

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

COUNTY OF PERRY

Complainant

vs.

Union Pacific Railroad Company

Respondent

AC 13 - 55

RECEIVED
CLERK'S OFFICE

JUL 30 2013

STATE OF ILLINOIS
Pollution Control Board



ORIGINAL

NOTICE OF FILING

To: See Attached Service List

PLEASE TAKE NOTICE that on July 30, 2013, I filed with the Clerk of the Pollution Control Board of the State of Illinois, the Petition for Review of UNION PACIFIC RAILROAD COMPANY, a copy of which is attached hereto and herewith served upon you.

By:

Caitlin M. Shields

Caitlin M. Shields
Attorney for Respondent,
Union Pacific Railroad Company
Rooney Rippie & Ratnaswamy LLP
350 West Hubbard Street, Suite 600
Chicago, Illinois 60654
(312) 447-2800

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UNION PACIFIC RAILROAD COMPANY'S VERIFIED PETITION FOR REVIEW

Union Pacific Railroad Company ("Union Pacific"), by and through its counsel, pursuant to 415 ILCS 5/31.1 and 35 Ill. Admin Code Sec. 108.204, respectfully submits this Petition for Review of the Amended Administrative Citation of County of Perry ("Perry County" or "Complainant"). In support thereof, Union Pacific states:

1. On or about June 17, 2013, Complainant filed the above-referenced Administrative Citation ("Citation") with the Illinois Pollution Control Board ("IPCB"), which was served on Union Pacific *via* statutory agent on June 25, 2013, as reflected in Union Pacific Exhibit ("Ex.") A.¹ The Citation is supported by an Affidavit and Field Inspection Report ("Report") from a field inspector with the Perry County Solid Waste Management Department. Complainant alleges that Union Pacific has "caused or allowed litter at the facility" in violation of Section 21(p)(1) of the Illinois Environmental Protection Act ("IEPA") and seeks to impose a civil penalty against Union Pacific in the amount of \$1,500.00.

2. In support of its claims, the Report indicates that the field inspector spent one

¹ According to Section 31.1(d)(1) of the IEPA and Section 108.24 of the Illinois Administrative Code, a petition to contest an administrative citation must be filed within 35 days after the date of service of the citation. Union Pacific was served with the administrative citation on June 25, 2013, therefore Union Pacific's Petition for Review is timely filed.

minute on a Union Pacific-owned site on May 15, 2013, during which time she noticed “open dumped railroad property,” which she characterizes as “railroad spikes and buckets.”

3. Complainant asserts that by virtue of these spikes and buckets, Union Pacific has “caused or allowed litter at the facility in violation of 415 ILCS 5/21(p)(1).” That provision provides, in pertinent part, that no person shall “cause or allow the open dumping of any waste in a manner which results in any of the following occurrences at the dump site: (1) litter...” 415 ILCS 5/21(p)(1).

4. The Citation was improperly issued and no violation should be found for the following reasons:²

- a) No violation has occurred. The materials cited by Complainant, which is located on Union Pacific property, are materials used in Union Pacific’s regular course of maintaining and operating its railway system and therefore do not constitute “waste” or “litter.” Although “litter” is not defined by the IEPA, the Illinois Litter Control Act defines “litter” as:

[A]ny discarded, used or unconsumed substance or waste. “Litter” may include, but is not limited to, any garbage, trash, refuse, debris, rubbish, grass clippings or other lawn or garden waste, newspaper, magazines, glass, metal, plastic, or paper containers ... or anything else of an unsightly or unsanitary nature, which has been discarded, abandoned or otherwise disposed of improperly.

415 ILCS 105/3(a) (emphasis added). Because Union Pacific uses this material in its normal course of maintaining and operating its railway system, they have not been discarded, abandoned or otherwise disposed of improperly. Therefore, the alleged materials do not constitute “litter” and no violation of Section 21(p)(1) of the IEPA

² Union Pacific reserves the right to add to or amend the defenses stated herein.

has occurred. Accordingly, pursuant to 35 III. Admin Code Sec. 108.206, Union Pacific did not cause or allow the alleged violation.

- b) Alternatively, if a violation occurred, it was the result of uncontrollable circumstances. The materials at issue are or were used in the normal course of railroad operations and maintenance, and removal of such materials could compromise Union Pacific's ability to effectively operate its rail system. Accordingly, in the event the IPCB determines that a Section 21(p)(1) violation occurred, the materials at issue are/were necessary for Union Pacific to conduct safe and effective rail services, and therefore the result of circumstances beyond Union Pacific's control pursuant to 35 III. Admin Code Sec. 108.206.

