

IN THE SUPREME COURT OF MISSOURI

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No. SC91066

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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

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On A Petition For A Writ of Prohibition And Mandamus

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RELATOR'S REPLY BRIEF

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## ARGUMENT

### I.

**Relator Is Entitled To An Order Prohibiting Respondent From Compelling Arbitration Of The *Gordon And Champlin* Cases Because There Is No Written Arbitration Agreement As Required By § 435.350 RSMo In That Respondent Found There Existed Only An Oral Agreement To Modify An Existing Written Agreement Between Relator And Other Persons; The Requirement Of A Written Agreement Is A Matter Of Substantive Law, Not Evidence; And Oral Agreements To Arbitrate Are Unenforceable And Revocable At Will.**

### A.

#### Introduction

Respondent's Brief mischaracterizes the record, makes unwarranted and unsupported accusations of falsehoods by Relator's counsel, and ultimately fails to address the substance of Relator's arguments — let alone refute them. Respondent offers nothing to justify compelling arbitration based on a so-called oral agreement to arbitrate because the law is clear: to be enforceable under § 435.350 RSMo an arbitration agreement must be in writing.

Only a written agreement — not an oral agreement or an oral modification of a written agreement, “is valid, enforceable and irrevocable.” §435.350 RSMo. Only “an agreement described in section 435.350 providing for arbitration in this state confers jurisdiction on the court to enforce the agreement.” § 435.430 RSMo. Lacking a written

agreement, Respondent had no authority to compel Union Pacific to arbitrate with Gordon or Champlin.

**B.**

**Plaintiffs Sought, And Respondent Ordered, The Gordon And Champlin Cases To Be Arbitrated With The Ellison Group**

Respondent's first argument appears to be — rather remarkably — that plaintiffs never sought to have the *Gordon* and *Champlin* cases arbitrated with the *Ellison* group of cases. Resp. Br. at 6-7. Plaintiffs fume at the suggestion, even though their own pleadings filed in the circuit court sought and received that relief. Indeed, plaintiffs' claim that they never sought such a result does not withstand even the most cursory review of the record.

While this issue is remote from the substantive matter before the Court, the record establishes Plaintiffs *did* seek to consolidate *Gordon* and *Champlin* with the *Ellison* group of cases by a motion to consolidate filed on November 24, 2009. Ex. 9 at 61 (“wherefore” clause). Plaintiffs' motion to compel arbitration alleged that there was an agreement to include the *Gordon* and *Champlin* cases in either the *Steele* or *Ellison* group. By the time the motion was filed — December 17, 2009 — the only remaining group was the *Ellison* group. And plaintiffs alleged that they asked Union Pacific to agree to arbitrate the two cases along with the *Ellison* group. Ex. 11 at 111. When Judge Dowd granted the motion to consolidate *Gordon* and *Champlin* before Respondent, he also stayed the arbitration of the *Ellison* group previously scheduled to begin the following week. Ex. 17 at 154.

Respondent subsequently granted the motion to compel arbitration of the *Gordon* and *Champlin* cases, and ordered them to be arbitrated with the *Ellison* group. Resp. App. at A29-A30. Respondent subsequently revoked Judge Neill's orders in the *Ellison* arbitration, and removed the three-person panel that had begun its work. Ex. 20 at 178-180. The order was in response to plaintiffs' motion seeking exactly that relief. Ex. 19 at 158-161. Respondent appointed Judge Van Amburg in lieu of the three-person panel, and she was prepared to arbitrate all of the remaining cases, including *Gordon* and *Champlin*. Exs. 23- 24, At 190-191.

If any rational reading of this record does not demonstrate that plaintiffs did indeed seek to have *Gordon* and *Champlin* arbitrated with the *Ellison* group — and that such a request was made to, and ordered by, Respondent — then one wonders what it does show. Certainly, nothing justifies the charge of falsifying the record leveled by plaintiffs. In light of plaintiffs' own pleadings, one is hard pressed to find any basis for plaintiffs' *faux* outrage at the suggestion that they sought the very result they achieved.

In any event, plaintiffs did seek to have the *Gordon* and *Champlin* cases arbitrated with the *Ellison* group, and Respondent granted plaintiffs the relief they sought on the grounds that the parties reached an oral modification of a written arbitration agreement. That is why we are here.

