

PUBLIC VERSION

**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.

Docket No. 42126

**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

Finance Docket No. 33537

REBUTTAL EVIDENCE

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**AMEREN MISSOURI'S AND MISSOURI CENTRAL
RAILROAD COMPANY'S REBUTTAL EVIDENCE¹**

Union Electric Company d/b/a Ameren Missouri (“Ameren Missouri” or “UE”) and the Missouri Central Railroad Company (“MCRR”) (collectively “Ameren/MCRR”) respectfully file this Rebuttal Evidence pursuant to the procedural schedule adopted by the Surface Transportation Board (“Board” or “STB”) on January 14, 2011. As demonstrated in the Opening Evidence (filed April 18, 2011) and confirmed by this Rebuttal Evidence, the Labadie paper barrier is unlawful, notwithstanding the limited and ineffectual assertions of Union Pacific Railroad Company (“UP”) in its Reply Evidence (filed June 18, 2011) (“Reply”). The Board should declare the paper barrier provisions in the Line Sale Contract and the Trackage Rights Agreement void and unenforceable. Additionally and/or alternatively, the Board should revoke the exemptions in STB Finance Docket Nos. 33508 and 33537 to the extent necessary to declare the paper barrier unenforceable. In support hereof, Ameren/MCRR state as follows:

I. SUMMARY OF ARGUMENT

Nothing in UP’s Reply has changed or refuted the fundamental facts of this case. The paper barrier (1) unlawfully prohibits MCRR from fulfilling its common carrier obligation to serve Labadie; (2) unlawfully restricts Ameren Missouri’s right to receive MCRR service; and (3) is unlawful and unreasonable under antitrust principles. In fact, UP has barely made any effort whatsoever to counter the showing made by Ameren/MCRR on Opening. UP’s position on Reply is that the Board should do nothing, not even render a decision in this case, because neither the common carrier obligation of MCRR nor the rights of Ameren Missouri under 49

¹ Material in double brackets [[]] is Highly Confidential pursuant to the Protective Order entered in this proceeding on January 14, 2011. The Highly Confidential and the Confidential material is redacted from the Public Version.

USC § 11101 are really that important. The Board should reject UP's blasé do-nothing attitude. Board action is necessary to enforce the common carrier obligation.

In support of its view that no Board action is necessary, UP states that "terms" of MCRR "access" to Labadie might be "allow[ed]" by UP upon further negotiation with Ameren Missouri. The Board should not countenance UP's view because UP does not have this sort of permitting authority over the common carrier obligation. Decision for Ameren/MCRR in this case is also warranted because UP has not refuted or even responded to most of the arguments submitted by Ameren/MCRR in its Opening Evidence. The Board should find the paper barrier in the Line Sale Contract and the Trackage Rights Agreement is unlawful and unenforceable, and the Board should also find that no additional compensation is due to UP.

II. FACTUAL BACKGROUND

Ameren Missouri and MCRR have already provided an extensive factual background relating to this proceeding, including the history of the Former Rock Island Line (sometimes termed the "Line" herein), operations at the Labadie electric generating station, rail service to Labadie, the merger of UP and Southern Pacific Transportation Company ("SP"), and MCRR's purchase of the Former Rock Island Line. The background will not be repeated in this Rebuttal Evidence. Ameren Missouri and MCRR direct the Board's attention to the Verified Complaint or, in the Alternative, Petition to Revoke in Part (filed Nov. 22, 2010) and the Opening Evidence (filed Apr. 18, 2011). For the most part, UP has not disagreed with the facts set forth by Ameren/MCRR on Opening. Therefore, as specifically set forth below, there are only a few areas where Ameren/MCRR clarify and/or rebut factual assertions made by UP in its Reply.

III. UP HAS NOT REFUTED OR EVEN RESPONDED TO THE GREAT MAJORITY OF AMEREN/MCRR'S OPENING EVIDENCE

The Board should find for Ameren/MCRR in this proceeding because UP has submitted no evidence or argument on most of the issues raised by Ameren/MCRR in its Opening Evidence, including (but not limited to):

- the jurisdiction of the Board to address the Labadie paper barrier. Opening Evidence at 4-5.
- virtually all of the factors applicable to paper barrier evaluation under Review of Rail Access and Competition Issues – Renewed Petition of the Western Coal Traffic League, STB Ex Parte No. 575 (served Oct. 30, 2007). Opening Evidence at 29-38.
- the evidence that removal of paper barrier will have no effect on UP. Opening Evidence at 37-38.
- the need for partial revocation of the exemption under 49 USC § 10502. Opening Evidence at 39-41.
- the evidence that the trackage rights fee currently paid by MCRR for use of UP's line between Vigus and Rock Island Junction is at a market rate and, therefore, no additional compensation is needed upon elimination of the paper barrier. Opening Evidence at 57.
- the severability of the paper barrier provisions from the Line Sale Contract and the Trackage Rights Agreement. Opening Evidence at 59-60.
- the inapplicability of 49 USC § 10705 to this case. Opening Evidence at 60-62.
- the showing that UP's previously-raised defenses (unclean hands, laches, waiver, statute of limitations, and failure to state a claim upon which relief can be granted) do not apply. Opening Evidence at 63-66.

Because UP has not refuted the showing made by Ameren/MCRR on these issues, the only evidence of record is the evidence provided by Ameren/MCRR and a Board decision in favor of Ameren/MCRR is warranted. Additionally, UP has provided no substantive response to Ameren/MCRR's showing that they already paid the full value of the Line and there is no additional payment due for the common carrier obligation to serve Labadie. Opening Evidence at 55-59. The few meager arguments that UP did include in its Reply Evidence can be easily dismissed, as described further herein. Thus, Ameren/MCRR's evidence is not only correct, it is largely the only "evidence of record" and the Board should find for Ameren/MCRR in this case.

Climate Master Inc. and International Environmental, Inc. – Petition for Declaratory Order – Certain Rates and Practices of Trans Tech Solutions, Inc., F&M Bank, and Midland Transportation Co., STB Docket No. 42085, slip op. at 1-2 (served Sept. 28, 2004); Duke Energy Corp. v. Norfolk Southern Railway Co., 7 S.T.B. 89, 161 (2003); Union Pacific Railroad Co. – Abandonment – In Carver and Scott Counties, MN, STB Docket No. AB-33 (Sub-No. 255), slip op. at 3 (served Apr. 1, 2008).

In addition, an attempt, if any, by UP to submit additional arguments or evidence in the future should be rejected as a collateral attack on the procedural schedule adopted by the Board for this case. Such an attempt would also be prejudicial and costly to Ameren/MCRR, and a waste of finite agency resources. Cf. Arkansas Electric Cooperative Corp. – Petition for Declaratory Order, STB Docket No. 35305 (served Mar. 3, 2011), slip op. at 3 ("we must resolve this controversy based upon the evidence available at this time"); 49 CFR § 1104.13(c)(2011) (a reply to a reply is not permitted); Canadian National Railway Co., Grand Trunk Corp., and Grand Trunk Western Railroad Inc. – Control – Illinois Central Corp., Illinois Central Railroad

Co., Chicago, Central and Pacific Railroad Co., and Cedar River Railroad Co., STB Docket No. 33556, slip op. at 6 (served Aug. 27, 2002) (reopening denied when evidence available earlier).

UP has had its chance to respond to Ameren/MCRR's Opening Evidence, has engaged in discovery, has received nearly 3,000 pages of discovery from Ameren/MCRR, and has had two months to prepare its Reply Evidence. Despite this ample opportunity, UP has left most of Ameren/MCRR's evidence unrefuted, therefore, a decision for Ameren/MCRR is warranted.

IV. THE PAPER BARRIER IS NOT "HYPOTHETICAL"

The paper barrier permanently bars MCRR from serving Labadie despite the fact that MCRR's tracks connect directly to Labadie. Contrary to UP's assertion, this is not a "hypothetical" issue. Reply at 2-3. This is a case where two separate lines connect to the plant and have provided service and now one line is contractually prohibited from providing service to a facility on its separate track. The common carrier obligation forms the bedrock upon which rests the remainder of the Board's rail regulatory scheme. It is not a "difficult question[]" for the Board to find that federal law, including 49 USC § 11101, does not allow a railroad to be barred from serving a shipper on its rail line. Reply at 3. The Board can and should use its authority to declare the paper barrier unlawful and unenforceable. Railroad Ventures, Inc. – Abandonment Exemption – Between Youngstown, OH and Darlington, PA, in Mahoning and Columbiana Counties, OH and Beaver County, PA, STB Docket No. AB-556 (Sub-No. 2X), slip op. at 3 (served Jan. 7, 2000) ("contractual restrictions that unreasonably interfere with common carrier operations are deemed void as contrary to public policy"). Cf. United States v. Baltimore & Ohio O.R. Co., 333 U.S. 169, 177 (1948) (holding that a rail line owner may not "enforce conditions upon its use which conflict with the power of Congress to regulate railroads so as to secure equality of treatment of those whom the railroads serve.").

