

REDACTED – TO BE PLACED ON PUBLIC FILE

**BEFORE THE
SURFACE TRANSPORTATION BOARD**



UNION ELECTRIC COMPANY *D/B/A*
AMEREN MISSOURI and MISSOURI
CENTRAL RAILROAD COMPANY,

Complainants,

v.

UNION PACIFIC RAILROAD COMPANY,

Defendant.

230130

Docket No. 42126

**ENTERED
Office of Proceedings**

JUN 17 2011

**Part of
Public Record**

MISSOURI CENTRAL RAILROAD
COMPANY – ACQUISITION AND
OPERATION EXEMPTION – LINES OF
UNION PACIFIC RAILROAD COMPANY

and

GRC HOLDINGS CORPORATION –
ACQUISITION EXEMPTION – LINES OF
UNION PACIFIC RAILROAD COMPANY

Finance Docket No. 33508

230132

Finance Docket No. 33537

230134

UNION PACIFIC'S REPLY EVIDENCE AND ARGUMENT

J. MICHAEL HEMMER
LOUISE A. RINN
ELISA B. DAVIES
Union Pacific Railroad Company
1400 Douglas Street
Omaha, Nebraska 68179
(402) 544-3309

MICHAEL L. ROSENTHAL
SPENCER F. WALTERS
Covington & Burling LLP
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 662-6000

Attorneys for Union Pacific Railroad Company

June 17, 2011

UNION ELECTRIC COMPANY <i>D/B/A</i>	)	
AMEREN MISSOURI and MISSOURI	)	
CENTRAL RAILROAD COMPANY,	)	
	)	
Complainants,	)	Docket No. 42126
	)	
v.	)	
	)	
UNION PACIFIC RAILROAD COMPANY,	)	
	)	
Defendant.	)	
MISSOURI CENTRAL RAILROAD	)	
COMPANY – ACQUISITION AND	)	
OPERATION EXEMPTION – LINES OF	)	Finance Docket No. 33508
UNION PACIFIC RAILROAD COMPANY	)	
	)	
and	)	
	)	
GRC HOLDINGS CORPORATION –	)	
ACQUISITION EXEMPTION – LINES OF	)	Finance Docket No. 33537
UNION PACIFIC RAILROAD COMPANY	)	
	)	

Union Pacific Railroad Company (“UP”) hereby replies to the opening evidence of Union Electric Company d/b/a Ameren Missouri (“Ameren Missouri”) and Missouri Central Railroad Company (“MCRR”) (collectively “Ameren/MCRR”).

2

might well be entirely hypothetical. UP is willing to allow MCRR to serve Ameren Missouri's Labadie plant. UP respectfully suggests that the Board allow the parties to negotiate access terms on their own, rather than undertake to resolve the difficult questions raised by this proceeding; namely, whether Ameren Missouri should be allowed to revise the terms of its prior deal with UP to obtain service from MCRR and, if so, under what terms.

I. INTRODUCTION AND BACKGROUND

Ameren/MCRR seek an order that would allow MCRR to transport Illinois Basin coal to Ameren Missouri's Labadie plant. MCRR's ability to transport Illinois Basin coal to the Labadie plant will not be a live issue for many years, and it may never become a real issue. The Labadie plant cannot presently burn Illinois Basin coal. The plant will not be able to burn Illinois Basin coal unless Ameren Missouri first installs scrubbers at the plant. Ameren Missouri says that it is "considering" installing scrubbers at Labadie, and that installation may take place "within the next ten years," but the "exact timing . . . is unknown." Opening Evidence at 2-3. Even if Ameren Missouri installs scrubbers, MCRR might never transport any Illinois Basin coal: "Labadie may continue to burn [Powder River Basin] coal." *Id.* at 3.

Ameren Missouri has a pattern of signing agreements with UP and then asking the Board to rewrite the contracts. That is what is happening here. Whether Ameren Missouri's manipulation of the Board's processes reflects simple buyer's remorse or a more calculated strategy, the Board should not reward this behavior by unnecessarily devoting resources to this case.

UP has described its dealings with Ameren Missouri in prior proceedings, and those events require only a brief summary here.

Prior to the UP/SP merger, the Labadie plant had access to both SP and UP. UP primarily transported coal from the Powder River Basin in Wyoming via North Platte and

Kansas City to the Labadie plant.¹ SP primarily transported coal from Colorado to the Labadie plant via Pueblo and Kansas City.² From Kansas City to St. Louis, SP trains used overhead trackage rights over UP, which it had obtained in the UP/MP/WP merger.³ From St. Louis, SP operated over its own line to Labadie (the “SP line”), which it had obtained from the bankrupt Chicago, Rock Island, and Pacific Railroad.⁴

After UP and SP announced their plan to merge in 1995, UP tried to preserve two-carrier service to Labadie by selling the SP line to BNSF.⁵ When BNSF declined to buy the line, UP offered Ameren Missouri several options to preserve the competition that SP had provided:

- 1 UP offered to sell the SP line, with unrestricted access to Labadie, to Ameren Missouri;
- 2 UP offered to sell the SP line, with unrestricted access to Labadie, to another railroad;

¹ As Ameren/MCRR’s own exhibits show, UP also transported a substantial amount of Illinois Basin coal to the Labadie plant. {

} See Opening Evidence, Vol. II, Exhibit No. 8.

Text contained within brackets has been designated as Highly Confidential and is redacted from the public version of this document.

² As Ameren/MCRR’s own exhibits also show, SP transported some Illinois Basin coal to the Labadie plant. {
} See *id.*

³ See *Union Pacific – Control – Missouri Pacific; Western Pacific*, 366 I.C.C. 459, 586-87 (1982).

⁴ See *St. Louis Sw. Ry. – Purchase (Portion) – William M. Gibbons, Trustee of the Property of Chicago, Rock Island & Pac. R.R., Debtor*, 363 I.C.C. 320, 325, 410-11 (1980).

⁵ See Union Pacific Railroad Company’s Response to AmerenUE’s Petition for Clarification and Enforcement of Merger Conditions (UP/SP-374), Verified Statement of John H. Rebensdorf (“Rebensdorf V.S.”) at 2-4, *Union Pac. Corp., Union Pac. R.R., & Missouri Pac. R.R. – Control & Merger – Southern Pac. Rail Corp., Southern Pac. Transp. Co., St. Louis Sw. Ry., SPCSL Corp., & The Denver & Rio Grande W.R.R.*, STB Finance Docket No. 32760 (Feb. 8, 2000). Mr. Rebensdorf’s verified statement is attached hereto as Exhibit A.

- 3 UP offered to allow another carrier unrestricted trackage rights over the SP line; and
- 4 UP offered to handle coal to Labadie from interchanges at St. Louis or Kansas City for a defined rate, which Ameren Missouri could then combine with rates from any carrier that could reach St. Louis or Kansas City.

