

IN THE SUPREME COURT OF MISSOURI

No. SC91066

STATE OF MISSOURI ex rel. UNION PACIFIC RAILROAD COMPANY,

Relator

v.

HONORABLE MICHAEL P. DAVID,

Circuit Judge, Division 6 of the Twenty-Second Judicial Circuit (St. Louis City),

Respondent

On A Petition For A Writ of Prohibition And Mandamus

RESPONDENT'S BRIEF

Robert H. Wendt, #19862
1010 Market Street, Suite 1440
St. Louis, Missouri 63101
Telephone: 314-621-1775
Facsimile: 314-621-4688
rwendt@wendtlawfirm.com

Ronnie White, #31147
James Holloran, #20662
Holloran, White, Schwartz & Gaertner, LLP
2000 S. 8th Street
St. Louis, Missouri 63104
Telephone: 314-772-8989
Facsimile: 314-772-8990
rwhite@holloranlaw.com
jholloran@holloranlaw.com

Attorneys for Respondent

TABLE OF CONTENTS

	<u>Page Number</u>
INTRODUCTION.....	6
POINTS RELIED ON.....	9
ARGUMENT.....	11
I. Relator Is Not Entitled To An Order Prohibiting Respondent From Compelling Arbitration Of The <i>Gordon And Champlin</i> Cases Because Respondent Did Not Abuse His Discretion In That The Agreement Regarding Arbitration Signed By Mssrs. Wendt And Lamb Is A Written Agreement To Arbitrate Within The Meaning of § 435.350 RSMo That Was Orally Modified To Include Plaintiffs Gordon And Champlin.....	11
A. The “Agreement Regarding Arbitration” Signed By Mssrs. Wendt And Lamb Is A Written Agreement To Arbitrate Within The Meaning Of §435.350 RSMo.....	11
B. A Written Contract To Arbitrate Can Be Orally Modified.....	12
C. The Wendt/Lamb Agreement Regarding Arbitration Is The Only Written Agreement To Arbitrate.....	13
D. The Written Consent Agreements of Gordon And Champlin.....	14
II. Relator Is Not Entitled To An Order Prohibiting Respondent From Compelling Arbitration Of The <i>Gordon And Champlin</i> Cases Because Respondent Did Not Abuse His Discretion In That He Was Presented Ample Evidence Supporting An Oral	

Modification Of The “Agreement Regarding Arbitration” To Include Gordon And Champlin In Arbitration..... 17

A. The Evidence Presented To Respondent Supports His Finding That There Was An Oral Modification To The Wendt/Lamb Agreement That Included Gordon And Champlin In Arbitration..... 17

B. Relator’s Lack Of Authority Argument Is Inappropriately Argued For The First Time In This Court..... 18

C. Relator Admitted To Respondent That The Wendt/Lamb Agreement Is A Written Agreement To Arbitrate..... 19

CONCLUSION..... 20

APPENDIX

Defendant's Opposition to Plaintiff's Motion to Compel Arbitration	A1-A11
Motion to Compel Arbitration	A12-A24
Court Order (10/9/2007) – <i>Barnes, et al. v. Union Pacific Railroad Company</i>	A25-A27
Court Order (1/13/2010) – <i>Gordon, et al. v. Union Pacific Railroad Company</i>	A28-A30
Plaintiff's Motion to Consolidate Actions	A31-A69
22nd Judicial Circuit Local Rule 33.6	A70
Court Order (1/6/2010) – <i>Gordon, et al. v. Union Pacific Railroad Company</i>	A71
Agreement Regarding Arbitration	A72-A75
Relator's Motion to Strike	A76-A80
Court Order (6/15/2010) – <i>Gordon, et al. v. Union Pacific Railroad Company</i>	A81-A84
Transcript of Proceedings (1/4/2010) – <i>Gordon, et al. v. Union Pacific Railroad Company</i>	A85-A95
Defendant's Request for Evidentiary Hearing Pursuant to RSMo § 435.355 on Plaintiff's Motion to Compel Arbitration	A96-A98

TABLE OF AUTHORITIES

Page Number

Cases

Anglim v. Missouri Pacific Railroad Co., 832 S.W. 2d 298 (Mo. banc 1992)..... 9, 14

