despite being obligated to do so, [PNWR's] intent is clear.”¹³

Thus, there is no question that Complainants properly pled (and UP admitted) that UP has an obligation as a residual common carrier to replace the bridge. To claim that this is a “new theory that appear[s] nowhere in the Amended Complaint” is a disingenuous argument by UP. There are no grounds to strike this theory of liability against UP in this case.

2. UP retains overhead trackage rights on the line.

Complainants' Amended Complaint alleged that “VFRC purchased its section of the line from UP...with UP retaining overhead trackage rights on the line.”¹⁴ Obviously, UP retained overhead trackage rights on the line which it continued to own and did not sell to VFRC. Again, UP claims in its Motion to Strike that UP's retention of overhead trackage rights was unpleaded and appears nowhere in the Amended Complaint. This is clearly false, and the Board should not strike this argument.

3. The lease between UP and PNWR has been a theory of liability against UP which Complainants have pleaded since the start of the case.

The two remaining theories of liability which UP contends were “unpleaded” and “not before the Board” both involve the lease between UP and PNWR (the “Lease”). Complainants' Amended Complaint explicitly alleged the Lease as a basis for UP's liability regarding the collapse of the Marys River Bridge:

“In or around 1992, Southern Pacific contracted with PNWR (formerly Willamette & Pacific Railroad (“WPRR”)) to operate the line, including the Marys River Bridge. This lease was recently extended in 2025. This arrangement remains in effect today. Thus, the obligation to operate, maintain, and repair the bridge and line lies with PNWR and UP.”¹⁵

¹³ *Id.* at 13.

¹⁴ *Id.* at 6.

¹⁵ *Id.* at 4.

It should be of particular concern to the Board that UP was aware of this yet chose to proceed with filing its Motion to Strike. The following is a quote from UP's Motion to Dismiss:

“The original 1992 lease and ninth amendment authorized in 2025 are attached as Exhibits 1 and 2, respectively, for the Board's convenience, **and may be considered on this motion to dismiss because it was explicitly referenced in the Amended Complaint.**”¹⁶

For UP to make this statement to the Board in its Motion to Dismiss, then turn around and now claim that allegations of its liability under the Lease “appear nowhere in the Amended Complaint” underscores the blatant bad faith and dishonesty in UP's Motion to Strike. The above makes it clear that UP has been on notice that the Lease was a theory of liability since the Amended Complaint was filed with the Board.

Complainants' arguments that UP is failing to enforce the Lease against PNWR, and that Complainants are entitled to enforce the Lease as creditor beneficiaries, are simply aspects of Complainants' theory of liability arising under the Lease, of which UP has been on notice since the outset of this proceeding. These arguments do not “supplement” or “expand” the pleadings as UP asserts. Moreover, a party may obtain relief on a theory of recovery not expressly pleaded in the complaint but proven at trial, when it is based on the same wrongful act that was pleaded, and when the opposing party has had fair notice.¹⁷ As the Amended Complaint shows, Complainants pled the Lease as a theory of liability against UP, and UP had fair notice of the Lease as a theory of liability. UP would not have attached the Lease to its Motion to Dismiss if it were not germane to the Amended Complaint, nor would UP have acknowledged that the Lease was “explicitly referenced in the Amended Complaint” if UP were not on notice of Complainants' theories of liability flowing from it.

¹⁶ UP's Motion to Dismiss, at 4 (emphasis added).

¹⁷ See *Oglala Sioux Tribe of Indians v. Andrus*, 603 F2d 707, 714 (8th Cir 1979) (theory of recovery raised in post-trial brief was based on same wrongful act alleged in complaint.).

UP attempts to misdirect the Board by claiming that UP would be prejudiced if its Motion to Strike is not granted because it has had no opportunity to respond to, challenge, or test the factual assertions underlying Complainants' theories of liability, despite those theories having been pleaded in Complainants' Amended Answer. In fact, UP had two such opportunities to do so through its Answer and its Motion to Dismiss.