## C.

### **Union Pacific Never “Admitted” That There Was A Written Arbitration Agreement Between It And Gordon Or Champlin**

Plaintiff’s first substantive argument is based on a false premise: that Union Pacific’s counsel (supposedly contrary to the position taken here) admitted that there was a written arbitration agreement with Gordon and Champlin. Again, when one reads the *entire* sentence (not just plaintiffs’ selective quote), it is apparent who is playing fast and loose with the record.

Union Pacific’s counsel denied that there was ever any written agreement to arbitrate between Union Pacific and Gordon and Champlin, asserted that the statute and case law held that only written agreements to arbitrate were enforceable, and argued that cases allowing oral modifications of other contracts were not applicable. Ex. 13 at 137. He then said:

Beyond that, a different point is, yes, there was a written agreement to arbitrate, *but it was not a written agreement to arbitrate with these two guys, Champlin and Gordon.* You can’t take a contract that applies to different people and say that you orally modified it to apply to persons who are a party to the original contract, so therefore that’s a permissible modification.

Ex. 13 at 137 (emphasis added).

Plaintiffs claim that the individual arbitration agreement (Exhibit B to the general arbitration agreement, *see, e.g.*, Ex. 16 at 152) is a “written consent” to arbitration, but not an arbitration agreement itself. Resp. Br. at 14. This is also incorrect.

*First*, a “written consent” to arbitration is, by definition, an agreement to arbitrate.

*Second*, the language of both agreements belies the claim that only the general arbitration agreement is a written agreement to arbitrate. The individual arbitration agreement is titled “ARBITRATION AND SETTLEMENT AGREEMENT.” Ex. 16 at 152. The individual agreement provides that each lawsuit filed by each plaintiff “will be decided by binding arbitration instead of a jury trial.” Ex. 16 at 152.

*Third*, while the general arbitration agreement and the individual arbitration agreement *might* each be, standing alone, sufficient to evidence a written agreement contemplated by § 435.350, neither was effective unless the individual agreement was signed by both parties. Ex. 16 at 149. Thus, signing one without the other meant there was no agreement to arbitrate.

*Fourth*, plaintiffs’ claim that the basis for compelling arbitration of these two cases was “identical” to the circumstances in which Respondent compelled arbitration of the *Thielemier* case is, once again, refuted by the record. *Thielemier* was part of the *Steele* group of cases. The parties specifically named *Thielemier* in Exhibit A to the general arbitration agreement as a plaintiff whose case was to be arbitrated. *See* Ex. 16 at 152 (under the *Steele* group).

Neither Gordon nor Champlin were named in Exhibit A — not because plaintiff’s counsel “forgot” about them or “overlooked” them — but because Respondent severed

their cases from the group *before* the arbitration was ever proposed or agreed upon. *See* Ex. 10 at 101. Thielemier sought to pursue other claims in addition to his alleged carpal tunnel injuries, and didn't sign the individual arbitration agreement. Tr. at 13-14, Ex. 13 at 137. Two years later he changed his mind, and signed the agreement. Union Pacific contended that he waived his right to arbitrate by not signing on to the arbitration initially, but Respondent overruled its objection. Whether Respondent's ruling was correct was not raised in this writ proceeding. It isn't relevant here because the circumstances are different.

*Fifth*, plaintiff quotes Respondent's statement of the parol evidence rule and the string citations accompanying it, but provides no analysis defending that position. As pointed out in Union Pacific's opening brief, Relator's Br. at 23-29, there are substantially different historical and policy reasons for the statutory requirement of a written agreement to arbitrate that do not apply to the parol evidence rule. For example, an oral agreement to arbitrate is revocable at will. Moreover, when a party agrees to arbitration it gives up its constitutional right to a jury trial, it may give up other important litigation rights (such as discovery), and the scope of appeals from arbitration awards is more limited than the scope of an appeal from a jury trial.

The requirement of a written agreement is a substantive provision comparable to the Court's Rule 17, not a rule of evidence. As noted in Relator's Opening Brief at 24-26 (and not even discussed, let alone distinguished by Respondent), Rule 17 requires a written settlement agreement be signed at the conclusion of a successful mediation for the same underlying policy reasons that the legislature required arbitration agreements to be

in writing to be enforceable. *See Williams v. Kansas City Title Loan Co., Inc.*, 314 S.W.3d 868, 873 (W.D. Mo. 2010).

If the Court were to allow the waiver of substantial constitutional and litigation rights solely on the basis of the uncorroborated affidavit of a party's attorney who "remembers" months later that he reached some agreement with somebody at some time (by his own admission he can't remember who, where, or when, Tr. at 5(1/4/10), Resp. App. at A87), future claims of oral agreements to arbitrate are certain to arise and would be subject to obvious abuse.