Birkenmeier v. Keller Biomedical, LLC, 312 S.W.3d 380
(Mo.App. E.D. 2010)..... 10, 17, 18

State ex rel. Public Service Com’n v. Joyce, 258 S.W.3d 58
(Mo. banc 2008)..... 9, 10, 13, 17

Willis v. Community Developers, Inc., 563 S.W.2d 104
(Mo.App. K.C. Dist. 1978)..... 9, 12

Statutes

Section 435.350 RSMo..... 9, 11, 19, 20

Rules

22nd Judicial Circuit Local Rule 33.6..... 7

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI ex rel.)	
UNION PACIFIC RAILROAD)	
COMPANY,)	
)	
Relator,)	
)	
)	No. SC91066
v.)	
)	
HONORABLE MICHAEL P. DAVID,)	
Circuit Judge, Division 6)	
of the Twenty-Second Judicial)	
Circuit (St. Louis City),)	
)	
Respondent.)	

RESPONDENT’S BRIEF

INTRODUCTION

Relator has submitted a forty-three (43) page Opening Brief largely devoted to extraneous matters. Additionally, its Brief contains numerous assertions, claimed to be factual, which are outright false. For example, Relator states, “Union Pacific further objected because the attempt to join *Gordon* and *Champlin* to the *Ellison* arbitration was brought before Respondent...” Relator’s Opening Brief at 13. Plaintiffs never sought, nor does the record support the statement that Plaintiffs requested Respondent join *Gordon* and *Champlin* with *Ellison*. It never happened and Relator knows it never happened. This outright misstatement of fact alone is reason enough to deny extraordinary relief. Relator’s citation for this false statement is its Opposition to Plaintiffs’ Motion to Compel Arbitration, which states, “Plaintiff’s Motion to Compel

Arbitration asks this Court to include this plaintiff's case in the *Ellison* group of cases.” App. at A4. This is yet another false statement. Nowhere in Plaintiffs' Motion to Compel Arbitration do Plaintiffs request that *Gordon* or *Champlin* cases be included in the *Ellison* group. See, App. at A12-A14. Thus, what you have is a false statement in a pleading in the 22nd Judicial Circuit Court which Relator relies on in making an additional false statement to the highest Court in this state.

The record demonstrates the following. By agreement between the parties, *Gordon* and *Champlin* were severed from the *Barnes* consolidated cases. App. at A25. Plaintiffs alleged, and Respondent later found, that there was an oral agreement to include *Gordon* and *Champlin* in a subsequent arbitration. App. at A29. Further, the record demonstrates that there was never an attempt to “join” *Gordon* and *Champlin* to *Ellison*. Rather, pursuant to Local Rule 33.6, Plaintiffs filed a Motion to Consolidate the *Ellison* consolidated cases and the *Champlin* case into the *Gordon* case. App. at A31-A69. Local Rule 33.6 mandates that a Motion to Consolidate “...shall be filed in the first filed case.” App. at A70. Additionally, the Local Rule requires that the Motion be filed in Division 1. App. at A70. Plaintiff's Motion to Consolidate was granted by the Honorable David L. Dowd, Presiding Judge, Division 1, on January 6, 2010. App. at A71. It was Judge Dowd's Order that lodged the newly minted *Gordon* consolidated cases before Respondent. App. at A71. The basis of Judge Dowd's action was that the *Gordon* case had been and was pending before Respondent. App. at A71. This record conclusively demonstrates the falsity of Relator's assertion that “...the attempt to join *Gordon* and *Champlin* to the *Ellison* arbitration was brought before Respondent...”

Relator's Opening Brief at 13. When a party comes to the highest Court in our state and misrepresents crucial facts, this Court should not only reject the relief sought by such party, it should announce in loud and clear terms that it will not tolerate such action from officers of the Court.

This Court should also ask why Relator believes it necessary to file a forty-three (43) page brief to deal with the simple question: Did Respondent abuse his discretion in compelling arbitration in the *Gordon* and *Champlin* cases? The answer is no, Respondent did not abuse his discretion in compelling arbitration of *Gordon* and *Champlin* based on the evidence before him.

POINTS RELIED ON

I.