UP's assertion that the paper barrier is "hypothetical" is based on UP's bizarre belief that the common carrier obligation of MCRR matters only if Ameren Missouri installs scrubbers at Labadie and purchases Illinois Basin coal for use at Labadie. Reply at 3 and 16. There is no basis in law or fact for this position. Ameren Missouri and MCRR have been very clear, in both the Complaint and the Opening Evidence, that this case is about the common carrier obligation of a railroad, MCRR, to serve a shipper, Ameren Missouri at Labadie, regardless of the traffic.² For example, the Prayer for Relief in the Complaint stated "Ameren Missouri and MCRR respectfully request that the Board void all restrictions that prevent MCRR from providing unfettered rail freight service to Labadie." Compl. at 23. Ameren/MCRR stated in Opening Evidence that "Ameren Missouri should have the ability and option to use the MCRR line for its coal (regardless of coal origin) and other transportation needs" and "the Board should declare the paper barrier provisions in the Line Sale Contract...and the Trackage Rights Agreement...to be void and unenforceable as a matter of law." Opening Evidence at 3 and 67. These statements by Ameren/MCRR show the fallacy of UP's attempt to narrow the relief requested in this case, such

² UP's discussion related to the issues raised by Ameren in its Opening Evidence on the incentives of UP or BNSF to move Illinois Basin coal gloss over a few issues. First and foremost, Ameren/MCRR believe that the common carrier obligation is paramount and the fact that the paper barrier bars MCRR from providing service to Labadie on its own separate track, in perpetuity, is an unreasonable restriction on the common carrier obligation and it should be voided. Second, the UP/SP merger did occur and conditions were imposed to protect shippers and yet as discussed in Section VII UP, SP and BNSF decided to treat Labadie "unique" and UP voluntarily sold the separate line to a third party. Thus, what SP or UP moved in the past or currently to Labadie is not the dispositive issue of whether the paper barrier is unlawful because it prohibits MCRR from competing for that business. In addition, UP's Reply on the BNSF pricing of Illinois Basin coal versus PRB coal completely ignores the difference in mileage of the movements which shows the lack of incentive to competitively price Illinois Basin coal that Ameren has experienced. Furthermore, infrastructure investments that would be paid by Ameren as part of the pricing to move Illinois Basin coal are relevant to the incentive or lack thereof to move Illinois Basin coal over the longer haul PRB coal. Finally, in footnote 26, UP again mischaracterizes Ameren's position that it was forced to take in 2000 to try and obtain an administrative remedy for the "unique" treatment that Labadie received in the UP/SP merger.

as when UP stated that “Ameren/MCRR seek an order that would allow MCRR to transport Illinois Basin coal to Ameren Missouri’s Labadie plant.” Reply at 3.

Ameren/MCRR described the possibility of scrubbers and Illinois Basin coal in order to provide the Board some context for possible future Labadie coal-sourcing, and to show the harmful and prejudicial impact of the paper barrier on Ameren Missouri’s planning for the future. Scrubber installation is an expensive, complex, and time-consuming endeavor, which requires very long lead times. So, Ameren Missouri needs to know now about its rights for future coal sourcing and transportation options in order to make that decision. Furthermore, it is incorrect to state that the paper barrier “will not be a live issue for many years.” Reply at 3. The paper barrier is an issue right now. Moreover, UP has itself acknowledged that expensive investments require long lead times. Comments of Union Pacific Railroad Company, Competition in the Railroad Industry, Ex Parte No. 705, Verified Statement of Lance Fritz at 6 (“Union Pacific must plan its capital investments and operations carefully. The investments we make to expand and enhance our network are very expensive, require long lead time, and last for decades. Most track and terminal expansions require at least three years from concept to operation.”) Ameren has been upfront with the Board and UP regarding the lead times for its planned investments and expects them to be completed within the next ten years, see V.S. Jones at 2, and UP’s attempt to twist this into a reason for the Board to not act is disingenuous. It is plainly false to suggest, as UP has done, that the Labadie paper barrier is merely hypothetical and of no real-world consequence.

UP's basic view is that the Board need not do anything right now, and Board action will only be necessary, if UP, Ameren Missouri, and MCRR cannot reach a "negotiated resolution."³

Reply at 16. Ameren Missouri and MCRR have already unsuccessfully discussed the issue of the paper barrier with UP. UP suggested that Ameren Missouri and/or MCRR must pay additional compensation for the common carrier obligation to apply in this situation.

Ameren/MCRR reject UP's view, and have provided conclusive evidence on Opening that UP has already been paid the full market value for the Line. Given UP's refusal to abide by 49 USC § 11101, the Board is the proper avenue for Ameren Missouri and MCRR. Hence, Ameren/MCRR vehemently object to UP's suggestion that this proceeding can be dismissed or held in abeyance. Reply at 2. Prompt Board action is required to enforce the common carrier obligation and allow MCRR and Ameren Missouri to move forward with planning and sourcing options for Labadie.

UP also suggests it would be willing to submit this issue to arbitration (Reply at 16 n. 34) but Congress has given the Board the duty of enforcing the common carrier obligation. Ensuring that shippers receive the common carrier service they request is arguably the most important of the Board's duties, and the Board should not leave it for arbitration. It is clear from UP's Reply that UP's only issue with MCRR having access to Labadie is that UP wants to be further compensated for MCRR right to fulfill its common carrier obligation and such action should not be condoned. In fact, as described in Section XII, conclusive evidence of valuation has already been offered in this proceeding and this evidence, consisting of UP contemporaneously-created

³ While UP offers to lift the restriction if Ameren/MCRR pay UP some undefined amount of money, UP also seems to state that it would only be willing to negotiate when UP determines that Ameren is "ready to burn Illinois Basin coal." UP Reply at 16. As discussed above, investments take years of planning and UP should not be permitted to determine when it thinks Ameren is ready to have the answer it deserves regarding the MCRR access to Labadie.

documents, shows that MCRR has already paid full market price for the Line. Moreover, UP could have suggested arbitration in November 2010, after Ameren/MCRR filed the Complaint. Instead, UP waited for eight months to pass, with untold hours and fees spent by Ameren/MCRR on discovery and developing evidence. UP's newly-devised arbitration suggestion strongly reeks of an attempt to delay this proceeding and cause even more legal fees for Ameren/MCRR.

Ameren/MCRR understand that the Board has a busy work schedule, with numerous rate cases and the recent Competition in the Railroad Industry proceeding in Ex Parte No. 705 and many other proceedings on its docket. However, the issues in this proceeding are extremely important. Ameren/MCRR paid a filing fee of \$20,600,⁴ engaged in over two months of discovery, produced and reviewed thousands of pages of documents, and have expended significant legal fees to enforce the common carrier obligation and have their issues addressed by the Board. Resolution of this issue cannot wait any longer, despite UP's attempts to delay this proceeding.

V. UP HAS NOT REFUTED THE SHOWING MADE BY AMEREN/MCRR THAT THE PAPER BARRIER IS UNLAWFUL UNDER REVIEW OF RAIL ACCESS

In the Opening Evidence, Ameren/MCRR showed that the paper barrier is unlawful under the standard and factors described by the Board in Review of Rail Access and applied in Entergy Arkansas, Inc. and Entergy Services, Inc. v. Union Pacific Railroad and Missouri & Northern Arkansas Railroad, STB Docket No. 42104 (served June 26, 2009). Opening Evidence at 24-38. UP did not refute this showing or, indeed, offer any evidence on the factors described by the Board in Review of Rail Access. There were only two brief quotations to Review of Rail

⁴ The Board recently reduced this filing fee because the Board feared that some meritorious claims may not have been filed because of the high filing fee. Ameren/MCRR did in fact pay this high filing fee and believe their claims are meritorious. Regulations Governing Fees for Services, Docket No. EP 542 (Sub-No. 18) (STB served July 7, 2011).

Access in UP's Reply, and neither applies to the Labadie paper barrier. First, UP quoted the Board to support the position that the effect of the Labadie paper barrier must be viewed from the pre-sale perspective. Reply at 11. The statement quoted by UP, however, was addressing a "traditional" interchange commitment where the shipper was always served by only one set of tracks and one railroad. After sale (or lease) of the rail line, the shipper was then served by a shortline railroad that was contractually required or influenced to interchange the shipper's traffic with the selling railroad. See, e.g., Review of Rail Access at 10 (Board notes that these types of situations are "agreements between two companies that do not compete with each other, but rather provide services at different points in a distribution chain"). UP's quotation is therefore inapplicable to the situation at Labadie, where tracks of both UP and MCRR reach Ameren Missouri's facility but the paper barrier purports to bar MCRR's exercise of its common carrier obligation on its separate track.

UP's second citation to Review of Rail Access is similarly misplaced. UP claims that because UP owned the SP line for several years before selling it to MCRR, then MCRR does not have the right to serve Labadie because "Ameren/MCRR are seeking 'to create a new competitive option that did not exist prior to the [transaction].'" Reply at 11 (citing Review of Rail Access). Again, UP is conflating the Labadie paper barrier (where a railroad sold a rail line to a third party yet imposed a prohibition on the third party's rail service to shippers via its completely separate tracks) with a traditional interchange commitment (where the tracks of only one railroad reach the shipper's facility, meaning the transaction substituted one railroad for another). Under UP's erroneous interpretation of Review of Rail Access, when a transaction results in a "new competitive option", the new railroad does not have a common carrier obligation to serve a shipper if another railroad already provides service. Thus, UP is advocating

for some sort of selective application of the common carrier obligation, but Congress did not create any such exception to the common carrier obligation when it drafted 49 USC § 11101. Moreover, this novel interpretation would certainly be shocking news to the many shippers that have constructed “build-outs” over the past few decades in Board-approved transactions⁵, not to mention the shippers in the Shared Assets Areas that gained competitive options in the purchase of Conrail by CSXT and Norfolk Southern. UP itself has apparently believed, at one point in the past, that a transaction can increase the number of railroads serving a shipper. Union Pacific Corp., Union Pacific Railroad, and Missouri Pacific Railroad – Control and Merger – Southern Pacific Rail Corp., Southern Pacific Transportation Co., St. Louis Southwestern Railway, SPCSL Corp., and The Denver and Rio Grande Western Railroad, Decision No. 13, 3 STB 987, 1018 n. 127 (1998) (“UP cites the following procompetitive impacts:...the injection of new competition for ‘1-to-2’ shippers in Louisiana”).

