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January 20, 2014

Surface Transportation Board  
Secretary of Administration  
395 E. Street SW  
Washington, DC 20423

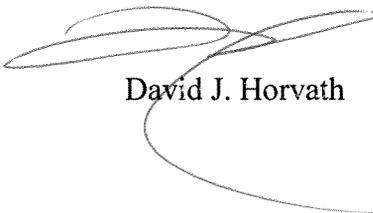
***RE: 14500 Limited LLC v. CSX Transportation, Inc.***

Dear Chief of Secretary of Administration:

Enclosed for filing is the Petitioner's Response to the Respondent's Reply to the Petition for Declaratory Order. 11 copies have been submitted therewith.

Thank you for your assistance with this matter. Please call me or e-mail me at [djhorvath@hotmail.com](mailto:djhorvath@hotmail.com) if you have any questions.

Respectfully,



David J. Horvath

DJH/nz  
Enclosures

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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Docket No. FD 35788

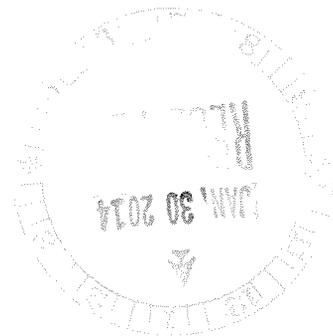
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14500 LIMITED LLC  
v.  
CSX TRANSPORTATION, INC.

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STATEMENT IN RESPONSE TO CSX TRANSPORTATION INC'S  
REPLY TO PETITION FOR DECLARATORY ORDER

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Dated: January 20, 2014

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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On December 2, 2013, 14500 Limited LLC filed a petition before this Surface Transportation Board for a Declaratory Order. Pursuant to the STB's rules and regulations, the Respondent CSX filed a reply to this Petition. A careful review of this petition reveals that within this "Reply" is couched what is essentially a motion to dismiss.

Rather than filing a simple denial, or answer as would be course under the Federal Rules of Civil Procedure (for reference), the "reply" strenuously objects to the STB having jurisdiction over Petitioner's claims. In fact Respondent strenuously asserts that all of Petitioner's claims must be dismissed as they are "precluded". Therefore, as this reply may be deemed an informal motion to dismiss, as there is no STB rule which mirrors Federal Rule of Procedure 12(B), Petitioner believes that it is necessary to respond to same. Accordingly Petitioner submits the statements set forth in the following paragraphs in order to clarify the record and point out certain potential misstatements of the Respondent: in particular that Petitioners claims are "precluded" when in fact the District Court ruled to the contrary.

## ANALYSIS OF CSX'S REPLY

On the face of this Reply, CSX incorrectly claims that “Federal District Court has already properly concluded that Petitioner’s State law claims are completely pre-empted by Section 10501(b) of the ICCTA”. The following sentence, also incorrect, states that “the Court could have dismissed the complaint with that finding as a matter of law”. Unfortunately these statements made by the Respondent are inaccurate and an overstatement.

Petitioner points to the Court’s Order attached to its Petition for Declaratory Order. Therein Judge Christopher Boyko clearly analyzed the elements of “jurisdiction” over this matter, and whether the matter should be **dismissed without prejudice** based upon the exclusive jurisdiction of the STB. This is a completely different ruling than what Respondent is trying to purport. At no time did Judge Boyko discuss dismissal of the action **on its merits**. Rather Judge Boyko discussed whether or not the Federal Court had jurisdiction over the subject matter, or whether the matter should be **transferred to the STB** because it had exclusive jurisdiction under the ICCTA. Again, at no time did the Federal District Court ever conclude that the matter should be dismissed as a matter of law such as the Respondent suggests.

What the Respondent is championing is an impossible standard. Per the Respondent’s logic, any party bringing a state court action against a railroad company would have its claims dismissed with prejudice as a matter of law. In other words, the failure to file with the STB allows for adjudication on the merits. This is simply ludicrous.

If one reviews the history of this case, the impossibility of the axiom presented by Respondent is apparent and set forth as follows:

Removal would always be proper to the Federal Court for one or two reasons: 1) the claim arises under Federal Law (ICCTA), and/or 2) diversity of citizenship (in most

cases). After removing and action to the Federal Court CSX, or any other railroad company, could then perfunctorily move the Court to dismiss the matter on its merits because exclusive jurisdiction lies with the STB.

In short, a petitioner's claims would, by Respondents logic, be obviated by a party's filing in any State or Federal Court. This make no sense and is not supported by Rule or case law.

