

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

RECEIVED  
CLERK'S OFFICE

JUL 09 2007

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)

NOTICE OF FILING

TO: Glenn C. Sechen  
Schain, Burney, Ross Citron, Ltd.  
222 N. LaSalle Street, Suite 1900  
Chicago, Illinois 60601

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 Response Brief in Opposition to Complainant's Motion to Strike**, a copy of which is hereby served upon you.

DATE: July 9, 2007

BNSF RAILWAY COMPANY

By: Robert M. Baratta, Jr.  
One of Its Attorneys

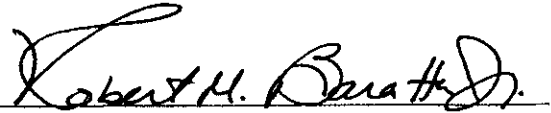
Weston W. Marsh  
Robert M. Baratta, Jr.  
FREEBORN & PETERS LLP  
311 South Wacker Drive  
Suite 3000  
Chicago, Illinois 60606  
(312) 360-6000 -- telephone  
(312) 360-6597 -- facsimile

**CERTIFICATE OF SERVICE**

I, the undersigned, certify that I have served **Respondent's Response Brief in Opposition to Complainant's Motion to Strike** by depositing the same in the U.S. Mail box at 311 South Wacker Drive, Chicago, Illinois before 5:00 p.m. on July 9, 2007, postage prepaid and addressed to:

Glenn C. Sechen  
Schain, Burney, Ross Citron, Ltd.  
222 N. LaSalle Street, Suite 1900  
Chicago, Illinois 60601

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



Robert M. Baratta, Jr.

**RECEIVED**  
CLERK'S OFFICE

JUL 03 2007

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD** 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)

**RESPONDENT'S RESPONSE BRIEF**  
**IN OPPOSITION TO COMPLAINANT'S MOTION TO STRIKE**

Under the Illinois Code of Civil Procedure, a pleader need only plead a concise, factual statement of its claim or defense. Evidence need not be pled. The rules of the Illinois Pollution Control Board require no more. Following these simple rules, BNSF asserted six affirmative defenses, which are based, in part, on the extensive allegations made in the Complaint. As discussed below, each of the affirmative defenses is properly asserted and pled.

With respect to affirmative defenses, the Illinois Code of Civil Procedure states:

The facts constituting any affirmative defense, such as payment, release, satisfaction, ... and defense which by other affirmative matter seeks to avoid the legal effect of or defeat the cause of action set forth in the complaint, counterclaim, or third-party complaint, in whole or in part, and any ground or defense, whether affirmative, or not, which, if not expressly stated in the pleading, would be likely to take the opposite party by surprise, must be plainly set forth in the answer or reply.

735 ILCS 5/2-613(d).

With respect to pleading generally, the Illinois Code of Civil Procedure states that “[a]ll pleadings shall contain a plain and concise statement of the pleader’s cause of action, counterclaim, defense, or reply.” (emphasis added) 735 ILCS 5/2-603(a).

While Complainant correctly states that Illinois procedure requires fact pleading, as opposed to notice pleading, only ultimate facts need be pled, not evidence. *Bd. of Ed. of Kankakee School Dist. No. 111 v. Kankakee Federation of Teachers Local No. 886*, 46 Ill.2d 439, 446-47, 264 N.E.2d 18, 22-23 (1970); *Ingram v. Little Co. of Mary Hosp.*, 108 Ill. App. 3d 456, 459, 438 N.E.2d 1194, 1196 (1<sup>st</sup> Dist. 1982). Moreover, “despite the requirement for fact pleading, courts are to construe pleadings liberally to do substantial justice between the parties.” *Lempa v. Finkel*, 278 Ill. App. 3d 417, 424, 663 N.E.2d 158, 163-64 (2<sup>nd</sup> Dist. 1996). No pleading is bad in substance that reasonably informs the opposite party of the nature of the claim. *Fisher v. Holt*, 52 Ill. App. 3d 164, 166, 367 N.E.2d 370, 372 (1<sup>st</sup> Dist. 1977).

