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BEFORE THE
SURFACE TRANSPORTATION BOARD

FD 36849 (Sub-No. 1)

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

KANSAS & OKLAHOMA RAILROAD, LLC'S RESPONSE TO WESKAN GRAIN LLC'S JULY 6, 2026 SUR-REPLY

Robert A. Wimbish
Fletcher & Sippel LLC
29 North Wacker Drive, Suite 800
Chicago, Illinois 60606-3208
rwimbish@fletcher-sippel.com
(312) 252-1500

ATTORNEY FOR KANSAS & OKLAHOMA RAILROAD, LLC

Dated: October 20, 2026

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Pursuant to the Surface Transportation Board's (the "Board") decision served September 30, 2026, Kansas & Oklahoma Railroad, LLC ("K&O") submits this limited response to the sur-reply (the "Sur-reply") filed in this proceeding by Weskan Grain LLC ("Weskan") on July 6, 2026. In deciding ultimately to grant Weskan leave to file, the Board waived 49 C.F.R. § 1104.13(c), departing from the more rigorous enforcement of the rule against replies to replies that has characterized agency's recent practice. This creates an unusual procedural circumstance: K&O, as petitioner, is permitted to close the record by addressing arguments that Weskan aimed (for the most part, but not entirely) at the reply evidence submitted by Union Pacific Railroad Company ("UP"), rather than at K&O's underlying petition for exemption.

While K&O genuinely appreciates the Board's recognition of its procedural due process right to close the record as the party bearing the burden of proof, it places K&O in the incongruous position of being entitled to defend a third

party's evidentiary submission. Setting that procedural peculiarity aside, the substantive arguments presented by Weskan and its consultants, L.E. Peabody & Associates, Inc. ("Fapp/Crowley"), do not withstand scrutiny. Rather than reflecting the commercial and operational realities of the lease, Weskan's filing relies on unsupported assumptions and mischaracterizes a standard commercial arrangement as an anticompetitive penalty.

As demonstrated below, Weskan's arguments collapse when subjected to factual scrutiny. The Asset Use Fee is a rational, proportional commercial mechanism facilitative of short line service on a line that UP otherwise could have retained to ensure itself line haul opportunities. Fapp/Crowley's attempt to prove otherwise relies on circular logic and a deliberate mischaracterization of actual transportation flows in the market. More importantly, Weskan's entire narrative relies on the fallacy that it is an aggrieved party under the lease—a fiction that exposes the complainant's true, ulterior motives for participating in this proceeding.

Fapp/Crowley falsely sensationalize a standard commercial mechanism in Class I – short line lease transactions.

Weskan manufactures a conspiracy out of the 2019 Fourth Supplement, claiming that UP and K&O are merely repeating each other's arguments regarding the origins of the complained-of Asset Use Fee (Weskan Reply at 2, 4). It is no surprise that K&O and UP provide similar explanations for the adoption of the fee; both parties are accurately recounting the objective, documented history of a bilateral lease amendment. Weskan's suggestion that UP and K&O are, and have been, collaborating on their evidence and argument is false and

unfounded. Fapp/Crowley engage in sensationalism to baselessly attack the Asset Use Fee, arguing the mechanism functions solely "to raise the cost of a rival routing option" and characterizing it as a "classic example of raising a rival's costs" (Fapp/Crowley V.S. at 12).

This argument deliberately ignores the fundamental economics of the lease arrangement, spinning false narratives in the process. UP is willing to lease the subject rail line to K&O for a nominal base fee, provided that this rent is offset by the expected line-haul revenue UP earns from traffic traditionally flowing to and from the line. If K&O were entirely free to route traffic in interline service with carriers other than the line owner, UP would be deprived of the expected line-haul revenues that justify the nominal rent in the first place, leaving UP with neither its line-haul traffic nor a fair-market rental return on its physical assets. The Asset Use Fee is the alternative compensation mechanism that allows UP to offer a nominal base rent to K&O without forfeiting the economic value of its own network.

Furthermore, Fapp/Crowley attack UP's use of Wichita manifest grain margins as the benchmark for the Asset Use Fee, claiming it proves the fee is "calibrated to preserve eastbound routing" (Fapp/Crowley V.S. at 5). This is a manufactured grievance. The lease arrangement intends to capture income for UP not merely through base rent, but by ensuring that traffic moves to UP just as it would if the line were still operated by UP itself. UP has no commercial (nor any irrational) desire or regulatory obligation to share traffic with alternative carriers

where it can serve both the origin and destination itself—forming the lease terms under the Fourth Supplement to maintain the traffic flow *status quo*.