Other than these two inapplicable quotations to Review of Rail Access, UP did not address any of the factors or other standards mentioned in that decision. Given UP’s failure to refute Ameren/MCRR’s evidence, the Board should find the paper barrier unlawful under Review of Rail Access because Ameren/MCRR have provided the only relevant evidence of record.

⁵ Under UP’s view, the railroad with newly-created access would not have a common carrier obligation (and the shipper would have no rights under 49 USC § 11101) because the “competitive option did not exist prior to the transaction.” This would mean that a shipper constructing a build-out would only get service over its expensive investment if the railroad voluntarily decided to provide such service.

VI. UP HAS NOT REFUTED THE SHOWING MADE BY AMEREN/MCRR THAT THE BOARD SHOULD REVOKE THE EXEMPTION APPLICABLE TO THE LINE SALE CONTRACT AND THE TRACKAGE RIGHTS AGREEMENT TO THE EXTENT OF THE PAPER BARRIER

Ameren/MCRR also showed in the Opening Evidence that, under the principles described in 49 USC § 10502, revocation of the exemption governing the Line Sale Contract and the incorporated Trackage Rights Agreement is warranted to the extent of the paper barrier. Opening Evidence at 39-41. UP did not make any effort to disprove this showing and, in fact, did not mention 49 USC § 10502 at all. The Board should find that revocation is appropriate, to the extent necessary to remove the paper barrier, because Ameren/MCRR have offered the only evidence of record.

VII. NO “ACCESS TERMS” ARE NEEDED, AND THE BOARD SHOULD REJECT UP’S IMPLICIT EFFORT TO CLAIM THAT THE COMMON CARRIER OBLIGATION CAN BE AND/OR HAS BEEN WAIVED

MCRR has a route to Labadie on its own tracks, completely separate from UP’s route. As such, UP is mistaken in its belief that the Board must set “access terms.” Reply at 3. This is not a situation where UP and MCRR would share the same track to serve Labadie; instead, like any other shipper that has direct and separate access to two separate railroads, there need not be negotiation of any “terms” to govern MCRR’s use of its own tracks to serve Labadie.⁶ Similarly, “renegotiated contracts” are not necessary for MCRR to provide service to Labadie. Reply at 16. As a common carrier, MCRR is obligated to serve all shippers on its lines, including Labadie, and no UP contract is required for MCRR to exercise its common carrier obligation. Pejepscot

⁶ UP does not use the trackage rights portion (between Vigus and Rock Island Junction) for its coal traffic to Labadie. In fact, the trackage rights portion is “an island” separated from the UP rail system, and operations on it have been leased to Central Midland Railway Company (“CMR”). See Ex. 1 (UP-Ameren-0000533, HC). Furthermore, the MCRR trackage rights agreement with UP already sets a market rate for use of tracks to connect to the TRRA in St. Louis.

Industrial Park, Inc. d/b/a Grimm Industries – Petition for Declaratory Order, STB Docket No. 33989, slip op. at 14 (served May 15, 2003) (where no embargo or abandonment exists, railroad has “an absolute duty to provide rates and service...upon reasonable request, and that its failure to perform that duty was a violation of section 11101”).

In support of its claim that “access terms” are needed, UP asserts that Ameren Missouri is seeking “to revise the terms of its prior deal with UP.” Reply at 3. UP has not specified the exact nature of this alleged “prior deal” between UP and Ameren Missouri. Similarly, UP claims that “Ameren Missouri once again wants the Board to relieve it of its commitments to UP.” Reply at 8. Again, UP has not specified the commitments to which it is referring. Regardless, neither any “deal” between UP and Ameren Missouri nor any “commitments” by Ameren Missouri can eliminate the common carrier obligation under 49 USC § 11101 of MCRR to serve all shippers on its tracks. As a common carrier, MCRR has “no right to deny service to any shipper.” Hanson Natural Resources Company – Non-Common Carrier Status – Petition for a Declaratory Order, ICC Docket No. 32248, slip op. at 33 (served Dec. 5, 1994). If there is any “deal” that the Board should not condone, it is the deal that UP, SP and BNSF reached in the mid 1990’s when they decided to treat Labadie “unique.”⁷ See UP Reply, V.S. Rebensdorf at 3.

⁷ In any other industry, it would be per se unlawful for competitors to get together and decide how this “unique” shipper would be allocated in the market but that is just what UP, SP and BNSF did. See Exhibit 2, a letter from UP to BNSF dated February 7, 2000 which was filed as Attachment A to BNSF’s Reply to AmerenUE’s Petition for Clarification and Enforcement of Merger Conditions (BNSF-90), Finance Docket No. 32760. Before this early 2000 timeframe, UP, SP and BNSF never told the STB that Labadie was being treated unique and never explained to Ameren that it was being treated unique. While it would certainly seem to be, the STB does not have to rule this nefarious conduct unlawful in order to rule in favor of Ameren’s request for relief. However, it does help provide a context for the way UP was thinking at the time of the sale of the Line to MCRR and such unique treatment cannot include a restriction on the common carrier obligation of any railroad.

It appears that UP may be referring to the “Conceptual Framework” between Union Electric (“UE”) and UP as the alleged “deal” and/or source of the “commitments,” but the Conceptual Framework was signed in 1996 and, consequently, could not signal Ameren Missouri’s waiver of service from MCRR because the Former Rock Island Line was not sold until 1999, after the terms had been agreed between UP and General Railway GRC Holdings Corporation (“GRC”) in 1997.⁸ See UP-SP Merger, Decision No. 89, 4 STB 879, 882-85 (2000). It goes without saying that the Conceptual Framework also did not and could not bar MCRR’s service to Labadie, a facility on a rail line that MCRR had not even yet purchased at the time the Conceptual Framework was signed. Entergy, STB Docket No. 42104, slip op. at 7 (served June 26, 2009) (“UP and MNA cannot contract away the statutory rights of a third party or neglect their own obligations under the statute.”)

The Board previously addressed the Conceptual Framework, finding that it was simply a proportional rate agreement between UE and UP, and that UE withdrew its opposition to the merger as a result of the agreement. UP-SP Merger, Decision No. 89, 4 STB 879, 883 (2000). The Board certainly did not find that the Conceptual Framework barred MCRR service to Labadie. UP also raises other terms of the Conceptual Framework, regarding an alleged reimbursement to SP and a transportation contract volume commitment, without any showing that these terms have any relationship to the common carrier obligation of MCRR to serve Labadie. Reply at 5 n. 7. The reason for UP’s failure on this point is simple – there is no

⁸ In fact, the Board recognized that the Conceptual Framework was signed by UE on March 14, 1996, yet UP had already met with GRC before that date regarding the sale of the Rock Island line with the restriction which would attempt to permanently extinguish the common carrier obligation on that line to Labadie. See UP/SP Merger, Decision No. 89 and UP Reply, V.S. Rebensdorf at 3.

relationship.⁹ The Board should reject UP's claim that any alleged "prior deal" and "commitments" bar the common carrier obligation at Labadie.

To the extent that UP's claim related to a "deal" is addressed at the contract modification arguments raised by UE in 2000, UP is well aware that UE was denied any relief under the contract modification condition of the UP/SP merger. See UP/SP Merger, Decision No. 89. In fact what Decision No. 89 supports is that there was a lot of confusion regarding how Labadie would be treated by UP after it acquired SP. What has become subsequently clear is the UP, SP and BNSF decided collectively that Labadie would be treated "unique."¹⁰

UP also claims that Ameren Missouri previously argued to the Board that the restrictions on Labadie service were "valid" (Reply at 15), but UP has only mentioned Decision No. 89 on this point and has not provided a citation to any such statement of "valid[ity]" by Ameren Missouri. At most, Decision No. 89 merely shows that UE informed the Board of the mere existence of the restriction; there is no mention of the restriction's "validity." In any event, the viewpoint of any party cannot trump MCRR's common carrier obligation under 49 USC § 11101.

UP asserts that Ameren Missouri was not interested, in the 1995-1996 timeframe, in receiving service over the SP line from another railroad. Reply at 5. This assertion is utterly irrelevant to the common carrier obligation of MCRR to serve Labadie. Furthermore, the

⁹ Furthermore, UP's assertions regarding this "savings" are wrong. Ameren addressed these same inaccurate statements by UP in the Reply of AmerenUE to Additional Issues Raised by Union Pacific In its "UP/SP-387" Response" at 6-7, filed Feb. 23, 2000, Finance Docket No. 32760 and attached hereto as Exhibit 3.

¹⁰ UP seems to imply that Ameren's exercise of its right to seek clarification at the Board over issues that were very unclear and occurred more than 10 years ago, somehow supports a "pattern" of inappropriate conduct by Ameren. The Board should not condone UP's attempt to shift or cloud blame for UP's actions to restrict MCRR's common carrier obligation vis-a-vis Ameren's exercise of its rights to redress at the Board.

assertion is also misleading. Ameren Missouri was never treated as a 2-to-1 shipper in 1995-1996 because UP, SP and BNSF had decided to treat Labadie “unique.” Once BNSF declined to purchase the line, UP proposed trackage rights on the line for one of two smaller railroads. Ameren Missouri was concerned that neither railroad had the ability to sufficiently repair the SP line and handle Labadie’s needs. Moreover, neither railroad would have had the same trackage rights that SP previously had on UP’s former MP line. See Opening Evidence at 13. Ameren Missouri itself did not want to purchase the line because railroading is clearly not Ameren Missouri’s core business.¹¹

Similarly, UP incorrectly claims that “Ameren Missouri wants another chance to obtain what UP offered back in 1995: ownership of the SP line with no restrictions.” Reply 8. This is not an accurate characterization of the positions taken by Ameren Missouri and MCRR in the Complaint and Opening Evidence. MCRR wants the ability to serve Labadie, a shipper on its tracks, and Ameren Missouri wants service from MCRR. UP fails to explain how first BNSF’s rejection and then UE’s rejection of UP’s offer to sell the line in 1995 could waive MCRR’s current common carrier obligation to serve Labadie, or waive Ameren Missouri’s right to such service.¹² In contrast to the apparent belief of UP, there is no loophole in 49 USC § 11101 that eliminates the common carrier obligation when a shipper declines to purchase a rail line or the railroads get together and decide to treat a shipper “unique.”

