

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Ex Parte No. 575

**REVIEW OF RAIL ACCESS AND COMPETITION ISSUES – RENEWED PETITION
OF THE WESTERN COAL TRAFFIC LEAGUE**

COMMENTS OF AMEREN ENERGY FUELS AND SERVICES COMPANY

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SERVICES COMPANY***

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INTRODUCTION

In a February 1, 2006 Decision in this proceeding,¹ the Surface Transportation Board (“STB” or “Board”) announced that it was requesting comments on the renewed petition of the Western Coal Traffic League (“WCTL”)² for a rulemaking to address sale or lease agreements of rail lines that restrict the ability of the purchaser or tenant to interchange traffic with competitors

¹ *Review of Rail Access and Competition Issues – Renewed Petition of the Western Coal Traffic League*, Ex Parte No. 575, Slip op. (STB served Feb. 1, 2006) (“*Decision*”).

² Ameren Energy Fuels and Services Company (“AFS”), a subsidiary of Ameren Corporation, is currently a non-voting member of WCTL. AFS was not a member of WCTL when the original WCTL petition was filed in 1998. AFS files these separate comments to provide the Board with an example of a paper barrier faced by AFS and provide additional support in favor of the Board initiation of a rulemaking on paper barriers.

of the seller or landlord railroad (“paper barriers”).³ The Board invited interested persons to participate and to address broad issues regarding paper barriers.⁴

COMMENTS OF AMEREN ENERGY FUELS AND SERVICES COMPANY

AFS, on behalf of its generation affiliates, AmerenUE, Ameren Energy Generating Company, and Ameren Energy Resources Generating Company, and its parent company, Ameren Corporation (hereinafter collectively referred to as “Ameren”), hereby submits Comments to the Board in response to the Board’s invitation requesting comments on paper barriers. Part I of these Comments discusses the identity and interest of Ameren in this proceeding. Part II describes a particular paper barrier that has a direct impact on Ameren. Part III discusses (a) the Board’s clear authority to regulate paper barriers, as exemplified by its general authority over carrier transactions in the rail industry, particularly those that impact rail competition, (b) recent statements by the Board regarding paper barriers and their anticompetitive impact, (c) the anticompetitive effect of paper barriers on a short line railroad’s common carrier obligations, (d) prior public testimony by an industry expert regarding the anticompetitive effects of paper barriers, and (e) some examples of other agencies’ inherent authority to regulate anticompetitive industry practices (in contractual agreements, such as paper

³ The Board has described paper barriers as rail line sale or lease agreement terms that “limit the incentive or ability of the short line railroad to interchange traffic with connecting carriers that could compete with the [larger railroads].” *Decision*, Slip op. at 1.

⁴ The Decision asked parties to provide information on the following issues: (a) the Board’s statutory authority to address pre-existing paper barriers; (b) identify and describe existing paper barriers so that the Board can determine the extent of the problem; (c) identify and quantify any problems experience by shippers as a result of paper barriers; (d) address the short and long term economic impacts of paper barriers; (e) address the effectiveness of the existing AAR/ASLRRA agreement on paper barriers; and (f) include information about the RIA, including the most recent version, amendment history, interpretations, proceedings, handbooks, etc.

barriers). In Part IV, Ameren suggests competition-enhancing remedies for paper barriers. In conclusion, Ameren supports the opening of a Board rulemaking to consider and adopt specific rules governing the elimination of unreasonable or anticompetitive paper barriers.

I. IDENTITY AND INTEREST OF AMEREN ENERGY FUELS AND SERVICES COMPANY

AFS is a subsidiary of Ameren Corporation, a public utility holding company that provides electricity to approximately 2.3 million customers in Missouri and Illinois. Verified Statement of Robert K. Neff at 1 (“hereinafter “V.S. Neff”). Ameren has 11 coal-fired plants, of which, 10 plants rely on rail service as the primary mode of transportation for coal.⁵ Ameren purchases approximately 40 million tons of coal annually for all of its coal-fired plants. Of these 40 million tons of coal, 10 million tons are purchased for one of Ameren’s plants – the Labadie Plant located in Franklin County, Missouri (the “Labadie Plant” or “Plant”) – which is impacted by a paper barrier. V.S. Neff at 2.

As the Board may be aware, Ameren has been active in trying to improve rail service and rates at its plants by creating competitive transportation alternatives. Ameren, via its partially-owned subsidiary, Electric Energy, Inc., completed its first rail build-out in 1990 with the Joppa and Eastern Railroad Company to the Joppa Plant in Illinois.⁶ *Id.* With the recent approval of the Coffeen and Western Railroad Company’s build-out from Ameren’s Coffeen Power Plant,⁷

⁵ Ameren has 5 coal-fired plants that can also utilize barge transportation.

⁶ See *Joppa and Eastern Railroad Co. – Construction Exemption – Joppa, IL*, F.D. 31656 (ICC served July 5, and Dec. 24, 1990). Union Electric and now AmerenUE’s interest in the Joppa plant and the Joppa and Eastern Railroad is through its controlling interest in Electric Energy, Inc.

⁷ See *Ameren Energy Generating Company – Construction And Operation Exemption – In Coffeen And Walshville, IL*, F.D. 34435 (STB served Feb. 17, 2006).

Ameren will have moved toward completing its objective of obtaining multiple transportation alternatives at all of its coal-fired plants, via various methods. *Id.* As discussed below, Ameren supports self-help measures and shipper investments in the rail transportation infrastructure to assist in fostering alternative opportunities for fuel and transportation. However, the creation of paper barriers in line spin-offs can and have hindered such efforts. As such, increased scrutiny of paper barriers should be required by the Board.