Relator Is Not Entitled To An Order Prohibiting Respondent From Compelling Arbitration Of The *Gordon And Champlin* Cases Because Respondent Did Not Abuse His Discretion In That The Agreement Regarding Arbitration Signed By Mssrs. Wendt And Lamb Is A Written Agreement To Arbitrate Within The Meaning of § 435.350 RSMo That Was Orally Modified To Include Plaintiffs Gordon And Champlin.

Section 435.350 RSMo

Anglim v. Missouri Pacific Railroad Co., 832 S.W. 2d 298 (Mo. banc 1992)

State ex rel. Public Service Com'n v. Joyce, 258 S.W.3d 58 (Mo. banc 2008)

Willis v. Community Developers, Inc., 563 S.W.2d 104 (Mo.App. K.C. Dist. 1978)

II.

Relator Is Not Entitled To An Order Prohibiting Respondent From Compelling Arbitration Of The *Gordon* And *Champlin* Cases Because Respondent Did Not Abuse His Discretion In That He Was Presented Sufficient Evidence Supporting An Oral Modification Of The “Agreement Regarding Arbitration” To Include Gordon And Champlin In Arbitration.

Birkenmeier v. Keller Biomedical, LLC, 312 S.W.3d 380 (Mo.App. E.D. 2010)

State ex rel. Public Service Com’n v. Joyce, 258 S.W.3d 58 (Mo. banc 2008)

ARGUMENT

I.

Relator Is Not Entitled To An Order Prohibiting Respondent From Compelling Arbitration Of The *Gordon And Champlin* Cases Because Respondent Did Not Abuse His Discretion In That The “Agreement Regarding Arbitration” Signed By Mssrs. Wendt And Lamb Is A Written Agreement To Arbitrate Within The Meaning of § 435.350 RSMo That Was Orally Modified To Include Plaintiffs Gordon And Champlin.

A. The “Agreement Regarding Arbitration” Signed By Mssrs. Wendt And Lamb Is A Written Agreement To Arbitrate Within The Meaning Of §435.350 RSMo.

In October 2007, Robert H. Wendt and Nicholas J. Lamb entered into a contract titled “Agreement Regarding Arbitration” (hereinafter, “Wendt/Lamb Agreement”). App. at A72-A75. Surely, this Court must find, as did Respondent, that the Wendt/Lamb Agreement is a written agreement to arbitrate within the meaning of § 435.350 RSMo. App. at A29. Indeed, as is discussed in further detail below, Relator admitted as much when its attorney appeared before Respondent for oral argument and stated, “Beyond that, a different point is, yes, *there was a written agreement to arbitrate...*” App. at A89 (emphasis added). Thus, the simple question before the Court is not whether a written agreement to arbitrate exists, but instead, whether the written agreement could be orally modified to include Plaintiffs *Gordon and Champlin*. The answer is yes.

B. A Written Contract To Arbitrate Can Be Orally Modified.

Respondent found that “...the written agreement to arbitrate was orally modified to include Plaintiffs Gordon and Champlin, who were not listed as plaintiffs to be arbitrated in the attachment to the Wendt/Lamb Agreement.” App. at A29. In making his finding, Respondent relied on well established Missouri law, to wit:

“Missouri law clearly permits evidence of subsequent oral agreements, such as exists here, to modify a written contract. ‘Oral evidence of agreements made prior to or contemporaneous with a written contract is not admissible to various terms. Oral evidence of agreements which modify a written contract and which are made *subsequent* to its execution are admissible.’ Willis v. Community Developers, Inc., 563 S.W.2d 104, 107 (Mo. App. K.C. Dist 1978) (citing Chandler v. Rosewin Coats, Inc., 515 S.W.2d 184, 188 (Mo. App. 1974)). See also, Warrenton Campus Shopping Ctr. V. Adolphus, 787 S.W.2d 852, 855 (Mo. App. E.D. 1990); AAA Uniform and Linen Supply v. Barefoot, 81 S.W.2d 133, 137(Mo. App. W.D. 2002); and Krombach Co. v. Blue Cross & Blue Shield, 929 S.W.2d 888, 895-96 (Mo. App. E.D. 1996).” App. at A29.