¹¹ Eventual purchase of the line in 1999 only became necessary when GRC could not raise the money to meet UP’s asking price and abandonment was imminent. See Opening Evidence at 17-21.

¹² The only way to extinguish the common carrier obligation is by obtaining discontinuance of service or abandonment authority from the STB pursuant to 49 USC § 10903. No such authority was granted to UP for the MCRR line.

VIII. BNSF'S RIGHT TO SERVE LABADIE DOES NOT EXTINGUISH EITHER MCRR'S COMMON CARRIER OBLIGATION OR AMEREN MISSOURI'S RIGHT TO RECEIVE MCRR SERVICE AT LABADIE

A. The common carrier obligation is not eliminated by BNSF's trackage rights

While MCRR's common carrier obligation to serve Labadie arises from 49 USC § 11101, UP repeatedly asserts, either implicitly or explicitly, that BNSF's access to Labadie under the 2-to-1 condition of the UP-SP merger somehow extinguishes the common carrier obligation. For example, UP asserts that Ameren Missouri is "not entitled to service" from MCRR (Reply at 9) and that "Ameren Missouri did not lose any competitive options as a result of the SP line sale and grant of trackage rights." Reply at 11. Apparently, UP is taking the position that just because there is "competition" at Labadie between UP and BNSF's trackage rights, then the issue of MCRR's common carrier obligation to serve Labadie, and Ameren Missouri's right under 49 USC § 11101 to receive such service, are irrelevant and can be ignored.

UP's position is legally unsound and factually incorrect. Before the UP/SP merger was even approved, UP started the process to voluntarily sell the former Rock Island Line to a third party, thereby giving a new railroad direct access to Labadie. The BNSF access to Labadie does not and cannot take the place of the common carrier obligation of MCRR to serve Labadie, or Ameren Missouri's rights under 49 USC § 11101 to receive such service. As a common carrier, MCRR has "no right to deny service to any shipper." Hanson, ICC Docket No. 32248, slip op. at 33 (served Dec. 5, 1994). Moreover, it was UP itself that stated "UP's Sale of the SP Line [to MCRR] Has No Bearing on UE's Petition [for clarification of 2-to-1 status]." UP Reply to AmerenUE Petition for Clarification and Enforcement of Merger Conditions, at 12 (STB Docket No. 32760, filed Feb. 8, 2000 as UP/SP-374). In other words, UP agreed there is no relationship

between Ameren Missouri's rights under the merger and the sale of the Former Rock Island Line to MCRR.

In support of its new position in this case, UP takes issue with precedent cited by Ameren/MCRR that shows Ameren Missouri has a right under 49 USC § 11101 to receive MCRR service. See, e.g., Opening Evidence at 27-29. UP asserts that the precedent stands for the proposition that shippers only have rights to rail service under 49 USC § 11101 if the “shippers could not obtain rail service from *any* carrier.” Reply at 10 (emphasis in original). UP's view, it appears, is that the common carrier obligation only applies to one railroad per shipper, even if tracks of more than one railroad reach the shipper. This groundless interpretation of 49 USC § 11101 would mark a dramatic shift in national rail policy, and would create an intractable implementation problem: if two or more railroads served a shipper, how would the Board determine which of them had the “one” common carrier obligation to serve that shipper? The Board should reject UP's fanciful and unsupported interpretation of 49 USC § 11101. UP's position on this point is so extreme that UP itself has previously argued just the opposite. Three years ago, UP answered the Board question “To whom does the common carrier obligation apply?” by stating:

Although Union Pacific is uncertain about the meaning of this question, the Board may be asking whether one railroad can be held to its common carrier obligation when another carrier serves the same customer. In our view, any common carrier obligation should apply in equal measure to both carriers. We do not believe that one carrier is free to decline to provide service in response to a reasonable request merely because another carrier could provide the service.

Comments of Union Pacific Railroad at 20-21, Common Carrier Obligation of Railroads, Ex Parte No. 677 (filed Apr. 17, 2008).

B. Cases cited by UP are inapplicable

UP unconvincingly cites to an ICC decision in support of its view that the paper barrier is lawful because there was allegedly no loss of “competitive options.” Montana Rail Link, Inc. – Exemption Acquisition and Operation – Certain Lines of Burlington Northern Railroad Co., ICC Docket No. 31089 (served May 26, 1988). In this case, the Montana Rail Link acquired several hundred miles of BN rail line in Montana. Several parties protested, but the ICC rejected their concerns because, among other things, “local shippers will continue to receive service similar to the service they received before.” *Id.* at 17. This case involved a simple sale of rail lines. BN was not trying to prevent MRL from serving shippers to whom MRL’s tracks connected; therefore, this case is entirely dissimilar from the Labadie paper barrier. After UP sold the Former Rock Island Line to a third party (MCRR), the common carrier obligation must prevent all efforts by UP to bar MCRR from using its own property to serve shippers on its own tracks. UP’s attempted application of Montana Rail Link to the Labadie paper barrier is misplaced and reveals only that UP continues to ignore the common carrier obligation of MCRR.

UP claims legal support for its view that a seller of a rail line can permanently disable the common carrier obligation of the buyer as in the Labadie paper barrier, but the two cases cited by UP do not support such a proposition. Reply at 10 n. 20. UP relies first upon a case wherein Amtrak sought an order from the ICC directing the Boston and Maine Corporation (“B&M”) to sell a rail line to Amtrak under the Railroad Passenger Service Act. National Railroad Passenger Corp. – Conveyance of Boston & Maine Corp. Interests in Connecticut River Line in Vermont and New Hampshire, 4 I.C.C.2d 761 (1988) (“Amtrak”). This ICC decision does not support UP’s contention that a seller can void the common carrier obligation of a rail line buyer. The Amtrak purchase, to be followed by a subsequent conveyance to Central Vermont Railway

(“CVR”) and possible trackage rights for B&M on the CVR track, involved a single rail line, not two separate tracks as in the Labadie situation. As stated by the ICC, if B&M accepted the trackage rights, B&M would have the exclusive right to serve existing shippers on the CVR rail line, with new shippers open to both B&M and CVR. 4 I.C.C.2d at 800. Contrary to UP’s view, the restriction in this case was not based on a sale, but on the possible B&M trackage rights. 4 I.C.C.2d at 800. (“If B&M does not exercise its trackage rights option, then the shippers that are now served exclusively by B&M would be served by CV instead.”). It is not unusual for a railroad to lease a track or grant trackage rights to a second railroad, which is what CVR proposed for B&M rail service. The Amtrak case obviously does not stand for the proposition that a railroad can be prevented from exercising the common carrier obligation on its own tracks when no other railroad has the common carrier obligation for those tracks either.¹³

The second case cited by UP is equally inapplicable. State of Maine, Department of Transp. – Acquisition & Operation Exemption – Maine Cent. Railroad Co., 8 I.C.C.2d 835 (1991). UP contends that the State of Maine precedent supports the lawfulness of the Labadie paper barrier, but such a contention is untenable. In State of Maine, the acquiring state government only purchased the physical assets and real property, but did not assume the common carrier obligation. As a result, the ICC disclaimed jurisdiction. 8 I.C.C.2d at 836. Unlike the Labadie paper barrier, there was no railroad in State of Maine that was barred from service on its own tracks, and there was no shipper barred from using a rail line on which it formerly received service. In contrast to the situation in State of Maine, MCRR is a common carrier and the UP sale to MCRR did fall within Board jurisdiction. The ICC specifically stated

¹³ Additionally, the ICC found that substantial motor carrier competition existed in the area of the rail line (Amtrak at 799-801); such competition obviously does not exist for Labadie’s voluminous coal traffic.

that State of Maine was based on its “specific facts” and the ICC expressed particular concern for transactions that “could affect the carrier’s ability to meet its common carrier obligations.” 8 I.C.C.2d at 838. Given the Labadie paper barrier’s complete bar on MCRR meeting its common carrier obligation, the State of Maine precedent actually supports the position of Ameren/MCRR in this proceeding.

IX. UNDER THE FACTS OF THIS CASE, THE TRACKAGE RIGHTS RESTRICTION IS ANTI-COMPETITIVE AND UNLAWFUL

In both the Complaint and Opening Evidence, Ameren/MCRR showed that the trackage rights between Vigus and Rock Island Junction were an integral part of, and incorporated into, the line sale. Compl. at ¶¶ 32-44; Opening Evidence at 23. Additionally, Ameren/MCRR showed that the paper barrier was devised to apply to both the line sale and the trackage rights in an integrated fashion to achieve an anti-competitive goal. Opening Evidence at 16-21. In its Reply, UP has not refuted the integrated nature of the Trackage Rights Agreement and the Line Sale Contract and, therefore, the Board should accept Ameren/MCRR’s evidence as uncontroverted on this point.