Notwithstanding, throughout the Respondent's brief it continues to claim that the District Court found the Petitioner's State Law **claims** completely pre-empted by ICCTA. Nothing could be farther from the truth. The State Law claims are in no way pre-empted by the ICCTA. Rather, the State Law claims must be presented to the STB **as jurisdiction is exclusive**, under the ICCTA, to the Surface Transportation Board. This is distinction Respondent ignores.

Neither this Board nor any Federal Court can dismiss these claims merely because they were filed in state court contrary to the provisions of the ICCTA. This is generally because a court cannot convert a motion to dismiss made under Rule 12(b)(1) into one for summary judgment. *See Wheeler v Herdman 825 F.2d 257, 259, (10<sup>th</sup> Circuit) 1987*. Dismissal under Rule 12(B)(1) is without prejudice, allowing the possibility of repeating the action and bringing it within the subject matter jurisdiction of the appropriate court. *Id. Cited by Zerr vs. Johnson 894 F. Supp. 372 (D. Colo.) 1995*. Respondent is trying to avoid this maxim by claiming any violation of the jurisdictional parameters of the ICCTA, in particular filing in any State or Federal Court, warrants dismissal with prejudice. Obviously there is no case law to support this type of dismissal. The Petitioner's claims are properly before the Surface Transportation Board and should continue.

Again, the ICCTA pre-empts actions in State Court or the application of any other laws which may be contrary to it. This does not mean, nor could it mean, nor is there any legislative

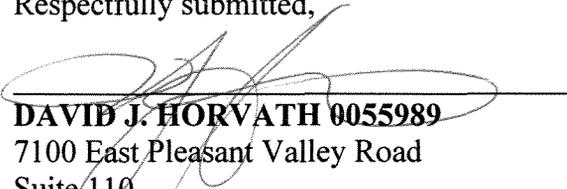
history to support any such proposition that such **claims are barred as a matter of law** merely because the initial filing was done in the inappropriate forum. They are not barred. They are merely required to be brought with the Surface Transportation Board, or transferred to it. Alternatively, and as a worst-case scenario, dismissed without prejudice and “re-filed”. Notwithstanding, the Respondent continues to pound its fist on the table demanding dismissal with prejudice despite the well-articulated ruling by the Federal District Court.

In somewhat of a clever alternative argument (beginning on page 5 of its brief) the Respondent makes a point of stressing the proposed “discretionary authority” to hear Petitioner’s case. Respondent would have this Tribunal dismiss as insignificant the claims of the Petitioner based upon the self-serving, egregiously overstated, and quite frankly factually incorrect affidavits of its officers. This Tribunal cannot accept as true the statements made therein when they are completely controverted by the Petitioner and affidavits previously submitted to the Federal District Court. This is a matter in controversy. The land cannot be used by CSX. It is doubtful whether or not the people signing these affidavits have ever viewed this property in person. The Petitioner’s Chief Officer has. CSX was unaware that it even owned this property until Petitioner brought it to their attention. This is a matter in controversy and one which any alleged discretionary authority should be exercised.

Overlooking these this obvious defects in their argument the Respondent resumes its discussion (at page 7 of its brief) stating that all state law claims are pre-empted by the ICCTA. This blatant misstatement of the law in itself brings us to the conclusion that the Respondent is guilty of bootstrapping, and that Petitioner’s claims are properly before the STB. As such the Petitioner respectfully prays this Tribunal to proceed in due course with discovery, briefing and any hearing as is required by the internal rules and regulations of the Surface Transportation

Board and eagerly awaits its first hearing in regards to same. The arguments of the Respondent are incorrect, misleading, and not persuasive. They should be ignored and this matter should proceed accordingly.

Respectfully submitted,



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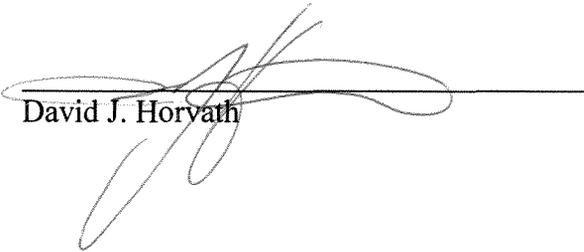
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**CERTIFICATE OF SERVICE**

The undersigned hereby attests that a true and accurate copy of this petition along with its Exhibits has been mailed to G. Paul Moates and Marc A. Korman at Sidley Austin LLP, 1501 K Street, N.W., Washington, D.C. 20005 by way of Ordinary US Mail this 20<sup>th</sup> day of January, 2014.



David J. Horvath