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**INDIANA SOUTHWESTERN RAILWAY CO.  
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December 15, 2004

Vernon A. Williams, Secretary  
Surface Transportation Board  
1925 K Street, N.W.  
Washington, D.C. 20423

RE: Docket No. FD-34599 (Petition of Mid-America Locomotive and Car Repair, Inc. for Declaratory Order)

Dear Secretary Williams:

Mid-America Locomotive and Car Repair, Inc. ("Mid-America") submitted a Petition for Declaratory Order to the Board in FD No. 34599, based upon a suit filed by Mid-America in Vanderburgh County (Indiana) Superior Court. Mid-America seeks to impose a permanent easement over a stretch of Indiana Southwestern Railway ("ISW") right of way, which includes property literally up to the ends of the crossties of tracks actively used by ISW and CSX. The Court initially granted ISW's Motion to Dismiss, and subsequently had doubts about whether the decision should rest with the Court or the Surface Transportation Board.

Notwithstanding the denials of Mid-America, it is clear from the facts submitted to the Court that an imposed, permanent easement, would pose a safety and security threat to railroad operations, and perhaps violate Federal Railroad Administration Regulations as well. While ISW disputes the allegations Mid-America presented to both the Court, and the Board, ISW will not further argue facts at this time. Rather, since the Board is being asked to initiate a Declaratory Proceeding as a means to advise the Superior Court of Vanderburgh County, ISW will address that issue.

ISW believes that the essence of this question was dealt with in FD 34425, *City of Lincoln - Petition for Declaratory Order*. In that case the City of Lincoln sought to condemn a portion of the right of way of Lincoln Lumber Company, a common carrier railroad in Lincoln, Nebraska. The Board found the action preempted (See FD No. 34425, served August 12, 2004). Other than the fact that Mid-America is a private party seeking private use of railroad right of way, and the City of Lincoln is a local government seeking public use of railroad right of way, there is little meaningful distinction between Mid-America's attempt to force a roadway easement and the City of Lincoln's attempt to condemn a trail. Both should be preempted.

Therefore, while ISW has no objection to the initiation of a Declaratory Proceeding, ISW

also feels the Board could summarily dispose of this matter by referring the Court to the *City of Lincoln* decision.

In any event, ISW urges the Board to make clear to all parties that there is a distinction between consensual use of railroad right of way, where the carrier has the necessary control over access needed to maintain safety and security of railroad operations, and unauthorized and uncontrolled encroachments on railroad right of ways, which are, *ipso facto*, dangerous interferences with railroad operations.

The Interstate Commerce Commission Termination Act provides at 49 U.S.C. §10501(b) that the Board has exclusive jurisdiction over the "operation" of railroad "facilities". There is no question that the right of way upon which active tracks are located is a rail facility. Both the Federal Railroad Administration and the Department of Homeland Security are actively pursuing anti-trespassing programs, and encouraging railroads to more actively prevent trespassers and encroachers. Permitting private parties to seize parts of active railroad right of ways under flimsy past practice theories, would make a mockery of such efforts, and, therefore, be clearly contrary to public policy.

Sincerely yours,

Daniel A. LaKemper,  
General Counsel.

## Formal Filing

Docket #:

FD

-34599

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