II. THE IMPACT OF PAPER BARRIERS ON AMEREN

The Labadie Plant began operations in 1970 and is Ameren's largest coal-fired plant at 2,415 megawatts. V.S. Neff at 3. The Plant, as originally built, was located at the intersection of the Missouri Pacific Railroad and the Chicago, Rock Island and Pacific Railroad ("Rock Island"). The Missouri Pacific Railroad was purchased by Union Pacific in 1984. The former Rock Island line (the "Line"), which connects to St. Louis and Kansas City, faced financial troubles and the Line was acquired in bankruptcy by the Southern Pacific Railway ("SP").⁸ *Id.* In 1990, Southern Pacific upgraded the Line from St. Louis to Labadie in order to handle coal shipments to Labadie from 1990 to 1996. *Id.* In 1996, the Line was acquired by Union Pacific Railroad ("UP") as a result of the UP/SP merger. *Id.*

As the Board will recall, Ameren petitioned the Board for clarification of the UP/SP merger conditions to have Ameren declared a "2-to-1" shipper entitled to certain merger protections. *Union Pac. Corp. – Control and Merger – Southern Pac. Corp.*, 4 S.T.B. 879, 881 (2000). As a result of the Board's decision in UP/SP, Labadie received access to BNSF via the

⁸ Southern Pacific had purchased the line from the bankrupt Rock Island railroad in the early 1980s to gain a rail route between St. Louis and Kansas City. Southern Pacific, however, obtained permission to operate over a parallel line owned by Union Pacific as a result of the UP / Missouri Pacific Railroad in 1982.

UP/SP merger condition known as the “omnibus” clause that attempts to replicate SP’s service on the St. Louis to Labadie section of the former SP line. This access was received by BNSF via trackage rights over the UP from their interconnection at Pacific, Missouri. 4 S.T.B. at 885; V.S. Neff at 3. While BNSF has the omnibus access, BNSF has not moved any significant amount of coal to Labadie because BNSF’s rates have not provided a competitive alternative.

Before the UP/SP merger was finalized, UP began the process to sell off the Line because UP already owned the parallel line between St. Louis and Kansas City. In 1999, UP finalized the sale of a majority of the line (from Vigus, Missouri west of St. Louis to Pleasant Hill, Missouri east of Kansas City – the “Vigus / Pleasant Hill” portion of the Line) to GRC Holdings, which formed the Missouri Central Railroad (“MCRR”). However, Union Pacific retained ownership of parts of either end of the Line - approximately 9.7 miles of the Line between Kansas City and Pleasant Hill and approximately 7.7 miles of the Line between Vigus and St. Louis. MCRR is only able to operate over the end portions of the line through trackage rights agreements with UP. V.S. Neff at 4.

Because the original proposed purchaser (GRC Holdings) could not fund the acquisition, Ameren was approached by GRC Holdings to help finance the acquisition. V.S. Neff at 4. The MCRR line runs through the center of AmerenUE’s service territory and has a physical connection to the Labadie Plant. Therefore, Ameren was interested in saving the Line. *Id.* Ameren funded the acquisition of the line, and GRC Holdings, upon closing, sold a majority interest to an affiliate of Ameren. *Id.* Ameren had no role in the contents of the Line Sale Contract or the Trackage Rights Agreement because the deal terms had already been reached by the time Ameren was approached by GRC Holdings. *Id.* It was widely known that the Line was

heading for abandonment⁹ and Ameren had to make a quick decision to save the Line, so Ameren stepped in as a last option financier for this troubled line, notwithstanding the already agreed to terms. With Board approval, Ameren acquired a controlling interest in MCRR.¹⁰

Ameren may have a unique perspective as shipper subject to a paper barrier because Ameren ended up purchasing the line and thus has knowledge of the restrictive language in the paper barriers imposed upon the MCRR. Many shippers may be unaware of the extent to which the paper barrier impacts their competitive situation or may not be aware of the paper barrier at all. Due to the fact that Ameren stepped in as the last minute financier, Ameren would be in a position to be able to share with the Board specifics about the paper barrier it faces, except for the fact that the agreements contain confidentiality provisions.

In the resulting MCRR's purchase of the Vigus / Pleasant Hill section, several restrictions were imposed on service on the Line, thereby restricting rail competition for coal transportation service to the Labadie Plant. The MCRR restrictions were aimed specifically at the Labadie Plant and were imposed upon the MCRR in various places of the documents between UP and MCRR, including the sale agreement and the trackage rights agreements. As stated above, these agreements have confidentiality provisions so Ameren cannot share them in this proceeding since there is no protective order in place at this time. As the Board may recall, some specifics

⁹ Although the Line was never abandoned, initial abandonment filings had been made starting back in 1993. *See The St. Louis Southwestern Railway Company – Abandonment Exemption in Gasconade County, MO*, Docket No. AB-39 (Sub-No. 18X) (ICC served on April 1, 1994). Portions of the abandonment proceeding were dismissed between 1993 and 1998. In 2000, all remaining abandonment proceedings with respect to the Line were dismissed with prejudice. *See The St. Louis Southwestern Railway Company – Abandonment Exemption in Gasconade County, MO*, Docket No. AB-39 (Sub-No. 18X) (STB served on June 20, 2000)

¹⁰ *See Ameren Corp. – Control Exemption – Missouri Cent. R.R.*, F.D. 33805, Slip op. (STB served Nov. 5, 1999)

about the restrictions were provided in the highly confidential version of Ameren's Petition for Clarification in the UP/SP merger proceeding. V.S. Neff at 4-5.¹¹

