

COPY

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

**THE BURLINGTON NORTHERN and
SANTA FE RAILWAY COMPANY,**)
)
 Petitioner,)
)
 v.)
 STATE OF ILLINOIS, DEPARTMENT)
 OF TRANSPORTATION , CITY OF AURORA,)
 ILLINOIS and AURORA TOWNSHIP, ILLINOIS,)
 Respondent.)

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No. T 03-0072 Illinois Commerce Commission
RAIL SAFETY SECTION

RESPONSE TO RESPONDENT'S MOTION TO STRIKE

Now comes petitioner, The Burlington Northern and Santa Fe Railway Company ("BNSF"), by its attorneys, Kenneth J. Wysoglad & Associates, and for its response to respondents, City of Aurora and Aurora Township's Motion to Strike, states as follows:

1. Respondents filed their motion to strike the petition filed by BNSF complaining that the petition does not include certain of the items described in 92 Illinois Administrative Code, §1536 (b). Respondent's further suggest that Kane County, Illinois and Mocherville Fire Department and possibly the Sheriff's Department of Kane County, Illinois should be named as additional parties respondent. Respondents' motion to strike should be denied as the petition filed by BNSF fully informs respondents as to the nature of the proceedings and the relief requested by petitioner and should further be denied as Kane County, Illinois, Mocherville Fire Department and/or the Sheriff's Department of Kane County, Illinois have no jurisdiction over the at issue roadway or grade crossing location and are therefore not necessary parties to resolution of the instant administrative proceeding.

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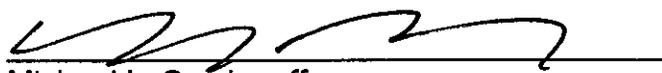
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2. The provisions of 92 Illinois Administrative Code. §1536.10(a) and (b) were designed to facilitate the mandatory grade crossing closure provisions of 92 Illinois Administrative Code part 1536. In this case, BNSF is not relying on the mandatory closing provisions of the aforesaid regulation. Rather, BNSF has filed its petition seeking to close the McClure Road at grade crossing pursuant to 625 ILCS 5/18c-7401 as the public convenience no longer requires the retention of the subject at grade crossing and that public safety will be enhanced by the crossing closure.
3. In their motion, respondents do not suggest that they have not been reasonably informed as to the nature of the petition or the relief sought by BNSF thereunder. Moreover, respondents have not suggested that they have not been able to prepare for the public hearing or are in any way prejudiced in this case. Additionally, it is reasonably anticipated at time of public hearing that testimony will be presented by the parties addressing virtually all of the items referenced in 92 Illinois Administrative Code §1536(b).
4. In essence, by their motion, respondents are seeking to place form over substance. Should it become necessary, petitioner can file an amended petition conforming to the evidence. However, any such requirement should not delay public hearing, particularly as no continuance has been requested by respondents.
5. As to the respondents' observation that Kane County, Illinois and Mocherville Fire Department have not been named as parties respondent, petitioner

merely observes that there is no Illinois Commerce Commission requirement to name as parties respondent any governmental entity or unit which has no jurisdiction or responsibility over the roadway involved in the grade crossing proceeding. Of course, to the extent Kane County, Illinois and/or Mocherville Fire Department have any interest in the proceeding before the Illinois Commerce Commission, those entities are free to file their respective petitions to intervene to protect their interests as may be appropriate. However, they are certainly not necessary parties to the proceeding.

Wherefore, based on the above, petitioner, The Burlington Northern and Santa Fe Railway Company prays that the Illinois Commerce Commission deny respondents' motion to strike and, in the alternative, if necessary, grant petitioner additional time in which to file an amended complaint to conform with the evidence presented at public hearing and/or the provisions of 92 Illinois Administrative Code §1536(b).

KENNETH J. WYSOGLAD & ASSOCIATES


Michael L. Sazdanoff

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Kenneth J. Wysoglad & Associates
Attorneys for Petitioner
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PROOF OF SERVICE

Michael L. Sazdanoff, being first duly sworn on oath, deposes and says that on the

18. day of NOVEMBER, 2003, he caused to be served, a true and

correct copy of **RESPONSE TO RESPONDENT'S MOTION TO STRIKE** upon:

Mr. Michael C. Funkey
Law Offices of Michael C. Funkey, PC
2111 Plum Street, Suite 301
Aurora, Illinois 60506

Mr. Scott F. McCleary
Assistant Corporation Counsel
City of Aurora
44 E. Downer Place
Aurora, Illinois 60507

Administrative Law Judge June Tate
Illinois Commerce Commission
160 N. LaSalle Street, 8th Floor
Chicago, Illinois 60601

by depositing same in the U.S. Mail depository located at Adams and Clinton Streets,
Chicago, Illinois in an envelope(s) with first-class postage, prepaid.