- c) The statute is void as-applied to Union Pacific under the federal preemption doctrine. The preemption doctrine is rooted in the Supremacy Clause of the U.S. Constitution and grows from the premise that when state law conflicts or interferes with federal law, state law must give way. *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 662-64 (1993); *City of Seattle v. Burlington Northern R. Co.*, 105 Wash. App. 832, 835-836 (2001). The railroads are, and have historically been completely regulated by federal law, for "it is clear that the ICCTA [Interstate Commerce Commission Termination Act of 1995] has preempted all state efforts to regulate rail transportation." *Wisconsin Central Ltd. v. City of Marshfield*, 160 F. Supp. 2d 1009, 1013-14 (D. WI 2000); see *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 663-664 (1997). Thus, to the extent a state law, including a state environmental law, interferes with railroad operations, the state law must be invalidated. See *City of Auburn v. U.S. Government*, 154 F. 3d 1025, 1031 (9th Cir. 1998). In the case of railroads, laws

falling within a state's traditional sphere of authority may be voided under the preemption doctrine when the state law interferes with the railroad operations. *Green Mountain R. R. Corp. v. Vermont*, 404 F. 3d 638 (2nd Cir. 2005); *Soo Line R. Co. v. City of Minneapolis*, 38 F. Supp. 2d 1096 (D. Minn. 1998). Here, the materials identified as "waste" or "litter" in the Citation are located on Union Pacific property and used in the normal course of maintaining and/or operating its rail system. Therefore, requiring Union Pacific to remove such materials unreasonably interferes with Union Pacific's railroad operations, and Section 21(p)(1) of the IEPA is void as applied.

WHEREFORE, for the reasons stated herein, Respondent Union Pacific contests the County of Perry's Administrative Citation and requests that the Illinois Pollution Control Board issue a finding of no violation, dismiss the citation, and for any and all other appropriate relief.

Dated: July 30, 2013

Respectfully submitted,

UNION PACIFIC RAILROAD COMPANY

By: 

One of its attorneys

Caitlin M. Shields
Rooney Rippie & Ratnaswamy LLP
350 West Hubbard Street
Suite 600
Chicago, Illinois 60654
caitlin.shields@r3law.com

Counsel for Union Pacific Railroad Company

VERIFICATION

I, Caitlin M. Shields, being first duly sworn, depose and state that I am an attorney for Union Pacific Company, that I have read the foregoing Petition For Review, and know the contents thereof, and that the statements contained therein are true and correct to the best of my knowledge, information, and belief.

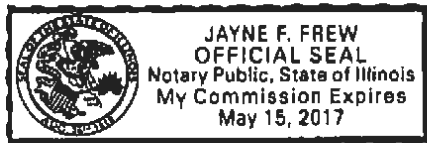
C. Shields

Caitlin M. Shields

Subscribed and sworn to before me
this 30 day of July, 2013.

Jayne F. Frew

Notary Public



CERTIFICATE OF SERVICE

NOW COMES Caitlin M. Shields, counsel for Respondent, Union Pacific Railroad Company, and provides proof of service of the attached Petition for Review and Notice of Filing upon the parties listed on the attached Service List, by having a true and correct copy affixed with proper postage placed in the U.S. Mail at Rooney, Rippie, Ratnaswamy LLP, 350 West Hubbard Street, Suite 600, Chicago Illinois 60654, at or before 4:30 p.m. on **July 30, 2013**.



Caitlin M. Shields

Caitlin M. Shields
Attorney for Respondent,
Union Pacific Railroad Company
Rooney Rippie & Ratnaswamy LLP
350 West Hubbard Street, Suite 600
Chicago, Illinois 60654
(312) 447-2800

Dated: July 30, 2013

SERVICE LIST

Perry County State's Attorney's Office
Perry County Courthouse
1 Public Square
Pinckneyville, IL 62274
(618) 357-6221



Exhibit A

**Service of Process
Transmittal**

06/25/2013

CT Log Number 523001043

TO: Richard Hautzinger
Union Pacific Railroad Company
1400 Douglas Street, Mail Code 1580 / Law Dept.
Omaha, NE 68179

RE: **Process Served in Illinois**

FOR: Union Pacific Railroad Company (Domestic State: DE)

ENCLOSED ARE COPIES OF LEGAL PROCESS RECEIVED BY THE STATUTORY AGENT OF THE ABOVE COMPANY AS FOLLOWS:

TITLE OF ACTION: County of Perry, Complainant vs. Union Pacific Railroad Company, Respondent

DOCUMENT(S) SERVED: Notice, Appearance, Administrative Citation, Remittance Form(s), Proof of Service, Affidavit, Attachment(s), Letter

COURT/AGENCY: Illinois Pollution Control Board, IL
Case # AC1355

NATURE OF ACTION: Environmental Litigation - Respondent has caused or allowed open dumping at the facility in a manner that resulted in violations

ON WHOM PROCESS WAS SERVED: C T Corporation System, Chicago, IL

DATE AND HOUR OF SERVICE: By Process Server on 06/25/2013 at 10:30

JURISDICTION SERVED: Illinois

APPEARANCE OR ANSWER DUE: None Specified

ATTORNEY(S) / SENDER(S): David Searby,
Assistant State's Attorney
1 Public Square
Pinckneyville, IL 62274
618-357-6221

ACTION ITEMS: CT has retained the current log, Retain Date: 06/26/2013, Expected Purge Date:
07/01/2013
Image SOP
Email Notification, Richard Hautzinger rjhautzi@up.com
Email Notification, Penelope Menchey PLMENCHE@up.com
Email Notification, Marcia Bovenzo mlbovenzo@up.com
Email Notification, Jonelle Walter Jkwalter@up.com

SIGNED: C T Corporation System
PER: Joyana Ivancevic
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