Absent the paper restrictions in the MCRR documents, AmerenUE's Labadie Plant could be served by MCRR. MCRR has a physical connection to Labadie which has been in place since the plant was built. It is only the paper barriers that create a never-ending restriction on MCRR's ability to serve Labadie. V.S. Neff at 5. The MCRR example is different from some of the examples cited by the WCTL in its Petitions and by the Board in the February 1st Decision. Nevertheless, the MCRR example is equally anticompetitive. In fact, the MCRR example could be characterized as even more anti-competitive in that coal deliveries to Labadie were specifically singled out and restricted at a time before Labadie was confirmed as a "2-to-1" shipper. More importantly, the anticompetitive restriction contains no time limitation, and the restriction had no apparent relation to the sale price or any legitimate business purpose, particularly in light of the condition of the line being sold. In addition to the restrictions in the Line Sale Agreement, the manner in which the stub ends of the line are retained, with highly restrictive trackage rights imposed, is additional evidence of the anticompetitive provisions of the line sale.

With this perspective and knowledge, Ameren urges the Board to protect Ameren and other shippers by reducing the anticompetitive effects of paper barriers. Paper barriers may have been originally used and helpful in some manner to facilitate the financing of rail line

¹¹ As stated throughout these comments, Ameren supports the initiation of a rulemaking on paper barriers. As part of the rulemaking, the Board should impose a protective order so that specific details of paper barriers could be discussed. In addition, since most paper barrier documents are likely to only be in the hands of the railroads that have entered into the agreements, the Board should require the railroads to produce the documents for Board review under the protections of the protective order.

acquisitions by small, undercapitalized short lines. However, the use of paper barriers has developed into an unlimited and never-ending restriction of competitive choice for shippers and unlimited restraints on competition.

It is worth a brief mention that some in the rail industry have alleged that the line sales with paper barriers are helpful and reasonable because they have saved lines from abandonment. Yet the industry also alleges that any STB action to remove these anti-competitive paper barriers would rob the railroad of its full franchise value for the line that the railroad otherwise would have bargained for in a line sale. These assertions seem incongruous. If a rail line would be eligible for abandonment so that it must be saved from abandonment, then there would be no franchise value worth protecting and the value of the line would be scrap value or a net liquidated value ("NLV"). It would be highly unusual if any railroad did not at least obtain the NLV in any sale.

As the Board also noted in its February 1st Decision, concerns with various competitive issues in the rail industry, including paper barriers, were raised in this proceeding in 1998. At that time, the Board held the proceeding in abeyance to gain experience under the AAR and ASLRRRA proposed "Rail Industry Agreement" ("RIA"), which is purported to govern relationships and conflict resolution between large and short line rail carriers (including issues relating to paper barriers). The Board now asks for comment on the effectiveness of the RIA agreement. Unfortunately, under the RIA, "reasonable" paper barriers are still viewed as enforceable contract terms. RIA, at 3. But more troubling is the fact that shippers are not allowed to participate in RIA negotiations regarding paper barriers. Specific to the Labadie Plant, the RIA offers no relief to the anti-competitive paper barriers imposed on the MCRR. V.S. Neff at 5.

III. THE BOARD HAS AUTHORITY TO ELIMINATE UNREASONABLE PAPER BARRIERS

Paper barriers are often established in transactions that are “approved” by the STB pursuant to its exemption authority under 49 U.S.C. § 10502. These exemptions are generally sought from 49 U.S.C. §§ 10901 (construction and operation of railroad lines) and 10902 (short line purchases) and 49 U.S.C. § 11321 *et seq.* (control authority). The Board has continuing jurisdiction over any such transaction as set out in Section 10502(d), which permits the Board at any time to revoke an exemption, “*to the extent it specifies*, when it finds that application in whole or in part of a provision of this part to the person, class, or transportation is necessary to carry out the transportation policy of section 10101.” Thus, the Board has authority to revisit past transactions and it clearly has the authority to review pending or future transactions. In addition, the language “to the extent it specifies” supports the Board’s authority to revoke part of an exemption to address a particular concern without disrupting the remaining parts of the transaction.

The Board has authority and should exercise its authority to address anticompetitive behavior. The following section will address (a) the Board’s authority to regulate rail competition; (b) recent examples by the Board which address the anticompetitive nature of paper barriers; (c) how paper barriers interfere with a railroad’s common carrier obligation; and (d) other agency examples of regulating anticompetitive conduct similar to paper barriers.

A. The Board’s Statutory Authority to Regulate Rail Competition.

The primary reason that certain paper barriers are unreasonable is that they are specifically designed to prohibit or stifle competition. It is undisputed that our national public policy strongly favors competition, in the railroad industry as elsewhere. This is captured in the heavy emphasis placed on the promotion of competition in the rail transportation policy (“RTP”)

enacted by Congress in 49 U.S.C. § 10101. Indeed, one third of the points that Congress has mandated and codified in the RTP of 49 U.S.C. § 10101 charge the STB to act as a competition-enhancing agency. Specific language in Section 10101 where the Board is charged not only to protect – but to *promote* – competition includes:

(1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail; . . .

(4) to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense;

(5) to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes;

(7) to reduce regulatory barriers to entry into and exit from the industry; . . . and

(12) to prohibit predatory pricing and practices, to avoid undue concentrations of market power, and to prohibit unlawful discrimination.

(Emphasis added.) These duties address many of the situations where paper barrier issues are raised. Based on its Congressional mandate to promote competition, the Board should review anticompetitive effects of paper barriers, to determine whether they are in violation of the goals of the RTP. As shown below, the Board has strongly adopted its authority to promote competition in rail construction cases (49 U.S.C. § 10901) and the Board has issued new rules for merger cases (49 U.S.C. § 11323) which are stated to require enhanced competition. The promotion of competition should apply equally in any rail line transaction that creates a paper barrier.