The Labadie-specific restriction on the Trackage Rights Agreement cannot be evaluated in isolation, but must be viewed as part of a larger set of circumstances. Review of Rail Access, slip op. at 15 (Board states it will “examine the relevant facts and circumstances” surrounding challenged paper barriers). To wit the uncontroverted evidence shows:

- The Line Sale Contract incorporated the Trackage Rights Agreement, with its paper barrier restriction. Opening Evidence at 23. Therefore, sale of the Line could not have occurred without the accompanying trackage rights portion of the paper barrier.
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- UP's responses in discovery confirm that this rail segment was retained specifically to limit competition at Labadie. Opening Evidence, Ex. 43 at 18-19, UP response to Interrogatory #21 (UP states it retained the Vigus to Rock Island Junction segment, rather than selling it, "in order to...ensure that the line would not be used by another carrier to move loaded coal trains to Labadie").
- UP has its own separate double-track line between Kansas City and St. Louis [[

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- After selling the Line to MCRR, UP leased the Vigus to Rock Island Junction track to a third party railroad.

Under these circumstances, the anti-competitive intent and purpose of the trackage rights portion of the paper barrier is clear. UP wanted to ensure that it retained control over MCRR rail service to Labadie even if MCRR served Labadie directly.¹⁴ The Board should use its authority under 49 USC § 11101, Review of Rail Access, Railroad Ventures, Hanson, and other relevant authority to find the entirety of the paper barrier, including the restriction in the Trackage Rights Agreement, to be void and unenforceable. It bears repeating that Ameren Missouri had no role in or input on the terms in the Line Sale Contract or the Trackage Rights Agreement. By the time Ameren Missouri became involved, UP and GRC were in litigation, UP was threatening

¹⁴ MCRR trains serving Labadie would utilize the trackage rights to reach the TRRA.

abandonment and UP stated the sale would only go forward on terms agreed nearly two years previously with GRC. Opening Evidence at 19-21.

UP cited two cases allegedly supporting the lawfulness of the trackage rights portion of the paper barrier,¹⁵ but these authorities only highlight the illegality of the Labadie paper barrier. Opening Evidence at 10 n. 21. In the first case cited by UP, the Toledo, Peoria & Western Railway (“TPW”) opposed the discontinuance of trackage rights by BNSF over a rail line owned by Peoria and Pekin Union Railway (“PPU”). BNSF Railway Co. – Discontinuance of Trackage Rights Exemption – In Peoria and Tazewell Counties, Ill., STB Docket No. AB-6 (Sub-No. 470X), and Toledo, Peoria & Western Railway Corp. – Petition for Declaratory Order, STB Docket No. 35404 (served Apr. 26, 2011). TPW wanted the Board to force BNSF to continue using the trackage rights because TPW did not want to lose its direct interchange with BNSF. Alternatively, TPW requested that it be given access to use the PPU line to interchange with BNSF 3 miles away. The Board rejected TPW’s requested relief, finding that (1) TPW had not shown that the national rail transportation policy required revocation of the BNSF discontinuance exemption; (2) there is no authority for giving TPW rights to operate on PPU track; (3) BNSF is not required to establish a through route with TPW because the tracks of BNSF and TPW do not connect; (4) TPW’s own trackage rights on PPU were limited to just intermodal traffic; and (5) TPW is otherwise not entitled to the declaratory order it seeks. Id. at 5-12. UP is apparently relying on this decision due to the trackage rights limitation that applied to TPW service on PPU. Regarding the TPW-PPU trackage rights agreement, the Board

¹⁵ UP’s claim that Ameren/MCRR understand that Board precedent permits contractual restrictions on the type of traffic vis-a-vie a provision in the MCRR and CMR lease is misplaced. The provision in the MCRR/CMR lease does not restrict the service to Labadie, it merely lets the parties work out who is best qualified to provide that service and make any investments that might be needed to upgrade the line.

specifically stated that it would “not upset that arms-length, negotiated arrangement based on the record in this proceeding.” Id. at 11. In contrast to the situation in the TPW case, the MCRR trackage rights on the Vigus-Rock Island Junction segment were not the result of an “arms-length, negotiated arrangement” between Ameren Missouri and UP; instead, GRC and UP negotiated these terms long before Ameren Missouri became involved. Similarly, the “record in this proceeding” (as opposed to the TPW case) reveals that the Trackage Rights Agreement was an integral part of the Line Sale Contract which eliminated a direct competitor for Labadie coal service because UP had “no need” for the second Line to Labadie. While the unique facts of the TPW case may have warranted upholding the existing trackage rights agreement, the entirely different facts of the Labadie paper barrier warrant elimination of the paper barrier provisions from the Trackage Rights Agreement.

The second case cited by UP involved a proposed rail line construction that would have served the Big Stone industrial park and a nearby power plant in South Dakota while also connecting two rail lines. Minnesota v. Big Stone – Grant Industrial Development and Transportation, L.L.C., 990 F.Supp. 731 (D. Minn. 1997). If this rail line were built, operations would have been provided by the Twin Cities and Western Railroad (“TCW”), which had trackage rights on the two existing rail lines to be connected. Id. at 733. These rights were local on one rail line, but overhead only on the other. In response to the proposed construction, Burlington Northern (“BN”) objected, arguing that the construction would cause TCW to violate its overhead-only trackage rights agreement with BN, which barred TCW from serving any existing or future industry which may in the future be connected to the line. Id. at 734. The district court agreed with BN, finding that construction of the rail line would constitute tortious interference with BN’s contractual rights in the trackage rights agreement, and the 8th Circuit

affirmed. Id. at 737; Minnesota v. Big Stone – Grant Industrial Development and Transportation, L.L.C., 131 F.3d 144 (8th Cir. 1997). The Big Stone case does not support the lawfulness of the Labadie paper barrier. The district court in Big Stone specifically stated that “interests” superior to BN’s contract interests might justify the contract interference. 990 F. Supp. at 737. The common carrier obligation, enshrined at 49 USC § 11101 by Congress, is just such an “interest” that justifies Board intervention in the Line Sale Contract and the incorporated Trackage Rights Agreement in order to void the paper barrier restrictions therein. Hanson, ICC Docket No. 32248, slip op. at 3 (“once common carrier operations commence over all or part of this line, any contractual restrictions that unreasonably interfere with those common carrier operations will be deemed void as contrary to public policy”). Moreover, the trackage rights in Big Stone were granted where TCW did not previously have the rights on the Line. Unlike the MCRR situation, the rights were not integrated into a line sale contract and, ultimately, a larger plan to eliminate rail service on a route that had previously been used by a separate carrier.

X. PUBLIC POLICY CONCERNS STRONGLY FAVOR ELIMINATION OF THE PAPER BARRIER

Although UP asserts that the Labadie paper barrier is “consistent with public policy” (Reply at 11), policy concerns actually strongly favor elimination of the paper barrier. UP has admitted in the past that its east-west rail line across Missouri, the UP line on which UP uses to serve Labadie, is a capacity constrained corridor. Comments of Union Pacific Railroad at 7, Common Carrier Obligation of Railroads, Ex Parte No. 677 (filed Apr. 17, 2008). Thus, an efficient use of the nation’s rail resources strongly favors elimination of a restriction, such as the Labadie paper barrier, that prevents a railroad from serving shippers to which it directly connects. “When market forces are allowed to operate, scarce capacity will be allocated as efficiently as possible.” Comments of Union Pacific Railroad at 8, Common Carrier Obligation

of Railroads, Ex Parte No. 677 (filed Apr. 17, 2008). It is inherently inefficient, and damaging to the future survival of both MCRR as a railroad and the Former Rock Island Line as a rail line, for MCRR to be barred from serving a shipper on its tracks. Ameren/MCRR made these same arguments at 30-33 of its Opening Evidence, and UP has not responded.

UP has provided virtually no evidence on the issue of public policy or the public interest, despite the public interest being one of the key factors the Board said it would evaluate when considering a challenged paper barrier. Review of Rail Access, slip op. at 7-8 and 15. Instead, UP has merely stated that the effect of any restrictions must be viewed before the sale or lease. Reply at 11. As Ameren/MCRR stated previously, the Labadie paper barrier's effect has been to harm the viability of MCRR and continued rail service on the Line. Opening Evidence at 30-33. The Board must act pursuant to its "statutory duty to preserve and promote continued rail service." New York Cross Harbor Railroad v. Surface Transportation Board, 374 F.3d 1177, 1187 (D.C. Cir. 2004) (citation omitted).

UP claims the sale, with its incorporated trackage rights, helped ensure continued rail service for shippers and fulfilled Ameren Missouri's wish for continued rail operations in the service area. Reply at 11. UP's overly sanguine view ignores the fact that Ameren Development Company financed the transaction only as a last-gasp measure to save the rail line as the likelihood of an abandonment loomed. The paper barrier is severely damaging to the long-term viability of the Line because it bars MCRR from serving the largest shipper on the Line.

XI. ANTITRUST PRINCIPLES SUPPORT ELIMINATION OF THE PAPER BARRIER

UP claims the Labadie paper barrier does not implicate antitrust concerns. Instead, UP says the paper barrier is merely a property use restriction. Reply at 11-12. UP's position ignores 49 USC § 11101, the importance of the common carrier obligation, and otherwise does not show

the paper barrier is lawful. As described in the Opening Evidence, an attempt by UP to allocate the Labadie market, as between UP and MCRR, entirely to UP is unlawful under antitrust law. Indeed, any attempt to allocate a market “violate[s] the antitrust laws and would subject [UP]...to Department of Justice (“DOJ”) action and private treble-damage litigation.” Presentation by J. Michael Hemmer, Union Pacific Railroad Company, for American Association of Railroads, Hearing on H.R. 233, Railroad Antitrust Enforcement Act of 2009, House Committee on the Judiciary, Subcommittee on Courts and Competition Policy, at 6 (written testimony submitted May 15, 2009).