The law in Missouri is straightforward – an oral agreement, made after the execution of a written contract, is admissible. Furthermore, Relator’s Opening Brief fails to provide this Court with any authority that a written contract to arbitrate is different from all other contracts and thus resides in a special class of contracts that cannot be orally modified.

In Willis v. Community Developers, Inc., 563 S.W.2d 104 (Mo.App. K.C. Dist. 1978), the

court held that a contract required to be in writing, namely, contracts enumerated in the Statute of Frauds, §432.010 RSMo, can be orally modified. Apparently, Relator would have this Court, without any support, place arbitration contracts in a special class of written contracts that cannot be orally modified, unlike all other Missouri contracts.

Relator's assertion that the cases relied on by Respondent are "parole evidence" cases only, unable to alter substantive law, is balderdash. They overlook the fact that Respondent could, and did, consider the evidence of an oral amendment. Relator's real complaint is that, after considering the evidence, Respondent reached the wrong conclusion. As a result, we are treated to approximately three (3) pages asserting that Respondent's finding was against the weight of the evidence. Relator's Opening Brief at 34-37. However, Relator's argument is totally irrelevant given that this Court's "standard of review for writs of mandamus and prohibition...is abuse of discretion..." *State ex rel. Public Service Com'n v. Joyce*, 258 S.W.3d 58, 61 (Mo. banc 2008)(citing, *State ex rel. City of Jennings v. Riley*, 236 S.W.3d 630, 631 (Mo. banc 2007)).¹

C. The Wendt/Lamb Agreement Regarding Arbitration Is The Only Written Agreement To Arbitrate.

Throughout these proceedings, Relator has attempted to confuse this Court by referring to the "individual consents" specified in the Wendt/Lamb Agreement as separate written agreements to arbitrate. App. at A72, A75. Such, of course, is not the case as is revealed by the unambiguous language of the Wendt/Lamb Agreement. App. at A72 ("The parties hereby agree to obtain written consent from their clients...in the

¹ This issue is fully addressed in Respondent's Point II below.

form attached hereto as Exhibit B”). The written consents are a term of the Wendt/Lamb Agreement and nothing more. They are not the agreement to arbitrate. The right and obligation to arbitrate came into existence when the Wendt/Lamb Agreement was executed. App. at A72-A73. The sole reason for the inclusion of the individual consents in the Wendt/Lamb Agreement was Relator’s unfounded fear that an individual might later claim his attorney had acted without his knowledge. The individual consents are exactly what the Wendt/Lamb Agreement defines them to be – written consents. Again, they are not the agreement to arbitrate. It is obvious that in the absence of the individual consent language, the Wendt/Lamb Agreement is a written agreement, obligating Relator to arbitrate the claims of all Plaintiffs listed in the attachment to such contract.

D. The Written Consent Agreements of Gordon And Champlin.

Relator has filed a Motion to Strike the Arbitration and Settlement Agreements, of Gordon and Champlin (App. at A76-A80) on the ground that they were not before Respondent until after Respondent published his ruling. Relator’s Opening Brief at 40-42. In support, Relator cites *Anglim v. Missouri Pacific Railroad Co.*, 832 S.W.2d 298 (Mo. banc 1992). However, that case is clearly distinguishable. In *Anglim*, the court held only that trial evidence should not be considered by an appellate court in determining the propriety of a pre-trial *forum non conveniens* ruling. *Anglim*, 832 S.W.2d at 303. As is obvious, that is not the same situation presently before this Court.

Further, this Court should reject Relator’s request that this Court purge from the record the Arbitration and Settlement Agreements executed by Gordon and Champlin when they failed to seek relief before Respondent. If Relator believed that the Gordon

and Champlin individual consents should not be part of the record, what possible justification can they have for not filing their Motion to Strike in the same court where such consents were filed? The answer is that Relator has no justification for its actions.

The duplicitousness of Relator in this matter is transparent. They chose not to file their Motion to Strike below because the matter would have then been considered by Respondent and most certainly would be part of the record here. Additionally, Relator knew there was a high probability of losing on the merits in front of Respondent because of Respondent's ruling in the *Thielemier* case (*see*, App. at A81-A84), a ruling Relator opted not to contest via writ application.