The Board has long promoted the establishment of rail competition through rail construction.¹² This policy was most recently exemplified in the Board's decision last month to approve a rail construction that happens to be a rail build-out at Ameren's Coffeen Plant, *supra* note 6. The Board has shown its commitment to opening competition by exercising its statutory authority over construction cases for the benefit of improving competitive service to coal shippers. Likewise, the Board should use its authority to reduce the occurrence of anti-competitive paper barriers which are often approved by the Board under an exemption from the same section or chapter involved in rail construction projects.

Although they have not yet been applied, the Board's new merger rules further support the basis for removal of unreasonable paper barriers. For example, Rule 1180.1(a) states that "the Board does not favor consolidations that reduce the transportation alternatives available to shippers. . . ." The rules also state that the Board's consideration shall include the public interest criteria of 49 U.S.C. § 11324 and the rail transportation policies set forth in 49 U.S.C. § 10101. In determining the public interest, the Board "must consider . . .adequate service for shippers"

¹² *Class Exemption for Rail Construction Under 49 U.S.C. § 10901*, Ex Parte No. 392 (Sub-No. 3), Slip op. (ICC served May 29, 1987) ("It is [the ICC's] aim to eliminate barriers to entry through new construction to the greatest extent possible to facilitate investment initiatives and expanded rail service."); *Gateway Western Ry. Co. – Construction Exemption – St. Clair County, IL*, F.D. 32158, *Gateway Western Ry. Co. – Petition Under 49 U.S.C. § 10901(c)*, F.D. 32158 (Sub-No. 1), Slip op. at 4-5 (ICC served May 11, 1993) (noting that the Board has "made findings in a series of construction [exemption] cases that the rail transportation policy favors the construction of new lines."); *Class Exemption for the Construction of Connecting Tracks Under 49 U.S.C. § 10901*, 1 S.T.B. 75, 79 (1996) ("The creation of additional rail service and additional competition via rail line construction benefits the public."); *The Burlington N. & S.F. Co. – Construction and Operation Exemption – Seadrift and Kamey, TX*, F.D. No. 34003, Slip op. at 5 (STB served June 19, 2001) (approving a petition for exemption and noting that the Board shall facilitate construction as part of its Congressional mandate under the RTP); *Ameren Energy Generating Co. – Construction and Operation Exemption – In Coffeen and Walshville, IL*, F.D. 34435, Slip op. at 4 (Feb. 17, 2006) (noting that the proposed rail line will provide the area with additional transportation options and enhanced competition).

and that the transaction “would promote a competitive . . . rail system.” 49 C.F.R. § 1180.1(b). Moreover, the Board’s own rules suggest carving out a transaction’s anticompetitive elements, such as unreasonable paper barriers. In addition, the Board states that “it is prepared to use its conditioning authority under 49 U.S.C. 11324(c) to preserve and/or enhance competition.” The rules also note that efforts by shippers to directly combat limited service can be stymied because “competition [from shipper build out, etc.] can be eliminated or reduced when two railroads serving overlapping areas merge.” 49 C.F.R § 1180.1(c) and (c)(i).

The reasoning behind the new merger rules and rail construction precedent supports Board action to enhance competition in other transactions approved by the Board, including line sales or leases. The Board has the authority and it should exercise its authority to eliminate or phase out existing anti-competitive paper barriers. In addition, the Board should prohibit the imposition of future anti-competitive paper barriers.

B. Recent Statements by the Board Regarding Paper Barriers.

The anticompetitive nature of paper barriers has been recognized by members of the Board, in recent decisions. For example, in *Buckingham Branch Railroad Company – Lease – CSX Transportation, Inc.*,¹³ Commissioner Mulvey strenuously noted that paper barriers have little or no competitive value in rail line agreements. Commissioner Mulvey stated:

Paper barriers are clauses in contracts for the sale or lease of rail lines to shortline carriers by which Class I carrier sellers seek to ensure that the traffic originated or terminated by shortline carriers on the segments (sold or leased) continues to flow over the lines of the seller to the maximum extent possible. As such, these restrictions effectively tie the shortline to a single Class I carrier, thereby restricting the flow of interstate commerce and reducing the potential public benefits of the lease transaction.

¹³ *Buckingham Branch Railroad Company – Lease – CSX Transportation, Inc.*, F.D. 34495 (Decision No. 6) (STB served Nov. 5, 2004) (Mulvey, dissenting).

.....

I concede that paper barriers result from voluntary negotiations between private parties. However, that these provisions conflict with the notion of avoiding restraints of trade is beyond doubt. I do not believe that the Board should continue to condone this practice. While I would prefer not to interfere with contracts between private individuals, I believe the Board should do so when contractual provisions run counter to public policy and the public interest as a whole. **Thus, while restrictions on interchange may be in the private interests of two railroads, they nevertheless operate as a restraint of trade and run counter to the public interest.**

Buckingham Branch, slip op. at 13-14 (Mulvey, dissenting) (emphasis added). These concerns were reflected in other decisions that addressed paper barriers. See *Indiana & Ohio Central Railroad, Inc. – Acquisition and Operation Exemption – CSX Transportation, Inc.*, F.D. 34536, Slip op. (STB served Aug. 23, 2005) (“As Class I carriers continue to use these exemptions to shave off thousands of miles of track by subdividing [and] downsizing into smaller transactions, the Board should more regularly require full applications to allow for complete review of the transactions and their potential impact on railroad employees, rail shippers, and the national transportation system. While I would prefer not to interfere with contracts between private parties, I believe that the Board must do so when contractual provisions run counter to key elements of our national transportation policy and the broader public interest as a whole”) (Mulvey, dissenting); *Paducah & Louisville Railway, Inc. – Acquisition – CSX Transportation, Inc.*, F.D. 34738, Slip op. at 6-7 (STB served Nov. 18, 2005) (Mulvey, dissenting) (“[P]aper barriers are not infinitely valuable, they should not have infinite lives, and I do not believe that the Board should continue to condone their inclusion so long as they are not time limited.”).