Ameren Missouri did not want to purchase the SP line (Option 1). Nor was Ameren Missouri interested in receiving service over the SP line from another carrier (Options 2 and 3). Instead, Ameren Missouri told UP that it wanted to pursue the fourth option.⁶ Ameren Missouri and UP thus negotiated an agreement that gave Ameren Missouri the option that it said it wanted to obtain competitive rates via both St. Louis and Kansas City. According to Ameren Missouri's sworn testimony to the Board in March 1996, the agreement "insure[d] on-going competition for rail service to the Labadie Plant after the [UP/SP] merger."⁷

⁶ See Union Pacific Railroad Company's Response to AmerenUE's Petition for Clarification and Enforcement of Merger Conditions (UP/SP-374), Verified Statement of Jerry P. Klym ("Klym V.S.") at 2-4, *Union Pac. Corp., Union Pac. R.R., & Missouri Pac. R.R. – Control & Merger – Southern Pac. Rail Corp., Southern Pac. Transp. Co., St. Louis Sw. Ry., SPCSL Corp., & The Denver & Rio Grande W.R.R.*, STB Finance Docket No. 32760 (Feb. 8, 2000). Mr. Klym's verified statement is attached hereto as Exhibit B.

⁷ Comments of Governors, Shippers and Others in Support of the Primary Application (UP/SP-195), Verified Statement of Udo A. Heinze, *Union Pac. Corp., Union Pac. R.R., & Missouri Pac. R.R. – Control & Merger – Southern Pac. Rail Corp., Southern Pac. Transp. Co., St. Louis Sw. Ry., SPCSL Corp., & The Denver & Rio Grande W.R.R.*, STB Finance Docket No. 32760 (Mar. 29, 1996). A copy of Mr. Heinze's verified statement is attached hereto as Exhibit C.

The settlement also relieved Ameren Missouri of two expensive obligations under rail service contracts with SP. First, UP relieved Ameren Missouri of its contractual obligation to repay SP for the costs of rehabilitating the SP line between St. Louis and Labadie to enable SP access to Labadie. { } See Klym V.S. at 4; see also Opening Evidence, Vol. II, Exhibit No. 6 (line rehabilitation agreement). Thus, Ameren Missouri did not pay the full cost of rehabilitating the SP line, contrary to the impression that Ameren/MCRR seek to create. See Opening Evidence, Verified Statement of Robert K. Neff ("Neff V.S.") at 2.

Second, by the time of the UP/SP merger, Ameren Missouri no longer wanted Colorado coal at Labadie, and it asked UP to allow PRB coal moving under an existing UP contract to be credited toward the volume commitment in its contract with SP. { (continued...)

Believing it had satisfied Ameren Missouri's concerns, UP set about finding a buyer for the SP line that neither BNSF nor Ameren Missouri had wanted to buy. UP ultimately found a buyer, GRC Holdings Corp. ("GRC").⁸ GRC acquired the 244.5-mile portion of the SP line from Pleasant Hill, Missouri, to Vigus, Missouri, which it immediately conveyed to MCRR, a new shortline railroad created by GRC.⁹ When UP sold the SP line to GRC, UP also granted MCRR trackage rights over UP on the 8.7-mile portion of the SP line from Vigus, Missouri, to Rock Island Junction, Missouri, so that MCRR could reach St. Louis from the portion of the SP line that GRC bought.¹⁰

UP's line sale and trackage rights agreements precluded MCRR from serving the Labadie plant. From the beginning of the negotiation process, UP made clear to GRC that MCRR would not have the right to serve the Labadie plant.¹¹ UP would have charged more for the line if it had included the right to serve the Labadie plant.¹² The quitclaim deed filed in connection with the line sale leaves no doubt that the sale included a restriction on service to the Labadie plant and that the restriction was reflected in a reduced sale price. The deed states that the restriction was "a material inducement to Grantor [UP] to sell the Property to Grantee [GRC], that Grantor

} See Klym V.S. at 4-5.

⁸ See *Rebensdorf V.S.* at 4.

⁹ See *id.* at 4-5; see also *Missouri Central R.R. – Acquisition & Operation Exemption – Lines of Union Pac. R.R. Co.*, Finance Docket No. 33508 (STB served April 30, 1998) at 1. The sale saved a large portion of the SP line from abandonment. See *id.* at 8 n.10 (noting that the Board had held in abeyance SP's proposed abandonment request, which had covered approximately 170 miles of the 244-mile line that UP sold).

¹⁰ See *id.* at 1. UP also granted MCRR trackage rights over UP on the portion of the SP line from Pleasant Hill to Leeds Junction to provide MCRR connections at Kansas City. See *id.*

¹¹ See *Rebensdorf V.S.* at 5.

¹² See *id.*

would not have been willing to sell the Property to Grantee without such restriction, and that such restriction has been taken into account in the purchase price for the Property.”¹³

As Ameren/MCRR admit, Ameren Missouri was fully aware of the transaction, including the restrictions on service to Labadie. *See* Neff V.S. at 4-6. With this knowledge, Ameren Missouri provided GRC with the funds that GRC needed to close the deal, and it received a majority stake in MCRR. *See id.*¹⁴ As Ameren/MCRR explain, Ameren Missouri had a strong interest in the transaction, even though it did not create additional rail access to the Labadie plant, because the SP line “travels through Ameren Missouri’s service territory and Ameren was concerned about the effect on economic development of any potential loss of rail service to the area.” Neff V.S. at 5. Ameren Missouri “wanted to ensure that existing and future businesses continued to have the option of rail service on the line.” *Id.*

Ameren Missouri first asked the Board to revise its contracts with UP in 2000. Despite its settlement with UP and testimony to the Board that its concerns about the UP/SP merger had been resolved, Ameren Missouri filed a petition in which it claimed that the “only appropriate competitive fix” to remedy the loss of competition that resulted from the UP/SP merger was to provide BNSF with direct access to the Labadie plant.¹⁵ Ameren Missouri’s petition specifically

¹³ A copy of the quitclaim deed that was publicly filed is attached hereto as Exhibit D.

¹⁴ The Shareholders’ Agreement among GRC, MCRR, and Ameren ERC, Inc., an affiliate of Ameren Missouri, provides additional confirmation that Ameren Missouri knew the transaction it funded did not provide for additional access to Labadie. The agreement {

} *See* Opening Evidence, Vol. II, Exhibit No. 20 (Article IX “GRC Incentives,” § 9.1(i)).

¹⁵ AmerenUE’s Petition for Clarification and Enforcement of Merger Conditions at 20, *Union Pac. Corp., Union Pac. R.R., & Missouri Pac. R.R. – Control & Merger – Southern Pac. Rail Corp., Southern Pac. Transp. Co., St. Louis Sw. Ry., SPCSL Corp., & The Denver & Rio Grande W.R.R.*, STB Finance Docket No. 32760 (Jan. 19, 2000). In the same proceeding, Ameren Missouri also asked the Board to release Ameren Missouri from its obligations with respect to 50 (continued...)

invoked the restrictions contained in UP's sale of the SP line. Ameren Missouri argued that the Board needed to provide BNSF access to Labadie using trackage rights over UP because the restrictions precluded Ameren Missouri from obtaining service over the SP line.¹⁶ The Board ordered UP to provide BNSF access to Labadie, and UP granted BNSF trackage rights that allowed BNSF to serve the plant directly.¹⁷

Ameren Missouri once again wants the Board to relieve it of its commitments to UP. Ameren Missouri/MCRR now argue that even the "BNSF trackage rights are not providing the full benefit of competition to Labadie." Opening Evidence at 15. They argue that the Board should now give MCRR "the same rights [to operate over the SP line] that SP would have had with respect to the line prior to the UP/SP merger and the MCRR sale." *Id.*

In short, Ameren Missouri wants another chance to obtain what UP offered back in 1995: ownership of the SP line with no restriction on access to Labadie. But Ameren Missouri rejected UP's offer and elected instead to pursue BNSF access to Labadie. Moreover, Ameren Missouri obtained BNSF access to Labadie, and it has used that access both to move coal to Labadie and to extract lower rates from UP. Now, Ameren Missouri argues that, even if the Board were to

percent of its volume commitment in a coal transportation contract with UP, even though Ameren Missouri and UP had renegotiated the same contract just the prior year. *See id.* at 3, 20-22.