Most interesting is that the position that UP is attempted to assert in its Reply is that the transfer of property subject to a use restriction is *per se* lawful under the antitrust laws. UP Reply at 11-12.¹⁶ UP is wrong and its position flies in the face of the STB’s recognition that paper barriers can harm competition. See Opening Evidence at 41-55. Restrictions of the type that UP imposed on MCRR are clearly subject to antitrust law principles. In fact, UP reluctantly acknowledges that the primary case cited by Ameren, Sound Ship Building Corp. v. Bethlehem

¹⁶ The cases cited by UP for this startling proposition do not say anything of the kind. In Christy Sports, LLC v. Deer Valley Resort Co., Ltd., 555 F.3d 1188 (10th Cir. 2009), the court reviewed a claim brought under Section 2 of the Sherman Act alleging monopolization of the ski rental market at the Deer Valley, Utah resort (in the present matter, Ameren/MCRR have not alleged monopolization; they have alleged that the paper barrier is an unreasonable restraint of trade under principles found in Section 1 of the Sherman Act). The court conducted a thorough antitrust analysis and concluded that, under the facts and circumstances of that case, the business restrictions that the defendant imposed on land buyers did not violate Section 2. The Court also found it dispositive that the business was a purely private business and did not address a situation where there is a common carrier obligation.

Likewise, the Drury Inn – Colorado Springs v. the Olive Co., 878 F.2d 340 (10th Cir. 1989) involved a claim that a restrictive covenant constituted a price fixing agreement, a *per se* illegal agreement under Section 1 of the Sherman Act. Ameren/MCRR have not asserted that claim. The remaining cases cited by UP all recognize that the restraint must be reasonable and/or limited in time and thus support Ameren/MCRR’s position.

Steel Corp., 387 F. Supp. 252 (D.N.J. 1975) is right on point (UP Br. at 12, n. 23). In that case, the seller imposed a business use restriction on the purchaser of certain harbor-front property. Relying on the seminal antitrust case concerning restrictive covenants, United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898) aff'd 175 U.S. 211 (1899), the district court applied a “rule of reason” analysis under Section 1 of the Sherman Act to the restrictive covenant and found it lawful given that “the covenant is sufficiently limited in scope and time.” 387 F. Supp. at 256.

A leading antitrust treatise, Areeda & Hovenkamp, recognizes that business restrictions imposed by a seller of property on the buyer are covered by Section 1 of the Sherman Act and subject to “rule of reason” analysis.

While noncompetition covenants differ greatly in their terms, most of them divide markets by protecting the promisee from the promisor’s competition. Common examples are:

(1) the owner of a shoe store sells adjacent land subject to a covenant that the purchaser not sell shoes on the transferred land:

* * *

As a general proposition, noncompetition covenants accompanying the sale of substantial business assets are regarded as ancillary restraints and subjected to rule of reason treatment.¹⁷

Because UP has taken the untenable position that paper barriers are *per se* lawful under the antitrust laws, UP has not addressed the core competition issues in this proceeding, i.e. (i) whether the paper barrier imposed by UP on MCRR is *ipso facto* an unreasonable restraint on trade because it is of unlimited duration and (ii) whether the paper barrier unduly harms the ability of Ameren’s Labadie plant to obtain the benefits of rail competition from various viable sources of coal. UP’s failure to address the proper standard means that Ameren/MCRR’s

¹⁷ XIII P. Areeda & H. Hovenkamp, Antitrust §2134d (2d ed. 2005).

Opening Evidence is the best and in fact, the only evidence in the record that correctly addresses the antitrust implications of this paper barrier. Thus, the paper barrier should be found an unreasonable restraint of trade and declared unenforceable.

XII. THE LINE WAS WORTH NO MORE THAN WHAT HAS ALREADY BEEN PAID

A. UP did not and does not have the authority to erase the common carrier obligation to serve Labadie

UP claims that it “would have charged more for the line if it had included the right to serve the Labadie plant.” Reply at 6. See also Reply at 14. UP is operating from the faulty assumption that it had the legal right to erase the common carrier obligation when selling the line. There is no legal basis for this view. For every common carrier rail line, such as the Former Rock Island Line, there must be some entity with the common carrier obligation – there can be no gaps. Hanson, ICC Docket No. 32248, slip op. at 34 (“If common carrier service were authorized...any restrictions limiting the shippers that could be served would, upon challenge, also be found void as contrary to public policy and the common carrier obligation.”). Yet, UP purports to have the ability to create just such a gap, magically erasing the Labadie access of the Former Rock Island Line from the common carrier obligation that necessarily accompanied MCRR’s purchase of the Line. UP does not possess such powers. The Board must enforce the common carrier obligation here, and reject UP’s viewpoint. For the same reason, the quitclaim deed cited by UP (Reply at 6-7) cannot and does not trump the Board’s statutory authority to enforce 49 USC § 11101.

UP also states that MCRR access to Labadie would be a “windfall” and that Ameren Missouri is seeking Labadie access “for free.” Reply at 14-15. Again, these statements ignore that Ameren Missouri paid a substantial amount for the line and reflect an erroneous view that

UP could somehow erase the common carrier obligation for part of the Line. UP is apparently operating from the belief that the common carrier obligation of a railroad has a separate price than the purchase of a rail line. In UP's worldview, a railroad could buy a rail line, but have no common carrier obligation if it did not pay a separate fee for it. There is absolutely no legal basis for this position.¹⁸ Again, UP is operating from a faulty premise that (1) a railroad is bound by the common carrier obligation to serve shippers on its rail line only if the railroad pays to be bound by it; and (2) a shipper can assert its rights under the common carrier obligation only if the railroad that serves the shipper has paid to be bound by the common carrier obligation. UP provides no support for this convoluted interpretation of when the common carrier obligation applies. A shipper does not have to pre-pay ahead of time just for the right to receive common carrier rail service. Pejepscot, STB Docket No. 33989, slip op. at 13 (served May 15, 2003). Similarly, a railroad's common carrier obligation cannot be impeded by contractual restrictions, as previously noted by the ICC:

Any restriction, imposed by any entity, that limits the properties that might be served would be inconsistent with the common carrier obligation that will accompany Santa Fe's hypothetical future common carrier operations. Santa Fe, once having commenced common carrier operations on the Baca-LRM Line, will have no right to deny service to any shipper. If a complaint regarding such a restriction should arise in the future, we would find the offending restriction void as inconsistent with public policy.

Hanson, slip op. at 33.

Ameren/MCRR have shown that the value of the Line, including the common carrier obligation to serve Labadie, was no more than what Ameren Missouri has already paid for the Line. Opening Evidence at 55-59. Thus, no further compensation is necessary.

¹⁸ MCRR's purchase is obviously different from a State of Maine scenario, where the purchaser of rail assets does not become a common carrier and the transaction is outside Board jurisdiction. MCRR became a common carrier with its purchase, and the purchase was a transaction within Board jurisdiction.

[[

]] In reply, UP claims that some level of additional compensation may be necessary, but UP has not stated what the compensation level is, if any. Reply at 16. UP's argument is a nullity. UP is unsure if additional compensation is necessary, but UP is also unsure what that level of compensation might be. Based on the Complaint and Opening Evidence in this case, UP knew that Ameren/MCRR were raising the issue of compensation and taking the position that no compensation is necessary. UP benefitted from several months of discovery, and has not claimed that Ameren/MCRR refused to respond to discovery. In short, UP's Reply Evidence is a nullity on the issue of compensation because UP has taken no definitive position. Ameren/MCRR have submitted the only evidence of record stating a clear position, and the Board should find that no additional compensation is warranted.

B. UP's own contemporaneous documents show that MCRR paid the fair market value for the Line

UP claims that it "would have charged more" for the Line if access to Labadie had been included, but this claim is legally baseless and factually incorrect. [[

]]¹⁹

In its attempt to muddy the waters surrounding the amount paid by MCRR for the Line, UP states that "[i]f UP did receive more than net liquidation value for the SP line, some amount

¹⁹ Later, UP stated that the Line was sold for NLV. UP Reply Comments, Review of Rail Access, at 6 and 10 (filed Mar. 28, 2006).

above that level was plainly justified, because MCRR gained the right to serve several active businesses on the line.” Reply at 14 n. 29. UP seems to be saying that any traffic on a rail line means the going concern value (“GCV”) is higher than NLV, but this is obviously not true. “Under Board precedent, GCV is calculated by dividing the owner’s net revenues from operating the line by the railroad industry’s pre-tax cost of capital. The net revenues (or cash flows) are determined by subtracting the variable costs of operating the line from the gross revenues earned.” PYCO Industries, Inc. – Feeder Line Application – Lines of South Plains Switching, Ltd. Co., STB Docket No. 34890, slip op. at 19 (served Aug. 31, 2007). Thus, a rail line could have significant traffic yet still have a GCV lower than NLV. See, e.g., PYCO, slip op. at 30 (Board finds GCV of \$2.197 million and NLV of \$2.351 million). In fact, a rail line with traffic could have a negative GCV if variable operating costs exceed revenue.

In claiming that the Line was worth more than what MCRR paid, UP asserts that the “book value” cited in its documents did not reflect the “value of traffic on the line.” Reply at 14 n. 28. UP also says that it “would have charged a higher price...if the sale had included access to Labadie.” Reply at 14. In arguing that the “value of traffic” and Labadie access would have caused the sale price to be higher, UP is apparently relying on the alleged GCV of the Line. Reply at 14 n. 28 (“‘Book value’ is different from...going concern value.”). See also UP Reply Comments, Review of Rail Access, V.S. of Warren C. Wilson at 2 (filed Mar. 28, 2006) (“Without interchange commitments, UP would build the going concern value (“GCV”) of the traffic generated by the line into the lease rate or sale price.”). UP’s current attempt to invoke GCV for the Line is unavailing. ||

|| UP also asserted that the Line would have

been abandoned if it had not been sold. UP Reply Comments, Review of Rail Access, V.S. of Warren C. Wilson at 8 (filed Mar. 28, 2006). Since (1) UP already had its own tracks to Labadie, (2) UP was not using the Line, and (3) UP would have abandoned the Line if no sale occurred, then obviously the Line had no value to UP other than salvage value or NLV. At most, the Line had a GCV well below the NLV.