Commissioner Mulvey’s comments appropriately reflect the Board’s duty to promote the public interest which is governed by the RTP. Ameren concurs that the Board has a duty to

evaluate paper barriers in transactions with an eye toward opening up, not shutting down, rail carrier competition to shippers.

C. Common Carrier Obligation

The Board should also look at whether paper barrier restrictions interfere with and, therefore, violate the common carrier obligation of railroads. If a rail line transaction includes a provision that prohibits the purchasing railroad from providing service to shippers along its line, then the paper barrier should be deemed an unreasonable contract restriction to the acquiring railroad's common carrier obligation under Section 11101(b). As in other instances, the Board should not approve agreements that require a railroad to contract away its common carrier obligations.

For example, in *Railroad Ventures, Inc. – Abandonment Exemption – Between Youngstown, OH, and Darlington, PA, in Mahoning and Columbiana Counties, OH, and Beaver County, PA*, Docket No. AB-556 (Sub-No. 2X) (STB served Jan. 7, 2000), the Board found a condition precedent to a line sale, which required the purchaser to subsidize an expensive track crossing, was void because “any contractual restrictions that unreasonably interfere with common carrier operations are deemed void as contrary to public policy.” Slip op. at 3.

In *Railroad Ventures*, The Board cited two other instances where frustrations of common carrier obligations by private contract are incompatible with the national rail transportation policy. See *Hanson Natural Resources Company – Non-Common Carrier Status – Petition for a Declaratory Order*, F.D. 32248, Slip op. at 3 (ICC served Dec. 5, 1994) (“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 to public policy”). See also *United States v. Baltimore & O. R. R.*, 333 U.S. 169, 178-78 (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” and that “Congress under its constitutional authority has provided that no railroad shall engage in certain types of discriminatory conduct . . .”). As such, a contractual agreement that a railroad cannot provide service to a shipper which makes a reasonable request would be in direct violation of 49 U.S.C. § 11101(b).

D. Public Testimony of Dr. Curtis M. Grimm.

The issue of paper barriers has been publicly discussed by industry expert, Dr. Curtis M. Grimm, who testified to Congress that paper barriers are hurting – not enhancing – competition for carrier service to shippers.¹⁴ Grimm’s study, discussed in his testimony to Congress, regarding service competition between large and small carriers resulted in several interesting points. The Grimm Testimony is particularly interesting because it does not appear to have been prepared to support a particular interest or party.

The Grimm Testimony opens by recognizing that railroad deregulation has had positive impacts on the rail industry because it substituted competition for government regulation for most rail customers. Grimm states that U.S. rail deregulation provided a greater reliance on free markets to promote railroad profitability and public benefits. By increasing operating freedom and stimulating competition, Grimm posits that deregulation spurred the railroad industry to shrink its physical plant and work force to better match available traffic. As such, rail deregulation has been a successful policy; however, rail mergers and captive shipper issues have limited effective competition. Grimm Testimony, at 69.

¹⁴ *Status of Railroad Economic Regulation: Hearing Before the Subcomm. on Railroads, H. Comm. On Transportation and Infrastructure*, 108th Cong. 65-74 (2004) (testimony of Curtis M. Grimm, Chairman and Professor in the Department of Logistics, Business, and Public Policy at the University of Maryland’s Robert H. Smith School of Business) (“Grimm Testimony”).

As a solution, Grimm proposed that methods should be taken to empower smaller railroads and provide competition to captive shippers. One example suggested by Grimm is removal of “paper barriers” to competition between major railroads involving short line and regional carriers that would increase their competitive vitality and provide meaningful competition for many captive shippers. Grimm suggested that concern about potential short-term rail revenue diminution is no reason to accept the status quo. Grimm Testimony, at 72.

E. Agencies Commonly Regulate Anticompetitive Industry Agreements

The Board’s mandate to promote competition under the rail transportation policy is similar to the authority over competition problems exercised by other agencies. In general, Congress has charged agencies with promoting competition, and giving them the means to carry out that mandate. By exercising their authority over competition issues within their jurisdiction, agencies are promoting the general policy that competition is desirable in regulated industries.

When an agency finds that parties subject to its authority have engaged in an anticompetitive agreement, the agency may bring the offender into either the administrative process or the courts.¹⁵ The Board is no exception to other federal agencies, which have recognized their responsibility to seek out and nullify anticompetitive behavior.

¹⁵ The forum selection depends on the individual agency’s regulations and Congressional authority. For example, the Federal Maritime Commission (much like the STB, FTC, DOT, etc.), has authority over competition among water carriers. If the FMC finds that a carrier or carriers violated the Shipping Act of 1984, the FMC will typically institute a proceeding and fashion a remedy to end the anticompetitive effect(s). If the carriers do not adhere to the FMC’s recommendations, the agency may then seek enforcement of its order in federal court. Shipping Act, 46 U.S.C. app. 1713(c). The Antitrust Division of the Department of Justice, however, has no such administrative avenue, and must sue in federal court. The power to bring suit rests with the U.S. Attorney General, which defers to the judgment of the AAG for Antitrust in granting the order to sue. However, the DOJ will often entertain a lengthy internal review and investigation process, during which the parties subject to the DOJ’s charges will make an effort to cooperate – sometimes even agreeing to enter into a consent decree with the agency to avoid protracted litigation.