On the other hand, granting UP's Motion to Strike would substantially prejudice Complainants. As demonstrated above, Complainants pled each of the theories that UP now characterizes as "unpleaded," including sufficient factual allegations to withstand a motion to dismiss.¹⁸ UP itself acknowledged in its Motion to Dismiss that it holds a residual common carrier obligation over the line and attached a copy of the Lease to that Motion. Complainants were therefore entitled to address both UP's admission and the specific provisions of the Lease in their Reply, particularly where the Lease and the obligations arising from it were already pleaded as bases for liability in the Amended Complaint. The Lease was thus already squarely at issue by virtue of Complainants' pleadings, and UP placed it even more directly at issue by attaching it to its Motion to Dismiss. UP cannot reasonably place the Lease before the Board and then argue that Complainants should be prohibited from addressing the same document and obligations arising from it. Such a result would be fundamentally unfair and would substantially prejudice Complainants' ability to present and defend their claims.

Moreover, until UP attached the Lease to its Motion to Dismiss, neither UP or PNWR had disclosed the Lease to Complainants. As the Board is aware, the Lease is designated as

¹⁸ *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) ("to survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'")); *Cent. Valley Ag Grinding, Inc. v. Modesto & Empire Traction Co.*, Docket No. NOR 42159, slip op. at 4 (STB served July 25, 2018) (When reviewing a motion to dismiss, the Board will view the alleged facts in the light most favorable to the Complainant...Motions to dismiss are generally disfavored.).

“highly confidential” under the protective order entered in this proceeding. UP’s position in its Motion to Strike—that Complainants should be prohibited from addressing the Lease notwithstanding that Complainants pleaded the Lease as a basis for liability and UP itself disclosed and relied upon the document—is particularly troubling in light of UP’s proposed procedural schedule filed with the Board on July 27, 2026. That proposed procedural schedule would further delay Complainants’ ability to obtain any discovery, and in practical effect, restrict Complainants’ ability to develop and test the very theories of liability that UP now seeks to characterize as improper. UP should not be permitted to both rely upon the Lease when it advances their own position and simultaneously prevent Complainants from addressing that same document when doing so supports the claims which they pleaded in their Amended Complaint.

III. CONCLUSION

Complainants’ Reply to UP’s Motion to Dismiss demonstrated how their Amended Complaint stated multiple bases upon which relief could be granted in this case. It provided ample support to compel Board investigation and action regarding the facts and theories pleaded in its Amended Complaint. Accordingly, the Board should deny UP’s Motion to Strike Complainants’ Reply to UP’s Motion to Dismiss.

DATED this 19th day of August 2026

FRANCIS HANSEN & MARTIN LLP

/s/ Martin E. Hansen
Martin E. Hansen, OSB #800526
Attorney for Complainants

CERTIFICATE OF SERVICE

I certify on the 19th day of August 2026, I served the foregoing **COMPLAINANTS' REPLY TO UNION PACIFIC RAILROAD COMPANY'S MOTION TO STRIKE** on the parties below by email:

Eric M. Hocky
Clark Hill PLC
Two Commerce Square
2001 Market Street
Suite 2620
Philadelphia, PA 19103
(215) 640-8523
ehocky@clarkhill.com
Counsel for Portland & Western Railroad, Inc. and Genesee & Wyoming, Inc.

Justin J. Marks
Clark Hill PLC
1001 Pennsylvania Ave., N.W.
Suite 1300 South
Washington, DC 20004
(202) 772-0916
jmarks@clarkhill.com
Counsel for Portland & Western Railroad, Inc. and Genesee & Wyoming, Inc.

Matthew J. Warren
Sidley Austin LLP
1501 K Street, NW
Washington, DC 20005
mjwarren@sidley.com
Counsel for Union Pacific Railroad Company

DATED this 19th day of August, 2026

FRANCIS HANSEN & MARTIN LLP

/s/ Martin E. Hansen
Martin E. Hansen, OSB #800526
Attorney for Complainants

CERTIFICATE OF SERVICE

FRANCIS HANSEN & MARTIN LLP
1148 NW HILL STREET, BEND, OR 97703-1914
TEL: (541) 389-5010 • FAX: (541) 382-7068
WWW.FRANCISHANSEN.COM