

**BEFORE THE POLLUTION CONTROL BOARD  
OF THE STATE OF ILLINOIS**

PEOPLE OF THE STATE OF ILLINOIS	)	
<i>ex rel.</i> LISA MADIGAN, Attorney General	)	
of the State of Illinois	)	
	)	PCB 2008-007
Complainant,	)	
	)	
vs.	)	<b><i>VIA ELECTRONIC FILING</i></b>
	)	
UNION PACIFIC RAILROAD COMPANY,	)	
a Delaware corporation,	)	
	)	
Respondent.	)	

**NOTICE OF FILING**

John Therriault  
Illinois Pollution Control Board  
James R. Thompson Center  
100 West Randolph Street  
Suite 11-500  
Chicago, IL 60601

Zemeheret Bereket-Ab  
Assistant Attorney General  
Environmental Bureau North  
69 West Washington Street, Suite 1800  
Chicago, IL 60602

Bradley P. Halloran  
Hearing Officer  
James R. Thompson Center  
100 West Randolph Street  
Suite 11-500  
Chicago, IL 60601

W. Lee Hammond  
Union Pacific Railroad Company  
1400 Douglas Street  
Stop 1080  
Omaha, NE 68179

Please take notice that today, May 1, 2009, I have filed with the Office of the Clerk of the Illinois Pollution Control Board by electronic filing a Reply in Support of Union Pacific Railroad Company's Motion to Sever, along with Notice of Filing and Certificate of Service, a copy of which is attached hereto and served upon you.

Respectfully submitted,

SONNENSCHN NATH & ROSENTHAL LLP

Thomas A. Andreoli  
SONNENSCHN NATH & ROSENTHAL LLP  
233 South Wacker Drive  
Chicago, Illinois 60606  
312.876.8000  
tandreoli@sonnenschein.com

By: /s/ Thomas A. Andreoli  
Attorneys for Respondent  
Union Pacific Railroad Company

**BEFORE THE POLLUTION CONTROL BOARD  
OF THE STATE OF ILLINOIS**

PEOPLE OF THE STATE OF ILLINOIS	)	
<i>ex rel.</i> LISA MADIGAN, Attorney General	)	
of the State of Illinois	)	
	)	PCB 2008-007
Complainant,	)	
	)	
vs.	)	<b><i>VIA ELECTRONIC FILING</i></b>
	)	
UNION PACIFIC RAILROAD COMPANY,	)	
a Delaware corporation,	)	
	)	
Respondent.	)	

**REPLY IN SUPPORT  
OF UNION PACIFIC RAILROAD COMPANY'S  
MOTION TO SEVER**

Union Pacific Railroad Company ("Union Pacific") has moved the Illinois Pollution Control Board (the "Board") to sever this action, pursuant to 35 Ill. Adm. Code §§ 101.406 and 101.408 and 735 ILCS 5/2-1006, and in support of its Reply to the Response of the Attorney General of the State of Illinois (the "State") states as follows:

**Introduction**

Union Pacific moved the Board to sever this action and direct the State to re-file separate actions, because the Complaint improperly consolidates claims arising from two separate and unrelated alleged releases. These alleged releases took place at ***different times***: November 2005 and February 2006. They also took place on ***separate properties***: Union Pacific's Proviso Yard ("Proviso Yard") at 5050 W. Lake Street in Melrose Park, Illinois, and its Global II intermodal facility ("Global II") at 301 W. Lake Street in Northlake, Illinois. The cause of the alleged release in each instance bears ***no connection*** to the other. The resulting claims involve different

theories of liability, witnesses and potential evidence. Trying these two unrelated sets of facts in the same action would result in material prejudice to Union Pacific.

The courts have recognized that the prejudice inherent in requiring a party to try two unrelated claims in the same case is reversible error. *See Mount v. Dusing*, 414 Ill. 361, 367-68 (1953) (reversed and remanded for severance); *Rogola v. Silva*, 16 Ill. App. 3d 63, 64-65, 68 (1st Dist. 1973) (affirming severance of action). The State's response cites no contrary authority. Indeed, the State acknowledges that "an action involving materially different issues may be severed by the court." (Resp. 2 (quoting *Dusing*, 414 Ill. at 367-68)).