¹⁶ *See id.* at 22 (arguing that BNSF was entitled to direct access to Labadie because "UP has imposed restrictions on [GRC] and MCRR thereby removing the Rock Island line from being used in service to Labadie"); *see also id.* at 16 ("Importantly, Ameren's financing of the MCRR line has no impact on UE's current situation at Labadie because of the all encompassing restrictions that UP has placed on the line as shown above.").

¹⁷ *See Union Pac. Corp., Union Pac. R.R., & Missouri Pac. R.R. – Control & Merger – Southern Pac. Rail Corp., Southern Pac. Transp. Co., St. Louis Sw. Ry., SPCSL Corp., & The Denver & Rio Grande W.R.R.*, Finance Docket No. 32760 (STB served June 1, 2000).

Ameren Missouri nonetheless retained the benefit of having been relieved of its obligation to pay for rehabilitating the SP line and its obligations under its coal transportation agreement with SP. *See note 7, supra.*

award it unrestricted use of the SP line without additional compensation to UP, it would still be entitled to access to BNSF. Ameren Missouri/MCRR plainly seek more than a return to the pre-UP/SP merger status quo.¹⁸

II. ARGUMENT

Ameren Missouri is not entitled to service from a third rail carrier at Labadie. The line sale and trackage rights agreement did not deprive it of common carrier service. Today, Labadie is served by two carriers, including BNSF, the competitor that Ameren Missouri demanded.¹⁹ Moreover, MCRR was free under Board precedent to enter into an agreement that reserved to UP the exclusive right to serve an existing shipper on the SP line, even after ownership of the line

¹⁸ Ameren Missouri argues that this outcome is justified because it “expended significant funds to enable BNSF access” to Labadie. Opening Evidence at 34. {

}

Moreover, Ameren Missouri’s arrangement with BNSF provided that Ameren Missouri was eligible for {

} See Opening Evidence at 15. In other words, Ameren Missouri {

}

Finally, Ameren has more than recouped its investment by obtaining much lower rates from UP as a result of competition from BNSF. BNSF is plainly a much stronger competitor to UP for movements of PRB coal than SP ever could have been, because SP did not have single-line access to the PRB coal that Ameren burns at Labadie.

¹⁹ If Ameren Missouri believes its access to BNSF is not sufficiently addressing competitive harms arising from the UP/SP merger, its remedy is to ask the Board to enforce the access condition. See *Union Pac. Corp., Union Pac. R.R. & Mo. Pac. R.R. – Control & Merger – S. Pac. Rail Corp., S. Pac. Transp. Co., St. Louis Sw. Ry., SPCSL Corp., & The Denver & Rio Grande W.R.R. (General Oversight)*, 5 S.T.B. 1173, 1177-78 (2001).

was transferred to MCRR,²⁰ and to acquire only limited trackage rights over UP's line from Vigus to Rock Island Junction, Missouri.²¹ Ameren/MCRR's argument that Ameren Missouri is being unlawfully deprived of common carrier service relies on snippets of language from cases that have no bearing on the present situation – cases in which shippers could not obtain rail service from *any* carrier with a physical connection to the shipper's facility.²²

²⁰ See *Amtrak – Conveyance of B&M in Conn. River Line in VT & NH*, 4 I.C.C.2d 761, 798-801 (1988) (approving line acquisition in which new owner granted former owner exclusive right to continue serving existing customers); cf. *State of Maine – Acquisition & Operation Exemption – Maine Cent. R.R.*, 8 I.C.C.2d 835, 838 (1991) (approving line acquisition in which the new owner obtained *no* common carrier obligation so long as the seller continued to meet such obligations).

²¹ See, e.g., *Toledo, Peoria & Western Ry. – Petition for Declaratory Order*, Finance Docket No. 35404 (STB served Apr. 26, 2011) at 11 (“TP&W knowingly entered into a trackage rights agreement that barred free, direct interchange of all traffic except intermodal traffic with BNSF. The Board will not upset that arms-length, negotiated arrangement based on the record in this proceeding.”); see also *Minnesota v. Big Stone-Grant Indus. Development & Transp., L.L.C.*, 990 F. Supp. 731, 736 (D. Minn. 1997) (holding that trackage rights tenant would be in breach of trackage rights agreement prohibiting tenant from serving industries connected to the trackage rights line even if it constructed a separate line to serve such an industry), *aff'd*, 131 F.3d 144 (8th Cir. 1997).

Ameren/MCRR plainly understand that Board precedent permits a line owner to impose, and a tenant carrier to accept, a contractual restriction on the type of traffic the tenant may carry when it obtains rights over the owner's line. {

} Currently, rail operations on MCRR's line are provided by Central Midland Railway Company pursuant to a lease with MCRR. And, as Ameren/MCRR acknowledge, under that lease, {

} See *Neff V.S.* at 8.

²² See, e.g., *Coal Rates on the Stony Fork Branch*, 26 I.C.C. 168, 174 (1913); *Pejepscot Industrial Park, Inc. d/b/a Grimm Industries – Petition for Declaratory Order*, Finance Docket No. 33989 (STB served May 15, 2003); *Hanson Natural Resources Co. – Non-Common Carrier Status – Petition for a Declaratory Order*, Finance Docket No. 32248 (ICC served Dec. 5, 1994).

Ameren/MCRR employ the same technique – taking snippets of language entirely out of context – with regard to cases even further off point, including one involving the discriminatory refusal to provide a carrier access to terminal facilities, see *St. Louis, Springfield & Peoria R.R. v. Peoria & Pekin Union Ry.*, 26 I.C.C. 226 (1913), and one in which the ICC was concerned that many carriers had stopped offering c.o.d., freight-collect, and order-notify shipments, see *Investigation into Limitations of Carrier Service on C.O.D. and Freight-Collect Shipments*, 343 I.C.C. 692 (1973).

The line sale and trackage rights agreement, including the restrictions on service to the Labadie plant, are also consistent with public policy. Ameren/MCRR claim the public interest favors removing the restriction on service to Labadie to create an additional competitive option and give MCRR the opportunity to earn additional revenue by serving Labadie. *See* Opening Evidence at 30-33, 39-41. However, as the Board has explained, the effect of such restrictions must be “viewed *ex ante* (i.e., before the sale or lease of the facilities).” *Review of Rail Access and Competition Issues – Renewed Petition of the Western Coal Traffic League*, Ex Parte No. 575 (STB served Oct. 30, 2007) (“*Ex Parte No. 575*”) at 9. As Ameren Missouri itself recognized when it agreed to step in and provide financing, the transaction helped to ensure continued rail service for shippers on the SP line, and it even advanced Ameren Missouri’s own interest in economic development within its service area. *See* Opening Evidence at 18.