The statutory requirement that arbitration agreements must be in writing to be enforceable forestalls any such abuse or potential litigation over conflicting versions of whether an "oral" agreement was reached or what its terms might be. An oral agreement to arbitrate — whether styled as a stand-alone agreement or as an oral "modification" of an existing written agreement — is still an oral agreement, and it is still unenforceable. This is the substantive law and public policy of Missouri as expressed by the legislature in § 435.350. An oral agreement to arbitrate, even one called a "modification," does not fall within the terms of the statute.

**D.**

**The Exhibits Attached To Respondent's Answer Should Not Be Considered By The Court Because They Were Never Before Respondent When He Made The Challenged Ruling, And Because They Are Not Properly Authenticated**

Plaintiffs claim that Union Pacific was "duplicitous" in filing its motion to strike the exhibits attached to Respondent's answer in this Court, rather than before Respondent.

Plaintiffs contend that Respondent would surely rule that the agreements could be admitted, Resp. Br. at 15, apparently without having them properly authenticated.

But Union Pacific's motion was properly filed in this Court because Respondent had no authority to rule on anything related to the alleged arbitration agreements with Gordon and Champlin after this Court issued its preliminary writ. That writ precluded Respondent from taking any further action on those claims pending the outcome of this proceeding. That is why the motion was filed with this Court.

And, the genuineness of the documents is irrelevant to anything now pending before Respondent. Respondent ruled on the motion to compel arbitration months ago. When plaintiffs belatedly filed the documents in the Circuit Court, long after Respondent's ruling, they did not ask Respondent to do anything with them. They filed no motion to accompany the documents seeking any sort of relief. The filing appears to be merely an attempt to create a record they failed to create when the issue was before Respondent.

Apart from that reason to strike these exhibits, as noted in Relator's Opening Brief at 40, the authenticity of the documents is not established by the affidavit. The affidavit of plaintiffs' counsel accompanying the purported individual arbitration agreements neither identifies the signatures on the documents, nor establishes any basis for the affiant being able to do so. The affiant did not himself find the documents. Therefore, his testimony as to the circumstances of the discovery is hearsay. The claim that the documents were supposedly signed in July 2008 is only on "information and belief" — not personal knowledge. On this record, the documents are inadmissible.

Moreover, plaintiffs did not produce an affidavit from Nagel Champlin, who supposedly signed one of the documents. (Gordon died in July 2010.) If counsel can't even get his own client to identify the document, or to testify as to the circumstances of its execution, its bona fides are certainly subject to question.

Apart from the circumstances under which these documents came to light, the purported existence of individual arbitration agreements signed by only the plaintiffs does not alter the legal analysis. To the extent these documents are supposed to "prove" there was a written agreement to arbitrate, they are completely inconsistent with the affiant's prior affidavit claiming that the agreements were oral, with plaintiffs' theory of an oral agreement to arbitrate, and with Respondent's own finding of an alleged oral agreement.

Finally, there is no claim that the documents were ever submitted to Union Pacific to sign or that Union Pacific ever signed them — a requirement of the arbitration agreements. Indeed, even plaintiffs' counsel supposedly did not know of their existence until August 23, 2010. Union Pacific clearly did not sign these documents — thus confirming the testimony in Brown's affidavit that no agreement to arbitrate was ever reached with Gordon or Champlin. In sum, these documents are neither properly before this Court nor relevant to the outcome of the case.

## II.

**Relator Is Entitled To An Order Prohibiting Respondent From Compelling Arbitration Of The *Gordon And Champlin* Cases Because There Was Insufficient Evidence That An Oral Agreement Had Been Made Or That Relator's Attorneys Had Actual Authority To Enter Into Any Oral Agreement Or Modification Of The Written Arbitration Agreement In That The Brown Affidavit Said That Relator Did Not Authorize *Any* Agreement With Gordon And Champlin, Which Was A Denial Of The Existence Of An Oral Agreement, And Brown Testified That He Did Not Otherwise Authorize Anyone To Agree To Arbitrate Their Claims**

### A. Introduction

Plaintiffs claim that the question of whether there was sufficient evidence of the existence of an oral agreement to arbitrate is reviewed for an abuse of discretion. Resp. Br. at 17. That is not so. The proper standard is whether there was substantial evidence of an agreement to arbitrate, and whether that finding was against the weight of the evidence. *See Abrams v. Four Seasons Lakesites/Chase Resorts, Inc.*, 925 S.W.2d 932, 936 (Mo. App., S.D. 1996). In any event, under either standard Respondent's finding was unsupported by the evidence.