The State's response also provides three independent grounds for granting Union Pacific's motion:

- **First**, the State late-filed its response in violation of the Hearing Officer's March 23, 2009 Order, without requesting or receiving leave from the Hearing Officer or the Board. The State has waived any objection to the motion.
- **Second**, Union Pacific verified its motion. The State did not verify its response, although the response purports to contradict the verified facts Union Pacific presented. The Board cannot consider the unverified and inaccurate statements contained in the State's response. 35 Ill. Adm. Code § 101.504.
- **Third**, the Board should not credit the State's attempted rewrite of its Complaint, via its response, in an effort to avoid severance. The Complaint does not allege any "pattern of violations" by Union Pacific, which is a red herring argument. (Resp. 3). The Complaint does not allege any causal connection between the November 2005 or February 2006 releases. Indeed, the alleged releases have no connection whatsoever other than the State's ultimate claim that each release separately resulted in violations of the Illinois Environmental Protection Act (the "Act") or the Board's regulations.

As a matter of law, the State must prove each and every alleged violation of the Act and the Board's regulations on its own terms and cannot subject Union Pacific to liability by innuendo. Requiring Union Pacific to defend these unrelated claims in a single action would be in error, because a finding of liability as to either one of the alleged releases would create an impermissible negative inference as to Union Pacific's liability related to the other. Union

Pacific believes that, once the evidence has been heard, neither alleged release will support a finding of liability. Contrary to much of the argument in the State's response, however, that question is *not* before the Board on Union Pacific's motion. The motion merely seeks to avoid the unfairness and material prejudice created by the Complaint's improper consolidation of claims. Severance is not only the proper remedy, it also will avoid confusion of the record, serve to narrow disputed issues and facilitate settlement, and assist in the convenient, expeditious and complete determination of the issues.

### **Argument**

#### **A. The State Has Waived Any Objection To Severance**

Pursuant to the Hearing Officer's Order, dated March 23, 2009, Union Pacific timely filed its Motion to Sever on April 3, 2009. The Hearing Officer's Order required the State to respond on or before April 20, 2009. The State, without leave, late-filed its response on April 22, 2009, after the date set by the Hearing Officer (and after the date that otherwise would have applied under the Rules). The Board's General Rules provide that a party may request more time to respond to a motion by filing a motion for extension of time. 35 Ill. Adm. Code § 101.500(d). The Rules also provide that "[i]f no response is filed, the party will be deemed to have waived objection to the granting of the motion." *Id.* Because the State did not file a motion for extension of time, and did not file a response to Union Pacific's motion on or before April 20, 2009, the Board should find that the State has waived objection to severance of its actions.

#### **B. The State's Unverified And Inaccurate Fact Assertions Cannot Be Considered**

Union Pacific verified its motion in accordance with Section 101.504 of the Board's General Rules. 35 Ill. Adm. Code § 101.504 ("Facts asserted that are not of record in the proceeding must be supported by oath, affidavit, or certification in accordance with Section 1-109 of the Code of Civil Procedure [735 ILCS 5/1-109]."). Union Pacific asserted specific facts

in support of severance in its Motion. (Mot. & Mem. of Law, ¶¶ 1-9). Among them, Union Pacific asserted that the November 2005 and February 2006 releases took place on different properties. The two properties are separately fenced and located in and accessed through different street addresses in different municipalities. Union Pacific further stated that the two properties serve entirely separate purposes and are staffed with different personnel. The Proviso Yard is staffed with Union Pacific employees; the Global II facility is staffed with outside contractors.

In its unverified response, the State repeatedly and inaccurately contradicts Union Pacific's verified motion and asserts that the Proviso Yard and Global II are the same thing. ***They are not.*** As variously formulated by the State, the two separate properties are "the same facility," are "located on the same parcel of land, just in different locations on the parcel," and are "the same property owned by the same party." (Resp. 1-3). The State also asserts that "they have different street addresses based upon their proximity to specific streets bordering the entire facility, but they are located on the same parcel of land." (*Id.* at 2). These unverified and inaccurate statements are improper under the Rules, and the Board, pursuant to 35 Ill. Adm. Code § 101.504, cannot credit them in opposition to Union Pacific's motion.

