

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

INDIAN CREEK DEVELOPMENT COMPANY,)
an Illinois Partnership, Individually as)
beneficiary under trust 3291 of the Chicago)
Title and Trust Company dated December 15,)
1981 and the Chicago Title and Trust Company,)
as trustee under trust 3291, dated December)
15, 1981)

Complainant,)

vs.)

The BURLINGTON NORTHERN SANTA FE)
RAILWAY COMPANY, a Delaware Corporation)

Respondents.)

PCB- 07-44
Citizen's Enforcement
§21(e), §12(a), §12(d)

NOTICE OF FILING AND PROOF OF SERVICE

TO: See Attached Service List

PLEASE TAKE NOTICE that on August 13, 2009, the attached document, **Complainant's Motion To Strike Burlington Northern and Santa Fe's Affirmative Defense**, was filed with the Clerk of the Pollution Control Board and is hereby served upon the person(s) referenced above by placing a copy of the same in the U.S. mail at 222 N. LaSalle Street, Chicago, Illinois on or before 4:00 p.m. on the 13th day of August, 2009, with proper postage affixed.

**Indian Creek Development Company and
Chicago Land Trust Company t/u/t 3291,
dated December 15, 1981**

By *Glenn C. Sechen*
One of Its Attorneys

Service List

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Complainant,

vs.

The BURLINGTON NORTHERN SANTA FE
RAILWAY COMPANY, a Delaware Corporation
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RAILWAY COMPANY, a Delaware Corporation,)	
)	
Respondent.)	

**COMPLAINANT'S MOTION TO STRIKE BURLINGTON
NORTHERN AND SANTA FE'S AFFIRMATIVE DEFENSE**

Complainant, Indian Creek Development Company, and the Chicago Title and Trust Company as trustee under trust 3291, dated December 15, 1981, (collectively "Indian Creek"), moves to strike the single affirmative defense pled by the Respondent, Burlington Northern and Santa Railway Company ("BNSF") filed. In support thereof, Indian Creek states as follows:

INTRODUCTION

This matter involves a release of diesel fuel on January 20, 1993 on the BNSF Property which is owned and operated by the BNSF. The Complaint alleges that property owned by Indian Creek ("Indian Creek Property") continues to receive soil and groundwater contamination flowing from the BNSF Property approaching seventeen (17) years after the release (Complaint, Paragraphs 11, 17, 24, 37). In 1996, prosecutors filed a civil enforcement action in Circuit Court, CH KA 95 0527 and obtained a consent decree against the BNSF which expressly precludes enforcement by third parties such as Indian Creek (the Consent Order is attached to the Complaint

as Exhibit A), Pages 2, 30 at Paragraph K). The Consent Order acknowledges that the BNSF has not fully remediated the diesel fuel contamination on the BNSF Property and requires the BNSF to identify potential pathways of migration of the diesel fuel, contaminated soil and groundwater along with the identification of potentially affected human and environmental receptors. (Consent Order (Complaint Exhibit A), Page 6 at Paragraphs 2(3) 5). In its Motion to Dismiss, claiming that this action is duplicative of the prior consent order, the BNSF stated:

Under the Consent Decree, BNSF, among other things, assumed full responsibility for the cleanup, paid a civil penalty and agreed to cease and desist from future violations of the Act. (Respondent's Memorandum in Support of its Motion to Dismiss ("Memo") at 5.)

Despite having "assumed full responsibility for the cleanup" the Indian Creek Property remains contaminated.

ARGUMENT

On June 18, 2009 the Board struck the BNSF's previously filed affirmative defenses. On July 20, 2009 the BNSF fled its Amended Answer including one affirmative defense, the statute of limitations. Paragraphs 6 through 8 of its affirmative defense state:

6. The Kane County lawsuit referenced by Indian Creek was dismissed with leave to reinstate, which order has been extended a number of times.
7. Currently, the Kane County lawsuit may be reinstated by Indian Creek prior to November 23,2009.
8. Indian Creek has not reinstated the Kane County lawsuit.

The pleading of affirmative defenses, Section 2-613(d) of the Code of Civil Procedure specifically provides that the facts constituting any affirmative defense must be plainly set forth in the defendants' answer. 735 ILCS 5/2-613(d); Richco Plastic Co., *supra*. The facts establishing an affirmative defense must be pled with the same degree of

specificity as required by a plaintiff to establish a cause of action. International Insurance Co. v. Sargent and Lundy, 242 Ill. App. 3d 614, 630, 609 N.E.2d 842, 853 (1st Dist. 1993), citing Kermeen v. City of Peoria, 65 Ill. App. 3d 969, 973, 382 N.E.2d 1374 (3rd Dist. 1978). The Board's procedural rules provide that "any facts constituting an affirmative defense must be plainly set forth before hearing in the answer or in a supplemental answer, unless the affirmative defense could not have been known before hearing." 35 Ill. Adm. Code 103.204(d). In a valid affirmative defense, the respondent alleges "new facts or arguments that, if true, will defeat . . . the government's claim even if all allegations in the complaint are true." Grand Pier Center LLC v. River East LLC, PCB No. 05-157, slip op. at 3 (January 5, 2006), citing People v. Community Landfill Co., PCB 97-193, slip op. at 3 (Aug. 6, 1998).

Illinois is a fact pleading jurisdiction, Knox College v. Celotex Corp., 88 Ill.2d 407, 430 N.E.2d 976 (1981); Richco Plastic Co. v. IMS Co., 288 Ill. App. 3d 782, 681 N.E.2d 56 (1st Dist. 1997). In order to set forth a good and sufficient claim or defense, a pleading must allege ultimate facts sufficient to satisfy each element of the cause of action or affirmative defense pled. *Id.*

The BNSF's Amended Answer pleads on nexus between the allegations paragraphs 6 through 8 and the statute of limitations. It is completely vague and wholly unclear what impact on the statute of limitations defense the facts alleged in paragraphs 6 through 8 is claimed to have. It is complete guesswork. These paragraphs do not set forth anything, except perhaps evidentiary facts. Perhaps these paragraphs are intended as some sort of premature response to Indian Creeks expected answer to the statute of limitations defense. Indian Creek will answer, among other things, that this case is a refiling of Kane County case number 04 L 607 filed on or about December 7,

2004. At most paragraphs 6 through 8 are evidentiary facts and not ultimate facts as are required to be pled. Either way, they are vague, unclear, improper surplusage and should be stricken. Board of Education of Kankakee School District v. Kankakee Federation of Teachers, 46 Ill.2d 439, 264 N.E.2d 18 (1970).

At this point in the pleading chain paragraphs 6 through 8 do not support the BNSF's statute of limitations defense. Their relevance is mere conjecture and should be stricken as surplusage for that reason as well. The striking of these paragraphs is not hyper technical application of the law of pleadings. The pleadings determine the scope of admissible evidence. Paragraphs 6 through 8 are a mere wild card. Striking such surplusage prevents future claims that the surplus language means something or constitutes some sort of defense or support for a defense that cannot presently be imagined by either party much less properly pled.

WHEREFORE, Complainant, Indian Creek, respectfully requests that the Pollution Control Board enter an order striking Respondent's affirmative defenses and grant Indian Creek such further and other relief as this Board deems just and proper.

Respectfully submitted,

Indian Creek Development Company

By Glenn C. Sechen

One of Its Attorneys

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