UP's claim that it "would have charged a higher price...if the sale had included access to Labadie" (Reply at 14) also reveals a fundamental misunderstanding of GCV. The value of the Line to MCRR as the buyer is irrelevant in a GCV calculation. PYCO, STB Docket No. 34890, slip op. at 19 (served Aug. 31, 2007) ("GCV is the worth of a rail line as an operating business. We measure the worth to the seller, not the worth to the buyer."). Given UP's stated plan to abandon the Line if no sale occurred, then the Line undeniably had a GCV below NLV. It goes without saying that UP cannot be compensated for its unlawful anticompetitive desire to limit competition at Labadie and prevent the MCRR from serving a shipper on its tracks. In its Reply, UP wondered whether "additional compensation, if any," is due from MCRR to UP. Reply at 16. The unequivocal answer to this question is that no additional compensation is necessary or permissible.

Next, UP attempts to impeach its own documents that it produced in discovery regarding the valuation of the Line. Reply at 14 n. 28. The Board should reject UP's effort to call into question its own valuation. By far, these documents are the most probative evidence of fair market valuation in this proceeding. [[

II

The documents that UP is now trying to impeach do not represent an isolated, singular document of uncertain origin and ambiguous interpretation. These documents represent the official “Authority for Disposition of Property” of UP, and they ascended the highest chains of command at UP, receiving the approval from untold senior officials on the way. The Board cannot and should not allow UP to impeach its own documents. Public Service Co. of Colorado d/b/a Xcel Energy v. The Burlington Northern and Santa Fe Railway Co., 7 S.T.B. 589, 683

(2004); Western Fuels Assoc., Inc. and Basin Electric Power Cooperative v. BNSF Railway Co., STB Docket No. 42088, slip op. at 114 (served Sept. 10, 2007).

UP's feeble attempt to use Ameren/MCRR's documents as support for its position that the valuation of the Line was meant to be much higher can be easily rejected. Reply at 14 n. 28. The two documents cited by UP both reference a rail line valuation below the price paid by MCRR; hence, they do not support any assertion that the fair market value should have been higher than what MCRR has already paid.

C. No additional valuation evidence is necessary

UP makes the implausible claim that the Board "cannot" enforce the common carrier obligation in this case because there is insufficient evidence regarding the "value of additional access." Reply at 16 and 16 n. 34. The Board should not countenance UP's attempt to prevent enforcement of the common carrier obligation. Furthermore, conclusive evidence regarding valuation has already been offered as part of Ameren/MCRR's Opening Evidence. UP's own contemporaneous documents from the time the sale was agreed show that MCRR paid the fair market value for the Line and, indeed, paid in excess of NLV. In discovery, Ameren/MCRR requested that UP produce all documents related to the value of all or any part of UP's interest in the Line since January 1, 1980, and all documents related to bids, offers, or contemplated sales or leases of the Line. See Opening Evidence at Ex. 43 (RFP Nos. 11 and 12). UP replied that it would produce valuation documents, studies, analyses, or reports "that were prepared in connection with the actual or contemplated sale or lease of all or portions of that trackage." Id. (UP response to RFP Nos. 11 and 12). The documents cited by Ameren/MCRR at Exhibit 46 of the Opening Evidence represent, by far, the most probative evidence of valuation produced in this proceeding. If UP had other valuation documents, it should have produced them and cited to

them in its Reply Evidence. UP's failure to do so means that Exhibit 46 is the best evidence and the only contemporaneous evidence regarding the fair market value of the line at the time of the sale to MCRR. UP's failure is not surprising because Exhibit 46 is as close to conclusive as evidence can be.

UP cites to two ICC decisions and one related court decision in support of the proposition that UP must be compensated for "allowing" the common carrier obligation to apply to MCRR's service to Labadie. Reply at 16 n. 34. These decisions do not support such a view. The first case involved the ICC's promulgation of rules implementing the 16 USC § 1247 (d), the rails-to-trails statute. Rail Abandonments – Use of Rights-of-Way as Trails (49 CFR Parts 1105 and 1152), 2 I.C.C.2d 591 (1986). After the ICC determined that landowners with reversionary property interests in a rail line did not need to be compensated for trail creation, the D.C. Circuit remanded the case for further consideration of the takings issue. National Wildlife Fed. v. Interstate Commerce Comm'n, 850 F.2d 694 (D.C. Cir. 1988). This was a case about reversionary property interests, and has no relevant relationship to UP's assertion that UP must be compensated for "allowing" MCRR to fulfill its common carrier obligation by serving all shippers on MCRR's own tracks. In fact, the D.C. Circuit opinion actually supports Ameren/MCRR's position. Like the property owners in National Wildlife Federation, MCRR is a property owner that is being deprived of the use of its property. 850 F.2d at 708. It is MCRR, not UP, that deserves relief.

The final case cited by UP involved a request by the Wisconsin Department of Transportation that the ICC set sale terms and order an abandoning railroad to sell a line for continued public use. Chicago & N. W. Transp. Co. – Abandonment – Between Clintonville and Eland, WI, 363 I.C.C. 975 (1981). The ICC determined that it did not have the authority to

order sales of rail lines for purposes other than continued rail use. 363 I.C.C. at 976. Again, this decision does not support UP's position; it merely represents a distinction between the Offer of Financial Assistance statute (now found at 49 USC § 10904) and the other public use statute (now found at 49 USC § 10905). Unlike the Wisconsin DOT, MCRR is seeking to use its own property to fulfill the common carrier obligation.

II

II “[T]he purchase price agreed to by these commercially sophisticated railroads represents by far the best evidence of the current market value of these properties.” CSX Corp. and CSX Transportation, Inc., Norfolk Southern Corp. and Norfolk Southern Railway Co. – Control and Operating Leases/Agreements – Conrail Inc. and Consolidated Rail Corp., 3 STB 196, 265 (1998), pet. for review denied, Erie-Niagara Steering Committee v. Surface Transportation Board, 247 F.3d 437, 442-43 (2d Cir. 2001).²⁰

UP should not and cannot be lawfully compensated for the apparent desire to illegally prevent competition at Labadie. In Decision No. 89, the Board found that Labadie was entitled to continued competitive rail service, so UP should never had a lawful expectation of monopoly rents or differential pricing from the Labadie rail service.

²⁰ See also Railroad Revenue Adequacy – 1988 Determination, 6 I.C.C.2d 933, 939-42 (1990), affirmed, Association of American Railroads v. Interstate Commerce Commission, 978 F.2d 737 (D.C. Cir. 1992).

UP's position would have selling railroads able to extinguish the common carrier rights of shippers and the common carrier obligations of railroads simply by inserting a clause in a sales document. No precedent exists for this sweeping pronouncement of unilateral control over the common carrier obligation.

XIII. ESTOPPEL DOES NOT APPLY

UP asserts that Ameren Missouri is estopped from challenging the Labadie paper barrier because Ameren Missouri allegedly "argued to the Board that the [Labadie] restrictions were valid" in 2000. Reply at 15-16. UP has not cited to any particular statement by Ameren Missouri that the Labadie restrictions were "valid." UP simply cited Decision No. 89, wherein the Board noted that UE mentioned the existence of the paper barrier. UP-SP Merger, 4 STB at 886. Simply recognizing the existence of the paper barrier is not the same as asserting its "validity," let alone its lawfulness.

Estoppel also cannot apply because the current situation in this proceeding does not exhibit the three estoppel factors mentioned by the Supreme Court in New Hampshire v. Maine, 532 U.S. 742 (2001) and applied by the Board in PYCO, STB Docket No. 34890 (served June 11, 2010). As described by the Supreme Court in a case cited by UP, estoppel is an equitable doctrine that bars "a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." New Hampshire, 532 U.S. at 749 (internal citation omitted). The Court mentioned three factors that "typically inform the decision whether to apply the doctrine" in a particular case: (1) the positions taken must be "clearly inconsistent;" (2) the party must have succeeded in persuading the court to accept the earlier position; and (3) an unfair advantage or unfair detriment would befall the opponent if estoppel is not applied. 532 U.S. at 750-751. These are the same factors applied by the Board in

PYCO, a case also cited by UP. PYCO, STB Docket No. 34890, slip op. at 5-6 (served June 11, 2010). Strangely, though, UP has not mentioned these factors, let alone made an effort to apply them to the current case. For this reason alone the Board should reject UP's estoppel argument. Even when these factors are considered, however, it is clear that estoppel does not apply to Ameren Missouri.

First, UP has not cited to any statement by Ameren Missouri saying that the Labadie paper barrier is lawful. As described above, the most that can be gleaned from Decision No. 89 is that UE informed the Board of the existence of the paper barrier. Therefore, factor #1 does not exist. Second, UE's mention of the paper barrier in 2000 failed to convince the Board to accept UE's position, which was that Section 8(l) of the BNSF Agreement applied to Labadie due to the paper barrier. The Board firmly disagreed, stating that "[t]o avoid possible confusion, we clarify that our decision today does not rest upon Section 8(l) of the BNSF agreement." UP-SP Merger, Decision No. 89, 4 S.T.B. at 886. Third, it simply cannot be the case that the common carrier obligation, mandated by Congress in 49 USC § 11101, creates an unfair advantage to the shippers served by common carrier railroads. Therefore, factor #3 does not apply.