Moreover, Ameren Missouri did not lose any competitive options as a result of the SP line sale and grant of trackage rights. The transaction occurred years after the UP/SP merger; SP had long ceased to be a competitive presence on the line. UP’s control over traffic moving to Labadie over the SP line “is no greater, and cannot be greater,” than before the transaction. *Montana Rail Link, Inc. – Exemption Acquisition & Operation – Certain Lines of Burlington Northern R.R.*, Finance Docket No. 31089 (ICC served May 26, 1988) at 20. Ameren/MCRR are seeking “to create a new competitive option that did not exist prior to the [transaction].” *Ex Parte No. 575* at 9.

Also contrary to Ameren/MCRR’s claims, the antitrust laws do not prohibit a property owner from retaining certain property rights while selling others. Ameren/MCRR draw an inapt analogy to situations in which the antitrust laws establish limits on agreements by the seller of a business not to compete with the buyer. Here, UP did not agree not to compete with MCRR.

Rather, UP, as the owner of the SP line, simply included a restriction in the sale agreement that precluded the buyer from using that part of UP's property to serve Labadie in competition with UP. Such agreements are permissible under the antitrust laws. As the U.S. Court of Appeals for the Tenth Circuit recently explained: "Just as a property owner who operates a business on his land has no obligation to sell part of his property to a person who intends to open a competing facility, he generally has no obligation, if he sells part of the property, to allow a competing facility to be opened there." *Christy Sports, LLC v. Deer Valley Resort Co.*, 555 F.3d 1188, 1196 (10th Cir. 2009).²³

Ameren/MCRR also argue that removal of the restrictions on MCRR service to Labadie is necessary to restore the pre-UP/SP merger status quo. *See* Opening Evidence at 15. But even assuming that Ameren/MCRR could raise that type of claim in this case,²⁴ Ameren/MCRR's claims are not supported by the facts. Ameren/MCRR say that BNSF access to Labadie does not replace competition that SP would have provided to move Illinois Basin coal to Labadie because

²³ Ameren/MCRR cite only one antitrust case in which land was sold subject to a use restriction. Notably, the court in that case *upheld* the restriction because, among other reasons, the seller did not have monopoly power. *See Sound Ship Bldg. Corp. v. Bethlehem Steel Corp.*, 387 F. Supp. 252, 256-57 (1975), *aff'd*, 533 F.2d 96 (3d Cir. 1976). Union Pacific similarly does not have monopoly power, even with respect to the Labadie plant, which is also served by BNSF. Moreover, in more recent cases involving antitrust challenges to use restrictions, courts have been even more emphatic in upholding such restrictions, as in *Christy Sports*.

Courts have also said that framing challenges to restrictive covenants in land sales as antitrust suits "improperly intrudes federal antitrust principles into state common law," and that parties should not be permitted "to avoid [an otherwise valid contract] by wielding the Sherman Act." *Drury Inn – Colo. Springs v. Olive Co.*, 878 F.2d 340, 343, 344 (10th Cir. 1989). Significantly, such land use restrictions are regularly enforced at common law. *E.g.*, *Hitchcock v. Anthony*, 83 F. 779 (6th Cir. 1897) (upholding the sale of a dock in which the purchaser was not permitted to use the dock in the coal or fish business, to the benefit of the seller's adjacent dock operating in the coal and fish business); *Doo v. Packwood*, 265 Cal App. 2d 752 (Ct. App. 1968) (enforcing a land sale restriction prohibiting the grantee's construction of a grocery store on the property in order to protect against competition with the grantor's neighboring grocery store); *Oliver v. Hewitt*, 60 S.E.2d 1 (Va. 1950) (same).

²⁴ *See* note 19, *supra*.

BNSF and UP both have incentives to favor their single-line PRB movements. *See* Opening Evidence at 51-54. However:

- SP never had single-line access to Illinois Basin coal, but it had single-line access to Colorado coal. Thus, under Ameren/MCRR's theory, SP would have had the same incentive to favor single-line Colorado movements that BNSF and UP supposedly have to favor single-line PRB movements. In other words, Ameren Missouri would have been in the same position with respect to Illinois Basin coal if the UP/SP merger had never occurred.
- Ameren/MCRR's evidence shows that UP moved substantial quantities of Illinois Basin coal to Labadie in interline service at the same time it was moving PRB coal to Labadie.²⁵ But if Ameren/MCRR's theory were correct, that never should have happened. In other words, Ameren/MCRR is wrong to claim that UP has not "demonstrated incentive or desire to move" Illinois Basin coal to Labadie. *See* Neff V.S. at 8. The evidence shows that if Ameren Missouri decides it wants Illinois Basin coal, UP will compete for that business.²⁶
- Ameren/MCRR's supposed evidence that BNSF lacks incentive to move Illinois Basin coal to Labadie actually supports the opposite conclusion. Ameren Missouri would have paid { } for Illinois Basin coal than for PRB coal moving to its Sioux plant, and { } for Illinois Basin coal than for PRB coal moving to its Rush Island plant. *See* Opening Evidence at 53; *see also id.*, Vol. III, Exhibit No. 45. Those figures do not support Ameren Missouri's claim that BNSF tried to "prevent Ameren Missouri from accessing . . . Illinois Basin coal." Opening Evidence at 52.²⁷

²⁵ *See* Opening Evidence, Vol. II, Exhibit No. 8.

²⁶ UP's and SP's history of moving Illinois Basin coal to the Labadie plant before the UP/SP merger suggest that Ameren Missouri was fully aware of this issue when it told the Board that BNSF access was the "only appropriate competitive fix" to remedy the loss of competition that resulted from the UP/SP merger. AmerenUE's Petition for Clarification and Enforcement of Merger Conditions at 20, *Union Pac. Corp., Union Pac. R.R., & Missouri Pac. R.R. – Control & Merger – Southern Pac. Rail Corp., Southern Pac. Transp. Co., St. Louis Sw. Ry., SPCSL Corp., & The Denver & Rio Grande W.R.R.*, STB Finance Docket No. 32760 (Jan. 19, 2000).

²⁷ Ameren/MCRR complain that {

} *See* Opening Evidence at 53 & Vol. III, Exhibit No. 45 (at AM/MCRR-HC-000100). That has nothing to do with BNSF's incentive to move Illinois Basin coal to Labadie.

Finally, Ameren/MCRR also argue that MCRR should be entitled to serve Labadie because GRC “fully compensated” UP for the right to serve the Labadie plant. *See* Opening Evidence at 56.²⁸ However, that claim is not true. Ameren/MCRR elsewhere acknowledge that they are trying here to obtain rights to serve Labadie that they knew at the time were expressly excluded from the SP line sale and trackage rights agreements. *See* Opening Evidence at 16-20; *Neff V.S.* at 6. The transaction documents leave no doubt that the parties agreed to terms that restricted MCRR’s access to Labadie, and that UP would have charged a higher price for the SP line if the sale had included access to Labadie.²⁹ As discussed above, the quitclaim deed for the

²⁸ Ameren/MCRR try to confuse the issue by referencing a 1997 UP document stating the SP line would be sold at “Ledger/Book Value,” which reflected a write-up of “book value” to “the fair market at the time of the acquisition of the SP.” Opening Evidence, Vol. III, Exhibit No. 46. But the “book value” does not reflect the value of traffic on the line – it reflects the value of the land and the track assets in the ground. “Book value” is different from both (a) net liquidation (or salvage) value, which accounts for the costs of removing the track assets and assumes they are sold for scrap, and (b) going concern value, which reflect the value of traffic on the line, as well as the costs to maintain and operate the line. *See Pyco Industries, Inc. – Feeder Line Application – Lines of South Plains Switching, Ltd.*, Finance Docket No. 34922 (STB served Aug. 31, 2007) at 15, 19.

