

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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AUG 31 2009

STATE OF 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 AND SANTA FE)
RAILWAY COMPANY, a Delaware Corporation,)

Respondent.)

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

ORIGINAL

NOTICE OF FILING

TO: Glenn C. Sechen, Of Counsel
Schain, Burney, Ross Citron, Ltd.
13909 Laque Drive
Cedar Lake, Indiana 46303

Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
100 West Randolph Street, Suite 11-500
Chicago, Illinois 60601

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board **Respondent's Opposition to Complainant's Motion to Strike Burlington Northern and Santa Fe's Affirmative Defense**, a copy of which is hereby served upon you.

DATE: August 31, 2009

BNSF RAILWAY COMPANY

By: 

One of Its Attorneys

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

INTRODUCTION

BNSF Railway Company's ("BNSF") original answer to Indian Creek Development Company's ("Indian Creek") complaint raised six affirmative defenses. Indian Creek objected to several of the affirmative defenses, including the statute of limitations defense, as being pled without adequate factual specificity. Indian Creek argued that BNSF's approach to pleading the affirmative defenses amounted to "gamesmanship" intended to keep Indian Creek "in the dark and increase the time as well as the expense of the proceedings." By alleging affirmative defenses that were "deliberately vague and unclear" Indian Creek argued, BNSF could shift the facts "to whatever suits BNSF at whatever point in time it ultimately chooses to state those

facts.” The Board gave leave to BNSF to replead its affirmative defenses with adequate specificity. BNSF has filed an amended answer and affirmative defense, all pled with adequate sufficiency, and again Indian Creek has moved to strike the affirmative defense, seemingly now arguing that BNSF’s affirmative defense is too specific (and bringing into question its claim about who is involved in gamesmanship and attempting to increase the time as well as the expense of the proceedings). Indian Creek’s motion is confusing at best. Overall, the motion appears to be focused solely on several allegations in the affirmative defense, as opposed to the sufficiency of the affirmative defense as a whole. However, the title of the motion and relief requested are directed to the entire affirmative defense, which Indian Creek itself acknowledges is sufficiently pled.

ARGUMENT

Respondent has pled ultimate facts sufficient to support its statute of limitations affirmative defense. A statute of limitations affirmative defense simply requires Respondent to allege that a lawsuit regarding a particular harm has not been filed within a prescribed period (5 years in the case of 735 ILCS 5/13-205). In the first five paragraphs of the affirmative defense, BNSF has alleged, with sufficient particularity, the time at which Indian Creek became aware of the contamination and the date upon which Indian Creek filed suit with the Board. Indian Creek has not challenged the sufficiency of these allegations, which, in and of themselves, allege ultimate facts sufficient to establish a statute of limitations affirmative defense. For this very reason, Indian Creek is not entitled to its requested relief of having BNSF’s affirmative defense struck in its entirety.

In paragraphs 6-8 of its affirmative defense, BNSF alleges ultimate facts that the Kane County lawsuit was dismissed with leave to reinstate, that the case may be reinstated until November 23, 2009, and that the Kane County lawsuit has not been reinstated. While these allegations may not typically be necessary for a statute of limitations affirmative defense, BNSF believes that they are ultimate facts as Indian Creek, itself, first raised the Kane County lawsuit in its Complaint and stated that the matter before the Board is a refiling of that matter. See Complaint ¶ 23.

To the extent that there is any uncertainty as to whether paragraphs 6-8 allege ultimate facts, the Board should consider the general pleading requirements. As Complainant has correctly pointed out, 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). What Complainant has failed to point out is that Illinois law requires “[p]leadings shall be liberally construed with a view to doing substantial justice between the parties.” 735 ILCS 5/2-603. Indian Creek first raised the issue of the Kane County lawsuit, and approving Indian Creek’s motion to strike would be manifestly unfair, effectively allowing Indian Creek to claim that the lawsuit has no importance or relevance other than that which best suits Indian Creek.

Furthermore, the statements in paragraphs 6-8 comply with the purpose of 735 5/2-603 by giving “notice to the court and to the parties of the claims being presented.” Smith v. Heissinger, 319 Ill. App. 3d 150, 154 (4th Dist. 2001). BNSF claims that the matter in Kane County was dismissed with leave to reinstate, that it currently can be reinstated by November 23, 2009, and that it has not been reinstated, all of which are ultimate facts intended to inform Indian Creek of BNSF’s argument as to why the statute of limitations has run. Any arguments by

Complainant that it does not understand the relevance of the Kane County lawsuit to the affirmative defense are specious, without merit, and reflect the very “gamesmanship” of which it has complained.

Finally, Indian Creek contends that the entire affirmative defense should be struck because of the alleged errors in paragraphs 6-8. Illinois case law does not support this contention. Instead, where the ultimate facts are properly alleged, an additional statement of evidentiary facts should merely be deemed surplusage and not defeat the entire claim. People v. Northbrook Sports Club, 53 Ill. App. 3d 331, 11 Ill. Dec. 112, 368 N.E.2d 663 (1st Dist. 1977). As previously discussed, BNSF has alleged ultimate facts in paragraphs 1-5 that establish the statute of limitations affirmative defense. Thus, while BNSF maintains that paragraphs 6-8 allege additional ultimate facts that address the Kane County litigation first raised by Indian Creek, if the Board determines that paragraphs 6-8 do not allege ultimate facts, at most, the Board can only strike those paragraphs and not the entire affirmative defense.

CONCLUSION

For the foregoing reasons, the Board should deny Complainant Indian Creek’s Motion to Strike. In the alternative, to the extent that the Board determines that any of the paragraphs 6-8 in the affirmative defense are not in conformance with the pleading requirements and the Board’s prior order, the Board should strike only those individual paragraphs that are not in conformance.

Respectfully submitted,

Burling Northern and Santa Fe

By: 

One of their attorneys

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CERTIFICATE OF SERVICE

I, the undersigned, certify that I have served **Respondent's Opposition to Complainant's Motion to Strike Burlington Northern and Santa Fe's Affirmative Defense** by depositing the same in the U.S. Mail box at 311 South Wacker Drive, Chicago, Illinois before 5:00 p.m. on August 31, 2009, postage prepaid and addressed to:

Glenn C. Sechen, Of Counsel
Schain, Burney, Ross Citron, Ltd.
13909 Laque Drive
Cedar Lake, Indiana 46303

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