The facts in *Thielemier* were identical to those in *Gordon* and *Champlin*. App. at A82-A83. It was a virtual certainty that Respondent would have judicially estopped Relator from contesting the lateness in the execution of the agreements by Gordon and Champlin as he did in *Thielemier*. Indeed in *Thielemier*, Respondent stated, "Defendant would have this Court condone a procedure whereby Defendant can selectively waive a contractual provision as to some of the listed plaintiffs, include them in arbitration, and then choose in a later proceeding to enforce the provision as to Plaintiff Thielemier. This Court finds that Defendant is judicially estopped from relying on contract language concerning the execution of an individual 'Arbitration and Settlement Agreement' by Plaintiff Thielemier."² App. at A82.

The inescapable conclusion is that Relator is once again trying to game the system. Certain of the outcome below, they chose not to act and now want this Court to approve

² See entire Opinion.

their conduct. This Court should not allow itself to place its stamp of approval on conduct such as this. At a minimum, this Court should remand the Motion to Strike to the Circuit Court where it properly belongs.

Lastly, Relator calls into question the legitimacy of the Gordon and Champlin Arbitration and Settlement Agreements. Strange indeed. With over one hundred (100) other plaintiffs, Relator never questioned the authenticity of the agreements. Why now? To the extent Relator is attempting to question the legitimacy of the Gordon and Champlin Agreements, both Plaintiffs would welcome such an inquiry by the trial court, which is the proper forum to make such a factual determination.

II.

Relator Is Not Entitled To An Order Prohibiting Respondent From Compelling Arbitration Of The *Gordon And Champlin* Cases Because Respondent Did Not Abuse His Discretion In That He Was Presented Sufficient Evidence Supporting An Oral Modification Of The “Agreement Regarding Arbitration” To Include Gordon And Champlin In Arbitration.

A. The Evidence Presented To Respondent Supports His Finding That There Was An Oral Modification To The Wendt/Lamb Agreement That Included Gordon And Champlin In Arbitration.

Predictably, Relator ignores the proper standard of review in its Point II concerning Respondent’s factual finding that the Wendt/Lamb Agreement was orally modified. However, Missouri case law is clear – Relator’s writ challenging Respondent’s Order is reviewable only for an abuse of discretion. *State ex rel. Public Service Com’n v. Joyce*, 258 S.W.3d 58, 61 (Mo. banc 2008)(citing, *State ex rel. City of Jennings v. Riley*, 236 S.W.3d 630, 631 (Mo. banc 2007)). Further, “[w]hen reviewing for an ‘abuse of discretion,’ we presume the trial court’s finding is correct and reverse only when the ruling is ‘clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable to shock the sense of justice and indicate a lack of careful consideration; if reasonable persons can differ about the propriety of the action taken by the trial court, the it cannot be said that the trial abused its discretion.” *Birkenmeier v. Keller Biomedical, LLC*, 312 S.W.3d 380, 386 (Mo.App. E.D. 2010)(citing, *Williams v. Trans States Airlines*, 281 S.W.3d 854, 872 (Mo.App. E.D. 2009)).

The evidence before Respondent on the issue of oral modification were the affidavits of Robert H. Wendt, Esq., and Richard E. Brown, Relator's claim agent. App. at A29. Indeed, Respondent specifically noted, "At the evidentiary hearing requested by Defendant, the only evidence offered by Defendant was the affidavit of Richard E. Brown, claim agent. Nowhere in the affidavit does Mr. Brown deny the existence of the oral agreement alleged by Plaintiff. Thus, based on the only evidence before this Court, the Court hereby finds that there was an oral agreement to include Plaintiffs Gordon and Champlin in one of the later arbitrations." App. at A29. It simply cannot in candor be maintained that when Relator failed to even deny the existence of the oral agreement at the evidentiary hearing, Respondent's finding was "...clearly against the logic of the circumstances then before [him] and [was] so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration..." *Birkenmeier*, 312 S.W.3d at 386.