In any case, the 1997 UP document may have erroneously addressed the net liquidation value of only the portion of the SP line between Vigus and Union, Missouri. Other documents indicate a net liquidation value for the entire SP line that is much closer to, or even exceeding, the full sale price (particularly when considering that UP provided financing for \$2 million of the purchase price). As Ameren/MCRR’s exhibits show, when MCRR sued UP in June 1999 to try to force the sale to move forward, MCRR claimed that the net liquidation value of just the 40.5-mile portion of the line between Vigus and Union, Missouri (that is, excluding the 204-mile portion between Union and Pleasant Hill) was \$4.5 to \$5 million. *See* Opening Evidence, Vol. III, Exhibit No. 26, ¶¶ 15, 18. Ameren/MCRR’s exhibits also include a third-party assessment of the net liquidation value of the SP line that “indicates a valuation of { }.” Opening Evidence, Vol. III, Exhibit No. 28 (UP-Ameren-0003050).

²⁹ *See* Line Sale Contract, Section 3.a (attached to Complaint as Exhibit C); Term Sheet at § 1 (attached to Line Sale Contract as Exhibit A-1); *see also* *Rebensdorf V.S.* at 5.

If UP did receive more than net liquidation value for the SP line, some amount above that level was plainly justified, because MCRR gained the right to serve several active businesses on the line. Although the western portion of the SP line had been out of service for years, there were (and still are) several businesses located on the eastern part of the line that are presently being served by MCRR, through an arrangement between MCRR and Central Midland Railway. *See* (continued...)

transaction specifically states that the “restriction has been taken into account in the purchase price for the Property.”³⁰ Ameren/MCRR plainly understood that UP has not been compensated for the value the restriction provides to UP.³¹ Ameren/MCRR are simply attempting to obtain a windfall by urging the Board to give MCRR access to Labadie for free.

In short, the only actions contrary to public policy in this matter have been Ameren Missouri’s. Ameren Missouri says now it believed the restrictions on access to Labadie were *not* valid when it funded the transaction in 1999. Yet, when Ameren Missouri decided to seek BNSF access to Labadie in 2000, it argued to the Board that the restrictions *were* valid.³² Now that the Board has given it access to BNSF and Ameren has used that access to its benefit, Ameren Missouri is back again, saying that it knew all along the restrictions were *not* valid. It would be

Letter from John Larkin (GRC) to John Rebensdorf (UP) (July 25, 1996) (UP-Ameren-0003389)
{

} This correspondence is attached hereto as Exhibit E. *See also* Opening Evidence, Vol. III, Exhibit No. 27 (discussing a shipper at Union, Missouri); Opening Evidence at 18 (“In particular, Ameren Missouri wanted to ensure that existing and future businesses would continue to have the option of rail service on the line”); *id.* at 22 (“Rail operations on MCRR are provided by Central Midland Railway Company.”).

³⁰ Exhibit D hereto (at UP-Ameren-0002241).

³¹ Ameren Missouri’s recognition that MCRR access to the Labadie plant would be a windfall can be seen in the provision of the Shareholders’ Agreement among Ameren, GRC, and MCRR that is discussed above in note 14.

³² The Board appeared to agree with Ameren Missouri’s view of the restriction at the time. “[W]ere it not for the prohibition against service to [Ameren Missouri] at Labadie, [Ameren Missouri] would presently have, at least as respects traffic moving via St. Louis, the intramodal competitive option that it seeks under the auspices of the omnibus clause.” *Union Pac. Corp., Union Pac. R.R., & Missouri Pac. R.R. – Control & Merger – Southern Pac. Rail Corp., Southern Pac. Transp. Co., St. Louis Sw. Ry., SPCSL Corp., & The Denver & Rio Grande W.R.R.*, Finance Docket No. 32760 (STB served June 1, 2000) at 8 n.23.

contrary to public policy to reward Ameren Missouri's effort to manipulate Board processes with inconsistent representations to the Board.³³

However, the Board need not do anything at this point. UP is not opposed to allowing MCRR to serve the Labadie plant through renegotiated contracts. If Ameren Missouri wants the option of service from a third rail carrier at Labadie when it is ready to burn Illinois Basin coal (if that ever actually happens), UP would be willing to modify the line sale and trackage rights agreements so that MCRR can provide service to Labadie over the SP line. In other words, only if Ameren/MCRR and UP are unable to reach a negotiated resolution would the Board have to decide whether it would be appropriate to rewrite the agreements and what additional compensation, if any, Ameren/MCRR should pay UP. But the Board cannot proceed along that course based on the record created by Ameren/MCRR.³⁴ Moreover, we doubt Ameren Missouri

³³ The Board has applied the doctrine of estoppel in similar situations to prevent a party from "avoid[ing] the consequences of an earlier position it had freely asserted," as Ameren Missouri is attempting here. *Pyco Industries, Inc. – Feeder Line Application – Lines of South Plains Switching, Ltd. Co.*, Finance Docket 34890 (STB served June 11, 2010) at 6; *see also New Hampshire v. Maine*, 532 U.S. 742, 749 (2001); *Del. & Hudson Co. – Lease & Trackage Rights – Springfield Terminal Ry. (Arbitration Review)*, Finance Docket No. 30965 (Sub-No. 4) (ICC served Sept. 29, 1995) at 9.

³⁴ Ameren/MCRR have not submitted evidence addressing the fair value of additional access. Instead, they claim they are entitled to free access because UP was compensated for that access in the sale price, and because the line sale agreement contains a severability clause that allows the Board to order additional access without affecting any other terms of the transaction. *See* Opening Evidence at 55-60.

However, as discussed above, UP has not been compensated for the additional access, and the severability clause does not mean the Board could order UP to expand MCRR's rights under the sale agreement, much less MCRR's rights under the separate trackage rights agreement, which contains a different severability clause, without any compensation. *See Rail Abandonments – Use of Rights-of-Way as Trails* (49 C.F.R. Parts 1105 & 1152), 2 I.C.C.2d 591 (1986), *aff'd sub nom. Nat'l Wildlife Fed'n v. ICC*, 850 F.2d 694 (D.C. Cir. 1988); *Chicago & N.W. Transp. Co. – Abandonment – Between Clintonville & Eland, WI*, 363 I.C.C. 975, 977 (1981). Although there is a substantial question as to whether the Board could or should resolve compensation issues itself in these types of cases, UP would not object to that approach in this case. UP would also be willing to submit any dispute to an arbitrator, if Ameren/MCRR would prefer that approach.

will be willing to pay now for rights it may never use. Much can change in a decade. Coal markets can change. Electricity markets can change. Environmental regulations affecting Labadie can change. Transportation markets can change. Board policies can change. For the Board to address these questions a decade before Ameren Missouri will make a decision about using Illinois Basin coal at Labadie would be a waste of everyone's resources.