As UP established in its Reply, the fee was developed using Wichita manifest grain traffic as "comparable traffic" to determine the average margin UP would have earned if it operated the lines directly (UP Reply at 8; McLaughlin V.S. at 10). UP appears to have utilized this metric because it serves as a rational proxy for the line-haul contribution UP foregoes when originating traffic is diverted. UP has a legitimate commercial right to structure its lease to protect its expected traffic flows and retain the value of its franchise; the fact that Wichita is geographically east is a function of the physical rail network and shipper preference, not an unlawful restraint of trade.

Weskan's use of circular logic to "explain" the Asset Use Fee and failure to account for ordinary market volatility in its analysis and conclusions.

Weskan repeatedly and incorrectly asserts that UP alone controls the flow of interchange traffic originating or terminating on the leased lines (Weskan Reply at 3-4). In fact, UP does not dictate K&O's routing or shipper choices. K&O and its customers retain the discretion to route traffic to Colorado Pacific Railroad LLC ("CXR"), South Kansas & Oklahoma Railroad, LLC ("SKOL"), Wichita Terminal Association ("WTA"), or BNSF Railway Company ("BNSF"). While a modest amount of traffic has recently begun to flow via cooperative efforts between BNSF and CXR to serve Weskan's Stockton Siding elevator, K&O remains ready to facilitate available interchange gateways as commercial demand dictates.

To artificially construct a narrative of market foreclosure, Fapp/ Crowley attempt to establish a direct cause-and-effect relationship between the 2019 fee implementation and 2020 traffic decline. Relying on limited data, they isolate a 100-carload drop in "total non-exempt interchange traffic," arguing that this specific reduction definitively proves the fee suppresses competitive traffic and acts as a barrier to interchange (Fapp/Crowley V.S. at 15-16).

This argument exposes Fapp/Crowley's reliance on circular logic and a misrepresentation of their own evidence. In their zeal to blame the Asset Use Fee for a routine 2020 traffic decline, Fapp/Crowley attempt to draw a definitive causal link from a single year-over-year comparison involving a statistically small number of railcars. Their own Table 2 contradicts that conclusion: the data reveals that the volume of cars interchanged with non-UP carriers—the exact traffic subjected to the fee—actually increased from 17 cars in 2019 to 25 cars in 2020 (Fapp/Crowley V.S. at 16, Table 2). Focusing on minor, aggregated volume changes as definitive proof of market foreclosure is purely speculative and ignores normal fluctuations in demand. Agricultural traffic is inherently volatile and subject to a wide array of routine market forces, regional crop variations, and broader economic shocks.

Rather than engaging in basic deductive reasoning to account for these normal fluctuations in agricultural demand, Fapp/Crowley immediately resort to the only explanation that serves their client's narrative. Attributing a routine volume fluctuation entirely to a per-carload fee, without any underlying empirical support for that exclusive causation, is speculative and analytically unsound.

Weskan's misleading gap-filling and its perpetuation of the "aggrieved party" fallacy.

A foundational misconception permeates this proceeding: the presumption that Weskan is a specifically aggrieved party under the interchange commitment provisions, and that the emergence of CXR was the reason the interchange commitment was modified to thwart westward flows of traffic. Weskan explicitly asserts that the Asset Use Fee was adopted because "CXR became a competitive option" for westward traffic flows (Fapp/Crowley V.S. at 22) to maintain UP "veto power" over westward interchange (Weskan Reply at 4), and that the fee reduces competitive options "available to Weskan" (Weskan Reply at 4).

This narrative is an utter fallacy, albeit one that some casual observers of this case who have not read the record in this case embrace as fact. *See, e.g.*, Evidentiary Statement of George Avery Grimes, FD 36873 (filed Oct. 2, 2026), at 7 (Dr. Grimes incorrectly asserts that UP amended the lease to add a "per car use fee" to stop a shipper "on the short line" from moving grain, although he later admitted to the undersigned counsel via email that he had not actually read the pleadings in this case, explaining that he had relied on a single, third-party report). The Asset Use Fee in question does not apply to any existing Weskan traffic or routings. As established previously in this record and in the original FD 34849 docket, Weskan's active loading facilities (specifically those at Scott City) are located on K&O-owned lines east of the leased line. Consequently, any traffic moving from those facilities westward to CXR is overhead bridge traffic. Fapp and Crowley explicitly acknowledge that overhead bridge traffic pays no Asset Use Fee whatsoever

(Fapp/Crowley V.S. at 18). Because Weskan's traffic is beyond the reach of the interchange commitment, the fee imposes zero impact upon its operations.