Before looking at specific examples it is instructive to look at the approach taken under the antitrust laws for evaluating whether a competition-restricting condition, similar to a paper barrier, is a reasonable restraint on competition. Federal antitrust laws will permit, for example, covenants not to compete, so long as they are limited in geographical scope or in time. For example, in *Lektro-Vend Corp. v. Vendo Co.*,¹⁶ the court found that non-competition clauses in agreements for the sale of a business are reasonable restrictions so long as they are reasonably limited both in geographic scope and in duration to the minimum necessary to accomplish a proper purpose (i.e., the restriction is necessary to protect the legitimate property interests purchased by the covenantee – such as protecting the goodwill of an established business). *Lektro-Vend*, 403 F. Supp. 527, 532. See also, *Eichorn v. AT&T*, 248 F.3d 131, 145 (3rd Cir. 2001) (hornbook law that a covenant not to compete ancillary to the sale of a business does not violate the Sherman Act if reasonably limited in time and territory); *Alders v. AFA Corp.*, 353 F. Supp. 654, 656 (S.D. Fla. 1973) (five-year time limitation and geographic restriction found reasonable). The antitrust case law approach (conducted on a case-by-case basis) is an effective method to ensure each transaction receives the proper scrutiny, and thereby prevent the parties' ability to privately contract around forbidden restrictions on competition.

Similarly, the rail transportation policy weighs in favor of agreement terms that do not interfere with competition. Unreasonable paper barriers, designed to deter (if not prohibit) a short line railroad from interchanging traffic with the seller's competitors, serve neither the efficiency nor the public interest goals of the *ICC Termination Act*¹⁷ or its predecessors. Indeed,

¹⁶ 403 F. Supp. 527 (N.D. Ill. 1975), *aff'd*, 545 F.2d 1050 (7th Cir. 1976), *rev'd on other grounds*, 433 U.S. 623 (1977).

¹⁷ *ICC Termination Act of 1995*, Pub.L. 104-88, 109 Stat. 803 (1995).

enhancing competition is the common thread that runs throughout much of the legislation Congress has enacted to address market issues, including the *Sherman Act* and the *Clayton Act* (15 U.S.C. §§ 12-27, 44), the *Robinson-Patman Act* (15 U.S.C. § 13), and the *Federal Trade Commission Act* (15 U.S.C. §§ 41-57a), as well as the transportation deregulation statutes. Efforts to suppress competition are antithetical to this body of administrative law.

(1) Federal Maritime Commission

The Federal Maritime Commission (“FMC”) has exercised its authority to reduce the effects of anticompetitive action, even if as a result of privately contracted agreements, where the parties were subject to the FMC’s jurisdiction. Specifically, in *Ceres Marine Terminals, Inc. v. Maryland Port Admin.*,¹⁸ the FMC reviewed terminal access agreements of a terminal operator vis-à-vis two competing carriers using its facilities to determine whether it had jurisdiction over private contracts that created potentially unequal port access. In particular, the FMC was asked to decide if private contract rights could be invoked to prohibit a party to an agreement (subject to the FMC’s jurisdiction) from challenging that agreement before the FMC, where the complaining party alleged that the contract resulted in a violation of the Shipping Act of 1984.

The FMC held that parties subject to the FMC’s jurisdiction could not contract away their regulatory obligations under the Shipping Act, including their obligation to conduct themselves in a competitively fair manner. The FMC’s decision demonstrates that (1) agencies can review ongoing, private arrangements whenever they perceive them to be contrary to the public interest, even if the practices have been ongoing for a while, and (2) agencies should not let private contracts be used as a vehicle to skirt around the rail transportation policy concerns.

¹⁸ FMC Docket No. 94-01 (FMC served Aug. 15, 2001).

(2) *Department of Justice*

The Antitrust Division of the Department of Justice (“DOJ”) has also intervened when a private agreement was found to violate competition laws. In *United States v. Ecast, Inc.*,¹⁹ the DOJ charged two digital jukebox platform producers with entering into a non-compete agreement that caused the UK-based producer not to proceed with its plans to enter the U.S. digital jukebox platform market and compete with the domestic producer. DOJ alleged that the non-compete agreement constituted a restraint of interstate trade in violation of Section 1 of the Sherman Act (15 U.S.C. § 1). According to the DOJ, the UK-producer had planned on competing in the U.S. market, which likely would have stimulated competition and resulted in better customer benefits at lower prices. As noted in court decisions on the reasonableness of non-compete agreements (e.g., *Lektro-Vend, supra*), failure to reasonably limit the non-compete in time and scope will support a violation of antitrust laws.²⁰ Even where, as was apparently the case here, the non-compete was entered into as part of a larger agreement to provide services or license technology, it should be scrutinized for its competitive effect and legitimate justification. In the *Ecast* case, DOJ pulled the anticompetitive non-compete provision out of the larger agreement and permitted the remainder to go forward.

In sum, the above examples of analyses performed by other agencies, regarding the potentially anticompetitive effects of agreements, would be rightfully exercised by the Board in evaluating paper barrier effects. For example, the Board is required to evaluate the competitive

¹⁹ *United States v. Ecast, Inc. and NSM Music Group Ltd.*, Final Judgment, No.: 1:05CV01754 (D.D.C. filed Dec. 12, 2005).