Respectfully submitted,



MICHAEL L. ROSENTHAL
SPENCER F. WALTERS
Covington & Burling LLP
1201 Pennsylvania Avenue, N.W.
Washington, DC 20004
(202) 662-5448

J. MICHAEL HEMMER
LOUISE A. RINN
ELISA B. DAVIES
Union Pacific Railroad Company
1400 Douglas Street
Omaha, Nebraska 68179
(402) 544-3309

Attorneys for Union Pacific Railroad Company

June 17, 2011

CERTIFICATE OF SERVICE

I, Michael L. Rosenthal, hereby certify that on this 17th day of June, 2011, I caused copies of the Highly Confidential and Public versions of Union Pacific's Reply Evidence and Argument to be served by hand and email on:

Sandra L. Brown
David E. Benz
Thompson Hine LLP
1920 N Street, N.W., Suite 800
Washington, DC 20036

and a copy of the Public version to be served by U.S. first-class mail, postage prepaid, on:

James A. Sobule
Ameren Corporation
1901 Chouteau Avenue
St. Louis, MO 63103



Michael L. Rosenthal

A

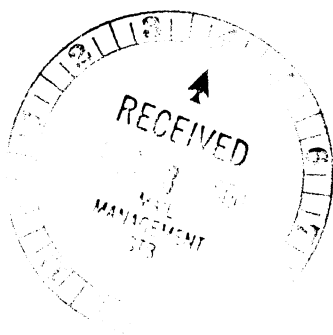
Redacted - To Be Placed on Public File

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 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**

**UNION PACIFIC RAILROAD COMPANY'S
RESPONSE TO AMERENUE'S PETITION FOR
CLARIFICATION AND ENFORCEMENT OF MERGER CONDITIONS**



**James V. Dolan
Larry E. Wzorek
Beverly S. Greer
Union Pacific Railroad Company
1416 Dodge Street
Omaha, NE 68179
(402) 271-5357**

**J. Michael Hemmer
John M. Scheib
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2401
(202) 662-6000**

***Attorneys for Union Pacific
Railroad Company***

February 8, 2000

VERIFIED STATEMENT

OF

JOHN H. REBENS DORF

My name is John H. Rebensdorf. I am Vice President-Network & Service Planning for Union Pacific Railroad Company ("UP"). I hold a Bachelor's Degree in Civil Engineering from the University of Nebraska and a Master's Degree in Business Administration from Harvard University. Before coming to UP, I was employed as a management consultant by Temple, Barker and Sloane. I previously worked in the Mechanical Department of Chicago, Burlington & Quincy Railroad and in the Operating and Engineering Department of Chicago, Rock Island and Pacific Railroad. I joined UP in 1971 as Manager of Budget Research. I became Assistant Controller in 1976, Assistant Vice President-Planning & Analysis in 1980, Assistant Vice-President-Finance in 1984 and Vice President-Strategic Planning in 1987. I was appointed to my present position in 1998. I was the principal negotiator for UP of the agreement among Burlington Northern Santa Fe Railroad Company ("BNSF"), UP and Southern Pacific Transportation Company ("SP") (the agreement is known as the "BNSF Settlement Agreement"), which preserved rail competition that would otherwise have been lost as a result of the UP/SP merger.

In this statement I will explain that UP did not refuse to allow BNSF to serve the Labadie plant, as AmerenUE ("UE") now claims. UP tried to sell an SP rail line to BNSF, which would have enabled BNSF to serve the Labadie plant, but BNSF declined to buy it.

I will also explain that, because of BNSF's refusal to buy the SP line, that plant became unique. BNSF, SP and UP negotiators all understood that UP intended to negotiate

directly with other parties to provide UE with a competitive alternative for the Labadie plant. As I testified in the UP/SP merger proceedings, UP was then negotiating this separate settlement agreement (the “UE Settlement Agreement”), which UE and UP later signed.

I will conclude this statement with a brief description of our eventual sale of the SP line to an entity called GRC Holdings (“GRCH”).

BNSF’s Rejection of the SP Line

Shortly after the August 4, 1995, announcement that UP and SP would merge, UP’s senior management asked me to negotiate agreements that would preserve rail competition for all rail customers who were then served by both UP and SP and no other railroad (“2-to-1” shippers). Over the next several weeks, I met with eleven railroads, including BNSF, to explore their interest in providing competing service and suitability as a competitive alternative. Although we negotiated in good faith with a number of carriers, BNSF emerged as the leading candidate because it had the geographic reach and financial resources to ensure effective competition.

During the protracted negotiations with BNSF, we identified all geographic points where both UP and SP but no other railroad provided service to customers (“2-to-1” locations). We then negotiated trackage rights and line sales with BNSF that would provide replacement competition at each of the points. We also created an “omnibus clause” to ensure that BNSF could serve shippers at smaller 2-to-1 locations through haulage arrangements, trackage rights or ratemaking authority to be identified later.

UE says that UP tried to prevent BNSF from serving the Labadie plant, but that is not true. UP offered BNSF the opportunity to buy numerous rail lines. One of the lines UP

offered to sell BNSF was SP's former Rock Island line from the St. Louis area to Owensville, Missouri, which accessed the Labadie plant. By buying this line, BNSF could have delivered coal originating in the Powder River Basin, Illinois or other coal mining areas via St. Louis.

On September 23, 1995, BNSF informed UP that it would purchase several lines, but it did not purchase all the lines UP had offered. BNSF chose only three lines: (1) the SP line from Avondale to Iowa Junction, Louisiana; (2) the SP line from Dallas to Waxahachie, Texas; and (3) the UP line from Beiber to Keddie, California. BNSF rejected our offer to sell the SP line to the Labadie plant.

The Labadie Plant's Exclusion from the BNSF Settlement Agreement

All of the negotiators of the BNSF Settlement Agreement, including BNSF's lead negotiator Carl Ice, recognized and discussed the fact that the Labadie plant would receive unique treatment. I explained to BNSF that UP was working to provide another competitive alternative. BNSF agreed. We assumed that if UP could not reach agreement with UE, we would find another way to fill the void. In my verified statement in the UP/SP merger application, I explained the special treatment of UE's Labadie facility.

I recognized that UP may have caused some confusion when it issued an overly broad press release that treated the BNSF Settlement Agreement as providing BNSF competition for every 2-to-1 shipper. The negotiators of the BNSF Settlement Agreement understood the Labadie plant's unique situation. I understand that we clarified our intent in a subsequent communication with UE.

BNSF's decision not to buy the SP line left UP without a competitive solution for the Labadie plant. As Jerry P. Klym explains in his verified statement, UP then negotiated the

UE Settlement Agreement with UE that gave UE a competitive option satisfactory to the shipper.

Redacted

UP's Sale of the SP Line

With the UE Settlement Agreement in place, UP was free to sell the SP line. We had not wanted to sell the SP line before reaching an agreement with UE, because we believed we might need to use the line to provide competition at the Labadie plant. I handled discussions with several other parties. Our efforts to sell this line included marathon discussions with a group of former railroad employees that originally called itself General Rail Corporation ("GRC"). They wanted to create a new shortline railroad called the Missouri Central Railroad ("MCRR"), which would acquire not only the St. Louis-Owensville segment but also the inactive Rock Island track from Owensville all the way across Missouri to Kansas City.

I first met with GRC on March 13, 1996, after UP had agreed with UE on the terms of the UE Settlement Agreement. After extended negotiations, UP signed a term sheet with GRC on November 3, 1997, for sale of the line.