At a practical level, these statements reflect a basic misunderstanding of the nature and operation of Global II and the Proviso Yard. They are not the same nor does Union Pacific ***or*** the State treat them that way. As documented in the Union Pacific letter attached to the State's response (Resp. Ex. A), the Proviso Yard and Global II each have its own Stormwater Pollution Prevention Plan (SWPPP) and Spill Prevention, Control and Countermeasure (SPCC) plan. While both Global II and the Proviso Yard drained indirectly to a discharge point served by the same NPDES permit at the time of the alleged releases, so did other various unrelated

municipalities and industries, as the State's response also admits. (Resp. Ex. A.). Moreover, as shown in Union Pacific's motion, the State conducted its investigations of the alleged November 2005 and February 2006 events at all times under separate violation notices and classifications (W-2005-00535 and M-2006-02009).

**C. There Is No Pattern Of Violations Alleged**

The State also argues, without citation to any authority, that its claims should be consolidated because each of the alleged releases involved an "inadequate" oil water separator. The State argues that consolidation of its claims is appropriate so that the State may prove a "pattern of violations" by Union Pacific. This argument fails on three essential grounds. First, it has no basis in the Complaint, which does not purport to allege any "pattern" of violations. Rather, the Complaint simply consolidates claims arising from two separate alleged releases which, based on the face of the Complaint, have no causal connection whatsoever.

Second, the State argues that "[t]his case in no way differs from cases involving POTWs where there are a few months of BOD violations" equally fails. (*See* Resp. 3). The Complaint, however, does not alleged any continuous time period or causal nexus connecting the alleged November 2005 and February 2006 releases. The Complaint addresses each of the alleged releases as a distinct and separate event. The February 2006 release allegedly was caused by an actual operational release by a non-railroad third-party contractor at Global II. (Compl. ¶¶ 9, 12). The November 2005 allegedly resulted from a separate and distinct fuel oil release at the Proviso Yard's locomotive fueling pad. (Compl. ¶¶ 6-8). To analogize these unrelated releases, in the State's words, to "months of fecal coliform effluent violations caused by inadequate chlorination" by a publicly owned treatment works (Resp. 3) does not pass the straight-face test.

Third, as noted above, the State must prove each and every alleged violation of the Act and the Board's regulations on its own terms. This requirement is both a legal requirement and a

matter of basic fairness. The State cannot obtain a finding of liability by consolidating separate and unrelated claims in the hope that one or the other will stick—*i.e.*, “If Union Pacific isn’t liable for this, then it should be for that.” Such an approach is impermissible, because it renders a fair and objective determination on liability and damages impossible.

Finally, the State devotes a significant portion of its argument to whether, despite the Complaint’s distinct theories of liability, the State will be able to prove liability for either alleged release under the Act . (Resp. 4-5). This argument is irrelevant to the relief sought in Union Pacific’s motion, which does not go to the merits. What is on point, however, is the entirely different set of facts and circumstances presented in the Complaint in the instance of each alleged release, including importantly the existence of different causes, witnesses and potential evidence. Severance is not only the appropriate procedural remedy, it is essential to the convenient, expeditious and complete determination of the issues.

**Conclusion**

WHEREFORE, for these reasons and as support in its verified Motion to Sever and supporting Memorandum of Law, Union Pacific Railroad Company respectfully requests that the Illinois Pollution Control Board enter an order severing this action, directing the State to re-file separate actions and providing such other relief as the Board deems appropriate.

Dated: May 1, 2009

Respectfully submitted,

SONNENSCHN NATH & ROSENTHAL LLP

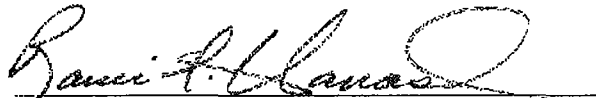
By: /s/ Thomas A. Andreoli  
Attorneys for Respondent  
Union Pacific Railroad Company

Thomas A. Andreoli  
Sonnenschein Nath & Rosenthal LLP  
233 South Wacker Drive  
Chicago, Illinois 60606  
312.876.8000  
tandreoli@sonnenschein.com



**VERIFICATION**

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

  
Rami S. Hanash

Regional Environmental Counsel  
Union Pacific

**CERTIFICATE OF SERVICE**

I, Thomas A. Andreoli, an attorney, hereby certify that I caused a copy of the Reply in Support of Union Pacific Railroad Company's Motion to Sever, along with Notice of Filing and Certificate of Service, to be served upon the service list on May 1, 2009, by regular mail.

/s/ Thomas A. Andreoli

Thomas A. Andreoli