Applying these well-worn concepts to BNSF’s affirmative defenses, it is clear that the defenses are properly pled. For instance, BNSF’s first affirmative defense states that

Complainant knew or reasonably should have known of the alleged contamination on its property more than five years prior to filing the initial complaint. Accordingly, complainant’s claims must be dismissed pursuant to the applicable statute of limitations. 735 ILCS 5/13-205

This defense alleges the ultimate facts upon which BNSF will rely – that Plaintiffs knew or should have known of the contamination more than 5 years before they brought the claim – and the legal basis of the defense – the applicable statute of limitations found at 735 ILCS 5/13-205. This defense also relies upon the allegations made by Complainant in its Complaint. For instance, Complainant alleges that the release occurred in 1993 (Compl. ¶3), the “direction of groundwater flow is from the BNSF Property to the Premises” (Compl. ¶4), BNSF and the State entered into a Consent Decree in 1996 (Compl. ¶6), under the Consent Decree, BNSF was to

investigate off-site locations (Compl. ¶7), BNSF threatened the ongoing discharge of contaminants onto the soil and groundwater of the Premises (Compl. ¶33), and BNSF abandoned the diesel fuel in 1993 on the BNSF Property (Compl. ¶45). Undoubtedly, the very facts raised by Indian Creek and those asserted by BNSF in the affirmative defense establish the needed factual background for this affirmative defense. BNSF need allege no more than that.

Disregarding the Illinois Code of Civil Procedure's requirement that the such defenses be pled "concisely," complainant's sole argument with respect to this affirmative defense is that it is only a few sentences long. Complainant does not argue that it is not informed of the substance of the defense or cannot reasonably determine the nature and basis for the defense. Therefore, Complainant's argument must be rejected.

BNSF's third, fourth, and fifth affirmative defenses are based on the same operative allegations that:

Complainant knew or reasonably should have known of the alleged contamination on its property many years ago. Complainant chose not to bring this lawsuit for many years after having such knowledge.

As such, BNSF asserts that Complainant has waived its claim or is estopped or prohibited by the doctrine of laches from bringing its claim. Again, Complainant does not argue that it is not informed of the substance of the defense or cannot reasonably determine the nature and basis for the defense. BNSF is not required to plead more.

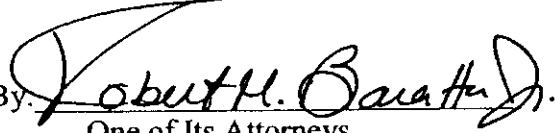
BNSF's second and sixth affirmative defenses relate to the damages asserted by Complainant. BNSF asserts that Complainant has not mitigated its damages and/or has not pleaded damages with sufficient particularity. Complainant argues that such defenses are not affirmative in nature. But, the Illinois Code of Civil Procedure requires the pleader to state any affirmative matter that may take the other party by surprise. These two affirmative defenses are

alleged so as not to run afoul of such requirement. To the extent that these two defenses are not otherwise evident from the answer, BNSF is under an obligation to assert them. BNSF has done so.

BNSF's affirmative defenses follow the pleading requirements in the Illinois Code of Civil Procedure and the Board rules by reasonably informing Complainant of the allegations against it. As such, the Motion to Strike should be denied. If, however, the Board is inclined to grant the Motion to Strike, BNSF requests leave to amend the affirmative defenses to include additional facts.

Respectfully submitted,

**BNSF RAILWAY COMPANY**

By:   
One of Its Attorneys

Weston W. Marsh  
Robert M. Baratta, Jr.  
FREEBORN & PETERS LLP  
311 South Wacker Drive  
Suite 3000  
Chicago, Illinois 60606  
(312) 360-6000 – telephone  
(312) 360-6597 – facsimile