GRC defaulted several times under this commitment, apparently because it was unable to obtain the financing it claimed to have. Nevertheless, UP continued to work with the

purchasers until they obtained financing from UE. MCRR operates the line between St. Louis and Owensville.

Redacted

UP did not need to create a third competitive alternative to the Labadie plant, in addition to UP service and the proportional rate alternative under the UE Settlement Agreement.

Redacted

In conclusion, UP always recognized that it needed to preserve a competitive option for UE's Labadie plant. UP offered the SP line to BNSF, which would have given BNSF direct access to the Labadie plant, but BNSF declined to buy it. As a result, the Labadie plant was not included in the BNSF Settlement Agreement. UP then negotiated the UE Settlement Agreement with UE to give UE a competitive alternative that it considered satisfactory. Our later sale of the SP line to GRCH had no impact on the competitive arrangement we had made with UE.

VERIFICATION

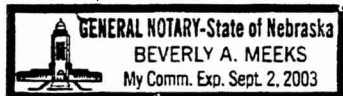
STATE OF NEBRASKA)
) SS:
COUNTY OF DOUGLAS)

John H. Rebensdorf, being duly sworn, deposes and states that he has read the foregoing statement, knows the contents thereof, and that the same is true and correct as stated to the best of his knowledge and belief.

John H. Rebensdorf

Subscribed and Sworn to
Before Me, a Notary Public
This 7th Day of February, 2000.

Beverly A. Meeks
NOTARY PUBLIC



B

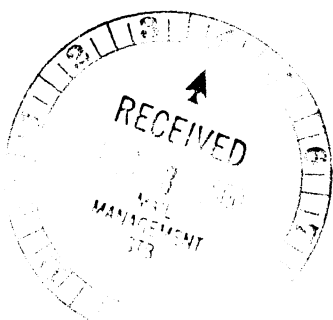
Redacted - To Be Placed on Public File

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 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**

**UNION PACIFIC RAILROAD COMPANY'S
RESPONSE TO AMERENUE'S PETITION FOR
CLARIFICATION AND ENFORCEMENT OF MERGER CONDITIONS**



**James V. Dolan
Larry E. Wzorek
Beverly S. Greer
Union Pacific Railroad Company
1416 Dodge Street
Omaha, NE 68179
(402) 271-5357**

**J. Michael Hemmer
John M. Scheib
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2401
(202) 662-6000**

***Attorneys for Union Pacific
Railroad Company***

February 8, 2000

VERIFIED STATEMENT OF
OF

JERRY P. KLYM

My name is Jerry P. Klym. I am Business Director-Energy for Union Pacific Railroad Company ("UP"). I have worked in the Marketing and Sales Department at UP since 1974, holding various sales positions between 1974 and 1987. Since 1987, I have worked in the Energy Business Unit, where I am responsible for UP's commercial relationships with specific major coal burning utility customers. I became National Account Manager-Energy in 1987 and Market Manager-Energy in 1995. In my present position, which I received in 1996, I am responsible for marketing and contract negotiations for several of UP's major utility customers, including AmerenUE ("UE").

I have been involved with managing the UE account since September 1995, and I am familiar with the negotiations with UE that resulted in a settlement agreement ("UE Settlement Agreement"), which we called the Conceptual Framework.

Redacted

In this statement, I will discuss the UE Settlement Agreement, including aspects of the Agreement that UE does not mention. I will also explain why UP did not notify UE of the contract modification condition included in the Surface Transportation Board Decision No. 44, which approved the merger of UP with Southern Pacific Transportation Company ("SP"). Then I will describe UP's frustrated efforts to implement the UE Settlement Agreement. Finally, I will

discuss Addendum Three to UP's long-term rail transportation contract (ICC-WRPI-C-0080) covering shipments of coal from the PRB to the Labadie plant. This addendum was executed by UP and UE in 1999, but applied retroactively to 1997.

A. The UE Settlement Agreement

When UP and SP announced their merger plans on August 4, 1995, UE's Labadie plant qualified as a "2-to-1" shipper because UP and SP served it. UP transported coal via North Platte and Kansas City to the Labadie plant, as shown on Map No. 1. SP transported Colorado coal from West Elk, Colorado, via Pueblo and Kansas City to St. Louis, using trackage rights over UP from Pueblo, Colorado, to St. Louis. Id. From St. Louis, SP moved the coal back west from St. Louis to the Labadie plant over its former Rock Island line (the "SP line"). Id.

As merger partners, UP and SP sought to preserve rail competition for the Labadie plant in a form comparable to UE's pre-merger options. As John H. Rebensdorf describes in his verified statement, UP originally offered to sell the SP line to BNSF, which would have enhanced UE's pre-merger competitive options by allowing BNSF to provide direct service to the Labadie plant from the PRB. BNSF turned down that offer. We worked with UE to identify another competitive alternative.

UP and UE began negotiating on September 7, 1995, long before UP and SP filed their merger application.

Redacted

Redacted

On November 7, 1995, UP presented UE with a draft of the UE Settlement Agreement .

Redacted

. We then sent UE a revised draft on December 12, 1995

Redacted

On January 17 and February 27, 1996, UP gave UE additional drafts of the UE Settlement Agreement.

Redacted

Redacted

On March 8, 1996, UP sent a final version of the UE Settlement Agreement. UP and UE executed this agreement, which was dated March 11, 1996. UP and UE knew that we still needed to agree on an implementing contract to provide for the UP transportation under the proportional rates.

Redacted

But we agreed that we had a settlement agreement. On March 29, 1996, UE filed with the Board, expressing its approval of the merger and acknowledging that its competitive concerns had been satisfied.

UP signed the UE Settlement Agreement only because we understood that UP and UE had resolved the "2-to-1" shipper issue on the basis of that agreement. We would not have signed this agreement : without that understanding.

Redacted

B. Notice of the Right to Modify Contracts

The Board's Decision No. 44 approving the UP/SP merger permitted "2-to-1" shippers under the BNSF Settlement Agreement to open 50 percent of their contract

commitments to UP or SP to competitive bidding between UP and BNSF. As required by Decision No. 44, UP promptly sent notices to all qualified "2-to-1" shippers informing them of the contract modification condition.

UP did not notify UE of this option because the contract re-opening provision did not apply to UE. BNSF does not directly serve UE under the BNSF Settlement Agreement. UP and UE agreed to a different competitive option,

Redacted

To the best of our recollection, UE never complained to UP about not receiving a notice of contract modification, and it never asked for one. In more than three years since Decision No. 44, UE never once suggested that it had the right to reopen its contracts with UP until last month.

UE is mistaken about the scope of service it could have received if the re-opener provision had applied to the Labadie plant. BNSF would not have moved any coal over any BNSF trackage rights on UP. BNSF could have moved coal over its mainline between the PRB and either Kansas City or St. Louis.