Fapp/Crowley base their "missing markets" theory on the outdated and factually incorrect assumption that there is a total "absence of CXR interchange traffic" (Fapp/Crowley V.S. at 18, 20). But modest traffic ***is*** currently flowing via cooperative BNSF-CXR routings to serve Weskan's Stockton Siding elevator. The fact that Weskan's own experts are seemingly unaware of their client's active traffic movements demonstrates that their "missing markets" theory, which utilizes general equilibrium theory to excuse a presumed lack of transactions (Fapp/Crowley V.S. at 19-20), relies on academic gap-filling rather than actual market facts.

Because Weskan is not a genuinely aggrieved party, the Board should question Weskan's continued, aggressive engagement in this lease proceeding. Weskan's apparent posture as a public champion for absent shippers is a smokescreen. As K&O has indicated in this proceeding and elsewhere, Weskan's true objective is to use the burden of STB processes as tactical leverage to force the divestiture of the leased lines to its affiliate, CXR. Tellingly, despite K&O explicitly calling this out, Weskan has never denied it. Weskan's careful evasion of this point is a tacit admission that this protest is corporate shakedown masquerading as a public interest dispute. It further demonstrates that the supposed economic theories Weskan has advanced here are not objective market analyses, but rather purchased ammunition designed to manufacture litigation leverage.

The RIA safety valve functions as intended.

Weskan's attack on the Railroad Industry Agreement ("RIA") improperly re-argues issues already briefed, extending beyond the Board's narrow authorization to respond to new evidence in UP's reply. K&O raised the RIA issue in its Petition, and Weskan already had a full and fair opportunity to address the subject in its original reply filing. Procedural overreach aside, Weskan's attempt to dismiss the RIA as a "rolling uncertainty" that provides shippers no "party standing" or genuine recourse (Fapp/Crowley V.S. at 24) ignores both the commercial reality of the industry and UP's empirical track record. UP routinely evaluates RIA waivers on an annual basis to respond to dynamic, real-world market conditions, granting waivers where new traffic opportunities arise that do not harm UP's existing economic value. UP evaluated and granted all waiver requests it received from short line partners in 2025, and continues to do so in 2026.

Specifically, UP previously granted K&O a waiver for Weskan traffic destined for CXR. *As the record now reflects, this initial waiver request was driven by a mutual misunderstanding by K&O and UP of the lease's geographic scope, with K&O and UP originally believing (mistakenly) at the outset that Weskan's Scott City loading elevators were located on the leased line, when they are not*. Weskan's active facilities are located east of the leased premises, meaning its traffic is inherently exempt from the fee, and they have adjusted accordingly once the error was noted. However, UP's willingness to grant this waiver nevertheless proves a critical point: should Weskan or any other shipper ever construct hypothetical new loading

facilities directly on the leased lines, the RIA framework demonstrates UP's readiness to evaluate the market and provide commercial relief.

Weskan's complaint that these waivers are granted one year at a time highlights a fundamental misunderstanding of rail economics. Annual evaluation is a necessary, standard industry practice ensuring that the underlying economic foundation of the lease is not permanently eroded by blanket concessions. The RIA functions precisely as designed: a dynamic safety valve that accommodates genuine new traffic while preserving the lessor's legitimate asset protections.

. . .

Weskan's Sur-reply relies on straw men and academic theories that ignore the physical geography of the lines and the explicit exemptions within the lease. Most importantly, it relies on the manufactured grievance of a party whose traffic is completely exempt from the fee it challenges. The Asset Use Fee is a necessary, proportionate, and standard commercial mechanism that preserves light-density rail service while protecting the asset owner's legitimate interests.

WHEREFORE, for the reasons stated herein and in K&O's Petition for Exemption in this docket, K&O respectfully requests that the Board reject Weskan's arguments and grant the exemption sought in this proceeding.

Respectfully submitted,

By: /s/ R. A. Wimbish

Robert A. Wimbish
Fletcher & Sippel LLC
29 North Wacker Drive, Suite 800
Chicago, Illinois 60606-2832
rwimbish@fletcher-sippel.com
(312) 252-1500

ATTORNEY FOR KANSAS & OKLAHOMA RAILROAD, LLC

Dated: October 20, 2026

CERTIFICATE OF SERVICE

I hereby certify that I have on this 20th day of October, 2026, served a copy of the foregoing Response to Weskan Grain LLC's July 6, 2026 Sur-reply via electronic mail to all parties of record in this proceeding.

/s/ *R. A Wimbish*
Robert A. Wimbish
Counsel for Kansas & Oklahoma Railroad, LLC