²⁰ As such, this case is a useful reminder that, as the Supreme Court held in *Palmer v. BRG of Ga., Inc.*, 498 U.S. 46 (1990), actual competition is not required to render customer or market allocation agreements unlawful.

nature of a merger (49 U.S.C. § 11325), and a careful evaluation of all the terms and conditions of that merger would be consistent with the Congressional mandate to promote carrier competition as part of the rail transportation policy (49 U.S.C. § 10101). In addition, the Board's established power to examine line sale agreements under 49 U.S.C. §§ 10901 and 10902 would likewise promote competition by considering the effects on competition (if any) that would result from allowing the paper barrier terms to remain in the agreement.

IV. SUGGESTED REMEDIES TO PAPER BARRIERS

Based on the prior discussion, Ameren respectfully submits that the Board can – and should – use its authority to remove the anticompetitive effects of paper barriers. Ameren encourages the Board to initiate a rulemaking on paper barriers. Some suggested remedies to consider for addressing the anticompetitive aspects of paper barriers follow. First, Ameren submits that the Surface Transportation Board should institute a sunset provision for all current paper barriers, limiting their life to no more than 5 years. This provision supports the RTP to promote promoting carrier competition (49 U.S.C. § 10101(1), (4), (5), (7)), while recognizing that a reasonable restriction (limited by time and location) could assist the financial position of divesting carriers (49 U.S.C. § 10101(3)). *See, e.g., United States v. Ecast, Inc.*, antitrust discussion, *supra*, at pg. 20. Second, Ameren suggests that the Board should develop rules to conduct a case-by-case review of current paper barriers to determine whether they should be revoked or dissolved before the sunset period, as permitted by the Board's established power to

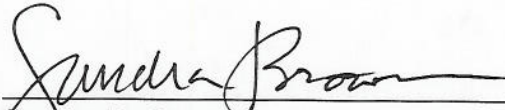
review agreements for line sales.²¹ 49 U.S.C. §§ 10901, 10902, and 11325. Finally, Ameren submits that the Board would be well within its rights to eliminate unreasonable paper barriers in future rail line sales and leases. Under the rail transportation policy, the Board is charged with ensuring “effective competition among rail carriers” and to reduce “barriers to entry and exit from the industry.” 49 U.S.C. § 10101(4), (7). By preventing anticompetitive terms in line sale agreements, the Board would benefit emerging carriers, thereby promoting competitive service and expanding consumer choice for shippers dependent upon rail transportation.

²¹ In the proposed rules by WCTL for 49 C.F.R. § 1180, the last paragraph seems to imply that different rules should be in place for purchasers that “will be able to physically interchange only with the selling carrier.” Given that anticompetitive restrictions in line sales may be accomplished in conjunction with or independently through the selling carrier retaining the stub end of the line, the proposed rule should not be adopted. In essence, the retention by the selling carrier of the end of the line that connects to the selling carrier, is just a further paper barrier. All such paper barrier restrictions should be subject to the sunset provision and/or subject to earlier challenge as suggested above.

CONCLUSION

For the foregoing reasons, Ameren Energy Fuels and Services Company respectfully requests the Surface Transportation Board to grant the renewed petition of WCTL and immediately commence a rulemaking proceeding to consider and adopt specific rules governing the elimination of unreasonable paper barriers.

Respectfully submitted,



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*ATTORNEYS FOR AMEREN ENERGY FUELS AND
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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Ex Parte No. 575

**REVIEW OF RAIL ACCESS AND COMPETITION ISSUES – RENEWED PETITION
OF THE WESTERN COAL TRAFFIC LEAGUE**

VERIFIED STATEMENT OF ROBERT K. NEFF

INTRODUCTION

My name is Robert K. Neff. I am the Vice President, Coal Supply for Ameren Energy Fuels and Services Company (“AFS”), a subsidiary of Ameren Corporation (collectively, “Ameren”).¹ My business address is 1901 Chouteau Avenue, St. Louis, Missouri 63103. My responsibilities as Vice President of Coal Supply include the acquisition of coal and related transportation for all electric utility subsidiaries of Ameren Corporation, including the electric utility plant at Labadie, Missouri (“Labadie Plant”). I have worked in the fuel transportation area with the Ameren family of companies for over 17 years.

The purpose of this statement is to address the impact of paper barriers upon service to Ameren’s Labadie Plant. This verified statement is submitted in support of AFS’s Comments, filed in response to the Surface Transportation Board (“STB” or “Board”) initiation requesting

¹ I also serve as the President of the Missouri Central Railroad, and the Coffeen and Western Railroad Company which are Ameren-owned common carrier railroads.

comments on the renewed petition of the Western Coal Traffic league for a rulemaking to address line sale or lease agreements that contain paper barriers.

AFS's ultimate parent, Ameren Corporation, is a public utility holding company that provides electricity to approximately 2.3 million customers in Missouri and Illinois. Ameren has 11 coal-fired plants, of which, 10 plants rely on rail service as the primary mode of transportation for coal.² Ameren purchases approximately 40 million tons of coal annually for all of its coal-fired plants. Of these 40 million tons of coal, 10 million tons are purchased for one of Ameren's plants – the Labadie Plant located in Franklin County, Missouri (the "Labadie Plant" or "Plant") – which is impacted by a paper barrier.

Ameren has been active in trying to improve rail service and rates at its plants by creating competitive transportation alternatives. Ameren, via its partially-owned subsidiary, Electric Energy, Inc., completed its first rail build-out in 1990 with the Joppa and Eastern Railroad Company to the Joppa Plant in Illinois.³ With the recent approval of the Coffeen and Western Railroad Company's build-out from Ameren's Coffeen Power Plant,⁴ Ameren will have moved toward completing its objective of obtaining multiple transportation alternatives at its coal-fired plants, via various methods.