C. UP's Efforts to Implement the Settlement Agreement

In December 1996 UP sent UE a draft transportation contract that implemented the UE Settlement Agreement. UE did not respond. UP asked UE several times in 1997 and 1998 for its comments but received none. On April 24, 1998, UP sent UE a letter requesting comments on the 1996 draft. We sent a Memorandum of Understanding three days later. On May 1, 1998, UP suggested a short term contract so that trains could move to Labadie pursuant to **Redacted** the UE Settlement Agreement. This short term contract extended from May 1, 1998

through September 30, 1998. UE could have shipped coal by BNSF to Kansas City or St. Louis during these five months, which UP thought was ample time to finalize the implementing agreement with UE. UE never responded to any of these UP initiatives. In February 1999, after UE management had changed, UP again asked about the implementing contract, along with other unrelated matters between the two companies. UE resolved the other matters, but did not address the implementing contract.

Finally, in late August 1999, UE presented UP with comments on UP's three-year-old draft implementing contract. UP received these comments and developed a revised draft that it is prepared to discuss with UE at UE's convenience. UP remains prepared to provide UE with competitive rail alternatives as the parties agreed in 1996. UP also is prepared to provide UE with a short term contract so that it can begin shipping tomorrow under the UE Settlement Agreement's proportional rates.

D. Addendum Three to ICC-WRPI-C-0080

In 1999, UE and UP executed Addendum Three to their long-term contract between UP and UE for the transportation of coal from the PRB to the Labadie plant, ICC-WRPI-C-0080. This contract had been in effect when the merger was approved.

Redacted

Redacted

E. Conclusion

UP and UE resolved the “2-to-1” shipper issue for the Labadie plant by negotiating and executing the UE Settlement Agreement,

Redacted

Because of the UE Settlement Agreement, the Labadie plant did not qualify for the contract modification condition and UP did not provide UE notice of that condition. UE behaved as though it shared our understanding.

UP worked to implement the UE Settlement Agreement. Implementing the UE Settlement Agreement has not been a priority for UE, however, and UE did not respond to UP’s

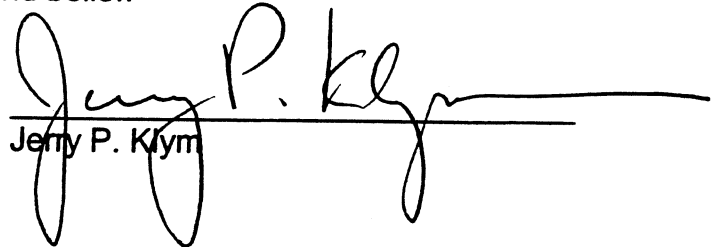
efforts for almost three years. Nevertheless, UP continues to be willing to implement the UE Settlement Agreement today.

Finally, UP and UE signed Addendum Three to their coal transportation contract three years after the UP/SP merger. UE benefitted in many ways from this Addendum. UE should be held to the agreements it made — the UE Settlement Agreement and Addendum Three.

VERIFICATION

STATE OF NEBRASKA)
)
COUNTY OF DOUGLAS) SS:

Jerry P. Klym, being duly sworn, deposes and states that he has read the foregoing statement, knows the contents thereof, and that the same is true and correct as stated to the best of his knowledge and belief.

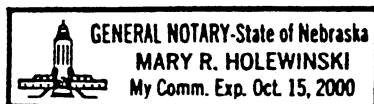


Jerry P. Klym

Subscribed and Sworn to
Before Me, a Notary Public
This 7th Day of February, 2000.



NOTARY PUBLIC



C

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 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

COMMENTS OF GOVERNORS, SHIPPERS AND
OTHERS IN SUPPORT OF THE PRIMARY APPLICATION

CANNON Y. HARVEY
LOUIS P. WARCHOT
CAROL A. HARRIS
Southern Pacific
Transportation Company
One Market Plaza
San Francisco, California 94105
(415) 541-1000

PAUL A. CUNNINGHAM
RICHARD B. HERZOG
JAMES M. GUINIVAN
Harkins Cunningham
1300 Nineteenth Street, N.W.
Washington, D.C. 20036
(202) 973-7601

Attorneys for Southern
Pacific Rail Corporation,
Southern Pacific Transportation
Company, St. Louis Southwestern
Railway Company, SPCSL Corp. and
The Denver and Rio Grande
Western Railroad Company

CARL W. VON BERNUTH
RICHARD J. RESSLER
Union Pacific Corporation
Martin Tower
Eighth and Eaton Avenues
Bethlehem, Pennsylvania 18013
(610) 861-3290

JAMES V. DOLAN
PAUL A. CONLEY, JR.
LOUISE A. RINN
Law Department
Union Pacific Railroad Company
Missouri Pacific Railroad Company
1416 Dodge Street
Omaha, Nebraska 68179
(402) 271-5000

ARVID E. ROACH II
J. MICHAEL HEMMER
MICHAEL L. ROSENTHAL
Covington & Burling
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044-7566
(202) 662-5388

Attorneys for Union Pacific
Corporation, Union Pacific
Railroad Company and Missouri
Pacific Railroad Company

March 29, 1996

VERIFIED STATEMENT OF

UDO A. HEINZE

**MANAGER, FOSSIL FUEL
on behalf of
UNION ELECTRIC COMPANY**

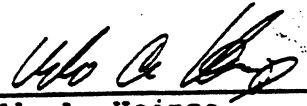
My name is Udo A. Heinze. I am the Manager of Fossil Fuels at Union Electric Company ("UE"). I have held this position for eight years. Prior to that time, I was a Senior Buyer of coal and rail services for UE. Union Electric Company, headquartered in St. Louis, Missouri supplies energy services to a 24,500 square mile service territory in Missouri and Illinois.

UE's total generating capacity is approximately 8,000 MW, of which approximately 68% is from coal-fired steam generating units. In 1995 UE received over 12 million tons of coal at its four coal-fired plants. Over 96% of this coal was delivered by rail. The Union Pacific ("UP"), Southern Pacific ("SP"), Illinois Central ("IC") and Burlington Northern ("BN") are the railroads utilized by Union Electric for the delivery of coal.

In 1995, 6,926,000 tons of coal were delivered to UE's Labadie Power Plant - all by rail. The Labadie Plant has been served by the Union Pacific and Southern Pacific separately. The merger of UP and SP would result in the Labadie Plant being served by only one railroad instead of the current two.

Because of this proposed reduction from two railroads to one provider of rail service to Labadie, UE and UP have met to discuss the future of rail service to this plant.

UE and UP have reached an agreement that will insure on-going competition for rail service to the Labadie Plant after the merger. Because of this agreement, the Union Pacific/Southern Pacific merger is in the best interests of Union Electric, and UE supports the merger application.



Udo A. Heinze

Dated: March 25, 1996

VERIFICATION

STATE OF MISSOURI)
) ss
CITY OF ST. LOUIS)

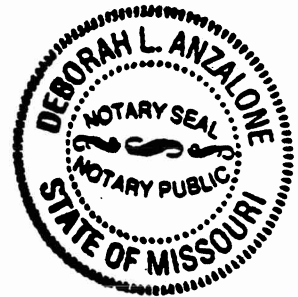
Udo A. Heinze, being first duly sworn, deposes and says that he has read the foregoing document, knows the facts asserted therein, and that the same are true as stated.

Udo A. Heinze
Udo A. Heinze

Subscribed and sworn to before me this 25th day of March 1996.

Deborah L. Anzalone
Notary Public

DEBORAH L. ANZALONE
NOTARY PUBLIC—STATE OF MISSOURI
ST. LOUIS COUNTY
MY COMMISSION EXPIRES APR. 18, 1998



D

REDACTED

E

REDACTED