The final case cited by UP on the subject of estoppel does not apply for similar reasons. Delaware and Hudson Company – Lease and Trackage Rights – Springfield Terminal Railway Co., ICC Docket No. 30965 (Sub-No. 4) (served Sept. 29, 1995). In that case, the ICC refused to allow a party "to revise the record" by claiming a collective bargaining agreement ("CBA") applied when the same party earlier argued there was no applicable CBA. Delaware and Hudson, slip op. at 9. As mentioned above, UP has cited to no statement by Ameren Missouri or MCRR that the paper barrier is lawful. Moreover, the Board's legal mandate to enforce 49 USC

§ 11101 cannot be foreclosed even if a party at some point expressed a view contrary to the Board's implementation of its Congressionally-granted authority.

XIV. AMEREN MISSOURI AND MCRR HAVE NOT “MANIPULAT[ED] THE BOARD’S PROCESSES”

UP alleges that this case represents a “manipulation of the Board’s processes.” Reply at 3. Not only is this allegation unfounded and untrue, but it also does not affect the plain fact that the paper barrier is unlawful. UP bases its manipulation argument on two points: first, that Ameren Missouri is asking the Board to “rewrite the contracts” as a result of “buyer’s remorse.” Reply at 3. Second, UP bases its manipulation argument on the assertion that Ameren Missouri is making inconsistent representations to the Board. Reply at 15-16.

It cannot be “manipulation” for a party to file a complaint about a paper barrier in response to the Board’s unequivocal statement that a shipper may attempt to show an “existing” paper barrier “is causing, or would cause, a violation of the Interstate Commerce Act.” Review of Rail Access, slip op. at 15. It also cannot be “manipulation” to seek enforcement of the common carrier obligation. Former Chairman Nottingham stated that the “heart” of the Board’s mission was to resolve disputes regarding whether railroads are meeting the common carrier obligation. Common Carrier Obligation of Railroads, Transcript of Public Hearing at 33, Ex Parte No. 677 (Apr. 24, 2008).

UP’s allegations are also the product of a revisionist history that ignores the uncertainty created by both UP’s refusal to apply the BNSF Settlement Agreement to Labadie and also the late 1990’s view of paper barriers. A brief historical review confirms the hollowness of UP’s claims of manipulation.²¹

²¹ Ameren/MCRR provided a chronology of major events at 12-21 of the Opening Evidence.

UP and SP announced their intention to merge in 1995. As a shipper located on both UP and SP, Ameren Missouri was understandably concerned regarding the loss of competition that would occur if UP and SP merged. Soon thereafter, UP and BNSF announced a Settlement Agreement that would give all 2-to-1 shippers access to BNSF in an attempt to preserve competition. Three days after announcing the Settlement Agreement, UP informed Ameren Missouri that the Settlement Agreement did not apply to Labadie, a position to which UP vehemently adhered at least through June 2000, the date of Decision No. 89 of the Board in the UP-SP Merger and several years after the sale of the Line to MCRR. See UP-SP Merger, Decision No. 89, 4 S.T.B. 879 (2000).

In the 1990's and into the first decade of the new millennium, it was also unclear if the Board would exercise regulatory oversight of paper barriers. "For decades, the ICC and the STB strongly supported these spin-offs, including their financing arrangements." Presentation by J. Michael Hemmer, Union Pacific Railroad Company, for American Association of Railroads, Hearing on H.R. 233, Railroad Antitrust Enforcement Act of 2009, House Committee on the Judiciary, Subcommittee on Courts and Competition Policy, at 22 (written testimony submitted May 15, 2009). In response to the request of the Western Coal Traffic League to commence a rulemaking regarding paper barriers, the Board decided to hold the petition for rulemaking in abeyance for an indefinite time period. Review of Rail Access, Ex Parte No. 575 (served Mar. 3, 1999). From the point of view of UP and other railroads, they asserted that the Board did not possess legal authority to evaluate and/or void paper barriers. In 2006, UP stated that "the Board is legally prohibited from retroactively removing interchange commitments from consummated spin-offs." Reply Comments of Union Pacific Railroad Company, Review of Rail Access, Ex Parte No. 575, at 13 (filed Mar. 28, 2006). It was not until 2007 that the Board affirmatively

stated that it would evaluate paper barriers and interchange commitments, both existing and proposed, to determine whether a particular arrangement is “permissible.” Review of Rail Access, Ex Parte No. 575, slip op. at 2 (served Oct. 30, 2007). This Board action “opened up the opportunity to challenge existing transactions.” Presentation by J. Michael Hemmer, Union Pacific Railroad Company, for American Association of Railroads, Hearing on H.R. 233, Railroad Antitrust Enforcement Act of 2009, House Committee on the Judiciary, Subcommittee on Courts and Competition Policy, at 23 (written testimony submitted May 15, 2009). While it is true that railroads imposed paper barriers or interchange commitment over the years, these were mostly done under exemption proceedings and should not be interpreted as establishing STB precedent authorizing the restrictions (in fact, the existence of a paper barrier was often not disclosed or known about in the exemption proceeding). Thus, UP’s position now that UP was free “under Board precedent” to enter into an agreement reserving for UP the exclusive right to serve a shipper on the SP line when UP also had separate access to the shipper on UP’s line is clearly wrong. UP Reply at 9.

Within this context, there is nothing manipulative about the decisions taken by Ameren Missouri. Faced with the possible abandonment of the Former Rock Island Line and the uncertainty about whether the Board would uphold the 2-to-1 status of Labadie, Ameren Missouri wanted to preserve the second rail route to Labadie. Even though the sale included a paper barrier, Ameren Missouri had no choice but to go forward with the transaction because UP said that the sale would only occur under the original terms agreed with GRC. Opening Evidence at 20-21. While Ameren Missouri believed the paper barrier was illegal, it was not until 2007 that the Board definitively stated that paper barriers were subject to Board review.

XV. CONCLUSION

The Board should not ignore the primary role of the common carrier obligation, both as a duty of MCRR and a right of Ameren Missouri. Board action is necessary in this proceeding to enforce 49 USC § 11101. Ameren/MCRR have provided a compelling and enforceable case in the Complaint, Opening Evidence, and this Rebuttal Evidence, while UP has made the most feeble of responses. Using UP's own documents, Ameren/MCRR have also shown that no additional compensation is necessary to UP for the elimination of the Labadie paper barrier in the Line Sale Contract and the incorporated Trackage Rights Agreement, and that the trackage rights fee is at a market level. Ameren/MCRR reiterate the relief requested in the Opening Evidence and urge the Board to act. Board action is necessary to carry out the most fundamental of the nation's rail transportation policies – the policy that railroads must serve the shippers on their lines and that shippers have a right to such service.

Respectfully submitted,



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*Attorneys for Ameren Missouri and
Missouri Central Railroad Company*

July 18, 2011

VERIFICATION

I Robert K. Neff, pursuant to 49 CFR § 1104.5 verify under penalty of perjury that the facts in the foregoing are true and correct based upon my information and belief. Further I certify that I am qualified and authorized to file this verification submitted as part of this Rebuttal Evidence.

Executed on: 7/15/2011

Robert K. Neff

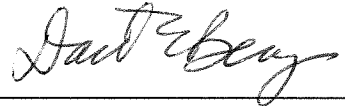
Robert K. Neff
President, *Missouri Central Railroad
Company and Director, Coal Supply, for
Union Electric Company d/b/a UE or
Ameren Missouri*

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served on July 18, 2011 on the parties listed below via e-mail and hand delivery.

Michael L. Rosenthal
Covington & Burling LLP
1201 Pennsylvania Ave., N.W.
Washington, DC 20004

Counsel for Union Pacific Railroad Company

A handwritten signature in cursive script, reading "David E. Benz", written over a horizontal line.

David E. Benz

EXHIBIT 1

REDACTED

EXHIBIT 2

LAWRENCE E. WZOREK
Assistant Vice President-Law

UNION PACIFIC RAILROAD COMPANY



1416 Dodge Street
Omaha, Nebraska 68179
(402) 271-3897
Fax (402) 271-5810

February 7, 2000

Via Facsimile (817) 352-7154

Peter J. Rickershauser
Vice President Network Development
Burlington Northern Santa Fe
2600 Lou Menk Drive, 2nd Floor
Fort Worth, TX 76131

Re: Union Electric Co. (d/b/a Ameren UE), Labadie, MO

Dear Pete:

John Ransom has referred your letter of February 2 concerning Union Electric at Labadie, MO, to me for a response.

The "2-to-1" Point Identification Protocol which you refer to does not apply in this situation. As you know, that protocol "is to establish procedures and mechanisms for further identifying 2-to-1 shipper facilities open to BNSF as a result of the conditions imposed in the UP/SP merger." During the negotiations among UP, SP and BNSF which led to the Settlement Agreement that the STB approved as a condition of its approval of the UP/SP merger, our railroads agreed that the Union Electric plant at Labadie would receive unique treatment. The parties agreed that UP could negotiate directly with the shipper, and that BNSF would not object to an arrangement, even with another railroad, that met Union Electric's needs for substitute rail competition. After extensive negotiations, UP entered into a settlement agreement with Union Electric to provide the competitive alternative. That agreement remains in effect, leaving BNSF no right to demand direct access to the Labadie plant.

Nevertheless, since you insist that UP would have only two options in responding to your request under the protocol, if in fact it did apply, UP denies BNSF's request for access on the ground that all of the interested parties reached an agreement on a competitive option for the Labadie plant which satisfies the conditions established by the STB in the UP/SP proceeding. UP will describe its position in detail in a submission to the Surface Transportation Board tomorrow, February 8, which responds to a petition by Union Electric's owner, Ameren. A copy of that response will be delivered by hand to BNSF's counsel in Washington.

Sincerely

A handwritten signature in dark ink, appearing to read "Lawrence E. Wzorek", written over a horizontal line.

cc: John Ransom
Michael Roper (via fax 817-352-2397)

EXHIBIT 3

REDACTED