² Ameren has 5 coal-fired plants that can also utilize barge transportation.

³ See *Joppa and Eastern Railroad Co. – Construction Exemption – Joppa, IL*, F.D. 31656 (ICC served July 5, and Dec. 24, 1990). Union Electric and now AmerenUE's interest in the Joppa plant and the Joppa and Eastern Railroad is through its controlling interest in Electric Energy, Inc.

⁴ See *Ameren Energy Generating Company – Construction And Operation Exemption – In Coffeen And Walshville, IL*, F.D. 34435 (STB served Feb. 17, 2006).

The Labadie Plant began operations in 1970 and is Ameren's largest coal-fired plant at 2,415 megawatts. The Plant, as originally built, was located at the intersection of the Missouri Pacific Railroad and the Chicago, Rock Island and Pacific Railroad ("Rock Island"). The Missouri Pacific Railroad was purchased by Union Pacific in 1984. The former Rock Island line (the "Line"), which connects to St. Louis and Kansas City, faced financial troubles and the Line was acquired in bankruptcy by the Southern Pacific Railway ("SP").⁵ In 1990, SP upgraded the Line from St. Louis to Labadie in order to handle coal shipments to Labadie from 1990 to 1996. In 1996, the Line was acquired by Union Pacific Railroad ("UP") as a result of the UP/SP merger.

In early 2000, Ameren petitioned the Board for clarification of the UP/SP merger conditions to have Ameren declared a "2-to-1" shipper entitled to certain merger protections; and in June 2000, and the Board granted Labadie access from BNSF via the UP/SP merger condition known as the "omnibus" clause, which attempts to replicate SP's service on the St. Louis to Labadie section of the former SP line.⁶ This access was received by BNSF via trackage rights over the UP from their interconnection at Pacific, Missouri. Although BNSF has the omnibus access, BNSF has not moved any significant amount of coal to Labadie because BNSF's rates have not provided a competitive alternative.

Before the UP/SP merger was finalized, UP began the process to sell off the Line because UP already owned the parallel line between St. Louis and Kansas City. In 1999, UP finalized the

⁵ Southern Pacific had purchased the line from the bankrupt Rock Island railroad in the early 1980s to gain a rail route between St. Louis and Kansas City. Southern Pacific, however, obtained permission to operate over a parallel line owned by Union Pacific as a result of the UP / Missouri Pacific Railroad in 1982.

⁶ *Union Pac. Corp. – Control and Merger – Southern Pac. Corp.*, F.D. 32760, Decision No. 89 (STB served June 1, 2000).

sale of a majority of the line (from Vigus, Missouri west of St. Louis to Pleasant Hill, Missouri east of Kansas City – the “Vigus / Pleasant Hill” portion of the Line) to GRC Holdings, which formed the Missouri Central Railroad (“MCRR”). However, UP retained ownership of parts of either end of the Line - approximately 9.7 miles of the Line between Kansas City and Pleasant Hill and approximately 7.7 miles of the Line between Vigus and St. Louis. MCRR is only able to operate over the end portions of the line through trackage rights agreements with UP.

Because the original proposed purchaser (GRC Holdings) could not fund the acquisition, Ameren was approached by GRC Holdings to help finance the acquisition. The MCRR line runs through the center of AmerenUE’s service territory and has a physical connection to the Labadie Plant; therefore, Ameren was interested in saving the Line. Ameren funded the acquisition of the line, and GRC Holdings, upon closing, sold a majority interest to one of the Ameren affiliates. Ameren had no role in the contents of the Line Sale Contract or the Trackage Rights Agreement because the deal terms had already been reached by the time GCR Holdings approached Ameren. It was widely known that the Line was heading for abandonment and Ameren had to make a quick decision to save the Line, so Ameren stepped in as a last option financier for this troubled line, notwithstanding the already agreed to terms. With Board approval, Ameren acquired a controlling interest in MCRR in November 1999.

In the resulting MCRR’s purchase of the Vigus / Pleasant Hill section, several restrictions were imposed on service on the Line, thereby restricting rail competition for coal transportation service to the Labadie Plant. The MCRR restrictions were aimed specifically at the Labadie Plant and were imposed upon the MCRR in various places of the documents between UP and MCRR, including the sale agreement and the trackage rights agreements. Unfortunately, these

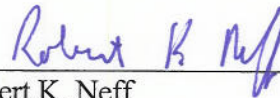
agreements have confidentiality provisions, and Ameren cannot share them in its Comments because there is no protective order in place for this proceeding.

Absent the paper restrictions in the MCRR documents, AmerenUE's Labadie plant could be served by MCRR. MCRR has a physical connection to Labadie that has been in place since the plant was built. It is only the paper barriers that create a never-ending restriction on MCRR's ability to serve Labadie.

The Board specifically asked for comment on the effectiveness of the Railroad Industry Agreement ("RIA"). While I am not in a position to provide broad comment on the RIA, I am aware that shippers are not allowed to participate in RIA negotiations regarding paper barriers. Furthermore, specific to the Labadie Plant, the RIA offers no relief to the anticompetitive paper barriers imposed on the MCRR.

Verified Statement of Robert K. Neff
STB Ex Parte 575

I, Robert K. Neff, verify under penalty of perjury that the foregoing is true and correct based on my knowledge, information and belief. Further, I certify that I am qualified and authorized to file this verified statement.



Robert K. Neff
Vice President, Coal Supply
AmerenEnergy Fuels & Services

Dated: 3/3/06