B. Relator's Lack Of Authority Argument Is Inappropriately Argued For The First Time In This Court.

In its Opening Brief in this writ proceeding, Relator argues for the first time that its attorneys lacked the authority to orally modify the Wendt/Lamb Agreement. Relator's Opening Brief at 33. Relator did not advance this proposition in its Opposition to Plaintiff's Motion to Compel Arbitration. App. at A1-A11. Relator did not take this position in its request for an evidentiary hearing. App. at A96-A98. Lastly, and probably most telling, Relator failed to make such argument during the evidentiary hearing granted by Respondent. App. at A85-A90. At no time during oral argument before Respondent

did Relator's attorneys claim that they lacked the authority to orally modify the contract. App. at A85-A90. Making that argument here is obviously an afterthought. It is inconceivable that Relator maintains this Court should not consider the Gordon and Champlin individual consents because they were not before Respondent prior to his ruling, then does a double summersault and requests this Court do the exact opposite regarding its attorneys alleged lack of authority.

C. Relator Admitted To Respondent That The Wendt/Lamb Agreement Is A Written Agreement To Arbitrate.

The transcript of the evidentiary hearing before Respondent is telling for an additional reason. During the hearing, one of Relator's attorneys admitted that the Wendt/Lamb Agreement is a valid written agreement to arbitrate within the meaning of § 435.350 RSMo. Referring to the Wendt/Lamb Agreement, Relator's attorney conceded to Respondent, "Beyond that, a different point is, yes, *there was a written agreement to arbitrate*..." App. at A89 (emphasis added). This admission conclusively establishes the point made earlier in this Brief that the sole issue in this writ proceeding, despite Relator's best efforts to confuse and complicate, is whether the exhibit of individual names attached to the Wendt/Lamb Agreement could be and was orally modified. Again, as detailed above, the answer is clearly in the affirmative.

CONCLUSION

The arguments set forth and detailed above provide more than sufficient proof to this Court that Respondent did not abuse his discretion in finding that the Wendt/Lamb Agreement is the written agreement to arbitrate. Indeed, Relator's attorney admitted the same in the presence of Respondent. This Court should be convinced that there is a written contract to arbitrate within the meaning of § 435.350 RSMo.

Furthermore, Respondent did not abuse his discretion in concluding that the Wendt/Lamb Agreement was orally modified to include Plaintiffs Gordon and Champlin. The evidence presented to Respondent during the evidentiary hearing supports his finding that an oral modification existed to include Gordon and Champlin in arbitration. In fact, the only evidence contradicting oral modification was the affidavit of Richard Brown, Relator's claim agent, which failed to deny such oral modification. Undoubtedly, the evidence provided to Respondent supports only one conclusion – the Wendt/Lamb Agreement was orally modified to include Gordon and Champlin in arbitration.

Relator has failed to meet its burden showing this Court that Respondent abused his discretion in deciding that a written arbitration agreement existed and that it was subsequently orally modified to include Plaintiffs Gordon and Champlin. This Court should thus deny all requested relief in Relator's Writ of Prohibition and Mandamus.

Respectfully submitted,

Robert H. Wendt (#19862)
1010 Market Street, Suite 1440
St. Louis, Missouri 63101
Telephone: 314-621-1775
Facsimile: 314-621-4688
rwendt@wendtlawfirm.com

AND

Ronnie White, #31147
James Holloran, #20662
Holloran, White, Schwartz & Gaertner, LLP
2000 S. 8th Street
St. Louis, Missouri 63104
Telephone: 314-772-8989
Facsimile: 314-772-8990
rwhite@holloranlaw.com
jholloran@holloranlaw.com
Attorneys for Respondent

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that Respondent's Brief contains the information required by Rule 55.03, that it complies with the limitations in Rule 84.06(b), and it contains 3,581 words, excluding the parts of the Brief exempted by Rule 84.06, that it has been prepared in proportionally spaced typeface using Microsoft Word 2003 in 13-point Times New Roman font and that it includes a virus free CD-ROM in Microsoft Word 2003.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of Respondent's Brief was mailed, first class mail, postage prepaid, on this 28th day of October, 2010, to:

Nicholas J. Lamb
Booker T. Shaw
James W. Erwin
David A. Stratmann
THOMPSON COBURN, LLP
One US Bank Plaza
St. Louis, Missouri 63101

Honorable Michael P. David
Circuit Judge, Division 6
Circuit Court of the City of St. Louis
10 N. Tucker Boulevard
St. Louis, Missouri 63101

Attorneys for Relator