**B.**

**Respondent Failed To Take Into Account Brown's Testimony That No One Was Authorized To Enter Into Any Agreement To Arbitrate With Gordon Or Champlin, Which Was Broad Enough To Deny The Existence Of An Oral Agreement To Arbitrate And Which Necessarily Raised The Issue Of Counsel's Authority To Enter Into Such An Agreement**

According to plaintiffs, the critical fact that supports the finding of an oral arbitration agreement is the alleged failure of Brown's affidavit to mention the word "oral" when he denied that he authorized the arbitration of Gordon and Champlin's claims, and further denied that anyone at Union Pacific signed or "otherwise authorized the arbitration of the claims of plaintiffs James Gordon and Nagel Champlin." Ex. 16 at 146.

Respondent's finding was not based upon a rejection of Brown's affidavit or a finding that the uncorroborated affidavit of plaintiffs' counsel recounting his *post hoc* recollections was more credible. Rather, it was simply based on the absence of the word "oral" in Brown's affidavit. But, Brown's actual words deny the existence of *any* arbitration agreement in *any* form.

The question of the attorneys' authority was necessarily raised by the same sentence in Brown's affidavit stating that no one at Union Pacific authorized any arbitration with Gordon or Champlin. In the context of plaintiffs' claims of an oral agreement with some unidentified attorney for the company, Brown's reference included either Mr. Lamb or

Mr. Stratmann (plaintiff's counsel could not remember who supposedly made the oral agreement). *See* Tr. at 5 (1/4/10), Resp. App. at A87.

When Respondent rejected Brown's claim of a lack of authority by finding that an oral agreement to arbitrate was reached between the attorneys, he necessarily had to have found that Relator's attorneys had such authority, even though their own client denied it, and the attorneys never claimed that they had such authority. Significantly, plaintiffs do not dispute that Union Pacific's attorneys lacked the authority to enter into an oral agreement to arbitrate with persons who were not named in the list of cases attached to the general arbitration agreement.

Finally, Respondent renews his claim that Union Pacific's attorneys "admitted" at the hearing on the motion to compel arbitration that there was a valid, written agreement to arbitrate between Relator and Gordon and Champlin. Resp. Br. at 19. But repetition is not argument, particularly when it relies upon a misreading of the record. As noted earlier, Union Pacific's attorneys specifically denied that there was any written agreement to arbitrate with Gordon and Champlin, and further denied that any so-called oral "modification" could lawfully add them to the general written arbitration agreement from which they had been excluded. Tr. at 11-14 (1/4/10), Ex. 13 at 137.

## CONCLUSION

Section 435.350 provides that only written arbitration agreements are valid, enforceable, and irrevocable. Even assuming Gordon and Champlin had an oral agreement to arbitrate, there is no written arbitration agreement that applies to them. Nothing in the statute allows them to compel arbitration based on someone else's written agreement. Because Respondent lacked the authority to compel arbitration, this Court should enter a writ of prohibition on this issue.

Respondent's order directing that Union Pacific arbitrate the claims of two plaintiffs with whom it never signed a written arbitration agreement is directly contrary to the statute, which limits a court's authority to compelling arbitration of written agreements — and only written agreements. The public policy embodied within the statute supports making the writ permanent to discourage costly and time-consuming litigation over future claims of alleged oral agreements to arbitrate.

For these reasons, Relator Union Pacific Railroad requests that the Court make its preliminary writ of prohibition permanent, direct that Respondent take no further action to require arbitration of the claims of plaintiffs Champlin and Gordon because those two plaintiffs do not have any written arbitration agreement, and grant such other and further relief as the Court deems proper in the circumstances.

Respectfully submitted,

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## **CERTIFICATE OF COMPLIANCE**

The undersigned hereby certifies that this brief contains the information required by Rule 55.03, that it complies with the limitations in Rule 84.06(b), and it contains 3,026 words, excluding the parts of the brief exempted by Rule 84.06, that it has been prepared in proportionally spaced typeface using Microsoft Word 2007 in 13 point Times New Roman font; and that it includes a virus free CD-ROM in Microsoft Word 2007 format.

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## **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that two copies of Relator's Reply Brief and a virus-free CD-ROM were mailed, first class mail postage prepaid, this 5<sup>th</sup> day of November, 2010 to:

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